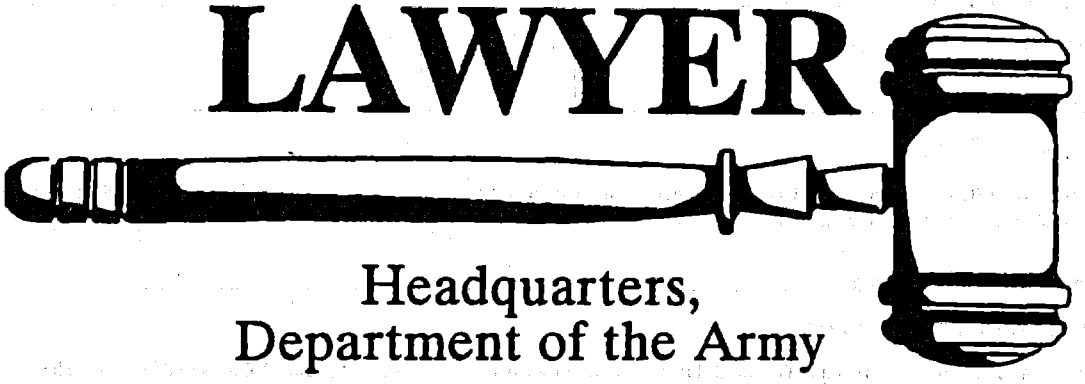
THE ARMY LAWYER



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Articles

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1995 Contract Law Developments—The Year in Review

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Contents

I. Foreword

This past year in government contract law reminded the Contract Law Department of "extreme skiing;" we took a leap of faith over the precipice at the beginning of the year, not knowing for sure where we would end up. First, there was the possibility of further acquisition reform resulting in massive changes to the contracting process. Then came proposals to rewrite the *Federal Acquisition Regulation (FAR)* and finally the threat of the big fiscal train wreck. However, as you well know, no changes were quite as extreme as some predicted. To quote William Shakespeare, "there is nothing either good or bad, but thinking makes it so." Various parties are still trying to determine how best to reform the contracting process. We are awaiting further direction as to who will rewrite the *FAR* and the extent of such a rewrite. The fiscal train wreck was avoided by switching the train to another track.

Although new reform legislation has not come to fruition, there has, as always, been change. A portion of the *FAR* was rewritten. Some interesting fiscal issues surfaced as a result of the funding gap. As usual, the courts and boards have given us some important new case law.

This article analyzes the 1995 procurement related cases, statutes, administrative decisions, and regulations. We hope you find this article helpful in researching acquisition issues, discerning legal trends, and in the day-to-day operations of your offices. Best wishes for a happy and prosperous new year from the Contract Law Department, The Judge Advocate General's School, United States Army.

II. Department of Defense Legislation

A. *Department of Defense Appropriations Act, 1996.*

1. Introduction. On 1 December 1995, the Department of Defense Appropriations Act for Fiscal Year 1996 (1996 Appropriations Act or Act)[1] became law, temporarily putting to rest a political tug-of-war between Congress and President Clinton over the defense budget. Congress appropriated $243 billion to the Department of Defense (DOD), nearly $7 billion more than the President requested in his budgetary submission.[2]

With its first Republican majority in forty years, Congress boldly asserted its priorities through the appropriations process. Noting the rapid restructuring and downsizing of our armed forces after the end of the Cold War, the increasing demand on our armed forces due to ethnic and geographic disputes, the instability in the former Soviet Union, and the military threats in Korea and the Persian Gulf, Congress substantially increased funding for weapons modernization programs.[3]

Unhappy with Congressional priorities and restrictions on performing abortions in military hospitals,[4] President Clinton threatened repeatedly to veto the defense appropriations bill.[5] The stalemate, however, turned out to be short lived. Not wanting to imperil funding for the Bosnian peacekeeping mission, the President allowed the defense bill to become law without his signature.[6]

In addition to providing substantial increases over the President's budget request in funding for the B-2 bomber, amphibious assault ships, and ballistic missile defense, Congress provided funds for numerous other major programs, including procurement of a new Seawolf submarine, three DDG-51 class destroyers, eight C-17 aircraft, and sixty UH-60 Blackhawk helicopters.[7] Moreover, Congress has placed a premium on force readiness and quality of life initiatives by substantially increasing operation and maintenance funding, including $700 million over the budget request for barracks renovation and real property maintenance.[8] Also concerned about the impact of unfunded contingency operations, Congress provided an additional $647 million over the budget request for costs associated with Operations Provide Comfort and Enhanced Southern Watch in and around Iraq.[9]

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[1] Pub. L. No. 104-61, 109 Stat. 636 (1995).

[2] Specifically, President Clinton's Fiscal Year 1996 budget request for the Department of Defense totalled $236,344,017,000 in new budget authority. Congress appropriated $243,251,297,000, an increase from Fiscal Year 1995 of $1,698,226,000. *See* H.R. CONF. REP. No. 344, 104th Cong., 1st Sess. 128 (1995).

[3] H.R. REP. No. 208, 104th Cong., 1st Sess. 4 (1995). Congress expressed concern that the President's Fiscal Year 1996 budget request contained the lowest level of funding for weapons procurement (in constant dollars) in over forty-five years and noted that production lines were shutting down and inventory requirements going unmet for lack of funds. *Id.* at 5. To remedy this problem, Congress appropriated $44 billion for Department of Defense procurement, a $5.4 billion increase over the President's budget request. *See* H.R. CONF. REP. No. 344, 104th Cong., 1st Sess. 78 (1995).

[4] *See* Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, § 8119, 109 Stat. 636, 678 (1995).

[5] *See* Rick Maze, *Defense Bills Still in the Works*, ARMY TIMES, Oct. 23, 1995, at 10.

[6] *See President Accepts Defense Appropriations Act While Authorization Measure Stalls*, 37 Govt. Contractor (Fed. Pubs.) ¶ 612 (Dec. 6, 1995); John F. Harris & Eric Pianin, *Clinton Accepts Hill's Defense Spending Bill*, WASH. POST, Dec. 1, 1995, at A1. Although the House of Representative's version of the Department of Defense Appropriations Bill prohibited the use of funds to deploy troops to Bosnia without Congressional authorization, *see* H.R. Rep. No. 208, 104th Cong. 1st Sess. 195 (1995), the bill sent to President Clinton merely expressed the restriction as a nonbinding "Sense of Congress." Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, § 8124, 109 Stat. 636, 678 (1995). *See also id.* § 8115, 109 Stat. at 675 (stating the sense of Congress that the President must engage in consultations with Congress in the event of a deployment of United States Armed Forces in any international peacekeeping, peace enforcement, or humanitarian assistance operation).

[7] *See* H.R. CONF. REP. No. 344, 104th Cong., 1st Sess. 78, 84, 85, 88, 114 (1995).

[8] *Id.* at 55, 57.

[9] *Id.* at 50; H.R. REP. No. 208, 104th Cong., 1st Sess. 6, 7, 10, 11 (1995). Congress designated these funds "Congressional Interest" items. This means that, absent prior congressional approval, the Department of Defense may use the funds only for the additional incremental costs of the operations. Congress also directed the President to include the costs of these operations in his Fiscal Year 1997 budget request. *See* H.R. CONF. REP. No. 344, 104th Cong., 1st Sess. 50 (1995).

2. Investment/Expense Threshold Increased. Congress increased the investment/expense threshold[10] to $100,000, double its previous rate of $50,000.[11] This is the third annual increase since Fiscal Year 1993 when the rate was just $15,000.[12] Typically, the DOD implements this authority with a regulatory amendment.[13]

3. New Appropriation for Overseas Humanitarian, Disaster, and Civic Aid. Last year, Congress appropriated $65 million for the Department of Defense to conduct humanitarian assistance.[14] Congress decided to merge the funds provided for this purpose into a new appropriation account, which would provide all DOD funding for various relief efforts such as disaster assistance, humanitarian relief, and civic aid.[15] The new appropriation[16] specifically references the DOD's Title 10 authority to conduct humanitarian assistance.[17] Expressing concern about the DOD's involvement in "this aspect of United States foreign policy," however, Congress decided to reduce funding to $50 million, with $20 million earmarked for landmine clearing efforts.[18]

4. Reduced Compensation for Defense Industry Executives. Last year, Congress limited allowable costs charged to the government on new contracts for individual compensation to no more than $250,000 per year.[19] This limitation did not commence until 15 April 1995 and applied only to Fiscal Year 1995 appropriations.[20] Congress tightened its wallet even more this year, limiting allowable costs for payments of individual compensation to $200,000 per year after 1 July 1996.[21] This limitation will not take effect, however, if the Office of Federal Procurement Policy establishes *FAR* guidance governing the allowability of individual compensation.[22]

5. No More "Golden Handshakes." As if the limitation on executive compensation was not enough to cause anxiety in the defense contractor community, Congress also prohibited the payment of costs *of any amount* for contractor employee bonuses that are part of restructuring costs associated with a business combination.[23] The conferees included this provision in the Act in response to the merger of Lockheed Corporation and Martin Marietta Corporation, in which $31 million in employee bonuses were charged to the DOD.[24] In an awkwardly worded provision, Congress limited the applicability of the restriction to circumstances in which "it is made known to the Federal official having authority to obligate or expend such funds" that costs have been charged to the contract for the bonuses.[25] Although the restric-

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[10] *See* DEP'T OF DEFENSE, FINANCIAL MGMT. REG., vol. 2A, ch. 1. The Department of Defense may treat items of equipment not designated for centralized management and costing less than the threshold amount as expenses, funding them with operation & maintenance funds. Items at or above the threshold qualify as investments, and must be funded with procurement funds.

[11] Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, § 8065, 109 Stat. 636, 664 (1995).

[12] *See* Department of Defense Appropriations Act, 1995, Pub. L. No. 103-355, § 8076, 108 Stat. 2599, 2635 (1994); Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8092, 107 Stat. 1418, 1461 (1993).

[13] *See* Message, Defense Finance Accounting Service, DFAS-IN-AM, subject: Change (03) to DA Pamphlet 37-100-95 (261348Z Oct. 94) (increasing threshold to $50,000).

[14] Department of Defense Appropriations Act, 1995, Pub. L. No. 103-355, tit. II, 108 Stat. 2599, 2606 (1994).

[15] *See* H.R. CONF. REP. No. 344, 104th Cong., 1st Sess. 77 (1995); H.R. REP. No. 208, 104th Cong., 1st Sess. 67 (1995). The appropriation committees adopted the recommendation of the House National Security Committee in its National Defense Authorization Bill to consolidate funding for these missions. *See* H.R. REP. No. 131, 104th Cong., 1st Sess. 261 (1995).

[16] Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, tit. II, 109 Stat. 636, 642 (1995).

[17] These authorities are found in 10 U.S.C. §§ 401, 402, 404, 2547, and 2551 (1988).

[18] *See* H. R. Rep. No. 208, 104th Cong., 1st Sess. 67 (1995).

[19] Department of Defense Appropriations Act, 1995, Pub. L. No. 103-355, § 8117, 108 Stat. 2599, 2649 (1994).

[20] *Id. See also* DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 231.205-6(a)(2) (1 Apr. 1984) [hereinafter DFARS] (providing that costs for individual compensation in excess of $250,000 per year are unallowable under contracts "funded by Fiscal Year 1995 appropriations").

[21] Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, § 8086, 109 Stat. 636, 668 (1995).

[22] *Id.* Although Senator Barbara Boxer introduced legislation to permanently cap allowable executive compensation at $250,000 per year, Congress did not adopt the measure, but instead made the provision applicable only to the last three months of Fiscal Year 1996. Moreover, the provision apparently allows the Department of Defense the flexibility to pay higher rates of compensation so long as the Office of Federal Procurement Policy issues appropriate guidance to that effect. *See Conferees Set $200K Contractor Compensation Cap*, 64 Fed. Cont. Rep. (BNA) 249 (Sept. 25, 1995); *House, Senate Vote to Extend Cap on Allowable Defense Contractor Compensation Costs*, 64 Fed. Cont. Rep. (BNA) 195 (Sept. 11, 1995).

[23] Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, § 8122, 109 Stat. 636, 678 (1995).

[24] *See Conferees Delete Prompt Pay Provision, Modify Provision on Matching Disbursements*, 64 Fed. Cont. Rep. (BNA) 273 (Oct. 2, 1995). Most of the bonus payments were made before the prohibition was enacted. Presumably, these costs should be charged to prior year funds and thus escape the ban. Nevertheless, Department of Defense auditors are still reviewing the reasonableness and allowability of the bonuses. *Id.*

[25] Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, § 8122, 109 Stat. 636, 678 (1995). This provision implies that the contracting officer, disbursing officer, or other federal official does not violate the restriction by authorizing payment of contractor costs unless he or she has *actual knowledge* that the payment is for a bonus associated with a merger. This important caveat may save federal officials from unwittingly violating the Antideficiency Act. *See* 31 U.S.C. § 1341(a)(1)(A) (prohibiting the making or authorizing of an expenditure or obligation exceeding an amount available in an appropriation or fund).

tions have no express applicability beyond Fiscal Year 1996, the conferees directed the DOD to revise its regulations to make it *absolutely clear* that taxpayer funds would not be used to reimburse the contractor for special executive bonuses or retention incentive payments triggered by a merger, acquisition, or "any other change in corporate control."[26]

6. Disbursements Must Match Obligations. In a series of reports resulting in some embarrassing publicity, the DOD Inspector General and the General Accounting Office determined that the Department of Defense could not account for as much as $25 billion in "unmatched disbursements"—payments made to contractors without a matching obligation.[27] Expressing its displeasure with this practice, Congress last year ordered the DOD to match each disbursement in excess of $5 million with a particular obligation before payment, starting 1 July 1995, and each disbursement in excess of $1 million, starting 1 October 1995.[28] Despite proposals to reduce the threshold for matching disbursements to obligations to $500,000,[29] Congress retained the $5 million threshold for Fiscal Year 1996.[30] The requirement to match disbursements to obligations may be waived for disbursements involving deploying forces, a declared war, or when otherwise necessary for national security purposes.[31] Responding to Congress's concern about problems in the DOD's payment system, the Director of Defense Procurement, Eleanor R. Spector, recently formed a process action team to recommend improvements to the contract payment process.[32]

7. No Assistance to North Korea. Expressing its extreme disappointment that the DOD used its emergency and extraordinary expense funds to provide direct assistance to North Korea,[33] the Senate Appropriations Committee included a new prohibition in the 1996 Appropriations Act against using funds to assist North Korea "unless specifically appropriated for that purpose."[34] The Senate Appropriations Committee also cautioned that the emergency and extraordinary authorities were provided only for *true emergencies* and "not merely as a mechanism to avoid or delay notification to Congress of major foreign policy initiatives."[35]

8. The More Things Change . . . ? Buy American Provisions Continue to Fill Appropriations Act. For those who thought the new Congress would be immune from the desire to protect local interests at the public's expense, the 1996 Appropriations Act brought a dose of political reality. In one well publicized example,[36] a representative from Wisconsin sought to protect a diesel engine manufacturer in his district from competing with a German made engine by sponsoring provisions in the 1996 Appropriations Act prohibiting the Navy from procuring certain engines and generators for the LPD-17 ship and the new attack submarine unless those items would be powered by diesel engines manufactured in the United States by a domestically operated entity.[37]

Likewise, Congress has again prohibited the purchase of any supercomputer that is not manufactured in the United States,[38] a

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[26] H.R. CONF. REP. No. 344, 104th Cong., 1st Sess. 127 (1995).

[27] *See GAO Finds $25B in Unmatched DOD Payments*, 62 Fed. Cont. Rep. (BNA) 333 (Oct. 10, 1994); *Senate Passes Defense Appropriations Bill, Requires Matching Disbursements*, Obligations, 62 Fed. Cont. Rep. (BNA) 170 (Aug. 15, 1994); Dana Priest, *Billions Go Astray, Often Without a Trace*, WASH. POST, May 14, 1995, at A1. Reports also indicate that last year, the Defense Finance & Accounting Center in Columbus, Ohio erroneously paid private contractors from $300 million to $750 million more than it owed them. *Id.* at A6.

[28] Department of Defense Appropriations Act, 1995, Pub. L. No. 103-355, § 8137, 108 Stat. 2599, 2654 (1994).

[29] *See Conferees Delete Prompt Pay Provision, Modify Provision on Matching Disbursements*, 64 Fed. Cont. Rep. (BNA) 273 (Oct. 2, 1995).

[30] Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, § 8102, 109 Stat. 672 (1995).

[31] *Id.*

[32] *See Spector Forms Team to Recommend Ways to Improve Contract Payment Process*, 64 Fed. Cont. Rep. (BNA) 394 (Nov. 6, 1995).

[33] S. REP. No. 124, 104th Cong., 1st Sess. 214 (1995). Emergency and extraordinary expense funds are typically provided as an earmark to the operation and maintenance appropriation. *See, e.g.*, Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, tit. II, 109 Stat. 636, 638 (1995) (earmarking $14,437,000 of the Army's operation and maintenance appropriation for emergencies and extraordinary expenses).

[34] Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, § 8088, 109 Stat. 636, 668 (1995).

[35] S. REP. No. 124, 104th Cong., 1st Sess. 215 (1995).

[36] *See* Dan Morgan & Walter Pincus, *Despite Protestations, Wisconsin Lawmaker Plays "Washington Game" Well*, WASH. POST, Oct. 19, 1995, at A6.

[37] Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, §§ 8109, 8110, 109 Stat. 636, 673-74 (1995). The Secretary of Defense may waive this restriction by certifying to the appropriations committees that domestic supplies are not available to meet the needs of the Department of Defense on a timely basis, and that the acquisition must be made for national security purposes, or that there exists a significant cost or quality difference.

[38] *Id.* § 8103, 109 Stat. at 673.

restriction that has appeared in previous appropriations acts.[39] The DOD recently implemented this restriction in the *Defense Federal Acquisition Regulation Supplement (DFARS).*[40] Additionally, Congress included "Buy American" restrictions on the procurement of 120mm mortars and ammunition,[41] ball and roller bearings,[42] and welded shipboard anchor and mooring chains four inches in diameter and under.[43]

9. Advance Notice Required for Transfer of Defense Articles and Services. Expressing its concern about the diversion of the DOD's resources to support nontraditional operations such as occurred in Haiti, Rwanda, and the former Yugoslavia,[44] Congress has prohibited the DOD from transferring to another nation or international organization any defense article or service for use in international peacekeeping, peace enforcement, or humanitarian assistance operations unless Congress receives notification fifteen days in advance.[45] The notification must include a description of the equipment, supplies or services proposed for transfer, a statement of their value, and a statement of whether inventory requirements for the supplies have been met, and how the President proposes to provide funds for items needing to be replaced.[46]

10. Congress Declines to Raise Progress Payment Rates. Two years ago, Congress prohibited the Department of Defense from making progress payments to large businesses at a rate exceeding 75% of incurred costs.[47] The Senate Appropriations Committee sought to increase this rate to the previous limit of 85%,[48] but this provision was not included in the final version of the Act.

11. Support for Full Funding Policy. Although failing to address the matter in the 1996 Appropriations Act, Congress reiterated its strong support for the DOD's full funding policy for procurement of weapons systems.[49] While noting the temptation to incrementally fund new systems due to pressure from budget deficits, the House of Representatives Appropriations Committee found the full funding policy to be a "sound and time proven policy" since its inception in 1951.[50] The House of Representatives National Security Committee has proposed a permanent prohibition on the use of incremental funding of procurement items.[51]

12. Loan Guarantees. Congress provided funds for the defense export loan guarantee initiative by which the Secretary of Defense may issue loan guarantees in support of United States defense exports so long as the total contingent liability of the United States does not exceed $15 billion.[52] Countries involved in the loan guarantee program must pay the exposure fee rather than financing it as part of the guaranteed loan.

B. Military Construction Appropriations Act, 1996.

1. Introduction. President Clinton signed the Military Construction Appropriations Act, 1996 (MCA Act)[53] on 3 October 1995, making it the first Fiscal Year 1996 appropriations act to become law. The MCA Act provides nearly $11.2 billion in new obligational authority for military construction, family housing, and base realignment and closure functions administered by the DOD, an increase from Fiscal Year 1995 of $2.4 billion.[54]

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[39] *See* Department of Defense Appropriations Act, 1995, Pub. L. No. 103-355, § 8023, 108 Stat. 2599, 2622 (1994).

[40] *See* DAC 91-9, 60 Fed. Reg. 61,586 (1995) (effective 30 November 1995, finalizing an interim rule which added *DFARS 225.7023* and *252.225-7011*). DFARS, *supra* note 20.

[41] Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, § 8104, 109 Stat. 636, 673 (1995).

[42] *Id.* § 8099, 109 Stat. at 672.

[43] *Id.* § 8022, 109 Stat. at 656. We are also happy to report that Congress continued the prohibition on payments to the Louisiana State University Medical Center for Brain Missile Wound Research on cats. *Id.* § 8032, 109 Stat. at 658.

[44] *See* H.R. REP. No. 208, 104th Cong., 1st Sess. 12 (1995).

[45] Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, § 8117, 109 Stat. 636, 677 (1995). Prior notification must be provided to the congressional defense committees, the House Committee on International Relations, and the Senate Committee on Foreign Relations.

[46] *Id.*

[47] Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8155, 107 Stat. 1418, 1478 (1993).

[48] *See* S. REP. No. 124, 104th Cong., 1st Sess. 215 (1995).

[49] H.R. REP. No. 208, 104th Cong., 1st Sess. 188 (1995).

[50] *Id.*

[51] H.R. REP. No. 131, 104th Cong., 1st Sess. 249 (1995).

[52] Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, § 8075, 109 Stat. 636, 665 (1995); *see also* H.R. Conf. Rep. No. 406, 104th Cong., 1st Sess. 307 (provision of National Defense Authorization Bill for Fiscal Year 1996 establishing loan guarantee program).

[53] Pub. L. No. 104-32, 109 Stat. 283 (1995).

[54] *Id.*; H.R. CONF. REP. No. 247, 104th Cong., 1st Sess. 52. Congress appropriated nearly $500 million more than President Clinton requested, prompting the President to complain that the Act was loaded with "pork-barrel projects." *See* Rick Maze, *Clinton Signs Bill but Complains of Pork-Barrel Projects*, AIR FORCE TIMES, Oct. 16, 1995, at 16.

Expressing concern about quality-of-life issues for service members, Congress put a priority on funding for new barracks, family housing, and child development centers.[55] Congress also substantially increased funding for base realignment and closure activities, to ensure closure schedules could be met and anticipated savings realized.[56]

2. *Congress Makes Exception to Cost-Plus-Fixed-Fee Prohibition for Environmental Restoration.* In recent years, Congress has prohibited the use of military construction funds for cost-plus-fixed-fee contracts in excess of $25,000 performed in the United States, except Alaska, absent prior Secretary of Defense approval.[57] Unaware that this prohibition applied to base realignment and closure contracts funded by the military construction (Milcon) appropriation, DOD activities awarded numerous cost-plus-fixed-fee contracts for base realignment and closure environmental restoration projects without prior Secretary of Defense approval, thereby violating the Antideficiency Act.[58] Congress remedied this problem in the MCA Act by providing that the cost-plus-fixed-fee prohibition does not apply to contracts funded by the base realignment and closure account for environmental restoration at installations being closed or realigned.[59]

3. *Floors Become Ceilings for Base Realignment and Closure Environmental Funding.* Congress has appropriated funds for base realignment and closure activities since 1990, but it has earmarked minimum amounts of each appropriation as available only for environmental restoration.[60] Concerned that environmental restoration costs be "reasonable and affordable,"[61] Congress wrote the earmarks for base realignment and closure environmental restoration in the 1996 MCA Act as *maximum amounts*, which may not be exceeded unless the Secretary of Defense first notifies the appropriations committees in accordance with normal reprogramming procedures.[62]

4. *Reprogramming Procedures Apply to Base Realignment and Closure Accounts.* Congress has established a reprogramming threshold for military construction projects, housing construction projects, and improvement projects at twenty-five percent of the funded project amount or $2 million, whichever is less.[63] Closing a potential loophole, the conferees directed that *any* transfer of funds for base realignment and closure construction projects deviating from the project lists in the House Appropriations Committee Report[64] must follow normal military construction reprogramming procedures.[65]

5. *Countries Bordering the Arabian Gulf Added to List of Foreign Contractor Limitations.* Expanding on previous restrictions, the 1996 MCA Act requires the DOD to award military construction funded architect and engineer contracts exceeding $500,000 to United States firms, or United States firms in joint venture with host nation firms, for projects in Japan, North Atlantic Treaty Organization countries, or in countries bordering the Arabian Gulf.[66] Similarly, the 1996 MCA Act prohibits the award of military construction funded construction contracts exceeding $1 million to foreign contractors for projects in United States territories and possessions in the Pacific, Kwajalein Atoll, or countries bordering the Arabian Gulf unless the lowest bid price of a

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[55] H.R. REP. No. 137, 104th Cong., 1st Sess. 3-8 (1995); S. REP. No. 116, 104th Cong., 1st Sess. 8, 9 (1995).

[56] H.R. CONF. REP. No. 247, 104th Cong. 1st Sess. 51 (1995) ($3.9 billion appropriated for Fiscal Year 1996 base realignment and closure activities); H.R. REP. No. 137, 104th Cong., 1st Sess. 34 (1995) (noting a 44% increase in base realignment and closure funding over Fiscal Year 1995 levels).

[57] *See* Military Construction Appropriations Act, 1995, Pub. L. No. 103-307, § 101, 108 Stat. 1659, 1663 (1994); Military Construction Appropriations Act, 1994, Pub. L. No. 103-110, § 101, 107 Stat. 1037, 1041 (1993).

[58] *See* Memorandum, Director for Procurement Policy, Office of the Assistant Secretary of the Army (Research, Development, & Acquisition), for All Army Contracting Activities, subject: Delegation of Authority to Approve Certain Cost-Plus-Fixed-Fee Contracts Funded With Military Construction/Base Realignment and Closure Appropriations (Aug. 4, 1994). Although base realignment and closure related appropriations have been funded in the Military Construction Appropriations Act since 1990, the Department of Defense's implementation of the cost-plus-fixed-fee prohibition in DFARS 236.271 stated only that the prohibition applied to construction or Architect-Engineering service contracts. Relying on this DFARS provision, military departments awarded numerous cost-plus-fixed-fee contracts for base realignment and closure environmental restoration efforts from 1990-94 without Secretary of Defense approval, requiring the investigating and reporting of these contracts as Antideficiency Act violations. *Id.*

[59] Military Construction Appropriations Act, 1996, Pub. L. No. 104-32, § 101, 109 Stat. 283, 287-88 (1995).

[60] *See* Military Construction Appropriations Act, 1995, Pub. L. No. 103-307, 108 Stat. 1659, 1662-63 (1994).

[61] H.R. REP. No. 137, 104th Cong., 1st Sess. 35 (1995).

[62] Military Construction Appropriations Act, 1996, Pub. L. No. 104-32, 109 Stat. 283, 287 (1995) (providing, for example, that of the funds appropriated for the base realignment and closure part II account, *not more than* $325.8 million shall be available solely for environmental restoration); H.R. CONF. REP. No. 247, 104th Cong., 1st Sess. 17 (1995).

[63] H.R. REP. No. 137, 104th Cong. 1st Sess. 29 (1995).

[64] *Id.* at 35-42.

[65] H.R. CONF. REP. No. 247, 104th Cong. 1st Sess. 7, 8 (1995).

[66] *Id.* § 111, 109 Stat. at 288.

United States firm exceeds the low bid of a foreign firm by more than twenty percent.[67]

III. Contract Formation

A. Authority to Contract.

1. CHAMPUS Partnership Agreement is Not an Express or Implied-in-Fact Contract. In *Trauma Service Group, Ltd. v. United States*,[68] the United States Court of Federal Claims (COFC) dismissed a complaint, for failure to state a claim, based on a partnership agreement made pursuant to 10 U.S.C. § 1096.[69] Trauma Service Group (TSG) entered into a partnership agreement with Winn Army Community Hospital in 1990 to provide primary care and pediatric services to Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) beneficiaries. Trauma Service Group, Ltd. (TSG) sought to recover the salary of one of its employees, an X-ray technician, alleging that the government breached its contract by requiring the X-ray technician to work full time on non-CHAMPUS related inpatient services.

In granting the motion to dismiss, the COFC reasoned that the memorandum of agreement (MOA) that formed the basis for the partnership is a cooperative agreement[70] rather than a binding contract. Additionally, even if the MOA were considered to be a contract, it contained no remedy granting clauses for monetary relief. The only remedy provided by the MOA was termination of the agreement. Finding no express contract on which it could base its jurisdiction, the COFC examined whether recovery could be based on an implied-in-fact contract. In this regard, the COFC found that TSG could not prevail, noting that TSG could identify no individual with the requisite authority to fund the payment of its employee's salary. The COFC also addressed plaintiff's inability to recover on a *quantum meruit*[71] theory. Such claims for unjust enrichment are based on contracts implied-in-law over which the COFC has no jurisdiction.

Interestingly, six months later, in *Thermalon Industries, Ltd. v. United States*,[72] the COFC reached an entirely different conclusion concerning a National Science Foundation grant. The COFC denied a motion to dismiss, declaring that grants and agreements as described in the Federal Grants and Cooperative Agreements Act (FGCAA) may be enforceable contracts under the court's Tucker Act jurisdiction. The COFC determined that the answer to the question of enforceability "is not found in the Grant Act, but rather in the standards traditionally applied by this court requiring a mutual intent to contract, including an offer, acceptance, and consideration."[73] In other words, the COFC focused on the intent of the parties rather than the type of instrument used (procurement contract, agreement, or grant). Although the two cases are factually different, the results seem primarily dependent on the differing opinions of the COFC judges. In a footnote, the *Thermalon* opinion states its disagreement with the analysis in *Trauma Service Group*,[74] which suggests that an "agreement" under the FGCAA could never be an enforceable contract. For the moment, the issue remains unsettled.

2. Authority to Award Contract Included Authority to Administer Contracts—What's in a Name? The Department of Transportation Board of Contract Appeals (DOTBCA) held that the authority to administer contracts was included in the language of a contracting officer's warrant, which on its face granted her only the authority to "award" contracts.[75] The case arose from a termination for default issued by Mrs. Elizabeth Moore, formerly Ms. Elizabeth Dougherty, whose warrant had been reissued to reflect her new married name. The language of the original warrant granted her the authority to "award and administer" whereas the reissued warrant contained only the authority to "award." In upholding the termination, the DOTBCA considered the intent of the Federal Bureau of Prisons (FBOP) as evidenced by language common to its warrants.[76] The DOTBCA also considered the purpose of the new warrant, which was issued solely to affect the name change and not to limit the contracting officer's authority. Although not cited as a critical factor in the decision, the DOTBCA

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[67] *Id.* § 112, 109 Stat. at 288-89.

[68] 33 Fed. Cl. 426 (1995).

[69] This statute authorizes commanders of military medical treatment facilities to enter into agreements with civilian health care providers. Under these agreements, civilian health care providers treat patients in military facilities. This arrangement allows the government to avoid facility charges which would otherwise be billed to the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS).

[70] The court cited the Federal Grant and Cooperative Agreement Act (FGCAA), 31 U.S.C. §§ 6301-08 (1988). In support of its ruling, the opinion contains a discussion of the differences under the FGCAA between procurement contracts, cooperative agreements, and grant agreements. The court concludes that partnership agreements were not intended to be binding contracts. As such, they are not subject to the same laws and regulations which govern procurement contracts. 33 Fed. Cl. at 429-30.

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

[72] No. 94-1078C, 1995 U.S. Claims LEXIS 211 (Fed. Cl. Nov. 6, 1995).

[73] *Id.* at *21.

[74] *Id.* at *18.

[75] Cogefar-Impresit U.S.A., Inc., DOTBCA No. 2721, 95-2 BCA ¶ 27,686.

[76] All FBOP warrants issued since 1990 use only the term "award."

noted that the FBOP's regulations do not split the duties of award and administration functions.

3. Common Commercial Practice and Common Sense: There is no Such Thing as a Free Auxiliary Interface. The United States Geological Survey (GS) awarded a contract to Paroscientific, Inc. for an indefinite quantity of nonsubmersible hydrostatic pressure sensor units.[77] These devices are used to measure water depth and to transmit data to a remote recording device. In the contract, GS agreed to purchase at least ten upgrade kits, which would provide the additional capability of transmitting data to a second recording device. Subsequently, GS and Paroscientific agreed to modify the sensor units to allow the auxiliary option to be activated without installation of an additional upgrade kit or the use of additional accessories. Paroscientific demanded additional payment on learning that GS had activated and used the upgrade feature on numerous sensor units. Paroscientific claimed an implied-in-fact agreement to render payment for each unit on which the upgrade capability had been used.

The Government argued that no implied-in-fact contract could exist because the terms of the contract were contained in a written agreement. The Board was not persuaded. Citing common commercial practices and common sense, the Board held that an implied-in-fact contract arose "derived fundamentally from the plain language of appellant's express contract with GS."[78] In reaching this conclusion, the Board considered that the option price was fixed by the contract, and that the change to the product was made as a convenience to the government. Hardware acquisition, according to the Board, does not grant the right to free software use.

4. Deputy Secretary of Defense Lacks Authority to Bind the Government to Fund an Environmental Remediation Project. In *Town of Floyd v. United States*,[79] the COFC dismissed a claim submitted by the town of Floyd, New York seeking reimbursement for costs associated with environmental remediation. Specifically, Floyd sought to recover the cost of extending water lines to provide safe drinking water to residents of an area near Griffiss Air Force Base. The controversy arose when drinking water wells in the town were found to have been contaminated by de-icing chemicals used at the base. Mr. Gary Vest, then the Air Force Deputy Assistant Secretary for Environment, Safety and Occupational Health, attended a meeting with Floyd officials to discuss a plan to extend water lines from the nearby city of Rome to the contaminated areas. Mr. Vest declared that the Air Force would pay its "fair share."[80] In response to a question about whether his offer included a particular section of town (referred to as Area B), he replied that he would not "quibble over a road or two."[81] The town then proceeded with the remediation project, which included bringing city water to Area B, although Air Force officials had earlier stated that the Air Force would not reimburse Floyd for that portion of the project. According to the Air Force, Area B had not been contaminated by the government.

The COFC found no mutual agreement sufficient to support an implied-in-fact contract.[82] Additionally, the court ruled that Mr. Vest lacked authority to bind the government.[83] The COFC did not consider Mr. Vest's understanding of his own authority to be conclusive. The COFC relied instead on the language of the statute, which created the Defense Restoration Program,[84] holding that Mr. Vest's authority could not exceed that of the Secretary of Defense, who could only commit to remediate those areas contaminated by the DOD.[85]

5. Seizing Defeat from the Jaws of Victory? A quick victory in Desert Storm left a Saudi Arabian holding company retaining twenty-two heavy commercial vehicles in various states of conversion to Army specifications.[86] The contractor, Arieb Development Co., entered into a sole-source contract with the

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[77] Paroscientific, Inc., IBCA No. 3230, 95-1 BCA ¶ 27,318.

[78] *Id.* at 136,194.

[79] No. 94-570C, 1995 U.S. Claims LEXIS 195 (Fed. Cl. Oct. 12, 1995).

[80] *Id.* at *5.

[81] *Id.*

[82] The court noted that Vest agreed only to pay the Air Force's "fair share," an amount which, at the time, was undetermined. *Id.* at *6-*7.

[83] *Cf.* Lockheed Shipbldg. & Constr. Co., ASBCA No. 18460, 75-1 BCA ¶ 11,246, *aff'd on recon.*, 75-2 BCA ¶ 11,566 (holding that the Deputy Secretary of Defense was not bound by Navy regulation which granted to other individuals the authority to approve claims settlements and holding that the government was estopped from repudiating settlement agreement approved by the Deputy Secretary of Defense).

[84] 10 U.S.C. § 2701 (1988).

[85] The court relied upon 10 U.S.C. § 2701(d), which states:

> The Secretary may enter into agreements on a reimbursable basis with any . . . State or local agency . . . to obtain the services of that agency to assist the Secretary in carrying out any of the Secretary's responsibilities under this section. Services which may be obtained under this subsection include the identification, investigation, and cleanup of any off-site contamination possibly resulting from the release of a hazardous substance or waste at a facility under the Secretary's jurisdiction.

[86] Arieb Dev. Co., ASBCA No. 44953, 95-2 BCA ¶ 27,857.

Army to supply heavy vehicles to the 82d Airborne Division for use as troop transport vehicles in the campaign against Iraq. The contract was partially terminated for convenience after the cease-fire, but not before Arieb had purchased and modified an additional number of vehicles.

As originally contemplated, the vehicle lease was to last for thirteen months. Funding concerns, however, caused the contracting officer to write a seven month lease with a six month option. Arieb sought to recover an amount equal to six months of additional rental payments. Arieb unsuccessfully argued that it had a separate verbal or implied-in-fact contract requiring exercise of the six month option. Arieb further alleged, also without success, that the government was estopped from denying compensation because it induced the contractor to obtain and modify additional trucks, knowing it had no obligation to pay the contractor.[87] The Board ruled, however, that an express contract precludes any implied-in-fact contract on the same subject. Estoppel, said the Board, cannot be successfully asserted against the government when the true facts are known to both parties, as they were in this case.

6. Dealing with Deputy Barney Fife[88] and Getting Stung? In *Garza v. United States*,[89] plaintiffs sued for breach of contract alleging an oral agreement made by agents of the United States Customs Service. Pursuant to conversations with two customs agents, the plaintiffs spent several years and over $1 million establishing a shipping operation that was intended to be used to contract with drug smugglers to import marijuana into the United States. As the operation was envisioned, the customs agents would assist plaintiffs in obtaining shipping agreements with drug dealers. The agents would arrest the drug dealers, and the government would allow plaintiffs to keep the substantial sums paid "up front" by the criminals for the shipping service. Plaintiffs had the potential to net approximately $3 million per 100 ton load shipped. No money was ever paid by the customs service to the plaintiffs.[90] When it became clear that the plan, dubbed "Operation Sealift," had been abandoned, the plaintiffs filed a complaint seeking $6 million in expectation damages and, in the alternative, the cost of their expenses and overhead.

The COFC found that the customs agents had, in fact, promised that the plaintiffs could retain any "up front money" from their criminal customers. The court determined, however, that enforcement of such a contract would interfere with prosecutorial discretion and would violate public policy. The court reasoned that plaintiffs could not have sued for the return of government seized drug money, so clearly they could not claim their unrealized profit from government funds.

As to the plaintiffs' implied-in-fact contract theory asserted as a basis for recovery of expenses, the court denied recovery on two grounds. The plaintiffs failed to prove the existence of any promise to pay,[91] and the customs officers who masterminded "Operation Sealift" lacked authority to contract.[92]

B. Competition.

1. Commerce Business Daily. Since 1 October 1995, the Department of Commerce has been charging contracting offices $18 for each notice published in the *Commerce Business Daily.* The Department of Commerce cautions subscribers that failure to make payment will result in halting publication of notices.[93]

2. Restrictive or Ambiguous Specifications.

a. Environmental Specifications More Strict than Industry Standards Upheld. Specifications requiring a contractor to do more than what is customary in the industry to protect the environment are not unreasonable and do not overstate the agency's minimum needs.[94]

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[87] The contractor also failed to recover based on an alleged unilateral mistake. Although he claimed to have priced the rental on the assumption that the option would be exercised, the board was convinced that he was aware of the risks.

[88] It has only been in recent years that courts have begun to recognize this legendary law enforcement officer from Mayberry. *See* Smith v. Farley, 873 F. Supp. 1199 (N.D. Ind. 1994); United States v. Shields, 783 F. Supp. 1058 (N.D. Ill. 1991); Hebert v. Angelle, 600 So. 2d 832 (La. App. 1992).

[89] 34 Fed. Cl. 1 (1995).

[90] Apparently, the only individual who received any money from the Customs Service during the operation was a Mr. Davila who, subsequent to his arrest and conviction for a drug offense, was lodged at government expense in a country club in Miami while Customs agents enlisted his aid in setting up a shipment of marijuana from Colombia. Unfortunately for plaintiffs, the shipment was only 25,000 pounds of marijuana—much too small for their vessel, the El Frio, which could accommodate a 1000-ton cargo. *Id.* at *15.

[91] The customs officers each submitted to a polygraph examination regarding any promises made to the plaintiffs. One agent's test result indicated no deception. The other's result was inconclusive; the agent had been operating a boat for twenty-four hours preceding the test. *Id.* at *27.

[92] Plaintiffs were advised by a Drug Enforcement Agency employee that the Customs Service lacked authority to conduct such an operation. They apparently attributed this remark to interagency rivalry and refused to further discuss the matter. *Id.* at *15.

[93] FAC 90-32, 60 Fed. Reg. 48206 (1995) (effective Oct. 1, 1995).

[94] Continental Lumber Co., B-258330, Jan. 9, 1995, 95-1 CPD ¶ 12.

b. Waste Removal Specifications Found Ambiguous. The United States District Court for the Middle District of Alabama ruled that an invitation for bids for waste collection and removal was so ambiguous as to impede full and open competition.[95] After the United States General Accounting Office (GAO) denied its protest,[96] the disappointed bidder obtained injunctive relief from the Alabama District Court. The solicitation required bidders to comply with all applicable federal, state, and local environmental laws and regulations. Every bidder, except the awardee, interpreted the invitation for bid as requiring use of a local landfill as mandated by a local ordinance that required collectors of nonresidential waste to use the Escambia County, Florida disposal facility. The Navy argued that the solicitation did not contain an express requirement that the unit price be based on any specific landfill. It claimed that the solicitation's reference to Escambia County, where the landfill and Navy base were located, merely served as a benchmark to limit a price increase payable to the contractor. The court rejected the Navy's "benchmark" argument and suggested that the GAO adopted the Navy's theory merely to explain away its own confusion about the reference to Escambia County. The court found the local ordinance significant and held that the Resource Conservation and Recovery Act waived sovereign immunity.

c. Requiring Specific Subcontractor Found to be Overly Restrictive. A contractor is entitled to its increased cost of performance where an agency insists on strict compliance with specifications that, unknown to bidders, were written around the design features of a particular manufacturer and refuses to consider an equal product proposed by the contractor. In *S&D Construction Co.*,[97] the Department of Veteran's Affairs (VA) awarded a $320,000 contract to S&D Construction Co. for renovation of space for a research laboratory. Southern Laboratory submitted to S&D Construction Co. a low bid on a subcontract for laboratory casework. After awarding the contract, however, the VA informed S&D Construction Co. that Fisher Scientific was the only supplier VA would approve for the subcontract work. S&D Construction Co. informed the VA that the Southern Laboratory submittals were for products that were equal or superior to those required by the specification. The VA refused to accept Southern Laboratories, and S&D Construction Co. contracted with Fisher Scientific at a higher cost. The contracting officer refused to pay S&D Construction Co.'s claim for the additional cost.

The Veteran's Affairs Board of Contract Appeals (VABCA) ruled that, while the government is not precluded from writing specifications around design features of a particular manufacturer, the specification must set forth the essential characteristics of the product so that bidders may intelligently formulate their bids and select their suppliers. A contractor is entitled, as a matter of right, to substitute a product that is equal to the specification. The VABCA also rejected the government's argument that the contractor was barred from submitting a claim based upon restrictive specifications because it failed to raise the issue prior to bidding. The VABCA found no evidence that the contractor knew that the VA would accept only the product of one manufacturer. Where the government wrongfully rejects an acceptable alternative product, the rejection constitutes a change in the contract terms.

3. Electronic Commerce. A requirement that vendors submit responses to requests for quotations (RFQ) electronically is reasonable and consistent with the statutory requirement that competition for simplified acquisitions be promoted to the maximum extent practicable.

The challenged RFQs were issued by the Defense Industrial Supply Center (DISC) under automated procedures for purchases up to $25,000. Under this process, the RFQs are transmitted to an electronic bulletin board (EBB) and remain on the EBB for fifteen days. Firms desiring access to the EBB must first register with the agency. The GAO noted that many of the protested RFQs did not exceed $2500. A purchase not greater that $2500 may be made without obtaining competitive quotations if the contracting officer determines the price is reasonable.[98] The GAO stated that there was no basis to object to the requirement that the vendors submit their quotes electronically because there were no allegations that the quotations were unreasonable.

Requiring the use of electronic means for purchases in excess of $2500 did not violate the Competition in Contracting Act (CICA) according to the GAO. The GAO specifically found that the use of an EBB fulfills simplified acquisition requirements and increases contracting opportunities for prospective vendors and thereby increases competition. Through the use of EBB, the DISC was able to solicit all vendors who had access to the EBB, as opposed to the three vendors that ordinarily would be solicited under paper procedures. The use of an EBB did not preclude any potential vendor from submitting quotes.[99]

4. Subcontract Procurement. The GAO will no longer exercise jurisdiction over subcontract procurement on behalf of the government in the absence of a request by the federal agency involved. The GAO will also refuse to consider a sole-source subcontract award as a basis for exercising jurisdiction. The GAO will take jurisdiction over such a protest only if the prime contractor, in deciding to make sole-source award to another firm,

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[95] Mark Dunning Indus. v. Perry, 890 F. Supp. 1504 (M.D. Ala. 1995).

[96] *See* Mark Dunning Indus., B-258373, Dec. 7, 1994, 94-2 CPD ¶ 226.

[97] VABCA No. 3885, 95-2 BCA ¶ 27,609.

[98] *See* GENERAL SERV. ADMIN. ET AL., FEDERAL ACQUISITION REG. 13.603 (Apr. 1, 1984) [hereinafter FAR].

[99] Arcy Mfg. Co., B-261538, Aug. 14, 1995, 1995 WL 479664.

does not exercise substantial responsibility for the procurement such that the prime contractor is merely serving as a conduit for the agency.[100]

5. Organizational Conflicts of Interest. The GAO stated that it is not the impact of an organizational conflict of interest but the existence of one that impairs competition. Once the organizational conflict is established, reasonable steps to avoid, neutralize, or mitigate the conflict are required. There is no need to prove the actual impact of the conflict on competition. Where the facts demonstrate that an organizational conflict of interest exists, the harm from that conflict, unless it is avoided or adequately mitigated, is presumed to occur.[101]

6. Refusing to Consider Costs Saved by Incumbent. In *Hughes Missile Systems Co.*,[102] the GAO denied Hughes' protest against the manner in which the Air Force conducted a follow-on contract to provide weapon systems engineering services. Hughes, the incumbent, contended that in evaluating the price proposals, the Air Force improperly refused to consider the additional costs the government would incur if it did not award the contract to Hughes. Because consideration of these costs benefitted only Hughes, the Air Force decided that it would instead foster competition. The GAO found that Hughes was not harmed by the decision because it was still allowed to compete, and the decision created a level field for competition.

C. Types of Contracts.

1. Contract Awarded Without Proper Approval is VOID! In a decision which could have far reaching ramifications, the COFC found that a contract awarded without obtaining approvals required by statute was *void ab initio*.[103] In 1987, the Navy awarded American Telephone and Telegraph Co. (AT&T) a fixed-price, incentive fee contract for the development and initial production of a component of a submarine detection system. The COFC found that the Navy had violated § 118 of the 1988 Department of Defense Appropriations Act.[104] This section prohibited the obligation or expenditure of any funds for fixed-price type contracts in excess of $10,000,000 for the development of major systems or subsystems unless the Undersecretary of Defense (Acquisition) first made certain written determinations.[105] The COFC rejected the Government's argument that the requirement was simply an internal housekeeping measure or that it had no affect on the validity of the contract. Importantly, the court rejected the government's argument that the statutory requirement affected only the funding of the contract. The court noted that § 8118 prohibited the obligation or expenditure of funds without the proper approvals and stated, "the authority to obligate funds is synonymous with the authority to contract. It follows, therefore, that absent compliance with the written determination requirement of § 8118, no authority to obligate funds came into being and thus no valid contract was created."[106] Rejecting AT&T's request for reformation of the contract,[107] the COFC held that it could not reform a contract which was void from its inception. The COFC did hold, however, that AT&T may be entitled to relief under a *quantum meruit*, or unjust enrichment theory, if it could show that the government had been unjustly enriched. At the request of both parties, the court later granted certification of its opinion for interlocutory appeal.[108] The United States Court of Appeals for the Federal Circuit (CAFC) granted permission for the appeal in a one page unpublished opinion.[109] If the CAFC agrees with the COFC that the contract was *void ab initio*, many other contracts awarded in technical violation of miscellaneous statutory restrictions may be in jeopardy.

2. Options Mean What They Say. In *Tecom, Inc.*,[110] the Interior Board of Contract Appeals (IBCA) considered a contract containing an option clause that required the government to exercise the option "within thirty (30) calendar days of expiration" of the contract. The government exercised the option one day after the contract expired. Noting that "this option exercise language

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[100] Compugen, Ltd., B-261769, Sept. 5, 1995, 95-2 CPD ¶ 103.

[101] Aetna Gov't Health Plans Inc., B-254397.15, July 27, 1995; Foundation Health Fed. Serv. Inc., B-254397.16, July 27, 1995, 95-2 CPD ¶ 129.

[102] B-259255.4, May 12, 1995, 95-1 CPD ¶ 283.

[103] American Tel. & Tel. Co. v. United States, 32 Fed. Cl. 672 (1995).

[104] Pub. L. No. 100-202, 101 Stat. 1329, 1384 (1987).

[105] The Undersecretary was required to find that the level of program risk permits "realistic pricing" and that "use of a fixed-price type contract permits an equitable and sensible allocation of program risk between the contracting parties." *Id. See* DFARS, *supra* note 20, 235.006 (stating the current regulatory implementation of this requirement).

[106] 32 Fed. Cl. at 681.

[107] AT&T had requested that the court reform the contract into a cost-plus-fixed-fee type contract to allow AT&T to recover approximately $60 million in losses it had incurred to date.

[108] American Tel. & Tel. Co. v. United States, 33 Fed. Cl. 540 (1995).

[109] American Tel. & Tel. Co. v. United States, Misc. No. 438, 1995 U.S. App. LEXIS 25,319 (Fed. Cir. Aug. 30, 1995).

[110] IBCA No. 2970a-1, 95-2 BCA ¶ 27,607.

is not precise," the IBCA found that "the only reasonable interpretation" of the option language was that the government had a thirty day window, ending on the contract's expiration date within which to exercise the option.[111] Because the government did not exercise the option within this window, the IBCA found the purported option exercise invalid and granted summary judgment for the contractor on entitlement. This decision shows the importance of precise drafting when dealing with option clauses.

3. Options Mean What They Say—Part II. In *Grumman Technical Services, Inc.*,[112] the Armed Services Board of Contract Appeals (ASBCA) invalidated the Navy's exercise of an option because it deleted a line item from the contract. The contract required Grumman to maintain TA-J4 naval aircraft at five naval air stations. The contract provided for a base year and four option years and required the Navy to exercise each option by written notice "prior to the expiration of the current period of performance." On 25 September 1991, the contracting officer issued a modification to the contract deleting one of the five sites from the contract effective 1 October 1991. Then, on 30 September 1991, the contracting officer issued and delivered to Grumman a modification exercising the option for Fiscal Year 1992 services. This modification showed the deletion of the fifth site and also had an effective date of 1 October 1991. In its appeal, Grumman argued that the purported option exercise was invalid because it changed the terms of the contract by deleting a line item. The ASBCA agreed, stating that the option was exercised on 30 September prior to the effective date of the modification deleting the fifth site from the contract. Because the Navy attempted to exercise the option with the deletion of the fifth site, a change to the contract's terms, the option was invalid. The ASBCA essentially found that the 1 October effective date for the option exercise was irrelevant—the date the government exercised the option controls. The ASBCA also implied that the option exercise would have been valid had the Navy first exercised the option for all five sites then deleted the fifth site through a partial termination for convenience.

4. Options Mean What They Say—Part III. In *Cessna Aircraft Co.*,[113] the ASBCA rejected the contractor's argument that an option clause, which stated that the Navy could exercise the option "not later than 1 October 1988," required exercise of the option not later than 30 September 1988. Cessna had argued that the option exercise on 1 October was invalid because both the contract performance period and the one year funds used to fund the contract expired on 30 September. The board stated that, through the option, the parties had contracted that Cessna would keep its offer open through 1 October. The ASBCA denied the appeal and held that expiration of the contract, or its funding, "had no bearing on the parties' contract with respect to the prescribed period within which the Navy" could exercise the option.

D. Sealed Bidding.

1. Responsiveness.

a. Ambiguous Bid is Not Constructive Acknowledgement of Amendment. The Army Corps of Engineers (Corps) invitation for bids (IFB) sought the painting of an emergency bulkhead hoist structure at Hildebrand Lock and Dam.[114] The original IFB estimated the structure's square footage at 1800 square feet. Amendment No. 1 corrected the figure to reflect 18,000 square feet. The protester acknowledged a subsequent amendment, which extended the bid opening date, but failed to specifically acknowledge Amendment No. 1. The protester's bid was submitted on the original bid schedule, which understated the size of the structure.[115] Its extended price, however, reflected the unit price multiplied by 18,000. Although it seemed readily apparent that the protestor received the amendment and calculated its bid accordingly, the GAO upheld the Corps's determination that the bid was nonresponsive. The GAO rejected the protester's contention that the error was a waivable minor informality and that its extended price served to constructively acknowledge the amendment. Instead, the GAO focused on the protester's failure to "clearly establish that the firm received the amendment and intended to be bound by it."[116]

b. Brand Name Product may Not Satisfy Brand Name or Equal Requirement in a Small Business Set-Aside. In *Innovative Refrigeration Concepts*,[117] the protester challenged the responsiveness of the awardee's bid on a small business set-aside contract. The Air Force IFB called for a bid on a chiller,[118] requiring a Trane brand chiller or equal. The Trane chiller listed in the IFB failed, however, to comply with the requirement that any furnished end item be manufactured by a domestic small business.[119] The apparent low bidder offered an equal chiller manufactured

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[111] 95-2 BCA ¶ 27,607, at 137,595.

[112] ASBCA No. 46040, 1995 ASBCA LEXIS 239 (Sept. 5, 1995).

[113] ASBCA No. 43196, 1995 ASBCA LEXIS 270 (Sept. 21, 1995).

[114] Avalotis Painting Co., B-261481, Aug. 24, 1995, 95-2 CPD ¶ 84.

[115] An amended bid schedule was included with Amendment No. 1. *Id.* at 1.

[116] *Id.* at 3.

[117] B-258655, Feb. 10, 1995, 95-1 CPD ¶ 61.

[118] A chiller is "a device for cooling or refrigerating." THE RANDOM HOUSE COLLEGE DICTIONARY (rev. ed. 1982).

[119] *See* FAR, *supra* note 98, 52.219-6 (Notice of Small Business Set-aside).

by a large business. The protester, on the other hand, offered a chiller manufactured by a small business. The protester asserted that the apparent low bid was nonresponsive.

The Air Force sought to have the protest dismissed as untimely. It argued that the issue was one of an ambiguous specification that called for a large business manufactured brand name product but simultaneously required the product of a small business. As such, the Air Force maintained that the protest should have been raised prior to bid opening.[120] The GAO disagreed and found that the specification was susceptible to only one reasonable interpretation. By reading the IFB as a whole and giving effect to all provisions, the GAO determined that only an offer of an equal product manufactured by a small business would be responsive.

c. Agency's Loss of Section K Works to Bidder's Detriment. World-Wide Movers, Inc. protested the rejection by the Air Force of its bid for personal property moving services as nonresponsive.[121] Five timely bids, including that of the protester, were opened by the contract specialist and recorded by the contracting officer. World-Wide was the low bidder for three of the twelve awards but, when bids were evaluated on the following day, sections G through K—including the Certificate of Procurement Integrity—were missing from World-Wide's bid. The GAO rejected all attempts by the protester to prove that the missing documents were included in its bid packet at the time of submission. Allowing submission of duplicates after bid opening would harm the integrity of the procurement process because it would give an "otherwise successful bidder the opportunity to walk away from its bid."[122] The GAO was equally unimpressed with the protester's allegations that the agency failed to adequately safeguard the bid. The GAO indicated that the agency's negligent loss of the bid, standing alone, would not support a successful protest.

2. Mistakes in Bid.

a. Garbage in, Bid out. The Air Force issued an IFB for road work at Andrews Air Force Base, Maryland.[123] The low bid, submitted by Lobo Construction Co., contained a discrepancy between unit prices and extended prices on a line item which was subject to a statutory limit of $300,000. Assuming a correct unit price, Lobo's bid exceeded the statutory limit. Lobo alleged a mistake in bid and sought correction. As evidence, Lobo submitted its workpapers and explained that it had calculated its unit prices from its extended price, which was chosen specifically to avoid exceeding the price limit. Lobo demonstrated how the error in unit price was caused by a calculator that had been mistakenly set to calculate to the nearest dollar rather than to the nearest cent, which produced a mistakenly high unit price. The protester argued that the discrepancy should have been resolved by reference to the unit price and urged that Lobo's bid be rejected as nonresponsive. The GAO denied the protest and agreed that a bid price in excess of a statutory cost limitation should normally be rejected, but nevertheless, the GAO permitted the correction of what it considered to be a legitimate mistake proven by clear and convincing evidence.

b. Backdated Documents Can Be Considered for Correction of Mistake. The Navy issued an IFB for installation of covered bus stops.[124] On request for verification of its low bid, Fiorini Bros. alleged a mistake in the bid and sought permission for an upward correction. As evidence of the alleged mistake, Fiorini Bros. explained that it had made an erroneous entry in response to an amendment reducing the number of shelters required from five to four. In calculating its costs, Fiorini Bros. had mistakenly used the cost of steel for only one shelter. Fiorini Bros. produced its work papers and a written quote from its steel supplier. The protester cried foul, stating its belief, based on discussions with Fiorini Bros.'s steel supplier, that no quotes had been given until after bid opening. In response to this allegation, Fiorini Bros. admitted to submission of a backdated quote, but included sworn statements asserting that the backdated quote memorialized an oral quote which had been communicated prior to bid submission. The GAO refused to disturb the Navy's decision to allow correction, but limited its finding by stating that "a contracting officer may consider Fiorini's actions in submitting a backdated document to the government as part of a responsibility determination in any future procurement in which Fiorini participates."[125]

c. You Say Worksheet, I say Spreadsheet. In *Severino Trucking Co.*,[126] the low bidder, NACC, sought upward correction of its bid on a Federal Aviation Administration (FAA) construction contract. The correction, which was allowed by the FAA, brought the bid from over $1 million low to within $300,000 of the next low bidder, Severino Trucking Co. Evidence offered by NACC in support of its mistake included spreadsheets used in calculating its bid, but no worksheets. The FAA found that NACC proved its mistake and its intended bid by clear and convincing evidence and allowed upward correction of the bid. The protester

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[120] *See* 4 C.F.R. § 21.2(a)(1) (1995).

[121] World-Wide Movers, Inc., B-261941, Oct. 26, 1995, 1995 U.S. Comp. Gen. LEXIS 684.

[122] *Id.* at *6 (citation omitted).

[123] The Driggs Corp., B-258795, Feb. 13, 1995, 95-1 CPD ¶ 66.

[124] CGM Global, Inc., B-258996, Feb. 28, 1995, 95-1 CPD ¶ 117.

[125] *Id.* at 5. It is interesting to note that the incident was reported to the United States Navy Criminal Investigative Service, which declined to pursue an investigation. The Department of Defense Inspector General had also been informed, but had taken no action pending the General Accounting Office's decision. *Id.*

[126] B-259080.2, Mar. 23, 1995, 95-1 CPD ¶ 160.

argued that the spreadsheets could not substitute for the worksheets requested by the contracting officer. The GAO denied the protest by holding that the FAR's requirement for worksheets[127] was illustrative only and that the agency was free to consider computer generated spreadsheets.

3. Responsibility Determinations.

a. Definitive Responsibility Criterion Met by Submission of Prospective Employee's Credentials. In *Tucson Mobilephone, Inc.*,[128] the Air Force issued an IFB for land mobile radio maintenance services. Included in the solicitation was a definitive responsibility criterion, which required a level of technical capability for certain contractor employees. The incumbent contractor's lead technician attended the bid opening on behalf of the incumbent. Several days later, he contacted the apparent low bidder, ENC, to discuss potential employment should ENC win the award. He instructed ENC, however, not to use his résumé to get the contract. In its bid, ENC proposed to employ this individual should it win the award. The agency, however, declined to find ENC responsible until it could examine the lead technician's credentials. The ENC contacted the technician and told him that he needed to deliver his credentials to the contracting office if he wanted the job. He did so under the apparent mistaken belief that award had already been made.[129] On learning that his résumé had been considered in making the responsibility determination, the technician decided that he did not want the job and attempted to retrieve his credentials. A protester argued that the unauthorized use of these credentials rendered the ENC bid nonresponsible. The GAO upheld the agency's determination that ENC was responsible, finding no intentional misrepresentation by ENC, which would reasonably have interpreted the technician's hand carried submission of his credentials to the contracting office as permission to use them.

b. Unrealistic Worst Case Scenario Cannot Support Finding that Bidder Lacked Responsibility. In *MPE Business Forms, Inc.*,[130] the GAO sustained the protest of the apparent low bidder whose bid was rejected based on a nonresponsibility determination. The IFB was issued by the United States Government Printing Office (GPO) for a requirements contract to supply varying quantities of a variety of business forms. The bid by MPE was more than $90,000 lower than that of the awardee. The GPO determined, however, that MPE lacked the production capability to supply the forms. The GAO sustained MPE's protest and found that the method used for the responsibility determination unrealistically assumed that the agency would order the most complicated forms at the highest possible frequency. Under this scenario, the agency's calculation of its needs unreasonably exceeded even its own annual estimates as set out in the IFB.

4. Late Bids.

a. Bidder Cannot Rely on Telephonic Assurance That Bid Arrived. In *Selrico Services, Inc.*,[131] the GAO denied a protest against the Air Force's rejection of a late bid. Selrico argued that its bid should be accepted because it was erroneously assured by an Air Force employee that its bid had been received. Selrico dispatched its bid by commercial carrier on a Saturday for bid opening scheduled for the following Monday. Six hours prior to bid opening, Selrico telephoned the agency to confirm that its bid had arrived. A contract administrator checked the bid box and found a bid from another bidder from the same city as Selrico. The contract administrator mistakenly told Selrico that its bid had arrived. Selrico's bid actually arrived approximately an hour and a half late. In its protest, Selrico claimed that it would have submitted a duplicate had it known that its bid was missing. Two reasons were cited by the GAO for denying the protest. First, the government is not bound by the oral advice of government personnel. Second, the erroneous information was not the paramount or sole cause of the late bid because the commercial carrier failed to deliver the bid in a timely fashion.

b. Bidder Should Be Able to Rely on Use of Preprinted Bid Envelope Supplied by Agency. Department of Agriculture—Advance Decision[132] involved a bid mailed in an agency furnished addressed envelope. After bid opening, the Forest Service realized that the envelopes it had furnished had the wrong address. This resulted in late receipt of the low bid. The GAO recognized that the bidder might have noticed the discrepancy in the two addresses and made an inquiry. However, in sustaining the protest, the GAO thought it reasonable for bidders to use agency furnished preprinted envelopes without further examination.

c. Conflict in Bid Opening Times Prompts Duty to Inquire. Delta Construction Co. was a disappointed bidder on the Department of Agriculture's Soil Conservation Service contract for the Big Sandy Creek riprap[133] emergency watershed protec-

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[127] FAR, *supra* note 98, 14.406-3(g)(2).

[128] B-258408.3, June 5, 1995, 95-1 CPD ¶ 267.

[129] The lead technician was apparently uncomfortable with the dilemma created by his loyalty to his employer and his desire to work for ENC should the incumbent lose the contract. He stated on numerous occasions that his résumé was not to be used to gain the award. He discussed his predicament with the contract administrator. When he expressed concern about the ethics of ENC's use of his résumé, he was assured that it was normal procedure. *Id.* at 4.

[130] B-259432, Mar. 31, 1995, 95-1 CPD ¶ 172.

[131] B-259709.2, May 1, 1995, 95-1 CPD ¶ 224.

[132] B-259262, Dec. 7, 1994, 1994 U.S. Comp. Gen. LEXIS 928.

[133] Riprap is "a quantity of broken stone for foundations, revetments of embankments, etc." THE RANDOM HOUSE COLLEGE DICTIONARY (rev. ed. 1982). Riprap should not be confused with a musical style popular among teenagers.

tion project.[134] The IFB contained two different times for bid opening. One document indicated that bids would be opened at 1:00 p.m.; another stated 1:45 p.m. Delta Construction Co. hand delivered its bid before 1:45 p.m. but subsequent to bid opening. Consequently, Delta Construction Co.'s bid was rejected. The GAO denied Delta Construction Co.'s protest finding that Delta had failed to explain why it had ignored the earlier time or had failed to inquire on noticing the discrepancy.

5. Cancellation of the Invitation for Bid.

a. Agency May Cancel IFB Where Full and Open Competition Was Not Achieved. In *Kertzman Contracting, Inc.*,[135] the GAO upheld the cancellation of an IFB after discovery by the Corps of Engineers (Corps) that the apparent low bidder, Centigrade, Inc., had not been provided with all of the amendments and, consequently, submitted a nonresponsive bid. Centigrade was not on the original bidder's mailing list. Its request for a solicitation packet arrived at the agency on a day when two amendments were issued. The amendments extended the bid opening date and changed the minimum acceptance period from thirty to sixty days. Due to confusion at the Corps, Centigrade never received the amendments. In response to a protest by Centigrade, the Corps cancelled the IFB. The cancellation spurred a protest by the second low bidder, Kertzman. Kertzman argued that Centigrade's protest lacked merit because Centigrade contributed to its failure to receive the amendments by its late request for the packet and its failure to make appropriate inquiries when it learned through a trade journal of the extended bid opening date. The GAO ruled that the agency's interest in obtaining full and open competition was sufficient reason to cancel, regardless of the relative merits of Centigrade's protest.

b. Reinstatement of Cancellation Proper After Bid Determined to Be Responsive. Three bids were received by the Corps of Engineers (Corps) for rehabilitation of family housing units in the Virgin Islands.[136] The Corps originally determined all three bids to be nonresponsive. The apparent low bid from General Engineering Corporation (GEC) was rejected for failure to acknowledge an amendment changing the applicable labor rates. The Corps cancelled the IFB but, after a protest from GEC, changed its position regarding the materiality of the amendment. The Corps determined that the amendment was immaterial because the wage rate increase for laborers required the same hourly wage rate already imposed by the Virgin Island's minimum wage law. The Corps then reinstated the IFB and awarded the contract to GEC. The GAO rejected the protester's assertion that cancellation was irrevocable. The GAO held that reinstatement is proper when "justification for the cancellation no longer exists, when the needs of the agency would be met by an award under the original solicitation, and when no bidders are prejudiced."[137]

E. Negotiated Acquisitions.

1. Past Performance.

a. Office of Federal Procurement Policy Issues Past Performance Guide. The Office of Federal Procurement Policy (OFPP) has issued a "best practices" guide for the use of past performance as an evaluation factor.[138] The guide contains lessons learned from several OFPP pilot programs. It also contains useful information on incorporating past performance in evaluation criteria, instructions to offerors, and bases for award as well as suggestions on methodology for collection of past performance information.

b. Federal Acquisition Regulation Provisions on Use of Past Performance As an Evaluation Factor Issued. Federal Acquisition Circular 90-26 (FAC 90-26)[139] added provisions to the *FAR* requiring the evaluation of past performance in negotiated acquisitions. The new provisions set forth a phased-in schedule for use of past performance as an evaluation factor based on the dollar value of the acquisition.[140] Additionally, agencies must establish past performance information systems for the collection, storage, and dissemination of past performance information. On 17 November 1995, the DOD issued a proposed rule to implement the new *FAR* requirements.[141]

c. Have a Plan and Follow It. The General Services Administration Board of Contract Appeal's (GSBCA) decision in *Computer Data Systems, Inc. v. Department of Energy*[142] shows the importance of preparing and following an evaluation plan. The Department of Energy (DOE) issued a solicitation for information resource management support services with an estimated

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[134] Delta Constr. Co., B-258518, Dec. 12, 1994, 94-2 CPD ¶ 235.

[135] B-259461.2, May 3, 1995, 95-1 CPD ¶ 226.

[136] Bilt-Rite Contractors, Inc., B-259106.2, Apr. 25, 1995, 95-1 CPD ¶ 220.

[137] *Id.* at 5 (citations omitted).

[138] OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET, A GUIDE TO BEST PRACTICES FOR PAST PERFORMANCE (interim ed. 1995).

[139] 60 Fed. Reg. 16,718 (1995) (effective May 30, 1995, amending various provisions in *FAR*, *supra* note 98, pts. 9, 15, and 42).

[140] Past performance must be included as an evaluation factor in all competitively negotiated acquisitions with an estimated value in excess of: (1) $1 million issued on or after July 1, 1995; (2) $500,000 issued on or after July 1, 1997; and (3) $100,000 issued on or after Jan. 1, 1999.

[141] 60 Fed. Reg. 57,691 (1995) (comments on the proposed rule are due 16 January 1996).

[142] GSBCA No. 12824-P, 95-2 BCA ¶ 27,604.

value of over $200 million. The solicitation required offerors to include in their technical proposals references for three to five contracts of similar size and scope. Computer Data Systems's (CDS) protest alleged, *inter alia*, that the DOE had unfairly evaluated its references resulting in an adverse score for this factor. The GSBCA agreed. The members of the Source Evaluation Board (SEB) split into pairs to check references with the exception of the member who checked CDS's references—his partner was temporarily busy with other matters. More importantly, each group checking references had a different concept of the meaning of "similar size and scope." The group decided to contact the contracting officer's representative (COR) for each reference because that person would have the most technical information regarding the offeror's performance. Each group contacted the COR with the exception of the member evaluating CDS, who contacted the contracting officer because he could not reach the COR. Finally, each group used a prepared reference contact sheet—again with the exception of the member evaluating CDS--who stated that the contact sheet became too confusing, but, unfortunately, the member included the sheet in his summary to the SEB without correction. The GSBCA held that the cumulative effect of these actions resulted in an unfair evaluation of CDS's proposal and sustained the protest.

d. Agency Properly Limited Consideration of Subcontractor Experience in Competitive 8(a) Acquisition. In *Innovative Technology Systems, Inc.*,[143] the GAO held that an agency can limit its consideration of an offeror's subcontractor experience in a competitive 8(a) set-aside procurement. The GAO first noted its general rule that subcontractor experience may be considered when evaluating the experience or past performance of an offer. In this case, however, the solicitation included a standard *FAR* clause[144] that required the successful offeror to expend at least 50% of the labor costs under the contract for its own employees. Under these circumstances, it was appropriate for the agency to limit its consideration of subcontractor experience to 50% of the solicitation's experience evaluation factor.

e. Experience of key Personnel Can Satisfy Solicitation's Corporate Experience Requirement. Although it is a decision involving an invitation for bids (IFB), *Tucson Mobilephone, Inc.*[145] provides valuable insight into the GAO's views regarding the evaluation of prior experience. The protest concerned a solicitation provision requiring the awardee to have five years of general experience and three years of specialized experience. The protester argued that the awardee did not meet this requirement because it had been incorporated for less than five years. The GAO, noting that several of the awardee's key personnel met the experience requirements, held that, in these types of cases, "an agency may consider the experience of the [contractor's] employees, even if the experience was gained while these employees worked for other employers."[146]

f. More Good Grades than Bad Does Not Necessarily Help—Nor Does Correcting the Problems. In *Federal Environmental Services, Inc.*,[147] the GAO considered a protest concerning two solicitations for hazardous waste disposal in which past performance and price were the only evaluation factors. In both cases, the agency awarded contracts to higher priced offerors[148] because of the protester's poor past performance rating. The protester argued, *inter alia*, that the agency had considered only its negative past performance information, claiming that it had much more positive information and that it had corrected the problems that led to the negative evaluations. The GAO denied the protest stating, "[s]ignificant problems can reasonably lead to an overall negative evaluation, even if, in absolute terms, there are far more positive than negative reports."[149] As for the protester's argument that it had corrected its problems, the GAO simply noted: "[protester's] solving the problems after they arose did not preclude the agency from being concerned that the problems arose in the first place."[150]

2. Source Selection Decisions—Who Decides What Constitutes "Best Value"?—Part II. Last year, we characterized the issue of how much deference the GSBCA gives, or should give, to an agency's source selection decision as "contentious."[151] This year, the issue continued to make news with GAO also joining the fray. First, the GSBCA.

In *AT&T Corp. v. Department of the Air Force*,[152] the GSBCA considered a protest concerning an Air Force procurement to re-

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[143] B-260074, May 24, 1995, 95-1 CPD ¶ 258.

[144] FAR, *supra* note 98, 52.219-14 (Limitation on Subcontracting).

[145] B-258408.3, June 5, 1995, 95-1 CPD ¶ 267. For a discussion of this decision in the context of a responsibility determination, *see supra* text § III.D.3.a.

[146] *Id.*

[147] B-260289, May 24, 1995, 95-1 CPD ¶ 261.

[148] The agency paid a price premium of nearly 30% for one contract and nearly 20% for the other.

[149] *Id.* at 6.

[150] *Id.* n.3.

[151] *See 1994 Contract Law Developments—The Year in Review*, ARMY LAW., Feb. 1995, at 32 (discussing B3H Corp. v Dep't of the Air Force, GSBCA No. 12813-P, 94-3 BCA ¶ 27,068).

[152] GSBCA No. 13107-P, 95-1 BCA ¶ 27,551.

place and enhance telecommunications systems at installations throughout the Department of Defense. The Air Force had to choose between two proposals that were "very closely matched," both in terms of technical quality and cost.[153] The Air Force made award to NORTEL, whose bid was evaluated lower in both cost[154] and technical quality. The board found that these ratings, on which the Source Selection Authority (SSA) relied, were "flawed in significant ways." The opinion specifically questioned the accuracy of the cost risks associated with contract performance and criticized the agency's assessment of performance risk and issues involving engineering and commercial availability. In light of these flaws, the GSBCA concluded that any source selection decision made in reliance on these evaluations could not be adequately justified.[155] Interestingly, the GSBCA majority did not assert that the Air Force made award to the wrong offeror, but only that, in its opinion, the SSA based his decision on flawed information—thereby bringing the propriety of the award into question. Consequently, the GSBCA directed the Air Force to scrub its evaluations and make a new award determination.

In *Unisys Corp. v. Department of the Air Force*,[156] the GSBCA focused on the agency's apparent failure to fully quantify the cost delta between proposals. This protest concerned a best value acquisition requiring the installation of local area networks. The Air Force made award to TRW, who submitted the higher priced and higher technically rated offer when compared to Unisys. In reaching this determination, the Source Selection Advisory Council (SSAC) had conducted a cost/technical trade-off (CTTO). Identifying over fifty discriminators that would have a *significant payoff possibility*, the SSAC's analysis concluded that Unisys's proposal was more advantageous than TRW's. The SSA, however, was particularly concerned about the risk associated with Unisys's past performance, a qualitative discriminator that was not quantified by the SSAC. In her source selection document, the SSA concluded that, in her judgment, these risks could "cost the government . . . tens of millions of dollars."[157] On review, however, the GSBCA concluded that the SSA's concerns about protester's past performance were not founded on "the required benefit analysis" and refused to affirm the agency's award determination.[158] Interestingly, the GSBCA suggests that award to TRW was not necessarily unreasonable. During the protest, the Air Force argued that, given the fact that price was the least important factor, award to TRW could never be unreasonable. In response, the board stated:

> The problem with this argument is that Unisys's proposal, with its . . . evaluated price advantage and "best value price" advantage of about . . . offset by somewhat higher performance risk, *would also be a reasonable choice.* The Air Force . . . has not provided a rational reason for selecting TRW over Unisys . . . . The SSA's cost/technical trade-off, which failed to reasonably establish that TRW's proposal was worth the additional cost, was deficient.[159]

The GSBCA directed the Air Force to conduct a new source selection analysis.

The GAO issued a decision which appeared to follow the same trend in *Redstone Technical Services*.[160] The protest involved two best value determinations by a contracting officer, acting as the source selection authority. In both cases, the contracting officer determined that award should be made to higher technically rated offerors at a substantial cost premium.[161] According to the GAO, the contracting officer made these award decisions based only on the better adjectival ratings given to the awardees.[162] In sustaining protests against both awards, the GAO began its analysis with a restatement of the standard of review applicable to these cases:

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[153] *Id.* at 137,300. The dissent asserted that:

> [E]ven the majority, in the absence of any perceived irregularities, would have to agree that the two offers were so close that a decision either way would be unattackable here because it would be within the bounds, whoever got the award, of the considerable discretion of the SSA.

Id. at 137,301.

[154] Specifically, NORTEL's Total Estimated Contract Price (TECP) was approximately $262.6 million. *Id.* at 137,289. In its discussion, the Board notes that AT&T's TECP was $14 million more that NORTEL's, or approximately $274.6 million. *Id.* at 137,295. If true, the total price delta between awardee and protester would appear to be less than 5% of the total estimated contract price.

[155] *Id.* at 137,298.

[156] GSBCA No. 13129-P, 95-2 BCA ¶ 27,622.

[157] *Id.* at 137,718.

[158] *Id.* at 137,721.

[159] *Id.* (emphasis added).

[160] B-259222, Mar. 17, 1995, 95-1 CPD ¶ 181.

[161] *Id.* For one award, the price differential was approximately 24% or more than $7 million. For the second award, the price differential was approximately 16% or nearly $4 million.

[162] *Id.*

"In negotiated procurements, where an agency chooses between a higher-cost, higher-rated proposal and a lower-cost, lower-rated proposal, our review is limited to a determination of whether the cost/technical tradeoff is reasonable and consistent with the solicitation's evaluation criteria."[163] The GAO then went on to clarify its application of this standard to the facts of the protest: "While adjectival ratings, like point scores, are useful as guides to decision-making, they generally are not controlling because they often reflect the disparate subjective judgment of the evaluators."[164] The GAO sustained the protest finding that the contracting officer had simply relied on the adjectival ratings rather than documenting why the higher priced offerors represented a better value to the government.[165]

A subsequent decision, however, appears to limit the *Redstone* holding to the proposition that the agency's best value determination must be supported by more than the simple adjectival ratings of the offerors' proposals. *In Hawk Services, Inc.*,[166] the protester challenged the award to a higher technically-rated offeror at a cost premium of 15% (over $7 million). Although the source selection memorandum apparently did not contain an attempt to quantify the benefits of the higher rated and higher cost proposal, the GAO noted that the "contracting officer was concerned that [the protester's] understaffed approach, poor quality control plan, and unsupported low price presented significant risks of poor contract performance that outweighed [its] . . . price advantage.[167] The GAO distinguished *Hawk* from *Redstone* by noting that in *Redstone* the contracting officer "merely relied upon adjectival evaluation ratings without considering whether the relative differences, weaknesses, and risks presented in the offeror's proposals represented any meaningful qualitative differences that warranted the payment of a substantial cost premium." According to the GAO, in *Hawk*, "the Army's contracting officer did consider the evaluation findings underlying the adjectival ratings for [the awardee's and protester's] BAFOs, and determined [the awardee's] technically superior, low risk proposal was worth the associated price premium, when compared to [the protester's] much riskier proposal."[168]

3. More Best Value Cases.

a. Risk to Life and Property Lessens Agency's Burden? In *Titan Corp. v. Department of Commerce*,[169] the GSBCA considered the award of a contract for a new radio system to warn of weather emergencies. The agency awarded the contract to a higher priced, higher technically rated offeror at a price premium of $3.3 million, 30% more than the protester's proposed cost. Although the decision makes no mention of any attempt by the source selection official (SSO) to quantify how the awardee's proposal was worth the extra cost, the board denied the protest. The board stated: "[t]he SSO concluded that despite the higher cost, [the awardee's] less risky, more thoroughly developed, technically better proposal would result in an earlier deployment, which, in turn, might well save lives and property that might otherwise be lost. We cannot say that the protester has shown his judgment to be wrong."[170]

b. Participation in Blue Ribbon Contractor Program Not Worth 1% Price Differential. In *Hi-Shear Technology Corp.*,[171] the GAO determined that the contracting officer had not erred in awarding a contract to a slightly lower priced offeror in spite of the solicitation's expressed preference for award to a participant in the Air Force Materiel Command's Blue Ribbon Contractor (BRC) Program.[172] The GAO held that the preference applied only when it was in the government's best interest. In this case, because the contracting officer determined that both firms could equally meet the solicitation's quality and delivery requirements, the government had no need to pay a price premium to make an award to a BRC Program contractor.

4. Conducting Discussions.

a. The CAFC Affirms Board Holding That Improper Disclosure of Prices Did Not Lead to Improper Auction. LaBarge Products, Inc. v. West[173] involved a solicitation for pipe couplings. LaBarge submitted the low offer and was selected for award of the contract. Sometime during the evaluation period, a government employee informed the next low offeror, Victaulic, that

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[163] *Id.* at 8 (citations omitted).

[164] *Id.* at 9 (citations omitted).

[165] It should be noted that the decision refers to portions of the contracting officer's source selection memorandum which appear to provide some rationale for paying a cost premium. Apparently, however, there was not enough evidence in the record to convince the GAO that the contracting officer had done more than rely on the adjectival ratings.

[166] B-257299.4, Aug. 31, 1995, 1995 U.S. Comp. Gen. LEXIS 564.

[167] *Id.* *10.

[168] *Id.* at *12.

[169] GSBCA No. 13103-P, 95-2 BCA ¶ 27,779. *See* discussion *infra* text § V.M.2.d. addressing the board's consideration of the validity of the agency's delegation of procurement authority (DPA).

[170] *Id.* at 138,539.

[171] B-261206, Aug. 31, 1995, 95-2 CPD ¶ 97.

[172] This program, which applies to spare parts acquisitions, recognizes a contractor's past quality and delivery performance. *Id.*

[173] 46 F.3d 1547 (Fed. Cir. 1995).

LaBarge had submitted the low priced offer. Prior to award, the contracting officer became concerned that the couplings might not be compatible with the pipe that the agency was procuring. Because of this concern, the contracting officer decided to amend the coupling solicitation to allow the government to purchase production tooling and manufacturing drawings and to request second Best and Final Offers (BAFOs). The day after the request for new BAFOs, someone telephoned Victaulic and informed it of LaBarge's intended price. In spite of this, LaBarge's price remained low, and it was awarded the contract. After completion of the contract, LaBarge filed a claim seeking reformation of the contract on the grounds that, in light of the disclosure of its proposed prices, the second round of BAFOs constituted an illegal auction.[174] The CAFC stated that, even where there has been an improper disclosure of the low offered price, subsequent rounds of BAFOs will not constitute improper auctioning where "the government has a rational and reasonable basis for doing so unrelated to the" improper disclosure of prices.[175] In affirming the ASBCA's initial denial of LaBarge's appeal, the CAFC determined that the contracting officer's concerns regarding compatibility provided a rational and reasonable basis for the BAFOs.

b. Protester Must Show It Was Prejudiced by Improper Discussions. In *Diverco, Inc.*,[176] the GAO considered a protest that the Army had engaged in improper discussions with the contract awardee. Admitting to that fact,[177] the Army nevertheless argued that GAO should deny the protest because the protester could show no prejudice. The GAO agreed and found that the protester had the fifth highest price and was substantially higher priced than the awardee. According to the GAO, the protester had failed to show that, if the Army had reopened discussions, it would have lowered its prices enough to be in line for the award.

c. Failure to Evaluate Appendix to Proposal Results in Finding That Source Selection Was Improper. In *Communication Network Systems, Inc. v. Department of Commerce*,[178] the GSBCA sustained a protest based, in part, on the agency's failure to evaluate a 200 page appendix submitted by the protester. The protester submitted four copies of the appendix with its proposal rather than the eight required by the solicitation. For some reason, no copies of the appendix were given to the evaluators who scored the proposals. Naturally, the evaluators questioned the whereabouts of the missing appendix and downgraded the protester's proposal for lack of information. During discussions, the agency questioned the protester about the missing appendix. However, when the protester responded that it had been delivered, no effort was made to locate it, and the evaluators scored the BAFOs as if the protester had omitted the appendix. The GSBCA held that these actions invalidated the source selection process. Regarding the adequacy of discussions, the GSBCA stated that when the agency realized it did not have the appendix, it should have gone back to protester and obtained copies. According to the GSBCA, the missing appendix was an informational gap in the proposal which the protester could have easily corrected. The agency argued that it had conducted a post award review of the appendix, rescored the protester's proposal, and determined that protester still was not in line for the award. The board dismissed this argument, noting that comments from two of the evaluators showed that they still believed that protester had not timely submitted the appendix.[179]

4. The DOD Issues Proposed Rule on Competitive Range Determinations. The DOD has issued for comment a proposed amendment to the *FAR* that would limit the scope of competitive range determinations.[180] *Federal Acquisition Regulation 15.609* currently includes a statement that contracting officers should include proposals in the competitive range if there is doubt as to whether the proposal is in the competitive range. The proposed rule would delete this statement.

F. Simplified Acquisitions.

1. The FAR Amended to Implement Federal Acquisition Streamlining Act[181] *Simplified Acquisition Rules.* On 3 July 1995, the interim rules[182] amending *FAR Part 13* to conform to the Federal Acquisition Streamlining Act (FASA) were published. Under the interim rules, contracting offices can use simplified acquisition procedures for acquisitions up to $50,000. Once a contracting office obtains certification that it possesses the ability to process acquisitions using the Federal Acquisition Computer Network (FACNET), the contracting office may use simplified acquisition procedures for acquisitions up to $100,000. The in-

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[174] For a discussion of the unique jurisdictional issues the court considered in this case, *see* text *infra* § IV.H.5.

[175] 46 F.3d at 1555.

[176] B-259734, Apr. 21, 1995, 95-1 CPD ¶ 209.

[177] The Army requested, and received, a first article delivery schedule from the awardee without reopening discussions.

[178] GSBCA No. 12705-P, 95-1 BCA ¶27,556.

[179] In its order of relief, the board directed the agency to replace these two evaluators when the agency reconvened the evaluation board.

[180] 60 Fed. Reg. 56,035 (1995).

[181] Pub. L. No. 103-355, 108 Stat. 3243 (1994) [hereinafter FASA].

[182] 60 Fed. Reg. 34,741 (1995).

terim rules also made other miscellaneous *FAR* changes mandated by FASA, including exempting all simplified acquisitions for construction from the bonding requirements of the Miller Act.[183]

2. The DFARS Amended to Provide Miller Act Alternatives. Although the FASA exempted simplified acquisitions from Miller Act coverage, the FASA also required contracting officers to specify acceptable alternative financial guarantees in lieu of Miller Act bonds.[184] In response to that guidance, the DAR Council published an interim *DFARS* change describing acceptable alternative financial guarantees that contracting officers may require.[185] These guarantees include irrevocable letters of credit, certificates of deposit, and tripartite escrow agreements.

3. New Cases.

a. No Bull—Failure to Properly Publicize Simplified Acquisition Could Be Fatal. In *Minotaur Engineering*,[186] the Department of Veterans Affairs (VA) issued a $15,600 purchase order to provide telephone service for the VA Medical Center in New Orleans, Louisiana. However, the agency neither contacted any other sources nor posted notice of the procurement in a public place.[187] The GAO held that the VA's omissions were harmful errors, sustained the protest, and awarded the protester bid protest costs. However, because the work was completed and the VA had taken corrective action to prevent future mistakes, the GAO did not require the VA to recompete the contract.

b. Blanket Purchase Agreements Are Not Contracts. The Corps of Engineers (Corps) established a blanket purchase agreement (BPA) with a moving company for moving services in the New Orleans, Louisiana area. Later, the Corps issued a formal solicitation that encompassed the scope of the earlier BPA. When the Corps stopped issuing orders under the BPA, the moving company claimed for breach of contract damages for its purchasing of uniforms and a truck. The board denied the claim, holding that the BPA clearly indicated that the government was obligated only for orders placed under the BPA.[188] Additionally, although the government sent a termination notice of the BPA, that action did not make the BPA a true contract, but merely provided notice that the contractor would receive no further orders.[189]

c. Simplified Acquisitions Must Be Reserved for Small Business. Walter Reed Army Medical Center issued a number of purchase orders to Hewlett Packard, Inc., a large business, for servicing and maintenance of laboratory equipment. The protester, the awardee under a prior contract for the maintenance services, alleged that the purchase orders should be issued to small businesses. The GAO agreed[190] and stated that Hewlett Packard should not have received the purchase orders because it was a large business.[191] However, because the maintenance work had already been performed, the GAO limited its relief to awarding the protester bid protest costs.

d. Late Is Not Necessarily Late in Simplified Acquisition Requests for Quotations. In *ATF Construction Co.*,[192] the Army issued a simplified acquisition RFQ for minor repair work at Fort Benning, Georgia. The RFQ had an original closing date of 10 March, but the Army decided to extend the closing date.[193] On 13 March, the Army received a quote from a vendor, and later that vendor submitted an amended quote with a price reduction. On 16 March, the Army issued a purchase order based on the amended quote, and on the following day, the protester filed a protest alleging, among other things, that the Army's acceptance of the quote after the original closing date was improper. The GAO held that because simplified acquisitions are exempt from the *full and open competition* requirements of the Competition in Contracting Act, agencies are generally free to seek and consider

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[183] 40 U.S.C. § 270a (1988).

[184] FASA, *supra* note 181, § 4104(b).

[185] 60 Fed. Reg. 45,376 (effective Aug. 31, 1995).

[186] B-258367, Jan. 11, 1995, 95-1 CPD ¶ 137. A "minotaur" is a mythological creature, half bull and half man. THE RANDOM HOUSE COLLEGE DICTIONARY (rev. ed. 1982).

[187] Although the *FAR* requires synopsizing simplified acquisitions in the *Commerce Business Daily* only if the acquisition is greater than $25,000 (unless FACNET is used), the *FAR* also requires the contracting officer to post a notice of the acquisition in a public place if the acquisition is less than $25,000, but greater than $5000 (Department of Defense), or less than $25,000, but greater than (civilian agency acquisitions). FAR, *supra* note 98, 5.101(a)(2).

[188] BSG Constr. Servs., Inc., ENG BCA No. 6127, 95-1 BCA ¶ 27,520.

[189] The board pointed out that the government could have merely stopped placing orders against the BPA, which could have caused the contractor more harm by making the contractor guess whether additional orders would come.

[190] Laboratory Sys. Servs., Inc., B-258519.2, Apr. 3, 1995, 95-1 CPD ¶ 175.

[191] The reader should note that several of the purchase orders involved were for less than $2500. Under the new *FAR* implementation of FASA, the small business reservation for simplified acquisitions of $2500 or less ("micropurchases") no longer exists. *See* FAR, *supra* note 98, 13.105(a).

[192] B-260829, July 18, 1995, 95-2 CPD ¶ 29.

[193] The Army extended the closing date because two quoters responded with "no quote" and the protester responded with a quote that was 79% above the government estimate. However, the opinion is silent concerning whether the Army's extension action was communicated to the quoters.

revisions to quotes at any time prior to award. Because the RFQ did not contain a late quotations provision, the stated closing date in the RFQ was not a firm closing deadline, and therefore, the Army could legally consider the late quote.

G. Bid Protests.

1. Executive Order on Use of Alternative Dispute Resolution Procedures Issued. As part of the ongoing effort to streamline the federal acquisition process, President Clinton issued an executive order directing all executive agencies to establish alternative dispute resolution (ADR) procedures for bid protests.[194] The executive order directs agency heads to create a system that to the maximum extent practicable will allow for the inexpensive, informal, procedurally simple, and expeditious resolution of protests. Although drafted to allow agencies great latitude in devising ADR procedures to meet their particular needs, the order does prescribe a few specifics. First, the agency must establish a system that allows contractors to have their protest decided at a level above the contracting officer. Additionally, the agency procedures must allow for a stay of contract performance or award following a timely filed protest, using time frames similar to that provided under GAO procedures. Last, the executive order directs that, within two years, the Administrator of Federal Procurement Policy will report to the President "agency experience and performance under this order."[195]

2. Proposed Rule Makes Bid Protest Litigation Costs Unallowable. The Civilian Agency Acquisition (CAA) and Department Acquisition Regulation (DAR) Councils proposed a change to tighten the rules regarding the allowability of bid protest legal fees and costs.[196] With the exception of costs incurred by an intervenor on the side of the government, the proposed *FAR* revision would make such costs unallowable.[197] The DAA and DAR Councils proposed the change in response to a Defense Contract Audit Agency (DCAA) concern that recent rulings by the ASBCA would encourage contractors to protest contract award decisions.[198] Comments to this revision were due in late December 1995.

3. The COFC Injunctive Authority Limited to the Scope of Protester's Cause of Action. The CAFC recently clarified the scope of the injunctive authority of the COFC. At issue in *Central Arkansas Maintenance v. United States* was whether the government complied with applicable Procurement Integrity Act (PIA) restrictions.[199] The agency properly eliminated the protester, Central Arkansas Maintenance (CAM), from the procurement's competitive range. Despite its removal as a player in the acquisition, CAM challenged the agency's proposed award alleging that the awardee violated the PIA. Although the COFC upheld the agency's removal of the protester from the competitive range, it also enjoined contract award because it concluded that the awardee had violated the PIA.[200] On appeal, the CAFC vacated the injunction. The appeals court ruled that the COFC's injunctive authority is limited to those circumstances where "an offeror has not been given fair and honest consideration" by the agency.[201] In this case, the agency properly considered and then eliminated CAM's proposal from the competitive range. Once that occurred, the claims court could not then act under the auspices of CAM's cause of action to enjoin the agency from making award.[202]

4. The COFC Enjoins a "Post-Award" Legal Fiction. In *IMS Services, Inc. v. United States*,[203] IMS Services, Inc. challenged a GAO recommendation that the Navy cancel its earlier

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[194] Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (1995).

[195] *Id.*

[196] 60 Fed. Reg. 54,918 (1995).

[197] Under this proposal, *FAR 31.205-47(f)*, Costs Related to Legal and Other Proceedings, would be amended to read:

> (f) Costs not covered elsewhere in this subsection are unallowable if incurred [for]—
>
> * * *
>
> (8) Protests of Federal Government solicitations or contract awards, unless the costs are incurred by interested parties to defend against such protests.

Id.

[198] *See* Bos'n Towing & Salvage Co., ASBCA No. 41357, 92-2 BCA ¶ 24,864; J.W. Cook & Sons, Inc., ASBCA No. 39691, 92-3 BCA ¶ 25,053. According to the notice for this proposed rule, the ASBCA held that the rule making litigation costs unallowable applied only to Contract Disputes Act appeals and not to bid protests. *See* FAR, *supra* note 98, 31.205-47(f).

[199] No. 95-5059, 1995 WL 613946 (Fed. Cir. Oct. 19, 1995).

[200] Specifically, CAM argued that the awardee intended to hire a former agency procurement official who was involved in drafting the solicitation that was being protested. Subsequently, at the suggestion of agency counsel, the former government employee withdrew from further involvement in awardee's proposal. *Id.*

[201] *Id.* at *4.

[202] *Id.* at *5.

[203] 32 Fed .Cl. 388 (1994).

award to IMS, demanded that the Navy reopen discussions, requested a new iteration of the best and final offerings, and sought an injunction barring the Navy from taking the corrective action recommended by the GAO.[204] Because the Navy had already awarded the contract, the government moved to dismiss IMS's action by arguing that the court had no jurisdiction over this "post-award matter."[205] Noting that the scope of its pre-award injunctive authority should be evaluated on a case-by-case basis, the COFC made short work of this argument. Given the circumstances surrounding this procurement,[206] the COFC held that to view IMS's challenge as a post-award protest would be engaging in "legal fiction."[207]

5. The GAO Declines to Review Cooperative Agreement Award Decision. In *Energy Conversion Devices, Inc.*,[208] the Advanced Research Projects Agency (ARPA) sought proposals for the research and development of vapor phase manufacturing technology. The solicitation informed offerors that the agency anticipated "substantial industrial cost sharing and program funding via contract or agreements authority as applicable."[209] The protester challenged the agency's selection, contending that the ARPA should have conducted this action as a procurement contract. The GAO rejected this argument noting that contracts are required "only when the principal purpose is the acquisition of goods and services for the direct benefit of the Federal Government."[210] Because the agency's primary purpose was to "advance the state-of-the-art by supporting and stimulating research and development" in vapor phase manufacturing technology, the protester could not demonstrate that a "procurement contract" was required.[211]

6. Not All CRADAs Are "CRADA'd Equal"; Protester's Challenge of Agency Award of Cooperative Agreement Untimely. At issue in *Spire Corp.*[212] was the transfer of an ion implanter by the Navy from protester to another contractor.[213] Spire had obtained use and control of the device via a Cooperative Research and Development Agreement (CRADA) executed under the authority of the FGCAA. Spire alleged the transfer of the ion implanter violated the FGCAA. The Navy, in turn, informed Spire that it was transferring the device under a CRADA based on a different authority, that of the Federal Technology Transfer Act. Apparently, to Spire, at least, a CRADA is a CRADA; at any rate, Spire failed to amend its protest until well after the protest window had closed. Because Spire's protest was founded on the wrong statute, the GAO dismissed the action as untimely.[214]

7. The Competition in Contracting Act Stay and Sovereign Acts—Who Pays for the Contractor's Delay Costs? In *Tempo, Inc.*,[215] the ASBCA addressed the issue of who pays for delay costs associated with a suspension of work arising from a CICA stay. Before the ASBCA was a contract for the construction of three barracks buildings. The contract did not contain the "protest after award" clause.[216] Subsequent to award, the government issued a stop work order pursuant to the CICA that lasted ninety-two days—the approximate time required to obtain a protest decision from the GAO. According to the board, because the agency issued the stop work order pursuant to "the mandate of CICA," the alleged delay was the direct result of a sovereign act. Therefore, the board denied the contractor's request for delay costs and a time extension.[217]

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[204] *See* SRS Tech., B-254425, 94-2 CPD ¶ 125.

[205] The COFC may grant injunctive relief in a pre-award bid protest founded upon an alleged breach of the government's implied-in-fact contract with bidders and offerors to fairly and honestly consider bids or offers received in response to a solicitation. 28 U.S.C. § 399 (1988).

[206] The COFC noted that the Navy had not issued any work orders, nor would it do so. In fact, the Navy indicated that it would instead reopen the solicitation process and seek a new set of best and final offers—sometimes known as "Best and Really Final Offers" or "BARFOs." *Id.* at 399.

[207] *Id.*

[208] B-260514, June 16, 1995, 95-2 CPD ¶ 121.

[209] *Id.* at 2.

[210] *Id.* at 3 (citing *FAR 35.003(a)*). The FAR provision also provides: "Grants or cooperative agreements should be used when the principal purpose of the transaction is to stimulate or support research and development for another public purpose." FAR, *supra* note 98, 35.003(a).

[211] *Id.* at 4-5.

[212] B-258267, Dec. 21, 1994, 94-2 CPD ¶ 257.

[213] According to the decision, an ion implanter is a device used to implant electrically active elements into the surface of various articles (such as aircraft components) to enhance the durability and anticorrosive properties of the implanted material. *Id.* at 1, n.1.

[214] *Id.* at 3-4.

[215] ASBCA No. 37589, 95-2 BCA ¶ 27,618.

[216] *Id.* at 137,678-79. The *FAR 52.233-3*, Protest After Award, provides, in part: "(b) If a stop-work order issued under this clause is canceled either before or after a final decision in the protest, the Contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, and the contract shall be modified, in writing, accordingly . . . ." FAR, *supra* note 98, 52.233-3.

[217] ASBCA No. 37589, 95-2 BCA ¶ 137,679 (citing Port Arthur Towing Co., ASBCA No. 37516, 90-2 BCA ¶ 22,857, *aff'd sub nom.* Port Arthur Towing Co. v. Department of Defense, Civ. No. 90-1889, U.S.D.C.D.C., order dated July 9, 1991).

8. *What Is "Urgent and Compelling?"—Service Contracts.* In *Pragmatics, Inc. v. Department of Health and Human Services.*,[218] the protester requested that the GSBCA suspend the agency's delegation of procurement authority to prevent the award of a computer services contract. As it addressed the suspension request, the board laid out a few useful rules for identifying "urgent and compelling" circumstances. First, the GSBCA noted that the agency must demonstrate that the effect of a suspension would be "drastic, direct and unavoidable through use of alternative methods of proceeding."[219] Second, the GSBCA pointed out the qualitative difference between service contracts and supply contracts—observing that the degree of *harm* to a protester in allowing contract performance is far more speculative in a service contract.[220] Finally, the GSBCA noted that the activity at issue involved a critical agency mission for which the agency lacked the in-house assets to perform during the suspension time frame.[221] The GSBCA emphasized the fact that the incumbent could not guarantee adequate staffing to meet minimal mission staffing requirements. Given this scenario, the GSBCA found that the agency had no "viable alternative" for obtaining the needed services and denied the protester's request for suspension.[222]

9. Next-In-Line Interested Party Rule Extended to Best Value Procurement. An interested party is an offeror who has a direct economic interest in the outcome of a protest. Typically, this means that the protester is either next-in-line for award or, given the bases of its protest, that the entire award determination will be thrown wide open—making the protester and other offerors potential awardees.[223] Generally, unless the agency has rank ordered the offerors, application of the next-in-line analysis is not well suited for best value procurements.[224]

In *Computer Maintenance Centers, Inc. v. Department of the Army*,[225] the protester challenged the evaluation and selection of the awardee, but failed to challenge the agency's valuative process in general, much less challenge all intervening offerors. The Army, however, had memorialized its ranking of all offers, which demonstrated that at least one intervening offeror was positioned between awardee and protester. Given the protester's failure to challenge the intervening offer and that the Army had established a "reliable and final ranking of evaluated offers," the board held that protester was not an interested party.[226]

10. Protest Involving Conflict of Interest Found Untimely. In *Women's Energy, Inc.*,[227] the National Park Service awarded a contract for the installation of a new electrical distribution system to the incumbent, Pacific Gas & Electric (PG&E). The protester alleged that PG&E assisted in the preparation of the statement of work and challenged the award, in part, as an organizational conflict of interest. The protest record, however, demonstrated that the protester knew that PG&E was a competitor in the procurement for a significant period of time prior to award. Consequently, the GAO dismissed the protest as untimely finding that the protester should have objected within ten days of when it became aware of PG&E's prior involvement in the procurement.[228]

11. Protest Timeliness—Educated Guesses Do Not Trigger the Protest Clock. In *C3, Inc. v. General Services Administration*,[229] the GSBCA addressed the issue of exactly when a protester has knowledge sufficient to start the "protest clock." On 20 January, the Coast Guard informed C3, Inc. (C3) that it intended to make award to a competitor. The procurement required the offerors to meet certain systems interface and connectivity standards, and C3, through careful monitoring of industry publications and information published by government agencies, strongly suspected that the awardee's proposal did not meet these standards. It was not until the publication of a magazine article, describing awardee's offered system, that C3's suspicions were

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[218] GSBCA No. 13158-P, 95-2 BCA ¶ 27,658.

[219] *Id.* at 137,902 (citing Spectrum Leasing Corp., GSBCA No. 9881-P, 89-1 BCA ¶ 21,513).

[220] The board observed that "if a suspension does not occur, a successful protester may ultimately secure the entire rights to perform under the contract, less a short period of time." *Id.* (citing Sector Tech., GSBCA No. 10566-P, 90-2 BCA ¶ 22,865).

[221] The protested procurement sought systems software engineering services for computer networks and mainframes supporting the processing and distribution of social security benefits. *Id.* at 137,901.

[222] *Id.* at 137,903.

[223] *See* 40 U.S.C. § 759(f)(9)(B) (1988). This also is known as the "*IBM* rule," named after the CAFC's decision in United States v. International Bus. Mach. Corp., 892 F.2d 1006 (Fed. Cir. 1989) (third low, nonresponsive bidder not an interested party).

[224] *See* Anstec, Inc. v. Department of Trans., GSBCA No. 13087-P, 95-1 BCA ¶ 27,509 ("in the absence of evidence to show what the SSO would have done in the event that the awardee was eliminated from the competition, it would be speculative for the Board to determine that protester had no chance of award").

[225] GSBCA No. 13417-P, 1995 WL 641116 (Oct. 24, 1995).

[226] *Id.* at *10. *See also* Computer Data Sys., Inc. v. Department of Energy, GSBCA No. 12824-P, 95-2 BCA ¶ 27,604, at 137,567 (board notes that "the existence of a final reliable ranking is essential to the application of the *IBM* rule").

[227] B-258785, Feb. 15, 1995, 95-1 CPD ¶ 86.

[228] *Id.* at 4-5.

[229] GSBCA No. 13201-P, 95-2 BCA ¶ 27,820.

confirmed, and C3 protested within ten working days of receiving the article, which apparently was well after it learned of the Coast Guard's proposed award. The board refused to dismiss the protest as untimely holding that to do so would require the protester to file a protest based solely on "educated guesswork." Because the agency had not yet made contract award and since the protester had not received a debriefing, the protest was timely.

12. Protest Timeliness: Information from a "Competitive Watcher" Triggers the Protest Clock. At issue in *Digital Equipment Corp. v. Department of the Navy*,[230] was whether an awardee's workstation met the commercial availability standards required by the request for proposals (RFP). The Navy conducted a debriefing on 25 January during which it indicated that the awardee would provide a brand name workstation. The protester immediately launched an investigation to identify the specific model and ascertain its compliance with the RFP. By 3 February, after talking with a "competitive watcher," the protester had tentatively identified the model used by awardee and discovered that the item was not commercially available.[231] According to the protester, however, it did not *confirm* this information until mid-February. The protester then filed an agency protest in March. In dismissing the protest as untimely, the board observed that it has "consistently construed its timeliness rules in a stringent manner" so as to enhance the degree of certainty associated with procurement decisions.[232] In this case, the GSBCA concluded that early in its investigation the protester had the information necessary to file its protest. If it required additional evidence to support its allegations, it could "then seek through discovery."[233]

13. Board Imposes Sanctions for Violation of Protective Order. A large number of bid protests involve the review of proprietary sensitive information requiring the issuance of a protective order. The release of such information is strictly limited by the terms of the protective order. In *Communication Network Systems, Inc. v. Department of Commerce*,[234] the GSBCA addressed a situation in which counsel for an intervening party released partially redacted information to his client without first obtaining the approval of the other parties and the board.[235] On learning of his *faux pas*, the offending counsel retrieved all copies of the wrongfully provided information and apologized to the GSBCA. The GSBCA denied a request that the firm represented by this attorney be precluded from participating in a follow-on procurement. The GSBCA, however, directed that, because the disclosure could have provided the intervenor a competitive advantage, identical information would be released to all parties to the protest. Finally, the GSBCA admonished counsel for violating its protective order.[236]

14. The GSBCA's Treatment of Protest Costs Strikes a "Sterling" Note. The long saga involving the GSBCA's treatment of protest costs finally ended in *Sterling Federal Systems v. National Aeronautic and Space Administration*[237] (NASA). In 1994, the CAFC vacated the board's previous decision in this protest. The board had denied Sterling's claim for costs it incurred to retain an expert consultant and for the salaries of in-house employees, all of whom were involved in successfully prosecuting the underlying protest.[238] Following the CAFC's remand, the GSBCA returned to its prior practice of awarding, based on a case-by-case analysis, consulting fees, employee salaries, and expenses that are "necessary and reasonable" for pursuing the protest. The GSBCA, in part, justified reimbursement of consultant fees and expenses based on the technical complexity of many protests and the concomitant time constraints of the protest process.[239] With respect to the use of in-house employees, a divided GSBCA rejected NASA's argument that the salaries of Sterling's employees are generally charged as indirect costs against other existing contracts with the government.[240] Instead, the GSBCA ruled that such expenses were recoverable so long as they were *necessary and reasonable* because Sterling had segregated the

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[230] GSBCA No. 13242-P, 95-2 BCA ¶ 27,730.

[231] As the title suggests, vendors apparently hire "competitive watchers" to monitor the activity and products of their competitors.

[232] *Id.* at 138,217.

[233] *Id.*

[234] GSBCA No. 13028-P, 95-1 BCA ¶ 27,571.

[235] The attorney provided his client his own redacted version of information submitted by the government and the other parties to the protest. The information improperly disclosed included technical score data and the source selection official's statement addressing some of protester's weaknesses. *Id.* at 137,406.

[236] *Id.*

[237] GSBCA No. 10000-C-REM, 95-1 BCA ¶ 27,575.

[238] The CAFC rejected the board's determination that, in light of a recent Supreme Court decision, such costs were not recoverable. *See* Sterling Fed. Sys., Inc. v. Goldin, 16 F.3d 1177 (Fed. Cir. 1994).

[239] The board observed that use of consultants "help[s] the lawyers get to the bottom of issues more economically and efficiently than the lawyers would if left to their own devices." *Id.* at 137,424.

[240] *Id.* at 137,427. Indeed, it is this concern about the potential for the contractor receiving a windfall in payment for pursuing protests that has prompted a revision in treatment of protest litigation costs. *See* text *supra* § III.G.2.

costs that its employees incurred in support of the protest to a separate cost center.[241] The dissent, however, objected to reimbursement of employee expenses because salary costs are not costs arising under the requirement to prosecute a protest, but are "the costs of hiring . . . and agreeing to pay the employees' salaries;" therefore, in the opinion of the dissent, such costs would be the same irrespective of whether a protest was filed or not.[242]

15. Party On!—Intervenor Entitled to Legal Fees Although Not a Party to Settlement Agreement. At issue in *Integrated Systems Group, Inc. v. Department of the Air Force*,[243] was a settlement agreement in which the agency agreed that its proposed procurement action violated applicable statute and regulation. Although Integrated Systems Group, Inc. (ISG) intervened on the side of protester, it apparently was not a party to the actual settlement of the protest. Rejecting ISG's request for costs and fees, the Air Force contended that, in accordance with the terms of the settlement agreement, it viewed only the protester as the prevailing party. In the Air Force's opinion, ISG was little more than a "fortuitous beneficiary" that "did not succeed on any significant issue."[244] The GSBCA disagreed, finding that ISG was an interested party to the protest and, hence, could still potentially meet the Air Force's requirements in this procurement. As such, the GSBCA concluded that ISG, as an intervenor of right, obtained a "tangible benefit" and was entitled to reasonable costs and fees for "pursuing the protest/intervention."[245]

16. The GSBCA Bid Protest Activity Levels off. After several years of decline, the number of bid protests filed with the GSBCA appears to have levelled off. In its annual report, the GSBCA stated that, for Fiscal Year 1995, it had docketed 178 protests; this compares with 179 protests for Fiscal Year 1994.[246] Counting carry overs from the previous fiscal year, the GSBCA disposed of 194 protests—issuing decisions on 54 protests and dismissing 140 protests. Of the protests disposed of by decision, approximately 35% were granted in whole or in part.[247]

H. Small Business Program Developments

1. Regulatory Changes.

a. Relief for Negligent Bidders—Relaxed Certification Requirements. The CAA and the DAR Councils amended the Small Business Concern Representation clause[248] to eliminate the requirement that offerors certify that all supplies furnished will be manufactured by a small business in the United States.[249] While the requirement to furnish supplies manufactured by a domestic small business remains,[250] this amendment will eliminate the requirement for a contracting officer to reject as nonresponsive an offer containing an erroneous certification that the offeror would not supply products manufactured by a small business.[251]

b. 5% Goal for Small Businesses Owned by Women Implemented. The FASA mandated a government wide contracting goal of 5% for small businesses owned by women.[252] To meet this requirement, the *FAR* was amended to place small businesses owned by women on an "equal footing" with small disadvantaged businesses.[253] Thus, contracts in excess of the simplified acquisition threshold must require the contractor to agree that small business concerns, small disadvantaged business concerns, and small business concerns owned by women shall have the maximum practicable opportunity to participate as subcontractors.[254] Further,

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[241] *Id.*

[242] *Id.*

[243] GSBCA No. 12256-C, 95-2 BCA ¶ 27,738.

[244] *Id.* at 138,283.

[245] *Id.*

[246] *GSBCA IT Protest Level Unchanged In FY'95; Contract Appeals Up 24%*, 64 Fed. Cont. Rep. (BNA) 393, 405-06 (Nov. 6, 1995). The absence of any change in protest activity contrasts sharply with Fiscal Year 1994 where protest actions dropped by 38% from the previous fiscal year.

[247] *Id.* at 405.

[248] FAR, *supra* note 98, 52.219-1.

[249] 59 Fed. Reg. 67,037 (1994) (effective Feb. 27, 1995, amending *FAR 52.219-1, Small Business Concern Representation*).

[250] *See* FAR, *supra* note 98, 52.219-6(c) (Notice of Total Small Business Set-Aside) (providing that offerors agree to furnish only end items manufactured or produced by small business concerns inside the United States, its territories and possessions, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia).

[251] *See* Satin Am. Corp., B-261068, Aug. 16, 1995, 95-2 CPD ¶ 70 (agency required to reject offer as nonresponsive due to bidder's mistaken certification that not all end items furnished would be manufactured by a small business). *Cf.* Innovative Refrigeration Concepts, B-258655, Feb. 10, 1995, 95-1 CPD ¶ 61 (Air Force improperly awarded contract to firm which it knew would supply items produced by a large business). This case is discussed in text *supra* § III.D.1.b.

[252] FASA, *supra* note 181, § 7106 (amending sections 8 and 15 of the Small Business Act, 15 U.S.C. § 644 (1988)).

[253] 60 Fed. Reg. 48,206, 48,258 (1995) (effective Oct. 1, 1995, amending, *inter alia*, *FAR pt. 19*).

[254] *Id.* at 48,260-62 (amending *FAR 19.201*; *FAR 19.702*).

subcontracting plans must include separate goals for small business concerns owned by women.[255]

c. Subcontracting Plans for Commercial Item Contracts. The Office of Federal Procurement Policy has issued a new policy letter to ease the burden on commercial item contractors in complying with mandatory subcontracting requirements.[256] The policy letter authorizes annual commercial subcontracting plans for either prime contracts for commercial items or subcontracts that provide commercial items under a prime contract.[257] These plans are the preferred method of complying with the subcontracting requirements of the Small Business Act.[258]

2. Supreme Court Applies Strict Scrutiny to Federal Minority Preference Programs—Department of Defense Small Disadvantaged Business Program Suspended. In a decision which has already begun to have far reaching consequences for federal contracting minority preference programs, the Supreme Court in *Adarand Constructors, Inc. v. Peña*[259] declared that all racial classifications must be analyzed by a reviewing court using a *strict scrutiny* standard. Thus, only those affirmative action programs that are narrowly tailored to achieve a compelling government interest will pass constitutional muster.

In *Adarand*, the Department of Transportation (DOT) awarded a highway construction contract to Mountain Gravel & Construction Company. The contract contained a subcontractor compensation clause,[260] which provided that the contractor would receive additional compensation if it subcontracted with firms controlled by "socially and economically disadvantaged individuals."[261] Mountain Gravel subsequently awarded a subcontract for guardrail work to Gonzales Construction Company, a minority owned firm, thereby becoming entitled to a bonus payment of $10,000. As the low bidder on the guardrail subcontract, Adarand Constructors asserted that the race based presumptions used by the DOT violated its right to equal protection under the law. The Court agreed and announced a new "strict scrutiny" standard for all racial classifications, federal or state, benign or pernicious. In so doing, the Court expressly overruled recent precedent which had applied an "intermediate scrutiny" standard to federal affirmative action programs.[262] The case was remanded back to the United States Court of Appeals for the Tenth Circuit for further consideration using the new standard.

Although the Supreme Court in *Adarand* did not strike down any particular affirmative action program, the fallout from the decision has been dramatic. First, the Department of Justice issued a memorandum to federal agencies providing legal guidance on the implications of *Adarand*.[263] While not addressing the merits of specific affirmative action programs, the guidance advised agencies of the myriad factors they should consider when determining the validity of their affirmative action programs.[264] Three weeks later, President Clinton announced his administration's continued commitment to federal affirmative action programs, but issued a memorandum to the heads of executive departments and agencies requiring an evaluation of all affirmative action programs in light of *Adarand*.[265] This memorandum orders the elimination or reform of any program that creates a quota, creates preferences for unqualified individuals, creates reverse discrimination, or continues after it has achieved its purposes.[266]

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[255] *Id.* at 48,262 (amending *FAR 19.704*). *See also* 60 Fed. Reg. 49,644 (1995) (proposed policy letter on subcontracting plans). Section 8(d) of the Small Business Act, 15 U.S.C. § 637(d) (1988), as amended by FASA § 7106, provides that each contract in excess of $500,000 ($1 million in the case of construction) must require the offeror to negotiate a subcontracting plan.

[256] OFPP Policy Letter 95-160, Policy Letter on Subcontracting Plans, Companies Supplying Commercial Items, Fed. Reg. 49,642 (1994). For more on this policy letter, *see* discussion *supra* text § V.N.5.a.

[257] 60 Fed. Reg. 49,643 (1995).

[258] *Id.*

[259] 115 S. Ct. 2097 (1995).

[260] The Small Business Act, 15 U.S.C. § 631 (1988), authorizes federal agencies to provide incentives to contractors to encourage subcontracting with small business concerns owned and controlled by socially and economically disadvantaged individuals. *Id.* § 637(d)(4)(E).

[261] "Socially disadvantaged individuals" are those individuals who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities. 15 U.S.C. § 637(a)(5) (1988). "Economically disadvantaged individuals" are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities. *Id.* § 637(a)(6)(A). Contractors may presume that Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities are "socially and economically disadvantaged." *Id.* § 637 (d)(3)(C).

[262] *See* Metro Broadcasting, Inc. v. Federal Communications Comm'n, 497 U.S. 547 (1990) (upholding the Federal Communications Commission's policy of granting a preference to minorities when distributing broadcast licenses).

[263] Memorandum, Mr. Walter Dellinger, Assistant Attorney General, U.S. Department of Justice, to General Counsels, subject: *Adarand* (June 28, 1995).

[264] *Id.* at pp. 35-38.

[265] *Clinton Unveils Affirmative Action Plans*, 37 Gov't Contractor (Fed. Pubs.) ¶ 385 (July 26, 1995).

[266] *Id. See also Clinton Reaffirms Support for Affirmative Action Programs but Calls for Reform*, 64 Fed. Cont. Rep. (BNA) 64 (July 24, 1995).

Shortly thereafter, Senator Robert Dole introduced the Equal Opportunity Act of 1995,[267] which would, among other things, prohibit the use of racial and gender preferences by the federal government in awarding and administering federal contracts. Congress also held hearings last summer that focused on the Office of Federal Contracts Compliance Programs' enforcement of affirmative action programs.[268]

Although the GAO has refused to rule on the constitutionality of the DOD's small disadvantaged business (SDB) program,[269] contractors have challenged the program in federal court.[270] The DOD finally cried uncle and announced the suspension of the SDB set aside program.[271] Citing *Adarand*, the Undersecretary of Defense for Acquisition & Technology (Undersecretary) directed contracting officers not to set aside acquisitions for SDBs and to amend solicitations already issued to remove set asides to the extent that it would not unduly delay needed deliveries under the contract.[272] Interestingly, the Undersecretary did not address the 10% evaluation preference for SDBs bidding on unrestricted acquisitions.[273] This apparent anomaly may place nonminority contractors in a more tenuous position than before because they may not discover until after competing for a procurement that the government will award the contract to an SDB offering a higher price.[274] As a result, at least one firm is seeking an injunction in federal district court against the DOD's use of the evaluation preference to award to an SDB.[275]

In any event, to help offset the loss of contracting opportunities to SDBs,[276] the Undersecretary has urged all contracting activities to use their "utmost skill and existing authorities" to increase awards to SDBs, including encouraging small businesses to subcontract with SDBs and prime contractors to increase their efforts to award more subcontracts to SDBs.[277]

3. Agency May Decline to Submit Size Status Questions to the Small Business Administration. In *United Native American Telecommunications, Inc.*,[278] the Defense Information Technology Office issued an unrestricted solicitation for installation and maintenance of telecommunication circuits. United Native American Telecommunications (UNAT) submitted an offer, certifying that it was a small disadvantaged business and entitled to a 10% evaluation preference.[279] Due to UNAT's track record as a firm that failed to meet the small business eligibility requirements,[280] the contracting officer questioned UNAT's self-certification, but

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[267] S. 1085, 104th Cong., 1st Sess. (1995).

[268] *See OFCCP Downplays Impact of Adarand as House Panel Examines Affirmative Action in Procurement*, 37 Gov't Contractor (Fed. Pubs.) ¶ 346 (June 28, 1995).

[269] *See* Elrich Contracting, Inc; The George Byron Co., B-262015, Aug. 17, 1995, 95-2 CPD ¶ 71 (the GAO finds no "clear judicial precedent" on the issue). The Department of Defense SDB program generally requires Department of Defense activities to set aside for SDBs all contracts where there is a reasonable expectation of receiving two or more offers from SDBs, if award will be made at not more than 10% above fair market price. DFARS, *supra* note 20, 219.502-70. This portion of the program is frequently referred to as the "Rule of Two." In unrestricted acquisitions, the contracting officer must provide a 10% evaluation preference to all SDB offers. *Id.* subpt. 219.70.

[270] *See* Ann Devroy, *Rule Aiding Minority Firms to End*, WASH. POST, Oct. 22, 1995, at A1, A8 (describing a challenge to the "Rule of Two" by a contractor from New Mexico, where 80% of federal contracts are set aside for minority firms).

[271] 60 Fed. Reg. 54,954 (1995) (effective Oct. 23, 1995, suspending *DFARS*, *supra* note 20, subpts. 219.501 (S-70); 219.502-2-70; 219.502-4; 219.504(b)(i); 219.506; 219.508(e); 219.508-70; and 252.219-7002).

[272] Memorandum, Undersecretary of Defense (Acquisition & Technology), for Secretaries of the Military Departments, subject: Small Disadvantaged Business Utilization Program (Oct. 23, 1995) [hereinafter Undersecretary's Memorandum].

[273] *See* DFARS, *supra* note 20, subpt. 219.70; *Id.* 252.219-7006. *But cf.* 60 Fed. Reg. 43,563 (1995) (amending *DFARS 219.7001* to prohibit the 10% evaluation preference in acquisitions for long distance telecommunications services).

[274] *See DOD Suspends Use of "Rule of Two" Set-Asides for SDBs in Light of Adarand-Mandated Review*, 64 Fed. Cont. Rep. (BNA) 368 (Oct. 30, 1995).

[275] *DOD Contractor Challenges Constitutionality of DOD's 10% Price Preference Policy for SDBs*, BNA Fed. Cont. Daily 12 (Nov. 17, 1995). The plaintiff, an incumbent aircraft maintenance contractor, is challenging the constitutionality of the Navy's use of the 10% evaluation preference to award a follow-on contract to an SDB. According to plaintiff's complaint, the Navy advised it during a debriefing that its offer had been the lowest price, technically acceptable offer, but after application of the preference, an SDB's offered price became low.

[276] The Department of Defense awarded SDBs over $1 billion in contracts under the SDB set-aside program in 1994. *See* United States General Accounting Office, *Status of SBA's 8(a) Minority Business Development Program*, GAO/T-RCED-95-122 (Mar. 6, 1995) (testimony of Judy Joseph-England before the Committee on Small Business, House of Representatives).

[277] Undersecretary's Memorandum, *supra* note 272.

[278] B-260366, May 30, 1995, 95-2 CPD ¶ 78.

[279] DFARS, *supra* note 20, subpt. 219.70 requires the contracting officer to provide small disadvantaged businesses with a 10% evaluation preference in unrestricted acquisitions when award is based on price. If the preference had been applied, UNAT would have submitted the lowest price offer.

[280] The contracting officer was aware of approximately 40 SBA decisions within the previous year which determined that UNAT was "other than a small business" on telecommunications procurements.

decided not to refer the case to the Small Business Administration for resolution, as required by the *FAR*.[281] Rather, the contracting officer determined that award to another firm was necessary to "protect the public interest" in that the telecommunications line was required immediately to support a large military training exercise. The GAO found the contracting officer's decision to be reasonable and denied the protest.

4. Agencies Continue to Stumble on Set Aside Requirement. The *FAR* requires agencies to set aside procurements for small businesses where a reasonable expectation that offers will be received from at least two responsible small business concerns and that an award will be made at a fair market price.[282] Despite the simplicity of this well known "Rule of Two," agencies continue to lose protests by failing to set aside acquisitions as required. For example, in *Bollinger Machine Shop & Shipyard, Inc.*,[283] the Army Corps of Engineers (Corps) issued an invitation for bids for design and construction of a fisheries research vessel. The Corps had recently cancelled a procurement for the research vessel in which six small businesses had submitted offers because all of the responsive bids exceeded the funds available for the procurement. Nevertheless, the contracting officer issued the IFB on an unrestricted basis because she did not expect to receive bids from two small businesses within the available funding. After reviewing the results of the prior procurement, the GAO determined that the contracting officer reasonably should have expected bids from two small businesses at fair market price, noting that funding availability is not equivalent to fair market price.

Likewise, in *General Distributors, Inc.*,[284] the GAO found the Federal Prison Industries' (FPI) decision to issue an unrestricted IFB for angle steel to be unreasonable. The contracting officer determined that he did not expect two responsible small businesses to bid because FPI had recently terminated for default a small business supplier of angled steel for failure to make timely deliveries. The GAO granted the protest because the contracting officer failed to adequately investigate the small business interest in this market. In fact, the bidders list contained the names of thirty small business concerns, and FPI's procurements of angled steel over the previous three years had significant small business interest.[285]

5. Agency Not Required to Terminate Contract After Small Business Administration Issues Certificate of Competency More Than Fifteen Days Past Referral. If the contracting officer finds a small business nonresponsible, he must refer the determination to the Small Business Administration (SBA) for possible issuance of a Certificate of Competency (COC) and withhold award to another bidder for 15 days.[286] In *Control Corp.*,[287] the Navy determined that Control Corp.'s proposal for computer maintenance was technically unacceptable and awarded the contract to another firm. Control Corp. protested this decision, arguing that the Navy had essentially determined it to be nonresponsible, and therefore, the Navy should have referred the decision to the SBA.[288] The GAO dismissed this initial protest after the Navy agreed to refer the decision to the SBA. Nearly one year later, the SBA issued a COC; however, the Navy refused Control Corp.'s request to terminate the existing contract and award it to Control Corp. Control Corp. again protested the Navy's decision,[289] but the GAO upheld the decision on a technicality. Declining to resolve the issue of whether the Navy's rejection of Control Corp.'s proposal involved a determination of Control Corp.'s responsibility, the GAO found that the Navy was not required to terminate the contract and award to Control Corp. The GAO reasoned that, notwithstanding the fact that the Navy did not refer the case to the SBA until after award, termination was not required because the SBA issued its COC determination more than fifteen days after referral.

6. The GSBCA Strikes Down Contract Splitting on 8(a) Procurement. Agencies must compete 8(a)[290] supply contracts expected to exceed $5 million and other contracts expected to

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[281] The *FAR 19.301(b)* requires the contracting officer to refer questions regarding certification of size status to the SBA, and the *FAR 19.302(h)(1)* prohibits the contracting officer from making award for ten business days after referral to SBA, unless the contracting officer determines that award is necessary to protect the public interest. FAR, *supra* note 98.

[282] *Id.* 19.502-2(b).

[283] B-258563, Jan. 31, 1995, 74 Comp. Gen. 32, 95-1 CPD ¶ 56.

[284] B-257812, Nov. 14, 1994, 94-2 CPD ¶ 184.

[285] *See also* Thermal Solutions, Inc., B-259501, Apr. 3, 1995, 95-1 CPD ¶ 178 (Navy improperly failed to set aside acquisition for small disadvantaged businesses where five responsible SDBs responded to CBD synopsis—contracting officer unreasonably decided not to set aside merely because the SDBs had failed to bid on prior acquisitions which had not been set aside for SDBs or which covered dissimilar work).

[286] FAR, *supra* note 98, 19.602.

[287] B-253410.3, July 5, 1995, 95-2 CPD ¶ 127.

[288] The GAO has held that evaluating "responsibility type factors" on a "go/no go" basis is tantamount to a responsibility determination. *See* Docusort, Inc., B-254852, Jan. 25, 1994, 94-1 CPD ¶ 38; Envirosol, Inc., B-254223, Dec. 2, 1993, 93-2 CPD ¶ 295.

[289] The Purdy Corp., B-257432, Oct. 4, 1994, 94-2 CPD ¶ 127.

[290] Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988).

exceed $3 million.[291] Seeking to avoid this competition requirement and award on a sole-source basis, agencies frequently split their requirements into two or more contracts.[292] In *Dynamic Decisions, Inc. v. Department of Health & Human Services*,[293] the GSBCA called the Public Health Service (PHS) onto the proverbial carpet for such an abuse. In this case, the PHS initially planned to award one contract for desktop and scientific computer workstations and supporting equipment, with an estimated cost of $24.5 million. Due to time constraints, the project officer determined that a noncompetitive acquisition was "the only viable method" to proceed.[294] Thereafter, the PHS structured two indefinite quantity, indefinite delivery (IQID) contracts with a guaranteed minimum value under $3 million.[295] The board sustained a protest by an 8(a) contractor, finding the PHS's actions made a "mockery of the competition requirements established by statute."[296] The GSBCA determined that PHS's split of the requirement into two contracts reflected "a manipulation of dollars without a tie to true requirements," and that the "true requirement" appeared to be for a minimum amount of $9.5 million.[297]

I. Domestic Preference.

1. Regulatory Changes.

a. The DOD Implements New Public Interest Exceptions to Buy American Act and Lowers Approval Thresholds. Agencies may waive the restrictions of the Buy American Act (BAA)[298] if the waiver is in the public interest.[299] Last year, Congress amended the BAA to provide several factors for defense agencies to consider when making public interest determinations.[300] The DOD has implemented this rule in the *DFARS*[301] and has lowered the approval thresholds for granting the waiver. For acquisitions valued at less than $100,000, a waiver may now be approved at a level above the contracting officer.[302] The head of the contracting activity may approve the waiver if the acquisition is valued less than $1 million,[303] and the agency head may approve the waiver for higher amounts.[304]

b. The DOD Proposes to Change Valuation Basis for Application of Trade Agreements. Generally, the North Ameri-

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[291] *Id.* § 637(a)(1)(D) (1988).

[292] *See* United States General Accounting Office, *Status of SBA's 8(a) Minority Business Development Program*, GAO/T-RCED-95-122 (March 6, 1995) (stating that federal procuring agencies have limited firms' opportunities for competition under the 8(a) program by keeping price estimates artificially low and structuring contracts so that estimated prices are below competition thresholds).

[293] GSBCA No. 13170-P, 95-2 BCA ¶ 27,732.

[294] *Id.* at 138,223.

[295] The SBA's regulations implementing the 8(a) program in place at the time provided that, when determining whether competition is required, the value of an IQID contract is the contract's "guaranteed minimum value." 13 C.F.R. § 124.311(a)(2) (1995). In response to criticism of this standard, the SBA recently amended its regulations to provide that the competitive threshold requirement for all types of contracts will be based on the agency's "estimate of the total value of the contract, including all options." 60 Fed. Reg. 29,969 (1995) (amending 13 C.F.R. § 124.311(a)). Further, the regulation now provides that 8(a) requirements which exceed the competitive threshold amount "shall not be divided into several requirements for lesser amounts in order to use 8(a) sole-source procedures for award to a single contractor." *Id.*

[296] 95-2 BCA ¶ 27,732, at 138,231.

[297] *Id.*

[298] 41 U.S.C. § 10a-10d (1988).

[299] 41 U.S.C. § 10a (West Supp. 1995); FAR, *supra* note 98, 25.102(a)(3).

[300] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 812, 108 Stat. 2663, 2815-16 (1994) (amending 10 U.S.C. § 2533). The factors include the need to ensure DOD has access to advanced, state-of-the-art technology, the need to protect the national technology and industrial base, and the need to maintain a source of supply for spare and repair parts.

[301] 60 Fed. Reg. 34,470 (1995) (effective July 3, 1995, amending DFARS, *supra* note 20, 225.102).

[302] DFARS, *supra* note 20, 225.102(a)(3)(C)(1).

[303] *Id.* at 225.102(a)(3)(C)(2).

[304] *Id.* at 225.102(a)(3)(C)(3).

can Free Trade Agreement (NAFTA)[305] and the Trade Agreements Act (TAA)[306] allow the purchase of products from NAFTA participants or *designated countries* regardless of the BAA restrictions.[307] If the TAA applies to the procurement, however, agencies generally must reject offers of products from nondesignated countries.[308] Both the NAFTA and the TAA apply only to products valued above certain thresholds.[309] Because these thresholds apply to products, rather than the total value of the acquisition, many large dollar procurements can fall below the thresholds and escape application of the NAFTA and TAA.[310] For example, in *Laptops Falls Church, Inc. v. Department of Justice*,[311] the board sustained the Justice Department's acquisition of nearly $700,000 worth of computer equipment manufactured in a nondesignated country because none of the contract line items exceeded the threshold. The DOD has proposed amending the *DFARS* to provide a different result.[312] If the change becomes final, the value of an acquisition for purposes of determining the applicability of the NAFTA and the TAA will be the total estimated value of *all end products* subject to the acts.

2. Postdelivery Costs Must be Excluded from Buy American Act Evaluation. In *Dynatest Consulting, Inc.*,[313] the Army Corps of Engineers (Corps) issued a RFP containing a single line item for an automatic loading machine. Dynatest offered a product manufactured in South Africa, a nonqualifying country.[314] The Corps applied the 50% Buy American Act evaluation factor[315] to Dynatest's entire lump sum price, including postdelivery setup and training, believing that this was required by the *DFARS*.[316] Application of the 50% evaluation factor to Dynatest's entire price caused it's price to exceed the next low offer, and Dynatest protested. Sustaining the protest, the GAO found that the Corps improperly included postdelivery costs when applying the evaluation factor. The GAO also chided the Corps for failing to follow the GAO's earlier advice[317] to include separate line items in the RFP to differentiate those portions of the offer subject to the evaluation factor and those portions which are not.

J. Labor Standards.

1. President Issues Executive Order Dealing with Permanent Replacement of Striking Workers. The hot news in this area has been the President's promulgation of Executive Order (EO) 12,954.[318] Citing the Federal Property and Administrative Services Act as authority,[319] EO 12,954 establishes a system whereby the Secretary of Labor may, upon a finding that an employer has hired permanent replacements for lawfully striking workers, request agencies to terminate any contracts with the employer for the convenience of the government and to debar the employer for the duration of the labor dispute which led to the hiring of permanent replacements.[320] Congressional Republicans and business

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[305] *See* North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

[306] 19 U.S.C. §§ 2501-82 (1988).

[307] FAR, *supra* note 98, 25.402(a)(1), (a)(3). Designated countries under the TAA include such countries as Japan, Sweden, Switzerland, and Botswana. *Id.* 25.401.

[308] *Id.* 25.402(c).

[309] The current thresholds are: $190,000 for supply and service contracts and $7,311,000 for construction contracts under the TAA; $25,000 for application of NAFTA to Canadian end products under a supply contract; $50,000 for application of NAFTA to Mexican end products under supply contracts; and $6,500,000 for application of NAFTA to construction materials under construction contracts. *See Id.* 25.402(a).

[310] *See* DFARS, *supra* note 20, 225.402 (providing that activities should consider "individually" essentially different line items of eligible products).

[311] GSBCA No. 12953-P, 95-1 BCA ¶ 27,311.

[312] 60 Fed. Reg. 46,805 (1995).

[313] B-257822.4, Mar. 1, 1995, 95-1 CPD ¶ 167.

[314] "Qualifying countries" are countries which have an international agreement or memorandum of understanding with the United States. The Department of Defense does not apply the BAA's evaluation factor to qualifying countries. DFARS, *supra* note 20, 225.000-70(i); 225.105. *See also infra* note 315.

[315] *See* 41 U.S.C. § 10a (1988) (requiring agencies to purchase articles manufactured in the United States substantially all from articles mined, produced, or manufactured in the United States, unless the agency determines the cost to be unreasonable). This statutory provision is implemented in *DFARS 225.105*, which requires Department of Defense activities to evaluate nonqualifying country offers by adding a 50% factor to the offered price.

[316] The Corps apparently ignored the BAA clause incorporated into the RFP, *DFARS 252.225-7001*, which defines end products as the line items to be delivered to the government, but specifically excludes "installation and other services to be performed after delivery."

[317] *See* To Westinghouse Elec. Corp., B-179029, 53 Comp. Gen. 259, 264 (1973).

[318] Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (1995).

[319] Specifically, 40 U.S.C. § 486(a)(1988), which grants the President the authority to "prescribe such policies and directives, . . . as he shall deem necessary to effectuate the provisions of said Act." 40 U.S.C. § 486(a) (1988).

[320] The Department of Labor issued a final rule implementing the E.O. on May 25, 1995. *See* 60 Fed. Reg. 27,856 (1995).

groups have strongly criticized EO 12,954 as beyond the authority of the President and as skewing the balance between management and labor.[321] Promulgation of the order has already resulted in three published decisions regarding its validity.[322]

2. Executive Order Gives Service Employees Right of First Refusal on Successor Contracts. Late last year, President Clinton issued an executive order dealing with the rights of service employees when a follow-on contractor takes over the work.[323] The executive order applies only to service contracts for the maintenance of public buildings. Under the executive order, such service contracts must contain a clause, set out in the executive order, requiring the contractor to offer the predecessor contractor's employees a right of first refusal for positions for which the employees are qualified. However, the executive order allows the contractor to determine the number of employees it believes necessary for efficient performance of the contract and hire fewer employees than the predecessor contractor had employed. The requirement to hire predecessor contractor employees does not apply to those in managerial or supervisory positions. The Department of Labor issued a proposed rule implementing the executive order in July 1995.[324]

3. The Department of Labor Drops Requirement for Minimum Wage Clause in Contracts Below $2500. The Department of Labor (DOL) has issued a final rule[325] deleting the requirement that any service contract covered by the Service Contract Act[326] (SCA) must contain a clause requiring the contractor to pay at least the federal minimum wage to any service employee engaged in the performance of the contract.[327] The DOL stated that the purpose of the rule was to facilitate the use of credit cards for purchases under the $2500 micropurchase threshold.

4. Wage Determinations—To Be or Already in There? The ASBCA Asserts Jurisdiction over Another Case Involving the Meaning of Wage Rate Determination. In the latest case in the continuing saga concerning Armed Services Board of Contract Appeals (ASBCA) jurisdiction over appeals involving wage rate determinations, the ASBCA decided that it did have jurisdiction.[328] The case involved the incorporation of a collective bargaining agreement (CBA) into a wage rate determination in accordance with Section 4(c) of the Service Contract Act.[329] The CBA provided for wages and fringe benefits effective during the first option year of the contract and contained a modification providing for wage rates for the remaining option years. Some time after receipt of the CBA, the DOL issued a wage rate determination retroactively incorporating the CBA wage rates for the first option year, but not mentioning the rates in the modification for subsequent years. The contracting officer denied the contractor's claim for payment at the rates set out in the modification, and the contractor appealed. Filing a motion for dismissal, the government argued that, under the Service Contract Act, only the DOL has jurisdiction to determine whether the modification to the CBA is to be part of the wage rate determination. The ASBCA acknowledged that this was a correct statement of the law, but denied the motion, stating that the issue was not "whether [the] modification . . . 'is to be part' of the determination, but instead whether it *was* part of the determination."[330] The ASBCA stated that the DOL had already exercised its authority by issuing the wage rate determination. Thus, the question before the board was the effect of that determination on the contractual rights of the parties.

K. Bonds and Sureties.

1. Bid Responsive Despite Conditions on Surety's Liability. A contractor's bid contained a condition that would excuse the surety from liability if the contract involved asbestos removal. The GAO found the condition did not make the bid nonresponsive because the specifications did not require the removal of asbestos, and there was only a remote possibility that the requirement would be added to the contract.[331]

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[321] *See President Clinton's Striker Replacement Order Sets Off Furor in Congress*, 37 Gov't Contractor (Fed. Pubs.) ¶ 142 (Mar. 15, 1995).

[322] All three decisions involve a suit by the U.S. Chamber of Commerce, and others, challenging the validity of the E.O. In *Chamber of Commerce v. Reich*, 886 F. Supp. 66 (D.D.C. 1995), the court dismissed the action as not ripe for judicial review. The United States Court of Appeals for the D.C. Circuit overturned this decision and remanded the case to the district court for expedited review. Chamber of Commerce v. Reich, 57 F.3d 1099 (D.C. Cir. 1995). In the last decision issued to date, the court upheld the validity of the E.O., but enjoined its enforcement pending appeal. Chamber of Commerce v. Reich, 897 F. Supp. 570 (D.D.C. 1995). As the court noted in its opinion, this is a case which most likely will be decided by the Supreme Court. *Id.* at 571.

[323] Exec. Order No. 12,933, 59 Fed. Reg. 53,559 (1995).

[324] 60 Fed. Reg. 36,756 (1995) (to be codified at 29 C.F.R. pt. 9). Readers should note that the definition of "public building" is very narrow. For example, buildings on military installations are not covered by the E.O. *Id.*

[325] 60 Fed. Reg. 51,725 (1995).

[326] 41 U.S.C. § 351 (1988).

[327] This requirement was codified at 29 C.F.R. § 4.7 (1995) and implemented at *FAR 22.1005*.

[328] Inter-Con Sec. Sys. Inc., ASBCA No. 46251, 95-1 BCA ¶ 27,424.

[329] 41 U.S.C. § 353(c) (1988).

[330] *Id.* (emphasis in original).

[331] Rufus Murray Commercial Roofing Sys., B-258761, Feb. 14, 1995, 95-1 CPD ¶ 83.

2. Bid Nonresponsive Due to Alteration on Bid Bond. The GAO found that the Navy properly rejected a bid with an altered bid bond as being nonresponsive. The percent of bid price obligated in the penal amount section of the bond had been typed over an erased figure. Although the surety stated that it considered the bond enforceable, the GAO concentrated on lack of evidence in the bid documents or the bond itself to establish that the surety had consented to the alteration. The GAO decided that the surety's obligation was not objectively manifested on the bidding documents, and therefore, the extent and character of its liability was not clearly ascertainable. The surety's assurance that it would honor the altered bid bond had no effect on the Navy's determination that the bid bond was defective because material defects in a bid bond cannot be explained or affirmed after bid opening.[332]

3. Watch the Dates on Bid Bonds. In *Integrity Works*,[333] the GAO found that the Army Corps of Engineers (Corps) improperly rejected a bid as being nonresponsive because of problems with the bid bond. The Corps rejected the bid because the power of attorney certification, which confirmed the authority of the person signing the bid bond on behalf of the surety, was dated one day before the bid bond was executed although the power of attorney was dated eight months prior to the bid. The GAO found that this certification unequivocally established that the person signing the bid bond was authorized to bind the surety and, therefore, the bid was responsive.

4. Irrevocable Letter of Credit Not Sufficient Guarantee if it Restricts Government's Right to Draw Thereon. The GAO found in *Blanton Contractors, Inc.*[334] that it was proper to reject an offer that provided an irrevocable letter of credit as the contractor's guarantee. The letter of credit restricted the government's right to draw on the letter. The GAO found this was a defective guarantee.

5. What's in a Solicitation Number Anyway? A bid bond that clearly identifies the solicitation to which it applies was found to be acceptable even though it cited the incorrect solicitation number. The GAO found the bid bond referred to a specific and correct opening date, referenced the correct penal amount, and there was no other ongoing procurement to which the bid bond could have applied.[335]

IV. Contract Performance

A. Contract Interpretation Issues.

1. General Telephone Inquiries Do Not Satisfy Duty to Seek Clarification. The government issued a solicitation for meal services. During the preparation of its bid, a prospective bidder noticed a possible ambiguity concerning the number of meals that it would be required to serve. The bidder telephonically contacted the contracting specialist and requested whether the information provided in a prior memorandum[336] was accurate. Because of remaining uncertainty, the bidder telephonically contacted the contracting specialist a second time and requested whether the meal count references in the memorandum were accurate. The contracting specialist stated that the information was accurate to her knowledge, but that she provided the contractor with another phone number for additional information. After contract award, the contractor filed a claim alleging that the government understated the number of meals required. The board rejected the claim by holding that, if an ambiguity existed, the contractor's general inquiries concerning whether the memorandum information was accurate was not sufficient to put the government on notice of a problem between the meal figures in the solicitation and the meal figures in the memorandum. As a result, the contractor did not comply with its duty to seek clarification, and, therefore, could not recover.[337]

2. Comments at Presolicitation Conference Bind Navy in Flight Training Contract. The Navy solicited offers to provide flight training services at Pensacola Naval Air Station, Florida. The solicitation indicated that, although the estimated total flight hours involved would be approximately 17,000 hours annually, the length of training would be approximately fifty-eight hours per student. At a presolicitation conference, the Navy indicated that, (1) no changes were planned to the course syllabus describing the number of hours per student, (2) the flights would be for training purposes only, (3) there would be no more than three overnight flights per week, and (4) the contractor's aircraft would not be used as target aircraft (that is, flown to simulate enemy aircraft). However, after award, the Navy changed its syllabus to increase instruction to seventy-eight hours per student. Additionally, the Navy required the contractor to make more than three

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[332] HR Gen. Maint. Corp., B-260404, May 16, 1995, 95-1 CPD ¶ 247.

[333] B-258818, Feb. 21, 1995, 1995 WL 73689.

[334] B-260562, June 27, 1995, 1995 WL 382544.

[335] R.P. Richards Constr. Co., B-260965, July 17, 1995, 95-2 CPD ¶ 128.

[336] The memorandum accompanied a formal solicitation amendment and included a printed list of questions and answers in response to prior inquiries. However, the memorandum never was formally incorporated as part of the solicitation.

[337] Mann, Hundley, & Hendricks, ASBCA No. 41311, 95-2 BCA ¶ 27,751.

overnight flights per week, to use its planes to fly very important persons (VIPs) and others on nontraining flights, and to fly target aircraft missions. The contractor submitted a claim for its additional costs incurred with the extra flights, and the Navy defended with the argument that there was no change because the total flight hours was less than 17,000. However, the board sided with the contractor.[338] The board held that the contractor should receive an equitable adjustment under the Changes clause of the contract for the deviations from the Navy's pre-award comments because of the extra training hours, the target aircraft flights, and the overnight flights. Additionally, the board held that the requirement to fly VIPs persons was a cardinal change entitling the contractor to breach damages.

3. Failure to Explain Rejection of Proposed Method Can Be Government Interference. In *Keno & Sons Construction Co.*,[339] a contractor on a river dredging project proposed to use a crane mounted on top of a dike to remove dredged material from ships. The government rejected the contractor proposal, but the government failed to respond when the contractor requested an explanation of its rationale.[340] When the contractor claimed for its additional costs, the board held that although the government may have had valid reasons for its rejection, the government's failure to provide an explanation of its rationale prevented the contractor from explaining its position or suggesting a cost effective alternative, unnecessarily increasing its costs.

4. Specific Contract Terms Still Control over General Terms. The Veteran's Administration (VA) issued a contract to provide eyeglass lenses for eligible veterans. A general term in the contract indicated that all types of lenses could be made of glass, plastic, or polycarbonate. However, a later section of the contract specifically describing bifocal lenses stated that bifocal lenses would only be made of glass or polycarbonate. When the VA required the contractor to provide plastic bifocal lenses, the contractor submitted a claim for additional costs. The board agreed with the contractor[341] that the omission of plastic lenses from the specific description was not such a patent ambiguity that it created a duty to inquire and that reading the provisions together showed that the specific provision merely explained the general language.[342]

5. Omission from List Costs Government. In a hospital construction contract, the specifications contained the following provisions: (1) a painting section that stated that the contractor was not to paint areas above suspended ceilings unless the contract specifically stated otherwise, (2) the same painting section that contained a specific list of surfaces not to be painted, but did not include areas above suspended ceilings, and (3) another contract section that required the contractor to paint all interior plaster surfaces. When the contracting officer directed that plaster surfaces above certain suspended ceilings be painted, the contractor claimed for the additional costs. The government contended that because the plaster surfaces were not on the specific list of areas not to paint, the contracting officer's order was not a change. However, the board disagreed and held for the contractor.[343] The board held that the omission of the plaster surfaces from the specific list of surfaces not to paint was not *specifically stating otherwise* for purposes of the provision governing painting surfaces above suspended ceilings.

6. The CAFC Disagrees with Army Definition of "Equipment." The Army contracted to renovate a power plant in Virginia. The contract required the contractor to replace four steam turbine generators. To properly place control valves near each generator, the contractor configured the steam piping in a gooseneck fashion, which resulted in the piping extending into an adjacent walkway area. The Army ordered the contractor to redesign the piping so that it would not extend into the walkways, citing a contract provision that space available for installing "equipment" was limited to the space made available by removing the old generators. The Board denied the contractor's claim,[344] but the CAFC reversed.[345] The CAFC held that the steam piping involved was not equipment as defined in the contract because the reference to integral piping in the equipment definition referred to piping that was part of the new generators, not steam supply lines to the generators. Based on that interpretation, the court held that the contractor's gooseneck design was allowed under the contract, and the directive to change that design was a compensable change.

7. "Actual Knowledge" Does Not Equal "Intent to Deceive," According to the CAFC. In *First Interstate Bank of Billings v. United States*,[346] a cattle rancher borrowed money from a

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[338] Cessna Aircraft Co., ASBCA No. 48118, 95-1 BCA ¶ 27,560.

[339] ENG BCA No. 5837, 95-2 BCA ¶ 27,687.

[340] The government's rationale was that it felt that the dike could not support the size of crane that the contractor wished to use.

[341] 20/20 Labs, Inc., VABCA No. 4458, 95-2 BCA ¶ 27,630.

[342] Ironically, the board denied the contractor's claim because, although it found for the contractor as to entitlement, the contractor failed to establish the quantum portion of its claim.

[343] Santa Fe Engr's, Inc., ASBCA No. 48331, 95-1 BCA ¶ 27,505.

[344] CBI Na-Con, Inc., ASBCA No. 45245, 94-2 BCA ¶ 26,753.

[345] CBI Na-Con, Inc. v. West, No. 94-1393, 1995 U.S. App. LEXIS 6484 (Fed. Cir. Mar. 28, 1995) (nonprecedential opinion).

[346] 61 F.3d 876 (Fed. Cir. 1995).

bank to continue his land leasing operations.[347] To induce the bank to make the loan, the Farmers' Home Administration (FmHA) provided a loan guarantee which prohibited FmHA from contesting the guarantee except in case of "fraud or misrepresentation of which Lender . . . had actual knowledge at any time it became such Lender . . . or which Lender participates in or condones . . . ." The rancher received a $400,000 loan from the bank to continue his operations, but the rancher defaulted on the loan when the cattle lessor removed its cattle from the ranch. The bank sued FmHA to enforce the loan guarantee, and FmHA defended on the basis that the bank should have known about the cattle removal,[348] and therefore, its failure to notify FmHA voided the guarantee. The CAFC held that FmHA could not void its guarantee unless it could show at the time FmHA issued the guarantee that the bank actually knew that the cattle had been removed. However, the court went on to state that the lower court erred in holding that the FmHA had to prove that the bank intended to deceive the FmHA because the term "misrepresentation" did not require an intent to deceive and to construe it otherwise would make misrepresentation surplusage.

8. Inconsistency in Language Hurts the Government. The Air Force entered into a contract for security services. The general scope of work provision of the solicitation provided that employees should have prior experience either as military or civilian police officers. However, the "Personnel" provisions of the solicitation required armed forces police experience or "other comparable civilian police operations" for some positions while other positions were described as requiring armed forces police experience or "comparable civilian experience." When the Air Force objected to the contractor hiring persons without actual police experience, the contractor claimed for the additional personnel costs. In *United International Investigative Services v. United States*,[349] the COFC held for the contractor. The COFC held that the inconsistency in language created an ambiguity, but that the ambiguity was not patent enough to require the contractor to seek clarification. As a result, *contra proferentum* required that the ambiguity be construed against the government, entitling contractor to recovery.

9. Which Part of "All" do You Not Understand? In *T.E.C. Construction v. VA Medical Center*,[350] a building renovation contractor alleged that the government constructively changed its contract by requiring it to install additional gutters and downspouts and to paint additional fascia boards. The relevant drawings contained notes stating that the contractor was to remove and replace *all* gutters and to paint *all* fascia boards. However, the drawings also contained "note flags"[351] that were placed in certain areas showing gutters and fascia boards, but not all areas. The contractor claimed that since a particular area did not contain a note flag, the drawing note did not apply. However, the board disagreed and held that a reading of the specifications and drawings gave no indication that the contract limited the meaning of *all* to any particular length, and therefore, *all* should be given its ordinary meaning.

10. "Drilling" Through Air Costs Government. In *Incore, Inc. v. General Services Administration*,[352] the government contracted to improve a border patrol station near Laredo, Texas. The contract required the contractor to renovate and expand certain loading docks, which included drilling holes and mounting caissons to support the new docks. Under the contract, the contractor was to be paid for drilling on a unit price basis. After contract award, the government claimed an overpayment of over $150,000 because it had paid the contractor for drilling based on the height from the top of the caisson to the bottom of the hole drilled rather than from the top of the ground to the bottom of the hole drilled. However, the board held that the GSA's use of "drilling" in its ordinary sense conflicted with the contract provisions requiring bidders to bid based on the total length of the caisson. As a result, the board rejected the GSA's contention that it was paying for the contractor to drill through air and found for the contractor.

11. Preaward Statements and Postaward Payments Bind Government. The government contracted for the renovation of a federal courthouse. Although the contract contained the standard *FAR* clause governing utility costs,[353] the contract contained additional language that suggested that the government would pay utility costs. After a prebid conference, the government issued a list of questions and answers that stated that the government would pay the utilities. Additionally, prior to award, the contractor contacted the contracting officer who orally stated that the government would pay the utility costs. Finally, for the first two and one half years of contract performance, the government paid the utility costs. After the government changed contracting officers, however, the new contracting officer claimed that the contractor

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[347] The lessor and the rancher operated under a lease arrangement where, in return for the use of its land to keep the cattle, the rancher received a percentage of the calves born to the lessor's cattle.

[348] The facts were unclear as to whether the cattle removal took place before or after the loan guarantee.

[349] 33 Fed. Cl. 363 (1995).

[350] VABCA No. 3965, 95-2 BCA ¶ 27,833.

[351] "Note flags" are drawing annotations referencing the viewer of particular sections of a drawing to the relevant drawing note.

[352] GSBCA No. 12711, 1995 GSBCA LEXIS 319 (Sept. 6, 1995).

[353] Under *FAR 52.236-14*, Availability and Use of Utility Services, contractors are responsible for the cost of utilities used at a construction site "unless otherwise provided in the contract."

should reimburse the utility costs. The board disagreed.[354] The board held that, although the contract was ambiguous, the government's preaward oral and written statements plus its conduct during performance of paying the utility bills clarified the contract's ambiguous language and bound the government.

B. Changes.

1. "Sovereign Act" Cases.

a. Congressionally Imposed Surcharge Is Not a Sovereign Act . . . . An electric power company operating nuclear power plants entered into fixed price contracts with the Department of Energy (DOE) to purchase enriched uranium. After contract award, Congress passed legislation authorizing the DOE to collect a special assessment from domestic utilities using government enriched uranium. When the DOE attempted to collect the special assessment, the power company sued in the COFC for a refund, alleging a breach of contract. The COFC rejected the government's defense that the special assessment was a sovereign act holding that because the special assessment only applied to utilities using government enriched uranium, it was not an act for the benefit of the general public normally considered a sovereign act. Rather, the COFC found that the assessment amounted to an unlawful price increase on a fixed price contract and an unlawful taking of the utility's contractual right to acquire uranium at that fixed price. As a result, the COFC ordered the DOE to refund the assessment.[355]

b. And Neither Is a Congressional Restriction of Mortgage Prepayment Rights. Low income housing developers entered into mortgage arrangements guaranteed by the Department of Housing and Urban Development (HUD). The forty year arrangements required HUD's approval if a developer wished to prepay the mortgage during the first half of life of the arrangement. Later, Congress passed legislation requiring HUD approval on all prepayments. The developers sued in the COFC and alleged that the HUD breached the arrangements by prohibiting prepayments after twenty years. Once again, the COFC rejected the government's sovereign act defense. The court stated that since the legislation was targeted at specific contractual obligations, the legislation was not a sovereign act prohibiting recovery for breach of contract.[356]

c. The CAFC Holds Government Breached Savings and Loan Merger Contracts. During the 1970s and 1980s, the Federal Savings and Loan Insurance Corporation (FSLIC) encouraged profitable savings and loan associations to merge with failing savings and loan associations. As an incentive, the FSLIC allowed the merging associations to count "supervisory goodwill"[357] toward their minimum regulatory capital requirements. Later, Congress passed legislation that prohibited savings and loans from counting supervisory goodwill toward their capital requirements. Three different savings and loan associations filed suit, alleging that the legislation breached their takeover agreements with the FSLIC. The COFC found that the legislation breached the agreements,[358] and on appeal, the CAFC affirmed.[359] The CAFC held that the savings and loans either had express or implied-in-fact agreements with the government that allowed the associations to count supervisory goodwill for capital purposes. The CAFC rejected the government's sovereign act defense because, although the statute was phrased in general terms, its intent was to prohibit an accounting practice that the government had previously endorsed by contract. As a result, the government was liable for monetary damages to the savings and loans for breaches of those preexisting contracts.

2. Changes Clause Covered by Christian *Doctrine.* In *GAI Consultants, Inc.*,[360] the Army Corps of Engineers entered into a contract for archaeological services. In the contract, the government accidentally used the wrong version of the Changes clause.[361] However, in deciding whether the contractor could recover on a constructive change theory,[362] the board held that under the *Christian*[363] Doctrine, that the proper version of the Changes

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[354] P.J. Dick, Inc. v. General Servs. Admin., GSBCA No. 12151, 1995 GSBCA LEXIS 345 (Sept. 26, 1995).

[355] Yankee Atomic Elec. Co. v. United States, 33 Fed. Cl. 580 (1995).

[356] Cienega Gardens v. United States, 33 Fed. Cl. 196 (1995).

[357] "Supervisory goodwill" was the difference between the fair market value of the assets and the fair market value of the liabilities of the failing savings and loan. The effect of this was to allow the profitable savings and loans to use less of its funds to perform the merger while showing additional capital that was not reflected by actual assets.

[358] Winstar Corp. v. United States, 21 Cl. Ct. 112 (1990); Winstar Corp. v. United States, 25 Cl. Ct. 541 (1992); Statesman Savings Holding Corp. v. United States, 26 Cl. Ct. 904 (1992).

[359] Winstar Corp. v. United States, 64 F.3d 1531 (Fed. Cir. 1995).

[360] ENG BCA No. 6030, 95-2 BCA ¶ 27,620.

[361] The contract used the standard service contract version of the Changes clause (*FAR 52.243-1, Alternate I*). However, because the contract was for professional services, the government should have used the professional services version of the Changes clause (*FAR 52.243-1, Alternate III*).

[362] The board ultimately decided the government specifications were defective and as a result the contractor suffered compensable delay and additional costs.

[363] *See* G.L. Christian & Assocs. v. United States, 160 Ct. Cl. 1, 312 F.2d 418 (Ct. Cl.), *reh. denied*, 320 F.2d 345, *cert. denied*, 375 U.S. 954 (1963).

clause would be read into the contract by operation of law to determine the contractor's rights under the contract.

3. Change in Manufacturer's Guidance After Award Does Not Make Government Specification Defective. The Air Force entered into a contract to renovate enlisted housing at Keesler Air Force Base, Mississippi. Under the contract, the contractor was to apply waterproof floor covering per the manufacturer's instructions. After contract award but before actual performance, the manufacturer changed its products and application instructions,[364] increasing the contractor's costs. The contractor claimed additional costs based on defective specifications, but the board denied the claim.[365] The board held that because the manufacturer changed its product line and application instructions prior to contractor performance, the contractor never used the precise design specification originally stated in the solicitation. As a result, the government's implied warranty of design specifications never attacheddenying the contractor recovery.

4. Government Pays for Omission in List. In *J.A. Jones Construction Co.*,[366] the contract specifications stated that all cables required to construct a lock and dam were listed in the cable schedule. After award, the government required the contractor to install additional cables that were indicated on the contract drawings, but not included in the cable schedule. After installing the cables, the contractor claimed for its additional costs, and the government argued that in the trade not all cables shown in the drawings were necessarily included in the cable schedule. The board rejected the government's argument and found that the contractor's interpretation that *all cables* would be shown in the schedule was reasonable, and that the omissions in the cable schedule were latent defects because of the voluminous nature of the contract. Additionally, the government could not argue trade practice because the government failed to prove the validity of the trade practice and because the trade practice, even if true, could not contradict unambiguous language in the contract.

5. The Government's Superior Knowledge Results in Contractor Recovery. The Forest Service contracted for tree thinning services in Alaska. After one month's performance, the contractor stopped work after encountering abandoned steel cable and other logging debris from logging operations twenty years earlier. The hidden cable had damaged a chain saw and, in the contractor's opinion, made the operation unsafe. The contractor claimed for the saw damage, but the contracting officer denied the claim and later terminated the contract for default when the contractor refused to resume work.[367] The board held that the contractor was justified in stopping work because of the dangerous conditions caused by the abandoned cable. Additionally, the board held that because the Forest Service knew about the prior logging operations and failed to tell bidders in its solicitation, the contractor had established its claims based on both a superior knowledge and an interference with performance theory.[368]

6. Transfer of Contract Held to Be "In-Scope" Change. In 1992, the Defense Logistics Agency (DLA) solicited a requirements contract for mainframe computers and related services. The solicitation informed prospective offerors that organizational restructuring was taking place, and that automated systems might be added to or taken from the DLA. In 1994, the DLA modified the contract to transfer contract administration and management to the Defense Information Systems Agency (DISA). After the modification, the DISA ordered a mainframe computer under the contract. Another vendor protested, alleging that the DISA should have competed the requirement. The board disagreed, holding that because the solicitation told offerors that such a transfer might occur, the modification transferring the contract from the DLA to the DISA was an *in-scope* change requiring no further competition.[369]

7. Impossibility of Performance Cases.

a. Contractor Loses Impossibility Argument Based in Part on Specification Designed by Its Supplier . . . . The DLA contracted for flame retardant denim pants. The specification referenced a military specification for flame retardant cloth designed in part by one of the contractor's cloth suppliers. The contractor's pants failed first article tests, and after several attempts at compliance, the contractor alleged that the specifications were impossible to perform. The court denied the claim, holding that because the contractor's suppliers, (1) participated in the drafting of the military specification, (2) stated that the specification could be met by commercial suppliers, and (3) actually produced cloth meeting the specifications, the contractor assumed the risk that its suppliers could not produce proper cloth.[370]

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[364] The manufacturer announced that it no longer made the government stated material, but suggested a newer product as an alternative. However, the application procedures were more complex than required for the product stated in the solicitation.

[365] James River Contractor, Inc., ASBCA No. 44065, 95-2 BCA ¶ 27,718.

[366] ENG BCA No. 6164, 95-1 BCA ¶ 27,482.

[367] The government argued that a pre-bid inspection should have revealed the presence of the cable. However, the solicitation contained neither the Differing Site Conditions clause (*FAR 52.236-2*) nor the Site Investigation and Conditions Affecting the Work clause (*FAR 52.236-3*).

[368] Shawn K. Christiansen d/b/a Island Wide Contracting, AGBCA No. 94-200-3, 95-1 BCA ¶ 27,578.

[369] Federal Sys. Group, Inc. v. Defense Info. Sys. Agency, GSBCA No. 13174-P, 95-1 BCA ¶ 27,548.

[370] Coastal Indus. v. United States, 32 Fed. Cl. 368 (1994).

b. But Wins Impossibility Argument by Demonstrating No One Else Could Perform. In *Defense Systems Corp. & Hi-Shear Technology Corp.*,[371] the Navy contracted for the production of cartridges used to decoy enemy missiles from ships. The Navy imposed a *zero defect requirement* on the cartridges. After three years of attempts, the contractor informed the Navy that it could not commercially continue to perform the contract unless the Navy revised its technical data packages (TDPs). The Navy terminated the contracts for default, and the contractor appealed the termination, alleging impossibility of performance. The board found that the Navy had waived the performance requirements for other contractors who also were unable to achieve the zero defect standard. This created a strong presumption of impossibility. Because of the combined impact of the flawed TDPs plus the Navy's refusal to relax its zero defect performance standard, the board held that the contractor was justified in stopping performance and converted the default terminations into terminations for convenience.[372]

8. Contractor Loses Contra Proferentum *Argument for Lack of Reliance.* A food services contractor for an enlisted dining facility claimed its costs for repair parts to maintain government equipment. The relevant contract provision stated that the government would bear the cost for *items needing replacement due to normal wear and tear.* The contractor contended that items included repair parts while the government argued that items referred only to end items. The board found that the term "items" was ambiguous, but its use did not rise to the level of a patent ambiguity. However, the contractor had indicated in its technical submission that its fixed monthly prices included its costs for repair parts. As a result, the board held that the contractor failed to show that it relied on its current interpretation of items and denied the claim.[373]

C. Value Engineering Change Proposals. The CAFC Closes Chapter on M. Bianchi *Cases.* In an unpublished opinion, the CAFC wrote the final chapter in a series of long running disputes over five alleged value engineering change proposals (VECP) in three separate contracts concerning military garments.[374] The CAFC held that under the value engineering clause used in the contracts, the contractor could share in cost savings only when: (1) the VECP was accepted by the agency, (2) the VECP is implemented on the instant contract, and (3) the VECP requires the issuance of a change to the contract.[375] In the case of three of the five VECPs, the government had rejected the proposals during contract performance, and therefore, the contractor could not recover. The CAFC also held that the contractor could not recover on a *constructive acceptance* theory because there was no evidence the government used the proposal prior to the termination of the instant contract.[376] Finally, the CAFC rejected the contractor's claim on the remaining VECP's by holding that the term "essentially the same item" in the clause referred to the same *end items* as the original contract and not, as the contractor contended, on component parts of different items.[377]

D. Pricing of Adjustments.

1. Are Consultant Costs Allowable?—The CAFC Says Maybe. A contractor renovating family housing units submitted a request for equitable adjustment (REA) of $995,568 based on alleged government delay. Of that amount, $190,248 was for costs of hiring a consultant to assist in preparing the REA. The government denied the claim for the consultant costs, stating that because the contract work was completed, the consultant's costs were unallowable under *FAR 31.205-33(d).*[378] The ASBCA upheld the contracting officer's denial of the consultant's costs because the ASBCA considered the REA to be a "claim" under *FAR 33.201*, and therefore, unallowable under *FAR 31.205-33(d).* However, in *Bill Strong Enterprises v. Shannon*,[379] the CAFC reversed the ASBCA and allowed the costs. The CAFC held that the *FAR Part 31* reference to *FAR 33.201* meant that the *FAR Part 31* language incorporated *FAR Part 33's* "claim" definition. As a result, the CAFC held that because the REA was not a claim, the costs were considered contract administration costs and presumed al-

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[371] ASBCA No. 42939, 95-2 BCA ¶ 27,721.

[372] The board remanded to the parties the issue of determining appropriate equitable adjustments as part of the termination for convenience settlement.

[373] Food Servs., Inc., ASBCA No. 46176, 1995 ASBCA LEXIS 220 (Aug. 15, 1995).

[374] M. Bianchi of Cal. v. Perry, No. 94-1166, 1995 U.S. App. LEXIS 19666 (Fed. Cir. July 21, 1995) (nonprecedential opinion).

[375] The court cited its prior decision in *John J. Kirlin v. United States* for this proposition. 827 F.2d 1538 (Fed. Cir. 1987).

[376] The court used its earlier ruling in *M. Bianchi of Cal. v. United States*, 31 F.3d 1163 (Fed. Cir. 1994) to support the proposition that if the government rejects the VECP in good faith and the contract terminates, the contractor cannot recover cost savings if the government uses the proposal in a subsequent contract.

[377] The contractor's alleged VECPs were for changes in interlining in certain garments, changes in type of thread used in button holes, and changes in size of size labels in garments. The contractor's theory was that, for example, any future contract that used the proposed thread in the button holes (even on different type garments) would entitle it to cost savings under the Value Engineering clause.

[378] Under this section as it existed in 1987, costs were unallowable if incurred "in the prosecution of claims. . . against the government." The current *FAR* provision on this issue is now found at *FAR 31.205-47(f)(1). Supra* note 98.

[379] 49 F.3d 1541 (Fed. Cir. 1995).

lowable.[380] The CAFC remanded the issue to the contracting officer to determine the reasonableness and allocability of the consultant costs.

2. "Uncertain" Period of Government Delay Plus "Standby" Requirement Equals Eichleay Recovery for Home Office Overhead. The Army awarded a contract to upgrade the fire alarm system at Fort Belvoir, Virginia. Under the contract, the Army was to install the transmission lines between the alarm sites and the fire station. After the beginning of contractor performance, the Army told the contractor that it could not install the transmission lines as scheduled. The contractor completed as much work as possible and then left the worksite. Ten months later, the Army directed the contractor to return to the site and perform certain remaining work. After completing performance, the contractor filed a claim for unabsorbed home office overhead costs for the ten month delay period using the *Eichleay*[381] formula. The contracting officer denied the claim, and on appeal, the ASBCA upheld the denial.[382] However, in *Mech-Con Corp. v. West*,[383] the CAFC reversed. The CAFC held that, for a contractor to recover under *Eichleay*, the contractor must show: (1) that the government caused the delay, (2) that the contractor was on "standby," and (3) that the contractor was unable to take on other work. However, the CAFC also held that when government caused delay was "uncertain" in duration, the contractor could not practically mitigate its costs by taking on other work. As a result, the CAFC announced that if the contractor could prove the government caused delay was "uncertain" in duration, and the government required the contractor to be on "standby," then the contractor had established a *prima facie* case for *Eichleay* damages. Because the parties had stipulated that the delay was government caused, that the delay was "uncertain" in duration, that the contractor was required to be on standby, and that the contractor could not reduce its home office staff during the delay period, the CAFC held for the contractor.

3. Contractor Not Entitled to Equipment Rental Rate for Use of Own Equipment. Under a GSA lease for warehouse space, the lessor was required to clean the warehouse during the work week. When GSA employees performed maintenance work during a weekend, the lessor filed a claim on behalf of its cleaning subcontractor for the additional cleaning costs. The claim included charges for use of the subcontractor's equipment based on a rental rate for similar equipment. Although it held that the contractor was entitled to additional compensation for the extra work, the board held that the subcontractor's use of equipment rental rates to price the cost of using its own equipment was unreasonable. The board suggested that the depreciation rate for the equipment might be a more appropriate pricing standard.[384]

E. Inspection and Acceptance.

1. Inspection.

a. Contractor Must Replace Nondefective Parts. In *General Electric Co.*,[385] the government issued a delivery order to General Electric (GE) for four ship propulsion turbines for the USS Kitty Hawk. During a fast cruise exercise subsequent to delivery, the government discovered one of the turbine valves was stuck. The government then conducted tests on all of the turbine valves and determined that a significant number of the valve stems and bushings on the turbines were not hardened to the required specification.[386] Acknowledging that the process it used to harden the valves and bushings was inadequate, GE followed the government's direction and replaced them all. On appeal, however, GE asserted that it was entitled to recover the cost of replacing those valve stems that were found to be hard during the government tests. The board disagreed, finding that the lack of uniform hardness was due to a deficiency in the manufacturing process, and therefore, the government had a sufficient basis to reject all valve stems made under that process.

b. Grooving is Destructive! During the construction of a hospital at Bremerton, Washington, the Navy directed the contractor to take samples of liquid glazed coating on walls and doors and forward them to an independent testing laboratory.[387] To comply with this directive, the contractor selected a testing laboratory that cut grooves in the coatings and then measured their

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[380] The Federal Circuit rendered this decision prior to its decision in *Reflectone, Inc. v. Dalton*. 60 F.3d 1572 (Fed. Cir. 1995). *Reflectone* overruled *Dawco Const., Inc. v. United States*, 930 F.2d 872 (Fed. Cir. 1991), and held that a preexisting dispute was not required to establish a "claim." As a result, since this case cited *Dawco*'s preexisting dispute requirement in holding that the REA was not a claim, there is now an unanswered question concerning whether the court would have changed its decision had *Reflectone* been the law. *See* text *infra* § III.H.1. for further discussion of the *Reflectone* decision.

[381] *See* Eichleay Corp., ASBCA No. 5183, 60-2 BCA ¶ 2688.

[382] Mech-Con Corp., ASBCA No. 45105, 94-3 BCA ¶ 27, 252.

[383] 61 F.3d 883 (Fed. Cir. 1995). *See also* Sippial Elec. & Constr. Co. v. Widnall, No. 93-1276, 1995 U.S. App. LEXIS 31166 (Fed. Cir. Nov. 2, 1995) (failure to prove either actual damages or that delay idled workforce does not bar *Eichleay* recovery).

[384] Greenville Storage & Inv. v. General Serv. Admin., GSBCA No. 13059, 95-1 BCA ¶ 27,554.

[385] ASBCA No. 45936, 95-1 BCA ¶ 27,541.

[386] The government used a portable hardness tester to determine that eight of the stems were soft and twenty were hard. Using a "file scratch" test, the government found fourteen hard bushings and thirteen soft. Although neither test covered the tested item 100%, GE did not object to the testing methods used. *Id.* at 137,243.

[387] Santa Fe Eng'rs, ASBCA No. 48409, 95-1 BCA ¶ 27,526.

thickness. The test results indicated that most of the coatings complied with contract specifications. Unfortunately, the grooves could not be repaired without recoating the entire wall. After recoating the walls, the contractor filed a claim for reimbursement for those walls which had passed the thickness tests. The Navy denied the claim by asserting that no work had been removed or torn out within the meaning of the Inspection and Acceptance clause.[388] *Au contraire*, said the board on appeal by finding that the cutting of grooves in the liquid glaze coatings was indeed *removing or tearing out* within the meaning of the contract, and therefore, the contractor was entitled to an equitable adjustment for recoating those walls that met contract requirements.

2. Acceptance.

a. Acceptance Precludes Default Termination . . . . The Construction Inspection clause provides that acceptance is final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or the government's rights under any warranty or guarantee.[389] The government discovered, to its detriment, just what "final and conclusive" means in *Hogan Construction Co.*[390] In this building renovation case, the government conducted a "prefinal inspection" and noted discrepancies in some of the mortar work. Nevertheless, the government conducted a "final punchlist follow-up inspection" two months later, but failed to mention the mortar work. Shortly thereafter, the government took beneficial occupancy of the building, noting just four punchlist items and four warranty items remained to be completed, but again failed to mention the mortar work. Five months later, the government directed the contractor to replace the mortar. Significantly, in several memorandums for record, the contracting officer referred to the rework as warranty work, and the government paid the contractor all amounts due except the retainage. The government eventually terminated the contract for default for failing to perform the rework in a timely manner. On these facts, the board determined that the government had accepted the construction work, which precluded termination for default.

b. Unless There Is a Latent Defect. The government fared somewhat better in *Spandome Corp. v. United States*,[391] wherein the Defense Logistics Agency (DLA) contracted with Spandome for a "tensioned fabric structure" intended to protect containers of hazardous liquids. Eighteen months after the government accepted the structure, storms deposited two feet of snow and several inches of rain on top of the structure causing it to collapse. The DLA revoked its acceptance of the structure due to a latent defect, and when the contractor failed to offer a plan to correct the deficiencies, terminated the contract for default.[392] The COFC upheld the DLA's action, finding that the structure had a design defect which caused it to collapse. Nevertheless, the COFC found that the contractor was entitled to a credit for the portion of the structure that the DLA used for eighteen months after the collapse. Moreover, the contractor was not liable for the costs of dismantling and removing the structure because the DLA unreasonably gave the contractor only twenty-four hours to perform this work.

F. Terminations for Default.

1. Abuse of Discretion.

a. The FAR *Factors for Government's Benefit, Not Contractor's.* The *FAR* requires the contracting officer to consider seven factors prior to terminating a contract for default.[393] Contractors have successfully asserted, in some cases, that the government's failure to properly consider these factors prior to termination constitutes an abuse of discretion.[394] The CAFC put

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[388] The clause used predates the *FAR*, however, the pertinent provisions are substantially the same as *FAR 52.246-12, Inspection of Construction*. The clause used in the contract required the contractor to provide, without additional charge, all facilities, labor, and material needed to perform safe and convenient inspections. The clause also authorized the government to examine already completed work by removing or tearing it out. If the government found the work to be nonconforming due to the contractor's fault, the contractor bore the expense of reconstruction, but if the work met contract requirements, the government was required to compensate the contractor for the examination and reconstruction.

[389] *FAR 52.246-12, Inspection of Construction.*

[390] ASBCA No. 39014, 95-1 BCA ¶ 27,398.

[391] 32 Fed. Cl. 626 (1995).

[392] The contract contained *FAR 52.246-2, Inspection of Supplies—Fixed Price*. The clause allows the government to revoke acceptance for latent defects and to require the contractor to correct or replace nonconforming supplies at the contractor's expense. The clause further provides that if the contractor fails to correct or replace as required, and does not cure such failure within ten days, then the government may correct or replace the supplies and charge the costs to the contractor. FAR, *supra* note 98, 52.246-1(l). Interestingly, the clause does not provide the government the right to terminate for default if the contractor fails to correct or replace. The government must, therefore, rely on its rights under the default clause, *FAR 52.249-8, Default (Fixed-Price Supply and Service)*, to terminate the contract.

[393] FAR, *supra* note 98, 49.402-3(f) [hereinafter FAR factors]. The factors include the terms of the contract and applicable law; the specific failure of the contractor and its excuses; the availability of supplies from other sources; the urgency of the need for the supplies and the time required to obtain them from other sources; the degree of essentiality of the contractor and the effect of a termination on its capability as a supplier under other contracts; the effect on the contractor's ability to liquidate guaranteed loans, advance payments, or progress payments; and any other pertinent facts or circumstances.

[394] *See* Jamco Constructors, Inc., VABCA No. 3271, 94-1 BCA ¶ 26,405, *aff'd on recon.*, 94-2 BCA ¶ 26,792; S.T. Research Corp., ASBCA No. 39600, 92-2 BCA ¶ 24,838.

these factors in perspective in *Frank D. Minelli, dba Swiss Craft Professional Painters v. United States*.[395] In this case, the government default terminated a contract to paint reservoir control gates on two dams in Oklahoma because the contractor failed to make sufficient progress.[396] On appeal, the contractor asserted that the contracting officer abused his discretion by failing to consider several factors prior to the default termination. The CAFC rejected the contractor's argument and granted summary judgment for the government, holding that the *FAR* factors create no rights in contractors. While recognizing that a contracting officer's failure to consider the *FAR* factors may shed light on whether he has abused his discretion by "precipitously terminating the contract for default," the CAFC ruled that the factors were not designed to benefit contractors, but to aid the contracting officer's exercise of discretion.[397]

b. Must the Government Have Considered the FAR *Factors When Justifying Termination on Alternative Grounds? Board Decides Not to Decide*—Courts and boards will sustain a default termination when justified by circumstances at the time of termination even if the government was unaware of those circumstances and terminated the contract for other reasons.[398] When the government relies on an alternative basis to terminate, a question arises as to what extent the board can, and should, review the contracting officer's exercise of discretion. The ASBCA addressed this issue in *Spread Information Sciences, Inc.*[399] but failed to resolve it. In this case, the government default terminated the contractor's computer contract for failure to deliver on time, and on appeal, moved for summary judgment on the basis that the contractor erroneously certified that it had not had a contract terminated for default within the preceding three years.[400] The ASBCA refused to decide whether the abuse of discretion standard enunciated in *Darwin Construction Co. v. United States*[401] applied when the government seeks to justify its default termination on an alternative basis. While noting that standard principles of abuse of discretion would seem to apply because the false certification provision did not make termination mandatory, the ASBCA found it to be "more debatable" whether the *FAR* factors would apply to a termination outside the Default clause.[402] Nevertheless, the ASBCA granted summary judgment to the government after reviewing the contracting officer's decision to terminate for failure to deliver, concluding that the contracting officer's decision was not improperly motivated, and that she reasonably considered the *FAR* factors prior to issuing the default termination.[403]

c. Absence of Good Faith Not Equivalent to Bad Faith. The government default terminated a dredging contract at Fort Richardson, Alaska after the contractor demobilized its work force and refused to proceed.[404] Sustaining the appeal, the board agreed with the contractor that it had not abandoned the contract, but was justified in ceasing performance because the government failed to issue appropriate instructions on how to proceed and failed to obtain wetlands permit authority for the dredging work. Not satisfied with recovery under the termination for convenience clause,[405] however, the contractor asserted that it was entitled to

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[395] No. 95-5018, 1995 U.S. App. LEXIS 18455 (Fed. Cir. July 18, 1995) (withdrawn from publication).

[396] *See* FAR, *supra* note 98, 52.249-10, Default (Fixed-Price Construction) (authorizing termination for default if the contractor fails to prosecute the work with diligence that will insure its completion within the time specified in the contract).

[397] 1995 U.S. App. LEXIS 18455, at *11. *See also* Jonatech, Inc., ASBCA No. 46088, 94-3 BCA ¶ 27,248 (board grants government's motion for summary judgment sustaining default termination; no abuse of discretion shown by government's failure to consider alternatives to default or the contractor's ability to perform compared to other potential sources).

[398] Kelso v. Kirk Bros. Mech. Contractors, 16 F.3d 1173 (Fed. Cir. 1994) (court sustains default termination for Davis-Bacon Act violations although government terminated contract for failure to make timely delivery).

[399] ASBCA No. 48438, 1995 ASBCA LEXIS 275 (Sept. 29, 1995).

[400] *See* FAR, *supra* note 98, 52.209-5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters (authorizing default termination for knowingly rendering an erroneous certification concerning whether the contractor has had one or more contracts terminated for default by any federal agency in the preceding three years). The Department of Treasury had default terminated its contract with Spread less than two years prior to its certification, and Spread did not dispute that it knew of the prior termination.

[401] 811 F.2d 593 (Fed. Cir. 1987) (holding that a contracting officer's decision to terminate will be set aside if the court determines the decision was arbitrary, capricious, or an abuse of discretion).

[402] 1995 ASBCA LEXIS 275, at *15. Numerous other *FAR* clauses authorize termination for default, including *FAR 52.203-3, Gratuities*; *FAR 52.203-5, Covenant Against Contingent Fees*; *FAR 52.222-26, Equal Opportunity*; *FAR 52.228-1, Bid Guarantee*; *FAR 52.246-2, Inspection of Supplies—Fixed Price.* As the board noted, a "larger question" is whether the procedures and remedies of the default clause, as well as *FAR Part 49*, apply to default terminations under these other contract provisions. *Id.*

[403] The board decided that, when reviewing a default termination on a later discovered ground, the only *FAR* factor which could not be "readily reviewed" is *FAR 49.402-3(f)(2)*, "the specific failure of the contractor and the excuses for the failure." The board found this factor to be satisfied, because Spread never alleged that the contracting officer would not have exercised her discretion to terminate on that ground. *Id.* at *16.

[404] Marine Constr. & Dredging, Inc., ASBCA No. 38412, 95-1 BCA ¶ 27,286.

[405] FAR, *supra* note 98, 52.249-2, Termination for Convenience of the Government (Fixed-Price) (limiting contractor's recovery to the costs of work performed, a reasonable profit on those costs, and the costs of settlement). The construction default clause provides that if a default termination is determined to be improper, "the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of the government." *Id.* 52.249-10(c).

breach of contract damages due to the government's bad faith in awarding and administering the contract. Specifically, the contractor asserted that the government prepared contract documents ineptly, misrepresented the scope of the work, delayed notice to proceed, failed to clarify and resolve the scope of authorized dredging, and refused to decide its claims and make contract payments. While agreeing that the government's administration of the contract was *seriously flawed* and that government officials displayed ignorance and insensitivity, the board nevertheless found no malice or designedly oppressive conduct that would constitute bad faith.[406] The board reasoned that the government's breach of its duty of good faith and fair dealing is not tantamount to bad faith, and thus the contractor's recovery is limited by the termination for convenience clause.[407]

2. Termination for Minor First Article Defect Improper. In *AYA Technology, Inc.*,[408] the Air Force terminated a contract for phase shifters[409] after the contractor's first article failed a government test.[410] On appeal, the contractor demonstrated that the performance failure was due to a nonfunctional circuit chip, and that identification and correction of this defect took no more than fifteen minutes. The board had little problem finding that the defective first article was easily correctable and did not provide the government a valid basis to terminate the contract.

3. Two-Hundred Day Forbearance Does Not Constitute Waiver. Courts and boards have long held that the government may waive the contract delivery date if it fails to terminate the contract within a reasonable time and the contractor relies on such inaction by continuing performance.[411] Nevertheless, in *Case, Inc. v. United States*,[412] the CAFC made it clear that the government's reasonable attempts to accommodate a delinquent contractor will not be construed as waiver. In this case, the Defense Personnel Support Center (DPSC) awarded a contract to Case, Inc. for fire resistant coveralls. Shortly after Case, Inc. failed to meet the delivery date under a revised delivery schedule, the contracting officer issued a show cause notice. Two months later, the contracting officer rejected Case, Inc.'s request to provide assistance in locating supplies. After meetings the following month, the contracting officer rejected Case, Inc.'s plan for completion of the contract, but allowed Case, Inc. additional time to seek financing from the Small Business Administration. After providing Case, Inc. one more opportunity to present an acceptable performance plan, the contracting officer default terminated the contract, approximately two hundred days after Case, Inc. failed to meet the first revised delivery schedule requirement. On appeal, the court rejected the contractor's assertion that DPSC waived the delivery date. Describing the contracting officer's actions as "diligent efforts to avoid termination," the CAFC held that DPSC's actions were "nothing less than reasonable forbearance" to accommodate Case, Inc.'s performance problems.[413]

G. Terminations for Convenience.

1. The CAFC Refuses to Expand Torncello.[414] In *Caldwell & Santmyer, Inc. v. Glickman*,[415] the Department of Agriculture solicited bids for construction of a plant laboratory. Prior to award, the contracting officer had information that showed that Caldwell & Santmyer, Inc. had failed to include in its bid price the cost of equipment required by the solicitation,[416] but the contracting officer ignored this information because he found "no reason to believe Caldwell's bid contained an error."[417] Shortly after award,

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[406] 95-1 BCA ¶ 27,286, at 136,026.

[407] *But see* Shawn K. Christensen, d/b/a Island Wide Contracting, AGBCA No. 94-00-3, 95-1 BCA ¶ 27,578, *aff'd on recon.*, 95-2 BCA ¶ 27,724 (board overturns default termination and awards breach damages after finding that government made a material omission of fact and breached its implied duty to cooperate). *See* text *supra* § IV.B.5. for a discussion of this decision.

[408] ASBCA No. 44374, 95-2 BCA ¶ 27,845.

[409] Phase shifters are electronic instruments used for calibration.

[410] *See* FAR, *supra* note 98, 52.209-4, First Article Approval—Government Testing (providing that the contractor shall be deemed to have failed to make delivery within the meaning of the Default clause if the contracting officer disapproves any first article).

[411] *See* Devito v. United States, 413 F.2d 1147 (Ct. Cl. 1969) (government waived delivery date by failing to terminate for forty-eight days after the delivery date); Applied Cos., ASBCA No. 43210, 94-2 BCA ¶ 26,837 (government actions encouraging contractor performance waived delivery date).

[412] No. 94-5127, 1995 U.S. App. LEXIS 7564 (Fed. Cir. Apr. 3, 1995) (nonprecedential opinion).

[413] *Id.* at *7.

[414] Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982) (holding that the Navy's failure to order its pest control requirements from the contractor was a breach of its requirements contract, rather than a constructive termination for convenience, because the Navy knew at the time of award that the contractor's price was too high and that it could obtain the services at lower cost from the Department of Navy Public Works).

[415] 55 F.3d 1578 (Fed. Cir. 1995).

[416] The equipment schedule in the solicitation included a requirement for "vendor furnished/vendor installed" equipment; the government interpreted this provision as requiring the contractor to furnish and install these items. Prior to award, Caldwell provided to the government its cost summary sheets used to determine its bid price, which showed that it had not included in its bid price any costs for this equipment.

[417] 55 F.3d at 1579. The contracting officer's opinion was based on architectural/engineering estimates and on the amounts of the next three lowest bids.

however, the contracting officer terminated Caldwell & Santmyer, Inc.'s contract on determining that the solicitation contained an ambiguity related to the furnishing of equipment that may have affected bid prices. Citing *Torncello*, the contractor argued on appeal that the termination was improper because the contracting officer had actual knowledge, prior to award, that its bid did not contain the cost of equipment, but chose to contract anyway. Rejecting this argument, the CAFC expressly refused to apply *Torncello* to situations where the government contracts in good faith, but knows of facts putting it on notice that it may have to terminate for convenience "at some future date."[418] The CAFC declined Caldwell's invitation to put an additional restriction on the government's right to terminate for convenience and held that *Torncello* is limited to bad faith terminations where the government has a preexisting intent to terminate at the time of contract award.[419]

2. Termination for Convenience Clause Trumps Minimum Quantities Clause. The Department of Housing and Urban Development awarded an indefinite quantity contract to Plaza 70 Interiors, Ltd. (Plaza) for the installation of floor coverings.[420] The contract contained an Estimated Services clause that *guaranteed* that the government would order the minimum amount of services specified in the contract and an indefinite quantity clause[421] that provided that the government *shall order* the minimum quantity of services designated. After the government terminated the contract for convenience without ordering the minimum amount of services, Plaza claimed for its lost profits, arguing that the estimated services clause superseded the termination for convenience clause. The board disagreed and found that the government's *guarantee* did not render it liable for failing to order the minimum quantities prior to termination.[422]

3. Contractor All Wet, But Government Must Pay. In June 1991, Mount Pinatubo spewed forth its volcanic fury over Clark Air Base in the Philippine Islands, leaving huge amounts of ash on the buildings. As if that were not enough, strong typhoon winds carried a heavy rainfall to the beleaguered base causing heavy damage to facilities. On realizing that the Air Force was no match for Mother Nature, the government decided to close Clark and return the installation to the Philippine government. As a result, the government terminated a renovation contract for convenience.[423] Shortly thereafter, government inspectors discovered that much of the contractor's inventory[424] had been exposed to the rain, with some items resting in standing water. The government subsequently refused to pay for the material as unserviceable. On appeal, the board rejected the government's argument that the permits and responsibilities clause[425] and the government furnished property clause[426] rendered the contractor liable for the damage to the property. The board reasoned that, because the government terminated the contract for convenience, the contractor was entitled to its allowable cost of the materials acquired for performance under the contract.[427] The mere fact that the material was damp and rusty did not render it so damaged as to be "undeliverable to the government," so the government's deduction for these amounts was improper.[428]

4. Christian[429] *Doctrine Saves Termination of Purchase Order. Roaches Check in And out at Wil*—In *C&J Assocs. v. VA Medical Center*,[430] the VA terminated a pest control contract for

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[418] *Id.* at 1582. *See also* Salsbury Indus. v. United States, 905 F.2d 1518, 1521 (Fed. Cir. 1990) (stating that *Torncello* stands for the "unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by adverting to the termination for convenience clause").

[419] *See* Operational Service Corp., ASBCA No. 37059, 93-3 BCA ¶ 26,190 (termination for convenience was an abuse of discretion because the government was aware at the time it exercised the option that either a commercial activity or the government would take over the work).

[420] Plaza 70 Interiors, Ltd., HUD BCA No. 94-C-150-C, 95-2 BCA ¶ 27,668.

[421] FAR, *supra* note 98, 52.216-22.

[422] *But see* Montana Refining Co., ASBCA No. 44250, 94-2 BCA ¶ 26,656 (holding government liable for unordered minimum quantities because the contract contained a nonstandard Termination for Convenience clause which provided that the government would not be liable for unordered quantities "unless otherwise stated in the contract").

[423] E.R. Mandocdoc Construction Co., ASBCA No. 43701, 95-2 BCA ¶ 27,800.

[424] The inventory consisted of "Contractor-Furnished U.S. Material," which is purchased by the contractor from United States suppliers and paid for directly by the government after completion of a joint inventory.

[425] FAR, *supra* note 98, 52.236-7 (contractor responsible for all materials delivered and work performed until completion and acceptance).

[426] *Id.* 52.245-4 (contractor responsible for loss or damage to government furnished property, except for reasonable wear and tear).

[427] *Id.* 31.205-26.

[428] *Id.* 49.204 (allowing reduction of the fair value of termination inventory only for material which is "destroyed, lost, stolen, or so damaged as to become undeliverable").

[429] G.L. Christian & Assocs. v. United States, 312 F.2d 418 (Ct. Cl.), *reh. denied*, 320 F.2d 345, *cert. denied*, 375 U.S. 954 (1963) (court reads termination for convenience clause into contract by operation of law). *Cf.* Michael Grinberg, DOT BCA No. 1543, 87-1 BCA ¶ 19,573 (*Christian* Doctrine applies only to mandatory clauses reflecting significant public procurement policies).

[430] VABCA No. 3892, 95-2 BCA ¶ 27,834.

default, but later withdrew the termination and substituted a no cost termination for convenience.[431] Although the purchase order used for the contract did not contain a termination for convenience clause, the board relied on the *Christian* Doctrine and read the clause into the contract by operation of law.[432] The board then rejected the contractor's assertion that the contracting officer abused his discretion when terminating the contract, noting that the contractor had numerous performance failures, including the failure to bomb the kitchen where roaches were thriving. Although the contractor apparently found nothing unusual about this situation, remarking that there was "nothing to correct" and "nothing else to do," the board denied its request for breach of contract damages.[433]

H. Contract Disputes Act Litigation.

1. What Constitutes a Claim?—One Step Forward. One of the more notable decisions rendered by the CAFC last year addressed the most fundamental element of the Contract Disputes Act (CDA)[434] appeals process—what is a claim?[435] In *Reflectone, Inc. v. Dalton*,[436] the CAFC eliminated the requirement that a CDA claim must be in dispute at the time of submission. This decision expressly overrules almost four years of case law.

In 1991, the CAFC issued a decision that sent shock waves throughout the federal contracting community by changing the manner in which CDA claims are processed. In *Dawco Construction, Inc. v. United States*,[437] the CAFC held that a dispute as to liability must exist at the time a contractor submits its claim to the contracting officer. Therefore, despite the seemingly clear language of the *FAR*, which requires the existence of a dispute for only routine vouchers and invoices, the CAFC required a contractor to establish the existence of a dispute with the agency before it could have its day in court.

In *Reflectone*, the CAFC expressly overruled *Dawco*.[438] The CAFC observed that the *Dawco* dispute requirement resulted in a process that "is a waste of the contractor's time and money . . . [t]he taxpayers' money . . . [and is] seriously inefficient, unfair and wasteful;" consequently, the CAFC characterized the dispute requirement as "contrary to the goals of the CDA."[439]

In *Reflectone*, the CAFC stated that requests such as requests for equitable adjustment (REAs) were anything but routine. The CAFC noted that unlike vouchers or invoices, REAs are comparable to an assertion by the contractor of a breach of contract by the government.[440] Thus, the elimination of the *Dawco* disputes requirement not only serves to enhance the processing of CDA claims, but better comports with the actual perceptions of the parties involved with the contract claims process.[441]

2. What Constitutes a Claim?—Two Steps Back? Unfortunately, in *H.L. Smith v. Dalton*,[442] the CAFC not only overlooked the goal of enhancing the efficiency of the CDA claims process, but actually promoted a process which thwarts the goal of resolving CDA claims short of formal litigation. At issue in *H.L. Smith*

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[431] *See* FAR, *supra* note 98, 49.109-4 (requiring contracting officer to execute a no-cost settlement agreement if the contractor has incurred no costs for the terminated portion of the contract or is willing to waive the costs incurred, and no amounts are due the government).

[432] The board determined that the termination for convenience clause was mandatory for all fixed price contracts of $100,000 or less. *Id.* 49.502. The board noted, however, that the *Christian* Doctrine would not apply to the Termination for Default clause (*FAR 52.249-8*) because the use of the clause is optional for contracts which do not exceed the small purchase [simplified acquisition] threshold. *Id.* 49.504.

[433] 95-2 BCA ¶ 27,834, at 138,789. The indestructible cockroach has been the bane of not only the VA, but of contractors, government employees, and government tenants as well. *See* Patricia Alcock, Relocation, Reimbursement for Dual Lodgings, ATM Fees, B-260326, Aug 22, 1995, 1995 U.S. Comp. Gen. LEXIS 548 (government employee claimed dual lodging costs because she was forced to vacate temporary quarters infested with cockroaches); The Hotel San Diego, B-260971, July 7, 1995, 95-2 CPD ¶ 4 (agency properly decides not to award lodging contract to protester who submitted lowest price offer, noting that protester's hotel had roach-infested laundry facilities); James F. Harper, HUDBCA No. 92-C-7529-D39, June 16, 1993, 1993 HUDBCA LEXIS 9 (government inspector found 90% of government residences for low income families infested with cockroaches, including one unit with a "swarm" of twenty-four to forty "running everywhere").

[434] 41 U.S.C. §§ 601-13 (1988).

[435] In part, *FAR 33.201* defines a claim as follows: "[A] written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. . . . A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim."

[436] 60 F.3d 1572 (Fed. Cir. 1995).

[437] 930 F.2d 872 (Fed. Cir. 1991).

[438] Interestingly, Judge Paul Michel, the author of *Dawco*, wrote the majority opinion in *Reflectone*.

[439] 60 F.3d at 1581.

[440] *Id.* at 1577.

[441] For an excellent analysis of the impact of the *Reflectone* decision see Reflectone Inc. v. Dalton: *Does It Resolve the CDA Claims Morass?*, 64 Fed. Cont. Rep., (BNA) (Nov. 6, 1995) (Special Supp.).

[442] 49 F.3d 1563 (Fed. Cir. 1995).

were nine REAs totalling almost $1.5 million.[443] The contractor alleged that it had incurred these costs as a result of government caused delays. According to the facts contained in the ASBCA decision, the REAs consisted of "broad allegations . . . without linking a specific assertion of delay or disruption to the actual dollar amounts requested through specific documentation."[444] Despite specific requests by the contracting officer for additional information, the contractor, instead, appealed its claims on a deemed denial basis. Noting that the contractor had "not submitted *any* supporting documentation" for its REAs, the ASBCA had little difficulty in finding the submissions did not constitute valid CDA claims and dismissed the associated appeals.[445]

On review, the CAFC came to a different conclusion. In *H.L. Smith*, the CAFC noted that neither the CDA nor the *FAR* require the submission of "a detailed breakdown or other specific cost-related documentation."[446] Although the contracting officer may have found the REAs lacking in supporting cost data, the absence of such information did not invalidate the actual *claim status* of the contractor's submissions. Hence, the CAFC held that the ASBCA improperly dismissed Smith's appeals.[447]

3. What Constitutes a Claim? Inadequate Documentation and the Failure to Issue a Final Decision. At issue in *Aerojet General Corp.*[448] was a certified claim for approximately $41 million. Rather than issuing a final decision within sixty days, the contracting officer informed the contractor that, due to the complexity of the claim, he did not expect to render a decision for another five months.[449] The contracting officer further stated that he required additional cost and pricing data to intelligently evaluate the claim. Finally, the contracting officer stated that the timely issuance of a final decision was "contingent upon [the contractor's] . . . cooperation" in providing the requested information.[450]

The ASBCA agreed with appellant that such a response was the equivalent to a *deemed denial* of the claim. The ASBCA ruled that by "couching" the anticipated date for rendering a final decision in "these subjective and conditional terms," the contracting officer, in effect, retained discretion to withhold a decision indefinitely.[451]

4. All Dressed Up and Nowhere to Go?—Tort Claims or Contract Dispute Act Contract Claims. For a variety of reasons, parties often characterize their cause of actions in surprising ways. Such was the case in *United States v. J&E Salvage Co.*,[452] which involved the sale of surplus shipping and storage containers. The contractor purchased several lots of surplus containers from the government with the intent of selling them as scrap metal. Unknown to either the government or the contractor, four of the containers held helicopter transmissions. On notification by the contractor of its discovery, the government requested the return of the transmissions. The contractor refused, and the government sought relief in a federal district court. Interestingly, the government asserted its cause of action as one sounding in tort—claims of conversion and replevin or both.[453] The United States Court of Appeals for the Fourth Circuit (Fourth Circuit) rejected the government's characterization, noting that "[e]ffective enforcement of the jurisdictional limits of the Contract Disputes Act mandates that courts recognize contract actions that are dressed in tort clothing."[454] Rather than "scatter[ing] government con-

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[443] *See* H.L. Smith, Inc., ASBCA No. 45111, 94-2 BCA ¶ 26,723.

[444] *Id.*

[445] *Id.* (emphasis added).

[446] 49 F.3d at 1564.

[447] The CAFC noted that the board had two options, "It may decide Smith's claims on the existing record. Alternatively it may stay Smith's claims pending a decision by the contracting officer. If the Board chooses to stay, it may direct the contracting officer to obtain additional information that would facilitate a decision." *Id.* at 1566. Interestingly, at least one commentator has questioned the court's position that a board of contract appeals can order a contracting officer to obtain additional information. *Contractor Request Can Be CDA Claim Despite Lack of Supporting Documentation—ASBCA Position is Reversed,* 37 Gov't Contractor (Fed. Pubs.) ¶ 184 (Mar. 29, 1995). Although the CDA allows a board to order a contracting officer to issue a final decision, the statute is silent with respect to directing a contracting officer to seek further documentation surrounding a contractor claim. *See* 41 U.S.C. § 605(c)(4) (1988). In fact, at least one board has read its authority narrowly in this regard and held that it may not even direct the contracting officer to issue a more detailed final decision than issued already. *See* A.D. Roe Co., ASBCA No. 26078, 81-2 BCA ¶ 15,231. Whether the same approach will continue in light of the *H.L. Smith* decision remains to be seen.

[448] ASBCA No. 48136, 95-1 BCA ¶ 27,470.

[449] For certified claims exceeding $100,000, the contracting officer must either issue a final decision within sixty days or notify the contractor when a decision will be issued. 41 U.S.C. § 605(c)(1) (1988); FAR, *supra* note 98, 33.211.

[450] 95-1 BCA ¶ 27,470, at 136,853.

[451] *Id.* at 136,854. Interestingly, the board seems to have ignored the CDA's recognition that the timing of a contracting officer's final decision may depend, in part, on the "size and complexity of the claim and *the adequacy of the information in support of the claim provided by the contractor.*" 41 U.S.C. § 605(c)(3) (1988) (emphasis added).

[452] 53 F.3d 985 (4th Cir. 1995).

[453] *Id.* at 987.

[454] *Id.* at 988.

tract claims across the judicial landscape," the Fourth Circuit remanded the case, directed dismissal by the district court, and indicated that the dispute properly belonged in the COFC, which has "specialized experience regarding the intricate world of government contracting."[455]

The ASBCA also addressed the question of whether a government cause of action was really a tort action or a Contract Disputes Act claim. *PAE International*[456] involved a building maintenance services contract at the United States Embassy in Tokyo, Japan. As part of its responsibilities, the contractor was required to deliver fuel oil for the Embassy. Unfortunately, some of the fuel oil never made its intended destination due to alleged thievery by some of the contractor's employees.[457] On discovery, the government filed a suit for tortious conversion in a Japanese court. The contractor appealed to the ASBCA, arguing that the suit was primarily a CDA-based contract action. The ASBCA noted that merely because the tort arose out of circumstances involving a contract did not make it a CDA dispute. Accordingly, the ASBCA dismissed the appeal.

5. The CDA Jurisdiction and Pre-Award Misconduct: Contract Reformation. It is well settled that the CDA confers no jurisdiction over a protester's allegation that the government breached the pre-award implied-in-fact contract to treat its bid honestly and fairly.[458] In *LaBarge Products, Inc. v. United States*,[459] however, the CAFC considered the case where the *awardee* raised a post-award challenge to pre-award government misconduct.

In *LaBarge*, the contractor presented compelling evidence that government procurement officials had improperly divulged the contractor's proposed prices to a competitor to divert the pending contract award away from LaBarge. Despite this misconduct, LaBarge still secured award after submitting its best and final offer.[460] LaBarge did not learn of the misconduct until after award and subsequently sought reformation of the contract, claiming damages related to these efforts at auctioning.[461] During the subsequent appeal, the ASBCA denied the government's jurisdictional motion and also denied the contractor's appeal. LaBarge challenged the ASBCA's decision on the merits, and the government again filed a motion to dismiss for lack of jurisdiction.

The CAFC rejected the government's argument that LaBarge's claim was similar to a disappointed bidder protest based on an alleged breach of the implied contract to treat all offers fairly. Instead, the CAFC observed that the CDA confers jurisdiction over claims relating to a contract with the government. Unlike a protest in which the protester is *not* a party to a CDA contract, LaBarge's reformation claim was clearly related to a contract it had with the government.[462] Consequently, the CAFC held that the ASBCA properly exercised CDA jurisdiction over the claim.[463]

6. The CDA Jurisdiction and "Anterior" Contract Activity: LaBarge *Applied.* In *A&S Council Oil Co. v. Lader*,[464] the United States Court of Appeals for the D.C. Circuit (D.C. Circuit) applied the COFC's approach in *LaBarge* to find a home for a contract dispute that had been repeatedly shuffled between the D.C. District Court and the COFC. At issue were Small Business Administration (SBA) subcontracts to supply petroleum products using a pricing formula set out in an interagency agreement independent of or anterior to the subcontracts. The contractors alleged that the pricing formula prevented them from securing a reasonable profit. The government, on the other hand, stood by the terms of the subcontracts. After bouncing between the district court and the COFC,[465] the D.C. District Court finally rendered a decision in favor of the subcontractors, finding the loss of

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[455] *Id.* at 990.

[456] ASBCA No. 48922, 95-2 BCA ¶ 27,787.

[457] The board decision notes that a former embassy employee, who also worked for the contractor, conspired with another oil supply contractor in the theft of the oil. Specifically, the employee would "stealthily" enter the embassy compound with an empty tank lorry, usually early in the morning. The tank lorry would then be parked next to the embassy oil tank, and using the hose from the lorry as if pumping oil into the tank, the employee would actually use the hose to suck the oil out of the embassy tank and pump the oil into the lorry. *Id.* at 138,582.

[458] *See* Coastal Corp. v. United States, 713 F.2d 728 (Fed. Cir. 1983).

[459] 46 F.3d 1547 (Fed. Cir. 1995). For more on the court's holding regarding the contractor's claim of illegal auctioning, *see* text *supra* § III.E.4.a.

[460] The procurement official responsible for contract award was not aware of the misconduct when he directed the submission of BAFOs and when he made award to LaBarge. Evidence of government misconduct came to light during the ensuing GAO protest. *Id.* at 1556.

[461] *See* FAR, *supra* note 98, 15.610(d).

[462] LaBarge had successfully performed the contract when it submitted its claim. 46 F.3d at 1550.

[463] The court also affirmed the board's decision on the merits. *Id.* at 1556.

[464] 56 F.3d 234 (D.C. Cir. 1995).

[465] Initially, the district court viewed the case as involving CDA contract claims and transferred it to the COFC. The COFC, however, concluded it lacked jurisdiction because the claims were founded on conduct "anterior" to the contract, i.e., the interagency pricing agreement for petroleum products. Consequently, it transferred the case back to the district court. *Id.* at 237.

reasonable profits to be an unconstitutional taking of property. On appeal, the D.C. Circuit reversed the lower court's decision. Citing *LaBarge*, the D.C. Circuit ruled that the subcontractor's complaint suggested a claim of duress which was clearly related to a CDA contract with the government. Hence, the subcontractor's claim fell within the jurisdictional umbrella of the CDA and properly belonged before either the COFC or the appropriate board of contract appeals.[466]

7. Jurisdiction—The CDA Does Not Cover Government Bills of Lading. At issue in *Dalton v. Sherwood Van Lines, Inc.*[467] was the ASBCA determination that the CDA provided it jurisdiction to hear an appeal involving claims arising from government bills of lading (GBLs). The government typically uses GBLs to transport household goods of its employees or servicemembers to various locations. In this case, the carrier opted to bring its claims to the ASBCA, which found jurisdiction under the CDA. The CAFC reversed the board and found that the CDA did not preempt the remedial process of the Transportation Act of 1940.[468] In arriving at this position, the CAFC noted that the Transportation Act provided a streamlined administrative resolution process that is well suited to the quick and efficient disposition of GBL based disputes. Moreover, the CAFC could find no evidence that Congress intended to displace the disputes resolution process of the Transportation Act with that of the CDA.[469] The CAFC noted that the *FAR* specifically exempts GBL based transportation service contracts from its coverage. Finally, the CAFC pointed out that the carrier could always seek judicial review before the COFC.[470]

8. Jurisdiction over Contracts Where No Appropriated Funds Involved—Installation Newspapers. In *John Higginbotham*,[471] the ASBCA asserted jurisdiction over a contract dispute in which neither appropriated nor nonappropriated funds were involved. At issue was a contract allowing the appellant to publish the base newspaper at Fairchild Air Force Base. The contractor received the exclusive right to publish the official base newspaper and retain any resulting advertising revenues generated under this venture. The contractor appealed the Air Force's decision not to extend the contract with the contractor another year. The ASBCA rejected the government's jurisdictional motion, holding that the fact no appropriated funds were obligated was irrelevant where the contracting activity was an appropriated fund activity and nonmonetary consideration was involved.[472]

9. Jurisdiction—The CDA Versus The Tucker Act. In *United Technologies Corp.*,[473] the contractor contended, in part, that the government's failure to award it part of a jet engine production contract constituted a taking of property for which it was due compensation under the Fifth Amendment of the Constitution.[474] In denying this part of the contractor's complaint, the ASBCA noted that the board's jurisdiction and the jurisdiction of the COFC are not identical. Under the express terms of the CDA, the ASBCA's jurisdiction is strictly limited to claims relating to a contract. On the other hand, the COFC's jurisdiction is prescribed by both the CDA and the Tucker Act. The Tucker Act specifically allows the COFC to hear claims "founded either upon the Constitution, or any Act of Congress."[475]

10. Reconsideration of a Final Decision: "It Ain't Over 'til It's Over."[476] A key jurisdictional prerequisite for properly appealing a final decision is whether the contracting officer's decision is *final*. A final decision, unless timely appealed, is binding on the contractor and all courts, boards of contract appeals,

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[466] The appeals court specifically held that since the subcontractors sought damages well in excess of $10,000, the district court lacked jurisdiction under the Administrative Procedures Act. *Id.* at 242.

[467] 50 F.3d 1014 (Fed. Cir. 1995).

[468] *See*, 31 U.S.C. § 3726 (1988). The court also noted that in the seventeen years since enactment of the CDA, industry practice has consistently been to resolve GBL-based claims under the Transportation Act. *Id.*

[469] To the contrary, the court noted that Congress had revised the Transportation Act several times after the enactment of the CDA. Such action, in the opinion of the court, clearly supported the position that Congress did not intend the CDA disputes process to displace that provided by the Transportation Act.

[470] *Id.* For an example of the impact of this decision, *compare* Merchants Moving & Storage, Inc., ASBCA No. 47370, 95-1 BCA ¶ 27,298 (board asserts jurisdiction over GBL-based dispute involving the Air Force) *with* Merchants Moving & Storage, Inc., ASBCA No. 48308, 95-2 BCA ¶ 27,789 (citing *Sherwood*, the ASBCA summarily dismisses similar dispute involving the Army).

[471] ASBCA No. 47425, 95-1 BCA ¶ 27,420.

[472] *Id.*

[473] ASBCA No. 46880, 95-1 BCA ¶ 27,456.

[474] United Technologies contended that both the pre-existing production contract and the contract under appeal contained an "Investment Incentive" clause, which stated in part that the government intended to award at least 30% of its engine production requirements to a second source of supply. At issue in this appeal was the government's decision to award 100% of the production requirements to a single contractor. *Id.* at 136,767.

[475] *Id.* at 136,770.

[476] Yogi Berra, commenting on the 1973 National League pennant race.

and federal agencies.[477] Contracting officers must tread carefully when continuing to communicate with contractors concerning facts underlying a previously issued final decision.

In *Sach Sinha & Assocs.*,[478] the contracting officer, as a matter of *business courtesy*, agreed to meet with appellant to discuss the agency's default termination. During the meeting, both the contractor and the contracting officer discussed the termination decision, which was framed as a final decision and properly set out the contractor's CDA appeal rights. The meeting ended with the contracting officer asking the appellant to submit its settlement suggestions in writing. On review of this submission, the contracting officer rejected the appellant's offers and stated that default termination remained in effect. No appeal rights advisory accompanied this last communication.[479]

The board reviewed these facts from the perspective of whether the contractor could have "reasonably or objectively concluded the contracting officer's decision was being reconsidered." The board held that the request for settlement suggestions resulted in appellant's reasonable conclusion that the contracting officer was reconsidering his termination decision. Further, the appeals clock never started because the contracting officer's rejection letter did not again advise the contractor of its appellate rights. Given this scenario, the board held that it could hear the appeal.[480]

11. Final Decisions and Government Claims. In *Iowa-Illinois Cleaning Co. v. General Services Administration*,[481] the government took deductions from payments made under a fixed price janitorial services contract for alleged deficiencies in contractor performance. The GSBCA held that, while the taking of a deduction may constitute a government claim, such action, in and of itself, does not confer Contract Dispute Act jurisdiction from which a contractor may appeal. According to the GSBCA, the taking of deductions by the agency must be followed by a contracting officer's final decision.[482] In this case, the agency never issued a final decision. The GSBCA specifically noted that, in the case of a contractor's claim, the failure by the agency to issue a final decision can be considered a *deemed denial*. The GSBCA noted, however, no corresponding provision existed for government claims. Hence, the GSBCA granted the agency's jurisdictional motion and dismissed the appeal.[483]

The ASBCA also came to the same conclusion in a government claim involving the calculation of pension costs in light of contractor down-sizing. In *Honeywell, Inc.*,[484] the government issued a government claim requesting $2.2 million arising from the contractor's sale and closure of one of eleven business segments. The government claim did not mention any of the other segments. At the contractor's request, this claim was subsequently followed by a contracting officer's final decision. In the ensuing appeal, the contractor attempted to expand the scope of its appeal to encompass the other business sales and closures despite the fact that the contracting officer had not issued a final decision on those events.[485] The ASBCA declined to assert jurisdiction over the other closings, holding that a contracting officer's final decision on a claim establishes the outer parameters of any resulting CDA appeal. Hence, the contractor could not *expand* its appeal to encompass the segment closures not addressed in the contracting officer's final decision. Like the GSBCA, the ASBCA noted that the CDA does not provide it the authority to "impose time limits or otherwise compel" the issuance of a final decision.[486]

In *Motorola, Inc.*,[487] the ASBCA reviewed a government claim founded on a poorly drafted final decision. At issue was a $524,000 government defective pricing claim. The audit report prepared in support of the Army claim stated two principal reasons for concluding that Motorola had improperly calculated the costs associated with one of its subcontracts. In his final decision, however, the contracting officer cited only one of the two bases indicated in the audit report.[488] On appeal, the government sought to present its case citing *both* bases as provided in the audit report. Motorola,

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[477] Under the CDA, a contractor must appeal a contracting officer's final decision to a Board of Contract Appeals within 90 days from the receipt of that decision. 41 U.S.C. §§ 605(b) and 606 (1988).

[478] ASBCA No. 46916, 95-1 BCA ¶ 27,499.

[479] *Id.* at 137,040-41.

[480] *Id.* at 137,042.

[481] GSBCA No. 12595, 95-2 BCA ¶ 27,628.

[482] *Id.* at 137,743 (citing 41 U.S.C. § 607(d) (1988)). *But see* 41 U.S.C. § 605(a) (1988) and FAR, *supra* note 98, 52.233-1(d)(1) which state that all government claims against a contractor "*shall* be the subject of a decision by the contracting officer." (emphasis added).

[483] Judge Devine dissented, arguing that in light of the inequity of such a situation, "it is the duty of the Government's contracting officer to issue a final decision *before* taking deductions . . . ." 95-2 BCA ¶ 27,628, at 137,744 (emphasis in original).

[484] ASBCA No. 47103, 95-2 BCA ¶ 27,835.

[485] The contractor also alleged that the government had adopted inconsistent positions with respect to the segment closings. *Id.* at 138,791-93.

[486] Likewise, the ASBCA also noted that the CDA does not recognize a "deemed decision." *Id.* at 138,792 (citing 41 U.S.C. § 605(a) (1988)).

[487] ASBCA No. 46785, 95-2 BCA ¶ 27,772.

[488] Interestingly, the audit report was specifically cited in and attached to the contracting officer's final decision. *Id.* at 137,806.

Inc. objected to this tactic, arguing that since the appeal involved an affirmative government claim, the board's jurisdiction was strictly limited to those reasons expressly cited in the contracting officer's final decision; therefore, the scope of the government's claim was limited to that solitary basis. The ASBCA agreed with Motorola, Inc. by concluding that it could not assert jurisdiction where "the basis of a Government claim is *possibly implied* in a final decision."[489]

12. The ASBCA Asserts Jurisdiction over a Claim Involving Costs Not Yet Incurred. Most CDA claims generally seek damages or costs already incurred. In *Fairchild Industries*,[490] however, the ASBCA was faced with a claim that included costs that the contractor had not yet incurred. At issue was a multi-year contract for the production of A-10 aircraft. The contract contained a Business Volume Adjustment clause that, in part, allowed the contractor an equitable adjustment for phase out costs once the A-10 program ended. As part of its phase out costs, the contractor claimed projected costs it estimated for "downsizing, closure operations site restoration and environmental investigation and remediation [sic]." The contracting officer denied the $15 million claim, noting, in part, that "many of the costs have not been incurred . . . may never be incurred . . . and are speculative in amount . . . ."[491] The ASBCA concluded, however, that merely because the contractor had not yet incurred the costs did not mean that it had not submitted a proper CDA claim. Because the contractor had submitted a claim in a sum certain that otherwise comported with the CDA, the ASBCA concluded that it could assert jurisdiction over the issue of entitlement even though the contractor had not yet incurred such costs.[492]

13. The CDA Remedies—Damages and CDA Jurisdiction. In *Advanced Engineering Corp.*,[493] the ASBCA declined to consider the contractor's claim for damages arising from the Air Force's seizure of alleged government property from the contractor's warehouse. Challenging the manner in which the Air Force conducted this confiscation, the contractor claimed damages for the seized materials, lost business, damage to its reputation, and punitive damages. With respect to the claims seeking compensation for a general loss of business and damage to the contractor's corporate image, the ASBCA considered such claims too speculative.[494] As to the contractor's request for punitive damages, the ASBCA held that "[a]bsent express consent of Congress, neither punitive nor exemplary damages can be recovered against the United States."[495]

14. Dissolved Corporations—Timing May Be Everything. In *Fre'nce Mfg. Co.*,[496] the ASBCA addressed the situation where a dissolved corporation appealed both a final decision denying its claim for an equitable adjustment and the agency termination for default. At the time the contractor submitted its REA for over $1 million, it was properly incorporated pursuant to Illinois state law. However, at the time the agency issued its final decision denying the REA and terminating the contract, the appellant lacked proper corporate status. The appellant also lacked corporate status when it timely appealed the agency's actions. Several months after its appeal, the appellant regained its corporate status.

The agency contended that the appellant lacked the necessary status to appeal its the final decision and termination action and requested that the ASBCA dismiss the appeals as untimely.[497] In denying the government's jurisdictional motion, the ASBCA found that under Illinois state law, upon reinstatement, corporate status "shall be deemed to have continued without interruption from the date of . . . dissolution."[498] Given such language, the ASBCA concluded that the appellant had the necessary standing to bring its appeals to the ASBCA.

15. Assignment of Claims—What Statute of Limitations Clock Applies? In *Oakland Steel Corp. v. United States*,[499] the

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[489] *Id.* at 137,807 (emphasis added).

[490] ASBCA No. 46197, 95-1 BCA ¶ 27,594.

[491] *Id.* at 137,492.

[492] 95-1 BCA ¶ 27,594, at 137,492-93 (citing Servidone Constr. Corp. v. United States, 931 F.2d 860 (Fed. Cir. 1991), the board conceded that it apparently had CDA jurisdiction over anticipated costs; however, it emphasized that its decision did *not* address the issue of whether the contractor could actually recover costs not yet incurred).

[493] ASBCA No. 46889, 95-1 BCA ¶ 27,475.

[494] *Id.* at 136,869. The ASBCA reached this result despite the fact that it noted it had the specific authority to award anticipatory profits in a breach of contract by the government. *Id.* (citing Apex Int'l Mgt. Serv., Inc., ASBCA No. 38087, 94-2 BCA ¶ 26,842).

[495] *Id.* at 136,870 (citing Missouri Pac. R. Co. v. Ault, 256 U.S. 554, 564 (1921)).

[496] ASBCA No. 46233, 95-2 BCA ¶ 27,802.

[497] *See* Micro Tool Eng'g, Inc., ASBCA No. 31136, 86-1 BCA ¶ 18,680 (dissolved corporation lacks standing to appeal).

[498] *Id.* at 138,630.

[499] 33 Fed. Cl. 611 (1995).

plaintiff submitted a claim assigned it by the contractor following bankruptcy proceedings. The contract, which involved the manufacturing of parts for aircraft catapults for the Navy, had been performed by another contractor nine years earlier.[500] The COFC dismissed the resulting appeal, in part, because the assignee was not in privity of contract with the government.[501] Additionally, the COFC ruled that, since Oakland Steel Corp. lacked such privity and did not qualify as a contractor, the CDA statute of limitations did not apply. Rather, the Tucker Act's six year statute of limitation for filing a suit applied. Because contract performance ended nine years earlier, Oakland Steel Corp.'s action was untimely.[502]

16. Laches Shuts the Door on a Contractor. At issue in *Rudolf Bieraeugel*[503] was whether the Army had paid a contractor for the installation of metal doors in a military community at Wildflecken, Germany. The contractor submitted its invoice for the work at the end of November 1983. Mysteriously, for some two and one-half years, the contractor made no mention about not receiving payment from the Army. At that point, the contractor again submitted an invoice for the work, which was returned without further processing by the Army. The contractor then waited another six years before pressing the issue of nonpayment--almost nine years after the initial submission of its invoice. By this time, the Army had destroyed its records surrounding payments made under the contract, and the ASBCA noted that witnesses who might have known something about the claim were either "dead . . . or impossible to locate."[504] Given these circumstances, the ASBCA concluded that the Army had met its burden of proving prejudice from the contractor's delinquent actions.[505]

17. Attorney-Client Relationship: "If You See a Fork in the Road, Take It."[506] At issue in *AEC Corp.*[507] was the propriety of a termination for default of a contract subsequently performed by appellant's surety. As all too frequently happens, the surety sued the appellant in state court. The surety also contended that the government was partially responsible for alleged extra costs associated with contract performance and attempted to intervene as the real party in interest in the appeal of the default termination, which the board denied.

The surety then settled its lawsuit against appellant, with one of the terms of settlement being that appellant would allow surety's counsel to represent appellant in the CDA appeal. Seeing this as a back door attempt to present its case before the board, the government argued that the legal arrangement could "preclude the Government from getting a fair trial because, by its dual representation . . . [appellant's counsel] has an incentive to not fully address, or to selectively address, the issues involved in this appeal."[508] In response, the president of AEC Corp. submitted an affidavit asserting that there was no conflict of interest and waived any conflict if one was found to exist.[509]

The board observed that it is not necessary that the party raising the conflict of interest issue have a preexisting client relationship with the subject's legal counsel. Instead, one need only show that such an arrangement would have a negative effect on the board's proceedings. Finding the appellant's affidavit to be of paramount weight, the board could not conclude that such an attorney-client relationship would impede the efficient resolution of the appeal.[510]

18. Discovery—Attorney Work Product and Preparation in Anticipation of Litigation. In *SAE/American-Mid Atlantic, Inc. v. General Services Administration*,[511] the GSBCA addressed a series of assertions by both the government and the contractor that various documents fell within the work product privilege. In reaching its decision, the GSBCA established a number of general rules regarding privileged materials. First, the GSBCA noted that "not every document generated by the parties once litigation becomes likely is protected."[512] To the extent that the parties would

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[500] *Id.* at 612-13.

[501] The court specifically noted that, like subcontractors, assignees are not in privity with the government and may not bring "a direct action for contract infringement." *Id.* at 613 (citing Thomas Funding Corp. v. United States, 15 Cl. Ct. 495, 499 (1988)).

[502] *Id.* at 615. Thanks to the FASA, the statute of limitations for contracts entered into after 1 October 1995 is now six years from the date of "accrual of the claim." This provision does not apply to claims involving fraud. *See* FASA, *supra* note 181, § 2351(a) (amending 40 U.S.C. § 605).

[503] ASBCA No. 47145, 95-1 BCA ¶ 27,536.

[504] *Id.* at 137,220.

[505] *Id.*

[506] Yogi Berra.

[507] ASBCA No. 42920, 95-2 BCA ¶ 27,750.

[508] *Id.* at 138,354.

[509] *Id.* at 138,355.

[510] *Id.*

[511] GSBCA No. 12294, 95-2 BCA ¶ 27,737.

[512] *Id.* at 138,273.

otherwise create documents in the ordinary course of business, such materials are not protected. Therefore, many of the documents generated in response to the contracting officer's request for input so he could issue a final decision were not privileged. Further, the GSBCA observed that the circumstances surrounding the creation of documents, such as their timing and whether the probability of litigation was "substantial and imminent," affected the protected nature of the material.[513] Consequently, reports analyzing the strengths and weaknesses of a contractor's claims, prepared after the final decision when litigation of the claims was well underway, were privileged. Finally, the GSBCA looked to whether the documents themselves carried any indication of attorney involvement or whether they were prepared in anticipation of litigation. If so, the GSBCA was more likely to find such material to be privileged.[514]

19. Equal Access to Justice Act—Some Basic Principles Reemphasized. In this day and age in which litigation costs are coming under greater scrutiny, the ASBCA underscored a few basic principles to keep in mind when evaluating an Equal Access to Justice Act (EAJA)[515] application. In *Applied Cos.*,[516] the ASBCA held that, absent an agency regulation to the contrary, payment of legal fees is limited to $75 per hour.[517] Because the Army had not published any regulation adjusting the maximum fee rate, the appellant was limited to a $75 per hour cap. On the other hand, the ASBCA noted that payment of fees for experts, even if they do not appear as witnesses, are allowable.[518]

In *Walsky Constr. Co.*,[519] the ASBCA provided additional guidance about resolving EAJA claims. The appellant sought recovery of paralegal costs, facsimile and courier costs, and travel and lay witness expenses. Regarding paralegal support, the ASBCA looked to the legislative history behind the EAJA to conclude that Congress intended compensation for such costs.[520] The ASBCA also allowed the appellant's facsimile and courier costs.[521] The appellant also sought reimbursement of travel expenses associated with having its "Anchorage court reporter to provide stenographic services at depositions in Fairbanks, Alaska." The ASBCA disallowed these costs, noting that absent exigent circumstances, the parties should use local court reporter resources. Finally, unlike the costs associated with expert witnesses, the ASBCA found that expenses related to costs of lay witnesses at depositions or at trial were not reimbursable. In closing, the ASBCA provided both the appellant and the government the following admonition: "A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of the fee."[522]

20. The ASBCA Experiences Drop in Appeals Docketed. According to data recently released by the ASBCA, the number of appeals filed with the ASBCA during Fiscal Year (FY) 1995 fell by almost 14%.[523] The ASBCA indicated that 1323 appeals were docketed this past FY; that compares with 1533 appeals docketed in FY 1994. Appeals docketed with the board have dropped by almost 60% since FY 1990 when 2218 appeals were received. Of the 1478 appeals disposed of in FY 1995, the ASBCA sustained approximately 11.4%; last year, the ASBCA sustained 13% of the appeals it processed. The ASBCA has 1822 appeals pending decision, the lowest level since FY 1984.[524]

V. Special Topics

A. Bankruptcy Developments.

1. Jurisdiction of Bankruptcy Courts. Federal district courts have original, but not exclusive jurisdiction over all civil proceedings arising under the Bankruptcy Code or arising in or related to a bankruptcy case.[525] In 1995, the federal courts, in-

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[513] *Id.* at 138,274 (citing Ed A. Wilson, Inc. v. General Serv. Admin., GSBCA No. 12596, 94-3 BCA ¶ 26,998).

[514] *Id.*

[515] *See* 5 U.S.C. § 504 (1988).

[516] ASBCA No. 43210, 95-1 BCA ¶ 27,371.

[517] *Id.* at 136,383. *See also* 5 U.S.C. § 504 (1988). Note that the EAJA, which governs federal courts, allows courts discretion to adjust litigation fees and costs for cost of living and other factors. 28 U.S.C. § 2412(d)(1)(A) (1988).

[518] *Id.* (citing Sterling Fed. Sys. v. Goldin, 16 F.3d 1177 (Fed. Cir. 1994)). *See also* 5 U.S.C. § 504(b)(1)(A) (1988).

[519] ASBCA No. 41541, 1995 WL 518733 (Aug 16, 1995).

[520] The board specifically noted, however, that paralegal costs were to be determined "at cost," and not the market rate. *Id.*

[521] Indeed, the specific facts of this appeal are interesting. Appellant's counsel was located in Alaska, the government counsel in Ohio, and the board in Virginia. Citing the "vagaries of first-class mail delivery between these points," the ASBCA allowed the costs of facsimiles and couriers. The board, however, specifically disallowed such costs for transmitting documents between appellant and its counsel. *Id.*

[522] *Id.* (citing Hensley v. Eckerhart, 461 U.S. 424, 437 (1983)).

[523] *ASBCA: Armed Services Contract Appeals Down 14 Percent In Fiscal 1995*, Fed. Cont. Daily (BNA) d2 (Nov. 21, 1995).

[524] *Id.* According to the ASBCA, appeals pending decision peaked in Fiscal Year 1987 when 2503 appeals were awaiting board action.

[525] 28 U.S.C. § 1334(b) (1988).

cluding the Supreme Court, accepted that a proceeding is "related to" a bankruptcy case if "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy . . . [a]n action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate."[526]

2. Primary Jurisdiction. Whether the doctrine of primary jurisdiction applies in bankruptcy proceedings continued to be controversial. This doctrine requires courts to defer to another forum when enforcement of a claim requires the resolution of an issue that, under a regulatory scheme, has been placed in the special competence of an administrative body. In such cases, the judicial process is suspended pending referral of the issue by the administrative body. The United States has asserted, with some success, that this doctrine requires bankruptcy courts to defer government contract issues to the boards of contract appeals or the COFC. However, the CAFC held this year that bankruptcy courts need not defer to CDA forums for resolution of government contract issues. Rather, the CAFC held that while resolution by the COFC or the boards of contract appeals is preferable, transfer is not required when "transfer of a relatively straightforward contract claim would cause substantial losses to the creditors . . . while resolution of the claim [by the bankruptcy court] would do no harm to the fabric of government contracting law."[527]

3. Jurisdiction After the Bankruptcy Case Ends. Dismissal of a bankruptcy case normally results in dismissal of related adversary proceedings. However, the United States Court of Appeals for the Second Circuit held this year that although the general rule favors dismissal of adversary proceedings when the underlying bankruptcy case is terminated, this was not automatic, and courts have discretion to retain jurisdiction after dismissal.[528] The scope of a bankruptcy court's jurisdiction after the case ends through confirmation of a reorganization plan continues to be controversial. However, bankruptcy courts generally exercise jurisdiction after confirmation only over controversies involving interpretation and enforcement of the reorganization plan.[529]

4. Rejection of Executory Contracts. The Bankruptcy Code permits a debtor to *reject* an executory contract.[530] Rejection is the equivalent of the debtor breaching the contract and refusing to perform its obligations. This year several courts reiterated the limited impact of rejection, holding that rejection does not extinguish the contract. Rather, rejection breaches the contract, the terms of which still control the relationship of the parties.[531]

5. Setoff Between Agencies. Setoff against a debtor in bankruptcy requires mutual debts between the parties.[532] Although the United States has long asserted, generally with success, that all federal agencies are a single creditor for setoff in bankruptcy cases, this issue continues to be controversial, and court decisions this year are mixed.[533]

6. Freezing Funds Owed by the Government, But Subject to Setoff. The Supreme Court, in a unanimous opinion authored by Justice Scalia, held that a bank's administrative hold on the debtor's checking account does *not* constitute a setoff, and therefore, does *not* violate the automatic stay.[534] The Court began by holding that whether a setoff has occurred is a question of fed-

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[526] Celotex Corp. v. Edwards, 115 S. Ct. 1493 (1995). *See also* Specialty Mills, Inc. v. Citizens State Bank, 51 F.3d 770, 774 (8th Cir. 1995); Matter of Walker, 51 F.3d 562, 568-69 (5th Cir. 1995) (all following definition articulated in Pacor, Inc. v. Higgins, 743 F. 2d 984, 994 (3d Cir. 1984)).

[527] Quality Tooling, Inc. v. United States, 47 F.3d 1569 (Fed. Cir. 1995); *but cf.* Jones Truck Lines, Inc. v. Price Rubber Corp., 182 B.R. 901, 911 (M.D. Ala. 1995) (where issue falls within the particular expertise of a government agency, bankruptcy court may (1) retain jurisdiction; (2) stay the proceedings retaining jurisdiction and referring the matter to the administrative agency for a ruling; or (3) dismiss the case without prejudice).

[528] In re Porges, 44 F.3d 159, 162-63 (2d Cir. 1995); *see also* Matter of Hanks, 182 B.R. 930 (Bankr. N.D. Ga. 1995) (court lacks jurisdiction to enforce settlement which required dismissal of case; after case dismissed, enforcement of the settlement was a contract claim to be disposed of under applicable state law).

[529] *Compare* In re Lacy, 183 B.R. 890, 894 (Bankr. D. Colo. 1995) (court has no post-confirmation jurisdiction over property already returned to the debtor) *and* In re Dutch Masters Meats, Inc., 182 B.R. 405, 408 (Bankr. M.D. Pa. 1995) ("[W]hile bankruptcy court jurisdiction generally ceases upon confirmation, the plan may reserve jurisdiction over certain matters.") *with* In re Insulfoams, Inc., 184 B.R. 694 (Bankr. W.D. Pa. 1995) *and* In re Mai Sys. Corp., 178 B.R. 50, 52 (Bankr. D. Del. 1995) (both holding that court's post-confirmation jurisdiction is as broad as it is pre-confirmation; it extends to "any proceeding that conceivably could affect the debtor's ability to consummate the confirmed plan.").

[530] 11 U.S.C. § 365 (1988).

[531] In re Flagstaff Realty Assocs., 60 F.3d 1031 (3d Cir. 1995) (rejection of a lease does not alter the substantive rights of the parties to the lease; hence, creditor-lessee could rely on lease provision permitting it to make repairs to leased property and deduct the cost of those repairs from its rent payments to the debtor-landlord).

[532] 11 U.S.C. § 553(a) (1988).

[533] *Compare* Doe v. United States, 58 F.3d 494, 498 (9th Cir. 1995) ("all agencies of the United States, except those acting in some distinctive private capacity, are a single governmental unit" for setoff against the United States); In re Holder, 182 B.R. 770 (Bankr. M.D. Tenn. 1995) (IRS and Customs are one entity for setoff); *and* In re Reed, 179 B.R. 353 (Bankr. S.D. Ga. 1995) (FmHA and CCC are one entity for setoff) *with* In re Turner, 59 F.3d 1041 (10th Cir. 1995) (mutuality lacking between SBA and ASCS for setoff in bankruptcy) (petition for rehearing en banc pending). *See also* Wallach v. New York (In re Bison Heating & Equipment, Inc.), 177 B.R. 785 (Bankr. W.D.N.Y. 1995) (state agencies as "creatures of the State" are a "single entity capable of holding mutual credits and debts" for setoff purposes).

[534] *See* Citizens Bank v. Strumpf, 116 S. Ct. 286 (1995).

eral, not state, law, and in stating the federal rule, the Court adopted the requirement of a majority of states that no setoff can occur in the absence of an intent *permanently to settle accounts*. Imposing a hold on the account while seeking relief from the automatic stay to effect a setoff does not indicate such an intent. The Court also rejected the debtor's argument that an administrative hold violated the automatic stay of acts to obtain possession of property of the estate and of acts to collect, assess, or recover a prepetition claim. Those arguments, observed the Court, were based on the false premise that funds in a bank account were property of the depositor. A hold on the bank account was merely a refusal to perform on the bank's promise to pay, not an exercise of control over the debtor's property. Thus, adopting the result urged by the debtor would proscribe what other provisions of the Bankruptcy Code "were plainly intended to permit: the temporary refusal of a creditor to pay a debt that is subject to setoff against a debt owed by the bankrupt."[535] The Court's decision should be very helpful to the government by apparently sweeping aside decisions of the United States Courts of Appeals for the Third, Fourth, and Eighth Circuits, which had held the government violated the automatic stay by withholding tax refunds and subsidy checks for later offset.

7. Recoupment. Recoupment, a creditor's right long recognized in bankruptcy proceedings, is the setting up of a demand arising from the same transaction as the plaintiff's claim to abate or reduce that claim. Where the relationship between the creditor and the debtor is contractual, and the mutual debts arise from the same contract, withholding from ongoing payments to offset earlier overpayments has generally been allowed as recoupment. Because recoupment is an equitable defense, most courts recognize that application of the defense of recoupment in a contractual context is especially appropriate and that recoupment is not subject to the automatic stay.[536]

8. Setoff and Recoupment After Discharge. Most courts continue to permit a creditor to exercise offset rights—whether characterized as setoff or recoupment—after a debtor receives its bankruptcy discharge. For example, most courts hold that a creditor may setoff a prepetition debt after discharge without violating the statutory injunctive provisions of the Bankruptcy Code.[537] Similarly, most courts recognize that recoupment is unaffected by a discharge in bankruptcy.[538]

B. Government Furnished Property.

1. Contractor Entitled to Equitable Adjustment for Defective Government Furnished Data Package Although Contractor Aware of Defect When Preparing Its Bid. A contractor that submitted a ship overhaul bid based on what it knew was a defective government furnished data package is nonetheless entitled to an equitable adjustment for the cost of remedying the defective data package delivered by the United States Navy after award.[539] The data package included in the solicitation contained extensive defects. The contractor notified the contracting officer of the defects, but based its bid on the package nonetheless. The contractor performed the work, returned the ship to the Navy, and submitted a claim for damages based on the deficient package. The contracting officer denied the claim.

The ASBCA rejected the Navy's argument that the contractor had forfeited its right to seek equitable adjustment because the contractor prepared its bid based on a package that the contractor knew was defective. The ASBCA also rejected the Navy's argument that the contractor suffered no compensable damage. The ASBCA found that the contractor could not have known from the preaward package the extent of the defects in the postaward technical package, and the contractor reasonably believed that the Navy would inspect the data package, after award prior to delivery, once being placed on notice of deficiencies.

2. The GAO Will Not Question Government Furnished Property Price Evaluations Absent Unreasonableness or Bad Faith. In *TAAS Israel Industries*,[540] the GAO refused to question the Navy's valuation of government furnished property because the valuation is a matter of agency discretion requiring the protester to show unreasonableness or bad faith. The protester also failed to show prejudice because it was determined that, even under

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[535] *Id.* at 290.

[536] In re Flagstaff Realty Assocs., 60 F.3d 1031 (3d Cir. 1995) ("[A] claim subject to recoupment avoids the usual bankruptcy channels and thus, in essence, is given priority over other creditor's claims." Where the creditor's claim for repair costs and the debtor's claim to rent payment arise from the lease relationship, they arise from the same transaction and are subject to recoupment); Matter of Coxson, 43 F.3d 189, 193-94 (5th Cir. 1995) (where creditor's and debtor's obligations arise out of the same contract, recoupment is appropriate); In re Bram, 179 B.R. 824 (Bankr. E.D. Tex. 1995) (where prepetition overpayments and postpetition payments arise by the terms of the same contract, they arise from the "same transaction"); *but see* In re Thompson, 182 B.R. 140, 147-49 (Bankr. E.D. Va. 1995) ("one contract alone, however, is not sufficient to establish a single transaction, since separate transactions may occur within the confines of the contract").

[537] In re Thompson, 182 B.R. 140, 154 (Bankr. E.D. Va. 1995) (setoff rights survive chapter 7 discharge); In re Holder, 182 B.R. 770 (Bankr. M.D. Tenn. 1995) (setoff rights survive chapter 11 discharge); In re Tillery, 179 B.R. 576, 578 (Bankr. W.D. Ark. 1995) (IRS right to setoff survives confirmation of debtor's chapter 13 plan); In re Warwick, 179 B.R. 582, 584-85 (Bankr. W.D. Ark. 1995) (same).

[538] In re Flagstaff Realty Assocs., 60 F.3d 1031 (3d Cir. 1995) (recoupment survives discharge even if creditor did not object to plan or seek a stay pending appeal); In re Bram, 179 B.R. 824 (Bankr. E.D. Tex. 1995) (recoupment does not constitute a dischargeable debt because it is essentially a defense to payment and does not permit an affirmative recovery); *but see* In re Kings Terrace Nursing Home & Health Facility, 184 B.R. 200 (S.D.N.Y. 1995) (Medicaid recoupment is a claim within the meaning of the Bankruptcy Code; hence, a right to recoupment is barred by the discharge).

[539] Northwest Marine, Inc., ASBCA No. 43673, 1995 ASBCA LEXIS 229 (Aug. 29, 1995).

[540] B-260733, July 17, 1995, 95-2 CPD ¶ 23.

the protester's valuation of the government furnished property, the protester would not have been in line for contract award.

3. Spector Signs DOD Class Deviation. The Director of Defense Procurement, Eleanor R. Spector, authorized a class deviation from *FAR 45* recordkeeping and inventory requirements for special tooling, special test equipment, and plant equipment with an acquisition cost of $1500 or less.[541] The class deviation holds defense contractors accountable for "low value property," but relieves them of the requirement to track the equipment. Periodic physical inventories need not be performed. The deviation also permits contractors to defer the reporting of the loss, damage, or destruction of such property until contract termination or completion. The deviation does not apply to "sensitive property,"which is defined as government property that the theft, loss, or misplacement of could be potentially dangerous to public health or safety, or which is subject to additional physical security, protection, control, maintenance, or accountability requirements, such as hazardous property, precious metals, arms, ammunition, explosives and classified property. The deviation is mandatory for all solicitations issued subsequent to its publication, with the exception of service contracts performed at military installations. For those contracts, the deviation is at the discretion of the contracting officer. Contracting officers may modify existing contracts to include this provision only if the contractor provides adequate consideration. The deviation is approved until 14 July 1997, or until *FAR 45* is revised, whichever comes first.

C. Payment and Collection.

1. Assignment of Claims. On 3 October 1995, President Clinton issued a memorandum to agency heads delegating to them the authority to determine the need to include a no setoff or reduction clause in contracts under the Assignment of Claims Act.[542] This clause prohibits agencies from withholding from an assignee amounts due the contractor when the government holds claims against the contractor. Under the Assignment of Claims Act, the government is authorized to use this clause during war and national emergency. The FASA broadens the circumstances under which the clause may be used by making the determination of need by the President the sole criterion.[543] The President delegated the determination of need authority to the agency heads.

According to an Office of Federal Procurement Policy official, the *FAR* Council will issue an interim rule implementing the delegation of authority.[544] The likely criteria for use of the no setoff commitment is: (1) necessary for the national defense, (2) required in the event of national disaster, (3) required in the event of national emergency, or (4) necessary to facilitate procurement.

2. Prompt Payment Act. In *Electronic & Space Corp.*,[545] the ASBCA held that a government agency must first demand payment of the underlying debt in a sum certain to be entitled to Prompt Payment Act interest on an overpayment of progress payments. The ASBCA ruled that the government's debt letter, which simply stated that it appears progress payments were overpaid, was not a proper demand letter because it only tentatively stated the debt was owed.

3. Progress Payments. Overturning an ASBCA decision[546] in a nonprecedential opinion,[547] the CAFC held that a contractor demonstrated that it had relied on the government's past practice of making full progress payments as equipment was delivered to the construction sites. The Navy adopted a policy prior to performance of the disputed contract that for certain complex pieces of equipment, 20% of the progress payment would be withheld until the equipment had been installed and tested. The contractor provided uncontroverted testimony that, in preparing its bid, it assumed the Navy would, as it had in the past, make full progress payments for equipment when it was delivered to the construction site. The CAFC found sufficient evidence to show that the contractor had relied on prior government practice and that the ASBCA should not have distinguished this case from one in which it had held that the contracting officer had abused his discretion in withholding progress payments on the basis of an unpublished directive.

D. Defective Pricing and the Truth in Negotiations Act.

1. Truth in Negotiations Act Regulations Revised. The final *FAR* rule implementing various changes to the Truth in Negotiations Act (TINA)[548] made by the FASA was published in September 1995.[549] First, the rule finalized an interim rule which increased the threshold for cost or pricing data to $500,000 for civilian agencies and made that threshold permanent for Depart-

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[541] 56 Fed. Reg. 67126 (1995).

[542] 60 Fed. Reg. 52,289 (1995).

[543] FASA, *supra* note 181, § 2451.

[544] *Contracting Out: Clinton Delegates Authority Under Assignment of Claims Act*, 64 Fed. Cont. Rep. (BNA) 13 (Oct. 6, 1995).

[545] ASBCA No. 47539, 95-2 BCA ¶ 27,768.

[546] Mallory Elec. Co., ASBCA No. 41399, 94-2 BCA ¶ 26,841.

[547] Mallory Elec. Co. v. Dalton, 60 F.3d 839 (Fed. Cir. 1995).

[548] 10 U.S.C. § 2306a (1988); 41 U.S.C. § 254(d) (1988).

[549] 60 Fed. Reg. 48,208-23 (1995).

ment of Defense, National Aeronautical and Space Administration, and the Coast Guard.[550] The $500,000 threshold will be adjusted every five years beginning 1 October 1995. This final rule also added a new exemption to the requirement for the submission of cost or pricing data for commercial items and prohibits the government from requiring the submission of such data when any exemption applies. However, the government may require the submission of information other than cost or pricing data, for example limited cost information, sales data, or pricing information, to determine cost realism or price reasonableness, and a new Standard Form (SF) 1448, replacing the SF 1412, was created as a transmittal cover sheet for such instances. The contracting officer may not require the certification of such information.[551]

Never satisfied, Congress is considering proposed legislation that would make further changes to the TINA. Section 201 of the Federal Acquisition Reform Act of 1995[552] (FARA) would exempt *all* acquisitions for commercial products and services meeting the commercial items definition from requiring the submission of cost or pricing data. This section would clarify the TINA provisions regarding submission of information for determination of price reasonableness in certain circumstances when certified cost or pricing data are not required. Finally, § 204 of FARA would exempt all contracts for commercial items from coverage of the cost accounting standards.[553]

2. *Essential Elements of Management Decisions Defined.* In one of the largest defective pricing cases ever litigated, the ASBCA provided a number of benchmarks for determining when management decisions rise to the level of cost or pricing data. At issue in *Lockheed Corp.*[554] were price negotiations associated with the $7.8 billion acquisition of fifty C-5B aircraft. In support of its claims for $95.6 million, the government contended that two management decision documents, an internal memorandum establishing goals for collective bargaining and a presentation on labor proposals, were cost and pricing data that would have had a significant impact on price negotiations had Lockheed timely provided them to government negotiators.[555]

The ASBCA rejected the government's arguments. In doing so, the ASBCA established two principles for identifying *management decisions* that constitute pricing data. First, there must be a substantial relationship between the decision and the cost element at issue. Second, the decision must have been made at a level of management which had the authority to affect the relevant cost element.[556] In this case, the ASBCA ruled that Lockheed's memorandum on collective bargaining contained few, if any, facts and generally reflected pure judgment that could not be expected to have a significant impact on cost. Similarly, the presentation documents constituted little more than business judgment based on facts already known to the government.[557] Last, the ASBCA noted that even if the government negotiators were aware of the collective bargaining memorandum, they may well have not given it the same weight during negotiations that they would have after realizing the success of the contractor's efforts with its labor force.[558]

3. *Learning Curves: Contractor Not Required to Create Documents.* The case of *Rosemount, Inc.*[559] involved a contract for the manufacture of ice detectors for jet aircraft. The government claimed $242,500 based on the contractor's alleged failure to reveal a downward trend in the labor hours required to manufacture each detector unit. During price negotiations, the contractor provided the government its labor cost reports using its standard methodology for compiling such information. The contractor did not include a reference to labor trends nor did the government representatives request such information.[560] During a postaward audit, government auditors took the same information provided by the contractor, redefined the time frame for evaluating labor hours, and plotted a learning curve, using a computer program it had available for this very purpose.[561] Laid out in this manner, the cost savings to the government were readily appar-

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[550] 59 Fed. Reg. 62,498 (1994).

[551] 60 Fed. Reg. 48,208-23 (1995).

[552] H.R. 1670, 104th Cong., 1st Sess. (1995).

[553] *Id.*

[554] ASBCA No. 36420, 95-2 BCA ¶ 27,772.

[555] The Truth In Negotiations Act defines "cost or pricing data" as: "[A]ll *facts* that, as of the date of agreement on the price of a contract (or the price of a contract modification), a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgement is derived." 10 U.S.C. § 2306a(i) (West Supp. 1995) (emphasis added).

[556] 95-2 BCA ¶ 27,772, at 138,180.

[557] *Id.* at 138,181-82.

[558] *Id.* at 138,173.

[559] ASBCA No. 37520, 95-2 BCA ¶ 27,770.

[560] *Id.* at 138,451.

[561] *Id.* at 138,453.

ent. The ASBCA, however, had little difficulty in denying the government's claim, stating that the contractor had no obligation to create a new document similar to that generated by the government's auditors.[562] Additionally, given the fact auditors commonly use learning curve analyses, the ASBCA noted the government had failed to show whether its preaward auditors or price negotiators had any interest in developing such information, much less to what extent, if any, they would have used it.[563]

4. Learning Curves Redux: 20-20 Hindsight Rejected. In *Aerojet Ordnance Tennessee*,[564] the ASBCA again reviewed the use of learning curve analyses for determining the scope of a contractor's liability under a defective pricing claim. At issue was a contract for the production of depleted uranium cores for M774 projectiles. During a post-award audit, the contractor admitted that it had overstated the labor hours involved in its production efforts. In response, the government sought to determine liability using a calculation based on learning curves. Citing to its recent decision in *Rosemount*, the ASBCA pointed out that "[c]are must also be taken to try to . . . avoid imposing an after-the-fact perspective on how the negotiations should have been conducted to produce improved results from a particular party's point of view."[565] Although all the parties were aware that learning efficiencies were occurring, the ASBCA noted the government negotiator did not like to use learning curves, viewing them as an impediment to negotiations. Given these facts, the ASBCA declined to calculate liability using learning curves, but instead directed the parties to determine liability as measured by the DCAA in a separate audit and previously agreed to by the contractor.[566]

5. Changes in Accounting Practices Covered by Both Defective Pricing Clause and Cost Accounting Standards Regulations. At issue in *McDonnell Douglas Corp.*[567] was the contractor's failure to apprise the government during price negotiations of the savings associated with a change in accounting procedures. The parties reached price agreement on 31 October with the contractor submitting a cost and price certificate on 15 November following a postnegotiations "sweep."[568] During the postaward audit, the government discovered the contractor's omission and filed a defective pricing claim for approximately $22 million. In response, McDonnell Douglas Corp. (MDC) filed a motion for summary judgement, arguing that the government's claim was not governed by the defective pricing clause of the contract. Instead, the contractor argued that the government's cause of action was covered by *Cost Accounting Standards (CAS)*, which are provisions addressing adjustments required for *CAS* covered contracts that provide their own specific relief. In denying MDC's motion, the ASBCA held that the contractor had "misconstrue[d] the nature of the Government's claim."[569] What was at issue was not the impact of the change in accounting procedures as calculated under applicable *CAS* provisions, but that the contractor had failed to provide information about the planned accounting changes that "prudent buyers and sellers would reasonably expect to have a significant effect on price negotiations."[570]

E. Costs and Cost Accounting.

1. Cost Accounting Standards.

a. Changes in Cost Accounting Standards.

(1) In *Perry v. Martin Marrietta Corp.*,[571] the CAFC upheld the ASBCA's decision that an internal reorganization is not a change in cost accounting practice, which would obligate the contractor to amend its disclosure statement and submit a cost impact proposal.

(2) The DCAA has issued audit guidance regarding changes in accounting practices resulting from corporate reorganizations in reaction to the *Perry v. Martin Marietta*[572] decision. The rule states: "A corporate reorganization involving a change in the grouping of segments for home office expense allocation purposes should not be considered a change in accounting prac-

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[562] *Id.* at 138,455 (citing Hughes Aircraft Co., ASBCA No. 30144, 90-2 BCA ¶ 22,847).

[563] *Id.*

[564] ASBCA No. 36089, 1995 WL 547716 (Sept. 7, 1995).

[565] *Id.* at *154.

[566] Not surprisingly, this separate calculation was far more favorable to the contractor. *Id.* at *158-59.

[567] ASBCA No. 44637, 95-2 BCA ¶ 27,858.

[568] The record also shows that on 1 November, MDC submitted to an administrative contracting officer notice of its intent to change accounting procedures. The contractor, however, failed to apprise the contracting officer of the significance of this information to the contract at issue in this appeal. Additionally, MDC's certificate of cost/pricing data indicated that its information was "accurate, complete, and current" as of the price agreement date, 31 October. *Id.* at *5-6.

[569] *Id.* at *16-17.

[570] *Id.* at *17.

[571] 47 F.3d 1134 (Fed. Cir. 1995).

[572] *Id.*

tice unless the method or technique used to allocate the cost changes. For all other circumstances, auditors need to evaluate the specifics of each situation on a case by case basis to determine whether a change in accounting practice has resulted from a change in the measurement, allocation, and assignment of costs."[573] This guidance is intended to narrow the application of *Perry v. Martin Marietta* to its facts. Prior to the CAFC's decision, contractors with previously recognized changes in cost accounting practices reversed their positions to argue there had been no changes. The guidance attempts to prevent this by evaluating each change separately. The Cost Accounting Standards Board has proposed cost accounting standards changes intended to prevent another *Perry v. Martin Marietta* result, but the DCAA guidance governs until the final cost accounting standard rule is effective.

b. Cost Accounting Standard 420.

(1) In accordance with *Cost Accounting Standard 420*, research and development costs incurred by a corporate subsidiary solely engaged in developing a manufacturing machine must be allocated to that subsidiary.[574] QuesTech, Inc. appealed a contracting officer's final decision seeking the return of money taken as a result of a disallowance of costs incurred by a subsidiary. Although QuesTech, Inc. argued the costs were incurred for the benefit of the segments as a whole and thus properly allocated to the home office, a government audit found that research and design costs should have been retained and absorbed by the subsidiary. The ASBCA rejected QuesTech, Inc.'s argument that the ASBCA should accept the *broad benefits test* and stated that the specific language of the cost accounting standard must be applied. *Cost Accounting Standard 420.40(a)* states that "the basic unit for the identification and accumulation of independent research and development and bid and proposal costs shall be the individual . . . project." In the present case, since the costs were entirely accumulated and maintained by the subsidiary, QuesTech, Inc. was not allowed to allocate the costs to all its government contracts.

(2) The Department of Defense, the General Services Administration, and the National Aeronautic and Space Administration have proposed revisions to the *FAR* definition of bid and proposal costs that would clarify that those costs related to funding instruments (contracts, grants, cooperative agreements, and other similar types of agreements) are allowable costs. The current definition does not address grants or cooperative agreements. The goal is to make the cost principle compatible with the definition found in *Cost Accounting Standard 420.*[575]

c. Cost Accounting Standards*: Allowable Costs.*

(1) The GAO decided that there is no requirement that a proposed contractor's prices for a fixed price contract encompass estimated performance costs.[576] The GAO also stated that it does not review an awardee's attempt to recoup direct contract costs indirectly from the government as this is a matter of contract administration. The *CAS* requirements establish rules for the consistent accumulation and reporting of cost data and do not require a contractor to base its fixed prices upon any particular allocation of costs.

(2) On 8 March 1995 the Cost Accounting Standards Board issued an interim interpretation on assignment and allocation of restructuring costs.[577] Amortization of certain costs over a five year period is permitted by the interpretation. Also permitted is the presumption that cost accounting practice changes made to permit such amortization are not detrimental to the government. While the interpretation states that most categories of restructuring costs should be recognized in the accounting period in which they are incurred, it permits deferral and amortization over a five year period. Where a contractor must change its established or disclosed cost accounting practices to defer such costs, the interpretation establishes a presumption that such change is desirable and not detrimental to the interests of the government. Restructuring costs include both direct and indirect costs (severance pay, early retirement incentives, retraining, employee relocation, lease cancellation, asset disposition, and write-offs) associated with contractor restructuring activities taken after a business combination is effected or after an internal corporate restructuring decision is made. The cost impact on existing *CAS* covered contracts is measured by the difference between an estimate to complete before giving effect to the restructuring and an estimate to complete considering restructuring.

d. Cost Accounting Standards 412 and 413*: Pension Costs.* The Cost Accounting Standards Board (CAS Board) has published its final revisions to *Cost Accounting Standards 412 and 413.*[578] For qualified pension plans, the full-funding limitation of the Employee Retirement Income Security Act (ERISA) is incorporated such that contributions in excess of that amount would not be recognized for government cost accounting purposes. Although critics opposed the adoption of the ERISA full-funding

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[573] DEFENSE CONTRACT AUDIT AGENCY, ACCOUNTING PRACTICE CHANGES, 95-PAD-090(R) (June 9, 1995).

[574] QuesTech, Inc., ASBCA No. 45127, 95-2 BCA ¶ 27,743.

[575] 60 Fed. Reg. 43,508 (1995).

[576] SAIC Computer Sys. Inc., B-258431, Mar. 13, 1995, 95-1 CPD ¶ 156.

[577] Cost Accounting Standards Board, Interim Interpretation 95-01, Mar. 8, 1995. The CAS Board issued this interim interpretation in reaction to *Martin Marietta*, 47 F.3d 1134.

[578] 60 Fed. Reg. 16,534 (1995).

limitation and supported full accrual accounting, the CAS Board determined that full-funding is needed to substantiate the cost allocation because of the magnitude of the liability and the extended delay between the accrual of the cost and the settlement of the liability.[579] For nonqualified plans, the CAS Board adopted a complementary funding approach that reimburses incurred costs to the extent they are funded to the complement of the contractor's corporate income tax rate. The addition of a zero dollar floor to the costs assigned to a period for qualified plans eliminates any inequity between a requirement to credit negative costs to contracts and the contractor's inability to make withdrawals from the funding agency. The rule expanded the types of events requiring a current period of adjustment where the difference between assets and the value of accrued benefits is charged or credited to the current accounting period. The rule also includes transition methods and illustrations.

e. False Claims Act and Cost Accounting Standard 418. The United States Court of Appeals for the Ninth Circuit held that pooling of direct costs is not expressly prohibited by *CAS 418* and is not necessarily a violation of the False Claims Act.[580] Although the False Claims Act provides a remedy for knowing submission of costs expressly specified as unallowable by regulation or statute, *CAS 418* only requires that direct costs be allocated to the contracts they benefit. The government failed to show the basis for charging the costs was other than a measure of the actual work performed for the benefit of a given contract.[581]

2. The FAR *Cost Principles.*

a. The DFARS *Revised: Contractor Restructuring Costs.* On 5 January 1995, the Defense Acquisition Regulation Council issued an interim *DFARS* rule making a contractor's external restructuring costs unallowable unless the Office of the Secretary of Defense determines that the costs of restructuring will be outweighed by cost savings to the government.[582] Following expression of industry concern, the DOD withdrew the rule. This means allowability of restructuring costs will continue to be governed by the *FAR* cost principles.[583]

b. Allowable Costs.

(1) Protest Costs. A proposed FAR) cost principles change, which would make protest costs unallowable, soon will be issued for public comment. The draft rule, *FAR Case 93-010*, adds costs related to legal and other proceedings as unallowable costs. An exception has been provided for intervenors on the side of the government to defend their awards. The draft rule would not affect cost awards to prevailing protestors by the protest forum.[584] The draft *FAR* change is now in final clearance.

(2) Employee Gifts, Meals, and Recreation Costs.

(a) Gift and recreation costs for contractor employees, except for company sponsored sports teams and fitness centers, are now expressly unallowable. The new rule, issued 16 August 1995, closes a loophole in the cost principles that previously allowed contractors to bill the government, under provisions governing employee health and morale, for the costs of items such as fishing vacations and sporting events. These same costs are now unallowable as entertainment costs.[585]

(b) The CAA and DAR Councils propose to amend the cost principles to clarify the allowability of the cost of business meals for contractor employees. The proposed rule retitles *FAR 31.205-46* as "Travel Costs and Business Meals" and adds a new paragraph making the cost of meals for contractor employees unallowable unless the employee is on official business travel, or the meals are an integral part of the contractor's business activities. Under *FAR 31.205-43(c)*, costs of attendance at meetings, conferences, or seminars when the principal purpose is the dissemination of trade, business, or technical or professional information or the stimulation of production or improved productivity are allowed.[586]

(3) Stockholder Suits. On 13 April 1995, the DCAA issued audit guidance requiring auditors to question contractor costs in defense of stockholder lawsuits relating to contractor wrongdoing. Wrongdoing includes proceedings brought by the government against the contractor, suits brought by contractor employees under the False Claims Act,[587] and intentional harm to other persons or reckless disregard for harmful consequences of the contractor's actions. Because an allegation of wrongdoing is not sufficient evidence to establish unallowability of costs, the auditor must determine that an allegation not resulting in a judgement is supported by independent evidence that convinces an impartial factfinder that wrongdoing has occurred.[588]

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[579] *Accounting: Final CAS Rule On Pension Costs Affirms NPRM Approaches, Including Full-Funding Limit*, 63 Fed. Cont. Rep. (BNA) 12 (Mar. 27, 1995).

[580] 18 U.S.C. § 287 (1988).

[581] Schumer v. Hughes Aircraft Co., 67 F.3d 1512 (9th Cir. 1995).

[582] 60 Fed. Reg. 1747 (1995).

[583] *Id.* 53,321.

[584] *Id.* 54,918. *See* text *supra* § II.G.2. for further discussion of this proposed rule.

[585] 60 Fed. Reg. 42,648 (1995).

[586] *Id.* 43,508.

[587] 31 U.S.C. § 3729-30 (1988).

[588] *DCAA To Question Costs in Stockholder Suits*, 64 Fed. Cont. Rep. (BNA) 4 (July 24, 1995).

(a) Facilities Capital Cost of Money. In a firm-fixed-price contract for which cost or pricing data is not required, the *FAR* do not require prospective contractors to elect or identify facilities capital cost of money (FCCOM)[589] in the original proposal to avoid waiving facilities capital cost of money in subsequent cost based changes.[590]

American Telephone and Telegraph Co. (AT&T) asserted that its initial price proposal for its contract included FCCOM in its bottom line price, and AT&T maintained that it did not expressly identify FCCOM as an element of cost because it was exempt from the requirement to provide cost or pricing data.[591] The GSA twice notified the contractor that cost or pricing data was required for the proposal. On both occasions, AT&T stated that the requirement to provide cost or pricing data was inapplicable because of the adequate price competition, and GSA did not make further requests for cost or pricing data or perform a cost reasonableness analysis. In December 1988, AT&T was awarded a fixed-price ten year contract. Subsequently, AT&T submitted change proposals for the pricing of modifications and included FCCOM in the proposals. The contracting officer denied the request on the grounds that FCCOM was not provided during the negotiation of the contract.

Under the *FAR*,[592] the board ruled that the requirement that a prospective contractor propose FCCOM to avoid waiving it is contingent on the applicability of cost principles for contracts with commercial organizations. If a prospective contractor fails to identify or propose FCCOM in a proposal for a contract that will be subject to the cost principles for contracts with commercial organizations, FCCOM will not be an allowable cost in any resulting contract.[593] The board's conclusion is consistent with the purpose of the FCCOM election requirement, which is to prevent a contractor from receiving FCCOM as both a cost and an element of profit.[594] The board found no danger of double compensation in the present case because the contract was not cost-based. Further, the board found no suitable means for election of the FCCOM short of submission of cost or pricing data.

(b) Executive Compensation Practices. In *Information Systems & Networks Corp.*,[595] the ASBCA held that a contractor is entitled to adequate notice that the government would no longer approve of the contractor's long and consistent use of its executive compensation practices, which were previously known to and approved by the government. In such circumstances, a contractor may reasonably rely on the government's acquiescence when it prospectively determines its method of calculating executive compensation; in this case, the ASBCA denied the contractor's motion for summary judgment on a government claim for repayment of $680,000 in excess executive compensation. The ASBCA found the evidence did not clearly establish government approval or acquiescence in the contractor's executive compensation practices.

(c) Costs of Defending *Qui Tam* Suits. The Department of Justice (DOJ) intervenes in less than 20% of *qui tam* lawsuits filed against government contractors. The DCAA issued a guidance memorandum on 24 August 1995,[596] which reflects the DOJ's view by stating that costs of defending against any *qui tam* suit are to be evaluated under *FAR 31.205-47*, and if such a suit is settled, the costs would normally be disallowed.[597] This guidance seems to ignore the explicit language of the cost principle, which disallows only costs incurred in connection with any proceeding brought by the government. If the government does not intervene, it cannot be said that the suit has been brought by the government.[598]

(d) Authority to Examine Books and Records. The CAA and DAR Councils issued a final rule on 16 August 1995, which made several changes to the government's authority to examine a contractor's books and records.[599] The rule permits contractors to store records in electronic form, restricts contract-

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[589] Facilities capital cost of money is an imputed economic cost designed to compensate a contractor for the opportunity and inflationary costs of holding fixed assets used to perform a contract. The FCCOM is calculated by applying a cost of money rate to a contractor's facility capital measured and allocated to a contract.

[590] American Tel. & Tel. Co. v. General Serv. Admin., GSBCA No. 11730, 1995 WL 490507 (May 31, 1995).

[591] The *FAR 15.804-3* provides that cost or pricing data need not be supplied by the contractor if there is adequate price competition. FAR, *supra* note 98.

[592] *Id.* 15.903(c).

[593] *Id.* 52.215-31, Waiver of Facilities Capital Cost of Money.

[594] *Allowable Costs: AT&T Was Not Required To Identify Facilities Capital Cost of Money In Original Proposal For Firm Fixed Price FTS 2000 Contract in Order To Claim FCCOM In Subsequent Cost-Based Changes, GSBCA Says*, 64 Fed. Cont. Rep. (BNA) 8, (Aug. 21, 1995).

[595] ASBCA No. 46119, 1995 WL 645763 (Nov. 2, 1995).

[596] Memorandum, Defense Contract Audit Agency, subject: Audit Guidance on Allowability of Legal Costs Associated with Qui Tam Suits (Aug. 24, 1995).

[597] Settlements of suits in which the Government does not intervene are often made as prudent decisions based upon the "nuisance" aspect of defending such suits, with no admission of fraud or liability. It is likely that the current DCAA guidance will have the effect of discouraging such settlements because defense costs will now be allowable only if the contractor prevails in the lawsuit.

[598] Nor can it be assumed the government would have brought suit had it had the opportunity to do so because the government found insufficient facts to intervene.

[599] FAC 90-31, 60 Fed. Reg. 42649 (1995) (effective Oct. 1, 1995, implementing FASA §§ 2201(a); 2251(a); 4102(c); 4103(d)).

ing officers from requesting a preaward audit of indirect costs if the results of a recent audit are available, and deletes the separate examination of records by comptroller general clause.[600] The rule inserts the authority in two other clauses.[601]

F. Intellectual Property.

As mandated by the FASA, the final *FAR* rule implementing changes to the government's ability to acquire technical data was published in September 1995.[602] Under the new *FAR 12.211*, the government will obtain only the technical data and rights to such data customarily provided to the general public with a commercial item, except as provided by agency specific statutes. Additionally, the new *FAR* provision states that the government will acquire commercial computer software under "licenses customarily provided to the public to the extent such licenses are consistent with Federal law and otherwise satisfy the Government's needs."[603]

On 28 June 1995, the DOD published final rules implementing its new policy regarding its rights in technical data, computer software and computer software documentation.[604] These new rules represent a significant departure from past practice by addressing rights in technical data separate from rights in computer software and documentation.[605]

The new *DFARS* provision divides the government's standard license rights into four categories: (1) unlimited rights, (2) government purpose rights, (3) limited rights, and (4) specifically negotiated license rights.[606] The degree of the government's rights in such data is generally based on the extent of government funding involved in developing the technical data. Consistent with its *FAR* counterpart, the policy contained in the *DFARS* is to allow agencies to "acquire only the technical data customarily provided to the public with a commercial item or process."[607]

1. Rights in Technical Data for Commercial Items.[608] The new *DFARS* now provides guidance on how the government may use, modify, reproduce, release, perform, display, or disclose technical data for commercial items, excluding computer software. In general, the government may make use of data pertaining to commercial items, components, and processes only within the government. Hence, the agency may not use its rights in such data to manufacture additional quantities of commercial items. Additionally, except for emergency repair or overhaul, the government may not disclose this data to third parties without the contractor's written consent.[609] These restrictions, however, do not apply to publicly available data, to form, fit, or function data, to data necessary for operation, maintenance, installation, or training, and to changes or corrections to government furnished data.[610] Finally, the government may negotiate for additional license rights, but may not force the contractor to give up any such rights except under mutually agreed terms.[611]

2. Rights in Technical Data for Noncommercial Items.[612] Standard license rights apply to noncommercial items and are defined by the source of developmental funding for the item, component, or process. This provision also applies to data created during the performance of a contract for a conceptual design where no manufacturing is required. If standard rights are not appropriate in a given situation, then the parties to the contract may negotiate non-standard licensing rights.[613] Additionally, the government is no longer required to obtain unlimited rights in data where development of the data was necessary for performance of

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[600] FAR, *supra* note 98, 52.215-1.

[601] *Id.* 52.214-26; 52.215-2.

[602] FAC 90-32, 60 Fed. Reg. 48,243 (1995) (effective Oct. 1, 1995, amending *FAR 12.211*).

[603] *Id.*

[604] Defense Acquisition Circular (DAC) No. 91-8, 60 Fed. Reg. 33,464 (1995) (effective for solicitations issued on or after Sept. 29, 1995, deleting *DFARS subpt. 227.4, Rights in Data and Copyrights*, and replacing it with *DFARS subpt. 227.71, Rights In Technical Data*).

[605] See DFARS, *supra* note 20, 227.71; 227.72 ("Rights In Technical Data" and "Rights In Computer Software and Computer Software Documentation," respectively). This article addresses the changes relevant to computer software. *See* text *infra* § V.M.1.a.

[606] *Id.* 227.7103-4.

[607] *Id.* 227.7102-1.

[608] *Id.* 227.7102, Commercial Items, Components, or Processes.

[609] *Id.* 227.7102-2.

[610] *See* 10 U.S.C. § 2320 (1988).

[611] DFARS, *supra* note 20, 227.7102-2.

[612] *Id.* 227.7103, Noncommercial Items or Processes.

[613] *Id.* 227.7103-5.

a government contract or subcontract.[614] Finally, the provision provides guidance on further disclosure or use of data previously provided to the government that carries with it restrictions on its use and release.[615]

3. "Greater Rights" Clause Allows Use of Technical Data in Foreign Military Sales Procurement. In *Israel Aircraft Industries*,[616] the Army issued a solicitation for the manufacture of mineplows[617] to be resold to Kuwait and Saudi Arabia under the foreign military sales (FMS) program. Under an earlier research and development contract, Israel Aircraft developed, manufactured, and delivered to the Army several hundred mineplows. During negotiations regarding the use of the technical data package (TDP) for the mineplows, the Army expressly rejected any restriction on its rights to use the TDP in the FMS program. Instead, the data rights clause expressly granted the Army "greater rights in the TDP," which only limited the use of the TDP as it applied to commercial transactions or purposes.[618] Israel Aircraft presented two basic arguments. First, the proposed FMS sale was not for governmental purposes, but for commercial purposes. Israel Aircraft also argued that the clause limited the Army's use of the TDP to "government-to-government FMS transfers . . . from existing United States government inventory."[619] The GAO rejected these arguments, finding that the applicable definition of governmental purposes implicitly includes FMS activity.[620] With respect to Israel Aircraft's alternate argument, the GAO held that no language in the contract "or anywhere in the record" supported such a position.[621]

G. Fraud.

1. Criminal Cases.

a. Breach of Promise Not to Disclose Offered Prices Is a False Statement. A GSA solicitation for irons and ironing boards contained a certificate of independent price determination clause.[622] In pertinent part, this clause states: "the offeror certifies that . . . the prices in this offer have not been *and will not knowingly be disclosed* by the offeror . . . to any other offeror or competitor . . . before contract award."[623] In *United States v. Nitin Shah*,[624] the United States Court of Appeals for the Fifth Circuit (Fifth Circuit) upheld a conviction for making a false statement based on a breach of the certification contained in this clause.[625] The government proved that Nitin Shah had conversations with a competitor regarding an exchange of pricing information prior to submitting an offer. Following submission of offers, the competitor, working with GSA investigators, exchanged prices with Nitin Shah. The Fifth Circuit rejected Nitin Shah's argument that a promise of future performance cannot constitute a violation of the statute. Following a lengthy analysis, the Fifth Circuit held that such a promise may amount to a false statement if it represents the "present existence of an intent to perform" which is "made without any present intention of performance."[626]

b. Title Does Not Pass Under Progress Payment Clause for Purposes of Criminal Prosecution. In *United States v. Ribas*,[627] the court dismissed an indictment charging the defendant with

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[614] Specifically, under such circumstances the government may accept something less than unlimited rights, but it must, at a minimum, retain "limited rights in such data." *Id.* 227.7103-5(d).

[615] *Id.* 227.7103-7.

[616] B-258229, Dec. 28, 1994, 94-2 CPD ¶ 262.

[617] According to the opinion, a mineplow "is a device that is attached to a battle tank, designed to detonate, extract, or push aside any mine in the path of the tank and provide a clear lane for follow-on assault forces." *Id.* at 2.

[618] *Id.* at 3.

[619] *Id.* at 4.

[620] The IAI contended that the Department of Defense had, subsequent to the parties' agreement on the use of the mineplow TDP, revised the *DFARS* definition of "government purpose" to expressly include the FMS program. Therefore, according to the protester, the applicable *DFARS* provision did not encompass FMS activity. *Id.* at 5-6; *see also* DFARS, *supra* note 20, 252.227-7013(a)(11).

[621] B-258229, Dec. 28, 1994, 94-2 CPD ¶ 262, at 7.

[622] FAR, *supra* note 98, 52.203-2.

[623] *Id.* (emphasis added).

[624] 44 F.3d 285 (5th Cir. 1995).

[625] A jury convicted Shah on one count of making a false statement in violation of 18 U.S.C. § 1001. The court sentenced Shah to three years probation and a $5000 fine.

[626] 44 F.3d at 294.

[627] 899 F. Supp. 42 (D.P.R. 1995).

several counts of violating 18 U.S.C. § 641.[628] The defendant was under contract to provide approximately 1.7 million pairs of military trousers. During the course of the contract, the government paid the defendant progress payments totalling approximately $9.6 million. The defendant delivered a number of trousers worth approximately $9.2 million. The defendant sold the remaining trousers to third parties. The Government argued that the trousers were a "thing of value of the United States" based on the title vesting provisions of the Progress Payments Clause.[629] The court disagreed, holding that, for purposes of a criminal prosecution, the government takes no more than a security interest in progress payment inventory. Therefore, the defendant's conversion of the property did not involve a "thing of value of the United States."

c. The DD 250, by Itself, Is Not a False Representation That Nonconforming Material Is Conforming. Jody Cannon, the general manager of a firm under contract to supply various aircraft components to the Air Force, was convicted on, among other things, one count of using false documents to defraud the government under 18 U.S.C. § 1001. Cannon's company had provided untested titanium to the Air Force. The contract required titanium which had been subjected to ballistics testing. Cannon's conviction was based on his submission of DD 250s to accompany the deliveries of titanium. A government quality assurance representative (QAR) signed the DD 250s signifying acceptance and conformance of the material. Neither Cannon nor his company certified on the form that the material was conforming. On Cannon's appeal of his conviction, the government argued that Cannon caused the QAR to make a false statement by presenting the DD 250s representing that the material was conforming. In overturning Cannon's conviction, the United States Court of Appeals for the Eleventh Circuit (Eleventh Circuit) rejected this argument, noting that Cannon had not provided any certification regarding conformance.[630] The Eleventh Circuit stated that "[i]t was through the failure of the QAR to perform an adequate review that the nonconforming material was certified."[631]

d. The United States Court of Appeals for the D.C. Circuit Defines Scope of Prosecutor's Immunity in Fraud Case. In *Moore v. Valder*,[632] the United States Court of Appeals for the D.C. Circuit (D.C. Circuit) considered Moore's *Bivens*[633] complaint against Valder, an Assistant United States Attorney who had prosecuted Moore for fraud.[634] Moore alleged that Valder pressured witnesses to incriminate Moore, concealed and distorted exculpatory evidence before the grand jury, withheld material exculpatory information from Moore after indictment, and disclosed grand jury testimony to unauthorized third parties. The district court dismissed Moore's complaint finding that Valder enjoyed absolute immunity. The D.C. Circuit disagreed and stated that a prosecutor has absolute immunity only for "advocatory conduct." The D.C. Circuit found that Valder's decision to prosecute Moore and the alleged concealment and distortion of evidence were advocatory conduct. However, the D.C. Circuit found that intimidating witnesses was a misuse of investigative techniques and was related to a typical police function. Likewise, unauthorized disclosure of grand jury information was not advocatory because it has no functional tie to the judicial process. The D.C. Circuit held that with respect to these actions, Valder enjoyed only qualified immunity and remanded the case for a determination of whether Valder's conduct violated any of Moore's clearly established constitutional rights.

2. Civil Cases.

a. The United States Court of Appeals for the D.C. Circuit Finds Damages not Required for Civil False Claims Act Recovery. In *United States ex rel. Schwedt v. Planning Research Corp.*,[635] the United States Court of Appeals for the D.C. Circuit (D.C. Circuit) considered a *qui tam* complaint filed by Schwedt, a Department of Labor (DOL) employee.[636] The DOL awarded Planning Research Corp. (PRC) a contract to design and install computer software. According to Schwedt, PRC submitted three progress reports which misrepresented that the software was complete. The district court dismissed Schwedt's complaint because

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[628] In pertinent part, the statute states: "whoever . . . without authority, sells, conveys or disposes of any . . . *thing of value of the United States* . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both . . . ." (emphasis added).

[629] FAR, *supra* note 98, 52.232-16.

[630] United States v. Cannon, 41 F.3d 1462 (11th Cir. 1995).

[631] *Id.* at 1469.

[632] 65 F.3d 189 (D.C. Cir. 1995).

[633] *See* Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (recognizing a cause of action for damages against officials who violate constitutional or statutory rights under color of federal law).

[634] The trial court in Moore's criminal trial entered a judgment of acquittal, finding there was insufficient evidence that Moore was aware of the fraudulent scheme.

[635] 59 F.3d 196 (D.C. Cir. 1995).

[636] According to the court, Schwedt was responsible for "overseeing the contract." *Id.* at 198 (no discussion in the opinion concerning Schwedt's status as a government employee *vis a vis* the contract and its impact on his standing as a *qui tam* relator).

Schwedt could not show any damages.[637] The D.C. Circuit reversed, noting that the Civil False Claims Act (FCA)[638] imposes two types of penalties: a civil penalty for which the submitter of a false claim is liable "regardless of whether the submission of the claim actually causes the government any damages,"[639] and damages the government sustains because of submission of the false claim. The D.C. Circuit held that if Schwedt could prove that the progress reports were false, the progress reports would constitute false statements in support of a false claim triggering the FCA's civil penalties. The D.C. Circuit also held that if Schwedt could prove that the government accepted and paid for certain other deliverables under the contract in reliance on misrepresentations in the progress reports, the payments for these items would constitute the government's damages under the FCA.

b. District Courts Hold Davis-Bacon Act Violations Are Not Claims Under the FCA (Prior to the Department of Labor Finding of Violation) . . . . In *United States ex rel. Windsor v. Dyncorp, Inc.*,[640] the court considered a *qui tam* relator's allegation that Dyncorp violated the FCA by failing to submit payroll reports required by the Davis-Bacon Act (DBA)[641] and by intentionally misclassifying its employees. Dyncorp's contract contained the relevant DBA clauses requiring compliance with the requirements of the FCA. While the failure to submit payroll reports was a violation of the DBA and subjected Dyncorp to penalties under the DBA, the court stated that there was no falsity or misrepresentation in failing to submit those reports. Therefore, there is no FCA liability. As for the misclassification of employees, the court noted that, by regulation, the proper classification of employees under the DBA must be resolved by Department of Labor (DOL). According to the court, allowing this issue to proceed in the form of an FCA complaint would allow a jury to make a determination which can be made only by DOL. The court granted summary judgment for Dyncorp on this issue.

c. But Violations of Environmental Law Are (Under the Proper Circumstances, of Course). In *United States ex rel. Fallon v. Accudyne*,[642] the *qui tam* relators alleged that Accudyne, which had a United States Army contract for electronic assemblies for mines, had knowingly violated contract requirements by performing the work in violation of environmental laws. Additionally, according to the relators, Accudyne had falsely certified its compliance with these laws in its requests for payment from the Army. Accudyne first argued that noncompliance with environmental laws is not a claim within the meaning of the FCA. The court quickly disposed of this argument by noting "it is not the violation of environmental laws that gives rise to an FCA claim, but the false representation to the government that there has been compliance."[643] The court stated: "[s]uch a claim is fundamentally no different than falsely representing that tests have been performed or falsely representing the results of product testing."[644] Accudyne next argued that an FCA remedy for such conduct is preempted by the more specific remedial provisions of the environmental laws. The court rejected this argument on the grounds that the FCA and environmental laws provide remedies for entirely different conduct. The court noted "[it] can hardly be inferred that Congress intended to deprive the United States of a remedy for contract fraud by creating a remedy for environmental degradation."[645]

d. The FCA Whistleblower Protections Do Not Extend to Federal Civil Service Relators. The CAFC held that the whistleblower provisions of the FCA[646] do not apply to federal employees. Roland LeBlanc, a former government quality assurance representative, brought a *qui tam* suit alleging fraud on the part of the Raytheon Co.[647] When that suit was dismissed on the grounds that LeBlanc was not an original source,[648] LeBlanc filed suit in the COFC seeking redress under a variety of theories, including a violation of the FCA whistleblower provisions. When

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[637] The district court based this holding on the fact that, "under the terms of the contract, the government had to inspect and approve any PRC submission prior to payment." *Id.*

[638] 31 U.S.C. §§ 3729-31 (1988).

[639] 59 F.3d at 199.

[640] 895 F. Supp. 844 (E.D.Va. 1995).

[641] 40 U.S.C. § 276a (1988).

[642] 880 F. Supp. 636 (W.D.Wis. 1995).

[643] *Id.* at 638.

[644] *Id.*

[645] *Id.* at 639.

[646] 31 U.S.C. § 3730(h) (1988).

[647] *See* United States ex rel. LeBlanc v. Raytheon Co., 913 F.2d 17 (1st Cir. 1990).

[648] *Id.*

the COFC dismissed his complaint, LeBlanc appealed to the CAFC.[649] In affirming the dismissal, the CAFC noted that the FCA does not contain a waiver of sovereign immunity allowing the government to be sued as employer. In light of the comprehensive provisions of the Civil Service Reform Act,[650] the CAFC declined to create such a remedy.

3. Qui Tam *Cases.*

a. The United States Court of Appeals for the Ninth Circuit Rules on Retroactivity of 1986 Amendments. In two cases,[651] the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) clarified its position regarding the retroactivity of the 1986 amendments to the FCA. Both cases involved *qui tam* suits, which would have been barred by the earlier version of the FCA's public disclosure rule if filed prior to the amendments.[652] In both cases, the Ninth Circuit held that the general rule that a statute does not operate retroactively did not apply because the 1986 amendments changed the consequences of the relator's conduct, not that of the defendants. In other words, retroactive application of the 1986 amendments in these circumstances would not result in retroactive imposition of criminal liability or a retroactive increase in punishment.

b. Government Cannot Decline Intervention and Settle Suit Without Informing Relator. In *United States ex rel Neher v. NEC Corp.*,[653] the United States Court of Appeals for the Eleventh Circuit (Eleventh Circuit) held that the government's improper settlement of the issues underlying the relator's *qui tam* complaint could not divest the relator of his statutory share of the proceeds. The government chose not to intervene in the suit, but the government settled the matter for $34 million without informing the relator or the court. The Eleventh Circuit held that the government's settlement constituted an election to intervene and awarded the relator 15% of the settlement amount.[654]

4. Fraud at the Boards of Contract Appeals.

a. Fraud Investigation Is a Sovereign act. In *Orlando Helicopter Airways, Inc. v. Widnall*,[655] the CAFC affirmed an ASBCA decision finding that the fraud investigation at issue in the appeal was a sovereign act.[656] The contractor had appealed the contracting officer's denial of its claim for the costs associated with responding to a criminal fraud investigation. On review of the board's decision, the CAFC stated that: "The government's exercise of [its] police powers in its law enforcement capacity . . . [is] . . . an ancient and fundamental indicia of sovereignty. It does not matter whether the particular infraction under investigation happens to transpire during a government contract."[657] In response to Orlando's argument that it should be able to recover its costs as the victim of an overzealous investigation, the CAFC simply noted that such a claim would not sound in contract.

b. Watch What You Put in Your Plea Agreements. In *United Technologies Corp.* (UTC),[658] the ASBCA considered UTC's $389 million claim against the Navy for breach of contract contending that the Navy prematurely ended it as a second source supplier of aircraft engines. In its motion for summary judgment, the Navy argued, among other things, that the contracts were *void ab initio* due to fraud. As a result of the Illwind investigations, UTC had plead guilty to four counts of fraud based on conduct related to the contracts at issue in UTC's claim. However, UTC's plea agreement with the government stated, in pertinent part, that the government released and discharged UTC for any claim that the contracts mentioned in the Information are void or voidable. The ASBCA first stated the general rule that contracts tainted by fraud are *void ab initio*. According to the ASBCA, however, the government could waive this protection. The ASBCA held that as a result of the plea agreement, the government had waived its right to assert that the UTC contracts were void or voidable stating, "the government, having waived its legal right to assert that the . . . contracts are unenforceable by reason of UTC's conviction . . . is now precluded from raising a legal defense based on such a right."[659]

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[649] LeBlanc v. United States, 50 F.3d 1025 (Fed. Cir. 1995).

[650] Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).

[651] United States ex rel. Neher v. NEC Corp., 52 F.3d 810 (9th Cir. 1995); United States ex rel. Lindenthal v. General Dynamics Corp., 61 F.3d 1402 (9th Cir. 1995).

[652] Prior to the 1986 amendments, 31 U.S.C. § 3730(b)(4) required a court to dismiss a *qui tam* complaint if based on information the government had when the action was brought. The 1986 amendments replaced this provision with the public disclosure rule now at 31 U.S.C. § 3730(e)(4) (1988).

[653] 53 F.3d 1284 (11th Cir. 1995) (unpublished).

[654] *See* Qui Tam Relator Entitled to Share in Proceeds From Undisclosed Settlement, 63 Fed. Cont. Rep. (BNA) 582 (May 8, 1995).

[655] 51 F.3d 258 (Fed. Cir. 1995).

[656] *See* Orlando Helicopter Airways, Inc., ASBCA No. 45778, 94-2 BCA ¶ 26,751.

[657] 51 F.3d at 262.

[658] ASBCA No. 46880, 95-1 BCA ¶ 27,538.

[659] 95-1 BCA ¶ 27,538, at 137,231-32.

c. When Will the ASBCA Suspend Proceedings Because of a Fraud Investigation? Two ASBCA decisions demonstrate the reluctance of the board to suspend its proceedings based on government allegations of fraud. In *Systems & Electronics, Inc.*,[660] the ASBCA considered a government motion to suspend proceedings based on a request from the Defense Criminal Investigative Service (DCIS). The ASBCA stated that the government must show "how the investigation would be compromised or prejudiced by going forward with this appeal."[661] The government's motion stated that the matters under investigation could have a direct impact on costs claimed by the contractor in the appeal. The ASBCA held, however, that the "[g]overnment's mere statements that the related criminal investigation will be prejudiced are insufficient without a clear showing why."[662] The ASBCA also noted that the investigation was in a preliminary stage and that no trial, indictment, or information had yet been initiated.

In *Donat Gerg Haustechnik*,[663] the ASBCA denied a request for a stay even though fraud cases against the appellant were pending in both the COFC and a German court. The ASBCA noted that, if the government established fraud in either court suit, the contracts would be *void ab initio*, and the ABSCA would not have jurisdiction over the appeals. Notwithstanding this fact, the ABSCA applied the prejudice test discussed above and found that the government would not be harmed by proceeding with a decision on the appeal. The ABSCA concluded that it would be manifestly unfair to the appellant to issue an open ended stay at this stage in the proceedings.

H. Suspension and Debarment.

1. The COFC Upholds Army Debarment. In *Imco, Inc. v. United States*,[664] the COFC considered and upheld the validity of the Army's debarment of Imco, Inc. for a "history of failure to perform."[665] Imco, Inc. was the low bidder in response to a solicitation. Because Imco, Inc. was proposed for debarment at the time, however, the contracting officer could not consider Imco, Inc.'s bid. Because none of the other bids were reasonably priced, the contracting officer cancelled the solicitation. Imco, Inc. challenged its debarment[666] in the context of the contracting officer's decision to eliminate it from the competition and cancel the solicitation. The COFC first noted that it would have no jurisdiction to consider a debarment decision "in isolation."[667] The COFC held, however, "that Imco, Inc. may argue that its contractual entitlement to a full, fair, and honest consideration of its bid was breached by a debarment that was arbitrary, capricious, not in accordance with law, or not based on substantial evidence."[668] After an exhaustive analysis, the COFC found the administrative record supporting the debarment was adequate, and the debarment decision was reasonable.

2. Offer Properly Rejected Because Offeror an Affiliate of Imco, Inc. In *Detek, Inc.*,[669] the GAO considered a protest from an offeror disqualified from a competition because the contracting officer found it to be an affiliate of Imco, Inc., the firm discussed above. The GAO first rejected Detek's contention that, because it was a small business, the contracting officer should have referred the matter to the Small Business Administration. The GAO simply noted that once the contracting officer determined that Detek was affiliated with a debarred firm, "the matter of Detek's responsibility became irrelevant."[670] As for the propriety of the affiliation determination, GAO found it reasonable based, *inter alia*, on the fact that Detek was a newly activated company, purchased by an Imco, Inc. employee and reorganized shortly after Imco, Inc. was debarred. Additionally, Detek shared a common street address with Imco, Inc. and would lease Imco, Inc. facilities and equipment to perform the contract.

I. Taxation.

1. Taxes on Electric Service Not Improper. The Federal Aviation Administration (FAA) sought to establish a local air route surveillance station. Because of its remote location, the local electric company required the FAA to pay a connection charge for providing the new electric service. The connection charge had itemized entries for federal and state taxes. Based on the FAA's

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[660] ASBCA No. 47811, 95-1 BCA ¶ 27,530.

[661] *Id.* at 137,203.

[662] *Id.* (citations omitted).

[663] ASBCA No. 41197, 1195 ASBCA LEXIS 286 (Oct. 6, 1995).

[664] 33 Fed. Cl. 312 (1995).

[665] *See* FAR, *supra* note 98, 9.406-2(b)(1)(ii).

[666] By the time the matter reached the court, the Army had debarred IMCO for three years.

[667] 33 Fed. Cl. at 316.

[668] *Id.* at 316-17.

[669] B-261678, Oct. 16, 1995, 1995 WL 604643.

[670] *Id.*

request for an advisory opinion, the GAO held that the amount of the connection charge attributable to federal and state taxes was proper.[671] The GAO held that the taxes involved were vendor taxes,[672] and as a result, were not unconstitutional taxes against the federal government, but were merely reimbursements to the vendor for the taxes which it had previously paid.[673]

2. *Alaska's 911 Surcharge Is an Unconstitutional Tax.* The State of Alaska authorized its municipalities to impose a surcharge on each local exchange access telephone line to pay the costs of emergency 911 service. In *Telephone Surcharge—State of Alaska*,[674] the GAO examined whether the 911 surcharge was an unconstitutional tax against the United States. The GAO identified a three part test to determine whether a telephone surcharge was a tax: (1) the telephone service is provided by a governmental or quasi-governmental unit; (2) public funding of the surcharge requires legal authority; and (3) the service charge is based on a flat rate per telephone line and is unrelated to level of service. The GAO held that the surcharge was nothing more than a municipal tax collected by the telephone companies from the phone customers. Based on its three part test, the GAO held that the surcharge was an unconstitutional tax.

J. Freedom of Information Act.[675]

1. *Another District Court Refuses to Adopt the Critical Mass Confidentiality Test.*[676] In 1994, a district court in the United States Court of Appeals for the Fourth Circuit (Fourth Circuit) was the first court to refuse to adopt the United State Court of Appeals for the D.C. Circuit's *Critical Mass* confidentiality test when deciding to release or withhold commercial or financial information.[677] The Fourth Circuit court elected to rely exclusively on the confidentiality test set forth in *National Parks*.[678] In 1995, a district court in the United States Court of Appeals for the First Circuit similarly declined to follow *Critical Mass* because it was not a test expressly adopted by its circuit court of appeals.[679]

2. *The D.C. District Court Refuses to Apply Critical Mass to Unit Price Submissions in Government Contracts.* In 1995, a federal district court for the District of Columbia issued four decisions holding that unit prices submitted in government contracts are required submissions for purposes of determining confidentiality under Freedom of Information Act (FOIA) exemption 4.[680] Consequently, the confidentiality test established in *Critical Mass* for voluntary submissions is not applicable. These four decisions are consistent with Department of Justice policy guidance that prices submitted in conjunction with a government contract are *required submissions*.[681]

a. Chemical Waste Management, Inc. v. O'Leary.[682] In a reverse-FOIA case, the court vacated the Department of Energy's decision to release the submitter's unit prices and remanded the case back to the agency for further consideration under *National Parks*. The court rejected the submitter's argument that it volun-

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[671] Matter of Federal Aviation Admin. Negotiations with Pac. Gas & Elec. Co. to Provide Elec. Utility Serv. to a Remote Air Route Surveillance Radar Facility, B-260063, June 30, 1995, 1995 U.S. Comp. Gen. LEXIS 441.

[672] "Vendor" taxes are taxes that a state requires a seller of goods and services to pay. This is contrasted with "vendee" taxes, which the state requires purchasers of goods and services to pay.

[673] This concept is known as the "economic incidence" of taxation, where a person who is not legally responsible to pay the tax directly feels the economic impact of taxation (i.e., higher prices). On the other hand, the "legal incidence" of a tax falls directly upon the party who is liable to the state for the payment of the tax.

[674] B-259029, May 30, 1995, 1995 U.S. Comp. Gen. LEXIS 371.

[675] 5 U.S.C. § 552 (1988).

[676] *See* Critical Mass Energy Project v. Nuclear Reg. Comm'n, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S.Ct. 1579 (1993). The court created a separate FOIA exemption four confidentiality test for commercial or financial information provided *voluntarily* to the government. Under this test, the government may elect to withhold requested commercial or financial information if (1) the information was "voluntarily" provided to the government, and (2) the provider did not have a custom of routinely releasing the information to the public. The government continues to use the test established in *National Parks & Conservation Assn. v. Morton* to determine the confidentiality of commercial or financial information *required* to be provided to the government. 498 F.2d 765 (D.C. Cir. 1974).

[677] Comdisco, Inc. v. General Serv. Admin., 864 F. Supp. 510 (E.D. Va. 1994) ("reverse-FOIA" lawsuit where the court upheld a partial release of unit prices and refused to apply the *Critical Mass* test for confidentiality).

[678] National Parks & Conservation Assn. v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (holding that FOIA exemption four allows withholding of confidential commercial or financial information from a person if release (1) impairs agency ability to obtain similar information in the future, or (2) causes substantial competitive harm to the provider).

[679] Bangor Hydro-Elec. Co. v. United States Dep't of the Interior, No. 94-0173-B, no. 3 (D. Me. Apr. 18, 1995). (Plaintiff requested certain letters and memoranda from the Department of the Interior regarding flooded islands belonging to the Penobscot Indians. The court considered the letters and memoranda commercial or financial information because release might reveal information explaining higher use and fee assessments in re-licensing proceedings affecting the Penobscot Indian Nation reservation. The agency, in attempting to withhold the letters, unsuccessfully argued the confidentiality test established in *Critical Mass*. The court declined to apply *Critical Mass* because it was not the law in the First Circuit, and ordered release of the documents since there was no showing of impairment to the agency under *National Parks*. *See also* OFFICE OF INFORMATION AND PRIVACY, U.S. DEPARTMENT OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW, 127-130 (September ed. 1995) [hereinafter DOJ FOIA GUIDE].

[680] DOJ FOIA GUIDE, *supra* note 679, at 127-130.

[681] *Id.* at 127.

[682] No. 94-2230, 1995 WL 115894 (D.D.C. Feb. 28, 1995).

tarily bid on the government contract and voluntarily released its unit prices thereby entitling it to the less stringent test for confidentiality afforded in *Critical Mass*.[683]

b. CC Distributors., Inc. v. Kinzinger.[684] Finding *Critical Mass* inapplicable to government contract submissions, the court noted that: "A bidder only provides confidential information because the agency requires it; once a firm has elected to bid, it must submit the mandatory information if it hopes to win the contract. Thus, it does not submit the information on a voluntary basis."[685] In rejecting plaintiff's reverse-FOIA claim, the court found that the Air Force's decision to release plaintiff's unit prices was neither arbitrary, capricious, an abuse of discretion, nor contrary to law.

c. McDonald Douglas Corp. v. NASA.[686] The court rejected the plaintiff's temptingly simple argument for *Critical Mass* confidentiality and ordered release of requested termination schedule percentages and secondary payload prices. Plaintiff unsuccessfully argued that "since [they] . . . did not have to enter into a contract, no information within the contract can be considered mandatory"—the court found this rather simplistic approach to FOIA exemption four analysis would result in classifying all contractors as *per se* volunteers, and pricing information would never be subject to release.[687]

d. McDonald Douglas Corp. v. NASA.[688] On remand from the United States Court of Appeals for the D.C. Circuit, the court held that disclosure of unit prices is necessary to win a government contract, and disclosure is not voluntary for purposes of determining confidentiality under FOIA exemption four.

K. Environmental Law.

1. Contracting Officer Cannot Waive Local Zoning Board Requirements. In *The Mary Kathleen Collins Trust*,[689] the GAO stated that local zoning board requirements, which would not permit the type of facility proposed, cannot be waived by the contracting officer. The GAO found that meeting these requirements was a matter of responsibility, and they had to be met by the offeror to be eligible for contract award. If the offeror is a small business and is rejected for not meeting the zoning board requirements, the contracting officer must refer the matter to the Small Business Administration for review under the certificate of competency program.

2. The GAO's Bid Protest Jurisdiction Does Not Encompass Determinations Made Under Environmental Statutes. In *Federal Environmental Services, Inc.*,[690] the GAO commented on its bid protest jurisdiction concerning the review of environmental regulations. The GAO specifically stated that the determination of whether particular materials constituted hazardous waste under environmental statutes and regulations was outside its bid protest jurisdiction. The decision also seems to indicate that GAO believes review of all environmental statutes and regulations is outside of its bid protest jurisdiction. The GAO also stated that determinations of compliance with environmental statutes and regulations were within the purview of the cognizant environmental protection agency and contracting officer.

L. Ethics.

1. The GAO Denies Protest Based on Project Manager's Subsequent Employment by Competing Contractor. Once again the GAO considered and rejected a disappointed bidder's assertion that the winning contractor should have been disqualified for hiring a former government employee.[691] *Stanford Telecommunications, Inc.*[692] involved an Army Communications-Electronics Command (CECOM) contract for network control support services. After CECOM's satellite communications project manager retired during the performance of the predecessor contract by Stanford, he was employed by Harris Technical Services Corporation (Harris) as its program manager and proposal consultant for the follow-on contract. Stanford protested award to Harris claiming that it had, by virtue of this employment, gained an unfair competitive advantage. The agency found no impropriety.

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[683] *Id.* at *3-*4.

[684] No. 94-1330, 1995 WL 405445 (D.D.C. June 28, 1995).

[685] *Id.* at *4 (citing Chemical Waste Management, Inc. v. O'Leary, 1995 WL 115894 at *3-*4 (D.D.C. Feb. 28, 1995)).

[686] 895 F. Supp. 319 (D.D.C. 1995). *See also* OFFICE OF INFORMATION AND PRIVACY, U.S. DEPARTMENT OF JUSTICE, SIGNIFICANT NEW DECISIONS, FOIA UPDATE , at 4 (Spring/Summer 1995).

[687] 895 F. Supp. 325 (D.D.C. 1995).

[688] 895 F. Supp. 316 (D.D.C. 1995).

[689] B-261019.2, Sept. 29, 1995, 1995 WL 579836.

[690] B-260289, May 24,1995, 95-1 CPD ¶ 261.

[691] *See 1994 Contract Law Developments—Year in Review*, ARMY LAW., Feb. 1995, at 82-83 (discussing ITT Federal. Services Corp., B-253740.2, May 27, 1994, 94-2 CPD ¶ 30 and Textron Marine Systems, B-255580.3, Aug.2, 1994, 94-2 CPD ¶ 63).

[692] B-258662, Feb. 7, 1995, 95-1 CPD ¶ 50.

The GAO agreed with the Army, stating that, while Harris may have gained some business advantage, there was "no evidence of any improper competitive advantage."[693] In support of this conclusion, the GAO found that the former employee's access to such a large volume of information made it unrealistic to believe that he would have been able to recall cost and pricing data.[694] Additionally, the GAO determined that the employee's input into the proposal preparation appeared to be no more than "statements of opinion as to the best way to perform the contemplated contract."[695]

2. Supervisor's Oversight of Procurement Is Not "Substantial" Participation. Ruble Garner was employed for approximately ten years at a large federal procurement center. Prior to his retirement, Garner was the head of the planning and support division. In the latter years of his government service, Garner served on the source selection team for a federal information processing service (FIPS) procurement. In *Caelum Research Corporation* (Caelum),[696] the protester sought to prevent award of the FIPS contract to its competitor, whose subcontractor, OAO Corporation (OAO), had hired Garner. The protester argued that Garner's direct supervision of the employee responsible for planning the reprocurement, his access to proprietary information, and his review and approval of the procurement request made him a procurement official within the definition of the Procurement Integrity Act.[697]

The GSBCA denied the protest. Although the GSBCA agreed that Mr. Garner participated personally in the conduct of the procurement, the board determined that his participation was not substantial. In reaching this conclusion, the GSBCA was persuaded by Garner's testimony that he could not recall reviewing the procurement request and may have "simply signed off on [it] so the recompetition could go forward."[698] Also key to this determination was testimony from his subordinate indicating that, with regard to the FIPS procurement, she "took the ball and ran with it."[699] The ASBCA totally discounted both the inclusion of Garner's name on the attestation of procurement integrity and the conclusion stated in two legal opinions indicating that Garner was a procurement official. The attestation, said the ASBCA, was erroneous, and the legal opinions "were based upon incomplete information . . . and were subsequently disavowed by the counsel who prepared them."[700]

The ASBCA similarly rejected Caelum's assertions that Garner violated Procurement Integrity Act restrictions on negotiating for employment. The ASBCA concluded that Mr. Garner committed no knowing violation, finding that he made a good faith effort to reveal the potential problem and obtain the agency's approval. Garner had written a letter to agency counsel requesting advice concerning his employment. In discussing Garner's letter, the ASBCA was convinced that his failure to disclose certain details regarding his employment resulted from his lack of memory rather than from an intentional omission. The ASBCA found that the "sum of Garner's activities . . . indicate[d] that he had no intention to violate the Act."[701]

3. Joint Literary Efforts Do Not Amount to Procurement Integrity Act Violation. In *DRI/McGraw-Hill*[702] the protester claimed that its elimination from the competitive range was tainted by an improper conflict of interest. The protested best value procurement dealt with a Department of Commerce contract for a study of service technology trends. The technical evaluation team included Dr. Tassey, an economist who "conceived of the study at issue . . ., selected the evaluators, and was responsible for coordinating the technical evaluation."[703] Only the awardee's offer was deemed technically acceptable. Dr. Link was the individual named by the awardee as its director of economic analysis and a member of its advisory board. Doctors Link and Tassey had been acquainted for fifteen years. They coauthored a book in 1987 and coedited a volume in 1989. The protester asserted that this prior professional relationship created a conflict of interest, violated the Procurement Integrity Act, and tainted the award. The GAO found no conflict of interest.[704] The GAO emphasized that con-

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[693] *Id.* at 6.

[694] *Id.* at 5.

[695] *Id.*

[696] Caelum Research Corp., GSBCA No. 13139-P, 95-2 BCA ¶ 27,733.

[697] 41 U.S.C. § 423 (1988).

[698] 95-2 BCA ¶27,773, at 138,260.

[699] *Id.* at 138,259.

[700] *Id.*

[701] *Id.* at 138,260.

[702] B-261181, Aug. 21, 1995, 95-2 CPD ¶ 76.

[703] *Id.* at 4.

[704] The GAO did, however, state in a footnote that Dr. Tassey should have sought advice from an ethics counselor. *Id.*

tracts were made between each economist and the publisher—no contracts were made between the two individuals. Furthermore, royalties had ceased several years before the procurement. The GAO found no Procurement Integrity Act violation, finding no evidence of existing business or employment contacts between Dr. Tassey and the contractor and no evidence of any unauthorized disclosure of information.

M. Contracting for Information Resources.

1. New Rules.

a. New DFARS *Final Rule on Technical Data Rights.* On 28 June 1995, the DAR Council published in the *Federal Register* the long awaited new *DFARS* rules concerning technical data rights.[705] The new rules contain guidance concerning the extent of the DOD's ability to acquire rights in technical data based on the funds used to create the data, and the procedures used to resolve disputes between DOD and contractors over data rights. For the first time, the new rules create a separate subpart concerning rights in computer software and computer software documentation.[706] Under the new subpart, the DOD has the same license rights as private purchasers of computer software and documentation unless the software was developed partially with DOD funds or the parties negotiate otherwise. The new subpart also contains procedures for resolving disputes between the DOD and contractors over the scope of data rights in computer software and documentation.

b. The GSA Amends the Federal Information Resources Management Regulation *to Delete Synopsis Requirement in Federal Information Processing Resource Schedule Contracts.* In an attempt to streamline the use of multiple award schedules to purchase Federal Information Processing (FIP) resources,[707] the GSA has amended the *Federal Information Resources Management Regulation (FIRMR)* to remove the requirement to synopsize proposed schedule purchases of greater than $50,000 in the *Commerce Business Daily (CBD).*[708] Prior to the change, agencies were required to synopsize in the *CBD* their intent to place schedule orders greater than $50,000 and were required to wait for responses from vendors who sought to offer lower prices. Under the new rules, contracting officers are only required to consider other schedules or price lists before making schedule purchases greater than $2500. For purchases of $2500 or less, the contracting officer is not required to consult any additional source because GSA has determined the schedule prices to be reasonable.

c. The DOD Receives Special Agency Delegation of Procurement Authority to Make Agency Delegated Procurement Purchases up to $100 Million. On 19 June 1995, the GSA issued a new special agency delegation of procurement authority (DPA)[709] to the DOD[710] and other agencies. Under the terms of the new DPA, the DOD may now procure federal information processing resources up to $100 million without prior approval from GSA. The new ceiling applies not only to competitive acquisitions, but also to sole-source and specific make and model acquisitions.

d. The GSA Clarifies Federal Information Resources Management Regulation Rules on Multi-Agency Use of Federal Information Processing Indefinite-delivery, Indefinite-Quantity Contracts. The GSA has amended the FIRMR to clarify the procedural rules concerning use of indefinite-delivery, indefinite-quantity (IDIQ) federal information processing (FIP) resource contracts by other federal agencies.[711] Under the new guidance, agencies placing orders against FIP resource contracts awarded by other federal agencies are not subject to Economy Act procedures when placing orders against contracts awarded pursuant to a DPA.[712] The new rules encourage contracting agencies to allow other federal agencies to place orders up to the maximum quantities stated in the contract.

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[705] 60 Fed. Reg. 33,464 (effective June 30, 1995, amending *DFARS 227 and 252*).

[706] *Id.* at 33,482 (creating new *DFARS Subpart 227.72*).

[707] The term "Federal Information Processing resources" is the regulatory term that GSA uses in the Federal Information Resources Management Regulation (FIRMR) to describe automatic data processing equipment (ADPE) used by federal agencies.

[708] 60 Fed. Reg. 10,508 (effective Mar. 29, 1995, amending GEN. SERVS. ADMIN., FED. INFORMATION RESOURCES MGMT. REG. 201-39.803-3) [hereinafter FIRMR].

[709] Under the Brooks Automatic Data Processing Act (40 U.S.C. § 759 (1988)) the Administrator of GSA may delegate his statutory authority to make automatic data processing equipment (ADPE) purchases to other federal agencies. Under the FIRMR, the Administrator has delegated his authority to all federal agencies to make ADPE purchases up to certain levels, commonly known as "blanket" or "regulatory" DPAs. *See* FIRMR, *supra* note 708, 201-20.305-1. Additionally, the Administrator may grant additional delegations on an agency-by-agency basis (so-called "special agency" DPAs) under *FIRMR 201-20.305-2*, or on an acquisition by acquisition basis (so-called "specific acquisition" DPAs) under *FIRMR 201-20.305-3*.

[710] Letter, Deputy Commissioner for Information Technology Policy and Leadership, GSA Information Technology Service, to Assistant Secretary of Defense for Command, Control, Communication, and Intelligence, (June 19, 1995).

[711] 60 Fed. Reg. 56,248 (1995) (amending *FIRMR 201-39.1700* and creating *FIRMR 201-39.1702*).

[712] Under the Economy Act, 31 U.S.C. § 1535 (1988), agencies are allowed to order goods and services from other federal agencies under certain conditions. The *FAR Subpart 17.5* prescribes procedures for agencies to use when making Economy Act orders. The comment to the new rules implies that since the FIP resource contract is awarded pursuant to GSA's authority under the Brooks Act, the Economy Act does not apply. For more on the Economy Act, *see* text *infra* § VI.E.

2. Delegation of Procurement Authority Cases.

a. Supporting Overseas Aid Operations Constitutes Sufficient "Urgent and Compelling Circumstances" to Avoid Delegation of Procurement Authority Suspension. The United States Agency for International Development (AID) issued a solicitation for desktop computers for its regional economic development services office in Nairobi, Kenya. In response to a protest, AID argued that urgent and compelling circumstances existed which required the immediate award of the contract. Specifically, AID argued that in order to communicate with a new network system being installed at AID headquarters in Washington, the regional office needed the new computers.[713] The board refused to suspend AID's DPA.[714] It held that since AID would no longer support its old network after 31 December 1995, and because the regional office needed the new computers to communicate with Washington, the effect of the DPA suspension would be to effectively cut off communication between the regional office and Washington, which would seriously disrupt AID's mission in the region.

b. The Delegation of Procurement Authority Must be Redelegated to Required Levels to be Effective. The Western Area Power Administration (WAPA), a subagency of the Department of Energy (DOE), entered into a cost-plus-fixed-fee contract for FIP resources greater than WAPA's "blanket" DPA of $2.5 million. Previously, the DOE had received from the GSA a special agency DPA for a higher amount. However, the special agency DPA was contingent on the DOE formally redelegating the authority to its subagencies, which the DOE failed to do. The protester alleged, among other things, that the agency's contract award was improper because the WAPA exceeded its "blanket" DPA and it did not have proper authority to make the award. The board sustained the protest,[715] holding that since the special agency DPA required redelegation to the subagency level, DOE's failure to redelegate resulted in WAPA lacking authority to award the contract, and as a result, the award was void.[716]

c. Changing Performance Location Does Not Invalidate Delegation of Procurement Authority . . . . The Army awarded a contract for upgrading phone systems. After contract award, the Army modified the contract by deleting certain Army performance locations and substituting certain Navy and Marine Corps locations. The contractor protested the action, alleging an out-of-scope change and further alleging that the change violated the agency's DPA. However, the board disagreed.[717] It held that there was no contract language that prohibited the Army from changing the performance sites; therefore, there was no out-of-scope change.[718] Additionally, the agency did not violate its DPA because there was no evidence that the Army would exceed the DPA's monetary limits.

d. Neither Does Post-Award Change in Performance Costs. In *Titan Corp. v. Department of Commerce*,[719] the National Oceanic and Atmospheric Administration (NOAA) conducted a solicitation for a new weather radio system. Initially, the NOAA began the procurement with a DPA of $13.1 million. However, based on figures received through initial proposals, the NOAA obtained a DPA amendment increasing its DPA to $19.552 million. The NOAA subsequently awarded a contract for $19,551,649. The protester alleged that the agency violated its DPA by examining offers that were priced in excess of the DPA limits. The board rejected the argument, stating that the agency never contemplated awarding a contract in excess of the DPA limits, and therefore, the agency actions were proper. However, the board, in dicta, went on to state that *CACI, Inc. v. Stone*[720] required contracts to be voided only for "plain illegality." Therefore, postaward performance cost increases resulting in the contract price exceeding the DPA do not retroactively invalidate a contract because the agency awarded the contract based on the best information available at the time.[721]

f. The GAO Applies Timeliness Standards to Delegation of Procurement Authority Protests. The protester was eliminated from the competitive range on a Marine Corps

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[713] The desktop computers that were in the office apparently did not have the capability (network cards, hard drive capacity, etc.) to properly connect to the new network.

[714] Government Technology Servs., Inc. v. United States Agency for Int'l Development, GSBCA No. 13241-P, 1995 GSBCA LEXIS 355 (Oct. 3, 1995). *See* Pragmatics, Inc. v. Dep't of Health and Human Services, GSBCA No. 13158-P, 95-2 BCA ¶ 27,658 (another case involving suspension of a DPA).

[715] Electronic Data Sys. Corp. v. Department of Energy, GSBCA No. 13020-P, 95-1 BCA ¶ 27,485.

[716] The board cited *CACI, Inc. v. Stone* for the proposition that the contract award was void. 990 F.2d 1233 (Fed. Cir. 1993)

[717] AT&T Global Business Sys. v. Department of the Army, GSBCA No. 12397-P, 95-1 BCA ¶ 27,379.

[718] The board cited its earlier decision in *Pacific Bell v. NASA* to support its holding that the contract language fairly gave the contractor notice that such changes were possible. GSBCA No. 12814-P, 94-3 BCA ¶ 27,067.

[719] GSBCA No. 13,103-P, 95-2 BCA ¶ 27,779. *See* text *supra* § III.E.3.a. for a discussion of the board's treatment of the agency's source selection decision.

[720] 990 F.2d 1233 (Fed. Cir. 1993).

[721] It is unclear why the board addressed this issue. The board may have felt that because of the narrow margin between the contract price and the DPA limit ($351), it was likely that contract modifications would push the contract price above the DPA ceiling.

procurement conducted under the Warner Amendment.[722] The protester then protested to the GAO that the Marine Corps' reliance on the Warner Amendment was improper, and as a result, the Marine Corps should have obtained a DPA from GSA to conduct the procurement. The GAO dismissed the protest as untimely, holding that if the protester thought a DPA was required, the protester should have filed the protest prior to the receipt of initial proposals.[723]

g. Warner Amendment Exception for Command and Control Systems Not Waived by Partial Non-Exempt Use. The Air Force, on the DOD's behalf, issued a solicitation for software, hardware, and services to create the new Defense Messaging System, which would deliver intelligence and command and control messages for the DOD. However, the system also would carry other electronic message traffic on a lower priority basis. Although counsel opined that the solicitation was exempt under the Warner Amendment, the Air Force obtained a DPA to protect itself. When a protester protested the award decision, the Air Force moved to dismiss for lack of jurisdiction, based upon its Warner Amendment exemption. The board held that even though the majority of the message traffic would not be command and control messages, the fact that exempt messages would be given priority on the system qualified the system for Warner Amendment treatment.[724] Additionally, the board held that the Air Force's acquiring a DPA for the acquisition had no significance on the question of whether the Warner Amendment applied in the particular case. As a result, the board granted the motion to dismiss.[725]

3. Other Automatic Data Processing Equipment Cases.

a. Improper use of Automatic Data Processing Equipment Schedule Contracts Invalidates Procurements. The Internal Revenue Service (IRS) sought to purchase computer workstations and associated software. It published in the *Commerce Business Daily* two notices of intent to purchase the workstations from a vendor's schedule contract.[726] It also specified a certain make and model of workstation. Two weeks after publishing the notices, the IRS prepared Justification for Other than Full and Open Competition explaining why the specific make and model of workstations were required. When the protester and others responded to the notices with alternative quotations, the IRS evaluation team revised the specifications to decrease the price of the desired workstation, but only sought revised quotes from vendors offering the listed workstation.[727] Additionally, the contracting officer added $14,500 to each responding vendor's price as the perceived administrative cost of conducting a competitive procurement versus ordering from the schedule contract. When the protester discovered after award that the agency ordered the equipment from the vendor's schedule contract, it filed a protest seeking invalidation of the schedule contract orders. In *Integrated Systems up v. Department of the Treasury*,[728] the board granted the protest and held that (1) the justifications were improper because they were prepared *after* the notices, and they did not sufficiently justify the restrictive requirement; (2) the IRS's determination that the vendor's offered equipment would not meet the IRS's needs was improper because the rejection was based upon criteria not stated in the notices; and (3) the IRS failed to justify the contracting officer's $14,500 administrative cost estimate.[729]

b. "Bundling" Decision for Smart Bombs Upheld. The Air Force awarded a contract for smart bombs. Later, the Air Force sought to modify the contract to include a mid-course guidance system for the bombs.[730] Another vendor protested to the GAO, alleging that the modification violated the CICA by failing to provide proper notice and that the modification constituted an improper bundling of the requirement. In *Magnavox Electronic*

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[722] The Warner Amendment (10 U.S.C. § 2315 (1988); 40 U.S.C. § 759(a)(3)(C)(1988)) exempts from Brooks Act coverage DOD ADPE acquisitions for intelligence purposes, cryptologic purposes, command and control of military forces, integral parts of weapons or weapons systems, and ADPE acquisitions critical to the direct fulfillment of a military mission.

[723] Source Diversified, Inc., B-259034, Mar. 1, 1995, 95-1 CPD ¶ 119.

[724] This appears to be an expansion of the board's view concerning the scope of the Warner Amendment's "command and control" exemption. The board cited its earlier holding in *WilTel, Inc. v. Defense Info. Sys. Agency* for the proposition that the exemption applied so long as the *primary* purpose of the system was to transmit command and control messages. GSBCA No. 12310-P, 93-3 BCA ¶ 25,982. However, the language of this case strongly suggests that the exemption applies so long as *any part* of the system is used for command and control purposes.

[725] Harris Corp. v. Department of the Air Force, GSBCA No. 13271-P, 95-2 BCA ¶ 27,816.

[726] As stated previously, GSA amended the *FIRMR* to delete this synopsis requirement.

[727] Four companies responded to the first CBD notice while five companies responded to the second notice. The protester proposed alternative equipment which it felt would meet the agency's needs. However, since the protester did not offer the brand name equipment, it did not receive a request for revised quotations based on the agency's amended requirements.

[728] GSBCA No. 13023-P, 95-1 BCA ¶ 27,343.

[729] The board indicated that the information suggested that, if anything, the IRS could acquire the needed goods and services competitively for *less* than the schedule contract price.

[730] The Air Force had initially planned to award separate contracts on a "sole source" basis and had synopsized its intent to do so in the CBD. However, the Air Force discovered that it could issue an "in scope" contract modification to the preexisting contract.

Systems Co.[731] the GAO rejected the CICA violation claim.[732] As for the improper bundling claim, the GAO held that the agency was reasonable in determining that purchasing subsystems for the smart bombs from different vendors would create an undue risk of procuring incompatible subsystems.

c. Courts Covered Under Brooks Act. In *Concept Automation, Inc. v. Administrative Office of the United States Courts*,[733] the protester invoked the FASA[734] and requested the board to suspend the agency's DPA after a debriefing. The agency defended on the basis that because it was not an executive agency for purposes of the CICA, it was not subject to the debriefing requirements. However, the board rejected the agency argument and held that even though the agency was not subject to CICA, it was clearly subject to the Brooks Act and the *FIRMR*, which incorporated by reference the *FAR* provisions concerning debriefings. As a result, the board suspended the agency DPA.

d. Brooks Act Trumps Economy Act. The Army requested the GSA to purchase computer maintenance services for the Army's use. The protester alleged that the Army's request to GSA was improper because the Army violated the Economy Act[735] by failing to determine in advance that the order from GSA was in the best interest of the Army. The board denied the protest[736] and held that, when an agency requests GSA to procure automatic data processing equipment under the Brooks Act, the Economy Act requirements do not apply to the transaction.

e. Board Construes New "Replacement" and "Upgrade" of "Embedded FIP Resources" FIRMR *Exemptions Broadly.* Late last year, the GSA amended the *FIRMR* by exempting automatic data processing equipment (ADPE) acquisitions of equipment to replace or upgrade "embedded FIP resources"[737] from Brooks Act coverage.[738] In its first decision construing the new rule, the GSBCA dismissed a protest concerning an acquisition to replace and upgrade an automated utility control system for the post hospital at Fort Riley, Kansas.[739] The board held, based in large part on an advisory opinion from GSA, that because the original utility control system qualified as "embedded ADPE" within a hospital building,[740] the solicitation fell within the new replacement/upgrade exception. The board announced that in order for systems to meet the new exception, "the system currently being acquired must have been capable of meeting the embedded exception at the time the embedded product was originally installed, and must be an integral part of and perform an integral function in the product in which it is embedded."[741]

N. Construction Contracting.

1. Suspension of Work.

a. Impractical Is Eichleay Formula Standard. Use of the *Eichleay* formula requires showing that it was impractical for the contractor to take on additional work during a period of contract suspension. In *All State Boiler Work Inc.*,[742] the contractor argued the work was delayed fifty-eight days past its planned completion date (the board found that the work was delayed twenty-two days past the *contract* completion date). The board found that, although the contractor may have planned an early completion date, it has the burden of showing it had the ability to do so. Here, the contractor did not meet its burden.

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[731] B-258037, Dec. 8, 1994, 94-2 CPD ¶ 227.

[732] The GAO found the Air Force properly had published a CBD notice, and the protester had failed to respond; therefore, it dismissed the protest issues based on alleged lack of notice.

[733] GSBCA No. 13313-P, 95-2 BCA ¶ 27,813.

[734] FASA, *supra* note 181, § 1433(a) (amending the Brooks Act at 40 U.S.C. § 759(f) (1988) by authorizing the GSBCA to hold DPA suspension hearings if an offeror files a protest within five days after a debriefing date).

[735] 31 U.S.C. § 1535(a) (1988). The Economy Act permits agencies to place orders for goods and services with other federal agencies, subject to certain limitations. *See* text *infra* § VI.E. for more on the Economy Act.

[736] Integrated Sys. Group. v. General Serv. Admin. & Department of the Army, GSBCA No. 13108-P, 95-1 BCA ¶ 27,484.

[737] The *FIRMR* defines "embedded FIP resources" as an ADPE which is embedded in a product whose principal function is other than automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information, and which (1) cannot be used for other purposes without substantial modification, or (2) costs less than the lesser of $500,000 or 20% of the product's value. FIRMR, *supra* note 708, 201-1.002-2(f); 201-39.101-3(b)(6).

[738] 59 Fed. Reg. 66,202 (1994) (effective Jan. 23, 1995, creating *FIRMR 201-1.002-2(g)* and *FIRMR 201-39.101-3(b)(7)*).

[739] HSQ Technology v. Department of the Army, GSBCA No. 13280-P, 95-2 BCA ¶ 27,815.

[740] The board found that the original system was installed as part of a major renovation of the hospital. Because the board found that the original system comprised only $300,000 of a $20 million hospital renovation, the original system met the regulatory definition of "embedded ADPE."

[741] 95-2 BCA ¶ 27,815, at 138,691.

[742] VABCA No. 4537, 95-2 BCA ¶ 27,831.

The Veteran's Administration argued that the contractor should be required to prove that it was unable to take on additional work during the delay period, emphasizing that the contractor was actively bidding for and entering into additional contracts. The board found this an impossible standard. They also found that before the *Eichleay* formula may be used to compute unabsorbed overhead costs, the contractor must show that it was reasonably required to stand by during the delay period, and that it was "impractical" for it to take on additional jobs.

b. No Suspension of Work if Contractor Informed of Delay Prior to Contract Award. In *F.G. Haggerty Plumbing Co.*,[743] the contractor claimed an equitable adjustment based on a constructive suspension of work. The contractor's complaint was that the contract administrator did not release the Veteran's Administration hospital for contract work a floor at a time, causing the contractor to suspend work pending the release of the work area. Normally, delays resulting from lack of access to the work site cause constructive suspensions which entitle the contractor to an equitable adjustment. In this case, the board found there was no constructive suspension of work because the contractor was informed during contract negotiations that the hospital would not be released a floor at a time and delays might occur depending on medical needs. The board also found the contractor did not prove its cause of action, because the contractor never informed the contracting officer of the delays as required by the suspension of work clause in the contract.

2. Differing Site Conditions.

a. Duty to Investigate Similar Site Defeats Differing Site Conditions Claim. A contractor cannot be compensated for a Category I differing site condition if an obvious conflict between contract drawings obligated the contractor to investigate a similar site. The board found that a contractor who relies on obviously contradictory contract data does not act as a reasonable and prudent contractor in formulating its offer. Although the precise site was not available for the contractor's review, a similar site was available. The contractor did not avail itself of the opportunity and was held responsible for information that would have been disclosed during a reasonable site investigation[744].

b. Reasonable Site Investigation Would Have Revealed Omissions from Contract Drawings. In *Indelsa, S.A.*,[745] the board determined that the contractor could not recover for a Category I differing site condition although the contract drawings omitted various obstructions. The board found that the contract is required to conduct a reasonable site investigation. In this case, the contractor did not perform a site investigation. Had the contractor done so, it would have discovered the obstructions.

c. Government Warnings Concerning Contract Drawing Defeat Differing Site Conditions Claim. In *Veca Electric Co.*,[746] the board found that the appellant failed to prove a Category I differing site condition because the contract drawings were diagrammatic rather than specific representations. The specifications contained warnings that the drawings were only general in nature, and these warnings were reinforced during the site investigation walk through. The board concluded, based on these warnings, that the appellant's interpretation was unreasonable.

3. Contract Interpretation.

a. To Recover, Contractor Must Rely on Order of Precedence Clause. Although the contractor was correct in its application of the Order of Precedence clause[747] to clarify a dispute between the contract drawings and specifications, the contractor was not entitled to an equitable adjustment because it prepared its bid based on a different interpretation. In *Witherington Construction Corp.*,[748] the government agreed that there was an obvious conflict between the specifications and the drawings, and they could not be read as a harmonious whole. Therefore, the contractor had a duty to seek clarification. The contractor neither inquired about the conflict nor utilized the order of precedence clause in preparing its bid. The board stated further that even if the contractor had been able to convince the board that it reasonably construed the ambiguity, recovery would have been denied because the contractor failed to show reliance on the interpretation in submitting its bid. When preparing its bid, the contractor actually relied on the interpretation it was now complaining it had to follow.

b. Contractor Must Follow Specific References in Specifications if Omitted from Drawings. Under the "Order of Precedence" clause, the specifications, which explicitly and repeatedly required the contractor to provide a graphic annunciator, were controlling over the drawings that did not mention a graphic annunciator. The ASBCA held that the Order of Precedence clause applied although the specifications stated that the annunciator was to be located as shown on the drawings.[749]

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[743] VABCA No. 4482, 95-2 BCA ¶ 27,671.

[744] Steele Contractors, Inc., ENG BCA No. 6043, 95-2 BCA ¶ 27,653.

[745] ENG BCA No. PCC-117, 95-2 BCA ¶ 27,633.

[746] ASBCA No. 47733, 95-2 BCA ¶ 27,749.

[747] *See* FAR, *supra* note 98, 52.236-21; DFARS, *supra* note 20, 252.236-7002.

[748] VABCA No. 4456, 95-2 BCA ¶ 27,631.

[749] Baldi Bros. Constructors, ASBCA No. 46218, 95-2 BCA ¶ 27,713.

4. Certifications. The Navy issued a RFP for maintenance and repair work on a guided missile cruiser. The RFP required the contractor to hold a master ship repair agreement (MSRA) with the Navy. The awardee did not have the required certification. The GAO decided that award to an offeror that lacked a specific certification is proper when the only item preventing the awardee's certification is irrelevant to the contract. After the awardee submitted its proposal, the Navy determined they were eligible for a MSRA with the exception that access to their drydock was not satisfactory. The Navy determined the contract did not require drydock, and therefore, the reason preventing their lack of certification did not apply to this particular contract. The GAO agreed.[750]

5. Liquidated Damages.

a. Office of Federal Procurement Policy Issues Guidance on Subcontracting Plans. On 26 September 1995, the Office of Federal Procurement Policy (OFPP) issued new policy guidance[751] on subcontracting plans for companies supplying commercial items. Along with the new policy letter, OFPP issued for comment draft policy guidance focusing on administration and enforcement of subcontracting plans. The draft guidance lists factors contracting officers should consider in determining whether a contractor has made a good faith effort to comply with a subcontracting plan. Failure to make a good faith effort is a material breach of the contract. A contractor found not to have made a good faith effort to comply with its subcontracting plan is liable for liquidated damages.[752]

b. Unqualified Release of Claims Equals No Challenge to Liquidated Damages. A contractor's unqualified execution of a release of claims, in a modification by which the contractor agreed to pay specific liquidated damages, barred the contractor's subsequent challenge to the liquidated damages.[753]

c. Liquidated Damages During Wartime. Liquidated damages clauses for delay in the delivery of supplies during wartime are *per se* enforceable.[754]

O. Commercial Items.

1. Buying Like the Private Sector. The Federal Acquisition Commission 90-32[755] issued the final *FAR* rules implementing Title VIII of FASA. The new rules encourage the acquisition of commercial end items and components by the government as well as by contractors and subcontractors at all levels. With an effective date of 1 October 1995, the new rules are optional for solicitations issued before 1 December 1995, but mandatory for those issued after that date. The final rules include broad definitions of "commercial item," "component," "commercial component," and "nondevelopmental item" in *FAR 2.101*. Some commercial services are now included in the definition of "commercial items." The new rule revises *FAR Part 10* to require market research as the first step in the acquisition process. The purpose of market research is to determine whether the government's need can be filled by purchase of a commercial item or a modified commercial item. The new *FAR Part 11* provides guidance on the process of describing the agency's need, developing the overall acquisition strategy, and identifying terms and conditions unique to the item being procured. The *FAR Part 11* also establishes the government's order of precedence for requirements documents and addresses the concept of market acceptance as it pertains to delivery or performance schedules, liquidated damages, priorities and allocations, and variations in quantities.

The *FAR Part 12* is completely rewritten and contains unique policies for the acquisition of commercial items above the micro-purchase threshold. Among other changes, a new Standard Form 1449, Solicitation/Contract/Order for Commercial Items, is established in *FAR 12.204*. The *FARs 12.602* and *12.603* provide streamlined procedures for both evaluation and solicitation of offers. These discretionary procedures are more akin to those used in the commercial marketplace, for example, "greatest value in terms of performance and other factors." Under the streamlined procedures, standard[756] or tailored evaluation factors may be used. Subfactors for technical capability are unnecessary if the intended use of the item is adequately described. A technical evaluation may be conducted by reference to descriptive literature, samples (if requested), features, and warranties. Streamlined solicitation is accomplished by a combined *Commerce Business Daily* synopsis/solicitation. A format is included in *FARSubpart 12.6*. The combined synopsis/solicitation is for relatively simple solicitations and is subject to the *Commerce Business Daily* limit on textual characters, which is approximately three and one-half single spaced pages.

2. How Do You Spell Relief? "INAPPLICABLE STATUTES." The *FARs 12.503* and *12.504* contain an extensive list of laws inapplicable to prime contracts and subcontracts, like the

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[750] North Fl. Shipyard, Inc., B-260003.2, Apr. 14, 1995, 95-1 CPD ¶ 201.

[751] OFPP Policy Letter 95-1, Subcontracting Plans for Companies Supplying Commercial Items, 60 Fed. Reg. 49,642 (1995).

[752] *Id.*

[753] E&R Inc., ASBCA No. 48056, 95-2 BCA ¶ 27,745.

[754] DJ Mfg. Corp. v. United States, 33 Fed. Cl. 357 (1995).

[755] 60 Fed. Reg. 48,231 (1995) (effective Oct. 1, 1995, amending various sections of *FAR pts. 2, 10, 12, and 52*).

[756] FAR, *supra* note 98, 52.212-2 (a standard clause containing evaluation factors for commercial items).

Walsh-Healey Act and the Drug-Free Workplace Act of 1988, for the acquisition of commercial items, and a list of laws revised to modify their applicability to commercial item acquisitions. The waiver of these statutes unique to government contracts removes significant impediments to commercial firms doing business with the government.

3. Financing Commercial Items. The *FAC 90-33*[757] issued a final *FAR* rule which implements Sections 2001 and 2051 of FASA, relating to financing and payments under government contracts—specifically FASA's fundamental distinction between financing of purchases of commercial and noncommercial items. Although recognizing that most commercial item purchases will not involve financing, the new rule authorizes the government to provide contract financing under certain circumstances where financing is appropriate or customary for the purchase of commercial items in the commercial marketplace.

P. Commercial Activities and Service Contracts.

1. "Personal Animus": Insufficient Grounds to Cancel Solicitation. In *Mastery Learning Systems*,[758] the GAO found that even if personal animus supplied part of the agency's motivation for canceling solicitations, the cancellation is not objectionable where the agency reasonably determined that performing the services in-house was in its best interest because it would assure the continuity of the family readiness program. Mastery protested the cancellation of requests for proposals (RFP) and requests for quotes (RFQ) by the Marine Corps for the operation of a Family Readiness/Key Spouse program at three Marine Corps air station sites. After several revisions to the RFPs and RFQs, Mastery filed a protest with the GAO contending that the Marine Corps acted improperly in not awarding the contract to Mastery. Shortly thereafter, the Marine Corps notified the GAO that it had reevaluated its requirements and had determined it would perform the services in-house. The GAO dismissed the protest.

Mastery then filed another protest alleging that the cancellations were improper, characterizing them as pretexts to avoid the GAO's review of Mastery's original protest. The GAO disagreed, stating that as a general rule, it did not review agency decisions to cancel procurements and perform the work in-house since such decisions are a matter of executive branch policy. However, the GAO went further to state that, where the protester argues that the agency's rationale for cancellation is a pretext to avoid awarding a contract or is in response to the filing of a protest, GAO will examine the reasonableness of the agency's actions. The GAO found that the Marine Corps cancelled the solicitations because it determined that in-house capability was both desirable and feasible to avoid disruptions in such a vital service. Even if part of the reason for the cancellation was based on personal animus, the GAO could not conclude that the cancellations were improper.

2. In-House Decisions Reasonable if Based on Cost Comparison. In United Media Corp.,[759] the GAO denied a protest challenging a decision by the Air Force to retain audio-visual services in-house because the decision was reasonably based on the results of a cost comparison conducted pursuant to *Office of Management Budget Circular No. A-76.*[760] United Media protested the Air Force's decision to keep the audio-visual services in-house because the Air Force, in its cost comparison, failed to properly consider the costs of converting the work previously done by a contractor. The GAO found that the Air Force's cost comparison was not flawed because the Air Force properly included a 10% cost differential to account for the costs of converting the work from contractor performance to in-house performance. After completing the cost comparison, the Air Force properly concluded that it was more advantageous for the government to retain the work in-house.

3. The DOD Seeks Withdrawal of Office of Management Budget Circular No. A-76 *and Counters with Revisions.* Defense Secretary William Perry ordered the DOD to develop plans for increased privatization of depot maintenance work and supply management. His order seeks withdrawal of *Office of Management and Budget Circular A-76.*[761] The Office of Management and Budget proposed revisions to *A-76* reducing, and in some cases, eliminating cost comparison requirements, reporting, and other administrative burdens.[762] Currently, *A-76* exempts inherently governmental functions, defense mobilization requirements, research and development, and certain direct patient care in government hospitals from the cost comparison process. The proposed revision broadens the exemptions to include national security activities, certain residual core activities, and any temporary requirements that cannot be met by contract. Since the planned revision exempts all recurring national security commercial activities from the cost comparison process, it seems to meet the DOD's objectives.[763] The revision delegates to agency heads the authority to decide when and if to conduct cost comparisons. The proposed revisions are intended to reduce cost comparison re-

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[757] 60 Fed. Reg. 49,706 (1995) (effective Oct. 1, 1995, amending various sections of *FAR pts. 1, 32, 42, and 52*).

[758] B-258277.2, Jan. 27, 1995, 95-1 CPD ¶ 54.

[759] B-259425.2, June 22, 1995, 95-1 CPD ¶ 289.

[760] OFFICE OF MANAGEMENT AND BUDGET, CIR. NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (Aug. 16, 1995).

[761] *DOD To Seek Withdrawal Of OMB Circular A-76 To Outsource More Depot Maintenance*, 64 Fed. Cont. Rep. (BNA) 9 (Sept. 11, 1995).

[762] 60 Fed. Reg. 54,394 (1995).

[763] *OMB Plans Revisions To A-76 Handbook To Reduce Cost Comparison, Reporting Requirements*, 64 Fed. Cont. Rep. (BNA) 11 (Sept. 25, 1995).

quirements and other administrative burdens and provide new administrative flexibility to the government.[764]

VI. Fiscal Law

A. Purpose.

1. The GAO Approves Payment of Commercial Drivers' Licenses. Appropriated funds generally may not be used to purchase a license or certificate necessary to qualify a government employee to perform his job.[765] Nevertheless, the GAO determined that the National Security Agency (NSA) may use its appropriated funds to pay for commercial drivers' licenses for a team of its employees to perform security testing at remote sites.[766] The team consisted of engineers, computer scientists, and physicists, several of whom volunteered to drive the vehicle used to transport test equipment. The NSA argued that the use of team members to drive the vehicles was more cost effective and manpower efficient than hiring a contractor or using a government driver from the motorpool. The GAO approved of NSA's plan, reasoning that the licenses were not for the purpose of qualifying the employees for their positions, and that the primary benefit of purchasing the licenses accrued to NSA.[767]

2. But the GAO Says "Ixnay" to Certified Government Financial Manager Designation. The Bureau of Land Management (BLM) was less persuasive than the NSA when seeking to use appropriated funds to reimburse its employees for the costs of obtaining a certified government financial manager (CGFM) designation.[768] Conferred by the Association of Government Accountants, the designation's purpose is to "increase the emphasis on the professional qualifications and stature of government financial managers."[769] The BLM asserted that the designation would demonstrate increased skills of its employees, which would primarily benefit the government. Further, the BLM argued that the designation was not required by a state licensing agency, and the benefit of obtaining the designation was not transferable by the employee to the private sector. The GAO was unimpressed. Conceding that the CGFM designation is not a professional license, but a recognition of a government employee's credentials and experience, the GAO nevertheless determined that such recognition from a private professional organization did not further an official purpose. Because the benefits of having the designation are personal in nature, rather than for the benefit of the agency, the GAO determined that appropriated funds are not available for this purpose.

3. Training May Benefit Future Assignments. A finance and accounting officer (FAO) requested an opinion from the GAO on the expenditure of appropriated funds to reimburse two Defense Logistics Agency quality assurance specialists for training in nongovernment facilities.[770] The FAO questioned whether the courses, given by the University of Maryland's Asian Division in Pusan, South Korea were sufficiently related to the employee's duties, believing that training could be approved only to improve current job knowledge, skills, and abilities.[771] Noting that the Government Employees Training Act[772] specifically authorizes the training of government employees in nongovernment facilities, the GAO stated that agencies have a "considerable degree of discretion" to determine the types of training its employees should receive.[773] Because the courses did not appear to be so attenuated from the work of the employees such that approval would constitute an abuse of discretion, reimbursement for the courses was proper.

4. Cutting the Red Tape. Searching for a creative way to promote teamwork, efficiency, and effectiveness, the Food and Drug Administration (FDA) decided to purchase buttons emblazoned with the logo "No Red Tape."[774] The FDA envisioned the buttons being worn voluntarily by its employees to remind the

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[764] *OMB Proposes Revisions To A-76 Supplemental Handbook*, 64 Fed. Cont. Rep. (BNA) 15 (Oct. 23, 1995).

[765] Department of the Navy, Payment for Commercial Drivers' License Fees, B-249061, May 17, 1993, 93-1 CPD ¶ 384 (holding that a drivers' license is a personal expense incident to qualifying an employee for his position and not chargeable to appropriated funds).

[766] *National Security Agency—Request for Advance Decision*, B-257895, Oct. 28, 1994, 73 Comp. Gen. 32, 1994 U.S. Comp. Gen. LEXIS 844.

[767] Air Force, Appropriations, Reimbursement for Costs of Licenses & Certificates, B-252467, June 3, 1994, 73 Comp. Gen. 32, 1995 U.S. Comp. Gen. LEXIS 486 (agencies may reimburse employees for fees necessary to obtain licenses to comply with state and local environmental requirements).

[768] Bureau of Land Mgmt., Availability of Appropriations to Pay Expenses for Employees to Obtain a Certified Gov't Fin. Mgr. Designation, B-260771, 1995 U.S. Comp. Gen. LEXIS 674 (Oct. 11, 1995).

[769] *Id.* at *2. To obtain the designation, employees must satisfy education, experience, and ethics requirements, and pay the requisite fee.

[770] Robert E. Monson & William P. Owens, Reimbursement for Training—Nongov't Facility, B-258442, Apr. 19, 1995, 1995 U.S. Comp. Gen. LEXIS 276.

[771] One of the specialists sought reimbursement for classes in organizational behavior and entrepreneurship, claiming that the courses would help him to "facilitate groups" and "enhance presentation skills, professionalism and writing capabilities." The second specialist claimed reimbursement for a class on international business management, the objective of which was the "development of international business management techniques" and to help "in writing and analytic skills." *Id.* at *2.

[772] 5 U.S.C. §§ 4101-18 (1988).

[773] 1995 U.S. Comp. Gen. LEXIS 276, at *6.

[774] Food and Drug Admin., Use of Appropriations for "No Red Tape" Buttons and Mementos, B-257488, 1995 U.S. Comp. Gen. LEXIS 703 (Nov. 6, 1995).

staff and customers that the agency's mission is not to say "no," but to find a way to satisfy the needs of its customers. The GAO agreed that the FDA's purchase of the buttons would be a necessary expense of its appropriation because the buttons have no intrinsic value, and the message is "clearly informational and directed at the promotion of an internal agency management objective."[775]

B. Time.

1. Bargains Do Not Justify Bona Fide *Need Exception.* In 1993, the IRS purchased computer equipment through an indefinite-quantity contract. Because of cost savings due to vendor discounts, the contractor, in turn, reduced its contract price to the IRS. The IRS sought an advisory opinion from the GAO[776] whether the IRS could use the excess expired funds resulting from the cost savings to purchase additional computer equipment. The GAO held, in *Modification to Contract Involving Cost Underrun*,[777] that the IRS could not use the prior year funds to purchase the additional computer equipment. The GAO rejected the IRS's argument that the proposed modification was an in-scope contract change that the IRS could fund with the prior year's funds. Rather, the GAO cited a 1983 decision[778] and held that the proposed modification was an out-of-scope change requiring the agency to use funds current when the modification was issued. Additionally, the GAO held that, because the IRS used an indefinite-quantity contract, no legal obligation existed until the IRS placed orders against the contract. Because the original funds had expired prior to the IRS ordering the additional equipment, the IRS could not use the prior year funds to pay for the additional equipment.[779]

2. Agency Must Pay Attorney Fees with Funds Current at Time of Settlement Not with Funds Current When Case Filed. A Federal Aviation Administration (FAA) employee filed an equal employment opportunity complaint against the FAA in January 1992. During Fiscal Year 1994, an administrative judge found for the employee, and the FAA awarded a promotion, back pay, compensatory damages, and attorney's fees. However, the FAA memorandum directing payment of the attorney's fees cited Fiscal Year 1992 funds. When the certifying official requested GAO guidance, the GAO held that the FAA memorandum cited the wrong funds.[780] The GAO held that the proper fiscal year appropriation for payment of claims is when the claim becomes a legal liability. Since the agency had no legal liability to pay attorney's fees until after the administrative judge's decision, the FAA should have used Fiscal Year 1994 funds to pay the fees.

C. *Continuing Resolution Authority.*

Continuing Resolutions and "Train Wrecks": What Exactly is That Light at the End of the Tunnel? Fiscal Year 1995 was remarkable as it was one of the few occasions when Congress and the President enacted all thirteen appropriation bills prior to the onset of the fiscal year. Fiscal Year 1996 also was remarkable—but for exactly the opposite reason. By the first day of Fiscal Year 1996, Congress had managed to forward only three appropriations bills to the President for his signature, and of these, the President signed only two—the Military Construction and the Department of Agriculture appropriations bills. President Clinton refused to sign the third bill, the Legislative Branch Appropriations bill, until the bills for the other agencies had been enacted.[781]

Congress and the President were able to enact a Continuing Resolution (CR) which remained in effect from 1 October 1995 to 13 November 1995.[782] This CR differed from earlier CRs in many respects, not the least of which was its status as the first resolution authored by a Republican Congress in over forty years–and the contrast in approach from previous CRs was marked. The goal of down-sizing the government through reduced appropriations was reflected in this CR. Specifically, the CR required agencies to reduce their rate of operations by at least five percent; further, programs earmarked for termination or significant reductions could continue operations at a minimal level—90% of Fis-

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[775] *Id.* at *6. *Compare id. with* Implementation of Army Safety Program, B-223603, 1988 U.S. Comp. Gen. LEXIS 1582 (Dec. 19, 1988) (Army failed to establish connection between ice scrapers with inscription "Please Don't Drink and Drive" and the purposes of the Occupational Safety and Health Act; record failed to show how the items addressed an occupational health and safety hazard not shared by the public as a whole).

[776] Under 31 U.S.C. § 3529 (1988), agencies may request advisory opinions from the Comptroller General concerning the propriety of a disbursement.

[777] B-257617, Apr. 18, 1995, 1995 U.S. Comp. Gen. LEXIS 258.

[778] Magnavox—Use of Contract Underrun Funds, B-207433, Sept. 16, 1983, 83-1 CPD ¶ 401.

[779] Under 31 U.S.C. § 1553 (1988), agencies may use expired appropriations to adjust preexisting obligations made during the appropriations' period of availability, but not to make new obligations.

[780] Federal Aviation Administration, Appropriations Availability—Payment of Attorney's Fees, B-257061, July 19, 1995, 1995 U.S. Comp. Gen. LEXIS 48.

[781] The veto of the Legislative Branch appropriations bill marked the first time since 1920 that a president refused to enact Congress' annual budget. *If Train Wreck Happens, What About Congress?*, ROLL CALL, Nov. 13, 1995.

[782] H.J. Res. 108, 104th Cong., 1st Sess. (1995).

cal Year 1995's current rate.[783] Unfortunately, by 13 November, the light at the end of the tunnel was an on-coming train, and America then experienced one of its more memorable train wrecks.

On midnight 13 November, the government shut down for six days. By 18 November, however, Congress and the President were able to agree on the terms of a second CR.[784] This follow-on CR retained the requirement that programs targeted for significant reduction or termination operate at lower rates of operation–this time at 75% of current rate.[785] Additionally, the CR appropriated only that amount necessary to accomplish the orderly termination of specified government activities, to include shutting down the Interstate Commerce Commission.[786] The CR also contained a commitment provision requiring both Congress and the President to balance the federal budget by no later than the year 2002.[787] Finally, as in the past, the CR paid furloughed federal employees their salaries during the funding gap and ratified specific obligations.[788]

D. The Antideficiency Act.

1. New DOD and Department of the Army Guidance Issued. The DOD issued new guidance regarding the administrative control of appropriations and the Antideficiency Act (ADA). The form of this guidance is an update to the governing directive[789] and a new volume of the *Financial Management Regulation (FMR)*.[790] The primary focus of the guidance is on the reporting and investigation of ADA violations. Specifically, the *FMR* identifies and provides examples of common ADA violations;[791] provides detailed guidance on conducting investigations and reporting violations;[792] sets out new requirements for training regarding the ADA;[793] and contains strong language regarding the punishment of individuals found responsible for ADA violations.[794] The Department of the Army issued additional guidance in the form of a supplement to *Army Regulation 37-1*.[795] This supplemental guidance provides additional requirements for conducting ADA investigations, including a requirement for the establishment of a roster of qualified investigators.[796]

2. Failure to Obligate Funds to Cover Ceiling Price Not an Antideficiency Act Violation Even Though Termination for Convenience Required. In *Derek J. Vander Schaaf*,[797] the GAO considered the Air Force procurement of advanced cruise missiles (ACM) for Fiscal Years 1987 and 1988. The contract at issue started as an undefinitized fixed-price incentive-fee contract. When finally definitized,[798] the contract provided for a target price

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[783] *Id.* §§ 111, 115 (1995). *See also* 141 CONG. REC. S14637 (daily ed. Sept. 29, 1995) (statement of Sen. Hatfield, Chairman of the Senate Appropriations Committee):

> This bill continues ongoing programs at restrictive rates that are the average-less 5 percent-of the 1996 levels in the House-passed and Senate-passed bills. For those programs that are terminated or significantly affected by either the House or Senate bills, the rate may be increased to a minimal level—which could be up to 90 percent of the current rate. In any instance where the application of the formula would result in furloughs then the rate can be increased to a level just sufficient to avoid furloughs.

[784] H.J. Res. 122, 104th Cong., 1st Sess. (1995).

[785] *Id.* at § 111.

[786] Among the other agencies identified were: Administrative Conference of the United States; Advisory Commission on Intergovernmental Relations; Pennsylvania Avenue Development Corporation; Land and Water Conservation Fund, State Assistance; and Office of Surface Mining Reclamation and Enforcement, Rural Abandoned Mine Program. *Id.* at § 123.

[787] *Id.* at § 203.

[788] *Id.* at § 124. With respect to ratification authority, this section provides as follows: "(b) All obligations incurred in anticipation of the appropriations made and authority granted by this Act *for the purposes of maintaining the essential level of activity to protect life and property and bring about orderly termination of government functions* are hereby ratified and approved if otherwise in accordance with the provisions of this Act." (emphasis added).

[789] DEP'T OF DEFENSE, DIRECTIVE 7200.1, ADMINISTRATIVE CONTROL OF APPROPRIATIONS (May 4, 1995).

[790] DEP'T OF DEFENSE, FINANCIAL MANAGEMENT REGULATION, VOL. 14, ADMINISTRATIVE CONTROL OF FUNDS AND ANTIDEFICIENCY ACT VIOLATIONS (Aug. 1, 1995) [hereinafter FMR, Vol. 14].

[791] *Id.* ch. 2.

[792] *Id.* chs. 3-7.

[793] *Id.* ch. 8.

[794] *Id.* ch. 9.

[795] Memorandum, Principal Deputy Assistant Secretary of the Army (Financial Management and Comptroller), subject: Supplemental Guidance to *Army Regulation 37-1* for "Reporting and Processing Reports of Potential Violations of Antideficiency Act Violations [sic] (Aug. 17, 1995)." This supplemental guidance will be included as a revision to *Army Regulation 37-1* when that regulation is re-published.

[796] The Department of the Army will maintain this roster based on information provided by Army Major Commands (MACOMS) and agencies.

[797] B-255831, July 7, 1995, 74 Comp. Gen 32, 1995 U.S. Comp. Gen. LEXIS 461.

[798] According to the decision, design and production problems resulted in the definitization of the contract being delayed for one and one-half years.

and a ceiling price which represented the government's maximum liability. In accordance with applicable regulations, the Air Force obligated only enough funds to cover the target price. The Air Force did not commit any funds to cover what GAO termed "predictable cost overruns." When these overruns materialized,[799] there were insufficient funds to allow completion. Therefore, to avoid an ADA violation, the Air Force terminated the contract for convenience. Stating that an agency has a duty to attempt to avoid or at least mitigate any potential ADA violation and noting that there were sufficient funds in the appropriations at all times to cover the government's termination liability, the GAO determined that there was no ADA violation. However, the GAO went on to note that agencies could avoid such major disruptions to their programs by committing funds to cover reasonably foreseeable cost overruns.

E. Intragovernmental Acquisitions.

1. The FAR Council Implements FASA Changes to Economy Act. The FASA directed revision of the *FAR* to place new restrictions on agencies' use of the Economy Act.[800] In response to this statutory mandate, the FAR Council has implemented a final rule amending *FAR Subpart 17.5* in several significant respects.[801] Prior to placing an Economy Act order, agencies must now prepare a Determination and Finding (D&F) stating that: (1) the order is in the best interest of the government, and (2) that the supplies or services cannot be obtained as conveniently or economically by contracting directly with a private source.[802] Further, if the agency performing the order will contract out for the supplies or services, the D&F must find: (1) that the acquisition will be made under a preexisting contract for similar supplies or services, (2) the performing agency has expertise to enter such a contract which is not available within the ordering agency, or (3) the performing agency is specifically authorized by law or regulation to purchase supplies or services on behalf of other agencies.[803] The D&F must be approved by a contracting officer or other official designated by the agency head, except that the senior procurement executive must approve if the performing agency is not covered by the FAR.[804] Finally, if the performing agency contracts out for the requirement, it may not charge a fee in excess of the actual cost of entering or administering the contract.[805]

2. Committee for Blind & Disabled Changes Mandatory Source Requirements. The Javits-Wagner-O'Day Act (JWOD Act)[806] generally requires federal agencies to purchase all goods and services specified on a procurement list from qualified nonprofit agencies designated by the Committee for Purchase from People Who Are Blind or Severely Disabled (Committee).[807] Traditionally, the Committee has required agencies to purchase items on the procurement list directly from the nonprofit agency.[808] After reexamining its regulatory interpretations of the JWOD Act, the Committee has decided that federal agencies may purchase items on the procurement list from commercial distributors authorized by the Committee.[809]

3. Federal Supply Schedule Prices Need Not Be Lowest. The GSA's Federal Supply Schedule (FSS) program provides an efficient and simple method for federal agencies to obtain com-

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[799] By October 1991, the projected cost overrun (the amount by which final cost was expected to exceed the target price) was $100 million.

[800] FASA, *supra* note 181, § 1074. The Economy Act, 31 U.S.C. § 1535 (1988), authorizes federal agencies to order goods and services from other federal agencies and pay the actual costs of the goods and services received.

[801] FAC 90-33, 60 Fed. Reg. 49,720 (1995) (effective Oct. 1, 1995, amending *FAR pts. 1, 7, 9, 17, 37, 49, and 52*).

[802] FAR, *supra* note 98, 17.503(a)). These determinations simply mirror the requirements of the Economy Act. *See* 31 U.S.C. § 1535 (a)(2), (4) (1988).

[803] FAR, *supra* note 98, 17.503(b). These requirements are less restrictive that the guidance issued to DOD last year. *See* Memorandum, Secretary of Defense, to Secretaries of the Military Departments, subject: Use of Orders Under the Economy Act (8 Feb. 1994) [hereinafter SECDEF Memorandum] (requiring a determination that the ordered supplies or services cannot be provided as conveniently and cheaply as a private source, that the performing agency has unique expertise not available within DOD, *and* the supplies or services are clearly within the scope of the activities of the performing agency and the performing agency normally contracts for those supplies or services for itself). As of this writing, the more restrictive DOD guidance is still in effect.

[804] FAR, *supra* note 98, 17.503(c). *Compare id. with* SECDEF Memorandum, *supra* note 803 (requiring General Officer, Flag Officer, or Senior Executive Service approval prior to issuing an order to a non-DOD agency for contract action).

[805] *Id.* 17.505(d). The Economy Act already requires payment of the "estimated or actual cost" of the goods or services ordered. 31 U.S.C. § 1535(b) (1988). Undoubtedly, FASA, *supra* note 181, § 1074 clarified this requirement in response to the practice of federal agencies issuing Economy Act orders to the Tennessee Valley Authority and paying amounts in excess of $1 million for "brokering fees." *See* Department of Defense Audit Report No. 93-068 (Mar. 18, 1993); *Levin Pledges Action to End Abuses of Interagency Purchases*, 60 Fed. Cont. Rep. (BNA) 94 (Aug. 4, 1993).

[806] 41 U.S.C. §§ 46-48c (1988).

[807] *See* FAR, *supra* note 98, subpt. 8.7.

[808] 41 C.F.R. § 51-5.2(a) (1995).

[809] 60 Fed. Reg. 54,199 (1995) (effective Nov. 20, 1995, amending 41 C.F.R. § 51-5.2).

mon supplies and services at reduced prices.[810] In *Charter of Lynchburg, Inc.*,[811] a contractor offering prices on furniture not included on an FSS asserted that the Air Force was precluded from placing an FSS order for similar furniture because the contractor's prices were lower. The Air Force had placed the order with the FSS after determining that the FSS furniture was of superior quality. The GAO found that the Air Force properly satisfied its minimum needs from the FSS, noting that purchasing from an FSS vendor has a higher priority than purchasing from non-FSS sources.[812]

4. Federal Prison Industries' Current Market Price May Properly Exceed a Competitor's Quote. Federal agencies generally are required to purchase certain products from Federal Prison Industries, Inc. (FPI) if the prices charged do not exceed current market prices unless the FPI grants the agency a clearance to obtain the products from another source.[813] In *Battery Assemblers, Inc.*,[814] the GAO discussed how agencies determine whether a product is sold by FPI at current market price. Noting that neither the FPI's enabling legislation nor *FAR Subpart 8.6* define "current market price" or indicate how it is to be determined, the GAO stated that the "current market price" is merely a "bookkeeping arrangement" to enable Congress to determine whether FPI is a "paying proposition."[815] Agencies and the FPI, therefore, have the burden of determining "current market price," and any method that reliably estimates it may be used. If the agency and FPI cannot agree, the dispute is subject to arbitration.[816] Turning to the merits of the protest, the GAO found that the agency reasonably determined that FPI's price for batteries, arrived at after negotiations between the parties, did not exceed "current market price."[817] The mere fact that the protester claims it could offer the same batteries for a cheaper price does not mean that FPI's price exceeds "current market price."

F. Liability of Accountable Officers.

1. Improper Payment Excused by Good-Faith Reliance on General Counsel's Approval. In *Ms. Trudy Huskamp Peterson*,[818] a certifying officer improperly certified payment of an employee's attorney's fees, requested by the agency pursuant to a settlement agreement with the employee.[819] Because the terms of the agreement were approved by the agency head and the National Archives and Records Administration (NARA) Office of the General Counsel, the certifying officer certified payment of the fees. Subsequent review by the GAO determined, however, that such payment violated the general prohibition against paying for an employee's legal expenses.[820] Given the certifying officer's good faith reliance on the agency's general counsel office and the fact that NARA had received value for the payment, however, the GAO concluded that relief from liability was appropriate.[821]

2. Payment Made Prior to Ratification Does Not Require Relief. In *Mr. Dan J. Carney, Controller*,[822] a certifying officer had approved payment for employee training courses which were not authorized by a contracting officer. On discovery of the error, the contracting officer sought to ratify the purchases. Prior to ratification, however, the certifying officer certified payment, and payment was made to the contractor. The agency, believing ratification was no longer possible, sought relief from the GAO. The agency believed it could not ratify the transaction because it had

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[810] FAR, *supra* note 98, 8.401(a). When agencies use the FSS to satisfy their requirements, they need not seek further competition, synopsize the requirement, make a separate determination of fair and reasonable pricing, or consider small business set-asides. *Id.* 8.404(a). The reader should note that, for automatic data processing equipment procurements, the *FIRMR* requires agencies to prepare a J&A for purchases from an FSS contract.

[811] B-260017, May 22, 1995, 95-2 CPD ¶ 115.

[812] *See* FAR, *supra* note 98, 8.001(a)(1).

[813] *Id.* subpt. 8.6. The FPI publishes a "Schedule of Products Made in Federal Penal and Correctional Institutions" which lists those products agencies must acquire from the FPI.

[814] B-260043, May 23, 1995, 95-1 CPD ¶ 254.

[815] *Id.* at 3. The GAO noted that Congress established a working capital fund for the prison manufacturing operation which was intended to be self-sustaining; the fund had to charge current market prices to cover its production expenses.

[816] *See* 18 U.S.C. § 4124(b) (1988).

[817] Interestingly, the agency's estimate was based on the protester's 1991 contract price, adjusted for inflation, differences in quantity, and learning curve.

[818] B-257893, June 1, 1995, 1995 WL 331073.

[819] The National Archives and Records Administration (NARA) entered into a settlement agreement with its former Inspector General (IG), which, in part, provided for the removal of the employee as the agency IG and that the agency would pay the employee's legal costs associated with arriving at settlement. *Id.*

[820] *See* Payment of Attorney Fees Incurred by Employee During the Admin. Settlement of a Personnel Action, B-253507, Jan. 11, 1994, 1994 WL 14190.

[821] 1995 WL 331073 at *2 (citing 31 U.S.C. § 3528 (1988)). The "value" received by the agency was the removal of the employee as IG and a one-grade reduction for inappropriate conduct. *Id.*

[822] B-259926, Mar. 31, 1995, 1995 WL 147499.

already made payment. The GAO noted, however, that nothing in the applicable *FAR* provision, *FAR 1.602-3*, prohibited after-the-fact ratification. Therefore, ratification was the appropriate measure to resolve this matter. The GAO found that since payment was otherwise appropriate and the agency received the services for which it bargained, there existed no need to grant relief.[823]

G. Revolving Funds/Defense Business Operations Fund.

The GAO States that the Defense Business Operation Fund's Progress is Debatable. On 6 March 1995, the GAO issued a report on the Defense Business Operations Fund (DBOF) for the House of Representatives National Security Committee and the Senate Armed Services Committee.[824] The GAO found that the Department of Defense had made some progress toward better cash management, but "after more than three years of operations, very little has changed in the day-to-day operations of DBOF's business areas." The Fiscal Year 1994 loss marks the third consecutive year of operating losses.

The GAO specifically reported as follows: (1) The DOD does not have in place a systematic process to ensure consistent implementation of policies, (2) accurate financial reports are unavailable, (3) the DOD's cash management policy has been reversed by returning cash control to the Department of Defense components, and (4) the current system will cause continued dissemination of inaccurate and unreliable information. The GAO recommended Congress enact legislation requiring that DBOF's prices ensure full cost recovery of military support personnel. The GAO further recommended that the DOD comptroller: (1) ensure that a functional economic analysis is prepared for each recommended interim system prior to expenditure of funds, (2) reverse the decision to transfer cash management to the military services and Department of Defense components, and (3) revise the revenue recognition policy to require that the percentage of completion method be used for work done on orders that cross fiscal years, and clarify the management headquarters policy to specifically identify the costs not to be included in the process.[825]

H. Nonappropriated Fund Contracting Cases.

1. No Scanwell *Standing for Suit Against Army & Air Force Exchange Service.* In *MCI Telecommunications Corp. v. Army & Air Force Exchange Service* (AAFES),[826] the United States Court of Appeals for the D.C. Circuit found that MCI lacked standing to challenge the sole-source extensions of contracts for long distance telephone service. The original contract implemented an AAFES program called "Call CONUS." The contract required the installation of coinless pay telephones at overseas installations. The program allowed military personnel and family members to place calls to the continental United States using a calling card. The awardee contractor paid AAFES a commission based on the volume of business generated by the Call CONUS program. The original contract was awarded in 1987. The largest award went to AT&T.

Numerous noncompetitive extensions of the contract were awarded in the following years. Several reasons were cited as justification for these extensions. The Federal Communications Commission was considering mandating the installation of technology which would allow pay phone customers to have calls handled by the long distance carrier of their choice, which was expected to eliminate presubscription of pay phones and the payment of commissions. Drawdowns and base closures further threatened the program as did the Army's initiative to require telephones in barracks rooms. Based on market uncertainty, AAFES contemplated that bidders would be reluctant to accept these risks and recompetition would not be in AAFES's best interest.

To stop AAFES from spending certain commissions generated by the contract and to require competitive resolicitation, MCI sought an injunction and asserted *Scanwell*[827] jurisdiction under the Administrative Procedure Act[828] and the Federal Property and Administrative Service Act of 1949 (FPASA).[829] In dismissing the case for lack of standing, the court noted that the FPASA does not apply to AAFES. The court further explained that the regulations and policies allegedly violated were not based upon statute and were not meant to benefit an aggrieved bidder. To have standing, the plaintiff must show that he is "injured in fact by agency action and that the interest he seeks to vindicate is arguably with[in] the 'zone of interests to be protected or regulated by the statute' in question."[830] Here, the plaintiffs could show injury, but could not meet the second prong of the test for standing.

2. Brooks Act Inapplicable to ADPE Procurements Conducted by NAFIs. Consulting Associates, Inc. filed a protest with the GSBCA against award of a contract for data processing sup-

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[823] The GAO also observed that the contractor was entitled to payment under the doctrine of *quantum meruit*. *Id.*

[824] United States General Accounting Office, *Defense Business Operations Fund: Management Issues Challenge Fund Implementation*, GAO/AIMD-95-79 (Mar. 6, 1995).

[825] *GAO: Management Issues Remain For DBOF*, 64 Fed. Cont. Rep. (BNA) 12 (March 27, 1995).

[826] No. 95-0607, 1995 U.S. Dist. LEXIS 12947 (D.D.C. May 9, 1995).

[827] Scanwell Lab., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

[828] 5 U.S.C. §§ 701-06 (1988).

[829] 41 U.S.C. §§ 251-60 (1988).

[830] 1995 U.S. Dist. LEXIS 12947, at *19 (citations omitted).

port services by the Air Force Nonappropriated Fund Purchasing Office.[831] The GSBCA found that the issue of its protest jurisdiction hinged on whether nonappropriated fund instrumentality (NAFI) contracts are subject to the provisions of the Brooks Act.[832] The opinion contains a lengthy discussion of whether NAFIs are federal executive agencies under the statute. The GSBCA finally determined that the statute is ambiguous on the issue and gave considerable weight to "the reasonable interpretation of the statute advanced by the agency which is responsible for administering the law," the GSA.[833] A divided panel held that NAFIs are not federal agencies within the definition of the Brooks Act. This holding is in line with GAO opinions, which have held that the Brooks Act is inapplicable to NAFIs.

3. Regulatory Change Increases Dollar Limit for NAF Contracting Officers. Interim Change 1 to *Army Regulation 215-4* increased the dollar limitation for nonappropriated fund (NAF) contracting officer appointments to $100,000 for supplies, services, and construction.[834] Under the previous version of this regulation, NAF contracting officers' warrants could not exceed $25,000 for supplies, services, entertainment, and construction and could not exceed $50,000 for resale. The separate dollar limitation for the purchase of resale items has been eliminated.

VII. Conclusion

The year 1995 was more notable for its lack of change rather than for the meaningful acquisition reform many had predicted. As we noted in the Foreword, we began the year with the expectation that Congress would deliver another acquisition reform package to build upon the start made by the Federal Acquisition Streamlining Act. As things turned out, however, we did not even get a DOD Appropriations Act until the last day of November.

The courts and boards remained busy, however, issuing decisions expanding or refining the law in ways which impact us all. Some will make our lives easier such as the CAFC's decision in *Reflectone*, which brought some sanity back to the disputes process. We have attempted to capture the most significant developments in the field while recognizing that we could never cover the entire spectrum of issues facing practitioners.

This next year may bring some significant reform to the acquisition process. Proposals currently before Congress, which would reform the bid protest process, streamline competition requirements, and further relax the requirements relating to the purchase of commercial items, may become law this year. Portions of the *FAR* may be rewritten. Whatever happens, we will continue to monitor the important developments in the field so that we can provide the best possible year-in-review for 1996.

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[831] Consulting Associates, GSBCA No. 13194-P, 95-1 BCA ¶ 27,602.

[832] 40 U.S.C. §§ 759 (1988).

[833] 95-1 BCA ¶ 27,602 at 137,529 (citations omitted).

[834] DEP'T OF ARMY, REG. 215-4, NONAPPROPRIATED FUND CONTRACTING, para. 1-6h(1), (10 Sept. 1990) (I01, 15 June 1995).

USALSA Report

United States Army Legal Services Agency

Clerk of Court Notes

Office of the Clerk of Court, United States Army Judiciary

Courts-Martial and Nonjudicial Punishment Rates

Court-martial and nonjudicial punishment rates for the fourth quarter of fiscal year 1995 are shown below.

Rates per Thousand

Fourth Quarter Fiscal Year 1995; July—September 1995										
	ARMYWIDE		CONUS		EUROPE		PACIFIC		OTHER	
GCM	0.36	(1.44)	0.33	(1.32)	0.47	(1.88)	0.45	(1.81)	0.38	(1.52)
BCDSPCM	0.13	(0.51)	0.12	(0.49)	0.11	(0.44)	0.19	(0.75)	0.19	(0.76)
SPCM	0.00	(0.00)	0.00	(0.00)	0.00	(0.00)	0.02	(0.08)	0.00	(0.00)
SCM	0.19	(0.76)	0.22	(0.89)	0.09	(0.38)	0.09	(0.38)	0.00	(0.00)
NJP	19.58	(78.33)	20.78	(83.14)	15.32	(61.28)	17.35	(69.41)	14.80	(59.21)

Note: Based on average strength of 512088. Figures in parenthesis are the annualized rates per thousand.

Six-Year Military Justice Statistics, Fiscal Years 1990-1995

Office of the Clerk of Court, United States Army Judiciary

Instead of our customary annual five year look at military justice statistics, we offer a six year look beginning with Fiscal Year 1990 for two reasons. First, we neglected to publish the five year figures last year (so you are seeing the Fiscal Year 1994 data for the first time). Second, and more importantly, Fiscal Year 1990 is a better base year than Fiscal Year 1991. The latter was impacted to a greater degree by the Desert Shield mobilization, which reduced court-martial rates. You may notice, too, that the rates rose in Fiscal Year 1992 as Operation Desert Storm ended and courts-martial resumed. Accordingly, Fiscal Year 1990 seems to be the last *normal year* even though some downsizing already had occurred.

Since Fiscal Year 1990, the average annual troop strength has decreased by thirty percent. General courts-martial have declined forty-three percent. Special courts-martial have declined at an even greater rate: special courts-martial empowered to adjudge a bad-conduct discharge were down fifty-seven percent and special courts, down eight-seven percent, were no longer statistically significant. There are fewer summary courts-martial, too (a seventy-three percent decline), but the largest decrease occurred in Fiscal Year 1993 and has since leveled off. Nonjudicial punishments are down forty-nine percent since Fiscal Year 1990.

Looking at Fiscal Year 1995, some leveling off is apparent, particularly in general courts-martial and special courts-martial empowered to adjudge a bad-conduct discharge with the rates per thousand being the highest since Fiscal Year 1992. At those rates, a force of 495,000 would yield per year about 782 general courts-martial, 316 special courts-martial empowered to adjudge a bad-conduct discharge, and about 19 other special courts-martial. More cases than that would have to be investigated and prepared, however, because the figures in the charts below show only trials terminated by findings and do not include cases terminated for other reasons such as administrative discharge.

General Courts-Martial

FY	Cases	Conv. Rate	Disch. Rate	Guilty Pleas	Judge Alone	Courts w/Enl	Drug Cases	Rate/ 1,000
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
1994	843	92.8%	87.9%	60.1%	64.5%	26.0%	20.2%	1.51
1995	825	92.9%	83.5%	58.1%	66.0%	28.1%	20.7%	1.58

Bad-Conduct Discharge Special Courts-Martial

FY	Cases	Conv. Rate	Disch. Rate	Guilty Pleas	Judge Alone	Courts w/Enl	Drug Cases	Rate/ 1,000
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
1994	345	89.8%	54.1%	57.1%	58.2%	34.2%	24.3%	.62
1995	333	87.3%	56.4%	55.6%	64.5%	28.8%	19.5%	.64

Other Special Courts-Martial

FY	Cases	Conv. Rate	Disch. Rate	Guilty Pleas	Judge Alone	Courts w/Enl	Drug Cases	Rate/ 1,000
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
1994	32	62.5%	NA	18.7%	50.0%	37.5%	9.3%	.06
1995	20	80.0%	NA	40.0%	60.0%	35.0%	5.0%	.04

Summary Courts-Martial

FY	Cases	Conv. Rate	Guilty Pleas	Drug Cases	Rate/ 1,000
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
199	364	86.3%	36.3%	10.2%	0.62
1994	349	92.0%	35.2%	11.2%	0.63
1995	304	93.1%	34.5%	11.8%	0.58

Nonjudicial Punishment

FY	Total	Formal	Summarized	Drugs	Rate/ 1,000
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
1994	41,753	78.3%	21.7%	6.6%	74.89
1995	38,591	79.3%	20.7%	8.4%	73.72

Average strength for rates/1,000:

FY 1990—747,147

FY 1991—798,614

FY 1992—665,800

FY 1993—586,149

FY 1994—557,516

FY 1995—523,500

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces *The Environmental Law Division Bulletin* (*Bulletin*), designed to inform Army environmental law practitioners of current developments in the environmental law arena. The *Bulletin* appears on the Legal Automated Army-Wide Bulletin Board Service, Environmental Law Conference, while hard copies will be distributed on a limited basis. The content of the latest issue is reproduced below.

Policy Guidance on Water Rights

On 24 November 1995, Mr. Paul Johnson, Deputy Assistant Secretary of the Army (Installations and Housing), and Mr. Earl Stockdale, Deputy General Counsel (Civil Works and Environment), signed policy guidance on water rights at Army installations in the United States. The policy guidance provides instruction on how Army installations must document and protect water rights information.

Water is a scarce resource throughout the Western continental United States and growing scarcer in some parts of the East. Several Army installations are involved in litigation over water rights and, as the competition for water increases, other installations will likely become involved as well.

The guidance has been distributed to the MACOMs. All Environmental Law Specialists should review the guidance and ensure that appropriate individuals in the installation directorate of public works do so as well. Major Saye.

Safe Drinking Water Act

On 29 November 1995, the Senate unanimously passed Senate Bill 1316, reauthorizing the Safe Drinking Water Act (SDWA). The measure would repeal the requirement that the Environmental Protection Agency regulate twenty-five new contaminants every three years. Also, future maximum contaminant levels could be set at less stringent levels when benefits do not justify costs.

Most important for military installations, however, the federal facilities provision of the SDWA has been amended to allow fines for violations of the SDWA. Specifically, the statute, is amended to read that the "Federal, State, interstate, and local substantive and procedural requirements, administrative authorities, and process and sanctions . . . include all administrative orders and all civil and administrative penalties or fines, regardless of whether the penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations." The language is similar to in the Federal Facility Compliance Act.

Although it is unclear at this point when the House of Representatives will move to reauthorize the SDWA, any bill they produce will almost certainly mirror the Senate's version regarding the expanded waiver of sovereign immunity.

Until the SDWA is reauthorized, however, please remember that, as with the Clean Water and Clean Air Acts, federal facilities are not subject to fines for violations of the SDWA. Major Saye.

Clean Air Act

On 7 December 1995, the EPA published its National Emission Standards for Hazardous Air Pollutants (NESHAP) for new and existing wood furniture manufacturing operations. The NESHAP rule regulates wood furniture manufacturing facilities engaged in the manufacture of wood furniture or wood furniture components. Incidental wood furniture manufacturers, which include most military installations, are defined in the NESHAP as major sources primarily engaged in the manufacture of products other than wood furniture or wood furniture components and use no more than 100 gallons per month of finishing material or adhesives in the manufacture of wood furniture or wood furniture components. Incidental wood furniture manufacturers are not subject to the regulation, but they must maintain purchase or usage records demonstrating that they meet the criteria for an incidental wood furniture manufacturer. Lieutenant Colonel Olmscheid.

Cultural Resources Interim Policy Statements

On 27 November 1995, the Army issued interim policy guidance for Cold War era historic properties and Native American cultural resources. These interim policies were distributed through the major Army commands to each installation's department of public works (DPW). Installation environmental law specialists should obtain a copy of these interim policies from the local DPW or this office because the policies provide installation commanders with implementing guidance for Cold War era historic properties and Native American cultural resources. The interim policies remain in effect until 27 November 1996, or until *Army Regulation 200-4, Cultural Resources*, is published. Major Ayres.

Endangered Species Act Enforcement

In the case of *Bennet v. Plenert*, United States Court of Appeals for the Ninth Circuit (Ninth Circuit) held recently that plaintiffs who assert no interest in preserving endangered species lack standing to sue the government for violating the procedures established in the Endangered Species Act. In *Bennet*, two Oregon ranch operators and two irrigation districts challenged the United States Fish and Wildlife Service's preparation of a biological opinion (BO). The BO concluded that the water level in two reservoirs should be maintained at certain minimum levels to preserve two endangered species of fish. The ranchers and irrigation operators sued to gain greater access to the water than was allowed under the BO.

The Ninth Circuit ruled that the ranchers and irrigation districts suit was barred by the *zone of interests test*. The Ninth Circuit explained that the "zone of interests test simply provides a method of determining whether Congress intended to permit a particular plaintiff to bring an action." The Ninth Court found that the ranchers' and irrigation operators' interest in the water rested solely on economic and recreational uses. These uses were found to compete with, rather than benefit, the endangered species. Therefore, the Ninth Circuit concluded that the plaintiffs did not assert an interest protected by the Endangered Species Act. Major Ayres.

Environmental Protection Agency Administrator Reaffirms Permit Exemption

In a letter dated 1 November 1995, the Environmental Protection Agency (EPA) Administrator Carol M. Browner reaffirmed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provision exempting on-site removal or remedial actions from regulatory permits. Ms. Browner made this decision in response to an attempt by the State of Missouri to require permits for the incinerator, contaminated waste water treatment, and storm water run off activities at the Army's cleanup site at Weldon Springs Ordnance Works, St. Charles County, Missouri. Missouri had elevated the permit dispute under the 1990 Federal Facility Agreement between Missouri, the EPA, and the Army.

Missouri argued that the holding in the Rocky Mountain Arsenal case, *United States v. Colorado*, supports the interpretation that CERCLA § 121 does not bar a state from enforcing its laws through its permitting requirements. The EPA rejected this argument, noting that the *Colorado* case addresses only enforcement of state law outside the CERCLA process and does not address the meaning of "on-site" and what permits are required under CERCLA.

Missouri also argued that what constitutes "on-site" in the EPA's view is overbroad and that the response actions under the selected remedy at Weldon Springs would inevitably result in extended off-site discharges beyond the "on-site" area and thus require state permits. The EPA rejected this argument as well, noting that the 1988 National Contingency Plan Preamble (NCP) specifically refers to incinerator emissions and waste water discharges and run off as being on-site.

Ms. Browner's letter states that the "EPA interprets CERCLA § 121(e)(1) and the corresponding provision of the NCP (§ 300.400(e)(1)) as exempting response actions conducted entirely on-site even if the actions involve discharges or emissions that result in some subsequent migration of contaminants beyond the site boundaries."

Ms. Browner's letter includes a discussion of the legislative history of the permit exemption and notes that "[s]ince Congress clearly chose to exempt on-site actions from permits specifically under [the Clean Water Act and Clean Air Act], an interpretation that effectively required permits under these Acts in most or all cases, would be inconsistent with the intent of Congress." Mr. Nixon.

Revised Interim Policy for Decision Documents

On 16 November 1995, the Director of Environmental Programs (DEP), Office of the Assistant Chief of Staff for Installation Management, signed a revised interim policy for staffing and approving decision documents (DDs). The revised policy provides that the DEP must approve all DDs greater than $6 million. The MACOMS commander approves DDs between $2 million and $6 million, including national priorities list (NPL) record of decisions (ROD). Installation commanders may approve DDs, including NPL RODs, that are less than $2 million.

Approval authority for NPL RODs may not be delegated below a general officer or senior executive service official, except that an installation commander, regardless of grade or rank, may sign NPL RODs that select the no action alternative.

The DEP's policy states further that, for all DDs above $6 million, the MACOMS must coordinate, at a minimum, with the United States Army Environmental Center (USAEC) and the United States Army Center for Health Promotion and Preventive Medicine (USACHPPM) and staff the DDs with environmental, legal, public affairs, and medical authorities in the MACOM chain of command. The MACOM or installation commander must coordinate with USAEC and USACHPPM for all NPL RODs, regardless of the amount involved. Ms. Fedel.

Claims Report

United States Army Claims Service

Tort Claims Note

Status of Volunteers Under the Federal Tort Claims Act

In 1983, Congress authorized the acceptance of voluntary services by the United States Armed Forces to be provided for a museum, a natural resources program, or a family support program.[1]

Congress expanded the categories of volunteer services in 1995 to include the following:

(1) Voluntary medical services, dental services, nursing services, and other health care related services.

(2) Augmentation of family support programs as follows:

(a) Child development and youth services programs,

(b) Library and education programs,

(c) Religious programs,

(d) Housing referral programs,

(e) Programs providing employment assistance to spouses of service members of the armed forces, and

(f) Morale, welfare, and recreation programs to the extent not covered by *a* through *e* above.[2]

Both the 1983 Act and its 1995 expansion consider volunteers providing services under the above categories as federal employees for purposes of the Federal Tort Claims Act (FTCA)[3] and the Military Claims Act (MCA).[4] Persons undergoing training in these areas are also considered employees. The Act also provides workers' compensation benefits under the Federal Employees Compensation Act (FECA)[5] or the Longshore and Harbor Workers Act (LSHWA)[6] depending on the volunteer's particular status. The volunteer must be processed as a federal volunteer and performing within the scope of services as accepted.

Any tort claim arising from the acts or omissions of a volunteer should be investigated and processed under the provisions of *Army Regulation 27-20* just as any claim arising from the acts of a service member or civilian employee. Any claim for injury or

[1] Public Law 90-94, 97 Stat 614, 10 U.S.C. § 1588 (1983).

[2] Public Law 103-377, Subtitle 6, Defense Authorization Act, 10 U.S.C. § 1588 (1995).

[3] 28 U.S.C., ch. 171 (1995).

[4] 10 U.S.C. § 1733 (1995).

[5] 5 U.S.C., subch. I, ch. 81 (1995).

[6] *Id.* subch. II, ch. 81.

death to a volunteer *incident to service* is barred by FECA and LSHWA.

The Army has specifically implemented the portion of the 1983 Act pertaining to family support programs by regulation.[7] The 1995 Act required specific regulatory implementation. Without proper implementation, it is doubtful whether a volunteer would be considered an employee under the FTCA or MCA, particularly in view of pre-existing law that states "No officer or employee of the United States shall accept voluntary service for the United States or employ personal services in excess of that authorized by law, except in case of emergency involving the safety of human life or the protection of property."[8] To date, no federal agency has implemented the 1995 Act's expanded volunteer programs, although an Army test program on family support services has been completed. Further implementation is forthcoming.

Other volunteers who are considered federal employees for the purposes of the FECA and MCA[9] include students and Red Cross volunteers meeting the criteria of Army regulations.[10] Mr. Rouse.

Personnel Claims Note

Expensive Porcelain Figurines

Pay close attention when a claimant requests replacement cost for a damaged porcelain figurine, for example, Lladro, Hummel, Kaiser. Replacement may not be warranted on porcelain figurines especially if the damage is a clean break, rather than broken into many pieces, some of which are missing.

Claims examiners should inspect a broken item(s), if possible, to determine the extent of the damage and then check the repair options before paying a replacement cost (see USARCS Specialty Replacement and Repair Guide, 1 October 1990). A number of firms specialize in such repairs. The following two additional firms are listed for your information. No recommendation is made as to the quality of their work or their fees. They are only listed as possible sources:

Broken Heart Restoration
1841 W. Chicago Avenue
Chicago, Illinois 60622
(312) 226-8200.

Specializing in porcelain, pottery, ceramics.

Old World Restorations, Inc.
347 Stanley Avenue
Cincinnati, Ohio 45226-2100
(513) 321-1911.

Specialize in paintings, frames, porcelain, glass, and crystal figurines.

If you discuss with the claimant your decision regarding repairing porcelain figurines or awarding full replacement cost before settlement, you must make it clear to the claimant that your decision is not binding on your claims judge advocate, staff judge advocate, or this service should a request for reconsideration be forwarded for a final decision. For example, in a recent claim forwarded to this service as a conflict of interest claim, the field claims office told the claimant to replace a damaged expensive porcelain eagle prior to adjudication. Based on our review of the file and inquiries of the type of damage to the figurine, we determined that the figurine could be repaired. The claimant was entitled to the repair cost and a loss of value, not full replacement cost.

Do not be in a rush to pay replacement cost for expensive damaged figurines. An inspection and a few inquiries to an appropriate repair firm may result in a satisfactory repair to the item at a cost below replacement value. Lieutenant Colonel Kennerly and Ms. Holderness.

Service Member's Statements Save the Day

The Army recently received two favorable General Accounting Office (GAO) Settlement Certificates in which success was predicated largely on the basis of the service member's statements describing the state of the items at tender.

The first claim involved a missing display case containing 100 Army unit crest insignias.[11] The display case was not listed on the inventory and the service member was not able to provide an inventory number on his claim. The carrier was offset $540 for the missing item. The carrier denied liability and maintained that there was lack of proof of tender, the first element of a prima facie case of carrier liability.

The evidence in the well documented claim file amply established that the display case was shipped. The most important piece of evidence was the detailed service member's statement. The service member indicated that his father collected Army unit

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[7] DEP'T OF ARMY, REG. 215-1, THE ADMINISTRATION OF ARMY MORALE, WELFARE AND RECREATION ACTIVITIES AND NONAPPROPRIATED FUND INSTRUMENTALITIES, para. 3-14 (29 Sept. 1995); DEP'T OF ARMY, REG. 608-1, ARMY COMMUNITY SERVICE PROGRAM, ch. 4 (30 Oct. 1995).

[8] 31 U.S.C. § 1342 (1988).

[9] 5 U.S.C. § 3111(c) (1995).

[10] DEP'T OF ARMY, REG. 40-3, MEDICAL, DENTAL, AND VETERINARY CARE, para. 2-42 (15 Feb. 1995); DEP'T OF ARMY, REG. 27-20, CLAIMS, para. 4-3 (1 Aug. 1995).

[11] GAO Settlement Certificate, Z-2862146(29) January 18, 1995 (GAO Settlement Certificates are not precedent setting).

crest insignias during his thirty-two year Army career. He indicated that his father had a wooden case constructed to house them and that the interior was lined with felt. The service member further indicated that the display case was included in a larger carton, but he did not know which carton. In a second statement, he further described the case and supplied pictures of a display case similar to his. The service member further noted that he used a value of $5 for each insignia. Some were available in military clothing sales stores. For others, which were obsolete, he obtained prices from dealers. He estimated $100 for the case. The service member also indicated that he checked all of the rooms of his house at origin and nothing was left behind. The pictures of the display case showed that it resembled a picture. When preparing our administrative report for GAO, we pointed out that there were fourteen picture cartons on this move, and that the missing display case containing the 100 Army unit crest insignias could easily have been mistaken for a picture and packed in one of the picture cartons.

The GAO Claims group agreed that the claim file contained sufficient information to establish that the display case was tendered. In similar claims, the Comptroller General has upheld offset action principally based on convincing statements from the service member that he owned the items and tendered them to the carriers but they were not delivered.[12]

The second claim involved a Sony Beta Max VCR that worked at origin and was inoperative at delivery.[13] The carrier denied liability and maintained that, because there was no sign of external damage, it was not liable for any internal damage. After great effort to locate the claimant, we finally received a statement from him explaining that, before the move, the Sony Beta Max video tape cassette recorder/player was in good operating condition. At destination it was inoperable. The repair person explained that interior plastic parts of the VCR were broken and that the item was a total loss. He indicated that the damage came from rough handling or dropping.

The service member's statement establishing that the VCR worked properly at pickup, but not at delivery, and that the repair person's estimate were sufficient to convince the GAO that this claim was properly paid.

Personal statements from the service member are absolutely vital in cases of missing items and damaged electronic items. Field claims offices are in the best position to recognize these issues and obtain a statement from the claimant before the claim is adjudicated and approved for payment. These statements often mean the difference between winning or losing an appeal at GAO. Ms. Schultz.

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[12] Andrews Van Lines, Inc. B-257398, December 29, 1994; American VanPac Carriers, B-256688, September 2, 1994; and All-Ways H&S Forwarders, Inc., B-252197, June 11, 1993. (Comptroller General Decisions are precedent setting).

[13] GAO Settlement Certificate, Z-2609168 (103) (17 Jan. 1995) GAO Settlement Certificates are not precedent setting).

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Schedule Update

The following is an up to date schedule of The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Schedule. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires that all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program unites must attend the On-Site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend the On-Site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any On-Site training session. *If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Eric Storey, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380, (800) 552-3978 ext. 380. Major Storey.*

THE JUDGE ADVOCATE GENERAL'S RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING, ACADEMIC YEAR 1995-1996

DATE	CITY, HOST UNIT AND TRAINING SITE	ACTION OFFICER
24-25 Feb	Denver, CO 87th LSO Doubletree Inn 13696 East Iliff Pl. Aurora, CO 80014	MAJ Kevin G. MacCary 87th LSO Bldg. 820, Fitzsimons AMC McWethy USARC Aurora, CO 80045-7050 (303) 977-3929
24-25 Feb	Salt Lake City, UT UTARNG National Guard Armory 12953 South Minuteman Dr. Draper, UT 84020	LTC Michael Christensen HQ, UTARNG P.O. Box 1776 Draper, UT 84020-1776 (801) 576-3682
24-25 Feb	Indianapolis, IN National Guard Indianapolis War Memorial 421 North Meridian St. Indianapolis, IN 46204	MAJ George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449
2-3 Mar	Colombia, SC 12th LSO Univ. of South Carolina School of Law Columbia,SC 29208	LTC Robert H. Uehling 12th LSO 5116 Forest Drive Columbia, SC 29206-4998 (803) 790-6104
9-10 Mar	Washington, DC 10th LSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, DC 20319	CPT Robert J. Moore 10th LSO 5550 Dower House Road Washington, DC 20315 (301) 763-3211/2475
16-17 Mar	San Francisco, CA 75th LSO	LTC Joe Piasta Shapiro, Galvin, et. al. 640 Third St., Second Floor P.O. Box 5589 Santa Rosa, CA 95402 (707) 544-5858
23-24 Mar	Chicago, IL 91st LSO Holiday Inn (Holidome) 3405 Algonquin Rd. Rolling Meadows, IL 60008	LTC Tim Hyland P.O. Box 6176 Lindenhurst, IL 60046 (708) 688-3780
27-28 Apr	Columbus, OH 9th LSO Clarion Hotel 7007 N. High St. Columbus, OH 43085 (614) 436-0700	CPT Mark Otto 9th LSO 765 Taylor Station Rd. Blacklick, OH 43004 (614) 692-5434 DSN: 850-5434

THE JUDGE ADVOCATE GENERAL'S RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING, ACADEMIC YEAR 1995-1996

DATE	CITY, HOST UNIT AND TRAINING SITE	ACTION OFFICER
26-28 Apr Note: 2.5 days	~~St. Louis, MO~~ ~~N Broadway~~ **CANCELLED**	~~LTC John O'Mally~~ ~~Independence Ave~~
	St. Louis, MO 63102 (314) 421-1776	Independence, MO 64054 (816)836-7031
4-5 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Blvd. Gulf Shores, AL 36542 (334) 948-4853	LTC Eugene E. Stoker Counsel, MS JW-10 Boeing Defense Space Group Missiles Space Division P.O. Box 240002 Huntsville, AL 35806 (205) 461-3629 FAX: 3209
18-19 May	Tampa, FL 174th LSO/65th ARCOM Sheraton Grand Hotel 4860 W. Kennedy Blvd. Tampa, FL 33609 (813)286-4400	LTC John J. Copelan, Jr. Broward County Attorney 115 S Andrews Ave, Ste 423 Fort Lauderdale, FL 33301 (305) 357-7600

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have a confirmed reservation. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. **If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.**

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—**181**

Course Name—133d **Contract Attorneys 5F-F10**

Class Number—**133d** Contract Attorneys' Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1996

February 1996

5-9 February:	134th Senior Officers' Legal Orientation Course (5F-F1).
5 February - 12 April:	139th Basic Course (5-27-C20).
12-16 February:	PACOM Tax CLE (5F-F28P).

12-16 February:	62d Law of War Workshop (5F-F42).
12-16 February:	USAREUR Contract Law CLE (5F-FI8E).
26 February - 1 March:	38th Legal Assistance Course (5F-F23)

March 1996

4-15 March:	136th Contract Attorneys' Course (5F-FI0).
18-22 March:	20th Administrative Law for Military Installations Course (5F-F24).
25-29 March:	1st Contract Litigation Course (5F-F102).

April 1996

1-5 April:	135th Senior Officers' Legal Orientation Course (5F-F1).
15-18 April:	1996 Reserve Component Judge Advocate Workshop (5F-F56).
15-26 April:	5th Criminal Law Advocacy Course (5F-F34).
22-26 April:	24th Operational Law Seminar (5F-F47).
29 April- 3 May:	44th Fiscal Law Course (5F-F12).
29 April- 3 May:	7th Law for Legal NCOs' Course (512-71D/20/30).

May 1996

13-17 May:	45th Fiscal Law Course (5F-F12).
13-31 May:	39th Military Judge Course (5F-F33).
20-24 May:	49th Federal Labor Relations Course (5F-F22).

June 1996

3-7 June:	2d Intelligence Law Workshop (5F-F41).
3-7 June:	136th Senior Officers' Legal Orientation Course (5F-F1).
3 June - 12 July:	3d JA Warrant Officer Basic Course (7A-550A0).
10-14 June:	26th Staff Judge Advocate Course (5F-F52).
17-28 June:	JATT Team Training (5F-F57).
17-28 June:	JAOAC (Phase II) (5F-F55).

July 1996

1-3 July:	Professional Recruiting Training Seminar
1-3 July:	27th Methods of Instruction Course (5F-F70).
8-12 July:	7th Legal Administrators' Course (7A-550A1).
8 July - 13 September:	140th Basic Course (5-27-C20).
22-26 July:	Fiscal Law Off-Site (Maxwell AFB) (5F-12A).
24-26 July:	Career Services Directors Conference.
29 July - 9 August:	137th Contract Attorneys' Course (5F-FI0).
29 July - 8 May 1997:	45th Graduate Course (5-27-C22).
30 July - 2 August:	2d Military Justice Managers' Course (5F-F31).

August 1996

12-16 August:	14th Federal Litigation Course (5F-F29).
12-16 August:	7th Senior Legal NCO Management Course (512-71D/40/50).
19-23 August:	137th Senior Officers' Legal Orientation Course (5F-F1).
19-23 August:	63d Law of War Workshop (5F-F42).
26-30 August:	25th Operational Law Seminar (5F-F47).

September 1996

4-6 September:	USAREUR Legal Assistance CLE (5F-F23E).
9-11 September:	2d Procurement Fraud Course (5F-F101).
9-13 September:	USAREUR Administrative Law CLE (5F-F24E).
16-27 September:	6th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

1996

February 1996

12-14, GI:	Environmental Laws and Regulations Compliance Course, San Antonio, TX

15-17, NITA:	Deposition Skills Programs: Pacific Deposition,San Diego, CA
22 - 3 March, NITA:	Basic Trial Skills Programs, Fort Lauderdale, FL

March 1996

6-8, NITA:	Deposition Skills Programs: Southeast Deposition, Chapel Hill, NC
15, NITA:	Discovering the Secrets of Effective Depositions, Las Vegas, NV
15-24, NITA:	Basic Trial Skills Programs, Chicago, IL
22-24, NITA:	Advocacy Teach Training Programs, Cambridge, MA
25-27, GI:	Environmental Laws and Regulations Compliance Course, Jackson Hole, WY

July 1996

21-26, APA:	31st Annual Seminar/Workshop, New Orleans, LA

For further information on civilian courses, please contact the institution offering the course. The addresses are listed below.

AAJE:	American Academy of Judicial Education 1613 15th Street, Suite C Tuscaloosa, AL 35404 (205) 391-9055
ABA:	American Bar Association 750 North Lake Shore Drive Chicago, IL 60611 (312) 988-6200
ALIABA:	American Law Institute-American Bar Association Committee on Continuing Professional Education 4025 Chestnut Street Philadelphia, PA 19104-3099 (800) CLE-NEWS (215) 243-1600
ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990
CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3203 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW., Suite 408 Washington, D.C. 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (904) 222-5286
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, N.W., Room 2107 Washington, D.C. 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227.
LSU:	Louisiana State University Center of Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837

MICLE: Institute of Continuing Legal Education
1020 Greene Street
Ann Arbor, MI 48109-1444
(313) 764-0533 (800) 922-6516.

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(800) 225-6482
(612) 644-0323 in (MN and AK).

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557
(702) 784-6747

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(800) 932-4637 (717) 233-5774

PLI: Practising Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 September 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	30 days after program
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	prior to 1 April annually
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially

Jurisdiction	Reporting Month
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**	30 days after program
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	31 December annually
Utah	End of two year compliance period
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially
West Virginia	31 July annually
Wisconsin*	1 February annually
Wyoming	30 January annually

* Military Exempt
** Military Must Declare Exemption

For addresses and detailed information, see the July 1994 issue of *The Army Lawyer.*

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 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, 9725 John J. Kingman Road, Suite 0944, Fort Belvoir, VA 22060-6218, telephone: commercial (703) 767-9087, 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. These publications are for government use only.

Contract Law

*AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).
*AD A301095	Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).
AD A265777	Fiscal Law Course Deskbook, JA-506(93) (471 pgs).

Legal Assistance

AD B092128	USAREUR Legal Assistance Handbook, JAGS-ADA-85-5 (315 pgs).
AD A263082	Real Property Guide—Legal Assistance, JA-261(93) (293 pgs).
AD A281240	Office Directory, JA-267(94) (95 pgs).

AD B164534	Notarial Guide,JA-268(92) (136 pgs).
AD A282033	Preventive Law,JA-276(94) (221 pgs).
AD A266077	Soldiers' and Sailors' Civil Relief Act Guide, JA-260(93) (206 pgs).
*AD A297426	Wills Guide, JA-262(95) (517 pgs).
AD A268007	Family Law Guide,JA 263(93) (589 pgs).
AD A280725	Office Administration Guide, JA 271(94) (248 pgs).
AD A283734	Consumer Law Guide,JA 265(94) (613 pgs).
*AD A289411	Tax Information Series,JA 269(95) (134 pgs).
AD A276984	Deployment Guide, JA-272(94) (452 pgs).
AD A275507	Air Force All States Income Tax Guide, April 1995.

Administrative and Civil Law

AD A285724	Federal Tort Claims Act, JA 241(94) (156 pgs).
*AD A301061	Environmental Law Deskbook, JA-234(95) (268 pgs).
*AD A298443	Defensive Federal Litigation, JA-200(95) (846 pgs).
AD A255346	Reports of Survey and Line of Duty Determinations, JA 231-92 (89 pgs).
*AD A298059	Government Information Practices, JA-235(95) (326 pgs).
AD A259047	AR 15-6 Investigations, JA-281(92) (45 pgs).

Labor Law

AD A286233	The Law of Federal Employment, JA-210(94) (358 pgs).
*AD A291106	The Law of Federal Labor-Management Relations, JA-211(94) (430 pgs).

Developments, Doctrine, and Literature

AD A254610	Military Citation, Fifth Edition, JAGS-DD-92 (18 pgs).

Criminal Law

AD A274406	Crimes and Defenses Deskbook, JA 337(94) (191 pgs).
AD A274541	Unauthorized Absences, JA 301(95) (44 pgs).
AD A274473	Nonjudicial Punishment, JA-330(93) (40 pgs).
AD A274628	Senior Officers Legal Orientation, JA 320(95) (297 pgs).
AD A274407	Trial Counsel and Defense Counsel Handbook, JA 310(95) (390 pgs).
AD A274413	United States Attorney Prosecutions, JA-338(93) (194 pgs).

International and Operational Law

AD A284967	Operational Law Handbook, JA 422(95) (458 pgs).

Reserve Affairs

AD B136361	Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-89-1 (188 pgs).

The following United States Army Criminal Investigation Division Command publication also is available through DTIC:

AD A145966	Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8 (250 pgs).

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

a. *The following provides information on how to obtain* Manuals for Courts-Martial, *DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The United States Army Publications Distribution Center (USAPDC) at Baltimore, Maryland, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
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.

b. 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.

c. Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of *DA Pam 25-33*, you may request one by calling the Baltimore USAPDC at (410) 671-4335.

(*1*) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(*2*) Units that require publications that are not on their initial distribution list can requisition publications using *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.

(*3*) 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.

(*4*) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, Maryland 21220-2896. You may reach this office by telephone at (410) 671-4335.

3. The Legal Automation Army-Wide Systems Bulletin Board Service

The Army Lawyer will publish information on new publications and materials available through the LAAWS BBS.

4. Instructions for Downloading Files from the LAAWS BBS

Instructions for downloading files from the LAAWS BBS are currently being revised. If you have a question or a problem with the LAAWS BBS, leave a message on the BBS. Personnel needing uploading assistance may contact SSG Aaron P. Rasmussen at (703) 806-5764.

5. TJAGSA Publications Available Through the LAAWS BBS

The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	UPLOADED	DESCRIPTION
RESOURCE.ZIP	June 1994	A Listing of Legal Assistance Resources, June 1994.
ALLSTATE.ZIP	April 1995	1995 AF All States Income Tax Guide for use with 1994 state income tax returns, January 1995.
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.

FILE NAME	UPLOADED	DESCRIPTION
BULLETIN.ZIP	April 1995	List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions, November 1993.
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	March 1995	Deployment Guide Excerpts. Documents were crated in Word Perfect 5.0 and zipped into executable file.
FOIAPT1.ZIP	November 1995	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FOIAPT.2.ZIP	November 1995	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
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.
JA200.ZIP	November 1995	Defensive Federal Litigation—Part A, August 1995.
JA210.ZIP	November 1994	Law of Federal Employment, September 1994.
JA211.ZIP	April 1995	Law of Federal Labor-Management Relations, December 1994.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction, September 1992.
JA234.ZIP	November 1995	Environmental Law Deskbook, Volume 1, September 1995.
JA235.ZIP	August 1995	Government Information Practices Federal Tort Claims Act, August 1995.
JA241.ZIP	September 1994	Federal Tort Claims Act, August 1994.
JA260.ZIP	March 1994	Soldiers' & Sailors' Civil Relief Act, April 1994.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, June 1993.
JA262.ZIP	July 1995	Legal Assistance Wills Guide.
JA263.ZIP	August 1993	Family Law Guide, August 1993.
JA265A.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part A, June 1994.
JA265B.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part B, June 1994.
JA267.ZIP	December 1994	Legal Assistance Office Directory, July 1994.
JA268.ZIP	March 1994	Legal Assistance Notarial Guide, March 1994.
JA271.ZIP	May 1994	Legal Assistance Office Administration Guide, May 1994.
JA272.ZIP	February 1994	Legal Assistance Deployment Guide, February 1994.
JA276.ZIP	July 1994	Preventive Law Series, July 1994.
JA281.ZIP	November 1992	15-6 Investigations.
JA285.ZIP	January 1994	Senior Officers Legal Orientation Deskbook, January 1994.
JA301.ZIP	November 1995	Unauthorized Absences Programmed Text, August 1995.
JA310.ZIP	December 1995	Trial Counsel and Defense Counsel Handbook, May 1995.
JA320.ZIP	November 1995	Senior Officer's Legal Orientation Text, November 1995.
JA330.ZIP	November 1995	Nonjudicial Punishment Programmed Text, August 1995.

FILE NAME	UPLOADED	DESCRIPTION
JA337.ZIP	November 1995	Crimes and Defenses Deskbook, July 1994.
JA422.ZIP	May 1995	OpLaw Handbook, June 1995.
JA501-1.ZIP	August 1995	TJAGSA Contract Law Deskbook, Volume 1, May 1993.
JA501-2.ZIP	August 1995	TJAGSA Contract Law Deskbook, Volume 2, May 1993.
JA505-11.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 1, July 1994.
JA505-12.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 2, July 1994.
JA505-13.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 3, July 1994.
JA505-14.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 4, July 1994.
JA505-21.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 1, July 1994.
JA505-22.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 2, July 1994.
JA505-23.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 3, July 1994.
JA505-24.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 4, July 1994.
JA506.ZIP	November 1995	Fiscal Law Course Deskbook, October 1995.
JA508-1.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA508-2.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
1JA509-1.ZIP	November 1994	Federal Court and Board Litigation Course, Part 1, 1994.
1JA509-2.ZIP	November 1994	Federal Court and Board Litigation Course, Part 2, 1994.
1JA509-3.ZIP	November 1994	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	November 1994	Federal Court and Board Litigation Course, Part 4, 1994.
JA509-1.ZIP	March 1994	Contract, Claims, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	February 1994	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
YIR94-1.ZIP	January 1995	Contract Law Division 1994 Year in Review, Part 1, 1995 Symposium.
YIR94-2.ZIP	January 1995	Contract Law Division 1994 Year in Review, Part 2, 1995 Symposium.
YIR94-3.ZIP	January 1995	Contract Law Division 1994 Year in Review, Part 3, 1995 Symposium.
YIR94-4.ZIP	January 1995	Contract Law Division 1994 Year in Review, Part 4, 1995 Symposium.
YIR94-5.ZIP	January 1995	Contract Law Division 1994 Year in Review Part 5, 1995 Symposium.
YIR94-6.ZIP	January 1995	Contract Law Division 1994 Year in Review, Part 6, 1995 Symposium.
YIR94-7.ZIP	January 1995	Contract Law Division 1994 Year in Review, Part 7, 1995 Symposium.
YIR94-8.ZIP	January 1995	Contract Law Division 1994 Year in Review, Part 8, 1995 Symposium.

Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobi-

lization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International and Operational Law, or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781.

Requests must be accompanied by one 5¼-inch or 3½-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.

Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SSG Aaron P. Rasmussen, Commercial (703) 806-5764, DSN 656-5764, or at the following address:

LAAWS Project Office
ATTN: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

6. Articles

The following information may be of use to judge advocates in performing their duties:

William H. Kenety, *Observations on Teaching Trial Advocacy*, J. LEGAL EDUCATION 582 (1995).

Robert M. Martin, Jr., *Expert Testimony - The New Buzzword "Gatekeeping"*, 59 Tx. L.J. 16 (1995).

Jennifer L. Rosato, *All I Ever Needed to Know About Teaching Law School I Learned Teaching Kindgergarten: Introducing Gaming Techniques into the Law School Classroom*, 45 J. LEGAL EDUCATION 568 (1995).

7. TJAGSA Information Management Items

a. The TJAGSA LAN continues to provide great support to all users and the "paperless" office is becoming a reality. The T-1 connection scheduled for November 1995 has been delayed until January 1996. This connection will give the faculty and staff access to the OTJAG Wide Area Network (WAN), the rest of DOD, and even the Internet. E-mail addresses for TJAGSA staff and faculty will be published as soon as this connection is established.

b. Pentium PCs have been installed in five TJAGSA classrooms to support faculty and guest speaker presentations. Replacing 386 DOS systems, the P5-90 machines operate in Windows 3.11 and offer larger hard drives, CD-ROM, a video graphics accelerator card, network interfacing, and future expansion capabilities for growth into multimedia displays and on-line demonstrations. Since the installment of the new technology in September, we have seen a dramatic increase in faculty use of the PC in the classroom. This new technology is just one of the many instructional tools available in TJAGSA to enrich legal education in the classroom.

c. Electronic Multimedia Imaging Center (EMIC) equipment was recently installed in Visual Information production centers. EMIC is an Army wide concept providing local technology for desktop publishing, electronic file acquisition and manipulation, including digital photo processing, and multimedia production support. We are very fortunate to have this equipment which offers increased efficiency and quality for production of instructional materials. Installation and testing is complete and the initial phase of staff training on the imaging and publication equipment will be completed in February. The arrival of EMIC equipment is just in time. Now that the TJAGSA LAN offers internal file sharing and the OTJAG WAN offers connection with the rest of DOD and the Internet, we are poised to exchange information that will support TJAGSA faculty and the legal education mission.

d. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115. The receptionist will connect you with the appropriate department or division. The Judge Advocate General's School also has a toll free number: 1-800-552-3978. Lieutenant Colonel Godwin (ext. 435).

8. The Army Law Library Service

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

b. Law librarians having resources available for redistribution should contact Ms. Nell Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

c. The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address provided below:

Staff Judge Advocate
HQ, I Corps and Fort Lewis
ATTN: AFZH-JA (CW3 Gardner)
Fort Lewis, Washington 98433-5000
Commercial (206) 967-0701

* Corpus Juris Secundum, 173 Vols
(no updates since 1992)

By Order of the Secretary of the Army:

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General, United States Army
Chief of Staff

Official:

Yvonne M. Harrison

YVONNE M. HARRISON
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