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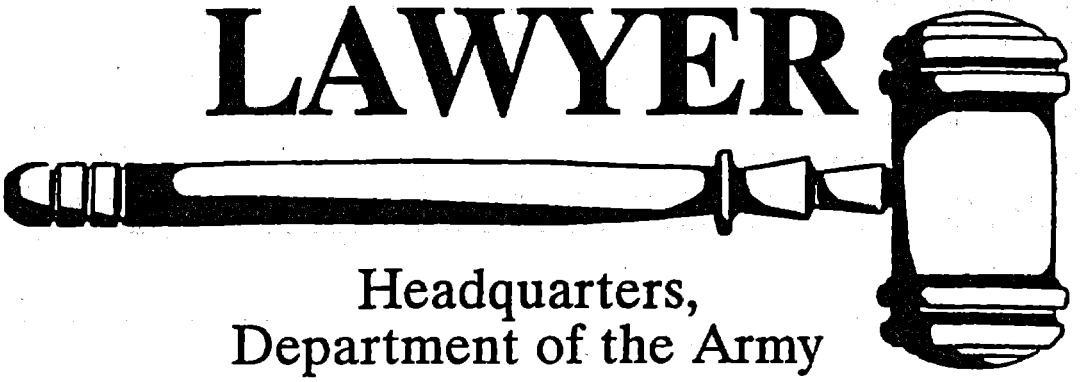
THE ARMY LAWYER



Headquarters,
Department of the Army

Department of the Army Pamphlet 27-50-255
February 1994

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Articles

The Army Lawyer (ISSN 0364-1287)

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The Army Lawyer articles are indexed in the *Index to Legal Periodicals, the Current Law Index, the Legal Resources Index,* and the *Index to U.S. Government Periodicals.*

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, telephone (202) 783-3238.

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Issues may be cited as ARMY LAW., [date], at [page number].

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1993 CONTRACT LAW DEVELOPMENTS—THE YEAR IN REVIEW

Major Steven N. Tomanelli; Lieutenant Colonel Harry L. Dorsey;
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I. Forward

This year undoubtedly will be remembered more for Jurassic Park, Seinfeld, seven percent mortgage rates, and the North American Free Trade Agreement, than for changes in federal procurement law. Although the military drawdown has spawned numerous proposals for procurement streamlining, few of these were finalized in 1993. Consequently, we approach 1994 apparently on the verge of significant procurement reform. The "Bottom Up" and National Performance Reviews, the Section 800 Panel's report on acquisition streamlining, and numerous legislative proposals all suggest that 1994 will be a momentous, and perhaps turbulent, year for federal procurement.

In the meantime, we must apply current rules to current problems. In writing this article, we analyzed the 1993 procurement-related cases, statutes, regulations, and policy letters from which we collected those items that we felt were most important to practitioners. We hope that readers find this a useful tool for updating their libraries and denoting trends in the law. Best wishes for a happy and prosperous new year from the Contract Law Division, The Judge Advocate General's School, United States Army.

II. Legislation

A. National Defense Authorization Act for Fiscal Year (FY) 1994

1. Introduction.—On November 30, 1993, President Clinton signed the National Defense Authorization Act for Fiscal Year 1994 (1994 Authorization Act).[1] Although the 1994 Authorization Act did not make major changes to the federal acquisition system as proposed in other legislation,[2] it nevertheless made some changes of significance to practitioners within the Department of Defense (DOD). This section highlights the more notable changes and recaps important recurring provisions regularly included in DOD authorization acts.

2. New Authority for Army Depots to Make Commercial Sales.—Congress authorized Army depots that produce large-caliber cannons, mounts, and related equipment, to sell commercial articles or services to customers outside the DOD.[3] This authority allows the Army's Watervliet Arsenal—currently the only facility producing large-caliber guns and related items—to compete in commercial markets dominated by foreign suppliers. The additional workload generated by commercial sales will aid the DOD in maintaining this core defense capability at reduced cost.[4]

3. Temporary Ban on Obligation of Funds for Work by Federally Funded Research and Development Centers.—Until the DOD submits a report to Congress that breaks down by center the scope of the DOD's proposed work for federally funded research and development centers in FY 1994,[5] the DOD may not obligate funds for work performed by such centers.[6] The House and Senate conferees noted that the DOD had failed to comply with the requirement to break down such work by center in its budget request,[7] and therefore passed a statutory funding limitation to compel compliance.[8]

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[1] Pub. L. No. 103-160, 107 Stat. 1547 (1993).

[2] *See, e.g.*, H.R. 3400, 103d Cong., 1st Sess. (1993) (introduced as the Government Reform and Savings Act of 1993, this bill would implement many of the recommendations of Vice President Gore's National Performance Review); S. 1587, 103d Cong., 1st Sess. (1993) (introduced as the Federal Acquisition Streamlining Act of 1993, this bill would enact many of the acquisition reform recommendations of the Acquisition Law Advisory Panel (the Section 800 Panel) established by the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 800, 104 Stat. 1485, 1587 (1990)); H.R. 2238, 103d Cong., 1st Sess. (1993) (introduced as the Federal Acquisition Improvement Act of 1993, this bill would establish a preference for acquisition of commercial items, raise the simplified acquisition threshold, and make several other changes to current procurement practices).

[3] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 158, 107 Stat. 1547, 1581 (1993) (to be codified at 10 U.S.C. § 4543).

[4] *See* H.R. REP. No. 200, 103d Cong., 1st Sess. 96 (1993) (the report directs the Secretary of the Army to issue appropriate implementing regulations for this new authority).

[5] *See* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 35.017 (1 Apr. 1984) [hereinafter FAR].

[6] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 215, 107 Stat. 1547, 1587 (1993).

[7] 10 U.S.C. § 2367(d)(1).

[8] H.R. REP. No. 357, 103d Cong., 1st Sess. 603 (1993).

4. New Fiscal Sandtrap for the Unwary.—Congress proscribed the DOD's use of appropriated funds to equip, operate, or maintain a golf course within the United States, except at remote and isolated locations.[9] Army regulations already limit the use of appropriated funds to support golf courses,[10] but applicable regulations need to be revised to implement the new statutory prohibition.[11]

5. Prohibition on Award of New Commercial Activity Contracts Extended Through April 1, 1994.—Last year's Authorization Act prohibited award of service contracts resulting from commercial activity cost comparison studies.[12] The 1994 Authorization Act lifts the moratorium on new awards effective April 1, 1994.[13]

6. Defense Business Operations Fund (DBOF).—

(a) The DOD's Authority to Use DBOF Extended.—Congress extended the DBOF's sunset date to December 31, 1994.[14] The House and Senate conferees were concerned about continuing DBOF implementation problems,[15] but continued to express general support for the DBOF concept. To ensure senior DOD management addresses congressional concerns, the 1994 Authorization Act requires the DOD to prepare a comprehensive management plan and to submit to Congress a progress report on DBOF implementation; the 1994 Authorization Act also directs the Comptroller General to oversee the DOD's efforts.[16]

(b) Customers' Unit Costs No Longer Will Include Capital Charges for Military Construction.—The capital asset charges included as depreciation in DBOF customers' unit costs, no longer will include an amount to cover military construction at DBOF activities.[17] Congress chose to continue funding military construction through direct appropriations, rather than through the DBOF, making a charge for depreciation of these assets in the unit costs paid by customers unnecessary.[18] Capital asset charges for other DBOF capital equipment will continue.

(c) Ceiling Imposed on Supply Divisions' Obligational Authority.—To continue drawing down defense stocks in conjunction with the DOD's downsizing, Congress again imposed a limitation on the obligational authority of the DBOF's supply divisions.[19] They may not incur obligations in excess of sixty-five percent of their sales during FY 1994. This limitation does not apply to sales and obligations for fuel, commissary items, retail operations, and certain other excluded mission areas. The Secretary of Defense may waive the limitation if necessary to maintain the readiness and effectiveness of the Armed Forces.[20]

7. Depot Maintenance.—Congress underscored the importance of the DOD depot maintenance system to the defense industrial base through several provisions in the 1994 Authorization Act. The 1994 Authorization Act requires the DOD to study and report on the overall performance and management of DOD maintenance depots,[21] proscribes the consolida-

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[9] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 312, 107 Stat. 1547, 1618 (1993) (to be codified at 10 U.S.C. § 2246).

[10] *See, e.g.*, DEP'T OF ARMY, REG. 215-1, THE ADMINISTRATION OF ARMY MORALE, WELFARE, AND RECREATION ACTIVITIES AND NONAPPROPRIATED FUND INSTRUMENTALITIES, para. 2-12 (10 Oct. 1990) (providing for only very limited appropriated fund support to golf courses and similar recreational activities capable of sustaining its own operations through revenue generated).

[11] *See* National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 312, 107 Stat. 1547, 1618 (1993) (the new code provision at 10 U.S.C. § 2246(b) requires the Secretary of Defense to issue implementing regulations).

[12] National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 312, 106 Stat. 2315, 2365 (1992). *See* OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (1983).

[13] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 313, 107 Stat. 1547, 1618 (1993).

[14] *Id.* § 331, 107 Stat. at 1620. The previous DBOF sunset date had been April 15, 1994. *See* National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 341, 106 Stat. 2315, 2374 (1992).

[15] H.R. REP. NO. 357, 103d Cong., 1st Sess. 653 (1993).

[16] *See* National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 332, 107 Stat. 1547, 1620-21 (1993); *see also* H.R. REP. NO. 357, 103d Cong., 1st Sess. 653-54 (1993).

[17] *See* National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 333, 107 Stat. 1547, 1621-22 (1993); *see also* National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 342, 106 Stat. 2315, 2376 (1993) (establishing a capital asset subaccount within the DBOF, funded through charges to DBOF customers for depreciation of capital assets).

[18] *See* H.R. REP. NO. 200, 103d Cong., 1st Sess. 224 (1993).

[19] *See* National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 342, 106 Stat. 2315, 2376 (1992) (imposing the 65% of sales limitation for FY 1993).

[20] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 334, 107 Stat. 1547, 1622 (1993).

[21] *Id.* § 341, 107 Stat. at 1622-23.

tion of depot management under a single DOD entity,[22] and retains the requirement that sixty percent of DOD depot maintenance work be performed in house.[23]

8. Defense Industrial Preparedness Program.—Congress directed the DOD to establish an industrial preparedness manufacturing technology program to enhance industry's capability to meet the DOD's manufacturing needs.[24] The FY 1994 DOD research, development, test, and evaluation authorization includes $112,500,000 for this program.[25] However, the conferees denied funding for any individual service manufacturing technology programs.[26]

9. The DOD Must Publish Its Policy on the Mentor-Protege Pilot Program.—Congress directed the DOD to publish its policy on the pilot Mentor-Protege Program[27] in the *Defense Federal Acquisition Regulation Supplement (DFARS)*.[28] Publication of the policy will improve public access to the program's operating details and expand the potential for investments by mentor firms in their proteges.[29]

10. Acquisition Streamlining.—The 1994 Authorization Act repeals, revises, and consolidates a number of provisions of Title 10 that were redundant or outdated. Most notably, these efforts extended certain acquisition laws DOD-wide that previously were applicable only to the Army and the Air Force,[30] repealed the Defense Enterprise Program,[31] and amended the DOD's authority to buy, sell, and store petroleum and natural gas.[32]

11. Major Defense Acquisition Pilot Program Expanded.—Congress expanded the Secretary of Defense's authority to include large acquisitions in the Major Defense Acquisition Pilot Program. Initially, no more than six major defense programs were eligible for designation as pilot acquisition programs,[33] and each pilot program had to be designated a Defense Enterprise Program.[34] The 1994 Authorization Act removes the limitation on the number of participating programs[35] and eliminates the requirement for designation as a Defense Enterprise Program.[36] Congress expressed a desire that at least one of the participating pilot programs use the concept of mission-oriented program management,[37] and that the DOD exempt one or more programs from normal program phasing requirements.[38] Any program exempted from normal program phasing requirements would follow a simplified acquisition program cycle.[39]

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[22] *Id.* § 342, 107 Stat. at 1624.

[23] *Id.* § 343, 107 Stat. at 1624; *see also* 10 U.S.C. § 2466.

[24] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 801(a), 107 Stat. 1547, 1700-01 (1993) (to be codified at 10 U.S.C. § 2525).

[25] *Id.* § 801(b), 107 Stat. at 1701.

[26] H.R. REP. NO. 357, 103d Cong., 1st Sess. 694 (1993).

[27] *See* National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 831, 104 Stat. 1485, 1607-12 (1990) (establishing the Mentor-Protege Program and explaining that its purpose is to provide incentives for major contractors to furnish assistance to small disadvantaged businesses in becoming suppliers and subcontractors under DOD contracts); *see also* DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 219.71 (1 Apr. 1984) [hereinafter DFARS].

[28] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 813, 107 Stat. 1547, 1703 (1993).

[29] H.R. REP. NO. 357, 103d Cong., 1st Sess. 695 (1993).

[30] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 822, 107 Stat. 1547, 1704-07 (1993).

[31] *Id.* § 821(a)(5), 107 Stat. at 1704. The concept underlying the Defense Enterprise Program lives on, however, in the Major Defense Acquisition Pilot Program enacted in the 1991 Authorization Act. *See* H.R. REP. NO. 200, 103d Cong., 1st. Sess. 311 (1993); *see also infra* notes 33-39 and accompanying text.

[32] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, §§ 825-26, 107 Stat. 1711-12 (1993) (to be codified at 10 U.S.C. §§ 2388, 2404).

[33] National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 809(b), 104 Stat. 1485, 1594 (1990).

[34] *Id.* § 809(d), 104 Stat. at 1594. *See supra* note 31 and accompanying text (Defense Enterprise Program repealed).

[35] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 832(a), 107 Stat. 1547, 1715 (1993).

[36] *Id.* § 832(b), 107 Stat. at 1715.

[37] *Id.* § 833, 107 Stat. at 1716.

[38] *See* DEP'T OF DEFENSE, DIRECTIVE 5000.1, DEFENSE ACQUISITION (Feb. 23, 1991) (requires a comprehensive structured management approach for acquiring major defense systems and materiel, using a series of milestone decision points at which senior acquisition officials determine whether a program proceeds to the next acquisition phase).

[39] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 835, 107 Stat. 1547, 1717 (1993).

12. New Restrictions on Contract Offloading.—The DOD must prescribe regulations governing its acquisition of goods and services through contracts administered by other federal agencies under the Economy Act,[40] a practice sometimes referred to as "contract offloading."[41] The regulations must limit offloading to situations in which the agency receiving the order is buying similar goods or services for itself and it makes sense to consolidate buys, the receiving agency has unique capabilities or experience with purchases of the type required, or the receiving agency has specific authority to make purchases for other federal agencies. Additionally, the regulations must require advance approval by a DOD contracting officer authorized to make purchases of the type being offloaded.

13. New Authority for the DOD to Permit Commercial Test and Evaluation Activities at Major Ranges.—A new code section authorizes the DOD to contract with commercial entities for the use of major range and test facilities.[42] Under this provision, the DOD must recover all of its direct costs from the commercial user, but charging indirect costs is within the DOD's discretion. Funds received through these contracts with commercial entities may be credited to the accounts of the DOD range or test facility.[43]

14. Congress Expresses Concern About the Effects of Contract Bundling on Small Businesses.—The General Accounting Office (GAO) must study the effects of contract bundling on the ability of small and small disadvantaged businesses to compete for DOD contracts and report its findings to Congress.[44] Contract bundling is the consolidation of two or more requirements, previously fulfilled through separate contracts, into a single contract. Congress is concerned that the diversity and size, aggregate dollar value, or geographical dispersion of the work included in bundled contracts, may adversely affect small business contract opportunities.

15. No More Depot Competitions with Small Businesses.—In a 1993 decision, the GAO determined that DOD depots could compete against small businesses for DOD contracts set aside for small businesses.[45] Congress legislatively overruled the GAO's decision and precluded depots' participation in future competitions set aside for small businesses.[46]

16. Buy American Act[47] (BAA) Issues.—The 1994 Authorization Act prohibits DOD expenditures for purposes inconsistent with the Buy American Act.[48] It also requires the Secretary of Defense to consider debarring[49] any person convicted of affixing a false "Made in America" inscription to any product sold in or shipped to the United States,[50] and to rescind any prior blanket Buy American Act waiver of any country that violates a reciprocal defense procurement agreement with the United States.[51]

17. Redesignations for Senior DOD Acquisition Officials.—Congress redesignated the DOD's Acquisition Executive, formerly the Under Secretary of Defense for Acquisition, as the Under Secretary of Defense for Acquisition and Technology. Similarly, the former Deputy Under Secretary of Defense for Acquisition is now the Deputy Under Secretary of Defense for Acquisition and Technology.[52]

18. Commander in Chief (CINC) Initiative Fund Authorization Increased, but Appropriated Amount Remains at $25,000,000.—Congress authorized an additional $5,000,000[53] for the CINC Initiative Fund[54] in FY 1994. The

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[40] 31 U.S.C. § 1535.

[41] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 844, 107 Stat. 1547, 1720-21 (1993).

[42] *Id.* § 846, 107 Stat. at 1722-23 (to be codified at 10 U.S.C. § 2681).

[43] For other statutory exceptions to the Miscellaneous Receipts Statute appearing in annual appropriation and authorization acts, *see infra* notes 114-116 and accompanying text.

[44] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 847, 107 Stat. 1547, 1723-24 (1993).

[45] *See* RJO Enters., B-252232, June 9, 1993, 72 Comp. Gen. ___, 93-1 CPD ¶ 446; *see also infra* notes 919, 920 and accompanying text.

[46] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 848, 107 Stat. 1547, 1724-25 (1993) (to be codified at 10 U.S.C. § 2304a).

[47] 41 U.S.C. §§ 10a-d.

[48] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 849(a), 107 Stat. 1547, 1725 (1993).

[49] *See* FAR subpt. 9.4.

[50] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 849(b), 107 Stat. 1547, 1725 (1993).

[51] *Id.* § 849(c), 107 Stat. at 1725.

[52] *Id.* § 904, 107 Stat. at 1728.

[53] H.R. REP. No. 357, 103d Cong., 1st Sess. 706 (1993).

[54] *See* 10 U.S.C. § 166a.

total amount authorized for the fund this year is $30,000,000.[55] However, Congress only appropriated $25,000,000 for this fund, despite the higher authorized amount.[56]

19. New Environmental Reporting Requirements.—The 1994 Authorization Act imposes new reporting requirements on the DOD's environmental restoration and compliance efforts at military installations.[57] These reports must address the DOD's environmental compliance progress and the funds expended on those efforts. The 1994 Authorization Act also requires the DOD to report annually on its reimbursements to contractors for the costs of environmental response efforts at contractor owned or operated facilities. This reporting requirement applies only to the largest 100 contractors in terms of dollar volume of prime contracts awarded during the fiscal year covered by each report.[58]

20. Funding Contingency Operations.—Congress clarified the procedures used for funding contingency operations.[59] The new legislation waives the requirement that a unit participating in a contingency operation reimburse the DBOF for support it receives, requires the Secretary of Defense to submit a financial plan to Congress detailing the DOD's funding proposal for the operation, and establishes a reserve fund to pay the incremental personnel costs of a contingency operation. Congress authorized initial funding of $10,000,000 for the personnel reserve fund, to remain available until expended.[60]

21. Counter-Drug Activities.—Congress extended the DOD's authority to provide counter-drug support to civilian law enforcement agencies[61] through FY 1995. Congress expanded the types of authorized support to include aerial and ground reconnaissance within the United States and beyond its borders.[62]

Congress also required the DOD to adopt procedures to permit state and local governments to purchase law enforcement equipment suitable for counter-drug activities through DOD contracts. These customers must pay the cost of their purchases in advance, and pay for the DOD's administrative costs incurred in providing purchasing support.[63] This provision does not require the DOD to purchase equipment for local governments that it would not buy for its own requirements.

22. Cooperative Threat Reduction with States of the Former Soviet Union.—Both Congress and the DOD recognize that demilitarization of the former Soviet Union is key to the long-term security interests of the United States. Consequently, the DOD requested, and Congress authorized, $400,000,000 to support demilitarization efforts within the Commonwealth of Independent States.[64] The demilitarization efforts may include programs that only indirectly support the reduction of the Former Soviet Union's military capability, such as environmental restoration at former military installations,[65] and housing for former military personnel.[66]

23. Defense Technology and Industrial Base Reinvestment and Conversion.—Congress authorized funding for a number of defense conversion initiatives, including a dual-use partnership program,[67] assistance to communities adversely affected

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[55] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 945, 107 Stat. 1547, 1737 (1993).

[56] Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, Title II, 107 Stat. 1418, 1422 (1993).

[57] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 1001(a), (b), 107 Stat. 1547, 1737 (1993) (amending 10 U.S.C. § 2706(a), (b)).

[58] *Id.* § 1001(c), 107 Stat. at 1744 (to be codified at 10 U.S.C. § 2706(c)).

[59] *Id.* § 1108, 107 Stat. at 1751-52 (to be codified at 10 U.S.C. § 127a). "Contingency operation" means a military operation designated by the Secretary of Defense in which military personnel may become involved in hostilities against enemies of the United States or an opposing force. *See* 10 U.S.C. § 101(a)(13).

[60] The authority of units participating in a contingency mission to draw DBOF support without reimbursement is not intended as a permanent alternative funding mechanism. Reimbursement of the DBOF through reprogrammings, transfers, supplemental appropriations, or foreign contributions is required. H.R. REP. NO. 357, 103d Cong., 1st Sess. 713 (1993).

[61] *See* National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, §§ 1001-11, 104 Stat. 1485, 1628-34 (1990) (providing general authority for the DOD to engage in counter drug operations).

[62] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 1121, 107 Stat. 1547, 1753-54 (1993). Congress inadvertently limited the DOD's surveillance and reconnaissance ability in the 1993 Authorization Act. *See* S. REP. NO. 112, 103d Cong., 1st Sess. 184 (1993).

[63] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 1122, 107 Stat. 1547, 1754-55 (1993) (to be codified at 10 U.S.C. § 381).

[64] *Id.* §§ 301(21), 1205(a), 107 Stat. at 1616, 1781. *See* H.R. REP. NO. 357, 103d Cong., 1st Sess. 726-27 (1993) (noting that the DOD included a budget request for former Soviet Union threat reduction efforts for the first time).

[65] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 1203(b)(6), 107 Stat. 1547, 1778 (1993) (when this work would support demilitarization efforts).

[66] *Id.* § 1203(b)(7), 107 Stat. at 1778 (when this support would contribute to nuclear weapons dismantlement efforts).

[67] *Id.* § 1311, 107 Stat. at 1785 (providing for DOD participation in the development of critical technologies with both military and commercial uses).

by base closures and realignments,[68] and retraining assistance to enable separating military personnel to pursue careers in education or law enforcement.[69]

24. National Shipbuilding Initiative.—Congress implemented a new defense conversion program, titled the National Shipbuilding Initiative,[70] to sustain the shipbuilding industrial base. The initiative provides for public-private cooperation to enable the United States shipbuilding industry to become competitive in commercial markets, while preserving a vital component of the defense industrial base.[71]

25. Requirement for Notice of Program Termination Amended.—Last year Congress imposed a notification requirement on the DOD and its contractors,[72] requiring them to provide timely notice of major program terminations decisions. The 1994 Authorization Act clarifies the requirements for notice to contractors and employees upon the proposed or actual termination—or substantial reduction—of major defense programs.[73]

26. Exports of Defense Articles.—Congress extended the moratorium on land mine exports for an additional three years, through October 23, 1996.[74]

27. International Peacekeeping and Humanitarian Activities.—The 1994 Authorization Act provides general authority for the DOD to participate in international peacekeeping activities, but limits the funding for such activities during FY 1994 to $300,000,000.[75] The 1994 Authorization Act also amends 10 U.S.C. § 403 to require that the DOD be reimbursed for the cost of any contracted support it provides to the United Nations or regional organizations, during the performance of peacekeeping operations, and extends the DOD's authority to support the United Nations under 10 U.S.C. § 403 until September 30, 1994.[76]

Congress severely restricted the DOD's ability to use general operation and maintenance (O&M) funds to provide humanitarian and civic assistance. Formerly, the DOD could provide minimal humanitarian and civic assistance using general O&M funds pursuant to 10 U.S.C. § 401(c)(2). The 1994 Authorization Act amends section 401(c)(2) by stating that general O&M funds are available *only* for incidental costs incurred in providing humanitarian and civic assistance with O&M funds earmarked for those purposes pursuant to 10 U.S.C. § 401(c)(1).[77]

B. Department of Defense Appropriations Act, 1994

1. Introduction.—On November 11, 1993, President Clinton signed the Department of Defense Appropriations Act for FY 1994 (1994 Appropriations Act).[78] The 1994 Appropriations Act appropriates to the DOD $240.5 billion in new obligational authority, which is $13.5 billion less than last year. This represents the ninth consecutive decline in annual defense spending, as measured in constant dollars.[79]

2. Real Property Maintenance (RPM), Defense Account Not Included in 1994 Appropriations Act.—The 1994 Appropriations Act does not include separate funding for real property maintenance and minor construction, as the last two appropriations acts had provided.[80] This omission apparently restores the former practice of using O&M funds for all repairs and for minor construction priced below $300,000 at O&M-funded installations.

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[68] *Id.* § 1322, 107 Stat. at 1790.

[69] *Id.* §§ 1331-32, 107 Stat. at 1791-97 (to be codified at 10 U.S.C. §§ 1151-52).

[70] *Id.* §§ 1351-63, 107 Stat. at 1809-17.

[71] *See* H.R. REP. No. 357, 103d Cong., 1st Sess. 733-35 (1993).

[72] National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 4471, 106 Stat. 2315, 2753 (1992). The DOD has implemented these requirements by amendment to the *DFARS*. *See infra* note 581 and accompanying text.

[73] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 1372, 107 Stat. 1547, 1817-20 (1993) (the 1994 Authorization Act specifies who must provide and receive this notice and specifically discusses the notice responsibilities of subcontractors). *See* H.R. REP. No. 357, 103d Cong., 1st Sess. 735-36 (1993).

[74] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 1423, 107 Stat. 1547, 1830-32 (1993).

[75] *Id.* § 1501, 107 Stat. at 1835-36.

[76] *Id.*

[77] *Id.* § 1504(b), 107 Stat. at 1839.

[78] Pub. L. No. 103-139, 107 Stat. 1418 (1993).

[79] H.R. REP. No. 254, 103d Cong., 1st Sess. 3 (1993).

[80] *See* Department of Defense Appropriations Act, 1993, Pub. L. No. 102-396, Title II, 106 Stat. 1876, 1885 (1992); Department of Defense Appropriations Act, *1992, Pub. L. No. 102-172, Title II, 105 Stat. 1150, 1159 (1991).*

For FY 1993, the DOD Comptroller directed use of RPM funds, in lieu of O&M funds, for minor construction priced between $15,000 and $300,000, and for repairs in excess of $15,000.[81] Congress legislatively overruled the Comptroller's directive on May 31, 1993,[82] and again made O&M funds available for these efforts. With the omission of the RPM account from the 1994 Appropriations Act, controversy on the use of RPM versus O&M funds for minor construction projects and repairs should end.[83]

3. Progress Payment Rate Reduction.—The DOD no longer may make progress payments to large businesses at a rate exceeding seventy-five percent of incurred costs under any contracts resulting from solicitations issued after November 11, 1993.[84] This new rate is a reduction from the previous customary progress payment rate of eighty-five percent for DOD contracts.[85] The 1994 Appropriations Act's change in progress payment rates is likely to cause a corresponding reduction in the rates paid to small and small disadvantaged businesses as well.[86] Whether Congress intended the new statutory limitation to affect the rates payable for flexible progress payments[87] or unusual progress payments[88] is unclear, but the DOD has halted the use of flexible progress payments in its new contracts, at least for the time being.[89]

4. Potential Change to Investment/Expense Threshold.—Congress enacted a provision in the 1994 Appropriations Act stating that the DOD may use O&M funds to procure investment items costing up to $25,000.[90] Because this provision is permissive and not mandatory, the DOD apparently may elect to retain the current $15,000 investment/expense threshold for the use of procurement versus O&M funds.[91] Moreover, the language in the 1994 Appropriations Act is not codified and has no express applicability beyond FY 1994.

5. Depot Maintenance.—The House and Senate conferees urged the DOD to improve programs to compete depot maintenance work between the services, as a means of reducing the size and cost of the depot maintenance infrastructure. The conferees stressed the importance of maintaining a core depot infrastructure, however, to ensure mobilization needs are met and to fulfill depot support requirements when private concerns are not the lowest cost providers of these services.[92]

Additionally, Congress extended the DOD's authority to obtain depot maintenance services and component production through competitions between its depots and private firms.[93] In a change from the 1993 Appropriations Act, however, the senior acquisition executive of each service now must certify,

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[81] *See* Memorandum, Deputy Comptroller for Program and Budget, Department of Defense, subject: Real Property Maintenance, Defense Account (24 Nov. 1992).

[82] Pub. L. No. 103-35, § 301, 107 Stat. 97, 103 (1993). This legislation provided a statutory exception to the normal rule that once an agency elects between two appropriations reasonably available for a particular purpose, it must continue to use the selected appropriation to the exclusion of all others. *See, e.g.*, Recording Obligations under EPA Cost-Plus-Fixed-Fee Contract, B-195732, 59 Comp. Gen. 518 (1980), *rev'd on other grounds*, 61 Comp. Gen. 609 (1982).

[83] Mr. Matt Reres, Deputy General Counsel for Fiscal Law and Policy, Office of the General Counsel, Department of the Army, explained the controversy on November 17, 1993, during his presentation to the 37th Fiscal Law Course at The Judge Advocate General's School, United States Army, Charlottesville, Virginia. According to Mr. Reres, most installations during FY 1993 had O&M funds available, but lacked RPM money to fund their minor repair requirements. Many projects previously considered "repair" were characterized as "maintenance," so installations could use O&M money to fund the work. The fiscal distinction between "repair" and "maintenance" was never critical, because both were O&M funded. The distinction became critical, however, after the DOD Comptroller's direction to use only RPM funds for repair projects exceeding $15,000. This previously moot distinction suddenly gained notoriety as a likely candidate for audit scrutiny. *See* DEP'T OF ARMY, REG. 420-10, MANAGEMENT OF INSTALLATION DIRECTORATES OF ENGINEERING AND HOUSING, Glossary, sec. II (Terms) (3 Aug. 1987) (defining "repair" and "maintenance").

[84] Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8155, 107 Stat. 1418, 1478 (1993). The Defense Acquisition Regulatory Council published an interim *DFARS* rule to implement this provision at 58 Fed. Reg. 62,045.

[85] DFARS, *supra* note 27, at 232.501-1(a)(i).

[86] The conferees noted that "government regulations allow for five and ten percent increases . . . to be used for small businesses and small disadvantaged businesses respectively. The DOD is expected to maintain these percentage differences." *See generally* DFARS, *supra* note 27, at 32.501-1(a)(i) (90% for small businesses and 95% for small disadvantaged businesses).

[87] *See id.* at 232.501-1-71.

[88] *See id.* at 232.501-2; FAR 32.501-2.

[89] Memorandum, Director, Defense Procurement, subject: Revised Progress Payment Rates (18 Nov. 1993).

[90] Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8092, 107 Stat. 1418, 1461 (1993).

[91] *See* DEP'T OF DEFENSE, MANUAL 7110.1-M, BUDGET GUIDANCE MANUAL, para. 241.4 (May 1990) [hereinafter BUDGET MANUAL]. The investment/expense threshold determines whether the DOD may use procurement or O&M funds to buy supplies and equipment. The $15,000 regulatory limit has been in effect since FY 1990.

[92] *See* H.R. REP. NO. 103-339, 103d Cong., 1st Sess. 48-49 (1993); *see also* H.R. REP. NO. 254, 103d Cong., 1st Sess. 61-63 (1993).

[93] Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8068, 107 Stat. 1418, 1455 (1993). *But see* notes 45, 46 and accompanying text.

prior to award, that successful bids include comparable estimates of direct and indirect costs for both the public and private bids.[94] Formerly, the Defense Contract Audit Agency (DCAA) made this certification.[95]

6. Former Soviet Union Threat Reduction.—In its changing role within the new world order, the DOD is charged both with helping to demilitarize the former Soviet Union and with providing its new republics with economic incentives. Congress appropriated $400,000,000—to remain available until expended—for the DOD to assist the republics of the former Soviet Union in eliminating or safely securing—nuclear, chemical, and other weapons. These funds also are available to establish programs to prevent the proliferation of those weapons, and to provide incentives for demilitarization.[96] Of the $400,000,000 Congress provided, $60,000,000 is available specifically to establish United States-Russian joint venture companies.[97]

7. No Separate Accounting for Defense Small Business Funds Within RDT&E Appropriation.—Although the DOD proposed a system for budgeting small business funds separately within the research, development, test, and evaluation (RDT&E) appropriation, the House and Senate conferees found this system undesirable because it might exclude small businesses from participating in major research programs. The conferees feared that segregation of small business RDT&E funds might thwart the socioeconomic goals of small business legislation by exempting some DOD program managers from responsibility for cultivating small business participation in the DOD's major research efforts.[98]

8. Defense Conversion.—In support of the much-publicized effort to reduce the defense infrastructure, Congress earmarked $2.49 billion for defense conversion. Conversion initiatives are scattered among programs within the personnel, O&M, procurement, and RDT&E appropriations.[99]

9. Defense Business Operations Fund.—Congress prohibited the DOD from using DBOF funds to expand the Defense Business Management System,[100] except as necessary to comply with law and directives, support management and fiduciary information requirements, and support existing customers.[101] This provision forecloses expansion of the DBOF to include any new business areas during FY 1994.[102] Congress also barred the use of DBOF funds to acquire inventory items that exceed the investment/expense threshold, and which otherwise would be chargeable to procurement appropriations.[103] Items traditionally funded from procurement accounts must continue to be so funded.[104]

10. Department of Defense Funding Policies.—Two provisions in the 1994 Appropriations Act endorse or amend significant DOD funding practices. Congress considered the DOD's practice of incrementally funding the procurement and installation of equipment modification kits in production hardware, and the conferees reluctantly approved this practice.[105] However, Congress rejected the DOD's occasional practice of annually exercising its below-threshold reprogramming authority on programs funded with multi year appropriations. The conferees required cumulative accounting of reprogramming actions, so the total amount reprogrammed into or out of a program does not exceed the below-threshold amount over the life of the appropriation.[106]

11. Emergency Response Fund.—In 1989, Congress established the Emergency Response Fund, Defense (Fund) to reimburse DOD activities that expend their own funds to pro-

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[94] *Id.* § 8068, 107 Stat. at 1418, 1455 (1993).

[95] Department of Defense Appropriations Act, 1993, Pub. L. No. 102-396, § 9095, 106 Stat. 1876, 1924 (1992).

[96] Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, Title II, 107 Stat. 1418, 1426 (1993).

[97] H.R. REP. NO. 339, 103d Cong., 1st Sess. 77 (1993).

[98] *Id.* at 108.

[99] *Id.* at 148-51.

[100] The Defense Business Management System is the automated finance and accounting system that the DOD selected to facilitate DBOF implementation. *See* H.R. REP. NO. 254, 103d Cong., 1st Sess. 279 (1993).

[101] Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, Title V, 107 Stat. 1418, 1434-35 (1993).

[102] *See* H.R. REP. NO. 339, 103d Cong., 1st Sess. 152 (1993); *see also* H.R. REP. NO. 254, 103d Cong., 1st Sess. 279 (1993) (denying DOD request to transition Defense Contract Management Command and Defense Contract Audit Agency into the DBOF).

[103] Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8097, 107 Stat. 1418, 1461-62 (1993).

[104] *See* H.R. REP. NO. 254, 103d Cong., 1st Sess. 316 (1993).

[105] H.R. REP. NO. 339, 103d Cong., 1st Sess. 78 (1993).

[106] *Id.*

vide immediate disaster assistance in anticipation of requests for aid from other federal departments, or state or local governments.[107] Unfortunately, DOD activities that expended their own funds for disaster aid *after* a request for assistance—without a reimbursement agreement with the requesting entity—received no reimbursement from the Fund, or any other source. Congress has expanded the DOD's ability to use the Fund. Once the Secretary of Defense has determined that use of the Fund is necessary, the DOD may use these funds before or after a request for support from the designated entities.[108] Department of Defense activities should continue to obtain reimbursement agreements as emergency conditions permit, however, rather than relying totally on the DOD funding sources for their emergency response efforts.

12. No Budgeting for Costs Formerly Charged to Closed Accounts.—The Army's budget request for FY 1994 contained amounts for unanticipated cost overruns in prior year programs for which *M* account funding is no longer available.[109] The conferees considering the 1994 Appropriations Act reluctantly approved this request to avoid imposing across-the-board cuts not aimed at specific programs. The conferees wanted to prevent old program overruns from jeopardizing current programs, but noted that the legislation eliminating the *M* accounts was intended to foster better cost controls and program discipline. The conferees stated that separate budgeting for cost overruns sends the wrong signal to program officials and "emphatically directed" that no future budget requests contain contingency amounts to cover prior year cost overruns.[110]

13. Program Guidance—Congress Continues to Dwell in the Weeds.—Several provisions in the 1994 Appropriations Act highlight the need for all program attorneys to look carefully for specific congressional direction affecting their programs. For example, Congress provided specific guidance on the use of contractor warranty recoveries on a satellite program,[111] directed contract terminations under the Navy's A-6 program and prohibited the use of recovered funds for any other purposes,[112] and provided money to settle claims under a specific contract—to include listing the contract number in the statute—and directed payment of the settlement within thirty days of enactment of the 1994 Appropriations Act.[113]

14. Specific Exceptions to Miscellaneous Receipts Statute.[114]—Specific authorities to receive and spend funds for narrow purposes—without first depositing the receipts into the treasury—continue to appear in annual appropriations acts. Whether these portend a comprehensive overhaul of the Miscellaneous Receipts Statute is difficult to predict, but in the meantime these statutory exceptions provide an expedient funding source for affected activities by partially circumventing the normal budget submission and appropriations process. One exception authorized the DOD to retain residual payments received from North Atlantic Treaty Organization (NATO) host governments for returned United States military property for the DOD's use in constructing facilities to support United States forces within the same NATO nations.[115] The other exception authorized the DOD to accept burden-sharing contributions from Japan, Korea, and Kuwait, and to spend those funds without further congressional action, to support DOD operations in those countries.[116]

C. Military Construction Authorization Act for FY 1994 [117]

1. Introduction.—President Clinton signed the Military Construction Authorization Act for FY 1994 (1994 Construction Act) on November 30, 1993. Congress passed the 1994 Construction Act as Division *B* of the 1994 Authorization Act for the DOD, but provided it with its own short title.[118]

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[107] Department of Defense Appropriations Act, 1990, Pub. L. No. 101-165, Title V, 103 Stat. 1112, 1126-27 (1989).

[108] Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8131, 107 Stat. 1418, 1470 (1993).

[109] *See infra* note 938 and accompanying text.

[110] H.R. REP. No. 339, 103d Cong., 1st Sess. 78-79 (1993).

[111] Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8119A, 107 Stat. 1418, 1466 (1993).

[112] *Id.* § 8154, 107 Stat. at 1478.

[113] *Id.* § 8113, 107 Stat. at 1464-65.

[114] 31 U.S.C. § 3302(b).

[115] Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8036, 107 Stat. 1418 (1993) (retaining substantial congressional oversight of such receipts and expenditures). *See* Department of Defense Appropriations Act, 1993, Pub. L. No. 102-396, § 9047A, 106 Stat. 1876, 1913 (1992) (retaining substantial congressional oversight of such receipts and expenditures).

[116] Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8063, 107 Stat. 1418, 1453 (1993) (requiring a quarterly report to Congress on the use of this authority). *See* Department of Defense Appropriations Act, 1993, Pub. L. No. 102-396, § 9085, 106 Stat. 1876, 1920 (1992) (requiring a quarterly report to Congress on the use of this authority).

[117] Pub. L. No. 103-160, §§ 2001-2930, 107 Stat. 1856-1935 (1993).

[118] *Id.* § 2001, 107 Stat. at 1856.

2. Unspecified Minor Military Construction Funding.—Congress increased the total dollars available to the DOD during FY 1994 to carry out unspecified military construction projects.[119] The 1994 Construction Act authorizes unspecified minor military construction expenditures totalling $12,000,000 for the Army,[120] $5,500,000 for the Navy,[121] $6,844,000 for the Air Force,[122] and $21,658,000 for defense agencies.[123]

3. Energy and Water Conservation.—Congress has provided the DOD additional incentives to conserve energy and water at DOD facilities.[124] Military services or agencies may now use one-half of the funds they save through conservation efforts to implement additional energy and water conservation measures.[125] Congress intended that the benefits of the DOD's conservation efforts be available to those responsible for the savings.[126]

4. Three-Year Authorization for Five-Year Money.—Congress again has provided only a three-year authorization period for military construction projects.[127] Because the DOD may carry out only authorized military construction,[128] this limited authorization curtails the DOD's ability to use military construction funds during the last two years of their normal five-year appropriation life. The 1994 Construction Act provides for certain exceptions to the three-year authorization limitation,[129] and extends the authorization for specified FY 1990 and 1991 projects that have exceeded their original three-year authorization periods.[130]

5. Acquisition of Existing Facilities in Lieu of New Construction.—The service secretaries may now use military construction funds to acquire existing facilities—including real property on which facilities are located—and to modify or alter those facilities, rather than contracting for new construction as authorized by Congress.[131] To use this authority, agencies must: (1) determine that acquisition of an existing facility is more cost effective than construction of a new one; (2) determine that the proposed acquisition is in the best interests of the United States; and (3) notify Congress and wait thirty days before awarding a contract for an existing facility.[132]

6. Base Closure and Realignment.—To mitigate the adverse effects of base closures and realignments, Congress passed provisions in the 1994 Construction Act to aid affected communities.[133] These provisions authorize transfer of certain categories of property at closing installations to affected communities and states,[134] and to persons who pay the cost of environmental restoration of the property.[135] Legal advisors

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[119] The 1994 Construction Act authorizes a total of $46,002,000 for the DOD's unspecified minor military construction program, whereas the 1993 Construction Act authorized $28,308,000. *See* Military Construction Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, §§ 2105(a)(4), 2204(a)(3), 2304(a)(3), 2403(a)(5), 106 Stat. 2586, 2588-2600 (1992).

[120] Military Construction Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 2104(a)(4), 107 Stat. 1859 (1993).

[121] *Id.* § 2204(a)(3), 107 Stat. at 1864.

[122] *Id.* § 2304(a)(3), 107 Stat. at 1870.

[123] *Id.* § 2403(a)(9), 107 Stat. at 1876.

[124] *Id.* §§ 2802, 2804, 107 Stat. at 1884, 1885-86 (amending 10 U.S.C. §§ 2483, 2865); § 2803, 107 Stat. at 1884-85 (adding 10 U.S.C. § 2866).

[125] *Id.* This authority to retain money saved through conservation and use it to achieve additional savings is a new statutory exception to the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b).

[126] H.R. REP No. 357, 103d Cong., 1st Sess. 759 (1993).

[127] Military Construction Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 2701, 107 Stat. 1856, 1880 (1993). The 1993 Military Construction Authorization Act provided the same three-year authorization period for military construction projects. *See* Military Construction Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 2701, 106 Stat. 2586, 2602-03 (1992).

[128] 10 U.S.C. § 2802(a).

[129] Military Construction Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 2701(b), 107 Stat. 1856, 1880 (1993). The exceptions waive the expiration of project authorization for most projects if the funds were obligated before the end of the three-year authorization period.

[130] *Id.* §§ 2702-03, 107 Stat. at 1880-82.

[131] *Id.* § 2805, 107 Stat. at 1886-87 (to be codified at 10 U.S.C § 2813).

[132] *Id.*

[133] *Id.* §§ 2901-30, 107 Stat. at 1909-35.

[134] *Id.* § 2903, 107 Stat. at 1912-15. *But see id.* § 2902, 107 Stat. at 1909-12 (prohibition on transfer of certain property).

[135] *Id.* § 2908, 107 Stat. at 1922-24.

at installations impacted by the base closure and realignment process should review the 1994 Construction Act for its effect on their communities.

D. Military Construction Appropriations Act, 1994

1. Introduction.—President Clinton signed the Military Construction Appropriations Act, 1994 (1994 MCA Act) on October 21, 1993.[136] The 1994 MCA Act provides budget authority for specified military construction projects, unspecified minor military construction projects, and the military family housing program.

2. Cost-Plus-Fixed-Fee Contracts.—Congress again has prohibited the use of cost-plus-fixed-fee contracts for most MCA-funded projects.[137] This restriction applies to contracts for work performed within the United States—except Alaska—which have an estimated cost exceeding $25,000. The Secretary of Defense may waive this restriction.[138]

3. Reprogramming.—"Reprogramming" is the use of funds within an appropriation for purposes other than those contemplated by Congress when it appropriated the money.[139] Congress noted that budget constraints prevented it from appropriating funds for all projects it would authorize, and encouraged the DOD to submit reprogramming requests for authorized but unfunded projects executable during FY 1994.[140] Congress also raised the reprogramming thresholds for the active and reserve forces, to $2,000,000 and $600,000 respectively, per project, or twenty-five percent of the funded amount, whichever is less, for both military construction and family housing projects.[141]

4. Relocation of Activities.—The DOD may not use minor construction funds to transfer or relocate any activity from one base or installation to another without prior notification to Congress.[142]

5. Exercise-Related Construction.—Congress again directed the Secretary of Defense to inform the Appropriations and Armed Services Committees of the plans and scope of proposed military exercises, thirty days before the exercises begin, if the amounts to be expended for construction, either permanent or temporary, are expected to exceed $100,000.[143]

6. Use of Prior-Year MCA Act Funds.—The DOD may use MCA Act funds from prior years for any of the projects authorized in the current authorization act, as well as for the projects Congress originally authorized.[144] This authority to use old MCA Act funds for current needs as well as for older projects may be illusory, however, because Congress rescinded significant portions of the unobligated MCA balances from prior appropriations acts[145] in its continuing effort to reduce future outlays and budget deficits.

7. Funding Research and Development Construction Projects.—The DOD generally funds all large construction projects with MCA funds. However, in response to an inquiry from the Senate Committee on Appropriations about funding research and development construction projects, the DOD noted that it occasionally will fund military construction with research and development or procurement funds, if a contractor performs construction under a contract funded from those appropriations. The Senate Committee on Appropriations did not express any reservations about this DOD practice, but it did note that it expects the DOD to follow this policy consistently.[146]

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[136] Pub. L. No. 103-110, 107 Stat. 1037 (1993).

[137] *Id.* § 101, 107 Stat. at 1041.

[138] *Id. See* DFARS, *supra* note 27, at 236.271.

[139] BUDGET MANUAL, *supra* note 91, ch. 113.

[140] H.R. REP. No. 278, 103d Cong., 1st Sess. 5 (1993). Although the conferees considering the 1994 MCA Act anticipated that Congress would authorize projects in addition to those actually funded, the conferees considering the 1994 Construction Act did not authorize any projects for which money had not been appropriated. However, the 1994 Construction Act conferees encouraged reprogramming requests for two National Guard projects, and indicated that such requests would be approved. H.R. REP. No. 357, 103d Cong., 1st Sess. 770 (1993).

[141] H.R. REP. No. 278, 103d Cong., 1st Sess. 5 (1993). *Cf.* BUDGET MANUAL, *supra* note 91, para. 432.3 B.2.(a) (specifying a reprogramming threshold for congressional committee approval of the lesser of $1,500,000 or 20% of the reprogramming base for military construction and family housing projects).

[142] *See* Military Construction Appropriations Act, 1994, Pub. L. No. 103-110, § 107, 107 Stat. 1037, 1042 (1993); *see also* 10 U.S.C. § 2687 (also requiring congressional notification of most base closure and realignment construction activities).

[143] Military Construction Appropriations Act, 1994, Pub. L. No. 103-110, § 113, 107 Stat. 1037, 1042 (1993).

[144] *Id.* § 116, 107 Stat. at 1043.

[145] *Id.* § 116, 107 Stat. at 1037-38, 1040 (rescinding about $277 million in MCA funds for military and family housing construction from the amounts appropriated to the DOD in the past four years).

[146] S. REP. No. 148, 103d Cong., 1st Sess. 14 (1993). The situation in which a contractor may use research and development or procurement funds to build a facility occasionally arises in weapons system acquisitions. If a contractor must build a new facility to support its development or production efforts, and if the government pays for the facility as a direct contract cost under the weapon system contract, the facility's cost is considered part of the cost of the weapon system, even though the government ultimately takes title to the facility. *See* FAR 45.302, 52.245-10.

III. Contract Formation

A. Negotiated Acquisitions

In 1993, no significant changes occurred in either the statutes or regulations governing negotiated acquisitions. Nevertheless, the courts, the General Services Board of Contract Appeals (GSBCA), and the GAO reported a number of notable protest decisions involving negotiated procurements which provide insights of benefit to agencies using competitive proposal procedures.[147]

1. Evaluation Criteria.—

(a) Failure to Disclose a Subfactor May Not Be a Basis for Protest Relief.—The GAO confirmed its pre-1990 position regarding subfactor disclosure in *AWD Technologies, Inc.*[148] Before Congress mandated disclosure of significant subfactors,[149] the GAO held that nondisclosure of subfactors was not prejudicial if they were approximately equal in importance and reasonably related to the disclosed factors.[150] Both statute and the *Federal Acquisition Regulation (FAR)* now require disclosure of significant factors *and* subfactors in DOD solicitations.[151] Notwithstanding the new statutory and *FAR* provisions, the GAO continued its prior approach in the *AWD Technologies* protest. The protester challenged the agency's consideration of successful past performance of *similar* environmental restoration work, despite the omission of "similar work" as a stated subfactor under the past performance factor. The GAO ruled that if an undisclosed subfactor reasonably relates to a stated factor, and if it is less significant in weight than disclosed factors and subfactors, then failure to disclose the subfactor is not prejudicial.[152]

(b) No Relief for Improper Disclosure of Evaluation Factor Weights if No Prejudice.—The Department of Energy's failure to disclose the relative weights of the cost and technical criteria in a solicitation for technical and management support services did not provide a basis for overturning a contract award, because such criteria are presumed equal. Even though the agency actually accorded more weight to the technical criteria than to cost in its evaluation, the protester was not prejudiced. The agency reasonably concluded that the result would have been the same if equal weights had been used, given the awardee's approximately fifty percent technical advantage, and its cost which was only twenty-three percent higher than the protester's.[153]

The GSBCA also requires a showing of prejudice before it will grant protest relief for failure to disclose evaluation criteria completely, or to follow them precisely during an evaluation.[154] In a procurement for software development and support, evaluators applied different weights to the evaluation criteria than were listed in the request for proposals (RFP). The protester received a lower evaluation score based on these weights. Even with a higher, properly-evaluated score, however, the protester's proposal still would have rated lower than the awardee's. The GSBCA therefore denied the protest.[155]

(c) Disclosure of Elements or Their Weights Below Subfactor Level Not Required.—An agency must disclose the relative weights of the significant evaluation factors and subfactors which it lists in a solicitation.[156] An agency's decision to provide a greater breakdown by listing the more detailed elements which it will consider under properly disclosed subfactors, however, does not obligate it to provide the relative weights of each of the sub-subfactors. In *Integrated*

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[147] *See* FAR pt. 15. This part of the *FAR* governs the use of both competitive and noncompetitive proposal procedures. The vast majority of protests decisions in negotiated acquisitions involve the use of competitive proposal procedures.

[148] B-250081.2, Feb. 1, 1993, 93-1 CPD ¶ 83.

[149] *See* National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 802, 104 Stat. 1485, 1588-89 (1990) (codified at 10 U.S.C. § 2305(a)(2)(A)).

[150] *See, e.g.*, Bell & Howell Corp., B-196165, July 20, 1981, 81-2 CPD ¶ 49.

[151] 10 U.S.C. § 2305(a)(2)(A); FAR 15.605(e).

[152] *See* Orion Research, Inc., B-253786, Oct. 21, 1993, 93-2 CPD ¶ ___ (reasonable for agency to consider protester's lack of experience in work like that required under request for proposals, even though relevant work was not disclosed as a subfactor of past experience, because it is logically encompassed within that evaluation factor); *cf.* American Dev. Corp., B-251876.4, July 12, 1993, 72 Comp. Gen. ___, 93-2 CPD ¶ 49 (agency need not explicitly disclose *relevant* prior contracts as a subfactor when it discloses that it will evaluate past performance, because relevance is logically encompassed in that evaluation factor; however, giving preference to offerors with at least one prior contract for similar work, regardless of the quality of work under that contract, is unreasonable). *But see* Sci-Tec Gauging, Inc., B-252406, June 25, 1993, 72 Comp. Gen. ___, 93-1 CPD ¶ 494 (use of evaluation standards set forth in evaluation plan—but not in the solicitation—to downgrade offeror's proposal was improper, because the standards were actually subfactors that were not evident from the disclosed evaluation criteria).

[153] Meridian Corp., B-246330.3, July 19, 1993, 93-2 CPD ¶ 29.

[154] The GSBCA's requirement for a showing of prejudice is a change from its past practice of granting relief for the government's failure to disclose *all* evaluation factors or subfactors, or for a failure to evaluate them *strictly* in conformance with the solicitation. The change conforms with recent guidance from the Federal Circuit. *See* Andersen Consulting v. United States, 959 F.2d 929 (Fed. Cir. 1992) (prejudice required before protest relief is appropriate).

[155] DPSC Software, Inc. v. Department of the Treasury, GSBCA No. 12353-P, 93-3 BCA ¶ 26,144.

[156] *FAR 15.605(e).*

Systems Group, Inc. v. Department of the Army,[157] the Army had disclosed "technical" as one of three factors it would evaluate, with thirty-seven subfactors listed below it in descending order of importance. The protester complained that the solicitation did not provide the relative importance of the multiple elements listed below some subfactors. The GSBCA denied the protest, holding that such a breakdown of relative weights for potentially hundreds of elements would require an extreme level of detail beyond the requirements of any statute or regulation.

(d) The GSBCA Agrees with the GAO That Risk Is an Inherent Evaluation Consideration.—The GSBCA ruled in *US Sprint Communications Co. v. Department of Defense*[158] that agencies properly may consider risk in evaluating proposals, even if risk is not a stated evaluation factor. The risk evaluated must relate to disclosed evaluation criteria, however, or its consideration may be improper. Sprint protested the award of a contract for a leased communications system to a competitor based on the government's use of risk as an unstated evaluation factor. The GSBCA favorably cited recent GAO opinions permitting consideration of risk as an inherent part of the evaluation process,[159] and denied the protest.

(e) Past Performance as an Evaluation Factor.—

(1) Evaluation of Past Performance Mandatory for Solicitations Valued over $100,000.—The Office of Federal Procurement Policy issued a policy letter requiring evaluation of past performance in all negotiated contracts expected to exceed $100,000 in value.[160] The policy letter explains that prior performance, or lack thereof, is an important predictor of successful completion of solicited work. It advises that agencies may consider conformance to specifications, good workmanship, timely performance, cost overrun history, compliance with administrative requirements, reasonable and cooperative behavior, customer satisfaction, and business-like behavior in evaluating an offeror's previous work experience. Although the policy letter calls for the issuance of implementing regulations within 210 days, no implementing change to the *FAR* has yet been issued.

(2) Past Performance and Price Alone Are Adequate Evaluation Criteria.—The GAO upheld an evaluation based only on price and past performance in *Aqua-Chem, Inc.*[161] The Army's evaluation plan required evaluators to consider only offerors' past performance on relevant government contracts, including factors such as adherence to delivery schedules and submission of quality products. The GAO determined that the evaluators' risk assessment in awarding to the protester was reasonable and denied the protest. The decision highlights the central role that past performance evaluations may legitimately play in source selections.

2. *Evaluating Proposals.*—

(a) Consistency Required.—Downgrading a protester's proposal for certain deficiencies, but not the awardee's for nearly identical deficiencies, is unreasonable. The GAO sustained a protest in *Park Systems Maintenance Co.*[162] based on the evaluators' inconsistent scoring of proposals to furnish maintenance services at a Corps of Engineers facility. The GAO found the scoring inconsistencies prejudicial because, as a result, the protester received a lower technical rating than the incumbent, and because the protester's lower technical rating was key in the cost/technical tradeoff decision, given the eleven percent lower price offered by the protester.

(b) Minor Deviation from Stated Evaluation Criteria May Not Be Prejudicial.—The GSBCA found that a minor deviation from the strict descending order of importance disclosed in the RFP did not constitute actual prejudice.[163] The board determined that the evaluators' treatment of some criteria as equal was nonprejudicial because the offerors' relative scores would remain the same, even with scoring in strict compliance with the RFP. The board was unpersuaded that it should find prejudice merely because the protester claimed it would have proposed a different technical solution, if it had known that the government would weigh some subfactors as equal rather than strictly in descending order.[164]

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[157] GSBCA No. 12417-P, 93-3 BCA ¶ 26,225.

[158] GSBCA No. 11769-P, 93-1 BCA ¶ 25,255.

[159] *See* Communications Int'l, Inc., B-246076, Feb. 18, 1992, 92-1 CPD ¶ 194 (risk assessment is inherent in every technical evaluation, but it must relate to disclosed criteria); *see also* 4th Dimension Software, Inc., B-251936, May 13, 1993, 93-1 CPD ¶ 420 (agency may consider proposal risk intrinsic to stated evaluation factors); *cf.* H.J. Group Ventures, Inc., B-246139, Feb. 19, 1992, 92-1 CPD ¶ 203 (agency used "performance risk"—meaning past performance—as "general assessment criteria" rather than as an evaluation factor, without disclosure of its relative importance; not disclosing its relative weight was improper).

[160] Office of Federal Procurement Policy, Policy Letter 92-5, 58 Fed. Reg. 3,573 (1993).

[161] B-249516.2, May 18, 1993, 93-1 CPD ¶ 389.

[162] B-252453, June 16, 1993, 93-1 CPD ¶ 466.

[163] HFS, Inc. v. National Archives & Records Admin., GSBCA No. 12010-P, 93-2 BCA ¶ 25,812.

[164] *See id.; see also* Computer Sciences Corp. v. Department of the Air Force, GSBCA No. 12299-P, 93-3 BCA ¶ 26,054 (failure to show benefit from proper rescoring precludes relief).

(c) Comparative Consideration of Undisclosed Features in Competing Offerors' Proposals Is Permissible.—The GSBCA held in *Grumman Data Systems Corp. v. Department of the Air Force*[165] that, even if features in offerors' proposals do not receive quantifiable evaluation credit under the disclosed evaluation criteria, the Source Selection Authority (SSA) may consider the comparative advantages of these features in making a cost/technical tradeoff. The solicitation stated in section *M* that the SSA would conduct an integrated assessment of the proposals received for the software development effort as part of the award decision. Given this language, and the lack of any objection to it before the solicitation's closing date, the GSBCA found no error in the SSA's head-to-head comparison of several nonquantifiable discriminators discussed in the proposals, such as ease of use, logic of menu layout, and system intuitiveness. Based on his assessment of these features, the SSA reasonably selected a higher-priced proposal as the best value to the government, despite the protester's essentially equal scores on all disclosed criteria.[166]

(d) Evaluating Key Personnel.—The government normally may adopt any evaluation method that is not arbitrary or in violation of procurement statutes and regulations, but as a minimum it should give higher scores to better proposals. The *CBIS Federal, Inc. v. Department of the Interior*[167] protest involved evaluators who improperly gave maximum scores for personnel with minimum qualifications. The evaluators also subjectively downgraded offerors' scores if their personnel did not meet minimum requirements, rather than finding their personnel unqualified. The GSBCA determined that the evaluators had acted outside of their discretion, and therefore held the evaluation to be unreasonable, because the evaluators' waiver of mandatory solicitation requirements was impermissible.

(e) Point Scoring Techniques.—Agencies may rate individual factors on a numerical scale and state relative importance in terms of numerical weights. However, point scoring systems are difficult to use correctly. The GSBCA noted that the Navy had "trouble with [its] mathematics,"[168] and found prejudice in the Navy's improper use of a point scoring scheme in a competition for a computer-aided-design and computer-aided-engineering hardware, software, and services contract. The GSBCA sustained the protest.

(f) Responsibility Matters May Be Extrinsic Evaluation Considerations.—During a preaward survey, a DCAA auditor identified significant deficiencies in an offeror's cost accounting system. Nevertheless, the Navy awarded a ship repair contract to that offeror, after working out an agreement that would improve its cost accounting system during contract performance. The GAO sustained a protest by another offeror, holding that an agency must consider relevant information discovered during a preaward survey in evaluating an offeror's technical or cost proposal.[169] The adequacy of the cost accounting system was a relevant evaluation consideration because the solicitation mentioned cost controls as subfactors under both the management and the technical criteria.[170]

(g) Evaluating Cost.—

(1) Probable Cost Determinations.—If the government will award a cost-type contract, it must evaluate proposals based on a resulting contract's probable cost to the government.[171] Cost adjustments must be reasonable and based on the offeror's proposed method of fulfilling the requirement.[172] Recently the GAO upheld an award against a protest challenging the Navy's adjustment of an offeror's overhead rate, which appeared to be artificially low, to equal

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[165] GSBCA No. 11939-P, 93-2 BCA ¶ 25,776.

[166] *See* Advanced Mgt., B-251273.2, Apr. 2, 1993, 72 Comp. Gen. ___, 93-1 CPD ¶ 288 (in its award decision, agency considered "start-up" period, when new contractor would be less efficient than incumbent; GAO denied protest alleging that consideration of learning curve amounted to use of an undisclosed evaluation factor, and held that consideration of initial efficiency advantage was a permissible tool in performing a cost/technical tradeoff). Both the *Advanced Mgt.* and the *Grumman* decisions involved consideration of matters in addition to the disclosed evaluation criteria *by the SSA* as part of the cost/technical tradeoff decision. As the government agent vested with discretion to make inherently subjective best value determinations, this individual probably has more freedom than evaluators to consider collateral matters.

[167] GSBCA No. 12092-P, 93-2 BCA ¶ 25,643.

[168] Centel Fed. Sys., Inc. v. Department of the Navy, GSBCA No. 12011-P, 93-2 BCA ¶ 25,648, 127,632. The board noted that the expenditure of millions of dollars conducting the procurement did not buy a license to violate procurement laws. *Id.* at 127,640.

[169] Continental Maritime of San Diego, Inc., B-249858.2, Feb. 11, 1993, 93-1 CPD ¶ 230.

[170] The GAO stated that the government must evaluate both an offeror's approach and its *ability* to meet the solicitation's requirements. The Navy argued that ability considerations were better performed as part of a preaward responsibility determination, but the GAO disagreed, holding that failure to consider certain extrinsic evidence related to an offeror's ability to perform during proposal evaluation was unfair to the agency and to the competitive process. *Id.; see also* Department of the Navy—Recon., B-244918.3, July 6, 1992, 92-2 CPD ¶ 199.

[171] FAR 15.605(d).

[172] The GAO and the GSBCA both recognize that cost realism evaluation involves the application of business judgment, and that it should not be upset merely because a protester suggests another reasonable cost-evaluation approach. *See, e.g.*, CompuAdd Corp. v. Department of the Air Force, GSBCA No. 12021-P, 93-2 BCA ¶ 25,811. Nevertheless, an agency cannot entirely substitute its technical approach for the offeror's, if the offeror proposes a reasonable solution to an agency's requirement.

the offeror's prior-year rate. Based on the information available to the Navy, the adjustment was reasonable.[173]

An agency's probable cost determination may be successfully challenged, however, if based on mechanical adjustments to offerors' proposed costs, or if cost adjustments are made inconsistently between proposals. Proper cost realism adjustments require agencies to analyze independently the realism of each offeror's proposal based on its particular circumstances, its approach, its personnel, and other known unique factors. The GAO sustained a protest challenging the Navy's practice of splitting the difference between an offeror's proposed costs and the government estimate, if the proposed cost was outside a percentage range from the government estimate. The GAO found this to be an unreasonable mechanical adjustment, despite the Navy's argument that the offeror's and the government's estimates were equally likely to be correct.[174]

The *Lockheed Aeronautical Systems Co.*[175] protest challenged the Air Force's allegedly inconsistent evaluation of offerors' proposals for providing autopilot replacement systems. The evaluation considered life-cycle costs for the replacement system, rather than just acquisition costs. Competing offerors used different assumptions in developing life cycle estimates, however, and the evaluators did not challenge them or revise probable costs to reflect common assumptions. Because the GAO requires consistent cost realism evaluations among proposals to find an agency's evaluation reasonable, it sustained the protest.

(2) Price Realism Analysis Upheld on Fixed-Price Contract.—Because the government's liability is fixed at the contract price, price realism normally is not a factor in the evaluation of fixed-price proposals. However, because the risk of poor performance is a legitimate concern in evaluating proposals—particularly when a contractor proposes to work for little or no profit, or with an underestimated workforce—the GAO ruled that an agency has discretion to conduct a price-realism analysis. The GAO opined that the depth of such an analysis is within an agency's discretion.[176]

(h) Past Performance Evaluations.—The GAO found nothing inherently improper in the Defense Logistics Agency's downgrading of an offeror's proposal in *two* areas—"past performance" and "manufacturing plan"—based on performance problems under prior contracts. In *Greenbrier Industries*[177] evaluators downgraded an offer to provide general purpose tents, because of previous delivery and quality problems. The GAO ruled that downgrading in both areas was reasonable, because the past problems affected the scores in more than one evaluated area. Additionally, because the offeror proposed to divert resources from other work in progress to handle the new contract, and because the other work in progress was delinquent, the agency reasonably concluded that previous problems could recur. The GAO, therefore, denied the protest.

In *CTA, Inc.*,[178] the GAO considered whether good performance under a recent contract for work similar to that required under the instant solicitation offset poor performance under three previous contracts, entitling the protester to a favorable past performance rating. The Air Force assessed the protester's mixed, but recently improved, track record in evaluating its ability to make training devices, and concluded that the protester's offer still presented a high level of risk. The GAO denied the protest, finding that the Air Force was reasonable in concluding that the protester had not climbed sufficiently on the learning curve to avoid repeating past mistakes.

3. Award Without Discussions.—The DOD agencies are successfully exercising their relatively new authority to award on initial proposals to an offeror not necessarily the lowest in price.[179] In *TRI-COR Industries,*[180] the GAO ruled that the Army permissibly selected a higher-priced, technically superior offeror over the lower-priced protester, despite the protester's higher management rating. The Army conducted a cost/technical tradeoff based on initial proposals, and reasonably decided that the awardee's technical superiority outweighed the protester's management and cost advantages.

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[173] MR&S/AME, An MSC Joint Venture, B-250313.2, Mar. 19, 1993, 72 Comp. Gen. ___, 93-1 CPD ¶ 245.

[174] The Jonathan Corp., B-251698.3, May 17, 1993, 93-2 CPD ¶ 174, *recon. denied sub nom.* Moon Eng'g Corp., B-251698.6, Oct. 19, 1993, 93-2 CPD ¶ ___. For a decision in which the GAO essentially found a *lack* of adjustment of proposed costs to be unreasonable, see Canadian Commercial Corp./Heroux, Inc., B-253278, Sept. 3, 1993, 93-2 CPD ¶ 144 (unreasonable for DCAA to certify depot costs as suitable for comparison with commercial sources when depot costs were understated).

[175] B-252235.2, Aug. 4, 1993, 93-2 CPD ¶ 80.

[176] Oshkosh Truck Corp., B-252708.2, Aug. 24, 1993, 93-2 CPD ¶ 115 (Army truck procurement).

[177] B-252943, Aug. 11, 1993, 93-2 CPD ¶ 91.

[178] B-253654, Oct. 12, 1993, 93-2 CPD ¶ ___.

[179] *See* 10 U.S.C. § 2305(b)(4)(A)(ii) (amended in 1990 to permit the DOD to award on initial proposals to an offeror that does not necessarily propose to meet the government's requirements at the lowest cost). Civilian agencies still may award on initial proposals only to the offeror that is lowest in price.

[180] B-252366.3, Aug. 25, 1993, 93-2 CPD ¶ 137 (contract for technical support services).

4. Competitive Range Determinations.—

(a) Exclusion for Vagueness.—The government may properly exclude a proposal with vague and ambiguous design descriptions from the competitive range without giving the offeror an opportunity to explain the ambiguities during discussions. In *TSM Corp.*,[181] the GAO upheld the Army's determination that the frequent use of "may" and "where possible" in describing proposed software development work amounted to multiple weaknesses and deficiencies, and that their correction would require multiple revisions throughout the proposal. The Army reasonably concluded that the multiple deficiencies made the protester unqualified for award.

(b) Acceptable Proposals May Not Make the Competitive Range.—Even a proposal that is technically acceptable, or susceptible to being made acceptable, may be excluded from the competitive range, if in comparison with other offers, it stands no reasonable chance of being selected for award. In *Caldwell Consulting Associates*,[182] the GAO upheld an agency's decision to exclude from the competitive range an offeror that ranked eleventh of twelve technically, and was fifth low on price. Although the offeror submitted an update of a prior proposal that was within the competitive range in a prior procurement for the same requirement, the different level of competition in the current procurement produced a different, but reasonable, competitive range determination.

(c) Reducing the Competitive Range to a Single Offeror Is Subjected to Very *Close Scrutiny.*—Even when good reasons exist for reducing a competitive range to one offeror, it may be an abuse of discretion to do so unless it is clear that an excluded offeror has absolutely *no* reasonable chance of receiving award. In *Birch & Davis International v. Christopher*,[183] the Federal Circuit applied this approach in reviewing a competitive range selection that left only one offeror remaining. The court vacated a GSBCA decision upholding the contracting officer's reduction of the competitive range to one offeror, finding that the GSBCA's "close scrutiny" had not been close enough. The court faulted the GSBCA for basing its decision on the contracting officer's reasonable decisional process in excluding the protester, rather than on specific findings on whether the protester had any chance of receiving award. Absent such specific findings, the Federal Circuit refused to affirm the protester's exclusion.[184]

(d) Improper Inclusion Claims.—The GAO recently found that leaving an offeror proposing a poorly-documented, new design in the competitive range was proper, because the design had technical merit, despite requiring substantial revision.[185] The Army properly advised the offeror of design deficiencies needing correction for its proposal to have a reasonable chance of receiving award. The offeror's decision not to continue pursuing award by correcting its deficiencies, while continuing to incur proposal preparation costs for other proposal revisions, caused it to remain technically unacceptable. Hence, the protester was not entitled to payment for the bid and proposal costs that it incurred by remaining in the competition.

5. Conducting Discussions.—

(a) Determining Whether Discussions Are Necessary.—Even if a solicitation states that discussions will not be held unless necessary,[186] a decision not to hold discussions still must be reasonable. A contracting officer must consider the procurement's unique circumstances, the proposals received, and the basis for award. In *Jonathan Corp.*,[187] a second basis[188] for the protester's challenge of the government's award decision was the government's election not to hold discussions. Because the government estimate differed substantially from the offerors' proposed costs, the contracting officer should have considered whether discussions to resolve the inconsistencies were in the government's interest. Failure to hold discussions to resolve discrepancies in cost estimates and other issues raised by the evaluators during their review of proposals was unreasonable.

(b) Meaningful Discussions Must Provide Real Opportunity to Improve Proposal.—In *E.L. Hamm & Associates*,[189]

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[181] B-252362.2, July 12, 1993, 93-2 CPD ¶ 13.

[182] B-252590, July 13, 1993, 72 Comp. Gen ___, 93-2 CPD ¶ 18.

[183] 4 F.3d 970 (Fed. Cir. 1993) *rev'g* Birch & Davis Int'l v. Agency for Int'l Dev., GSBCA No. 11643-P, 92-2 BCA ¶ 24,881.

[184] The Army avoids the competition problems inherent in reducing a competitive range to a single offeror by prohibiting competitive range determinations that leave only a single remaining offeror. DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. 15.609(b) (1 Dec. 1984) [hereinafter AFARS].

[185] Mainstream Eng'g Corp., B-251444, Apr. 8, 1993, 72 Comp. Gen. ___, 93-1 CPD ¶ 307 (tracked vehicle heater requirement).

[186] *See* FAR 15.610(a). Federal Acquisition Regulation 52.215-16 (Alternate III), when included in a solicitation, notifies offerors that a DOD agency may award based on initial proposals.

[187] B-251698.3, May 17, 1993, 93-2 CPD ¶ 174.

[188] *See supra* note 174 and accompanying text for a discussion of the GAO's consideration of the government's probable cost analysis in this protest.

[189] B-250932, Feb. 19, 1993, 93-1 CPD ¶ 156. *Accord* Manekin Corp., B-239040, Oct. 19, 1992, 92-2 CPD ¶ 250 (agency failed to advise protester that its proposed delivery schedule was deficient; prejudice established if disclosure of deficiency would give protester a reasonable chance of receiving award).

the government evaluators noted concerns about the protester's proposed site manager's lack of experience, but the contracting officer failed to disclose this deficiency. By not even hinting at this critical concern during discussions, the government essentially precluded the protester from having any chance of winning the competition to provide training materials for the Federal Emergency Management Agency. The GAO therefore sustained the protest.

Although an agency need not identify every aspect of a technically acceptable proposal that receives less than a maximum score,[190] it must discuss a proposal's pervasive lack of detail that results in a low but acceptable score, to provide the offeror a meaningful chance to improve its proposal. In *Eldyne, Inc.*,[191] notwithstanding such a pervasive lack of detail, the Navy argued that discussions were "meaningful," because it disclosed a single deficiency regarding one proposed employee who did not appear to be available to the contractor. The Navy asserted that the lack of detail in other parts of the proposal was a *weakness*, not a *deficiency* requiring discussions under the *FAR*. The GAO determined that the discussions were not meaningful, however, and sustained the protest, because the cumulative effect of the weaknesses essentially precluded the protester from serious contention for award.

(c) Prohibited Discussions.—

(1) Technical Leveling and Transfusion.—Some agencies fail to discuss every problem noted in an offeror's proposal because of concern that doing so would amount to technical leveling or technical transfusion. The *Simmonds Precision Products*[192] decision illustrates the usual result in a protest, however, when protesters allege impermissible technical leveling or transfusion. The Air Force asked the awardee during discussions if it had considered alternate approaches to meeting an Air Force black box requirement. In response, the awardee submitted a second offer proposing a technical solution similar to the protester's. Because the protester's solution was not novel, the GAO found that the government's question did not amount to a technical transfusion, despite further encouragement of the awardee to submit a second proposal, when the awardee revealed it had considered but decided against a solution like the protester's. Furthermore, because the Air Force did not engage in repeated rounds of discussions, the GAO held that no technical leveling had occurred.

(2) Unfair Discussions.—An agency must treat offerors fairly. Although an agency normally has no obligation to discuss mere weaknesses with an offeror,[193] it may do so if those discussions do not amount to technical leveling or technical transfusion. Once it opens discussions below the level of deficiencies with one offeror, however, it must do so with all offerors in the competitive range. The *Securiguard, Inc.*[194] protest involved an agency's conduct of a procurement for guard services, in which it asked the awardee questions directing it to all of the perceived weaknesses in its proposal. The same level of depth was not present, however, in discussions held with the protester. The GAO held the discussions to be unfair and sustained the protest.

6. Best and Final Offers (BAFO).—

(a) Deficiencies Introduced in BAFOs.—In *Saco Defense, Inc.*,[195] the GAO reviewed an Army procurement for weapon night-sight brackets. After testing competing designs, the Army conducted discussions and advised the protester of design deficiencies which caused it to fail several mandatory solicitation requirements. Although the Army anticipated only minor adjustments to meet mandatory requirements, the protester completely redesigned its bracket. The contracting officer determined that the evaluators could not fully reevaluate the revised design without more testing, which would cost over $200,000 and delay award by several months. The contracting officer therefore evaluated the protester's design only to the extent possible without testing, resulting in a low technical score. When the protester complained that it deserved a higher technical score and contract award, because its price was thirty percent lower, the GAO ruled for the Army. The GAO stated that an agency need not retest a completely redesigned product to verify that deficiencies are overcome, when only a minor redesign was needed, and when the contractor furnished no new test data with its redesign to demonstrate that it met test requirements.[196]

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[190] *See* FAR 15.610 (must identify deficiencies in proposals). A deficiency is defined as "[a]ny part of a proposal which fails to satisfy the government's requirements." *Id.* at 15.601. *See* SeaSpace Corp., B-252476.2, June 14, 1993, 93-1 CPD ¶ 462 (all-encompassing discussions not required).

[191] *See* B-250158, Jan. 14, 1993, 93-1 CPD ¶ 430, *sust'd on recon.*, Department of the Navy—Recon., B-250158.4, May 28, 1993, 93-1 CPD ¶ 422; *see also* Andrew M. Slovak, B-253275.2, Nov. 2, 1993, 93-2 CPD ¶ ___ (meaningful discussions not conducted because agency failed to inform protester of weaknesses that significantly affected its scores and precluded it from having a reasonable chance of receiving award).

[192] B-244559.3, June 23, 1993, 93-1 CPD ¶ 483.

[193] *But see supra* notes 190, 191 and accompanying text.

[194] B-249939, Dec. 21, 1992, 93-1 CPD ¶ 362.

[195] B-252066, May 20, 1993, 93-1 CPD ¶ 395.

[196] *See* Cubic Field Servs., B-252526, June 2, 1993, 72 Comp. Gen. ___, 93-1 CPD ¶ 419 (agency is not required to reopen discussions after BAFOs to cure deficiencies first introduced in one offeror's BAFO); Potomac Research, Inc., B-250152.8, July 22, 1993, 72 Comp. Gen. ___, 93-2 CPD ¶ 109 (offeror assumes the risk that changes in its BAFO may raise questions about its ability to meet requirements).

(b) Material Amendment Requires Second BAFOs[197]—The *Dairy Maid Dairy, Inc.*,[198] protest involved an Army procurement for the contracted operation of a milk plant. The Army issued a post-BAFO amendment changing the contract type from a requirements contract to a definite quantity contract. The GAO held that the change to the solicitation was a material one, and sustained the protest. The GAO explained that material amendment of a solicitation after BAFOs requires a second round of BAFOs, not just negotiation of the change with the apparent awardee, because such a change may require proposal revisions, and affect the relative standing of the offerors.

(c) Post-BAFO Discussions.—In *SmithKline Beecham Pharmaceuticals, N.A.*,[199] the GAO determined that post-BAFO discussions with a proposed awardee—which afforded it an opportunity to meet its obligations in an alternative manner—were prejudicial to other offerors and impermissible. The Centers for Disease Control requested a post-BAFO change in packaging, due to concerns that the proposed awardee might be unable to meet production rate requirements for its low-cost, multidose packages. The offeror agreed to provide single-dose packages at the same per-dose price, if necessary. The agency argued no prejudice, because the protester had not offered the multidose packaging. The GAO disagreed, however, because production rate concerns might have affected the agency's source selection, absent agreement on the same-price packaging alternative.[200]

(d) Failure to Submit BAFO.—An offeror's failure to submit a BAFO does not preclude consideration of its offer for award, if the acceptance period has not expired, and if the technical revisions submitted during discussions make the offer technically acceptable. However, the cost impact of the technical revisions must be minimal, permitting a reasonable cost evaluation. Therefore, when a protester complained that an agency made award to a contractor that had not submitted a BAFO, the GAO denied the protest.[201]

7. The Source Selection Decision.—

(a) The Cost/Technical Tradeoff.—Determining the technical adequacy and relative desirability of a proposal is a matter of agency discretion that the GAO will not disturb, unless its determination is unreasonable or inconsistent with the evaluation criteria listed in an RFP.[202] A *reasonable* cost/technical tradeoff analysis is an essential element of any source selection decision using a best value basis of award.[203] In *Duke/Jones Hanford, Inc.*,[204] the GAO upheld an SSA's discretion to decide that two offers with slightly different technical scores were essentially equal in technical merit, and to award based on lower price. The protester rated "outstanding minus," and the awardee rated "good plus" on the "key personnel experience" criterion, and the proposals were identical on all other ratings. The GAO found that once the two proposals were determined to be essentially identical technically, the decision to award on lower cost was a reasonable one, despite the technical factor's greater weight.[205]

(b) The Federal Circuit's View on Best Value.—The Federal Circuit upheld an agency cost/technical tradeoff decision to award a contract for office automation equipment, software, and maintenance to a higher priced, technically superior offeror.[206] In affirming the GSBCA, the court noted that noth-

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[197] DFARS, *supra* note 27, at 215.611(c)(i)-(iii), severely restricts a contracting officer's ability to reopen discussions, and then request another round of BAFOs. However, with required approval, the contracting officer still must solicit additional BAFOs in appropriate cases.

[198] B-251758.3, May 24, 1993, 93-1 CPD ¶ 404.

[199] B-252226.2, Aug. 4, 1993, 93-2 CPD ¶ 79.

[200] This decision highlights the rule that if the government reopens *discussions*, rather than seeking minor clarifications, with one offeror after BAFOs, it must reopen with all. *Accord* Paramax Sys. Corp., B-253098.4, Nov. 15, 1993, 93-2 CPD ¶ ___ (permitting one offeror to make its offer acceptable after BAFO—by clarifying inconsistencies to ensure fee for cost-plus-incentive-fee work remained within RFP limits—required reopening discussions with all remaining offerors in competitive range).

[201] MR&S/AME, An MSC Joint Venture, B-250313.2, Mar. 19, 1993, 72 Comp. Gen. ___, 93-1 CPD ¶ 245. For a discussion of the cost realism evaluation performed in this procurement which the GAO also reviewed in this decision, *see supra* note 173 and accompanying text.

[202] *See, e.g.*, Axion Corp., B-252812, July 16, 1993, 93-2 CPD ¶ 28 (upholding an Army Missile Command award of a contract for circuit card assemblies to an offeror with a seven percent higher price than the protester, because the awardee had an excellent past performance rating and was acceptable in quality, while the protester was acceptable for both criteria; the SSA reasonably determined that a better past performance rating was worth a higher price, and that the protester's offer did not represent the best value to the government).

[203] An SSA's failure to consider cost differences in making a best value determination, and awarding a contract to a higher-priced offeror based on technical superiority alone, is unreasonable. *See* Sturm, Ruger & Co., B-250193, Jan. 14, 1993, 93-1 CPD ¶ 42.

[204] B-249637.10, July 13, 1993, 93-2 CPD ¶ 26.

[205] *Cf.* Macon Apparel Corp., B-253008, Aug. 11, 1993, 93-2 CPD ¶ 93 (SSA reasonably considered identical adjectives earned by two offerors to be different, because one was borderline with the next lower adjective, and the other was borderline with the next higher adjective; therefore, paying a seven percent price premium to the technically better offeror was permissible).

[206] Lockheed Missiles & Space Co. v. Bentsen, 4 F.3d 955 (Fed. Cir. 1993).

ing in the *FAR* or any statute requires that technical evaluation points be proportional to cost. Therefore, the court concluded that "a proposal which is one point better than another but costs millions of dollars more may be selected if the agency can demonstrate with a reasonable degree of certainty that *the added value of the proposal is worth the higher price.*" [207]

(c) The Basis for Award.—Even if an RFP does not state the basis for award as clearly as possible, an award made on a best value basis will be upheld *if* that basis for award is apparent from the most reasonable reading of the RFP. In *State Technical Institute at Memphis*,[208] the GAO upheld an award based on best value, despite confusing RFP language indicating that evaluation, at least in part, would be on a pass/fail or low-cost, technically acceptable basis. An overall reading of the solicitation put offerors on notice that technical merit was more important than price, and that award would not necessarily be made to the lowest-cost offeror.[209]

(d) Looking Behind the Scores.—Reliance on evaluators' scores alone—without looking at each proposal's strengths or weaknesses—may be unreasonable.[210] In selecting the winning proposal in a competition for leased office and warehouse space, evaluators reached conclusions that were inconsistent with the rating scheme and that did not accurately reflect matters presented in offerors' proposals. In sustaining a protest, the GAO remarked that "the agency could hardly have considered the reality behind the point scores and still have awarded a contract to [the selected offeror]."[211] The decision highlights the need for SSAs to review the actual proposals of the offerors, in addition to the technical scores and narrative reports of the evaluators.

B. Sealed Bidding

1. Rejection of Bids.—

(a) Acknowledgement of Amendment Does Not Establish Compliance with Minimum Bid Acceptance Period.—A bidder acknowledged a solicitation amendment which changed the minimum bid acceptance period from sixty to ninety days.[212] In its bid, however, the bidder inserted sixty days in the blank provided on *Standard Form 1442* as its bid acceptance period. The agency rejected the bid. The GAO determined that the bid was ambiguous and upheld the agency's action, citing the general rule that the minimum bid acceptance period is a material solicitation requirement.[213] This decision overrules a line of cases that found bids to be responsive in identical circumstances.[214]

(b) Statute Does Not Require Award to Unreasonably Priced Bid.—In *Atkinson Dredging Co.*,[215] the GAO upheld the Army Corps of Engineers' cancellation of a solicitation for maintenance dredging because the bid price was unreasonably high compared to the government estimate. The protester argued on reconsideration[216] that 33 U.S.C. § 624 required the Corps to award the contract to the protester because its bid price was less than twenty-five percent higher than the government estimate.[217] The GAO disagreed, finding that while the statute prohibits the Corps from awarding a dredging contract to a bidder whose price exceeds the government estimate by twenty-five percent, it does not mandate that the Corps award a contract to a bidder whose bid price is within twenty-five percent of the government estimate. To hold otherwise would "infringe upon the agency's ability to exercise its discretion in the determination of price reasonableness."[218] The

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[207] *Id.* at 960.

[208] B-250195.2, Jan. 15, 1993, 93-1 CPD ¶ 47 (solicitation for training services).

[209] Nevertheless, a solicitation must make more than an oblique reference to best value for an agency to perform a cost/technical tradeoff as part of its source selection decision. If a fair reading of the solicitation leaves it doubtful that award will be made on a best value basis, then use of a low cost, technically acceptable basis for award is required. *See* Systems Resources, Inc. v. Department of the Navy, GSBCA No. 12536-P (Sept. 13, 1993), ____ BCA ¶ ____ (citing Lockheed Missiles & Space Co. v. Secretary of the Treasury, 4 F.3d 955 (Fed. Cir. 1993) for a good example of cost/technical tradeoff language).

[210] *See* SDA, Inc., B-248528.2, Apr. 14, 1993, 72 Comp. Gen. ___, 93-1 CPD ¶ 320.

[211] *Id.* at 11.

[212] John P. Ingram, Jr. & Assoc., B-250548, Feb. 9, 1993, 93-1 CPD ¶ 117.

[213] *See* Valley Constr. Co., B-243811, Aug. 7, 1991, 91-2 CPD ¶ 138.

[214] Alaska Mechanical, Inc., B-225260.2, Feb. 25, 1987, 87-1 CPD ¶ 216; RG&B Contractors—Recon., B-225260.4, Apr. 20, 1987, 87-1 CPD ¶ 425; Ingenieria Y Construcciones Omega, B-233277, Jan. 25, 1989, 89-1 CPD ¶ 85.

[215] B-250965, Feb. 17, 1993, 93-1 CPD ¶ 153.

[216] Atkinson Dredging Co.—Recon., B-250965.2, July 19, 1993, 93-2 CPD ¶ 31.

[217] 33 U.S.C. § 624 provides: "No works of river and harbor improvement shall be done by private contract . . . [where] the contract price is more than 25 per centum in excess of what [the Chief of Engineers] determines to be a fair and reasonable estimated cost of a well-equipped contractor doing the work."

[218] Atkinson Dredging, 93-2 CPD ¶ 31, at 3. *See* FAR 14.407-2(a) ("the contracting officer shall determine . . . that the prices offered are reasonable before awarding the contract"); *id.* at 14.404-2(f) ("any bid may be rejected if the contracting officer determines in writing that it is unreasonable as to price").

GAO expressly rejected a Federal Claims Court decision requiring the Corps of Engineers to award a dredging contract to plaintiff, whose low bid was within twenty-five percent of the government estimate.[219]

(c) Resolicitation Appropriate When Bidder Is Misled by Procurement Integrity Certificate.—A bidder submitted a bid properly signed by its company president.[220] The "sales support" manager, however, executed and signed the Certificate of Procurement Integrity. Noting that FAR 3.104-9 requires the officer or employee "responsible for the bid or offer" to execute the certificate, the GAO found that the sales manager was not responsible for the bid because he did not have authority to bind the bidder.[221] Nevertheless, the bidder argued that the certificate uses the term "responsible for the preparation of this offer,"[222] and although the sales manager was not responsible for the bid or offer, he was responsible for preparing the bid. The GAO agreed that the bidder was misled by the IFB, and that the bidder's understanding of the language of the certificate was "not unreasonable." The GAO recommended that the agency resolicit the requirement and that the Federal Acquisition Regulatory Council revise the language of the certificate.[223]

(d) Descriptive Literature Clause Rendered Meaningless.—The Descriptive Literature clause[224] requires bids to be accompanied by descriptive literature as "required elsewhere in this solicitation." If a bidder fails to submit descriptive literature, the agency must reject the bid.[225] In *Adrian Supply Co.*,[226] the agency issued a solicitation that included the Descriptive Literature clause but failed to specify the particular requirements for which descriptive literature was needed. Finding that the Descriptive Literature clause does not operate independently, the GAO determined that the solicitation did not establish a valid requirement to submit descriptive literature for bid evaluation purposes.[227]

(e) Failure to Sign Bid Modification May Be a Minor Informality.—A bidder submitted a signed bid and an unsigned bid modification in one envelope.[228] The bid modification deducted $38,000 from the bid price, which displaced the apparent low bidder. The apparent low bidder protested the agency's consideration of the unsigned bid modification, asserting that the integrity of the sealed bidding system had been adversely affected because the bidder could have repudiated its modification after bid opening and demanded a higher price. The GAO disagreed and determined that the bidder would be bound by the modification, therefore, the agency properly waived the bidder's failure to sign the modification as a minor informality.

2. *Mistake in Bids.*—

(a) Subcontractor Omissions Are Correctable.—After bid opening, a bidder generally may not recalculate its bid to include funding for items it omitted originally.[229] In *Pacific Components*,[230] the low bidder requested permission to correct a mistake where the bidder relied on the quotation of a subcontractor that unknowingly omitted certain items. The GAO upheld the agency's determination to permit correction of the bid, noting that the mistake in the subcontractor's quote was not "readily apparent."

(b) Unit Prices Are Correctable.—When there is a discrepancy between a unit price and an extended price, "the unit price will be presumed correct, subject, however, to correction

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[219] Bean Dredging Corp. v. United States, 19 Cl. Ct. 561 (1990).

[220] Sweepster Jenkins Equip. Co., B-250480, Feb. 8, 1993, 93-1 CPD ¶ 111.

[221] The GAO did agree, however, that different individuals may sign the bid and the certificate. See Hutchinson Contracting, B-251974, May 18, 1993, 93-1 CPD ¶ 391.

[222] FAR 52.203-8—Requirement for Certificate of Procurement Integrity.

[223] On reconsideration, the bidder provided additional documents and affidavits showing that the sales support manager had actual authority to bind the company. The GAO reversed its prior opinion granting the protest. Schmidt Eng'g & Equip., Inc.—Recon., B-250480.2, June 18, 1993, 72 Comp. Gen. ___, 93-1 CPD ¶ 470.

[224] FAR 52.214-21(b). Solicitations often require bidders to submit descriptive literature to demonstrate that the product offered complies with the specification requirements.

[225] *Id.* at 52.214-21(c).

[226] B-253656, July 1, 1993, 93-2 CPD ¶ 3.

[227] *Id. See* Williams Envtl. Servs., B-250404, Jan. 29, 1993, 93-1 CPD ¶ 80 (Descriptive Literature clause rendered meaningless; descriptive literature actually furnished by bidders akin to "unsolicited" descriptive literature).

[228] Tilley Constructors & Eng'rs, B-251335.2, Apr. 2, 1993, 93-1 CPD ¶ 289.

[229] *See* J. W. Creech Inc., B-191177, Mar. 8, 1978, 78-1 CPD ¶ 186.

[230] B-252585, June 21, 1993, 93-1 CPD ¶ 478.

to the same extent and in the same manner as any other mistake."[231] A bid submitted by an apparent low bidder contained a discrepancy between the unit price and the extended price.[232] The GAO upheld the contracting officer's decision to correct the "apparent" mistake in the unit price, rejecting the protester's argument that the *FAR* clause precluded such action. The GAO reasoned that correction of the unit price was proper because it represented the "only reasonable interpretation of the intended bid."

(c) Mistake-in-Bid Procedures Not Available to Reallocate Prices That Exceed Statutory Limitation.—A protester submitted a bid to renovate single family housing units at Edwards Air Force Base, California, but the bid exceeded statutory price limits for several housing units.[233] The bidder asked to reallocate its unit prices, arguing that it made a mistake on the price limitation, but the Air Force denied the request and rejected the bid. The GAO upheld the Air Force's decision and concluded that the bidder could not use mistake-in-bid procedures to recalculate its bid and arrive at a bid never intended before bid opening.

(d) When Is the Contracting Officer on Notice of a Mistake in Bid?—Not frequently! In *Kitco, Inc.*,[234] the contractor argued that the government "knew or should have known" that it made a unilateral mistake in its bid because the contractor attempted to raise its bid price by sending a facsimile modification—not authorized by the IFB—prior to bid opening. The board refused to rescind or reform the contract, finding that the contracting officer had no duty to verify the bid because the attempted modification showed nothing more than a mistake in business judgment. In *Mid-South Metals*,[235] the contractor contended that the government was on notice that its bid on surplus property was a mistake because it was forty percent higher than the next high bid. The board rejected the contractor's argument, finding that a wide range of bids is "not unexpected in a surplus property sale."

3. Cancellation of Solicitation.—

(a) Unfair Competitive Advantage.—In *P&C Construction*,[236] the IFB provided for a site visit on a particular day, with "no other site visits" authorized. After attending the scheduled site visit, the low bidder revisited the work site on several occasions. The contracting officer cancelled the IFB after bid opening because the IFB overstated the government's needs and the low bidder may have obtained a competitive advantage over other bidders. The GAO agreed that the contracting officer was justified in cancelling the solicitation to eliminate the "appearance" of unfair competitive advantage.

(b) Wrong Reasons? Not a Problem!—In a negotiated acquisition for database programs, the contracting officer cancelled the solicitation on determining that all offers were unacceptable.[237] The plaintiff argued that the cancellation was erroneous because the agency evaluated its proposal improperly. Borrowing an idea from the law of contract terminations,[238] the court held that, even if the evaluation of plaintiff's proposal was improper, the cancellation was proper if the agency had another, proper basis for the cancellation. Because the agency needed to reassess its requirements when it cancelled the solicitation, the court concluded that the cancellation was proper.[239]

(c) Cancellation May Be Postaward.—Federal Acquisition Regulation 14.404-1 refers to cancellation of an IFB "before award," but makes no provision for postaward cancellations. In *Control Corp.*,[240] the agency cancelled its solicitation after award because it determined that the IFB was severely flawed and confusing. The GAO rejected a protester's assertion that the *FAR* does not authorize postaward cancellation, finding that the *FAR* provision does not bar termination of a contract and cancellation of the underlying IFB "based on a defect in the award process."[241]

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[231] FAR 52.214-12(c).

[232] J&J Maint., B-251355, Mar. 1, 1993, 93-1 CPD ¶ 187.

[233] William G. Tadlock Constr., B-252580, June 29, 1993, 93-1 CPD ¶ 502.

[234] ASBCA No. 45347, 93-3 BCA ¶ 26,153.

[235] ASBCA No. 44241, 93-2 BCA ¶ 25,675.

[236] B-251793, Apr. 30, 1993, 93-1 CPD ¶ 361.

[237] Shields Enters. v. United States, 28 Fed. Cl. 615 (1993).

[238] *See* Joseph Morton Co. v. United States, 757 F.2d 1273, 1277 (Fed. Cir. 1985) ("it is settled law that a party can justify a termination if there existed at the time an adequate cause, even if then unknown").

[239] The GAO also has upheld an agency's erroneous cancellation of a solicitation, when the agency properly justified the cancellation after the fact. *See* Nonpublic Educ. Servs., B-207751, Mar. 8, 1983, 83-1 CPD ¶ 232.

[240] B-251224.2, May 3, 1993, 93-1 CPD ¶ 353.

[241] Control Corp.—Protest and Entitlement to Costs, B-251224.2, May 3, 1993, 93-1 CPD ¶ 353.

4. Late Bids.—

(a) Postponement of Bid Opening—Proposed FAR *Amendments.*—The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have proposed changes to FAR 14.402-3 and FAR 52.214-7, "Late Submissions, Modifications and Withdrawals of Bids."[242] The proposed changes would provide that when a contracting officer postpones bid opening due to emergency or unanticipated events that interrupt normal governmental processes, the bid opening day will be extended to the first workday on which normal governmental processes resume. The bid opening time will be the same as that specified in the IFB.[243]

(b) The GAO Rejects Strict Interpretation of Government Mishandling Exception.—The government may consider a mailed late bid if the contracting officer determines that the late receipt of the bid was due "solely to mishandling by the government after receipt at the government installation."[244] The only evidence the government may consider to establish the time of receipt is the "time/date stamp of such installation on the bid wrapper or other documentary evidence of receipt maintained by the installation."[245] In *Data General Corp.*,[246] the GAO refused to literally interpret the word "solely" in FAR 14.304-1(a)(2), finding that such an interpretation would contravene the mandate for full and open competition. Instead, the government should consider a late bid if government mishandling was the "paramount cause" of its lateness, and if consideration of the bid would not compromise the integrity of the procurement process. Therefore, the GAO determined that even if the bidder misaddressed its bid, government mishandling was the paramount cause of the late receipt of the bid because the bid "should have been delivered" by the government prior to bid opening. Moreover, a bidder is not limited to "documentary evidence" to prove government mishandling. Rather, the GAO will consider whether a "preponderance of all relevant evidence," including statements of "cognizant government personnel," support a conclusion that government mishandling occurred.

(c) Late Proposal Not Saved by Using Two-Day Priority Mail.—Agencies must reject late bids or proposals unless one of the four exceptions to the "Late Bid Rule" apply.[247] In *Austin Telecommunications Electrical,*[248] the proposal was sent via United States Postal Service Two-Day Priority Mail four days before bid opening. The Navy received the proposal two days late and rejected it. Austin contended that its proposal would not have been late but for "government mishandling" by the Postal Service. The GAO held that Postal Service Two Day Priority Mail was not one of the two mail exceptions to the "Late Bid Rule." Moreover, the Postal Service's failure to meet its two-day delivery schedule did not constitute government mishandling.

5. Responsibility Determinations.—

(a) Army Finds Solution to Moving Problems.—In a case that should be pleasing to those who have endured a "difficult" move, the GAO upheld the Army's determination that a moving contractor was nonresponsible.[249] The Army based its determination on over thirty written complaints (and nearly 800 claims) by service members whose household goods had been handled (or mishandled) by the protester. The GAO noted that the contracting officer may base his determination on a "reasonable perception" of inadequate prior performance, even when the agency did not terminate the prior contract for default.

(b) Settlement of Dispute Does Not Preclude Nonresponsibility Determination.—In *L&M Mercadeo Internacional, S.A.*,[250] the Panama Canal Commission (Commission) found a bidder nonresponsible based on the nonresponsibility of the bidder's proposed subcontractor. Seven months earlier, the Commission had terminated for default a contract with the same bidder due to the failure of the same subcontractor to supply conforming materials. The bidder asserted that a settlement of the dispute precluded a finding of nonresponsibility, because the Commission had agreed that the termination would not, by itself, be a basis for a future determination of nonresponsibility. In upholding the Commission's nonresponsibility determination, the GAO refused to imply a condition in the settlement agreement that was not "clearly set out" therein. Because the agreement did not specifically require the Commission to disregard the subcontractor's performance under the prior contract, the Commission properly considered the subcontractor's prior deficiencies in finding the bidder nonresponsible.

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[242] 58 Fed. Reg. 59,618 (1993).

[243] Federal Acquisition Regulation 14.402-3(c) currently provides that the contracting officer may proceed with bid opening "as soon as practical," and that the "time of actual bid opening" is deemed the new bid opening time.

[244] FAR 14.304-1(a)(2).

[245] *Id.* 14.304-1(c).

[246] B-252239, June 14, 1993, 93-1 CPD ¶ 457.

[247] *See* FAR 14.304; 15.412; 52.214-7; 52.215-10.

[248] B-254425, Aug. 19, 1993, 93-2 CPD ¶ 108.

[249] Schenker Panamerican (Panama) S.A., B-253029, Aug. 2, 1993, 93-2 CPD ¶ 67.

[250] B-250637, Feb. 11, 1993, 93-1 CPD ¶ 124.

C. Small Purchase Procedures

1. Best Value Procurements in Small Purchases.—A "best value" small purchase procurement received GAO approval in *Essner Metal Works* [251]. In *Essner*, the Defense Industrial Supply Center (DISC) issued a request for quotations (RFQ) for nut and bolt retainers. The RFQ indicated that price and delivery were evaluation factors and that the DISC might give a preference for early delivery. The DISC issued a purchase order to the firm submitting the low quote, after allowing a stated factor ($18.60 per day) for prompt delivery. In upholding the agency's action, the GAO stated that the RFQ sufficiently notified all quoters of the impact of each evaluation factor, and that the protestor's challenge to the amount of the delivery allowance was untimely.

2. Cancelling "Set-Asides."—In *Stiziel Co.*,[252] the protester challenged the requirement to set aside small purchases for small businesses.[253] *Stiziel* involved an RFQ for the procurement of freeze-dried bone for medical purposes. The protestor, a small business, quoted a price twelve percent higher than that given by the American Red Cross and twenty-two percent higher than the government's estimate. In upholding the contracting officer's decision to cancel the set-aside and complete the acquisition on an unrestricted basis, the GAO stated that the contracting officer acted reasonably based on the significant differences in the estimated prices.[254]

3. Negotiated Small Purchase Contracts.—Tahoma Co.[255] addressed the need for discussions in negotiated small purchase contracts. In *Tahoma*, the Forest Service issued an RFQ for technical evaluation services in connection with a pollution control project. After receiving quotes, the Forest Service found the protester's quote technically unacceptable and excluded the protester from further discussions. The GAO held that, because the procurement was subject to small purchase procedures, the *FAR* only required the Forest Service to be fair and equitable and to evaluate the quotes in accordance with the standards of the RFQ.[256] The GAO found the Forest Service's action reasonable based on the protestor's limited experience in mining and hydrology, which did not include the specified ability to evaluate acid rock damage. Because the quote was not technically acceptable, the GAO concluded that there was no requirement to conduct further discussions.

4. Sole Source Awards.—An Environmental Protection Agency (EPA) sole source small purchase award was the subject of GAO scrutiny in *Midwest Dynamometer & Engineering Co.*[257] The EPA awarded a contract for $24,998 to a sole source after placing three telephone calls and determining that only one vendor could supply the required dynamometer to test small engines. The GAO concluded that the EPA acted reasonably based on the protester's preaward statements and literature, which indicated that it could not meet the EPA's requirements.

5. Termination of Purchase Orders.—The board clarified the government's right to terminate purchase orders in *Rex Systems*,[258] which involved an order for counter rewind assemblies by the Defense Electronics Supply Center (DESC). The DESC's purchase order, issued on September 27, 1991, required delivery on May 4, 1992. In February 1992, the DESC proposed a no-cost termination of the purchase order, but the contractor refused because it had incurred initial production costs. When the contractor failed to make timely delivery, the DESC terminated the purchase order. The contractor filed its claim, arguing that the communications of February 1992 created a binding contract whereby the DESC could only terminate the purchase order for the convenience of the government. The board disagreed. It found that the contractor had not accepted the purchase order in writing, and held that, while the contractor's incurrence of costs did not create a contract, it converted the purchase order into an irrevocable option which the government could not default terminate prior to the scheduled delivery date. However, once the contractor failed to make timely delivery under the purchase order, the government could terminate the purchase order for default.

D. Competition

1. Urgent and Compelling Circumstances Do Not Excuse Agency's Failure to Solicit Responsible Offeror.—In *Kahn Industries; Midwest Dynamometer & Engineering Co.*,[259] a

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[251] B-251599, Mar. 31, 1993, 93-1 CPD ¶ 285.

[252] B-251560, Apr. 13, 1993, 93-1 CPD ¶ 315.

[253] FAR 13.105(a).

[254] *See* Camtech Co., B-252945, Aug. 5, 1993, 93-2 CPD ¶ 83 (cancellation upheld where agency receives two quotes and protestor's quote "substantially exceeded" both the large business quote and catalog prices known to the contracting officer).

[255] B-253371, Sept. 14, 1993, 93-2 CPD ¶ 162.

[256] *See generally* FAR subpt. 13.1.

[257] B-252168, May 24, 1993, 93-1 CPD ¶ 408.

[258] ASBCA No. 45301, 93-3 BCA ¶ 26,065.

[259] B-251777, May 3, 1993, 93-1 CPD ¶ 356.

contracting officer properly determined that "urgent and compelling"[260] circumstances justified limiting competition. However, the GAO sustained the protest because the agency improperly excluded a responsible source. The agency conducted a market survey and identified four firms that could meet its needs, including Kahn Industries. Subsequently, the agency sent RFQs to three of these companies but excluded Kahn because the contracting officer did not have Kahn's telephone number. The contracting officer believed she did not have to send Kahn a RFQ because urgent circumstances existed and soliciting three offerors established adequate competition. The GAO upheld Kahn's protest and held that even if the agency was justified in limiting competition, it still had to request offers from as many potential sources as practicable. Because the agency knew through its market survey that Kahn was capable of meeting the agency's needs, it was "unreasonable for the [agency] to omit a source simply because the source's telephone number has not been supplied by other contracting agency personnel."

2. *Broad Initial Competition May Exempt Subsequent Modifications from the Requirement for Full and Open Competition.*—In *AT&T Communications, Inc. v. Wiltel, Inc.*,[261] the Federal Circuit reversed the GSBCA's determination that a modification was beyond the scope of the contract and was, therefore, subject to the statutory requirement for "full and open competition."[262] The contract was for a government-wide telecommunications system and the solicitation advised potential offerors that, throughout the period of contract performance, they should propose improvements to the system. During performance, AT&T, one of two awardees, proposed using an advanced circuit that could transmit information twenty-eight times faster than the circuit initially proposed. The agency determined that incorporating the new circuit would be a within-scope change and modified the contract accordingly. In sustaining the agency's determination, the court noted that telecommunications technology is evolving rapidly and offerors should have anticipated many changes over the contract's ten-year performance period. The court concluded that "this contract's breadth suggests a broad range of modifications would fall within the scope of its changes clause."

3. *Sole-Source Award Upheld Because Protester Failed to Meet Qualification Requirements.*—The Air Force awarded a contract for repair of F-16 displays on a sole-source basis after determining that only the awardee had the requisite technical data and experience.[263] Although the protester failed to meet required qualification standards, it argued that the Air Force should have waived this requirement based on the protester's work on other aircraft. After emphasizing that it will "closely scrutinize" sole-source procurements, the GAO upheld the Air Force's decision because the contracting officer, in the Justification and Approval (J&A), documented the protester's shortcomings and explained the need for reliable display repair.

4. *Promoting Competition.*—In *Simula, Inc.*,[264] the protester requested the GAO to recommend that the agency rewrite the solicitation to include a stricter performance and safety specification. The GAO held that it will not sustain protests asserting that specifications should be more restrictive. In *Alpha Technical Services, Inc.*,[265] the protester complained that the agency improperly relaxed the specifications solely at the request of another vendor. The agency argued that it relaxed the specifications to increase competition, after evaluating its minimum needs. The GAO denied the protest and held that an agency may relax its specifications if it determines that it can meet its minimum needs while increasing competition. These cases indicate that GAO will not sustain protests that would limit competition.

5. *Option Exercise After Informal Market Survey Upheld.*—Before an agency can exercise an option, it must determine that the option is the most advantageous method of fulfilling its needs.[266] In *AAA Engineering and Drafting*,[267] the protester argued that the agency's option exercise was unreasonable because the agency's informal market survey was inadequate and at least one firm could perform at a lower price. The GAO denied the protest, noting that the *FAR* allows contracting officers to use informal market surveys to determine whether an option is "most advantageous" to the government.[268] In making this determination, the contracting officer may consider factors other than price. Thus, in *AAA Engineering*, the GAO upheld the contracting officer's deter-

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[260] 10 U.S.C. § 2304(c)(2) authorizes federal agencies to contract without full and open competition if, *inter alia*, "urgent and compelling" circumstances exist.

[261] 1 F.3d 1201 (Fed. Cir. 1993).

[262] Full and open competition is required by the Competition in Contracting Act of 1984, 10 U.S.C. § 2304(a)(1)(A).

[263] International Enters., B-251403, Apr. 1, 1993, 93-1 CPD ¶ 283.

[264] B-251749, Feb. 1, 1993, 93-1 CPD ¶ 86.

[265] B-250878, Feb. 4, 1993, 93-1 CPD ¶ 104.

[266] FAR 17.207(c)(3).

[267] B-236034.3, Apr. 6, 1993, 93-1 CPD ¶ 295.

[268] FAR 17.207(d)(2).

mination that "the need for continuity of services and the potential costs of disrupting operations" outweighed the benefit of securing a lower price through resolicitation.

6. Agency Assumption of Nonresponsibility Is Insufficient to Exclude Incumbent from Competition.—In *Chaffins Realty Co.*,[269] the agency did not provide the protester with a copy of the solicitation for leased office space because, seven months earlier, in response to another solicitation, the protester offered the same space and the agency ranked the offer third. The agency contended that the protester was not prejudiced by its exclusion from the later procurement because its offeror probably would have been found nonresponsible. The GAO rejected this contention and granted the protest, reasoning that "if allowed to compete, [the protester] would have had an opportunity to improve the competitiveness of its proposal."[270]

7. The GAO Applies Last Clear Chance Rule to Deny Protest.—In *Lewis Jamison Inc. & Associates*,[271] the protester, a small business, requested a copy of the solicitation twelve days after learning of the procurement through the *Commerce Business Daily*.[272] The protester did not receive a copy of the solicitation because the agency sent it to the wrong address. The protester challenged the award, contending that the agency improperly excluded it from the competition. The GAO denied the protest because it determined that the protester failed to use "every reasonable opportunity to obtain solicitation documents." Although the GAO recognized that agency error was involved, it stated that "we look to see whether the agency or the protester had the last clear opportunity to avoid unreasonably precluding the protester from competing."

E. Authority to Contract

1. Existence of a Contract.—

(a) Closeout Agreement Precludes Termination for Default.—The government was bound by a closeout agreement between the contracting officer and the contractor after the two reached a meeting of the minds, even though the agreement was not formalized.[273] After partial performance of a maintenance dredging contract, the contractor and the contracting officer agreed that the contract would be deemed complete and the government would make payment based on certain downward adjusted prices to be negotiated later. Subsequently, a successor contracting officer attempted to repudiate the agreement and terminate the contract for default. The board declared the attempt to terminate for default a nullity, and held that reserving some terms for future negotiation did not preclude an enforceable agreement where the parties had clearly manifested an intent to be bound.

(b) Court Dismisses Complaint Alleging Illegal Contract.—The court dismissed a complaint in which the contractor alleged that the contract giving rise to the complaint was illegal.[274] The contractor sought relief from unexpectedly high development costs for radios on the grounds that 10 U.S.C. § 2306(h)(1)(D) required a "stable design" for items to be procured by multiyear contract, and that because the Army's plans did not satisfy this requirement, the contract was illegal. On motion, the court dismissed the complaint because the contractor sought recovery under an implied-in-law contract, over which the court lacked jurisdiction.

2. Settlement.—

(a) Fourth Circuit Limits Department of Justice Authority to Settle Litigation.—The Attorney General representing a government agency is bound by the same laws that control the agency, and must obey those laws when settling litigation.[275] While representing the Defense Commissary Agency, the Department of Justice (DOJ) attempted to settle ongoing litigation involving a bi-monthly commissary publication. In settlement of the litigation, the DOJ offered to modify the original contract to permit the contractor to publish two items that exceeded the scope of the original contract. The contractor agreed, but another contractor sought injunctive relief in the district court. The court denied relief. On appeal, the Fourth Circuit acknowledged the Attorney General's plenary power over certain litigation, but limited that plenary power to the power to pursue legitimate objectives. Specifically, the DOJ's power to settle litigation did not include authority to offer settlement terms that would violate the civil laws governing the agency, including the requirement to submit out-of-scope modifications to competitive bidding.[276]

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[269] B-247910.3, June 8, 1993, 93-1 CPD ¶ 440.

[270] *But see* E. Huttenbauer & Son, B-252320.2, June 29, 1993, 93-1 CPD ¶ 499, where the GAO upheld the agency's decision to exclude a delinquent and poorly performing incumbent.

[271] B-252198, June 4, 1993, 93-1 CPD ¶ 433.

[272] Executive agencies must publish notice of procurements over the small purchase threshold (currently $25,000) in the *Commerce Business Daily*. 41 U.S.C. § 416(C).

[273] Folk Constr. Co., ENG BCA No. 5839, 93-3 BCA ¶ 26,094.

[274] Gould, Inc. v. United States, 29 Fed. Cl. 758 (1993).

[275] Executive Business Media v. Department of Defense, 3 F.3d 759 (1993).

[276] *See* FAR 52.243-1(a).

(b) Contracting Officer's Actions Manifest Settlement.—Despite protestations to the contrary, a contracting officer settled a dispute when he agreed to pay a portion of a contractor's $258,000 claim, then sought funding.[277] Once the parties reached settlement, the board refused to allow the contracting officer to issue a new "final decision" purportedly denying the contractor's amended claim.

3. Implied Contract.—If goods are furnished or services rendered, but the *contract* under which the performance occurred is void, the United States must pay for the value of the goods or services actually furnished under an implied contract on a *quantum meruit/quantum valebant* basis.[278] Therefore, the government was obligated to pay for services received under a statutorily prohibited cost-plus-percentage-of-cost arrangement.[279] However, if the contracting officer refuses to ratify an *unauthorized commitment* and specific statutory prohibitions exist against making payment, the government may not pay for work performed based on *quantum meruit*.[280]

4. The Procurement Contracting Officer (PCO) Lacks Authority to Determine CAS Compliance.—Under the *FAR* and the *Defense Acquisition Regulation* (*DAR*), the administrative contracting officer (ACO) has exclusive authority to determine a contractor's compliance with the Cost Accounting Standards (CAS). For a description of what happens when the PCO attempts to exercise this authority, see the discussion of *McDonnell Douglas Corp.*[281] in the CDA Litigation section.

F. Types of Contracts

1. The DOD Authorizes Incremental Funding of Fixed-Price Contracts.—On August 23, 1993, the Director of Defense Procurement announced the addition of DFARS subpart 232.7 and a clause at DFARS 252.232-7007 (Limitation of Government's Obligation), to clarify DOD policy on funding fixed-price contracts. Although the DOD policy favors fully funding fixed-price contracts,[282] DFARS 232.703-1 authorizes incremental funding if the contract is funded with research and development appropriations, Congress has otherwise incrementally appropriated program funds, or the head of the contracting activity approves incremental funding for base services contracts or hazardous waste remediation contracts.[283] Obligations or expenditures in excess of allotted funds are addressed in DFARS 252.232-7007(b) which states that "the Government will not be obligated in any event to reimburse the Contractor in excess of the amount allotted to the contract."

2. The Armed Services Board of Contract Appeals (ASBCA) Treats Letter Contract as a Fixed-Price Contract Prior to Definitization.—In *Litton Systems*,[284] a contracting officer established a definitized price lower than the "not to exceed" (NTE) price of a letter contract to account for a deductive change. The contractor challenged, arguing that prior to definitization, a letter contract is similar to a cost-reimbursement contract and as a result, the contractor should be reimbursed for its allowable costs up to the NTE price. The board disagreed and held that prior to definitization, letter contracts are similar to fixed-price contracts with a ceiling equal to the NTE price. When the government deletes work, the NTE price and the eventual definitized price should be reduced by what it would have cost the contractor to perform the deleted work.

3. Economic Price Adjustment (EPA) Contracts.—

(a) Economic Price Adjustment Based on Industry Average Sales Prices Was Improper.—In *MAPCO Alaska Petroleum v. United States*,[285] a fixed-price petroleum contract contained an EPA clause based on a national index of petroleum sales prices.[286] The effect of the clause was to reduce the price MAPCO received under the contract thirty-five percent, although its actual costs increased ninety-five percent. MAPCO alleged that the index was improper because it was

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[277] Busby School Bd. of the N. Cheyenne Tribe, No. 3007, IBCA LEXIS 5 (Aug. 25, 1993), ___ BCA ¶ ___.

[278] *See* Decision of Assoc. Gen. Counsel Kepplinger, B-252378, Sept. 21, 1993 (unpub.); *see also* Latin Am. Mgt. Assoc., B-251668, May 13, 1993 (unpub.).

[279] *See* 10 U.S.C. § 2306(a); 41 U.S.C. § 254(b).

[280] Graphic Creations, Inc., B-252780, Aug. 26, 1993 (unpub.).

[281] ASBCA No. 44637, 93-2 BCA ¶ 25,700; *see infra* note 631 and accompanying text.

[282] DFARS, *supra* note 27, at 232.702; "Fixed-price contracts shall be fully funded except as permitted by 232.703-1." 58 Fed. Reg. 46,091, 46,092 (1993) (to be codified at 48 C.F.R. pts. 232, 252).

[283] 58 Fed. Reg. 46,091, 46,092 (1993) (to be codified at 48 C.F.R. pts. 232, 252).

[284] ASBCA No. 36976, 93-2 BCA ¶ 25,705.

[285] 27 Fed. Cl. 405 (1992).

[286] The *FAR* does not prescribe a standard clause covering adjustments based on cost indexes because of the "variations in circumstances and clause wording that may arise." FAR 16.203(d)(2). The *FAR* advises, however, that "the contracting officer should consider using an [EPA] clause based on cost indexes of labor or material . . . prepared and approved under agency procedures." *Id.* 16.203(d).

neither an "established price" under FAR 16.203-1(a), nor a "cost index" under FAR 16.203-1(c). The court agreed and determined that the index was not an "established price" because that term referred to the contractor's established price and not the established prices of an industry. Secondly, because the index was based on sales prices, it was a price index and not a cost index as specified by FAR 16.203-1(c).

(b) Late Request for Adjustment Results in Denial of Recovery.—In *Betaco Industries*,[287] the fixed-price contract's EPA clause stated that "the contractor's entitlement to price increases shall be waived, unless the contractor's written request therefor is received by the contracting officer within 180 days after the date of final shipment of supplies under the contract."[288] Betaco's request was late and the contracting officer denied payment. The contractor contended that the EPA clause merely established a notice requirement that should not bar recovery absent prejudice to the government.[289] The court disagreed, finding that use of the word "request," as opposed to "notice," indicated that the parties intended that the contractor would waive its entitlement to an adjustment if it submitted a late request. The court also found that this timeliness requirement was distinguishable from standard notice requirements because the EPA clause measured timeliness from the "date of final shipment" and did not require the contractor to explain the reasons for its request for payment.

4. Requirements Contracts.—

(a) Court of Federal Claims Prefers Requirements Contracts over Indefinite Quantities Agreements.—In *Ceredo Mortuary Chapel, Inc. v. United States*,[290] the appellant claimed lost profits because the government ordered, from another contractor, services similar to those provided by the appellant under a requirements contract. The government contended that it had only an unenforceable indefinite quantity agreement with appellant. The court disagreed because the solicitation included a quantity estimate and a "per-unit pricing" provision, which are typical of requirements contracts. The court concluded that the parties had an enforceable requirements contract that limited the government's authority to obtain similar services from another contractor.

(b) Estimate Based on Historical Data Found Unreasonable.—In a laundry services requirements contract, the government calculated its estimate by collecting monthly usage rates from serviced activities and multiplying by twelve.[291] The estimate overstated the government's needs by forty-five percent. The court found the government's estimate unreasonable because the government "did not attempt to verify these estimates or buttress them with research or other data. Further, while the estimates were [one year old], the government made no effort to update [them]." Consequently, the contractor recovered its overhead and general and administrative expenses incurred in reliance on the unreasonable estimate.

5. Job Order Contracting (JOC).—Formerly, installations using JOC contracts for minor construction and repair efforts could issue delivery orders exceeding $125,000 only in emergencies, and even then they required head of contracting activity (HCA) approval. A change to the *AFARS* has raised the dollar limit for JOC delivery orders for nonemergency requirements to $300,000.[292] Orders above that value still require HCA approval, and may be issued only in emergencies.

G. Small Business Program Developments

1. Small Business Administration (SBA) Actions.—

(a) Small Business Size Standards.—The SBA currently has thirty size standard levels that it uses to determine a firm's eligibility for SBA assistance and small business set-asides on government procurements.[293] These size standard levels are based on the firm's number of employees or its annual receipts.[294] Last year, the SBA published a proposed rule to

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[287] 29 Fed. Cl. 318 (1993).

[288] This provision is substantially similar to FAR 52.216-4(a), which states that "[t]he Contractor shall furnish this notice within 60 days after the increase or decrease. . . ." FAR 52.216-4(a). *But see* FAR 52.216-2(c)(2), stating that:

> The increased contract unit price shall be effective (i) on the effective date of the increase in the applicable established price if the Contracting Officer receives the Contractor's written request within 10 days thereafter or (ii) *if the written request is received later, on the date the Contracting Officer receives the request.*

Id. (emphasis added).

[289] The contractor relied on Hoel-Steffen Constr. Co. v. United States, 197 Ct. Cl. 561 (1972) (holding that the notice requirement in a suspension of work clause should not be read too technically because the government had actual notice) and Interlog Corp., ASBCA No. 21212, 77-1 BCA ¶ 12,362 (board liberally construed notice provision in an EPA clause to allow contractor's claim even though contractor provided notice late).

[290] *See* 29 Fed. Cl. 346 (1993); *see also* Crown Laundry and Dry Cleaners v. United States, 29 Fed. Cl. 506 (1993).

[291] Crown Laundry and Dry Cleaners v. United States, 29 Fed. Cl. 506 (1993).

[292] AFARS, *supra* note 184, 17.9102-4(e).

[293] 13 C.F.R. pt. 121 (1993).

[294] *Id.* § 121.601 (1993).

reduce the number of fixed size standard levels to nine.[295] On February 19, 1993, the SBA withdrew the proposed rule for further evaluation,[296] but reproposed it on September 2, 1993.[297] The proposed rule retains the five existing employee-based levels and establishes four new receipts-based levels.[298]

(b) Nonmanufacturer Rule Waiver Procedures.—For contracts set aside for small businesses (including contracts in the SBA 8(a) program), the Nonmanufacturer Rule[299] requires nonmanufacturer contractors to provide end items manufactured or processed by a domestic small business. The SBA has published procedures by which agencies, businesses, and other interested parties may request a waiver of the Nonmanufacturer Rule for any class of products if there are no small business manufacturers or processors available in the federal market.[300] The SBA also has issued a proposed rule to implement procedures for waiving the Nonmanufacturer Rule on individual solicitations.[301]

(c) Agency-Prescribed Size Standards.—When an agency decides that an SBA size standard is not appropriate, it may prescribe a small business standard that is more appropriate to that agency's activities.[302] The SBA has proposed a rule specifying new procedures that agencies must follow to establish a differing size standard.[303] Under the proposed rule, the agency head must publish notice for comment and obtain approval from the SBA Administrator before prescribing a differing size standard.

(d) Small Business Competitiveness Demonstration Program (SBCDP).—The Office of Federal Procurement Policy and the SBA have issued an interim policy directive on the SBCDP.[304] The directive implements section 201 of the Small Business Credit and Business Opportunity Enhancement Act of 1992,[305] which amended the SBCDP and extended the program until September 30, 1996. Under the new rules, when a participating agency fails to meet its small business goals, only those organizational units within the agency that failed to attain its goals may reinstitute restricted competition.

2. The DOD Implements New Regulations.—

(a) Certificate of Competency (COC) Process.—As we noted last year, Congress has eliminated the requirement to automatically forward small business nonresponsibility determinations to the SBA.[306] Rather, if the contracting officer finds a small business nonresponsible, it must notify the business in writing and advise that it may request SBA review. The business then has fourteen days to notify the contracting officer of its intent to seek a COC. The contracting officer must forward all pertinent information to the SBA on timely notice by the business. The DOD has implemented this statute with an interim rule.[307]

(b) Comprehensive Small Business Subcontracting Plans Test Program.—The DOD has extended through September 30, 1994, its test program to determine whether comprehensive subcontracting plans will increase subcontracting opportunities for small businesses.[308] Additionally, the DOD has extended, through September 30, 1994, the period of eligibility for qualified nonprofit agencies for the blind and other severely disabled persons to participate in the small business subcontracting program.[309]

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[295] 57 Fed. Reg. 62,515 (1992).

[296] 58 Fed. Reg. 9,131 (1993).

[297] *Id.* 46,573 (1993).

[298] *Id.* The proposed standards are as follows: Annual Receipts: $5.0 million, $10.0 million, $18.0 million, $25.0 million. Employees: 100, 500, 750, 1000, 1500.

[299] 15 U.S.C. § 637(a)(17) (as implemented by 13 C.F.R. § 121.906, 121.1106 (1993)).

[300] 58 Fed. Reg. 48,954 (1993) (effective Sept. 21, 1993, to be codified at 13 C.F.R. pt. 121).

[301] *Id.* 48,981 (1993).

[302] 13 C.F.R. § 121.1502 (1993).

[303] 58 Fed. Reg. 44,620 (1993).

[304] *Id.* 19,849 (1993) (effective Apr. 16, 1993).

[305] Pub. L. No. 102-366, 106 Stat. 986, 993 (1992).

[306] National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 804, 106 Stat. 2315, 2447 (1992).

[307] DAC 91-5, 58 Fed. Reg. 28,458 (1993) (effective Apr. 30, 1993, amending DFARS 219.602-1 and adding DFARS 252.219-7009).

[308] *Id.* (1993) (effective Apr. 30, 1993, amending DFARS 219.702(a)(i)(A)(1)).

[309] *Id.* (effective Apr. 30, 1993, amending DFARS 219.703).

(c) Other Subcontracting Plans.—The DOD has published interim rules requiring evaluation (when the agency uses technical evaluations and formal or alternative source selection procedures) of the extent to which offerors plan to subcontract with small businesses and small disadvantaged businesses (SDB) in performing the contract.[310] The contracting officer also may ask the surveying activity to evaluate a prospective contractor's performance against small business subcontracting plans.[311]

(d) Changes in the SBCDP.—Architect-engineering (A&E) services in support of military construction projects or military family housing projects are now exempt from the SBCDP, except for the emerging small business (ESB) set-aside requirements. If an ESB set-aside is not appropriate, contracting officers may consider these A&E services for small business set-aside if the estimated value is less than $85,000.[312] The Director, Office of Small Disadvantaged Business Utilization, Office of the Under Secretary of Defense (Acquisition) is responsible for determining whether reinstatement of small business set-asides is necessary to meet agency goals. When appropriate, the Director will recommend reinstatement to the Director of Defense Procurement, who makes the final determination.[313]

3. Size Status Issues.—The GAO rendered several opinions concerning an offeror's status as a small business. In *McCaffery & Whitener*,[314] the GAO held that on a small business set-aside, when the agency reasonably determines that urgent circumstances exist, the agency need not provide written notice to each unsuccessful offeror prior to award.[315] If the SBA later determines that the awardee is not a small business, termination of the contract is not required.

In *Vantex Service Corp.*,[316] the GAO determined that an agency is not required to re-examine a contractor's size status in order to exercise an option.[317] Thus, when a contractor properly self-certifies as a small business, but is later acquired by a large business, the agency may properly exercise an option without such re-examination.

The GAO drew the proverbial "line in the sand" in *Timothy S. Graves*,[318] holding that on a small business set-aside, an agency may not award a contract to a bidder that it knows has been declared other than small by the SBA at the time of bid opening. This rule applies even if the SBA reverses itself and declares—before contract award—that the bidder is an eligible small business. The status at the time of bid opening controls, and although a contracting officer generally may accept self-certification at face value, the contracting officer may not accept a self-certification that he or she knows to be false.[319]

4. Set-Aside Procedures.—

(a) Contracting Officer's Discretion.—In deciding whether to set aside an acquisition, the contracting officer has discretion to determine whether there is a reasonable expectation that offers will be submitted by at least two responsible small businesses.[320] In *DCT Inc.*,[321] the GAO held, however, that the contracting officer failed to make a reasonable market investigation because she contacted only the four firms that had responded to a solicitation five years before, and she knew that only one of those firms was a small business. Conversely, in another case, the GAO held that a contracting officer may determine that there is insufficient small business interest even if there are many small businesses on the bidders' mailing list.[322]

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[310] *Id.* (effective Apr. 30, 1993, amending DFARS 215-605(a) and (b), 219.705-2(d)).

[311] *Id.* (effective Apr. 30, 1993, amending DFARS 209.106-2).

[312] *Id.* (effective Apr. 30, 1993, amending DFARS 219.1005(3)(A).

[313] *Id.* (effective Apr. 30, 1993, amending DFARS 219.1006).

[314] B-250843, Feb. 23, 1993, 93-1 CPD ¶ 168.

[315] *See* FAR 15.1001(b)(2).

[316] B-251102, Mar. 10, 1993, 93-1 CPD ¶ 221.

[317] *See* FAR 19.301(a) ("To be eligible for award as a small business, an offeror must represent in good faith that it is a small business at the time of written self-certification."); *see also* 13 C.F.R. § 121.904(a) (1993) ("[T]he size status of a concern . . . is determined as of the date of its written self-certification as a small business.").

[318] B-253813, Oct. 22, 1993, 93-2 CPD ¶ ____.

[319] *See* 13 C.F.R. § 121.1005(b) (1993) ("In the absence of a written protest by other offerors or other credible information which would cause a contracting officer to question the veracity of a concern's self-certification as a small business, a contracting officer may accept the self-certification at face value.").

[320] *See* FAR 19.502-2(a); Neal R. Gross & Co., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53.

[321] B-252479, July 1, 1993, 93-2 CPD ¶ 1.

[322] State Mgt. Servs., B-251715, May 3, 1993, 93-1 CPD ¶ 355.

In *Valix Federal Partnership I v. Department of Health and Human Services*,[323] the contracting officer did not set aside a procurement for personal computers after determining that there were not two or more small business manufacturers—as defined under the Walsh-Healey Act[324]—that were capable of providing the computers. The board held that the contracting officer should have considered the "less strict" definition of manufacturer, used in the SBA's Nonmanufacturer Rule.[325] The government moved for reconsideration,[326] contending that the contracting officer's use of the more restrictive standard was mandated by 15 U.S.C. § 644(o).[327] The board denied the government's motion, noting that the statute controls award of contracts to small businesses, but does not mandate the fifty-percent statutory rule as the exclusive standard for making the set-aside determination.

(b) No Requirement to Set Aside Concession Services Contract.—The Federal Bureau of Investigation issued a solicitation for a concessionaire contract for the establishment and operation of a cafeteria.[328] The GAO determined that the agency was not required to set aside the procurement for small business participation because the procurement did not involve the expenditure of appropriated funds.[329]

5. Small Business Responsibility Determinations.—

(a) Failure to Meet Prequalification Criteria Must Be Referred to SBA for COC.—The Maritime Administration (MARAD) issued an IFB for ship deactivation services which required bidders to obtain a "Shipyard Agreement" (SA) as a prerequisite for award.[330] The protester, a small business, submitted an SA application, but the MARAD found it ineligible for an SA and rejected its bid. The GAO found that the MARAD's ineligibility determination concerned the bidder's capability to perform the contract, and thus had to be referred to the SBA for a COC consideration. In response to the MARAD's argument that the *FAR*[331] exempts prequalification requirements from referral to the SBA, the GAO determined that this provision does not apply when an agency is requiring bidders to meet eligibility criteria for providing services, as opposed to demonstrating the qualifications of their products.

(b) No Requirement to Refer to the SBA when Offeror Makes a Material Misrepresentation.—In *RMTC Systems v. Department of the Air Force*,[332] the GSBCA upheld the contracting officer's determination to eliminate the protester from the competition for falsely certifying that it had not had a contract terminated for default within the past three years. On reconsideration,[333] the protester and the SBA asserted that the contracting officer's determination to eliminate the protester from the competition was a "defacto determination of nonresponsibility," requiring SBA review.[334] The board disagreed, finding that the protester made a material misrepresentation that compromised the integrity of the procurement process; in such cases, elimination of an offeror from a procurement did not require SBA review.

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[323] GSBCA No. 12023-P, 93-2 BCA ¶ 25,659. We would be remiss if we failed to note that Commerce Clearing House, Inc. published this case twice (see 93-2 BCA ¶ 25,596). We dare not omit a twice-published case from our Year-in-Review, else the country's done for.

[324] 41 U.S.C. §§ 35-45. The Walsh-Healey Act requires, for supply contracts over $10,000, that offerors certify that they are manufacturers or regular dealers of the item(s) being procured. 41 C.F.R. § 50-201.101(A)(1) defines a manufacturer as a person who "owns, operates, or maintains a factory or establishment that produces on the premises the . . . supplies . . . required under the contract . . . ." For bidders proposing to assemble a final product from component parts, the firm must have an "independent ability" to perform a "significant or substantial portion" of the manufacturing operations needed to produce the end product, or the facilities to produce a "significant portion of the required component parts" needed for the end product. Firms that perform "minimal operations" cannot qualify as manufacturers. 41 C.F.R. § 50-206.52(b),(c).

[325] 13 C.F.R. 121.906(b) (1993). The Nonmanufacturer Rule permits a nonmanufacturer, with less than 500 employees, to supply a product of a small business that is a manufacturer of the end product. For these purposes, a "manufacturer" performs, with its own facilities, the "primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired."

[326] Valix Fed. Partnership I v. Department of Health and Human Servs., GSBCA No. 12023-P-R, 93-2 BCA ¶ 25,731.

[327] The statute provides that a firm (other than a regular dealer) may not be awarded a supply contract as a small business concern unless it agrees that it "will perform work for at least 50 percent of the cost of manufacturing the supplies (not including the cost of materials)." 15 U.S.C. § 644(o).

[328] Good Food Serv., B-253161, Aug. 19, 1993, 93-2 CPD ¶ 107.

[329] *See* FAR 2.101, which defines "acquisitions" as "the acquiring by contract with appropriated funds of supplies and services (including construction) by and for the use of the Federal government." The *FAR* applies to all "acquisitions," unless expressly excluded. *Id.* 1.103.

[330] Stevens Tech. Servs., B-250515.2, May 17, 1993, 93-1 CPD ¶ 385.

[331] FAR 9.202(d) states, "The procedures in subpart 19.6 for referring matters to the Small Business Administration are not mandatory . . . when the basis for a referral would involve a challenge by the offeror to the validity of the qualification requirement or the offeror's compliance with such requirement."

[332] GSBCA No. 12346-P, 93-3 BCA ¶ 26,046.

[333] RMTC Sys. v. Department of the Air Force, GSBCA No. 12346-P-R, 93-3 BCA ¶ 26,199.

[334] The SBA has the duty to certify to government procurement officials "with respect to all elements of responsibility, including . . . integrity . . . of any small business concern . . . ." 15 U.S.C. § 637(b)(7)(a).

6. Section 8(a) Contracting Cases.—

(a) Price Limitation Agreement Between the SBA and the Agency Improper.—In *A&S Council Oil Co. v. Saiki,*[335] the SBA entered an interagency agreement with the Defense Logistics Agency (DLA) for the supply of ground fuels. The agreement provided that the price per gallon paid to the 8(a) contractors would not exceed the fair market price, defined as the "highest award price for the competitively solicited items" within the commercial market area of the region. The court found this agreement improper because it deprived the 8(a) contractors of the benefits of the 8(a) program and failed to protect them from unreasonably low prices. Further, the court held that the agreement violated the Small Business Act because it failed to include the 8(a) contractors in the price negotiations.[336] The court awarded damages to the 8(a) contractors who supplied fuel to the DLA at the prices set by the agreement.

(b) Women-Owned Business Must Prove Social Disadvantage.—A woman-owned business asserted that the SBA improperly denied it admission into the 8(a) program.[337] The court determined that the SBA could not presume that the owner of the business was socially disadvantaged because she was not a member of a designated group.[338] The court further found that the owner failed to demonstrate social disadvantage due to gender discrimination, because delays in obtaining her college education, prior employment discrimination, and generalized evidence of "stereotyping and prejudice against women in the computer software industry" did not impede her firm's business development.

(c) Great Expectations?—The Court of Federal Claims held that the Air Force did not violate the Small Business Act by negotiating an 8(a) contract with the expectation that the contractor would subcontract a significant portion of the work to a large business.[339] The plaintiff, an 8(a) contractor, asserted that the Air Force breached its implied obligation of fair and honest consideration of plaintiff's offer, because the Air Force's negotiations with plaintiff were merely a "pass through" attempt to reach a large firm without competitive bidding. The court determined that the *FAR* permits subcontracting up to forty-nine percent of an 8(a) contract, and makes the 8(a) contractor responsible for ensuring that it does not subcontract in excess of that percentage.[340] An agency's mere expectation that the contractor would subcontract a portion of the work does not constitute bad faith or violate the Small Business Act.

(d) Randolph-Sheppard Act Trumps 8(a) Program.—An 8(a) contractor protested[341] the Air Force's withdrawal of a food service contract from the 8(a) program to reissue the solicitation on an unrestricted basis to comply with the Randolph-Sheppard Act.[342] The protester asserted that the Air Force could not withdraw the solicitation from the 8(a) program once proposals had been submitted, and that the Small Business Act takes priority over the Randolph-Sheppard Act. In rejecting the protester's arguments, the GAO determined that the decision to award a contract under the 8(a) program was "solely within the discretion" of the contracting officer. The GAO further determined that with respect to this procurement, the Randolph-Sheppard Act took precedence over the 8(a) program. The GAO reasoned that the Randolph-Sheppard Act specifically requires that a procurement for cafeteria operation be conducted in accordance with the statute, while the Small Business Act does not require that any particular procurement be conducted through the 8(a) program.

7. Small Disadvantaged Business Cases.

(a) Joint-Venture Eligible for SDB Set-Aside.—In *Caltech Service Corp.,*[343] the GAO determined that a joint venture comprised of an SDB and a non-SDB was eligible for award of an SDB set-aside contract. The joint venture agreement indicated that the SDB owned fifty-one percent of the venture, would receive fifty-one percent of the profits, and

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[335] 799 F. Supp. 1221 (D.D.C. 1992).

[336] Any contractor selected by the SBA to perform a noncompetitive contract "shall, when practicable, participate in any negotiation of the terms and conditions of such contract." 15 U.S.C. § 637(a)(3)(A).

[337] Software Sys. Assoc. v. Saiki, No. 92-1766 (D.D.C. June 24, 1993).

[338] Individuals are considered socially disadvantaged if they have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups. Certain individuals are presumed to be socially disadvantaged, including Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Subcontinent Asian Americans. 13 C.F.R. § 124.105 (1993).

[339] Tonya, Inc. v. United States, 28 Fed. Cl. 727 (1993).

[340] For service contracts performed by small businesses (including 8(a) firms), at least 50% of the cost of contract performance incurred for personnel shall be expended for employees of the firm. *See* FAR 52.219-14; *see also* 15 U.S.C. § 644(o)(1)(A).

[341] Department of the Air Force—Recon., B-250465.6, June 4, 1993, 72 Comp. Gen. ___, 93-1 CPD ¶ 431.

[342] The Randolph-Sheppard Act, 20 U.S.C. §§ 107-107f, provides that in authorizing the operation of vending facilities on federal property, "priority shall be given to blind persons licensed by a state agency." "Vending facilities" include cafeterias and snack bars.

[343] B-250784.2, Feb. 4, 1993, 93-1 CPD ¶ 103.

would supervise and control the manner and method of contract performance. The GAO rejected the protester's argument that the non-SDB controlled the joint venture merely because the non-SDB would provide the payment and performance bonds for the project.

(b) But Not Always.—A joint venture was unsuccessful in asserting SDB status in *C&S Carpentry Services.*[344] Although the joint venture agreement provided that the SDB would have a fifty-one percent interest in the venture, a "committee" composed of two representatives from both the SDB and the non-SDB would be responsible for the management and day-to-day operations of the project. The GAO found that the agreement did not provide the SDB with control over the management and daily operations of the project because the decisions of the committee required a unanimous vote; the non-SDB representatives could effectively veto any decisions made by the SDB representatives. The GAO also rejected the parties' attempt to amend the agreement to provide the SDB with voting control over the committee, because a concern must qualify as an SDB on the date of bid opening and on the date of award to be eligible for an SDB set-aside.[345]

H. Domestic Preference Issues

1. Regulatory Changes.—A new interim rule implements the sanctions imposed by the President on the European Community (EC).[346] The sanctions prohibit the purchase by federal agencies of EC-sourced products not covered by the General Agreement on Tariffs and Trade Government Procurement Code. In other words, a procurement from the EC generally is prohibited if it does not exceed $176,000 ($6.5 million for construction). Significantly, the sanctions do not apply to contracts in support of United States security interests, including all procurements by the DOD.

2. "Substantial Transformation" Is More Stringent than "Manufacture."—The GSBCA overturned the Air Force's award to Zenith Data Systems Corporation (Zenith) of the $724 million "Desktop IV" contract for microcomputer systems, software, and related services in *CompuAdd Corp. v. Department of the Air Force.*[347] The protesters argued that Zenith was ineligible for award because Zenith's plan to assemble monitors in the United States, using "semi-knock-down kits" from nondesignated countries, did not constitute "substantial transformation" within the meaning of the Trade Agreements Act of 1979 (TAA).[348] Zenith responded that the assembly process performed in the United States would transform the components into a new article of commerce and, because this constitutes "manufacturing" under the BAA,[349] the board should find that it complied with the substantial transformation requirements of the TAA.[350] The board agreed with the protesters, finding that the "manufacturing" standard of the BAA is less stringent than the "substantial transformation" requirement of the TAA. Because Zenith would not be performing the type of change in character, use, and name to the monitors, to warrant a finding of substantial transformation, the board overturned the award.

Zenith ultimately prevailed, however.[351] After further evaluation, the Air Force made a dual award to Zenith (on an alternate proposal) and to Electronic Data Systems Corporation. Thereafter, Zenith obtained a "country of origin" determination from the Customs Service.[352] The Customs Service determined that Zenith's proposal to assemble the computers in Singapore (a designated country) would constitute "substantial transformation" under the TAA. Finding that the determination of the Customs Service deserved "exceptional weight," the board held that the monitors to be supplied by Zenith complied with the TAA.

3. Air Force Properly Waived Berry Amendment Restrictions.—The Air Force awarded a contract for helicopter fuel cells to Sekur-Pirelli, an Italian firm. The GAO subsequently determined that the Berry Amendment applied to this procure-

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[344] B-253615, Oct. 6, 1993, 93-2 CPD ¶ ___.

[345] *See* DFARS, *supra* note 27, at 219.301.

[346] FAC 90-18, 58 Fed. Reg. 31,140 (1993) (effective May 28, 1993, amending FAR pts. 14, 15, 17, 25, 52).

[347] GSBCA No. 12021-P, 93-2 BCA ¶ 25,811.

[348] 19 U.S.C. §§ 2501-2582. The TAA authorizes the President to waive the BAA and other buy-national laws, regulations, or procedures for the acquisition of eligible products from "designated countries." *See* E.D.I., Inc., B-251750, May 4, 1993, 93-1 CPD ¶ 364. A "designated country end product" is an article that is wholly the growth, product, or manufacture of a designated country, or one that has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from the article from which it was transformed. 19 U.S.C. § 2518(4); FAR 25.401.

[349] 41 U.S.C. §§ 10a-10d. The BAA generally requires that contractors supplying manufactured end items to the government provide only articles that have been manufactured in the United States substantially from materials produced in the United States.

[350] *See* General Kinetics, Inc., B-242052.2, May 7, 1991, 91-1 CPD ¶ 445 (assembly of components into machine may constitute manufacture under the BAA; no requirement for the process performed in United States to result in substantial change to the physical character of the machine).

[351] CompuAdd Corp. v. Department of the Air Force, GSBCA No. 12301-P, 93-3 BCA ¶ 26,123.

[352] *See* 58 Fed. Reg. 21,538 (1993). The United States Customs Service, Department of Treasury, is the administrative agency vested with authority to issue binding determinations concerning the origin of an article under the TAA. 19 U.S.C. § 2515(b)(1).

ment.[353] After the GAO's decision, the Deputy Assistant Secretary of the Air Force (Acquisition) waived the Berry Amendment restrictions for the purchase of the fuel cells after determining that the Air Force could not acquire them when needed in sufficient quality and quantity in the United States. This determination further explained that the Air Force needed the fuel cells immediately to prevent helicopter crashes and loss of life. In *Dash Engineering*,[354] the protester, a domestic firm, asserted that the Air Force improperly waived the Berry Amendment restrictions, but the GAO disagreed, finding that the Air Force urgently needed the fuel cells to minimize the dangers to crews and passengers. The GAO further found that the Air Force had reason to doubt that the protester could deliver the fuel cells within the required delivery schedule.[355]

4. Buy American Act Cases.—

(a) Contractor, Not Contracting Officer, Must Request Waiver of the BAA.—In *C. Sanchez & Son v. United States*,[356] the contractor asserted that it was entitled to an equitable adjustment because the government required it to provide domestic wire and cable pursuant to the BAA. The contractor reasoned that the contracting officer's authorized representative was required to process a request for waiver of the BAA upon learning that the cost of using domestic cable was over six percent more than the cost of the foreign source cable which the contractor proposed to use.[357] The Federal Circuit rejected the contractor's argument, finding that the contractor should have made a formal request for a BAA waiver prior to contract award. The court further held that, although waiver of the BAA was permissible after award,[358] the contractor's failure to request a waiver before completing performance of the contract precluded relief.

(b) Construction Materials: Total Cost Irrelevant to Determination of BAA Applicability.—The board upheld a contracting officer's decision requiring the contractor to replace Taiwanese steel pipe fittings with domestic products in *Mauldin-Dorfmeier Construction*.[359] The contractor used the fittings, valued at $2,300, to construct a water condenser system at a construction site. The total cost of the materials incorporated into the water condenser system was $140,000. The contractor argued that, because the Taiwanese "components" of the water condenser amounted to less than fifty percent of the total cost, the use of the foreign fittings was proper under the BAA. The board rejected this argument, finding that the fittings were not "components" but "construction materials" because they were delivered separately to the construction site in their manufactured condition.[360] The board further determined that the low cost of the Taiwanese fittings relative to the total material cost of the water condenser did not change their character from a "construction material" to a "component."

(c) Award to Higher Priced Firm Offering a Foreign Product Is Proper.—After a competitive negotiation, the Air Force awarded a contract for a Magnetohydrodynamic power generator to Textron Defense Systems (Textron) as the technically superior offeror.[361] Textron proposed to subcontract with a Russian firm for the basic generator hardware. After

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[353] Department of Defense Purchase of Fuel Cells, B-246304.2, July 31, 1992 (unpub.). The Berry Amendment has been included in defense appropriations acts since 1941. The 1993 version was contained in the DOD Appropriations Act, 1993, Pub. L. No. 102-396, § 9005, 106 Stat. 1876, 1900 (1992). *See also* 10 U.S.C. § 2241 note. Congress made the Berry Amendment permanent in the DOD Appropriations Act, 1994, Pub. L. No. 103-139, § 8005, 107 Stat. 1418, by amending section 9005 of the 1993 Appropriations Act. The Berry Amendment prohibits the use of appropriated funds to purchase any item of:

> food, clothing, tents, tarpaulins, covers, cotton and any other natural fiber products . . . or any item of individual equipment manufactured from or containing such fibers, yarns, fabrics, or materials . . . not grown, reprocessed, reused, or produced in the United States . . . [unless] the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of [such] articles or items . . . produced in the United States . . . cannot be procured as and when needed at United States market prices.

Id.

[354] B-246304.8, May 4, 1993, 93-1 CPD ¶ 363, *request for recon. denied*, B-246304.12, Sept. 27, 1993, 93-2 CPD ¶ 184.

[355] Section 8090 of the 1994 DOD Appropriations Act, 103 Pub. L. No. 139, 107 Stat. 1418 (1993), prohibits the use of funds appropriated by the Act to procure foreign aircraft fuel cells unless the Secretary waives the restriction by certifying to the Committees on Appropriations in the House and Senate that adequate domestic supplies are not available and that the acquisition is needed for national security purposes.

[356] 6 F.3d 1539 (Fed. Cir. 1993).

[357] Federal Acquisition Regulation 25.105(a)(1) provides that unless an agency head determines otherwise, an offered price of a domestic end product is unreasonable (and thus, the procurement is exempt from BAA requirements) when the lowest acceptable domestic offer exceeds the lowest acceptable foreign offer by more than six percent. For the DOD, the evaluation factor is increased to 50%. DFARS, *supra* note 27, at 225.105(1).

[358] *See* John C. Grimberg Co. v. United States, 869 F.2d 1475 (Fed. Cir. 1989) (Navy abused discretion by refusing to grant contractor's postaward request for waiver of the BAA).

[359] ASBCA No. 43633, 93-2 BCA ¶ 25,790.

[360] *See* FAR 25.201.

[361] STD Research Corp., B-252073.2, May 24, 1993, 93-1 CPD ¶ 406.

the only other offeror filed a protest at the GAO, the Air Force applied a fifty percent price differential[362] to Textron's offer, but still concluded that Textron's proposal was technically superior and most advantageous to the government. The GAO upheld the award to Textron, even though its offer (after application of the price differential) exceeded the protester's offer by over fifty percent. The GAO reasoned that an award to a higher priced foreign offeror is proper when an agency determines the offer to be "the best offer considering the combination of price, differential, and technical approach."

I. Labor Standards

1. Withholding in Response to a Department of Labor (DOL) Request Found Unconstitutional.—In *Bailey v. Department of Labor*,[363] the court held that the contractor had a due process right to a hearing before the contracting officer withholds contract payments in response to a DOL determination of underpayment of wages under the Service Contract Act (SCA).[364] The court reasoned that the contractor had a property interest in the withheld payments, and enjoined the withholding until the agency provided an adequate due process hearing. The requirement is inconsistent with the SCA clause, which directs contracting officers to withhold monies from contractors on request from the DOL.[365] Further, even if contractors do have a constitutional right to a prewithholding hearing, they probably waive that right by assenting to the SCA clause in the contract.[366]

2. President Rescinds Requirement to Post Beck *Notices.*—On February 1, 1993, President Clinton issued Executive Order 12836[367] revoking former President Bush's Executive Order 12800,[368] which required federal contractors to post *Beck* notices.[369] These notices: (1) informed employees that their employers could not require union membership as condition of continued employment; and (2) advised employees that they might be entitled to reimbursement of union dues if the union used those monies for purposes unrelated to collective bargaining or contract administration.

3. Contractor May Challenge Effect of DOL Wage Determination with a Contracts Dispute Act (CDA) Claim.—In *Burnside-Ott Aviation Training Center v. United States*,[370] the Federal Circuit clarified the jurisdictional limits of the CDA[371] in cases arising under a contract's labor standards clauses. In *Burnside*, the contractor submitted a CDA claim under the Price Adjustment and Changes clauses, based on a DOL decision requiring the contractor to reclassify its "technician employees" to the higher paid classification of "aircraft workers." The government moved to dismiss, arguing that the DOL had exclusive jurisdiction because the claim arose out of the contract's labor standards provisions. The court rejected this argument, noting that the contractor already had challenged the DOL's classification decision and had paid its employees the increased wages required by the DOL. The court held that the contractor simply was challenging the effect of the DOL's decision and was not challenging the decision itself.

4. Contractors Not Entitled to Cost Increases Unrelated to DOL Action.—In *Ace Services v. GSA*,[372] a contractor sought reimbursement under a fixed-price contract's Price Adjustment clause[373] for the increase in its worker's compensation insurance premiums. The board found that the clause required the agency to reimburse the contractor only for increases caused by DOL action. Because the change in appellant's insurance premiums was not caused by DOL action, the board denied the claim. In *Aleman Food Services v. United States*,[374] the DOL increased an applicable SCA wage rate contemporaneous with a state increase in worker's compensa-

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[362] DFARS, *supra* note 27, at 225.105(1).

[363] 810 F. Supp. 261 (D. Alaska 1993).

[364] The authority of the Secretary of Labor to direct contracting officers to withhold underpaid SCA wages derives from 41 U.S.C. § 352.

[365] The pertinent part of the *FAR* SCA clause states that: "The Contracting Officer shall withhold or cause to be withheld from the Government Prime Contractor under this or any other Government contract with the Prime Contractor such sums as an appropriate official of the [DOL] requests . . . ." FAR 52.222-41(k); 22.1022.

[366] *Id.* 52.222-41.

[367] 58 Fed. Reg. 7,045 (1992).

[368] 57 Fed. Reg. 12,985 (1993).

[369] The notices derive their name from the Supreme Court's decision in Communications Workers of America v. Beck, 487 U.S. 735 (1988).

[370] 985 F.2d 1574 (Fed. Cir. 1993).

[371] 41 U.S.C. §§ 601-613.

[372] GSBCA No. 11771, 93-2 BCA ¶ 25,848.

[373] FAR 52.222-44.

[374] 994 F.2d 819 (Fed. Cir. 1993).

tion rates. When the government exercised an option, it incorporated the DOL wage rate modification, but did not reimburse the contractor for the state rate increase. The court granted the contractor's claim for the total cost impact of the two rate increases.[375] The Federal Circuit reversed, stating "the increases in worker's compensation . . . rates were the result of Texas law, and no DOL determination applicable at the beginning of a renewal option period mandated these benefits. Aleman is not entitled to compensation . . . for additional costs attributable only to the increase under Texas law."

5. Failure to Acknowledge Labor Standards Amendment Renders Bid Nonresponsive.—In *Safe-T-Play, Inc.*,[376] the Army rejected as nonresponsive a bid that failed to acknowledge an amendment correcting a misstatement of the requirements of the Davis-Bacon Act (DBA).[377] The bidder protested, arguing that its failure to acknowledge the amendment was immaterial because the amendment merely restated the DBA requirements, with which the bidder had to comply even absent the corrective amendment.[378] The GAO disagreed and denied the protest. It determined that the amendment was material because, without it, offerors could reasonably rely on the erroneous prior amendment and seek an equitable adjustment when the Army corrected the error and required payment of higher wages.

6. The DOL Rescinds DBA Helper Regulations (Again).[379]—The FY 94 DOL Appropriations Act[380] prohibits the DOL from expending funds to implement its "helper" regulations.[381] Thus, after October 21, 1993, agencies must not authorize helpers on federally funded construction contracts, unless authorized under the narrow exception existing prior to the February 1991 promulgation of the helper regulations.[382] Contracting officers must ensure that all federally funded construction contracts awarded after October 21, 1993 include the clause set forth at 29 C.F.R. § 5.5(a)(1)(ii).[383]

J. Bonds and Sureties

1. Bid Bonds.—

(a) The GAO Reverses Position on Partial Validity.—In Arlington Construction, Inc.,[384] the GAO refused to apply the doctrine of partial validity[385] to validate a bid bond rejected by the contracting officer. An attachment to the $1,124,000 bid bond (twenty percent of the bid) revealed that the bonding company's attorney-in-fact had exceeded his authority to bind the surety, because it limited the signer's authority to $300,000. Nevertheless, the protester argued that the surety was bound up to $300,000 under the doctrine of partial validity.[386] Because the authorized amount exceeded the difference between the protester's bid and the awardee's bid, the protester sought waiver of the full bond amount and a determination that its bid was responsive.[387] The GAO determined, however, that the doctrine of partial validity did not apply, because it only binds a principal up to the agent's authority to a *second* party, but does not necessarily bind a surety to a *third* party. Because suretyship is strictly construed, the GAO was uncertain that a surety is liable at all on a bond signed by an agent exceeding his authority, and therefore upheld the contracting officer's rejection of the bid as nonresponsive.

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[375] 25 Cl. Ct. 201 (1992).

[376] B-250682.2, Apr. 5, 1993, 93-1 CPD ¶ 292.

[377] 40 U.S.C. §§ 276a to 276a-7.

[378] *See* Miller's Moving Co., ASBCA No. 43114, 92-1 BCA ¶ 24,707; BUI Constr. Co. & Bldg. Supply, ASBCA No. 28707, 84-1 BCA ¶ 17,183, which hold that labor standards provisions are read into solicitations and contracts by operation of law and bind the parties even if omitted.

[379] On June 26, 1992, the DOL rescinded 29 C.F.R. § 5.5(a)(4)(iv) to comply with Building and Constr. Trades Dep't, AFL-CIO v. Martin, 961 F.2d 269 (D.C. Cir. 1992), which invalidated a section of the helper regulations that fixed the ratio of helpers to journeymen.

[380] Pub. L. No. 103-112, 107 Stat. 1082 (1993).

[381] The helper regulations are located at 29 C.F.R. §§ 1.7(d), 5.2(n)(4), and 5.5(l)(ii)(A). They authorize contractors to pay semi-skilled workers on federal construction contracts less than workers included in the DOL's journeyman classifications.

[382] Under this exception, the DOL would approve a helper classification only if it was a separate and distinct class of worker, if it prevailed in the area of the upcoming contract, and if it could be differentiated from the classifications of journeymen workers.

[383] *See* 58 Fed. Reg. 58,954 (1993).

[384] B-252535, July 9, 1993, 93-2 CPD ¶ 10.

[385] *See* RESTATEMENT (SECOND) OF AGENCY § 164 (1956). The doctrine of partial validity essentially states that when an agent exceeds the limits of his authority, the principal is bound in any obligation to another party only up to the limit of the agent's authority.

[386] The protester's argument was well founded based on an old GAO decision. *See* To H.E. Hansen, United States Dep't of Agric., B-175696, 51 Comp. Gen. 802 (1972). The GAO determined in *Arlington*, however, that it had been too hasty in its 1972 opinion to conclude that the doctrine of partial validity would apply to save an otherwise defective bid bond. *Arlington*, 93-2 CPD ¶ 10, at 5.

[387] FAR 28.101-4(c)(2) authorizes waiver of the full 20% bid bond requirement when the amount of the bond exceeds the difference between the low and the second-low bids.

(b) Public Information May Clarify Name of Bonded Entity.—Although the preceding decision strictly construed the law of suretyship, another GAO decision cautions not to construe it too strictly. In *Gem Engineering Co.*,[388] the GAO found valid a bid bond bearing a bonded entity's name that was different from the name of the bidder. The GAO reasoned that information in the public domain at the time of bid opening clearly identified the two entities as the same, and left no doubt about the surety's obligation.

2. Payment Bonds.—Negligent approval of a payment bond secured by an individual surety does not make the government liable under the Federal Tort Claims Act (FTCA)[389] to a third-party subcontractor who is unable to collect from either the prime or the surety.[390] A subcontractor recently sued the United States after winning an uncollectible judgment under the Miller Act[391] against the prime contractor's individual surety. Although the court found that a contracting officer has a duty to investigate the acceptability of individual sureties,[392] the United States is not liable under the FTCA for negligence in a contracting officer's investigation, because no analogous private right of action exists.[393]

Similarly, suppliers who are unable to collect against a prime contractor or its payment bond surety may not collect against the government on a third-party beneficiary theory, even if the government fails to follow its regulations in approving an individual payment surety. In rejecting a claim pursued on a third-party beneficiary theory,[394] the board held that if a contract does not give suppliers—as beneficiaries of a contract's payment bond requirement—a direct right to sue for enforcement, the board cannot provide such a right, because the suppliers lack standing under the CDA.[395]

K. Disappointed Bidders' Remedies

1. Government Accounting Office Decisions.—

(a) Interested Parties and Jurisdiction.—The GAO generally does not have jurisdiction to hear protests challenging the selection of subcontractors by prime contractors, unless the GAO finds that the subcontract is "by or for the government."[396] In such cases, the government's involvement must be so pervasive that the prime contractor is a mere conduit for the government in selecting a subcontractor.[397] In *Kerr-McGee Chemical Corp.*,[398] the protester asked for reconsideration of the GAO's dismissal of its protest. The prime contractor was subcontracting for chemicals for use in solid rocket fuel boosters it was supplying to NASA. Kerr-McGee protested the prime's selection of another subcontractor, alleging that the selection was actually made by NASA. The GAO stated that a subcontract procurement was "by" the government only when the agency handles substantially all of the substantive aspects of the action, while leaving the prime with only the procedural aspects. Kerr-McGee was unable to demonstrate that NASA prepared the solicitation or source selection criteria, negotiated with any subcontractor, or played any role in the award decision. Even if NASA had directed award, no jurisdiction existed because the prime handled all substantive aspects of the subcontractor selection. The prime's extensive involvement was the best evidence that it was not acting for the government.

The GAO has jurisdiction over acquisitions conducted by federal agencies[399] and wholly-owned government corporations.[400] In *J.D.J. Services*,[401] the protester complained of a contract award made by AMTRAK. The GAO dismissed the protest because AMTRAK is only a partially government-owned corporation,[402] which is not a federal agency for purposes of GAO protest jurisdiction.

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[388] B-251644, Mar. 29, 1993, 93-1 CPD ¶ 303.

[389] 28 U.S.C. §§ 2671-80.

[390] Hardaway Constr. Co. v. United States Army Corps of Eng'rs, 980 F.2d 1415 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 75 (1993).

[391] 40 U.S.C. §§ 270a-d.

[392] *See* FAR 28.203; 28.202(a) (1986) (the 1986 version of the clause was in effect at the time of contract award).

[393] *See* 28 U.S.C. § 2674.

[394] Westinghouse Elec. Supply Co., ASBCA No. 44350, 93-3 BCA ¶ 26,132.

[395] 41 U.S.C. §§ 601-13.

[396] *See* 4 C.F.R. § 21.3(m)(10) (1993); St. Mary's Hosp. and Medical Cntr., B-243061, June 24, 1991, 91-1 CPD ¶ 597.

[397] *See St. Mary's Hosp.*, 91-1 CPD ¶ 597, at 6.

[398] B-252979.2, Aug. 25, 1993, 93-2 CPD ¶ 120.

[399] 31 U.S.C. § 3551; 4 C.F.R. § 21.0(c) (1993).

[400] 4 C.F.R. § 21.0(c) (1993).

[401] B-252085, Jan. 26, 1993, 93-1 CPD ¶ 68.

[402] 31 U.S.C. § 9101.

In *Military Newspapers of Virginia*,[403] the Navy contracted for publication of the weekly base newspaper. The awardee would not be paid, but would keep whatever revenues it generated through advertising. Even though the contract did not obligate appropriated funds, the GAO had jurisdiction because the protest challenged the propriety of a federal agency contract. In these cases, the GAO reviews the agency's procurement actions to determine if they were reasonable. Because appropriated funds were not involved, the basic acquisition statutes and regulations,[404] which establish the standards for GAO review, did not apply.

(b) Recovery of Protest Costs and Attorneys' Fees.—In 1991, the GAO changed its rules to allow protesters to recover attorneys' fees and protest costs when the agency takes corrective action anytime after a protest is filed.[405] Agencies no longer could avoid these costs by settling or taking corrective action just before the GAO issued a decision. Although agencies expected an avalanche of requests for costs, the GAO has been evenhanded in granting such requests. In *Network Software Associates*,[406] the Army took corrective action within six working days after the protest was filed. The GAO denied the protester's request for costs and attorneys' fees and considered the agency's corrective action the type of prompt reaction to protests that its regulations were designed to encourage.[407]

After the GAO declares entitlement to protest costs and attorneys' fees, protesters must submit their claims to the agency.[408] When the parties cannot agree on quantum, they bring the issue to the GAO. Such disagreement is especially likely when the protester does not prevail on all issues. In *Department of the Navy—Request for Reconsideration and Modification of Remedy*,[409] the GAO stated that it would not limit the award of attorneys' fees to those pertaining only to the issues in which the protester prevailed, unless a losing protest issue is so clearly severable as to essentially constitute a separate protest. If the issues share a common core of facts and are based on related legal theories, the protester may recover all reasonable attorneys' fees.

The GAO will not fully deny the award of attorneys' fees if protester's counsel is unable to segregate costs by winning and losing issues. In *CBIS Federal*,[410] the protester prevailed on several issues, but lost on one of its major issues. In the original decision, the GAO held that the protester was entitled to protest costs and attorneys' fees, except on the issue it lost.[411] The protester was unable to fully segregate costs on the losing issue, the agency refused to pay, and the protester filed with the GAO. After reviewing the arguments in the original protest and the submissions of the parties, the GAO determined that seventy-five percent of the protester's efforts were on the losing issue, and awarded CBIS twenty-five percent of its claimed amount.

(c) Timeliness of Claims for Protest Costs.—Protesters must file their claims for costs with the agency within sixty working days of receiving the GAO's decision declaring entitlement to costs.[412] Protester's claims at a minimum "must identify the amounts claimed for each individual expense, the purpose for which the expense was incurred, and how the expense relates to the protest."[413] The GAO set a time limit to ensure timely claim resolution, avoid piecemeal presentation of claims, and avoid unwarranted delays.[414] In *Test Systems Associates*,[415] the protester's initial submission to the agency did not meet the GAO's requirements for a proper cost claim. Seven months after the original protest decision, and after repeated requests from the agency, Test Systems submitted additional cost information. The GAO stated that its sixty working day filing requirement provided sufficient opportunity for protesters to submit adequately documented cost claims. Because Test Systems failed to comply with this requirement, the GAO refused to consider its claim.[416]

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[403] B-249381.2, Jan. 5, 1993, 93-1 CPD ¶ 5.

[404] The standards for GAO review are set forth generally in the CICA, subpart 33.1 of the *FAR*, and subpart 233.1 of the *DFARS*.

[405] 4 C.F.R. § 21.6(e) (1993).

[406] B-250030.4, Jan. 15, 1993, 93-1 CPD ¶ 46.

[407] *See* Mandex, Inc.—Entitlement to Costs, B-252339.4, July 20, 1993, 93-2 CPD ¶ 41 (protester was not entitled to protest costs or attorneys' fees as the Navy took corrective action within three weeks of the protest's filing).

[408] 4 C.F.R. § 21.6(f)(1) (1993).

[409] B-246784.4, Feb. 17, 1993, 93-1 CPD ¶ 147.

[410] B-245844.5, May 18, 1993, 93-1 CPD ¶ 388.

[411] B-245844.2, Mar. 27, 1992, 92-1 CPD ¶ 308.

[412] 4 C.F.R. § 21.6(f)(1) (1993).

[413] Diverco, Inc., B-240639.5, May 21, 1992, 92-1 CPD ¶ 460.

[414] Test Sys. Assoc., B-244007.7, May 3, 1993, 93-1 CPD ¶ 351.

[415] *Id.*

[416] While the GAO may consider untimely cost claims if good cause is shown, Test Systems offered no evidence as to why it could not timely file a proper claim.

(d) Hearings.—In *Border Maintenance Service*,[417] the protester alleged that the GAO should have held a hearing to assess the veracity of agency personnel who submitted affidavits. The GAO generally will conduct hearings only if a factual dispute exists between the parties that requires oral testimony for resolution and an assessment of the witnesses' credibility, or the issues are so complex that a hearing is the most cost effective and efficient method of resolving the issues.[418] In denying Border's request, the GAO stated that the record disclosed no basis for Border's allegations that the affidavits were fabricated or were otherwise questionable.

(e) Timely Filing at the GAO.—The GAO strictly enforces its timeliness rules for filing comments to agency reports by dismissing protests when protesters fail to timely file comments or request that the GAO decide the protest on the record.[419] When the GAO dockets a protest, it establishes a due date for the agency report and the protester's comments are due within ten working days of that date.[420] Protesters must notify the GAO if they fail to receive the agency report by the due date. In *Balimoy Manufacturing Co.*,[421] the protester received the agency report after the due date, but did not notify the GAO. Because the GAO did not receive Balimoy's comments until the eleventh working day, the GAO ruled that the comments were late and dismissed the protest. On reconsideration, Balimoy complained that it should not be penalized because the agency was not timely in getting the report to Balimoy. The GAO rejected this argument and held that because Balimoy did not notify it of the late receipt until the comments were filed, the ten-day period would be measured from the original due date.

In *La Quinta Roofing*,[422] the protester asked the GAO to reconsider its decision dismissing La Quinta's protest for failing to file comments to the agency report. La Quinta stated that its failure to file comments was inadvertent and that it did not believe that the filing of comments was necessary. The GAO affirmed its dismissal holding that the protest acknowledgement letter specifically advised La Quinta of the requirement to respond to the agency report.

In federal contracts litigation practice, different rules concerning the timely filing of documents at the various forums exist. For example, the board considers a document "filed" when mailed,[423] but at the Court of Federal Claims, a document is "filed" only when received by the court.[424] At the GAO, "filing" occurs when the GAO receives the documents, as evidenced by a date/time stamp.[425] The GAO strictly enforces its filing deadlines.

In *C&S Associates*,[426] C&S argued that its GAO protest was timely because C&S had mailed it within ten days of learning of the grounds for the protest. The GAO affirmed its dismissal of the protest, holding that in order to be timely filed, the GAO must receive the protest within the required time period.

The facsimile machine continued to be the downfall of those filing last minute protests at the GAO. In *Balimoy Manufacturing Co.*,[427] the protester sent its comments to the agency's report by facsimile at 5:25 p.m. on the due date. However, because the GAO did not receive all the pages until well after the GAO's business day ended at 5:30 p.m., the GAO ruled that the filing was untimely.

(f) Attorney Access to Documents Under Protective Orders.—In 1991, the GAO authorized the issuance of protective orders giving protesters' counsel access to proprietary or source selection information if they are included in the protective orders.[428] The GAO examines each application for inclusion to determine whether the attorney is involved in competitive decisionmaking for the protester.[429] In *Allied Sig-*

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[417] B-250489.4, June 21, 1993, 93-1 CPD ¶ 473.

[418] *Id.* at 6. *See* 4 C.F.R. § 21.5(a) (1993).

[419] 4 C.F.R. § 21.3(j) (1993).

[420] *Id.*

[421] B-250672.2, Mar. 10, 1993, 93-1 CPD ¶ 220. *Accord* Unicorn Servs., B-252429.3, May 28, 1993, 93-1 CPD ¶ 425.

[422] B-250901.2, Jan. 11, 1993, 93-1 CPD ¶ 33.

[423] ASBCA Rule 1(a).

[424] RUSCC Rules 3(a), 5(d).

[425] 4 C.F.R. § 21.0(g) (1993). *See* Kenneth W. Ware, B-241170.2, Apr. 23, 1991, 91-1 CPD ¶ 397.

[426] B-252241.2, Mar. 3, 1993, 93-1 CPD ¶ 200.

[427] B-250672.2, Mar. 10, 1993, 93-1 CPD ¶ 220.

[428] 4 C.F.R. § 21.3(d) (1993).

[429] *See* United States Steel Corp. v. United States, 730 F.2d 1465, 1468 (Fed. Cir. 1984).

nal Aerospace Co.,[430] the interested party's outside counsel was a corporate officer for two of the interested partys' second tier subsidiaries and represented nine of its first tier subsidiaries. In denying admission, the GAO looked to counsel's role in the competitive decisionmaking process and found that even though he was not an officer of the interested party, his status as an officer or frequent advocate for numerous subsidiaries of the interested party was enough to question whether the information disclosed to him could be protected from inadvertent disclosure to the subsidiaries.

(g) Does Protester Allege Enough to Avoid Dismissal?—Protesters are responsible for setting forth a detailed statement of the factual and legal grounds for their protests,[431] or risk dismissal.[432] In *Rice Services, Ltd.-Reconsideration*,[433] the GAO had dismissed the original protest because Rice failed to allege or show improper agency action on the Treasury Department's evaluation and source selection action. Rice argued that its initial protest was "broad enough" to include challenges to the evaluation and source selection and attempted to offer supporting information not included in its initial protest. Because Rice failed to explain why this information was not included initially, the GAO refused to allow Rice to supplement its inadequately supported protest on reconsideration.

The GAO often will not dismiss protests filed by *pro se* protesters if it finds the basic protest elements in the document. In *American Material Handling*,[434] the protester's handwritten note to the Army stating that the specifications were "written around" another vendor's product was a sufficient expression of dissatisfaction to constitute an agency protest. The GAO also found that American Materials' request to "please advise me," after it had suggested changes to the solicitation, was a request for corrective action.[435]

(h) Contractor Suit Foils Government Request for Reconsideration.—The GAO generally will dismiss a protest or request for reconsideration if the matter is pending before a court of competent jurisdiction.[436] In *Department of the Navy*,[437] although the protest was sustained,[438] the Navy had overridden the stay and performance continued throughout the protest period. The Navy requested reconsideration, but before the GAO could decide the matter, the protester filed suit in district court to challenge the award and enjoin performance, and the GAO dismissed the Navy's request. The Navy filed another request for reconsideration,[439] and unsuccessfully argued that it should not be deprived of the opportunity for reconsideration at the GAO because its opponent filed suit in district court. The GAO stated that it will not consider any matter when the issues will be decided by a court on the merits, regardless of which party filed the court action.

(i) Timely Protest Fails to Trigger "Automatic" Stay.—Protesters often are surprised when their timely protest does not trigger the automatic stay because the GAO failed to notify the agency of the protest within ten calendar days.[440] In *Ballentines of South Bay Caterers,* the protest was filed at 5:20 p.m. on Friday, which was the seventh calendar day after award. Monday was the tenth calendar day, but was a federal holiday, so the GAO notified the agency on the eleventh calendar day. Although the GAO complied with its requirement to notify the agency of the protest within one day of its filing,[441] Ballentines was not entitled to the automatic stay.

(j) The GAO Will Not Modify Recommendations When Agency Overrides "Automatic Stay."—The head of a procuring activity may override the "automatic stay" if he or she determines that continued contract performance is in the best interest of the government or urgent and compelling circumstances will not permit waiting for the GAO's decision on the protest.[442] In *Kumasi Ltd.*,[443] the GAO notified the MARAD

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[430] B-250822, Feb. 19, 1993, 93-1 CPD ¶ 201.

[431] 4 C.F.R. § 21.1(c)(4) (1993).

[432] 4 C.F.R. § 21.1(f) (1993).

[433] B-249513.4, Mar. 1, 1993, 93-1 CPD ¶ 182.

[434] B-250936, Mar. 1, 1993, 93-1 CPD ¶ 183.

[435] One of the elements of a proper protest is for the protester to request corrective action from the agency or the GAO. 4 C.F.R. § 21.1(c)(6) (1993).

[436] However, the GAO will decide the matter if the court requests a decision. 4 C.F.R. § 21.3(m)(11) (1993).

[437] B-253129.3, Sept. 24, 1993 (unpub.).

[438] SeaBeam Instr., B-253129, Aug. 19, 1993, 93-2 CPD ¶ 106.

[439] Department of the Navy, B-253129.4, Sept. 30, 1993, 93-2 CPD ¶ ____.

[440] 31 U.S.C. § 3553(d)(1); FAR 33.104(c)(5); McDonald Welding v. Webb, 829 F.2d 593 (6th Cir. 1987).

[441] 4 C.F.R. § 21.3(a) (1993).

[442] 31 U.S.C § 3553(d)(2).

[443] B-247975.7, May 3, 1993, 93-1 CPD ¶ 352.

of protests to its award of contracts for twelve roll-on/roll-off vessels within ten days of award, but the MARAD determined that continued performance was in the best interest of the government. The GAO sustained the protests, and recommended that the MARAD amend the solicitation and request revised proposals from technically acceptable offerors. On reconsideration,[444] the MARAD asserted that the GAO's recommendation was impracticable because the government already had obtained title to nine of the twelve selected vessels, and the owners of the remaining three vessels already had expended funds to fulfill the contracts. In rejecting the MARAD's request, the GAO held that it was required by statute to make recommendations "without regard to any cost or disruption from terminating, recompeting, or reawarding the contract."[445] The GAO did note, however, that corrective action was "unavailable" with respect to the nine vessels for which the government had obtained title. Further, the GAO determined that one of the protesters did not lose its status as an interested party merely because it offered to charter its vessels to the Military Sealift Command prior to the GAO's decision granting its protest. While an offeror that unequivocally expresses disinterest in award is not an interested party eligible to pursue a protest,[446] the protester in *Kumasi* pursued an alternate market for its vessels "only after MARAD's actions compelled it to do so" and thus did not signal disinterest in the award.

(k) Other Grounds for Protest.—In *Zeiders Enterprises*,[447] the protester challenged the Navy's award because the awardee's proposal did not provide for payment of taxes as required by FAR 52.229-3. The awardee was a tax exempt company and took no exception to the *FAR* tax clause. The contracting officer asked for, and received, a verification of the awardee's tax exempt status. The GAO stated that it would be unduly burdensome for agencies to examine the tax situation of its offerors. If an offeror submits a tax excluded offer, it is not barred from award, but bears the responsibility for any tax liability arising under the contract.

2. *Court of Federal Claims.*—

(a) Review of Agency Procurement Decisions.—In *Shields Enterprises v. United States*,[448] plaintiff sought recovery of bid preparation costs and review of the Social Security Administration's cancellation of a procurement. In upholding the Social Security Administration's action, the court stated that review of agency procurement decisions is limited in scope, and those decisions are accorded great deference.[449] Recovery of bid preparation costs "may be had only upon showing of *'clear and convincing proof'* that award of the contract to another was arbitrary and capricious, thereby denying a contractor's bid the fair and impartial consideration to which it was entitled."[450] Moreover, the court reaffirmed that contracting officers have more discretion in decisions concerning negotiated procurement than in sealed bidding.[451]

(b) Injunctive Relief.—Plaintiffs must prove four elements to obtain a preliminary injunction in a preaward suit.[452] In *Magellan Corp. v. United States*,[453] the court considered the plaintiff's burden of proving the "likelihood of success." While sometimes requiring proof of a "strong likelihood of success," the court held that absence of such proof is not necessarily fatal to a plaintiff.[454] The court stated that "the chance of success must be 'better than negligible,' even if the harm is very great."[455] Moreover, the court held that "if the harm to the injunction applicant is sufficiently serious, it is only necessary that there be a 'fair chance of success on the merits.'"[456] If plaintiff can demonstrate it has a "great risk"

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[444] Kumasi Ltd.—Recon., B-247975.12, Sept. 27, 1993, 93-2 CPD ¶ 195.

[445] 31 U.S.C. § 3554(b)(2).

[446] *See* Signal Corp., B-240450, Aug. 8, 1990, 69 Comp. Gen. 659, 90-2 CPD ¶ 116, *aff'd*, B-240450.2, Sept. 19, 1990, 69 Comp. Gen. 725, 90-2 CPD ¶ 236 (1990) (protester that disbanded its proposal team and disclaimed any interest in award was not an "interested party").

[447] B-251628, Apr. 2, 1993, 93-1 CPD ¶ 291.

[448] 28 Fed. Cl. 615 (1993).

[449] RADVA Corp. v. United States, 17 Cl. Ct. 812, 818 (1989); M. Steinthal v. Seamans, 455 F.2d 1289 (D.C. Cir. 1971).

[450] 28 Fed. Cl. at 622 (citing Space Age Eng'g v. United States, 4 Cl. Ct. 739, 741-42 (1984)).

[451] 28 Fed. Cl. at 625 (citing Drexel Heritage Furnishings v. United States, 7 Cl. Ct. 134, 142-43 (1984) *aff'd*, 809 F.2d 790 (Fed. Cir. 1986)).

[452] In We Care, Inc. v. Ultra-Mark, Int'l Corp., 930 F.2d 1567, 1570 (Fed. Cir. 1991), the court described the four elements as follows: (1) the degree of immediate irreparable harm to the plaintiff; (2) the degree of harm to the party enjoined; (3) the impact of the injunction on public policy considerations; and (4) the likelihood of plaintiff's ultimate success on the merits.

[453] 27 Fed. Cl. 446 (1993).

[454] *Id.* at 451.

[455] *Id.* (citing Standard Havens Prods. v. Gencor Indus., 897 F.2d 511, 512-13 (Fed. Cir. 1990)).

[456] *Id.*

while showing "virtually no risk" to defendant, plaintiff need only show a "fair chance of success" to prevail on that element.[457]

3. Federal District Courts—Overriding the Automatic Stay.—District courts frequently review agency decisions to lift the Competition and Contracting Act (CICA) stay of contract award or performance.[458] Two such Fourth Circuit cases challenge precedent and warn of the consequences of not following the CICA in overriding stays.

In *DTH Management Group v. United States*,[459] the incumbent contractor sought to enjoin performance of a services contract, pending the GAO's decision on the merits of its protest. After lifting the automatic stay, the Navy directed the awardee to perform the work. The court found that the Navy's determination and findings (D&F), which explained the rationale for lifting the stay, raised "serious and grave" questions because it failed to consider the incumbent contractor's ability to continue performing the services pending the GAO's decision on the protest. The court held that to lift the stay, an agency must find that "performance of the contract by a particular proposed contractor is urgent and compelling."[460] The Navy's findings only stated that performance of the contract by "some entity" was urgent and compelling.

In *Dairy Maid Dairy v. United States*,[461] the court reviewed Army decisions to lift preaward and postaward stays in a procurement for operation of a milk plant. Dairy Maid, the incumbent, protested solicitation irregularities to the GAO, invoking the automatic stay. The Army executed a D&F, citing "urgent and compelling" reasons for keeping the plant in operation, and awarded the contract to another contractor. Dairy Maid again protested to the GAO.[462] The Army did not suspend performance, asserting that it was not required to make a separate finding to lift the stay of performance because it already had made a finding to override the preaward stay triggered by Dairy Maid's preaward protest. The court found the Army's preaward override improper because it did not consider using the incumbent contractor to continue the services before making award.[463] The court characterized the Army's rationale and failure to lift the postaward stay as an arbitrary and capricious action that constituted a "clear and prejudicial violation of the applicable statutes or regulations."[464] If there are preaward and postaward protests of the same procurement, agencies must make separate determinations to lift the applicable stays.

4. Alternative Dispute Resolution (ADR)—Army Uses ADR to Resolve Protest.—In *Integrated Systems Group v. Department of the Army*,[465] the Army awarded a contract to the second low bidder after rejecting the low bid as nonresponsive for failing to provide warranty information. The low bidder then protested to the GSBCA, but the board dismissed the protest after the bidder and the Army agreed to resolve the dispute in an ADR forum (the Contract Law Division, Office of The Judge Advocate General (Army)).[466] Both the Army and the bidder agreed to be bound by the decision of the ADR

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[457] *Id.*

[458] *See* Universal Shipping Co. v. United States, 652 F. Supp. 668, 673-74 (D.D.C. 1987).

[459] No. 93-439-CIV-5-D (E.D.N.C. Aug. 4, 1993).

[460] *DTH*, slip op. at 11. We note that this decision conflicts with cases holding that to override the stay, agencies must find that performance of the contract by any contractor was urgent and compelling. Burnside-Ott Aviation Training Cntr. v. Navy, No. 88-3056 (D.D.C. Dec 1, 1988); NES Gov't Servs. v. United States, No. 4:92CV1945-DJS (E.D. Mo. Oct. 29, 1992). Moreover, "under CICA the clear presumption is that the awardee of the disputed contract, not the bid protester, will perform when the automatic stay is overridden." Burnside-Ott Aviation Training Cntr. v. Navy, No. 88-3056, slip op. at 9. The *DTH* decision appears to incorrectly combine the choice of contractor with the "urgent and compelling" circumstances required for the work to continue. If an agency could get along without performance pending the GAO's decision, it would be arbitrary and capricious to lift the stay and allow any contractor to perform. *Id.* at 7-8.

[461] No. Civ. A. 2:93CV260 (E.D. Va. Nov. 5, 1993).

[462] Dairy Maid Dairy, B-251758.3, May 24, 1993, 93-1 CPD ¶ 404. There was a stay of performance because the GAO advised the Army of the protest within ten calendar days of award.

[463] Well before the override action, Dairy Maid had offered to extend its contract pending resolution of its first GAO protest, at a price more favorable than the new contract price. Moreover, the Army had extended prior contracts rather than make award in substantially similar circumstances. While recognizing that it was necessary to continue operation of the milk plant, the court held that the Army had not explained why it could not extend Dairy Maid's contract and wait for the GAO's decision. As in *DTH*, the court refused to allow an override based solely on that performance of the contract itself was "urgent and compelling."

[464] *Dairy Maid*, slip op. at 8. The Army had argued that its failure to override was a "mere technical violation" of the CICA, which did not justify injunctive relief (citing Superior Eng'g & Elec. Co. v. United States, No. 86-860-N (E.D. Va. Aug. 31, 1987) where the wrong individual signed the D&F). Unlike *Superior Engineering*, the Army made no attempt to comply with the CICA. The court found that "the complete failure to comply with the statute cannot be remedied by characterizing it as a 'mere technical violation' of CICA." *Id.*

[465] No. 12613-P, GSBCA LEXIS 613 (Dec. 7, 1993).

[466] The board in *Integrated Systems* did not address the issue of whether an agency properly may use ADR in protest cases, apparently assuming that agencies have such authority. FAR subpart 33.1, Protests, does not include provisions for ADR. Subpart 33.2, Disputes and Appeals, defines ADR as "any procedure or combination of procedures voluntarily used to resolve issues in controversy without the need to resort to litigation." An "issue in controversy" is defined as a "material disagreement between the government and the contractor related to a claim or which could result in a claim."

forum. The ADR forum determined that the contracting officer erroneously rejected the low bid because the IFB did not require bidders to submit information regarding the warranty requirement. After learning of the Army's plan to terminate its contract, the awardee filed a protest at the GSBCA. The board denied the protest after reviewing the analysis of the ADR official and agreeing that it was correct.

IV. Contract Performance

A. *Contract Interpretation*

1. Contractors Must Read Contract as a Whole Document.—

(a) Contractor's Unreasonable Interpretation Precludes Recovery.—The contractor attempted to avoid termination for default in *Composite International, Inc.*[467] by alleging that defective specifications caused its failure to timely deliver leading edge skin parts on the E-3A aircraft. The contractor argued that the contract contained a military specification that conflicted with an industry specification on proper heat treatment methods. The board denied the claim because the contractor's interpretation, in the context of the entire contract, was unreasonable. Furthermore, the board held that the contractor failed to show reliance on its interpretation when it bid. Finally, any existing ambiguity was sufficiently patent to require the contractor to clarify the situation.[468]

(b) Subcontractors' Omissions Do Not Create a Latent Ambiguity.—In *Okland Construction Co.*[469] the construction prime contractor provided portions of the solicitation to its electrical and mechanical subcontractors to assist them in formulating their quotes to the prime contractor. However, neither subcontractor included motor controllers in its quote, which led the prime contractor to omit controllers from its bid. When the government required controllers during performance, the prime contractor alleged a latent ambiguity. The board denied recovery, because the prime contractor was responsible for coordinating all subcontractor work, and the contract clearly required the prime contractor to provide motor controllers.[470]

(c) Patent Ambiguity and Contractor's Unreasonable Interpretation Preclude Recovery.—In a contract to renovate military housing, the contractor sought an additional $317,000 to place moisture-proof gypsum board in places other than bathrooms.[471] The contractor had planned to install moisture-proof gypsum board only in bathrooms, based on its interpretation of a cost estimate schedule. The Federal Circuit denied the claim because: (1) the contractor's interpretation was unreasonable in light of other contract provisions indicating that the contract required additional moisture-proof board; and (2) the conflict (if any) between the cost estimate schedule and the other provisions was patent and required the contractor to seek clarification.

2. Constructive Changes Due to Ambiguous Specifications.—

(a) Federal Circuit Clarifies Contract Ambiguity.—In *Community Heating & Plumbing Co. v. Kelso*,[472] the Federal Circuit denied a contractor's claim for additional costs to install conduit sleeves in manholes. The court stated that differing interpretations of contract language by the parties do not create an ambiguity, but that an ambiguity exists only when the language is "susceptible of two different and reasonable interpretations, each of which is found to be consistent with the contract language."[473] In addition, the court held that when a patent ambiguity exists, the contractor must seek clarification and, if its initial attempts at clarification are unsuccessful, it must inquire further.[474]

(b) Ambiguities That Cost the Government.—Government interpretations of ambiguous specifications sometimes result in constructive changes entitling contractors to reimbursement. During construction of a brig, the contractor filed claims in excess of $1 million based, in part, on ambiguous and defective specifications and overzealous inspection.[475]

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[467] ASBCA No. 43359, 93-2 BCA ¶ 25,747.

[468] *See* Wisser Dienstleistungs GmbH, ASBCA No. 41290, 93-2 BCA ¶ 25,862 (attempt by contractor to recover increases in German employment tax denied because contractor's entitlement claim unreasonable in light of entire contract).

[469] ASBCA No. 43898, 93-2 BCA ¶ 25,867.

[470] *See* Stratton, Inc., ASBCA No. 39583, 93-2 BCA ¶ 25,755 (prime contractor responsible for coordinating work and resolving any patent ambiguities); Carmone Corp., ASBCA No. 43023, 93-3 BCA ¶ 26,185 (prime contractor must coordinate all work of subcontractors).

[471] Walter-Thosti-Boswau AG v. Stone, No. 92-1398, 1993 U.S. App. LEXIS 22958 (Fed. Cir. Sept. 3, 1993).

[472] 987 F.2d 1575 (Fed. Cir. 1993).

[473] *Id.* at 1579.

[474] For other cases requiring offerors to seek clarification of patent ambiguities, see Emerald Isle Elec., Inc. v. United States, 28 Fed. Cl. 71 (1993); CRC Sys., GSBCA No. 11173, 93-2 BCA ¶ 25,842; General Elevator Co., VABCA No. 3666, 93-2 BCA ¶ 25,685; Abhe & Svoboda, Inc., ENG BCA 5748, 93-2 BCA ¶ 25,633.

[475] H. G. Reynolds Co., ASBCA No. 42351, 93-2 BCA ¶ 25,797.

The board granted the contractor's ambiguous specification claim because the contract requirement to "provide metal shims when necessary" did not permit the government to demand factory-built metal shims on metal doors.

The Federal Circuit reversed the lower court's summary judgment for the government in *C. Sanchez & Son, Inc. v. United States*.[476] The contract incorporated a safety manual requiring rollover protection devices (ROPD) for certain listed vehicles. The government required the contractor to put ROPDs on a trenching machine, which was not listed. The Federal Circuit held that the proper standard of review was whether the contractor's reading of the safety manual to exempt trenching machines from the ROPD requirement was reasonable. If it was, then the later government direction to install the ROPDs was a constructive change.[477]

M. A. Mortensen Co.[478] involved a firm-fixed-price design/build contract for a medical clinic. After award, the contractor used government-provided figures to determine the required quantities of structural steel. When the government rejected the proposed design plan in favor of a design requiring additional structural steel, the contractor claimed for the cost of the additional steel. In allowing the claim, the board stated that the government's position that the contractor should have bid to cover possible increases in required steel quantity was unreasonable and "effectively reads the Changes clause out of the contract."

In another ambiguous specification case,[479] the government required the contractor to remove and replace a cooling tower in an office building within 240 days following notice to proceed (NTP) without interfering with the building's normal use. The government issued NTP in June, but delayed work until October, because of hot weather. The board allowed delay costs because the contractor proved that other bidders believed the government would allow immediate removal of the old cooling tower. Because the ambiguity was not patent, requiring the contractor to seek clarification, the doctrine of *contra proferentum* applied and the government bore the responsibility for costs attributable to the ambiguity.

In *Hoffman Construction Co.*,[480] the ambiguity concerned whether the contract required the contractor to waterproof stairwells, tunnels, and elevator shafts. The specifications stated that the contractor was to waterproof the tunnel, but stated elsewhere that waterproofing was not required. Additionally, the specifications stated that the "sides" of the stairwells and the elevator shafts required waterproofing. The board held that as to the tunnel waterproofing, the specifications contained a patent ambiguity that the contractor should have clarified before bid opening. However, as to the floors of the stairwell and the elevator shafts, the contractor's interpretation that "sides" excluded floors was reasonable, and the government's directive to waterproof the floors was a constructive change.

Determining which trees to cut was the issue in *Diversified House Logs, Inc.*[481] The contractor believed that it could cut trees outside of a designated cutting area, so long as it remained within a larger "sale" area containing the cutting area. The board found the contractor's interpretation to be reasonable because of both parties' knowledge of prior litigation involving this issue.

(c) Unsuccessful Allegations of Ambiguity.—In *Davister, Inc. v. General Services Administration*,[482] the General Services Administration (GSA) awarded a contract requiring the contractor to renovate and construct office space for lease to the GSA. The contractor gutted the preexisting structure and built new office space, including a T-shaped corridor. Because the contract excluded "corridors in place," from the square footage calculation for lease payment purposes, the GSA did not pay the contractor for the T-shaped corridor space. The contractor claimed for the total square footage of the structure because no corridors in place existed initially (before the contractor gutted the structure). After reviewing the entire contract, the board denied the contractor's claim, concluding that "corridors in place" meant in place when the parties measured the office space after construction for payment purposes.

Lack of reliance on ambiguous specifications prevented a contractor's recovery for installing center sumps in fuel tanks in *L. D. Dosca Associates*.[483] The contract drawings required, and the specifications described, center sumps, but the standard incorporated by reference in the specifications showed side sumps. Although a contracting officer's representative

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[476] 6 F.3d 1539 (Fed. Cir. 1993).

[477] Engineering Technology Consultants, S.A., ASBCA No. 42649, 93-3 BCA ¶ 26,134.

[478] ASBCA No. 39978, 93-3 BCA ¶ 26,189.

[479] Stroh Corp. v. General Servs. Admin., GSBCA No. 11029, 93-2 BCA ¶ 25,841.

[480] VABCA No. 3676, 93-3 BCA ¶ 26,110.

[481] AGBCA No. 92-212-1, 93-3 BCA ¶ 25,991.

[482] GSBCA No. 11662, 93-3 BCA ¶ 25,987.

[483] ASBCA No. 45267, 93-3 BCA ¶ 26,066.

approved the use of side sumps, the contracting officer later demanded that the contractor install center sumps. The board denied the claim, finding that the contractor did not rely on its interpretation when preparing its bid.[484]

In *Tomahawk Construction Co.*,[485] the board disagreed with a Federal Claims Court decision[486] concerning a contract requirement to wrap underground "metallic pipe and fittings" in tape. The contractor asserted that trade practice required it to wrap only steel water pipes, but the government demanded the contractor wrap all metal pipe (including cast iron pipe). On another contract on the same project using the same language, the Federal Claims Court held that contractors could use trade practice to demonstrate that an ambiguity existed. Although it acknowledged the "excellent legal analysis" of the Federal Claims Court, the board specifically refused to follow its decision. The board found "sufficient factual differences" to support its conclusion that the contract language clearly required the wrapping of *all* metal pipes.

3. "Prior Course of Dealing" Cases.—A prior course of dealing worked against a contractor in *RJS Constructors, Inc.*,[487] where the contractor claimed additional costs to maintain at least two persons trained in CPR and first aid at a construction site. The contractor argued that the requirement was improper and "stupid" because the contract only required such persons at "remote" sites. The board denied the claim, however, because the contractor had received two prior contracts requiring trained personnel at sites similarly located, and therefore, the contractor's prior course of dealing put it on notice of the contract requirements.

In *T.L. Roof & Associates Construction Co.*,[488] the government prevented a masonry subcontractor from stacking masonry on scaffolding higher than the brickmason's head. The prime contractor claimed for the additional delay, alleging that on two prior contracts involving the same subcontractor, the government allowed higher stacking levels. The board denied the contractor's claim because: (1) the parties in the prior contracts were different than the parties in the contract in dispute; and (2) the contractor failed to show that the government had any knowledge of the alleged prior practice sufficient to waive the safety requirement.

Reliance on prior understandings cost the government in *Computer Network Systems v. General Services Administration.*[489] In 1985, the government awarded a multiple award schedule contract for telecommunications services in which the contractor could charge a twenty percent surcharge to provide software. During the contract period, the government requested a different type of software, which the contractor provided at no additional charge. In 1988, the government awarded a new contract, allowing the same contractor to charge fifty percent surcharge for software, and later issued delivery orders specifically citing the new contract. The government claimed that although the delivery orders specifically referenced the new contract, the prior course of dealing between the parties meant that the proper surcharge was only twenty percent. The board disagreed, stating that under the parol evidence rule, prior understandings could not contradict the delivery orders' clear language.

4. New or Different Requirements in Submittal Process Can Result in a Constructive Change.—In *Page Construction Co.*,[490] a contractor renovating an office building submitted for approval a proposed chiller for use in an air conditioning unit. Although the contract specified the desired chiller on a "brand name or equal" basis, the government refused to approve the contractor's "equal" submittal and ultimately approved only a chiller that was field tested and capable of redirecting output. Because the solicitation did not state either of the additional requirements, the board found that the government had constructively changed the contract.

5. Minor Deviations Do Not Make a Design Specification a Performance Specification.—In *Blake Construction Co. v. United States,*[491] a construction contract's drawings indicated that the contractor should install the main feeder lines overhead, but a drawing note stated that the feeder locations described were "diagrammatic" and that the contractor should run the lines to avoid conflicts with other subcontractors. When the electrical subcontractor attempted to install the lines in an underground duct, the agency required the contractor to follow the drawings and install the wires overhead. The court awarded the contractor its additional installation costs, finding that allowing deviations made the specification a performance

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[484] *See* J. W. Bateson Co., VABCA No. 3460, 93-2 BCA ¶ 25,819 (claim for extra attic air ducts denied because no evidence of contractor reliance in preparing its bid).

[485] ASBCA No. 41717, 93-3 BCA ¶ 26,219.

[486] Western States Constr. Co. v. United States, 26 Cl. Ct. 818 (1992).

[487] *See* ENG BCA No. 5956, 93-2 BCA ¶ 25,673; *see also* American Transport Line, Ltd., ASBCA No. 44510, 93-3 BCA ¶ 26,156 (contractor's acquiescence for years in government's interpretation of requirements barred contractor's later claim for extra costs).

[488] ASBCA No. 38928, 93-2 BCA ¶ 25,895.

[489] GSBCA No. 11368, 93-3 BCA ¶ 26,233.

[490] AGBCA No. 92-191-1, 93-3 BCA ¶ 26,060.

[491] 987 F.2d 743 (Fed. Cir. 1993).

specification.[492] The Federal Circuit reversed, holding that allowing minor deviations from the drawings did not change the specification, and that the contract did not give the contractor the unlimited discretion required for a performance specification.

B. Contract Changes

1. Defective Specifications.—

(a) Contractor Must Comply with Specifications to Recover.—In *Mega Construction Co. v. United States*,[493] the government terminated a construction contract for default based, in part, on the pouring of a concrete slab that was defective because of the contractor's failure to install proper rebar and expansion joints in the slab. The contractor challenged the default termination by claiming that the specifications were defective. The court held that even if the specifications were defective, the contractor could not recover because it did not comply with the specifications.

(b) Implied Warranty in Design Specifications Does Not Warrant Compliance with Industry Standards.—In *Caddell Corp.*,[494] the Department of Veterans' Affairs (VA) awarded a contract for building renovation. The contract's ductwork drawings did not indicate the location of all smoke dampers in accordance with industry practice. However, other contract drawings did show the dampers' location. The board denied the contractor's claim for additional costs in installing dampers not shown on the ductwork drawings. The board reasoned that the contractor must read the entire contract, and that industry practice could not contradict the contract's clear requirements. The board also noted that the implied warranty of design specifications provides only that the specifications are sufficient for their intended purpose, not that the specifications comply with industry or trade standards.

(c) Government Losses Due to Defective Specifications.—In *Domgaard Associates v. General Services Administration*,[495] the contractor built GSA office space in Ogden, Utah. The contract required the office to have a "uniform lighting level" of fifty foot candles. Despite adding fifty additional lighting fixtures, the contractor was unable to obtain the required lighting level. The board held for the contractor, stating that the "uniform lighting level" requirement was unrealistic in light of industry practice.

A misuse of drawing symbols cost the government in *Prism Construction Co.*[496] On a drawing note for underground piping for a new maintenance facility, the government used a "typical" detail symbol for pipe hangers with an arrow pointing to underground compressed air lines. The contractor interpreted the note to mean that the contract required pipe hangers only on underground compressed air lines. The government directed the contractor to use pipe hangers on all underground lines. The board awarded the contractor its additional costs because although the symbol said "typical," the symbol only pointed to compressed lines. The board also placed great weight on the government's admission at hearing that it did not use the detail symbol in this case in a typical manner.

(d) Proceeding Without Proper Approval Dooms Contractor Claim of Defective Specifications.—In *Hogan Construction, Inc.*,[497] the contract required the contractor to submit its design to replace fascia board on columns for a school building to the contracting officer for approval. The specifications required the contractor to build the columns in accordance with the drawings, and the drawings required a level-appearing brick fascia effect. The contractor proceeded without obtaining the proper approval, and then asserted that the specifications were defective. The board rejected the contractor's argument, holding that a contractor proceeding without a required submittal approval proceeded at its own risk that the contracting officer would later disapprove the submittal and require corrective action.

2. Order of Precedence Clause May Not Be Used for Unjust Result.—In *McGhee Construction, Inc.*,[498] the contract specifications erroneously stated that the contractor had to remove 13,000 square feet of inner asbestos sealant. The contract drawings, however, showed 4300 square feet of asbestos sealant. The contractor based its bid price on removing 4300 square feet, and actually removed 4325 square feet. The government then claimed a net credit based on the difference in square footage between the specification quantity and the quantity removed, arguing that the contractor should have relied on the Order of Precedence clause[499] when formulating

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[492] Blake Constr. Co. v. United States, 25 Cl. Ct. 177 (1992).

[493] 29 Fed. Cl. 396 (1993).

[494] VABCA No. 3509, 93-3 BCA ¶ 26,114.

[495] GSBCA No. 11421, 93-3 BCA ¶ 25,955.

[496] ASBCA No. 43613, 93-3 BCA ¶ 26,137.

[497] ASBCA No. 37084, 93-2 BCA ¶ 25,758.

[498] ASBCA No. 45175, 93-3 BCA ¶ 26,154.

[499] FAR 52.236-21.

its bid. In rejecting the government's claim, the board held that the government could not use the Order of Precedence clause to achieve an inequitable result of reducing a contract price when the contractor did not use the Order of Precedence clause to overreach the government.

3. "Superior Knowledge" Cases.—

(a) Contractors' Successful Assertion of "Superior Knowledge."—In *Jack L. Olsen, Inc.*,[500] the Forest Service discovered in 1980 that borrow pits near the site of a proposed road were not sufficient, but stated that sufficient borrow pits existed when soliciting for road construction one year later. When the contractor discovered during construction that the local borrow pits were insufficient, the contractor claimed for the costs of bringing fill material from distant borrow pits. In finding for the contractor, the board held that the Forest Service should have disclosed the information that it obtained in 1980, especially when the contractor specifically asked before bid opening whether the local borrow pits were sufficient for the job. Further, the board held that it was unreasonable for the government to expect the contractor to perform its own prebid soil borings at the sites.

In *Ogden-HCI Services*,[501] the contractor operating a morale, welfare, and recreation activity claimed over $700,000 in additional costs, because of the government's withholding of financial information from a predecessor contractor, and because of interference from the government's failure to require the predecessor contractor to properly maintain the facilities. In its solicitation, the government had provided financial charts showing expected revenue from operations, but had not provided updated information in its possession which projected a reduced revenue. Moreover, the government did not provide the information even after the contractor asked for it. The board found for the contractor, holding that the financial information was vital for the proper preparation of offers; that the government should have updated its information; and that it was reasonable for the contractor to assume that the solicitation information was current. In addition, the board agreed with the contractor that the failure to require the predecessor contractor to properly maintain the facilities caused undue interference with the contractor's ability to perform the contract.

(b) Contractor's Unsuccessful Assertion of "Superior Knowledge."—In *United Standard Industries*,[502] the contractor claimed additional costs for alleged difficulty in making handle assemblies, based on defective design specifications and failure to provide information on prior manufacturing problems. In rejecting the claim, the board held that the contractor failed to show that the prior contractor (the original equipment manufacturer) had any production problems or that the government knew about the problems, if any. In addition, the board rejected the defective specification argument because the specification showed only the assembly's general characteristics and warned that the information given may not be sufficiently detailed.

In *Avisco, Inc.*,[503] a contractor claimed additional costs because of delays caused by a prior road relocation agreement between the federal government and the local county government. The board had little trouble disposing of the alleged superior knowledge claim, finding that the contractor should have known about the agreement because one of its key employees had actual knowledge of the scheduled relocation and finding that the agreement was a matter of public record that the contractor should have discovered.

The contractor, in *Cosmechem, Inc. v. General Services Administration*,[504] raised the government's alleged failure to disclose vital information as a defense to a termination for default based on failure to supply a pipe cleaning compound. The board rejected the defense for several different reasons. First, it found that the contract called for a commercial item, and the contractor thus had a duty to ascertain exactly what the contract required. Second, the attributes of the chemicals involved were available from other sources, so the government was not required to disclose the information to the contractor. Finally, the board held that the government does not have to disclose every possible difficulty that a contractor might face.

In *Caddell Construction Co.*[505] the contract required installation of new subsurface water lines. When the contractor attempted to run the new lines, it encountered storm drains not found in the contract drawings. After rerouting the lines, the contractor claimed for the additional costs, arguing that the specifications were defective and that the government knew about the preexisting lines. The board dismissed the defective specification claim because the specifications merely referred to the drawings, which stated that the preexisting line locations shown were approximate. On the superior knowledge claim, the board denied the claim because the contractor should have known about the preexisting lines, having built several of the lines under a prior contract.

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[500] AGBCA No. 87-345-1, 93-2 BCA ¶ 25,767.

[501] ASBCA No. 32169, 93-3 BCA ¶ 26,141.

[502] ASBCA No. 40067, 93-2 BCA ¶ 25,754.

[503] ENG BCA No. 5802, 93-3 BCA ¶ 26,172.

[504] GSBCA No. 12147, 93-3 BCA ¶ 26,057.

[505] ASBCA No. 43776, 93-3 BCA ¶ 26,001.

4. Number of Changes Does Not Result in Entitlement.—The Federal Claims Court denied a contractor's claim that a large number of contract change orders by the government entitles the contractor to additional costs automatically. In *Triax Co. v. United States,*[506] the contractor claimed in excess of two million dollars incurred in response to hundreds of minor change orders on a housing renovation project. The court denied the claim because it found that although the government issued numerous change orders, the changes did not cause any additional costs. Rather, the additional costs were attributable to the contractor's management inefficiency and underbidding.

5. Denial of Preferred Space to Exchange Concessionaire Is Not Government Interference.—In *Ritt Industries,*[507] a concessionaire claimed for lost profits because the concessionaire did not receive its requested space in the post exchange complex. The exchange assigned spaces to concessionaires on a "first-come, first-served" basis. The board denied the appeal, holding nothing in the concessionaire contract guaranteed the protester any set space, and that the exchange's policy of assigning concessionaire space on a "first-come, first-served" basis was a reasonable exercise of discretion.

6. Constructive Acceleration.—In *Intermax, Ltd.,*[508] the contractor alleged that the government constructively accelerated performance of a renovation contract by refusing to grant requested time extensions. However, the contractor never submitted a justification for the requests, and the government told the contractor that the government would only grant a properly justified request. The board held that to prevail on a claim for constructive acceleration, a contractor must show that the government issued an order or request to, or exerted some "pressure" on, the contractor to perform under the original schedule, despite the existence of excusable delay. Because there was neither proper justification to prove excusable delay nor pressure by the government to meet the original completion date, the board denied the claim.

7. Change in Space Launch Policy Is Not a "Sovereign Act" Excusing Contract Breach.—The Federal Circuit decided two cases on whether a presidential change in space launch policy was a "sovereign act" excusing the government from contract breach. In *Hughes Communications Galaxy, Inc. v. United States,*[509] Hughes had contracted with NASA in 1982 to launch ten commercial communications satellites through the space shuttle program, in accordance with then-current launch policy approved by the President and specifically referenced in the contract. The President changed the policy in 1986, however, by directing that NASA would only launch commercial payloads important to national security. In reversing the lower court,[510] the Federal Circuit held that the specific contract language referencing the launch policy—as it existed in 1982—controlled over more general language in the contract limiting NASA's obligation to provide launch services to "the extent consistent with United States' obligations . . . United States' Law and United States' Published Policy." As a result, the government waived its "sovereign act" defense by the contract terms.[511]

C. Value Engineering Change Proposal Cases

1. Savings Due to Reduced Need Not Compensable.—In *Hayes Targets, PEMCO Aeroplex,*[512] the ASBCA considered the effect of a value engineering change proposal (VECP) that reduced the required number of suppressors on Cobra helicopters. Later, the contractor claimed additional compensation based on the resultant savings. In denying the claim, the board held that "acquisition savings" under the VEC clause[513] did not include savings caused by the reduced need for an item.

2. Request for Deviation from Specifications Distinguished from VECP.—The Federal Claims Court considered a claim based on a VECP involving gaskets on five-gallon gas cans. In *Robin Industries v. United States,*[514] the contractor proposed relaxing contract specifications requiring gaskets suitable for arctic climates, which resulted in the cost of gaskets dropping from eight dollars to forty cents. In denying the contractor's claim, the court gave a detailed discussion of the scope of the VECP clause. It held that the contractor's proposal was actually a request for deviation from specification requirements because the new gaskets proposed by the contractor were inferior to the older gaskets.

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[506] 28 Fed. Cl. 733 (1993).

[507] ASBCA No. 39872, 93-3 BCA ¶ 26,013.

[508] ASBCA No. 41828, 93-2 BCA ¶ 25,699.

[509] 998 F.2d 953 (Fed. Cir. 1993).

[510] Hughes Communications Galaxy, Inc. v. United States, 26 Cl. Ct. 123 (1992).

[511] *See* American Satellite Co. v. United States, 998 F.2d 950 (Fed. Cir. 1993) (Federal Circuit remanded for determination of whether plaintiff's payload qualified under 1986 launch policy).

[512] ASBCA No. 44137, 93-3 BCA ¶ 25,999.

[513] FAR 52.248-1.

[514] 29 Fed. Cl. 122 (1993).

3. Value Engineering Change Proposal Savings Limited to Savings Realized by Agency Initially Using the VECP.—A contractor's share in the savings resulting from a successful VECP is limited to a share of the savings resulting from incorporation of the idea into items bought by the agency that initially accepted the VECP. Therefore, when the Army awarded a contract for an item incorporating a Navy VECP, after the Navy furnished the Army with the VECP through its technical data package for the item, the contractor was not entitled to a share of the savings realized by the Army as future contract savings.[515] The board found that the Army was not a successor agency to the Navy merely because it awarded the next procurement for the fuses covered by the VECP. The board also found that the Navy's furnishing of its technical data to the Army was not an assignment of procurement responsibility for the government.

D. Other Remedy Granting Clauses

1. Differing Site Conditions.—

(a) Combination of Conditions.—In *Glagola Construction Co.*,[516] a combination of bad weather and misdescribed soil conditions constituted a Type I differing site condition. The drawings indicated local sandy soil at the site, but the contractor expected some clay as well, because the site had been a containment area for fuel spillages. However, the amount of clay encountered, and unusually heavy rains, made conditions at the site much more difficult than expected. The absence of explicit solicitation statements regarding clay at the site did not bar a Type I recovery, because the solicitation drawings induced the contractor to expect more favorable conditions than it actually encountered.

(b) Site Investigations.—In *Valley Construction Co.*,[517] a contractor who extended its bid acceptance period, in response to the agency's request, recovered for increased work necessitated by flooding that occurred after bid opening but before award. In an appeal of first impression, the board reached this result despite the contractor's knowledge of the high water when it extended its bid. The board determined that a request to extend a bid must specifically address changes of this magnitude, if the government knows of the changes and intends to limit the contractor to the bid price. The board held that the request to extend the bid applied only to the bid as made, and did not require bidders to adjust their bids for changed conditions after the time of bid submission.

In *Operational Service Corp.*,[518] a mowing contractor recovered additional costs incurred to mow around trees planted at Fort Leonard Wood, Missouri, after bid opening. Although the contractor considered existing trees in preparing its bid, it did not consider the cost of mowing around hundreds of additional trees planted after bid opening, despite knowing about the Army's ongoing tree planting program. The contract was for services and did not contain a differing site conditions clause,[519] so the board permitted recovery on a constructive change theory. These decisions indicate two boards' willingness to consider favorably claims for additional costs caused by significant changes to a site occurring after bid opening.

2. Suspensions of Work.—

(a) Suspension of Interior Construction Work for Entire Winter Season Was Reasonable.—Although the government suspended work[520] for an entire winter season, the court denied appellant's claim for delay costs.[521] A subcontractor's failure to obtain approvals for asbestos removal delayed the start of work from July until mid-December, requiring a suspension of work during the winter to keep both boilers in an Air Force hospital working, as required in the contract. The court denied the claim because it determined that this was a reasonable delay period for which the contractor bore responsibility.[522]

(b) Sound Critical Path Analysis May Be the Critical Path to Recovery.—A well-maintained critical path analysis is often decisive in determining entitlement to an adjustment. In *Coffey Construction Co.*,[523] the contractor alleged that multiple government delays caused its late performance. The board ruled that because the contractor's critical path analysis was

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[515] Ordnance Devices, Inc., ASBCA No. 42709, 93-2 BCA ¶ 25,794.

[516] ASBCA No. 45579, 93-3 BCA ¶ 26,179.

[517] ENG BCA No. 6007, 93-3 BCA ¶ 26,171.

[518] ASBCA No. 37059, 93-3 BCA ¶ 26,190.

[519] FAR 52.236-2.

[520] *See* FAR 52.212-12 (Suspension of Work).

[521] Hvac Constr. Co. v. United States, 28 Fed. Cl. 690 (1993).

[522] *Id.* at 694. The court noted that prime contractors generally are responsible for the acts and omissions of their subcontractors. Therefore, the court found that the suspension resulted from the contractor's own fault or negligence, and held that the delay was noncompensable. *See* FAR 52.212-12(b).

[523] VABCA No. 3361, 93-2 BCA ¶ 25,788.

maintained poorly after its initial submission to the government, the contractor could not use the initial critical path analysis to assign responsibility for delays. Because the board was unable to apportion the causes of delay between the parties, or discern which activities were critical at any point in time, it denied the contractor's delay claim.[524] In *G. Bliudzius Contractors*,[525] the board held that a critical path analysis, or similar technique for demonstrating a connection between delayed work and overall project completion, is essential to recovery on a delay claim. Even though the contract did not require the contractor to use critical path methodology, the contractor needed more than "an array of war stories complaining about the Government's delay of the project. [The board had] no way of knowing what effect, if any, [the] mid-project items had on the delay of the project as a whole."[526]

(c) State Agency's Direction to Contractor Imputed to Contracting Officer.—A one-day delay caused by the Maryland Highway Administration was compensable, notwithstanding that the contracting officer did not issue any suspension of work order.[527] The Maryland Highway Administration prohibited the contractor from working during otherwise permissible hours because of concerns about traffic congestion following a hockey game. The board found that a special "Maintenance of Traffic" provision in the contract guaranteed the contractor access to the work site, and ruled that *any* denial of access by the contracting officer during scheduled working hours was unreasonable. Although the contracting officer did not order the suspension, the board imputed the suspension to him because of the federal entity's close working relationship with the Maryland Highway Administration.[528]

3. Liquidated Damages.—In *H.G. Reynolds Co.*,[529] the board held that excessive and conflicting government punch-lists—which included items not required by the contract—contributed to performance delays, and amounted to constructive changes. The board, therefore, denied the government's claim for liquidated damages for the contractor's late completion of required work. However, the board found the contractor partly responsible for the delays, so it also denied the contractor's delay claim.

A contractor is not excused from liquidated damages unless it shows that delays were excusable or beyond its control, and were not caused by the contractor's fault or negligence or that of its subcontractors.[530] If the contractor succeeds in making such a showing, the contracting officer's final decision excusing the contractor from some or all liquidated damages, is generally conclusive. However, the board may occasionally find that the government is not bound by the contracting officer's final decision. In *Potomac Marine & Aviation, Inc.*,[531] the board, sua sponte, found all delays under the contract inexcusable, and granted the government liquidated damages for the entire 315 days that the contractor was late, despite the contracting officer's final decision excusing thirty days of that period.[532]

4. Varying Interpretations of the Variations in Estimated Quantity (VEQ) Clause.[533]—When a contract prices work on a unit basis for an estimated quantity, and the actual quantity is either above 115% or below 85% of the quantity estimated, the parties often disagree about how to price the adjustment under the VEQ clause.[534] The issue has been whether quantities above or below the thresholds are repriced completely,[535]

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[524] The board also disallowed the government's withholding of liquidated damages, because it was uncertain whether the government caused delays in activities on the critical path which resulted in late project completion. *Id.*

[525] ASBCA No. 42366, 93-3 BCA ¶ 26,074.

[526] *Id.* at 129,592-129,593.

[527] Lane Constr. Corp., ENG BCA No. 5834 (Sept. 22, 1993), 94-1 BCA ¶ 26,358.

[528] *Cf.* Mergentime Corp., ENG BCA No. 5765, 92-2 BCA ¶ 25,007 (delay due to Secret Service instructions not compensable; no working relationship between Secret Service and contracting officer).

[529] ASBCA No. 42351, 93-2 BCA ¶ 25,797.

[530] *See, e.g.*, FAR 52.249-10(b)(1) (listing of excusable delays in the Default (Fixed-Price Construction) clause).

[531] ASBCA No. 42417, 93-2 BCA ¶ 25,865.

[532] The board's decision predates a recent Federal Circuit case holding that favorable determinations by the contracting officer may be *binding* evidentiary admissions against the government. *See* Wilner Constr. Co. v. United States, 994 F.2d 783, *reh'g en banc denied,* (Fed. Cir. Aug. 2, 1993). Whether this decision would be different if made after *Wilner* remains to be seen.

[533] FAR 52.212.11.

[534] The VEQ clause states in pertinent part that: "The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115% or below 85% of the estimated quantity." *Id.*

[535] *See, e.g.*, Burnett Constr. Co. v. United States, 26 Cl. Ct. 296 (1992); Bean Dredging Corp., ENG BCA 5507, 89-3 BCA ¶ 22,034.

or only partially based on an adjustment to the unit price of quantities outside the stated range.[536] The Federal Circuit applied United States Court of Claims precedent[537] requiring the latter interpretation in *Foley Co. v. United States.*[538] The court rejected the government's argument that work in excess of 115% of the estimated quantity should be repriced completely, because the government failed to show that the actual unit cost for work over the threshold differed from the actual unit cost for work within the allowable range. The three-judge panel split two-to-one on the decision, however, and the concurring judge indicated disagreement with the rationale of the precedential Court of Claims case.[539] For now the *Foley* decision controls interpretation of the VEQ clause, but further refinement of this interpretation by the Federal Circuit is possible.

In a pre-*Foley* decision, the board determined in *Diversified Technology & Services of Virginia, Inc.,*[540] that a service contractor was due reimbursement for costs incurred for a consultant, who was employed only because the quantity of work increased beyond the fifteen percent allowable variation. Applying a "but for" causation analysis, the board held that the consultant would not have been employed at all if the quantity of work had not exceeded that permissible range. Therefore, the total cost of employing the consultant was compensable under the Variation in Estimated Workload clause.[541]

5. General Risk and Responsibility Allocation Clauses.—The potentially harsh effects of the Permits and Responsibilities clause[542] may be mitigated, if the clause's application is limited by another clause in the contract. In *Hills Materials Co. v. Rice,*[543] the Federal Circuit held that the Accident Prevention clause's[544] requirement to "comply with the [safety] standards *issued* by the Secretary of Labor"[545] limited the applicability of the Permits and Responsibilities clause to safety standards in effect at the time of contract award. Thus, when the Occupational Safety and Health Administration amended its earthwork excavation regulations[546] after award, and required the contractor to move more earth, the government bore the cost of the increased effort.

E. Inspection, Acceptance, and Warranty

1. Inspection.

(a) Government Orders Additional Tests by Rejecting First Article Report.—In a contract for the manufacture of filter elements for F-15 aircraft, the government failed to include a provision requiring the contractor to perform a certain qualification test.[547] However, the contract allowed the government to require additional functional and performance testing "if deemed necessary by the government." The contracting officer rejected the contractor's First Article Test Report (FATR) for failing to perform the unspecified test. When the contractor continued to refuse to perform the unspecified test, the government terminated the contract for default. On appeal, the board determined that the government properly required the contractor to perform the unspecified test in its rejection of the FATR. The board reasoned that the govern-

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[536] *See, e.g.,* Foley Co. v. United States, 26 Cl. Ct. 936 (1992), *aff'd,* No. 93-5084 (Fed. Cir. Nov. 4, 1993) (repricing of unit prices *not* required); Clement-Mtarri Cos., ASBCA No. 38170, 92-3 BCA ¶ 25,192, *aff'd sub nom.,* Shannon v. Clement-Mtarri Cos., No. 93-1268 (Fed. Cir. Nov. 4, 1993) (unit price is *baseline* for equitable adjustment). These decisions would adjust unit prices only for the *difference* between the unit cost of performing the original quantity of work, and the unit cost of work outside the estimated range. This adjustment would leave the contractor with the same profit or loss on both the changed and original quantities. Complete repricing would provide the contractor a reasonable profit on the actual cost of the new quantity of work, regardless of the profit or loss incurred on the original quantity.

[537] *See* Victory Constr. Co. v. United States, 510 F.2d 1379 (Ct. Cl. 1975); *see also* South Corp. v. United States, 690 F.2d 1368, 1370-71 (Fed. Cir. 1982) (Federal Circuit is bound by Court of Claims precedent).

[538] No. 93-5084, 1993 U.S. App. LEXIS 28894 (Fed. Cir. Nov. 4, 1993).

[539] *Id.* at *5 (Lourie, C.J., concurring, and expressing a preference for the repricing of work based on changes in total cost, with allowance of a reasonable profit, "if writing on a clean slate").

[540] ASBCA No. 44961, 93-2 BCA ¶ 25,876.

[541] The service contract contained a Variation in Estimated Workload clause, included in the contract as a special provision, rather than the standard VEQ clause at FAR 52.212-11. The board did not note any distinction in its interpretation of this clause from its interpretation of FAR 52.212-11.

[542] FAR 52.236-7 (allocates to contractors the risk of remaining continuously in compliance with all regulatory requirements, and of bearing the costs of complying with changes and obtaining new permits or licenses that are necessary to perform federal construction contracts).

[543] 982 F.2d 514 (Fed. Cir. 1992).

[544] FAR 52.236-13.

[545] *Id.* 52.236-13(b)(2) (emphasis added).

[546] *See* 29 C.F.R. § 1926.652 (1992).

[547] Puroflow Corp., ASBCA No. 36058, 93-3 BCA ¶ 26,191.

ment had the right to direct additional testing, which it did implicitly by citing the absence of such testing as a defect in the FATR.

(b) Mere Mention of Test in Contract Not Sufficient.—In *CBI NA-CON, Inc.*,[548] the government asserted that a contract for powerhouse modernization required the contractor to perform factory load testing of steam turbine generators. The contract mentioned the load test in the introductory portion of a section entitled "Factory Tests," however, the contract did not include the test in its enumerated list of required tests. Citing the Latin phrase "expressio unius est exclusio alterius,"[549] the board determined that the contract reasonably could be read as not requiring performance of the test. The mere mention of the test in the introductory paragraph did "not command performance of the test."

(c) Excessive Government Inspection.—After a contractor substantially completed construction of a consolidated brig for the Navy, government project management personnel inspected the site and provided the contractor with a punchlist.[550] Shortly thereafter, the using agency conducted an "extremely meticulous inspection" and compiled a punchlist nearly twice as large as the first one. This second punchlist included some items that were not required by the contract. The board determined that the contractor was entitled to an equitable adjustment for increased costs due to the "multiple inspections to differing standards by differing officials," and for additional work performed at the direction of "over-zealous inspectors."

2. *Acceptance.*—

(a) Replacement of Concrete Slab Not Economic Waste.—In *Shirley Construction Corp.*,[551] the government ordered the contractor to replace a concrete slab after core samples showed that it did not meet contract requirements. Although the slab was of sufficient thickness to support the design load, the contractor failed to place wire fabric in the appropriate place within the slab. On appeal, the contractor asserted that the doctrine of economic waste[552] precluded the government from requiring replacement of the slab. The board disagreed, finding that the doctrine of economic waste did not apply because the slab did not substantially comply with contract requirements. The board reasoned that because the purpose of the wire fabric was to prevent future cracking, the slab could not be considered "serviceable."

(b) Government May Reject "Equal" Product.—The Army issued a solicitation to convert long distance heating lines that required the use of "Kabelmetal or equal" steel armored conduit pipe.[553] The contractor failed to specify in its bid that it intended to use an "equal" product. After award, the contracting officer refused the contractor's request to use an "equal" brand of pipe, insisting that the contract required the contractor to use the brand name product. The board upheld the contracting officer's refusal to permit substitution of the "equal" pipe, even though the board determined that the pipe met the salient characteristics of the specifications. Citing an often used comment,[554] the board noted that if a contractor could "bind himself to build a snowman in August," a contractor also could bind himself to supply a brand name product.[555]

(c) Government Changes to Product Preclude Rejection.—In *The Interlake Cos. v. General Services Administration*,[556] the government modified a contract for a material handling system to include a computerized diagnostic system. The contractor programmed the computer system to respond to signals from the material handling system as designed by

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[548] ASBCA No. 42268, 93-3 BCA ¶ 26,187.

[549] "The expression of one thing is the exclusion of the other." We are relying on the board for its interpretation of this phrase, being a bit rusty in latin ourselves.

[550] H. G. Reynolds Co., ASBCA No. 42351, 93-2 BCA ¶ 25,797.

[551] ASBCA No. 41098, 93-3 BCA ¶ 26,245.

[552] The doctrine holds that the government may not require correction of noncompliant construction work if, as completed, the work is suitable for its intended purpose and the cost of correction would far exceed the gain that would be realized. *See* Granite Constr. Co. v. United States, 962 F.2d 998 (Fed. Cir. 1992), *cert. denied,* 113 S. Ct. 965 (1993).

[553] Meisel Rohrbau, GmbH, ASBCA No. 35622, 93-3 BCA ¶ 26,222, *aff'd on recon.,* (Nov. 19, 1993), 94-1 BCA ¶ ___. The solicitation included a "brand name or equal" clause which stated that the government would consider an offer to be for the brand name product unless the offer clearly indicated that it was for an "equal" product. *See* DFARS, *supra* note 27, at 252.210-7000.

[554] *See* Blake Constr. Co. v. United States, 28 Fed. Cl. 672 (1993); Teledyne Lewisburg, ASBCA No. 20491, 79-2 BCA ¶ 14,165; Rixon Elecs. v. United States, 21 Ct. Cl. 309, 536 F.2d 1345 (1976).

[555] The ubiquitous "snowman" has quite an extensive life outside of government contract law. *See* Doe v. Small, 964 F.2d 611 (7th Cir. 1992) (snowman as part of Christmas display); Papercutter Inc. v. Fay's Drug Co., 900 F.2d 558 (2d Cir. 1990) (snowman involved in trademark infringement case); Contreras-Aragon v. Immigration and Naturalization Serv., 852 F.2d 1088 (9th Cir. 1988) (dissenting opinion accuses majority of building "a snowman only to melt it with the heat of its rhetoric"); Fiorillo v. Department of Justice, 795 F.2d 1544 (Fed. Cir. 1986) (Falcon and the Snowman); Dennis v. General Elec. Corp., 762 F.2d 365 (4th Cir. 1985) (civil suit alleging negligent exposure to radiation—juror asks whether he was prohibited from watching "Frosty the Snowman" because it involved possible meltdown); Eden Toys v. Marshall Field & Co., 675 F.2d 498 (2d Cir. 1982) (snowman involved in copyright infringement case); Big O Tire Dealers, Inc. v. Goodyear Tire and Rubber Co., 561 F.2d 1365 (10th Cir. 1977) (Abominable Snowman).

[556] GSBCA No. 11876, 93-2 BCA ¶ 25,813.

the contractor. After the contractor installed the computer system, government personnel made numerous changes to the material handling system, including eliminating conveyors and adding various foot switches and motors. The government then refused to accept the computer system when it failed to function properly. In sustaining the contractor's appeal, the board found that the government's changes to the material handling system rendered the computer's preprogrammed logic useless. Because the contractor was not at fault, the government could not properly refuse to accept the computer system. The board concluded that the government "will now pay full price for a nonfunctional" computer.

3. Government Bears Burden of Proving Warranty Claim.—In a fixed-price supply contract for Marine Corps men's dress coats, the contractor warranted that the coats would be free of defects for one year.[557] After delivery, the contracting officer asserted a government claim against the contractor for defects in the coats. The board held that the government failed to prove all the elements of its warranty claim because the government used an erroneous method to inspect for defects and inconsistently allocated the cost of repairing the defects. Accordingly, the board reduced the government's claim against the contractor.

F. Terminations for Default

1. Decision to Terminate.—

(a) Directive to ACO Tainted the Termination.—In *Walsky Construction Co.*,[558] the Air Force awarded a contract for roof replacement. Less than two weeks later, the director of contracting at another base, a lieutenant colonel, advised the ACO that the Corps of Engineers was trying to deny award of another contract to the contractor. He then directed the ACO to monitor the contractor "more than normal" and to terminate the contract if the "smallest thing goes wrong." One month later, the ACO terminated the roofing contract for default. On appeal, the board determined that the lieutenant colonel's directive "impermissibly tainted" the termination and converted the termination to one for the convenience of the government. Although the government had technical reasons to terminate the contract—such as the contractor's failure to provide timely submittals—the government abused its discretion because the termination resulted from a predisposition against the contractor.

(b) Agreement That Work Is Complete Precludes Termination.—In an exchange of letters, a contracting officer agreed to deem a contract complete in exchange for the contractor's agreement to release all claims against the government.[559] Subsequently, a new contracting officer ordered the contractor to complete the unfinished work, and terminated the contract for default when the contractor refused. The board declared the termination a nullity, finding that the agreement between the government and the contractor was a binding contract, and awarded the contractor its allowable costs.

2. Excusable Delay.—

(a) Death Is Not an "Act of God."—In *Centennial Leasing v. General Services Administration*,[560] the contracting officer terminated a contract for default because the contractor failed to meet the contract delivery schedule. The contractor asserted that the default was excused because of an act of God: the death of the chief operating officer of the firm that was to provide financing to the contractor. The board rejected this argument, finding that the contractor was responsible for having the cash needed to perform the contract. When a lender fails to advance funds, the contractor is obligated to find alternate financing, notwithstanding the illness or death of a key person in the lending organization.[561]

(b) Commercial Impracticability Not Available.—A contractor's failure to perform may be excused as commercially impracticable if the cost of complying with the contract is so exorbitant that no willing buyer would pay for the work.[562] In *C&M Machine Products*,[563] the government awarded a contract for the production of piston rods at a unit price of $211.60. Subsequently, the contractor's vendor failed to apply nickel/chrome plating to piston rods per its agreement with the contractor. After the contractor received quotes from other vendors to perform the plating process, it proposed increasing the unit price to $434.50 (a 105% increase). The government rejected the proposal and eventually terminated the contract for failure to deliver the piston rods. On appeal, the board determined that performance was not commercially impracticable because the plating cost was not so exorbitant that no buyer would be willing to pay a price which included that cost.

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[557] Globe Corp., ASBCA No. 45131, 93-3 BCA ¶ 25,968.

[558] ASBCA No. 41541, 94-1 BCA ¶ 26,264.

[559] Folk Constr. Co., ENG BCA No. 5839, 93-3 BCA ¶ 26,094.

[560] GSBCA No. 12037 (Sept. 15, 1993), 94-1 BCA ¶ ____.

[561] *See* M.W. Microwave Corp., ASBCA No. 45084, 93-3 BCA ¶ 26,027 (where contract is awarded to a corporation, the illness of a key person in the organization generally does not excuse the corporation's failure to perform).

[562] *See* RAPOCO, Inc., ASBCA No. 39371, 93-1 BCA ¶ 25,308.

[563] ASBCA No. 43348, 93-2 BCA ¶ 25,748.

3. Waiver of Delivery Schedule.—

(a) Government's Failure to Reestablish Delivery Schedule Prohibits Termination.—The Navy encouraged a contractor to continue performing after the contractor failed to deliver metal instrument cases by the original delivery date under a fixed-price supply contract.[564] Although the Navy received and evaluated a partial shipment of instrument cases one month after the delivery date, it later attempted to enforce the original delivery date by issuing a "show cause" letter which gave the contractor ten days to present a plan "for curing the conditions endangering performance."[565] When the contractor failed to respond, the Navy terminated the contract for default. The board determined that the termination was improper because the Navy had waived the original delivery date and failed to establish a new one. Moreover, the board held that the government may not use a "cure notice" to revive a delivery schedule. Without a definite delivery date, the contractor could not be in default for failing to make progress.

(b) Retest of Product After Delivery Date Not a Waiver.—In *Cosmechem Co. v. General Services Administration*,[566] the contractor failed to meet contract performance specifications for an alkaline pipe cleaning compound prior to the delivery date. The government issued a show cause notice after the delivery date, then conducted a second inspection of the product without rescheduling an extended delivery date. In upholding the government's termination of the contract for default, the board found that the government indicated an intent to waive delivery "only until the product could be tested a second time." Because the contractor failed to meet performance specifications on the second test, the government did not waive delivery.

(c) No Waiver of Delivery Schedule Without Detrimental Reliance.—In *Ordnance Parts & Engineering Co.*,[567] the government awarded a contract for "rat guards."[568] The contractor advised the government shortly after award that it would not manufacture the rat guards because of substantial cost increases. The government issued a show cause letter ten months later, but did not terminate the contract for default until two years thereafter. The board rejected the contractor's arguments that the government waived the delivery schedule and, therefore, the right to terminate the contract for default, holding that detrimental reliance is an "essential element of establishing a waiver." The contractor did not detrimentally rely on the government's forbearance because the contractor repudiated the contract and had no intention of performing.

4. Reprocurement of Defaulted Contract.—

(a) Board Limits Fulford.—The *Fulford* doctrine permits a contractor, in an appeal from a contracting officer's decision assessing excess costs, to challenge the validity of the termination for default, although it did not appeal the termination decision.[569] In *Bulloch International, Inc.*,[570] the contractor had appealed its termination for default, but the board dismissed the appeal with prejudice for failure to prosecute. Subsequently, the contracting officer issued a final decision granting the government excess reprocurement costs. On appeal, the contractor challenged the excess costs and the underlying termination for default. The board declined to extend the *Fulford* doctrine, holding that the earlier dismissal was an adjudication on the merits that precluded relitigation of the termination decision.

(b) Government May Be Required to Negotiate with Reprocurement Contractor.—After a default termination, the government solicited offers for the reprocurement of filter elements for F-15 aircraft.[571] Three firms submitted offers, but the government determined that one of the firms was nonresponsible. Without negotiating, the contracting officer awarded a contract to the low offeror at a price which was 12.5% higher than its bid price on the original procurement eighteen months earlier. The other firm, Air Porous Medium (APM), had submitted an offer that was twelve percent higher than its price on an identical contract which was awarded three months earlier. The board determined that, in these circumstances, the government was required to negotiate with the offerors to mitigate the defaulted contractor's damages.[572]

(c) Government Must Mitigate Costs Prior to Exercise of Reprocurement Option.—After a default termination, the government generally may reprocure for the entire period of the

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[564] Lanzen Fabricating, ASBCA No. 40328, 93-3 BCA ¶ 26,079.

[565] FAR 49.402-3(d); 49.607(a) require the government to issue a cure notice before terminating a contract for default before the delivery date. Although calling it a "show cause notice," the government in *Lanzen* apparently tried to issue a "cure notice."

[566] GSBCA No. 12147, 93-3 BCA ¶ 26,057.

[567] ASBCA No. 44327, 93-2 BCA ¶ 25,690.

[568] As the board helpfully explained, the guards are placed on ships' mooring lines to prevent rats "of the four-legged variety" from boarding.

[569] The doctrine takes its name from Fulford Mfg. Co., ASBCA No. 2144, 6 CCF ¶ 61,815.

[570] ASBCA No. 44210, 93-2 BCA ¶ 25,692.

[571] Puroflow Corp., ASBCA No. 36058, 93-3 BCA ¶ 26,191.

[572] The board reduced the government's recovery of excess reprocurement costs to the difference between the original contract price and APM's contract price.

original contract, including option years.[573] Nevertheless, in *Ross & McDonald Contracting, GmbH*,[574] the board refused to award the government its excess reprocurement costs associated with the options on a reprocurement contract. The board found that the contracting officer failed to make the determination required in FAR 17.207,[575] and otherwise failed to mitigate costs before exercising the options.

(d) Unclear Specifications Do Not Prevent Mitigation.—In *Etex Co.*,[576] the government reprocured elastic bandages at excess cost after a contractor defaulted. The contractor asserted on appeal that the government failed to mitigate its excess reprocurement costs because it improperly insisted on strict compliance with unclear specifications. The board acknowledged that there was "confusion on all sides" about the original contract requirements,[577] but determined that the contracting officer's decision to use the same specifications for the reprocurement was reasonable.

(e) Award to Next Low Offeror May Comply with Competition Requirements.—In a reprocurement for hazardous waste management services, the Navy negotiated an award for the remainder of the defaulted contract with the next low, acceptable offeror from the original competition.[578] The high priced offeror from the original competition protested the reprocurement, asserting that the contracting officer failed to comply with the *FAR* requirement to obtain competition "to the maximum extent practicable" on reprocurement contracts.[579] The GAO denied the protest, finding that a contracting officer reasonably may award a reprocurement contract to the next low, qualified offeror on the original solicitation at its original price when there is a relatively short time span between the original competition and the default. The GAO reasoned that the original competition "remained an accurate index of the competitive environment" because at the time of the reprocurement, only sixty days had passed since the award of the original contract.

5. Post-Termination Costs—Contractor May Not Recover Cost of Securing Premises After Termination.—In *Mega Construction Co. v. United States*,[580] the government directed the contractor's surety to maintain security on the project site following a termination for default. After the surety told the contractor of the government's demand, the contractor provided security at the site. The contractor appealed, arguing that it was entitled to recover the costs of complying with the government's demand. The court disagreed, finding that the government's directive to the surety did not create privity of contract with the defaulted contractor. The court further found that without authorization, any work performed by the contractor after termination is not compensable. The court noted that, on receiving a notice of termination for default, the contractor must vacate the premises immediately.

G. Terminations for Convenience

1. Regulatory Changes—Notification Requirements for Termination or Reduction of Defense Programs.—The DOD has issued an interim rule requiring military departments and defense agencies to notify contractors of a potential termination of, or substantial reduction in, a defense program.[581] Under the new rule, each military department and defense agency must establish procedures for determining which defense programs are likely to be terminated or substantially reduced as a result of the submission of the President's budget or enactment of an appropriations act. Within thirty days of such submission or enactment, agencies and military departments must notify affected contractors of the proposed termination or reduction. Affected contractors are those with a contract of $500,000 or more under a program identified as likely to be terminated or reduced by at least twenty-five percent. Within two weeks after receiving notice from the government, contractors must notify, among others, their affected employees and subcontractors of the proposed termination or reduction.

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[573] *See* Lewis Mgt. & Serv. Co., ASBCA No. 24802, 85-3 BCA ¶ 18,416.

[574] ASBCA No. 38154, 94-1 BCA ¶ 26,316.

[575] This provision states that when exercising an option, the contracting officer, "after considering price and other factors," shall make a determination that the option price is the best price available or more advantageous to the government. This determination must be based on either a new solicitation, an informal market analysis, or the short period of time between the award of the contract and the exercise of the option.

[576] VABCA No. 3415, 93-3 BCA ¶ 26,116.

[577] The specifications required the bandages to have rubber strands "woven-in." Neither the contractor nor the government could explain the difference between bandages that had rubber strands "knitted-in" and bandages that had rubber strands "woven-in." The contractor argued on appeal that, because of this uncertainty, the government should have relaxed the "woven-in" requirement on reprocurement, thereby reducing costs.

[578] International Technology Corp., B-250377.5, Aug. 18, 1993, 93-2 CPD ¶ 102.

[579] FAR 49.402-6(b). This provision also states that the contracting officer may use "any terms and acquisition method deemed appropriate for the repurchase."

[580] 29 Fed. Cl. 396 (1993). "A rose by any other name . . . ." No doubt Judge Tidwell had Shakespeare on his mind when writing this 89-page "Mega" opinion. Lift with care.

[581] 58 Fed. Reg. 43,285 (effective Aug. 9, 1993, amending DFARS parts 249 and 252 by adding §§ 249.7003 and 252.249-7002). The rule implements section 4471 of the National Defense Authorization Act for 1993, Pub. L. No. 102-484, 106 Stat. 2315 (1992).

2. *Decision to Terminate.*—

(a) Constructive Termination Not Available when Agency Fails to Order Minimum Quantity.—The EPA issued an IFB for an indefinite quantity contract for chemical analytical services.[582] The IFB required bidders to agree in advance that if the government failed to terminate the contract for convenience, the government's failure to order the specified minimum quantity would be "treated as a termination for convenience." The GAO sustained the protester's challenge to this provision, finding that the EPA was seeking to convert a breach of contract into a termination for convenience, in contravention of the Federal Circuit's decision in *Maxima Corp. v. United States*.[583] The GAO reasoned that the termination for convenience clause does not give the government a unilateral right to abandon its contractual obligations or renegotiate a contract after it has been fully performed. Thus, an agency must affirmatively terminate a contract for convenience prior to the end of performance.

(b) Torncello[584] *Lives.*—In *Operational Service Corp.*,[585] the board held that a contracting officer's decision to terminate a grass mowing contract for the convenience of the government was a breach of contract. The government had awarded the contract (with two option years) while it was conducting a commercial activities (CA) study for post maintenance. At the time the government exercised the option for the first year, it knew that it would be either awarding a CA contract or performing the work in house. Because the government intended to terminate the contract at the time it exercised the option, the termination was an abuse of discretion and a breach of the contract.

(c) Inept Government Actions Do Not Constitute Bad Faith.—The government awarded a contract to replace siding on family housing units at Fort Devens, Massachusetts.[586] Unfortunately for the government, military personnel still occupied the housing units, which prevented the commencement of work after issuance of the notice to proceed. The government eventually terminated the contract for convenience. The contractor argued, inter alia, that the government breached its contract in that it terminated the contract in bad faith, because it still had a requirement to complete the construction work. The board denied the contractor's appeal, finding that the government's termination did not, by itself, breach the contract. The board reasoned that the government's disregard that military personnel occupying the housing units would delay contract performance, while inept, did not constitute bad faith.

3. *Timeliness of Settlement Proposals.*—The termination for convenience clause requires a contractor to submit a final termination settlement proposal to the contracting officer no later than one year from the effective date of the termination.[587] In *Mediax Interactive Technologies, Inc.*,[588] the government asserted that the contractor had failed to submit its settlement proposal within the required time. The contractor filed its termination proposal in 1984 (within one year of the termination), but the board dismissed the associated claim in 1988 for lack of certification. The contractor did not file a revised proposal with the contracting officer until 1991. The board determined that the contractor's 1991 proposal was timely because it was a revision of the earlier, timely proposal. Further, the board rejected the government's argument that the proposal was barred by the doctrine of laches, because the government could not demonstrate that the contractor lacked diligence or that the government suffered prejudice.

In *Jo-Bar Manufacturing Corp.*,[589] the government argued that a contractor's settlement proposal was not timely because the government did not receive it within one year of the termination. The board held that the timeliness of a settlement proposal is determined by the date of mailing, not the date of receipt by the contracting officer. Accordingly, the contracting officer must consider a settlement proposal that is mailed within one year after the contractor receives notice of the termination.

4. *Termination for Convenience Recovery.*—

(a) Government Did Not Forfeit Right to Contract Price as Ceiling on Recovery.—In *Tom Shaw Inc.*,[590] the contractor

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[582] Southwest Lab. of Okla., Inc., B-251778, May 5, 1993, 93-1 CPD ¶ 368.

[583] 847 F.2d. 1549 (Fed. Cir. 1988) (the government may not retroactively terminate a fully performed contract in an effort to limit its liability for failing to order the minimum quantity specified in the contract).

[584] *See* Torncello v. United States, 681 F.2d 756 (Cl. Ct. 1982) (when government contracts with a party knowing full well that it will not honor contract, termination for convenience is improper); *see also* Salsbury Indus. v. United States, 905 F.2d 1518 (Fed. Cir. 1990).

[585] ASBCA No. 37059, 93-3 BCA ¶ 26,190.

[586] TLT Constr. Corp., ASBCA No. 40501, 93-3 BCA ¶ 25,978.

[587] *See* FAR 52.249-2(d).

[588] ASBCA No. 43961, 93-3 BCA ¶ 26,071.

[589] ASBCA No. 39572, 93-2 BCA ¶ 25,756.

[590] ENG BCA No. 5540, 93-2 BCA ¶ 25,742.

claimed entitlement to $10.3 million after the government terminated for convenience a $2.3 million fixed-price contract to repair a breakwater. The contractor asserted that the government had forfeited the right to use the contract price as a limitation on the termination claim because it had offered to settle in excess of the contract price, and actually had made payments exceeding the contract price. The board disagreed, holding that the government does not forfeit its right to apply the contract price as a ceiling by exceeding the contract price with a settlement offer, a partial settlement offer, or a unilateral determination. The board reasoned that the contract price as a ceiling is "logically related to the fact that payments under a fixed-price contract would amount to the contract price if the work were completed." Further, the board noted that the termination clause itself requires the contractor to repay to the government any payments in excess of the amount "determined to be due."[591]

(b) Government May Disallow Proportionate Share of Settlement Preparation Costs Related to Unallowable Costs.—In *Woodington Corp.*,[592] the Coast Guard terminated for convenience a contract for an electric distribution system. The contractor submitted a settlement proposal seeking reimbursement for the value of salvageable material which the government had refused to let the contractor remove after the termination. The board denied the contractor's claim, finding that the contract clearly stated that title to the salvageable material would not pass to the contractor until removal from the site, an event which did not occur due to the termination. Further, the board agreed with the Coast Guard's request to deny that portion of the contractor's claim for proposal preparation costs and negotiations related to the salvageable material. In light of the "clear statement in the specifications" that title would only pass on removal, the board determined that the contractor's expenditure of such sums was not reasonable. The board did note, however, that in some cases it may well be reasonable for a contractor to include, in a termination settlement proposal, "items which may ultimately be determined to be unallowable."

H. Pricing of Contract Adjustments

1. Eichleay *Formula*[593] *Applied to Manufacturing Contract.*—Courts and boards use the *Eichleay* formula—generally in construction contracts—to quantify the contractor's unabsorbed overhead incurred during government-caused delays.[594] Although recent cases have limited *Eichleay*'s applicability,[595] the board recently used *Eichleay* to measure unabsorbed overhead in a supply contract.[596] The board noted that appellant's actual overhead rates were lower than the rates appellant proposed in its offer, and decided that the *Allegheny* formula could not be used.[597] Acknowledging that "application of an 'Eichleay formula' . . . to a manufacturing contract . . . is rare," the board applied it and awarded appellant sixty-one percent of its daily overhead to compensate appellant for a sixty-one percent reduction in direct costs that would have absorbed its overhead but for the government-caused delay.

2. Jury Verdict Technique Used Despite Contractor's Failure to Segregate Costs.—Under the jury verdict technique of pricing contract adjustments, the contractor must establish, inter alia, that a no more reliable method of computing damages exists.[598] In *Service Engineering Co.*,[599] a fixed-price contractor submitted a request for equitable adjustment based on estimates, even though the contractor had a computerized cost management system capable of recording costs accurately. The government argued that the board should not use the jury verdict technique because there was a "more reliable method of computing damages," which the contractor failed to use. The board disagreed, finding that "it costs money to collect data" and the contractor's system, even if used, could not possibly segregate costs between originally required work and changed work.

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[591] *See* FAR 52.249-2(l)(2).

[592] DOT BCA No. 2592, 93-3 BCA ¶ 26,090.

[593] The *Eichleay* formula takes its name from Eichleay Corp., ASBCA No. 5183, 60-2 BCA ¶ 2688.

[594] *See, e.g.*, Do-Well Mach. Shop, ASBCA No. 35867, 92-2 BCA ¶ 24,843, where the board stated that "[t]he Eichleay formula was fashioned to deal with extended and unabsorbed home office overhead on construction contracts." *Id.* at 123,959.

[595] *See, e.g.*, C.B.C. Enters. v. United States, 978 F.2d 669, (Fed. Cir. 1992); Capital Elec. Co. v. United States, 729 F.2d 743, (Fed. Cir. 1984); CS&T Gen. Contractors, ASBCA No. 43657, 93-3 BCA ¶ 26,003; Debcon, Inc., ASBCA No. 45050, 93-3 BCA ¶ 25,906; Decker & Co., GmbH, ASBCA No. 38657, 92-2 BCA ¶ 24,970; Interstate Gen. Gov't Contractors, ASBCA No. 43369, 92-2 BCA ¶ 24,956; Charles G. Williams Constr., ASBCA No. 42592, 92-1 BCA ¶ 24,635; Gaffney Corp., ASBCA No. 36497, 91-2 BCA ¶ 23,811.

[596] So-Pak Co., ASBCA No. 38906, 93-3 BCA ¶ 26,215.

[597] The *Allegheny* formula, which is the method generally used to measure overhead expenses in supply contracts, awards the contractor the difference between the contractor's actual overhead rates and the rates the contractor proposed in its offer.

[598] The other prerequisites for applying this technique are clear proof of injury and evidence sufficient to make a fair and reasonable approximation of the damages. Dawco Constr. v. United States, 930 F.2d 872, 882 (Fed. Cir. 1991).

[599] ASBCA No. 40274, 93-2 BCA ¶ 25,885.

3. Contractor Denied Profit on Additional Work.—An equitable adjustment generally includes a reasonable profit on the contractor's allowable costs incurred to perform additional or changed work,[600] and it should be priced independent of the work originally required by the contract, so that it does not affect the contractor's loss or profit on the original work.[601] The board deviated from these established principles, however, in *BH Services*,[602] when it denied the contractor's claim for profit on costs incurred to perform additional work, because the contractor was performing the original contract at a loss. The board held that "[w]hen a contractor underestimates its costs in bidding, it may not use the equitable adjustment process to convert a loss to a profit."

I. Contract Disputes Act Litigation

1. Jurisdiction.—

(a) Court Appeal Filing Period Extended.—41 U.S.C. § 609(a) provides that the time for appealing a contracting officer's final decision to the Federal Claims Court is twelve months. Court Rule 6(a)[603] provides that the time is extended when the last day of the period is a Saturday, Sunday, or legal holiday. Nevertheless, the court recently dismissed an appeal for lack of jurisdiction after the contractor filed its appeal on Monday, December 10, 1990, although the final day of the twelve-month appeal period was Saturday, December 8, 1990. On appeal, a divided Federal Circuit held that a filing on the first day following a weekend or national holiday was timely and did not improperly expand the court's jurisdiction.[604]

(b) Postmark Determines FCAA Applicability.—The Federal Courts Administration Act of 1992 (FCAA), which amended the CDA[605] to permit contractors to recertify defectively certified claims, applies to appeals filed after the effective date of the FCAA. In determining the applicability of the FCAA, the board held that an appeal was filed when postmarked, and that the date on a postmark is presumably the date of filing.[606]

(c) Board Jurisdiction Includes Review of Fund Control Statutes.—An agency board has jurisdiction to decide whether the Navy complied with applicable fund control statutes when exercising a contract option.[607] Cessna Aircraft challenged the Navy's exercise of a three-year option following a five-year contract, arguing that the Navy's exercise of the option was ineffective because the government had not complied with the Antideficiency Act. The Navy responded that the board lacked jurisdiction to consider the associated appeal. The board found, however, that it had jurisdiction to consider the Navy's compliance with the fund control statute because the CDA grants jurisdiction over "any appeal from a decision of a contracting officer *relative* to a contract made by its agency."[608]

(d) Court Loses Jurisdiction when Case Filed Elsewhere.—The Federal Claims Court lost subject matter jurisdiction over a pending claim when a contractor filed a complaint based on the same operative facts in a federal district court.[609] While involved as the plaintiff in a taking action in the Federal Claims Court, Cascade filed a writ of mandamus in the district court to exhaust administrative remedies as mandated by the Federal Circuit. Notwithstanding Cascade's reason for filing, that filing invoked the jurisdictional bar of 28 U.S.C. § 1500, which divests the Federal Claims Court of jurisdiction over a claim whenever a corresponding claim is pending or has been disposed of in another federal court.

(e) Counterclaim Dismissed for Lack of Monetary Claim.—The Federal Circuit dismissed a government counterclaim after the lower court awarded the government approximately $1.4 million.[610] The government terminated for

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[600] *See, e.g.*, United States v. Callahan Walker Constr. Co., 317 U.S. 56 (1942); Aerojet-Gen. Corp., ASBCA No. 17171, 74-2 BCA ¶ 10,863; Pacific Architects & Eng'rs v. United States, 491 F.2d 734 (Ct. Cl. 1974).

[601] *See* Delco Elecs. Corp. v. United States, 17 Cl. Ct. 302 (1989), *aff'd*, 909 F.2d 1495 (Fed. Cir. 1990); Cen-Vi-Ro of Texas, Inc. v. United States, 538 F.2d 348 (Ct. Cl. 1976).

[602] ASBCA No. 39460, 93-3 BCA ¶ 26,082.

[603] U.S. CT. FED. CL. R. 6(a).

[604] Wood-Ivey Sys. v. United States, 4 F.3d 961 (Fed. Cir. 1993).

[605] 41 U.S.C. §§ 601-613.

[606] Engineered Maint. Servs., ASBCA No. 45261, 94-1 BCA ¶ 26,292.

[607] Cessna Aircraft Co., ASBCA No. 43196, 93-3 BCA ¶ 25,912.

[608] *Id.* at 128,881.

[609] *See* Cascade Dev. Co. v. United States, 27 Fed. Cl. 595 (1993); *see also* Allstate Fin. Corp. v. United States, 29 Fed. Cl. 366 (1993) (court lacked jurisdiction due to pending district court action for same claim).

[610] *See* Sharman Co. v. United States, 2 F.3d 1564 (Fed. Cir. 1993); *see also* Van Elk, Ltd., ASBCA No. 45311, 93-3 BCA ¶ 25,995 (no final decision—liquidated damages).

default a contract for water tanks in August 1989, but made no demand for the return of unliquidated progress payments. In September 1989, the government issued a "notice and demand for payment." At the hearing, the lower court found entitlement for the government based on the government's default termination letter, the subsequent notice, or some combination thereof. On appeal, the Federal Circuit dismissed the government's counterclaim for lack of jurisdiction, because the default termination letter was not a final decision regarding progress payments because it asserted no monetary claim. Furthermore, the subsequent letter was not a final decision because it was not so designated and it invited a counterproposal.

2. *Certification.*—

(a) Court Stands by Grumman.—The Federal Circuit refused to reconsider *Grumman.*[611] A contractor argued that the court should reconsider *Grumman* because the case diverged from existing law and should not be applied retroactively.[612] The Federal Circuit disagreed. It held that the Office of Federal Procurement Policy (OFPP) promulgated FAR 33.207(c)(2) properly; and that FAR 33.207(c)(2) does not limit the CDA[613] but, rather, "implements the statute." It also rejected the argument against retroactive application because the *Grumman* court applied the standards in the case retroactively to *Grumman* itself.

(b) "No Certification" Does Not Mean "Defective Certification."—The FCAA permits contractors to correct defectively certified claims while on appeal, but does not permit them to certify uncertified claims.[614] Section 907(a) of the FCAA states:

> A defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency board of contract appeals, the court or agency board shall require a defective certification to be corrected.

This language presupposes an existing certification. When none exists, there is nothing to correct, and the courts and boards lack jurisdiction to entertain the appeal of the uncertified request for adjustment.

(c) Revised Claim Requires Certification.—The board dismissed an appellant's claim because it was uncertified, although it required no certification when submitted.[615] The claim was under $50,000 and required no certification when submitted, but it totalled approximately $80,000 by the time of hearing. Appellant failed to prove that the increased amount of the claim was based on information that was not reasonably available when it filed its original claim. Absent that proof or certification, the board lacked jurisdiction.

(d) Contractor Must Certify Liquidated Damages Claim.—In *Spartan Building Corp.*,[616] the government withheld liquidated damages, but asserted no liquidated damages claim against the contractor. The contractor later submitted a certified claim, which the contracting officer denied, seeking relief on other grounds but making no mention of the assessment of liquidated damages. On appeal, the board dismissed, for lack of certification, that portion of the contractor's claim having to do with liquidated damages.

(e) Certification Language Relaxed.—For several years, the courts and boards have held consistently that a proper certification either repeats the CDA's wording verbatim or asserts its substantial equivalent. Since Congress amended the CDA this past year to permit contractors to correct defectively certified claims, the courts and boards have relaxed the definition of "substantial equivalent." Typical of the many cases during the past year in which the courts and boards have shown a willingness to consider as "substantially equivalent" language which, until recently, would have been inadequate, is *Cox & Palmer Construction Corp.*[617] In *Cox,* the board concluded that a statement that "the supporting data *as submitted therein* are accurate and complete" did not qualify the certification and render it ineffective. Similarly, the Federal Circuit concluded that certifying a claim to one's "understanding and belief," instead of to one's "knowledge and belief," substantially complied with the CDA.[618]

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[611] United States v. Grumman Aerospace Corp., 927 F.2d 575 (Fed. Cir. 1991) (the CDA requirement that contractor certify claims over $50,000 is a jurisdictional prerequisite), *cert. denied,* 112 S. Ct. 330 (1991).

[612] Newport News Shipbldg. and Dry Dock Co. v. Garrett, 6 F.3d 1547 (Fed. Cir. 1993).

[613] 41 U.S.C. § 605(c)(1)(1988).

[614] Applied Science Assocs., EBCA No. 9301146, 93-3 BCA ¶ 26,051.

[615] McNally Indus., ASBCA No. 43027, 93-3 BCA ¶ 26,130.

[616] ASBCA No. 43849, 94-1 BCA ¶ 26,336.

[617] *See* ASBCA No. 43438, 93-3 BCA ¶ 26,005; *see also* Heyl & Patterson, Inc. v. O'Keefe, 986 F.2d 480, 483 (Fed. Cir. 1993) (citing United States v. General Elec. Corp., 727 F.2d 1567, 1569 (Fed. Cir. 1984)).

[618] Fischbach and Moore Int'l Corp. v. Christopher, 987 F.2d 759 (Fed. Cir. 1993).

(f) "Certifying Official" Expanded.—Similarly, the courts and boards have demonstrated increased reluctance to declare a certification to be ineffective for lack of a proper certifying official. For example, the Federal Circuit held that an executive vice president is presumptively a corporate official with overall responsibility who may certify the corporation's claim,[619] and that a certifying official need not be in charge of the contractor's entire plant or location relating to the claim, but only of the contract.[620]

(g) Hamilton *Stipulation Update.—Gulf Construction Group, Inc.*[621] demonstrates the board's continuing approval of the *Hamilton*[622] stipulation, a device that expedites the contracting officer's review and denial of a contractor's previously submitted, previously uncertified claim.

(h) Certification of Claims and Requests for Adjustment or Relief Under DFARS 233.7000.—For claims and requests for adjustment or relief that exceed $100,000, the person certifying the claim or request now may base his or her certification on actual knowledge *or* derivative information "gained by a review of contractor records or reports from more directly involved individuals."[623]

3. What Constitutes a Claim?—

(a) Demand for Replacement Supplies Is a Claim.—Under the inspection clause in a supply contract, the government may (1) reduce the contract price, (2) demand repayment of an equitable portion of the contract price, or (3) direct the contractor to repair or replace latently defective parts.[624] In a case involving approximately 1200 jet engines for the F/A-18A aircraft with alleged latent defects, a contracting officer's decision revoking acceptance of the engines and directing replacement at no additional cost to the government amounted to a nonmonetary government claim.[625] From such a claim, the contractor could appeal and the court could exercise CDA jurisdiction.

(b) Submission of Quantified Cost Impact Statement Creates Dispute.—After the government refused to authorize retesting and repair of rejected wave tubes for Navy aircraft and held the contractor responsible for the defective items, a dispute arose once the contractor submitted a quantified cost impact statement relating to the additional work.[626] Under the CDA, the parties must dispute quantum before the contractor may submit a claim. However, after the government has denied liability for a matter, the amount is immediately in dispute once the contractor quantifies its claim.

(c) Unilateral Determination of Quantum Is Not a Government Claim.—A contracting officer's unilateral determination of quantum following a termination for convenience is not a government claim permitting the contractor to appeal without certification.[627] A contractor's settlement proposal was not a claim because it was not in dispute when submitted. It became in dispute when the parties disagreed on the amount and the contracting officer issued a unilateral determination of quantum. In its appeal of the unilateral determination, the contractor argued that the contracting officer's determination was a government claim requiring no certification. The board disagreed and dismissed the appeal for lack of jurisdiction.

(d) Requirement to Reach an Impasse.—The parties were not in dispute during the two years following submission of a certified cost proposal when they met several times and had not reached an impasse, and when the contractor continued to furnish cost data in support of its proposal to the Navy.[628] The issues came into dispute when the contractor demanded a final decision two years after submission of the cost proposal. The contractor failed to recertify its claim, however, when it demanded the final decision, so the board dismissed the subsequent appeal for lack of subject matter jurisdiction.

(e) What Constitutes an Impasse?—A certified request for an equitable adjustment, submitted after the parties were in dispute regarding the contractor's compliance with certain

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[619] *Id.*

[620] Ingalls Shipbldg., Inc. v. O'Keefe, 986 F.2d 486 (Fed. Cir. 1993).

[621] ENG BCA No. 5958, 93-3 BCA ¶ 26,174.

[622] United States v. Hamilton Enters., 711 F.2d 1038 (Fed. Cir. 1983).

[623] DAC 91-5, 58 Fed. Reg. 28,458 (1993) (effective Apr. 30, 1993).

[624] *See* FAR 52.246-2.

[625] Garrett v. General Elec. Co., 987 F.2d 747 (Fed. Cir. 1993), *reh'g en banc denied* (Fed. Cir. June 9, 1993).

[626] Hughes Aircraft Co., Elec. Dynamics Div., ASBCA No. 43877, 93-3 BCA ¶ 26,133.

[627] Spectrum Leasing Corp. v. General Servs. Admin., GSBCA No. 11977, 93-3 BCA ¶ 26,202.

[628] Santa Fe Eng'rs v. Garrett, 991 F.2d 1579 (Fed. Cir. 1993).

cost accounting standards, and after the contractor had submitted all of the supporting documentation that it intended to submit, was a CDA claim.[629] The request was accompanied by a demand for a final decision, and the government's refusal to issue a final decision—pending receipt of additional supporting data—did not render the claim ineffective.

4. Contracting Officer's Final Decision.—

(a) Contractor Prevents Final Decision by Demanding Progress Payments.—By asserting a right to retain progress payments while litigating a default termination in court, the contractor divested the contracting officer of authority to act on that matter.[630] Although the contracting officer issued no final decision on progress payments before litigation began, the DOJ gained exclusive authority to act on the matter once the contractor placed possession of progress payments in issue by asserting a right to retain them. Correspondingly, the contracting officer lost authority to act on the progress payment claim once the DOJ gained authority over the matter. Furthermore, because the contracting officer had issued no final decision regarding progress payments, the court had no jurisdiction to consider that matter. Therefore, the contractor prevented the government from recovering progress payments while the case was in litigation.

(b) The PCO Lacks Authority to Determine CAS Compliance.—The *FAR* and the *DAR* give the ACO exclusive authority to determine a contractor's compliance with the CAS. Therefore, a PCO lacked authority to determine CAS noncompliance, or to issue a final decision asserting a government claim for a downward price adjustment under the CAS clauses in a contract.[631] Consequently, the board dismissed, for lack of jurisdiction, an appeal from a PCO's ineffectual final decision involving a $24 million government claim.

(c) Promise to Render Final Decision at a Date Uncertain.—The board had "deemed denial" jurisdiction over a $980,231 claim involving security systems for the United States Embassy in Jamaica, in which the contracting officer failed to render a final decision, or to establish a date by which she would render a final decision, within sixty days.[632] The contracting officer's promise to render a final decision within sixty days following receipt of an audit report from a yet to be conducted audit did not establish a "date certain."

(d) Contracting Officer's Findings of Fact Aid Contractor.—The CDA provides that a contracting officer's findings of fact on appeal are "not binding in any subsequent proceeding." Despite this language, contracting officer testimony that is favorable to the contractor constitutes "a strong evidentiary admission, subject to rebuttal, of the extent of the government's liability."[633]

(e) Request for a Final Decision.—A contractor's uncertified letter alleging defective specifications and improper withholding of progress payments, and proposing settlement terms, did not implicitly request a contracting officer's final decision and, therefore, was not a proper claim under the CDA.[634] Citing the "common sense analysis" set forth in *Transamerica Insurance Corp. v. United States*,[635] the court searched for either an explicit or an implicit request for a contracting officer's final decision. Finding neither, the court granted the government's motion to strike portions of appellant's complaint for lack of jurisdiction.

5. Pleadings.—An agency board dismissed the government's amended complaint seeking relief for latently defective insulators because the complaint was not "simple, concise, or direct," as required by board's rules.[636] The complaint, which was "as thick as a District of Columbia telephone directory," imposed an undue burden on the contractor in preparing a responsive answer and interfered with the board's mandate to provide informal and expeditious resolution of disputes.

6. Discovery.—

(a) Deliberative Thought Processes Protected.—American Telephone & Telegraph Co., Federal Systems Advanced

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[629] *See* Saco Defense, Inc., ASBCA No. 44792, 93-3 BCA ¶ 26,029; *see also* Raven Indus., ASBCA No. 44048, 93-3 BCA ¶ 26,031; Carmona Industrias Electricas, S.A., ASBCA No. 42996, 93-3 BCA ¶ 25,975 (settlement proposal became a claim after languishing for 30 months without a contracting officer's final decision).

[630] Sharman Co. v. United States, 2 F.3d 1564 (Fed. Cir. 1993).

[631] McDonnell Douglas Corp., ASBCA No. 44637, 93-2 BCA ¶ 25,700. *But see* Bell-Boeing J.V., ASBCA No. 39681, 93-2 BCA ¶ 25,791 (PCO's decision disallowing costs charged pursuant to a cost accounting practice earlier approved by the ACO was within the authority of the PCO because the PCO found that the contractor was on notice that the costs would be disallowed).

[632] Inter-Con Sec. Sys., ASBCA No. 45749, 93-3 BCA ¶ 26,062.

[633] Wilner v. United States, 994 F.2d 783 (Fed. Cir. 1993), *reh'g denied* (Fed. Cir. Aug. 2, 1993).

[634] Cascade Dev. Co. v. United States, 27 Fed. Cl. 595 (1993). *But see* Mega Constr. Co. v. United States, 29 Fed. Cl. 396 (1993) (request for final decision inferred from the circumstances).

[635] 973 F.2d 1572 (Fed. Cir. 1992), *motion denied on remand*, Transamerica Ins. Corp. on behalf of Stroup Sheet Metal Works v. United States, 28 Fed. Cl. 418 (1993).

[636] Bart Assocs., EBCA No. C-9211144, 93-3 BCA ¶ 26,253.

Technologies[637] discusses the status of senior government officials seeking to avoid deposition. The case holds that while the deliberative thought processes of senior government officials and the reasons for their exercise of statutory discretion are generally not discoverable, private litigants may depose senior government officials in certain limited circumstances. Specifically, private litigants may depose agency heads and other senior officials when the individuals have performed contract administration functions—that is, made business decisions, as compared to policy determinations—and when evidence exists that they "actively participated in the decision which is under CDA review by the board and *may* have had an impermissible effect upon that decision."

(b) Board Muzzles Reluctant Government Expert.—The board prospectively prohibited an expected government expert witness from testifying at a hearing because the witness refused to testify at a deposition.[638] The government was on notice of the key issues to be covered during the deposition, yet, when asked, the witness testified that he had not yet formed an opinion about those issues. The board found this refusal to testify to be "inexcusable."

(c) Board Compels Additional Discovery for Inactive Witness.—The board granted the government's motion to compel further deposition of a witness who performed management consulting services for the contractor.[639] The witness refused to testify at a deposition after the contractor's attorney inappropriately directed the witness not to answer proper questions involving neither attorney-client nor attorney-work-product privilege.

7. Attorneys' Fees and Costs.—

(a) Submission to the Contracting Officer.—A contractor's application for attorney's fees and costs under the Equal Access to Justice Act (EAJA),[640] submitted to the contracting officer, satisfied the requirement to submit the EAJA application to the board.[641] Submission to the contracting officer was equivalent to submission to the board.

(b) "Attorney" means "Attorney."—A contractor could not recover amounts paid to a corporate officer for work normally performed by an attorney, because the officer was not an attorney.[642] The board held that a nonattorney is not entitled to attorney's fees for work normally performed by attorneys.

(c) Prevailing Party Must Prove Net Worth.—To recover attorneys' fees and costs under the EAJA, the plaintiff must prove that it meets the applicable "net worth" limitations. A conclusory affidavit by plaintiff, submitted without supporting evidence, was inadequate to establish "party" status under the EAJA because it failed to provide the court with enough information to verify the plaintiff's eligibility for award.[643]

(d) Failure to Segregate Costs.—The board denied recovery of attorney's fees and expenses under the EAJA because the contractor failed to segregate the costs associated with seven successful claims from those associated with four unsuccessful ones.[644] Having prevailed on only some of its claims, the appellant should have allocated costs to correlate fees and expenses with the successful claims.

8. Request for Reconsideration.—Although the board's rules require parties to file requests for reconsideration within thirty days following receipt of the initial decision, the board may act to correct a mistake following an otherwise untimely request. This is true even if the mistake resulted from the requesting party's inadvertent failure to present pertinent information to the board on appeal.[645]

9. Payment of Interest Following Termination for Default.—The Prompt Payment Act (PPA)[646] provides that payment is due thirty days after the government receives a proper invoice unless the contract establishes a different date, and that an interest penalty is assessed from that date if interest is not paid when due.[647] Interest penalties are not required under the PPA, however, when payment is delayed because of a dispute over the amount of payment or other issues concern-

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[637] DOT BCA No. 2479, 93-3 BCA ¶ 26,087, *summary judgment denied,* 93-3 BCA ¶ 26,088.

[638] Golden West Refining Co., EBCA No. C-9208134, 94-1 BCA ¶ 26,319.

[639] American Tel. & Tel. Co., Fed. Sys. Advanced Technologies, DOT BCA No. 2479, 94-1 BCA ¶ 26,305.

[640] 28 U.S.C. § 2412.

[641] International Foods Retort Co., ASBCA No. 34954, 93-3 BCA ¶ 26,249.

[642] M.V.I. Precision Mach., ASBCA No. 37393, 94-1 BCA ¶ 26,300.

[643] Fields v. United States, 29 Fed. Cl. 376 (1993).

[644] MJW Enters., ENG BCA No. 5813-F, 93-3 BCA ¶ 26,045.

[645] Larry D. Paine, ASBCA No. 41273, 93-3 BCA ¶ 26,161 (failure to submit information showing that the contractor submitted a claim to the contracting officer).

[646] 31 U.S.C. §§ 3901-3906.

[647] *Id.* § 3902.

ing compliance with the contract, but interest on the disputed amount may be due if the contractor files a claim under the CDA. If a contractor has defaulted, the government is entitled to withhold a reasonable amount of the monies due the contractor, in accordance with its common law right of setoff and in order to recover excess reprocurement costs. On those monies reasonably withheld, the contractor is entitled to neither PPA nor CDA interest.[648]

10. Discovery Sanctions.—

(a) Court of Federal Claims.—Under the EAJA, the government has waived immunity with respect to certain costs and fees explicitly, including those imposed on litigants by the courts to maintain professional standards. Accordingly, the government was obligated to pay court-imposed monetary sanctions for noncompliance with the court's discovery orders, despite the government's arguments that the doctrine of sovereign immunity made the government immune from the award of money damages and that the court lacked jurisdiction to impose such damages.[649]

(b) The ASBCA.—Although a court can award attorneys' fees and expenses for a party's "failure to admit" matters in discovery, a board cannot.[650] Court Rule 37(c) permits the Federal Claims Court to impose sanctions—including attorneys' fees—against a party that "fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, if the party requesting admissions later proves the genuineness or truth of the matter." While the Federal Circuit has determined that the government is not immune from discovery sanctions—including attorneys' fees—the ASBCA recently held that the board's rules do not provide for similar sanctions. The court rules permitting discovery sanctions against the government are inapplicable at the board.

11. Miscellaneous Matters.—In *Burnside-Ott Aviation Training Center v. United States*,[651] the Federal Circuit limited the application of *Office of Personnel Management v. Richmond*,[652] which bars the application of equitable estoppel against the government, to "claim(s) for the payment of money from the Public Treasury *contrary to a statutory appropriation.*" Because equitable estoppel might otherwise lie against the government, the Federal Circuit reversed the Federal Claims Court decision granting summary judgement to the government.

V. Special Topics

A. Fraud—

1. Criminal Cases.—The Ninth Circuit upheld a conviction for willfully causing submission of false statements to the government, even though the defendant did not sign the statements nor direct their signature by another.[653] The defendant ordered employees to pack boxes of plastic bags by weight, knowing that the number of bags per box would be less than the specifications required. The defendant also knew that the government would not make payment unless the contractor certified that each box contained the required number of bags, and knew that an employee was submitting such false certifications. The court found that "[the defendant's] actions set in motion a process which he intended would be completed by the filing of the false certificates."[654]

2. Civil Cases.—

(a) Government Must Prove Knowledge or Intent to Establish Fraud Counterclaim.—The court considered the government's right to counterclaim under the False Claims Act (FCA),[655] the antifraud provision of the CDA,[656] and the Claim Forfeiture Statute.[657] In *Chemray Coatings, Inc. v. United States*,[658] the government terminated for convenience a GSA contract to purchase camouflage paint for the Army. When the contractor claimed settlement costs, the government counterclaimed, alleging that the contractor included the cost

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[648] Ross & McDonald Contracting, GmbH, ASBCA No. 38154, (Aug. 24, 1993), 93-3 BCA ¶ ____.

[649] M.A. Mortenson Co. v. United States, 996 F.2d 1177 (Fed. Cir. 1993).

[650] Southwest Marine, Inc., ASBCA No. 39472 (Oct. 27, 2993), 93-3 BCA ¶ ____.

[651] *See* 985 F.2d 1574 (Fed. Cir. 1993); *see also* Bell-Boeing J. V., ASBCA No. 39681, 93-2 BCA ¶ 25,791 (motion for reconsideration denied because of possible contractor reliance on government representations).

[652] 496 U.S. 414 (1990), *reh'g denied*, 497 U.S. 1046 (1990).

[653] United States v. Fairchild, 990 F.2d 1139 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 226 (1993). The government prosecuted the case under 18 U.S.C. § 1001 (making false statements) and 18 U.S.C. § 2 (accessories prosecuted as principals).

[654] *Id.* at 1141.

[655] 31 U.S.C. § 3729.

[656] 41 U.S.C. § 604.

[657] 28 U.S.C. § 2514.

[658] 29 Fed. Cl. 278 (1993).

of inventory it purchased prior to award in its termination settlement proposal and stated that its paint pigment was "new" when the pigment contained debris from a warehouse fire. The court held that the FCA requires proof that the contractor *knowingly* presented a false claim or used a false record to obtain payment, and the CDA and the Claim Forfeiture Statute require proof that the contractor acted with *intent* to deceive. Because questions of fact existed on what the contractor and the GSA actually knew, the court denied the government's summary judgment motion.

(b) Contract Void Ab Initio *if Tainted by Government Agent's Fraud.*—The Federal Circuit considered the effect of fraudulent conduct by government employees on contracts. In *Godley v. United States,*[659] a postal agent leased land for a postal facility. Later, the postal agent was convicted of bribery and conspiracy. The lower court held that the lease contract was voidable.[660] The Federal Circuit, found, however, that there was a question of fact whether the postal agent's illegal acts "tainted" the contract. The court remanded, and opined that if such a "taint" was established, the contract was void *ab initio,* rather than voidable.

3. Qui Tam *Cases.*—

(a) Qui Tam *Actions Are Constitutional.*—The latest attack on the constitutionality of *qui tam* actions fell on deaf ears. In *United States ex rel. Kelly v. Boeing Co.,*[661] the defendant contended that the *qui tam* provisions of the FCA[662] were unconstitutional because the *qui tam* plaintiffs lacked sufficient standing to satisfy the "case or controversy" requirement,[663] and because the *qui tam* provisions violated the constitutional separation of powers doctrine,[664] the Appointments Clause,[665] and the Due Process Clause.[666] The court disagreed, holding that the *qui tam* plaintiffs had standing under the FCA,[667] which assigned the government's right to the claim to the plaintiffs, and recognized a sufficient "injury in fact" to confer standing. The court also held that there was no separation of powers issue because the government still had the right to intervene and control the litigation.[668] As to the Appointments Clause, the court rejected the contention that the relator exercised sufficient authority to make him an "officer" for Appointments Clause purposes. Finally, the court rejected the argument that the relator's financial interest in the outcome created an impermissible conflict of interest that violated due process, because the relators were not empowered to function as true government prosecutors.[669]

(b) Discovery of Information Through Prior Litigation Is "Public Disclosure."—In *United States ex rel Kreindler & Kreindler v. United Technologies Corp.,*[670] the *qui tam* plaintiff discovered the basis for his allegations from a prior wrongful death action involving an Army Black Hawk helicopter crash. The court dismissed the action for lack of subject matter jurisdiction, based on the FCA's prohibition against using information obtained through "public knowledge" for *qui tam* litigation.[671]

(c) . . . But Not if the Information Came from the "Original Source."—The Ninth Circuit considered the FCA's "original source" exception to the "public knowledge" prohibition[672] described above in *United States ex rel. Bara-*

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[659] 5 F.3d 1473 (Fed. Cir. 1993).

[660] 26 Cl. Ct. 1081 (1992).

[661] No. 92-36660 (9th Cir. Sept. 7, 1993) *amended and reissued* (9th Cir. Nov. 5, 1993).

[662] 31 U.S.C. §§ 3729-3730.

[663] U.S. CONST. art. III, § 2, cl. 1.

[664] *See* Mistretta v. United States, 488 U.S. 361 (1989); Morrison v. Olson, 487 U.S. 654 (1988).

[665] U.S. CONST. art. II, § 2, cl. 2.

[666] U.S. CONST. amend. V.

[667] 31 U.S.C. § 3730(b)(1).

[668] The court relied on the Supreme Court decision in Morrison v. Olsen, 487 U.S. 654 (1988). In *Morrison*, the Court upheld the independent counsel provisions of the Ethics in Government Act against a similar challenge.

[669] *See* United States ex rel. Kreindler & Kreindler v. United Tech. Corp., 985 F.2d 1148 (2d Cir. 1993), *cert. denied sub nom.* 113 S. Ct. 2962 (1993) (in which the Second Circuit also upheld the constitutionality of the *qui tam* provisions of the FCA with a similar analysis); United States ex rel. Robinson v. Northrop Corp., 824 F. Supp. 830 (N.D. Ill. 1993).

[670] *Kreindler*, 985 F.2d at 1148.

[671] 31 U.S.C. § 3730(e)(4)(A).

[672] *Id.* § 3730(e)(4)(A), (B).

jas v. Northrop Corp.[673] The relator complied with the FCA provisions for filing a *qui tam* action.[674] The government decided to prosecute part of the claim civilly and later obtained a criminal indictment that included the *qui tam* allegations adopted by the government in its civil action, plus an additional charge. After receiving court approval to prosecute the portion of the civil action that the government declined to prosecute, the relator amended his complaint to include the additional criminal charge. The district court dismissed the civil count based on the criminal indictment because of the FCA's "public disclosure" rule, but the Ninth Circuit vacated and remanded the case. The Ninth Circuit directed the district court to determine whether the relator's disclosures formed the basis for the additional criminal allegation. If so, then the relator was an "original source," and could proceed with the litigation.

(d) FCA Amendments Expanding Standing for Qui Tam *Plaintiffs Not Retroactive.*—Congress amended the FCA in 1986[675] to broaden participation by *qui tam* plaintiffs. In *United States ex rel. Eagleye v. TRW, Inc.*,[676] the court reviewed *qui tam* actions dismissed under pre-1986 law to determine whether the FCA amendments applied retroactively.[677] Based on Supreme Court precedent,[678] the court found no clear congressional intent to rebut the presumption that statutes changing substantive rights have prospective effect only, and upheld the dismissals.

(e) Whistleblowers Protected even if No Resulting Litigation Filed.—In *Neal v. Honeywell, Inc.*,[679] the plaintiff reported that Honeywell employees provided false ammunition test reports to supervisors. The company conducted an internal investigation resulting in a $2.5 million settlement for the government. After allegedly receiving threats, the plaintiff sued the company under the "whistleblower" provision of the FCA, which provides relief from harassment for employees who reveal information to proper authorities.[680] Honeywell contended that the "whistleblower" provision is inapplicable if no action is ever filed. The court held that, based on cases construing other whistleblower statutes,[681] the intent of the statute was to provide broad protection to persons who reveal wrongful activity, whether litigation results from the disclosure or not.

B. Suspension and Debarment

1. Allegations in Civil Complaint May Be "Adequate Evidence" to Suspend Contractor.—The GAO expanded the scope of "adequate evidence" an agency may consider in deciding whether to suspend a contractor from future procurements.[682] In *SDA, Inc.*,[683] the GSA suspended the protester based on allegations in a federal civil complaint filed by the Resolution Trust Corporation (RTC) against the protester's president. The GAO held that there was no per se prohibition against using the allegations in the complaint, and that federal officials are presumed to act in good faith when filing a federal complaint. Because no evidence existed showing either bad faith on the part of RTC officials, or a lack of accuracy in the complaint's allegations, the GAO upheld the GSA's suspension action.

2. Suspension from Procurement Contracts Does Not Automatically Suspend from Sales Contracts.—In *Alamo Aircraft Supply*,[684] the DLA awarded a surplus property sales contract to a suspended bidder.[685] Another bidder protested, challenging a solicitation provision stating that firms "are ineligible to do business with the agency . . . who are either suspended, proposed for debarment, or debarred by . . . DOD, or any

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[673] 5 F.3d 407 (9th Cir. 1993).

[674] 31 U.S.C. § 3730. These requirements include filing the complaint under seal and giving the government time to decide whether it wants to prosecute the claim.

[675] False Claims Amendment Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986).

[676] 4 F.3d 417 (6th Cir. 1993).

[677] The pre-1986 version of the FCA prohibited *qui tam* actions based on information in the possession of the government at the time the relator filed the lawsuit.

[678] *See* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988).

[679] 826 F. Supp. 266 (N.D. Ill. 1993).

[680] 31 U.S.C. § 3730(h).

[681] *See* National Labor Relations Board v. Scrivener, 405 U.S. 117 (1972), *reh'g denied*, 405 U.S. 1033 (1972); Passaic Valley Sewerage Comm'rs. v. Department of Labor, 992 F.2d 474 (3d Cir. 1993), *cert. denied* 126 L.Ed.2d 373 (1993); Pogue v. United States Dep't of Labor, 940 F.2d 1287 (9th Cir. 1991).

[682] Under FAR 9.407-1(b), a debarring official may temporarily suspend a contractor from participating in procurements based on "adequate evidence." Federal Acquisition Regulation 9.403 defines "adequate evidence" as "information sufficient to support the reasonable belief that a particular omission or act has occurred."

[683] B-253355, Aug. 24, 1993, 93-2 CPD ¶ 132.

[684] B-252117, June 7, 1993, 93-1 CPD ¶ 436.

[685] The Army suspended the contractor from the procurement program pursuant to the procedures of FAR subpart 9.4.

other Executive Agency" from receiving an award. The GAO denied the protest because the Army's authority to suspend contractors from the procurement program did not extend to the surplus property sales program.[686] The GAO also invalidated solicitation language that purported to prohibit award to suspended bidders, because enforcement of the provision would have violated the suspended bidder's due process right to compete for sales contracts.[687]

3. The DAR Council Proposes to Include "Tax Evasion" as a Suspension/Debarment Cause.—The DAR Council issued a proposed rule that would require contractors to certify, in their suspension/debarment certificates, that they have not been convicted or had a civil judgment rendered against them for tax evasion.[688] The proposed rule would amend the *FAR*'s listed reasons for suspension and debarment[689] to include tax evasion, and would amend the suspension/debarment certification clause[690] to require contractors to address the tax evasion issue. The comment period for the proposed rule ends on January 31, 1994.

4. Settlement Agreement Prevents Second Debarment.—A contractor entered into a settlement agreement with an agency to resolve allegations that the contractor submitted fraudulent real estate documents. Under the agreement, the contractor accepted a voluntary debarment for a stated period, and, in return, the agency agreed to take no adverse action based on conduct occurring prior to a certain date. The contractor was subsequently convicted of conspiracy based on fraudulent real estate transactions—previously unknown to the agency—occurring prior to the date stated in the settlement. The agency initiated a second debarment action and the contractor appealed. The board held that the contractor did not breach the settlement agreement, and, therefore, the agreement's clear language blocked the agency's debarment action.[691]

C. Ethics

1. Conflict of Interest Cases.—

(a) No Improper Conflict Cases.—In *Lori Hawthorne*,[692] the Forest Service terminated for convenience protester's contract to document historical sites in New Mexico. As a former temporary Forest Service employee, the protester performed preliminary work at some of the sites later described in the agency RFQ. The agency believed this precluded contract award to her.[693] The GAO sustained the protest because the protester's work as a Forest Service employee was minimal and did not create a conflict of interest.

Similarly, the GAO found no improper conflict of interest in *Sarasota Measurements & Controls*.[694] The protester alleged that a former Air Force employee obtained confidential information from the protester and gave the information to his new employer, the awardee. The GAO found no conflict because the employee obtained the information two years before leaving the government and before the agency issued the solicitation. As a result, the information gave the awardee no competitive advantage.

Protester alleged that the awardee gained an unfair competitive advantage by contacting a federal employee who, in turn, provided the awardee with phone numbers for two of the protester's employees.[695] The GAO denied the protest because the employee was not a procurement official and no evidence existed that the employee's actions afforded any competitive advantage.

In *E. J. Richardson Associates*,[696] the protester objected to the award of a research contract for development of a computer simulation model showing various economic impacts on the

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[686] The surplus property sales program is governed by the *Federal Property Management Regulations* (FPMR); FPMR 101-45.601(d) prescribes the suspension/debarment procedures for the property sales program. The GSA is the only agency that can suspend or debar contracts under the property sales program. Although the GSA delegated its authority to suspend to the DLA, the DLA had not suspended the awardee from the sales program prior to contract award.

[687] Agencies cannot suspend or debar contractors without affording contractors at least minimal due process rights. Home Bros., Inc. v. Laird, 463 F.2d 1268 (D.C. Cir. 1972). The *FAR* and the FPMR prescribe procedures for providing contractors due process prior to suspension or debarment, including notifying them of the specific reasons for the suspension or debarment. FAR 9.407; FPMR 101-45.601(d).

[688] 58 Fed. Reg. 63,494 (1993).

[689] FAR 9.406; 9.407.

[690] FAR 52.209-5.

[691] In the Matter of Douglas A. Hauck, HUDBCA No. 92-A-7582-D49 (Aug. 1, 1993), 94-1 BCA ¶ ____.

[692] B-250912, Jan. 25, 1993, 93-1 CPD ¶ 62.

[693] *See* FAR 9.505-2(b) (a contractor is generally prohibited from providing services if the contractor prepares or provides other direct assistance in developing the statement of work the agency later uses to solicit the services).

[694] B-252406.2, June 25, 1993, 93-1 CPD ¶ 494.

[695] RAMCOR Servs. Group, B-253714, Oct. 7, 1993, 93-2 CPD ¶ ____.

[696] B-250951, Mar. 1, 1993, 93-1 CPD ¶ 185.

North American lobster industry. The protester alleged that the technical review committee chairman had a conflict of interest because he also directed a cooperative research program between the Northeast Fisheries Science Center and a possible subcontractor of the awardee. The GAO denied the protest because no evidence existed that the chairman used any improper influence either to aid the awardee or hurt the protester.[697]

Finally, a protester alleged conflict of interest because the awardee provided advisory services to an agency.[698] The GAO denied the protest because the advisory services did not contribute directly to the development of the solicitations's statement of work, and because the protester also had provided advisory services to the agency.

(b) Contracting Officer's Supervisor Created Improper Conflict.—In *Applied Resources Corp.—Reconsideration*,[699] the protester asked the GAO to reconsider an earlier decision[700] disqualifying it from award because the protester's president was married to the contracting officer's supervisor. The GAO affirmed its earlier decision. Although there was no evidence of misconduct, the supervisor created the appearance of an improper conflict of interest by not disclosing her connection with her husband's business and by not disqualifying herself before bid opening, thereby enabling her to review the in-house government estimate.

(c) Disqualification for Submitting Freedom of Information Act (FOIA) Request Was Unreasonable.—In *KPMG Peat Marwick*,[701] the agency issued an RFP for technical services. The agency awarded the contract without discussions, and the protester submitted a FOIA request for the winning proposal and other source selection information. After the agency responded with a redacted version of the proposal, this protest was filed. The contracting officer settled the protest by reopening the competition, but disqualified the protester because she believed that disclosure of the source selection information gave the protester an unfair competitive advantage. The GAO sustained the protest, holding that the contracting officer acted unreasonably in disqualifying protester based on the exercise of its FOIA rights, and recommended that the contracting officer provide the FOIA response to all competing offerors to eliminate any competitive advantage.

2. Standards of Conduct.—

(a) The DOD Issues Supplement to Office of Government Ethics (OGE) Regulations.—On August 30, 1993, the DOD issued its long-awaited supplementary rules[702] to the OGE Standards of Ethical Conduct. The OGE Standards of Ethical Conduct (OGE Standards), effective February 3, 1993,[703] gave executive agencies a uniform code of ethics. The DOD supplement treats the military departments as separate agencies for purposes of the OGE Standards,[704] expands the definition of permissible gifts from outside sources to include free attendance at community relations events sponsored by state and local governments,[705] and permits DOD personnel to accept certain scholarships and grants from educational institutions.[706] It also raises the gift limitation for gifts to superiors on special occasions to $300, with individual contributions limited to $10.[707] Finally, DOD employees required to file financial disclosure reports (*Standard Form 450 or Standard Form 278*) must obtain written approval from appropriate officials before accepting outside employment from a prohibited source.[708]

(b) The DOD Publishes Joint Ethics Regulation.—The DOD has published its new Joint Ethics Regulation (JER).[709] This comprehensive regulation addresses several areas,

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[697] *See* Charles Trimble Co., B-250570, Jan. 28, 1993, 93-1 CPD ¶ 77 (prior contacts between evaluator and awardee insufficient to establish bias absent evidence of improper influence).

[698] Abt Assocs., B-253220.2, Oct. 6, 1993, 93-2 CPD ¶ ___.

[699] B-249258.2, Feb. 26, 1993, 93-1 CPD ¶ 180.

[700] B-249258, Oct. 22, 1992, 92-2 CPD ¶ 272.

[701] B-251902.3, Nov. 8, 1993, 93-2 CPD ¶ ___.

[702] 58 Fed. Reg. 47,619 (1993).

[703] 5 C.F.R. pt. 2635 (1993).

[704] *Id.* § 3601.102 (1993).

[705] *Id.* § 3601.103(a) (1993).

[706] *Id.* § 3601.103(b) (1993).

[707] *Id.* § 3601.104 (1993).

[708] *Id.* § 3601.107 (1993).

[709] DEP'T OF DEFENSE, REG. 5500.7-R, JOINT ETHICS REGULATION (Aug. 30, 1993).

including use of government telephones by DOD personnel,[710] membership and participation in nonfederal entities,[711] political activities,[712] and postemployment restrictions.[713] The regulation is intended to be a "single, uniform source of standards of ethical conduct" within the DOD,[714] and broadens the coverage of the OGE Standards in certain cases to include enlisted members of the DOD.[715]

(c) The OGE Exempts Certain Income from Disclosure Requirements.—The OGE recently exempted persons who are required to file *Standard Form 450 (SF 450)* from reporting certain income.[716] Effective November 30, 1993, *SF 450* filers no longer must disclose interests in accounts in depository institutions (including banks, savings and loans, and credit unions), money market mutual funds, United States Government obligations, and securities issued by United States Government agencies. Additionally, *SF 450* filers need not report interest income from these sources.[717]

(d) Business Controlled by Government Employees Cannot Contract with the Government.—In *Gurley's, Inc.*,[718] the GAO upheld the Air Force's disqualification of a firm listing two current government employees as corporate officers. The Air Force issued a solicitation for postal services at Davis-Monthan Air Force Base, Arizona. The protester submitted the low bid, but the Air Force disqualified the firm because its president and vice president were active duty Air Force personnel. The protester asserted that the controlling person of the firm was the corporate secretary (the daughter of the other two officers). The GAO held, however, that the circumstances created a reasonable belief that the government personnel "substantially controlled" the firm, which precluded the Air Force from awarding it the contract.[719]

3. The DOD Proposes New Organizational Conflict of Interest Rule.—The DOD has proposed adding a *DFARS* solicitation provision prohibiting contractors that perform advisory and assistance services in the development, production, and testing of major defense systems, from providing those same services for the operational testing of those systems.[720] The proposed rule implements a statutory prohibition[721] and is based on DOD Inspector General (IG) findings that current internal controls were ineffective in enforcing the statute.

D. Contracting for Information Resources

1. Federal Information Processing (FIP) Procurement Without Proper Authority Is Void.—In *CACI, Inc. v. Stone*,[722] the Army attempted to procure data processing support services without a proper Delegation of Procurement Authority (DPA) from the GSA. Following a postaward protest, the Army admitted that it conducted the procurement without a proper DPA, but argued that suspending services would be disruptive and harmful to the Army. Additionally, the Army argued that it was attempting to obtain a proper DPA from the GSA. Although the GSBCA agreed, the Federal Circuit reversed. The court held that a procurement conducted in violation of the statute's plain language exceeded the contracting officer's authority and, therefore, was void under the Brooks Act.[723] It further held that although a procurement conducted in violation of the statute was void *ab initio*, minor regulatory violations would not invalidate FIP procurements.

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[710] *Id.* para. 2-301.

[711] *Id.* ch. 3.

[712] *Id.* ch. 6.

[713] *Id.* chs. 8-9.

[714] *Id.* para. 1-300(a).

[715] *Id.* para. 1-300(b).

[716] 58 Fed. Reg. 63,023 (1993).

[717] 5 C.F.R. § 2634.907 (1993).

[718] B-253852, Aug. 25, 1993, 93-2 CPD ¶ 123.

[719] Federal Acquisition Regulation 3.601 prohibits agencies from awarding contracts to businesses substantially controlled by government employees unless an appropriate official, no lower than a head of a contracting activity, determines that a compelling reason to do so exists (such as the firm is a sole source).

[720] 58 Fed. Reg. 58,316 (1993).

[721] 10 U.S.C. § 2399(e).

[722] 990 F.2d 1233 (Fed. Cir. 1993).

[723] 40 U.S.C. § 759.

In *Science Applications International Corp. v. NASA*,[724] the GSBCA considered a protest involving an automation system at NASA's Ames Research Center. NASA argued that the acquisition was of an "embedded system" and, therefore, was exempt from the DPA requirement;[725] that NASA's blanket DPA applied; and that NASA could cure any DPA defect before contract award. The GSBCA rejected the "embedded system" argument because the main purpose of the FIP procurement was to purchase an automation system. It rejected the second argument because the value of the system far exceeded NASA's blanket DPA. The board refused to rule on NASA's final argument, however, holding that board action at this time would be premature, because the GSA had made no final decision on the DPA.

2. New Executive Order Requires Energy-Efficient Computers.—On April 21, 1993, President Clinton signed Executive Order 12845,[726] requiring that all microcomputers purchased by the government on or after October 21, 1993, meet the EPA's "Energy Star" guidelines for energy efficiency. All solicitations issued on or after October 21, 1993, for microcomputers and printers, must specify that computers purchased under those solicitations must comply with the EPA Energy Star guidelines.

3. Replacement of Medical Information Computer Hardware Sufficiently "Urgent and Compelling."—In *Berkshire Computer Products v. Department of the Army*,[727] the protestor challenged a sole-source acquisition, by Fitzsimmons Army Medical Center, Aurora, Colorado, for replacement of hard disk drives containing data. The GSBCA found that the Army proved the "drastic, direct, and unavoidable" impact required to justify a sole-source FIP procurement by demonstrating that, unless it obtained the new hard drives, the Army would be forced to delete vital medical information to make room for new data. In addition, once the Army established an urgent and compelling need, it had no further obligation to delay the acquisition to analyze whether to purchase or lease the new equipment.

4. Restrictive Specification Challenges.—Several cases challenged the restrictiveness of FIP specifications. In *AT&T*,[728] the protester challenged its elimination from the competitive range in a telecommunications system acquisition by the DLA because the solicitation requirement for preemption signaling was overly restrictive. The GAO disagreed, and found that the agency reasonably defined its needs, because preemption signaling was necessary to properly connect the system to the Defense Support Network (DSN) interface.

Another challenge to FIP specifications came in *Federal Data Corp. v. Department of Justice*.[729] This acquisition involved a solicitation for new hard drives and hard drive controllers. The protester alleged that the maximum and average seek times stated in the solicitation were overly restrictive. In denying the protest, the GSBCA signaled that it would allow agencies broad discretion to decide their minimum needs if there was no *unreasonable* restriction on competition. In this case, the DOJ demonstrated that it needed the new equipment to handle a larger number of requests for information.

In *Integrated Systems Group v. Department of the Army*,[730] the protester challenged as overrestrictive the Army's specification for hand-held computers that, with limited exceptions, required that the computers contain the MS-DOS 5.0 operating system or equivalent. The GSBCA denied the protest because the requirement was necessary for the computers to interface with other computers, and the description "MS-DOS 5.0 or equivalent" sufficiently identified the government's needs without describing the salient characteristics of the operating system.

Coastal Computer Consultants Corp.[731] involved an Air Force solicitation for new computer hardware. The protester, a used computer equipment vendor, challenged the specification as overly restrictive. The GAO assessed whether the agency's restriction was reasonable based on its needs, and concluded that the Air Force intended to use the equipment as part of a mission critical radar system that would remain operational throughout an expected twenty-year life cycle. Under these circumstances, requiring new equipment was reasonable.

However, the GSBCA did not approve all new computer equipment solicitations. In *Integrated Systems Group v. Department of Commerce*[732], the agency rejected the protester's bid as nonresponsive because its proposal for "used/refur-

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[724] GSBCA No. 12600-P (Nov. 3, 1993), 94-1 BCA ¶ ____.

[725] Embedded FIP equipment is "FIP equipment that is an integral part of the product, where the principal function of the product is not the 'automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information.'" GENERAL SERVS. ADMIN. ET AL., FEDERAL INFORMATION RESOURCES MANAGEMENT REG. 201-1.002-2(e) (Dec. 4, 1990) [hereinafter FIRMR].

[726] 58 Fed. Reg. 21,887 (1993).

[727] GSBCA No. 12228-P, 93-2 BCA ¶ 25,768.

[728] B-253069, June 21, 1993, 93-1 CPD ¶ 479.

[729] GSBCA No. 12264-P (Aug. 4, 1993), ____ BCA ¶ ____.

[730] GSBCA No. 12417-P (July 9, 1993), ____ BCA ¶ ____.

[731] B-253359, Sept.7, 1993, 93-2 CPD ¶ 155.

[732] GSBCA No. 12420-P, 94-1 BCA ¶ 26,321.

bished/warranted as new" equipment did not specify the source or acquisition date of the equipment. In overturning the agency's decision, the GSBCA held that the *FAR* provision governing offers of used equipment[733] required agencies to identify any specific details of acceptability that offerors must provide. Because the agency failed to identify the required details, and because the protester failed to object to the solicitation requirements, the agency could not declare the protester nonresponsive, even though a *FAR* clause[734] required a "complete description of the items."

Two months later, the same protester won again in *Integrated Systems Group v. Department of the Army*.[735] This time, the government rejected the protester's offer because the protester did not obtain advance approval to offer used equipment in accordance with the *FAR* clauses for used equipment.[736] Calling the clauses "badly written," the GSBCA sustained the protest. It stated that the offer was responsive if the protester disclosed in its proposal that it was offering used equipment, unless the solicitation specifically required new equipment.

5. Is This ADPE or Is It Not?—The courts and boards have struggled to define "automated data processing equipment" (ADPE) under the Brooks Act. In *Best Power Technology Sales Corp. v. United States*,[737] the Federal Circuit considered whether uninterruptable power supplies (UPS)[738] were "ancillary equipment."[739] In reversing the GSBCA, the court concluded that UPS were not "ancillary equipment." The court added that the proper test for determining GSBCA jurisdiction in ADPE procurements, is whether the solicitation asked for ADPE, not whether the offeror offered ADPE.

The GSBCA addressed whether the incidental use of ADPE by a contractor subjects the acquisition to the Brooks Act,[740] and concluded that it did not. The Department of Housing and Urban Development solicited for a commercial firm to service its loan portfolio. The solicitation required the contractor to use ADPE but did not require a specific system or specific software. The GSBCA adopted the analysis found in *Federal Information Resource Management Regulation (FIRMR) Bulletin A-1* to determine that the use of ADPE was merely incidental to the contract and did not create an ADPE acquisition.

The GSBCA held, however, that interactive video equipment was ADPE. In *Raytech Engineering v. Department of the Navy*,[741] the Navy issued a solicitation for interactive video training devices at the Naval Supply Center in Charleston, South Carolina. The Navy argued that the devices were "embedded ADPE,"[742] and therefore, exempt from the Brooks Act. The GSBCA disagreed based on the Federal Circuit's analysis in *Best Power Technology*.[743]

6. Failure to Notify Unsuccessful Offerors in FIP Procurement Requires Suspension of DPA . . .—In *RMTC Systems v. Department of the Air Force*,[744] the contracting officer failed to notify unsuccessful offerors within twenty-four hours of award.[745] The GSBCA held that this violated the CICA[746] and required the GSBCA to suspend the agency's delegation of procurement authority.

7. . . . And Once Suspended, No Relief Unless Agency Can Show "Urgent and Compelling Circumstance Significantly Affecting the United States."—In *DPSC Software v. Department of the Treasury*,[747] the Office of Thrift Supervision's

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[733] FAR 10.010.

[734] *Id.* 52.210-6.

[735] GSBCA No. 12849-P, Sept. 10, 1993, 94-1 BCA ¶ ____.

[736] FAR 52.210-5; 52.210-6; 52.210-7.

[737] 984 F.2d 1172 (Fed. Cir. 1993).

[738] An uninterruptable power supply is a battery power pack designed to send power automatically to a connected computer during a power failure. The UPS protects the computer from data loss during sudden power failures or fluctuations. *Id.* at 1174.

[739] Automated data processing equipment includes "ancillary equipment." 40 U.S.C. § 759(a)(2)(B).

[740] National Loan Servicenter v. Department of Housing and Urban Dev., GSBCA No. 12193-P, 93-2 BCA ¶ 25,853.

[741] GSBCA No. 12240-P, 93-3 BCA ¶ 25,928.

[742] Items considered to have ADPE components embedded in them are not considered ADPE for Brooks Act purposes. *See* 40 U.S.C. § 759.

[743] 984 F.2d 1172 (Fed. Cir. 1993).

[744] GSBCA No. 12346-P, 93-3 BCA ¶ 25,948.

[745] *See* FAR 15.001(a).

[746] 10 U.S.C. § 2305.

[747] GSBCA No. 12353-P, 93-3 BCA ¶ 26,048.

DPA was suspended due to a protest. The agency asked the GSBCA to relieve the suspension based on the agency's urgent need for the software. The GSBCA denied the request, however, because the agency failed to show that urgent and compelling circumstances significantly affected the interests of the United States. The GSBCA reasoned that the solicitation allowed the agency thirty days to make award, and because the GSBCA would resolve the protest within forty-five days, no urgent and compelling circumstance existed.[748]

However, in *Vista Computer Services v. Department of Transportation*,[749] the Federal Aviation Administration (FAA) demonstrated an "urgent and compelling" need for continued use of its headquarters computer system, because it included the FAA's safety hotline system and financial management system. The board rejected the incumbent protester's arguments that the FAA could extend the current contract, because the DPA specifically prohibited extending the contract beyond the fiscal year.

8. The GAO Upholds Toner Cartridge Recycling.—The Defense General Supply Center issued a brand name or equal solicitation for electrostatic toner cartridges. The RFP contained a local clause implementing a statutory requirement for federal agencies to purchase recycled toner cartridges.[750] The agency rejected the protester's offer because it did not contain a required certification from an independent laboratory that the cartridges met certain minimum standards. The protester argued that the local clause violated DFARS 209.202(a)(1) (which prescribes approval authorities for placing products on a qualified products list), and that the laboratory certification was waivable under DFARS 210.004.[751] The GAO rejected both arguments,[752] holding that DFARS 209.202(a)(1) did not apply because the local clause addressed the certification of the *manufacturer,* not the product. In addition, the GAO held that the requirement was not waivable under DFARS 210.004 because the *DFARS* clause addressed waiving design and construction features of the *cartridge,* not the manufacturer.

9. Phone Circuits for Classified Use Are Still Exempt Under Warner Amendment Despite Nonclassified Use.—The Defense Information Systems Agency modified a contract adding "T3 circuits" to the Defense Commercial Telecommunications Network.[753] The protester alleged that the proposed modification was beyond the scope of the original procurement, and, therefore, the agency had to issue a new solicitation for the new circuits. The agency moved to dismiss the protest under the Warner Amendment[754] because the agency intended to use the circuits for military intelligence and cryptological functions. The GSBCA examined the intended use of the circuits and held that although nonclassified messages would be transmitted occasionally, the Warner Amendment exception was applicable because the primary use of the circuits fell within the Warner Amendment provisions.

10. The GSBCA Upholds GSA Indefinite-Quantity Mainframe Contracts.—The GSA requested proposals for an indefinite-delivery, indefinite-quantity (IDIQ) contract for mainframe computers. The GSA anticipated one-year contracts, and solicited computers "in current production," defined as being: (1) actively marketed; (2) currently maintained; and (3) not discontinued by the manufacturer. The RFP required offerors to submit data which the government could use to verify the computers' performance, instead of requiring benchmark test data. The protester alleged that the RFP was flawed because the definition of "in current production" allowed the contractor to provide used equipment in violation of the *FIRMR*. It further alleged that the use of the IDIQ type of contract and request for verification data was unreasonable. The board rejected all of the protester's arguments,[755] holding that the Brooks Act gave the GSA broad authority to obtain ADPE efficiently for the government, and that the GSA's use of the IDIQ contract complied fully with competition requirements. The board also held that requiring verification data in lieu of benchmark testing was reasonable. Finally, the board held that the GSA's definition of "in current production" did not violate the *FIRMR*, and to the extent, if any, that "in current production" conflicted with any *FIRMR* bulletins,[756] such a conflict would not invalidate the procurement.

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[748] *See* Amdahl Corp. v. Department of the Treasury, GSBCA No. 12658-P (Nov. 8, 1993), 94-1 BCA ¶ ____.

[749] GSBCA No. 12590-P (Oct. 10, 1993), 94-1 BCA ¶ ____.

[750] 42 U.S.C. § 6962(j).

[751] DFARS, *supra* note 27, at 210.004(b)(3)(B)(2) prohibits the government from rejecting brand name or equal offers for "minor differences in design, construction, or features which do not affect the suitability of the product for its intended use."

[752] Fantasy Lane, Inc., B-253407, Sept. 14, 1993, 93-2 CPD ¶ 164.

[753] Wiltel, Inc. v. Defense Information Sys. Agency, GSBCA No. 12310-P, 93-3 BCA ¶ 25,982.

[754] 10 U.S.C. § 2315; 40 U.S.C. § 759(a)(3)(C). Under the Warner Amendment, certain DOD uses of ADPE are exempt from the Brooks Act. These uses include: intelligence activities; cryptologic activities related to national security; command and control of military forces; integral parts of weapons systems; and direct fulfillment of military or intelligence missions.

[755] ViON Corp. v. GSA, GSBCA No. 12565-P (Oct. 29, 1993) 94-1 BCA ¶ ____.

[756] Federal Information Resource Management Regulation Bulletins are nonregulatory publications that provide guidance and information on the *FIRMR*. FIRMR 201-3.001(b)(1), *supra* note 725.

E. Commercial Items

Agencies' Use of Commercial Item Descriptions and Performance Specifications Do Not Preclude Competition.—The CICA[757] provides that agencies should develop specifications that will obtain full and open competition consistent with the nature of the supplies or services being acquired.[758] Congress also has mandated that agencies promote the use of commercial products and utilize performance specifications whenever practicable.[759] The bidders' desire to have clear, concise specifications sometimes conflicts with an agency's description of its needs in terms of performance requirements or commercial item descriptions. Two recent cases illustrate this conflict.

In *Adventure Tech, Inc.*,[760] the Army issued an IFB for rain jackets and trousers. The IFB was limited to "commercial items,"[761] and described the jacket as a "full length light weight rain jacket, camouflage woodland pattern," in small, medium, and large sizes. The IFB also required the jacket to be "machine washable, waterproof, moisture vapor permeable, with a minimum of two front pockets with closures, elastic or velcro sleeves." The protester asserted that the IFB was unclear and precluded competition on an equal basis, because it failed to specify minimum standards for "waterproofness," "moisture vapor permeability," and "durability." The GAO rejected the protester's argument, finding that the Army adequately stated its requirements in terms of the "performance required" and the "form, fit and function," as required by regulation.[762] The GAO conceded that terms like "waterproof" may apply to a wide range of water permeability, but determined that the bidders could compete on a common basis by submitting any product that is "of quality to pass without objection in the trade" and that otherwise meets the product description.

In *Isratex, Inc.*,[763] the protester argued that the Marine Corps' solicitation for modular sleeping bags lacked sufficient information to allow firms to prepare acceptable offers. The Marine Corps prepared a description of the sleeping bag after conducting an extensive market survey and synopsizing the requirement in the *Commerce Business Daily*.[764] The solicitation required two-component sleeping bags that would be suitable for use within a specified temperature range, and with a lining constructed of "hydrophobic" fabric.[765] The protester asserted that the description did not meet the *FAR* requirement for "essential physical and functional characteristics of the materials required."[766] The GAO rejected the protester's argument, finding that the Marine Corps properly used performance specifications to describe its minimum needs. The GAO noted that offerors could use any of the broad range of fabrics that meet the description of "hydrophobic," provided they met the stated performance requirements. Similarly, the insulating material "need only meet the performance requirements such as temperature range" and overall weight. The GAO concluded that an agency "can state its minimum needs in terms of performance specifications which alternate designs can meet."

F. Contracting for Services

1. New Policy Guidance on Management of Service Contracts.—The Office of Federal Procurement Policy issued Policy Letter 93-1, to establish government-wide policy on the use of service contracts.[767] The policy letter requires agencies to use effective management procedures to address five service contracting problem areas: (1) the performance of inherently governmental functions by service contractors; (2) the cost effectiveness of service contracts; (3) the adequacy of government control of contractor efforts; (4) conflicts of interest; and (5) competition. The policy letter rescinds Office of Management and Budget (OMB) Circular A-120,[768] and calls for the issuance of government-wide implementing regulations within 210 days of its publication.[769]

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[757] 10 U.S.C. §§ 2304-2305.

[758] *Id.* § 2305(a)(1)(A)(iii).

[759] *Id.* § 2301(b).

[760] B-253520, Sept. 29, 1993, 93-2 CPD ¶ ____.

[761] Commercial items are items regularly used in the course of normal business operations for other than government purposes that have been offered, sold, or licensed to the general public—or will be within a reasonable period of time—including items that would meet the requirements of the procuring agency with only minor modifications. DFARS, *supra* note 27, at 211.7001(a).

[762] *See* DFARS, *supra* note 27, at 211.7004-1(d).

[763] Isratex, Inc., B-253691, Oct. 13, 1993, 93-2 CPD ¶ ____.

[764] The GAO found the Marine Corps' market research effort to be "entirely proper."

[765] Although the solicitation used the term "commercial item description," there were no existing items that precisely met the Marine Corps' needs.

[766] *See* FAR 10.004(b)(1).

[767] Office of Fed. Procurement Policy, Policy Letter 93-1, subject: Mgt. Oversight of Serv. Contracting, 58 Fed. Reg. 63,596 (1993).

[768] OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR A-120, GUIDANCE FOR THE USE OF ADVISORY AND ASSISTANCE SERVICES (Jan. 4, 1988) (rescinded).

[769] Policy Letter 93-1 was published in the *Federal Register* on December 2, 1993.

Policy Letter 93-1 does not apply to personnel appointments or advisory committees, personal services authorized by statute, incidental services under supply contracts, or construction services. Although agencies must continue to report contracts for services to the Federal Procurement Data System, they need no longer separately categorize and report separately different types of contracted advisory and assistance services.[770]

2. *New Army Regulation Covering Contracted Advisory and Assistance Services Is Likely Candidate for Revision.*—The Army reissued its regulation covering advisory and assistance service contracts early in 1993, to implement a new DOD directive addressing management of service contracts.[771] The new Army regulation requires classification and reporting of contracted advisory and assistance services by category. That regulation, and the corresponding DOD directive, are likely candidates for revision in light of the new guidance from the Office of Federal Procurement Policy discussed above.

G. Government Information Practices

1. The DOD Issues New Guidance on Critical Mass.—In March, 1993, the DOD changed its policy on the applicability of Exemption 4 of the FOIA[772] to procurement information obtained through the solicitation process.[773] The DOD's previous policy was that information such as unit prices and other proprietary procurement information was "confidential" and, therefore, subject to withholding under Exemption 4 under a court decision[774] defining "confidential information" as information provided voluntarily and not released customarily to the general public.[775] The new DOD approach is to determine the confidentiality of procurement information under *National Parks & Conservation Ass'n v. Morton.*[776] The DOD's rationale is that because contractors must provide the information to compete for contracts, the information is not "voluntarily submitted" under the *Critical Mass* test.

2. *But One Court Disagrees with the DOD's Position.*—In *Environmental Technology, Inc. v. Environmental Protection Agency*,[777] an offeror for environmental cleanup services sued the EPA to block the release of its proposal to competitors, who requested the information under the FOIA.[778] In granting a permanent injunction, the court found that the offeror/plaintiff disclosed the information voluntarily based on the EPA's request for proposals. As a result, *Critical Mass* allowed the EPA to withhold the information pursuant to Exemption 4.

H. Intellectual Property Developments

Based on the Section 800 panel's recommendations and legislative initiatives,[779] significant changes to the technical data provisions of the *FAR* and *DFARS*[780] are undoubtedly forthcoming. However, no significant changes to these provisions appeared during 1993. While these reform proposals are pending, courts and boards of appeals must decide intellectual property cases under existing statutes and regulations. The following cases will affect how agencies handle intellectual property issues under current law.

1. Patents.—

(a) Government Rights.—The government obtains all rights in its employees' inventions produced through the following: efforts during normal working hours; use of government facilities, materiel, funds, or information; or any other connection with, or relationship to, the employees' official duties.[781] The government obtains these rights even if it does not challenge an employee's patent for over nineteen years.[782] Thus, in *Halas v. United States*,[783] the court dismissed an infringement suit brought by a former Army employee against

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[770] *See* Office of Fed. Procurement Policy, Policy Letter on Management Oversight of Services Contracting, Summary, 58 Fed. Reg. 63,593, 63,594 (1993).

[771] *See* DEP'T OF ARMY, REG. 5-14, MANAGEMENT OF CONTRACTED ADVISORY AND ASSISTANCE SERVICES (15 Jan. 1993); *see also* DEP'T OF DEFENSE, DIRECTIVE 4205.2, ACQUIRING AND MANAGING CONTRACTED ADVISORY AND ASSISTANCE SERVS. (Feb. 10, 1992).

[772] 5 U.S.C. § 552(b)(4).

[773] Memorandum, W. M. McDonald, Director, Freedom of Information and Security Review, Office of the Assistant Secretary of Defense, to DOD FOIA Components (Mar. 23, 1993).

[774] Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871 (D.C. Cir. 1992).

[775] Memorandum, W. M. McDonald, Director, Freedom of Information and Security Review, Office of the Assistant Secretary of Defense, to DOD FOIA Components (Nov. 12, 1992).

[776] 498 F.2d 765 (D.C. Cir. 1974). Under this standard, information is confidential if either disclosure is likely to impair the government's ability to obtain the information in the future or disclosure will cause substantial competitive harm to the provider of the information.

[777] 822 F. Supp. 1226 (E.D. Va. 1993).

[778] The action was a "reverse FOIA" suit, alleging that the agency's decision to release the information violated the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), because it was arbitrary, capricious, or not in accordance with law.

[779] *See, e.g.*, S. 1587, 103d Cong., 1st Sess. Title V (1993) (introduced by Senators Glenn and Nunn as the Federal Acquisition Streamlining Act of 1993).

[780] FAR pt. 27; DFARS, *supra* note 27, pt. 27.

[781] *See* 37 C.F.R. § 501.6 (1992) (codifies Executive Order 10096, as amended).

[782] Halas v. United States, 28 Fed. Cl. 354 (1993).

[783] *Id.*

the Department of Energy, finding that the government owned all rights and interests in the patented invention. This case highlights the need to investigate the circumstances surrounding the issuance of the patent when considering claims made by former government employees or assignees.

If a contractor produces a patentable invention based on concepts conceived or reduced to practice under a government research and development (R&D) contract, its patent rights may be limited by the terms of that contract. In *FilmTec Corp. v. Hydranautics*,[784] the Federal Circuit reversed a lower court's finding of patent infringement by a manufacturer producing reverse osmosis water purification membranes. FilmTec held a membrane patent encompassing the membrane produced by Hydranautics. Hydranautics defended the infringement suit by claiming that the United States government actually owned the patent, under the terms of an R&D contract on which one of FilmTec's founders had worked. Although the trend in recent years has been to allow contractors to retain title to their inventions under R&D contracts, the contract in this case, and the legislation in effect when the contract was awarded,[785] vested title in the United States. Before recognizing royalty or infringement claims, counsel should investigate the circumstances surrounding the development of patented inventions to ensure title truly is vested in the contractor.

(b) Infringement Suits.—When a patent owner sues another inventor for infringement, defendants often counterclaim for a declaratory judgment that the patent is invalid. Until recently, the Federal Circuit routinely vacated declaratory judgments of patent invalidity on appeal, if the defendant won below on the merits of its noninfringement defense. The court reasoned that the question of patent validity became moot upon a finding of noninfringement.[786] Recently, however, the Supreme Court changed this practice. In *Cardinal Chemical Co. v. Morton International, Inc.*,[787] the Supreme Court held that an appellate court does not lack jurisdiction to determine patent validity for mootness of the counterclaim, merely because a defendant won on the merits of the infringement suit. Because the trial court had jurisdiction over the counterclaim at the time of filing, the Court found that jurisdiction continued on appeal. The appellate court's practice of avoiding review of patent invalidity judgments to manage its docket more efficiently was held to be subordinate to important countervailing concerns, such as preserving a defendant's hard-won declaratory judgment, and the public's interest in determining with finality the validity of a patent.[788]

(c) Doctrine of Equivalents.—The court relied on the doctrine of equivalents to extend patent protection to a device that was essentially the same as the patented one, even though the device was not within the scope of a literal reading of the patent claim.[789] The court applied the doctrine of equivalents in recognition that in the business world, "words are not misappropriated; claimed inventions are."[790] The patent described a device for controlling the axis of rotation for spacecraft. Because the manufacturers of the infringing spacecraft had built the devices with government authorization, Hughes' claim for recovery lay against the government.[791] The court found that, although the spacecraft at issue[792] were not delivered and accepted until after the patent

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[784] 982 F.2d 1546 (Fed. Cir. 1992).

[785] Federal Non-Nuclear Energy, Research & Development Act of 1974, 42 U.S.C. § 5908; Saline Water Conversion Act of 1971, Pub. L. No. 92-60, 85 Stat. 159 (1971) (repealed 1978).

[786] *See* Morton Int'l, Inc. v. Cardinal Chemical Co., 959 F.2d 948 (Fed. Cir. 1992), *vacated*, 113 S. Ct. 1967 (1993).

[787] 113 S. Ct. 1967 (1993).

[788] *Id.* at 1976-77. *See* Messerschmidt v. United States, 29 Fed. Cl. 1 (1993), where in a 66-page decision, the court provides a detailed analysis of the pro se plaintiff's infringement claim, ultimately finding that the Army system did not infringe upon the patent and that the patent was invalid. The court's analysis of the infringement claim provides a treatise on much of the field of patent law, but its opinion is particularly insightful in its analysis of the infringement claim under the doctrine of equivalents. The court traces the historical development of the doctrine and discusses recent analytical variations that the Federal Circuit has used in its decisions. After careful analysis, the court held that the structure and function of the LH Commanche controller is significantly different from the controller claimed by the plaintiff; therefore, the court found the infringement claim without merit under the doctrine of equivalents as well as on all other bases.

[789] Hughes Aircraft Co. v. United States, 29 Fed. Cl. 197 (1993).

[790] *Id.* at 208 (quoting Laitram Corp. v. Cambridge Wire Cloth Co., 863 F.2d 855, 857 (Fed. Cir. 1988), *cert. denied*, 490 U.S. 1068 (1989)).

[791] *See* 28 U.S.C. § 1498, which provides that:

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

Id. The section goes on to explain that use or manufacture of a patented device by a government contractor shall be construed as use or manufacture for the United States.

[792] The spacecraft in issue were principally those constituting the government's global positioning system, but the infringement claim covered several other satellites as well. *See Hughes*, 29 Fed. Cl. at 243-48.

had expired, the infringing devices had been manufactured at the component level and tested prior to the patent's expiration. Furthermore, the court found that the government authorized the manufacture of the infringing devices at the time of contract award. Acceptance of the finished satellites was not required for a government infringement to occur.

2. Trade Secrets and Proprietary Data.—In *E.M. Scott & Assocs.*,[793] the board found an implied-in-fact contract prohibiting the Navy from using trade secrets disclosed in a contractor's proposal. The contractor sought compensation for proposal preparation costs, and the value of the trade secrets contained in its proposal, and other costs. The Navy sought dismissal of the claim on jurisdictional grounds, arguing that the claim sounded in tort rather than in contract,[794] and, in the alternative, that the contractor sought recovery on an implied contract to consider proposals fairly. The board disagreed, however, and determined that the contractor actually sought reimbursement for breach of an implied-in-fact, limited-use license agreement, a type of contract for personalty over which the board has jurisdiction. The case highlights the importance of safeguarding the contents of offerors' proposals, and of avoiding the use of any offeror's proprietary data, even for internal government purposes.[795]

3. Copyrights.—The United States Court of Appeals for the Ninth Circuit issued a copyright decision that could impact significantly the government's ability to contract for software maintenance services. The court held in *MAI Systems Corp. v. Peak Computer, Inc.*,[796] that loading a program from a permanent storage medium into the random access memory (RAM) of a computer amounts to copying the program, and that when this operation is performed by a party other than the software licensee, it violates federal copyright law. Peak Computer was performing software maintenance services for some of MAI Systems' software customers. To maintain the software, Peak Computers loaded it into customers' computers to reveal system errors and diagnose software problems. The court found that although the license to use the software necessarily permitted the licensed customer to load the software into RAM to use it, the license did not permit a third-party maintenance contractor to do so. Loading the program constituted copying it,[797] and violated copyright law.

I. International Acquisitions

1. Nonrecurring Cost Recoupment.—The DOD reissued a directive concerning nonrecurring cost recoupment[798] to implement President Bush's 1992 decision to stop recouping nonrecurring development and production costs through sales of nonmajor defense equipment[799] to foreign customers. The policy change applies to all sales made on or after October 7, 1992.[800] To comply with the new policy, the Army delegated authority to the Defense Contract Management Command to modify its contracts, at the request of contractors, to remove nonrecurring cost reporting and recoupment responsibilities that are not statutorily required.[801]

2. New Financial Management Regulation for Foreign Military Sales.—In March 1993, the DOD issued the volume of its new *Financial Management Regulation* covering foreign military sales.[802] Consistent with current policy, it requires recoupment of nonrecurring costs only in sales of major defense equipment,[803] as mandated by statute.[804] The new

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[793] ASBCA No. 45869, 94-1 BCA ¶ 26,258.

[794] The Navy claimed that the contractor was essentially pursuing a conversion claim for the theft of its trade secrets.

[795] This ASBCA decision concerned the alleged unauthorized use of proprietary data submitted in a proposal. For a decision considering an alleged unauthorized disclosure by a government employee of proprietary information outside of an ongoing procurement and its alleged unauthorized use by a competitor, *see* Olin Corp., B-252154, Mar. 9, 1993, 93-1 CPD ¶ 217 (GAO refused to consider merits of protest alleging improper disclosure of proprietary data by a government employee 11 years before the protest, because it was too remote from the current procurement, and because the protest basically addressed a matter in dispute between private parties).

[796] 991 F.2d 511 (9th Cir. 1993).

[797] Under the Copyright Act, copies are "material objects, other than phonorecords, in which a work is fixed by any method . . ., and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101 (1988).

[798] DEP'T OF DEFENSE, DIRECTIVE 2140.2, RECOUPMENT OF NONRECURRING COSTS ON SALES OF U.S. ITEMS (Jan. 13, 1993).

[799] Recoupment of these costs in sales of major defense equipment is required by statute; *see* 22 U.S.C. § 2761(e)(1)(B).

[800] Memorandum, Deputy Secretary of Defense, subject: Recoupment of Nonrecurring Costs under Defense Contracts (Jan. 13, 1993). Exercising his authority under Public Law 85-804, the Deputy Secretary of Defense directed in the memorandum that DOD contracts be modified as necessary to remove the requirement to report and recoup nonrecurring costs in connection with military equipment sales on or after October 7, 1992, except as required by statute.

[801] Memorandum, Acting Assistant Secretary of the Army (Research, Development, and Acquisition), SARDA-93-4, subject: Delegation of Authority—Recoupment of Nonrecurring Costs under Defense Contracts (Oct. 14, 1993).

[802] DEP'T OF DEFENSE, REG. 7000.14-R, SECURITY ASSISTANCE POLICY AND PROCEDURES, vol. 15 (18 Mar. 1993).

[803] *Id.* para. 070305.

[804] 22 U.S.C. § 2761(e)(1)(B). Senator Pell has introduced a bill to eliminate this statutory requirement, to promote the defense industry's ability to compete for sales in the increasingly competitive international arms market. S. 1474, 103d Cong., 1st Sess. § 1 (1993). To date, Congress has not acted on this proposed legislation. Elimination of all nonrecurring cost recoupment requirements should benefit both the DOD and industry. Accounting for these costs, and determining when they must be paid to the government and in what amount, is tedious and may be the source of protracted litigation. *See, e.g.*, BMY, A Div. of Harsco Corp., ASBCA No. 38172, 93-2 BCA ¶ 25,704.

DOD regulation cancelled and replaced the *Foreign Military Sales Finance and Accounting Manual*,[805] which should no longer be used by offices supporting foreign military sales programs.

3. Failure to Follow Security Assistance Management Manual (SAMM) Requirements Is Not a Basis for Protest.—The GAO held that the SAMM[806] only establishes internal DOD procedures, and is not a basis for protest.[807] Foreign customers occasionally request the DOD to award a contract to a specific contractor. Although such a request must be written,[808] it does not have to be included in a request for a letter of offer and acceptance (LOA) or in an LOA amendment, as specified in the SAMM.[809] In *Group Technologies Corp.*,[810] the GAO refused to grant the protest on the basis of the Army's failure to comply with the SAMM's format requirement.

4. Domestic Manufacture Requirement.—The Arms Export Control Act (AECA)[811] requires that items sold under its provisions to foreign customers be predominantly of United States manufacture.[812] This requirement is met even if a contractor purchases American-made parts from dealers in Canada and Israel, and resells them to the government of Turkey through direct commercial contracts.[813] In *United States v. Napco Int'l*[814] the government argued that the AECA bars procurement of American-made parts from foreign dealers for resale to foreign customers if the United States pays part of the bill. The court disagreed and found the AECA too ambiguous to impose a such a blanket prohibition. Therefore, the court found no False Claims Act[815] violation in the contractor's certification[816] that the parts were of United States origin.[817]

J. Bankruptcy

1. Assumption of Executory Contracts Does Not Alter Terms.—In *United States v. Gerth*,[818] the Eighth Circuit rejected an argument that assumption of an executory contract alters the date on which a prepetition duty arises. The opinion contains a lucid discussion of the impact of assumption of executory contracts on the right of setoff under the Bankruptcy Code (Code).[819] The court also held that for purposes of determining whether to allow a setoff, the debtor and the debtor in possession are the same legal entity. The court opined, however, that mutuality of identity between the debtor and the debtor in possession may not apply in other bankruptcy contexts.

2. Claim Settlement Is Postpetition Contract.—After filing a bankruptcy petition, the debtor in possession and the Air Force negotiated a contract settlement agreement. Subsequently, the Internal Revenue Service asserted a right to setoff payment of the money due the contractor under the settlement agreement. The court in *Southeast Bank, N.A. (In re Apex International Management Services)*,[820] reasoned that the

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[805] DEP'T OF DEFENSE, MANUAL 7290.3-M, FOREIGN MILITARY SALES FINANCE AND ACCOUNTING MANUAL (18 Sept. 1986) [hereinafter FOREIGN MILITARY SALES MANUAL].

[806] DEP'T OF DEFENSE, MANUAL 5105.38-M, SECURITY ASSISTANCE MANAGEMENT MANUAL (C5, 2 Nov. 1992) [hereinafter SECURITY MANUAL].

[807] Group Technologies Corp., B-250699, Feb. 17, 1993, 93-1 CPD ¶ 150.

[808] *See* 10 U.S.C. § 2304(c)(4); FAR 6.302-4(b)(1); DFARS, *supra* note 27, at 225.7304.

[809] SECURITY MANUAL, *supra* note 806, para. 80102.

[810] B-250699, Feb. 17, 1993, 93-1 CPD ¶ 150.

[811] 22 U.S.C. §§ 2751-2796.

[812] *Id.* § 2791(a), (c).

[813] United States v. Napco Int'l, F. Supp. 493 (D. Minn. 1993).

[814] *Id.*

[815] 31 U.S.C. § 3729(a).

[816] Contractors selling defense articles or services to foreign customers that will be paid for in whole or in part with United States funds must sign a "certification and agreement" with the Defense Security Assistance Agency. In this agreement, contractors certify that, unless specifically identified in the agreement, all parts and materials provided through the sale are of "U.S. manufacture." SECURITY MANUAL, *supra* note 806, tbl. 902-7.

[817] *Cf.* The Buy American Act, 41 U.S.C. § 10a. This statute only applies to contracts for items that are for public use within the United States, and, therefore, is not applicable to the sale discussed above. However, the intertwined economies of the world often make determining the origin of manufactured products difficult under both statutes.

[818] 991 F.2d 1428 (8th Cir. 1993).

[819] 11 U.S.C. § 553.

[820] 155 B.R. 591 (Bankr. M.D. Fla. 1993).

original contract had expired three years before and the settlement agreement created a new obligation on the Air Force to pay the debtor in possession. Thus, for purposes of determining setoff rights, the settlement agreement was a new postpetition contract.

3. Partial Default Precludes Assumption.—The Navy obtained relief from the automatic stay provisions of the Code[821] and partially terminated a contract for default. Later, the debtor in possession sought to assume the contract and force the Navy to exercise the contract's four one-year options, arguing that refusal to exercise the options violated the antidiscrimination provisions of the Code.[822] In *In re Plum Run Service Corp.*,[823] the bankruptcy court applied state law to determine whether the debtor in possession could assume the options, and conducted an evidentiary hearing to ascertain whether the Navy discriminated against Plum Run. The court held that the partial termination destroyed the option. There was, therefore, no contract to assume. The court found adequate evidence of prepetition performance problems to overcome any allegation of discrimination. In dicta, the court suggested that the Anti-Assignment Act bars the assignment of any prepetition government contract to another contractor.[824]

4. Automatic Stay Nullifies Default Termination.—In *C. Kennedy Manufacturing & Engineering*,[825] a contracting officer terminated a contract forty days after the contractor filed a bankruptcy petition. The contractor appealed to the ASBCA. Subsequently, the contracting officer learned of the bankruptcy and reinstated the contract. Several months later the bankruptcy court dismissed the bankruptcy action. The contracting officer then terminated the contract for default again. Two days later, the government moved to dismiss the ASBCA appeal for lack of jurisdiction.[826] The board held that the original termination was "null and void" and dismissed the action with prejudice. The board, however, allowed the pro se appellant to challenge the second termination based on its request to reinstate the contract.

5. Relief from Stay Allows Default Termination.—A bankruptcy court voided a postpetition termination for default, finding that it violated the automatic stay.[827] Subsequently, the government obtained relief from the stay and terminated the contract "nunc pro tunc." In *Sermor, Inc.*,[828] the board rejected the appellant's argument that the second termination violated the court's order, because the order expressly allowed the government to terminate the contract and because the appellant failed to challenge the termination in its bankruptcy proceeding.

6. Fair Labor Standards Act Enforcement Not Stayed.—A bankruptcy court refused to block the Department of Labor's Fair Labor Standards Act (FLSA) enforcement proceedings in *Martin v. Safety Electric Construction Co.*[829] The Code exempts government police and regulatory actions from the automatic stay.[830] The court applied a "pecuniary interest" and a "public policy" test to determine the applicability of the exemption. Under these tests, the stay applies if the agency's actions primarily relate to the "pecuniary interest" of the government, or if the action advances private rights or interests. Here, the labor investigation advanced the public policy of the FLSA and did not advance the pecuniary interest of the United States, so the stay did not apply.

7. Bankruptcy Court Has Discretion to Refuse Deferral.—In the long standing litigation between Murdock Machine & Engineering Co. of Utah and the United States,[831] the Tenth

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[821] 11 U.S.C. § 362.

[822] *Id.* § 525.

[823] 159 B.R. 496 (Bankr. S.D. Ohio 1993).

[824] 41 U.S.C. § 15. The court cites with approval In re West Elec., 852 F.2d 79 (3rd Cir. 1988), which holds that the Anti-Assignment Act bars the assumption of government contracts by a debtor in possession because the debtor (original contractor) and the debtor in possession are different legal entities.

[825] ASBCA No. 43341, 93-3 BCA ¶ 25,974.

[826] The government filed the motion to dismiss approximately 85 days before the 90-day limitation period for appealing the second termination to a board of contract appeals. The board offered the appellant two opportunities to respond to the motion. Eventually, the pro se appellant responded with a letter asking for reinstatement of the contract.

[827] 11 U.S.C. § 362.

[828] ASBCA No. 29798 (Aug. 16, 1993), 93-__ BCA ¶ ____.

[829] 151 B.R. 637 (Bankr. D. Conn. 1993).

[830] 11 U.S.C. § 362(b)(4).

[831] *See* In re Murdock Mach. & Eng'g Co., 990 F.2d 567 (10th Cir. 1993); Murdock Mach. & Eng'g Co., ASBCA No. 20409, 88-1 BCA ¶ 20,354, *rev'd and remanded*, Murdock Mach. & Eng'g Co. v. United States, 873 F.2d 1410 (Fed. Cir. 1989), *on remand*, Murdock Mach. & Eng'g Co., ASBCA No. 27860, 90-1 BCA ¶ 22,604, *aff'd. on recon.*, Murdock Mach. & Eng'g Co., ASBCA No. 27860, 90-3 BCA ¶ 23,006, *appeal granted, in part*, Murdock Mach. & Eng'g Co., ASBCA No. 42891, 93-1 BCA ¶ 25,329, *recon. denied*, Murdock Mach. & Eng'g Co., ASBCA No. 42891, 93-2 BCA ¶ 25,887.

Circuit upheld the bankruptcy court's discretion to decide whether to defer a bankruptcy proceeding during the pendency of contract litigation. The bankruptcy court initially deferred action on Murdock's entitlement under a contract claim. Once the ASBCA and the Federal Circuit decided the main contract issues,[832] the bankruptcy court retained jurisdiction to determine whether to allow the government's unsecured claims in the bankruptcy proceeding.[833] The court held that the bankruptcy court did not abuse its discretion when it refused to defer action on the bankruptcy claims based on the decisions of the board and the Federal Circuit.

8. Deferral is a Two Way Street.—In yet another chapter of the Murdock Machine & Engineering saga, the board deferred to the bankruptcy court to decide whether the Code permits accrued postpetition interest on a government guaranteed loan to be deducted from the amount due to the contractor under a termination for convenience settlement.[834]

9. Reorganization Plan Not a Basis to Protest Reprocurement Solicitation.—A debtor in possession hoped to complete a contract terminated for default as a part of its reorganization plan. It protested the government's reprocurement contract solicitation, arguing that the award of the reprocurement contract would interfere with its reorganization plan. The GAO ruled that the protestor did not state a basis for challenging the reprocurement award and that the debtor in possession's remedy for a wrongful default termination was to have it converted to a termination for convenience.[835]

K. Costs and Cost Accounting

1. Allowability of Consultant Fees.—Federal Acquisition Regulation 31.205-47(f) disallows costs incurred in connection with the prosecution or defense of a CDA[836] claim. In *Bill Strong Enterprises*,[837] the ASBCA disallowed a contractor's consultant costs even though the costs were incurred to prepare a demand for payment that did not meet all the requirements of a CDA "claim." Thus, even if no dispute exists when a contractor submits a demand for payment, consultant costs incurred to prepare that demand are unallowable. The board reasoned that to hold otherwise would reward a contractor who intended to submit a claim against the government but failed to "touch all of the CDA bases."

2. Cost Accounting Standards Board Raises Full Coverage Thresholds.—After November 4, 1993, contracts are subject to full CAS coverage if a contractor receives one contract of $25 million or more, or receives multiple contracts totalling $25 million or more, if at least one contract exceeds $1 million.[838] The CAS board raised the previous $10 million threshold to account for inflation. The board also amended the rules pertaining to contracts subject to modified coverage.[839] Under the new rules, contracts subject to modified coverage must comply with CAS 405, Accounting for Unallowable Costs, and CAS 406, Cost Accounting Period, in addition to the previously applicable standards, CAS 401, Consistency in Estimating, and CAS 402, Consistency in Allocating Costs Incurred for the Same Purpose.

3. Procuring Contracting Officer Can Disallow Costs Retroactively.—Administrative contracting officers are responsible for determining whether a contractor's CAS Disclosure Statement complies with applicable cost accounting standards.[840] In *Bell-Boeing Joint Venture*,[841] the board upheld a PCO's retroactive disallowance because the disallowance was not based solely on noncompliance with CAS, but also was based on the PCO's determination that the contractor was on notice that the government would not pay the costs in question.[842] Although an ACO had found the contract in compliance with applicable CAS, the board found that, thereafter, "the Navy repeatedly put [Boeing] on notice . . . that such charges would not be payable as a direct charge."[843]

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[832] *Murdock Mach.*, 873 F.2d, at 1410.

[833] The government's bankruptcy claim was based largely on unliquidated progress payments. The estate's sole asset is its claims against the government. Under the government's theory, its unliquidated progress payment claim is larger than any claim Murdock has against the government. The Federal Circuit held the Navy's termination for default improper and remanded to the board to quantify termination costs. The board then entered judgment in the amount of $4 million against the government, thus precluding any recovery by the government against the estate.

[834] Murdock Mach. & Eng'g Co., ASBCA No. 42891, 93-2 BCA ¶ 25,887.

[835] Inter Pipe, Inc.—Recon., B-253669.2, July 7, 1993, 93-2 CPD ¶ 9.

[836] 41 U.S.C. §§ 601-613.

[837] ASBCA No. 42946, 93-3 BCA ¶ 25,961.

[838] 58 Fed. Reg. 58,798 (1993). These changes became effective on November 4, 1993.

[839] Contracts over $500,000 that are not subject to full coverage—as discussed in the text—are subject to modified coverage. 48 C.F.R. § 9903.201-2(b) (1993).

[840] *See* FAR 30.202-6(d); DAR 1-406(c).

[841] ASBCA No. 39681, 93-2 BCA ¶ 25,791.

[842] Although the board had to apply DAR 1-406(c), that section is substantially similar to its current counterpart, FAR 30.202-6(d).

[843] *Bell-Boeing*, at 128,342.

L. Defective Pricing

1. Nondisclosure by Second-Tier Subcontractor Costs Prime.—When a contractor failed to inform the government of a price reduction by a second-tier subcontractor, then failed to prove that the subcontractor had informed it of the price reduction, the board held[844] that the contractor's nondisclosure resulted in a contract price increase under the Truth in Negotiations Act (TINA).[845] The government negotiated a contract with EDO Corporation to produce jettison release mechanisms for F-14 aircraft. Before contract negotiations were complete, a second-tier subcontractor to EDO reduced its price for decoders, a component of the release mechanisms. EDO failed to disclose the subcontractor's price reduction to the government, although it later argued that it had reduced its overall price to the government based on the subcontractor's price reduction. EDO, however, was unable to prove that it had known of, let alone considered, its reduced subcontracting costs when it negotiated with the government. Consequently, the board refused to reduce the government's defective pricing claim against EDO and determined that the amount of defective pricing equaled the full amount of the subcontractor's price reduction.

2. Government Failure of Proof Sinks Defective Pricing Claim.—The government failed to prove defective pricing in a case involving price proposals for definitization of delivery orders issued under a Basic Ordering Agreement (BOA) for spare parts and other items.[846] The government argued that the contractor provided defective cost or pricing data because it failed to provide current actual costs to the government negotiator. The board disagreed for two reasons. First, because the contractor furnished current data to the resident DCAA office prior to price agreement, the board found that the contractor made the data available. Second, because the government did not provide sufficient time for the contractor to analyze the information in its possession, the government failed to satisfy its burden of proving that the data was reasonably available.

3. Contract Clause in One Contract Permits Defective Pricing Action in Another.—In connection with a contract for long lead time items for the Trident submarine, General Dynamics Corporation submitted allegedly defective subcontractor cost or pricing data to the government.[847] The government sought to recover under TINA. In denying both parties' motions for summary judgment, the board held that the data submitted in one contract became, by virtue of the various contract clauses and for purposes of determining defective pricing, part of a subsequent production contract which used the long lead time items in production.

4. Director, Defense Procurement, Directs Early Release of Price Negotiation Memoranda.—The Director, Defense Procurement, encouraged contracting officers to release relevant portions of price negotiation memoranda when a contractor requests such information in connection with a defective pricing allegation.[848] She stated that whenever a contractor requests such information in connection with a defective pricing allegation, release will save the government and contractors considerable effort and expense because defective pricing allegations may be resolved without litigation.

5. The DAR Council Proposes FAR Provisions Regarding Postaward Audits.—The Civilian Agency Acquisition Council and the DAR Council are proposing revisions to the *FAR* to provide that postaward audits remain in draft form until the contractor and the contracting officer have the opportunity to review and comment on reports indicating defective pricing.[849] The purpose of this proposal is to ensure that final audit reports are as accurate as possible.

M. Environmental Law

1. The DOD Must Minimize Use of Ozone-Depleting Substances (ODS) in Its Procurements.—The DOD published an interim rule amending the *DFARS* and establishing procedures for eliminating ODS in DOD contracts.[850] The rule implements section 326 of the FY 93 DOD Authorization Act[851] and prohibits agencies from including specifications

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[844] EDO Corp., ASBCA No. 41448, 93-3 BCA ¶ 26,135.

[845] 10 U.S.C. § 2306(f).

[846] Litton Sys., Amecom Div., ASBCA No. 34435, 93-2 BCA ¶ 25,707.

[847] General Dynamics Corp., ASBCA No. 39866 (Aug. 24, 1993), 94-1 BCA ¶ ____.

[848] Memorandum, Director, Defense Procurement, DP/CPF, subject: Release of Price Negotiation Memorandum Upon an Allegation of Defective Pricing (June 14, 1993).

[849] 58 Fed. Reg. 64,824 (1993).

[850] Elimination of Ozone-Depleting Substances, 58 Fed. Reg. 32,061 (1993) (amending parts 207 and 210 of the *DFARS*).

[851] Section 336(a) of the FY 1993 Authorization Act, Pub. L. 102-484, provides:

> No [DOD] contract awarded after June 1, 1993, may include a specification or standard that requires the use of a class I [ODS] or that can be met only through the use of such a substance unless the inclusion of the specification or standard in the contract is approved by the senior acquisition official (SAO) for the procurement covered by the contract.

106 Stat. 2315, 2368. *See* Exec. Order No. 12843, 58 Fed. Reg. 21,881 (1993); DFARS, *supra* note 27, at 210.002-71(a); AFFARS, *supra* note 184, at 5310.002-71(90)(a).

requiring ODS use in contracts awarded after June 1, 1993, unless approved by a general officer or member of the Senior Executive Service.[852] This approval must be based on an independent determination by a technical representative that no suitable ODS substitute is reasonably available.[853] Agencies also must evaluate certain contracts awarded prior to June 1, 1993 to determine whether it is feasible to eliminate existing ODS requirements.[854]

2. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[855] *Does Not Waive Sovereign Immunity for Facilities No Longer Owned or Operated by the United States.*—In *Rosspatch Jessco Corp. v. United States*,[856] the court held that the United States could not be sued under state environmental law for its prior ownership and operation of a facility that released hazardous substances. The court noted that section 120(a)(4) of the CERCLA[857] distinguishes federal facilities with "facilities which *are* not owned or operated by any such department, agency, or instrumentality." Because this section is cast in the present tense, the court reasoned, the CERCLA does not unequivocally waive sovereign immunity with regard to facilities no longer owned or operated by the United States.[858]

3. President Directs Purchase of EPA Guideline Items.—On October 20, 1993, President Clinton issued an Executive Order requiring agencies to "ensure that their affirmative procurement programs require that 100 percent of their purchases of products meet or exceed EPA guideline standards."[859] This obligates agencies to purchase EPA guideline items[860] unless the contracting officer makes a written justification that the product is not available competitively within a reasonable time, does not meet appropriate performance standards, or is only available at an unreasonable price.[861]

4. Agencies Must Buy "Green" Paper.—Contracts awarded after December 31, 1994, for high speed copier paper, offset paper, forms bond, computer printout paper, and file folders, must specify that the paper be comprised of no less than twenty percent "postconsumer material."[862] After December 31, 1998, this minimum content standard will increase to thirty percent. However, this requirement will not apply to a procurement if the contracting officer determines that a satisfactory level of competition does not exist, the items are not available within a reasonable time, or the available items fail to meet reasonable performance standards established by the agency, or are only available at an unreasonable price.[863]

5. The CERCLA Does Not Preempt State Enforcement of Its Environmental Law.[864]—The Colorado Department of Health—exercising its state enforcement authority under RCRA—issued a plan closing a waste treatment facility at the Army's Rocky Mountain Arsenal, Colorado. The Army refused to comply with the Colorado plan and argued that because the EPA had placed the facility on the "national priority list," under the CERCLA,[865] Colorado was preempted from enforcing its environmental laws against the listed Army

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[852] Ozone-depleting substances include halons and chlorofluorocarbons, which are primarily used as firefighting agents, refrigerants, cleaning solvents, and for vector control in some missile systems. *See* 42 U.S.C. § 7671a(a); 40 C.F.R. pt. 82, app. A (1992).

[853] Elimination of Ozone-Depleting Substances, 58 Fed. Reg. 32,061 (1993).

[854] This evaluation requirement applies to contracts in excess of $10 million that are modified after June 1, 1993 if, as a result of the modification, the contract will expire more than one year after the effective date of the modification.

[855] 42 U.S.C. §§ 9601-9675 (1993).

[856] 829 F. Supp. 224 (W.D. Mich. 1993).

[857] 42 U.S.C. § 9620(a)(4).

[858] *See* Redland Soccer Club, Inc. v. Department of the Army, 801 F. Supp. 1432 (M.D. Pa. 1992). *But see* Tenaya Assocs. Ltd. Partnership v. United States Forest Serv., CV-F-92-5375 REC (E.D. Cal. May 18, 1993).

[859] Exec. Order No. 12873, 58 Fed. Reg. 54,911 (1993).

[860] The EPA has defined the following as "guideline items": cement and concrete containing fly ash, paper products, rerefined lubricating oil, retread tires, and building insulation containing recovered materials. 40 C.F.R. §§ 248-250 (1993).

[861] Exec. Order No. 12873, 58 Fed. Reg. 54,911 (1993).

[862] "Postconsumer materials" are materials or finished products that have served their intended use and have been discarded. Exec. Order No. 12873, § 504(a), 58 Fed. Reg. 54,911 (1993).

[863] Executive Order No. 12873 at § 504(c)(1).

[864] The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6901i. Under the RCRA, the EPA may authorize states to implement their environmental laws in lieu of RCRA requirements. State enforcement action, taken pursuant to this authority, has the same force and effect as if taken by the EPA. 42 U.S.C. § 6926(d).

[865] When a DOD facility is placed on the national priority list, the President, acting through the Secretary of Defense, must "remove or arrange for the removal of and provide for remedial action relating to such hazardous substance . . . or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment." 42 U.S.C. § 9504(a)(1).

facility. The court found that federal facilities are subject to regulation under the RCRA and that Congress intended the CERCLA to apply in conjunction with state and federal environmental laws. The court further found that Colorado's action was not in conflict with the remedial actions required by the CERCLA, and held that "[p]lacement on the national priority list simply has no bearing on a federal facility's obligation to comply with state hazardous waste laws which have been authorized by an EPA delegation of RCRA authority."

N. Payment and Collection

1. Surety Recovers Funds Owed to Defaulting Contractor Under Different Contract.—In *Transamerica Insurance Co. v. United States*[866] Bodenhamer Building Corporation had two construction contracts with the Army Corps of Engineers. Bodenhamer completed the first, a commissary contract, but defaulted on the second, a school contract. Transamerica, as surety, completed the school contract at a loss of approximately $1,000,000. Meanwhile, Bodenhamer filed a $500,000 equitable adjustment claim with the Army Corps of Engineers for its work on the commissary contract. Transamerica learned of Bodenhamer's claim and notified the Army Corps of Engineers that it sought the funds owed to Bodenhamer under the doctrine of equitable subrogation. Nevertheless, the Army Corps of Engineers paid Bodenhamer, and Transamerica sued the United States in the United States Court of Federal Claims. Although the court rejected Transamerica's arguments, the Federal Circuit reversed, and required the United States to pay Transamerica the amount ($500,000) paid to Bodenhamer under the commissary contract. The court held that on performing the school contract, Transamerica became subrogated to all the rights of the government, including the right to setoff funds owed to a defaulting contractor on another contract.

2. Prompt Payment Act.—

(a) Prompt Payment Act[867] *(PPA) Interest Tolled by Dispute Unrelated to Late Payment.*—The PPA obligates the government to pay an interest penalty when it fails to pay undisputed invoice payments by the due date. No interest accrues if the government has a good faith dispute concerning the contractor's entitlement to payment. This rule was expanded in *Ross & McDonald Contracting, GmbH*,[868] where the interest period was tolled because the government had a good faith basis to question the contractor's overall performance, even though it did not dispute the contractor's right to payment under the particular unpaid invoices. In *Ross*, the government terminated the contract for default because Ross refused to continue performance. Shortly before the termination, Ross submitted proper invoices for acceptable work with payment due after the termination. The government withheld payment to offset its expected reprocurement costs and Ross submitted a claim for PPA interest. In denying the claim, the board reasoned that interest never accrued because a dispute arose when Ross refused to continue performance and payment was not due until after the termination.

(b) The PPA Applies to Foreign Firms Under FAR *Deviation.*—On April 13, 1993, the Director of Defense Procurement granted a class deviation from FAR 32.901. Federal Acquisition Regulation 32.901 states that the government need not pay PPA interest under "contracts awarded to foreign vendors outside the United States for work performed outside the United States."[869] The deviation was in response to a 1992 ASBCA decision holding that the *FAR* exemption is inconsistent with the intent of the PPA.[870] Based on this class deviation, the government will be liable for PPA interest for late invoice payments, wherever contracts are performed.

(c) Prompt Payment Act Interest Penalty Applied to Late Interim Payments Under a Cost-Reimbursement Contract.—In a case of first impression, the ASBCA held that interim payments under cost-reimbursement contracts are not payments made "solely for financing purposes,"[871] and are, therefore, subject to the interest penalty authorized by the PPA. In *Technology for Communications International*,[872] the contractor submitted invoices seeking reimbursement for services rendered, though not yet accepted, by the government. The parties stipulated that the government failed to make timely payment. The government denied liability for PPA interest, however, arguing that PPA interest does not apply to late financing payments.[873] The board disagreed, reasoning that, "[w]hile the [government] did not formally accept either the specific services or partially completed structures, on the other hand it cannot be again said that such services had been 'ren-

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[866] 989 F.2d 1188 (Fed. Cir. 1993), *reh'g denied*, 998 F.2d 972 (Fed. Cir. 1993).

[867] 31 U.S.C. §§ 3901-3906.

[868] ASBCA No. 38154, 94-1 BCA ¶ 26,316.

[869] FAR 32.901.

[870] Held & Franke Bauaktiengesellschaft mbH, ASBCA No. 42463, 92-1 BCA ¶ 24,712.

[871] OFFICE OF MANAGEMENT AND BUDGET CIRCULAR 125, sect. 8.c (Aug. 25, 1982), 47 Fed. Reg. 37,321 (1982).

[872] ASBCA No. 36265, 93-3 BCA ¶ 26,139.

[873] Federal Acquisition Regulation 32.902 states, in relevant part, "'Contract financing payment,' as used in this subpart, means a Government disbursement of monies to a contractor under a contract clause or other authorization prior to acceptance of supplies or services by the Government."

dered' during the period for which the reimbursement of costs was requested." The board's decision is contrary to FAR 32.902, which defines interim payments under cost-reimbursement contracts as a type of "financing payment," which is not subject to the PPA interest penalty.[874]

3. Payments Clause.—

(a) Payments Clause Incorporated into Time and Materials Contract Under Christian *Doctrine.*[875]—In *General Engineering & Machine Works v. Acting Secretary of the Navy*,[876] the Federal Circuit determined that the time and materials payments clause[877] should be incorporated into a contract as a matter of law. The court found that the clause advanced a significant procurement policy by requiring separate cost pools for material handling costs because this practice deters double payments and the unnecessary expenditure of government funds. Because General Engineering failed to maintain separate cost pools for its material handling costs, the board could not determine whether its costs were billed as direct materials costs or overhead. In the board's decision—which the Federal Circuit upheld—the board assumed that the contractor received double payment and denied the contractor's claim for reimbursement.

(b) Prime Contractor Must Pay Subcontractors Before Receiving Progress Payments—Maybe.—Two board cases illustrate that a prime contractor's awareness of a contracting agency's past payment practice is critical in determining whether subcontractor payment must precede receipt of progress payments. Both cases involved construction contracts in which the contractor requested progress payments for supplies stored at the worksite but not yet installed. In such circumstances, the board noted, the contracting officer may refuse payment until the supplies are incorporated into the structure or the contractor provides proof that it has paid its subcontractors.[878] In *Webb Electric Co. of Florida*,[879] the board upheld the contracting officer's decision to deny payment because the contractor had performed other contracts for the agency and knew that the agency would not make progress payments until the contractor documented that it had paid its subcontractors. In *C. Lawrence Construction Co.*,[880] however, the board held that "it was not a reasonable exercise of discretion to exclude from the estimate of accomplished work the value of the . . . material stored on site, solely on the ground that [the contractor] had not yet paid the supplier for the material." The board distinguished *Webb* because in *Lawrence,* the contractor did not know that payment to suppliers was a precondition to receipt of progress payments.

(c) A Delinquent Prime May Be Reimbursed for Unpaid Subcontractor Payments.—In *Patel Enterprises*,[881] the government wrongly withheld payment from a small business contractor that was delinquent in paying its subcontractors. The government argued unsuccessfully, that, under the contract's allowable cost and payment clause,[882] the contractor was not entitled to reimbursement for costs incurred but not yet paid, if it was delinquent in paying the costs of contract performance. The board rejected this argument based on FAR 52.216-7(c), which entitles small businesses to reimbursement for "recorded costs" in advance of actual payment.

4. Final Payment—When Is a Release Not a Release?—When the ASBCA says it is not. In *Service Engineering Co.*,[883] the parties modified their contract to address several ordered changes. The modification contained a release provision whereby the contractor waived "all claims for delays and disruptions" associated with the changes. The board held that

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[874] The contract in the subject case was awarded prior to promulgation of FAR subpart 32.9, which addresses prompt payment issues (FAR subpart 32.9 became effective on Feb. 8, 1988, 48 C.F.R. § 232.9 (1992)). Consequently, the board did not have to decide whether the current *FAR* provision properly implements the PPA. However, the board indicated on how it would rule on a case involving a contract awarded *after* promulgation of FAR subpart 39.2. The board opined: "We are also satisfied that making the Government bear the consequences of delayed contract payments is in furtherance of the congressional intent in enacting the PPA." Technology for Communications Int'l, 93-3 BCA at 129,949.

[875] Under the *Christian* Doctrine, courts and boards read mandatory clauses into government contracts by operation of law if the clauses express a significant or deeply ingrained public procurement policy. *See* G.L. Christian & Assoc. v. United States, 312 F.2d 418 (Ct. Cl.), *reh'g denied*, 320 F.2d 345, *cert. denied*, 375 U.S. 954 (1963).

[876] 991 F.2d 775 (Fed. Cir. 1993).

[877] The clause in question was DAR 7-901.6 "Payments" (May 1972). Its current counterpart, FAR 52.232-7 "Payments Under Time and Materials and Labor Hours Contracts" (Apr. 1984), is essentially identical.

[878] *See* FAR 52.232-5 (Payments Under Fixed-Price Construction Contracts).

[879] ASBCA No. 40557, 93-2 BCA ¶ 25,715.

[880] ASBCA No. 45270, 93-3 BCA ¶ 26,129.

[881] ASBCA No. 41529, 93-2 BCA ¶ 25,863.

[882] FAR 52.216-7.

[883] ASBCA No. 40274, 93-2 BCA ¶ 25,885.

this provision did not bar the contractor's delay and disruption claim because agency officials told the contractor to exclude impact and delay costs in its change order proposal. The board stated that, "[t]he Government cannot have it both ways. It cannot force [the contractor] to defer its impact costs . . . [and also deny the contractor] the right to assert an impact claim because of the release clause."

5. Debt Collection Act[884]*—Federal Circuit Finds Debt Collection Act (DCA) Inapplicable to Government Contracts.*—The Federal Circuit has resolved whether the DCA applies to collection of debts arising from government contracts. Although cases have held consistently that the DCA does not apply to collection of "intracontractual" debts,[885] results have varied concerning collection of "intercontractual" debts.[886] In *Cecile Industries v. Cheney*,[887] the court noted that the government's common law right of offset predated enactment of the DCA and found that the DCA's legislative history indicated a congressional intent to strengthen the government's debt collection powers. The court concluded that the DCA does not apply to the government's collection of either intercontractual or intracontractual debts because "[n]owhere does the language, context, or enactment history of the DCA suggest restriction or replacement of doctrines permitting contractual offsets."

O. Government-Furnished Property (GFP)

1. Contractor Liable for Loss of GFP Despite Maintaining "Accurate" Inventory.—When an agency provides GFP to a contractor under a fixed-price contract, the contractor bears the risk of loss for that property.[888] In *United States Marine Management*,[889] the contract obligated the contractor to maintain an "accurate" inventory for each category of GFP in its possession. However, the contract contained a clause that stated that, "[f]or the purpose of delivery and eventual redelivery of [the GFP], an inventory validity of less than 90% will suffice as an 'accurate' inventory." When the contractor returned the property, it submitted an inventory for each category of the GFP it possessed, accounting for ninety-five, ninety-one, and ninety-two percent of the GFP, respectively. The government sought reimbursement for the unaccounted items and the contractor objected, arguing that its inventory was "accurate" according to the contract, and that it should not, therefore, be liable for the loss. The board held that the standard fixed-price contract Government Property clause[890] places the risk of loss on the contractor and the inventory standards provision "merely recognized that an inventory of 100 percent accuracy was not feasible."

2. Government's Attempted Disclaimer Found Ineffective.—If the government wants to disclaim responsibility for unsuitable GFP, it must do so expressly and with specific reference to the GFP covered. In *Lear Astronics Corp.*,[891] the government furnished the contractor with preliminary test software, "for information only," and final test software, without qualification. When the final test software caused testing problems, the contractor sought reimbursement for associated increased costs. The government contended that the qualification accompanying the preliminary software extended to the final software. The board disagreed, finding that the final software was furnished without specific qualification and, because "[t]ribunals are loath to find disclaimers of [GFP]," the contractor was entitled to its increased costs.

3. Contractor Must Prove That Unsuitable GFP Impacted Performance.—To recover for unsuitable GFP, contractors must prove that the unsuitable GFP was the most probable cause for the impact on performance. In *Southwest Marine, Inc.*,[892] the Coast Guard furnished the contractor with propeller shaft sleeves for performing a ship repair contract. The sleeves cracked during installation and the contractor requested an equitable adjustment for the costs of repairing the cracked sleeves. The board stated that "the appellant has the relatively heavy burden of negating every other equally probable cause for the cracks." Accordingly, the board denied the claim because the contractor failed to rebut government evidence that the contractor's method of installation could have caused the cracks.

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[884] 31 U.S.C. § 3716.

[885] *See* AVCO Corp. v. United States, 10 Cl. Ct. 665 (1986); Sam's Elec. Co., GSBCA No. 9359, 90-3 BCA ¶ 23,128; Information Consultants, Inc., GSBCA No. 8130-COM, 86-3 BCA ¶ 19,198; Fairchild Republic Co., ASBCA No. 29385, 85-2 BCA ¶ 18,047, *aff'd on recon.*, 86-1 BCA ¶ 18,608.

[886] *Compare* DMJM/Norman Eng'g Co., ASBCA No. 28154, 84-1 BCA ¶ 17,226 (holding that the DCA applied to intercontractual debt collection) *with* B&A Elec. Co., ASBCA No. 33667, 88-2 BCA ¶ 20,533 (holding that the DCA was not applicable to collection of intercontractual debts based on labor standards violations).

[887] 995 F.2d 1052 (Fed. Cir. 1993).

[888] FAR 52.245-2(g).

[889] ASBCA No. 45130, 93-3 BCA ¶ 25,969.

[890] FAR 52.245-2.

[891] ASBCA No. 37228, 93-2 BCA ¶ 25,892.

[892] DOT BCA No. 1661, 93-3 BCA ¶ 26,168.

P. Taxation

1. Supreme Court Rejects Government's Common Law Challenge to State Tax.—California imposed a sales and use tax on a contractor operating petroleum reserve facilities under a cost-plus-fixed fee contract.[893] In this contract, the government advanced funds into a special bank account, from which the contractor paid for its purchases under the contract. After the contractor successfully challenged a portion of the tax assessment, it paid the remaining taxes under protest from the special government-funded bank account.[894] The government then sued[895] the state to recover the taxes under a federal common law theory of "money had and received."[896] The government argued that it had a federal common law cause of action to challenge the state tax on state law grounds because it had reimbursed the contractor for payment of the taxes. The government did not assert that either it or the contractor were immune constitutionally from the tax.

The Supreme Court held that the government's reimbursement of the taxes did not create a federal cause of action for money had and received.[897] The Court reasoned that no implied-in-law contract existed between the federal government and the state and, without such an implied contract, the government could not bring this action against the state. The Court also held that the government's failure either to challenge the assessment in available state proceedings or to allege that it was exempt or immune from the tax, was fatal to its position. Therefore, the federal government was in no better position than a subrogee of the contractor that had settled its dispute with the state, and thus possessed no common law right to challenge the taxes.[898] Accordingly, the Court denied the federal government's action.

2. Supreme Court Upholds Government's Common Law Right to Prejudgment Interest.—In *United States v. Texas*,[899] the Court held that the DCA[900] did not abrogate the federal government's common law right to collect prejudgment interest from state governments, where the underlying claim is based on a contractual obligation to pay money.[901] As a result, in *United States v. Melcher*,[902] the Court vacated and remanded the Eighth Circuit's decision in *United States v. Benton*,[903] denying prejudgment interest to the government in a state sales and use tax case.

3. United States Must Challenge Valuation of Property Subject to State Tax Under State Law.—In *United States v. County of San Diego*,[904] the Ninth Circuit upheld an *ad valorem* property tax, but did not prescribe a method of valuing the property for purposes of computing the tax. The district court now holds that valuation is an issue controlled by state law.[905] Under applicable state law, a taxpayer cannot challenge valuation unless the taxes were paid and timely claims for refunds were filed. Here, the contractor paid the taxes sporadically and neither the contractor nor the government filed claims for refunds. Accordingly, the government had no basis to challenge the valuation of the property.

4. State Cleanup Surcharge Is a Tax.—The government awarded a contract that excluded certain state taxes from the contract price. The government agreed to reimburse the contractor separately for these taxes, including a one-cent per gallon basic gasoline tax. The government refused, however, to pay an additional one-cent per gallon petroleum storage tank cleanup fee based on the gasoline tax. In *Montana Refining*

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[893] The tax is virtually identical to the tax upheld by the Supreme Court in United States v. New Mexico, 455 U.S. 720 (1982).

[894] The government directed the contractor to challenge the tax in the state administrative proceeding. The contractor also filed timely actions in the state courts to challenge the tax.

[895] The United States commenced this litigation shortly after the contractor and the state stipulated to a settlement of the contractor's litigation. The district court granted summary judgment for the state and was upheld by the Ninth Circuit. United States v. California, 932 F.2d 1346 (9th Cir. 1991).

[896] This theory also is referred to as *indebitatus assumpsit. See* City of Philadelphia v. The Collector, 72 U.S. 720 (1866) (federal taxpayer may voluntarily pay taxes under protest and sue to recover them, if the assessment is ultimately found erroneous).

[897] United States v. California, 113 S. Ct. 1784 (1993).

[898] The Court noted that the United States waited until eight years after the last tax assessment notice and almost six years after the state statute of limitations ran to commence this challenge to the tax.

[899] 113 S. Ct. 1631 (1993).

[900] 31 U.S.C. §§ 3711-3717.

[901] The DCA is silent on this issue. The terms of the Act refer only to debts owed by a "person." 31 U.S.C. §§ 3711-3717.

[902] 113 S. Ct. 2925 (1993).

[903] 975 F.2d 511 (8th Cir. 1992) *aff'g in part and rev'g in part* 729 F. Supp. 671 (W.D. Mo. 1991) (affirming federal government's entitlement to state tax refund and reversing award of prejudgment interest), *vacated and remanded sub nom.*, 113 S. Ct. 2925, *vacated*, 997 F.2d 1244 (8th Cir. 1993).

[904] 965 F.2d 691 (9th Cir. 1992).

[905] United States v. County of San Diego, No. CV 89-0085T 1993 U.S. Dist. LEXIS 15168 (S.D. Cal. Sept. 27, 1993).

Co.,[906] the board rejected the government's argument that the cleanup fee was a "use fee," not a "tax."[907] The board found that the state imposed the fee on every distributor in the state and that it was in addition to the basic gasoline tax. Further, the board found that the state collected the fee in the same manner as the gasoline tax, and imposed a penalty for late payment. The fee bore all of the indicia of the taxes that were separately reimbursable to the contractor and was, therefore, a reimbursable tax under this contract.

Q. Nonappropriated Fund Instrumentalities (NAFI)

The NAFI issue of the year concerns attempts to expand the GAO's jurisdiction to hear protests of NAFI contract awards. In three recent cases, the GAO has indicated that because NAFI's are not "federal agencies" under the GAO's jurisdictional statute,[908] the GAO lacks jurisdiction over NAFI contract protests. In *Americable International, Inc.*,[909] the GAO refused to hear a protest concerning telephone and cable television service contracts issued by the morale, welfare, and recreation NAFI at the Navy Submarine Base in San Diego. The GAO also refused to hear a protest concerning a solicitation issued by the Navy Exchange Service Command,[910] and a protest of a concessionaire contract issued by the Army's 29th Area Support Group NAFI.[911]

VI. Fiscal Law

A. Regulatory Changes

The Comptroller of the Defense Department issued the first several volumes of a new fifteen-volume *Financial Management Regulation*.[912] The new regulation is identified as DOD 7000.14-R.[913] The forward to each volume of the new regulation states that the regulation is applicable DOD-wide, that it is effective immediately, and that agencies may not supplement the regulation without prior written approval of the DOD Comptroller. To date, volumes one, seven, and fifteen[914] are published. This effort appears to be the beginning of the effort to consolidate fiscal policy into a unified regulatory structure, under the control of the Defense Finance and Accounting Service.

B. Purpose

1. "Plain Language" versus Congressional Intent.—

(a) The GAO—DOD Depots May Submit Offers on Small Business Set-Asides.—In *RJO Enterprises, Inc.*,[915] the Air Force issued an RFP for test program sets. Although the RFP was a total small business set-aside, it contained a clause allowing DOD depots to submit proposals. The protester and the SBA argued that allowing DOD depots to compete on a small business set-aside violates the Small Business Act[916] because the "rule of two" applied to this procurement.[917] The Air Force responded that section 9095 of the FY 93 DOD Appropriations Act authorized the depot to compete with private firms.[918] The GAO determined that the plain language of the Appropriations Act gave the Secretary of Defense discretion to allow depots to compete with private firms even when the regulatory "rule of two" would otherwise restrict competition to small businesses. According to the GAO, any other reading would render the "notwithstanding" clause a nullity by exempting from its scope the regulations providing for

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[906] ASBCA No. 41774, 93-3 BCA ¶ 26,077.

[907] The government argued that the cleanup charge was a use fee and therefore was included in the contract price and was not separately reimbursable.

[908] 31 U.S.C. § 3551.

[909] B-251614, Apr. 20, 1993, 93-1 CPD ¶ 336.

[910] Military Equip. Corp. of America, B-253708, June 11, 1993, 93-1 CPD ¶ 455.

[911] DSV, GmbH, B-253724, June 16, 1993, 93-1 CPD ¶ 468.

[912] Copies of the new regulation are available through publication channels. Questions on the new regulation should be directed to the Office of the Comptroller of the Defense Department, Room 3E822, The Pentagon, Washington, D.C., 20301-1100.

[913] Volume 1, *General Financial Management, Information Systems, and Requirements*, was issued in May 1993. Volume 7, *Military Pay and Entitlements*, was issued in January 1993. Volume 15, *Security Assistance Policy and Procedures*, was issued in March 1993.

[914] Volume 15 supercedes FOREIGN MILITARY SALES MANUAL, *supra* note 805.

[915] B-252232, June 9, 1993, 72 Comp. Gen. ___, 93-1 CPD ¶ 446.

[916] 15 U.S.C. § 644.

[917] Federal Acquisition Regulation 19.502-2 provides: "[An] acquisition . . . shall be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that (1) offers will be obtained from at least two responsible small business concerns . . . ; and (2) awards will be made at fair market prices."

[918] Pub. L. No. 102-396, 106 Stat. 1876, 1924 (1992) provides: "Notwithstanding any other provision of law, during the current fiscal year, the Secretary of Defense may acquire the . . . production of components and other Defense-related articles, through competition between Department of Defense depot maintenance activities and private firms . . . ."

small business set-asides. Nevertheless, this interpretation is a "narrow and temporary exception to the broadly applicable requirements set forth in the FAR."

(b) Congress—"That's Not What We Meant!"—Congress responded to *RJO Enterprises* in section 848 of the National Defense Authorization Act for Fiscal Year 1994,[919] by prohibiting depots from competing against small businesses on set-aside contracts. Congress explained in a committee report that it was "not the intent of Congress to allow such competition."[920]

2. *Agencies May Not Pay Excess Declared Value Fees.*—Generally, agencies may not use appropriated funds to pay for insurance premiums on government-owned property.[921] The government has long maintained a policy of self-insuring its own risks of loss because its large resources make it more advantageous to carry its own risks than to pay premiums to private insurers.[922] In *United States Coast Guard—Payment for Declaration of Higher Value*,[923] the GAO held that agencies transporting packages through Federal Express may not value the packages in excess of the value that Federal Express automatically insures. The GAO noted, however, that limited exceptions to this rule may apply when an agency can demonstrate that self-insurance would not be economical, that sound business practice indicates that the agency can save money by paying for insurance, or that the agency can obtain services or benefits not otherwise available by purchasing insurance.

3. *De Minimus Credits Are Not Augmentations of Appropriations.*—Generally, agencies must deposit in the general fund of the Treasury, as miscellaneous receipts, all funds received for use by the United States.[924] However, agencies may retain "refunds" or "repayments" due to excess payments, but agencies generally must credit such refunds to the appropriation or fund accounts from which the excess payments were made.[925] In *Secretary of the Senate Processing and Accounting for "De Minimus" Credits*,[926] the GAO determined that, when a contractor owes a refund to the government, the agency may take the refund as a credit against a current invoice, rather than require the contractor to issue a refund check. Further, agencies may accept a "de minimus" ($100 or less) refund credit to a current year invoice without adjusting the prior year accounts to reflect the credit as a refund to the accounts. The GAO will not treat such an "insignificant impact" as an unauthorized augmentation of current year accounts.

4. *"Necessary and Incident Expense" Decisions.*—

(a) Meals Not Authorized at Quarterly Managers Meetings.—The Army Corps of Engineers sought to use appropriated funds to pay for lunch meals at its quarterly managers meetings in *Corps of Engineers—Use of Appropriated Funds to Pay for Meals.*[927] The meetings were typically one day in length, and were held in the Officer's Club at the attendees' duty station. The meetings consisted of morning "open forums," in which the attendees discussed the Corps of Engineers' operations and management. During lunch and in the mid-afternoon, guest speakers would give presentations which the Corps of Engineers described as "training." The GAO determined that the Army Corps of Engineers could not use appropriated funds to pay for the attendees' meals, citing the general rule that the government may not furnish meals or refreshments to employees at their official duty stations. The meetings did not fit within the GAO's exceptions for "training" or "formal conferences," but were merely "internal business meetings" of the Corps of Engineers.[928] The GAO

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[919] *See supra* notes 45, 46 and accompanying text.

[920] *See* H.R. REP. NO. 200, 103d Cong., 1st Sess. 315 (1993).

[921] *See* Insurance—Virgin Islands Co. Property, B-25040, 21 Comp. Gen. 928 (1942).

[922] *Id. See* 40 U.S.C. § 726, which prohibits agencies from spending money on insuring against loss or damage in the shipment of valuables, except as specifically authorized by the Secretary of the Treasury. The Secretary of the Treasury has declared money, securities and other instruments or documents, precious metals, and works of artistic or historical value to be "valuable" for the purposes of 40 U.S.C. § 726; *see also* 31 C.F.R. § 362.1 (1993).

[923] B-244473.2, May 13, 1993 (unpub.).

[924] 31 U.S.C. § 3302(b).

[925] Rebates from Travel Mgt. Ctr. Contractors, B-217913, 65 Comp. Gen. 600 (1986). *See infra* note 960 and accompanying text.

[926] B-250953, Dec. 14, 1992, 72 Comp. Gen. ____.

[927] B-249795, May 12, 1993, 72 Comp. Gen. ____.

[928] Under 5 U.S.C. § 4109, agencies may pay employees the "necessary expenses of training." Under 5 U.S.C. § 4110, agencies may pay expenses of employees for "attendance at meetings" which will "contribute to improved conduct, supervision, or management of the functions or activities." The GAO has held that 5 U.S.C. § 4109 authorizes an agency to pay for employees' meals during "training" at their duty station, provided the activity qualifies as "training" under 5 U.S.C. § 4101(4). *See, e.g.*, Coast Guard—Meals at Training Conference, B-244473, Jan. 13, 1992 (unpub.); Meals for Attendees at Internal Gov't Meetings, B-230939, 68 Comp. Gen. 606 (1989). The GAO also held that 5 U.S.C. § 4110 authorizes an agency to pay for the meals of employees attending meetings at their duty stations, if the meals are incidental to the meeting, attendance at the meals is necessary for full participation in the meetings, and the employees are not free to take their meals elsewhere without missing essential business of the meetings. The meetings must qualify, however, as "formal conferences or meetings," not simply internal business meetings concerning the day-to-day activities of the agency. *See* Department of the Army—Claim of the Hyatt Regency Hotel, B-230382, Dec. 22, 1989 (unpub.); Meals for Attendees at Internal Gov't Meetings, B-230939, 68 Comp. Gen. 606 (1989).

cautioned that it would continue to scrutinize attempts to "manipulate the content of meetings" to fit an established exception rather than "furthering a legitimate training function."

(b) Meals Not Authorized for Nonfederal Personnel.—The GAO allowed the Coast Guard to pay for refreshments of government employees attending an "On Scene Coordinator/Regional Response Team training exercise" in *Coast Guard—Coffee Break Refreshments at Training Exercise—Non-Federal Personnel.*[929] In this case, the Commander of the 7th Coast Guard District determined that the refreshments were provided to ensure full participation in the training, because attendees could not obtain refreshments elsewhere without missing the "unfolding events of the simulation." The GAO drew the line with nonfederal personnel, however, holding that no statutory authority exists to pay for the refreshments of nonfederal personnel attending federal training exercises.

(c) Security Devices Authorized.—The United States Customs Service (Customs) determined that home and automobile security devices were needed to protect its agents stationed in Puerto Rico and the Virgin Islands.[930] The GAO held that Customs could use appropriated funds to pay for the security devices. Nevertheless, the GAO cautioned that Customs could not install the security devices as permanent fixtures on private property unless the installation is incidental and essential to accomplishing the purposes of the appropriation, the costs are reasonable, the federal government is the primary beneficiary, and Customs protects the government's interests in the improvements.

(d) Payment of Interest and Penalties Not Authorized.—A California County assessed a "possessory interest tax" against a government employee renting quarters from the Forest Service.[931] Although the employee was personally liable for the tax assessment, the employee forwarded the assessment to the Forest Service for payment, as authorized by a Forest Service official.[932] The Forest Service did not pay the assessment until after the due date; consequently the state imposed penalties and interest on the employee for late payment. The GAO determined that the Forest Service could not use appropriated funds to pay the interest and penalties assessed against the employee, notwithstanding the employee's good faith reliance on the Forest Service official.

(e) Buttons, Magnets, Matchbooks, and Jar Openers.—No discussion of "necessary and incidental expenses" would be complete without reference to the gadgets and gizmos that agencies love to purchase with appropriated funds. The GAO upheld an EPA purchase of buttons and magnets inscribed with messages related to indoor air quality in *EPA Purchase of Buttons and Magnets.*[933] The GAO reasoned that the buttons and magnets further the EPA's statutory function of increasing public awareness of indoor air quality.[934] Similarly, in *Expenditures of the Department of Veterans Affairs for the Oklahoma State Fair,*[935] the GAO upheld the VA's purchase of matchbooks and jar openers imprinted with the VA seal and telephone number of the VA Medical Center. The GAO found that the purpose of these items was to inform veterans of VA services, which directly furthered an agency mission.

C. Time

Obligating Funds After Signing of Appropriations Act but Before Apportionment Held Valid.—In *Cessna Aircraft Co.,*[936] the Navy had a five-year contract, with a three-year option period, for flight training at Pensacola Naval Air Station, Florida. In FY 1989 (the first year of the option period), the contracting officer exercised the option the same day that the President signed the Appropriations Act, but before the OMB formally apportioned the funds. The contractor challenged the option exercise, arguing that the contracting officer lacked authority to exercise the option prior to formal apportionment by the OMB. After a detailed study of the apportionment statutes,[937] the board upheld the option exercise. The board held that there was nothing in the apportionment statutes that prohibited an agency from obligating funds after the signing of the appropriations act but prior to formal OMB apportionment.

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[929] B-247966, June 16, 1993, 72 Comp. Gen. ____.

[930] Home and Automobile Sec. Sys. for United States Customs Serv. Personnel, B-251710, July 7, 1993, 72 Comp. Gen. ____.

[931] Authority of Forest Serv. to Pay Penalties and Interest Assessed for Delay in Paying Tax on Employee's Possessory Interest, B-251228, July 20, 1993, 72 Comp. Gen. ____. California assessed the tax against persons living in tax-exempt housing. The Supreme Court held this tax to be constitutional in United States v. County of Fresno, 429 U.S. 452 (1977), because the "legal incidence" of the tax falls on the employee, not on the federal government or federal property.

[932] Agencies are authorized to reimburse employees living in government housing for their possessory interest tax payments. *See* 41 C.F.R. § 114-52.310 (1993). Before the assessment was levied, however, a Forest Service official advised employees living in government housing in that region to forward their tax assessments to the agency for "direct payment."

[933] B-247686, Dec. 30, 1992 (unpub.).

[934] Once again, the EPA is on the cutting edge of the law governing "necessary and incidental expenses." *See, e.g.,* Novelty Garbage Cans Distributed by EPA, B-191155, 57 Comp. Gen. 385 (1978) (EPA improperly purchased miniature plastic garbage cans containing candy in the shape of solid waste).

[935] B-247563.2, May 12, 1993 (unpub.).

[936] ASBCA No. 43196, 93-3 BCA ¶ 25,912.

[937] 31 U.S.C. §§ 1511-1519.

D. Expired and Closed Appropriations

1. Transition Period Complete.—On September 30, 1993, any remaining balances in merged accounts closed for all purposes, thereby ending the three-year transition period created by the National Defense Authorization Act for 1991.[938] Now executive agencies must manage all expired appropriations under the new rules.[939]

2. Congress Criticizes One Percent Tax to Cover Cost Overruns.—In its FY 1994 budget submission, the Army attempted to obtain $11.1 million for future cost increases in closed accounts—to avoid the necessity of using current funds—as envisioned by the new rules governing expired accounts.[940] The Conference Report accompanying the Appropriations Act criticized this concept and threatened to legislatively prohibit it in the future.[941]

3. The GAO Allows Correction in Closed Account.—In 1991, the Army erroneously certified to the Treasury Department that its year-end balances be cancelled.[942] After the Treasury cancelled the funds, the Army discovered its error and requested restoration of the funds. The GAO ruled that generally funds may not be restored into a closed account. This principle, however, does not preclude the correction of "obvious reporting and clerical errors." Correction is limited to "errors that result in inadvertent cancellations of budget authority, and is not meant to serve as a palliative for deficiencies in DOD's accounting systems."[943] The GAO recommended that the Treasury establish reasonable time limits for agencies to submit requests for correction.

4. Recording Disbursements After Cancellation Authorized.—An agency may adjust a cancelled appropriation to record a disbursement made before the cancellation of the funds.[944] The GAO reasoned that recording the prior disbursement was neither a new obligation nor an expenditure. The prior disbursement liquidates the appropriation, thus, there is nothing left to cancel. Accordingly, recording the prior disbursement does not violate the prohibition on obligating or expending cancelled funds.[945]

E. Intragovernmental Acquisitions

1. The DOD IG Finds More Economy Act Abuses.—Last year, we reported that the DOD IG had uncovered widespread misuse of the Economy Act[946] by the military departments.[947] The DOD was again the subject of adverse IG reports in 1993.[948] The reports found that DOD activities had offloaded contracts to the Department of Energy's Oak Ridge Field Office, the Tennessee Valley Authority, and the Jet Propulsion Laboratory, spending millions of dollars more than what it would have spent following normal contracting procedures. The report also found that DOD officials had placed Economy Act orders without obtaining the required approval from a contracting officer,[949] and had circumvented the Brooks

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[938] Pub. L. No. 101-510, § 1405(b)(4), 104 Stat. 1676 (1990).

[939] *See* 31 U.S.C. §§ 1551-1557.

[940] The new rule states that:

> [A]fter the closing of an account . . . obligations and adjustments to obligations that would have been properly chargeable to that account, both as to purpose and in amount, before closing and that are not otherwise chargeable to any current appropriation account of the agency may be charged to any current appropriation account of the agency available for the same purpose.

31 U.S.C. § 1553(b)(1).

[941] *See supra* note 110 and accompanying text.

[942] The National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, §§ 1405-1406, 104 Stat. 1676 (1990) (codified as 31 U.S.C. §§ 1551-1557), required agencies to certify funds for closure on the 30th of September 1991, 1992, and 1993. *See* § 1405(b)(3).

[943] Department of the Treasury—Request for Opinion on Account Closing Provisions of the Fiscal Year 1991 National Defense Authorization Act, B-251287, Sept. 29, 1993 (unpub.).

[944] *Id.*

[945] 31 U.S.C. § 1552(a).

[946] *Id.* § 1535.

[947] *See 1992 Contract Law Developments—The Year in Review,* ARMY LAW., Feb. 1993, at 77.

[948] *See* Dep't of Defense, Inspector General Audit Report No. 93-042, Allegations of Improprieties Involving DOD Acquisition of Services Through the Department of Energy (Jan. 21, 1993); Dep't of Defense, Inspector General Audit Report No. 94-008, DOD Procurements Through the Tennessee Valley Authority Technology Brokering Program (Oct. 20, 1993); Dep't of Defense, Inspector General Audit Report No. 93-068, Procurement of Services for the Non-Acoustic Anti-Submarine Warfare Program Through the Tennessee Valley Authority (Mar. 18, 1993); Dep't of Defense, Inspector General Audit Report No. 93-059, Army Acquisition of Services Through the Jet Propulsion Laboratory (Feb. 25, 1993).

[949] *See* FAR 17.502; DFARS, *supra* note 27, at 217.502.

Act[950] by using Economy Act orders to purchase automatic data processing equipment. In response to these and other abuses, Congress has required the DOD to promulgate regulations to severely limit contract offloading.[951]

2. Determination of Actual Cost of Inventory Items.—In *David P. Holmes*,[952] the GAO sanctioned agencies' use of certain methods to determine "actual cost" when filling an Economy Act order.[953] The GAO stated that for items provided from inventory, an agency properly may base its charges on the "standard cost" for the items. The "standard cost" may be based on the most recent acquisition cost of the specific type of item provided to the requesting agency. An agency also may charge for work performed on the item taken from inventory to meet the requesting agency's requirements. Further, the "standard cost" of inventory may include transportation costs incurred in bringing an item to its location as part of the performing agency's inventory. The GAO cautioned, however, that an agency would improperly augment its appropriations if it obtained reimbursement for the replacement cost of a more technologically advanced item than that provided to the requesting agency.

3. Agency May Not Retain Funds in Excess of Actual Costs Incurred Under Economy Act Agreement.—Pursuant to the Economy Act, the Water Resources Council (WRC) advanced funds to the Bureau of Land Management (Bureau) in 1978 to conduct a water resources study.[954] The Bureau completed the study in 1981, and retained $167,000 of unused WRC funds in a transfer account. The Bureau requested the GAO's opinion as to whether the balance of funds could be used to fund water-related research not included in the original agreement with the WRC, and, alternatively, whether the balance could be transferred to the Bureau's general receipts account. The GAO determined that the funds could not be used by the Bureau for any purpose, but had to be returned to the WRC appropriation. The GAO further held that retention of the excess funds would result in an improper augmentation of the Bureau's appropriation.

F. Obligations

1. Board Condones Contracting Officer's Alteration of Fund Authorization Document (FAD).—A contracting officer did not exceed her authority when she used correction fluid to conceal a proviso placed on the FAD by a budget analyst.[955] The document contained a proviso indicating that the funds committed by the FAD were contingent on congressional passage of the appropriations act or other budget authority. The board ruled that the FAD's qualified commitment was self-executing. Once Congress passed the act or granted budget authority, the FAD became an unqualified commitment of funds and the proviso was of no effect. Therefore, the contracting officer's concealment of the proviso was authorized.

2. Year End Obligation of Funds.—The Assistant Secretary of the Air Force for Acquisition emphasized that neither signing an award/order document nor recording an obligation is sufficient to obligate funds.[956] To ensure that the government obligates funds during the period of availability, contracting officers must mail or otherwise furnish the appropriate contractual document to the successful bidder (offeror) to bind both parties and obligate funds.[957] Simply signing an award or recording an obligation does not suffice.

3. No Requirement to Fund Potential Termination Charges on Multiyear Option Modification.—The government need not fund potential termination charges when exercising a multiyear option.[958] Cessna Aircraft Company challenged the government's exercise of a three-year option following completion of the base period of a multiyear contract to train undergraduate naval flight officers for the Navy. It argued that the option contract was void because the Navy failed to fund contingent cancellation liabilities, totalling over $50 million, when it exercised the option. The Navy had authorized only $23 million for the project. The board denied Cessna's motion for summary judgment. It held that the government need not fully fund contingent cancellation liabilities for either the base period of a multiyear contract or the option period of the same contract.[959]

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[950] 40 U.S.C. § 759 (assigning responsibility for acquisition of all automatic data processing equipment to the GSA).

[951] *See supra* notes 40, 41 and accompanying text.

[952] B-250377, Jan. 28, 1993 (unpub.).

[953] The Economy Act requires an ordering agency to pay the "estimated or actual cost as determined by the agency or unit filling the order." The agencies must make proper adjustments of amounts paid in advance "on the basis of the actual cost of the goods or services provided." 31 U.S.C. § 1535(b).

[954] Bureau of Land Mgt., B-250411, Mar. 1, 1993 (unpub.).

[955] Cessna Aircraft Co., ASBCA No. 43196, 93-3 BCA ¶ 25,912.

[956] Letter, Assistant Secretary of the Air Force (Acquisition), SAF/AQC, to ALMAJCOM-FOA (CONTRACTING), subject: Obligation of Funds at Fiscal Year End (July 12, 1993).

[957] *See* FAR 52.216-18(c).

[958] *Cessna Aircraft* at ¶ 25,912.

[959] *See* 10 U.S.C. § 2306(h)(5); FAR 17.103-1(f).

4. Use of Travel Rebates Limited.—Agencies must credit travel commission rebates received from Travel Management Centers (TMC) to the appropriation initially charged with the cost of employee travel, even if the paying account has expired for the purposes of incurring new obligations.[960] Travel Management Centers—which handle travel arrangements for federal agencies—receive commissions from transportation or lodging establishments with which they book reservations. After withholding part of each commission as a fee for services rendered, they return the remainder to the paying agency. The Comptroller General determined that the paying agency must credit all rebates received from TMCs to the appropriation initially charged for the transportation or lodging.

G. Continuing Resolution Authority (CRA)

The CRA Appropriates Full Annual Amount, Regardless of Duration—In *Cessna Aircraft Co.*,[961] the board held that during a CRA period, the government can award contracts and exercise options covering the entire fiscal year. The board rejected appellant's contention that a CRA with a specific cutoff date only authorizes obligation of an amount not exceeding the amount determined by the ratio of the CRA's duration to the number of days in the fiscal year (365). The board reasoned that the CRA's cutoff date is only significant in determining when the government may incur obligations; it does not limit the amount available for obligation.[962]

H. Liability of Accountable Officers

1. Attache Signature on Classified Contingency Fund Request Permits Payment.—Certification of contingency funds was the issue in *Certification of Defense Intelligence Agency (DIA) Emergency and Extraordinary Expense Vouchers*.[963] A State Department certifying officer in Haiti received a voucher for payment of DIA contingency funds signed by the defense attache. However, the attache refused to submit the supporting documentation because the documentation exceeded the certifying officer's security classification. The certifying officer sought an advance opinion[964] from the GAO concerning whether he could pay the voucher based solely on the attache's signature. The GAO held that because the voucher involved DIA contingency funds, the attache had statutory authority to certify the funds.[965] Under the statute, the defense attache's determination that the expenditure was proper was binding on other accountable officers.

2. Certifying Officer's "Good Faith" Avoids Liability.—In *Michael Rhode, Jr.*,[966] a certifying officer for the Panama Canal Commission certified official representation funds ($3,902.19) to provide intra-agency "working lunches," an improper purpose.[967] Upon request, the GAO granted relief from liability[968] because the payment violated no statute, the government obtained an indirect benefit from the payment, and the official acted in good faith reliance on erroneous agency regulations without knowledge of GAO decisions prohibiting payment. Additionally, he stopped making payments when he discovered that the regulations were in error.

3. Disbursing Officer's Proper Actions Provide Relief for Improper Payment.—A Marine disbursing officer at Camp Lejune, North Carolina, escaped liability following improper payment of $6,855.01.[969] The loss occurred because the disbursing officer issued a replacement check following a false report of a lost original. In issuing the check, the disbursing officer followed Navy procedures, including contacting the Treasury Department to determine whether someone had

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[960] Accounting for Rebates from Travel Mgt. Ctr. Contractors, B-217913.2, Feb. 19, 1993 (unpub.). *But see supra* note 925 and accompanying text (exception to de minimus credits).

[961] *Cessna Aircraft* at ¶ 25,912.

[962] This holding is consistent with the position taken by the GAO. *See* GENERAL ACCOUNTING OFFICE, OFFICE OF THE GENERAL COUNSEL, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, 8-13 (1992); *see also* DEP'T OF AIR FORCE, PAMPHLET 110-4, FISCAL LAW, para. 1-25e (30 Sept. 1988). *But see* DEP'T OF ARMY, REG. 37-1, ARMY ACCOUNTING AND FUND CONTROL, tbl. 9-2, n.2 (30 Apr. 1991) (C2, 18 Feb. 1992) [hereinafter AR 37-1] (CRA appropriates only the amount necessary to fund performance through the end of the CRA's duration).

[963] B-251905, July 2, 1993, 72 Comp. Gen. ____.

[964] Under 31 U.S.C. § 3529(a), certifying officers may seek advance opinions from the Comptroller General when presented with questionable vouchers.

[965] *See* 10 U.S.C. § 127 (Secretary of Defense, secretary of a military department, or their designees may authorize expenditure of contingency funds, and those authorizations are conclusive on other accountable officers).

[966] B-250884, Mar. 18, 1993 (unpub.).

[967] *See* United States Trade Representative—Use of Reception and Representation Funds, B-223678, June 5, 1989 (unpub.) (agencies may not use official representation funds to pay for food and meals to government employees at their duty station). *Cf. supra* notes 927, 928 and accompanying text.

[968] *See* 31 U.S.C. § 3528 (to obtain relief, the officer must show that he or she acted in good faith, that the payment did not violate any statutory prohibition specifically prohibiting payment of the funds, and that the government received value for the payment).

[969] Relief of Major M. J. Lofton, B-249888, Jan. 28, 1993 (unpub.).

cashed the original check. Upon discovery of the loss, the disbursing officer pursued collection aggressively under the Federal Claims Collection Standards,[970] sending demand letters and referring the action to higher headquarters. Consequently, the GAO found that the officer met the statutory requirements entitling him to relief.[971]

4. Accountable Officer Liability Limited to Three Years.—The GAO addressed the three-year statute of limitations for assessing liability against certifying officers.[972] A certifying officer improperly certified representational funds for sightseeing tours in October, 1989. The agency investigated in 1990, but never reported its findings to the GAO. The certifying officer submitted a request for relief to the GAO in 1991, but the GAO did not receive the request until January, 1993. The GAO declared the request for relief moot because the account was finally settled by operation of law. Under the statute of limitations,[973] the three-year period begins—absent fraud by the officer involved—when the account is "substantially complete,"—that is, when the agency can audit the paperwork on which the officer based his certification. In this case, the statute began to run on October 31, 1989 (the end of the month when the improper certification took place), and the three-year period expired on October 31, 1992, settling the account by operation of law.

I. Revolving Funds

1. Defense Business Operations Fund.—

(a) Defense Business Operation Fund Improvement Plan.—Responding to criticisms that accounting problems marred the DBOF's implementation,[974] the Secretary of Defense directed a comprehensive review of all aspects of the DBOF by an expert financial team.[975] The team concluded that the DBOF concept is sound, but that the DOD should make significant improvements to the financial management systems, policies, and training programs that support the DBOF. They recommended correcting DBOF problems by: establishing a strong management team, including a corporate board to oversee policies, procedures, and systems to support the DBOF; revising DBOF policies and procedures with input from the various organizations within the DOD that will effect its implementation; and developing accounting systems necessary to support the DBOF.[976] After the planned improvements are accomplished, the DBOF should be implemented fully by the third quarter of FY 1995.[977]

(b) Army Postpones Pilot Implementation of Base Support Within the DBOF.—The Army postponed, until FY 1995,[978] its plan to bring base support services within the DBOF as a new business area.[979] Pilot implementation at three installations was to begin in FY 1994, but was delayed by congressional concerns with DBOF implementation, the DOD review of the transition to the DBOF of several new business areas, and operational concerns regarding the fielding of an adequate accounting system to handle the implementation.

2. Recording Obligations Against Revolving Funds.—The Corps of Engineers Civil Works Revolving Fund[980] pays for the maintenance and operation of plant and equipment used in the Corps' civil works programs. Until recently, when buying equipment needed by civil works districts, the Corps obligated its civil works fund at the time of disbursement, rather than at the time of contract award.[981] The Corps interpreted its leg-

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[970] 4 C.F.R. pts. 101-105 (1993).

[971] *See* 31 U.S.C. § 3527(c) (officer requesting relief must show that the loss did not result from negligence, that the officer did not act in bad faith, and that the agency diligently pursued collection action upon discovery of the loss).

[972] Relief of Anna L. Pescod, B-251994, Sept. 24, 1993 (unpub.).

[973] 31 U.S.C. § 3526(c).

[974] The DBOF Implementation Plan required consolidated cash management for the DBOF's various business areas and divisions, while retaining functional and operational management responsibilities for DBOF activities with the military services and the defense agencies. Through a sophisticated finance and accounting system, the DBOF was intended to provide the DOD the resource management structure needed to ensure that DBOF customers received the best possible product at the lowest possible cost. *See* DIRECTORATE FOR BUSINESS MANAGEMENT (COMPTROLLER), DEPARTMENT OF DEFENSE, DEFENSE BUSINESS OPERATIONS FUND IMPLEMENTATION PLAN 8, 44 (1993) (telephone number for more information is (703) 697-8281). Unfortunately, implementation proved a greater challenge than expected. Accounting systems in the existing stock funds, industrial funds, and other business areas, were inadequate for, and difficult to reconcile with, the sophisticated unit cost system required under the DBOF. The planned full implementation of the DBOF by early FY 1994 proved unattainable. *Id.* App.

[975] DIRECTORATE FOR BUSINESS MANAGEMENT (COMPTROLLER), DEPARTMENT OF DEFENSE, DEFENSE BUSINESS OPERATIONS FUND IMPROVEMENT PLAN 3 (1993).

[976] *Id.* at 4.

[977] *Id.* App.

[978] John Lawkowski, *DBOF Pilot Sites Set For FY 95*, INSTALLATIONS, vol. 1, no. 2, July 1993, at 3.

[979] *See supra* notes 100-02 and accompanying text (Congress barred DBOF expansion into new business areas during FY 1994).

[980] *See* 33 U.S.C. § 576.

[981] Although 31 U.S.C. § 1501 requires agencies to record obligations at the time of contract award, the Corps argued that this rule was inapplicable because the Corps had specific legislative authority to operate its revolving fund within its own resources.

islative mandate to operate the fund within its own resources to mean that the fund balance must be sufficient to make disbursements, but not necessarily sufficient to cover all outstanding contract balances. The GAO disagreed, and determined that the Corps must record obligations at the time of contract award, and that the Anti-Deficiency Act[982] prohibits the Corps from incurring obligations in excess of its budget authority.[983]

3. The GAO Reviews the PPA [984] Interest Payments under Contracts Obligating Revolving Funds.—In *Corps of Engineers—Prompt Payment Act Interest Penalties,*[985] the GAO found impermissible the Corps' practice of paying PPA interest penalties, under contracts funded through its Civil Works Revolving Fund, from its General Expenses appropriation rather than from specific project funds or the Civil Works Revolving Fund. The PPA provides in part that "the head of an agency shall pay a penalty . . . out of amounts made available to carry out the program for which the penalty is incurred."[986] Prior to 1990, the Corps paid interest penalties from the revolving fund, but a regulatory change prohibited this practice.[987] The GAO determined that because Corps projects receive specific appropriations, the Corps must apportion interest penalties to those projects to comply with the PPA, rather than using an appropriation intended to pay only Corps headquarters' overhead and administrative expenses.[988]

J. Nonappropriated Fund Fiscal Policy

The DOD Issues Policy Memo Implementing the NAF Anti-Deficiency Act.—On September 24, 1993, the Assistant Secretary of Defense for Personnel and Readiness published a policy memorandum on fiduciary responsibility for nonappropriated funds (NAF).[989] The memorandum implements the NAF Anti-Deficiency Act,[990] and encourages DOD personnel to report suspected violations of NAF funding policies by providing "whistleblower" protection. Additionally, the policy requires commanders to immediately investigate reports of abuse and to refer serious cases to appropriate criminal investigative agencies. Finally, the memorandum restates the statutory penalties for substantial violations of NAF funding policies[991] and requires the military departments to implement the policy by December 31, 1993.

VII. Conclusion

As noted above, 1993 brought many important changes to federal procurement law. Many uncertainties were resolved this year, such as the inapplicability of the Debt Collection Act to government contracts and the survivability of the DBOF; yet many uncertainties remain, such as what constitutes a CDA "claim." We have attempted to provide readers with the most important developments occurring throughout the broad field of federal procurement. Where uncertainties remain, we attempted to provide an analytical framework to assist practitioners in resolving issues.

The abundance of procurement reforms currently being considered undoubtedly will result in significant changes. We expect that some areas will receive more attention than others. For example, socioeconomic preferences and labor standards, procurement of commercial items, environmental contracting requirements, and depot maintenance competitions, are some areas that are likely to experience significant changes. We plan to keep apprised of these changes throughout the year to present a comprehensive and useful *Year in Review for 1994.*

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[982] 31 U.S.C. § 1341(a)(1)(A) (prohibiting the making or authorizing of obligations or expenditures exceeding the amount available in an appropriation or fund).

[983] United States Army, Corps of Eng'rs Civil Works Revolving Fund, B-242974.8, Dec. 11, 1992, 72 Comp. Gen. ____. The budget authority of a revolving fund is its cash balance and other specifically authorized forms of budget authority. *See* OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR A-34, INSTRUCTIONS ON BUDGET EXECUTION VIII-8 (Aug. 1985).

[984] 31 U.S.C. §§ 3901-06.

[985] B-248150, Aug. 17, 1993, 72 Comp. Gen. ____.

[986] 31 U.S.C. § 3902(f).

[987] *See* AR 37-1, *supra* note 962, tbl. 9-8, n.5. The regulation requires payment of interest penalties from the funds of the activity responsible for the late payment, but it excepts revolving funds from responsibility for such payments. This provision of the Army regulation appears inconsistent with the *DOD Finance and Accounting Manual,* which cites an industrial fund (a type of revolving fund) as one of the types of funds from which interest may be paid. *See* DEP'T OF DEFENSE, MANUAL 7220.9-M, DOD FINANCE & ACCOUNTING MANUAL, ch. 25, para. D.9.c. (Oct. 1983) (C9, 6 June 1988). The *DOD Finance and Accounting Manual* has been partially superseded by the new *DOD Financial Management Regulation,* but the chapter of the *DOD Finance and Accounting Manual* covering PPA interest penalties remains in effect. *See* DEP'T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, VOL. 1: GENERAL FINANCIAL MANAGEMENT INFORMATION, SYSTEMS & REQUIREMENTS, iii (May 1993) (noting certain chapters of the *DOD Finance and Accounting Manual* as superseded).

[988] Steve Stevens, Defense Finance and Accounting Service (DFAS), Indianapolis Center, stated that the DFAS Indianapolis Center, in October 1993, requested DFAS Headquarters to approve a change to *AR 37-1* to permit payment of PPA interest from revolving funds, but DFAS Headquarters has not yet replied. Telephone Interview with Steve Stevens (Dec. 14, 1993).

[989] Memorandum, Assistant Secretary of Defense (Personnel and Readiness), subject: Defense Policy for Nonappropriated Fund Fiduciary Responsibility (Sept. 24, 1993).

[990] 10 U.S.C. § 2490a.

[991] The statutory penalties for civilians are the same penalties prescribed for violation of the Anti-Deficiency Act (31 U.S.C. §§ 1349-1350). For military personnel, violations are punishable as violations of Article 92 of the Uniform Code of Military Justice.

Clerk of Court Notes

Five-Year Military Justice Statistics, FY 1989-1993

From Fiscal Year 1992 to Fiscal Year 1993, the number of court-martial cases tried dropped thirty-three percent, while the average strength of the Army decreased only twelve percent. Nonjudicial punishment decreased 11.7 percent, almost exactly proportionate to the downsizing of the Army.

In the accompanying annual report of military justice statistics covering the last five fiscal years, the average Army strength for the years 1990-1992 has been increased to reflect the Army Reserve and Army National Guard soldiers mobilized for Operations Desert Shield and Desert Storm. These figures were not reported to us contemporaneously with the mobilization. The principal effect is to lower the previously reported court-martial and nonjudicial punishment rates for Fiscal Year 1991 when Army strength averaged almost 800,000; the mobilization did not bring about any significant increase in the number of courts-martial tried or Article 15s imposed.

FIVE-YEAR MILITARY JUSTICE STATISTICS, FY 1989-1993

General Courts-Martial

FY	Cases	Conv. Rate	Disch. Rate	Guilty Pleas	Judge Alone	Courts w/Enl	Drug Cases	Rate/ 1,000
1989	1,585	94.5%	87.6%	62.6%	63.8%	24.9%	31.4%	2.08
1990	1,451	94.9%	86.7%	60.8%	68.6%	20.2%	24.3%	1.94
1991	1,173	94.5%	87.4%	58.0%	67.5%	18.1%	16.9%	1.47
1992	1,168	93.9%	88.2%	60.0%	66.6%	19.4%	23.0%	1.75
1993	915	93.6%	84.8%	56.2%	65.3%	23.6%	20.7%	1.56

Bad-Conduct Discharge Special Courts-Martial

FY	Cases	Conv. Rate	Disch. Rate	Guilty Pleas	Judge Alone	Courts w/Enl	Drug Cases	Rate/ 1,000
1989	850	92.8%	62.6%	63.6%	69.2%	21.5%	26.3%	1.12
1990	772	92.6%	62.3%	64.3%	70.0%	21.2%	22.9%	1.03
1991	585	92.9%	64.8%	60.6%	69.9%	19.6%	12.4%	.73
1992	543	90.2%	63.6%	59.1%	67.9%	20.6%	16.3%	.82
1993	327	85.3%	54.1%	51.3%	63.3%	28.7%	16.5%	.58

Other Special Courts-Martial

FY	Cases	Conv. Rate	Disch. Rate	Guilty Pleas	Judge Alone	Courts w/Enl	Drug Cases	Rate/ 1,000
1989	185	80.5%	NA	40.0%	52.4%	36.2%	6.4%	.24
1990	149	75.8%	NA	34.8%	57.0%	31.5%	3.3%	.20
1991	92	81.5%	NA	45.6%	56.5%	27.1%	5.4%	.12
1992	70	62.8%	NA	21.4%	50.0%	38.5%	2.8%	.11
1993	45	51.1%	NA	20.0%	48.8%	33.3%	0.0%	.08

Summary Courts-Martial

FY	Cases	Conv. Rate	Guilty Pleas	Drug Cases	Rate/ 1,000
1989	1,365	94.6%	UNK	10.3%	1.79
1990	1,121	95.0%	42.4%	7.8%	1.50
1991	931	92.2%	32.5%	5.4%	1.17
1992	684	90.1%	37.0%	10.2%	1.03
1993	364	86.3%	36.3%	10.2%	0.62

FIVE-YEAR MILITARY JUSTICE STATISTICS, FY 1989-1993

Nonjudicial Punishment

FY	Total	Formal	Summarized	Drugs	Rate/ 1,000
1989	83,413	79.9%	20.1%	9.9%	109.45
1990	76,152	79.0%	21.0%	6.0%	101.92
1991	60,269	79.7%	20.3%	4.7%	75.47
1992	50,066	78.6%	21.4%	6.6%	75.20
1993	44,207	77.5%	22.5%	6.4%	75.42

Average strength for rates/1,000: FY 1989, 762,141; FY 1990, 747,147; FY 1991, 798,614; FY 1992, 665,800; FY 1993, 586,149.

COURT-MARTIAL AND NONJUDICIAL PUNISHMENT RATES

RATES PER THOUSAND

	Fourth Quarter Fiscal Year 1993; July-September 1993				
	ARMYWIDE	CONUS	EUROPE	PACIFIC	OTHER
GCM	0.34 (1.35)	0.31 (1.24)	0.48 (1.92)	0.48 (1.94)	0.41 (1.63)
BCDSPCM	0.13 (0.51)	0.12 (0.49)	0.18 (0.73)	0.17 (0.67)	0.00 (0.00)
SPCM	0.02 (0.07)	0.01 (0.04)	0.07 (0.27)	0.00 (0.00)	0.00 (0.00)
SCM	0.14 (0.56)	0.10 (0.39)	0.33 (1.32)	0.25 (1.01)	0.00 (0.00)
NJP	19.39 (77.54)	20.74 (82.95)	18.22 (72.89)	19.80 (79.20)	24.57 (98.28)

Note: Based on average strength of 571,761.
Figures in parentheses are the annualized rates per thousand.

Personnel, Plans, and Training Office Notes

Personnel, Plans, and Training Office, OTJAG

Army Management Staff College (AMSC)

Staff judge advocates are encouraged to nominate qualified civilian attorneys to attend the Army Management Staff College (AMSC). This fourteen-week resident course at Fort Belvoir, Virginia, is designed to provide advanced professional development across functional areas in matters such as acquisition management, resource management, personnel, logistics, and installation management.

To be eligible to attend the AMSC, nominees must: (1) be serving in, or have potential for, advancement to key leadership positions; (2) have a minimum of three years of consecutive service in one or more permanent appointments by class start date; and (3) be serving in grades GS-12 through GS/GM-14 or equivalent nonappropriated fund grades.

Nomination packets for AMSC Class 94-3 (13 September to 16 December 1994) must be processed through command channels and received at Personnel Command (PERSCOM)

by 18 April 1994. The nomination suspense date for AMSC Class 95-1 (10 January to 14 April 1995) is 15 August 1994. A copy of the nomination packet should be forwarded to Personnel, Plans, and Training Office, Office of The Judge Advocate General, 2200 Army Pentagon, Washington, D.C. 20310-2200.

Additional information on the AMSC is available through your local Civilian Personnel Office or by calling Mr. Roger Buckner (DAJA-PT) at DSN: 225-1353.

Career Status Selection Board

A selection board will convene on or about 19 April 1994 to recommend JAGC reserve officers for conditional voluntary indefinite (CVI) status. The board will consider applications for CVI status from officers who have served at least two years on active duty as JAGC officers by 19 April 1994.

Officers selected for CVI status will incur a one year active duty service obligation, commencing on the expiration of any existing obligation. The service obligation is triggered on approval of the board results by The Judge Advocate General.

The application for CVI status should conform to the guidance outlined in Section IV of the JAGC Personnel Policies Appendix to the *1993-94 JAGC Personnel Directory*. Applications must reach Personnel, Plans, and Training Office, Office of The Judge Advocate General, 2200 Army Pentagon, Washington, D.C. 20310-2200, not later than 1 April 1994. Forwarding endorsements must include a recommendation for approval or disapproval, the applicant's height and weight, and appropriate comments to aid the board in making its recommendation.

Applicants must ensure that their Career Management Individual File (CMIF), maintained by the Personnel, Plans, and Training Office (PP&TO), contains their current official photograph, complete college and law school transcripts, and all academic and officer evaluation reports (OER). No special OER is authorized for this board. Applicants also must ensure that their Officer Record Brief (ORB) is current and complete. Applicants may contact Ms. Jones (DAJA-PT), DSN: 225-1353, for assistance in telephonically checking their CMIF.

1994 JAGC Senior Service College Selection Board

On 10 through 27 May 1994, the JAGC Senior Service College (SSC) Selection Board will convene to consider eligible judge advocates for selection to attend SSC during academic year 1995-96. Officers meeting the following criteria are eligible for consideration:

(a) Have completed a minimum of sixteen years (192 months) active federal commissioned service (AFCS) as of 1 October 1995, and will be serving in the grade of colonel or lieutenant colonel as of the board convene date;

(b) Have completed no more than twenty-three years (276 months) of AFCS as of 1 October 1995, excluding any period of AFCS while attending law school under the Funded Legal Education Program or the Excess Leave Program;

(c) Have credit for completing a command and staff level college (military education level (MEL) 4);

(d) Have not attended, received credit for attending, or declined attendance at a resident SSC or SSC fellowship;

(e) Have not enrolled in, graduated, or disenrolled from the Army War College Corresponding Studies Course Class 87-89 or later; and

(f) Not have an approved separation date (either from resignation or retirement).

Officers who exceed the AFCS eligibility criteria may request a waiver by submitting, in writing, a request with adequate justification to PP&TO not later than 8 April 1994. The request does not require command endorsements. The approval authority is the Commanding General, PERSCOM.

The key items that the board considers include: the performance fiche of the Official Military Personnel File (OMPF); the ORB; and the official Department of the Army (DA) photograph. These items should be current and complete. Please note that photographs[1] and physicals[2] older than five years are considered out of date.

Officers who have not reviewed their OMPF performance fiche recently should request a copy from PERSCOM. A written request containing the officer's full name, rank, social security number, and mailing address should be sent to:

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[1] DEP'T OF ARMY, REG. 640-30, PERSONNEL RECORDS AND IDENTIFICATION OF INDIVIDUALS: PHOTOGRAPHS FOR MILITARY PERSONNEL FILES (1 Oct. 1991).

[2] DEP'T OF ARMY, REG. 40-501, MEDICAL SERVICES: STANDARDS OF MEDICAL FITNESS (15 May 1989).

Commander
U.S. Total Army Personnel Command
ATTN: TAPC-MSR-S
200 Stovall Street
Alexandria, Virginia 22332-04444

Alternatively, requests can be faxed directly to PERSCOM at commercial: (703) 325-0742; DSN: 225-0742.

Updated DA photographs (a color photograph is preferred, but not required), a signed ORB, and any documentation missing from the OMPF performance fiche should be mailed directly to:

Personnel, Plans, and Training Office
Office of The Judge Advocate General
2200 Army Pentagon
Washington, D.C. 20310-2200

For the board to consider an academic evaluation report (AER) or OER, the original report must be received by the Evaluation Reports Branch (TAPC-MSE-R) at PERSCOM not later than 3 May 1994. Complete-the-record OERs must comply with *Army Regulation 623-105*,[3] and have a "Thru Date" of 5 March 1994.

Questions about this board should be directed to MAJ Cullen (DAJA-PT) at DSN: 225-8365.

[3] DEP'T OF ARMY, REG. 623-105, PERSONNEL EVALUATION REPORTS: OFFICER EVALUATION REPORTING SYSTEM, para. 5-21 (31 Mar. 1992).

Regimental News from the Desk of the Sergeant Major

Sergeant Major John A. Nicolai

Course Information

The following information contains the definitive prerequisites for the 5th Law for Legal Noncommissioned Officers' Course, 521-71D/E/20/30, scheduled for 24 to 29 April 1994. This guidance supersedes any other publication of the prerequisites; in particular, page nineteen of the *1993-1994 Annual Bulletin of The Judge Advocate General's School.*

Prerequisites: Noncommissioned officers in the grade of E-5 or E-6 with a primary Military Occupational Specialty of 71D or 71E and who work, or are pending assignment, in a military legal office or in support of a military attorney. Attendees must complete the Law for Legal Specialist Correspondence Course no less than sixty days before the course starting date. Individuals who previously have attended this course within the last three years are not eligible to attend.

Questions about the course should be directed to SFC Fulton at (804) 972-6498, DSN: 934-7115.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

Reserve Judge Advocate Personnel Issues

Calendar Year (CY) 94 United States Army Reserve (USAR) Mandatory Promotion Board Schedule

The following is a chronological list of remaining CY 94 mandatory promotion boards for all eligible USAR officers, including reserve judge advocates (JA):

DATE	DOR	PED	GRADE	REQUIRED TIME IN SERVICE	TIME IN GRADE
1 Mar-1 Apr	880516	950515	7 yrs	12 yrs	MAJ
19 Jul-19 Aug	910101	951231	5 yrs	NA	COL
27 Sept-4 Nov	890101	951231	7 yrs	17 yrs	LTC
15 Nov-16 Dec	920516	960516	4 yrs	6 yrs	CPT

In the USAR, there are two important time periods that must be computed to determine whether an officer is eligible

to be considered by a promotion board. An officer must have completed *both* periods to be eligible for consideration.

The first important time period is the "time in grade," or the required period of time served in the present grade. At the beginning of this period is the cut-off "date of rank." An officer's date of rank is the date on which his or her present rank became effective. For each board, all officers, whose present rank became effective on or before the cut-off date of rank, will be considered for promotion to the next-higher grade. The promotion eligibility date (PED) is the required time in grade added to the cut-off date of rank determined for each board.

The second important time period for any mandatory promotion board—except colonels—is the "time in service." This is the greater of the time served as an officer of any component plus constructive credit, if any, granted at the time of appointment or number of years the officer's age exceeds twenty-five years. An individual must complete the required time in service as an officer on or before the PED as determined above.

The following is an example of the application of the above rules as they apply to the 1994 major's board. To be eligible, an individual must have a date of rank to captain of 16 May 1988, or earlier, and must have twelve years time in service on or before the promotion eligibility date of 15 May 1995. If a captain had a 15 May 1988 date of rank, but not the required twelve years in service by 15 May 1995, the officer is *not* eligible for this promotion board. Erroneous reliance on the date of rank alone, without considering time in service, is one of the must common errors made when an officer has been incorrectly identified for consideration by a mandatory promotion board. For more detailed information on mandatory promotion boards, see *Army Regulation 135-155 (Promotion of Commissioned Officers and Warrant Officers Other Than General Officers)* or contact your personnel management officer (PMO) at ARPERCEN.

Officers who are being considered by a promotion board are responsible for ensuring that any documentation they want to submit is received by the board no later than the close of business on the day before the board convenes. Eligible officers will receive a letter from the Office of Reserve Promotions, Total Army Personnel Command (PERSCOM), and a copy of their OMPF microfiche 90-120 days before the board convenes. Officers should review their microfiche immediately to identify missing documents. Personnel management officers at ARPERCEN may be able to assist in locating some of the missing documents that officers are unable to locate in their personal or unit files. Important items considered by promotion boards include the following: officer and academic evaluation reports; awards; service school diplomas; official photograph; *DA Form 2-1*, Personnel Qualification Record, Part II; and *DA Form 4037, Officer Record Brief* (ORB). The latter three items are not recorded on microfiche and officers should submit updated versions for each board. Detailed instructions on the photograph are contained in the letter from PERSCOM. Because *DA Forms 2-1* are not kept current for members of the IMA and IRR programs, these officers should submit a current ORB.

Officer evaluation reports (OER) must be complete to be considered by the promotion board. This includes the senior rater profile that is placed on individual reserve reports by ARPERCEN. Officers who find OERs (for reserve duty) missing from their microfiche must return certified true copies to PERSCOM so that a senior rater or unit administrative officer profile can be placed on the report. The certification must be placed on the copy itself and not appear as a separate attached page. The certification should be made by the senior rater or unit administrative officer and state simply, "I certify this to be a true copy." The senior rater or unit administrative officer should place the date and his or her original signature on the copy. Officers may direct questions on this procedure to their PMO.

Results from most mandatory promotion boards are usually released three to four months after the board adjourns. Unit members are encouraged to direct their inquiries about the results to their chain of command.

Other CY 94 Reserve Boards

Description	*Date*
AGR Officer Entrance/Continuation	9-19 Aug
General Officer Assignment Eligibility	13-23 Sept
USAR Officer Prof. Dev. Ed.	11-28 Oct

New Officer Symbol for ARPERCEN

Effective 1 January 1994, ARPERCEN is changing its official office symbol to "ARPC" from "DARP." Several days can be wasted if the wrong office symbol is placed on correspondence to your PMO. Many individuals are still using the old office symbol, DARP-OPS-JA, which has been discontinued for the past year-and-a-half. Correspondence addressed to your PMO should now read:

Commander
ARPERCEN
ATTN: ARPC-ZJA-P
9700 Page Boulevard
St. Louis, Missouri 63132-5200

The duty telephone numbers remain the same. United States Army Reserve JAs may call toll free (800) 325-4916, commercial (314) 538-2120, or DSN 892-2120. Duty hours remain 0730-1630 hours (Central) Monday-Friday.

Lieutenant Colonel Dennis Carazza is Branch Chief and PMO for those USAR JAs whose last two digits of their social security number are 50-99. Major James Brattain is the PMO for those USAR JAs whose last two digits are 00-49. Major Brattain, Personnel Management Officer, ARPERCEN.

The Judge Advocate General's Continuing Legal Education (On-Site) Schedule Update

Following is an updated schedule of The Judge Advocate General's CLE On-Sites. If you have any questions concerning the On-Site schedule please direct them to the local action officer or CPT David L. Parker, Chief, Unit Liaison and Training Office, Guard and Reserve Affairs Division, Office of The Judge Advocate General, telephone (804) 972-6380.

The Judge Advocate General's
School Continuing Legal Education (On-Site) Training, Academic Year 1994

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
26-27 Feb 94	Salt Lake City, UT UT ARNG HQ, Utah National Guard 12953 Minuteman Drive Draper, UT 84020-1776	AC GO RC GO Criminal Law Contract Law GRA Rep	 COL Cullen MAJ Wilkins LTC Killham COL Schempf	MAJ Patrick Casaday HQ, UT ARNG P.O. Box 1776 Draper, UT 84020-1776 (801) 576-3682
26-27 Feb 94	Denver, CO 87th LSO Edgar L. McWethy, Jr. USARC Bldg. 820 Fitzsimons Army Medical Ctr Aurora, CO 80045-7050	AC GO RC GO Criminal Law Contract Law GRA Rep	BG Magers BG Sagsveen MAJ Wilkins MAJ Killham Dr. Foley	LTC Dennis J. Wing Bldg. 820 McWethy USARC Fitzsimons AMC Aurora, CO 80045-7050 (303) 343-6774
5-6 Mar 94	Columbia, SC 120th ARCOM University of South Carolina Law School Columbia, SC 29208	AC GO RC GO Int'l Law Ad & Civ Law GRA Rep	MG Nardotti BG Sagsveen MAJ Hudson MAJ Jennings LTC Hamilton	MAJ Robert H. Uehling 209 South Springs Road Columbia, SC 29223 (803) 733-2878
12-13 Mar 94	Washington, D.C. 10th LSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, D.C. 20319	AC GO RC GO Int'l Law Ad & Civ Law GRA Rep	 COL Lassart MAJ Winters MAJ Diner LTC Menk	CPT Robert J. Moore 10011 Indian Queen Pt Rd. Fort Washington, MD 20744 (202) 835-7610
19-20 Mar 94	San Francisco, CA 5th LSO Sixth Army Conference Room Bldg. 35 Presidio of SF, CA 94129	AC GO RC GO Criminal Law Int'l Law GRA Rep	MG Gray Cullen/Lassart/Sagsveen MAJ Jacobson MAJ Warren COL Schempf	MAJ Robert Jesinger 32 Ayer Avenue San Jose, CA 95110 (408) 297-9172 X204
25-27 Mar 94	New Orleans, LA 122nd ARCOM Sheraton on the Lake Hotel Metairie, LA 70033	AC GO RC GO Int'l Law Criminal Law GRA Rep	MG Nardotti COL Lassart MAJ Johnson MAJ Hunter Dr. Foley	LTC George Simno 601 N. Carrollton Ave. New Orleans, LA 70119 (504) 282-6439
9 Apr 94	Indianapolis, IN INARNG TBD	AC GO RC GO Contract Law Int'l Law GRA Rep	 BG Sagsveen MAJ DeMoss MAJ Warren COL Schempf	MAJ George C. Thompson HQ, STARC P.O. Box 41326 Indianapolis, IN 46241 (317) 247-3449 FAX (317) 247-3198
23-24 Apr 94	Atlanta, GA 81st ARCOM TBD	AC GO RC GO Criminal Law Int'l Law GRA Rep	 COL Lassart MAJ Hayden LTC Crane LTC Menk	MAJ Carey Herrin 81st ARCOM 1514 E. Cleveland Avenue East Point, GA 30344 (404) 559-5484
7-8 May 94	Gulf Shores, AL 121st ARCOM/ALARNG Gulf State Park Resort Hotel Gulf Shores, AL 36547	AC GO RC GO Ad & Civ Law Int'l Law GRA Rep	BG Huffman BG Sagsveen MAJ Peterson MAJ Warner LTC Menk	LTC Samuel A. Rumore 5025 Tenth Court, South Birmingham, AL 35222 (205) 323-8957
14-15 May 94	Columbus, OH 83d ARCOM/9th LSO/ OH STARC TBD	AC GO RC GO Contract Law Int'l Law GRA Rep	 COL Cullen MAJ Causey LTC Crane COL Schempf	LTC Thomas G. Schumacher 762 Woodview Drive Edgewood, KY 41017-9637 (513) 684-3583

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by means of the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1994

7-11 March: USAREUR Fiscal Law CLE (5F-F12E).
(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

7-11 March: 34th Legal Assistance Course (5F-F23).

21-25 March: 18th Administrative Law for Military Installations Course (5F-F24).

28 March-8 April: 1st Criminal Law Advocacy Course (5F-F34).

28 March-1 April: 7th Government Materiel Acquisition Course (5F-F17).

4-8 April: 18th Operational Law Seminar (5F-F47).

11-15 April: 123d Senior Officers' Legal Orientation Course (5F-F1).

11-15 April: 56th Law of War Workshop (5F-F42).

18-21 April: 1994 Reserve Component Judge Advocate Workshop (5F-F56).

25-29 April: 5th Law for Legal NCOs Course (512-71D/E/20/30).

2-6 May: 38th Fiscal Law Course (5F-F12).
(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

16-20 May: 39th Fiscal Law Course (5F-F12).
(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

16 May-3 June: 37th Military Judges' Course (5F-F33).

23-27 May: 45th Federal Labor Relations Course (5F-F22).

6-10 June: 124th Senior Officers' Legal Orientation Course (5F-F1).

13-17 June: 24th Staff Judge Advocate Course (5F-F52).

20 June-1 July: JAOAC (Phase II) (5F-F55).

20 June-1 July: JATT Team Training (5F-F57).

6-8 July: Professional Recruiting Training Seminar.

11-15 July: 5th Legal Administrators' Course (7A-550A1).

11-15 July: 6th STARC Judge Advocate Mobilization and Training Workshop.

13-15 July: 25th Methods of Instruction Course (5F-F70).

18-29 July: 133d Contract Attorneys' Course (5F-F10).

18 July-23 September: 134th Basic Course (5-27-C20).

1-5 August: 57th Law of War Workshop (5F-F42).

1 August 1994-12 May 1995: 43d Graduate Course (5-27-C22).

8-12 August: 18th Criminal Law New Developments Course (5F-F35).

15-19 August: 12th Federal Litigation Course (5F-F29).

15-19 August: 4th Senior Legal NCO Management Course (512-71D/E/40/50).

22-26 August: 125th Senior Officers' Legal Orientation Course (5F-F1).

29 August-2 September: 19th Operational Law Seminar (5F-F47).

7-9 September: USAREUR Legal Assistance CLE (5F-F23E).

12-16 September: USAREUR Administrative Law CLE (5F-F24E).

12-16 September: 11th Contract Claims, Litigation and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

May 1994

1-4, LRP: 15th National Institute on Legal Issues of Educating, San Francisco, CA.

2-4, ESI: International Contracting, Washington, D.C.

5-6, ESI: Cost Allowability, Washington, D.C.

5-6, CLA: 1994 Computer Law Update, Washington, D.C.

8-12, NCDA: Violent Crimes—Assaults, New Orleans, LA.

10-13, ESI: The Winning Proposal, Washington, D.C.

10-13, ESI: Negotiation Strategies and Techniques, Washington, D.C.

12, GWU: Contract Award Protests: GAO, Washington, D.C.

12, ABA: Hazardous Waste and Superfund, Satellite Program.

13, GWU: Contract Award Protests: GSBCA, Washington, D.C.

16, ESI: Federal Information Processing (FIP) Acquisition Update, Washington, D.C.

16-17, ESI: ISO 9000 for Service Organizations, Washington, D.C.

17, MICLE: Title Insurance, Grand Rapids, MI.

17-18, ESI: Contract Performance Measurement: A Key to Problem Prevention, Washington, D.C.

17-20, ESI: Contract Pricing, San Diego, CA.

19, MICLE: Title Insurance, Troy, MI.

19, ABA: Litigation Tactics and Strategies, Satellite Program.

19-20, ABA: International Litigation, San Francisco, CA.

23-26, ESI: Subcontracting, Washington, D.C.

23-26, GWU: Source Selection Workshop, Washington, D.C.

26-27, NIBL: Pacific Bankruptcy Law Institute, San Francisco, CA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the September 1993 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	30 days after program
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Annually as assigned
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June biennially
Wisconsin*	31 December biennially
Wyoming	30 January annually

For addresses and detailed information, see the July 1993 issue of *The Army Lawyer.*

*Military exempt
**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone: commercial (703) 274-7633, DSN 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD A265755 Government Contract Law Deskbook vol. 1/JA-501-1-93 (499 pgs).

AD A265756 Government Contract Law Deskbook, vol. 2/JA-501-2-93 (481 pgs).

AD A265777 Fiscal Law Course Deskbook/JA-506(93) (471 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).

AD A263082 Real Property Guide—Legal Assistance/JA-261(93) (293 pgs).

AD A259516 Legal Assistance Guide: Office Directory/ JA-267(92) (110 pgs).

AD B164534 Notarial Guide/JA-268(92) (136 pgs).

AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).

AD A266077 Soldiers' and Sailors' Civil Relief Act Guide/JA-260(93) (206 pgs).

AD A266177 Wills Guide/JA-262(93) (464 pgs).

AD A268007 Family Law Guide/JA 263(93) (589 pgs).

AD A266351 Office Administration Guide/JA 271(93) (230 pgs).

AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).

AD A269073 Model Income Tax Assistance Guide/JA 275-(93) (66 pgs).

*AD A270397 Consumer Law Guide/JA 265(93) (634 pgs).

AD A259022 Tax Information Series/JA 269(93) (117 pgs).

AD A256322 Legal Assistance: Deployment Guide/JA-272(92) (364 pgs).

AD A260219 Air Force All States Income Tax Guide—January 1993.

Administrative and Civil Law

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD A269515 Federal Tort Claims Act/JA 241(93) (167 pgs).

AD A258582 Environmental Law Deskbook, JA-234-1(92) (517 pgs).

AD A268410 Defensive Federal Litigation/JA-200(93) (840 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).

AD A269036 Government Information Practices/JA-235(93) (322 pgs).

AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

*AD A273376 The Law of Federal Employment/JA-210(92) (402 pgs).

*AD A273434 The Law of Federal Labor-Management Relations/JA-211-92 (430 pgs).

Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

Criminal Law

AD A260531 Crimes and Defenses Deskbook/JA 337(92) (220 pgs).

AD A260913 Unauthorized Absences/JA 301(92) (86 pgs).

AD A251120 Criminal Law, Nonjudicial Punishment/JA-330(92) (40 pgs).

AD A251717 Senior Officers Legal Orientation/JA 320(92) (249 pgs).

AD A251821 Trial Counsel and Defense Counsel Handbook/JA 310(92) (452 pgs).

AD A261247 United States Attorney Prosecutions/JA-338(92) (343 pgs).

International Law

AD A262925 Operational Law Handbook (Draft)/JA 422(93) (180 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

Obtaining Manuals for Courts-Martial, *DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center (USAPDC) at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications
Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(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.

The units below are authorized publications accounts with the USAPDC.

(*1*) *Active Army.*

(*a*) *Units organized under a 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 DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. 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.)

(*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 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*c*) *Staff sections of FOAs, 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) *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 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) *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 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. 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 Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] 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-NV, Alexandria, VA 22331-0302.

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 Baltimore USAPDC at (410) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using *DA Form 4569*. All *DA Form 4569* requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. You may reach this office at (703) 487-4684.

(6) Navy, Air Force, and Marine Corps JAGs can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

3. LAAWS Bulletin Board Service

a. The Legal Automated Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) primarily dedicated to serving the Army legal community in providing Army access to the LAAWS BBS, while also providing 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) Army access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772):

(a) Active duty Army judge advocates;

(b) Civilian attorneys employed by the Department of the Army;

(c) Army Reserve and Army National Guard (NG) judge advocates on active duty, or employed fulltime by the federal government;

(d) Army Reserve and Army NG judge advocates *not* on active duty (access to OPEN and the pending RESERVE CONF only);

(e) Active, Reserve, or NG Army legal administrators; Active, Reserve or NG enlisted personnel (MOS 71D/71E);

(f) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(g) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g. DLA, CHAMPUS, DISA, Headquarters Services Washington);

(h) Individuals with approved, written exceptions to the access policy.

Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
Attn: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

(2) DOD-wide access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5791, or DSN 656-5791):

All DOD personnel dealing with military legal issues.

c. The telecommunications configuration is: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. After signing on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and tell them they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four to forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

d. *Instructions for Downloading Files from the LAAWS BBS.*

(1) Log onto the LAAWS BBS using ENABLE, PROCOMM, or other telecommunications software, and the communications parameters listed in subparagraph c, above.

(2) If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. For Army access users, to download it onto your hard drive, take the following actions (DOD-wide access users will have to obtain a copy from their sources) after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12] and hit the enter key when ask to view other conference members.

(c) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name, enter [pkz 110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. 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/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging onto the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

(e) When asked to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log-off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will

give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

e. *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*
1990_YIR.ZIP	January 1991	This is the 1990 Year in Review article in ASCII format. It originally was provided at the 1991 Government Contract Law Symposium at TJAGSA.
505-1.ZIP	March 1993	Contract Attorneys' Deskbook, Volume 1, 129th Contract Attorneys' Course, March 1993.
505-2.ZIP	June 1992	Volume 2 of the May 1992 Contract Attorneys' Course Deskbook.
93CLASS.ASC	July 1992	FY93 TJAGSA Class Schedule; ASCII.
93CLASS.EN	July 1992	FY93 TJAGSA Class Schedule; ENABLE 2.15.
93CRS.ASC	July 1992	FY93 TJAGSA Course Schedule, ASCII.
93CRS.EN	July 1992	FY93 TJAGSA Course Schedule; ENABLE 2.15.
ALAW.ZIP	June 1990	*Army Lawyer/Military Law Review* Database ENABLE 2.15. Updated through the 1989 *Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BBS-POL.ZIP	December 1992	Draft of LAAWS BBS operating procedures for TJAGSA policy counsel representative.
BULLETIN.TXT	June 1993	List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions.
CCLR.ZIP	September 1990	Contract Claims, Litigation, & Remedies.
CLG.EXE	December 1992	Consumer Law Guide Excerpts. Documents were created in WordPerfect 5.0 or Harvard Graphics 3.0 and zipped into executable file.
DEPLOY.EXE	December 1992	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FISCALBK.ZIP	November 1990	The November 1990 Fiscal Law Deskbook from the Contract Law Division, TJAGSA.
FSO 201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
JA200A.ZIP	August 1993	Defensive Federal Litigation—Part A, June 1993.
JA200B.ZIP	August 1993	Defensive Federal Litigation—Part B, June 1993.
JA210.ZIP	November 1993	Law of Federal Employment, September 1993.
JA211.ZIP	November 1993	Law of Federal Labor-Management Relations, November 1993.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.

JA235.ZIP	August 1993	Government Information Practices.
NA241.ZIP	August 1993	Federal Tort Claims Act.
JA260.ZIP	September 1993	Soldiers' & Sailors' Civil Relief Act. Updated September 1993.
JA261.ZIP	March 1993	Legal Assistance Real Property Guide.
JA262.ZIP	June 1993	Legal Assistance Wills Guide.
JA263.ZIP	August 1993	Family Law Guide. Updated 31 August 1993.
JA265A.ZIP	September 1993	Legal Assistance Consumer Law Guide—Part A, September 1993.
JA265B.ZIP	September 1993	Legal Assistance Consumer Law Guide—Part B, September 1993
JA267.ZIP	January 1993	Legal Assistance Office Directory.
JA268.ZIP	January 1993	Legal Assistance Notarial Guide.
JA269.ZIP	January 1994	Federal Tax Information Series, December 1993.
JA271.ZIP	June 1993	Legal Assistance Office Administration Guide.
JA272.ZIP	March 1992	Legal Assistance Deployment Guide.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.
JA275.ZIP	August 1993	Model Tax Assistance Program.
JA276.ZIP	January 1993	Preventive Law Series.
JA281.ZIP	November 1992	15-6 Investigations.
JA285.ZIP	March 1992	Senior Officer's Legal Orientation.
JA290.ZIP	March 1992	SJA Office Manager's Handbook.
JA301.ZIP	January 1994	Unauthorized Absences Programmed Text, August 1993.
JA310.ZIP	October 1993	Trial Counsel and Defense Counsel Handbook, May 1993.
JA320.ZIP	January 1994	Senior Officer's Legal Orientation Text, January 1994.
JA330.ZIP	January 1994	Nonjudicial Punishment Programmed Text, June 1993.
JA337.ZIP	October 1993	Crimes and Defenses Deskbook, July 1993.
JA4221.ZIP	April 1993	Op Law Handbook, Disk 1 of 5, April 1993 version.
JA4222.ZIP	April 1993	Op Law Handbook, Disk 2 of 5, April 1993 version.
JA4223.ZIP	April 1993	Op Law Handbook, Disk 3 of 5, April 1993 version.
JA4224.ZIP	April 1993	Op Law Handbook, Disk 4 of 5, April 1993 version.
JA4225.ZIP	April 1993	Op Law Handbook, Disk 5 of 5, April 1993 version.
JA501-1.ZIP	June 1993	Volume 1, TJAGSA Contract Law Deskbook, May 1993.
JA501-2.ZIP	June 1993	Volume 2, TJAGSA Contract Law Deskbook, May 1993.
JA506.ZIP	November 1993	TJAGSA Fiscal Law Deskbook, May 1993.
JA509.ZIP	October 1992	TJAGSA Deskbook from the 9th Contract Claims, Litigation, and Remedies Course held in September 1992.
JAGSCHL.WPF	March 1992	JAG School report to DSAT.
V1YIR91.ZIP	January 1992	Volume 1 of TJAGSA's Annual Year in Review for CY 1991 as presented at the January 1992 Contract Law Symposium.

V2YIR91.ZIP	January 1992	Volume 2 of TJAGSA's annual review of contract and fiscal law for CY 1991.
V3YIR91.ZIP	January 1992	Volume 3 of TJAGSA's annual review of contract and fiscal law for CY 1991.

f. 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 Law, or Doctrine, Developments, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

g. 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, SFC Tim Nugent, Commercial (703) 806-5764, DSN 656-5764, or at the address in paragraph b(1)h, above.

5. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

U.S. Postal Service

STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION

Required by 39 U.S.C. 3685)

1A. Title of Publication	1B. PUBLICATION NO.	2. Date of Filing
The Army Lawyer	0 3 6 4 1 2 8 7	25 Oct. 1993
3. Frequency of Issue	**3A. No. of Issues Published Annually**	**3B. Annual Subscription Price**
Monthly	Twelve	$19.00 Domestic $23.75 Foreign

4. Complete Mailing Address of Known Office of Publication *(Street, City, County, State and ZIP+4 Code) (Not printers)*

The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781

5. Complete Mailing Address of the Headquarters of General Business Offices of the Publisher *(Not printer)*

Headquarters, Department of the Army, Washington, D.C. 20310

6. Full Names and Complete Mailing Address of Publisher, Editor, and Managing Editor *(This item MUST NOT be blank)*

Publisher *(Name and Complete Mailing Address)*

Colonel John T. Edwards, Commandant, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781

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Managing Editor *(Name and Complete Mailing Address)*

Captain John B. Jones, Jr., The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781

7. Owner *(If owned by a corporation, its name and address must be stated and also immediately thereunder the names and addresses of stockholders owning or holding 1 percent or more of total amount of stock. If not owned by a corporation, the names and addresses of the individual owners must be given. If owned by a partnership or other unincorporated firm, its name and address, as well as that of each individual must be given. If the publication is published by a nonprofit organization, its name and address must be stated.) (Item must be completed.)*

Full Name	Complete Mailing Address
Headquarters, Department of the Army	Washington, D.C. 20310

8. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages or Other Securities *(If there are none, so state)*

Full Name	Complete Mailing Address
None	

9. For Completion by Nonprofit Organizations Authorized To Mail at Special Rates *(DMM Section 423.12 only)*
The purpose, function, and nonprofit status of this organization and the exempt status for Federal income tax purposes *(Check one)*

(1) [X] Has Not Changed During Preceding 12 Months

(2) [ ] Has Changed During Preceding 12 Months

(If changed, publisher must submit explanation of change with this statement.)

10. Extent and Nature of Circulation *(See instructions on reverse side)*	Average No. Copies Each Issue During Preceding 12 Months	Actual No. Copies of Single Issue Published Nearest to Filing Date
A. Total No. Copies *(Net Press Run)*	8055	8038
B. Paid and/or Requested Circulation 1. Sales through dealers and carriers, street vendors and counter sales	0	0
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C. Total Paid and/or Requested Circulation *(Sum or 10B1 and 10B2)*	500	500
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PS Form 3526, Feb. 1989

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SECOND CLASS MAIL

*U.S. Government Printing Office: 1994 — 300-675/80012

PIN: 072123-000