THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-392

January 2006

Contract and Fiscal Law Developments of 2005—The Year in Review

Major Andrew S. Kantner, Editor, Lieutenant Colonel Ralph J. Tremaglio, III, Chair,
Major Steven R. Patoir, Vice-Chair, Major Michael S. Devine, Major Marci A. Lawson, USAF,
Major Michael L. Norris, Major Jennifer C. Santiago, Lieutenant Colonel Karl W. Kuhn,
Lieutenant Colonel John J. Siemietkowski, Major Katherine E. White, Ms. Margaret K. Patterson

Contents

Editor, Captain Anita J. Fitch
Assistant Editor, Captain Colette E. Kitchel
Technical Editor, Charles J. Strong

The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities. Individual paid subscriptions to *The Army Lawyer* are available for $45.00 each ($63.00 foreign) per year, periodical postage paid at Charlottesville, Virginia, and additional mailing offices (see subscription form on the inside back cover). POSTMASTER: Send any address changes to The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781. The opinions expressed by the authors in the articles do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Editor and Assistant Editor thank the Adjunct Editors for their invaluable assistance. The Board of Adjunct Editors consists of highly qualified Reserve officers selected for their demonstrated academic excellence and legal research and writing skills. Prospective candidates may send Microsoft Word versions of their resumes, detailing relevant experience, to the Technical Editor at charles.strong@hqda.army.mil

The Army Lawyer welcomes articles from all military and civilian authors on topics of interest to military lawyers. Articles should be submitted via electronic mail to charles.strong@hqda.army.mil or on 3 1/2" diskettes to: Editor, *The Army Lawyer*, The Judge Advocate General's Legal Center and School, U.S. Army, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781. Articles should follow *The Bluebook, A Uniform System of Citation* (18th ed. 2005) and *Military Citation* (TJAGLCS, 10th ed. 2005). Manuscripts will be returned on specific request. No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*. *The Army Lawyer* is also available in the Judge Advocate General's Corps electronic reference library and can be accessed on the World Wide Web by registered users at http://www.jagcnet.army.mil/ArmyLawyer.

Address changes for official channels distribution: Provide changes to the Editor, *The Army Lawyer*, The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781, telephone 1-800-552-3978, ext. 396 or electronic mail to charles.strong@hqda.army.mil.

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

CONTRACT AND FISCAL LAW DEVELOPMENTS OF 2005—THE YEAR IN REVIEW

Major Andrew S. Kantner, Editor
Lieutenant Colonel Ralph J. Tremaglio, III, Chair
Major Steven R. Patoir, Vice-Chair
Major Michael S. Devine
Major Marci A. Lawson, USAF
Major Michael L. Norris
Major Jennifer C. Santiago
Lieutenant Colonel Karl W. Kuhn
Lieutenant Colonel John J. Siemietkowski
Major Katherine E. White
Ms. Margaret K. Patterson

CONTENTS

FOREWORD

As I reviewed the cases in this year's *Year in Review*, it struck me that an appropriate theme might be "Things I Thought We Already Knew, But Have Not Learned." The cases do not necessarily cut new trails in the procurement world, but serve as great examples of the basic principles of Contract Law. In the past year, the procurement world closed the book on the Darlene Druyun case, but unfortunately had new reminders that checks and balances throughout the procurement process are a necessity. My hope is that next year, we will have nothing but positives to speak about when discussing federal procurement and fiscal issues. Our New Year's resolution should be to continue to improve public trust by incorporating appropriate mechanisms of transparency, fairness, and integrity into public-private competition. As we look to this year's *Year in Review*, we also recognize the importance of contracts and fiscal issues to our deployed judge advocates.

In recognition of the highlighted role of contracts and fiscal law today, the theme of this year's Contract and Fiscal Law Symposium (6 to 9 December 2005) was *Afghanistan and Iraq: Lessons Learned*. The overarching lesson learned, however, should be that contract and fiscal law issues resonate not only throughout our operations in Afghanistan and Iraq, but throughout all governmental functions, whether it be in the Pentagon, in garrison, in a deployed environment, or in domestic relief operations. Because of this broad reach, the Symposium covered a variety of topics for practitioners at all levels and areas of operation. The wide range of guest speakers and panels provided something for everyone and a lesson to be learned for each.

This year's Symposium confronted the issues faced by the different practitioners head on, with a mix of familiar favorites and newcomers. It is amazing that many of our distinguished speakers such as Mr. Robert Burton, the Acting Administrator of the Office of Federal Procurement Policy; Mr. Stuart Bowen, Special Inspector General for Iraq Reconstruction; and the Honorable Paul McNulty, Acting Deputy Attorney General and the U.S. Attorney General for the Eastern District of Virginia, commented on the same type of issues military practitioners are currently dealing with: the sharing of expertise and information.

The *Year-in-Review* is the Contract and Fiscal Law Department's[*] annual attempt to summarize the past fiscal year's most important and relevant cases and developments in various subject matter areas. Hopefully, the trends that are captured in the *Year-in-Review* will assist you in your practice and enable you, in turn, to assist others.

Throughout the coming year, I hope senior military practitioners will help share their wealth of knowledge with the young attorneys throughout their office and the Judge Advocate General's Corps (JAG Corps). Young attorneys are frequently wrestling with contract and fiscal issues while deployed and they need and deserve our assistance. Share your expertise and your knowledge with the future of the JAG Corps and the procurement world. Through your guidance and mentorship, you will set them up for success. Remember that, some day, they will be sitting in your seats, advising clients and commanders, and attending future Symposiums to discuss the issues of their day.

Lieutenant Colonel Ralph J. Tremaglio III

[*] The Contract and Fiscal Law Department is composed of seven Judge Advocates (Lieutenant Colonel Ralph J. Tremaglio, III; Major Steven R. Patoir; Major Michael S. Devine; Major Andrew S. Kantner; Major Marci A. Lawson, USAF; Major Michael L. Norris; Major Jennifer C. Santiago); and our Secretary, Ms. Dottie Gross. Each officer contributed sections to this work. The Department would like to thank our outside contributing authors: Lieutenant Colonel Karl Kuhn, Ms. Margaret Patterson, Lieutenant Colonel John Siemietkowski, and Major Katherine White. We greatly appreciate their expertise and contributions. Finally, the issue has benefited inordinately from diligent fine-tuning by the School's resident footnote guru, Mr. Chuck Strong. Thank you all!

CONTRACT FORMATION

Authority

Barterers Beware

In *Catel, Inc.*,[1] the Armed Services Board of Contract Appeals (ASBCA) provided a thorough discussion of the concepts of express, implied, and implied-in-fact contracts, as well as the authority of government officials to bind the government. Catel, the contractor, verbally agreed with an employee of the government to "store its [skiff] at the Fire Training Center . . . in return for government use of the [skiff]."[2] The government employee used the skiff over a period of about two years. Catel ultimately submitted a claim for over seventy thousand dollars, an amount including the government's use of the skiff for four hundred fifty-eight days, repair and replacement costs, and markups for overhead and profit.

The government employee that entered into the agreement with Catel was not a warranted contracting officer, and had not yet been appointed as an alternate contracting officer's representative.[3] The verbal agreement, including Catel's agreement "to allow [the government] to use the equipment with the expectation of future work," formed the basis for Catel's argument that a contract existed.

The ASBCA has jurisdiction to hear such an argument only if there is an express contract *or* an implied-in-fact contract. Since there was no express contract, Catel had to prove that there was an implied-in-fact contract.[4] For an implied-in-fact contract to arise, government representatives without actual express authority must have implied actual authority that permits them to legally bind the government. That authority "must be an integral part of the duties assigned to the Government employee who created the obligation."[5] The ASBCA held that "Catel failed to prove the requisite elements of an implied-in-fact contract. It failed to prove that [the employee] had express or implied actual authority to enter into the storage/use arrangement with respect to government use of the skiff."[6]

Of course, another way to bind the government in a situation in which a government employee without authority creates an obligation is for the contracting officer to ratify the action, either expressly or by implication.[7] There was no express ratification, but Catel argued that "government representatives with contracting authority had actual or constructive knowledge of [the employee's] actions."[8] Catel produced no evidence, however, that the contracting officer had actual or

---

[1] ASBCA No. 54627, 05-1 BCA ¶ 32,966.

[2] *Id*.

[3] The employee was subsequently appointed as such two years later. *Id*.

[4] The ASBCA used a string of cases to describe the burden of proof with respect to such a contract:

> An implied-in-fact contract with the government requires proof of (1) mutuality of intent, (2) consideration, (3) an unambiguous offer and acceptance, and (4) "actual authority" on the part of the government's representative to bind the government in contract. City of Cincinnati v. United States, 153 F.3d 1375, 1377 (Fed. Cir. 1998). Thus, the requirements for an implied-in-fact contract are the same as for an express contract; only the nature of the evidence differs. An implied-in-fact contract is one founded upon a meeting of the minds and "is inferred, as a fact, from the conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." Balt. & Ohio R.R. v. United States, 261 U.S. 592, 597 (1923). William M. Hamlin v. United States, 316 F. 3d 1325, 1328 (Fed. Cir. 2003). *See* City of El Centro v. United States, 922 F.3d 816, 820-21 (Fed. Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991); United Pac. Ins. Co., ASBCA No. 53051, 03-2 BCA ¶ 32,267 at 159,623-24, *aff'd*, 380 F.3d 1352 (Fed. Cir. 2004); Balboa Sys. Co., ASBCA No. 39400, 91-2 BCA ¶ 23,715 at 118,702. *See also* FAR 1.602-3, Ratification of Unauthorized Commitments.

Id. at 163,298.

[5] *Id*. (citing MTD Transcribing Service, ASBCA No. 53104, 01-1 BCA ¶ 31,304 at 154,540, citing H. Landau & Co. v. United States, 886 F.2d 322 (Fed. Cir. 1989)).

[6] *Id*.

[7] Contracting officers can expressly ratify an obligation of an employee by issuing a written determination. In the absence of a written document, a contractor can prove ratification by proving that the contracting officer had actual or even constructive knowledge of the obligation. "Constructive knowledge may be imputed to the government representative with contracting authority, if the government representative knew or should have known of the unauthorized action." *Id*. (citing Real Estate Technical Advisors, Inc., ASBCA Nos. 53427, 53501, 03-1 BCA ¶ 32,074 at 158,508; Reliable Disposal Co., ASBCA No. 40100, 91-2 BCA ¶ 23,895 at 119, 717-18; *see* Balboa Sys., ASBCA No. 39400, 91-2 BCA ¶ 23,715, at 118, 702 (implied-in-fact contract may result from verbal representations ratified by word or action by someone having authority to bind the government)).

[8] *Id*.

constructive knowledge and, therefore, the ASBCA held that Catel "failed to prove a government representative with authority to bind the government had . . . expressly or by implication ratified [the employee's] actions."[9]

In addition to the implied-in-fact and ratification theories put forth by Catel, the ASBCA considered *sua sponte* the alternative theory of "institutional ratification," which may give rise to a contract where a government agency accepts benefits followed by a promise of payment by the agency, or approval of payment by a senior agency official with authority to obtain reimbursement for the one providing those benefits.[10] In *Catel*, when the contracting officer discovered that a government employee was using the skiff, "he took immediate action to return the skiff to Catel and to initiate an investigation of the matter. Furthermore, Catel did not show that a senior agency official with authority to approve of payment who was aware of the skiff matter promised to seek reimbursement for Catel for government use of the skiff."[11] Consequently, the ASBCA did not find any institutional ratification.

Major Jennifer C. Santiago

Competition

Can You Use the "Urgent and Compelling" Exception Two Consecutive Times for the Same Need?

It appears that you can get a second bite of the apple. In *Filtration Development Co. v. United States,*[12] the plaintiffs for the second time protested the Army's use of the "unusual and compelling urgency exception" to the Competition in Contracting Act (CICA) in a procurement of inlet barrier filters (IBF) for UH-60 Blackhawk helicopters.[13] Filtration believed the Army had violated the court's previous order and sought a preliminary injunction, attorneys fees, and costs.[14] Filtration did not get its injunction, but did receive money for attorney fees and expenses under the Equal Access to Judgment Act (EAJA).[15]

In Filtration's previous protest, the court held that the Army was justified in using the unusual and compelling urgency exception, but only for the exact number of kits required for helicopters deploying to Iraq in the immediate future.[16] However, the court was "unwilling to condone an indefinite extension of the 'unusual and compelling urgency' exception."[17]

The Army used the same reasoning in September 2004, after the first protest had been decided, to sole-source an additional two hundred inlet kits.[18] While the court had previously limited the scope of the previous Justification and Approval (J&A) document to the specific number of kits needed for helicopters affected by upcoming deployments, the court did not prevent the use of another J&A that detailed the urgent and compelling rationale for more kits based upon a separate

---

[9] *Id*.

[10] *Id*. at 163,299 (citing Janowsky v. United States, 133 F.3d 888, 891 (Fed. Cir. 1998) (institutional ratification occurred where the government received benefits and senior agency officials were aware of the unauthorized agreement by a government representative and allowed performance to continue); City of El Centro v. United States, 922 F.3d 816, 821 (Fed. Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991) (institutional ratification argument rejected because no proof of direct benefits and no promise by an official empowered to bind the government to pay for benefits); MTD Transcribing Serv., ASBCA 51304, 01-1 BCA ¶ 31,304, at 154,541 (institutional ratification rejected because there was no promise to pay for services and the agency did not receive benefits); *see* Thai Hai, ASBCA 53375, 02-2 BCA ¶ 31,971, at 157,922.

[11] *Id*.

[12] 63 Fed. Cl. 418 (2004).

[13] *Id.* For requirements of the unusual and compelling urgency exception of CICA, *see* 10 U.S.C.S. § 2304(c)(2) (LEXIS 2005). In the earlier protest, Filtration protested the Government's use of the unusual and compelling urgency exception in procuring engine IBFs for UH-60 Blackhawk helicopters to be deployed to Iraq in conjunction with a troop rotation beginning in March 2004. Filtration Dev. Co. v. United States, 60 Fed. Cl. 371 (2004). The filter systems reduced the damage to the helicopter engines caused by sand and other debris being ingested into the engines. *Id.* at 373. In Filtration's initial protest, the court held that since "the Army failed to limit the procurement to the number of IBF kits necessary to satisfy the current emergency and had extended the exception's application beyond the minimum time duration," the protest should be upheld. Filtration Dev. Co. v. United States, 63 Fed. Cl. 612, 615 (2005) (explaining the holding of the earlier case, *Filtration Dev. Co.*, 60 Fed. Cl. 371 (2004)). In the earlier case, the COFC also found that the Army had violated Organizational Conflict of Interest regulations in the procurement and that the Contracting Officer had "usurped the authority of the chief of contracting office in concluding that the mitigation plans adequately addressed the conflict." *Id*.

[14] *Id*.

[15] Filtration Dev. Co. v. United States, 63 Fed. Cl. 612 (2005). The Equal Access to Judgment Act provides that a prevailing party against the government may be awarded costs and fees for any civil action brought by or against the United States. 28 U.S.C.S. § 2412 (LEXIS 2005).

[16] *Filtration Dev. Co.*, 60 Fed. Cl. at 383.

[17] *Id.*

[18] Filtration Dev. Co. v. United States, 63 Fed. Cl. 418, 420 (2004).

and independent justification.[19] Since troop mobilizations to Iraq continued, more Blackhawk helicopters were being dispatched to the region,[20] which the Army needed to outfit with inlet kits.

The court reasoned that the September 2004 J&A addressed this increased need and the depletion of the kits previously bought under the last exception.[21] The inlet kits for the soon-to-be deployed helicopters, therefore, represented a new requirement that was addressed by a new J&A. The court, therefore, ruled that the Army did comply with its previous order and Filtration was not entitled to an injunction or relief.[22]

No Special Circumstances Either

To make the case even more intriguing, Filtration applied to have the Army pay its costs under EAJA.[23] Filtration's application for EAJA fees asked the court to recognize the "special factors" involved in its protests and a corresponding increased hourly rate for the counsel who worked on its case.[24] The government disputed that Filtration was entitled to any EAJA protection since the judgment in the case did not alter the relationship between the parties.[25] The court disagreed, reminding the government that if the plaintiffs succeed on a significant issue in the litigation, the plaintiff is entitled to EAJA fees.[26]

Rather than argue that the area of government contract law constituted a special factor, which the courts had already determined was insufficient,[27] Filtration argued that, given the context in which the bid protest occurred, special factors attached.[28] According to Filtration, the circumstances that set its bid protest apart from others were the backdrop of the war in Iraq.[29] According to the plaintiff, with litigation issues involving questions of national security and jurisdiction, the number of attorneys who could have successfully litigated the case was limited.[30] While the court recognized Filtration's entitlement to EAJA, it was not swayed by their argument. The court stated that military conflict does not change counsel's interpretation of a "straightforward FAR regulation."[31] The court awarded Filtration EAJA fees at the normal rate of $125 per attorney hour.

---

[19] *Id.* at 422.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] 28 U.S.C.S. § 2412 (LEXIS 2005). The act allows a prevailing party who meets the net worth and total employee limitation to be paid fees and other expenses. Fees and expenses include:

> [T]he reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.).

Id.

[24] Filtration Dev. Co. v. United States, 63 Fed. Cl. 612 (2004). Section 2412(d)(2)(A)(ii) of Title 28, United States Code, allows the court to increase the normal cap on EAJA attorney fees of $125 when "the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. § 2412 (2000).

[25] *Filtration Dev. Co.,* 63 Fed. Cl. at 617.

[26] *Id*; *see also* Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978).

[27] *See* Esprit Corp. v. United States, 15 Cl. Ct. 491, 494 (1988); Prowest Diversified v. United States, 40 Fed. Cl. 879, 889 (1998); California Marine Cleaning, 43 Fed. Cl. 724, 732 (1999).

[28] *Filtration Dev. Co.*, 63 Fed. Cl. at 624.

[29] *Id.*

[30] *Id.*

[31] *Id.*

In 2004, the Secretary of the Air Force issued guidance to assist field agencies in producing quality justifications for non-competitive contracts.[32] Within the last year, the Department of the Air Force expressed concerns that justifications for non-competitive contracts under 41 U.S.C. § 253(c)(1), an exception to the requirements of full and open competition under the CICA, were not meeting the standards of Federal Acquisition Regulation (FAR) 6.303.[33] In order to rectify the problem, the Honorable Charlie E. Williams, Jr., Deputy Assistant Secretary for Contracting, Office of the Assistant Secretary of the Air Force for Acquisition, sent out a short, but extremely helpful review of the standards.[34] Whether the wake-up call is answered, or the "snooze button" is pressed again, only time will tell.

The Williams memorandum, however, is something that all practioners in the field should review and take to heart. It serves to remind all practioners of the obligations to utilize fair and open competition.[35] Where competition is not attainable, or is excusable under one of the exceptions, there is an obligation to annotate the reasoning.[36] For example, it must be documented that substantial duplication of costs would occur; and the amount of the duplicated costs is not likely to be recovered through competition, or that the delays in fulfilling the agency needs are unacceptable.[37] The contracting officer is responsible for articulating the basis for the exception. The contracting officer can only make that decision after determining the length of the anticipated delay, and describing exactly what is being delayed.[38] This memorandum is a good reminder for all contracting officers, not just those in the Air Force.

If a Conflict Exists, the Government Accountability Office (GAO) Will Presume That the Protestor Was Prejudiced, Unless the Record Establishes the Absence of Prejudice!

The Comptroller General also was in a remindful mood this past year, stressing the importance of evaluating all proposals fairly and in an unbiased manner.[39] In one case, the former Air Force Principal Deputy Assistant Secretary for Acquisition, Ms. Darlene Druyun, acknowledged that Boeing's employment of her son-in-law and her interest in working for Boeing influenced her decisions in matters affecting the awardee of a contract, Boeing.[40] Three protestors used her statements to file agency-level protests with the Air Force to challenge the award of the C-130 AMP contract to Boeing.[41] Instead of acting on the protests, the Air Force advised the protestors that "[t]he Air Force is of the opinion that the protests . . . are more appropriately considered by the Government Accountability Office."[42] The protesters claimed that Ms. Druyun improperly manipulated certain program requirements and related evaluation factors in a manner that favored Boeing.[43] This enabled Boeing to win the competition to perform system design and development work under the program.[44] The Air Force

---

[32] Memorandum, Charlie W. Williams, Jr., Deputy Assistant Secretary (Contracting) Assistant Secretary (Acquisition), Department of the Air Force, to AlmaJCOM/FOA/DRU, subject: Justifications for Non-Competitive Contracts Under Exception 1 to the Competition in Contracting Act (CICA) (18 Oct. 2004) [hereinafter J&A Memo]; *see also Air Force Reminds Contracting Officers to Justify Use of CICA Exception in Awarding Non-Competitive Contracts*, 82 BNA FED. CONT. DAILY 434 (Oct 26, 2004).

[33] "A contracting officer shall not commence negotiations for a sole source contract, commence negotiations for a contract resulting from an unsolicited proposal, or award any other contract" without first providing for full and open competition in writing, certifying the justifications accuracy and completeness, and obtaining the required approval. U.S. GEN. SVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 6.303 (July 2005) [hereinafter FAR].

[34] J&A Memo, *supra* note 32.

[35] *Id.*

[36] *Id.*; *see also* FAR, *supra* note 33, at 6-303.

[37] J&A Memo, *supra* note 32; *see also* FAR, *supra* note 33, at 6.302-1.

[38] J&A Memo, *supra* note 32.

[39] Lockheed Martin Aeronautics Co. , Comp. Gen., B-295401, Feb. 24, 2005, 2005 CPD ¶ 41.

[40] *Id.* at 3; *see* Major Kevin J. Huyser et al., *Contract and Fiscal Law Developments of 2004—Year in Review*, ARMY LAW., Jan. 2005, at 159-160 [hereinafter *2004 Year in Review*]. Specifically, Ms. Druyun admitted she contacted a senior Boeing official in 2002 about her daughter's continued employment at Boeing after her daughter feared that she would be terminated by Boeing for performance issues. Ms. Druyun contacted the senior official with whom she was negotiating the lease of one hundred Boeing KC 767A tanker aircraft in order to prevent adverse action against her daughter. In negotiations concerning the KC 767A Ms Druyun "agreed to a higher price for the aircraft than she believed was appropriate" and "was influenced by her daughter's and son-in-law's relationship with Boeing." *Lockheed Martin Aeronautics Corp.*, 2005 CPD ¶ 41, at 4 n.4.

[41] *Lockheed Martin Aeronautics Corp.*, 2005 CPD ¶ 41, at 6.

[42] *Id.*

[43] *Id.*

[44] *Id.*

claimed that, even given Ms. Druyun's statement, there was no evidence that she had influenced the Source Selection Evaluation Team.[45] According to the Air Force, Ms. Druyun did not play a significant role in the decision to change the technical requirements.[46]

When an organizational conflict exists, the GAO will "presume that the protestor was prejudiced, unless the record establishes the absence of prejudice" to any offeror.[47] Since the Air Force could not establish that Ms. Druyun had no significant involvement in the procurement, the GAO sustained the protest.[48] As the GAO stated, when a record establishes that a procurement official had a bias towards one of the offerors, and was a significant participant in the agency's activities that "culminated in the decisions forming the basis of the protest," the need to maintain the integrity of the process requires GAO to sustain the protest.[49] The GAO requires "compelling evidence that the protester was not prejudiced."[50] The GAO rejected the Air Force's assertion that there was no evidence that Ms. Druyun influenced the Source Selection Evaluation Team, and that they conducted the evaluation process properly.[51] Even though the GAO sustained the protest, in the long run, the Air Force concluded that competing factors precluded recompetition. The GAO did recommend, however, that the government reimburse Lockheed Martin's costs of filing the protest and their attorneys' fees.[52]

On-Line Auctions for Federal Procurement, What's Next?

Move over eBay, the government is running on-line auctions as well. The only difference is that the Department of Housing and Urban Development (HUD) is holding reverse auctions—the low bid is the winner rather than eBay type auctions in which the high bidder is the awardee.[53] MTB Group challenged the procedure as being prohibited under the provisions of the Office of Federal Procurement Policy Act (OFPP),[54] but the GAO did not agree.[55] Under the auction system, the HUD published notices for inspection of properties on a webpage using the simplified acquisition procedures of FAR part 13.[56] The low bid would appear on the webpage for all to view, until a new, lower bid was received.[57] MTB Group protested on the ground that it was improper to disclose a vendor's prices during the auction.[58]

In a case of first impression, the GAO concluded the HUD's decision to reveal participants' prices during a reverse auction was proper.[59] The GAO disagreed with MTB Group's contention that its pricing information was confidential and that, by releasing the price information, the government was releasing its labor, overhead, and profit rates.[60] Instead, the

---

[45] *Id.* at 7.

[46] *Id.*

[47] *Id.*; *see also* The Jones/Hill Joint Venture, Comp. Gen. Dec. B-288392.2, 2001 CPD ¶ 178.

[48] *Lockheed Martin Aeronautics Corp.*, 2005 CPD ¶ 41, at 14-15.

[49] *Id.* at 7.

[50] *Id.*

[51] *Id.* at 13.

[52] *Id.* at 15.

[53] MTB Group, Inc., Comp. Gen. Dec. B-295463, Feb. 23, 2005, 2005 CPD ¶ 40. Under the program, the agency notifies potential participants of upcoming auctions, and the start and close times. If a company chooses to participate they submit their quotations to the online auction website. During the auction the property in question is displayed and the current lowest quotation, as well as the remaining time. The webpage does not display the name of the vendor or the any other identifying information. At the end of the auction competing vendors are able to view all quotations submitted, to include the winning quote. *Id.* at 2.

[54] 41 U.S.C.S. § 423(a) (LEXIS 2005). While the OFPP prohibits government officials, and those acting on behalf of the government, from knowingly disclosing contractor quotations or proposal information before award, the prohibition is not absolute. The act does not restrict the disclosure of information to any person or class of persons "authorized in accordance with applicable agency regulations or procedures, to receive the information" and it does not restrict a contractor from disclosing its own quote or proposal information or the recipient from receiving that information. *MTB Group,* 2005 CPD ¶ 40, at 3, quoting 41 U.S.C.S. § 423(a).

[55] *MTB Group,* 2005 CPD ¶ 40, at 2.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.* at 4 n.4.

GAO equated the release of price information in the reverse auction scenario to a sealed bid, where awardee price information is released at bid opening.[61]

As the GAO pointed out, the restrictions on government officials disclosing contractor quotations or proposal information before award are not absolute.[62] The OFPP does not prohibit "disclosure of information to . . . any person or class of persons authorized in accordance with applicable agency regulations or procedures, to receive the information."[63] The GAO also reminded the protestor that the OFPP does not restrict contractors from disclosing their own quote or proposal information.[64] The underlying purpose of the act is to prevent people in the government from disclosing sensitive procurement information in exchange for gratuities or future employment.[65] The HUD's release of participants' prices was not done in exchange for gratuities or future employment, and therefore, the reverse auction did not violate the underlying intent of the OFPP.[66] Since all vendors disclose their price as a condition of competing and the OFPP does not "restrict a contractor from disclosing its own quote or proposal information or the recipient from receiving that information," the reverse auction survived this challenge.[67]

Acquisition Strategy Mimics Court-Martial Panel Deliberations

One may be thinking that the pressure has finally gotten to the professors in the Contract and Fiscal Law Department. What does acquisition strategy have to do with court-martial panel deliberations? Nothing really, but a new method for competition sounds a lot like the instructions a military judge gives panel members when they adjourn for deliberations on sentencing.[68] The methodology is called cascading set-asides, and it has some businesses displeased.[69]

Created in 1999, agencies attempted to satisfy their need to quickly award contracts while still meeting the Small Business Administration's goals of increasing small business participation in the government procurement process.[70] Industry groups are unhappy with the procedure, claiming it is not fair that big companies' bids might never get opened.[71] Others see the process as an opportunity for big companies to win awards on contracts they had previously been prevented from bidding on at all.[72] This may be the beginning of a new wave of government procurement in the future, so stay tuned.

---

[61] *Id.*

[62] *See* 41 U.S.C.S. § 423(h)(1) (LEXIS 2005); *MTB Group*, 2005 CPD ¶ 40, at 3.

[63] *MTB Group*, 2005 CPD ¶ 40, at 3 (quoting 41 U.S.C.S. § 423(h)(1)).

[64] *MTB Group*, 2005 CPD ¶ 40, at 3.

[65] *Id.* (referring to Senator Glenn's summary of the purpose of the act found in the committee report. 134 Cong. Rec. 32156 (Oct. 20, 1988)).

[66] *MTB Group*, 2005 CPD ¶ 40, at 4. The GAO stated that "nothing in the Act itself or the Act's legislative history—and we find nothing- to support" the assertion that act did not envision disclosures to competing vendors, but only to people within the government. *Id.*

[67] *Id.* at 3; *see also* 41 U.S.C.S. § 423(h)(1) (LEXIS 2005).

[68] *See* U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK 60 (15 Sept. 2002). The judge's instructions to a court-martial panel when determining an appropriate sentence state that members should vote on proposed sentences starting with the lightest sentence to the most severe sentence. Once the two-thirds of the panel members votes to adjudge a sentence no other proposed sentences are voted upon (except for capital cases in which a unanimous vote is required to adjudge the death penalty). *Id.* at 72-73.

[69] *See* GOVEXEC.com, New Acquisition Strategy Alarms Industry, June 28, 2005, http://www.govexec.com/story_page.cfm?articleid=31619. Cascading set-aside procurements invite bids from all companies. Submitted bids are then opened in order of "legal precedence" going from small, disadvantaged businesses all the way up to big companies. When the agency has "enough proposals for a competition among small businesses or other preferred firms, it makes an award and never opens the remaining envelopes." *Id*.

[70] *Id.*

[71] *Id.*

[72] *Id.*

VSE Corporation successfully protested the Department of Homeland Security's sole-source award of a contract for storage, maintenance, and disposition services for personal property seized by various federal agents.[73] The Customs Service issued a request for proposals (RFP) for a follow-on procurement to a prior contract that included a four-month transition period, a base year, and nine one-year options.[74] The protester and two other firms responded to the RFP, and the agency awarded the contract to Day and Zimmerman, one of the other firms, on 23 April 2002.[75] After the incumbent protested, the agency took corrective action by terminating the award, revising the statement of work, and recompeting.[76] The Customs Service entered into two sole-source extensions with the incumbent to fulfill their requirement while the services were recompeted.[77] These extensions, with the option years, extended the incumbent's contract through 1 April 2005.[78] In 2003, the agency, now called the Customs Border Protection (CBP),[79] issued a new RFP with revised workload estimates.[80]

On 20 December 2004, the CBP decided to cancel its RFP because the revisions represented significant changes from what it originally requested, and questions continued to arise concerning bundling of services.[81] Three days later, the CBP posted a notice of its intent to sole-source its requirements to the incumbent for six months with three option periods.[82] The agency notice, filed on FedBizOpps stated "[i]t is intended that award will be made under the authority of 41 U.S.C. [§] 253(c)(1)."[83] On 1 April 2005, the agency awarded a sole-source contract to the incumbent, but the award was not supported by a J&A.[84]

VSE protested the RFP's cancellation as arbitrary, capricious, and unreasonable since the agency previously addressed significant changes in amendments.[85] VSE also claimed the cancellation was a pretext for the agency to rid itself of the burdensome procurement process, and to preserve the sole-source contract it already had with the incumbent.[86] After receiving the agency's report, VSE also attacked the cancellation as a result of a lack of advanced planning.[87]

While the GAO denied VSE's protest of the cancellation of the RFP on 11 April 2005, determining that the agency had established a reasonable basis for the cancellation, the GAO decided to resolve the propriety of the proposed sole-source contract to the incumbent since the agency's report had not addressed that issue.[88]

---

[73] VSE Corp., Comp. Gen. B-290452.3; B 290452.4; B-290452.5, May 23, 2005, 2005 CPD ¶ 103.

[74] *Id.* at 2.

[75] *Id.* at 3.

[76] *Id.*

[77] *Id.* at 3.

[78] *Id.*

[79] During that time frame, the Department of Homeland Security absorbed the Customs Service, the Department of Treasury, and other functions from the Department of Agriculture, the Immigration and Naturalization Service, and the Border Patrol, and created the Customs Border Protection (CBP) with these elements.

[80] *VSE Corp.* 2005 CPD ¶ 103, at 3.

[81] *Id*.

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

[83] *Id.* 41 U.S.C. § 253(c)(1) states that agency may use other than competitive procedures only when "the property or services needed by the executive agency are available from only one responsible source and no other type of property or services will satisfy the needs of the executive agency . . ." 41 U.S.C.S. § 253(c)(1) (LEXIS 2005).

[84] *VSE Corp.,* 2005 CPD ¶ 103, at 4-5.

[85] *Id.* at 4. Johnson Controls joined the protest in March following a conference call between VSE and CBP in which Johnson Controls was permitted to participate. Johnson Controls' protest was ultimately dismissed as untimely since it failed to protest the cancellation within ten days of notice on FedBizOpps. *Id.*

[86] *Id.*

[87] *Id.* at 5. VSE alleged the agency records demonstrate that CBP was aware in early June 2004 that the RFP likely would be cancelled, the agency should have made plans for acquiring the services from another source, besides EG&G (the incumbent). The CBP argued that because "any change in contractor required a 4-month lead time there was insufficient time to conduct a competition." *Id.* at 7.

[88] *Id.* at 4.

The GAO found the sole-source bridge contract to the incumbent improper because the award, based upon 41 U.S.C. § 253(c)(1), was not supported by a written J&A.[89] As the GAO noted, the only exception to the requirement for a written J&A before award is the unusual and compelling urgency exception that allows the J&A to be written after award.[90] The CBP argued, unsuccessfully, that due to the four-month transition period, there was insufficient time to solicit competition.[91] The GAO determined that CBP's predicament was caused by a lack of advanced planning and a failure to consider its requirements for the bridge contract with any other firm but the incumbent.[92] Clearly, the GAO's unwillingness to adopt CBP's reasoning for the sole-source contract was affected by the incumbent's contract expiration four years earlier and the subsequent contract extension on a sole-source basis since that time.[93]

Bumbling Bundling?

American College of Physicians Services and COLA[94] protested the terms of a RFP that the Navy issued to procure professional accreditation services and proficiency testing for its medical laboratories.[95] The protesters unsuccessfully argued that the solicitation unduly restricted competition by bundling both the accreditation services and the laboratory proficiency testing.[96]

The GAO applied a reasonable basis standard for the agency's contention that bundling was necessary.[97] The Navy claimed that one of its reasons for combining the services was to avoid the administrative burden of managing both contracts for agency contracting personnel.[98] The GAO determined that if the bundling requirements restrict competition, as it appeared to do in this case, then there is no legal basis to bundle the services solely due to administrative convenience.[99]

The GAO did, however, believe the Navy's bundling of these services was reasonable on two other grounds, in part due to the absence of a definitive showing of unreasonableness by the protester.[100] The GAO determined that the logistical problems of the Navy acting as a "go-between" to coordinate accreditation organization and proficiency testing in its management of laboratories was "a reasonable basis" to bundle this contract.[101] The GAO also determined that having the services provided by a single contractor would most likely afford the Navy access to an immediate review and monitoring of testing results that are needed to continue a laboratory's accredited status.[102] Given the logical connection between the proficiency testing and the laboratory's eligibly for accreditation, the GAO denied the challenge to the solicitation.[103]

You Have to Dance with the One That Brought You

My late grandfather was full of idioms and one of his favorites was, "You have to dance with the one that brought you." That idiom applies to the next competition case, although the caveat would be you also can't change the tune midway

---

[89] *Id.* at 6-7. The only exception to the requirement to publish a J&A is when the agency uses noncompetitive procedures because its need for the property or service is so unusual and compelling urgency that the government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals. *See* 41 U.S.C.S. § 253(c)(2), (f)(2) (LEXIS 2005).

[90] *VSE Corp.*, 2005 CPD ¶ 103, at 7; *see also* 41 U.S.C.S § 25(c)(2), f(2) (listing specific exceptions to the full and open competition requirements under an urgent and compelling need).

[91] *VSE Corp.*, 2005 CPD ¶ 103, at 7.

[92] *Id.*

[93] *Id.* at 9.

[94] *See* Am. Coll. of Physician Servs.; COLA, Comp. Gen. B-294881, B-294881.2, Jan 3, 2005, 2005 CPD ¶ 1, at 1 n.1.

[95] *Id.*

[96] *Id.* at 2.

[97] *Id.* at 4; *see also* Aalco Forwarding, Comp. Gen. B-277241.12, B277241.13, Dec. 29, 1997, 97-2 CPD ¶ 175.

[98] *Am. Coll. of Physician Servs.,* 2005 CPD ¶ 1, at 4.

[99] *Id.* at 8.

[100] *Id.* at 4.

[101] *Id.*

[102] *Id.*

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

through the dance. In *Poly-Pacific Technology*, the Air Force contracted with U.S. Technology Corporation (UST) for the lease and recycling of acrylic plastic media.[104] The acrylic plastic media was used as an abrasive in the removal of coatings from aircraft, components, and equipment.[105] Once used, the acrylic is no longer suitable for its intended purpose, the acrylic must then be disposed of in accordance with the Environmental Protection Agency's (EPA's) regulations on "solid waste."[106] The EPA does, however, allow for an exception. According to EPA regulations, the leftover acrylic may be excluded from the definition of solid waste if it is recycled according to the EPA's criteria.[107] U.S. Technology Corporation's contract called for the contractor to retain ownership of the acrylic material and ensure the material is recycled consistent with the EPA regulations.[108]

After the Air Force awarded the contract to UST, the agency learned of an alleged improper disposal of the acrylic remainder (known as spent blast media (SBM)) by UST's subcontractor.[109] The Air Force modified the contract to allow itself to either return the leftover acrylic to UST for recycling or order disposal of the remainder in lieu of recycling.[110] Under the modification, UST could dispose of the SBM, or the SBM could be sent to a third party. The modification, however, held the contractor responsible for the additional costs of disposal.[111] Poly-Pacific protested the modification as an improper relaxing of the performance requirements and outside the scope of the original work anticipated by the RFP.[112] The result, according to Poly-Pacific, was an improper sole-source contract.[113]

Normally, the GAO will not review contract modifications because such reviews are beyond the scope of the GAO's bid protest function.[114] The GAO will, however, review modifications when a protest alleges that a contract modification changes the scope of work of the original contract, because the out-of-scope work would be subject to the CICA competition requirements, absent a justification for sole-source.[115] The GAO standard is whether "there is a material difference between the modified contract and the contract that was originally awarded."[116] The GAO looked at whether the original nature or purpose of the contract is so substantially changed by the modification that the original and modified contracts are essentially and materially different, and whether the modification relaxed a contractor's performance more than what is reasonably anticipated under the original solicitation.[117]

Here, the GAO determined the modification did change the requirements of the original contract since the modification suspended UST's requirement to recycle the SBM and effectively only required UST to lease the acrylic plastic media to the Air Force with a reimbursement requirement to the government for disposal.[118] The original requirement required the awardee to lease the acrylic plastic media to the Air Force and recycle the SBM in accordance with the EPA regulations.[119] In order to do that offerors were required to propose technical solutions and pricing for both the lease and recycling portion of the contract.[120] Therefore, the GAO sustained the protest.[121]

---

[104] Poly-Pac. Tech., Comp. Gen. B-296029, Jun 1, 2005, 2005 CPD ¶ 105.

[105] *Id.* at 1.

[106] *Id.* at 2; *see* 40 C.F.R. § 264.1(2005); *see also* Resource Conservation and Recovery Act, 42 U.S.C.S. § §6901-6939e (LEXIS 2005).

[107] *Poly-Pac. Tech.*, 2005 CPD ¶ 105 at 2; *see* 40 C.F.R. § 264.1.

[108] *Poly-Pac. Tech.,* 2005 CPD ¶ 105, at 2.

[109] *Id*.

[110] *Id.* at 3.

[111] *Id.*

[112] *Id.*

[113] *Id*.

[114] *Id.* 4 C.F.R. § 21.5(a) (2005); Sprint Comm. Co., Comp. Gen. B-278407, B-278407.2, Feb. 13, 1998, 98-1 CPD ¶ 60.

[115] *Poly-Pac. Tech.*, 2005 CPD ¶ 105, at 3.

[116] *Id.* at 4; *see* Marvin J. Perry & Assoc., Comp. Gen. B-277684, B-277685, Nov. 4, 1997, 97-2 CPD ¶ 128; Avtron Mfg., Inc., Comp. Gen. B-229972, May 16 1988, 88 CPD ¶ 458.

[117] *Poly-Pac. Tech.*, 2005 CPD ¶ 105, at 4. The factors looked at include the magnitude of the change in relation to the overall effort, performance period, and costs between the original contract and the modification. *Id.*

[118] *Id.* at 5.

[119] *Id*.

[120] *Id*.

[121] *Id.* at 6.

The contracting officer is afforded wide discretion in determining whether or not a firm has an organization conflict of interest (OCI) and, absent some showing of unreasonableness, the GAO will not overturn the determination.[122] In *Lucent Technology World Services, Inc*.,[123] the Army excluded the protestor from competing for radio devices based upon a determination of organization conflict of interest. [124] In denying the protest, the GAO found no basis to question the contracting officer's determination that Lucent was prevented from submitting a proposal because Lucent prepared the technical specifications used in the solicitation.[125] The GAO based its decision on the contracting officer's broad discretion in performing his or her duties to identify and address conflicts of interest.[126]

Lucent protested its exclusion from competition for the production of the Army's Advanced First Responder's Network in Iraq—the Terrestrial Trunked Radio (TETRA) device.[127] Under a task order from an Indefinite Delivery/Indefinite Quantity (ID/IQ) contract that it held with the Army, Lucent developed a solicitation for procurement of the TETRA devices[128] The Army issued a revised RFP basing its specifications on Lucent's specifications.[129] Lucent categorized its submission to the Army as a collaboration, and not a "complete specification" for "non-developmental items" under FAR 9.505-2(a)(1),[130] which would prohibit their participation. [131] Lucent argued that this FAR subsection applied only to complete specifications. The GAO found no supervision or control by the Army that would make the OCI bar inapplicable.[132]

Since the FAR doesn't define "complete specification," and the GAO found no reason to question the contracting officer's determination, the protest was denied.[133] The GAO made clear that its decision is based primarily on the contracting officer's broad discretion.[134] By denying this protest, the GAO reminds us all that the OCI determination should be made as early as possible and that the contracting officer "must exercise 'common sense, good judgment, and sound discretion'" in determining whether there was OCI. [135]

---

[122] Lucent Tech. World Servs. Inc., Comp. Gen. B-295462, Mar 2, 2005, 2005 CPD ¶ 55.

[123] *Id.*

[124] *Id.* Organizational conflict of interest occurs where, because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government, or the person's objectivity in performing the contract might otherwise be impaired, or a person has an unfair competitive advantage. *See also* FAR, *supra* note 33, at 9-501.

[125] *Lucent,* 2005 CPD ¶ 105, at 5.

[126] *Id.*; *see also* FAR, *supra* note 33, at 9.505.

[127] *Lucent,* 2005 CPD ¶ 105, at 5. Part of the proposal contained specifications in Schedule D. *Id.*

[128] *Id.*

[129] *Id.* The Army's revised specifications were based upon specifications Lucent drafted that were located in its schedule D. *Id.*

[130] FAR 9.505-2(a)(1) states:

> If a contractor prepares and furnishes complete specifications covering nondevelopmental items, to be used in a competitive acquisition, that contractor shall not be allowed to furnish these items, either as a prime contractor or as a subcontract to, for a reasonable period of time including, at least, the duration of the initial production. This rule shall not apply to –
>
> Contractors that furnish at Government request specifications or data regarding a product they provide, even though the specifications or data may have been paid for separately or in the price of the product; or
>
> Situations in which contractors, acting as industry representatives, help Government agencies prepare, refine, or coordinate specification, regardless of source, provided this assistance is supervised and controlled by Government representative.

FAR, *supra* note 33, at 9.505-2(a)(1).

[131] *Lucent,* 2005 CPD ¶ 105, at 5.

[132] *Id.*

[133] *Id.* at 6.

[134] *Id.* at 4.

[135] *Id*.

Theoretical Possibilities that Awardees May Act in Bad Faith Not Enough to Substantiate OCI

The theoretical possibility that an awardee will act in bad faith is not enough to establish an organizational conflict of interest (OCI).[136] In a protest of the Defense Logistics Agency's Defense Reutilization and Marketing Service (DRMS) sale of scrap materials, the GAO denied the protest, finding no OCI where a subsidiary company performed a related surplus property contract.[137] Government Scrap Sales (GSS) alleged that the current contractor's status as the commercial venture (CV) contractor for the sale of surplus property creates a "potential OCI" if the contract is awarded to a subsidiary of the current CV.[138] GSS rested its argument on hypothetical examples to show the economic incentive that the CV and its subsidiary would have to convert surplus property into scrap and send property to the scrap venture (SV).[139] GSS hypothesized that that the CV could abandon property that it is obligated to purchase under its useable surplus contract by refusing acceptance or challenging the government's determination of whether the property is useable or not.[140] The DRMS would then use its sole authority to designate property status (useable or scrap) as scrap property, thereby sending property that should be sold to the CV to the SV.[141]

The GAO did not see (and GSS did not proffer) how the facts in the case fit into one of the three broadly characterized OCI situations: impaired objectivity, unequal access to information, or biased ground rules.[142] The GAO explained that "the mere existence of a prior or current contractual relationship between the agency and the contractor does not create an unfair competitive advantage," and that the agency is not "required to compensate for each competitive advantage inherently gleaned by a competitor's prior or current contracts."[143]

A Shallow Victory

KEI Pearson prevailed in its protest against the General Services Administration (GSA) contract for phase II of the Navy Knowledge Online (NVO) system, but its victory was hollow.[144] The Request for Quotations (RFQ) called for a combination fixed price and time-and-materials task order for a base year and four option years.[145] Under the RFQ, all items or services acquired by the offerors had to be purchased off the GSA schedule or through a vendor listed on the GSA schedule.[146] The awardee, CSC, had a line item in its proposal that stated it was a "Non-Schedule" item, but the corresponding note stated that while the item was available from a number of resellers under the GSA schedule, CSC had an "alliance agreement" with the producer that allowed CSC to buy the item at "a significant savings."[147]

KEI Pearson protested the award to CSC on the grounds that the GSA could not properly issue the task order because the non-schedule item in CSC's proposal[148] violated the rules governing the use of the Federal Supply Schedule (FSS) and the terms of the RFQ.[149] The GAO agreed.[150] The GSA claimed all its costs were evaluated in accordance with

---

[136] Gov't Scrap Sales, Comp. Gen. B-295585, Mar. 11, 2005, 2005 CPD ¶ 60.

[137] *Id.* The commercial venture is the surplus property contract whereby a company purchases the useable commercial property from DRMS and sells it at, presumably, a higher price to others. *Id.* at 60-61. Under both the CV contract, which purchased the useable surplus commercial property, and the scrap venture, where the excess scrap from DRMS is sold the awardee is required to set up a separate entity known as the purchaser. *Id.* n.2.

[138] *Id.* at 2

[139] *Id.*

[140] *Id.* at 3.

[141] *Id.*

[142] *Id.*

[143] *Id.* at 5.

[144] KEI Pearson, Inc., Comp. Gen. B-294226.4, Jan. 10, 2005, 2005 CPD ¶ 12. The NVO system is a web based system to provide the Navy with internet access to training and professional development, using commercial off the shelf items. *Id.*

[145] *Id.* at 4.

[146] *Id.* at 3.

[147] *Id.* The note went on to state that if required, CSC would buy the item via the Government authorized source. The "alliance agreement" is not defined in the case however, it appears to be a separate private agreement between the producer and CSC that avoids the middle man listed as a GSA vendor. *Id.*

[148] *Id.* at 5.

[149] *Id.*

[150] *Id.*

the GSA schedule and that the reference to the alliance agreement represented notification that the awardee could get the item at a cheaper rate via the alliance agreement versus the schedule.[151] The GAO did not buy the argument and sustained the protest. [152]

The GAO went on to hold that the GSA's position "is not supported by the language in CSC's (quotation)," and the GSA's evaluation of the quotation was not in accordance with the rules governing the RFQ.[153] Unfortunately for KEI Pearson, the GSA determined that urgent and compelling circumstances did not permit the task order to be suspended pending a decision on protest, and the awardee had already substantially performed the requirement. [154] The GAO did recommend that the GSA reimburse KEI Pearson for the costs and attorneys fees in filing the protest. [155]

Government Cannot Circumvent CICA By Modifying a Contract to Allow for Modifications That Were Not Originally Within the Scope of the Contract.

In an Air Force case involving custodial services at Hickman Air Force Base in Hawaii, the Court of Federal Claims (COFC) found that the Air Force improperly modified its contract outside the original scope, thereby violating CICA. In *Cardinal Maintenance Service, Inc.*, [156] the Air Force issued a RFP for custodial services at Hickman.[157] The contract attempted to combine custodial services for ninety-two buildings.[158]

The solicitation also provided that the Air Force had the right to expand or contract the quantity and type of custodial services to be provided by the awardee. The solicitation also contained an "Additions/Deletions" section that required the contractor to "provide costs for adding or deleting services."[159] Furthermore, the solicitation stated negotiations on the prices of these additions or deletions "may be held prior to or immediately after award" with the intent to incorporate them into the contract.[160] The RFP also provided estimates for workloads of various categories of custodial services anticipated.[161] After a best value evaluation, the Air Force awarded the contract to Navales in February 2003.[162]

The Air Force modified the contract eight times after initial award.[163] After the first two additions and deletions, the parties agreed to eliminate the 'add and delete' cost sheet from the contract.[164] Instead, the parties would negotiate the price for future modifications.[165] The total contract price after these modifications was almost eighty percent higher than the original contract price.[166] Cardinal protested the modification of Navales' contract, alleging the Air Force violated the CICA by not obtaining full and open competition for the increased services.[167] Furthermore, Cardinal alleged that the deletion of the 'add and delete' list was tantamount to a cardinal change to the original contract.[168]

---

[151] *Id.* at 6.

[152] *Id.*

[153] *Id.* at 6-9.

[154] *Id.* at 9.

[155] *Id.*

[156] 63 Fed. Cl. 98 (2004).

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.* The RFP included special requirements for the Child Development Center as well. *Id.*

[162] *Id.*

[163] *Id.* at 7.

[164] *Id.*

[165] *Id.*

[166] *Id.* at 10.

[167] *Id.*

[168] *Id.* at 12.

Applying the standards of the Administrative Procedure Act, the court could only overturn an agency's action if it finds that the agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[169] Here, the court issued an injunction, finding the "government does not have an unlimited right to modify the contract by eliminating the changes clause."[170] The court gave the Air Force nine months to complete a new procurement for custodial work at Hickam AFB.[171]

Lieutenant Colonel Ralph J. Tremaglio, III

Contract Types

Additional Contract Types for Commercial Services

The FAR Councils proposed amending the FAR to expressly authorize the use of time-and-materials and labor-hour contracts for certain categories of commercial services under specified conditions.[172] After extensive public comments, to include coordination between the GAO and the OFPP, the proposed rule contains some changes from the Councils' advance notice.[173] Changes include the following: a shift from a planned list of applicable services to a broad grant of authority to the contracting officer to make a determination and finding that no other contract type would be suitable; an emphasis that requirements should be structured to maximize the use of fixed price contracts; the authority for the government to pay contractors for reperformance without profit; and a requirement for contractors to substantiate subcontractor hours upon the contracting officer's request.

Defense Federal Acquisition Regulations Supplement (DFARS) Transformation of Contract Types

As part of a broad overall effort, the Department of Defense (DOD) issued an interim rule streamlining Part 216, Types of Contracts, of the DFARS and adding language to the new Procedures, Guidance, and Information (PGI) resource of discretionary guidance.[174] The interim rule deletes text on Economic Price Adjustment clauses and moves text to the PGI; increases the standard maximum ordering period under basic ordering agreements from three to five years; deletes an obsolete exception for cost-plus-fixed fees for environmental restoration; deletes unnecessary text on considering design stability in selecting contract types; and moves general guidance on the selection of contract type to the new PGI.[175]

Air Force Highlights Need to Review Undefinitized Contractual Actions (UCAs)

As a reaction to a DOD Inspector General report, discussed in last year's *Year in Review*,[176] the Air Force issued a memorandum that stressed the need to improve the documentation of UCAs to ensure they are properly justified, to include detailed acquisition planning.[177] The Air Force also issued a Mandatory Procedure that requires UCA approval authorities to track UCAs with reporting requirements if any UCAs fail to meet required definitization dates.[178]

---

[169] *Id.* at 13; *see also* 5 U.S.C.S. § 706(2)(A) (LEXIS 2005).

[170] *Id.* at 21. During the hearing the government admitted that the changes in the contract were dramatic. The contracting officer stated "[h]ad the price sheet been used it would have resulted in extremely excessive costs bordering changes outside the scope of the contract," and that the changes were "considerable." *Id.* at 21 & 24.

[171] *Id.* at 29.

[172] Federal Acquisition Regulation; Additional Contract Types, 70 Fed. Reg. 56,318 (proposed Sept. 26, 2005) (to be codified at 48 C.F.R. pts. 2, 10, 12, 16, 44, and 52). The proposed rule implements section 1432 of the National Defense Authorization Act for Fiscal Year 2004. *Id.* The advance notice of the proposed rule was discussed in last year's *Year in Review*. *See 2004 Year in Review*, *supra*, note 40, at 54.

[173] Federal Acquisition Regulation; Additional Contract Types, 69 Fed. Reg. 56,316 (proposed Sept. 20, 2004).

[174] Defense Federal Acquisition Regulation Supplement; Types of Contracts, 70 Fed. Reg. 54,694 (Sept. 16, 2005) (to be codified at 48 C.F.R. pt. 216).

[175] *Id.*

[176] *See 2004 Year in Review*, *supra* note 40, at 17-18.

[177] Memorandum, Associate Deputy Assistant Secretary (Contracting) & Assistant Secretary (Acquisition), U.S. Air Force, to ALMAJCOM/FOA/DRU (Contracting), subject: Management and Documentation of Undefinitized Contract Actions (13 June 2005).

[178] Mandatory Procedure; Definitization Schedule, MP 5317.7404-3 (Aug. 2005). This Mandatory Procedure does not apply to UCAs that invoke the exceptions at DFARS 217.740-5 (b). *Id.*

Aloha, Petroleum Marketing Monthly (PMM)-Based Economic Price Adjustment (EPA) Clause!

The Court of Appeals for the Federal Circuit (CAFC), in *Tesoro Hawaii Corporation v. United States*,[179] resolved a lengthy and broad litigation battle[180] over a Department of Energy EPA clause by ruling that the FAR allowed the use of market-based references to determine adjustments to established prices.[181] The Defense Energy Support Center tailored an EPA clause that was tied to price adjustments from the PMM, a Department of Energy publication that published the average sales figures for specified fuels.[182]

The argument, which was based on a reading of FAR § 15.203 (a),[183] centered on whether the term "established prices" meant only "contractor's established prices," as the appellants alleged.[184] The court agreed with the government that a plain meaning reading of the regulation demonstrated that the clause encompassed both catalog prices and industry-based prices.[185] The court declined to rule on the other outstanding issues: the legality of the individual and class deviations attempted by the government to rescue the EPA clause, and the question of whether waiver was an issue because the contracts were fully performed before suit was brought by the contractors.[186]

Turn Out the Lights; the Requirements Contract is Over

The Department of Agriculture Board of Contract Appeals (AGBCA), in *American Bank Note Company (ABN)*,[187] ruled that the burden is on the contractor to prove entitlement once the maximum requirement under the contract has been satisfied.[188] The Food and Nutrition Service of the Department of Agriculture (FNS) entered into a five-year requirements contract with ABN for the storage, distribution, and ordering services of FNS food coupons for the food stamp program.[189] The FNS anticipated that paper coupons would be phased out and that this would be the last contract necessary.[190] In the last contract year, the FNS issued contract modifications that liquidated the remaining boxes.[191]

The AGBCA agreed with the government that the contractor must provide evidence of its costs in order to obtain entitlement.[192] Since the requirements under the contract had been fulfilled, any excess work was properly classified as an additive change that placed the burden of proof on ABN, and not on the government.[193]

Indefinite Delivery/Indefinite Quantity (ID/IQ) Contracts
And the Magic Number is . . .?

The GAO, in *CW Government Travel*,[194] held that $2500 would be sufficient consideration as a non-nominal minimum for an ID/IQ contract for travel agent services.[195] The Army issued a RFP for commercial travel office services

[179] 405 F.3d 1339 (Fed. Cir. 2005).

[180] See *2004 Year in Review*, *supra* note 40, at 19-20. The first case dates back to 1992; overall ten cases have been filed in the COFC. *Tesoro*, 405 F.3d at 1346.

[181] *Id.* at 1348.

[182] *Id.* at 1341.

[183] FAR, *supra* note 33, at 15.203.

[184] *Tesoro*, 405 F.3d at 1344.

[185] *Id.* at 1347.

[186] *Id.* at 1349.

[187] AGBCA No. 2004-146-1, 05-1 BCA ¶ 32,867.

[188] *Id.* at 162,875.

[189] *Id.* at 162,865.

[190] *Id*.

[191] *Id.* at 162,871.

[192] *Id.* at 162,876.

[193] *Id.* at 162,877. The contractor's theory was more applicable to a deductive change. *Id.*

[194] Comp. Gen. B-295530, Mar. 7, 2005, 2005 CPD ¶ 59.

[195] *Id.* at 3.

under the prototype automated Defense Travel System program.[196] The intent was to consolidate and standardize travel services within the DOD under a single procuring activity.[197] The RFP specified a $2500 guaranteed minimum with a $15 million minimum order and $150 million maximum order.[198]

The general rule is that there is no "magic number" for adequate consideration in these types of contracts, but it is necessary to examine the acquisition as a whole.[199] The GAO reviewed data from an existing contract and agreed with the government that the guaranteed minimum potentially represented several hundred transactions.[200] The protestor requested reconsideration in a follow-up case,[201] based on a discovery that the Army would pay a "consolation prize" of $2,500 if an awardee did not receive a task order by the end of base period. The Army, however, clarified its intent and declared that it would order at least the $2,500 minimum from each awardee; the GAO subsequently denied the request for reconsideration.[202]

The Sum of All Task Orders

The GAO commented on the proper evaluation of ID/IQ contracts in *HMR Tech, LLC*.[203] The Coast Guard issued a RFP for project and acquisition management services for the Coast Guard's Acquisition Directorate. The RFP contemplated the award of an ID/IQ contract with fixed-price task orders. Offerors were required to insert on-site and off-site labor hourly rates for the twenty-three labor categories listed in the RFP.[204] The RFP also required the offeror to provide a technical proposal for two sample tasks to assist the agency in determining if the offeror understood the requirements.[205]

HMR Tech filed a protest arguing that the Coast Guard failed to evaluate the proposals properly since the Coast Guard failed to consider the protestor's more favorable sample task pricing.[206] The GAO noted that, while the RFP failed to specify what information the agency would use to assess cost, an agency, in evaluating ID/IQ contracts, may use either the total cost based on labor estimates or a comparison among the offeror's sample task pricing methodologies.[207] In this case, the Coast Guard chose to use the total evaluated cost by multiplying the proposed labor rates by the government's labor hour estimate.[208] Even though the Coast Guard asked for offerors to submit data for both evaluation techniques, it was permissible for the Coast Guard to use only one for the final evaluation.[209]

The GAO also rejected a challenge to making an award based on price when price is valued less than the technical evaluation factors. The GAO stated the general rule that "when proposals are essentially technically equal, price becomes the determining factor in making the award. . . ."[210]

---

[196] The base ordering period is two years, with three one-year options. Task orders will be competed among contract awardees. *Id.* at 1.

[197] *Id.*

[198] *Id.* at 2.

[199] *Id.*

[200] This estimate is based on transaction fees between $5 and $16. *Id.* at 3.

[201] *CW Gov't Travel, Inc.—Reconsideration,* Comp. Gen. B-295530.2; B-295530.3; B-295530.4, July 25, 2005, 2005 CPD ¶ 139.

[202] *Id.* at 9.

[203] Comp. Gen. B-295968; B-295968.2; May 19, 2005, 2005 CPD ¶ 101.

[204] *Id.* at 1.

[205] *Id.* at 2.

[206] *Id.* at 5.

[207] *Id.* at 6-7.

[208] *Id.*

[209] *Id.* at 7.

[210] *Id.* at 8.

Options

A Constructive Appeal

The GSA Board of Contract Appeals (GSBCA) rejected a "constructive" option exercise argument in *Integral Systems, Inc. v. Dep't of Commerce*.[211] The Department of Commerce awarded a contract for the Geostationary Operation Environmental Satellite Backup Acquisition, Command, and Control Station, which included two option years of station on-call support. The base year of on-call support under the contract was scheduled to end on 8 December 2001.[212] On 12 September 2002, nine months after the scheduled end of the contract, the government notified Integral that it would not exercise the last two options. However, the government previously had requested work from the contractor between February and July 2002—within what would have been the first option year.[213]

The GSBCA agreed with the government, holding that since the Department of Commerce did not exercise the option according to its terms (i.e. written notice six days before the contract expired), the government did not extend the contract.[214] The GSBCA deferred ruling on remuneration for the work after the end of the contract until the Department of Commerce addressed all of Integral's arguments.[215]

Optional Lack of Advanced Planning?

The GAO denied a challenge to an option exercise that occurred after a decision not to exercise the contract in the future in *Antmarin, Inc.*[216] The Navy awarded a requirements contract for husbanding services throughout ports in the Mediterranean for one base year (1 April 1999 to 31 March 2000) plus nine one-year options. The dispute revolves around Option Years Six and Seven.[217] On 15 March 2000, the Navy issued notice of a decision not to exercise Option Year Seven. The following week, the Navy formally exercised Option Year Six; the protestors challenged the exercise of Option Year Six in light of the decision not to continue the contract after that year.[218]

The GAO noted that contracting officers, under the FAR, can take into account other factors[219] other than the required FAR findings for the exercise of an option,[220] and had broad discretion in this determination.[221] The GAO approved of the contracting officer's analysis, which included an informal price analysis between the awardee and the offerors in the original competition, a comparison of the average rate of inflation in various countries with the percentage rate increase of the contract, and analysis of the costs of resoliciting a new contract for those services.[222] The GAO dismissed the offeror's argument that the option exercise should be nullified due to a "lack of advance planning" in light of the decision not to exercise Option Year Seven, holding that the principle is only viable against contracts awarded using noncompetitive procedures.[223]

---

[211] GSBCA No. 16321-COM, 05-1 BCA ¶ 32,984.

[212] *Id.* at 163,471.

[213] *Id.* at 163,472.

[214] *Id*.

[215] *Id.* at 163,473.

[216] B-296317, 2005 U.S. Comp. Gen. LEXIS 150 (July 26, 2005). Husbanding services include trash and sewage removal, refueling arrangements, force protection for ships, transportation for ship members as well as the provision of fresh food and water. *Id*. at *3.

[217] *Id.* at *6. The contract was awarded to MLS-Multinational Logistic Services, Ltd., which changed its name to MLS, Ltd. MLS, Ltd. consisted of fourteen Navy husbanding contractors; the protest was filed by three contractors who appear to be excluded from the operation of the company. *Id.* at *4 n.3.

[218] *Id.* at *6-7.

[219] *See* FAR, *supra* note 33, at 17.207 (c)(3) and (e).

[220] *Id.* § 17.207(d).

[221] *Antmarin*, 2005 U.S. Comp. Gen. LEXIS 150, at *8.

[222] *Id.* at *8-11.

[223] *Id.* at *22. The GAO also noted that the fact that the requirements were decreasing was a distinguishing factor which defeated option exercises in earlier cases. *Id.* at *22-23.

File under "Nice Try"

In a follow-up entitlement case from last year's *Year in Review*, [224] the Department of Energy Board of Contract Appeals (Energy BCA) rejected the government's argument that a contractor could be paid the contract option price following an improper option exercise.[225] The Energy BCA held that the Nuclear Regulatory Commission must pay NVT Technologies its costs, plus a reasonable profit, since the invalid option exercise resulted in additional work outside the original contract.[226] The Energy BCA theorized that the government's argument would result in the contractor not receiving any damages or recovery as a result of the improper action.[227]

In another "Nice Try" case, the ASBCA ruled that an improper option exercise could not remedy the government's failure to order the guaranteed minimum in an ID/IQ contract.[228] The Navy awarded a contract to Petchem, Inc. to provide and operate a Personnel Travel Vessel within the Port Canaveral, Florida area.[229] The contract had two option periods: one could extend the contract six months with thirty days notice; the other required an additional preliminary sixty days notice in order to extend the contract beyond that to a maximum of sixty months.[230] The Navy exercised the former option clause to extend the contract six months, but failed to provide the preliminary written notice needed to extend the contract further.[231]

The Navy only ordered twenty-nine out of the guarantee minimum amount of forty movements for the six month option period,[232] but issued unilateral modifications for six more months and ordered fifty-one more movements.[233] The contracting officer denied Petchem's claim for the unordered movements during the option period.[234] The ASBCA found that the option exercise was invalid and that Petchem was entitled to damages for the breach of the minimum guarantee for the six-month option period.[235]

Intro to Contract Types

The COFC, in a nice summary of the basics of contract types under the FAR, granted summary judgment in rejecting a contractor's attempt to get paid for state income tax payments[236] under a fixed price contract in *Information Systems & Networks Corporation (ISN) v. United States*.[237] The COFC held that even though cost principles may be used to analyze the fixed price that will be negotiated, the goal in a fixed price contract is to "reach a 'fair and reasonable' price based on the universe of costs."[238] Ultimately, in a fixed price contract, the contractor bears the risk that the agreed upon price may be less than actual expenses, which would result in a loss contract. The COFC concluded that it would be improper "to retroactively distribute the burden of a known cost that was already implicitly factored" in the negotiated fixed price.[239]

---

[224] *See 2004 Year in Review*, *supra* note 40, at 21.

[225] NVT Tech., EBCA No. C-0401372, 05-1 BCA ¶ 32,823.

[226] *Id.* at 162,415.

[227] *Id.*

[228] Petchem, Inc., ASBCA No. 53792, 05-1 BCA ¶ 32,870.

[229] *Id.* at 162,899.

[230] *Id.* at 162,899-90.

[231] *Id.* at 162,900.

[232] An amendment to the solicitation stated that the guaranteed minimum would be "per period." *Id.*

[233] *Id.*

[234] *Id.*

[235] *Id.* at 162,901.

[236] *See infra* section titled Taxation p. 142 for a discussion of the taxation issue in the case.

[237] 64 Fed. Cl. 599 (2005).

[238] *Id.* at 607.

[239] *Id.*

The court also rejected an attempt to obtain lost profits from an allegedly lower estimate for the fee in cost-reimbursement contracts.[240] The COFC found that the prohibition against cost-plus-percentage-of-costs[241] contracts clearly prohibited ISN's claim and ISN assumed the risk in the adequacy of its fees and profits in negotiating the fixed fee or profit margin in its cost reimbursement contracts.[242]

The Legacy of AT & T

In *Gould, Inc. v. United States,*[243] the COFC rejected an attempt to void a contract based on a violation of statutory and regulatory directives concerning the use of multiyear contracts.[244] In a convoluted case dating back to 1988, the contract involved a U.S. Navy procurement of radios for the Marine Corps.[245] A design problem resulted in a certified claim of equitable reformation of the contract.[246] The ground for the relief alleged that the Navy violated procurement regulations by failing to obtain the required written findings by the Head of the Contracting Activity of the existence of a stable design prior to pursuing a multiyear contract.[247]

In granting summary judgment to the government, the COFC reviewed the relevant statute and its legislative history and ruled that there was no private cause of action for a violation of "internal operating provisions for the management of funds within the agency."[248] The COFC concluded that the holding of *American Telephone & Telegraph Company v. United States*[249] "clearly prevented contractors from relying upon statutes aimed primarily at governmental functions and enforced through Congressional oversight."[250]

The COFC rejected a similar argument in *Short Brothers, PLC v. United States*[251] involving the same statutory requirement discussed above. In that case, the court held that the provisions are merely internal government directives that do not supply a private cause of action.[252] The contractor argued that the government violated implied duties to exercise good faith, fair dealing, and cooperation during contract formation.[253] The court, reviewing case law, distinguished these duties as applying only to implied-in-fact contracts.[254] The COFC also rejected an attempt to expand the law concerning negligent estimates for requirements contracts to a more general rule imposing good faith on the contracting officer's choice of contract.[255]

The COFC also followed *American Telephone & Telegraph Company* in *Northrop Grumman Corporation v. United States,*[256] which dealt with the same, now obsolete, requirement for a written determination from the Under Secretary of Defense for Acquisition before awarding a fixed-price contract for high-value research and development procurements in excess of $10 million.[257] Northrop Grumman, which initially attempted to obtain a cost-reimbursement for the contract for

---

[240] *Id.* at 607-08.

[241] 10 U.S.C.S. § 2306 (LEXIS 2005).

[242] *Info. Sys. Networks Corp.,* 64 Fed. Cl. at 608.

[243] 66 Fed. Cl. 253 (2005).

[244] *Id.* at 267.

[245] *Id.* at 255.

[246] *Id.* at 256-57.

[247] 10 U.S.C.S. § 2306b (a) (1)—(6) (LEXIS 2005).

[248] *Gould, Inc.,* 64 Fed. Cl. at 259 (quoting Cessna Aircraft Co. v. Dalton, 126 F.3d 1442, 1452 (Fed. Cir. 1997)).

[249] 177 F.3d 1368 (Fed. Cir. 1999).

[250] *Gould, Inc.,* 64 Fed. Cl. at 267.

[251] 65 Fed. Cl. 695 (2005).

[252] *Id.* at 764.

[253] *Id.* at 765.

[254] *Id.*

[255] *Id.* at 767.

[256] 63 Fed. Cl. 38 (2005).

[257] Department of Defense Appropriations Act, Pub. L. No. 100-202, § 8118, 101 Stat. 1329, 1329-84 (1987).

the full-scale development and initial production of a cruise missile, the Tri-Service Stand-Off Attack Missile,[258] attempted to distinguish *AT&T* through implied-in-fact case law, but the COFC ultimately held that the requirement in question was purely a procurement policy matter in which Congress chose not to create a private cause of action for contractors.[259]

Major Andrew S. Kantner

Sealed Bidding

Invitation for Ambiguity

In *Dynamic Corporation*,[260] the GAO examined a contracting officer's decision to cancel an IFB after bid opening and reaffirmed that where there are inadequate or ambiguous specifications, an agency's decision to cancel a solicitation is proper. Here, an IFB was issued for construction services, to include modernizing a building and demolishing and removing certain parts of a building. The demolition portion of the IFB included clean-up of hazardous materials. In the IFB, the bidders were told that they must provide a lump-sum bid that was to include the "hazardous materials services," and "were advised to base their prices for these services on the estimated quantities in the IFB, as verified by the bidders using the drawings and specifications provided, and by conducting building inspections."[261] In addition, the bidders were to segregate the hazardous materials services and provide unit prices. "[T]hese prices were to be used to adjust the lump sum price (either up or down), if the actual amount of hazardous materials encountered during performance was either 20 percent higher or 20 percent lower than the IFB estimates."[262]

Based on the language in the IFB, bidders inquired about whether the unit price was actually required. The agency issued an amendment to answer the question, which read, in part, "[i]f the contractor deems applicable, he can present different rates based on pipe size, thickness, composition, location, accessibility, or any other factor that the contractor feels is relevant."[263] This explanation led some bidders to assume that the unit price was not required and others to assume that it was required. Three bidders did not enter unit prices. Based on this and other ambiguities in the IFB, the contracting officer cancelled the IFB.[264]

Basing its analysis on the FAR, section 14.404-1(a)(1), the GAO first explained the general rule that "[b]ecause of the potential adverse impact on the competitive bidding system of cancellation after bid prices have been exposed, a contracting officer must have a compelling reason to cancel an IFB after bid opening."[265] The GAO further stated, however, that if an IFB is ambiguous or inadequate, bidders will not be able to compete "on an equal basis."[266] Therefore, the GAO held that an ambiguous or inadequate solicitation "provides the agency with a compelling reason to cancel the IFB."[267]

Major Jennifer C. Santiago

---

[258] *Northrop Grumman Corp*., 63 Fed. Cl. at 39.

[259] *Id.* at 49.

[260] Comp. Gen. B-296366, June 29, 2005, 2005 CPD ¶ 125.

[261] *Id*.

[262] *Id*. at 2.

[263] *Id*.

[264] One of the types of ambiguities in the IFB was the "substantially overstated" quantities of work, while the other was an ambiguous request for bidders to submit certain pricing information "which prevented bidders from preparing their bids on a common basis." *Id.* at 3.

[265] *Id*.

[266] *Cf.* Rand & Jones Enter. Co., Inc., Comp. Gen. B-296483, Aug. 4, 2005, 2005 U.S. Comp. Gen. LEXIS 136. In this case, the GAO sustained a protest based on the cancellation of a request for proposals after disclosure of the offerors' prices where "the RFP provided only for a price competition and did not contain technical evaluation factors, [where] the agency intends to issue an invitation for bids for the same requirement, and [where] there is no basis to find the government or the integrity of the procurement system would be prejudiced if the RFP were not cancelled." *Id*.

[267] *Dynamic Corp*., Comp. Gen. B-296366, June 29, 2005, 2005 CPD ¶ 125, at 4. (citing Neals Janitorial Serv., B-276625, July 3, 1997, 97-2 CPD ¶ 6, at 5).

Negotiated Acquisitions

DFARS Transformation

As part of the DFARS transformation, the DOD proposed amending changes that would delete unnecessary text, and relocate guidance on source selection to the new PGI.[268] Most of the language that would remain in the DFARS deals with the evaluation of small businesses.[269] A source selection plan would still be mandatory for high-dollar value acquisitions.[270]

Air Force Memo on Communications with Industry

The Air Force Chief of Staff and Acting Secretary issued a joint memorandum stating that communications must be strictly controlled through the Source Selection Authority (SSA) once the source selection begins (i.e. the release of the RFP).[271] The memorandum highlighted that while interaction with industry should be encouraged, all interactions with potential offerors should be recorded and all efforts should be made to keep a fair competitive advantage for all offerors.[272]

Air Force Memo on Cost/Price Risk Ratings

The Assistant Secretary of the Air Force (Acquisition) issued a memorandum that cautioned against "overly optimistic or unrealistic cost proposals."[273] The memorandum contained guidance that cost risk ratings should be given to evaluate offeror's cost proposals in light of the government probable cost estimates.[274] The Air Force subsequently made cost realism risk assessments mandatory for Acquisition Category programs whose source selection plans are approved after 1 March 2005.[275]

Fixing the Unbroken RFP

Echoing a protest in last year's *Year in Review*,[276] the GAO sustained a protest concerning an agency's attempt to fix an error by canceling a RFP, holding that an agency can take such an action only if there is a prior showing of prejudice against either the government or the integrity of the performance system.[277] In *Rand & Jones Enterprises Company,* the Department of Veterans Affairs (VA) issued a RFP for the expansion of a medical center in Northport, New York.[278] The VA indicated it would award based on the best value; however, the RFP did not identify technical or non-price related evaluation factors.[279] After amending the RFP, the VA received four revised proposals, publicly opened them, and disclosed all four prices in violation of the rule that only the awardee's price may be released, and only after award. [280]

---

[268] Defense Federal Acquisition Regulation Supplement; Contracting by Negotiation, 70 Fed. Reg. 14,624 (Mar. 23, 2005) (to be codified at 48 C.F.R. pt. 215).

[269] *Id.* at 14,625.

[270] *Id.*

[271] Memorandum, Chief of Staff, Air Force and Acting Secretary of the Air Force, to ALMAJCOM-FOA/CC, subject: Communication Throughout the Source Selection Process (6 June 2005).

[272] *Id.*

[273] Memorandum, Assistant Secretary of the Air Force (Acquisition), to SEE DISTRIBUTION, subject: Assessment of Cost/Price Risk Ratings in Source Selections (3 Jan. 2005).

[274] *Id.*

[275] Mandatory Procedure; Source Selection, MP 5315.3 (Feb. 9, 2005).

[276] *See 2004 Year in Review*, *supra* note 40, at 26-27.

[277] Rand & Jones Enter. Co., Comp. Gen. B-296483, Aug. 4, 2005, 2005 CPD ¶ 142, at 4.

[278] *Id.* at 1.

[279] *Id.* at 2.

[280] *See* FAR, *supra* note 33, at 3.104-3(a) and 3.104-4.

Following an unresolved Section 8(a) protest,[281] the contracting officer decided to cancel the RFP due to the failure to identify technical evaluation factors and informed the four offerors that the agency would issue an IFB instead.[282] Rand & Jones, which had the lowest bid and would have received the contract if the RFP had been conducted as a lowest price, technically-acceptable procurement, protested the decision to cancel the RFP. The GAO agreed with Rand & Jones, holding that the VA failed to argue either a reasonable basis to cancel the RFP or a reasonable possibility that a decision not to cancel would be prejudicial to the government or the integrity of the procurement system.[283] Without such a reason, the potential winning offeror would be the prejudiced one, and the decision to cancel the RFP could not stand.[284]

In a GSA case, the GAO also sustained a protest against a decision to cancel a solicitation for offers (SFO) in *Greenleef Construction, Inc.*[285] The GSA issued a small-business set-aside SFO requesting bids[286] for construction and asbestos work.[287] The GSA requested that interested firms submit discounts from listed line item estimates and explained that the GSA would compute the lowest total evaluated bid price through a formula.[288] Although Greenleef bid the largest discounts, the GSA awarded the contract to another company and Greenleef subsequently filed a protest.[289] Prior to the due date for the agency report, GSA indicated that it would take corrective action and resolicit offers based on alleged confusion in the SFO concerning whether the award would be made on "percentages" or "price." The GAO agreed with Greenleef, holding that the GSA failed to show a "reasonable basis" for the cancellation and was unable to show why the different methodologies mattered.[290] Under the GAO's analysis of either methodology, Greenleef was the lowest-price offeror and should have received the contract award.[291]

In an example of an appropriate decision to cancel a RFP, one can look at *VSE Corporation.*[292] This case dealt with a RFP from the Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security (DHS) for the storage, maintenance, and disposition services to handle personal property seized by various federal agencies.[293] In a troubled procurement,[294] the CBP cancelled the RFP, approximately five years after it was first issued, over concerns about improper bundling and the expansion of the contract due to the CBP's increased workload as a result of the DHS reorganization.

The GAO found that the agency had a reasonable basis to cancel the RFP, to include the reduced scope of work and the removal of a requirement for the contractor to provide a storage facility.[295] The GAO also found that it was reasonable to assume that other contractors may be interested in the RFP given the passage of time since the original solicitation.

---

[281] Arrow, which submitted the second lowest price, protested the fact that Rand & Jones graduated from the Section 8(a) program and would not be eligible for a Section 8(a) award. Unfortunately, the procurement was not set aside for small business concerns. *Rand & Jones,* 2005 CPD ¶ 142, at 2-3.

[282] *Id.* at 3.

[283] *Id.* at 3-4. The decision to cancel a RFP has a lower threshold than canceling an IFB, which requires the agency to demonstrate a "compelling reason." *See* FAR, *supra* note 33, at 4.404-1(a)(1).

[284] *Rand & Jones,* 2005 CPD ¶ 142, at 4.

[285] Comp. Gen. B-294338, Oct. 26, 2004, 2004 CPD ¶ 216. The GSA defines SFO as, "(an) invitation for bids in sealed bidding or request for proposals in negotiations." U.S. GEN. SVS. ADMIN., GEN. SVS. ADMIN. ACQUISITION MANUAL subpart 570.102 (July 2004).

[286] The GAO noted that the GSA used the terms "bidder" and "offeror" interchangeably in the SFO and uses SFOs for both sealed bid and negotiated procurements. *Greenleef Constr. Inc.*, 2004 CPD ¶ 216, at 2 n. 1. The GAO ultimately used the negotiated acquisition standard for its conclusion. *Id.* at 5.

[287] *Id.* at 2.

[288] *Id.* at 2-3. The formula was proportion of the work multiplied by the distribution of the work and by the sum of the percentages bid for each of the three years. *Id.* at 3.

[289] *Id.* at 4.

[290] *Id.* at 5.

[291] The GSA submitted flawed analyses to demonstrate that the awardee would have the lowest-price under one of the two methodologies. The GAO reviewed the data, found errors, and determined that the GSA would pay over $225 million more for the awardee. *Id.* at 5.

[292] Comp. Gen. B-290452.2; Apr. 11, 2005, 2005 CPD ¶ 111.

[293] *Id.* at 1. The RFP contemplated the award of a cost-plus-award-fee contract for a 4-month transition period, a base period and nine 1-year options. *Id.* at 2.

[294] A protest after the initial award resulted in a corrective action revising the statement of work and reopening the competition. The CBP also issued several amendments, one of which incorporated the use of a government-owned, contractor-operated facility. *Id.* at 3-4.

[295] *Id.* at 6.

Therefore, it was not reasonable merely to amend the RFP given the substantial difference from the needs of the CBP at this time compared with the original requirements.[296]

Cooperativa II—The Revised Sequel

The GAO provided guidance on an agency's attempt to limit the scope of revised proposals in *Cooperativa Muratori Riuniti.*[297] After a successful GAO protest by CMR,[298] the Department of the Navy implemented corrective action by amending the RFP for the construction of two facilities in Aviano AFB, Italy, and requesting revised proposals for reevaluation of the factors that the GAO found were evaluated improperly.[299] The GAO did not address one technical evaluation factor, "schedule," and the Navy notified the offerors that changes to that factor would not be accepted.[300] Since the time periods for exercise of options were being changed, price proposal revisions were being allowed, even though this factor was not in dispute.[301]

Cooperativa Muratori Riuniti first argued that the Navy should have implemented the corrective action strictly in accordance with the GAO's recommendation.[302] The GAO disagreed, stating that the parameters of a corrective action are within agency's discretion.[303] The GAO's sole criterion for corrective actions is that it must remedy the identified procurement impropriety.[304]

Cooperativa Muratori Riuniti then challenged the limitation of revised proposals.[305] The GAO first stated the general rule that an agency may limit revisions to revised proposals.[306] In this case, however, the GAO sustained the protest because the Navy failed to argue that the competitive process would be impaired by allowing offerors to completely revise their proposals.[307] The GAO found that in order to limit revised proposals following an amended RFP, the agency must argue that the amendment could not reasonably have any effect on other aspects of the proposal, or that revisions would have a detrimental impact on the competitive process.[308] The GAO agreed with Cooperativa Muratori Riuniti that changing the exercise of options may affect schedules, or at the very least, schedule-related matters, such as subcontractor availability.[309] In addition, since the Navy allowed price revisions, offerors should be allowed to revise technical aspects that may affect price.[310]

---

[296] *Id.* at 7.

[297] Comp. Gen. B-294980.5, 2005 U.S. Comp. Gen. LEXIS 132 (July 27, 2005).

[298] Cooperativa Muratori Riuniti, B-294980, B-294980.5, Jan 21, 2005, 2005 CPD ¶ 21.

[299] The RFP was a "best value" procurement which four equally weighted factors: price; and three technical evaluation factors, organizational experience, organizational past performance, and schedule. Cooperativa Muratori Riuniti's original protest dealt with the first two technical factors. *Id.* 2005 U.S. Comp. Gen. LEXIS 132, at *3.

[300] *Id.* at *5.

[301] *Id.*

[302] *Id.* at *8.

[303] *Id.* at *10.

[304] *Id.*

[305] *Id.* at *14.

[306] *Id.*

[307] *Id.* at *15-16.

[308] *Id.* at *15.

[309] *Id.*

[310] *Id.* at *17. Cooperativa Muratori Riuniti also challenged that the Navy conducted discussions solely with another offeror. The GAO found an absence of prejudice since CMR obtained a debriefing and then submitted a protest. The GAO also noted that the offeror did not change its proposal following the discussion. *Id.* at *18. The GAO also dismissed an alleged problem in the solicitation since it was not raised in the original protest. *Id.* at *19.

Memorandum of Understanding (MOU) Options

In *Northrop Grumman Information Technology,*[311] the GAO found that an agency must amend a solicitation if a change in circumstances materially affects the potential for an option exercise.[312] The Department of the Treasury issued a RFP to replace its telecommunications network. The RFP contemplated a best-value award of a predominantly fixed-price contract with a base period of three years with seven option years.[313]

The Department of Treasury decided to award the contract, without discussions, to AT&T. The day before award, the Department of Treasury signed a MOU[314] with various government agencies agreeing to conduct, at the end of the base period of the Department of Treasury contract, a "best value" analysis with the GSA to decide whether the Department of Treasury would transition to GSA's new network.[315] Northrop Grumman and others protested the failure to amend the solicitation after the decision was made to sign the MOU.[316]

The GAO sustained the protest, stating the general rule that when an agency's requirements change, the agency must issue an amendment to notify offerors of the changed requirements and afford them an opportunity to respond.[317] The GAO felt that the terms of the MOU made it less likely that the Department of Treasury would exercise the options under the contract.[318] First, the MOU took the decision out of the hands of the Department of Treasury's contracting officer. Second, in an apparent concession to the GSA, the MOU's best value analysis did not take into account transition costs, which the Treasury felt was the most important factor in its RFP.[319] The GAO felt that offerors should know of this development, in order to adjust their proposed prices accordingly.[320]

Discussions

Discussions Equals More Creative Information

The GAO clarified its definition of meaningful discussions in *Creative Information Technology, Inc.*[321] The Army issued a RFP for information management and technology support services to the Information Management Support Center.[322] The solicitation sought performance-based solutions to the requirements laid out in the Performance Work Statement.[323] The RFP divided the requirement into six lots; Lot V, the lot under protest, dealt with "strategic analysis" and was set aside for Section 8(a) small businesses.[324]

---

[311] Comp. Gen. B-295526, Mar. 16, 2005, 2005 CPD ¶ 45.

[312] *Id.* at 20.

[313] The RFP contained the following evaluation factors: price, transition, technical approach, operations and management, past performance, and small business participation. The non-price factors were approximately equal to price. Transition was the most important factor; technical approach was equal to operations in management; past performance and small business participation were equal in weight and less important. *Id.* at 3-4.

[314] Parties to the MOU include the Chief Information Officer for the Treasury, the Commissioner of the General Services Administration's Federal Technology Service, the Administrator of the Office of Management and Budget's (OMB) Office of Federal Procurement Policy, and the Administrator of OMB's Office of Electronic Government. *Id.* at 5. The MOU stated that the decision to exercise the option would be a joint decision between the GSA and the Treasury. In the event of a dispute, the OMB would make the final decision. In addition, the "best value" focus would be according the government's interest and not just the Treasury's. *Id.* at 10.

[315] The GSA's network would be called the FTS-Networx telecommunications services contract. *Id.* at 5.

[316] *Id.*

[317] *Id.* at 13.

[318] *Id.*

[319] *Id.* at 11-12.

[320] *Id.* at 20. The GAO also sustained the protest on the grounds that the Treasury failed to conduct a reasonable price evaluation on AT&T's proposal. *Id.* at 14-19.

[321] Comp. Gen. B-293073.10, Mar. 16, 2005, 2005 CPD ¶ 110.

[322] *Id.*

[323] *Id.* at 2.

[324] The RFP contemplated multiple awards of ID/IQ contracts for a base period of one year, plus four one-year options. *Id.* "Strategic analysis" was divided into "plans and policy," "technology assessment," "hardware/software testing," "research, analysis and recommendations," "information resource management," and "technical writing." *Id.*

The Army asked offerors to estimate hours for full-time-equivalent (FTE) employees assuming all tasks were awarded to the offeror.[325] Creative Information Technology's total price in its initial proposal was around $110 million, or about eight times the Army's unreleased independent government cost estimate (IGCE).[326] The Army included Creative Information Technology in its competitive range and informed the company during discussions that its price was overstated. Creative Information. Technology's revised price was around $89 million.[327] Creative Information Technology submitted a protest after the Army failed to select it for award.[328] After a corrective action,[329] Creative Information Technology resubmitted a protest to the GAO.

The general rule is that discussions must be meaningful, which means that agencies must inform offerors of "weaknesses, excesses or deficiencies in its proposal, the correction of which would be necessary for the offeror to have a reasonable chance (of award)."[330] The GAO also noted that an agency does not have to tell offerors of a high price, unless the belief is that the price is unreasonable.[331] The GAO felt that it was unreasonable to expect that Creative Information Technology could have understood the magnitude of the price disparity based on the Army's discussions.[332] The key to the GAO was that the fundamental problem was not pricing, but an underlying cause: a failure to understand the staffing levels required by the Army.[333] The GAO recommended that the Army reopen discussions and conduct a new source selection decision.[334]

A Red FLAG

In *Front Line Apparel Group* (FLAG),[335] the GAO sustained a protest by clarifying the limits of a second round of discussions through the "disparate treatment" test.[336] The Defense Logistics Agency issued a RFP for Army combat uniforms that contemplated multiple ID/IQ contracts.[337] The Army established a competitive range, conducted discussions, reduced the competitive range, and requested final proposal revisions (FPRs).[338] Prior to the last request, the Army issued two discussion letters reopening discussions.[339]

Although the GAO stated the general rule that it is permissible for agencies to conduct additional discussions relating to previously-discussed issues with a limited number of offerors where the agency had remaining concerns, the GAO sustained the protest because of disparate treatment.[340] In this case, the GAO seemed to focus on the fact that the Army had finished evaluations and reduced the competitive range prior to the request for FPRs (i.e. there were no "remaining concerns").[341] Following the additional discussions, the agency upgraded the overall rating of one offeror who did not submit

---

[325] *Id.* at 3. Other assumptions included 2,080 hours per staff year for each employee; twelve hours a day, five days a week; 7,000 customers for the base period; and five percent increase in customers for each of the option year. *Id.*

[326] *Id.* at 4. Creative Information. Technology's estimate was based on thirty-seven FTEs per year across eleven labor categories; the Army's IGCE estimated around $13 million with seven FTEs.

[327] *Id.* at 5.

[328] The source selection official concluded that CITI's total price was "unreasonably high." *Id.*

[329] The Army inadvertently used CITI's price from its initial proposal for the award decision. After reviewing CITI's revised proposal price, the Army again chose not to select CITI for award. *Id.* at 6.

[330] *Id.* at 6-7.

[331] *Id.* at 7.

[332] *Id.*

[333] *Id.* at 8.

[334] *Id.* at 9.

[335] Comp. Gen. B-295989, June 1, 2005, 2005 CPD ¶ 116.

[336] *Id.* at 4.

[337] The protest involved Contract Line Item Numbers (CLINs) 0011 and 0012 (trousers), which were set aside for small businesses. *Id.* at 1.

[338] *Id.* at 2.

[339] *Id.*

[340] *Id.* at 4.

[341] *Id.*

a timely reply and clarified its source selection decision by distinguishing another offeror's proposal from FLAG's.[342] Because FLAG, unlike the other offerors, did not receive a second "bite at the apple," the GAO sustained its protest.[343]

The Riddle of the Spherix

In *Spherix, Inc.,*[344] the GAO stressed that for discussions to be meaningful, an agency must discuss any aspect of an offeror's proposal that will be classified as a "significant weakness."[345] *Spherix* involved a competition between incumbents for a consolidated reservations system for all federal parks, recreation facilities, and activities.[346] The Forest Service ultimately awarded the contract to ReserveAmerica, citing ReserveAmerica's superior non-price advantages over Spherix's substantially lower price.[347]

The GAO sustained Spherix's protest, finding that the Forest Service failed to conduct meaningful discussions with Spherix concerning areas that were judged to be significant weaknesses in the source selection document.[348] The GAO found that the agency failed to adequately justify its evaluation in the source selection documents.[349] The GAO noted that the Forest Service gave credit to the awardee for providing greater detail in its proposed staffing that went beyond the requirements of the RFP.[350] The GAO also took umbrage with the Forest Service's attempts to "dollarize" proposed strengths in two areas, noting that while not required, if an agency attempted to quantify strengths, it must compare offerors equally.[351]

And the HITS Keep Coming!

The GAO provided more guidance on discussions in the context of a corrective action in *Lockheed Martin Simulation, Training & Support*.[352] In a troubled acquisition by the HUD,[353] the GAO examined an amended RFP for the HUD Information Technology Solution (HITS) for all the agency's information technology requirements.[354] Lockheed Martin protested the award to Electronic Data Systems (EDS) arguing that the HUD failed to adequately discuss Lockheed Martin's weaknesses,[355] challenging the agency's communications with EDS, and alleging that EDS improperly revised its proposal following those communications.[356]

---

[342] *Id.*

[343] *Id.*

[344] Comp. Gen. B-294572; B-294572.2, Dec. 1, 2004, 2005 CPD ¶ 3.

[345] *Id.* at 14-15.

[346] Spherix was the incumbent for the National Park Reservation Service while ReserveAmerica was the incumbent for the National Recreation Reservation Service. *Id.* at 2.

[347] *Id.* at 8.

[348] Significant weakness areas included the marketing approach, which was not discussed with the protestor; the quality control plan, not discussed because the "plan was simply weak;" and transition period staffing which were judged to be lacking in detail and therefore not discussed. *Id.* at 14.

[349] *Id.* at 13.

[350] *Id.* at 9. Both offerors addressed staffing in their proposals; but ReserveAmerica received credit for identifying the number of dedicated staff. The agency did not address this area with Spherix during discussions. *Id.* at 10.

[351] *Id.* The Forest Service used estimated costs of Staffing for ReserveAmerica and projected Spherix's staffing using historical data from its incumbency in the smaller system. The GAO felt that it was improper to use that data for the larger consolidated requirement. *Id.* at 10. The Forest Service also quantified ReserveAmerica's marketing plan strength. The GAO noted that the source selection document failed to take into account Spherix's plan in its proposal, relying on an incorrect briefing slide, which skewed the attempt to compare the two. *Id.* at 12.

[352] Comp. Gen. B-292836.80, Nov. 24, 2004, 2005 CPD ¶ 27.

[353] *See 2004 Year in Review*, *supra* note 40, at 35. The GAO also conducted ADR involving two pre-closing protests which resulted in the HUD amending the RFP. *Lockheed Martin Simulation, Training & Support,* 2005 CPD ¶ 27, at 2.

[354] HITS is a follow-on contract for the HUD Integrated Information Processing Service (HIIPS). *Lockheed Martin* was the incumbent for the HIIPS. While the first protest was pending, the agency proceeding with the award to Electronic Data System. Following litigation in the COFC, the HUD split the requirements between the two. *Lockheed Martin Simulation, Training & Support,* 2005 CPD ¶ 27, at 2.

[355] *Id.* at 11.

[356] *Id.* at 8.

The HUD allowed limited revisions to final proposals and did not conduct discussions with either offeror.[357] The GAO focused on six weaknesses of Lockheed Martin's original proposal that the source selection document stated were important in the best value analysis of the award decision.[358] Unfortunately for the agency, those weaknesses were not identified in the technical evaluation report, and were not the subject of previous discussions.[359] Given those facts, the GAO sustained the protest holding the agency must discuss any weaknesses that were determining factors for the best value award absent a "clear showing by the agency that (the weaknesses) were not significant."[360]

The GAO sustained another aspect of the proposal in a heavily redacted section[361] holding that EDS improperly revised its proposal following HUD's communications regarding its proposal.[362] Interestingly, the GAO sustained the protest despite a finding that the HUD failed to understand that EDS had changed its proposal.[363] It seems that the best approach would be to err on the side of caution and conduct discussions in lengthy procurements, particularly when there are several amendments to the RFP.[364]

Corrective Actions

Incorrective Action

In *Gulf Copper Ship Repair, Inc.*,[365] the GAO nullified a corrective action that resolved one issue with an awardee while ignoring another known problem with the protestor.[366] The Navy issued a RFP for two cost-plus-incentive-fee contracts over a five-year period for material, services, and facilities to perform maintenance and repairs on fourteen mine countermeasures and coastal minehunter class ships.[367] After the Navy awarded the contract to Anteon and another company, Gulf Copper submitted a protest, disputing the Navy's evaluation process based on Gulf Copper's erroneous assumption that it must use current forward pricing rate agreement rates in preparing its cost proposal; and challenging Anteon's past performance rating, based on the history of Anteon's corporate predecessor.[368]

The Navy informed the GAO that it would take corrective action.[369] The Navy conducted a thorough review of the Anteon's prior history, to include requesting and receiving six pages of data regarding the old contract.[370] Upon review, the Navy upheld the previous past performance rating and awarded the contract again to the two original awardees.[371]

The GAO sustained Gulf Copper's protest calling the Navy's action an improper discussion.[372] The GAO found that when the Navy decided to conduct discussions with Anteon about its past performance during the corrective action, it should

---

[357] *Id.* at 4.

[358] *Id.* at 10-11.

[359] *Id.* at 10.

[360] *Id.* at 11.

[361] [Deleted]. *Id.* at 9.

[362] *Id.* at 8.

[363] *Id*.

[364] The GAO also criticized the agency's attempt to argue that a two-year old communication from the initial RFP which placed the responsibility on the offeror to make its proposal "responsive, clear and accurate" *Id.* at 11.

[365] Comp. Gen. B-293706.5, Sept. 10, 2004, 2005 CPD ¶ 108.

[366] *Id.* at 8-9.

[367] *Id.* at 1.

[368] *Id.* at 4. Gulf Copper also made an OCI complaint which also was investigated in the Navy's corrective action. *Id.* at 5.

[369] *Id.*

[370] *Id.*

[371] *Id.* at 6.

[372] *Id.* at 7.

have discussed Gulf Copper's apparent misunderstanding of the RFP requirements.[373] The GAO went further to state that the Navy's corrective action would have been considered improper even if classified as a "clarification."[374]

Correct-ive Action

In *Consolidated Engineering Services, Inc.,*[375] the GAO upheld a corrective action that limited changes offerors could make to their proposals. The National Archives and Records Administration (NARA) issued a RFP to provide all program management, engineering, and services required to operate and maintain the archives in Washington, D.C., and College Park, Maryland.[376] After the award of the contract, Consolidated Engineers submitted a protest.[377] Following a GAO alternative dispute resolution session, the agency undertook corrective action regarding the issue highlighted in the session—reevaluating its past performance evaluations.[378] Subsequent to this action, Consolidated Engineers requested the agency reopen discussions concerning various issues raised in NARA's debriefing with the contractor.[379] In response, the contracting officer reopened limited discussions on only two areas, key personnel and key subcontractor information, and accepted changes only on those limited issues. The contracting officer did not allow price revisions of proposals[380]

The GAO disagreed with Consolidated Engineer's argument that NARA's corrective action went beyond the GAO's recommendation, and therefore, NARA should allow all offerors to submit unlimited revised proposals.[381] The general rule is that the contours of a corrective action are within the discretion of the contracting officer.[382] Reviewing the corrective action, the GAO agreed that the agency's decision to request additional information in disputed areas was reasonable, even though those areas were not in the scope of the issues highlighted in the ADR session.[383] The GAO noted, with approval, NARA's concern with allowing new price proposals after the awardee's price was revealed following the original award of the contract.[384]

Price Proposal Is Not Quite Right

In another corrective action case, *Resource Consultants, Inc.*,[385] the GAO sustained a protest against an offeror whose revised price proposal effectively altered its technical proposal in violation of the agency's guidelines for the corrective action.[386] The Army, in LOT 1 of the same RFP as the *Creative Information Technology* case,[387] contemplated a single-award ID/IQ contract for desktop support services for a base period of two years, plus five one-year options.[388] Offerors were required to submit five discrete components of price for the expected work.[389] The Army initially awarded the

---

[373] *Id.* at 8-9.

[374] *Id.* at 9. "Clarifications" are limited exchanges, between the Government and offerors that may occur when award without discussions is contemplated. *See* FAR, *supra* note 33, at 15.306 (a).

[375] Comp. Gen. B-293864.2; Oct. 25, 2004, 2004 CPD ¶ 214.

[376] *Id.* at 2. The RFP contemplated the award of a fixed-price contract, with four option years. *Id.*

[377] *Id.* at 3.

[378] *Id.* at 2.

[379] *Id.* Consolidated Engineering Services requested allowing the submission of revised proposals to address facility changes, upcoming collective bargaining agreements, a revised Department of Labor wage determination and matters raised in its debriefing. *Id.*

[380] *Id.* at 3. The contracting officer made this decision based on the length of time which had passed since the submission of the proposals. *Id.*

[381] *Id.*

[382] *Id.*

[383] *Id.* at 4.

[384] *Id.*

[385] Comp. Gen. B-293073.3, et. al, June 2, 2004, 2005 CPD ¶ 131.

[386] *Id.* at 11.

[387] *See supra* notes 321-334 and accompanying text.

[388] *Resource Consultants*, 2005 CPD ¶ 131, at 2.

[389] *Id.*

contract to Resource Consultants; however, after an agency-level and GAO protest, the Army took corrective action by lowering the expected users for the contract,[390] and requesting only revised price proposals.[391]

Following corrective action, the Army awarded the contract to Titan, which although rated the same as Resource Consultants, submitted a lower price in its revised proposal.[392] In its review of Resource Consultants's protest, the GAO focused on Titan's shift from using a greater proportion of higher-priced labor categories to proposing more lower-priced categories.[393] Titan also changed its off-site prices by reducing the expected staffing for off-site work.[394] Ultimately, although no offerors were allowed to submit revised technical proposals, the price proposals materially altered Titan's approach.[395] Therefore, the GAO sustained the protest since offerors were not allowed to compete on a common basis.[396]

Evaluations

The Value of More Betterments

The GAO sustained a protest due to the Source Selection Authority's (SSA's) failure to evaluate proposals in accordance with the RFP evaluation factors in *ProTech Corporation.*[397] The U.S. Army Corps of Engineers (COE) issued a RFP for the award of a fixed-price contract for construction services of sixty-two new military family housing units.[398] The RFP stated that award would be made on a "best value" basis with the following evaluation factors: project management plan, experience, past performance, betterments, and price. Project management was the most important factor and was given twice the weight as the other factors. The other technical factors were equal in importance to each other and price was equal to the other technical factors combined.[399] Betterments was a non-mandatory CLIN that became part of the contract once offered: the RFP stated that, "[m]ore betterments will be considered more favorably than fewer betterments."[400] The COE awarded the contract to Atherton who proposed a higher price but did not offer any betterments. ProTech, a small business, offered a lower price and six betterments.[401] ProTech protested the award on various grounds, to include the SSA's evaluation.

The GAO sustained the protest based on the SSA's failure to follow the dictates of the RFP.[402] Although ProTech received a higher rating in betterments, the SSA discounted the rating, declaring that betterments was, "the fourth, and least most important factor."[403] The SSA also incorrectly stated in the source selection decision that the evaluation factors were listed in descending order of importance.[404] The GAO felt that the SSA's failure to apply the correct weights to the evaluation factors required a new source selection decision.[405]

---

[390] The estimate went down from 10,000 to 7,000 users. *Id.* at 6.

[391] *Id.* at 3.

[392] *Id.* at 5.

[393] *Id.* at 9.

[394] *Id.* at 10.

[395] *Id.*

[396] *Id.* at 7. RCI also alleged a procurement integrity violation that the GAO declined to evaluate without evidence. *Id.* at 11.

[397] Comp. Gen. B-294818, 2004 U.S. Comp. Gen. LEXIS 293 (Dec. 30, 2004).

[398] *Id.* at *1-2.

[399] *Id.* at *4. The RFP also contained a ten-percent price evaluation preference in favor of Historically Underutilized Business (HUB) Zone small businesses. *Id.*

[400] *Id.* It does not appear that "betterment" was a defined term in the RFP. It appears that the term meant additions to the proposal outside the scope of the RFP which improved the quality of the proposal and which would result in a higher evaluation. *Id.*

[401] *Id.* at *5.

[402] The GAO denied the protest on other grounds finding the agency's evaluation of ProTech's offer was reasonable and consistent with the RFP. *Id.* at *16.

[403] *Id.* at *8.

[404] *Id.* The SSA's also valued Atherton's offer of no betterments to equal sixty-three percent of ProTech's six betterments. *Id.*

[405] *Id.* at *18.

The Non-Binding Price Is Not Right!

In *CW Government Travel, Inc.,*[406] the GAO rejected the Army's non-binding price evaluation scheme stating that the statutory requirement to evaluate price in every RFP requires some attempt to reasonably evaluate cost to the government.[407] The Army issued a RFP[408] for commercial travel officer services for the Defense Travel System program.[409] In an innovative approach, the RFP required offerors to respond to two sample tasks. Offerors would only complete pricing for the sample tasks; the government would use the pricing for evaluative purposes, but any proposed pricing would not be binding.[410]

CW Government Travel challenged this framework, stating that the failure to require binding fees would preclude a meaningful evaluation of cost.[411] The Army argued that it would still conduct a price realism analysis for all proposals.[412] The Army also argued that since price was the least important factor, competition would not be hindered.[413] The GAO disagreed, finding that agencies' evaluation schemes must provide some reasonable basis for evaluating or comparing the relative costs of offerors' proposals.[414]

Apples to Apples

In *Liquidity Services, Inc.*,[415] the GAO disapproved of the GSA's attempt to compare two close offerors by using a price evaluation scheme that effectively eliminated an unsuccessful offeror's price advantage.[416] The GSA issued a RFP for the sale of federal surplus property contemplating the award of a fixed price ID/IQ contract.[417] The GSA indicated that it would use an "integrated assessment" of price proposals using "standard financial and business analytical techniques and methodologies."[418] In a close competition, the GSA awarded the contract to Maximus, Inc., and Liquidity submitted a protest challenging the price evaluation technique.[419]

The GAO sustained the protest, focusing on the GSA's complicated analysis comparing the two different approaches in two areas: transportation and warehousing costs (both areas in which Liquidity had a decisive price advantage).[420] In the transportation area, the GSA excluded Liquidity's fixed price for hauls greater than two hundred miles under the assumption that the majority of the work would be short trips.[421] In the warehousing area, the GSA reduced

---

[406] Comp. Gen. B-295530.2; B-295530.3; B-295530.4, July 25, 2005, 2005 CPD ¶ 139.

[407] *Id.* at 6.

[408] The Army would issue multiple awards of ID/IQ contracts. The base ordering period would be for two years, with three one-year options. The RFP contemplates a "best value" procurement based on the following factors, in decreasing order of importance: performance risk, technical, small business participation, and price. Non-price factors would be "significantly more important than price." *Id.* at 2.

[409] *See infra* section titled Contract Types p. 17 for a discussion of the reconsideration request of an earlier protest dealing with the guaranteed minimum amount for the ID/IQ contract.

[410] *CW,* 2005 CPD ¶139, at 2-3.

[411] *Id.* at 4.

[412] *Id.* at 5.

[413] *Id.* at 6.

[414] *Id.* CW also challenged the proposed sample tasks arguing that the tasks were not broad enough to permit evaluation of all factors. The GAO found that the scheme reasonably related to the agency's needs. *Id.* at 6-7. In addition, the GAO dismissed an arguments that the RFP was vague stating that the requirement is only to provide sufficient information for offerors to compete intelligently and on equal terms. *Id.* at 7-8. The GAO also approved the agency's cautionary clarification that offerors must factor in risk of currency valuation into their price proposals. *Id.* at 8.

[415] Comp. Gen. B-294053, Aug. 18, 2004, 2005 CPD ¶ 130.

[416] *Id.* at 8.

[417] *Id.* at 1-2. The award would be made on a "best value" basis with the following factors: Technical Approach (forty-five percent), Related Experience (twenty percent), Past Performance (ten percent), and Price (twenty-five). *Id.*

[418] The GSA would evaluate spreadsheets which projected gross proceeds, net proceeds, and direct costs based on offeror's expectation on performance. *Id.* at 3 n.3.

[419] The GAO noted that Liquidity raised a number of other issues but that the RFP was unclear in those areas and the GSA should address those issues in its corrective action. *Id.* at 9.

[420] *Id.* at 6-7.

[421] *Id.* at 7.

Maximus's warehouse discount rate since it offered additional services not offered by Liquidity.[422] After making both adjustments, Maximus offered more favorable pricing.[423]

The GAO highlighted that the agency did not make similar types of adjustment in the other parts of its price analysis.[424] The GAO also found fault in the transportation assumption since the RFP did not have any guidance that would support the agency's exclusion of long-haul trips.[425] Since Liquidity would have had a clear advantage without the adjustment, and the GSA failed to articulate a reasonable rationale for the changes, the GAO felt that the evaluation was unreasonable.[426]

Sending Out a SOS

In *SOS Interpreting, LTD.*,[427] the GAO sustained a protest against a source selection decision that failed to adequately support the agency's rationale in accordance with the terms of the RFP.[428] The Drug Enforcement Administration (DEA) issued a RFP for various translation, transcription, interception, and monitoring support services.[429] The solicitation stated that the DEA would award the contract on a "best value" basis with the combined weight of the technical evaluation factors more important than price.[430] The SSA awarded the contract to McNeil Technologies, Inc., although the Technical Evaluation Panel (TEP) gave SOS Interpreting the highest rating of all the offerors in the competitive range.[431]

Although the GAO acknowledged the general rule that a source selection official can reasonably disagree with evaluators' recommendations, the GAO felt that, in this case, the SSA failed to adequately state her rationale in the decision document.[432] The GAO found that the SSA converted the "best value" RFP to a Lowest Price Technically Acceptable procurement through her declaration that all proposals were technically equal and that she would award the contract to the lowest-price offeror.[433] The primary fault of the SSA's decision was her failure to document two clear advantages to SOS Interpreting's proposal.[434]

The GAO also addressed other aspects of SOS's protest. First, SOS Interpreting attacked the DEA's evaluation of risk as an unstated evaluation factor.[435] In response, the GAO noted the general rule that the consideration of risk is inherent in technical evaluations.[436] Second, McNeil Technologies failed to follow the proposal instructions regarding accounting for Service Contract Act increases in its proposed price.[437] The GAO felt that the DEA should address this issue with McNeil Technologies in order to treat all offerors the same.[438]

---

[422] *Id.*

[423] *Id.*

[424] *Id.* at 8.

[425] *Id.*

[426] *Id.* at 9.

[427] Comp. Gen. B-293026, et. al, Jan. 20, 2004, 2005 CPD ¶ 26.

[428] *Id.* at 9.

[429] *Id.* at 2.

[430] *Id.* The RFP anticipated award of a fixed-price, ID/IQ contract for a base year with four one-year options for translation, transcription, interpreting, interception, and monitoring support services. The technical factors, listed in descending order of importance, were: management plan, quality control plan, and transition plan. *Id.*

[431] *Id.* at 6.

[432] *Id.* at 7.

[433] *Id.* at 9.

[434] SOS received higher ratings under two evaluation factors: quality control plan and transition plan. The GAO discounted the SSA's opinion that TEP rated SOS improperly as conclusory. *Id.* at 8-9.

[435] *Id.* at 10.

[436] *Id.* The GAO did recommend reevaluation of the risk factors since it appeared that the SSA used a LPTA approach to the award. *Id.*

[437] *Id.* at 11.

[438] *Id.* at 12. The GAO also upheld a past performance evaluation and noted with concern the source selection document's reference to SOS's agency-level protest. *Id.* at 10-11.

A Soapy Evaluation Results in a Leaky Award

In *Cooley/Engineered Membranes; GTA Containers, Inc.*,[439] the GAO sustained a protest based on an offeror's failure to propose an alternative test that met the RFP requirements.[440] The Air Force issued a RFP for two sizes of collapsible fuel containment bladders for storing aircraft fuels.[441] The RFP included a table listing approved tests for determining the bonding the seams and fittings of the bladder for proscribed strengths.[442]

The Air Force awarded the contract to MPC Containment System even though MPC used an "alternative pressurized soap bubble" test to its specialized fitting method.[443] After expert testimony, the GAO found that the alternative test would not meet the requirements of the RFP to measure the strength of the tanks.[444] Since the offeror's proposal did not meet the RFP requirements, the Air Force could not reasonably find that MPC's proposal was technically acceptable.[445]

Price Is Not Just a Color

The GAO underscored the importance of the statutory requirement to consider price in a RFP, particularly in an ID/IQ contract, in *The MIL Corporation.*[446] The Department of Commerce issued a RFP for the award of government-wide acquisition contracts to provide information technology services.[447] The agency selected twenty-four Tier II proposals, all of which received a "blue" rating.[448] The MIL Corporation received a "red" under past performance, a "blue" for price, and "green" overall; and subsequently filed a protest.[449] The protest challenged the agency's overall evaluation of price arguing that the agency relied upon a "mechanical application of a color-coded scheme."[450]

The GAO agreed, finding that the agency failed to sufficiently document the price/technical tradeoff required by the FAR.[451] Essentially, the agency only focused on those proposals that received the highest rating, "blue," for technical factors.[452] The agency failed to document why it chose proposals that received "yellow" price ratings[453] over the MIL Corporation's offer, which received a "blue" price rating.[454] The GAO specifically referenced the source selection document that indicated that price played a lesser role due to the pricing that would occur at the task order level.[455] In response, the

---

[439] Comp. Gen. B-294896.2, et. al, Jan. 21, 2005, 2005 CPD ¶ 22.

[440] *Id.* at 5.

[441] The RFP was a total small-business set-aside and contemplated a fixed price ID/IQ contract for one year with four option periods. The two sizes were 50,000 gallon and 210,000 gallon bladders. *Id.* at 2.

[442] *Id.* at 4.

[443] *Id.*

[444] *Id.* at 5. The tests in the RFP included "clamping samples in mechanical jaws and subjecting them to stress as measured in pounds/inch" in order to measure specified strength requirements. *Id.* at 4.

[445] *Id.* at 5.

[446] Comp. Gen. B-294836, Dec. 30, 2004, 2005 CPD ¶ 29.

[447] *Id.* at 1. The contracts were named the Commerce Information Technology Solutions Next Generation program. The RFP was issued as a total set-aside for small businesses and called for the award of multiple ID/IQ contracts. Small businesses were grouped into three tiers and those tiers competed among themselves. The protest involved Tier II. *Id.* at 2.

[448] The agency evaluated the proposals in the following manner: blue, green, yellow, or red. Price was rated depending on its differential will regard to the average price. *Id.* at 3 n.6.

[449] *Id.* at 7.

[450] *Id.*

[451] *Id.* at 9-10.

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

[453] "Yellow" for pricing meant between ten and twenty percent higher than the average. *Id.* at 3 n.6.

[454] *Id.* at 7.

[455] *Id.* at 9.

GAO stated there was no task order exception to the statutory requirement to consider price.[456] If the agency conducted a price/technical tradeoff, it could only do so with adequate justification in the source selection document.[457]

One, Two, Five (Three, My Lord). . .Three

The GAO approved of an agency's use of fewer adjectival ratings than described in the solicitation in the evaluation of proposals in *Trajen, Inc.; Maytag Aircraft Corporation.*[458] The contract involved fuel receipt, storage, and issue services at the Government-Owned, Contractor Operated facilities at the Defense Fuel Support Point in Norfolk, Virginia; and aircraft refueling services for Naval Station Norfolk and the Naval Amphibious Base in Little Creek, Virginia.[459] The RFP provided that technical factors[460] would be evaluated under five ratings: exceptional, very good, satisfactory, marginal, or unsatisfactory.[461]

The technical evaluation team only used three ratings in evaluating proposals: exceptional, average, and marginal. In dismissing the protest on these grounds,[462] the GAO highlighted the general rule that evaluation ratings, however concocted, are "merely guides for intelligent decision-making in the procurement process."[463] In rejecting allegations of prejudicial impact, the GAO focused on the detailed numerical scoring of the operational capability subfactors and that the evaluation was not based solely on the three adjectives.[464] The GAO also noted the SSA's consideration of the narrative comments in the consensus evaluation to demonstrate the fairness of the source selection process.[465]

The Value of Value-Added

In *Coastal Maritime Stevedoring, LLC*,[466] the GAO rejected a price/technical tradeoff that focused only on the advantages in a proposal that would result in a cost savings to the government, while ignoring advantages that could not be quantified.[467] The U.S. Army Surface Deployment and Distribution Command issued a RFP for stevedore[468] and related terminal services at Blount Island Terminal in Jacksonville, Florida.[469] The RFP contemplated the award of a four-year fixed price requirements contract on a best-value basis in which non-price factors, when combined, were approximately equal in weight to price.[470] The SSA received an analysis from the program manager that identified specific strengths to Coastal's proposal which would result in a cost savings to the government.[471] The program manager, however, neglected to comment on other strengths of the proposal that did not affect the cost.[472] The SSA then selected a lower-rated, lower-price proposal.[473]

---

[456] *Id.*

[457] *Id.*

[458] Comp. Gen. B-296334, et. al; 2005 U.S. Comp. Gen. LEXIS 154 (July 29, 2005).

[459] *Id.* at 2.

[460] The technical factors, in descending order of importance, were operational capability, past performance, price, and socioeconomic/subcontracting. Operational capability was divided into nine subfactors. *Id.* at *4.

[461] *Id.* at *3.

[462] The GAO also dismissed allegations of improper discussions made by both protestors. *Id.* at *6-14.

[463] *Id.* at *14.

[464] *Id.* at *15.

[465] *Id.* at *16.

[466] Comp. Gen. B-296627; 2005 U.S. Comp. Gen. LEXIS 180 (Sept. 22, 2004).

[467] *Id.* at *15-16.

[468] Stevedore services include the discharge and loading of ships, rail cars, and trucks and the drayage, or moving, of containers between rail, truck, and ship staging areas. *Id.* at *2.

[469] *Id.*

[470] *Id.* at *2-3.

[471] *Id.* at *15-17.

[472] *Id.*

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

The GAO sustained the protest, holding that advantages in a technical proposal, e.g. performance risk, need not result in a cost benefit to be of value to the government.[474] The SSA's obligation in a tradeoff decision is to determine whether the advantages of a higher-price proposal are worth paying a price premium.[475] Since the SSA failed to take into account all of Coastal's strengths in the best value determination, the GAO held that the tradeoff determination was insufficiently documented.[476]

Key Personnel

Key Personnel at Sea in the GAO Find Safe Harbor in the District Court

In *Patriot Contract Services—Advisory Opinion*,[477] the GAO advised the United States District Court for the Northern District of California[478] that an offeror must follow the terms of a RFP concerning key personnel and a failure to do so will result in a sustained protest in an admiralty case.[479] The Navy issued a RFP for the operation and maintenance of nine large, medium speed, roll-on/roll-off ships to move cargo worldwide.[480] The Navy selected American Overseas Marine Corporation (AMSEA) over Patriot Contract Services (PCS), the incumbent, on the basis of AMSEA's lower evaluated price.[481] After award, AMSEA placed employment advertisements for port engineers.[482] Patriot Contract Services challenged the award based on AMSEA's alleged misrepresentation of its agreements with the key personnel in its proposal.[483]

The GAO noted that the RFP specifically stated that letters of commitment of key personnel "must reflect mutually agreed position, salary, and benefits."[484] After contradictory testimony by AMSEA,[485] the GAO found that AMSEA had not discussed those factors with its prospective employees, rendering those discussions mere promises, rather than binding commitments as required by the RFP.[486] Based on this fact, the GAO found PCS's protest to be meritorious based on AMSEA's material misrepresentations in its proposal.[487]

The District Court, despite the GAO's advisory opinion, denied a request for preliminary judgment in *Patriot Contract Services v. United States*.[488] The District Court agreed that there were questions regarding AMSEA's conduct, but ultimately felt that the record was sufficiently ambiguous to reject the allegation of fraud.[489] One employee in question testified that he decided to retire subsequent to his contracts with AMSEA; the other employee testified that he left AMSEA

---

[474] *Id.* at *15-16.

[475] *Id.* at *17-18.

[476] *Id.* at *15-17.

[477] Comp. Gen. B-294777.3, May 11, 2005, 2005 CPD ¶ 97.

[478] Patriot Contract Services submitted a protest with the GAO and subsequently withdrew its protest and filed an action with the federal district court. The GAO used its traditional bid protest format to issue the advisory opinion. *Id.* at 1.

[479] *Id.* at 9.

[480] *Id.* at 1.

[481] Although PCS received higher evaluations in two subfactors, including key personnel, the source selection authority found the two offerors to be essentially equal. *Id.* at 4.

[482] *Id.* at 3.

[483] *Id.* at 4.

[484] *Id.* at 3.

[485] American Overseas Marine Corporation's president testified, and later its counsel later recanted, that the prospective employees withdrew after the Navy changed locations of work sites under the contract. *Id.* at 6-7.

[486] *Id.* at 9.

[487] *Id.* In a footnote, the GAO briefly dismissed other allegations upholding the agency's past performance evaluations, the evaluation of PCS's subfactors, and the agency's discussions with PCS. *Id.* at 5 n.5.

[488] 388 F. Supp. 2d 1010, 2005 U.S. Dist. LEXIS 37430 (2005).

[489] *Id.* at *30. The District Court also noted that the standard for injunctive relief was different from the GAO's standard for a meritorious protest. *Id.* at *31 n.13.

on mutually agreeable terms.[490] The District Court also agreed with AMSEA that there was no evidence of fraud in the absence of salary discussions prior to the submission of the letters of commitments since the salary for the same job should remain the same under a new contractor.[491] The District Court finally noted that it was reasonable to assume that changes in the key personnel could take place during the time period in question.[492] One year passed between the submission of the initial bid and the date that AMSEA started substituting personnel different from its proposal.[493]

An Incumbent's Venue

Two cases demonstrate different techniques for evaluating the use of incumbents as key personnel in a proposal. In the first, *AHNTECH, Inc*.,[494] the GAO denied a protest in which the agency classified an offeror's intent to hire staffing from the incumbent workforce as a weakness. The U.S. Army Joint Contract Command-Iraq issued a RFP for the maintenance and operation of the Butler Range Complex.[495] The Army eliminated AHNTECH from the competition after its operation plan was evaluated as a "no-go."[496] AHNTECH's operation plan included a stated intent to hire eighty-five percent of the incumbent workforce without signed letters of intent from the employees.[497]

The GAO denied the protest stating that AHNTECH could have either provided evidence that it could hire the incumbent workforce or it could have submitted an alternative approach for staffing.[498] Since it failed to do either, the agency's interpretation of staffing as a weakness was reasonable.[499]

In a COFC case, *Orion International Technology v. United States,*[500] the court held that the government could rely on a company's assertion that it would hire an incumbent, even if that employee subsequently signed a no-compete agreement with the incumbent contractor.[501] The Army Contracting Agency issued a RFP for the management of the Center for Counter Measures at the White Missile Range, New Mexico.[502] The RFP indicated that the proposed site manager would attend an oral presentation of the proposal.[503] Offerors were required to submit a list of key personnel. The Army selected Fiore Industries for award.[504]

Orion filed a protest primarily because of Fiore's assertion that it would hire Mr. Harold Zucconi, an employee of Orion, the incumbent contractor.[505] Fiore inserted Mr. Zucconi's name into its proposal after it reached an oral agreement with Mr. Zucconi to hire him.[506] After this oral agreement, Mr. Zucconi signed a no-compete agreement with Orion.[507]

---

[490] *Id.* at *32.

[491] *Id.* at *35.

[492] *Id.* at *38.

[493] *Id.*

[494] Comp. Gen. B-295973; May 11, 2005, 2005 CPD ¶ 89.

[495] The RFP contemplated the award of a fixed-price contract with two option years. *Id.* at 1-2.

[496] *Id.* at 2.

[497] *Id.* at 2. In the offeror's proposal, it asserted it would obtain similar results from its historical "85% retention rate of incumbent work forces." *Id.* at 3.

[498] *Id.*

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

[500] 66 Fed. Cl. 569 (2005).

[501] *Id.* at 576.

[502] *Id.* at 570.

[503] *Id.*

[504] *Id.*

[505] *Id.* at 572.

[506] *Id.* at 571-72. Mr. Zucconi had responded to a blind advertisement in a local newspaper. *Id.* at 571.

[507] *Id.* at 572. Mr. Zucconi initially submitted his resignation but was convinced by Orion to stay and sign the no-compete agreement. *Id.* The agreement bound Mr. Zucconi to only submit his resume with Orion. It also prohibited him from helping a competitor with its proposal. *Id.* at 575.

When Mr. Zucconi informed Fiore of the no-compete agreement, Mr. Zucconi again orally stated that he would work for Fiore if the company was selected for award.[508] Mr. Zucconi subsequently accepted a position for the government as the superintendent of various projects on White Sands, to include the contract in dispute in this case.[509]

Orion argued that Fiore made a material misrepresentation when it submitted Mr. Zucconi's name in its proposal, which would disqualify Fiore from the competition under the "bait and switch" line of key personnel cases.[510] The court held that as long as Fiore believed at the time that Mr. Zucconi would work for it, then the submission of his name with its proposal did not rise to the level of misrepresentation that could invalidate the award.[511] The court felt that since the RFP did not require letters of intent, or even a permanent list of key personnel, the government could accept Fiore's representations regarding Mr. Zucconi's employment.[512] This is especially true when the government did not consider reliance on incumbent personnel as a weakness, e.g. as in the *AHNTECH* discussed previously.[513]

What I Tell You Three Times Is True: University I

The GAO stressed that the source selection official must disclose contrary recommendations, or *at a minimum* not knowingly mischaracterize that recommendation, in the source selection document or risk a sustained protest in *University Research Company.*[514] The Substance Abuse and Mental Health Services Administration (SAMHSA) of the Health and Human Services (HHS) issued a RFP for the operation of the SAMHSA Health Information Network.[515] The HHS Acquisition Regulation recommends that SSAs receive recommendations from project officers in addition to technical evaluation panels.[516]

During the GAO hearing, the source selection official testified that she knowingly misstated the project officers' recommendation in order to award the contract to her preferred offeror.[517] At the hearing, the source selection official for the first time disclosed an eight-hour debate between her and the project officers about their evaluation conclusions that ended with the project officers leaving in resignation concerning the SSA's ultimate decision.[518]

Although the GAO conceded the agency's point that there was no affirmative requirement for the source selection official to document any dissension by the project officers, the GAO held that the lack of any statement either discussing or distinguishing a contrary recommendation must lead to a sustained protest.[519] As the GAO states, the SSA's independence does not equate to "a grant of authority to ignore, without explanation, those who advise them on selection decisions."[520]

In a follow-up case, *University Research Co.*[521] the GAO reviewed another source selection official's reaward of the contract to IQ Solutions.[522] This time, the GAO found sufficient documentation contained in the source selection decision to justify the source selection's decision not to follow the advice of the project officers.[523]

---

[508] *Id.* at 572.

[509] *Id.*

[510] *Id.* at 573. To prove a "bait and switch," a protestor must demonstrate (1) a representation of reliance on certain personnel, (2) agency reliance, and (3) a foreseeable outcome that the individual would not work on the contract. *Id.* at 573 n.5.

[511] *Id.* at 574.

[512] *Id.* at 576.

[513] *Id.*

[514] Comp. Gen. B-294358, et. al, Oct. 28, 2004, 2005 CPD ¶ 217.

[515] The RFP was set-aside for small businesses and anticipated the award of a cost-plus-award-fee contract for a base period of one year with four one-year options. *Id.* at 2.

[516] *Id.* at 5.

[517] *Id.* at 6-7.

[518] *Id.* at 7.

[519] *Id.* at 10.

[520] *Id.* at 8. The GAO also noted that the source selection official also mischaracterized the project officers' evaluation of IQ's proposed costs. *Id.* at 9.

[521] Comp. Gen. B-294358.6, B-294358.7, 2005 U.S. Comp. Gen. LEXIS 73 (Apr. 20, 2005).

[522] *Id.* at *12.

What's the Cost of Normal in the COFC? University II

In an ongoing saga, the COFC, in *University Research Company v. United States & IQ Solutions*,[524] granted a preliminary injunction, blocking the award of the SAMHSA clearinghouse.[525] The COFC held that the action was necessary due to an improper cost realism normalization of offeror's reproduction costs which the GAO had previously viewed as proper in *University Research Company*.[526]

In one area of the protest, the GAO upheld the agency's decision to normalize reproduction costs.[527] In its FPR, IQ Solutions lowered its overall proposed copying costs while significantly increasing its estimated cost per copying.[528] Based on this inconsistency, and a worry that the RFP was ambiguous regarding reproduction costs, the agency decided to replace all offerors' proposed costs with the government estimate for those costs.[529] The GAO felt that the agency reasonably determined that there should not be significant differences in copying costs.[530]

The COFC disagreed, holding that IQ Solution's apparent confusion may have justified additional clarifications by the agency, but the decision to normalize copying costs resulted in erasing URC's apparent cost advantage in this area.[531] The COFC reviewed the record and found no good reason why reproduction costs would be the same for all offerors.[532] The court also felt that it was arbitrary to use the government's estimate, when IQ Solution's marginal cost was one-third lower.[533] The COFC felt that the agency needed more time to evaluate the differences in the proposed copying costs and take the time to eliminate any confusion if necessary.[534] The court noted that "[t]he public interest is not well-served when contracting officials rush to save a few weeks and end up delaying contracts by many months."[535]

What Time Is It in the COFC?

The GAO found that a lack of posted instructions on a locked door on a Saturday met the government frustration rule in *Hospital Klean of Texas, Inc*.[536] The Army issued a RFP for hospital housekeeping services at Fort Polk, Louisiana.[537] Following requests from potential offerors, the Army extended the closing date for proposals from Friday, May 14, to 1 p.m., Saturday, May 15.[538] Although Saturday was not a work day, the Army's plan was that personnel would be present assisting with a move and would listen for any deliveries.[539] One proposal was delivered on that day.[540] Integrity Management Services, which was selected for award, utilized Federal Express to deliver their proposal on May 15. Federal Express, after

---

[523] *Id.* at *64. The GAO also considered a protest of the technical and past performance scores. Although there were problems, the GAO dismissed those changes as *de minimus*. *Id.* at *63. University Research Co. ultimately obtained a preliminary judgment in the COFC based on one aspect of that technical evaluation. University Research Co., LLC v. United States and IQ Solutions, 65 Fed. Cl. 500 (2005).

[524] University Research Co., LLC v. United States and IQ Solutions, 65 Fed. Cl. at 500.

[525] *Id.* at 625.

[526] Comp. Gen. B-294358.6, B-294358.7, 2005 U.S. Comp. Gen. LEXIS 73 (Apr. 20, 2005).

[527] *Id.* at *55.

[528] *Id.* at *50.

[529] *Id.* at *51.

[530] *Id.* at *51.

[531] University Research Co., 65 Fed. Cl. 500, 513 (2005).

[532] *Id.* at 511.

[533] *Id.* at 512.

[534] *Id.*

[535] *Id.* at 515.

[536] Comp. Gen. B-295836; B-295836.2, 2005 U.S. Comp. Gen. LEXIS 183 (Apr. 18, 2005).

[537] *Id.* at *2. The RFP contemplated the award of an ID/IQ, fixed unit-price contract for a base period with four option years. *Id.*

[538] *Id.*

[539] *Id.*

[540] *Id.*

no one answered the locked door, left a note stating that it had attempted delivery.[541] Agency personnel found the note while leaving the building for the day.[542]

The GAO determined that the agency was the paramount cause for the late delivery.[543] The GAO determined that there was no reasonable expectation that Federal Express could redeliver the proposal since the government failed to post delivery instructions on the locked door.[544]

In *Hospital Klean of Texas, Inc. v. the United States*,[545] the COFC disagreed with the GAO's analysis, granting a Temporary Restraining Order blocking the award to Integrity.[546] The COFC, while recognizing the GAO's "longstanding expertise in procurement law," found that Integrity failed to do "all it could" to ensure timely delivery of the proposal. [547] The COFC also failed to find "affirmative misdirection" on the part of the agency sufficient to allow acceptance of the late proposal.[548] The COFC focused on the fault of the offeror and its agent, Federal Express.[549] First, Integrity failed to notify Federal Express of the 1 p.m. deadline.[550] Second, Federal Express failed to do anything other than knocking on a locked door once and did not attempt to redeliver its package.[551] Therefore, the government frustration rule did not apply and the Army could not accept the late proposal.[552]

Dancing the Minutiae in the COFC

In *Beta Analytics International, Inc. v. United States & Maden Tech Consulting, Inc.,*[553] the COFC granted the protestor's motion for judgment on the administrative record by examining, in detail, each evaluator's score sheets.[554] The Navy issued a RFP for intelligence support for the Defense Advanced Research Projects Agency.[555] Beta Analytics' score for the technical evaluation process was 84; Maden Tech received an 88.[556] The Navy awarded the contract to Maden Tech on a best value analysis since it received the highest score and had the lowest price.[557]

Although there was a source selection document, the COFC declined to rely on the summary memorandum, given the mechanical nature of the source selection plan.[558] The intent of the plan was to average the evaluator's scores and then award the contract to the best value based on the technical proposal scores, past performance, and the proposed price.[559] Because the source selection authority conducted no real analysis,[560] the COFC analyzed the scores at the individual

---

[541] *Id.*

[542] *Id.* at *3.

[543] *Id.* at *8.

[544] *Id.* at *8-9.

[545] 69 Fed. Cl. 618 (2005).

[546] *Id.* at 625.

[547] *Id.* at 623.

[548] *Id.*

[549] *Id.*

[550] *Id.*

[551] *Id.* at 623-24.

[552] *Id.* at 624.

[553] 67 Fed. Cl. 384 (2005).

[554] *Id.* at 408.

[555] *Id.* at 386.

[556] *Id.* at 389.

[557] *Id.* at 392.

[558] *Id.* at 389.

[559] *Id.* at 396-97.

[560] The COFC characterized the summary narratives as "supplying a rationalization for the non-rational." *Id.* at 398.

evaluator level.[561] Since there were clear inconsistencies in areas of the evaluation,[562] the COFC ruled in favor of the protestor.

Your Strength Is Also Your Weakness

The GAO sustained a protest due to an insufficient cost realism analysis in *Honeywell Technology Solutions, Inc.; Wyle Laboratory, Inc.*[563] The National Aeronautics and Space Administration (NASA) issued a RFP for the consolidation of test operations services at the John C. Stennis Space Center and the George C. Marshall Space Flight Center.[564] The RFP indicated that NASA would adjust the "Mission Suitability" scores for cost realism.[565] The NASA adjusted the cost of both Honeywell's and Wyle's proposals due to a failure to propose staffing equal to the agency's independent government staffing estimate.[566] Both proposals were then downgraded due to the difference between the increased probable cost and the agency's most probable cost analysis.[567]

The GAO found that the agency failed to have an adequate record in how it conducted its cost realism analysis.[568] The GAO also found an inconsistency in recognizing Honeywell's staffing level as a strength while downgrading that staffing in its cost realism analysis as inadequate.[569] The GAO highlighted the agency's thin record of how it came to that conclusion.[570] The GAO questioned why, in an attempted consolidation, the agency failed to integrate two separate staffing estimates for the two centers and appeared to use those separate estimates in a mechanical manner.[571]

OverArching Prices

In *Arch Chemicals v. United States*,[572] the COFC found that there was no rational basis to exclude from the Defense Energy Support Center's (DESC's) price evaluation, the incumbent's plant shutdown costs which would be triggered if the contract was awarded to another company.[573] The DESC issued a RFP for a requirements contract for all the federal government's hydrazine requirements for ten years with two five-year options.[574]

---

[561] *Id.*

[562] Maden Tech received full credit for key personnel even though they were not current employees. *Id.* at 402. Evaluators gave inconsistent ratings for "N/A" scores. *Id.* at 403-04. BAI received an inconsistent evaluation for staffing when one examined its scores for the subfactors. *Id.* at 406. The government had a second set of score sheets which were not used but its existence was not sufficiently explained by the agency. *Id.* at 407.

[563] Comp. Gen. B-292354; B-292388, Sept. 2, 2003, 2005 CPD ¶ 107.

[564] The RFP contemplated the award of a cost-plus-award-fee contract for a base period of two years with two two-year options. The RFP had a detailed performance work statement and contemplated an award to the best value under the following equally weighted factors: mission suitability, past performance and cost. *Id.* at 2.

[565] The RFP included a table detailing point deductions based on the percentage difference between proposed costs and the most probably costs calculated by the agency. *Id.* The mission suitability factor had four subfactors: technical performance; management; safety, health, and mission assurance; and small disadvantaged business participation. *Id.*

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

[567] Honeywell's proposal was reduced by 100 points due to a 13.5 percent difference; the agency adjusted the cost due to an increase of proposed staffing from 248 FTE positions to 291. Wyle's proposal was reduced by 200 points due to a 21.5 percent difference; the agency adjusted the cost due to an increase of proposed staffing from 241 FTE positions to 291. Svedrup's proposal, which was selected for award, received its proposed cost, after an adjustment of ten FTEs, was within 2.7 percent of the most probable cost. *Id.*

[568] *Id.* at 7.

[569] *Id.* at 9-10.

[570] The GAO noted that the contemporaneous documentation was two pages long, with one page addressing the rationale. *Id.* The agency also failed to justify its analysis in testimony to the GAO by members of the source evaluation board. *Id.* at 8-9.

[571] *Id.* at 11-12.

[572] 54 Fed. Cl. 389 (2005).

[573] *Id.* at 399.

[574] *Id.* at 382. Hydrazine is used as fuel for many defense programs, including satellites, rockets, and the Space Shuttle; the successful offeror would be the only hydrazine production facility in the U.S. *Id.*

If the contract was awarded to a company other than Arch Chemicals, the DESC would pay Arch $8,513,000 in plant shutdown related costs.[575] In computing the price evaluation, the DESC decided to exclude those costs in order to foster competition.[576] The COFC rejected this argument, stating that "competition, like democracy is not an end but a means to the accomplishment of ends."[577] Since it was not speculative that those costs would be paid by the government, the COFC felt that there was no rational basis not to include these costs in the evaluation for a new contract.[578]

Late Scot!

In *Scot, Inc.*,[579] the GAO held that an agency can accept an expired offer without reopening negotiation, as long as acceptance does not provide an unfair competitive advantage.[580] The Navy issued a RFP contemplating award of an ID/IQ contract for oxygen mask, regulator, helmet, and communications test sets.[581] The RFP stated that each offeror was required to hold its offer firm for thirty calendar days from the due date for receipt of offerors.[582] The offers expired ten days prior to award; Scot protested the award arguing that it could have submitted a lower price due to "manufacturing process redesign efforts."[583] The GAO focused on the fact that no changes were made to the winning proposal; and according to the GAO, as long as expired proposals remained unchanged, the Navy could award the contract.[584]

A Shred of Evidence

The GAO held unobjectionable the agency's actions in destroying individual evaluation sheets after the evaluators met to create a consensus rating in *Joint Management & Technology Services.*[585] The DOE issued a RFP for information technology and engineering support services for its National Energy Technology Laboratory.[586] Joint Management & Technology Services alleged that the consensus evaluation materials failed to provide detail enough to analyze the evaluator's conclusions.[587] The GAO held that as long as the consensus materials support the agency's judgments, there is no objection to destroying the initial ratings of individual evaluators.[588]

Joint Management & Technology Services also challenged a satisfactory rating of experience arguing that this was unreasonable since several entities in its joint venture were the incumbent contractors.[589] The GAO rejected this argument, stating that the burden is on the offeror to submit an adequately written proposal.[590] Joint Management & Technology

---

[575] *Id.* at 399.

[576] *Id.* at 383.

[577] *Id.* at 400.

[578] *Id.* at 401. The COFC also rejected Arch's challenge that the other offeror should be excluded because the small business teamed with a French government-owned company. *Id.* at 399.

[579] Comp. Gen. B-295569; B-295569.2, 2005 U.S. Comp. Gen. LEXIS 68 (Mar. 10, 2005).

[580] *Id.* at *19-20.

[581] *Id.* at *2-3.

[582] *Id.*

[583] *Id.* at *19.

[584] *Id.* The GAO also found reasonable the Navy's downgrade of a warranty factor because the equipment would be stored beyond the warranty period; and evaluation of "similar" past performance even though the offerors reference contracts were vastly different in size. *Id.* at *13-14. The GAO also rejected a challenge to the awardee's price proposal as unbalanced since the Navy adequately evaluated the risk from the different pricing strategies. *Id.* at *17-18.

[585] Comp. Gen. B-294229; B-294229.2, Sept. 22, 2004, 2004 CPD ¶ 208.

[586] *Id.* at 2. The RFP was issued as a competitive section 8(a) set-aside and contemplated award of a cost-plus-award-fee task order contract for a base period of three years, with two one-year options. *Id.*

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

[588] *Id.* at 4.

[589] *Id.*

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

Services failed to provide adequate evidence of its experience, especially since it was a newly formed joint venture with no experience of its own.[591]

Major Andrew S. Kantner

Simplified Acquisitions—Final & Interim Rules

Buying from Federal Prison Industries

On 11 April 2005, the Defense Acquisition Regulations Council passed an interim rule requiring agencies to perform market research and a comparability determination before buying a supply item from Federal Prison Industries (FPI);[592] giving agencies permission not to send a copy of a solicitation to FPI if the solicitation is available through FedBizOpps;[593] and, requiring agencies to buy from FPI when FPI's item of supply provides the best value to the government and this conclusion was reached as a result of FPI's response to a competitive solicitation.[594]

Increase in Threshold for Simplified Acquisition Procedures

Section 822 of the Fiscal Year 2005 National Defense Authorization Act increased the micro-purchase and simplified acquisition threshold limits for purchases made outside the United States in support of a contingency operation or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack.[595] For micro-purchases made outside the United States, the micro-purchase threshold is increased to $25,000.[596] For simplified acquisition purchases made inside the United States, the simplified acquisition threshold is increased to one million dollars.[597] On 24 November 2004, Deirdre Lee[598] issued a memorandum announcing that these new threshold levels were effective immediately.[599]

Final Rule: Contractor Use of Government Supply Sources

Department of Defense agencies are now authorized to allow contractors to use government supply sources.[600] In addition, authorizing agencies are required to consider requests from DOD supply sources not to honor purchases from contractors that are indebted to the DOD and have not paid their bills on time.[601]

Major Steven R. Patoir

---

[591] *Id.* at 5. The GAO also rejected a challenge to JMTS's evaluation stating that even if the GAO agreed with JMTS, it would not have been in line for award and there was no prejudice to the offeror. *Id.* at 9.

[592] Federal Acquisition Regulation; Purchases from Federal Prison Industries—Requirement for Market Research, 70 Federal Register 18,954 (Apr. 11, 2005) (to be codified at 48 C.F.R. pts. 8 and 25).

[593] *Id.*

[594] *Id.*

[595] National Defense Authorization Act for FY 2005, Pub. L. No. 108-287, 118 Stat. 951 § 822 (2004).

[596] *Id.*

[597] *Id.*

[598] On 24 November, 2004, Ms. Deidre Lee was the Director of Defense Procurement and Acquisition Policy.

[599] Memorandum, Director, Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense, Acquisition, Technology and Logistics, to Assistant Secretary of the Army, Navy and Air Force and Directors of Defense Agencies, subject: Immediate Increase in the Dollar Threshold for Simplified Acquisition Procedures and in the Dollar Threshold for Senior Procurement Executive Approval of Justifications and Approvals (22 Nov. 2004).

[600] Defense Federal Acquisition Regulation Supplement, Contractor Use of Government Supply Sources, 69 Federal Register 67,858 (Nov. 22, 2004) (to be codified at 48 C.F.R. pts. 251 and 252).

[601] *Id.* DFARS PGI 251.102 has a sample authorization form for DOD agencies to use. *Id.*

Government Purchase Card

Office of Management and Budget Issues New Guidance on Managing Government Charge Cards—Effective Fiscal Year 2006

On 5 August 2005, the Office of Management and Budget (OMB) revised Circular No. A-123, Improving the Management of Government Charge Card Programs.[602] Effective Fiscal Year 2006, agencies and federal managers are required to take new measures to more effectively manage all government charge card accounts.[603] The objective of this guidance is to maximize the benefits to the Federal government when using government charge cards to pay for goods and services in support of official Federal missions.[604]

Below is a summary of each section of OMB Circular A-123.

Charge Card—Management Plan

Each agency is required to develop and maintain a written charge card management plan.[605] Internal plans will minimize fraud, misuse and delinquency. All management charge card plans will:

- Identify management officials and outline each person's duties;
- Establish formal procedures for appointing cardholders and card officials;
- Ensure each cardholder is credit worthy
- Develop agency training requirements
- Develop management control mechanisms to ensure appropriate charge card use and payment
- Establish appropriate authorization controls and ensure strategic sourcing practices are used
- Explain how reports will monitor card use and identify spending and payment practices
- Document and record retention requirements
- Collect charge cards from employees when they terminate employment or move to a different organization.[606]

Charge Card—Training

Every agency must train cardholders and charge card managers on their roles and responsibilities. Generic training requirements for all charge card programs and program participants include:

- Training prior to appointment;
- Refresher training at least every three years;

---

[602] U.S. OFF. OF MGMT. & BUDGET, CIRCULAR NO. A-123, MANAGEMENT'S RESPONSIBILITY FOR INTERNAL CONTROL (2004) [hereinafter OMB CIRCULAR A-123]. An electronic copy of *OMB Circular A-123* is available at: www.omb.gov.

[603] OMB CIRCULAR A-123 requires agencies and federal managers to "take systemic and proactive measures to:

> (1) develop and implement appropriate, cost-effective internal control for results-orientated management; (ii) assess the adequacy of internal control in Federal programs ad operations; (iii) separately assess and document internal control over financial reporting consistent with the process defined in Appendix A; (iv) identify needed improvements; (v) take corrective actions; and (vi) report annually on internal control through management assurance statements.

Id.

[604] *Id.* at 2. Identified benefits of this program are:

> reducing administrative costs and time for purchasing and paying for goods and services; 2) ensuring the most effective controls are in place to mitigate the risk of fraud, misuse, and delinquency; 3) improving financial, administrative and [other] benefits offered to the government by government charge card providers and other entities, including maximizing refunds where appropriate; 4) Using government charge card data to monitor policy compliance and inform management decision-making to drive a more cost effective card program; and 5) assure recovery of state and local taxes paid on fleet cards.

Id.

[605] *Id.*

[606] *Id.* at 4.

- Self-certification that each participant received the training, understands the regulations and procedures, and knows the consequences of inappropriate training;
- Management must retain all training certificates.[607]

More detailed guidance for the purchase card training program, travel card training program, fleet card program training, and the integrated card program is available at OMB Circular A-123, Chapter 3.[608]

Charge Card—Risk Management

Risk management programs ensure that charge card programs operate efficiently and with integrity. Managers are required to implement risk management programs that eliminate payment delinquencies and charge card misuse, fraud, and waste.[609]

Regarding agency charge card payments, program managers must ensure that agency payments are timely made and accurate; monitor delinquency reports from vendors and ensure that delinquent accounts are paid quickly; and ensure that delinquency control procedures related to centrally billed accounts are incorporated into an agency's charge card management plan.[610]

Regarding charge card payments by individual account holders, charge card managers are required to monitor delinquent payment reports; ensure individuals pay delinquent bills promptly; advise the delinquent cardholders that disciplinary action[611] could result from their late payment; incorporate management control plans into individual accounts; and implement split disbursements and salary offset procedures.[612]

Charge Card—Performance Metrics and Data Requirements

Metrics is the means of ensuring successful charge card control. Accordingly, management is required to compile metrics and other data and file quarterly reports. Examples of data required to be collected include the following: the number of cards issued; the number of active accounts; percentage of employees holding government charge cards; amount of money spend and the total refunds earned; number of cases referred to the Office of the Inspector General; and the number of administrative and disciplinary actions taken for card misuse.[613]

Charge Card—Credit Worthiness

Prior to issuing a new charge card, agencies must perform a credit worthiness check of each new proposed card holder.[614] Agencies can request a credit report through the Office of Personnel Management (OPM) Center for Federal Investigative Services.[615] If a proposed cardholder scores a low credit worthiness rating, agencies are required to reevaluate the individual's credit worthiness rating every time a card is renewed.[616] Agencies are required to maintain these reports in

---

[607] *Id.* at 6.

[608] *Id.*

[609] *Id.* at 9.

[610] *Id.* at 10.

[611] Possible disciplinary actions include suspending the employees account when the account is more than sixty-one days past due; canceling the charge card account; collection efforts; adverse reporting to credit bureaus; late fees; and, other disciplinary actions deemed necessary by the agency. *Id.* at 12.

[612] *Id.* at 11. Although mandatory, split disbursement and salary offset can be waived when the costs of doing so exceeds the benefit. *See* OMB CIRCULAR A-123, *supra* note 602, at 11, for due process requirements before offsetting an individual's salary.

[613] *Id.* at 14. There are also additional requirements regarding travel and purchase cards. *Id.* at 15.

[614] Current card holders, as of the effective date of OMB Circular A-123, are not required to undergo a credit worthiness check. The applicant's credit score will determine what management oversight responsibilities apply. *Id.* at 17-18.

[615] The telephone number for OPM's Center for Federal Investigative Services is 202-606-1042. Credit worthiness checks are performed on a reimbursable basis. *Id.* at 19.

[616] If an applicant is denied a government charge card due to a low credit score, agencies can re-evaluate the applicant's credit worthiness whenever the agency deems appropriate. *Id.*

accordance with the Privacy Act.[617] Finally, agencies are permitted to contract with their bank card holder to manage credit worthiness assessments.[618]

Charge Card—Refund Management

There are three categories of refunds. One category is payments received from vendors based on the total dollar amount spent during a specified time period. The second is payments received from vendors based on the timeliness or frequency of payments or both. The final category is payments received from the vendor to correct improper agency payments or adjustments to invoices.[619] Effective management of the charge card program will ensure the government obtains the best competitive deal from vendors, maximize the refunds the government receives and minimizes the interest rate the government pays.[620] To accomplish these goals, management is required to review its refund agreement each quarter, prior to the re-bid of the task order, and conduct an annual comparison of its refund agreement to other agencies' agreements.[621] Lastly, refunds have to be returned to the appropriation or account from which they were expended.[622]

Charge Card—Strategic Sourcing

Strategic sourcing is analyzing how the government spends its appropriations and ensures that agencies achieve discounts on its commonly purchased goods and services and that all discounts to charge cards are properly applied. This process is important because it helps ensure the federal government maximizes its potential savings on the billions of dollars it obligates each year.[623] To accomplish this requirement, charge card managers have to perform a thorough spending analysis; maintain a balanced spending program that considers socio-economic and prioritized spending objectives; implement agency performance measures that help achieve agency strategic sourcing goals; identify and establish key roles and responsibilities; articulate training and communication strategy; and develop internal control mechanisms to ensure compliance with strategic sourcing goals.[624]

Charge Card—Requirements for Micro Purchases

Section 508 of the Rehabilitation Act requires federal agencies to develop, procure, maintain, or use electronic and information technology that is accessible to federal employees with disabilities.[625] All micro-purchases are subject to §508 of the Rehabilitation Act, unless an exemption applies.[626] Failure to comply with §508 of the Rehabilitation Act could result in civil action against the agency.[627]

Charge Card—Environmental Requirements

Agencies have to ensure that their purchases comply with many environmental laws and regulations. See OMB Circular A-123, Chapter 10, Environmental Regulations, for further guidance.

---

[617] *Id.*

[618] *Id.*

[619] *Id.* at 21.

[620] *Id.*

[621] *Id.* at 22.

[622] *Id.*

[623] *Id.* at 23. OMB's strategic sourcing memorandum is available at http://www.whitehouse.gov/omb/. *Id.*

[624] *Id.* at 24.

[625] 29 U.S.C.S. § 794(d) (LEXIS 2005).

[626] *Id.* The exceptions to §508 of the Rehabilitation Act include micro purchases made before 1 April 2005; for a national security system; acquired by a contractor that is incidental to a contract; is located in spaces frequented only by service personnel for maintenance, repair or occasional monitoring of equipment; or, would impose an undue burden on an agency. *Id.*

[627] *See* OMB CIRCULAR A-123, *supra* note 602, at 26. The webpage, www.buyaccessible.gov, helps federal buyers ensure their purchases comply with §508 of the Rehabilitation Act. *Id.*

Charge Card—State & Local Tax Recovery

Since the federal government is not required to pay state and local government taxes, charge card program managers are required to recover any taxes paid. To ensure all taxes paid are returned, charge card managers must work closely with merchants and state and local authorities. Furthermore, card managers should ensure individual card holders know to provide lodging vendors with a tax exemption certificate.[628]

Major Steven R. Patoir

Contractor Qualifications: Responsibility

Two Buildings Considered One under Terms of Contract

In *Vador Ventures, Inc.*,[629] the GAO examined an IFB that required contractors to have specific "experience qualifications for key personnel," to include managing a building in excess of 800,000 square feet, and held that the contracting officer's decision to award to a contractor that had managed two buildings that were each less than 800,000, but which combined satisfied the square footage requirements, was proper. The IFB-required qualifications included:

> [T]he project manager and the alternate project managers… [must have at least four] years experience (within the past five years) 'in managing the operation, maintenance and repair, custodial services, building alterations, customer relations requirements, and all other operational components of a building with at least 800,000 square feet of occupiable [sic] space.' …[and the] supervisory employees… [must have] at least [four] years of recent (within the past [five] years) experience 'in directing personnel responsible for accomplishment of work in their respective program area in a building of at least 800,000 square feet of occupiable [sic] space.'[630]

The IFB required that this information be submitted "within 5 working days after notice to the apparent low bidder."[631] The contracting officer received fourteen bids and subsequently requested that the apparent low bidder provide the required information. The apparent low bidder submitted the information and was awarded the contract. The second low bidder then filed the subject protest and "alleg[ed] that the experience requirements laid out in the solicitation constitute definitive responsibility criteria that the awardee failed to meet."[632] Specifically, the protestor alleged that the awardee did not have any individuals with experience working in a 800,000 square-foot building, therefore failing to meet the specific qualifications set forth in the IFB.[633] In other words, the contracting officer's determination that the awardee was responsible was improper.

The protestor argued that the specific qualifications set forth in the IFB constituted "specific and objective standards established by an agency as a precondition to award which are designed to measure a prospective contractor's ability to perform the contract," or "definitive criterion of responsibility."[634] The agency argued that the information requirement was not a precondition to award because award could have been made any time after notification to the low bidder. Therefore, the information requirement was "a matter of contract administration,"[635] not one of responsibility. Before addressing the merits of the contracting officer's responsibility determination, the GAO disagreed with the agency, and held that "the key personnel experience requirements possess all of the principal characteristics of a definitive responsibility criterion--they

---

[628] *Id.* at 29.

[629] B-296394, B-296394.2, 2005 U.S. Comp. Gen. LEXIS 156 (Aug. 5, 2005).

[630] *Id.* at *2-3.

[631] *Id.* at *3 (quoting the terms of the IFB).

[632] *Id.* at *3-4 (citations omitted).

[633] *Id.* at *4.

[634] *Id.* at *5. The GAO explains that "[i]n most cases, responsibility is determined on the basis of what the FAR refers to as general standards of responsibility, such as adequacy of financial resources, ability to meet delivery schedules, and a satisfactory record of past performance and of business integrity and ethics. FAR § 9.104-1." *Id.*

[635] *Id.* at *6-7.

concern the capability of the offeror, not a specific product, and they are objective standards established by the agency as a precondition to award."[636]

The GAO then considered the protestor's specific arguments on whether the awardee satisfied the responsibility criteria. The protestor argued that the awardee's "key personnel failed to satisfy the definitive responsibility criteria because they did not have experience managing or supervising the operation of an 800,000 square foot building,"[637] which was based on the awardee's management of two different buildings at two different addresses, neither of which satisfied the square foot requirement established in the IFB. As a result, the protestor argued, "the agency improperly waived [the definitive responsibility criteria]."[638]

The agency alleged, and the protestor did not challenge, that the two buildings shared many electrical, plumbing, and mechanical systems, such as a chiller to run the cooling system.[639] The GAO concluded that the contracting official's determination that the awardee complied with the experience requirements set forth in the IFB was proper "[s]ince the combined occupiable [sic] square footage of the two buildings is 971,425 square feet, and the two buildings function as one building."[640]

The GAO concluded that "generally, a contracting agency has broad discretion in determining whether offerors meet definitive responsibility criteria," and that the standard for GAO review is whether "the contracting official reasonably could conclude that the criterion had been met."[641] The GAO found "no basis to question the agency's position that experience managing or supervising the operation of the [two buildings] was qualifying experience."[642]

Major Jennifer C. Santiago

Commercial Items—Final & Interim Rules

Simplified Acquisition Procedures for Commercial Items Is Extended

On 9 March 2005, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council agreed to extend the rule authorizing the use of simplified acquisition procedures to purchase commercial items to 1 January 2008.[643] Absent this action, the rule would have expired on 1 January 2006.[644] The Council also amended the FAR on 9 March 2005 to require the inclusion of FAR clause 52.244-6, Subcontracts for Commercial Items, in solicitations and contracts for non-commercial items.[645] Agencies are now required to include this subcontracting clause in contracts that are not for the acquisition of commercial items.[646]

---

[636] *Id.* at *9 (citing Specialty Marine, Inc., Comp. Gen. B-292052, May 19, 2003, 2003 CPD ¶ 106, at 3.)

[637] *Id.* at *8-9.

[638] *Id.* at *9.

[639] *Id.* Additionally,

> the two buildings are serviced by a single, common feed that supplies high pressure steam, and by a single, common electrical feed. (Indeed, the two buildings are billed by the steam and electrical providers as if they were one building.) The heating and air conditioning of the two buildings are controlled by a single, common energy management control system. Furthermore, contracted commercial facilities management services for the two buildings have always been obtained under one contract, and the buildings have always been serviced as one.

Id.

[640] *Id.* at *11.

[641] *Id.* at *9 (citing Carter Chevrolet Agency, Inc., Comp. Gen. B-270962, B-270962.2, May 1, 1996, 96-1 CPD ¶ 210, at 4).

[642] *Id.* at *10.

[643] Federal Acquisition Regulation; Extension of Authority for Use of Simplified Acquisition Procedures for Certain Commercial Items, Test Program, 70 Fed. Reg. 11,762 (Mar. 9, 2005) (to be codified at 48 C.F.R. pts. 13).

[644] *Id.*

[645] Federal Acquisition Regulation; Extension of Authority for Use of Simplified Acquisition Procedures for Certain Commercial Items, Test Program, 70 Fed. Reg. 11,740 (Mar. 9, 2005) (to be codified at 48 C.F.R. pts. 13).

[646] *Id.*

GAO Audit: GSA Cannot Be Assured That Its Multiple-Award Schedule Contracts Offer Fair & Reasonable Prices

On 11 February 2005, the GAO completed an audit of GSA Multiple Award Schedule (MAS) contract files and found:

> nearly [sixty] percent of the [MAS] files lacked sufficient documentation to establish clearly [that] the prices were effectively negotiated. Specifically, the contract files did not establish that negotiated process were based on accurate, complete, and current vendor information; adequate price analyses; and reasonable price negotiations. GSA's efforts to ensure most favored customer pricing has been hampered by the significant decline in the number of pre-award and post-award audits of MAS contracts . . . [647]

Through its MAS contracts, the GSA seeks the best price of an offeror given to the vendor's most favored customers.[648] When this is not possible, however, regulations allow the GSA to award a contract greater than the most favored customer price if the price is fair and reasonable.[649]

After reviewing product and service contract files at four acquisition centers, the GAO determined that most of the files reviewed lacked sufficient documentation to establish that prices were effectively negotiated.[650] When negotiating price, GSA contract negotiators generally used checklists, invoices, sales histories, and pre-award audits as a guide to determine what was fair and reasonable. The contract negotiators thought that their negotiated prices were always at least equal to a vendor's most favored customer prices.[651] The GAO, however, found that most files did not contain adequate price negotiation documentation to support this assertion.[652] In contrast, the GAO concluded that most contract files did not contain sufficient pre-award and post-award audits of pricing information.[653]

Pre-award audits are used to determine if vendor-supplied processes are accurate, complete, and current before contract award.[654] To illustrate, the GAO pointed out that there were one hundred thirty pre-award audits in 1992, and only fourteen in 2003.[655] In addition, the GSA Inspector General (IG) also reports that the negotiated cost savings dropped an average of $83 million per year from 1992 through 1997 and $18 million per year from 1998 to 2004.[656] Post-award audits help the federal government recover funds when the government has been overcharged due to a vendor failing to provide accurate, complete, or current price information.[657] Despite past recoveries, the GSA stopped requiring post-award audits in 1997 because it anticipated it would perform more pre-award audits, thereby decreasing the need for post-award audits. Despite their best intentions, the GSA never did increase its pre-award audits.[658]

The GAO concluded the audit with four recommendations to the GSA.[659] First, conduct pre-award audits when the threshold is met for new contracts and contract extensions.[660] Second, develop guidance to help contracting officers know when post-award audits are needed.[661] Third, revise the GSA's Acquisition Quality Measurement and Improvement Program

---

[647] U.S. GOV'T ACCOUNTABILITY OFF., No. GAO-05-229, CONTRACT MANAGEMENT, OPPORTUNITIES TO IMPROVE PRICING OF GSA MULTIPLE AWARD SCHEDULES CONTRACTS (Feb. 11, 2005). [hereinafter CONTRACT MANAGEMENT REPORT].

[648] *Id.* at 4.

[649] The complexity and circumstances of each acquisition determines the level of analysis used to determine if the final price is fair and reasonable. *See* FAR, *supra* note 33, at 15.404.

[650] CONTRACT MANAGEMENT REPORT*, supra* note 647, at 12.

[651] *Id.* at 13.

[652] *Id.*

[653] *Id.*

[654] *Id.* at 14.

[655] *Id.*

[656] *Id.* at 15.

[657] *Id.* at 17.

[658] *Id.*

[659] *Id.* at 23.

[660] *Id.*

[661] *Id.*

to better measure and report on the performance of pre-negotiation panels.[662] Fourth, revise the GSA contract management plans to better determine the underlying causes of contract pricing deficiencies and implement corrective actions.[663]

Major Steven R. Patoir

Multiple Award Schedules

Proposed Rule: Contracting Officers Should Consider a Contractor's Past Performance before Issuing Task Orders in Excess of $100,000

On 21 June 2005, the FAR Council issued a proposed rule that requires contracting officers to evaluate a contractor's management of subcontracts (to include how the contractor manages its small-business subcontracting plans) and a contractor's past performance on FSS or a task-order contract or delivery-order contract that was awarded by another agency.[664] This rule would apply to any order that exceeds $100,000, and to any delivery-order contract over $100,000 when these evaluations would produce more useful past performance information for source selection than in the overall contract evaluation.[665]

As federal agencies continue to adjust to smaller workforces, it is interesting to see this proposal requiring agencies to evaluate a contractor's subcontracting performance in regards to small businesses. The question is will federal agencies eventually accomplish socio-economic objectives and contract administration matters through large prime contractors?

GAO Sustains Three Protests Challenging an Agency's Decision to Order off the Federal Supply Schedule

In *Armed Forces Merchandise Outlet, Inc.* (AFMO),[666] the GAO sustained a protest because the agency ordered a product outside its FSS contract. The Army Materiel Command (AMC) wanted to purchase "Wick Away Sports Bras" and issued a RFQ advising potential vendors that, *inter alia*, the bras should not have a tag, the shell should consist of eighty-two percent nylon and eighteen-percent spandex, and that the entire garment will be lined with material consisting of eighty-four percent polyester and sixteen percent spandex.[667] The RFQ also advised vendors that the procurement was "limited to contractors possessing GSA contracts under schedule 078."[668]

The AMC received three quotes and issued its order with KP Sports.[669] AFMO, a competing vendor, protested the task order arguing that KP Sports Bra is outside KP Sports' FSS contract. In support of its position, AFMO pointed out that KP Sports' FSS contract lists a black sports bra constructed of sixty-three percent nylon, twenty-three percent polyester and fourteen percent lycra.[670] The AMC argued that the order was permissible because the KP Sports FSS contract was modified to include the ordered item.[671] The GAO disagreed with the AMC and sustained the protest. The GAO found that, despite AMC's assertions, the GSA Advantage webpage and KP Sport's modified contract still listed the "sports bra as having a fabric content of sixty-three percent nylon, twenty-three percent polyester, and fourteen percent lycra and not the polyester/spandex blend required by the RFQ."[672] The GAO advised AMC to terminate its order with KP Sports and directed AMC to pay AFMO's costs of pursing this protest.[673]

---

662 *Id.*

663 *Id.*

664 Federal Acquisition Regulation; Past Performance Evaluation of Orders, 70 Fed. Reg. 35,601 (proposed June 21, 2005) (to be codified at 48 C.F.R. pt. 42).

665 *Id.*

666 Comp. Gen. B-292281, Oct. 12, 2004, 2004 CPD ¶ 218.

667 *Id.* at 2.

668 *Id.* The GSA schedule contract 078 offers Sports, Promotional, Outdoor, Recreation, Trophies and Sign equipment. *Id.*

669 *Id.* at 5.

670 *Id.* at 12.

671 *Id.* at 13.

672 *Id.* The Army Materiel Command explained that the KP Sports' GSA contract was not updated when it was modified. *Id.* at 14.

673 *Id.* at 16.

In *American Systems Consulting, Inc.*,[674] the GAO put the public on notice to monitor labor categories and ensure that all labor ordered under a FSS contract is actually listed on the underlying FSS contract. Here, the Defense Information Technology Contracting Organization awarded a blanket purchase agreement (BPA) for systems applications and support to ManTech Advanced Systems International. The competition for this BPA was conducted using FAR part 8 procedures.

The RFQ sought quotations for software systems engineering support services and the development of new business systems applications for the Defense Commissary Agency.[675] American Systems Consulting, Inc. challenged the BPA award alleging that one of the services ordered, user support manager, was out of scope of ManTech's FSS contract.[676] Before resolving this scope issue, the GAO compared the user support manager's position as defined in the statement of work[677] against the user support manager labor category identified by ManTech.[678] The GAO made the following observations about ManTech's task manager position: the position does not include the help desk or systems support services identified in the statement of work; the position focuses on financial management activities; and the position does not include at least two years of help desk experience as required by the user support manager position and requires a bachelors degree in computer science and six years of relevant experience versus the RFQ's requirement of a master's degree in computer science with eight years of relevant experience.[679]

Based on the above comparisons, the GAO determined that the user support manager services were outside the scope of ManTech's FSS contract.[680] The GAO said "when concern arises that a vendor is offering services outside the scope of its FSS contract, the relevant inquiry is not whether the vendor is willing to provide the services that the agency [seeks], but whether those services are actually included in the vendor's FSS contract as reasonably interpreted."[681] The GAO also recommended that ASCI be awarded its protest costs to include attorney fees.[682]

In *Crestridge, Inc.,*[683] the GAO sustained a pro se protest when it determined that the record did not support the agency's determination that the awardee's quotation was technically superior to Crestridge's. Crestridge, under a GSA FSS

---

[674] Comp. Gen. B-294644, Dec. 13, 2004, 2004 CPD ¶ 247.

[675] The total services ordered include project management; systems analysis; evaluations; design, development and testing; systems maintenance; software quality assurance; user help desk services; systems deployment support; software configuration management; maintenance of on-line documentations; user training; and, local support. *Id.*

[676] *Id.* at 2.

[677] The RFQ included the following:

> *Help desk support* may also require "senior analysts and technical personnel with development and/or maintenance knowledge and experience on the systems applications, databases, data, interfaces, and system's environment" to resolve system problems.
>
> . . . .
>
> The *user support manager*, which will oversee this function, is required to "provide leadership and management of the user support personnel," "create[] the User Support Plan which defines the policies and procedures for providing [24 hours a day, 7 days a week] support for [DCA's business] systems," "manage multiple time sensitive tasks involving end user support," and "be available to provide on-call support." Education and experience requirements for this position are a Master's degree in "Information Technology, Computer Science, Business" and 8 years of relevant experience, or a Bachelor's degree and 10 years of relevant work experience. "The two years of the relevant experience must be in managing a User Support (Help Desk) operation providing around the clock support for more than 100 end users.

Id. at 6. Emphasis added.

[678] ManTech's FSS contract describes the task manager position as:

> Directs all financial management and administrative activities, such as budgeting, manpower and resource planning, and financial reporting. Performs complex evaluation of existing procedures, processes, techniques, model, and/or systems related to the management problems or contractual issues which would require a report and recommends solutions. Develops work breakdown structures, prepares charts, tables, graphs, and diagrams to assist in analyzing problems. Provides daily supervision and direction to staff. Defines and directs technical specifications and tasks to be performed by team members, defines target dates of tasks and subtasks. Provides guidance and assistance in coordinating output and ensuring the technical adequacy of the end product.

Id. at 7.

[679] *Id.* at 9.

[680] *Id.*

[681] *Id.* at 10.

[682] *Id.* at 12.

[683] Comp. Gen. B-295424, February 23, 2005, 2005 CPD ¶ 39. There are limited facts presented in this opinion because the protester filed pro se and the GAO had to protect select information covered by a protective order. *Id.* at 1.

contract, competed for a furniture moving and assembly services task order. After the Office of Personnel Management (OPM) announced the task order award to a competitor, Crestridge protested, claiming, *inter alia,* that OPM's technical evaluation was unreasonable because the evaluation and source selection decision were inconsistent with the stated evaluation criteria.[684]

The GAO agreed. It noted that the RFQ stated the task order would be awarded on a best value basis with the following three evaluation factors serving as the award criteria: technical; experience and past performance; and price.[685] After evaluating revised quotations from the awardee and Crestridge, the OPM concluded that the awardee's "technical approach better targeted specific OPM needs whereas Crestridge quotation was general in nature, lacked detail about the extent of the available labor pool to accomplish the required services, and did not include specifics about the OPM's needs."[686] This finding played a large part in OPM's decision to place the task order with the awardee.

The GAO determined that OPM's technical evaluation was unreasonable, explaining that the record did not support the OPM's conclusion. For example, the GAO noted that Crestridge submitted a more detailed quote and their quote was almost twice as long as the awardee's.[687] The GAO pointed out that Crestridge was sometimes penalized for not providing specific information while the awardee was not penalized for also failing to submit the required information.[688] Because OPM did not evaluate the quotes correctly, the GAO concluded that there was a reasonable possibility that Crestridge was prejudiced. Accordingly, the GAO recommended the agency revaluate all quotations, hold discussions of necessary, and make a new source selection decision. Crestridge was also awarded its protest costs, to include reasonable attorney fees.[689]

Major Steven R. Patoir

Socio-Economic Policies

Post –Adarand *Price Preference Issues Continue*

The Supreme Court's decision in *Adarand*[690] requiring a strict scrutiny analysis for race-based initiatives in federal contracts is now nearly ten years old, but its impact on price preference provisions in government contracts still continues. The Contract and Fiscal Law Department has chronicled the post-*Adarand* developments in the *Year in Review* over the last several years and this year will be no different.[691]

The most significant post-*Adarand* case still bouncing around the court system this year was *Rothe Development Corporation v. U.S. Department of Defense*.[692] Rothe was an incumbent, woman-owned small business that submitted the low bid for a computer-related services contract with an Oklahoma Air Force base. Rothe lost the contract to another firm when a ten percent price adjustment was added to Rothe's bid in accordance with § 1207 of the National Defense Authorization Act of 1987[693] because the competing firm was a small disadvantaged business. Rothe brought suit against the Air Force alleging that the small disadvantaged business price preference was unconstitutional because it violated equal

---

[684] Crestridge also argued that the government's price evaluation was improper because the government incorrectly estimated the overtime hours and applied the wrong hourly rate to weekend and evening work. In addition, Crestridge asserted that a negative past performance rating did not apply to this competition because the work underlying this rating was different than the contemplated order. The GAO disagreed with these allegations. It observed that OPM applied the same hourly rate analysis to the awardee and Crestridge. Therefore, the GAO concluded that the agency price evaluation was reasonable. The GAO also concluded that OPM evaluated the vendors past performance correctly because OPM focused on Crestridge's management weakness, not the type of work performed. *Id.* at 6.

[685] *Id.* at 2.

[686] *Id.* at 3.

[687] Crestridge provided more detail about their labor hours and the personnel proposed to perform the work. *Id.* at 8.

[688] Both Crestridge and the awardee failed to include details about the project schedule and proof that their employees are professionally trained. *Id.*

[689] *Id*. at 9.

[690] Adarand Constr., Inc. v. Pena, 515 U.S. 200 (1995).

[691] *See* Major Thomas C. Modeszto et al., *Contract and Fiscal Law Developments of 2002—The Year in Review,* ARMY LAW., Jan./Feb. 2003, at 38-41 [hereinafter *2002 Year in Review*]; Major Kevin J. Huyser et al., *Contract and Fiscal Law Developments of 2003—The Year in Review,* ARMY LAW., Jan. 2004, at 65 [hereinafter *2003 Year in Review*]; *2004 Year in Review*, *supra* note 40, at 67-68.

[692] 413 F. 3d 1327 (Fed. Cir. 2005).

[693] 10 U.S.C.S. § 232 (LEXIS 2005); s*ee also* FAR, *supra* note 33, at 19-1201. Note that this price preference has been serially suspended by DOD since 1998 (discussed *infra* at page 56). However, the contract in this case was entered prior to the price preference being suspended by the DOD.

protection.[694] The trial court granted summary judgment for the government finding that while the 1992 reauthorization of § 1207 was facially unconstitutional, the 2002 revised version of § 1207 (2002) withstood constitutional muster.[695]

Rothe appealed the district court's decision. The CAFC vacated the district court's decision and remanded the case back to the district court for further factual development on the issue of whether or not the revised authorization of the price preference is constitutional.[696] Stay tuned for further developments in this case over the next year.

In another case, very similar to *Adarand*, the U.S. Court of Appeals for the Ninth Circuit provided a thorough analysis of a race-based preference statute under the Supreme Court's strict scrutiny test and ultimately rejected appellant's constitutional challenges to the Transportation Equity Act for the 21st Century[697] which authorizes race- and sex-based preferences in the award of federally funded transportation contracts.[698] The court, however, sustained the appeal based on the state's application of the statute in this case.

In July 2000, Western States Paving Company submitted a bid for subcontracting work in Washington that was funded by federal transportation funds provided to the Washington State Department of Transportation.[699] Western did not receive the contract because of statutory and regulatory mandates for minority participation resulting in price preferences being given to minority subcontractors.[700]

The court stated that "Congress identified a compelling remedial interest when it enacted the [price preference statute] and the [disadvantaged business enterprise] program, and the implementation established by the [U.S. Department of Transportation] regulations is—on its face—a narrowly tailored means of achieving that of that objective."[701] For this reason, the court granted summary judgment for the federal government on Western's facial challenge of the statute.

Unfortunately for the state of Washington, the court went on to sustain Appellant's claim, holding that "as applied, the statute violated Western's equal protection rights because the record was "devoid of any evidence suggesting that minorities currently suffer - or have ever suffered—discrimination in the Washington transportation contracting community."[702] The court remanded the matter to the district court with instructions to enter summary judgment in favor of Western.[703]

Cascading Set-Asides Remain a Hot Issue

Cascading set-aside procedures remained a hot topic for contractors this past year. Under these procedures, agencies solicit bids and open the bids in order of legal socio-economic preference priority.[704] If the agency finds satisfactory proposals from a class of offerors with a higher socio-economic preference, such as small businesses or small disadvantaged businesses, then the agency does not open the proposals from offerors with a lower socio-economic preference. On 12 July 2005, the Professional Services Council (PSC), a contractor trade association, wrote a letter to David Safavian, former Administrator of the Office of Federal Procurement Policy (OFPP), urging sharp reductions in the use of cascading procurements.[705]

---

694 *See 2003 Year in Review*, *supra* note 691, at 65.

695 Rothe Dev. Corp. v. United States DOD, 324 F. Supp. 2d 840 (W.D. Tex. 2004)

696 *Rothe*, 413 F.3d at 1337.

697 Pub. L. No. 105-178, 112 Stat. 151 (1998).

698 Western States Paving Co., Inc. v. Washington State Dep't of Transportation, 407 F.3d 983 (9th Cir. 2005).

699 *Id*. at 987.

700 *Id*.

701 *Id*. at 1003.

702 *Id*. at 1002.

703 *Id*. at 1003.

704 *Id*.

705 Kimberly Palmer, *Industry Group Complains About Contracting Method*, GOVEXEC.COM, (July 12, 2005), http://www.govexec.com/story_page.cfm?articleid+31760.

While the cascading set-aside process is designed for administrative convenience, the trade group complained that larger, or even small non-preferred potential contractors are wasting money on bid and proposal costs in situations in which the contracting officers are failing to do their required market research prior to publishing the solicitation.[706] The trade group encouraged OFPP to issue a policy sharply restricting the use of cascades or, in the alternative, reimbursing contractors the bid and proposal costs for any offers not opened.[707]

Industry leaders are not the only ones complaining about the process. Though the GAO has deemed the process acceptable in the past,[708] commentators have recently been questioning its legal basis, which may signify future changes.[709]

In a bid protest case at the COFC, *Greenleaf Construction Co. v. United States,* the court addressed cascading set-aside procedures in federal contracts.[710] *Greenleaf* involved a large contract entered into by the HUD for the procurement of management and marketing services for single family housing units.[711] The contracting officer designed the solicitation as a cascading set-aside where small businesses were the first tier set-aside priority. The protester, who was initially selected for award, was one of two small-business offerors that the contracting officer deemed to be in the competitive range.[712]

The other small business offeror, Chapman, however, filed a size protest with the SBA to make a determination on Greenleaf's eligibility as a small business.[713] The SBA found that Greenleaf was "other than a small business," and therefore, ineligible for the set-aside award.[714] This exclusion left only one small business offeror, Chapman, in the competitive range. Based on these changed circumstances, the contracting officer decided to move to the next tier of offerors since the solicitation required two or more such offerors to maintain adequate price competition. Once into the unrestricted class of offerors, Greenleaf was again eligible for award and was, in fact, selected for award.[715]

Chapman protested the award decision to the GAO.[716] In light of the protest, the HUD reconsidered its decision based on the SBA recommendations. The contracting officer decided that adequate price competition had existed among small businesses, and further decided to award the contract to Chapman.[717] Greenleaf protested that decision to the court requesting declaratory and injunctive relief.[718]

The court analogized this situation to the rule of two in the typical small business set-asides.[719] When deciding whether or not to set a solicitation aside for small businesses, the contracting officer typically must make a prospective determination about whether or not two or more responsible small businesses *will* solicit bids.[720] The court in *Greenleaf* held that when cascading set-aside procedures are implemented, the determination whether or not reasonable competition can be obtained is made at the time of bid opening, not after the SBA rules on any potential requests for certificates of competency.[721] Since it appeared that there were two responsible small businesses at time of bid opening, the court held that

---

[706] *Id*.

[707] *Id*.

[708] *See* Carriage Abstract, Inc., Comp. Gen. B-290676, Aug. 15, 2002, 2002 CPD ¶ 148 (holding that the cascading set-aside provisions in the solicitation reasonably put large businesses on notice of the risks they were assuming by soliciting bids, and was therefore a permissible contract action); Urban Group, Inc., Comp. Gen. B-281352, Jan. 28, 1999, 99-1 CPD ¶ 25 (holding that the GAO was aware of no statute or regulation that would prohibit this cascading set-aside approach and as such there was no basis to object to it).

[709] Vernon J. Edwards, *Cascading Set-Asides: A Legal and Fair Procedure?* 19 NASH & CIBINIC REPORT 8, ¶ 117 (2005).

[710] Greenleaf Constr. Co. v United States, 67 Fed. Cl. 350 (2005).

[711] *Id*. at 351-52.

[712] *Id*. at 353.

[713] *Id*.

[714] *Id*.

[715] *Id*. at 354.

[716] *Id*.

[717] *Id*. at 355.

[718] *Id*.

[719] *Id*. at 360.

[720] *Id*.

[721] *Id*. at 361.

the contracting officer appropriately kept the award within tier-one small business offerors when awarding the contract to Chapman.[722]

Prior to making their findings, the court questioned and perhaps provided warnings about the use of the cascading set-aside contracting process. The court stated that "at the outset we note that the cascade procedure has developed without the discipline of regulatory guidance [and] . . . while the justifications for cascading may be legitimate, they cannot [be used in such a way as to] lead to a procurement that violates acquisition regulations."[723] Interestingly, after raising these apparent concerns, the court noted that Greenleaf did not challenge the use of the cascading set-aside procedure at the time the solicitation was issued.[724] Perhaps in a future pre-bid opening protest of a solicitation, the court will view cascading set-aside procedures more harshly.

Bundle Up? GAO Says No

In a case that implicated the new contract bundling rules implemented in October 2003 that made the FAR bundling rules applicable to FSS schedule contracts,[725] the GAO sustained a protest by an unsuccessful offeror finding that the Army Tank and Automotive Command (TACOM) failed to conduct the proper bundling analysis required by FAR § 7.107; failed to provide bundling notice to the SBA as required by FAR § 19.202-1; and failed to notify the incumbent small business contractor of its intent to bundle the contract as required by FAR § 10.001.[726]

The TACOM decided to consolidate a large engineering and support services contract that had previously been awarded to small businesses into a much larger single BPA for five years under the GSA's FSS for Professional Engineering Services.[727] The agency unsuccessfully argued, among other things, that the 2003 modification to the regulations covering the required analysis for bundling of contracts did not apply to this contract because the acquisition *planning* for this contract was completed prior to the implementation date for the new rules applicable to FSS contracts.[728]

The GAO recommended that the Army conduct an analysis in accordance with the FAR requirements to determine whether bundling was necessary and justified for these services, or whether these services should remain reserved for small business.[729] The GAO also recommended that the agency provide a complete copy of the analysis to the SBA and, if appropriate, to set aside the award for small businesses.[730]

Small Businesses Garner Record Contracts

In August 2005, the SBA proudly reported on the accomplishments of small businesses acquiring federal contracts: "U.S. small businesses reaped a record $69.23 billion in federal prime contracts in FY 2004 surpassing the previous high by almost 6 percent. The contracts represented 23.09 percent of federal prime contract dollars and 43.7 percent of federal prime contracting actions in FY 2004."[731]

The government also exceeded its statutory goal of awarding five percent of contracts to small disadvantaged businesses. Contracts to HUBZone contractors, woman-owned small businesses, and service-disabled veteran-owned small

---

[722] *Id*.

[723] *Id*. at 356.

[724] *Id*. at 356, n.13.

[725] Federal Acquisition Regulation; Contract Bundling, 68 Fed. Reg. 60,000 (Oct. 20, 2003).

[726] Sigmatech, Inc., B-296401, Aug. 10, 2005, 2005 CPD ¶156.

[727] *Id*. at 2.

[728] *Id*. at 6.

[729] *Id*. at 8.

[730] *Id*. at 8. The GAO also recommended awarding the protester their legal fees for filing the protest. *Id*.

[731] Press Release, Small Business Administration, Small Business Garnered a Record $69 Billion in Federal Contracts in FY 2004 (Aug. 25, 2005), *available at* http://www.sba.gov/news/05-49-Record-small-Business-contracts.pdf.

businesses all increased over the previous year, though these categories of contractors did not quite reach their statutory goals.[732]

Small and Disadvantaged Business Price Preferences Suspended for DOD and Civilian Agencies

As a result of the DOD's success in again exceeding its statutory goal of awarding five percent of its contracts to small disadvantaged businesses (SDB), the DOD again suspended the use of price evaluation adjustments for SDBs in DOD procurements through 23 February 2006.[733] Title 10, subsection 2323(e) of the U.S. Code requires the DOD to suspend the price preference when the Secretary of Defense determines at the beginning of the fiscal year that the agency achieved its five percent goal for the previous year.[734] Because of the DOD's continued success in this area, the price preference has been suspended for DOD contracts annually since 1998.

While the suspension of the price preference within DOD is old news, civilian agencies also suspended the use of the price preference for SDBs this year for the first time since the price preferences were implemented.[735] The cause of the suspension was a lapse in statutory authorization when the Small Business Reauthorization and Manufacturing Assistance Act of 2004[736] chose not to authorize the price preference that it had authorized in each of the previous years since the implementation of the preference.[737]

Currently, only the Coast Guard and NASA are authorized and required to provide a price preference under FAR 19.11 because neither of these agencies are covered by either suspension.[738] The government-wide goal for contracting with SDBs at not less than five percent remains in effect.

When Is Market Research Enough? HUBZone Contractors Get a Boost

The GAO sustained a protest by a small business contractor in a Historically Underutilized Business Zone (HUBZone) because the contracting specialist failed to perform sufficient market research to determine whether or not two responsible HUBZone small business concerns could compete for the contract as required by FAR 19.1305 and case law.[739]

The contract in this case was for aircraft cleaning and is of some significance because the contracting specialist did conduct some market research to include consideration of current and past contracts as well as extensive research on the SBA's Pro-Net web-based small business database system to search for potential HUBZone offerors.[740] Finding no HUBZone offerors, the contracting specialist decided to set-aside the protest for small businesses.[741] As it turned out, there were available HUBZone small business concerns (SBCs) in the area and one of them protested.

The GAO held that while the agency undertook efforts to determine whether two capable HUBZone firms would submit offers, "its efforts were insufficient under the circumstances" because after completing their research and acquisition plan, but prior to actually issuing the IFB, the agency was put on notice that a similar contract at a sister installation was being performed by a HUBZone SBC.[742]

---

[732] *Id*.

[733] Memorandum, Director, Defense Procurement and Acquisition Policy, to Directors of Defense Agencies, subject: Suspension of the Price Preference Evaluation Adjustment for Small Disadvantaged Businesses (24 Jan. 2005).

[734] *Id*.

[735] Memorandum, Chief Acquisition Officer, U.S. Small Business Administration, to Chief Acquisition Officers and Senior Procurement Executives, subject: Suspension of the Price Evaluation Adjustment for Small Disadvantaged Business at Civilian Agencies (22 Dec. 2004) [hereinafter Suspension Memo].

[736] Pub. L. No. 108-447, 118 Stat. 2809 (2004).

[737] Suspension Memo, *supra* note 735.

[738] *Id*.

[739] SWR Inc., Comp. Gen. B-294266, Oct. 6, 2004, 2004 CPD ¶ 219.

[740] *Id*. at 2.

[741] *Id*. at 3.

[742] *Id*. at 4.

Executive Order Gives Service—Disabled Veteran Owned Contractors Boost, Too

To strengthen and increase opportunities in federal contracting for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs), President Bush signed an Executive Order requiring heads of agencies "to provide significantly more contracting opportunities" to SDVOSBs.[743] The Executive Order requires agencies to do more to implement the statutory three percent goal for SDVOSB contracts and demands that agencies more effectively implement the authority to reserve certain procurements for SDVOSBs to help attain that goal.[744]

The SBA and the FAR Councils[745] issued final regulations in May 2005 permitting contracting officers to restrict awards to SDVOSBs if there is a reasonable expectation that at least two SDVOSBs will submit bids at a fair market price.[746] Sole source awards are permitted if the contracting officer does not expect to get two SDVOSBs bids and the contract will not exceed $3 million (or $5 million for manufacturing contracts).[747] This new rule does not provide for any price preferences, but does give SDVOSBs similar preference status as Section 8(a) and HUBZone SBCs.[748]

And How About a Little Something for the Hawaiians?

The past year saw some high profile criticism of the FAR's allowable preference for awarding sole-source contracts above the Small Business Administration's Section 8(a) competition threshold[749] to Alaskan Native Corporations and Indian Tribes.[750] The critics of the rule protest that, although apparently legal, such a large number of high dollar value contracts are currently being awarded to Alaska Native Corporations that there is an unfair impediment to competition.[751] The criticism was not enough, however, to prevent Congress from extending the same benefit to Native Hawaiian Organizations. A DFARS interim rule expanding the identical preference for DOD 8(a) contracts with Native Hawaiian Organizations for at least FY 2004 and 2005.[752] The interim rule implements Section 8021 of the DOD Appropriations Act for FY 2004 and 2005.[753]

Major Michael S. Devine

Randolph-Sheppard Act

A military cafeteria contract at Fort Campbell, Kentucky, gave the CAFC the opportunity to revisit the issue of whether or not a disappointed bidder—a Randolph-Sheppard Act (RSA) contractor—is required to exhaust its administrative remedies prior to filing a bid protest action.[754]

---

[743] Exec. Order No. 13360, 69 Fed. Reg. 62547 (Oct. 26, 2004).

[744] *Id*. This set-aside authority was provided for by § 308 of the Veterans Benefits Act of 2003 (Pub. L. No. 108-183) which authorized contracting officers and to set-aside procurements for SDVOSBs and to make sole source awards.

[745] The FAR Councils are the civilian and defense councils that oversee the Federal Acquisition Regulation.

[746] Government Contracting Programs, 70 Fed. Reg. 14523-14529 (Mar. 23, 2005).

[747] *Id*.

[748] *See generally* FAR, *supra* note 33, at 19.8 and 19.1306.

[749] The competition threshold for 8(a) contracts is $3 million for most acquisitions, but $5 million for manufacturing contracts. *Id.* at 19.805-1.

[750] *See generally* William K. Walker, Feature Comment: Alaska Native Participation in Government Contracts: Victims of Success, 47 THE GOVERNMENT CONTRACTOR 28, ¶ 322 (July 27, 2005); Kimberly Palmer, *The Alaskan Edge*, GOVERNMENT EXECUTIVE, July 15, 2005, available at www.govexec.com/features/0705-15/0705-15s2.htm.

[751] *See generally* William K. Walker, Feature Comment: Alaska Native Participation in Government Contracts: Victims of Success, 47 THE GOVERNMENT CONTRACTOR 28, ¶ 322 (July 27, 2005); Kimberly Palmer, *The Alaskan Edge*, GOVERNMENT EXECUTIVE, July 15, 2005, available at www.govexec.com/features/0705-15/0705-15s2.htm.

[752] Defense Federal Acquisition Regulation Supplement; Sole Source 8(a) Awards to Small Business Concerns Owned by Native Hawaiian Organizations, 70 Fed. Reg. 43072 (July 26, 2005).

[753] Pub. L. No. 108-87, 115 Stat. 1054 (2003); Pub. L. No. 108-287, 118 Stat. 951 (2004).

[754] Kentucky v. United States, 424 F.3d 1222 (Fed. Cir. 2005).

Fort Campbell issued a solicitation in October 2003 for cafeteria services at the military installation.[755] The solicitation indicated that the contract was subject to the RSA.[756] The Kentucky Department for the Blind (KDB), a state licensing agency under the RSA, submitted a bid, but the contracting officer determined that KDB's bid was outside the competitive range.[757] The KDB filed a protest with the COFC contending that its bid should have been included in the competitive range and, pursuant to DOD policy, it should have been awarded the contract.[758]

The COFC dismissed KDB's complaint for lack of subject matter jurisdiction.[759] The COFC found that because KDB's complaint had a "reasonable nexus" to the RSA, KDB was required to exhaust the administrative remedies provided in the RSA which include asking the State Secretary of Education to convene an arbitration panel to resolve the dispute.[760] KDB had not done so.

On appeal, KDB argued that its protest did not raise a claim under the RSA, and thus, arbitration would be inappropriate and unavailable.[761] Alternatively, KDB argued that even if its claim falls within the scope of the RSA, the RSA arbitration rules provide permissive, non-mandatory alternatives to filing a bid protest at the COFC.[762] The CAFC agreed with the COFC and held that KDB's complaint was premised on a violation of the RSA and, therefore, falls under the scope of the arbitration provisions of the Act.[763] Finally, the CAFC found that the discretionary term "may" in the statute "refers only to the initial discretion that the state licensing agency has in electing to challenge agency action in the first instance; if [they] "do so however, they must do so through the arbitration process.[764] The court affirmed the COFC's dismissal of the case on the basis that the COFC lacked jurisdiction over the complaint.

Javits-Wagner O'Day (JWOD) Program Developments[765]

The regulations at chapter 51, title 41 of the Code of Federal Regulation (CFR), ''Committee for Purchase From People Who Are Blind or Severely Disabled," provides the requirements, standards, and procedures for the JWOD Program.[766] The current regulations do not include governance standards for the affiliated nonprofit agencies working with the JWOD program. Responding to public criticism and a few reported instances of excessive compensation packages for nonprofit agencies involved with the JWOD Program, The Committee for the Purchase From People Who are Blind or Severely Disabled (the Committee) proposed new regulations for nonprofit agencies awarded government contracts under the authority of the JWOD Act.[767] The proposed regulations would have required nonprofit agencies wishing to qualify for

---

[755] *Id*. at 1223.

[756] *Id*. Under the Randolph-Sheppard Act, 20 U.S.C §§ 107, state licensing authorities under the State Departments of Education and representing the interest of blind vendors are permitted to submit bids on federal contracts on behalf of those vendors, and those bids are given special consideration. Pursuant to DOD Directive 1125.3, the DOD mandates that if the State licensing agency submits a proposal within the competitive range established by the contracting officer, then that contract must be awarded to the State licensee. U.S. DEPT. OF DEF., DIR. 1125.3, VENDING FACILITY PROGRAM FOR THE BLIND ON FEDERAL PROPERTY (7 Apr. 1978).

[757] *Kentucky*, 424 F.3d. at 1224.

[758] *Id*.

[759] *Id*. (citing Kentucky v. United States, 62 Fed. Cl. 445 (2004)).

[760] *Id.*

[761] *Id*.

[762] *Id*. Section §107d-1(a) of title 20 of the U.S. Code states that "a vendor . . . *may* file a complaint with the Secretary. . . ." (emphasis added). 20 U.S.C.S. §107d-1(a) (LEXIS 2005).

[763] *Kentucky*, 424 F.3d. at 1227.

[764] *Id*. at 1228.

[765] Named for its enabling legislation, the Javits-Wagner-O'Day Act of 1971 (41 U.S.C.S. §§ 46–48c (LEXIS 2005)), the JWOD Program is a mandatory source of supply for Federal employees. The JWOD Program creates jobs and training opportunities for people who are blind or who have other severe disabilities. Its primary means of doing so is by requiring Government agencies to purchase selected products and services from nonprofit agencies employing such individuals. The JWOD Program is administered by the Committee for Purchase from People Who Are Blind or Severely Disabled. Two national, independent organizations, National Industries for the Blind (NIB) and NISH, have been designated by the Committee as central nonprofit agencies, and these organizations help State and private nonprofit agencies participate in the JWOD Program. 41 U.S.C.S. §§ 46–48c (LEXIS 2005).

[766] Governance Standards for Central Nonprofit Agencies and Nonprofit Agencies Participating in the Javits-Wagner-O'Day Program, 69 Fed. Reg. 65,395 (proposed Nov. 12, 2004).

[767] Neil Munro, *Critics Call for Overhaul of Program Aimed at Employing Disabled*, GOVEXEC.COM (Apr. 22, 2005), *available at* www.govexec.com/dailyfed/0405/042205njl.htm.

participation in the JWOD Program to comply with, and certify their compliance with, new Committee approved standards of conduct to include restrictions on the makeup of the Board of Directors; limitations on executive compensation; and a requirement that minutes of the Board of Director's meetings be published and made public.[768]

Unfortunately, in response to extensive public comments, the Committee determined that the best course of action would be to withdraw the proposed rule to allow for extensive study of the comments and a potential re-drafting of the proposed rule.[769] The Committee hopes to have a new proposed rule prepared by the end of the calendar year (2005).[770]

Major Michael S. Devine

Foreign Purchases

The GAO recently issued a report analyzing the effect of international agreements on a variety of domestic preference laws,[771] particularly the Buy American Act.[772] The GAO found that the United States is party to "three multilateral trade agreements, four bilateral trade agreements, and three recently signed free-trade agreements that now await congressional approval. In addition, the DOD has signed twenty-one reciprocal defense procurement MOUs that remove barriers to procuring defense supplies."[773] The waiver of domestic preference statutes under these agreements and MOUs is "limited to procurements in excess of established dollar thresholds and to the categories of products and the federal entities covered by each agreement."[774] The seven trade agreements are authorized under the authority of the Trade Agreements Act and the Defense MOUs rely on the "public interest" exception to the Buy American Act.[775]

The GAO found that the effect of all these agreements is to result in the "waiver of the Buy American Act and DOD's Balance of Payments Program for certain products from forty-five countries."[776] The report was not intended to change or solve any particular problem, but Congress requested the GAO to determine the effect these agreements have on the applicability of U.S. domestic source restrictions to help "provide a better understanding of the relationship between domestic source preferences and these international agreements"[777] The GAO did not provide any recommendations in its report.

Berry Amendment[778]*—Final Rule*

Following the beret saga and the negative publicity the Army received for it over the last few years, the DOD looked at ways to tighten up the Berry Amendment waiver authority.[779] To (hopefully) conclude this saga, the DOD issued a final rule establishing a policy for waiving the domestic source preference for the acquisition of items covered by the Berry Amendment.[780] Under the new rule, only the Undersecretary of Defense for Acquisition, Technology and Logistics, and the

---

[768] 69 Fed. Reg. at 65,397-401.

[769] Governance Standards for Central Nonprofit Agencies and Nonprofit Agencies Participating in the Javits-Wagner-O'Day Program, 70 Fed. Reg. 38080 (July 1, 2005).

[770] *Id*.

[771] U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-05-188, INTERNATIONAL AGREEMENTS RESULTS IN WAIVERS OF SOME U.S. DOMESTIC SOURCE RESTRICTIONS (Jan. 2005).

[772] 41 U.S.C.S. §§ 10a-d (LEXIS 2005).

[773] *Id*. at 2.

[774] *Id*.

[775] *Id*. at 8-9.

[776] *Id.*

[777] *Id*. at 1.

[778] The Berry Amendment, codified at 10 U.S.C. § 2533a, requires that certain items such as clothing, hand-tools, tents, and certain metals by purchased from domestic suppliers only absent a waiver. 10 U.S.C.S. § 2533a (LEXIS 2005).

[779] *See 2002 Year in Review*, supra note 691, at 74.

[780] Defense Federal Acquisition Regulation Supplemental; Berry Amendment Memoranda, 70 Fed. Reg. 43,073 (July 26, 2005) (amending DFARS 225-7002-2(b)).

Secretaries of the military departments may make domestic non-availability determinations under the Berry Amendment.[781] The authorities are specifically made non-delegable under the new rule.[782]

Major Michael S. Devine

Labor Standards

Employees Get Paid for Off-Duty "Overtime" Even If CBA Says Otherwise

In *Bull v. United States*,[783] canine enforcement officers of the Customs Service sought to be paid for off-duty work that the Customs Service allegedly suffered or permitted them to perform. These tasks included laundering towels related to the dogs' training, constructing drug-concealing containers used as dog training aids, weapons training, and cleaning and maintaining their weapons while off-duty.[784] These types of "work" had apparently been performed by officers during off-duty time without pay for decades,[785] although the Customs Service did not explicitly direct the officers to perform these tasks in their off-duty time.

The "Overtime" section of the Collective Bargaining Agreement (CBA) applicable in this case specifically provided that "[e]mployees who are classified non-exempt under the Fair Labor Standards Act may not perform work outside normal working hours unless specifically ordered or authorized by the Employer to do so."[786] Another section of the CBA provided that "[w]hen assigned overtime, employees working such overtime will be compensated in accordance with applicable laws and regulations."[787] The CBA, the government argued, therefore permitted overtime pay only when a supervisor assigned overtime work to an employee, and not when the government merely "suffered or permitted" employees to perform work-related activities during off-duty hours.[788] The officers, and their union,[789] however, argued that the union could not, through the CBA, effectively waive employees' rights under the Fair Labor Standards Act (FLSA),[790] which requires payment of overtime wages for work in excess of forty hours per week.[791] Under OPM regulations implementing the FLSA, "hours of work" includes "[t]ime during which an employee is suffered or permitted to work[.]"[792]

Relying principally on the Supreme Court's decision in *Barrentine v. Arkansas-Best Freight System, Inc.*,[793] the COFC held that the CBA could not waive the substantive rights under the FLSA,[794] and that therefore the Customs Service was not shielded from paying overtime for off-duty work that the Customs Service "suffered or permitted" the employees to

---

[781] 70 Fed. Reg. 43,073.

[782] *Id*.

[783] 65 Fed. Cl. 407 (2005).

[784] *Id*. at 408 n.1.

[785] *Id*. at 417.

[786] *Id*. at 409.

[787] *Id*.

[788] *Id*.

[789] The National Treasury Employees Union submitted an amicus curiae brief in this case. *Id*. at 408.

[790] Fair Labor Standards Act of 1938, 29 U.S.C.S. §§ 201-219 (LEXIS 2005).

[791] *Bull*, 65 Fed. Cl. at 410.

[792] 5 C.F.R. § 551.401(a)(2) (2005). Although not specifically cited by the court, the "Definitions" section of the Fair Labor Standards Act specifies that the term "employ" includes "to suffer or permit to work." 29 U.S.C.S. § 203(g) (LEXIS 2005).

[793] 450 U.S. 728 (1981). In *Barrentine*, the Supreme Court stated:

> This Court's decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act. Thus, we have held that FLSA rights cannot be abridged by contract or otherwise waived because this would "nullify the purposes" of the statute and thwart the legislative policies it was designed to effectuate. Moreover, we have held that congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation arrangement.

Id. at 740-41 (citations omitted). The COFC also cited Air Line Pilots Ass'n Int'l v. Northwest Airlines, Inc., 199 F.3d 477, 485-86 (D.C. Cir.1999), *judgment reinstated*, 211 F. 3d 1312 (D.C. Cir. 2000) (en banc), as establishing that absent congressional authority, a union "may not prospectively waive statutory rights on behalf of employees." *Bull*, 65 Fed. Cl. at 414.

[794] *Bull*, 65 Fed. Cl. at 415.

perform.[795] The court went further, stating that even if FLSA rights could be waived by the union in a CBA, the language of this particular CBA did not provide a "clear and unmistakable" waiver of FLSA claims.[796]

Still, this doesn't mean that employees can automatically get overtime pay for performing work-related tasks during off-duty hours on their own initiative. The employees still have burden of proving that the activities constitute "work,"[797] and that the claimed hours of work are compensable.[798] In subsequent proceedings at the end of the fiscal year,[799] the COFC meticulously examined each of the officers' claims, applying extensive case law on each point, and found that some of the claimed tasks were compensable as "overtime." For example, the use of the towels in training the drug-sniffing dogs, and the necessity for laundering the towels after each use, were demonstrated to be a crucial part of the training of the dogs mandated by Customs Service regulations.[800] Several of the field locations, however, did not have facilities for laundering the towels, and the supervisors had actual or constructive knowledge that the employees were laundering the towels during off-duty hours and did not forbid or discourage the practice.[801] Accordingly, the court found that this was compensable overtime work.[802] Some other tasks, such as off-duty weapons proficiency training, did not withstand the court's detailed analysis and were not found to be compensable.[803] The court's analysis in this case serves as a very good example of how to distinguish between compensable and non-compensable claims of overtime for off-duty work that an employee is "suffered or permitted" to perform.

CBA's Contingent Wage Increase Doesn't Count, unless DOL Falls for It Too

Recently, the Federal Circuit held that while a contingent wage increase under a new CBA renders it ineffective to compel a contract price adjustment, a Department of Labor (DOL) wage determination erroneously issued based upon that faulty CBA does apply to a contract made after the wage determination is issued, even if that wage determination is subsequently withdrawn after the contract is made. In *Guardian Moving & Storage Company v. Hayden*,[804] a contractor providing drayage services entered into a new CBA with its employees' union a week before its contract was to be extended for two months by the government.[805] The new CBA provided for wage increases that would be effective on the first day of the contract extension "only if [DOL] issues a wage determination [effective on the first day of the contract extension] made applicable to [the extended contract] which adopts the provisions herein regarding wages and health and welfare benefits."[806]

Twelve days after the contract was extended, the DOL issued a wage determination based upon the new CBA, incorporating the new wage rates and purporting to be effective on the first day of the two-month contract extension. A month later, the contract was extended for another two-month period. A week after that extension, the DOL withdrew its previously-issued wage determination on the grounds that it was erroneous because the new CBA on which it was based contained the contingency language, and was therefore not the result of "arms-length negotiation."[807] The contractor then

---

[795] *Id*. at 418.

[796] *Id*. at 416. The court's reasoning on this point, however, was not necessarily compelling. Countering the Government's argument that the CBA language ("Employees who are classified as non-exempt under the Fair Labor Standards Act may not perform work outside normal working hours unless specifically ordered or authorized by the Employer to do so") is a waiver of the FLSA right to overtime pay for off-duty work that was not specifically ordered or authorized, the court noted that the subject of waiver is not specifically mentioned in that language. *Id*. The court also stated that its conclusion does not, as the Government argued, render the CBA language meaningless because that language "provides a basis upon which [the Government] could have ordered plaintiffs not to perform such work . . . ." *Id*.

[797] "For an activity to constitute work, plaintiffs must prove that the activity was (1) undertaken for the benefit of the employer; (2) known or reasonably should have been known by the employer to have been performed; and (3) controlled or required by the employer." Bull v. United States, 2005 U.S. Claims LEXIS 284 (2005), at *17-18 (citations omitted).

[798] "For work to be compensable, the quantum of time claimed by plaintiffs must not be de minimus, and must be reasonable in relation to the principal activity." *Id*. at *18-19 (citations omitted).

[799] Bull v. United States, 2005 U.S. Claims LEXIS 284 (2005).

[800] *Id*. at *64-70, 83-88.

[801] *Id*. at *92-101.

[802] *Id*. at *101-102.

[803] *Id*. at *156.

[804] 421 F. 3d 1268 (2005).

[805] *Id*. at 1270.

[806] *Id.*

[807] *Id*. at 1270-71.

removed the contingency language and the DOL issued a new wage determination,[808] which again purported to be effective on the first day of the first contract extension.[809]

In its appeal, the contractor argued that it was entitled to a price adjustment for the first extension period because the newest wage determination purported to be effective on the first day of the first extension. The Federal Circuit rejected that argument, holding that "wage determinations issued by DOL are not retrospective, regardless of the effective date of the underlying CBA."[810] This, the court noted, is clear from the language of DOL's regulations, which states that wage determinations are applicable to contracts "entered into [after the issuance of the wage determination] and before such determination has been rendered obsolete by a withdrawal, modification, or supersedure."[811]

The contractor also argued that it was nonetheless entitled to a price adjustment for the first extension period based upon section 4(c) of the Service Contract Act,[812] because once the erroneous wage determination was issued with an effective date of the first day of the extension, the contractor became legally bound by the CBA to pay the increased wages.[813] The Federal Circuit rejected that argument too, noting that section 4(c) applies only to CBA's entered into "as a result of arm's-length negotiations,"[814] and that the DOL had determined that the contingency clause in the new CBA equated to an absence of "arm's-length negotiations."[815] The Federal Circuit did agree, however, that the contractor is entitled to a price adjustment for the second contract extension, because at the time of that extension the erroneous DOL wage determination was in effect.[816] This is true even though that wage determination was in error and was subsequently withdrawn, because there was no authority to deem the withdrawal retroactive.[817]

Sometimes Labor-Related Disputes Can Be Heard at Boards of Contract Appeals

In *Myers Investigative & Security Services, Inc.*,[818] the GSBCA decided that it had jurisdiction to entertain a dispute involving the assessment of liquidated damages against a contractor for violating the Service Contract Act[819] and the Contract

---

[808] *Id*. at 1271.

[809] *Id*. at 1272.

[810] *Id*.

[811] *Id*. at 1272-73 (quoting 29 C.F.R. § 4.3(b) (2004)).

[812] McNamara-O'Hara Service Contract Act of 1965, 41 U.S.C.S. §§ 351-358 (LEXIS 2005).

[813] *Guardian*, 421 F.3d at 1272.

[814] *Id*. at 1273. Specifically, Section 4(c) provides:

> No contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract . . . .

41 U.S.C.S. § 353(c) (LEXIS 2005).

[815] The court did not explain the DOL's rationale in concluding that the contingency clause in the CBA equates to a lack of "arm's-length negotiations." However, the Armed Services Board of Contract Appeals, from which this case was appealed, noted that "DOL will not issue a wage determination specifying the wage rate in a CBA if a contingency in the CBA would limit a contractor's obligations by requiring issuance of a wage determination to obtain contracting agency reimbursement because such an agreement reflects a lack of arm's-length negotiations." Guardian Moving and Storage Company, Inc., ASBCA Nos. 54248, 54479, 04-2 BCA ¶ 32,753. The ASBCA quoted from a letter provided by DOL, dated 21 January 1992, which explained the policy rationale:

> Prospective wage rate and fringe benefit increases negotiated in CBA's [sic] that contain these contingencies essentially attempt to limit a contractor's obligations to comply with the provisions of section 4 (c) [of the SCA] to those situations where the contractor is reimbursed by the contracting agency. As such, because this constitutes an apparent attempt to take advantage of the wage determination scheme provided in sections 2 (a) and 4 (c) of the [SCA], . . . [DOL] has concluded that these provisions typically do not reflect arm's-length negotiations.

Id. at 161,980.

[816] *Guardian*, 421 F.3d at 1273.

[817] *Id.*

[818] GSBCA No. 16587-EPA, 05-2 BCA ¶ 32,983.

[819] McNamara-O'Hara Service Contract Act of 1965, 41 U.S.C.S. §§ 351-358 (LEXIS 2005).

Work Hours and Safety Standards Act (CWHSSA).[820] In *Myers*, the EPA repeatedly refused to incorporate into the contract the wage rates set forth in an addendum to the CBA, despite the contractor's repeated requests.[821] As a result, the contractor was placed in a "precarious financial position" and ultimately discontinued paying those increased wages, reverting instead to the lower wage rates prescribed by the contract.[822]

The DOL found that EPA's failure to incorporate the wage rates violated FAR 22.1012-3(b), and instructed EPA to retroactively amend the contract to incorporate the wage rates reflected in the CBA addendum, which the EPA then did.[823] The contractor then resumed paying the employees the higher rates in accordance with the CBA addendum, and made full restitution to the employees of the back wages. Later, the DOL informed the EPA that although the contractor had made full restitution, the contractor owed liquidated damages of ten dollars per day for each employee who was underpaid during the course of performance of the contract.[824] The EPA assessed the liquidated damages,[825] and denied the contractor's request for relief.[826] The contractor appealed to the GSBCA.

Without getting to the merits, which were left for future resolution, the GSBCA considered the issue of whether the dispute was properly before the board. The EPA sought to dismiss the appeal for lack of jurisdiction, arguing that the dispute concerns labor standards and is therefore reserved exclusively for DOL resolution.[827] The board, however, agreed with the contractor that the dispute was not directed at the labor standards but was instead directed at the parties' "mutual contract rights and obligations."[828] The court explained that although the DOL has exclusive jurisdiction over labor standards issues, "the Court of Federal Claims and boards of contract appeals may still entertain a dispute that centers on the mutual contract rights and obligations of the parties even though matters reserved to and decided exclusively by the DOL are part of the 'factual predicate.'"[829] In this case, the contractor was not disputing the calculation of the liquidated damages, but was instead essentially arguing that by improperly refusing to incorporate the CBA addendum, the EPA had breached the contract and must therefore make the contractor whole—"either through an abatement of the liquidated damages assessment or, if that is not possible, by equitably adjusting the contract price to reflect this cost."[830] The board agreed with the contractor's argument that the labor standards issues "are simply part of the factual predicate of a matter that properly belongs at the Board,"[831] and denied EPA's motion to dismiss for lack of subject matter jurisdiction.[832]

Increased Costs of Fringe Benefits under "Defined Benefit" Plan Is Not Compelled by Wage Determination

If a successor contractor provides health insurance as fringe benefits consistent with the predecessor's CBA, and the cost to obtain that insurance increases, is the contractor entitled to a price adjustment due to those increased costs? "No," answered the ASBCA. In *Lear Siegler Services, Inc*.,[833] the wage determination applicable to the contract incorporated the wages and fringe benefits set forth in the previous contractor's CBA, which provided various health insurance benefits under a "defined-benefit" plan.[834] A "defined-benefit" plan sets forth a fixed set of benefits without specifying the employer's costs

[820] Contract Work Hours and Safety Standards Act, 40 U.S.C.S. §§ 327-333.

[821] *Myers*, 05-2 BCA ¶ 32,983 at 163,467.

[822] *Id*.

[823] *Id*. at 163,467-68.

[824] *Id*. at 163,468. Federal Acquisition Regulation section 22.302(a) provides that the "contracting officer must assess liquidated damages at the rate of $10 per affected employee for each calendar day on which the employer required or permitted the employee to work in excess of the standard workweek of 40 hours without paying overtime wages required by the [CWHSSA]." FAR, *supra* note 33, at 22.302(a).

[825] *Myers*, 05-2 BCA ¶ 32,983 at 163,468.

[826] *Id.* at 163,468-69. The FAR permits the head of the agency to reduce or waive liquidated damages of $500 or less if the liquidated damages assessment was incorrect, or if the contractor inadvertently violated the CWHSSA, and to recommend that the Secretary of Labor reduce or waive liquidated damages over $500. FAR, *supra* note 33, at 22.302(c).

[827] *Myers*, 05-2 BCA ¶ 32,983 at 163,469.

[828] *Id*. at 163,470.

[829] *Id*. at 163,469 (citing Burnside-Ott Aviation Training Center, Inc. v. United States, 985 F. 2d 174 (Fed. Cir. 1993)).

[830] *Id*. at 163,470.

[831] *Id*.

[832] *Id*.

[833] ASBCA No. 54449, 05-1 BCA ¶ 32,937.

[834] *Id*. at 163,169.

to provide those benefits.[835] Over a year into the contract, after the start of the first option period, the contractor requested a price adjustment for increased costs in providing those health insurance benefits.[836] The contracting officer denied the request on the grounds that those increased costs were not compelled by a wage determination.[837]

The ASBCA agreed with the contracting officer. The board noted that the contractor's payment of increased wages or benefits would entitle him to a price adjustment under the contract's Price Adjustment clause[838] "to the extent that the increase is made to comply with the applicable wage determination."[839] However, the contractor was not required to provide the health insurance benefits, per se, in this case. Under the Service Contract Act and applicable DOL regulations, the contractor could instead satisfy its obligation to provide fringe benefits under a wage determination "by making equivalent or differential payments in cash."[840] The contractor's decision to provide the health insurance benefits, at an increased cost, rather than "equivalent" benefits under the CBA at no increased cost, resulted in increased costs that were not necessary to comply with the wage determination and therefore did not entitle the contractor to a price adjustment.[841]

The contractor argued that a price adjustment of that kind was made in a past contract it had with the Government for these services, and that therefore this prior course of dealing bears on the interpretation of the Price Adjustment clause.[842] The board rejected that argument, describing the clause as unambiguous,[843] and noting that the single prior instance of allowing a price adjustment in a past contract was insufficient to establish a relevant prior course of dealing that could modify the terms of the current contract,[844] particularly in the absence of any contemporaneous evidence that the parties understood the Price Adjustment clause to have that alternate meaning or that the contractor relied upon that understanding to its detriment.[845]

---

[835] *Id*.

[836] *Id*. at 163,170.

[837] *Id*. at 163,170-71.

[838] The Price Adjustment clause provided, in relevant part:

> (d) The contract price or contract unit price labor rates will be adjusted to reflect the Contractor's actual increase or decrease in applicable wages and fringe benefits to the extent that the increase is made to comply with or the decrease is voluntarily made by the Contractor as a result of:
>
> > (1) The Department of Labor wage determination applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period . . . .
> >
> > (2) An increased or decreased wage determination otherwise applied to the contract by operation of law . . . .

FAR, *supra* note 33, at 52.222-43.

[839] *Lear Siegler Servs.*, 05-1 BCA ¶ 32,937 at 163,172.

[840] Section 2 of the SCA provides that "[t]he obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary." 41 U.S.C. § 351(a)(2). Department of Labor regulations, in turn, provide:

> Wage determinations which are issued for successor contracts subject to section 4(c) are intended to accurately reflect the rates and fringe benefits set forth in the predecessor's collective bargaining agreement . . . . [A] contractor may satisfy its fringe benefits obligations under any wage determination "by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash" in accordance with the rules and regulations set forth in § 4.177 of this subpart. a

29 C.F.R. 4.163(j) (2005).

[841] *Lear Siegler Servs.*, 05-1 BCA ¶ 32,937 at 163,173.

[842] *Id*.

[843] *Id*. at 163,174.

[844] *Id*.

[845] *Id*. In finding that the contractor had not relied upon its own interpretation, the court noted that the contractor "at the time of submitting its second price adjustment proposal did not expect an adjustment for increased defined benefit costs, but rather requested permission to have such a proposal considered." *Id*.

Davis-Bacon Act Temporarily Suspended for Hurricane Katrina Areas, Then Reinstated

In response to the devastation caused by Hurricane Katrina during the last week of August 2005, President Bush on 8 September 2005 suspended the Davis-Bacon Act,[846] which requires federal contractors to pay construction workers the "prevailing wage rate" in the area, for the affected portions of Louisiana, Florida, Alabama, and Mississippi.[847] Following that controversial action,[848] a number of bills were introduced in Congress to either expand or overturn it.[849] The suspension of the Davis-Bacon Act lasted sixty days; on 3 November 2005, the President revoked the suspension "as to all contracts for which bids are opened or negotiations concluded on or after 8 November 2005."[850]

The Davis-Bacon Act, and its temporary suspension, remains controversial. A recent Congressional Research Service (CRS) Report suggests that the issue of whether the suspension would actually help hold down reconstruction costs remains "an open question."[851] Another recent CRS Report suggested that the suspension was technically improper because it was not preceded by a declaration of a national emergency pursuant to the National Emergencies Act.[852] The CRS Report referred to the President's suspension of the Davis-Bacon Act as "[a]n anomaly in the activation of emergency powers,"[853] and noted that "[t]he propriety of the President's action in this case may be ultimately determined in the courts."[854] At least one Congressman has suggested that because the President's suspension of the Act was not preceded by a proper declaration of a national emergency, contractors could potentially be held liable for failing to pay the prevailing wage rates in contracts awarded during the temporary suspension period.[855]

Major Michael L. Norris

---

[846] Davis-Bacon Act, 40 U.S.C.S. §§ 3141-3144, 3146-3147 (LEXIS 2005). Formerly 40 U.S.C. §§ 276a—a-7, Davis-Bacon was recodified in 2002. *See* Pub. L. No. 107-217, § 1, 116 Stat. 1150 (2002).

[847] Proclamation No. 7924, 70 Fed. Reg. 54227 (Sept. 8, 2005).

[848] There were both supporters and opponents of the suspension. *See* CONG. RESEARCH SERV., LIBRARY OF CONG., THE DAVIS-BACON ACT: SUSPENSION (2005), *available at* http://www.opencrs.com/rpts/RL33100_20050926.pdf.

[849] *See* CONG. RESEARCH SERV., LIBRARY OF CONG., DAVIS-BACON SUSPENSION AND ITS LEGISLATIVE AFTERMATH (2005), *available at* http://opencrs.cdt.org/rpts/RS22288_20051003.pdf.

[850] Proclamation No. 7959, 70 Fed. Reg. 67,899 (Nov. 3, 2005).

[851] CONG. RESEARCH SERV., LIBRARY OF CONG., DAVIS-BACON SUSPENSION AND ITS LEGISLATIVE AFTERMATH 3 (2005), *available at* http://opencrs.cdt.org/rpts/RS22288_20051003.pdf.

[852] CONG. RESEARCH SERV., LIBRARY OF CONG., NATIONAL EMERGENCY POWERS, 19 (updated Sept. 15, 2005), *available at* http://www.fas.org/sgp/crs/nat-sec/98-505.pdf.

[853] *Id*. at 18.

[854] *Id*. at 19.

[855] In a press release, Representative George Miller, ranking Democratic member of the House Education and the Workforce Committee, is quoted as saying:

> President Bush was in such a hurry to cut workers' wages that he did it even before declaring a national emergency. This may mean that the President's wage proclamation was done illegally. Contractors in the Gulf Coast should be aware that the President's proclamation may not protect them from liability if they choose to ignore the law and pay workers less than the prevailing wage.

Press Release, Comm. on Educ. & the Workforce, In Rush to Cut Wages, President Forgets to First Declare National Emergency (Sept. 16, 2005), *available at* http://www.house.gov/apps/list/press/ed31_democrats/rel91605b.html. Interestingly, on October 10, 2005, Representative Miller introduced a joint resolution which states:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That, pursuant to section 202 of the National Emergencies Act (50 U.S.C. 1622), the national emergency declared by the finding of the President on September 8, 2005, in Proclamation 7924 (70 Fed. Reg. 54227) is hereby terminated.

H.R.J. Res. 69, 109th Cong. (2005).

Protest, Filed More Than Ten Days after Receiving Agency Level Protest Decision, Is Timely Filed at the GAO

Defense Supply Center Richmond (DSCR) received quotes from two vendors to provide light plates for military aircraft. After reviewing the offers, the DSCR rejected Supreme Edgelight Devices, Inc.'s (Supreme's),[856] offer because Supreme's design drawings were revised. Immediately afterwards, the DSCR awarded a purchase order to Supreme's competitor, Dreco. Supreme filed an agency-level protest with the DSCR challenging this award.[857] After considering Supreme's agency protest, the DSCR denied the protest and did not award the purchase order to Supreme. Supreme then filed a protest with the GAO.[858]

The DSCR moved to dismiss Supreme's GAO protest arguing the protest was untimely because Supreme filed its protest with the GAO more than ten days after receiving actual or constructive knowledge of the adverse action resolving Supreme's agency-level protest.[859] The DSCR based its position on the fact that Supreme received the agency's adverse action on Saturday, 11 December 2004, and filed the protest with the GAO on Thursday, 23 December 2004.[860] The GAO did not agree.

The GAO noted that Supreme was not open for business on Saturday, 11 December 2004. The weekend clerk who received DSCR's response did not open the envelope.[861] The GAO then explained that a mechanical receipt of an agency's initial adverse action—during a weekend day that is not an ordinary business day—does not constitute actual or constructive notice. It analogizes DSCR's response to receiving an email during the weekend. The fact that the clerk who received the mail on Saturday, 11 December 2004, did not open DSCR's letter was the significant factor.[862]

International Marine Products: Further Clarification of Supreme Edgelight Devices, Inc.

International Marine Products, Inc.[863] protested the Navy's award of a contract for an automation control system inspection, training, system services and repair.[864] Like *Supreme Edgelight Devices*,[865] the issue in *International Marine Products* involves how to determine when a protest is timely filed. Specifically, do you count weekend days if the protester receives an agency's adverse decision in its agency level protest on a Saturday?

Procedurally, the facts in *International Marine Products* are also are very similar to *Supreme*. International Marine Products was not awarded the procurement and filed an agency-level protest.[866] Like Supreme, the company received the agency's adverse resolution of its protest on a Saturday.[867] International Marine Products then, within ten days of receiving the agency's decision, protested to the GAO.[868] Like Supreme, International Marine Products also calculated the ten-day period for filing a protest with GAO starting on the Monday immediately following the Saturday delivery. Finally, just like Supreme, the agency moved to dismiss International Marine Products' protest on timeliness grounds.[869]

---

[856] Supreme Edgelight Devices, Inc., Comp. Gen. B-295574, March 4, 2005, 2005 CPD ¶ 58.

[857] *Id.* at 3.

[858] *Id.* at 4.

[859] *Id.*

[860] *Id.*

[861] *Id.*

[862] *Id.* at 6.

[863] International Marine Products, Inc., Comp. Gen. B-296127, June 13, 2005, 2005 CPD ¶ 119.

[864] *Id.* at 2.

[865] *Supreme Edgelight*, 2005 CPD ¶ 58.

[866] *International Marine Products, Inc*., 2005 CPD ¶ 119, at 7.

[867] *Id.* at 7.

[868] *Id.* at 11.

[869] *Id.* at 7.

An interesting distinction between *Supreme* and *International Marine Products* is the status of the person who received the agency's opinion. In *Supreme*, a clerk without any management responsibilities received the agency's letter, but did not open it.[870] In *International Marine Products*, a vice-president received the Navy's denial of their protest.[871] He also did not open the letter. This vice-president, however, called another principal officer of the company on Saturday and advised him that a letter from the Navy arrived.[872]

The Navy argued for a dismissal of the protest on timeliness grounds and argued that International Marine Products had a duty to open the mail that contained the agency's decision.[873] The GAO did not agree and noted that "the time period for filing a protest [with GAO] commences with a protester's actual or constructive knowledge of initial adverse agency action" and agreed that "protesters have a duty to diligently pursue their bases of protest."[874] However, the GAO also explained that this duty to pursue its basis of protests does not extend to weekends or times outside of ordinary business hours. Accordingly, the GAO started the timeliness clock on the first business day after the Saturday notice of the agency's adverse decision.[875]

Information Posted to a RFQ's Question & Answer Webpage Constitutes an Amendment

In an effort to acquire language translation services, the GSA requested quotes from companies listed on its MAS program.[876] The RFQ stated that "the closing date/time for receipt of quotations was 12PM EST on 18 February 2005."[877] Six days after issuing this RFQ, the GSA clarified in the Questions and Answers section of its official webpage, that the official closing time for this RFQ was "12Noon EST, Friday, Feb 18, 2005."[878]

Linguistic Systems submitted its quote on Friday afternoon, 18 February 2005, and received an automated message that the RFQ was closed.[879] Linguistic Systems protested its exclusion, arguing that they interpreted the initial closing date/time of "12PM EST on February 18, 2005" to mean that the RFQ closed at midnight, 18 February 2005. Linguistics System also argued that the clarifying message posted in the "Questions and Answer" section did not constitute an amendment because this amendment was not made on the proper form and did not require an acknowledgement.[880]

The GAO concluded that the GSA issued a valid amendment and denied Linguistic Systems' protest. The GAO noted that information disseminated during a procurement that is in writing, signed by the contracting officer, and provided to all vendors is enough to constitute an amendment.[881] Accordingly, the GAO ruled that GSA amended this RFQ by clarifying exactly when the closing period for receiving quotes ends.[882]

---

[870] *Supreme Edgelight*, 2005 CPD ¶ 58.

[871] *International Marine Products, Inc*., 2005 CPD ¶ 119.

[872] *Id.* at 8.

[873] *Id.* at 9.

[874] *Id.* at 10.

[875] *Id.*

[876] Linguistic Systems, Inc., Comp. Gen. B-296221, June 1, 2005, 2005 CPD ¶ 104.

[877] The GSA issued the initial RFQ on February 9, 2005. *Id.*

[878] *Id.* at 2. In an unrelated case, the GAO dismissed a protest wherein the protester argued that the agency extended the time period for filing a bid protest because it allowed the protester to ask written questions after its debriefing. In *New SI, LLC.,* the GAO stated a debriefing is presumed to be closed at the end of the debriefing session unless there is a clear indication from the agency that the debriefing would be extended to allow the protester time to ask more questions. B-295209, 2004 U.S. Comp. Gen. LEXIS 290 (Nov. 22, 2004). In that case, the contracting officer advised the protester that if the protester had any questions after the debriefing was finished, the company could submit written questions after the debriefing. *Id.*

[879] *Linguistic Systems*, 2005 CPD ¶ 104.

[880] *Id.* at 3.

[881] *Id.* Posting the message in the "Question and Answer" section amounted to providing notice to all vendors. *Id.*

[882] *Id.* at 4.

Attorney Fees - Cap on $150 Hourly Fee Is Waived Again

During the last two years, the bid protest section of the Year in Review has tracked cases involving requests for reimbursement. Two years ago, the GAO in *Sodexho Management, Inc*.[883] permitted the Navy to pay attorney fees in excess of the $150-per-hour statutory cap.[884] Last year, in *NVT Technologies*,[885] the GSBCA affirmed *Sodexho* when it rejected a stipulation between the parties agreeing to pay attorney fees exceeding the statutory authorized limit.

This year, the GAO ordered the Social Security Administration to reimburse CourtSmart the costs it incurred for pursuing its protest.[886] The only dispute between the SSA and CourtSmart was the amount of legal fees.

CourtSmart paid its legal counsel $153,971 or $475 per hour.[887] The agency objected to this amount, claiming that it lacked authority to break the $150 per hour cap on attorney fees.[888] To support its claim, CourtSmart submitted a 2002 national billing survey that identified the ranges of hourly billing rates for partners and associates in the Washington, D.C. area.[889] CourtSmart also outlined that their counsel has "30 years of experience in federal procurement law in the Washington, D.C. area and has the expertise, reputation and ability commensurate with partners at the high end of the billing rate."[890]

The GAO found that this higher fee was justified and reasonable. It noted that the $475 per hour claim was documented[891] and that the SSA did not object to the reasonableness of the $475 per hour fee or the expertise, reputation or ability of the attorney.[892]

GAO Recommends the Army Pay Protester's Costs

In *Johnson Controls World Services, Inc.,*[893] the GAO recommended the Army reimburse Johnson Controls the reasonable costs of filing and pursuing its initial and supplemental protests.[894]

In this procurement action, the Army conducted an A-76 study to determine whether to outsource or retain the services in-house at Walter Reed Medical Hospital.[895] Initially, the Army determined that it would keep the services in-house.[896] On 30 March 2005, Johnson Controls protested this decision, alleging that the independent review office (IRO), which certified the most efficient organization (MEO), did not comply with the A-76 handbook and that the cost of in-house

---

[883] Comp. Gen. B-289605.3, Aug. 6, 2003, CPD ¶ 136.

[884] 31 U.S.C.S. § 3554(c)(2)(B) (2000). The statute provides:

> Attorney fees are capped at $150 per hour unless the agency determines based on the recommendation of the Comptroller General on a case by case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

[885] GSBCA No. 16196-C (10647), 2003 GSBCA LEXIS 210 (Oct. 24, 2003)

[886] CourtSmart Digital Systems, Inc., Comp. Gen. B-292995.7, Mar. 18, 2005, 2005 CPD ¶ 47.

[887] *Id.* at 4.

[888] *Id.* at 26.

[889] *Id.* at 4.

[890] *Id.* at 5.

[891] *Id.* at 6.

[892] *Id.* In an unrelated claim, the GAO permitted the Department of State to pay reasonable attorney fees above the $150 hourly cap. In *Department of State*, the protester claimed attorney fees between $196.89 and $197.77 per hour. Comp. Gen. B-295352.5, 2005 U.S. Comp. Gen. LEXIS 147 (Aug. 18, 2005). In support of its claim, the protester submitted a detailed explanation of its rates calculation and a copy of the "All Urban Consumers" CPI for San Francisco-Oakland-San Jose, California. *Id.* at 4. GAO also observed that the State department did not object to these rates and said that the GAO "ha[s] declined to impose a requirement that a claimant do more than request an adjustment and present a basis upon which the adjustment should be calculated." *Id.*

[893] B-295529.4, Aug. 19, 2005, U.S. Comp. Gen. LEXIS 152.

[894] *Id.* at 8.

[895] *Id.* at 2.

[896] *Id.*

services should have been adjusted upwards.[897] Specifically, Johnson Controls alleged that the MEO contained unrealistically low staff levels that could not realistically comply with the statement of work.[898] The Army filed its agency report on 2 May 2005.[899] The GAO conducted a hearing with many witnesses. Afterwards, the Army agreed to take corrective action by withdrawing the IRO's certification of the MEO. One day after the Army agreed to take this corrective action, Johnson Controls filed a request for reimbursement of its protests costs.[900]

In this case, the Army did not comply with numerous mandatory procedural requirements.[901] Specifically, the GAO commented on the following actions: 1) the Army did not respond to Johnson Controls' document requests at least five days before filing its agency report;[902] 2) these documents were produced on 20 May 2005 after the GAO held a hearing and directed the Army to produce these;[903] 3) during additional hearings on 8-9 June 2005, the Army conceded that some protest issues were accurate;[904] and 4) the Army Audit Agency withdrew its certification of the MEO on 15 June 2005.[905]

In deciding to award Johnson Controls its protest costs, the GAO noted that it took the Army more than seventy days after Johnson Controls filed its protest to produce all the materials related to the final MEO certification. The GAO determined that the Army "failed to investigate the substantive grounds of this protest, [the Army] failed to produce documents when required, [the Army] failed to take prompt corrective action in the face of a clearly meritorious protest, [and] frustrated the intent of the Competition in Contracting Act of 1984."[906]

Transparency and cooperation are significant teaching points in this case. Much deference is given to agencies, but when the courts or boards sense that agencies are not cooperating or working in an open and transparent manner, the agencies risk reputations and operating funds.

GAO Awards Some Costs, Denies Others

In *Security Consultants Group, Inc.*,[907] the GAO awarded Security some costs and denied others. Here, the DHS sought security guard services in Oklahoma. The DHS's initial award to Security was protested. Although the GAO dismissed this protest for failing to state a valid basis for protest, the DHS amended its RFP and allowed offerors to revise their technical and price proposals.[908]

Security protested DHS's corrective action because the DHS terminated Security's contract. Security argued that the corrective action was unnecessary because the initial defect in the RFQ did not prejudice any of the offerors, and Security was now prejudiced because its successful contract price was divulged.[909] The GAO sustained Security's protest and recommended that the DHS reinstate Security's contract.[910]

---

[897] *Id.*

[898] *Id.* at 3.

[899] *Id.* at 4.

[900] *Id.* at 3.

[901] *Id.* at 4.

[902] *Id.*

[903] These reports revealed that, internally, the Army conflicted over the merits of the protest. Specifically, the Army Audit Agency (the IRO) agreed with many points raised in the protest. The MEO opposed the protest issues. *Id.* at 5.

[904] *Id.* The Army agrees that the MEO did not include work that was required by an amendment, and that the MEO contained inadequate staffing levels for maintaining the hospital's grounds; that the agency needed to perform a new analysis of contract line items and determine if the MEO's certification should be overturned by unauthorized changes in the MEO. *Id.*

[905] *Id.* at 6.

[906] *Id.* at 8.

[907] Comp. Gen. B-293344.6, Nov. 4, 2004, 2004 CPD ¶ 228.

[908] *Id.*

[909] *Id.* The initial RFQ erroneously advised offerors that the three evaluation factors (technical, price and past performance) would be weighed equally. The revised RFQ stated that past performance was weighted sixty-percent and the other two factors twenty-percent each. *Id.* at 2.

[910] *Id.*

Despite the GAO's recommendation, the DHS divided its contract into three separate solicitations, and modified each to more accurately reflect the DHS's needs.[911] Security protested this decision.[912] Security argued they should have been awarded the initial contract.[913] Because they still wanted the work, however, Security submitted proposals for all three solicitations.

The DHS cancelled these three solicitations just prior to the date its agency report on Security's protest was due.[914] The GAO then dismissed Security's protest as academic.[915] Security learned that the DHS intended to modify existing contracts, and divvy the work between Security and another contractor.[916] Security then protested the DHS's decision not to follow the GAO's recommendation to award the entire initial contract to Security.[917]

Security also pursued reimbursement of their proposal and protests costs.[918] Although they did not prevail on the request for reimbursement of costs for submitting the three proposals and for protesting the terms of these three solicitations, Security did prevail in its claim for costs incurred in challenging the DHS's decision not to follow GAO's recommendation.[919]

Regarding the preparation costs for submitting three proposals and protesting these solicitations, the GAO reasoned that the DHS took prompt corrective action by canceling the three solicitations before the agency report's due date.[920] Concerning Security's protest of DHS's decision not to follow the GAO recommendation of awarding the initial contract to Security, the GAO observed that the DHS did not, as required, submit a detailed statement of factual and legal grounds explaining why reversal or modification of GAO's recommendation was warranted.[921] Because the DHS did not take the necessary steps to modify or reverse a GAO recommendation, it appeared that the DHS did not act in the public interest as required by the CICA, and was therefore liable for Security's costs.[922]

Watch Timelines When Reviewing Claims for Reimbursement of Protest Costs

In *Keeton Corrections, Inc.*,[923] the GAO dismissed a request to recover protest costs because the protester submitted its request eighty-three days after the GAO sustained Keeton's protest.[924] After prevailing on one ground, Keeton asked the GAO to reconsider other grounds Keeton raised in the protest. The GAO denied Keeton's request for reconsideration nineteen-days later.[925]

Keeton argued that the sixty-day period for filing a claim for costs began when it received the GAO's denial of Keeton's request for reconsideration.[926] The agency, on the other hand, argued that the sixty-day period commenced when Keeton received GAO's initial opinion.[927]

---

911 *Id.*

912 *Id.*

913 *Id.*

914 *Id.*

915 *Id.*

916 *Id.*

917 *Id.*

918 *Id.* at 3.

919 *Id.* at 4.

920 *Id.* at 3.

921 *Id.* at 5.

922 *Id.*

923 Comp. Gen. B-293348.3, Oct. 25, 2004, 2004 CPD ¶ 213.

924 *Id.* at 3.

925 *Id.* at 2.

926 *Id.*

927 *Id.*

The GAO concurred with the agency.[928] In its opinion, the GAO noted that the bid protest regulations require that all claims for costs be submitted within sixty days after receiving the GAO's recommendation.[929] As the GAO explained, this rule exists to avoid "the piecemeal presentation of claims and to prevent unwarranted delays in resolving such claims."[930] In addition, the GAO clarified that there is no recognized exception to the sixty-day filing requirement because a request for reconsideration was filed.[931]

Failure to Take Prompt Corrective Action Results in Protester Being Awarded Costs

The GAO found the DEA responsible for protester's costs after the DEA failed to take prompt corrective action. In *Envirosolve, LLC*,[932] the DEA attempted to buy hazardous waste environmental cleanup services through BPAs.[933]

On 2 August 2004, Envirosolve protested the DEA's procurement action, arguing that the DEA did not evaluate Envirosolve's proposal or correctly establish a competitive range.[934] In response, the DEA promised to cancel the RFP and take corrective action.[935] The GAO then dismissed this protest as academic.[936]

On 12 October 2004, Envirosolve filed a second protest alleging that the DEA improperly used BPAs as a method for procuring the hazardous waste cleanup services.[937] Specifically, Envirosolve claimed that the DEA's use of BPAs "failed to comply with applicable competition requirements and that the agency intentionally and improperly excluded Envirosolve from competition."[938] On 5 January 2005, the DEA again promised corrective action stating:

> [the DEA will] discontinue issuing purchase orders without adhering to applicable competition requirements . . . and will [establish] an acquisition strategy that will achieve the applicable competition requirements, perhaps though the competitive award of BPAs, or the establishment of multiple BPAs with qualified, responsible contractors and mini-competitions among BPA holders. The agency need to issue orders non-competitively will be done in accordance with the requirements of FAR § 13.106-1(b) and will not exceed a two-month window.[939]

The DEA also promised not to exclude Envirosolve from competing for the BPAs and purchase orders.[940] Due to this promised corrective action, on 6 January 2005, the GAO again dismissed Envirosolve's protest as academic.[941]

On 8 March 2005, Envirosolve filed its third protest and asked the GAO to reconsider its earlier dismissal.[942] Envirosolve claimed the DEA did not take the promised corrective action, was not competitively awarding BPAs and was continuing to issue purchase orders without the promised "mini-competitions."[943]

---

[928] *Id.*

[929] *Id.*

[930] *Id.*

[931] *Id.* at 3. In an unrelated case, the GAO held that a delaying the receipt of publicly-releasable version of a document did not toll the sixty-day time period for filing a claim for costs. *SWR, Inc.*, Comp. Gen. B-294266.4, Apr. 22, 2005, 2005 CPD ¶ 94.

[932] Comp. Gen. B-294974.4, June 8, 2005, 2005 CPD ¶ 106.

[933] *Id.* at 1.

[934] *Id.* at 3.

[935] *Id.* at 2.

[936] *Id.* at 3.

[937] *Id.* at 4.

[938] *Id.*

[939] *Id.* at 5.

[940] *Id.*

[941] *Id.*

[942] *Id.*

[943] *Id.*

The GAO stressed that promising corrective action and not implementing the steps quickly "circumvents the goal of the bid protest system of effecting the economic and expeditious resolution of bid protests."[944] The opinion noted how long the agency promised corrective action, and acknowledged that the DEA's actions forced Envirosolve to file another protest and incur additional costs.[945] The GAO then awarded Envirosolve the reasonable costs of filing and pursuing its protest because the agency was defeating the goal of resolving protests economically and expeditiously.[946]

Clarifying When Concession Contracts Are Within GAO's Bid Protest Jurisdiction

When juxtaposing two concessionaire cases that the GAO decided this year, one gets a clear picture of when a concession contract falls under GAO's bid protest jurisdiction. In *White Sands, Inc.*,[947] the GAO issued a terse opinion dismissing the protest of a Department of the Interior's award of a concessionaire contract to a gift shop and snack bar.[948] The GAO determined that the protest did not involve a procurement for property or services, and therefore fell outside of the GAO's bid protest jurisdiction.[949] In its opinion, the GAO noted that in order for a concessionaire contract to fall within the meaning of the CICA, the goods or services must be more than a *de minimus* value to the government.[950] Here, the only services the concessionaire would be required to perform in connection with its snack and gift shop were "maintenance, repairs, housekeeping, grounds keeping, and weed and pest control *for the concessionaire itself*."[951]

Realizing that the only services that a concessionaire is required to perform are maintaining its business operating area and that these upkeep services would not be needed if the concessionaire were not there, the GAO determined these services were of *de minimus* value to the government. Accordingly, the GAO dismissed the protest because it fell outside the meaning of CICA, and therefore outside the GAO's bid protest jurisdiction.[952]

In *Great South Bay Marina, Inc.*,[953] the GAO found a concessionaire contract to be more than a *de minimus* value to the government and concluded it had jurisdiction over the concessionaire contract protest. As part of this concessionaire contract, the concessionaire had to "invest not less than $1,259,000 in building rehabilitation and improvements [at the Fire Island National Seashore] over the first [five] years of the contract."[954] Considering the value, nature, and time-frame of the required work, the GAO concluded that the awardee would be providing services that were more than a *de minimus* value to the government.[955] Because of this, the protest fell within the meaning of CICA and within GAO's bid protest jurisdiction.[956]

Great South Marina also provides a practice tip: an agency should always file an agency report whenever a protest is filed. Here, the Department of the Interior argued that the protest was not within the GAO bid protest jurisdiction, and refused to submit an agency report.[957] The GAO disagreed and decided the protest solely based on the documentation submitted by the protester.[958] Fortunately for the agency, the GAO denied the protest because the protester failed to meet the minimal burden of proof to demonstrate why its proposal represents the best value to the government.[959]

---

[944] *Id.* at 7.

[945] *Id.*

[946] *Id.* at 9.

[947] Comp. Gen. B-295932, Mar. 18, 2005, 2005 CPD ¶ 62.

[948] *Id.* at 1.

[949] *Id.*

[950] *Id.* at 2.

[951] *Id.* Emphasis added.

[952] *Id.*

[953] Comp. Gen. B-296335, July 13, 2005, 2005, 2005 CPD ¶ 135.

[954] *Id.* at 4.

[955] *Id.* at 3.

[956] *Id.* at 4.

[957] *Id.*

[958] *Id.*

[959] *Id.* at 6.

2005: Bid Protests Filing with the GAO Decreases Slightly

Fiscal year 2005 was a busy year for bid protest filers. The following chart illustrates this point and the trends in the GAO's Bid Protest section during seven years.[960]

Bid Protest Statistics for Fiscal Year 2005

	FY 2005	FY 2004	FY 2003	FY 2002	FY 2001	FY 2000	FY 1999
Cases Filed	1,356 (down 9%)	1,485 (up 10%)	1,352 (up 12%)	1,204 (up 5%)	1,146 (down 6%)	1,220 (down 13%)	1,399 (down 11%)
Cases Closed	1,341	1,405	1,244	1,133	1,098	1,275	1,446
Merit (Sustain + Deny) Decisions	306	365 (80 days)	290 (79 days)	256 (79 days)	311 (79 days)	306 (86 days)	347 (88 days)
Number of Sustains	71	75	50	41	66	63	74
Sustain Rate	23%	21%	17%	16%	21%	21%	21%
ADR (cases used)	103	123	120	145	150	144	88
ADR Success Rate	91%	91%	92%	84%	84%	81%	92%
Hearings	TBD	9% (56 cases)	13% (74 cases)	5% (23 cases)	12% (63 cases)	9% (54 cases)	9% (53 cases)

Major Steven R. Patoir

[960] Email from Mr. Louis A. Chiarella, Government Accountability Office, Bid Protest Section, to Major Steven R. Patoir, Professor, The Judge Advocate General's School, U.S. Army (28 Oct. 2005) (on file with author).

CONTRACT ADMINISTRATION

Contract Interpretation

"Zone of Reasonableness" Concept Surfaces Again

Although the courts and boards did not articulate a new methodology for interpreting ambiguous contract terms in 2005, it is always worthwhile to review a case that thoroughly reviews basic contract interpretation concepts. This year's case is *M.G. Construction Inc., v. United States*.[1] Citing *NVT Tech., Inc.,*[2] last year's seminal contract interpretation case, the Court of Federal Claims (COFC) outlined the process for determining the parties' intent by reviewing the court's need to conclude if a parties' interpretation falls within the "zone of reasonableness."[3] This zone of reasonableness test helps courts resolve an ambiguity if a clause supports more than one interpretation.[4]

At the center of *M.G. Construction* is a dispute between M.G. Construction and the Air Force. M.G. Construction submitted a claim arguing that, in accordance with the contract, it was entitled to more money for the work performed as per its roofing removal and restoration contract at Francis E. Warren Air Force Base in Cheyenne, Wyoming.[5] The Air Force denied the claim, reasoning that M.G. Construction was only entitled to compensation in accordance with Contract Line Item Number (CLIN) 0001AC, Removal of BURS.[6] Both parties agree that M.G. Construction removed 243,100 square feet of surface gravel, and that M.G. Construction was paid $0.80 per square foot.[7] M.G. Construction, however, argues it should also be paid under CLIN 001AA, removal of aggregate surfacing, and should be paid $2.30 per square foot.[8] Therefore, according to M.G. Construction, the Air Force owes an additional $364,650.[9]

There are no facts in controversy in this case. Rather, the litigation is a consequence of different interpretations of the contract. Accordingly, the COFC considered the respective arguments and looked for the "zone of reasonableness" as a means of resolving the disputed meaning of the contract. The court started with the plain language of the contract and stated that it "will give the words of the agreement their ordinary meaning unless the parties mutually intended and agreed to an alternative meaning . . . [and will] interpret the contract in a manner that gives meaning to all of [the contract] provisions and makes sense."[10] The COFC also noted that "if an ambiguous [contract instrument] can only be understood upon consideration of the surrounding circumstances, extrinsic evidence will be allowed to interpret the [contract's] language."[11]

Putting itself in the shoes of a reasonable and prudent contractor, the COFC noted that M.G. Construction's claim seeks payment equal to $2.30 per square foot and that M.G. Construction's bid does not include this price anywhere.[12] The court also noted that the Air Force ordered the work under CLIN 0001AC even though the Air Force never placed an order under CLIN 0001AA. Therefore, the COFC considered it odd that M.G. Construction believed it was entitled to compensation under CLIN 001AA.[13] In addition, the court held that the BURS work (CLIN 0001AC) necessarily involved

---

[1] 67 Fed. Cl. 176 (2005).

[2] 370 F.3d 1153 (Fed. Cir. 2004).

[3] *M.G. Const.*, 67 Fed. Cl. at 183.

[4] *NVT*, 370 F.3d at 1159.

[5] *M.G. Const.*, 67 Fed. Cl. at 177. In its bid, M.G. priced Contract Line Item Number (CLIN) 0001AA, removal of aggregate surfacing, at $1.50 per square foot. The Air Force estimated 200 square feet of this service would be ordered. For CLIN 0001AC, removal of BURS (5-ply max and 2-inch insulation), M.G. bid $0.80 per square foot. The Air Force estimated approximately 23,333 square feet of this would be ordered. On CLIN 0001AH, removal of underlayment/vapor barrier, M.G. bid $15.00 per square foot. *Id.* at 178.

[6] *Id.* at 179.

[7] The Air Force paid this amount in accordance with CLIN 0001AC. *Id*.

[8] *Id*.

[9] M.G.'s total claim, $2.30 per square foot, is calculated by adding CLIN 0001AA and CLIN 0001AC. *Id*. at 179.

[10] *Id*. at 181.

[11] *Id*. at 182.

[12] *Id*. at 183.

[13] *Id*. at 186.

some removal of the aggregate surface. The separate CLIN (0001AA) for removal of aggregate surfaces was included in the contract to allow the Air Force maximum flexibility when placing orders for various types of roofing work.[14]

The COFC concluded that both interpretations do not fall within the "zone of reasonableness." The court ruled in the Air Force's favor, finding that the government's interpretation of the various and interdependent contract clauses was reasonable.[15] After advising M.G. Construction that it cannot perform the work and then attempt to renegotiate the contract, the COFC noted that M.G. Construction had a duty to clarify any patent ambiguities before it submitted its bid.[16]

Major Steven R. Patoir

Contract Changes

Review of Superior Knowledge Claims: Government Should Always Consider Sharing Information with Contractors

The Federal Group Inc. v. United States[17] provides a good review of the superior knowledge theory. In this case, Federal Group Inc. contracted with the Office of Personnel Management (OPM) to construct, operate and maintain a training facility.[18] Federal Group lost money on this contract.[19] As a result, Federal Group sued the OPM alleging that the OPM violated the superior knowledge doctrine by failing to project attendance accurately, and not advising all offerors that the federal government was sending fewer of its employees to federal training centers.[20] Federal Group based its opinion on the government's initiative to reduce the federal workforce, its decision to compete federal training courses amongst commercial vendors, and OPM's alleged failure to disclose relevant and accurate information.[21]

The COFC responded to the government's motion for summary judgment by dividing it into two parts. In its first ruling, the COFC determined that the OPM did not fail to disclose that the federal government's enrollment in training programs was declining because the Federal Workforce Restructuring Act was public knowledge. In delineating the superior knowledge doctrine, the court said:

> a contracting agency has a duty to disclose to a contractor otherwise unavailable information of novel matter vital to the performance of the contract where (1) a contractor undertook to perform without vital knowledge of a fact that affects performance costs or duration; (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information; (3) any contract specification supplied misled the contractor or did not put it on notice to inquire; and (4) the government failed to provide the relevant information.[22]

The court also stated that the government does not have a duty to volunteer information if the contractor can reasonably be expected to seek and obtain the facts elsewhere.[23] Regarding the decrease in the number of people attending federal training programs, the COFC observed that the government's legislative and regulatory activities were public knowledge, and everyone has a duty to be aware of U.S. statutes at large.[24] The Court concluded that everyone, not just the government, was aware of the government's movement toward a smaller government workforce and a more competitive Federal training environment.[25] Because Federal Group had easy access to government programs, the court concluded that

---

[14] *Id*. at 185.

[15] *Id*. at 187.

[16] *Id*. at 186.

[17] 67 Fed. Cl. 87 (2005).

[18] *Id.* at 90.

[19] *Id.* at 94.

[20] *Id.* at 90.

[21] *Id.* at 100.

[22] *Id.*

[23] *Id.* at 101.

[24] *Id.*

[25] *Id.*

the OPM did not have superior knowledge of an issue that was novel to the performance of this contract. Therefore, the court granted the government's motion for summary judgment.[26]

The court ruled differently on the second superior knowledge issue.[27] In regards to Federal Group's claim that the OPM did not share its specific knowledge of attendance problems at federal training centers, the court denied the government's motion for summary judgment. Noting that Federal Group produced government memoranda that demonstrated the OPM may have known of a decline in attendance at federal training centers before this contract was awarded, the court ruled that this aspect of Federal Group's superior knowledge claim was a matter best left for trial.[28]

Major Steven R. Patoir

Inspection, Acceptance and Warranty

Quality Assurance in the DFARS

The Department of Defense (DOD) proposed a rule to update and streamline government contract quality assurance requirements as part of the Defense Financial Acquisition Regulation Supplement (DFARS) Transformation initiative.[29] The proposed rule adds that the head of the contracting office will only use warranties when the benefits are expected to outweigh the cost.[30] The proposed rule also deletes text concerning definitions, technical requirements matters, and material inspection and receiving reports.[31] Language concerning contracting office responsibilities, quality evaluation data, and quality inspection approval stamps has been shifted to the Procedures, Guidance and Information (PGI) section, the DFARS companion resource of discretionary guidance.[32]

Final Rule on Government Source Inspection Requirements

The DOD issued a final rule eliminating quality assurance at source for most contracts or delivery orders under $250,000.[33] The rule contains some exceptions such as any inspection mandated by regulation; required by a Memorandum of Agreement (MOA); or conducted pursuant to a contracting officer's determination that technical requirements are significant or the product has critical characteristics, specific identified features, or specific acquisition concerns.[34] The DOD also added language exempting quality assurance at source for contracts below the simplified acquisitions subject to the above exceptions.[35]

Proposed Rule on Notification Requirements for Critical Safety Items

The DOD proposed a new rule to add a contract clause requiring contractors to promptly notify contracting officers of any nonconformance or deficiency that may have a safety impact.[36] The new rule encompasses replenishment parts identified as critical safety items; systems and subsystems; and services for upkeep of those systems, such as repair and maintenance support.[37] A contractor must notify the Administrative Contracting Officer and the Procuring Contracting

---

[26] *Id.* at 106.

[27] *Id.*

[28] *Id.* at 102.

[29] Defense Federal Acquisition Regulation Supplement; Quality Assurance, 70 Fed. Reg. 29,710 (May 24, 2005) (to be codified at 48 C.F.R. pt. 246).

[30] *Id.* at 29,711.

[31] *Id.* at 29,710.

[32] *Id.*

[33] Defense Federal Acquisition Regulation Supplement; Government Source Inspection Requirements, 70 Fed. Reg. 8,539 (Feb. 22, 2005) (to be codified at 48 C.F.R. pt. 246).

[34] *Id.* at 8,543.

[35] *Id.*

[36] Defense Federal Acquisition Regulation Supplement; Notification Requirements for Critical Safety Items, 70 Fed. Reg. 44,077 (Aug. 1, 2005) (to be codified at 48 C.F.R. pt. 246 and 252).

[37] *Id.* at 44,078.

Officer within seventy-two hours of receiving credible information about nonconformance and deficiencies that may cause serious damage to applicable systems or an unacceptable risk of personal injury or loss of life.[38] The rule makes it clear that this notification, however, will not be considered either an admission of responsibility or a release of liability.[39]

Tracking Surveillance

Because of past problems with inadequate surveillance in a DOD IG report[40] and general concerns about DOD's increasing reliance on service contracts, the GAO studied the quality assurance surveillance on DOD service contracts.[41] The GAO found that twenty-five out of the twenty-six contracts with insufficient surveillance were contracts for services using the General Services Administration (GSA) Multiple Award Schedule (MAS) program.[42] The GAO also discovered that thirteen surveillance personnel assigned quality assurance responsibilities over a contract had not completed required training prior to their assignment.[43] The GAO noted that it appeared that more importance was given to the contract award than to the surveillance of the contract.[44] Although the DOD had made some efforts to improve this area, the GAO recommended better training of personnel; more timely assignment of personnel no later than contract award; better practices to ensure accountability; better data collection; and more guidance on surveillance on services procured from other agencies' contracts.[45]

The Air Force's Assurances of Quality

Partially as a reaction to the DOD IG and GAO reports, the Air Force issued a Mandatory Procedure (MP) on quality assurance programs for performance-based services acquisitions.[46] The MP requires training for quality assurance personnel prior to contract award and creates the role of a Quality Assurance Program Coordinator who will oversee the drafting of requirements and the training of applicable personnel.[47]

Latent Defect but Leaky Proof

In *Northrop Grumman Corporation*,[48] the Armed Services Board of Contract Appeals (ASBCA) limited the Navy's recovery on a latent defect theory based on evidentiary issues.[49] The contract involved the production and delivery of TR-343 transducers, which is an element of the sonar for a surface ship antisubmarine warfare combat system.[50] The Navy discovered leakage problems and conducted extensive testing which concluded that cold temperatures and problems with

---

[38] *Id.*

[39] *Id.*

[40] U.S. DEP'T OF DEF. OFF. OF THE INSPECTOR GEN., REP. NO. D-2004-015, ACQUISITION: CONTRACTS FOR PROFESSIONAL, ADMINISTRATIVE, AND MANAGEMENT SUPPORT SERVICES (2003).

[41] U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-05-274, OPPORTUNITIES TO IMPROVE SURVEILLANCE ON DEPARTMENT OF DEFENSE SERVICE CONTRACTS (2005). The GAO focused on the issue of the oversight being performed by the contractor. *Id.* at 1.

[42] *Id.* at 7.

[43] *Id.* The GAO reviewed ninety total contracts. Sixteen out of the twenty-six contracts with insufficient surveillance were Army contracts. *Id.* at 8.

[44] *Id.* at 3.

[45] *Id.* at 16. The Army concurred with four recommendations and partially concurred with the accountability recommendation indicating that it would attempt to include surveillance duties in the contracting officer's representative's annual performance evaluation. *Id.* at 31.

[46] Mandatory Procedure; Quality Assurance, MP 5346.103 (Aug. 2005). The Air Force MP program tracks the DFARS Transformation goal of dividing guidance into mandatory and informational sections.

[47] *Id.*

[48] ASBCA Nos. 52178, et. al, 04-2 BCA ¶ 32,804.

[49] *Id.* at 162,256.

[50] *Id.* at 162,229. Part of the transducer is a tube housing which covers a ceramic stack and the electronics of the sonar. *Id.*

surface preparation prior to painting were significant factors in the failures.[51] The Navy issued warranty claims on some items; for other items, the Navy claimed latent defects in order to revoke the acceptance of those items.[52]

The ASBCA reviewed the expert testimony and found that defects related to improper surface preparation prior to painting were latent defects.[53] The ASBCA limited recovery to 2,550 out of nearly 10,000 total tubes because the testing was only performed on specimens from a specific range of serial numbers.[54] The ASBCA denied a broad warranty claim based on one hundred thirty-five faulty transducers because the Navy could not prove that all products were defective. The board refused to rule that a defect in one transducer meant that there were defects in all of the delivered products.[55] Thus, the ASBCA did not require the contractor to correct all the delivered transducers.[56] The ASBCA limited remedies based on the Inspection clause to transportation costs, retesting costs, and reasonable remanufacture of those transducers which were remanufactured.[57] Finally, the ASBCA rejected the contractor's claim for over-inspection since contractor failed to prove loss of productivity.[58]

Base Closure Brouhaha

The ASBCA, in *Brooke Enterprises*,[59] held that the Army and Air Force Exchange Service (AAFES) was liable for the wrongful transfer of allegedly "abandoned" mobile storage units related to a base closure in Augsburg, Germany.[60] The AAFES awarded a concessionaire contract for mini-warehouse storage services, including one at Quartermaster Kaserne, Augsburg Exchange, Germany.[61] The contract contained a clause that granted the AAFES the right to remove property and store it at the company's expense.[62]

The Army designated Augsburg for closure and return to Germany in March, 1998.[63] Although the AAFES informed the concessionaire of its contractual duty to remove its property, the AAFES failed to provide the company a phase-out plan required by the contract.[64] Although the base closure officer (BCO) extended the deadline for property removal, the BCO decided to sell the property to another individual three days before the deadline.[65] The BCO also failed to notify the concessionaire by registered mail of his intent to dispose the abandoned property.[66] The ASBCA held that the concessionaire should receive $46,800 plus Contract Disputes Act (CDA) interest for the improper disposal of its property.[67]

Major Andrew S. Kantner

---

[51] *Id.* at 162,238.

[52] *Id.* at 162,249.

[53] *Id.* at 162,251.

[54] *Id.* at 162,252.

[55] *Id.* at 162,254.

[56] *Id.*

[57] *Id.* at 162,255.

[58] *Id.* at 162,256.

[59] ASBCA No. 53993, 04-2 BCA ¶ 32,785.

[60] *Id.* at 162,152.

[61] *Id.* at 162,145.

[62] *Id.* at 162,146.

[63] *Id.*

[64] *Id.* at 162,251.

[65] *Id.* at 162,152.

[66] *Id.*

[67] *Id.* at 162,151-52.

Value Engineering Change Provision

Company Pursuing a Claim under a Value Engineering Change Provision Has Burden of Proving Its Claim

In *Applied Companies,*[68] the ASBCA ruled that Applied failed to establish a government cost savings and therefore did not establish entitlement. On 29 August 1985, the Army awarded two contracts to Applied, requiring Applied to produce horizontal air conditioning units.[69] The contracts included a value engineering clause[70] enticing contractors with a fifty percent share of any realized savings.[71] Pursuant to this clause, Applied submitted plans to help the Army save money while using these horizontal air conditioners.[72] Although these plans did save money with the 36K BTU/HR air conditioner model,[73] the plans did not help the government save money with other air conditioner models.[74]

Although it lacked technical and cost data to establish entitlement, Applied argued it should collect under the Value Engineering Change Provision (VECP) clause because the VECP program, as submitted, could be applied to any air conditioning unit. Applied asserted that the government has the burden of demonstrating why the claimant should not share in any cost savings as claimed verses the contractor having to prove "the dollar amount of future cost reductions."[75] The government responded that Applied only submitted a VECP plan for the 36K BTU/HR unit and did not do any design work for other air conditioning models.[76] Accordingly, the government reasoned that Applied was not entitled to a percentage of future savings regarding the other air conditioning units.[77]

The ASBCA agreed with the government. It noted that before the government can calculate an amount due under a VECP clause, the contractor is "required to submit to the [contracting officer] the savings amount and technical basis for each [claim] asserted."[78] In addition to explaining this burden, the ASBCA observed that "the facts are clear—[Applied] did not follow though with technical and cost details necessary to apply the VECP to other [air conditioning] configurations."[79] Because of this, the Board rejected Applied's claim for increased payments pursuant to the VECP program.

Major Steven R. Patoir

Terminations for Default

Contracting Officer Representative's Casual Comment Did Not Extend Performance Period

In *NECCO, Inc. v. General Services Administration*,[80] the GSA competitively issued a task order to a contractor to replace the roof of a federal building, under a multiple award term contract for construction work. Under the task order, the contractor was to complete the work by the end of the calendar year 2003. While discussing the project with the contractor prior to the preconstruction conference, the Contracting Officer's Representative (COR) noted the possibility of construction difficulties in winter months and speculated that the GSA might choose to delay the project until the spring.[81] At the

---

[68] ASBCA No. 50593, 2005 ASBCA LEXIS 55 (Jun. 13, 2005).

[69] *Applied Cos.,* 99-2 BCA ¶ 30,554, at 150,879.

[70] U.S. GEN. SVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 52.248-1 (July 2005) [hereinafter FAR].

[71] *Applied Cos.,* 99-2 BCA ¶ 30,554, at 150,880.

[72] *Id.* at 163,475.

[73] *Applied Cos.*. 2005 ASBCA LEXIS 55, at *6.

[74] *Id.* at *4.

[75] *Id.* at *2.

[76] *Id.* at *3.

[77] *Id.*

[78] *Id.* at *7.

[79] *Id.* at *10. In an unrelated case, the Court of Federal Claims (COFC) discusses the jurisdiction of a court or board to review VECP claims. In *George Sollitt Constr. Co.,* the COFC explains that courts and boards have jurisdiction to "review whether [a government's refusal to pay a VECP claim] was contrary to law or an abuse of discretion" and clarified that courts and boards do not have the jurisdiction "to review [the merits of] a contracting officer's discretionary decision to accept a VECP." 64 Fed. Cl. 229 (2005).

[80] GSBCA No. 16354, 05-1 BCA ¶ 32,902.

[81] *Id.* at 162,998.

subsequent preconstruction meeting, the parties, including Palmieri Roofing, the subcontractor who would actually perform the roofing work, settled on a start date of mid-October 2003 with completion anticipated four to six weeks later.[82]

At some later date, Palmieri informed the contractor that he had won a larger roofing job and would not be able to perform the GSA's project before winter after all.[83] Through a series of e-mail messages, the GSA insisted that the project completion date would not be extended,[84] while the contractor attempted to rely on the oral "offer" of a spring start date allegedly made by the COR prior to the preconstruction conference.[85] The contractor made similar arguments in response to the subsequent cure notice,[86] and also offered to immediately fix the leaks in the roof at no charge in exchange for being allowed to perform the roof replacement in the spring,[87] but was unable to locate any roofers who were available to perform the work before spring.[88] The contracting officer terminated the task order for default on 3 November 2003.[89]

The General Services Administration Board of Contract Appeals (GSBCA) agreed that the contractor clearly failed to give reasonable assurances in response to the cure notice, and that the contracting officer justifiably determined that there was no reasonable likelihood that the contractor would perform the work in the time required.[90] The contractor argued that he was not in default because he accepted the COR's "offer" to complete the project in the spring. To prevail on that theory, the board explained, the contractor would need to show that the COR had the authority to postpone the project until the spring, that the COR actually made that offer, and that the offer was binding.[91] The board was not convinced that the COR's letter of authority granted such that authority, but did not have to resolve that issue because the evidence did not demonstrate that any such "offer" had been made or accepted.[92] The board further found that the contracting officer properly exercised her discretion in terminating the order.[93] Among the factors that the contracting officer considered in making her decision to terminate was her concern for the integrity of the procurement process, in that materially altering the terms to allow for a spring completion date would be unfair to the unsuccessful offerors who had not been given an opportunity to compete for a later completion date.[94] The GSBCA denied the appeal.

Terminating for Cause without a Cure Notice—Same Rules as for T4D

The GSBCA recently looked at whether a cure notice was required before a contracting officer could properly terminate a commercial item task order for cause. In *Geo-Marine, Inc. v. General Services Administration*,[95] the GSA, on behalf of the Air Force, placed an order under an indefinite quantity, multiple award Federal Supply Schedule contract for commercial services to operate and expand the Avian Hazard Advisory System (AHAS), an advisory system that processes radar and weather data to alert pilots to potentially hazardous bird activity.[96] In June 2003, several members of Geo-Marine's technical staff assigned to the AHAS project suddenly left the company, resulting in significant problems in the operation of the system.[97] Almost immediately, the system suffered various failures, including the complete shutdown of the system.[98]

---

[82] *Id*.

[83] *Id.*

[84] *Id*. at 162,998-99.

[85] *Id.* at 162,999.

[86] *Id*. at 163,000.

[87] *Id*.

[88] *Id.*

[89] *Id.* The contractor's surety performed the takeover contract following the termination—using Palmieri Roofing, in the spring. *Id.*

[90] *Id.* at 163,001.

[91] *Id.*

[92] *Id.* at 163,002.

[93] *Id*. at 163,003.

[94] *Id.*

[95] GSBCA No. 16247, 05-1 BCA ¶ 33,048.

[96] *Id.* at 163,826.

[97] *Id.* at 163,826-27. Apparently, the first significant problem was that the none of the Geo-Marine's remaining employees could continue to operate the system because they didn't have the password for the system. The COR was able to obtain the password and provide it to Geo-Marine. *Id.* at 163,826.

[98] *Id.* at 163,827.

One of the former employees returned to the company one evening and restored the system as a courtesy to the Air Force, but system failures and several other problems persisted over the next couple of weeks, resulting in pilots not being able to access required current data.[99] In July, the contracting officer sent the COR to visit the contractor's facility to assess the operation of the system and determine whether the system tasks were being completed. When the COR determined that the contractor was not operating the system in accordance with the task order, the contracting officer terminated the task order for "default" without a cure notice.[100]

In its motion for summary judgment, Geo-Marine argued that the termination for cause should be converted to a termination for convenience because the contracting officer had failed to issue a cure notice before terminating the task order.[101] Acknowledging the similarity between terminations for cause and terminations for default, the GSBCA analyzed the issue using termination for default precedent. For both terminations for default and terminations for cause, cure notices are not required when the contractor fails to deliver on time.[102] Looking at prior decisions in which contracts were terminated for default for failure to perform on time, the board observed that "whether a contractor had achieved substantial completion was held to depend not only upon the quantity and nature of the defaults, but also upon the nature of the services to be provided."[103] The board examined decisions that had upheld terminations for default without cure notices where the services were of critical nature, such as railroad services in a terminal in which explosives were shipped and received,[104] guard services at a military range where the government stored explosives and classified materials,[105] ambulance services,[106] and lifeguard services.[107] Reviewing the facts in the instant case, the board held that Geo-Marine had failed to establish as a matter of law, as required for purpose of summary judgment, that it substantially complied with the contract and that a cure notice was required "taking into account the nature of the defaults and the nature of the services required."[108]

The GSBCA also considered the case in light of the common law doctrine of anticipatory repudiation. A cure notice is not required in cases of repudiation "because sending such a notice would constitute a useless, futile act."[109] Although Geo-Marine had not expressed an intent not to perform, the board held that there was a "genuine dispute" as to whether Geo-Marine continued to have any employees capable of maintaining and operating the system, and thus a genuine dispute over whether Geo-Marine's assurances of continued performance were accurate.[110] The board therefore held that Geo-Marine had not established as a matter of law that its actions did not amount to anticipatory repudiation, and denied its motion for summary judgment.[111]

---

[99] *Id.* at 163,827-28.

[100] *Id.* at 163,828. The termination notice erroneously referred to termination for "default" and cited the clause at FAR 52.249-8, which was not contained in the contract. Instead, the contract contained the termination for cause clause contained within FAR 52.212-4. *Id.*

[101] *Id.* at 163,829.

[102] The court noted that the termination for cause clause, unlike the termination for default clause, does not mention any requirement for issuing a cure notice. However, the regulation applicable to commercial items does require a cure notice unless the termination is for late delivery, although it does not specify the length of the cure period. *Id.* (citing 48 CFR 12.403(c)). *See* FAR, *supra* note 70, at 12.403(c)(1).

[103] *Geo-Marine, Inc.*, 05-1 BCA ¶ 33,048 at 163,829.

[104] Atlantic Terminal Co., ASBCA 13269, 69-2 BCA ¶ 7852.

[105] Sentry Corp., ASBCA 29308, 84-3 BCA ¶ 7852.

[106] Pulley Ambulance, VABCA 1954, 84-3 BCA ¶ 17,655.

[107] Building Maint. Specialist, Inc., ASBCA 25552, 85-2 BCA ¶ 18,300.

[108] *Geo-Marine, Inc.*, 05-1 BCA ¶ 33,048 at 163,831.

[109] *Id*. (citing Polyurethane Products Corp., ASBCA 42251, 96-1 BCA ¶ 28,154; Therm-Air Mfg. Co., NASA BCA 1280-21, 82-2 BCA ¶ 15,881).

[110] *Id.*

[111] *Id.* The board noted, however, that when the case is ultimately considered on the merits, the Government will have the burden of establishing that the termination was proper. *Id*.

In *Plum Run, Inc.*,[112] the Navy contracted for base maintenance services at the U.S. Naval Base at Guantanamo Bay, Cuba (GITMO). Within that contract, five of the twenty-two CLINs pertained to family housing maintenance services, and each of those CLINs was further subdivided into numerous subCLINs.[113] One particular subCLIN provided for "Change of Occupancy Maintenance" (COM) services, which consisted of inspecting, cleaning, repairs, and other maintenance of family quarters during the period between occupants.[114] During the first six months of performance under the contract, until the contracting officer partially terminated the contract for default, the contractor was routinely late in performing the COM. During that period, the contractor provided COM services on two hundred nine quarters, and was late an average of six days on most of them.[115] The untimely performance of the COM services was a particular concern as a morale issue, in part because it further delayed reunification of family members with their sponsors, given GITMO's remote location and the absence of commercial accommodations.[116]

Three months into the contract, the Navy issued a cure notice, noting that the contractor's "failure to perform the housing maintenance functions which includes Housing Change of Occupancy Maintenance (COM) has caused inconvenience as well as financial hardship to the residents of the Base."[117] The cure notice contained a two-page list of performance deficiencies pertaining to the COM services, and was followed later by a show cause notice.

Ultimately, the contracting officer partially terminated the base maintenance contract for default "due to unsatisfactory performance for the services related to the housing maintenance function" of the base maintenance contract.[118] The terminated portion of the contract included all five of the family housing maintenance CLINs and their combined twenty-five subCLINs. According to the contracting officer, the contractor was also deficient in performing other significant portions of the family housing maintenance services, and that therefore the family housing maintenance portion of the contract, in its entirety, was the appropriate portion of the contract to terminate.[119]

The contractor alleged various reasons for the delays in performing the COM services, including an issue over the number coats of varnish required and the number of days required to allow each coat to dry, alleged instances of insufficient government inspectors to conduct inspections of the work, and a payment issue allegedly affecting the contractor's cash flow.[120] The ASBCA was not persuaded that any of those issues excused the contractor's untimely performance of the COM services, and upheld the Navy's termination of the COM subCLIN.[121] The board, however, held that the Navy had failed to prove that there was a substantial failure to perform the other housing maintenance CLINs and subCLINs.[122] Stating that it was "confronted with the question whether the government may terminate all of the subCLINs relating to family housing because of the failure to perform [the COM subCLIN],"[123] the board concluded, without discussion, that "on the facts of this appeal with their focus on the COMs," the government had not proven that the COM subCLIN "was not severable and thus it

---

[112] ASBCA Nos. 46091, 49203, 05-1 BCA ¶ 32,977.

[113] *Id*. at 163,359. The five basic CLINs dealing with family housing maintenance services were: 0002 Service Calls; 0003 Maintenance, Inspection, and Repair of A/C; 0009 Perform Housing Maintenance; 0016 Interior & Exterior Painting; and 0021 Housing Maintenance. *Id*.

[114] *Id.*

[115] *Id*. at 163,361. The contractor was late on performing COM services in 177 of the 209 quarters. *Id.*

[116] *Id.*

[117] *Id.* at 163,363 (emphasis added).

[118] *Id.* at 163,364.

[119] *Id*. The board's opinion did not detail the performance deficiencies relating to the non-COM CLINs and subCLINs nor indicate how much detail, if any, on that was provided to the board. Obviously, given the result, the board believed it was provided with insufficient proof that the contractor substantially failed to perform those other CLINs and subCLINs. *Id.*

[120] *Id.* at 163,363.

[121] *Id*. at 163,366.

[122] *Id*. at 163,365.

[123] *Id*.

was entitled to terminate 24 other subCLINs."[124] Therefore, the board converted the termination for default on the other subCLINs to a termination for convenience.[125]

"Well-Nigh Irrefragable Proof," We Hardly Knew Ye

For years, contractors alleging bad faith by the government needed "well-nigh irrefragable proof" to overcome the strong presumption that government officials acted in good faith.[126] Three years ago, the Court of Appeals for the Federal Circuit (CAFC), recognizing that in some cases the standard had been described instead as "clear evidence to the contrary," suggested that the use of these "two different but nevertheless similar descriptions of the evidence needed to overcome this presumption may have led to some confusion."[127] Of the three more traditional standards of proof used in law,[128] the CAFC concluded that "clear and convincing" most approximated the "well-nigh irrefragable proof" standard.[129] Signaling the possible end of this term in government contract law, the Federal Circuit ultimately held that the contractor in that case had failed to meet the "'clear and convincing' or 'highly probable' (formerly described as 'well-nigh irrefragable') threshold."[130]

This year, the term "well-nigh irrefragable proof" was officially "given its last rites."[131] More significantly, the COFC recently found that the standard of proof—whatever it may be called—and even the presumption of good faith itself, were inapplicable in a case in which a contractor alleged bad faith on the part of the Air Force. In *Tecom, Inc. v. United States,*[132] the Air Force had awarded a contract to Tecom to provide vehicle maintenance services for a fleet of five hundred thirty-six vehicles at an Air Force base. Under the contract, Tecom was to provide regularly scheduled inspections and maintenance, and ensure that a certain percentage of each type of vehicle was in working order at all times. To account for any backlog of vehicles requiring service that Tecom might inherit from the incumbent contractor, the contract provided that the Air Force, the incumbent contractor, and Tecom would jointly assess the condition of all vehicles during the transition period, and that Tecom would be specially compensated if more than three hundred fifty-five labor hours were required to eliminate the backlog.[133]

A joint inspection of two hundred thirteen of the five hundred sixty-three vehicles revealed that approximately sixty-five percent of the vehicles were in such poor condition that they should be dead-lined for safety defects alone, and that an estimated 7,500 to 10,000 labor hours would be required to bring the entire fleet up to the minimum serviceability standards.[134] The Air Force apparently had insufficient funds for this purpose, so Tecom's subcontractor, Fleetpro, recorded the inspection results of the two hundred thirteen vehicles into the Air Force's electronic vehicle management database with a code designation indicating "maintenance delayed due to lack of funds."[135]

The Air Force ordered the inspections to cease and directed Fleetpro to delete the inspection results from the system and not comply with the contract requirement to produce monthly database reports.[136] The Contracting Officer "apparently told Tecom that if Fleetpro did not cease complaining about the condition of the vehicle fleet, the Air Force would 'write

---

[124] *Id.* (citing Technocratica, ASBCA Nos. 44134 et al., 94-2 BCA ¶ 26,606, at 132,370; Overhead Electric Co., ASBCA No. 25656, 85-2 BCA ¶ 18,026, at 90,471 and cases cited, *aff'd on the basis of the Board's opinion*, 795 F.2d 1019 (Fed. Cir. 1986)).

[125] *Id.* at 163,366.

[126] "In fact, for almost 50 years this court and its predecessor have repeated that we are 'loath to find to the contrary [of good faith], and it takes, and should take, well-nigh irrefragable proof to induce us to do so.'" Am-Pro Protective Agency, Inc., v. United States, 281 F.3d 1234, 1239 (Fed. Cir. 2002) (quoting Schaefer v. United States, 224 Ct. Cl. 541, 633 F.2d 945, 948-49 (Ct. Cl. 1980)) (citing Grover v. United States, 200 Ct. Cl. 337, 344 (1973); Kalvar Corp. Inc., v. United States, 543 F.2d 1298, 1302, 211 Ct. Cl. 192 (1976); Torncello v. United States, 231 Ct. Cl. 20, 681 F.2d 756, 770 (Ct. Cl. 1982); T&M Distribs., Inc. v. United States, 185 F.3d 1279, 1285 (Fed. Cir. 1999)).

[127] Am-Pro Protective Agency, Inc., v. United States, 281 F.3d 1234, 1239 (Fed. Cir. 2002).

[128] Those three standards of proof, of course, are "beyond a reasonable doubt," "clear and convincing," and "preponderance of the evidence." *Id.*

[129] *Id.*

[130] *Id*. at 1243.

[131] H&S Mfg. v. United States, 66 Fed. Cl. 301, 311 n.19 (citing Tecom, Inc. v. United States, 66 Fed. Cl. 736, 766 n.36 (2005)).

[132] 66 Fed. Cl. 736 (2005).

[133] *Id.* at 740.

[134] *Id.* at 741.

[135] *Id.*

[136] *Id.*

[Contract Discrepancy Reports] to kill Fleetpro.'"[137] Later, when Fleetpro developed its own program to track vehicle maintenance, the Air Force ordered Fleetpro to shut that program down.[138] Ultimately, over the course of five months of regularly scheduled maintenance services, Fleetpro was able to bring the fleet up to the required serviceability standards.[139] However, Tecom alleged that throughout that period, the Air Force chastised Tecom for asking to be compensated for the backlog,[140] conducted "over-inspection of Fleetpro's work" to intimidate Fleetpro,[141] threatened to "kill Fleetpro with [Contract Discrepancy Reports],"[142] and pressured Tecom to terminate its subcontract with Fleetpro under the threat of terminating Tecom for default based on Fleetpro's performance.[143] In response, Tecom terminated its subcontract with Fleetpro.

The court was unimpressed with the Air Force's arguments regarding the interpretation of relevant contract provisions and terms such as "required maintenance backlog" and "vehicle assessment," and granted Tecom's motion for summary judgment on its breach of contract claim, finding that that the Air Force breached the contract by failing to pay Tecom the promised extra compensation for the work backlog inherited from the previous contractor.[144] On a separate claim for equitable adjustment, Tecom argued that because the initial condition of the vehicle fleet was substantially worse than had been represented in the contract, the government had "violated the warranty of suitability covering Government-furnished property."[145] The court questioned the applicability of this particular theory because the "property" in this case—the vehicle fleet—was not furnished by the Government as equipment for Tecom to *use*. Still, the court found merit in the claim for an equitable adjustment in general because "[t]o be able to *maintain* a fleet at the levels and rates required presupposes that the fleet meets those standards to begin with. . . ."[146] Accordingly, the court denied the government's motion for summary judgment on this claim, but noted that Tecom would already be fully compensated for this under the breach of contract claim.[147]

The Air Force had not terminated Tecom's contract for default. However, Tecom made a separate "wrongful termination" claim alleging that the Air Force improperly pressured Tecom by threatening to terminate Tecom's contract for default unless Tecom terminated its subcontractor.[148] The Air Force did not dispute that allegation, but responded that its dissatisfaction with Fleetpro's work was justified and well-documented.[149] On this claim, the court granted the government's motion for summary judgment. The court explained that if the Air Force had followed through with its threat to issue a cure notice and ultimately terminate Tecom's contract for default, as it had a right to do, then Tecom could have challenged that action.[150] But that did not happen, and the Air Force had not actually ordered Tecom to terminate its subcontractor. "Instead," reasoned the court, "Tecom is essentially arguing a wrongful constructive termination of its subcontractor, but provides no authority for such an action."[151]

The most noteworthy, and largest, portion of the court's fifty-page opinion was the court's extensive historical analysis of the presumptions of regularity and good faith with respect to the conduct of government officials. The court deemed it necessary to examine these presumptions before deciding on Tecom's remaining two claims in this case: (1) the Air Force's alleged breach of its implied duty of cooperation, and (2) the Air Force's alleged breach of its implied duty not to

---

[137] *Id.*

[138] *Id.* at 742.

[139] *Id.*

[140] *Id.* at 747.

[141] *Id.* at 742.

[142] *Id.* at 747.

[143] *Id.* at 742.

[144] *Id.* at 757.

[145] *Id.* at 774.

[146] *Id.* at 775.

[147] *Id.*

[148] *Id.*

[149] *Id.* at 775-76.

[150] *Id.* at 776.

[151] *Id.*

hinder contract performance. The presumptions of regularity and good faith, though sometimes used interchangeably,[152] are "conceptually distinct, as regularity assumes that duties were performed, while good faith characterizes the manner in which these duties are presumed to have been performed."[153] The court painstakingly traced the development of both presumptions and the burden of proof needed to overcome the presumptions, and found it inconsistent and flawed, primarily through the misapplication of precedent.

The court explained, for example, that the "well-nigh irrefragable proof" standard enunciated in *Knotts v. United States*,[154] and even that case's threshold assumption that there is a presumption of good faith, was not supported by valid precedent.[155] Citing approvingly the Federal Circuit's 2002 decision in *Am-Pro Protective Agency, Inc. v. United States*,[156] the court concurred that a strong presumption of good faith exists "when a government official is accused of fraud or quasi-criminal wrongdoing in the exercise of his official duties,"[157] but was unwilling to recognize a strong presumption of good faith under other, more ordinary circumstances.[158] Accordingly, the court stated, if the alleged bad faith of a government official acting "under a duty to employ discretion, granted formally by law, regulation, or contract . . . does not sink to the level of fraud or quasi-criminal wrongdoing, clear and convincing evidence is not needed to rebut the presumption."[159] Moreover, the court continued, if the alleged bad faith actions of the government official "are not formal, discretionary decisions, but instead the actions that might be taken by any party to a contract," then there is no presumption of good faith at all.[160]

The court stated that the aspects of good faith and fair dealing at issue in this case—the implied duties of cooperation and to not hinder contract performance—do not require proof of bad faith, and that therefore "[t]he presumption of good faith conduct of government officials has no relevance."[161] The court identified plenty of evidence to support Tecom's claim that the Air Force had not reasonably cooperated with Tecom and had hindered contract performance,[162] and opined that "[t]hese facts might well demonstrate bad faith, and an actual intent to injure the contractor—perhaps even irrefragably."[163] Still, the court found "just enough reasonable inferences that can be drawn in the Air Force's favor to allow it to survive Tecom's motion for summary judgment on these claims."[164]

The court's narrowing of the applicability of a strong presumption of good faith, and of the standard of proof needed to rebut it where the presumption applies, is at distinct odds with the court's reliance on a broader reading of *Am-Pro* in another termination case last October. In *Rice Systems v. United States,*[165] the Air Force had terminated for convenience a contract for the development of a "Precision Orbital Microaccelerometer" after the contractor was unable to provide suitable replacements for key personnel it had proposed.[166] The contractor proposed its president, Dr. Colleen Fitzpatrick, as a replacement for the single most key position, but the Air Force assessed Dr. Fitzpatrick's credentials as being inferior to that of the person originally proposed for the position and did not consider her a suitable replacement.[167] Upon the termination of

---

[152] *Id.* at 757 (citing Pauley Petroleum Inc. v. United States, 219 Ct. Cl. 24, 52 (1979); Alaska Airlines v. Johnson, 8 F.3d 791, 796 (Fed. Cir. 1993)).

[153] *Id*. at 764.

[154] Knotts v. United States, 128 Ct. Cl. 489 (1954).

[155] After a lengthy discussion of the precedent, *Tecom*, 66 Fed. Cl. at. 758-67, the court concluded: "It can be seen, then, that the line of cases that Knotts relied upon contained no general requirement of a heightened standard of proof, and almost never mentioned any presumption of good faith." *Id.* at 767.

[156] Am-Pro Protective Agency, Inc., v. United States, 281 F.3d 1234, 1239 (Fed. Cir. 2002).

[157] *Tecom*, 66 Fed. Cl. at 769.

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.* at 771.

[162] The court cited the efforts of the Air Force to prevent and eliminate records of needed repairs that had been identified; the degree of inspection to which Fleetpro was subjected; the statements by Air Force employees that indicated that they would "kill" Fleetpro with Contract Deficiency Reports because of Fleetpro's request for payment for the backlog labor; and other indications that the Air Force failed hindered and failed to reasonably cooperate with the contractor. *Id*. at 772-73.

[163] *Id.* at 773.

[164] *Id.*

[165] 62 Fed. Cl. 608 (2004).

[166] *Id.* at 616.

[167] *Id.* at 614.

the contract, Dr. Fitzpatrick alleged that the decision to discontinue the contract was based upon gender discrimination. The Air Force conducted an independent review of the allegation and found it to be without merit.[168] The COFC agreed, and granted summary judgment for the Air Force.[169]

In addressing the contractor's allegation that the contract was terminated in bad faith as a result of discrimination, the court recited a litany of cases recognizing the strong presumption of good faith and the heavy burden of proof required to rebut it, relying most heavily on *Am-Pro* for the general proposition that allegations of bad faith by a government official requires "clear and convincing evidence," formerly articulated as "well-nigh irrefragably proof."[170] The court concluded that the contractor had "not offered clear and convincing evidence sufficient to overcome the presumption that the government officials acted in [good] faith . . . ."[171] On a similar, but equally meritless allegation of discrimination based upon national origin, the court found that the record "does not contain any evidence, let alone clear and convincing evidence" that another proposed key personnel replacement had been rejected on the basis of national origin.[172]

From its analysis and choice of words in this case, it is clear that the COFC did not see the Federal Circuit's *Am-Pro* decision as having narrowed the applicability of either the presumption of good faith or the heightened burden of proof. That makes the COFC's recent decision in *Tecom*, decided just eight months later, all the more noteworthy. It remains to be seen whether the Federal Circuit, in future cases, will continue to broadly apply the presumption of good faith and its corresponding burden of "clear and convincing evidence" as the COFC did in *Rice*, or will adopt the significantly narrower interpretation of its *Am-Pro* decision as the COFC more recently did in *Tecom.*

Even Without a Presumption, Government Acted In Good Faith in Its Inspections

A few weeks after *Tecom* was decided, the COFC considered a termination for default case in which the contractor alleged that the government breached its duty of good faith and to not hinder performance of a contract by conducting unreasonable inspections and failing to cooperate. In *H&S Mfg., Inc. v. United States*,[173] the contractor was frequently behind schedule in his production and delivery of Aircrewman survival vests, and the Defense Logistics Agency, Defense Supply Center, Philadelphia (DSCP) rejected several lots for deficiencies revealed during inspections. The court found that the inspections, while thorough, did not hinder production and were distinguishable from prior cases in which government inspections were found to have been unreasonable.[174] The court found that the rejection of some of the lots was not pretextual, and that DSCP did not keep the contractor in the dark about the standards of acceptability.[175] In fact, the court noted, the inspectors had also assisted the contractor by alerting him to defects that were not counted as deficiencies.[176] The court found that the contractor's default was due to his own failure to deliver acceptable vests in compliance with the delivery schedule.[177] Without articulating any presumption of good faith,[178] the court held that the contractor had failed to prove by a preponderance of the evidence that DSCP had breached its duty of good faith, failed to cooperate, or had hindered the contractor's performance,[179] and therefore upheld the termination for default.

---

[168] *Id*. at 617.

[169] *Id*. at 634.

[170] *Id.* at 620-22.

[171] *Id*. at 634.

[172] *Id*. at 631.

[173] 66 Fed. Cl. 301 (2005).

[174] *Id.* at 311-12 (discussing WRB Corp. v. United States, 183 Ct. Cl. 409, 509 (1968); Roberts v. United States, 357 F.2d 938, 941, 174 Ct. Cl. 940 (Ct. Cl. 1966); Adams v. United States, 358 F.2d 86, 175 Ct. Cl. 288 (Ct. Cl. 1966); H.W. Zweig Co. v. United States, 92 Ct. Cl. 472 (1941)).

[175] *Id.*

[176] *Id.*

[177] *Id.* at 314.

[178] In a footnote, the court, citing *Tecom*, did note that "[t]he Government's long touted desideratum that 'irrefragable proof' is needed to demonstrate the absence of good faith in the administration of government contracts has been given its last rites." *Id.* at 311 n.19. But the court was conspicuously silent as to whether there was any presumption of good faith applicable in this case, and as to what level of proof would be required to overcome that presumption if it exists.

[179] *Id.* at 312,314.

In *Trinity Installers, Inc.*,[180] the Forest Service sent the contractor several notices of non-compliance in the course of the contractor's roof-replacement work for various deficiencies in the workmanship.[181] Less than one week after the contractor was notified that it was failing to sufficiently protect the building from rain, heavy rains caused water damage to the building interior and contents.[182] After more notices of non-compliance citing several other deficiencies, and the passing of the date scheduled for contract completion with only seventy percent of the work completed, the contracting officer issued a cure notice.[183] The cure notice stated that the contractor's failure to complete the work on time or to protect the property from water damage was deemed a "condition endangering performance of the contract,"[184] and that the contract might be terminated unless the contractor cures the condition within ten days of receipt of the cure notice.[185] Thirteen days after the contracting officer issued the cure notice, the contractor reported that the work was complete.[186] However, the work was actually found to be only ninety-two percent complete at that time.[187] When the contracting officer inspected the work three days later, she found that the workmanship was "unprofessional" and that the work did not meet the contract specifications or the contract's intent of providing a water-tight roof.[188] The next day, the contracting officer terminated the contract for cause,[189] indicating that the government intended to reprocure the remaining work.

Apparently, the contracting officer did not act quickly enough for the Department of Agriculture Board of Contract Appeals (AGBCA), which converted the termination for cause into a termination for convenience. The board stated that the termination decision was based on quality of the work rather than timeliness.[190] Although acknowledging "the well settled principle that a termination for default may be sustained on grounds other than those cited by the [contracting officer] in the termination notice,"[191] the board nonetheless decided that timeliness was an invalid ground for termination because the contracting officer had waived that ground by failing to terminate "promptly after the ten-day cure period had elapsed."[192] The board also found it significant that the government apparently did not actually reprocure the work as originally intended,[193] as this shows that the Forest Service "found the facility usable as constructed by Appellant and without reprocuring to correct deficiencies or to complete the work."[194] The board faulted the government for failing to provide a

---

[180] AGBCA No. 2004-139-1, 05-1 BCA ¶ 32,868.

[181] *Id*. at 162,882.

[182] *Id*.

[183] *Id.* at 162,882-83.

[184] *Id.* at 162,883.

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] *Id.* The contract was fashioned as a commercial items contract, although the work required was construction and the contract was administered as a construction contract. *Id.* at 162,884.

[190] *Id.* at 162,885. However, the board's findings of fact suggest that untimeliness was at least incorporated by reference in the termination notice. The cure notice was based in part on the contractor's "failure to complete the contract within [the] contract time . . . ." *Id.* at 162,883. The termination decision "referenced the October 21, 2003 cure notice, stating it had outlined the reasons the Government was then considering terminating the contractor's right to proceed under the contract for cause." *Id.*

[191] *Id.* at 162,885.

[192] *Id.* It should be noted that the waiver doctrine is generally inapplicable to construction contracts, because the contractor gets paid for work performed subsequent to the completion date and therefore does not suffer forfeiture. Nisei Constr. Co., Inc., ASBCA Nos. 51464, 51466, 51646, 99-2 BCA ¶ 30,448. The AGBCA in *Trinity Installers* made a vague reference to the "forfeiture situation" but does not explain how the contractor would suffer forfeiture. *Trinity Installers, Inc.*, 05-1 BCA ¶ 32,868, at 162,885.

[193] The board inferred from incomplete information that the Government did not reprocure the work:

> The record contains no evidence that the Government has reprocured contract work. In a letter to the Board dated June 29, 2004, Government counsel stated that "the budget process has hindered the reconstruction of the roof." The Government's brief originally stated that the building "has not been and cannot be occupied until the job is redone, probably by removing the roof constructed by Appellant and installing a new one." The record, however, contains no evidence of any evaluation of work completed; the extent to which it was or was not acceptable; work necessary to correct the defective work nor an estimate of the cost of corrective work. A subsequent letter to the Board dated November 9, 2004, states that the building is in use as a machine shop and storage facility.

Trinity Installers, Inc., 05-1 BCA ¶ 32,868, at 162,883-84.

[194] *Id.* at 162,886.

sufficiently detailed comparison of the work defects to the contract requirements and for choosing not to supplement the record with testimony or affidavits.[195] The board, however, did acknowledge that it was a "close case," stating:

> It is close on the 'waiver' question because of the relatively short amount of time the contractor was allowed to work after the end of the cure period. It is close on the question whether the work was non-conforming, or merely mediocre. Were the facility not capable of being used or had the [Forest Service] found it necessary to correct Appellant's work, we may well have decided this appeal differently. The Government had the burden to tip the balance of the evidentiary scales. It failed to do so.[196]

Judge Vergilio dissented from the opinion of the board, providing further details from the record demonstrating that the contractor failed to comply with the terms and conditions of the contract. In his opinion, the termination for cause was fully supported by the record, and that given the defects in the work, he would "not conclude without more that the project was substantially complete."[197]

A few months after the *Trinity* decision, the same board sustained another contractor appeal of a termination for default in *Omni Development Corp.*.[198] In that case, the Forest Service had contracted with Omni to lease a building to the Forest Service—a building which was not yet in existence, but which Omni would first need to construct. On 6 June 1997, the contracting officer issued a cure notice citing the fact that the contractor had not submitted final construction drawings, had not secured financing for the project, and had not secured a building permit for the project. The cure notice went on to state that these failures to progress created serious doubt as to whether the contractor would be able to construct the building by the target date of 31 December 1997.[199] When the contractor failed to provide evidence that any of those deficiencies were cured, or any evidence that it could accomplish the project in time, the contracting officer terminated the contract for default.[200]

The AGBCA explained that the contracting officer "had legitimate concerns, however, having legitimate concerns is not the test for justifying a termination."[201] Instead, the test is "whether there was no reasonable likelihood of completion."[202] In the board's view, "the Appellant *could have* started the remaining construction considerably later than July 5, 1997, and still likely have met the due date."[203] The board found that the contracting officer's conclusion to the contrary was unreasonable.[204] According to the board, the contractor inability to secure financing, obtain a building permit, or close on the land within the cure period could not sustain a default termination because the cure period was an "artificial after-the-fact" deadline not specified in the contract.[205] In arriving at damages for the breach of the lease contract, the board factored in the "reversionary value" of the building, or "the equity Omni would have owned at the end of the lease."[206]

Judge Vergilio again dissented from the board's decision, both on the default termination and on the award of reversionary damages. In his view, the contracting officer was justified in terminating for default because the contractor had failed to provide assurances of his ability to complete construction in time to permit occupancy.[207] The test, he noted, is not whether the board majority would have terminated under these circumstances, but whether the contracting officer had a reasonable belief that there was no reasonable likelihood the contractor could have timely completed performance.[208] Judge

---

[195] *Id.*

[196] *Id.*

[197] *Id.* at 162,890.

[198] AGBCA Nos. 97-203-1, 98-182-1, 05-1 BCA ¶ 32,982.

[199] *Id.* at 163,409-10.

[200] *Id.* at 163,413.

[201] *Id.* at 163,432.

[202] *Id.*

[203] *Id.* at 163,434 (emphasis added).

[204] *Id.*

[205] *Id.* at 163,440.

[206] *Id.* at 163,442.

[207] *Id.* at 163,453.

[208] *Id.*

Vergilio believed that the contracting officer's conclusion was reasonable.[209] He also objected to the use of reversionary value as a measure of damages, noting that "[t]he value of the building at the commencement and conclusion of the lease term is not relevant to the terms and conditions of the lease contract."[210] He further opined:

> The majority is innovative in awarding the lessor a reversionary value (the projected price that the building would sell for in 2007 less the projected cost to sell the building, adjusted to a present value) as breach damages for a building never constructed. Such a conclusion is inconsistent with the contract and case law for several readily apparent reasons. I need not address the speculative nature of the awarded reversionary value and the underlying bases for valuing the unconstructed building, on an undeveloped piece of property, with imaginary tenants at conjectured rental rates, which separately supports why recovery of a reversionary value is inappropriate.[211]
>
> Major Michael L. Norris

Terminations for Convenience

Implied-in-Fact Contract Doesn't Always Contain Implied T4C Clause

In *Advanced Team Concepts, Inc. v. United States*,[212] the vendor provided training classes to Immigration and Naturalization Service (INS) personnel without a written contract. The director of the INS training facility would circulate the class schedule to the vendors, who would reserve instructors for the scheduled dates.[213] After conducting the training, the vendors would submit an invoice for payment to the director, who would then complete a Standard Form 182[214] to request payment for the services.[215] The director was not a warranted contracting officer, but discussed the use of this procedure for these small purchases with her supervisor and a procurement officer, and was authorized to proceed in this manner for a number of years.[216]

In 2000, the director circulated the 2001 schedule to the vendor, who scheduled its instructors for the class dates. When the director retired later in 2002, the new director cancelled the vendor's participation in the 2001 classes and instead obtained the services of the retired director, his predecessor, to provide the training.[217] The following year, the new director circulated the tentative 2002 class schedule to the vendor but informed him that the courses were being assessed and might change, and that he would contact the vendor later with regard to the 2002 schedule.[218] Thereafter, the new director informed the vendor that he would not need the vendor's services for 2002.[219]

The COFC found that the directors, while not contracting officers, had implied authority to bind the government to a contract because "scheduling, hiring and paying invoices for [the] courses were central to the Director's duties."[220] The court further found offer and acceptance for the 2001 classes when the former director circulated the 2001 schedule to the vendor and the vendor reserved instructors for those dates.[221] Accordingly, there was an implied-in-fact contract for the 2001 classes, which the new director breached by canceling the vendor's participation.[222] The court found no implied-in-fact

---

[209] *Id.*

[210] *Id.* at 163,454.

[211] *Id.* at 163,465.

[212] 2005 U.S. Claims LEXIS 283 (Sept. 28, 2005).

[213] *Id.* at *3.

[214] U.S. Off. of Personnel Mgt., SF-182, Request, Authorization, Agreement and Certificate of Training (12 Dec. 1979).

[215] *Advanced Team Concepts*, 2005 U.S. Claims LEXIS 283, at *3-4.

[216] *Id*. at *3.

[217] *Id.* at *13.

[218] *Id.* at *5.

[219] *Id.*

[220] *Id.* at *9.

[221] *Id.* at *11.

[222] *Id.*

contract for the 2002 classes, because the uncertainty expressed by the new director when circulating the 2002 class schedule created a lack of mutual intent to contract.[223]

The government argued that if an implied-in-fact contract exists, a termination for convenience clause must be read into that implied contract under the *Christian* doctrine.[224] While recognizing that the government has the right to terminate any contract for its convenience absent bad faith,[225] the court found that the *Christian* doctrine did not apply in this case because the termination "was not for the government's benefit but for that of a former employee."[226] Citing the Ethics in Government Act[227] and the CICA,[228] the court reasoned that by terminating the implied-in-fact contract with the vendor and giving the job to the former director, the government in bad faith "did what presumptively government contract policy seeks to prevent; favoring contractors who have an 'in,' or inside knowledge not available to the general public."[229]

Services Offered As an "Inseparable Whole" Can Be Separated In Partial T4C

In *Individual Development Associates, Inc.*,[230] a contractor's proposal to provide educational services had the following notation on the bottom of each page: "All items under [the Schedule] are offered as an inseparable whole and cannot be divided in any way."[231] The contractor's proposal, containing that "inseparable whole" language, was incorporated into the contract.[232] Subsequently, the government partially terminated the contract for convenience of the government by terminating one CLIN in its entirety.[233]

On appeal, the contractor argued that the "inseparable whole" language incorporated into the contract, supported by "subject to the terms of this contract" language of the termination for convenience paragraph of the clause at FAR 52.212-4,[234] precludes the government from terminating any CLIN (or a part of any CLIN) unless all the CLINs are terminated.[235] The ASBCA disagreed, holding that the "inseparable whole" language applied only to offer and acceptance, and not to termination.[236] Noting that the contractor's interpretation "would read out of the contract the government's right to partially terminate the contract for its convenience,"[237] the ASBCA held that the government had a right to partially terminate the contract because there was no clear language in the contract modifying the termination clause.[238]

---

[223] *Id.*

[224] G.L. Christian & Assoc. v. United States, 160 Ct. Cl. 1, 15 (1963).

[225] *Advanced Team Concepts*, 2005 U.S. Claims LEXIS 283, at *13.

[226] *Id.* at *14.

[227] The Ethics in Government Act, Pub. L. No. 95-521, § 1, 92 Stat. 1824 (1978).

[228] The Competition in Contracting Act, 41 U.S.C.S. § 253 (LEXIS 2005).

[229] *Advanced Team Concepts*, 2005 U.S. Claims LEXIS 283, at *13.

[230] ASBCA No. 53910, 04-2 BCA ¶ 32,740.

[231] *Id.* at 161,922.

[232] *Id.*

[233] *Id.* at 161,923. Under the terminated CLIN, the contractor taught American English to students at the Amphibious Warfare School. Under a separate CLIN that was not terminated, the contractor provided educational services at the Command and Control System School. The contract contained at least one more CLIN pertaining to advance courses for noncommissioned officers. *Id*. at 161,922.

[234] Paragraph (l) of the clause at FAR 52.212-4, Contract Terms and Conditions—Commercial Items, provides, in relevant part:

> (1) Termination for the Government's convenience. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. . . . Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination.

FAR, *supra* note 70, at 52.212-4(l).

[235] *Individual Dev. Assocs.*, 04-2 BCA ¶ 32,740, at 161,924.

[236] *Id*.

[237] *Id*.

[238] *Id*.

The contractor also maintained that because the partial termination created increased performance costs, he was entitled to an equitable adjustment.[239] The board rejected that argument as well, distinguishing the commercial termination clause used in this contract,[240] which does not provide for an equitable adjustment, from the non-commercial termination for convenience clause at FAR 52.249-2,[241] which does permit an equitable adjustment if a partial termination causes increased costs in the continued work. The board explained that the cost principles applicable to FAR part 49 are apparently not applicable to commercial contracts.[242] The board also noted, however, that the commercial termination for convenience clause does permit recovery of "reasonable charges" resulting from the termination, but expressed no opinion as to whether that would cover increased costs in the non-terminated portion of the work.[243]

Upon T4C of a Cost-Share Contract, Contractor Only Gets a Share of Its Costs

In *Jacobs Engineering Group, Inc. v. United States*,[244] the COFC held that upon the termination of a cost-share contract for the convenience of the government, the contractor is not entitled to recover one hundred percent of his costs, but instead must bear his allotted share of the costs. In *Jacobs*, the Department of Energy (DOE) entered into a cost-share contract with the contractor for the development of a gasifier.[245] During the design phase, the parties found that the costs of development would be significantly greater than anticipated, and the DOE ultimately terminated the contract for convenience because the project could not be funded.[246] In its termination settlement proposal and subsequent appeal, the contractor sought one hundred percent of its costs incurred in the performance of the contract, arguing that the cost-sharing provision under which he bore twenty percent of the costs did not apply in the event of termination.[247]

Noting that the contract's termination for convenience clause provided for "*all costs reimbursable under this contract*, not previously paid, for the performance of this contract, before the effective date of the termination,"[248] the court found that the clause did not invalidate the cost-sharing agreement, but instead "seeks to fashion a remedy for the contractor in conjunction with the cost-sharing provisions."[249] The court further found that FAR part 31, referenced in the termination clause, also "recognizes that a contractor cannot recover costs not contemplated by the contract."[250] Consistent with the cost-sharing provisions, the court held that the contractor was entitled to only eighty percent of his allowable incurred costs upon the termination for convenience.[251]

---

[239] *Id.* at 161,925.

[240] *See* FAR, *supra* note 70, at 52.212-4(l).

[241] *Id.* at 52.249-2.

[242] *Individual Dev. Assocs.*, 04-2 BCA ¶ 32,740, at 161,925.

[243] *Id.*

[244] 63 Fed. Cl. 451 (2005).

[245] *Id*. at 453. Beyond being a good word to use at cocktail parties, "gasification" is "a means of converting coal to electricity and fuel, as an alternative source of energy." *Id.*

[246] *Id*. at 454.

[247] *Id.* at 455. In its argument, the contractor relied in part on the terms of the contract's "Project Continuance" clause, which allowed the contractor to withdraw from continuing the project at a certain point in time under certain conditions, and which provided that if the contractor did withdraw he would bear 20 percent of the costs incurred. The contractor argued that applying the cost-sharing arrangement after termination would render the Project Continuous clause superfluous. *Id*. at 458.

[248] FAR, *supra* note 70, at 52.249-6(h)(1) (emphasis added).

[249] *Jacobs Eng'g Group*, 63 Fed. Cl. at 457.

[250] *Id*. at 457-58. Specifically, FAR 31.201-2(a) states: "A cost is allowable only when the cost complies with all of the following requirements: . . . (4) Terms of the contract." FAR, *supra* note 70, at 31.201-2(a).

[251] *Jacobs Eng'g Group*, 63 Fed. Cl. at 457.

No Termination Costs If ID/IQ Contract Minimum Was Satisfied

In *International Data Products Corporation v. United States*,[252] the contractor provided computer systems and related services to the Air Force under an ID/IQ contract awarded under section 8(a) of the Small Business Act.[253] When the contractor entered into an agreement to sell its company to a non-8(a) concern, the Air Force terminated the contract for convenience.[254] At that point in time, the Air Force had purchased over $35 million in goods and services under the contract, far in excess of the contract's $100,000 minimum quantity.[255] The contractor filed a claim for approximately $1.7 million in termination costs, and the contracting officer issued a final decision denying any termination costs.[256] The COFC granted summary judgment for the government on this issue, holding that once the government had met its obligation to purchase the guaranteed minimum quantity under the ID/IQ contract, it had no further obligation to pay contractor settlement costs.[257]

The termination clause in the contract provided that "[i]n no event shall the sum of the termination amounts payable and any amounts paid for items delivered under the contract exceed the total contract price."[258] The "total contract price," the court held, was the guaranteed minimum quantity plus the value of any purchases the government made in excess of that minimum.[259] "Thus, by placing orders that met and exceeded the minimum value, the Government has already paid [the contractor] the 'total contract price.'"[260] The court rejected the contractor's argument that the "total contract price" was the stated total estimated quantity of $100 million, finding that the contractor assumed the risk that the government would not order more than the minimum quantity.[261]

The court ruled against the government, however, on the unrelated issue of whether the government could continue to require the contractor to fulfill his obligations for warranty services and software upgrades that the government had already paid for under the contract. The court found that the statute which required the government to terminate the contract upon the contractor's agreement to relinquish ownership of its section 8(a) concern does not permit a partial termination, even though the government would suffer a loss as a result.[262] The court explained:

> Congress weighed the inconvenience and expense of termination to the Government against the goals of the 8(a) program and concluded that the exceptions to termination should be made only when the agency's objectives would be "severely impaired." Congress determined that not every loss or inconvenience to the agency would prevent termination of the contract. It is not up to the Court or the contracting officer to strike a different balance from that set forth in the statute.[263]

Government Breached Your T4C Settlement Agreement? No Attorney Fees for You!

Recently, the GSBCA held that attorney fees incurred by a contractor to defend third party suits resulting from the government's breach of a settlement agreement are not recoverable. In *Gildersleeve Electric, Inc. v. General Services Administration*,[264] the GSA terminated for convenience a contract for reconfiguring a parking lot. The termination settlement agreement provided, in part, that money due the contractor would be withheld for purposes of resolving any disputes with the subcontractors, to correct any deficiencies in the work, and to pay the subcontractor "any and all monies due for work on this

---

[252] 64 Fed. Cl. 642 (2005).

[253] 15 U.S.C.S. § 637(a) (LEXIS 2005).

[254] *Int'l Data Prods.*, 64 Fed. Cl. at 644.

[255] *Id.*

[256] *Id*.

[257] *Id*. at 647.

[258] *Id*. at 645.

[259] *Id.* at 647.

[260] *Id.*

[261] *Id.* at 648.

[262] *Id.* at 650 (citing 15 U.S.C.S. § 637(a)(21)(A)).

[263] *Id.*

[264] GSBCA No. 16404, 05-2 BCA ¶ 33,011.

project."[265] A couple of months later, the subcontractor sued the contractor for payment under the subcontract.[266] The contractor contacted the GSA's contracting officer and requested that she pay the subcontractor, but the contracting officer refused, maintaining that the contractor was responsible for paying the subcontractor for work performed prior to the settlement agreement.[267] In its appeal to the GSBCA, the contractor alleged that the government breached the parties' termination settlement agreement by failing to pay the subcontractor, and that as a result of this breach the contractor incurred legal fees defending against the lawsuit that was successfully brought by the subcontractor.[268]

The GSBCA granted summary relief on this issue for the government. The board explained that attorney fees are generally not compensable as breach damages absent some statutory authority.[269] Citing *Liles Construction Co. v. United States*,[270] the board noted a "rare exception to this rule . . . when there is a clear breach of the Government's contractual duties during performance of the contract, entitling the contractor to an equitable adjustment to fully compensate for the consequences of the Government's breach, including the expenses of litigation with third parties."[271] However, that exception did not apply to this case because the contractor was alleging a breach of a settlement agreement, rather than a breach of the contract.[272] Therefore, the board held, even if the government breached the termination settlement and the contractor becomes entitled to breach damages, those damages would still not include attorney fees.[273]

Major Michael L. Norris

Contract Disputes Act (CDA) Litigation

Proposal to Combine Boards of Contract Appeal

The on-going discussion about potentially combining the boards of contract appeals continues.[274] The boards of contract appeals would be combined to form two Boards of Contract Appeals: the Civilian Board of Contract Appeals and the Defense Board of Contract Appeals.[275] A main point of contention for those opposing the consolidation is the elimination of a forum for cases that are not specifically covered by the CDA.[276]

Additionally, this proposal contemplates rating the judges.[277] The Boards of Contract Appeals (BCA) Bar Association wants the government to slow this runaway train.[278] The BCA Bar Association recommends the creation of a "Blue Ribbon Panel" that would invite the views of the procurement community and preserve the role of the BCAs in CDA disputes as well as in non-CDA dispute resolution, such as Native American self-determination contracts and non-appropriated fund contracts.[279]

---

[265] *Id*. at 163,597.

[266] *Id*.

[267] *Id*.

[268] *Id.* at 163,598.

[269] *Id*.

[270] 455 F.2d 527 (Ct. Cl. 1972).

[271] *Gildersleeve Elec., Inc.*, 05-2 BCA ¶ 33,011, at 163,599.

[272] *Id.*

[273] *Id.*

[274] *See* National Defense Authorization Act for Fiscal Year 2006, H.R. 1815, 109th Cong. (2005) [hereinafter BCA Proposal]. The proposed Authorization Act renames the General Services Board of Contract Appeals to the Civilian Board of Contract Appeals and Armed Services Board of Contract Appeals into the Defense Board of Contract Appeals.

[275] *Id.*

[276] Letter from Board of Contract Appeals Bar Association, to the Honorable John Warner, Susan Collins, Carl Levin, and Joseph Lieberman (June 28, 2005); Letter from The Senior Executive Association, to the Honorable John Warner and Carl Levin (June 3, 2005).

[277] BCA Proposal*, supra* note 274.

[278] The Board of Contract Appeals Bar Association is made up of members from the three major components of the federal procurement community: Boards of Contract Appeals judges, federal government attorneys, and private sector government contracting practitioners

[279] Letter from Board of Contract Appeals Bar Association, to the Honorable John Warner, Susan Collins, Carl Levin, and Joseph Lieberman, (June 28, 2005).

The Senior Executives Association (SEA) also opposes the bill.[280] It does not believe the bill will streamline the repetitive functions of the BCAs. The SEA also seized on the fact that the bill, as passed in HR 1815, would eliminate jurisdiction over non-CDA cases as well as contracts issued by the Iraq Coalition Provisional Authority and certain NATO contracts. The SEA letter also questioned the rating of judges.[281] As the letter points out, the House bill does not specifically authorize rating the judges, but provides "for authority for 'regulations' to be promulgated and envisions reductions in force through the use of performance appraisals."[282] It is uncertain what the ratings would be based upon. As the letter also points out, setting performance for pay standards would impact the impartiality of the boards that now exists.[283]

NAFI Jurisdiction or Not, Part I

The debate concerning the jurisdiction over Nonappropriated Funds Instrumentalities (NAFI) contracts continues to make our yearly review. You may recall *Pacrim Pizza Co. v. Pirie*,[284] where the CAFC decided it did not have jurisdiction to decide the dispute involving a NAFI contract.[285] This year's NAFI contract dispute (really from Summer 2004) comes from the COFC. In *Sodexho Marriott Management, Inc.* (hereinafter "Marriott"), the COFC ruled that the non-appropriated funds doctrine bars the COFC from having jurisdiction over Marriot's claim.[286]

On 14 September 1999, prior to the *Pacrim Pizza* decision, Marriott filed a complaint to the COFC alleging the Marine Corps Recruit Depot Morale, Welfare and Recreation Center ("MWR") breached its contract or, in the alternative, took the fixtures that Marriott installed in the building without just compensation.[287] The dispute arose out of a MWR food service contract with Marriott for services on Parris Island, South Carolina.[288]

In 1996, the parties bilaterally terminated the contract.[289] In 1998, Marriott filed a certified claim for $127,576.15, for the cost of the installing fixtures in the food court building.[290] On 21 February 2001, the Court granted the government's motion dismissing the plaintiff's claim.[291] The following year, in 2002, the CAFC decided *Pacrim Pizza,*[292] ruling that while the CAFC had jurisdiction over appeals from agency boards of contract appeals when the CDA applied, the CDA limited the court's jurisdiction to NAFI contracts of the Armed Forces Exchanges.[293] Under *Pacrim Pizza*, the Federal Circuit determined that a local MWR entity with supervision and contracting structures separate and distinct from an exchange is not a covered activity which excluded the MWR entity from the CDA.[294]

Ultimately, as Joe Buck[295] would say, Marriott struck out looking. The COFC reminded Marriott that the Supreme Court overruled and replaced the *Chevron* rule with a strict rule requiring retroactive application.[296] Now, all civil cases are open to direct review, regardless of whether the events predate or postdate the announcement of a rule.[297]

---

[280] Letter from The Senior Executive Association, to the Honorable John Warner and Carl Levin (June 3, 2005).

[281] *Id*.

[282] *Id*.

[283] *Id*.

[284] 304 F.3d 1291 (Fed. Cir. 2002).

[285] *Id.*

[286] Sodexho Marriott Mgmt., Inc., f/k/a Marriott Mgmt. Servs. v. United States, 61 Fed. Cl. 229, 231 (July 2, 2004).

[287] *Id.*

[288] *Id.* at 230.

[289] *Id.* at 231.

[290] *Id.*

[291] *Id.* at 230.

[292] Pacrim Pizza Co. v. Pirie, 304 F.3d 1291 (Fed. Cir. 2002).

[293] *Marriott*, 61 Fed. Cl., at 230. See also, Pacrim Pizza Co. v. Pirie, 304 F.3d 1291 (Fed. Cir. 2002). The Federal Circuit stated that a NAFI "may be covered entity under the Contracts Disputes Act if it is closely affiliated with a post exchange and meets a three-part test." *Pacrim* at 1293

[294] *Pacrim Pizza*, 304 F.3d at 1292-1294.

[295] Fox national baseball announcer.

[296] *Marriott*, 61 Fed. Cl. at 236. *See also* James B. Beam Distilling Co. v. Georgia, 50 U.S. 529 (1991) and *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993). Pursuant to *Pacrim Pizza* the government moved to dismiss Marriott's surviving claim. Marriott, in turn, asserted that the Federal Circuit got

Next, Marriott argued that CAFC erroneously decided *Pacrim Pizza* because the court did not have an adequate factual record showing the nature of the MWR and the Marine Corps community services.[298] The court determined that the nonappropriated funds doctrine bars it from exercising jurisdiction and, based upon the findings in the controlling case of *Pacrim Pizza*, the Court of Federal Claims must apply that standard retroactively.[299]

The court granted the government's motion dismissing the plaintiff's case.[300] It appeared the debate over NAFI jurisdiction was settled, the CDA did not apply, and the federal courts did not have jurisdiction to decide disputes involving a NAFI contract unless the dispute arose out of an exchange contract. But wait, it is not over!

Jurisdiction over NAFIs. . . Parties Can Agree to Give Boards Jurisdiction, Part II

In the category of "watch out what you ask for you might just get it," a NAFI contract before the Department of Transportation Board of Contracting Appeals (DOTBCA) had a different result concerning the jurisdictional issue. The DOTBCA ruled that it could resolve a dispute arising out of a NAFI contract due to the specific agreement by the parties that the Board would resolve disputes.[301] The contract erroneously included the Disputes Clause stating that the CDA applied.[302]

In that case, Federal Prison Industries (UNICOR) contracted with Logan to provide drawer slides for use in the furniture created by federal inmates.[303] Ultimately, UNICOR terminated the contract for default for failing to provide drawer slides that meet the American National Standard for Office Furniture (ANSI/BIFMA) standards as required under the contract.[304] Logan appealed the termination for default and the government moved to dismiss for lack of jurisdiction.

UNICOR is a NAFI and since Logan's contract was based upon the CDA, there was no waiver of sovereign immunity under the CDA.[305] Accordingly, the DOTBCA was without jurisdiction.[306] The DOTBCA concluded that the differences between the jurisdiction in COFC and the jurisdiction exercised in the board permitted the DOTBCA to exercise jurisdiction where COFC could not.[307] The board agreed with the government that it did not have jurisdiction under the Tucker Act or the CDA, but notes that its jurisdiction is not limited by either.[308] The board reasoned that the CDA does not "remove or limit the Boards authority over non-CDA appeals."[309] The board pointed to its charter that granted the authority to exercise jurisdiction over appeals from contracting officer decisions relating to contracts when the agency consents in the contract to the board's jurisdiction.[310] While this contract incorrectly stated it was governed by the CDA, the parties agreed to the board's jurisdiction by including the disputes clause in the contract.[311]

---

it all wrong in *Pacrim Pizza.* *Id.* at 230-231. In an effort to save its case, Marriott filed motions to transfer and a motion to reinstate the previously dismissed claim on equitable grounds in the case that the Court dismisses the remaining count for lack of jurisdiction. *Id* at 230. Marriott acknowledged the *Pacrim Pizza* decision but asserted that the decision in should not be retroactively applied based upon the three-part test set forth in *Chevron Oil Co. v. Hudson*, 404 U.S. 97 (1971), which was (1) whether the decision announces a new principle of law; (2) whether the retrospective operation will further or retard" the operation of the legal principle at issue; and (3) whether making the rule retroactive would be inequitable. *Marriott*, 61 Fed. Cl. at 236.

[297] *Id.* *See* James B. Beam Distilling Co. v. Georgia, 50 U.S. 529 (1991) and Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 97 (1993).

[298] *Marriott*, 61 Fed. Cl. at 233-234.

[299] *Id.* at 231.

[300] *Id.*

[301] Logan Machinists, Inc., DOTBCA No. 4184, 05-1 BCA ¶ 32,894.

[302] *Id.* at 162,960.

[303] *Id.*

[304] *Id.*

[305] *Id.* at 162,961.

[306] *Id.*

[307] *Id.* at 162,964-65.

[308] *Id.*

[309] *Id.* at 162,964.

[310] *Id.*

[311] *Id.* at 162,965.

In perplexing dicta, the COFC determined in *Engineered Demolition v. United States*[312] that no certification equals "a defect in the certification;" and a defect in the certification equals "a defective certification." [313] This is even more confusing given the court's determination that the two claims filed by Engineered, totaling $107,987, were separate claims and that there was no certification requirement. [314]

The Army Corps of Engineers contracted with Engineered for the removal, transportation and disposal of radiologically contaminated soil stored at the Hazelwood Interim Storage Site located in northern St. Louis County, Missouri.[315] During negotiations, Engineered suggested, and the Corps did not dispute, that one hundred twenty-five railcars would be necessary for the transportation of the contaminated soil.[316] Based upon that estimate, Engineered entered into a subcontract for railcars to transport the soil to a low-level nuclear waste disposal site in Utah.[317] The subcontractor relied upon the Corps' survey and Engineered's estimate to order one hundred twenty-five railroad cars.[318] After the Corps awarded the contract, the contracting officer's representative changed the finish grade elevation to make the finish grade higher than specified in the contract.[319] As a result, the total amount of soil removed was 1,402 cubic yards less than originally estimated.[320]

Engineered originally requested an equitable adjustment for unabsorbed overhead in the amount of $161,729.16, claiming $62,427.10 in unrecouped overhead for differing site condition; $38,940 on behalf of its subcontractor for railcars for unused railcars; and $6,619.80 for Engineered's markup on the unused railcars.[321] Engineered's complaint requested two claims: one on its own behalf for $69,047, and a sponsored claim on behalf of a sub-contractor for $38,940.[322]

The government filed a motion to dismiss for lack of subject matter jurisdiction because the contractor failed to certify the claim which totaled over $100,000. The government argued that there is a distinction between failing to submit a certification and submitting a defective certification.[323] The government implied that failure to submit a certification is a jurisdictional bar, while a defective certification is fixable.[324] Therefore, the court lacked jurisdiction over the claims because Engineered failed to properly certify its claim, which exceeded the $100,000 threshold.[325] Engineered argued that no certification was necessary because the two claims were separate and each was under the $100,000 threshold.[326]

In denying the Corps' motion to dismiss for lack of subject matter jurisdiction, the COFC found that while the cumulative total of the defendant's two claims was greater than $100,000, the claims arose separately, albeit from the same contract.[327] The Court found that even if the claims were combined for purposes of the CDA, the Court would deny the

---

[312] Engineered Demolition, Inc. v. United States, 60 Fed. Cl. 822 (2004).

[313] *Id.* at 829-31.

[314] *Id.* at 831.

[315] *Id.* at 823.

[316] *Id.* at 824.

[317] *Id.* at 824.

[318] *Id.*

[319] *Id.* at 824.

[320] *Id.*

[321] *Id.* at 824-25. When Engineered filed its complaint with the court on 26 September 2003, it split its claim into two parts: $69,047 ($62,427.10 + 6,619.80 = $69,046.90) for its overhead, and $38, 940 on behalf of its subcontractor.

[322] *Id.* Engineered's first claim, for $69,047 was for an equitable adjustment claim for under-absorbed overhead associated with a shortfall in the quantity of contaminated soil to be removed which it claimed was caused by the Corps of Engineer's decision to change the final elevation of the finish grade. The claim on behalf of its subcontractor related to excess costs associated with the number of railcars ordered for the project, but not used because the government changed the final elevation of the finish grade. *Id.*

[323] *Id.* at 824.

[324] *Id.* at 827.

[325] *Id.* at 824.

[326] *Id.*

[327] *Id.* at 831.

government's motion since the only consequence of a defective certification would be that the Court required Engineered to certify the claims before the Court issued its decision.[328] Furthermore, the court held that no certification was required because each claim was separate, having arose out of different factual predicates, and each were under $100,000.[329]

In dicta, the court stated that the failure to provide a certification where a claimant mistakenly, but reasonably, believed multiple claims each under $100,000 that cumulatively totaled over $100,000 were not jurisdictionally barred.[330] The court interpreted the language of 41 U.S.C. Section 605(c)(6)[331] as ambiguous and "the last sentence of the definition of 'defective certification' in FAR § 33.201 as overbroad and invalid."[332] In coming to its conclusion that, in this case, the failure to submit a certification was not a jurisdictional bar, even if the claims were to be considered one, the court looked at the legislative materials in the 1992 amendments to the CDA.[333]

In determining that Engineered's claims were separate claims, the court stated that "more than one claim might arise from a single government contract."[334] The question is whether each factual predicate is separate and apart from the other and supports a separate claim.[335] Since the claims were separate and independent in nature, and less than $100,000, no certification was required.[336]

Are We Still Messing with Jurisdiction?

The COFC recently decided that the statute of limitations for the Tucker Act is not concerned about where you file your suit, just as long as you file it within the six years of the claim accruing.[337] In *Stockton East Water District v. United States,* the COFC denied the government's motion to dismiss for lack of jurisdiction even though it took the plaintiffs ten years to file its claim in the COFC.[338] The case revolved around a dispute between the Bureau of Reclamation and several water districts over the operation and maintenance of water facilities within the San Joaquin Valley, California, which was originally filed in the U.S. District Court within the statute of limitations, but much later refiled in the COFC.[339]

The appellants originally filed their complaint in the U.S. District Court for the Eastern District of California on 1 October 1993.[340] In February of 1994, that court dismissed the first four claims and stated, in part, that the government's

---

[328] *Id.* at 830-31.

[329] *Id.* at 831.

[330] *Id*.

[331] Title 41, section 605(c)(6) of the U.S. Code states:

The contracting officer shall have no obligation to render a final decision on any claim of more than $ 100,000 that is not certified in accordance with paragraph (1) if, within 60 days after receipt of the claim, the contracting officer notifies the contractor in writing of the reasons why any attempted certification was found to be defective. A defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency board of contract appeals, the court or agency board shall require a defective certification to be corrected. 41 U.S.C.S. § 605(c)(6) (LEXIS 2005)

[332] *Engineered Demolition*, 60 Fed. Cl. at 830.

[333] *Id.* at 827. The fundamental purpose of the certification is to have the contractor submit an accurate appraisal of its damages and to thereby encourage settlements. *See also* Medina Construction Limited v. United States, 43 Fed. Cl. 537 (1999). The court pointed to Judge Loren A. Smith's (Chief Judge of the U.S. Claims Court in 1992) testimony before Congress, whereby he pointed out that the "certification requirement 'hurt real people, especially small business who are less able to deal with the intricacies and complexities of Federal procurement law.'" *Id.*

[334] *Id.* at 831.

[335] *Id.* at 831.

[336] *Id.*

[337] Stockton East Water District v. United States, 62 Fed. Cl. 379 (2004).

[338] *Id.*

[339] *Id.* at 382.

[340] *Id.* at 383. Appellants claimed five areas of relief:

> (1) impairment of "vested rights under … water contract in violation of the Fifth amendment due process clause, (2) violation of the National Environmental policy Act for failure to prepare and environmental impact statement; (3) violation of the CVPIA, section 3410 ; (4) arbitrary and capricious action bye the Government; and (5) violation of the Fifth Amendment's taking clause.

Id.

motion to dismiss the claim of a violation of the Fifth Amendment's taking clause was granted without prejudice, allowing the appellant ten days to amend and bring the claim at the COFC.[341] Rather than avail themselves of the COFC, the appellants filed an amended complaint before the district court and concurrently with the California Resources Control Board (SWRCB). [342]

The Federal judge issued a summary judgment ruling in 1996; however he issued a stay, "pending the outcome of the SWRCB proceeding to determine state water rights issues." [343] While the court held that the plaintiffs "do not, by virtue of their contracts with [Reclamation], hold prior appropriative or senior water rights that would require the Secretary to appropriate their water before appropriating the 800,000 acre feet of water for fishery and wildlife purposes," it would not rule on whether the plaintiffs had prior water rights under the Watershed Protection Act.[344] The court again ruled that the contracts were ambiguous as to abrogation of the sovereign power to legislate, like it had in its original Dismissal Order.[345] Later in 1996 the federal court withdrew its ruling of the government's motion for partial judgment concerning the plaintiff's water right claim under the California Water Code.[346] Then in 1997, the court took up the state law issue.[347] There the court agreed with the SWRCB that all of the plaintiff's claims under the California Water Code[348] should be referred to the SWRCB.[349]

Seven years later, the appellants filed a motion asking permission to transfer the complaint, which was granted. [350] The Plaintiff's amended Federal Claims Court complaint sought relief for a takings and a breach of contract. [351] The court ultimately did not agree with the government's assertion that the court lacked subject matter jurisdiction because the complaint was time-barred. [352] The government's position was that the claims must have accrued no earlier than 20 April 1998, six years before the plaintiffs filed in the Court of Claims. [353] The plaintiffs, on the other hand, believed the appropriate filing date was the 1993 date of the original complaint and not the 2004 filing with the U.S. Court of Claims.[354] The court sided with the plaintiffs, holding that the statute did not expressly define "filed" or require that the claim be filed with the COFC.[355] The court instead looked to the statute authorizing the transfer of the case from Federal Court to the U.S. Court of Federal Claims: Title 28 United States Code, Section 1631 which states that "the action shall proceed as if it had been filed in . . . [the transferee court] on the date upon which it was actually filed in . . . [the transferor court.]"[356]

Riley & Ephriam Constr. Co. & the Court of Federal Claims; Forget About It!

Last year's *Year in Review* reported the *Riley* case for "the proposition that it is a good idea to regularly check your mailbox."[357] Well, as the boys from the movie *Goodfellas* would say, "Forget about It!" This year's episode of *Riley &*

---

[341] *Id.* at 384.

[342] *Id.*

[343] *Id.* at 385.

[344] *Id.* at 386.

[345] *Id.*

[346] *Id.* at 387.

[347] *Id.*

[348] *Stockton*, 62 Fed. Cl. at 387; Cal. Water Code § 11460 (2005).

[349] *Stockton*, 62 Fed. Cl. at 387.

[350] *Id.*

[351] *Id.*

[352] *Id.* at 388. 28 U.S.C. § 2501 stating that claims under the jurisdiction of the United States Court of Claims are barred unless the petition is filed within six years after the claim accrues. 28 U.S.C.S. § 2501 (LEXIS 2005).

[353] *Stockton*, 62 Fed. Cl. at 388.

[354] *Id.*

[355] *Id.* at 389

[356] *Id.* (quoting § 1631).

[357] *See* Major Kevin J. Huyser et al., *Contract and Fiscal Law Developments of 2004—Year in Review*, ARMY LAW., Jan. 2005, at 108 [hereinafter *2004 Year in Review*].

Ephriam Construction Company v. United States[358] (hereinafter Riley) saw the CAFC do a one-eighty. In *Riley*, the Court of Appeals for the Federal Circuit reversed the COFC's dismissal of a complaint filed more than one year after the receipt of the contracting officer's final decision.[359] The contracting officer issued a final decision on 27 November 2001, sending one copy the contractor via certified mail and the other to the contractor's attorney via fax.[360] The contractor failed to pick up the certified letter that was sent to its P.O. Box and Riley's attorney claimed that he never received the faxed final decision.[361] The contracting officer resent the final decision to the contractor's attorney, which he received and signed for on 30 January 2002.[362] On 24 January 2003, Riley filed an appeal with the Court of Federal Claims.[363]

While the COFC determined that Riley was barred by the statute of limitations,[364] the Federal Circuit did not see it the same way.[365] The contracting officer's statement that the fax went through, and a substantiating document that showed a 2.6 minute call to Riley's attorney's fax machine were not the "objective indicia of receipt'" required by the CDA.[366] Since the government failed to produce the requisite evidence of receipt for either final decision sent on 27 November 2001, the clock did not start running until the contractor's attorney received the final decision on 30 January 2002. The Federal Circuit also disagreed with the finding that the contractor implicitly consented to allow the Post Office employees to accept mail on its behalf, or that a Post Office box rental was analogous to a customer of a commercial mail handler or private mailbox service that has the authority to sign for its customers.[367] The moral of this story is: save those fax confirmation sheets, because someday they may just save you!

Are You Going to Believe My Stamp or Theirs!

The other delivery case, involving the U.S. Postal Service, has nothing to do with a final decision and everything to do with a notice of appeal. In *Premier Consulting & Management Services*,[368] the contractor claimed it dropped its notice of appeal off at the local post office on the last day of the ASBCA appeal period.[369] The case required the board to decide between the date that appeared on the U.S. Postal Service cancellation stamp and the date that appeared on the postage meter stamp from the Plaintiff's place of business.[370] While the envelope contained a postage meter stamp dated the 90th day, the U.S. Postal Service's cancellation stamp was dated the 91st day.[371] The ASBCA denied the government's motion to dismiss, noting that under the ASBCA rules,[372] a notice of appeal is considered filed when the contractor transfers custody to the Postal Service and that the contractor has the burden of proof as to when custody was transferred.[373] The board depended upon the uncontroverted sworn statement of the contractor employee who claimed that she dropped the envelope containing the notice of appeal at the post office on the 90th day.[374]

---

[358] Riley & Ephriam Constr. Co., Inc. v. United States, 408 F.3d 1369 (May 18, 2005).

[359] *Id.*

[360] *Id.*

[361] *Id.* at 1371.

[362] *Id.*

[363] *Id.*

[364] Riley & Ephriam Constr. Co. v. United States, 61 Fed. Cl. 405 (2005),

[365] Riley & Ephriam Constr. Co., Inc. v. United States, 408 F.3d 1369, 1370 (May 18, 2005).

[366] *Id.* at 1372.

[367] *Id* at 1373-74

[368] Premier Consulting & Mgmt. Servs., ASBCA No. 54691, 05-1 BCA ¶ 32,949

[369] *Id*. at 163,256.

[370] *Id.* at 163,257.

[371] *Id.* at 163,256.

[372] ASBCA Rule 1(a) states that a "[n]otice of appeal shall be in writing and mailed or otherwise furnished to the Board within 90 days from the date of receipt of a contracting officer's decision. A copy thereof shall be furnished to the contracting officer from whose decision the appeal is taken." U.S. DEP'T OF DEF., DEFENSE FEDERAL ACQUISITION REG. SUPP. App. A (July 2004).

[373] *Premier Consulting*, ASBCA No. 54691, 05-1 BCA ¶ 32,949, 163,256-163,257.

[374] *Id*.

In a somewhat embarrassing case for the government counsel, the GSBCA determined it did not have the authority to impose monetary sanctions against the GSA.[375] In *A&B Limited Partnership*,[376] the contractor won its appeal and EAJA fees, but the government did not pay the judgment.[377] The government counsel on the case failed to return calls to attempt to rectify the situation, and the agency general counsel failed to respond to written requests for the same.[378] While dismissing the appellant's request for monetary sanctions, the GSBCA clearly believed that the government's repeated failures to respond to appellant's requests for assistance were inappropriate.[379] The GSBCA raised serious concerns about the government's failure to adhere to the CDA's prompt payment requirements.[380] The Board went on to note that the government's delay cost taxpayer's money in the form of interest.[381] While the Board could, and did, admonish the government counsel, it did not have the inherent authority to impose a sanction on the government for uncooperative behavior.[382]

Lieutenant Colonel Ralph J. Tremaglio, III

Nonappropriated Fund Contracting

The Year of New Regulations

As part of the continuing effort to coordinate regulations in response to the still relatively new Installation Management Agency's (IMA) presence, the past year saw the Army update its two primary regulations controlling nonappropriated fund instrumentalities. *Army Regulation 215-1*, *Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities*, was updated twice—first on 1 December 2004, and then again on 15 August 2005. One of the most significant changes was an increase to the threshold for MWR minor construction projects to $750,000.[383] Another significant change was the elimination of the potential use of appropriated funds for golf courses at remote and isolated sites and at base realignment and closure sites.[384] A third significant change was the authorization for appropriated funds to be used for utility services consumed by MWR programs, with the exception of golf courses within the United States.[385]

Army Regulation 215-4, *Nonappropriated Fund Contracting*, was also revised on 11 March 2005. The substantial changes in this revision included modifying the policy regarding requests for exceptions or clarifications. The new requirement is that requests for exceptions or clarifications to the policy must to be sent through the requestor's supporting regional IMA office to the Army Community and Family Support Center (USACFSC).[386] The new regulation also provides the IMA regional directors authority for management and oversight of the NAF contracting activities[387] and specifies that IMA regional directors / garrison commanders are delegated the authority to issue NAF contracting officer warrants within established thresholds.[388] The new regulation also increases ordering officer authority to $25,000.[389]

---

[375] GSBCA, 05-1 BCA ¶ 32,832

[376] *Id.* at 162,446.

[377] *Id.*

[378] *Id.*

[379] *Id.*

[380] *Id.*

[381] *Id.*

[382] *Id.*

[383] U.S. DEP'T OF ARMY, REG. 215-1, MORALE, WELFARE, AND RECREATION ACTIVITIES AND NONAPPROPRIATED FUND INSTRUMENTALITIES para. 11-29b(13) (15 Aug. 2005).

[384] *Id*. paras. 4-4a, 4-5a, and app. D, nn.1 and 3.

[385] *Id*. app. D, para. 7.

[386] U.S. DEP'T OF ARMY, REG. 215-4, NONAPPROPRIATED FUND CONTRACTING para. 1-7 (11 March 2005).

[387] *Id*. para. 1-11.

[388] *Id*. para. 1-15.

[389] *Id*. para. 1-17b(2)(c).

In addition, the new regulation increases the competition threshold from $2,500 to $5,000;[390] establishes policies on the use of a simplified acquisition threshold for purchases not exceeding $100,000 ($250,000 for commercial items);[391] and incorporates text regarding policies for construction and architect-engineering contracts.[392] This revision also updated the contract clauses to be used in NAF contracts.[393]

The new regulation expands the requirements for legal review to twenty-seven different areas.[394] As a result of this change, administrative law attorneys and contract law attorneys can expect to see more NAF contract actions to review.

In addition to the regulatory updates, in response to reports that "the Military Services may be using 10 U.S.C. 2492 to enter into agreements with DoD NAFIs to provide goods and services that are not within the authorized activities of or of direct benefit to exchanges and morale, welfare, and recreation programs," the Under Secretary of Defense for Personnel and Readiness, Dr. David Chu, published a memorandum reminding defense agencies that DOD NAFIs may "not enter into contracts or agreements with DoD elements or other Federal Departments, Agencies or instrumentalities for the provision of goods and services that will result in the loss of jobs created pursuant to the Randolph-Sheppard Act (RSA), Javits-Wagner O'Day (JWOD), or small business programs."[395]

And B-I-N-G-O Was His Name-Oh! ASBCA Denies a Breach of Contract Claim

In a case of widespread significance across the DOD NAFI community, *Charitable Bingo Associations, Inc. d/b/a Mr. Bingo, Inc.* (*Charitable Bingo*),[396] the ASBCA denied a contractor's claim for breach of contract on the grounds that the government possesses broad rights to terminate contracts, and barring bad faith or a clear abuse of discretion, the board would not overturn a contracting officer's decision to terminate a contract for the convenience of the government.[397] The contractor argued that the Termination Contracting Officer did not exercise independent judgment in terminating a bingo services contract, but rather was acting on orders from her superiors.[398] The board held that since the contracting officer in good faith exercised her independent judgment in terminating the contract, it would not overturn that decision.[399]

In this case, the contractor was operating bingo games for installation NAFIs at Forts Gordon, Stewart, and Knox. After reviewing bingo operations across the Army, the Assistant Secretary of the Army for Manpower and Reserve Affairs, Mr. Patrick Henry, issued an action memorandum prohibiting contractor-operated bingo programs in Army MWR programs.[400] Five weeks later, the Charitable Bingo contract was terminated for the convenience of the government.[401] The ASBCA found that, despite a recent Department of Army policy barring civilian contractors from operating NAFI bingo games on Army installations, the contracting officer credibly testified that she considered alternatives to a termination for convenience in the face of the memorandum.[402] The Board felt this testimony was sufficient to show that she made an independent determination to terminate the contract.[403]

---

[390] *Id*. para 2-12.

[391] *Id*. ch. 3.

[392] *Id*. paras. 8-1 and 8-2.

[393] *Id*. at app. B.

[394] *Id*. at para.1-22.

[395] Memorandum, Under Secretary of Defense for Personnel and Readiness, to Secretaries of the Military Departments, subject: Limitations on Use of Contract and Other Agreements with DoD Nonappropriated fund Instrumentalities (NAFIs) Pursuant to 10 U.S.C. § 2492 (29 Dec. 2004).

[396] Charitable Bingo Associates., Inc. d/b/a Mr. Bingo, Inc., ASBCA Nos. 53249, 53470, 05-1 BCA ¶ 32,863. (Sept. 29, 2005).

[397] Upon request for reconsideration, the ASBCA again denied contractor's claims. *Id.*

[398] *Id*. at 162,847.

[399] *Id*.

[400] *Id*. at 162,840.

[401] *Id*. at 162,841.

[402] *Id*. at 162,847.

[403] *Id*. at 162,842.

The board held that the government's broad right to terminate contracts is nearly "at-will" and, barring bad faith or a clear abuse of discretion., the board would not overturn the contracting officer's decision to terminate a contract for the convenience of the government.[404] Given the Termination Contracting Officer's testimony in this case that, prior to issuing the termination for convenience notice, she considered both ignoring the memorandum and terminating the contractor for default for other issues related to the contract, the board held that the evidence did not support the contractor's argument that the Termination Contracting Officer failed to exercise independent judgment.[405]

The lesson to be learned from this case appears to be that contracting officers whose hands appear to be tied by higher authority must still make independent judgments and determinations on how to handle contract terminations. If they do so, the board appears willing to allow their "independent" judgment to stand.

Major Michael S. Devine

[404] *Id*. at 162,847.

[405] *Id*.

SPECIAL TOPICS

Competitive Sourcing

Application of A-76 to In-House Performance after Contract Expires

Although the Office of Management and Budget (OMB) published its revised version of OMB Circular A-76 [Revised A-76][1] over two years ago, there are still some unanswered questions concerning its application under certain circumstances. Specifically, one unresolved question is whether the Revised A-76 applies to in-house performance of a commercial activity[2] after the expiration of a contract resulting from an earlier standard competition[3] or cost comparison.[4]

In *LABAT-Anderson, Inc. v. United States*,[5] the plaintiff (LABAT) requested that the Court of Federal Claims (COFC) enjoin the government from allowing in-house employees to perform work LABAT had been performing under a contract. LABAT alleged[6] the agency violated the Revised A-76,[7] 32 C.F.R. Parts 169 and 169a, Exec. Order No. 12,615, and 10 U.S.C. § 2462 by permitting in-house employees to perform a commercial activity after the expiration of a contract resulting from a cost comparison under "Old" A-76.[8] Because the COFC concluded that the agency did not violate these sources of law, it denied LABAT's request for an injunction.[9] Significantly, the COFC found that in this case, the agency was not required to follow the detailed Revised A-76 procedures in deciding who should perform a commercial activity after the contract expired.[10]

In May 2001, after conducting a cost comparison under the "Old" A-76, the Defense Logistics Agency (DLA) awarded a contract to LABAT for the performance of distribution services at a depot in Cherry Point, North Carolina.[11] On 30 September 2004, after some disagreement over contract pricing, the DLA formally notified LABAT that it would not exercise the option to extend the term of the contract.[12] The contract was scheduled to expire on 30 November 2004.[13]

Prior to performing this work in-house, the DLA conducted an informal cost study[14] comparing the cost of government performance to the cost of LABAT's performance.[15] This informal cost study did not strictly comply with the

---

[1] U.S. OFF. OF MGMT. & BUDGET, CIRCULAR NO. A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES (2003) [hereinafter REVISED A-76]. *See also* Office of Mgmt. & Budget, Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32,134 (May 29, 2003).

[2] *Id*. attch. A, ¶ B.2. A "commercial activity" is a "recurring service that could be performed by the private sector and is resourced, performed, and controlled by the agency through performance by government personnel, a contract, or a fee-for-service agreement." *Id.*

[3] *Id*. ¶ 4. Revised A-76 requires agencies to perform either streamlined or standard competitions to determine whether it is more economical for government personnel or a contractor to perform a commercial activity. The term the OMB now uses to describe the procedures under Revised A-76 that agencies must follow to study a commercial activity is "competitive sourcing." *Id.*

[4] RSH, *infra* note 8, app. 1. A "cost comparison" is a term that the previous version of OMB Circular A-76 used to describe "the process whereby the estimated cost of government performance of a commercial activity is formally compared . . . to the cost of performance by commercial . . . sources." *Id.*

[5] 65 Fed. Cl. 570 (2005).

[6] *Id.* at 573.

[7] REVISED A-76, *supra* note 1. Revised A-76 requires federal agencies to conduct competitions of commercial activities currently performed by government personnel to determine whether private sector performance or government performance would be less expensive. At the conclusion of a Revised A-76 competition, if the agency finds that contract performance is cheaper, then the agency awards a contract to a contractor. Conversely, if the agency finds that government performance is cheaper, then the agency issues a "letter of obligation" to the "official responsible for performance of the MEO." *Id*. attch B, ¶ D6.

[8] U.S. OFF. OF MGMT. & BUDGET, CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (1999) [hereinafter OLD A-76] and U.S. OFF. OF MGMT. & BUDGET, CIRCULAR NO. A-76, REVISED SUPPLEMENTAL HANDBOOK, PERFORMANCE OF COMMERCIAL ACTIVITIES (1996) [hereinafter RSH]. Revised A-76 replaced and superseded "OLD" A-76 for streamlined and standard competitions commenced after its effective date.

[9] *LABAT*, 65 Fed. Cl. at 581-82.

[10] *Id.* at 587-89.

[11] *Id*. at 572-73.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 579-80. In conducting its informal cost study, the DLA used the software it would have used to perform a cost comparison under Revised A-76. The DLA's informal cost study consisted of a comparison of the costs of personnel, supplies, material, and other costs. *Id*.

Revised A-76 procedures.[16] The DLA concluded that performance in-house would be cheaper than performance by LABAT.[17] The DLA then informed LABAT that it would perform the distribution service work with government employees until the DLA could resolicit and award a new contract.[18]

LABAT requested the COFC enjoin the DLA from utilizing its in-house employees to perform the distribution services that LABAT had been performing under contract.[19] LABAT alleged that in-house performance of this work violated the sources of government procurement authority listed above.[20]

The DLA moved to dismiss for lack of jurisdiction, arguing that LABAT did not have standing under the Tucker Act to file suit because the case did not involve a pending procurement.[21] Although the COFC found that this case did not concern a solicitation or the award of a contract, the case concerned the "decision by the Government not to conduct a solicitation."[22] As such, the court found that it had jurisdiction over an "alleged violation of statute or regulation in connection with a procurement."[23] Additionally, the COFC found LABAT was an interested party under the Tucker Act and had standing.[24] After concluding that it had jurisdiction under the Tucker Act, [25] the COFC reviewed the merits of LABAT's request for an injunction.[26]

The COFC commented that the Department of Defense (DOD) is required by statute to acquire services from commercial sources if these sources can provide them at a cost that is lower than government sources can provide.[27] Although the statute does not specify how to compare the cost of private versus public performance, it states that the DOD "shall ensure that all costs considered are realistic and fair."[28]

Apply the facts of this case, the court found that even though the DLA did not conduct a competition strictly in accordance with the Revised A-76 procedures, the DLA complied with the statutory requirement because the DLA's informal cost study was "realistic and fair."[29] In making its determination, the COFC determined that the DLA used the same computer software that it ordinarily uses to conduct competitions pursuant to the Revised A-76.[30] The COFC also found that

---

[15] *Id.* at 579.

[16] *Id.* at 580. For instance, Revised A-76 requires that the agency calculate the cost of overhead (personnel costs multiplied by twelve percent) in determining the total cost of agency performance. Nevertheless, the DLA did not add the cost of overhead into its calculations. *Id.*

[17] *Id.* at 579. The DLA determined that the cost of performance by LABAT would be $425,000 per month, while the cost of in-house performance would be $365,475.50 per month. *Id.*

[18] *Id.* at 573.

[19] *Id.*

[20] *Id.* LABAT originally filed suit in the District Court for the District of Columbia but the case was transferred to the COFC because only the COFC has jurisdiction under the Tucker Act. *Id.* at 572.

[21] *Id.* at 575.

[22] *Id*. The Tucker Act, 28 U.S.C. § 1491(b)(1), states the COFC has jurisdiction:

> [T]o render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.

See 28 U.S.C.S. § 1491(b)(1) (LEXIS 2005).

[23] *LABAT*, 65 Fed. Cl. at 581-582 (citing 28 U.S.C.S. § 1491(b)(1)).

[24] *Id*. at 575. The COFC referred to the Competition in Contracting Act (CICA), 31 U.S.C. § 3551(2)(A), for the definition of "interested party" (citing the Act's definition as "[a]n actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or the failure to award the contract"). *Id.* The COFC found LABAT to be an interested party under the CICA because DLA's decision not to exercise the option extending the term of its contract with LABAT affected LABAT's direct economic interest. *Id.*

[25] *Id*. at 575-76.

[26] *Id*. at 575-77. Specifically, LABAT argued that the DLA violated Title 10 U.S.C. § 2462, Revised A-76, 32 C.F.R. Parts 169 and 169a, and Executive Order 12,615. *Id.* at 573.

[27] 10 U.S.C.S. § 2462 (LEXIS 2005).

[28] *Id.*

[29] *LABAT*, 65 Fed. Cl. at 570, 579.

[30] *Id*. at 580.

the DLA reasonably compared the personnel costs, material costs, and supply costs of both parties before determining that performance by in-house personnel would be cheaper than performance by LABAT.[31]

The COFC also commented that both federal regulatory provisions and the Revised A-76 procedures echo the statutory preference that agencies perform commercial activities with private sector employees if performance by private contractors is less costly than performance by government employees.[32] In particular, procurement regulations require the government to compare the cost of government performance versus contractor performance to determine which alternative would be the better value for the government.[33] For instance, one provision states that agencies shall perform commercial activities with commercial sources if the "services can be procured more economically" with commercial sources than with government employees.[34] The stated purpose of this series of regulations is to update DOD policies regarding "commercial activities" as "required by E.O. 12615 and OMB Circular A-76."[35] Additionally, DOD's installation commanders are affirmatively required to conduct "cost comparisons" pursuant to OMB Circular A-76.[36]

In applying the regulatory provisions and the Revised A-76 to this case, the court found the circular, as an executive policy, is relevant to the DOD only to the extent that the aforementioned federal regulations incorporate it.[37] The court stated that these federal regulations do not address a situation, as here, where the government has not completed a resolicitation prior to the expiration of a contract resulting from an earlier A-76 study.[38] As such, the court found that under the circumstances of this particular case, the federal regulations did not incorporate the Revised A-76 procedures. Thus, in its analysis of the DLA's informal cost study, the court referred to the broad procedural rules located in Title 32, Parts 169 and 169a versus the more draconian rules of Revised A-76.[39] Consequently, the court stated that in this case, "we have found Circular A-76 inapplicable."[40]

Agency heads are also required by Executive Order 12,615 to perform commercial activities with private sector employees if such activities "could be performed more economically by private industry."[41] Although LABAT argued that the DLA violated this order, the court opined that the executive order does not provide the court with a "meaningful standard of review."[42] Additionally, the court stated that it viewed this executive order as akin to an internal "memorandum within the Executive Branch."[43] Consequently, the COFC rejected this basis of LABAT's argument.[44]

In summary, after reviewing the bases of LABAT's argument that the DLA improperly permitted in-house personnel to perform a commercial activity after the expiration of the contract between the DLA and LABAT, the COFC rejected it. In short, the court was satisfied that the DLA complied with the statutory and regulatory authority, even if it did not comply with Revised A-76. It is debatable that the COFC correctly applied the relevant procurement authorities to the facts of this case.[45] While 10 U.S.C. § 2462 places few requirements upon agencies conducting analyses of the cost of private versus government performance of commercial activities, the aforementioned federal regulations and the Revised A-76—taken together—impose strict requirements for conducting a competition. The COFC opined that the Revised A-76

---

[31] *Id.*

[32] 32 C.F.R. § 169 (1989) and 32 C.F.R. § 169a (1992).

[33] *Id.* § 169.4 (1989).

[34] *Id.*

[35] *Id*. § 169.1.

[36] *Id.* § 169.5.

[37] *LABAT*, 65 Fed. Cl. at 577.

[38] *Id*. at 579.

[39] *Id.* at 578-79.

[40] *Id.* at 580.

[41] Exec. Order No. 12,615, 52 Fed. Reg. 44,853 (Nov. 23, 1987).

[42] *LABAT*, 65 Fed. Cl. at 580.

[43] *Id.*

[44] *Id.*

[45] 10 U.S.C.S. § 2462 (LEXIS 2005); Revised A-76, *supra* note 1, and 32 C.F.R. § 169 and 32 C.F.R. § 169a.

procedures applied to the DOD only insofar as 32 C.F.R. parts 169 and 169a incorporate it.[46] The court further stated that these regulations did not address the situation, as here, where the agency opts to perform a commercial activity with in-house employees after allowing a contract to expire.[47] Thus, the court argues that because the regulations do not address the specific facts of this case, the requirements of Revised A-76 also do not apply.[48]

Conversely, it is conceivable that 32 C.F.R. Parts 169 and 169a do incorporate the Revised A-76.[49] For example, 32 C.F.R. 169.1(b) states that it "updates DOD policies and assigns responsibilities for commercial activities (CAs) *as required by* . . . OMB Circular A-76."[50] Further, 32 C.F.R. 169.5(c) states that "installation commanders shall have the authority and responsibility to . . . conduct a cost comparison of those commercial activities selected for conversion to contractor performance under OMB Circular A-76."[51] Additionally, another regulation in the same series mandates that the DOD conduct another cost comparison[52] if the cost of a post-cost comparison contract "becomes unreasonable or performance becomes unsatisfactory."[53] While the COFC found this provision inapplicable to this case,[54] the provision is, arguably, applicable.[55] The above regulations' direct references to OMB Circular A-76 do not purport to require DOD to follow only portions of the Revised A-76. Therefore, it appears that the above regulations require DOD to fully utilize all of the detailed Revised A-76 procedures—not just some of the procedures.

In this case, the DLA allowed the LABAT contract to expire after a lengthy dispute over contract costs.[56] The DLA apparently believed that the LABAT contract costs were too high. If the contract costs were unreasonable, then 32 C.F.R. § 169a.10 would require the DLA to resolicit using Revised A-76 procedures.[57] Thus, contrary to the COFC's assessment, it is possible to interpret the above regulations as requiring the DOD to follow all of the procedures set forth in the Revised A-76.

Even assuming that the DOD is required to comply with the Revised A-76 under the circumstances of *LABAT*, it is worth noting that the Revised A-76 does not directly reference performance of a commercial activity by in-house personnel under these circumstances. The Revised A-76 only references in-house performance of an activity formerly performed by a contractor in the case where the agency terminated the previous contract.[58]

The impact of the *LABAT* court's holding is unclear. Nevertheless, the court found that in a case where the agency allows temporary in-house performance of a commercial activity following the expiration of a contract resulting from an earlier A-76 competition, the detailed procedures of Revised A-76 do not apply.[59] Put briefly, the court found in-house performance of such a commercial activity permissible without first performing a formal competition pursuant to the Revised A-76.[60] Whether agencies will have wider discretion in deciding whether to follow the Revised A-76 procedures is a question for future editions of the *Year in Review*.

---

[46] *LABAT*, 65 Fed. Cl. at 578.

[47] *Id*. at 581-82.

[48] *Id*. at 578.

[49] 32 C.F.R. § 169 and 32 C.F.R. § 169a (1989).

[50] 32 C.F.R. § 169.1 (emphasis added).

[51] 32 C.F.R. § 169.5.

[52] 32 C.F.R. § 169a.10. This regulation was implemented while "Old" A-76 was in effect and as such, it uses the term "cost comparison," an "Old" A-76 term, rather than "competition," a Revised A-76 term. *Id.*

[53] *Id.* This provision seems particularly relevant to the facts of this case in that in this case, DLA, arguably, found LABAT's contract costs unreasonable. As such, this provision requires the agency to conduct another "cost comparison" (now called a "competition") pursuant to OMB Circular A-76 to determine whether it would be more cost effective for a contractor or in-house employees to perform the commercial activity.

[54] *LABAT*, 65 Fed. Cl. at 570, 579. The court found this provision in applicable because in this case, prices were not unreasonable and performance was not unsatisfactory. *Id.*

[55] *Id*.

[56] *Id*. at 573.

[57] 32 C.F.R. 169a.10 (1992).

[58] *Id*. attch. B, ¶ E.6. In addition to government employees, this provision states that the agency may also use interim contracts or public reimbursable sources to temporarily perform a terminated contract. Nevertheless, these temporary remedies may not be used for more than one year after the date of contract termination. *Id.*

[59] *LABAT*, 65 Fed. Cl. at 581-82.

[60] *Id.*

Old A-76 is Gone But Not Forgotten

Although the Revised A-76 became effective over two years ago, the GAO is still reviewing protests of performance decisions based on the "Old" A-76. Two separate series of protests pursuant to the "Old" A-76 are discussed below.

In two related protests filed by Johnson Controls World Services, Inc. (JCWS), the protester first[61] requested the GAO recommend award to JCWS and later[62] requested reimbursement for its protest costs. In the first protest, JWCS requested the GAO recommend award to it because the Army's MEO failed to include all of the costs required for in-house performance and further, because the Independent Review Officer's (IRO) certification of the cost estimate was unreasonable.[63] After the Army withdrew the IRO's certification, the GAO dismissed the protest as academic.[64] In the second protest, JCWS requested GAO's recommendation that the Army reimburse it for protest costs because the Army unduly delayed taking corrective action in response to the earlier meritorious protest.[65] The GAO agreed and sustained the second protest recommending that the Army pay protest costs.[66]

In June 2000, the Army announced its intent to conduct a cost comparison pursuant to the "Old" A-76 of the base operations support services at Walter Reed Medical Center.[67] In June 2003,[68] the Army issued a solicitation to potential offerors.[69] Before receiving proposals, the Army submitted its most-efficient organization (MEO)[70] and cost estimates to the Army's IRO,[71] the Army Audit Agency.[72] In April 2004, the IRO first certified the accuracy of the Army's cost estimate and the MEO.[73] In July 2004, the Army modified the Performance Work Statement (PWS) and in September 2004, the Army made corresponding changes to the MEO.[74] The Army submitted the revised MEO to the IRO and in September 2004, the IRO certified the MEO again.[75] On 29 September 2003, the Army compared the cost of performance of the base support services by the MEO to the cost of performance by JWCS and determined that performance by the MEO would be less expensive.[76] JWCS filed an administrative appeal and then protested to the GAO.[77] On 30 March 2005, JWCS filed its second protest arguing that the Army's MEO failed to include all of the costs of government performance of the MEO and as such, the IRO's certification was improper.[78]

---

[61] Johnson Controls World Servs., Inc., Comp. Gen. B-295529.2, B-295529.3, Jun. 27, 2005, 2005 CPD ¶ 124 [hereinafter *Johnson Controls I*].

[62] Johnson Controls World Servs., Inc.—Costs, B-295529.4, 2005 U.S. Comp Gen. LEXIS 152 (Aug. 19, 2005) [hereinafter *Johnson Controls II*].

[63] *Johnson Controls I*, 2005 CPD ¶ 124, at 2.

[64] *Id.* at 3.

[65] *Johnson Controls II*, 2005 U.S. Comp. Gen LEXIS 152, at *6.

[66] *Id.* at *19.

[67] *Johnson Controls I*, 2005 CPD ¶ 124, at 2.

[68] *Id*. The Army received permission from DOD to proceed with the cost comparison under "Old" A-76 even though Revised A-76 was in effect at the time of the solicitation. *Id.*

[69] *Id*.

[70] RSH, *supra* note 8, app. 1. The most-efficient organization (MEO) is the "government's in-house organization to perform a commercial activity." The MEO is based on the PWS and is, in effect, the government's "offer" which is compared against a private sector offeror during the cost comparison process. *Id.*

[71] RSH, *supra* note 8, appendix 1. Under "Old" A-76, the IRO must certify in writing that the government's cost estimate for government performance of the commercial activity under study is accurate. Also, the IRO must ensure that the government's most-efficient organization (MEO) is capable of performing the work described in the PWS. *Id.*

[72] *Johnson Controls I*, 2005 CPD ¶ 124, at 2.

[73] *Id*.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id*.

[78] *Id.*

Specifically, JWCS contended that that the Army's MEO was based on "unrealistically low staffing levels to perform this work."[79] In response to the first protest, the GAO held a hearing on the merits of the case.[80] After the hearing, the Army requested that the GAO dismiss the protest "as academic" because the Army's IRO planned to withdraw its certification of the MEO. The GAO granted that request and dismissed the protest.[81]

JWCS filed its second protest on 16 June 2005 requesting the GAO recommend that the Army reimburse it for the costs associated with this protest and its previous protest.[82] The GAO granted this request after finding that the Army failed to "investigate the substantive grounds of this protest," to "produce documents when required, and "to take prompt corrective action in the face of a clearly meritorious protest."[83] The GAO reported that the Army admitted that it did not fully investigate the basis of JWCS' protest.[84] The GAO found that despite the requirement that the agency produce documents in response to a protest no later than five days prior to filing its report, the Army did not produce these documents until more than seventy days later—the day before the protest GAO hearing.[85] Further, the GAO found that the Army never made any sincere attempt to take corrective action in this case.[86] For the above reasons, the GAO recommended that the Army reimburse JWCS for the reasonable costs of pursuing its protest, to include attorneys' fees.[87]

In a separate series of cases, last year's *Year in Review*[88] discussed *Career Quest, a Division of Syllan Careers, Inc*., where the GAO sustained Career Quest's (CQ) protest following a cost comparison under the "Old" A-76.[89] Following the first protest, CQ filed another protest involving the same cost comparison referenced above.[90] The GAO denied the protest.[91]

As discussed in last year's *Year in Review*,[92] the GAO sustained CQ's first protest following a cost comparison under the "Old" A-76.[93] In that protest, the GAO found that the General Services Administration (GSA) improperly evaluated the cost of the MEO and also failed to include an adequate staffing plan.[94] Although the GAO sustained the protest, it did not recommend award of the contract to CQ because there were two issues that could affect the final cost comparison decision.[95] The GAO recommended that the GSA evaluate the MEO's staffing levels in the technical performance plan and the cost estimate, and then conduct another cost comparison.[96] In response to GAO's recommendations, the GSA revised the MEO and the cost estimate; then it completed another cost comparison, again finding that agency performance would be less expensive.[97] The GSA announced that it would perform the function in-house.[98]

---

[79] *Johnson Controls II*, 2005 U.S. Comp. Gen LEXIS 152, at *14.

[80] *Id.* at *5.

[81] *Id.*

[82] *Id.* at *6.

[83] *Id.* at *18.

[84] *Id.* at *16.

[85] *Id.* at *17.

[86] *Id.*

[87] *Id.* at *19.

[88] *See* Major Kevin J. Huyser et al., *Contract and Fiscal Law Developments of 2004—Year in Review*, ARMY LAW., Jan. 2005, at 121-22 [hereinafter *2004 Year in Review*].

[89] Comp. Gen. B-293435.2, B-293435.3, Aug. 2, 2004, 2004 CPD ¶ 152 [hereinafter Career Quest I]. In this case, the General Services Administration (GSA) conducted a cost comparison under "Old" A-76 of the services at GSA's National Customer Support Center for Federal Supply Schedule users. GSA determined that performance by the MEO would be less expensive. *Id.*

[90] Career Quest, a Division of Syllan Careers, Inc., Comp. Gen. B-293435.4, Mar. 31, 2005, 2005 CPD ¶ 91 [hereinafter Career Quest II].

[91] *Id.* at 1.

[92] *See 2004 Year in Review*, *supra* note 88, at 121-22.

[93] *Career Quest I*, 2005 CPD ¶ 91, at 1.

[94] *Id.* at 1.

[95] *Id.* at 6-7. First, the MEO's cost estimate was based upon 34.5 FTEs while the MEO's technical performance plan (TPP) was based upon 38.5 FTEs. Second, while the MEO's TPP referred to the American National Standard Institute/American Society for Quality (ANSI/ASQ) standard for the purposes of meeting the PWS's quality control call monitoring requirement, the MEO staffing plan did not provide enough FTEs to comply with this standard. *Id.* at 2-3.

[96] *Id.*

[97] *Career Quest II,* 2005 U.S. Comp. Gen. LEXIS 65, at 3.

CQ filed a second protest on the merits protesting GSA's decision.[99] CQ argued that (1) the MEO should not have been permitted to revise the technical performance plan (TPP) and the cost estimate, (2) the MEO did not include adequate staffing to perform the quality control program required by the PWS, (3) the MEO did not include adequate staffing to perform the call center operations as required by the PWS, (4) the MEO understated the hours for certain personnel in the staffing plan, and (5) the contracting officer showed improper bias in favor of the MEO.[100]

The GAO found each basis of the protest without merit. Regarding GSA's revision of its TPP and cost estimate, the GAO did not consider this basis because it was untimely. CQ submitted its protest more than ten days after it knew or should have known that the GSA might revise its MEO and cost estimate.[101] On the issue of the adequacy of the MEO's staffing for both quality control and operation of the call center, the GAO stated it had "no basis to object"[102] to the agency's conclusions on these matters.[103] Regarding whether the MEO understated the hours for certain personnel in the MEO, the GAO found that to be incorrect.[104] Finally, the GAO found that CQ did not meet the standard of presenting "credible evidence that clearly demonstrates bias."[105] Thus, the GAO found that CQ failed to demonstrate sufficient evidence on all grounds and denied the protest.[106]

The GAO's New Set of Bid Protest Rules

Last year, the *Year in Review*[107] discussed the agency tender official's (ATO's) limited protest rights in competitions involving more than sixty-five full-time equivalent (FTE) employees.[108] On 14 April 2005, the GAO amended its protest regulations pursuant to the changes the National Defense Authorization Act for Fiscal Year (FY) 2005 (NDAA FY05) made to the Competition in Contracting Act (CICA).[109] Consequently, the GAO's protest regulations now recognize as an interested party the official responsible for submitting the agency tender in a Revised A-76 competition involving more than sixty-five FTEs.[110] Additionally, although not mentioned in the NDAA FY05, the GAO's regulations gave certain additional parties intervenor status.[111] Specifically, if an interested party files a protest of a competition involving more than sixty-five FTEs, then the GAO's regulations permit a individual "representing a majority of the employees of the federal agency who are engaged in performance of the activity or function" subject to the competition and the individual who submitted the agency tender to intervene in the protest.[112]

---

[98] *Id.*

[99] *Id.* at 1.

[100] *Id.* at 3-7.

[101] *Id.* at 3.

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

[103] *Id.*

[104] *Id.* at 6.

[105] *Id.* at 7.

[106] *Id.* at 8.

[107] *See 2004 Year in Review*, *supra* note 88, at 116-17.

[108] National Defense Authorization Act for FY 2005, Pub. L. No. 108-375, § 326, 118 Stat. 1848 (2004) [hereinafter NDAA FY05]. The NDAA FY05 amended the definition of "interested party" for protests under the Competition in Contracting Act (Pub. L. No. 98-369, Title VII, § 2701, 98 Stat. 1175) to include the "official responsible for submitting the Federal agency tender in a public-private competition" completed pursuant to Revised A-76 regarding an activity performed by more than 65 FTEs. 31 U.S.C.S. § 3551 (LEXIS 2005).

[109] Bid Protest Regulations, Government Contracts, 4 C.F.R. § 21 (2005) [hereinafter GAO Bid Protest Regs].

[110] *Id*. Prior to this revision, the GAO Bid Protest Regs defined an interested party as an "actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract." *Id.*

[111] *Id*. Prior to this revision, the GAO Bid Protest Regs defined an intervenor as an "awardee if the award has been made or, if not award has been made, all bidders or offerors who appear to have a substantial prospect of receiving an award if the protest is denied." The revision now includes additional parties as intervenors. *Id.*

[112] *Id.*

The GAO's Latest Word on A-76

On 21 April 2005, Mr. David Walker, Comptroller General of the United States, testified to Congress[113] concerning the results of the President's Management Agenda (PMA).[114] Mr. Walker summarized some of the key aspects of the federal government's competitive sourcing program.[115] He testified that in response to a requirement in the National Defense Authorization Act for Fiscal Year 2001, he convened the Commercial Activities Panel (CAP) in 2001 to study the A-76 process.[116] After reviewing the CAP's recommendations, the OMB substantially revised the competitive sourcing process in May 2003 making the competition for federal commercial activities similar to FAR procedures and more evenly-applied to both the private and public sector.[117] Mr. Walker also explained that while the Revised A-76 did not grant federal employees standing to file a GAO protest, Congress amended the CICA in 2004 thus granting federal employees standing to file a GAO protest in large A-76 competitions.[118] Subsequently, the GAO modified its protest regulations implementing the change in the federal statute.[119] Finally, Mr. Walker concluded by stating that that GAO continues to review the success and integrity of Revised A-76.[120]

OMB's Latest Word on A-76

In May 2005, the OMB released a report on the results of competitive sourcing conducted by federal agencies in FY 2004[121] pursuant to the PMA.[122] The report stated that during FY 2004, federal agencies conducted two hundred seventeen competitions involving 12,573 FTE employees saving over $1 billion dollars.[123]

The report also identified some competitive sourcing trends for FY 2004.[124] The report stated that for the second consecutive year, federal agencies determined that performance of commercial activities by in-house personnel was more cost effective than private sector performance ninety-one percent of the time.[125] The report stated that eighty percent of the FTEs involved in competitions fell into one of five categories: (1) information technology, (2) maintenance and property management, (3) logistics, (4) human resources, personnel management, education and training, or (5) finance and accounting.[126] The average length of standard competitions was nine months while the average length of streamlined competitions was three months.[127] In FY 2004, the clear majority of the competitions (seventy-nine percent) were standard

---

[113] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-574T, 21, ASSESSING THE PRESIDENT'S MANAGEMENT AGENDA: WHAT GAO FOUND (Apr. 21, 2005) (Testimony Before the Subcommittee on Federal Financial Management, Government Information, and International Security Senate Committee (statement of Mr. David M. Walker, Comptroller of the United States)) [hereinafter WALKER TESTIMONY].

[114] *See* U.S. OFF. OF MGMT. AND BUDGET, EXECUTIVE OFF. OF THE PRESIDENT, THE PRESIDENT'S MANAGEMENT AGENDA: FISCAL YEAR 2002, at 17 (2001), *available at* http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf [hereinafter THE PRESIDENT'S MANAGEMENT AGENDA] (explaining that competitive sourcing is one of the key methods by which President Bush seeks to improve government performance).

[115] WALKER TESTIMONY, *supra* note 113, at 21.

[116] *Id.* The Commercial Activities Panel (CAP) was convened in response to a requirement in the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 106-398, § 832, 114 Stat. 1654, 1654A-221 (2001). The CAP studied the policies and procedures of studying the costs of private versus public performance of commercial activities pursuant to "Old" A-76. *See* Gov't Accountability Office, Commercial Activities Panel, Improving the Sourcing Decision of the Government (2002).

[117] WALKER TESTIMONY, *supra* note 113, at 21.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 21-22.

[121] U.S. OFF. OF MGMT. & BUDGET, REPORT ON COMPETITIVE SOURCING RESULTS FISCAL YEAR 2004 (May 2005), *available at* http://www.whitehouse.gov/omb [hereinafter OMB REPORT].

[122] THE PRESIDENT'S MANAGEMENT AGENDA, *supra* note 114.

[123] OMB REPORT, *supra* note 121, at 1.

[124] *Id.* at 2.

[125] *Id.* at 8.

[126] *Id.* at 14.

[127] *Id.* at 5.

competitions while in FY 2003, the majority of the competitions (sixty-three percent) were streamlined.[128] Finally, agencies pursued larger competitions in FY 2004 (average of fifty-eight FTEs) than in FY 2003 (average of twenty-seven FTEs).[129]

Reports on Competitive Sourcing in DOD

The aforementioned OMB Report[130] relied upon data submitted by the DOD in an earlier report (DOD Report).[131] Both the 2005 OMB Report and the earlier DOD Report provide data specifically on competitive sourcing in the DOD.

According to the OMB Report, in FY 2004, the DOD completed seventy competitions involving 8,234 FTEs.[132] Of these competitions, fifty-four were standard competitions, four were streamlined, and twelve were direct conversions.[133] The average number of FTEs involved in the DOD standard competitions was one hundred thirty-six, while in DOD streamlined competitions, the average number was thirty.[134] The most frequently competed commercial activity in DOD was "base/facilities support and management."[135] Resembling the trend in other federal agencies, the performance decisions following DOD competitions favored in-house employees ninety percent of the time.[136] By the date of the OMB Report, the DOD had announced seventeen additional streamlined competitions affecting 266 FTEs; the report listed no additional standard competitions.[137]

According to the DOD Report, during FY 2004, the DOD employed 408,715 FTEs performing commercial activities and 172,140 FTEs performing inherently governmental functions.[138] Concerning the FTEs performing commercial activities, the DOD listed the FTEs by OMB "Reason Codes."[139] Of these, this report[140] listed 125,781 FTEs under "Reason Code A"[141] and 173,154 FTEs under "Reason Code B."[142]

The DOD report also categorized work performed by military members—vice FTEs—as either commercial or inherently governmental.[143] During 2004, 841,820 military members were performing commercial activities, while 1,182,040 military members were performing inherently governmental functions.[144]

In summary, to a great extent, competitive sourcing trends in the DOD mirror the trends in other government agencies. For instance, in FY 2004, both the DOD and other federal agencies determined that in-house performance was less

---

[128] *Id.* at 11.

[129] *Id.* at 12.

[130] *Id.*

[131] U.S. DEP'T OF DEF. 2004 INVENTORY REPORT OF INHERENTLY GOVERNMENTAL AND COMMERCIAL ACTIVITIES (Aug. 2004), *available at* http://sharea76.fedworx.org/inst/sharea76 [hereinafter DOD REPORT].

[132] OMB REPORT, *supra* note 121, at 33. This total includes all competitions completed in FY 2004 regardless of when initiated.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 36.

[136] *Id.* at 38.

[137] *Id.* at 34.

[138] DOD REPORT, *supra* note 131, at 6.

[139] *Id.* at 7. Revised A-76 requires federal agencies to assign one of six "Reason Codes" to commercial activities performed by government employees. *See* REVISED A-76, *supra* note 1, attch. A, ¶ C.1.

[140] *Id.*

[141] REVISED A-76, *supra* note 1, attch. A, ¶ C.1. Reason Code A states the "commercial activity is not appropriate for private sector performance pursuant to a written determination by the CSO" (competitive sourcing official). *Id.*

[142] *Id*. Reason Code B states the "commercial activity is suitable for a streamlined or standard competition." *Id.*

[143] DOD REPORT, *supra* note 131, at 6.

[144] *Id.*

expensive than private sector performance about ninety percent of the time.[145] Additionally, in both the DOD and other federal agencies, the vast majority of competitions in FY 2004 were standard competitions.[146]

DOD Delegates Duties for Subordinate Competitive Sourcing Officials

In last year's *Year in Review*,[147] the Contract and Fiscal Law Department discussed the DOD memorandum delegating Competitive Sourcing Official (CSO)[148] duties from the DOD CSO to military Component Competitive Sourcing Officials (CCSO).[149] In that memorandum, the DOD CSO appointed Component CSOs in each of the armed services delegating certain duties to the Component CSOs while retaining certain duties at the CSO level.[150]

Under that DOD memorandum, in early 2005, both the Air Force[151] and the Army[152] CCSOs delegated some competitive sourcing duties to Delegated Competitive Sourcing Officials (DCSO). The Air Force and the Army have now delegated to DCSOs the authority to appoint competition officials for standard competitions, to approve changes to the solicitation closing date to facilitate the submission of the agency tender, and to make determinations regarding deficiencies in an agency tender.[153] The Air Force's policy is that an agency tender official must be at least an O-5 or GS-13 equivalent and organizationally independent of the activity being competed.[154] The Army has published more detailed guidance regarding the roles and responsibilities of competition officials in Army Regulation 5-20.[155]

Major Marci A. Lawson, USAF

Privatization

Housing Privatization Injunction Lifted

Last year's *Year in Review*[156] discussed *Hunt Building Company v. United States*, (*Hunt I*) where the COFC permanently enjoined the Air Force from awarding a military family housing privatization contract to Actus Lend Lease, LLC (Actus).[157] The COFC issued the injunction because the Air Force "failed to comply with its solicitation, changed material terms . . . and failed to treat offerors fairly and equally."[158] The COFC lifted the injunction on 24 November 2004

---

[145] OMB REPORT, *supra* note 121, at 38.

[146] *Id.* at 11 and 33.

[147] *See 2004 Year in Review*, *supra* note 88, at 120.

[148] REVISED A-76, *supra* note 1, ¶ 4.f. A Competitive Sourcing Official (CSO) is an official at the assistant-secretary level with the responsibility of overseeing the competitive sourcing program throughout a particular federal agency. *Id.*

[149] *See* Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments et al., subject: Designation of the Department of Defense Competitive Sourcing Official (12 Sept. 2003). In the DOD, the CSO is the Deputy Under Secretary of Defense (Installations and Environment). *Id.* This memo is available at http://emissary.acq.ods.mil/inst/share.nsf by clicking on the following links: "Library," Documents by Organization." Office of the Secretary of Defense," and "SECDEF Designation of DOD CSO."

[150] *Id.*

[151] Memorandum, Deputy Chief of Staff for Personnel, to all major command commanders et al., subject: Delegation of Competitive Sourcing Official (CSO) Responsibilities (14 Jan. 2005) [hereinafter Air Force Delegation Memo]. The memo is available at https://www.safaq.hq.af.mil/contracting/affars/5337/library-5337-a76.html by clicking on the following link: "Policy."

[152] Memorandum, Assistant Secretary of the Army (Installations and Environment), to Assistant Chief of Staff for Installation Management, subject: Delegation of Responsibilities of the Army Component Competitive Sourcing Official (CCSO) and Delegated Competitive Sourcing Official (DCSO) (7 Mar. 2005) [hereinafter Army Delegation Memo].

[153] *Id.*

[154] *Id.*

[155] U.S. DEP'T OF ARMY, REG. 5-20, COMPETITIVE SOURCING PROGRAM para. 1-4 (20 April 2005). This regulation governs the implementation of Revised A-76 in the Army.

[156] *2004 Year in Review*, *supra* note 88, at 124-26.

[157] 61 Fed. Cl. 243 (2004) [hereinafter Hunt I]. This solicitation envisioned award of a contract conveying 1356 military houses and leasing approximately 238 acres of land located beneath or near those houses at Hickam Air Force Base, Hawaii. *Id.* at 248.

[158] *Id*. at 247.

(*Hunt II*) after reviewing a motion filed by both Actus and Hunt Building Company, Ltd. (Hunt) jointly requesting that it be lifted.[159]

In *Hunt I*, the COFC found that the Air Force's unequal treatment of the two offerors in the competitive range, Actus and Hunt, warranted this severe remedy. First, the solicitation required the successful offeror to sign form legal documents at closing that would be "substantially identical"[160] to the documents attached to the solicitation. Nevertheless, after the Air Force selected Actus as the successful offeror, the Air Force permitted Actus to make significant changes to these documents. Second, the Air Force changed a material term of the solicitation to Actus' benefit but not to Hunt's benefit.[161] Third, although the solicitation stated that award and closing would be based upon the offeror's "final revised proposal,"[162] which the Air Force used for evaluation purposes, the Air Force permitted Actus to revise this final proposal.[163] Consequently, the COFC found that the Air Force contravened a fundamental principle of contract law that "evaluation and contract award must be made in accordance with the terms and conditions in the Solicitation."[164]

Prior to the COFC's opinion in *Hunt II*, Actus, the successful offeror, appealed the injunction to the Federal Circuit.[165] While this appeal was still pending, Actus and Hunt entered into a settlement agreement permitting them to resolve their differences.[166] On 24 September 2004, the parties requested relief from the *Hunt I* injunction arguing that under the circumstances, injunctive relief was no longer necessary.[167] Specifically, the parties argued that the injunction was no longer appropriate in light of the fact that Hunt had decided that it no longer wanted to participate in this privatization procurement.[168] The COFC waited until the Federal Circuit remanded the case to the COFC before ruling on the parties' Federal Rule of Civil Procedure (FRCP) 60(b) motion.[169]

The COFC granted the parties' joint motion under FRCP 60(b).[170] While the court did not vacate the earlier injunction, it granted relief from the injunction prospectively due to its "strong policy favoring settlement."[171] Consequently, the Air Force was free to award the privatization contract to Actus.[172]

It is significant that the COFC did not waver in its position that the Air Force's unequal treatment of the offerors in *Hunt I* clearly warranted the injunction preventing award of the housing privatization contract. The COFC permitted the Air Force to proceed to award the contract to Actus only because the parties to the case jointly requested that the court lift the injunction. Absent this joint request, the permanent injunction would have remained in effect until the Air Force corrected the serious errors in this procurement.

---

[159] Hunt Building Co., Ltd. v. United States, 63 Fed. Cl. 141 (2004) [hereinafter Hunt II]. The COFC issued its opinion in Hunt I on 8 July, 2004. *Id.* at 142.

[160] *Id.*

[161] *Id.* The Air Force changed a term in the solicitation regarding the wording of form legal documents that the successful offeror would be required to sign at closing. *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id*. (citing Lykes Bros. Steamship Co., Comp. Gen. B-236834.4, July 23, 1990, 90-2 CPD 62).

[165] *Id.* at 142. Actus filed its appeal on 3 September 2004.

[166] *Id.* The 23 September 2004 settlement agreement stated that the parties would "resolve their pending appeal" at the Federal Circuit Court if the COFC lifted the injunction preventing award of the contract to Hunt. *Id.*

[167] *Id.* The parties jointly filed a motion with the COFC under FRCP 60(b), Relief from Judgment or Order, requesting that the COFC lift the injunction based on the new fact that Hunt had decided that it no longer wanted to participate in this procurement. *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.* at 142-43.

[171] *Id.*

[172] *Id.* at 143.

In *American Water Services*,[173] the GAO denied a protest involving a DOD utilities privatization contract concerning waste water and storm water systems at Fort Knox, Kentucky. The Defense Energy Support Center (DESC)[174] awarded the utilities privatization contract to Hardin County Water District #1 (Hardin).[175] The protester, American Water Services (AWS), argued that the agency improperly applied the solicitation's evaluation criteria and that Hardin was ineligible for award.[176] In denying the protest, the GAO found that the agency reasonably evaluated the offers submitted and that Hardin was, in fact, eligible for award.[177]

The DESC issued the utilities privatization solicitation on 9 April 2001.[178] The solicitation stated that the utilities privatization contract would be awarded to the offeror whose proposal was the best value to the government considering five evaluation factors: (1) technical capability, (2) past performance, (3) risk, (4) socioeconomic plan, and (5) price. Some of these evaluation factors also included subfactors.[179] For the purpose of the protest, the subfactors included within the "risk" evaluation factor—performance, assurance of long-term price and service stability, and price realism—are relevant.[180] The solicitation also envisioned the receipt of offers by both regulated and unregulated entities.[181] In this regard, the solicitation stated that the agency would evaluate proposals "on the degree to which . . . *long-term price and service stability* are enhanced as a result of regulation by an independent federal, state, or local regulatory authority with jurisdiction over the applicable utility service."[182] In response to the solicitation, AWS and Hardin submitted offers.[183]

The agency determined that the offers submitted by AWS and Hardin were technically acceptable; however, Hardin's offer presented less risk and Hardin's price was significantly lower.[184] Although the agency gave both AWS and Hardin an overall rating of "low" on the "risk" evaluation factor, AWS received a "moderate" rating in the assurance of long-term price and service stability (risk) subfactor, while Hardin received a "low" rating.[185] Both AWS and Hardin received ratings of "low" in the price realism subfactor of the risk factor.[186] Because the source selection authority found Hardin's offer presented the best overall value to the government based on the evaluation criteria, the agency decided to award the contract to Hardin.[187] After DESC notified AWS of the source selection decision, AWS filed its protest at the GAO.[188]

---

[173] B-295376, 2005 U.S. Comp. Gen. LEXIS 57 (Feb. 8, 2005).

[174] *Id.* at *3. The Defense Energy Support Center (DESC) is a DOD agency which awards utilities privatization contracts to private entities on behalf of the Army and Air Force. *Id.*

[175] *Amer. Water Servs.*, 2005 U.S. Comp. Gen. LEXIS 57, at *2-3. DESC awarded the contract pursuant to 10 U.S.C. § 2688 which grants the military services the authority to convey utilities infrastructure to private or public sector offerors so long as such a conveyance is in the "interests of the United States." This authority states that in consideration for conveying all or part of a utilities infrastructure, the service secretary may require payment of a lump sum payment or a reduction in charges for utility services. Where the contract allows for utility services, this contract may not exceed fifty years. *See* 10 U.S.C.S. § 2688 (LEXIS 2005).

[176] *Amer. Water Servs.*, 2005 U.S. Comp. Gen. LEXIS 57, at *2-3.

[177] *Id*. at *34-35.

[178] *Id*. at *3. The solicitation envisioned that the agency would convey the utilities infrastructure to the awardee and that the awardee would provide utilities services to the agency for a fifty-year period. *Id.*

[179] *Id.* at *4.

[180] *Id.* Further, the solicitation stated that the first three evaluation factors listed above were equally important, the socioeconomic evaluation factor was the least important, and that these four factors, when combined, were significantly more important than price. *Id.* at *4-5.

[181] *Id.* at *5.

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

[183] *Id.* at *8. AWS was a non-regulated private sector offeror while Hardin was a regulated public sector offeror. *Id.* at *16. Hardin was a "political subdivision of Hardin County, charged with providing water service to the northern part of the county surrounding Fort Knox" and was regulated by the Kentucky Public Service Commission. *Id*. at *8.

[184] *Id.* at *18.

[185] *Id*. at *14.

[186] *Id.*

[187] *Id*. at *18.

[188] *Id.*

American Water Services protested the award to Hardin on three grounds.[189] First, AWS stated that the agency improperly evaluated the offers with regard to the long-term price and service stability subfactor.[190] Second, AWS stated that the agency failed to properly analyze Hardin's prices pursuant to the price realism subfactor.[191] Third, AWS stated that Hardin was ineligible for award because the agency awarded the contract on the condition that the State public service commission (PSC) approves Hardin's proposed prices.[192]

Regarding the evaluation of the assurance of long-term price and service stability subfactor, the GAO found that the agency had a rational basis for assigning Hardin a "low" rating and for assigning AWS a "moderate" rating.[193] The agency determined that Hardin's proposal warranted a "low" rating in this subfactor because Hardin, as an entity regulated by the State PSC, would not be able to increase prices if that commission found the increase to be unreasonable.[194] As mentioned above, the solicitation specifically stated that the agency could consider the effect, if any, that federal or state regulation of the offeror would have on this subfactor.[195] Consequently, the GAO found that the agency reasonably applied this evaluation subfactor.[196] Regarding the agency's analysis of Hardin's prices pursuant to the price realism subfactor, AWS argued that the agency failed to reasonably evaluate Hardin's offer by not considering its transition costs and that some of its costs were "suspiciously low."[197] The GAO considered the fact that the agency's cost realism analysis was based on thorough discussions regarding pricing with Hardin.[198] The GAO also determined that AWS misstated some of Hardin's prices.[199] Subsequently, GAO found no basis for AWS's argument and concluded that the agency's price realism analysis was reasonable.[200]

Regarding the issue of whether Hardin's proposal was qualified and was therefore, unacceptable, the GAO responded in the negative.[201] The GAO opined that Hardin's offer was unqualified and that the requirement for post-award approval of prices by the PSC was a contract administration issue and not an evaluation issue.[202] To conclude that Hardin's proposal was unacceptable because the PSC had to approve its prices would prevent regulated offerors from participating in the procurement.[203] After a thorough analysis of AWS's allegations, GAO found that none of the protest grounds were meritorious.[204] Accordingly, GAO denied the protest.[205]

The decision is significant in that it illustrates what the GAO considers an adequate evaluation of proposals submitted by both regulated and non-regulated entities in a utilities privatization protest. Despite the protester's allegations that the agency improperly evaluated Hardin, the regulated offeror, the GAO found that agency's evaluation and award was proper. Further, the case represents one of a handful of GAO protest decisions concerning utilities privatization.

---

[189] *Id*. at *19.

[190] *Id*.

[191] *Id*.

[192] *Id*. Hardin was regulated by the Kentucky Public Service Commission (PSC). The Hardin stated in its proposal that the PSC would regulate the cost of utility service at Ft. Knox if the agency awarded the contract to Hardin. *Id.* at *8. During discussions, Hardin stated that the prices contained in its proposal were still subject to approval by the PSC and as such, were not final. *Id.* at *9-10.

[193] *Id.* at *20-21. This subfactor is listed under the overall risk evaluation factor and so, Hardin's "low" rating on this subfactor is a better rating than AWS' "moderate" rating. *Id.*

[194] *Id.*

[195] *Id.* at *5.

[196] *Id.* at *20.

[197] *Id*. at *26.

[198] *Id.* at *27.

[199] *Id*. at *30.

[200] *Id*. at *33.

[201] *Id*. at *34-35.

[202] *Id*.

[203] *Id*.

[204] *Id*. at *35.

[205] *Id.*

On 12 May 2005, the GAO issued its "first detailed report on DOD's utility privatization program."[206] The GAO studied DOD's utility privatization program's[207] overall status and whether the DOD's cost savings estimates for utilities privatization projects were accurate.[208] After assessing the program, the GAO made findings and recommendations to the Secretary of Defense.[209]

The GAO found that DOD's progress in implementing the utility privatization program has been much slower than anticipated.[210] In 1997, the DOD expected to develop a plan to privatize all eligible utilities by January of 2000; however, as of the date of the report, the DOD had privatized only ninety-four utility systems out of 1,499 utility systems eligible for privatization.[211] In 1997, the DOD issued Defense Reform Initiative (DRI) Directive, Number 9, requiring the DOD to "develop a plan for privatizing" all DOD's utilities systems by 1 January 2000.[212] In December of 1998, the DOD revised its privatization goal stating that by 30 September 2003, the DOD should privatize all non-exempt utilities.[213] In October 2002, the DOD again revised its goal stating that the DOD must make a privatization evaluation decision on all utility systems at every active duty, reserve, and National Guard installation by 30 September 2005.[214] The GAO Report stated that it was unlikely that any of the Armed Services would meet the latest goal.[215] In November 2005, the DOD again revised its goal.[216]

The Government Accountability Office also found that while utilities privatization often results in an overall improvement of the utilities services, it may not result in overall cost savings.[217] The GAO found that privatization may even result in increased costs for utilities because if the contractor enhances utilities services, then the DOD will likely reimburse the contractor for these enhanced services via increased contract costs.[218]

The GAO stated that unnamed Air Force officials reported that its costs could increase as much as $200 million per year "for the first five to ten years of privatization" for systems already privatized.[219] The GAO further opined that DOD is

---

[206] U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-433, MANAGEMENT ISSUES REQUIRING ATTENTION IN UTILITY PRIVATIZATION 10 (May 12, 2005) (Report to Subcommittee on Readiness, Committee on Armed Servs., House of Representatives) [hereinafter GAO PRIVATIZATION REPORT]. The GAO has issued four other reports mentioning the utility privatization program. *Id*.

[207] *Id.* at 8. In 1997, DOD decided that privatization of utilities was the most cost-effective means of improving utilities services for military installations. This program envisions two transactions—the conveyance of the utility system infrastructure and also the acquisition of utility services for a period up to fifty years. The transaction ordinarily does not include the conveyance of real property on which the utility system is located. *Id.*

[208] *Id.* at 2.

[209] *Id.* at 36. *See also* National Defense Authorization Act for FY 1998, Pub. L. No. 105-85, § 2812, 111 Stat. 1629 (1997). In 1997, Congress passed permanent legislation authorizing the privatization of utilities at military installations. This legislation permits the secretary of a military department to convey a utility system to a private or public entity if doing so would be in the best interests of the United States. Consideration for the conveyance may be a lump sum payment or a reduction in the cost of utilities. *Id*

[210] *Id.* at 11.

[211] GAO PRIVATIZATION REPORT, *supra* note 206, at 3.

[212] U.S. DEP'T OF DEF., OFF. OF THE DEPUTY SECRETARY OF DEF., DEFENSE REFORM INITIATIVE DIRECTIVE No. 9 (Dec. 1997) [hereinafter DEFENSE REFORM INITIATIVE DIRECTIVE No. 9].

[213] U.S. DEP'T OF DEF., OFF. OF THE DEPUTY SECRETARY OF DEF., DEFENSE REFORM INITIATIVE, DIR. No. 49 (Dec. 1998) [hereinafter DEFENSE REFORM INITIATIVE DIR. No. 49].

[214] GAO PRIVATIZATION REPORT, *supra* note 206, at 11.

[215] *Id.* at 3. DOD stated that its implementation of the program had been slower than anticipated because of unforeseen complexities in assessing the fair market value of utilities systems and private sector reluctance to submit offers on privatization contracts. *Id.* at 14.

[216] *See* Memorandum, Undersecretary of Defense for Acquisition, Technology, and Logistics to Secretaries of the Military Departments et al., subject: Supplemental Guidance for the Utilities Privatization Program (2 Nov. 2005) [hereinafter DOD Privatization Memo]. This memo directs the Armed Services to continue the completion of these privatization evaluation or exemption decisions. The memorandum also directs that the services send a report to that office by 14 February 2006 listing the number of systems privatized as of 31 December 2005. The memo is available at http://www.acq.osd.mil/ie/irm/utilities/utilities.htm.

[217] *Id.* at 17.

[218] *Id.*

[219] *Id.* at 18.

sometimes unprepared for the actual cost of utilities privatization because the "services' economic analyses do not depict actual expected costs of continued government ownership."[220]

After analyzing the DOD's utilities privatization program, the GAO made some specific recommendations to the Secretary of Defense.[221] First, the GAO recommended that the DOD modify its guidance for conducting economic analyses of utilities privatization projects so that these analyses reflect the actual expected cost of privatization.[222] Second, the DOD should obtain an independent review of its economic analyses supporting each proposed privatization project to verify the accuracy of its analyses.[223] Third, the GAO recommended that the DOD draft guidance requiring the services to methodically plan for cost increases for privatized utilities.[224] Fourth, the GAO suggested that the DOD issue guidance requiring more oversight of privatized utilities contracts.[225] Finally, the GAO recommended that the DOD re-evaluate whether conveyance of utilities systems should continue to be DOD's approach in this program.[226]

Practitioners should be aware of GAO's utility privatization report not only because it is the first of its kind, but also because it provides a lengthy summary and analysis of this long-standing program. While implementation goals of this program have changed over the years, the overarching objective of evaluating the feasibility of privatizing every DOD-owned utility system remains unchanged.[227]

Major Marci Lawson, USAF

Construction Contracting

Federal Circuit Overturns McMullan Presumption

In *England v. Sherman R. Smoot Corporation*,[228] the Court of Appeals for the Federal Circuit (CAFC) vacated and remanded a decision of the ASBCA. In the process, the court overturned a twenty-nine year old judicially created presumption that the government was at fault for any delay coupled with an extension of the period of performance.[229] The presumption had been in existence since the ASBCA's decision in *Robert McMullan & Son, Inc.*[230] The CAFC held that the *McMullan* presumption was in conflict with the CDA.[231]

In *Smoot Corp*., the contractor had entered a fixed-price construction contract with the Navy for renovation work at the Washington Navy Yard.[232] As a result of various design and construction changes, the contractor notified the Navy contracting officer that there would be a completion delay of fifty-one days.[233] The contractor submitted a claim for extended overhead costs attributable to the delay and requested a completion extension.[234] After receiving notice from the contractor, the Navy Project Engineer wrote a letter to the contractor officer stating that "the construction schedule recently submitted is approved. . . . This time is fully compensable, and upon approval for related costs associated with this time, a modification

---

[220] *Id*. at 19.

[221] *Id.* at 36. The DOD submitted comments to the GAO's report disagreeing with its findings and recommendations. The DOD stated that GAO's findings were flawed in that they were based out-of-date information and based on a limited understanding of DOD's utility privatization program. *Id.*

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] *Id.* at 56.

[226] *Id.*

[227] DOD Privatization Memo, *supra* note 216.

[228] 388 F.3d. 844 (Fed. Cir. 2004).

[229] *Id*.

[230] The presumption takes its name from the case of Robert McMullen & Son, Inc., ASBCA No. 19023, 76-IBCA ¶ 11,728, at 55,903. This case predates the Contracts Disputes Act.

[231] *Smoot Corp*., 388 F.3d. at 845.

[232] *Id*. at 846.

[233] *Id*.

[234] *Id.*

will be issued. This has been discussed and approved by the [contracting officer]."[235] Five months later, the contracting officer informed the contractor that although the full period of delay will be accounted for in an extension of performance, only twenty-one days of the delay were compensable as being the fault of the government.[236]

The contractor submitted a claim for the full period of delay. After the contracting officer failed to issue a final decision on the claim, Smoot Corp. appealed the deemed denial to the ASBCA.[237] The ASBCA held for the contractor by invoking the so-called "McMullan presumption." This rebuttable presumption holds the government liable for a contractor's costs associated with a delay if, knowing all the material facts pertinent to the delay, the government extends contract performance to account for the delay.[238] The Navy appealed to the CAFC.

On appeal, the CAFC held that "the McMullan presumption is at odds with the CDA."[239] The court determined that "Congress made clear in the CDA that any findings of fact by a contracting officer in a final decision are not binding in any subsequent proceeding."[240] By applying the presumption to a contracting officer's decision to extend the performance period, the *McMullan* presumption gives the determination weight the CDA prohibits.[241] The court further found that "the McMullan presumption is logically inconsistent" because there are three potential causes of delay: contractor, government, or external forces.[242] The court found that the McMullan presumption ignores the possibility of events external to the government causing the delay and that applying the presumption in such a situation is unwarranted and "nothing in the [FAR] supports such a presumption."[243]

Concurrent Delay Caused by Contractor and Government Prevents Recovery of Unabsorbed Overhead

In *Singleton Contracting Corporation*,[244] the CAFC affirmed an ASBCA decision denying a contractor's claim for unabsorbed overhead due to the fact that the cause of delay in contract performance was concurrently caused by the government and the contractor.[245] In this case, the contractor appealed the ASBCA's determination that it was not entitled to unabsorbed overhead following a termination for convenience about a year after a construction contract was entered, but prior to any work commencing.[246] During a preconstruction conference after award, it became apparent that the government's construction drawings were flawed and work could not commence until new drawings were prepared.[247] Ultimately, the government never provided corrected drawings prior to terminating the contract for convenience several months later.[248] Such a government-caused delay typically permits the contractor to recover costs associated with such a delay. However, Singleton was required to provide proof of insurance at the preconstruction meeting since the contract required Singleton to maintain certain insurance policies "during the entire period of performance of the contract."[249] Fortunately for the government, Singleton never obtained such insurance.[250]

---

[235] *Id*.

[236] *Id*.

[237] *Id*. at 847

[238] Sherman R. Smoot Corp., ASBCA No. 53115, 03 -1 BCA ¶ 32,198.

[239] *Smoot Corp*., 388 F.3d. at 856.

[240] *Id*.

[241] *Id*. In this case, the decisions of the contracting officer were actually only interim decisions. *Id*. However, the court deemed the interim decisions in this case indistinguishable from a final decision of a contracting officer because the interim decision, coupled with the deemed denial of the claim, satisfied the required elements of a final decision. *Id*.

[242] *Id*. at 857.

[243] The importance of this point, obviously, is that while both government caused delays and delays caused by many factors outside the government's control may be "excusable delays" pursuant to FAR 52.249-10 (Default - Fixed Price Construction), generally only those delays caused by the government will be *compensable* excusable delays.

[244] Singleton Contracting Corp. v. Harvey, 395 F.3d. 1353 (Fed. Cir. 2005).

[245] *Id*.

[246] *Id.* at 1354.

[247] *Id*.

[248] *Id*. at 1355.

[249] *Id*.

[250] *Id*.

The court, finding that the contractor's failure to provide proof of insurance was a concurrent cause of delay along with the government's failure to provide correct drawings, affirmed that the contractor was barred from recovering unabsorbed overhead under either the *Eichleay*[251] formula or the methodology set out in *Nicon, Inc*. for delays caused prior to contract performance.[252] As is so often the case, *Singleton Contracting Corp*. appears to be a case where the government simply got lucky on the facts.

Architect-Engineer Firm Entitled to Recovery under Quantum Meruit *Basis*

In a case of first impression, the COFC held that an Architect—Engineer firm (Fluor Enter., Inc., hereinafter Fluor) was entitled to recover in *quantum meruit*[253] despite its illegal contract with the National Oceanographic and Atmospheric Administration (NOAA).[254] The source of the illegality in the contract was a violation of the fee limitations for architect-engineer (A&E) services prescribed at 41 U.S.C. § 254(b) which provides, in pertinent part:

> . . . in the case of a cost-plus-fixed-fee contract . . . a fee inclusive of the contractor's costs and not in excess of 6% of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project. . . .[255]

Because of a variety of factors, the NOAA was unable to estimate project costs for the A&E services at the time the contract was entered.[256] Because of the complexity of the requirement, the parties employed "a form of the cost-plus-fixed-fee contract--called a "level of effort" or "term" contract--that obligated Fluor to provide only a predetermined number of man-hours towards the project rather than completing the project itself."[257] Despite the flaws in the contract, and the lack of the required prospective estimate of project costs, both parties performed.[258] Nearly three years after completion of performance (and nearly ten years after the onset of the contract), the contracting officer sought to retroactively impose the statutory six percent fee limitation on required for A&E contracts and, thereby, recover overpayments based on a "substitute estimate."[259]

The case presented the court with a "quandary" because the project was already completed and the government had received the benefits of its contract whose illegality should make it void *ab initio* since the contracting officers have no authority to enter into illegal contracts.[260] The court stated that "[w]ithout the mandatory project estimate, the contracting officer lacked the authority to procure A&E services under § 254(b) and [f]ailure to follow the applicable rules negates the agent's authority to enter into a contract binding on the government. To permit otherwise would be to nullify those very statutes, regulations, and determinations--a result clearly contrary to the public interest.'"[261]

---

[251] Eichleay Corp., ASBCA No. 5183, 60-2 BCA ¶ 2,688 (1960), *aff'd on recon*., 61-1 BCA ¶2,8994 (1961)

[252] Nicon v. U.S., 331 F.3d. 878, 885 (Fed. Cir. 2003) (holding that while the *Eichleay* formula is the exclusive method for calculating unabsorbed overhead in cases where contract performance has begun, "there is no bar to the award of home office overhead in a termination for convenience settlement provided a reasonable method of allocation is available on the particular facts of the case").

[253] At common law, *quantum meruit* refers to the quasi-contractual recovery for the value of services rendered. Fluor Enter., Inc. v. United States, 64 Fed.Cl. 461, 495 n. 31 (2005).

[254] *Id*.

[255] 41 U.S.C.S. § 254(b) (Lexis 2005) (emphasis added). One unique aspect of the architect-engineer industry that is codified in this provision is that price competition between competing contractors is ethically inappropriate. *Fluor Enter., Inc*, 64 Fed.Cl. at 463. The six percent fee limitation, including the contractor's costs and their fee, in A&E cost-plus fixed fee contracts "helps ensure the integrity of the contractor's A&E costs because the maximum amount of reimbursable costs, *plus the fixed fee*, is fixed prior to contract performance. *Id*.

[256] *Id*. at 463. Chief among the factors the court cited was the fact that the scope of NOAA's project was uncertain and Fluor was hired to perform an array of services, among which included tailoring the scope of NOAA's project and, therefore, Fluor's own undertaking. *Id*.

[257] *Id*.

[258] *Id*.

[259] *Id*.

[260] *Id*. at 491. "The real problem that is implicated by these facts is a rule of constitutional law that a government agency can not validly contract to pay funds in contravention of a federal statute because any 'payment of funds from the Treasury must be authorized by a statute.'" (citing Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 424, 110 L. Ed. 2d 387, 110 S. Ct. 2465 (1990) (citing U.S. CONST. art. I, § 9 cl.7)).

[261] *Id*. at 492 (citing United States v. Amdahl Corp., 786 F.2d 387, 392 (Fed. Cir. 1986)).

Despite the illegality of the contract, the court determined that the appropriate remedy would be to allow the contractor to recover in this case on a theory of implied contract.[262] The court stated that "when a contract or a provision thereof is in violation of law but has been fully performed, the courts have variously sustained the contract, reformed it to correct the illegal term, or allowed recovery under an implied contract theory; the courts have not, however, simply declared the contract void *ab initio*."[263] In those circumstances where *quantum meruit* is appropriate, the court concluded that finding only certain contract provisions unenforceable does not have the same harshness as allowing a single party to bear the entire risk and penalty of unenforceability.[264]

The court ultimately held that the contractor was entitled to recover the "reasonable value" of the services rendered to the government, not exceeding the six percent statutory cap based on the estimate of the project.[265] The court recognized that it was a bit of a circular argument since it is nearly impossible to go back in time to create an estimate for a now-completed project that could not have been accurately estimated at the time the contract was entered into.[266] However, the court determined that since the government was trying to recover what they contended was an overpayment, the government has the burden of overcoming this deficiency.[267] The court determined that further proceedings would be necessary to resolve the *quantum* of Fluor's entitlement and, "given the convoluted nature of the facts in this case, and the guidance provided in the opinion," the court strongly encouraged the parties to seek a settlement on the issue of *quantum*.[268]

Architect-Engineer Small Business Set-Aside Threshold Increased

Effective 22 November 2004, the Defense Federal Acquisition Regulation Supplement (DFARS) was amended by final rule to increase the small business set-aside threshold for acquiring A&E services for military construction or family housing projects.[269] The threshold was increased from $85,000 to the new threshold of $300,000.

Major Michael S. Devine

Bonds, Sureties, and Insurance

Facially Valid Bid Bond Can't be Basis for Nonresponsive Bid Determination

In *Aeroplate Corporation v. United States*,[270] the COFC held that despite clear extrinsic evidence, a contracting officer may not look beyond a facially valid bid bond to determine whether it conforms to the invitation for bids.[271]

In this case, the contractor submitted a bid bond for the $7.3 million amount of their bid, but the bid bond did not have a corporate seal which led the contracting officer to investigate it.[272] Upon investigation, the surety on the bid bond informed the contracting officer that they would only issue performance and payment bonds up to $5.5 million, and the $7.3

---

[262] *Id*. at 495.

[263] *Id*. (citing AT&T Co., 177 F.3d 1376, 1378 (CAFC 1999)).

[264] *Fluor Enter., Inc*, 64 Fed.Cl. at 495.

[265] *Id*. at 496.

[266] *Id*.

[267] *Id*. at 496-97.

[268] *Id*. at 497.

[269] Defense Federal Acquisition Regulation Supplement; Contracting for Architect-Engineering Servs., 69 Fed. Reg. 67,855 (Nov. 22, 2004) (to be codified at 48 C.F.R. pt. 219). This final rule implements Section 1427 of the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108–136, 117 Stat. 1522 (2004).

[270] 67 Fed. Cl. 4 (2005).

[271] A "bid bond" is a bond that serves as a bid guarantee. Such bonds are frequently used in public construction contracts to ensure the bidder will not withdraw their bid and will execute a written contract and submit any required performance and payment bonds specified in the IFB if they are awarded the contract. U.S. GEN. SVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 28.001 (July 2005) [hereinafter FAR].

[272] 67 Fed. Cl. at 8. One of the bases that the government initially found the bid to be non-responsive was the lack of corporate seal on the bid bond. The government later recognized this determination was in error, but the lack of certification is still relevant because it led to the investigation of the bid bond which led to the primary reason that the contracting officer held the bid nonresponsive, *i.e*., it did not provide full bid coverage. *Id*.

million bid bond was, therefore, invalid.[273] Based on this information, the contracting officer determined that Aeroplate's bid was nonresponsive and Aeroplate protested.

Aeroplate argued that the relevant FAR provision[274] mandates that as long as a bid guarantee (bid bond) is proper on its face, the bidder has satisfied its requirements for the bid.[275] Aeroplate argued that the FAR provides remedies in the form of termination for default if the winning offeror later fails to provide performance or payment bonds as required.[276] The government pressed the argument that, as a matter of regulation and policy, the "procuring officer is not restricted to the 'superficial, truncated review [of the bid bond] urged by plaintiff."[277] The government contended that the express purpose of the bid guarantee is to "provide assurances that the bidder 'will execute a written contract and furnish required bonds, . . . within the time specified in the bid."[278]

The COFC believed that the government's position "would carve out an exception" to the rule that the validity of a bid bond must be determined at the time of bid opening.[279] The court was not willing to carve such an exception based on the facts of this case. Citing *Hawaiian Dredging Construction Co. v. United States*,[280] the COFC held that "the overarching issue is whether the contracting officer reasonably concluded that he could not establish unequivocally at the time of bid opening that the plaintiff's bid bonds were enforceable against the surety."[281] Despite the fact the court recognized that this firm rule could result in a waste of time and resources to award a contract knowing it would be terminated for default when required bonds are not submitted, the court held that such an exception would "deprive the established law of suretyship of the certainty that has been its hallmark"[282]

The court found that the agency's nonresponsiveness determination was arbitrary, capricious, or otherwise contrary to law, and granted Aeroplate's protest on this ground. The case was referred to the Small Business Administration (SBA) for a responsibility determination since the contracting officer had also incorrectly determined that Aeroplate was nonresponsible without first referring the matter to the SBA.[283]

---

[273] *Id*. at 9.

[274] FAR 52.228-1 provides that:

> (a) Failure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid.
>
> (b) The bidder shall furnish a bid guarantee in the form of a firm commitment, e.g., bid bond supported by good and sufficient surety or sureties acceptable to the Government, postal money order, certified check, ...
>
> (c) The amount of the bid guarantee shall be __ percent of the bid price or $ __ , whichever is less.
>
> (d) If the successful bidder, upon acceptance if its bid by the Government within the bid period, fails to execute all contractual documents or furnish executed bonds within 10 days after receipt of the forms by the bidder, the Contracting Officer may terminate the contract for default.
>
> (e) In the event that the contract is terminated for default, the bidder is liable for any cost of acquiring the work that exceeds the amount of its bid, and the bid guarantee is available to offset the difference.

FAR, *supra* note 271, pt. 52.228-1.

[275] *Aeroplate*, 67 Fed. Cl. at 11.

[276] *Id*.

[277] *Id*.

[278] *Id*.

[279] *Id*.

[280] 59 Fed. Cl. 305 (2004).

[281] *Aeroplate*, 67 Fed. Cl. at 11.

[282] *Id*. at 12.

[283] *Id*. at 14.

In 2002, the CAFC upheld the ASBCA's determination that the Tucker Act does not confer jurisdiction to the boards of contract appeal to entertain surety claims that arose prior to a takeover agreement between the government and the surety.[284] This past year, the CAFC had the opportunity to again address this issue in *United Pacific Insurance Company v. Roche*.[285]

In *United Pacific*, the CAFC again sustained the ASBCA's determination that they did not have jurisdiction to hear a surety's appeal of a contracting officer's denial of claims which arose prior to the surety and the government entering a takeover agreement.[286] The CAFC again held that the ASBCA was correct in determining that sureties in such a position did not constitute "contractors" under the Contracts Disputes Act at the time the claim arose.[287] Given the developments over the last couple of years, it is likely that sureties will get the message and file such claims in the future with the Court of Federal Claims, and not the ASBCA.

Interestingly, however, the Labor Board of Contract Appeals (LBCA) decided a case this year in which it distinguished the decisions discussed above which limited the rights of sureties to file claims for actions arising before a takeover agreement is in effect. In *Maharaj Construction, Inc*.,[288] the LBCA allowed a surety to dismiss a defaulted contractor's appeal of their termination for default, despite the fact that the grounds for the appeal arose prior to the takeover agreement between the surety and the government. The LBCA held that the surety had standing to dismiss the contractor's appeal because in this case, unlike those discussed above, there was a General Indemnification Agreement (GIA) between the contractor and the surety which provided for an assignment of claims to the surety in the event of default, and the GIA was later incorporated into the takeover agreement between the surety and the government.[289]

Major Michael S. Devine

Cost & Cost Accounting Standards

Some Fear the Treasury Doors Have Been Opened Too Wide but the Lump-Sum Reimbursement Is Allowed for an Expanded List of Relocation Costs

Three years ago, the FAR Councils issued a final rule increasing the limit from $1,000 to $5,000 for lump-sum reimbursement of miscellaneous relocation costs.[290] As we reported two years ago, the FAR Councils were next considering the appropriateness of allowing an appropriate lump-sum reimbursement for an expanded list of relocation costs under FAR 31.205-35 instead of an actual cost basis.[291] After further consideration of the issue through review of public comments and a public meeting on 6 February 2003, the FAR Councils issued a final rule through Federal Acquisition Circular (FAC) 2005-06 that also allowed a lump-sum reimbursement for house hunting, travel costs to the new location, and temporary lodging expenses. However, the lump-sum reimbursement for the expanded relocation costs is still limited to $5,000.[292]

---

[284] Fireman's Fund Ins. Co. v. England, 313 F.3d. 1344 (Fed. Cir. 2002). *See also* discussion of this case in *2004 Year in Review*, *supra* note 88, at 131.

[285] 401 F.3d. 1362 (Fed. Cir. 2005). A note of clarification for those who have been tracking this issue, this is the same case name, the same surety, and the same contractor that were subject of a CAFC decision in August 2004 (380 F.3d. 1352 (Fed. Cir. 2004)) and discussed in *2004 Year in Review*, *supra* note 88, at 131. However, this case is dealing with a different defaulted contract on which United Pacific was also the surety.

[286] *United Pac.*, 401 F.3d. at 1365.

[287] *Id*.

[288] No. 2001-BCA-3**,** 2005 DOL BCA LEXIS 1 (Jan. 25, 2005)

[289] *Id*. at *19 (citing Safeco Ins. Co., ASBCA No. 52,107, 03-2 BCA ¶32,341 for the proposition that express assignment of contractor's rights under contract, irrevocable power of attorney to surety, takeover agreement and government's knowledge of assignment entitles surety to pursue claims of the contractor).

[290] Federal Acquisition Regulation: Relocation Costs, 67 Fed. Reg. 43,512 (June 27, 2002). The council amended the relocation cost allowability rules at FAR 31.205-35.

[291] Major Kevin J. Huyser et al., *Contract and Fiscal Law Developments of 2003—The Year in Review,* ARMY LAW., Jan. 2004, at 133 (discussing Federal Acquisition Regulation; Reimbursement of Relocation Costs on a Lump-Sum Basis, 67 Fed. Reg. 65,468 (Oct. 24, 2002) [hereinafter *2003 Year in Review*].

[292] Federal Acquisition Regulation; Reimbursement of Relocation Costs on a Lump-Sum Basis, 70 Fed. Reg. 57,467 (Sept. 30, 2005).

Some respondents had expressed negative comments about whether an objective standard could be developed for cost reasonableness and allowability and whether lump-sum reimbursement was a common commercial practice.[293] However, the FAR Councils ultimately determined an expanded lump-sum reimbursement would "reduce the accounting and administrative burden of that cost principle on contractors and lead to faster relocations."[294] Further, the new rule is intended to only allow an appropriate lump-sum reimbursement if the contractor has adequately supported its payments with auditable component costs projections.[295] The Councils also determined that a lump-sum reimbursement for relocation expenses "may not be the predominant commercial practice at this time . . . [but it is a] common and growing practice."[296]

Clarification of the Allowability of Contractor Training and Education Costs

Also through FAC 2005-06, the FAR Councils issued a final rule clarifying FAR 31.205-44 by eliminating confusing language and restrictions that created disparate treatment between similar education costs.[297] Specifically, training and education costs are generally allowable if these costs are "related to the field in which the employee is working or may be reasonably expected to work" instead of a more restrictive principle that would have limited cost allowability to education costs to obtain an academic degree or to qualify for a job.[298] Additionally, the final rule lists six specific unallowable costs for added clarity.[299]

A Good Guesstimate of Your Unallowable Costs Is Close Enough for Government Work.

In 2003, the FAR Councils proposed to amend FAR 31.201-6, Accounting for Unallowable Costs, to add a new paragraph that allows statistical sampling identification of unallowable costs and acceptability criteria for contractor sampling methods.[300] Subsequently through the same aforementioned FAC 2005-06, the FAR Councils amended FAR 31.201-6 to allow statistical sampling identification of unallowable costs if specific criteria are met.[301] First, the sampling must result in an unbiased and reasonably representative sample. Second, large dollar or high risk transactions are not included in the sampling process and must be reviewed separately. Last, the statistical sampling can be verified through an audit.[302]

Lieutenant Colonel Karl W. Kuhn

---

[293] *Id.* at 57,467.

[294] *Id.* at 57,468.

[295] *Id.*

[296] *Id.*

[297] Federal Acquisition Regulation; Training and Education Cost Principle, 70 Fed. Reg. 57,470 (Sept. 30, 2005).

[298] *Id.* at 57,472.

[299] *Id.*

[300] Federal Acquisition Regulation; Application of Cost Principles and Procedures and Accounting for Unallowable Costs, 68 Fed. Reg. 28,108 (May 22, 2003).

[301] Federal Acquisition Regulation; Accounting for Unallowable Costs, 70 Fed. Reg. 57,463 (Sept. 30, 2005).

[302] *Id.* at 57,466.

Information Technology (IT)

What Is IT?

In dealing with IT, and especially with IT acquisitions, it helps to know what exactly is meant by "information technology." To that end, the FAR Councils recently published an interim rule[303] in the *Federal Register* reflecting changes to the definition incorporated in the 2004 Consolidated Appropriations Act.[304] Specifically,

> The rule modifies the definition of "information technology" at FAR 2.101(b) to include "analysis" and "evaluation." The rule also modifies the term "information technology" to include peripheral equipment designed to be controlled by the central processing unit of a computer, and clarifies the term "ancillary equipment" to include imaging peripherals, input, output, and storage devices necessary for security and surveillance.[305]

The FAR Councils also published an interim rule[306] that emphasizes IT security, "focus[ing] much needed attention on the importance of system and data security by contracting officials and other members of the acquisition team."[307] The rule acknowledges "security as an important part of all phases of the IT acquisition life cycle."[308] Additionally, the DOD published proposed changes to the DFARS that would "delete obsolete procedures for the exchange or sale of Government-owned information technology,"[309] and that would modify language concerning acquisition of telecommunications services.[310]

Better Watch Those Contractors

The FAR Councils and the DOD are not the only entities issuing reminders about IT security. In April 2005, the GAO published a report[311] encouraging better agency oversight over contractor access to sensitive IT systems. Noting that "[c]ontractors and users with privileged access to federal data and systems provide valuable services that contribute to the efficient functioning of the government,"[312] the GAO also observed that the presence of contractors poses "a range of risks. . . ."[313] The GAO recommended incorporating "key elements of FISMA"[314] into the FAR and into agency contracting actions.[315]

---

[303] Federal Acquisition Regulation; Definition of Information Technology, 70 Fed. Reg. 43,577-43,578 (July 27, 2005) (to be codified at 48 C.F.R. pt. 2).

[304] Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3 (2004).

[305] 70 Fed. Reg. at 43,577.

[306] Federal Acquisition Regulation; Information Technology Security, 70 Fed. Reg. 57,449-57,450 (Sept. 30, 2005) (to be codified at 48 C.F.R. pts. 1, 2, 7, 11, 39).

[307] *Id.* at 57,450.

[308] *Id.*

[309] Defense Federal Acquisition Regulation Supplement; Exchange or Sale of Government-Owned Information Technology, 70 Fed. Reg. 54,697-54,698, (proposed Sept. 16, 2005) (to be codified at 48 C.F.R. pt. 239).

[310] Defense Federal Acquisition Regulation Supplement; Acquisition of Information Technology, 70 Fed. Reg. 54,698-54,699 (proposed Sept. 16, 2005) (to be codified at 48 C.F.R. pts. 239, 252).

[311] U.S. GEN. ACCOUNTABILITY OFF., REP. NO. GAO-05-362, INFORMATION SECURITY: IMPROVING OVERSIGHT OF ACCESS TO FEDERAL SYSTEMS AND DATA BY CONTRACTORS CAN REDUCE RISK (APR. 2005) [hereinafter OVERSIGHT REPORT].

[312] *Id.* at 2.

[313] *Id.*

[314] *Id.* at 3. "FISMA" is the Federal Information Security Management Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (2002).

[315] OVERSIGHT REPORT, *supra* note 311, at 3.

IPv6—Say That Three Times Fast!

Internet protocol version 6 (IPv6), like its predecessor IPv4, is an Internet "addressing mechanism that defines how and where information such as text, voice, and video move across interconnect networks."[316] Its developers designed it "to increase the amount of available IP [Internet protocol] address space."[317] While recognizing that "transition is already underway" largely because IPv6 can greatly increase address space, the GAO also cautioned agencies that IPv6 can "introduce additional security risks," such as unauthorized traffic and more direct access from the Internet.[318] Fortunately, the DOD appears ahead of other agencies in planning for the transition to this updated Internet protocol.[319]

Who Let the Data Out?

In July 2005, the GAO strongly criticized the federal government for a general lack of IT security.[320] Using sweeping language, the GAO castigated executive branch agencies for "[p]ervasive weaknesses in . . . information security policies and practices [that] threaten the integrity, confidentiality, and availability of federal information and information systems" and that "put federal operations and assets at risk of fraud, misuse, and destruction."[321] Though the report acknowledges that "the government is making progress in its implementation of FISMA," it nonetheless asserts that agency weaknesses "place financial data at risk of unauthorized modification or destruction, sensitive information at risk of inappropriate disclosure, and critical operations at risk of disruption."[322] If the IT sky really is falling across the government, at least it's falling everywhere—the report attributes "pervasive weaknesses" to "24 major agencies."[323] Unfortunately, the report doesn't address reactions from those twenty-four agencies to these allegations. However, it does include a two-page letter from the OMB disagreeing with several GAO suggestions for the OMB,[324] as well as a two-page GAO response.[325]

Lieutenant Colonel John J. Siemietkowski

Intellectual Property

Trade Secrets and the Federal Tort Claims Act

In *Jerome Stevens Pharmaceuticals v. Food & Drug Admin,*[326] the Court of Appeals for the District of Columbia held that a contactor may sue the federal government for wrongful disclosure of trade secrets under the Federal Tort Claims Act (FTCA).[327] Although *Jerome Stevens* is not the first case to have such a holding,[328] it is the only case disposing of the issue as to whether disclosure of trade secrets is a discretionary function of a federal agency.[329] In the opinion, the court

---

316 U.S. GEN. ACCOUNTABILITY OFF., REP. NO. GAO-05-471, *Internet Protocol Version 6: Federal Agencies Need to Plan for Transition and Manage Security Risks* Highlights (May 2005).

317 *Id.*

318 *Id.* at What GAO Found.

319 *Id.*

320 U.S. GEN. ACCOUNTABILITY OFF., REP. NO. GAO-05-552, INFORMATION SECURITY: WEAKNESSES PERSIST AT FEDERAL AGENCIES DESPITE PROGRESS MADE IN IMPLEMENTING RELATED STATUTORY REQUIREMENTS(JULY 2005).

321 *Id.* at What GAO Found.

322 *Id.*

323 *Id.*

324 *Id.* at 42-43.

325 *Id.* at 44-45. The report also includes a list of thirty-two GAO reports since 2002, all generally critical of federal IT security efforts. *Id.* at 47-49.

326 402 F.3d 1249 (D.C. Cir. 2005).

327 28 U.S.C.S. § 1346 (b) (LEXIS 2005).

328 *See* Kramer v. Secretary, U.S. Dep't of the Army, 653 F.2d 726 (2d Cir. 1980) (holding that the alleged wrongful disclosure of the name of a subcontractor amounted to an allegation of wrongful misuse of a trade secret, however mislabeled, within the district court's jurisdiction under the Federal Tort Claims Act).

329 *Jerome Stevens Pharm.,* 402 F.3d at 1252; *see* Ralph C. Nash & John Cibinic, *Government Disclosure of a Trade Secret: A Tort Claim?*, 9 NASH & CIBINIC REP. 6, 28 (Jun. 2005).

states "[t]he parties appear to agree that the disclosure of trade secrets is not a discretionary function because federal law prohibits it. "[330] In addition, the court found that wrongful disclosure of a trade secret did not fall under the intentional tort exception of the FTCA.

The FTCA grants federal district courts jurisdiction over claims arising from certain torts committed by federal employees in the scope of their employment, and waives the government's sovereign immunity from such claims.'[331] Two important exceptions to jurisdiction and the waiver of sovereign immunity are relevant here: the discretionary function exception and the intentional tort exception.[332] The discretionary function exception prohibits claims "based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion, involved is abused."[333] The intentional tort exception prohibits "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights."[334]

In *Jerome Stevens*, the court did not ask whether the wrongful disclosure of a trade secret fell within the discretionary function exception. The court simply concluded that the parties seemed to agree that the discretionary function exception did not apply because federal law prohibits disclosing trade secrets.[335]

As for the second exception, the "district court treated [plaintiff's] claims of misappropriation of trade secrets and breach of a confidential relationship as a claim of interference with contract rights,"[336] which the intentional tort exception bars.[337] On appeal, the DC Circuit disagreed finding that the duties underlying such claims are different.[338] Unlike wrongful disclosure of trade secrets, claims regarding intentional interference with contracts involve an economic relationship with a third party.[339] Consequently, the court narrowly construed the intentional tort exception to "those circumstances [that] are within the words and reason of the exception"—no less and no more.[340]

After *Jerome Stevens,* it appears that tort relief is available to contractors when the government misappropriates or wrongfully discloses trade secrets.

DD Form 882 over Substance: Caveat Forfeiture

In a case of first impression, the CAFC, in *Campbell Plastics Engineering & Manufacturing v. Brownlee*,[341] held that the government may obtain title to the subject invention[342] where a contractor fails to comply with FAR invention disclosure requirements set forth in the contract. Harm to the government is not required in order for the contracting officer[343] to remain within the bounds of sound discretion in demanding forfeiture. [344]

---

[330] *Jerome Stevens Pharm.*, 402 F.3d at 1252 (citing 18 U.S.C. § 1905 (2000); 21 U.S.C. § 331(j) (2000); 5 U.S.C. § 552 (b)(4) (2000); 21 C.F.R. § 314.430 (2004)).

[331] *Id.* (citing Sloan v. U.S. Dep't of Housing & Urban Dev., 236 F. 3d 756, 759 (D.C. Cir. 2001); 28 U.S.C. §§ 1346(b), 2674 (2000)).

[332] *See* 28 U.S.C.S. § 2680 (LEXIS 2005).

[333] *Jerome Stevens Pharm.,* 402 F.3d at 1252 (citing 28 U.S.C. § 2680(a) (2000)).

[334] *Id.* (citing 28 U.S.C. § 2680(h).

[335] *Id.* (citing 18 U.S.C. § 1905; 21 U.S.C. § 331(j); 5 U.S.C. § 552 (b)(4); 21 C.F.R. § 314.430 (2004).

[336] *Id.* at 1255.

[337] 28 U.S.C. § 2680(a) (2000).

[338] *Jerome Stevens Pharm.,* 420 F.3d at 1255.

[339] *Id.*

[340] *Id.* at 1256 (citing Kosak v. United States, 465 U.S. 848, 853 n. 9 (1984) (quoting Dalenite v. United States, 346 U.S. 15, 31 (1953))).

[341] 389 F.3d 1243 (Fed. Cir. 2004).

[342] 35 U.S.C. § 201 defines "subject invention" as "any invention of the contractor conceived or first actually reduced to practice in the performance of work under a funding agreement." 35 U.S.C. § 201 (2000).

[343] In this case, the administrative contracting officer made the decision. Nonetheless, he will be referred to as the contracting officer throughout this discussion. *Campbell Plastics Eng'g & Mfg.,* 389 F.3d at 1243.

[344] *Id.* at 1250 (referring to the abuse of discretion test set forth in McDonnell Douglas Corp. v. United States, 182 F.3d 1319, 1326 (Fed. Cir. 1999)).

Campbell Plastics, a § 8(a) contractor, entered into a cost-plus-fixed-fee contract with the Army to develop components of an aircrew protective mask. Section I of the contract incorporated by reference the FAR Clause 52.227-11, Patent Rights-Retention by the Contractor. This clause "requires a contractor to disclose any subject invention developed pursuant to a [G]overnment contract and sets forth certain substantive requirements for doing so."[345] This clause allows the government to "obtain title if the contractor fails to disclose the invention within two months from the date upon which the inventor discloses it in writing to contractor personnel responsible for patent matters."[346]

Section I of the contract also incorporated by reference DFARS Clause 252.227-7039, Patents-Reporting of Subject Inventions, "which requires the contractor to disclose subject inventions in interim reports furnished" periodically.[347] Most importantly, to report on inventions and subcontracts, the contractor was required to submit a Department of Defense (DD) Form 882. Although the contractor failed, repeatedly, to disclose any subject inventions on the DD Form 882, contractor disclosed all technical aspects of the invention to the Army.[348] The Army even admitted that it possessed an enabling disclosure of the invention.[349] Technically, however, the contractor did not comply with the contract requirement that the subject invention be disclosed on DD Form 882.

At the ASBCA, contractor argued that its failure to comply with the contract requirement was in "form only" and should not result in title forfeiture.[350] The ASBCA denied contractor's appeal ruling that contractor "failed to satisfy its contractual obligation"[351]to properly inform the Army of the subject invention. Although the Army eventually found out about the subject invention, this was only discovered from "its review of the patent application for secrecy determination purposes and its own June 1997 report," which contractor did not supply.[352] Finally, the board held that FAR 52.227-11(d) allows the government to obtain title to a subject invention and the contracting officer in this case did not abuse his discretion in doing so.[353] Consequently, the contractor appealed.

The Federal Circuit agreed with the ASBCA.[354] The court focused on the purpose behind requiring disclosure of subject inventions to the government within a reasonable time after it has become known to contractor personnel:

> Though the [Bayh-Dole] Act provides nonprofit organizations and small business firms the right to elect title to a subject invention, it also vests in the [G]overnment the right to a paid-up license to practice the invention when the contractor elects to retain title..., and the right to receive title to the invention in the United Stated or any other country in which the contractor has not filed a patent application on the invention prior to any pertinent statutory bar date.[355]

In other words, the disclosure provisions ensure that the government has sufficient measures to protect its own rights. The court found that the contract was clear in that it required the contractor disclose subject inventions on the DD Form 882. The court was unsympathetic to contractor's argument that the Army had knowledge of the substance of the invention. The court said that the requirement to have the disclosure on an "easily identified form . . . is sound and needs to be strictly enforced."[356] Without rigid application of the rule, the government would never be sure of which piece of paper or oral statement might comprise the subject invention disclosure.[357]

---

[345] *Id.* at 1244.

[346] *Id.* (referring to FAR 52.227-11).

[347] U.S. DEP'T OF DEF., DEFENSE FEDERAL ACQUISITION REG. SUPP. 252.227-7039 (July 2004) [hereinafter DFARS].

[348] *Campbell Plastics Eng'g & Mfg.,* 389 F.3d at 1246.

[349] *Id.*

[350] *Id.*

[351] *Id.*

[352] *Id.*

[353] *Id.*

[354] *Id.* at 1243.

[355] *Id.* at 1247

[356] *Id.* at 1249.

[357] *Id.*

Arguing that forfeiture is disfavored by common law, the contractor asserted that the contracting officer abused his discretion in insisting on forfeiture when the government is not benefited in any way by such a decision.[358] The Federal Circuit agreed with the ASBCA to apply the four-prong abuse of discretion test of *McDonnell Douglas Corporation v. United States* by looking at: [359]

> evidence of whether the government official acted with subject bad faith; (2) whether the official had a reasonable, contract-related basis for his decision; (3) the amount of discretion given to the official; and (4) whether the official violated a statute or regulation.

The CAFC agreed with the board's finding that the contracting officer did not abuse his discretion. Commentators have disagreed with the outcome of this case, specifically criticizing the use of the *McDonnell Douglas* test in ascertaining abuse of discretion.[360] In that case, a review of the factors the contracting officer actually considered occurred.[361] Here, the ASBCA's decision does not demonstrate that such a review happened.[362]

In conclusion, *Campbell Plastics* makes it clear that contractors must strictly comply with subject invention disclosure requirements found in government contracts to avoid forfeiture to title of invention. It is now abundantly clear that form, more specifically DD Form 882, triumphs over substance.

Major Katherine E. White

Non-FAR Transactions

DOD Issues Interim Rule Regarding Other Transaction Agreements

In last year's *Year in Review*, we discussed the DOD's latest regulatory changes to its authority to enter into agreements that "do not comply with the normal statutory and regulatory contracting rules."[363] The Secretary of Defense and the Secretaries of the military departments have the authority to enter into non-traditional binding agreements for the purpose of research under two separate statutes.[364] Title 10, Section 2358, permits the DOD to utilize grants and cooperative agreements for research purposes.[365] Additionally, Title 10, Section 2371, permits the DOD to enter into agreements "other than contracts, grants, and cooperative agreements" for the purpose of research; these agreements are called other transaction agreements (OTAs).[366]

While the original OTA legislation did not allow a contractor performing the research to produce the item it researched,[367] a 1993 amendment allowed that contractor to produce prototypes derived from the research.[368] Later, a 2001 amendment allowed the DOD to award a follow-on production contract, without competition, to the contractor that had

---

[358] *Id.* at 1250.

[359] *Id.* at 1326

[360] Ralph C. Nash & John Cibinic, *Postscript: Forfeiture of Title to Patent*, 19 NASH & CIBINIC REP. 1, 2 (Jan. 2005). Dave Burgett, *Feature Comment: Federal Circuit Upholds Patent Forfeiture for Failure to Comply Strictly with Reporting Requirement, Despite Lack of Prejudice*, 46 GOV'T CONTRACTOR 44, 457 (Nov. 2004).

[361] Ralph C. Nash & John Cibinic, *supra* note 360, at 2.

[362] *Id.*

[363] *See 2004 Year in Review*, *supra* note 88, at 152.

[364] *See* Pub. L. No. 85-599, 72 Stat. 520 (1947) and Pub. L. No. 101-189, 103 Stat. 1403 (1989).

[365] Pub. L. No. 85-599, 72 Stat. 520 (1947).

[366] Pub. L. No. 101-189, 103 Stat. 1403 (1989).

[367] Major Kevin J. Huyser et al., *Contract and Fiscal Law Developments of 2003—The Year in Review,* ARMY LAW., Jan. 2004, at 159-60 [hereinafter *2003 Year in Review*].

[368] Pub. L. No. 103-160, § 845, 107 Stat. 1547, 1721 (1993).

produced the prototype under an OTA.[369] In 2003, another amendment expanded the DOD's authority to award such follow-on contracts.[370] In November 2004, this 2003 amendment was incorporated into an interim rule within the DFARS.[371]

This interim rule, located at DFARS 212.7000-212.7003, implements Section 847 of the National Defense Authorization Act for Fiscal Year 2004.[372] The interim rule permits a "non-traditional defense contractor" to use FAR part 12 (Acquisition of Commercial Items) procedures for a follow-on contract not exceeding $50,000,000 for the "production of an item or process begun as a prototype process under an other transaction agreement."[373] The interim rule defines a "non-traditional defense contractor" as a contractor that has previously entered into an OTA with the DOD under the following circumstances: (1) the contractor has not performed any contract that is "subject to full coverage under the cost accounting standards" per FAR part 30 for the past year, and (2) the contractor has not performed any contract "exceeding $500,000 to carry out prototype projects or to perform basic, applied or advanced research projects for a federal agency" for the past year.[374] This authority is further limited to firm fixed-price contracts or fixed-price contracts with an economic price adjustment awarded on or before 30 September 2008.[375]

The Future of the Future Combat Systems

In May 2003, the Army awarded an estimated $21 billion OTA to the Boeing Corporation for the research, development and demonstration of the Army's newest weapons program, the Future Combat Systems (FCS).[376] This OTA, although a non-FAR transaction, did contain some FAR and DFARS clauses.[377] While the FCS is currently in the research and development stage, the Army predicts that the FCS will be fully operational by the year 2016.[378]

The FCS is not a stand-alone weapon system, but is rather a "family of 18 manned and unmanned ground vehicles, air vehicles, sensors, and munitions that will be linked, by an information network."[379] The purpose of the FCS concept is to allow the modern Army to utilize a network of lighter, often unmanned vehicles to provide combat sensitive information to the battlefield commander.[380] The OTA for the systems development and demonstration phase involves eighteen weapons platforms and seventeen different subcontractors.[381] The OTA requires Boeing to serve as the "Lead System Integrator" with the responsibility for exercising oversight over the various subcontractors involved with the research, development and production of the FCS subsystems.[382]

After some pressure from Congress,[383] the Secretary of the Army announced that the OTA the Army had entered into with Boeing would be transformed into a FAR-based contract.[384] In a press release, Army Secretary Harvey stated that

---

[369] National Defense Authorization Act for FY 2002, Pub. L. No. 107-107, 115 Stat. 1012, 1182-83 (2001). This act permitted the DOD to award a follow-on production contract to the participant in an OTA for the development of a prototype without the use of competitive procedures. *Id.*

[370] Pub. L. No. 108-136, § 847, 117 Stat. 1392 (2003).

[371] Defense Federal Acquisition Regulation Supplement; Transition of Weapons-Related Prototype Projects to Follow-on Contracts, 69 Fed. Reg. 63,329 (Nov. 1, 2004) (amending 48 C.F.R. pt. 212).

[372] *Id.*

[373] *Id.*

[374] *Id.*

[375] *Id.*

[376] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-442T 10-12, DEFENSE ACQUISITIONS: FUTURE COMBAT SYSTEMS CHALLENGES AND PROSPECTS FOR SUCCESS (2005) (testimony before the Subcommittee on Airland, Committee on Armed Servs., U.S. Senate) (statement of Paul L. Francis, Director of Acquisition and Sourcing Management).

[377] *Id.* at 12.

[378] *Id.* at 23.

[379] *Id*. at 4.

[380] *Id.* at 6.

[381] *Id.* at 10.

[382] *Id.*

[383] Jonathan Karp and Andy Pasztor, *Army Program Run by Boeing Faces Challenge by Sen. McCain*, WALL ST. J., Mar. 15, 2005, at A1.

while "the OTA was appropriate for the earlier phases of the FCS . . . we need a contractual arrangement that best ensures FCS is properly positioned" for the modern Army force.[385]

Major Marci Lawson, USAF

Payment and Collection

DFARS Sets the Example - FAR Catches Up with Final Rule Allowing Optional Withholding under Time-and-Materials and Labor-Hour Contracts

As we reported last year, the DOD issued a final rule adding DFARS 232.111(b) and DFARS 252.232-7006, Alternate A, that clarified determinations whether to withhold payments under time-and-materials and labor-hour contracts.[386] The new clause notes that "there should be no need to withhold payment for a contractor with a record of timely submittal of the release discharging the Government from all liabilities, obligations, and claims."[387] However when determined necessary to protect the government's interest, the Administrative Contracting Officer may issue a unilateral modification to withhold five percent of payment amounts due, up to a maximum of $50,000.[388]

Subsequently, the FAR Councils issued a final rule as FAC 2005-05 that also revised the FAR to allow optional withholding for Time-and-Materials and Labor-Hour Contracts.[389] The final rule amended FAR 32.111 and 52.232-7 by removing the prior withholding mandatory requirement to allow the contracting officer to issue a unilateral modification to withhold five percent of the payments due, up to a maximum of $50,000 if considered necessary to protect the government's interest.[390] In response to comments on the initial proposed rule,[391] the FAR Councils clarified that the $50,000 withhold ceiling applies to the entire contract and not to each individual order under a task order contract.[392]

"Ouch, that Hurts Mr. Taxman! Mr. KO, What is a Poor Contractor to do?"

The DOD has issued an interim rule through DFARS Case 2004-D033 addressing the effect of Internal Revenue Service (IRS) collections of tax debts against an indebted contactor's payments for performance under DOD contracts.[393] This process of IRS debt collection is referred to as a levy and authorizes the government to continuously withhold up to one hundred percent of every contractor payment until the tax debt is satisfied.[394] Recognizing that there is a high risk of contract non-performance from the application of an IRS levy, DFARS 232.7100 and 252.232-7010 were added "to ensure that all parties understand their rights and obligations related to the assessment of a levy."[395] The DOD noted in the interim rule that it should be the contractor's responsibility to identify and notify the government of any levy significantly impacting contract performance because it is the contractor's tax delinquency creating the situation.[396]

Accordingly, DFARS 252.232-7010(b) requires the contractor to promptly notify the Contracting Officer of any levy that will jeopardize contract performance. The notification must include the dollar amount of the levy, the rationale and adequate supporting documentation of how the levy will jeopardize contract performance, and explain if an inability to

---

384 Press Release, U.S. Army Public Affairs, Army Announces Business Restructuring of the FCS Program (Apr. 30, 2005), *at* http://www4.army.mil/ocpa/print..

385 *Id.*

386 Defense Federal Acquisition Regulation Supplement; Payment Withholding, 68 Fed. Reg. 69,631 (Dec. 15, 2003).

387 DFARS, *supra* note 347, at 232.111(b)(ii).

388 *Id.* at 232.111(b)(iii).

389 Federal Acquisition Regulation; Payment Withholding, 70 Fed. Reg. 43,580 (July 27, 2005).

390 *Id.* at 43,581.

391 Federal Acquisition Regulation; Payment Withholding, 69 Fed. Reg. 29,838 (May 25, 2004).

392 70 Fed. Reg. at 43,580.

393 Defense Federal Acquisition Regulation Supplement; Levy on Payments to Contractors, 70 Fed. Reg. 52,031 (Sept. 1, 2005).

394 *See* 26 U.S.C.S. §§ 6331-6332 (LEXIS 2005).

395 70 Fed. Reg. at 52,031.

396 *Id.*

perform the contract will adversely affect national security. If the Contracting Officer determines in joint consultation with the Director, Defense Procurement and Acquisition Policy (DPAP) that a lack of performance will adversely affect national security, the DPAP will notify the IRS and "some or all of the monies collected will be returned to the contractor."[397]

Proposed Rule Issued to Clarify Payments under Time-and-Materials (T&M) Contracts

The FAR Councils through FAR Case 2004-015 proposed to amend FAR part 16.307 and specify that FAR clause 52.216-7, Allowable Cost and Payment, is included in T&M contracts.[398] The description of T&M contracts at FAR part 16.601 notes that supplies or services are acquired on the basis of "[d]irect labor hours at specified fixed hourly rates that include wages, overhead, , general and administrative expenses, and profit."[399] This pricing basis under a T&M contract would be the time portion and is usually referred to as loaded labor rates. The materials portion is for the materials used in contract performance "at cost, including, if appropriate, material handling costs."[400] Accordingly, the proposed rule would require the typical clause used in cost contracts, FAR part 52.216-7, "as applicable to the portion of the contract that provides for reimbursement of materials at actual cost."[401] Additionally, the definition of materials at FAR part 16.601 would be amended to include other typical costs under a T&M contract associated with material costs, such as, subcontract costs for supplies and services and applicable indirect costs (*e.g.,* general and administrative expenses).[402]

Re-do—$45 Billion and Counting: Magnitude of Government Improper Payments Remains Unknown

As we reported have reported in prior years, Congress remains very interested in the identification and recovery of agency improper payments.[403] Thus, Congress enacted the Improper Payments Information Act of 2002 (IPIA)[404] that "requires each agency to annually identify all 'programs and activities that may be susceptible to significant improper payments' and report an annual estimate of improper payments to Congress."[405]

For FY 2004, the GAO reviewed Performance and Accountability Reports (PAR) from twenty-nine agencies and reported on the challenges remaining in meeting the aforementioned requirements of the IPIA.[406] Specifically the GAO noted that the federal government had made progress because twenty-three of the twenty-nine agencies reported they had completed identifying programs at risk for improper payments and seventeen of those agencies had estimated and reported over $45 billion of improper payments.[407] However, the full magnitude of the improper payments problem remains unknown because all of the reviewed agencies had neither completed identification of at-risk programs, nor provided an estimate of their improper payments in accordance with the IPIA.[408]

Specifically for the DOD, it reported that it had assessed all programs and estimated $100 million in improper military health benefit payments and $34 million in improper military retirement fund payments.[409] Finally, true success in resolving the improper payments issue and complying with the IPIA involves implementing actions to identify and recover improper payments as well as eliminating the initial occurrence. Although the report noted that the OMB reported federal

---

[397] *Id.*

[398] Federal Acquisition Regulation; Payments Under Time-and-Materials and Labor-Hour Contracts, 70 Fed. Reg. 56,314 (Sept. 26, 2005).

[399] FAR, *supra* note 274, at 16.601.

[400] *Id.*

[401] 70 Fed. Reg. at 185.

[402] *Id.*

[403] *See 2003 Year in Review, supra* note 367, at 163.

[404] Pub. L. No. 107-300, 116 Stat. 2350 (2002) [hereinafter IPIA].

[405] *2003 Year in Review, supra* note 367, at 163 (quoting IPIA, § 2(a), 116 Stat. 2350).

[406] U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-05-417, FINANCIAL MANAGEMENT: CHALLENGES IN MEETING REQUIREMENTS OF THE IMPROPER PAYMENTS INFORMATION ACT (Mar. 2005).

[407] *Id.* at 3.

[408] *Id.* at 9.

[409] *Id.* at 21.

agencies had "established a strong foundation for . . . identifying and implementing the necessary corrective actions," the GAO had not specifically reviewed the effectiveness of improper payment identification and recovery actions.[410]

Lieutenant Colonel Karl Kuhn

Performance-Based Service Acquisitions (PBSA)

Final Rule on PBSA Incentives

As discussed in last year's *Year in Review*,[411] the FAR Councils issued a final rule which expands the government's authority to treat performance-based contracts or task orders for services as commercial items as long as the contracts meet specified criteria.[412] This criterion includes a firm-fixed price for specific tasks, a contractor that provides similar services to the general public, and a contract under $25 million which meets the FAR definition of performance-based contracting.[413] The FAR Councils made a small change intended to give contracting officers discretionary authority to tailor the remedies clause in the event that customary commercial practices do not exist for the types of services under contract.[414]

Challenging the 'Paradyne' of PBSAs

The GAO rejected a challenge to a minimum staffing requirement in a performance-based contract in *United Paradyne Corporation*.[415] The Air Force issued a RFP for the award of a fixed-price contract for fuels management services at Wright-Patterson AFB, Ohio. United Paradyne, the incumbent, protested the requirement that only one person be continuously present for safety, security, and environmental reasons because the company traditionally had used two employees during the midnight shift.[416] The GAO noted that the FAR required performance-based work statements "to the maximum extent practicable."[417] Given that standard, the GAO concluded that the Air Force's requirement was neither unreasonable nor improper.[418] The GAO also noted that the Air Force attempted to use a performance-based standard in the prior contracts, but that problems with appropriate manning had led the Air Force not to exercise the option-year and resolicit the contract.[419]

Major Andrew S. Kantner

Procurement Fraud

The past year saw a number of significant developments in False Claims Act litigation, particularly with regard to *qui tam* suits.[420]

---

[410] *Id.* at 4.

[411] *See 2004 Year in Review*, *supra* note 88, at 157.

[412] Federal Acquisition Regulation; Incentives for Use of Performance-Based Contracting for Services, 70 Fed. Reg. 33,657 (June 8, 2005) (to be codified at 48 C.F.R. pts. 2, 4, 12, 37 and 52).

[413] *See* FAR, *supra* note 274, at 2.101. Performance-based contracting is defined as, "structuring all aspects of an acquisition around the purpose of the work to be performed with the contract requirements set forth, in clear, specific, and objective terms with measurable outcomes as opposed to either the manner by which the work is to be performed or broad and imprecise statements of work." *Id.*

[414] 70 Fed. Reg. at 33,659.

[415] Comp. Gen. B-296609, 2005 U.S. Comp. Gen. LEXIS 151 (Aug. 19, 2005).

[416] *Id.* at *6.

[417] *See* FAR, *supra* note 274, at 11.002 (a)(2)(i).

[418] *United Paradyne Corp.*, 2005 U.S. Comp. Gen. LEXIS 151, at *7.

[419] *Id.* at *7 n.1.

[420] *Qui tam* suits are suits filed under the False Claims Act pursuant to 31 U.S.C. 3730, whereby private individuals known as a "relators" are permitted to act as like a private attorneys general and file action alleging fraud against the government. The government may or may not join the relator's suit but regardless whether or not the government joins the suit, pursuant to the statute, relators are entitled to share in any recovery if the suit proves successful. RALPH. C. NASH ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK, A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT (2d ed. 1998).

In a case of particular interest to the military, on 8 July 2005, the District Court for the Eastern District of Virginia denied a motion for summary judgment and allowed a case to proceed in a *qui tam* action against Custer Battles, LLC (Custer Battles).[421] A former Custer Battles' employee and others brought the *qui tam* action alleging that Custer Battles had inflated claims on two contracts with the Coalition Provisional Authority (CPA) for security services at the Baghdad International Airport. Before denying the motion, the court addressed two interesting legal issues. The first issue was whether a claim against the CPA was sufficient to constitute a "claim" under the False Claims Act (FCA).[422] The second issue was whether a claim presented to the CPA was a claim "presented" to U.S. officials pursuant to the statute.[423]

On the first issue, the court determined that in order to be subject to the FCA, there must be a request for or actual payment from federal property.[424] The court held that while "§ 3729(a)(1) requires a 'claim,' or a request or demand for payment that if paid would result in economic loss to the government fisc, i.e. a request for payment of government funds; it does not extend to cases where the government acts solely as custodian, bailee, or administrator, merely holding or managing property for the benefit of a third party."[425] The court went on to determine that claims against CPA Vested Funds[426] and Seized Funds[427] constituted claims subject to the FCA,[428] but that claims against the Developmental Fund for Iraq (DFI)[429] were not subject to the FCA because "the CPA played a restricted role as an administrator or custodian of the funds in the DFI, required to expend Iraqi money for the benefit of the people of Iraq. Accordingly, if DFI funds were paid out in response to a fraudulent request for payment, the United States would not suffer any economic loss."[430]

On the second issue, as to whether or not the claim was "presented to a U.S. government official," the court found that "the undisputed facts in the record reflect that demand for payment from Seized and Vested Funds under [both] contracts were presented to a member of the Armed Forces [who were acting as contracting officers for the CPA] before payment."[431] The court held that this presentment satisfied the requirements of the FCA regardless of whether or not the CPA was determined to be an instrumentality of the United States.[432] The court held that, under a causation theory, the claim presented to the CPA officials ultimately caused those officials to present the claims to an officer of the United States Army.[433] "The presentment requirement is satisfied in the case of all requests or demands in connection with [these cases] that were paid from Seized or Vested Funds."[434]

---

[421] United States *ex rel*. DRC, Inc. et al. v. Custer Battles, LLC et al., 376 F. Supp. 2d 617 (E.D. VA. 2005).

[422] 31 U.S.C.S. 3729 (LEXIS 2005). The *qui tam* provisions of the False Claims Act authorize "private persons" to bring action for a violation of the FCA in the government's stead. The FCA provides civil penalties against any person who: (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; . . . . Section 3729(c) defines "claim" to include "any request or demand . . . for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded."

[423] *Custer Battles, LLC*., 376 F. Supp. 2d at 635.

[424] *Id.* at 639.

[425] *Id.* at 641.

[426] "Vested Funds" are Iraqi funds confiscated by the U.S. pursuant to an executive order authorized by the International Emergency Economic Powers Act (see 50 U.S.C. § 1702(a)(1)(C)) under which "all rights, title and interest" in the confiscated funds vests in the agency or person designated by the President, in this case the U.S. Treasury. *Custer Battles, LLC,* 376 F. Supp. 2d at 624.

[427] "Seized Funds" are Iraqi state-owned funds seized by Coalition forces in Iraq. Under customary international law, Iraqi state-owned cash and other moveable property became U.S. government property once they were transferred to Army custody. *Custer Battles, LLC*., 376 F. Supp. 2d at 626.

[428] *Id.* at 647.

[429] Developmental Funds for Iraq was not U.S. Government property because the DFI was created by the U.N. and the CPA as a depository for proceeds from the sale of Iraqi national resources and repatriated Iraqi funds to fund relief and reconstruction efforts for the Iraqi people. The court held that these funds always belonged to the Iraqi people. *Id.* at 645.

[430] *Id*.

[431] *Id*. at 647.

[432] *Id*. at 648.

[433] *Id*.

[434] *Id*.

The denial of the motion for summary judgment in this case just means the case will be allowed to go forward. Whether or not Custer Battles[435] will ultimately be found liable is a question for a future day. However, given the ever-increasing variety of roles the United States is playing in the world, the decision in this case is particularly noteworthy.

KBR Employee Convicted

Custer Battles was not the only contractor in Iraq facing allegations of price gouging. In March, two individuals, one, a former Kellogg, Brown, and Root (KBR) employee, and the other, the managing partner of a Kuwaiti business, were charged in a ten-count indictment for "charges of devising a scheme to defraud the United States of more than $3.5 million related to the awarding of a subcontract to supply fuel tankers for military operations in Kuwait.[436] According to the indictment, the KBR employee negotiated and managed subcontracts on behalf of KBR under the Logistics Civilian Augmentation Program (LOGCAP) III prime contract.[437] The indictment alleges that the KBR employee inflated bids of all competitors and ensured that one particular subcontractor won the contract.[438]

The subcontract was supposed to pay the subcontractor more than $5.5 million dollars, despite KBR's estimate of just over $680,000 and the subcontractor allegedly paid the former KBR employee $1 million for the favorable treatment they received.[439] KBR reportedly brought the issue to the attention of the Department of Justice and the Department of Defense after discovering the discrepancy. The employee faces a maximum of ten years confinement and a fine of up to $5 million for each count in the indictment under the Major Fraud Act and no more than twenty years in prison and a fine of up to $250,000 for each count of wire fraud.[440]

Upon Further Review, the Call in the Field Is Reversed

In last year's *Year in Review*, we reported that a divided Fourth Circuit concluded that retaliation claims are subject to the False Claims Act's (FCA)[441] six-year statute of limitations, rather than the local state's three year limitation period for wrongful discharge actions.[442] This created a split in the circuits on this issue and the Supreme Court granted certiorari to hear the appeal.[443] In the *Graham County Soil and Water Conservation District, et al. v. United States ex rel. Wilson*, the Supreme Court reversed the Fourth Circuit and held that because the statute is ambiguous, the statute of limitations

---

[435] *See generally* Jason McLure, *How a Contractor Cashed in on Iraq*, LEGAL TIMES, Mar. 4, 2005, *available at* www.law.com/jsp/article.jsp?id+11098526942 (last visited Oct. 15, 2005), for an interesting article detailing how, for critics of the Bush administrations handling of postwar Iraq, Custer Battles has become something of a symbol of contractor excess during the fourteen-month period that the Coalition Provisional Authority governed Iraq.

[436] Press Release, U.S. Attorney for the Central District of Illinois, Former KBR Employee and Subcontractor Charged with $3.5 Million Government Contract Fraud in Kuwait (Mar. 17, 2005), *available at* http://www.usdoj.gov/isao/ilc/press/2005/march/Mazon%20indict031705.pdf

[437] *Id*.

[438] *Id*.

[439] *Id*.

[440] *Id.* at 2. The Kuwaiti businessman was also indicted, but has not been apprehended due to his residence outside the United States. *Id.* at 1.

[441] 31 U.S.C.S. § 3729(a) (LEXIS 2005).

[442] *2004 Year In Review*, *supra* note 88, at 159.

[443] The source of the split in the circuit court's was caused by the 1986 amendments to the FCA that created a third enforcement mechanism—that being a private cause of action for an individual retaliated against by his employer for assisting an FCA investigation or proceeding. This new mechanism was in addition to the longstanding government right and an individual relator's right to sue the alleged violator, but the statute of limitation language contained in the FCA only addressed the original two causes of action and does not specifically address the newer whistleblower retaliation claims. 31 U.S.C. § 3730(h). Remedies for retaliation claims include reinstatement, two times the amount of back pay plus interest, special damages, litigation costs, and attorney's fees. 31 U.S.C.S. § 3730(h) (LEXIS 2005). The 1986 amendments also revised the language of the 6-year statute of limitations applicable to FCA actions. The current provision reads:

> (b) A civil action under section 3730 may not be brought—
> (1) more than 6 years after the date on which the violation of *section 3729* is committed, or
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed

31 U.S.C.S. § 3731(b)(1) (emphasis added).

provisions pertaining to causes of action seeking a remedy for a false claim under the FCA do not govern whistle-blower retaliation claims made pursuant to 31 U.S.C. 3730.[444] Instead, the Court held that the most analogous state statute of limitations applies.[445]

"False Claim" by Subcontractor not a Claim until Prime Makes It So

In an interesting case from the District Court for the Southern District of Ohio, the court held that evidence of an allegedly false claim from a subcontractor to a prime contractor is not sufficient, as a matter of law, to meet the civil FCA requirement for a claim "to the Government," even if the subcontractor's claim was paid with federal funds.[446] Two relators brought this *qui tam* suit regarding alleged failures by subcontractors on the Navy's Arleigh Burke destroyer program.[447] Normally, knowingly false claims submitted by a subcontractor through a prime contractor for payment by the government would constitute a false claim under the FCA.[448] However, in this case, the court held that relators offered no evidence of claims or certifications from the prime contractors to the Navy and that claims between contractors themselves were insufficient to satisfy the relators' burden of proof that a claim was actually made to the government.[449]

Employees with Oversight of Government Contracts Have Special Rules in Retaliation Claims

In a blow to potential whistle-blowers working for contractors with duties as a government contract overseer, the Court of Appeals for the First Circuit granted summary judgment in favor of the defendant in a case where a relator brought suit against his company under the Rhode Island Whistle-Blowers' Protection Act[450] alleging that his company was double-billing the government for the salaries of some employees.[451] In this case, the relator was the president of McLaughlin Research Corporation (MRC) with responsibility for overseeing MRC contracts with the DOD.[452] Mr. Maturi discovered the billing problems and alerted the MRC Chairman of the Board of the potential liability if Defense Contract Audit Agency (DCAA) auditors scrutinized MRC's billing practices.[453] The board chairman found the letter threatening and constituted the "last straw" for an employee whose job performance was already under scrutiny so she fired Mr. Matsui.[454]

The court held that

> ordinarily an employer is charged with knowledge that an employee is engaged in protected conduct when the employer is put on notice that the employee is taking action that could reasonably lead to an FCA case, . . . where an employee's job responsibilities involve overseeing government billings or payments, his burden of proving that his employer was on notice that he was engaged in protected conduct should be heightened. Yet, such an employee can put his employer on notice by any action which . . . [regardless of his job duties,] would put the employer on notice that [FCA] litigation is a reasonable possibility.[455]

---

[444] 125 S. Ct. 2444 (2005).

[445] *Id*. at 2451.

[446] U.S. *ex rel*. Sanders and Thacker v. Allison Engine Co., Inc., Gen. Motors Corp., Gen. Tool Co., & Southern Ohio Fabricators, Inc., 2005 U.S. Dist. LEXIS 5612, 2005 WL 713569 (S.D. Ohio Mar. 11, 2005).

[447] *Id*.

[448] 31 U.S.C.S. § 2729(a)(2) (LEXIS 2005); *see also* United States v. Bornstein, 423 U.S. 303, 309 (1975); U.S. *ex rel*. Totten v. Bombardier Corp., 380 F.3d 488, 493, *reh'g en banc denied* (D.C. Cir. 2004).

[449] *U.S. ex rel. Sanders and Thacker v. Allison Engine Co., Inc.*, *et al*., 2005 U.S. Dist. LEXIS 5612, at 30-31.

[450] R.I. Gen. Laws § 28-50-1.

[451] Maturi v. McLaughlin Research Corp., 413 F.3d 166 (1st Cir. July 1, 2005).

[452] *Id*. at 169-70.

[453] *Id*. at 171.

[454] *Id*.

[455] *Id*. at 173.

In this case, the court held that the relator's notice to the board chairman of billing problems and potential liability "could not reasonably have put [the company] on notice that FCA litigation was a realistic possibility" prior to his termination.[456]

Government Need Not Intervene Prior to Seeking Dismissal of FCA Qui Tam *Suit*

Ordinarily, in order to intervene for purpose of pursuing the litigation in a *qui tam* action after the sixty-day seal period expires,[457] the government needs to first make a showing of good cause.[458] In an interesting case which extends recent case law, the Tenth Circuit held that "the Government, in a case in which it has declined to intervene in the [60-day] seal period, is not required to intervene [in a *qui tam* suit] with a showing of good cause under [31 U.S.C.] § 3730(c)(3) before moving to dismiss the action under § 3730(c)(2)(A)."[459] This case extends what had previously been established law that the government does not have to intervene in a case in order to bring a motion to dismiss the case *during* the seal period.[460]

The court also adopted the Ninth Circuit's standard for determining whether dismissal of a relator's *qui tam* suit under the FCA is appropriate.[461] The court held that the appropriate test is "identification of a valid government purpose; and a rational relationship between dismissal and accomplishment of the purpose."[462] The court went on to find that the government's stated purpose of protecting classified information from disclosure and the timely closing of an installation "were valid governmental purposes supporting its motion to dismiss the qui tam action" and that the government satisfied the second part of the test "by advancing a "plausible, or arguable' reason for the dismissal."[463]

Undervalued Bids May Constitute Fraud in the Inducement under the FCA

In a case that failed to resolve the issue, but instead raised another interesting issue to watch for in the future, the Court of Appeals for the District of Columbia failed to address whether a contractor's intentional underbidding with the intent to win the contract award and later obtain upward modifications constituted a valid basis for a fraud in the inducement claim under the FCA.[464] Courts have held that when a "fraud in the inducement" theory applies, a contractor is liable under the FCA for all claims submitted on the awarded contract even if the claims themselves were not fraudulent.[465]

In this case, the lower District Court had acknowledged that, "if construed broadly," the fraud in the inducement theory could apply to claims such as the one in this case.[466] The lower court held, however, that "while claims submitted under a contract obtained after a fraudulently *inflated* bid are actionable even thought the claims are neither false nor fraudulent themselves where it is alleged that the defendant has submitted a fraudulently deflated bid, it must be shown not only that the low bid was fraudulent, but also that one or more of the requests for payment under the contract induced by the low bid were also fraudulent."[467]

---

[456] *Id*.

[457] The "seal period" is a window of time following the relator's filing of a qui tam action in district court during which the Department of Justice is notified of the suit, but the defendant is not. The period is used by DOJ to determine whether it wants to intervene in the case.

[458] 31 U.S.C.S. § 3730(c)(3) (LEXIS 2005).

[459] Ridenhour v. KaiserHill Co., LLC, 397 F.3d. 925, 935 (10th Cir. 2005).

[460] *See* Swift v. United States, 318 F.3d 250 (D.C. Cir. 2003).

[461] *Ridenhour*, 397 F.3d at 936 (citing Sequoia v. Baird-Neece, 151 F.3d 1139 (9th Cir. 1998)).

[462] *Id.*

[463] *Id*. at 936-37.

[464] United States *ex rel* Alva Bettis v. Oderbrecht Contractors of California, Inc., 393 F.3d 1321 (D.C. Cir. 2005). Note, generally, that fraud in the inducement as a form of procurement fraud is a judicial creation gleaned from the legislative history of the 1986 amendments to the FCA. Specifically, Congress noted that under FCA case law "each and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim." S. Rep. No. 99-345, at 9 (1986), *reprinted in* 1986 U.S.C.A.N. 5266, 5274.

[465] *Oderbrecht Contractors of California, Inc*., 393 F.3d. at 1326 (citing United States ex rel. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 787-88 (4th Cir. 1999) (surveying the case law on fraud in the inducement FCA liability)).

[466] *Id*. at 1327.

[467] *Id.*

However, the Tenth Circuit Court of Appeals in this case did not address the issue raised by the lower court, instead holding that "on the evidence of this case, no reasonable jury could find that [defendant] fraudulently induced the [contract]."[468]

The (Continuing) Sad Saga of Darlene Druyun

Last year's *Year in Review* reported on the sad saga of Darlene Druyun, the former Principal Deputy Assistant Secretary of the Air Force for Acquisition and Management.[469] FY 2005 witnessed significant fall-out from Ms. Druyun's case to include the criminal conviction of a senior Boeing executive and the GAO sustaining two major protests against the Air Force.

While many in the contracting community are well aware of the Druyun saga by now, it is important to first recap the Druyun case for those who are not yet familiar with her misdeeds. On 1 October 2004, Ms. Druyun was sentenced by a federal judge after earlier pleading guilty to one felony count of conspiracy in connection with her discussions with Boeing concerning potential employment with Boeing following her retirement from the Air Force.[470] Ms. Druyun was sentenced to nine months in prison, seven months of community confinement, one hundred fifty hours of community service, and a fine of $5,000.[471] Following her plea, but before her sentencing, Ms. Druyun admitted she provided "favors" to Boeing on several matters in her last several years with the Air Force.[472] Ms. Druyun admitted that she favored Boeing in certain negotiations as a result of her employment negotiations and other benefits provided to her by Boeing. Ms. Druyun acknowledged that Boeing's employment of her future son-in-law and her daughter in 2000, at the defendant's request, along with the defendant's desire to be employed by Boeing, influenced her government decisions in several matters affecting Boeing.[473]

---

[468] *Id*. at 1328.

[469] *2004 Year in Review*, *supra* note 88, at 159.

[470] Supplemental Statement of Facts, the Defendant's Post Plea Admissions, U.S. v. Darlene Druyun, U.S. District Court for the Eastern District of Virginia, Criminal No. 04-150-A, at http://www.pogo.org/m/cp/cp-druyun-postpleaadmission-2004.pdf (last visited 6 Oct. 2005) [hereinafter Supplemental Statement of Facts].

[471] *Procurement Integrity: Ex-USAF Official Druyun Admits Boeing Offers of Job Influenced Her, Draws 9 Months in Jail*, BNA FED. CONT. DAILY (Oct. 4, 2004). Ms. Druyun completed her sentence and was released from prison in Marianna County, Florida, on 30 Sept. 2005. Kimberly Palmer, *Former Air Force Acquisition Official Released from Jail*, GOVEXEC.com Daily Briefing, 3 October 2005 (on file with the author).

[472] *Id.*

[473] As a result of the loss of her objectivity, Ms. Druyun admitted that she took actions which harmed the United States to include the following:

> 1. In negotiations with Boeing concerning the lease agreement for 100 Boeing KC 767A tanker aircraft, she agreed to a higher price for the aircraft than she believed was appropriate. She did so, in her view, as a "parting gift to Boeing" and because of her desire to ingratiate herself with Boeing, her future employer. She also acknowledges providing to Boeing during the negotiations what at the time she considered to be proprietary pricing data supplied by another aircraft manufacturer.
>
> 2. During 2002 she, as chairperson of the NATO Airborne Early Warning and Control Program Management Board of Directors, was involved in negotiations with Boeing concerning a restructuring of the NATO AWACS program. She negotiated a payment of 100 million dollars to Boeing as part of that restructuring. She acknowledges that at the time she believed a lower amount to be an appropriate settlement and she did not act in the best interest of the United States and NATO.
>
> 3. As the selection authority in 2001 for the C-130 AMP which was an Air Force procurement of more than four billion dollars to upgrade the avionics of C-130 aircraft, she selected Boeing from four competitors, and now acknowledges that an objective selection authority may not have selected Boeing.
>
> 4. During 2000, she negotiated a settlement with Boeing concerning the C-17 H22 contract clause with a senior executive of Boeing. These negotiations occurred at the time she was seeking employment at Boeing for her daughter's boyfriend. Her decision to agree to a payment of approximately 412 million dollars to Boeing in connection with the C-17 H22 clause was influenced by Boeing's assistance to her.

Supplemental Statement of Facts, *supra* note 470.

The fallout from the Druyun case has been massive. First, and most significantly, in February 2005, the GAO sustained a series of bid protests on two major contract actions during which Ms. Druyun participated as either an advisor or source selection authority. The first sustained protest related to contracts for the Air Force's small diameter bomb (SDB) program.[474] The SDB program "contemplated development of a 'miniature munition' weapon system to provide fighter and bomber aircraft with air-to-surface capabilities to attack 'fixed and mobile/relocatable targets.'"[475] During the evaluation phase, the Air Force deleted one evaluation factor for which Lockheed Martin was already identified as being particularly strong.[476] The Air Force argued that it deleted this evaluation factor because it was related to a requirement (moving targets) that the Air Force decided to delete from the procurement due to budget constraints.[477]

The GAO noted, however, that just after awarding the contract to Boeing, the "Air Force discovered that 'surplus funding may exist' that would facilitate reinstatement of the [moving target] requirement."[478] The GAO found that Ms. Druyun was involved in the discussions that culminated in favor of Boeing; was involved in the decision to delete the moving target requirement; had performed in much the same source selection authority (SSA) role in this decision as she had previously held before allegedly being replaced as the SSA; and acknowledged bias in favor of the ultimate awardee.[479] In this decision sustaining the protest, the GAO held that where a "a procurement official was biased in favor of one offeror, … the need to preserve the integrity of the procurement process requires that the agency demonstrate [by compelling evidence] that the protester was not prejudiced by the procurement official's bias."[480]

The second major group of protests sustained by the GAO was related to the Air Force's award to The Boeing Company of various contracts, totaling approximately four billion dollars, for the avionics modernization upgrade program for the C-130 aircraft.[481] On much the same grounds as they used to sustain the SDB protests discussed above, the GAO sustained this series of protests as well stating that where "the record establishes that a procurement official was biased in favor of one offeror, our Office believes that the need to preserve the integrity of the procurement process requires that the agency demonstrate that the protester was not prejudiced by the procurement official's bias in order for us to deny the protest."[482] The GAO required that the agency provide "compelling evidence that the protester was not prejudiced."[483] Because the Air Force could not satisfy this burden, the GAO sustained the protests.[484]

Just prior to the GAO releasing their decisions on the SDB and C-130 cases, Mr. Michael Wynne, acting Under Secretary of Defense for Acquisition, Technology, and Logistics, announced that he asked the DOD Inspector General (IG) to review eight additional contracts that were "under the decision-making purview" of Darlene Druyun.[485] The eight cases referred to the DOD IG, worth a total of approximately three billion dollars, had been flagged by the Defense Contract Management Agency which had conducted a sweeping review of significant Air Force procurements and identified these eight as ones which appeared "to have anomalies in them which warrant further review."[486] To date the DOD IG has not

---

[474] Lockheed Martin Corp., B-295402, Feb. 18, 2005, 2005 CPD ¶ 24.

[475] *Id*. at 1 n.1.

[476] *Id*. at 6.

[477] *Id*. at 6 n.12.

[478] *Id*. at 7.

[479] *Id*. at 11.

[480] *Id*. at 14. Because much of the work was already completed on Phase I of the contract, GAO recommended that only Phase II be recompeted and that Lockheed be awarded attorney's fees for the protest. The GAO delayed a decision on whether Lockheed would receive reimbursement for their bid and proposal costs until the Air Force looked into some additional matters. *Id*.

[481] Matter of Lockheed Martin Aeronautics Co.; L-3 Commc'n Integrated Sys. L.P.; BAE Sys. Integrated Def. Solutions, Inc., Comp. Gen., B-295401, et al., Feb. 24, 2005, 2005 CPD ¶ 41, at 14 (discussed *supra* at section titled Competition at page 7).

[482] *Id*.

[483] *Id*. at 7.

[484] *Id*. at 14. Because of much of the work was complete on these contracts, the GAO recommended that the Air Force recompete certain portions of the contracts, review others to see if they could be recompeted, and pay the protesters attorneys fees for the protest as well as bid and proposal costs for any portion of the contracts that can not be recompeted. *Id*.

[485] DOD Refers Contracts to IG Investigators, http://www.defenselink.mil/news/Feb2005/n02142005_2005021407.html (last visited Oct. 15, 2005).

[486] DOD Refers Contracts to IG Investigators, http://www.defenselink.mil/news/Feb2005/n02142005_2005021407.html (last visited Oct. 15, 2005). The specific cases referred were the National Polar-orbiting Operational Environmental Satellite System—Conical Microwave Imager Sensor; C-5 Avionics Modernization Program; Financial Information Resource System; C-22 Replacement Program; 60K Tunner Program Contractor Logistics; KC-135 Programmed Depot Maintenance; F-16 Mission Training Center; and the C-40 Lease and Purchase Program. *Id*.

completed their investigation into the eight contracts. If the DOD IG finds improprieties, Mr. Wynne intends to ask the adversely affected contractors to file protests with the GAO, so stay tuned for more "Druyun protests" next year.[487]

If You Can't Do the Time, Don't Do the Crime

In addition to the extensive GAO protest actions in response to Ms. Druyun's conviction, FY 2005 also saw the Department of Justice (DOJ) bring a criminal case against Michael Sears, the former Boeing Chief Financial Officer.[488] As a DOJ news release stated, "Mr. Sears pled guilty on November 15, 2004, to aiding and abetting acts affecting a personal financial interest. From September 23, 2002, through November 5, 2002, Sears aided and abetted Darleen Druyun, then the Principal Deputy Assistant Secretary of the Air Force for Acquisition and Management, in negotiating employment with Boeing while she was participating personally and substantially as an Air Force official overseeing the negotiation of a $20 billion lease of 100 Boeing KC 767A tanker aircraft."[489]

Mr. Sears troubled involvement with Ms. Druyun apparently started when he was contacted in September 2002 by Darleen Druyun's daughter, herself a Boeing employee.[490] The release added, "In a series of e-mails to Sears, the daughter outlined her mother's intention to retire from the Air Force and the type of position her mother would accept after retirement. Druyun discussed these E-mails with the daughter, who relayed Druyun's interest in Boeing employment in a meeting with Sears."

These e-mails and discussions between Mr. Sears and Ms. Druyun's daughter led to a private meeting between Mr. Sears and Ms. Druyun at the Orlando Airport on 17 October 2002.[491] As the release stated, "Druyun advised Sears at that meeting that she had not disqualified herself from matters involving Boeing and therefore they should not be discussing her possible employment by the Boeing Company," but Mr. Sears continued with the employment negotiations knowing that their actions created a conflict of interest and then also "discussed issues concerning a major Air Force procurement which Boeing participated in as a subcontractor."[492]

Mr. Sears was sentenced on 18 February 2005, to four months incarceration, a fine of $250,000 and two hundred hours of community service.[493] Mr. McNulty said, "Mr. Sears had a clear choice. Instead of respecting the integrity of the government's procurement system, he chose the financial interests of his company over the best interest for America."[494]

Well, We're Moving on Up, . . . to the [Top . . .][495]

While Mr. Sears and Ms. Druyun, as well as the Air Force and The Boeing Company, took substantial heat for their transgressions on various contracts, the DOD IG released a report in June in which they spread the blame for at least one of the Boeing-Druyun cases, the KC-767A tanker lease program, far wider than just to Ms. Druyun.[496] The report found that Mr. Aldridge, Under Secretary of Defense for Acquisition, Technology, and Logistics; Mr. Wynne, Acting Under Secretary of Defense for Acquisition, Technology, and Logistics; Dr. James Roche, Secretary of the Air Force; Dr. Sambur, Assistant Secretary of the Air Force for Acquisition; Ms. Druyun; Principal Deputy Assistant Secretary of the Air Force (Acquisition

---

[487] *See GAO Sustains Lockheed's Druyun Protest; DOD Refers Eight More Contracts to IG*, 47 GOV'T CONTRACTOR 8, ¶88 (Feb. 23, 2005).

[488] News Release, U.S. Department of Justice, United States Attorney for the Eastern District of Virginia (Feb. 18, 2005), *available at* http://www.DODig.osd.mil/IGinformation/ IGInformationReleases/SearsSent021805.pdf.

[489] *Id*.

[490] *Id*.

[491] *Id*.

[492] *Id*.

[493] *Id*.

[494] *Id*.

[495] Theme Song, *The Jeffersons* (Columbia Tri-Star, 1975-85).

[496] U.S. OFF. OF THE INSPECTOR GEN. OF THE DEP'T OF DEF., REP. NO. OIG-2004-171, MANAGEMENT ACCOUNTABILITY REVIEW OF THE KC-767A TANKER PROGRAM (13 May 2005), *available at* www.DODig.mil/tanker.htm.

and Management); Major General Essex, Director of Global Reach Programs; General Jumper, Air Force Chief of Staff, and various Air Force attorneys involved in the review process were all accountable for mistakes they made in the KC-767A tanker lease procurement process.[497]

The report, concluding that these officials did not comply in certain respects with DOD Directives and guidance, OMB Circulars, or the FAR, was issued to the Secretary of Defense Rumsfeld in May for his review and consideration, and certainly sheds some very interesting light on the acquisition processes taking place at the highest levels of our government.[498]

Welcome Back, . . . to that Same Old Place that You Laughed About[499]

Interestingly over the past year, despite a series of recent transgressions, The Boeing Corporation has apparently made a stunning comeback and managed to work their way back into the (moderately) good graces of the United States government. As reported in the 2003 Year in Review, the Air Force suspended Boeing Integrated System business units on 24 July 2003 for committing serious violations of the law with regard to the Evolved Expendable Launch Vehicle Contract (EELV).[500] However, as reported last year, the Air Force waived the suspension of these Boeing units on two separate occasions and awarded two separate space launches to Boeing.[501] On 4 March 2004, the Air Force lifted the twenty month suspension of Boeing's satellite launch business clearing the way for Boeing to again compete for rocket launch contracts.[502] To help the Air Force reach their decision to lift the suspension, Boeing agreed to reimburse the Air Force for the costs incurred investigating Boeing ($1.9 million).[503]

At the time the suspension was lifted, Mr. Peter Teets, the Acting Secretary of the Air Force, said that he hoped "that everyone who does business with the Air Force takes note of this case and is reminded that we tackle ethical breaches very seriously and will not hesitate to impose significant sanctions when necessary."[504] Time will tell if Mr. Teets' hopes are realized or whether the Air Force's willingness to waive the suspension for significant contracts and ultimately restore the relevant Boeing units to the launch competitions is viewed more as a 'slap on the wrist.'

One thing is clear; Boeing has wasted little time getting back in the game. In May of this year, Boeing and Lockheed Martin announced that they entered a joint venture to produce the Air Force's EELV rocket.[505] The joint venture, called United Launch Alliance, intends to reduce launch costs for future rocket launches by the DOD and NASA.[506] This joint venture may very well end any legitimate competition in the rocket launch arena, and both companies agreed to seek an order in federal district court suspending the litigation between and dismissing their claims related to the EELV launches.[507] Although both companies maintain that their respective versions of the EELV will remain available as alternatives for individual launch missions, the regulatory approval process will undoubtedly give this joint venture serious scrutiny. The consolidation of major defense contractors generally, and the rocket launch contractors specifically, has resulted in less than ideal competition problems and has hampered the use of suspension and debarment process as a deterrent.[508]

Boeing seems intent on concluding all their ongoing litigation related to their recent transgressions with regard to Ms. Druyun and the Lockheed Martin cases. In September, it was reported that the DOJ and Boeing are negotiating a

---

[497] *Id*. at 32-46.

[498] *Id*. at i.

[499] Theme Song, *Welcome Back Kotter* (The Konack Co., Inc., 1975-79).

[500] *See 2003 Year in Review, supra* note 367, at 173.

[501] *Id*. at 174 n. 2331.

[502] Renae Merle, *Boeing Cleared to Bid on Launches*, WASH. POST, Mar. 5, 2005, at E1.

[503] *Id*.

[504] *Id*.

[505] *Boeing and Lockheed Team on EELV*, 47 GOV'T CONTRACTOR 20, ¶ 234 (May 18, 2005).

[506] *Id*.

[507] *Id*.

[508] For an interesting article discussing these issues, including a case study on the Boeing EELV suspension, see generally, Jennifer S. Zucker, *The Boeing Suspension: Has Increased Consolidation Tied the Department of Defense's Hands?*, ARMY LAW, Apr. 2004, at 14.

settlement in which Boeing would pay up to $500 million to the United States government, but would avoid prosecution in two federal probes related to illegally acquiring Lockheed Martin's proprietary data related to the EELV contracts and the illegal recruitment of Ms. Druyun.[509] Based on these broad outlines, such a settlement would "entail the stiffest financial penalties ever imposed on a U.S. defense contractor for alleged procurement violations."[510] The settlement is apparently being pushed by Boeing's recently installed Chief Executive Officer who would undoubtedly like to move past its recent troubles and focus on the future.[511]

Qui Tam *Settlements Are All the Rage, Too*

This year saw several significant FCA settlements highlighted by two cases that were initiated as *qui tam* suits. In one of the largest False Claims settlements ever negotiated with a defense contractor, Northrop Grumman Corporation and the DOJ settled a fifteen-year-old civil lawsuit that was scheduled to go to trial in March.[512] Northrop Grumman agreed to pay $62 million to resolve allegations originally brought as a *qui tam* action back in 1989 that Northrop Grumman "overcharged the government by fraudulently accounting for materials purportedly used in multiple defense contracts and by fraudulently inflating the cost and misrepresenting the progress of a radar jamming device for the B-2 'Stealth' Bomber."[513] The settlement called for the government to pay $12.4 million to the two former Northrop Grumman employees who first alerted the government to the alleged fraud.[514]

In a second large settlement, PricewaterhouseCoopers LLP (PWC) agreed to pay the government $41.9 million "to resolve allegations that it made false claims to the United States in connection with travel reimbursements under contracts it had with several federal agencies."[515] The settlement resulted from an investigation by a multi-agency joint taskforce "which confirmed allegations that PWC received rebates for its federally-financed travel expenses from its various travel and credit card companies, airlines hotels, rental cart agencies, and travel service providers and, despite a duty to do so," did not reduce its travel reimbursement claims filed with the government.[516] The claim was originally brought under the *qui tam* provisions of the False Claims Act.[517]

---

[509] Andy Pasztor & Anne Marie Squeo, *Boeing Could Avoid Prosecution, Pay Up to $500 Million to U.S.*, WALL ST. J, Sept. 9, 2005, at A1.

[510] *Id*.

[511] *Id*.

[512] Press Release, U.S. Dep't of Justice, United States Attorney for the Northern District of Illinois, Northrop Grumman to Pay U.S. $62 Million to Settle Alleged Accounting Overcharges and False Claims about Radar Jamming Device for B-2 "Stealth" Bomber, (Mar. 1, 2005), *available at* http://www.dodig.osd.mil/IGInformation/IGInformationReleases/Northrop_030105B2.pdf.

[513] *Id*.

[514] *Id*.

[515] Press Release, United States Agency for International Development, PriceWaterhouseCoopers to Pay $41.9 Million to Settle False Claims Regarding Travel Reimbursements (July 22, 2005), *available at* http://www/isaod/gov/press/releases/2005/pr050722.html.

[516] *Id*.

[517] *Id*.

What'cha Gonna Do When They Come for You: The DOJ Forms Procurement Fraud Working Group

Following the sentencing in Mr. Sears's case, discussed above, Paul J. McNulty, the U.S., Attorney for the Eastern District of Virginia, announced a broad initiative to combat procurement fraud.[518] The U.S. Attorney's Office created a Procurement Fraud Working Group to strengthen the integrity of the procurement system by focusing on "the early detection and prevention of procurement fraud associated with the increase in contracting activity for national security programs."[519] The Procurement Fraud Working Group will include representatives from the Federal Bureau of Investigations, the Defense Criminal Investigations Service, the Naval Criminal Investigations Service, the National Reconnaissance Office, the DOD IG, the Department of Homeland Security and will "facilitate the exchange of information among participant agencies and assist them in developing new strategies to prevent and to promote early detection of procurement fraud."[520] The goal of the group is to "promote collaboration and exchange of ideas to increase effectiveness in this vital area of law enforcement" by improving the training of special agents, auditors, contracting officers and program managers and to provide "increased collaboration between field agents and government contractors to educate them on effect means for preventing waste, fraud, and abuse." [521]

Another One Bites the Dust: COL Moran's Target Employer Convicted

Last year's edition of *The Year in Review* chronicled the sordid details of the bribery and corruption scandal that Colonel Richard Moran, the former Commander, U.S. Army Contracting Command, Korea (USACC-K), engaged in during his time in Korea.[522] As that article discussed, Colonel Moran and his wife were ultimately convicted in federal court and Colonel Moran was sentenced to fifty-four months in prison.[523] On 25 July 2005, two executives of Information Systems Support, Inc. (ISS), a Maryland based military contractor, pleaded guilty to conflict of interest charges relating to illegal job negotiations with a Colonel Moran.[524] Young Lee and Lorn MacUmber each pled guilty to one count of aiding and abetting a conflict of interest involving Colonel Moran.[525] ISS offered Moran post-retirement employment and Moran had accepted their offer on 7 January 2002.[526] As commander USACC-K, Colonel Moran accepted numerous dinners and special favors from ISS and directed that numerous contracts be awarded to ISS. Colonel Moran ultimately never went to work for ISS because he was arrested nine days after he accepted the employment offer.

Major Michael S. Devine

Taxation

Must Uncle Sam Reimburse Your Personal Tax Liability? Maybe –If You're a Subchapter S Corporation

Buoyed by its victory in an earlier COFC decision[527] which determined that state income taxes paid by the Subchapter S corporation's [528] sole shareholder were reimbursable expenses under the corporation's various cost-reimbursement contracts, Information Systems & Networks Corporation (ISN) sought to extend that ruling to its negotiated

---

[518] News Release, U.S. Department of Justice, United States Attorney, Eastern District of Virginia, Combating Procurement Fraud: An Initiative to Increase Prevention and Prosecution of Fraud in the Federal Procurement Process (Feb. 18, 2005), *available at* http://www.dodig.osd.mil/IGInformation/IGInformationReleases/SearsSent021805.pdf.

[519] *Id*.

[520] *Id*. at 3.

[521] *Id*. at 1.

[522] *2004 Year in Review*, *supra* note 88, at 174.

[523] *Id*. at 175.

[524] Press Release, U.S. Department of Justice, United States Attorney for the District of Maryland, Two Military Contractor Executives Plead Guilty to Conflict of Interest Charges Relating to Job Negotiations with Army Contract Officer (July 25, 2005) (on file with author).

[525] *Id*.

[526] *Id*. at 4.

[527] Info. Sys. & Networks Corp. (ISN I). v. United States, 48 Fed. Cl. 265 (2000), *later proceeding at*, Info. Sys. & Networks Corp. (ISN II) v. United States, 64 Fed. Cl. 599 (2005). *See supra* section titled Contract Types at page 20 for an additional discussion of this case.

[528] Subchapter S corporations are so called because they are organized under Subchapter S of the Internal Revenue Code, 26 U.S.C. §§ 1361-1379. They are typically small businesses, closely held by no more than 75 shareholders, and often by a sole shareholder.

fixed-price contracts as well.[529] ISN also demanded lost profits on its cost-reimbursement contracts, based on the contracting officer's failure to classify state tax costs as reimbursable expenses.

In the earlier case, the Court had recognized that, as a Subchapter S corporation, ISN's income tax liability is "passed through" to its sole shareholder[530] and held that state income taxes paid by the shareholder are allowed under the Taxes provision.[531]

However, when ISN returned to Court to seek the same result for its fixed-price contracts, the Court easily dismissed its claim, pointing out the fundamental difference between cost-reimbursement and fixed-price contracts, with the contractor being responsible under the latter for all costs and resulting profit and loss. Additionally, the Court found ISN was not entitled to any "lost profits" under its cost-reimbursement contracts based on its claim that its negotiated fixed-fee for those contracts should have been greater because the costs should have included the state tax costs (which the earlier decision found to be reimbursable). The Court held that to do so would violate the prohibition against cost-plus-percentage-of-cost contracts[532] and would lead to a windfall.[533]

Note the breathtaking implications if in the future this decision is extended beyond Subchapter S corporations, to include other business arrangements, such as partnerships, individual proprietorships, or limited liability corporations where there are pass-throughs of tax liability.

Another Subchapter S Corporation Tries to Follow in Footsteps

In *Environmental Chemical Corporation*,[534] the board had an opportunity to address the issue of whether state income taxes paid by shareholders of a Subchapter S corporation [535] are allowable as general and administrative (G&A) expenses. DCAA had disallowed these expenses, deeming them to be a personal expense of the shareholders and not allocable in accordance with FAR 31.201-4.[536] After Environmental Chemical Corporation (ECC) submitted a certified claim requesting a contracting officer's final decision on the allowability and allocability of these taxes, the contracting officer denied the claim on the basis that exemptions from these taxes were available to ECC under State law. That is, the various states in which ECC does business exempt Subchapter S corporations from state income tax.

On appeal to the board, ECC filed a motion for summary judgment, urging the Board to adopt the rationale of the COFC in the first *Information Systems* case[537] that these taxes were not exempt for the purposes of FAR 31.205-41,[538] but

---

[529] *ISN II*, *supra* note 527.

[530] *ISN I, supra* note 527, at 266.

[531] FAR 31.205-41, which provides that certain federal, state, and local taxes are allowable if they are required to be and are paid or accrued in accordance with generally accepted accounting principles. FAR, *supra* note 271, at 31.205-41.

[532] *See* 10 U.S.C.S. § 2306 (LEXIS 2005).

[533] *ISN I*, *supra* note 527, at 609.

[534] ASBCA No. 54141, 2005 ASBCA LEXIS 32 (Apr. 13, 2005).

[535] *Black's Law Dictionary* describes a Subchapter S corporation as a corporation whose income is taxed through its shareholders rather than through the corporation itself. BLACK'S LAW DICTIONARY 344 (7th ed. 1999).

[536] FAR, *supra* note 274, at 31.201-4. The section, titled Determining Allocability, states:

> A cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a Government contract if it-
>
> (a) Is incurred specifically for the contract;
>
> (b) Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or
>
> (c) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

Id.

[537] *ISN I*, *supra* note 527.

[538] FAR, *supra* note 274, at 31.205-41. The section provides in pertinent part:

> (b) The following types of costs are not allowable:

rather that the State exemption results not in an absence of payment of the tax, but a transfer of liability for the tax to the individual shareholders. Not convinced it should follow that rationale, and finding there were unresolved factual issues, the board denied ECC's motion for summary judgment.

Be Aware of Exemptions from Foreign Taxation

Effective 30 September 2005, the DFARS was amended to implement a statutory prohibition on foreign taxation of commodities acquired under contracts funded with U.S. assistance.[539] The underlying statutory prohibition is contained in annual legislation, and requires that a bilateral agreement providing for U.S. assistance to a foreign country must specify that the U.S. assistance will be exempt from value added taxes and customs duties.[540] The added DFARS language[541] requires prompt notification to appropriate parties if a foreign government imposes such taxes, so that corrective action can be taken.

Ms. Margaret K. Patterson

Government Furnished Property

Tag, You're It!

Recent changes to the FAR have placed more responsibility on contracting officers to use their judgment to determine the best course of business in dealing with government furnished property.[542] In September of 2005, the DOD, the GSA, and National Aeronautics and Space Administration proposed sweeping changes to the rules for use of government property.[543] The proposed changes simplify complicated language and reduce recordkeeping and management requirements. The changes follow up on a change issued in July, and reflect current thinking in the procurement arena: sound business practice is required.[544] As part of the aim toward sound business practice, the changes incorporated streamlining of the procedures for using government furnished property. To that end, the proposed change deletes clauses that are obsolete, duplicitous, or unclear.[545]

Some of the more significant changes are associated with the requirement for "contracting officers, property administrators and other personnel involved in awarding or administering contracts with Government property to be aware of industry-leading practices and standards for managing Government property," as follows:

(a) Stricter policy for contracting officers to follow when determining whether or not to provide property to contractors.

. . . .

(3) Taxes from which exemptions are available to the contractor directly. . . .

The term "exemption" means freedom from taxation in whole or in part and includes a tax abatement or reduction resulting from mode of assessment, method of calculation, or otherwise.

Id.

[539] The affected contracts will primarily be Foreign Military Sales contracts. Defense Federal Acquisition Supplement; Prohibition of Foreign Taxation on U.S. Assistance Programs, 70 Fed. Reg. 57,191 (interim rule Sept. 30, 2005). The affected contracts will primarily be Foreign Military Sales contracts.

[540] Omnibus Appropriations Act, 2003, Pub. L. No. 108-7, div. E, § 579 (2003); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. D, § 506 (2004); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. D, § 506 (2004).

[541] *See* DFARS, *supra* note 347, at 229.170 through 229.170-4, and 252.229-7011.

[542] *See, e.g.*, Federal Acquisition Regulation; Interim Rules and Final Rules, 70 Fed. Reg. 143, 43,576 (July 27, 2005) (to be codified at 48 C.F.R. Chapter 1, pts. 2, 4, 8, 14 et al.) [hereinafter July FAR change]. FAR Parts 45 and 52 were amended in July, 2005, in part, to "clarify the basis for determining rental charges for the use of Government property. . . . [The changes were] intended to promote the dual use of [government property], [and] will impact contracting officers and property administrators responsible for the management of Government property and contractors that desire to use Government property for commercial purposes." *Id*.

[543] Federal Acquisition Regulation; Government Property, 70 Fed. Reg. 180, 54,878 (Sept. 19, 2005) (to be codified at 48 C.F.R. pts. 1, 2, 17, 31, 32, 35, 42, 45, 49, 51, 52 and 53).

[544] July FAR change, *supra* note 542.

[545] *Id*. at 54,880.

(b) Possible contracting officer revocation of the Government's assumption of risk when the property administrator determines the contractor's property management practices are inadequate and/or present an undue risk to the Government.
(c) An outcome-based framework for the management of property in the possession of contractors.
(d) Identification by contractors of the standard or practice proposed for managing Government property.[546]

The GAO is clearly interested in accounting for government property, whether it is property under a contract, used by the DOD, or excess.[547] Management controls are often cited as the reason for waste and inefficiency in dealing with government property.[548] This proposed FAR change will require contracting officers to take the initiative to determine the best "business-savvy" way to provide contractors with government property to avoid such waste and inefficiency.

Major Jennifer C. Santiago

Contract Pricing

Stickin' it to the Fisc

In *Viacom, Inc. v. General Services Administration*,[549] the General Services Administration Board of Contract Appeals (GSBCA) examined a defective pricing claim and held, among other things, that the proper time for determining when a contractor may have failed to provide accurate cost and pricing data is the point at which negotiations are concluded.[550] In a rather animated opinion, the GSBCA also held that where the agency cannot provide proper documentary evidence that a contractor failed to provide accurate pricing data, the agency will not prevail.[551]

In 1985, the GSA awarded a multiple award schedule contract to Westinghouse Furniture Systems ("Westinghouse") for various office furniture that lasted for three years.[552] In 1998, the GSA's Office of the Inspector General "issued an audit report concluding that Westinghouse had engaged in defective pricing."[553] In 2002, the contracting officer issued a decision on the report, "concluding that there was due a defective pricing refund of $3,804,316 and a refund due to incorrect payment terms of $4191 for a total of $3,808,316."[554] The GSA's claim "is based on the assumption that Westinghouse did not disclose the full range of discounts it had given to its non-governmental (commercial) customer as shown on numerous invoices to those customers."[555]

Viacom, Inc., the successor in interest to Westinghouse, appealed the decision to the GSBCA. The GSBCA granted the appeal in substantial part because the "[GSA] has failed to meet the burden of proof the law requires to establish a defective pricing claim. The reasons for [GSA's] failure--and our conclusion that follows from that failure--are disparate and numerous."[556]

The Board held that since the contract "contained the [d]efective pricing clause usually found in contracts subject to the Truth in Negotiations Act (TINA)," it would rely on cases arising under TINA that involved defective pricing in

---

[546] *Id*. at 54,879.

[547] *See, e.g.*, U.S. GOV. ACCOUNTABILITY OFF., REP. NO. GAO-05-15, DEFENSE INVENTORY: IMPROVEMENTS NEEDED IN DOD'S IMPLEMENTATION OF ITS LONG-TERM STRATEGY FOR TOTAL ASSET VISIBILITY OF ITS INVENTORY (Dec. 2004).

[548] *See, e.g.*, U.S. GOV. ACCOUNTABILITY OFF., REP. NO. GAO-05-729T, DOD EXCESS PROPERTY: MANAGEMENT CONTROL BREAKDOWNS RESULT IN SUBSTANTIAL WASTE AND INEFFICIENCY (June 2005).

[549] GSBCA No. 15871, 2005 GSBCA LEXIS 158 (Sept. 21, 2005).

[550] *Id.* at *48.

[551] *Id.* at *2.

[552] *Id.* at *1.

[553] *Id.* at * 2. "The audit report calculated a defective pricing refund of $3,804,316, an end of contract discount refund or $484,386, and a prompt payment discount of [$4,191] for a total of $4,292,893." *Id.*

[554] *Id.*

[555] *Id.*

[556] *Id.*

analyzing the issues presented.[557] In order for the government to establish a claim for defective pricing, it must prove by a preponderance of the evidence that "information was required to be disclosed, and that the government relied to its detriment on appellant's disclosure of defective data."[558] Once the government proves that the information was not provided, or that the cost or pricing data provided was inaccurate, "the Government is aided in meeting its burden of establishing that there was a significant overstatement in the contract price by a rebuttable presumption that the natural and probable consequence of the non-disclosure or use of noncurrent or inaccurate cost or pricing data is an increase in the contract price."[559]

Here, the GSA argued that the relevant transaction date for the submission of cost or pricing data was the date of contract award, and "vigorously argues for this proposition . . . maintaining that block 22 of the award document, signed by [Westinghouse], represents a certificate of completion of price negotiations."[560] The board succinctly stated that the government's "assumption is wrong"[561] because the completion of price negotiations marks the relevant time for determining whether cost or pricing data is either not disclosed or in noncurrent or inaccurate, not contract award.[562] In this case, contract award was over six months after what the Board determined to be the point at which "price negotiations were concluded."[563] The GSA argued that Westinghouse had "discount data" which existed after price negotiations were concluded (as determined by the Board) and before contract award that should have been submitted to the GSA so that the contracting officer could have negotiated a lower price.[564] The GSBCA summarily dismissed the argument, stating that data existing after price negotiations is simply not required to be disclosed.[565]

The board then proceeded to address the GSA's argument that information about discounts when selling individual furniture components is relevant to answering the question of whether there was defective pricing when the contract did not require the provision of individual components, only full furniture systems.[566] The Board held that "commercial discounts shown for individual components or groups of components, not proven to have constituted a systems furniture workstation identical or similar to a workstation offered under [the contract], are not pricing data that Westinghouse was required to disclose.[567]

---

[557] *Id.* at * 47 (citing 10 U.S.C. § 2606(f)). The Board noted that at contract award, the controlling statute:

> provided that for prime contracts expected to exceed $100,000 not awarded through sealed bid, with certain exceptions, the prime contractor was required to submit cost or pricing data and a certification of the data's completeness and accuracy. 41 U.S.C. § 254(d)(1)(A)(1984). An exception to the requirement for submission of cost or pricing data applied when the contract price was based upon adequate price competition and established catalog or market prices of commercial items sold in substantial quantities to the general public. 41 U.S.C. § 254(d)(5)(i),(ii).

Id. The Board found that the exception cited in the statutory provision did not apply because the contract terms required that "offerors submit cost or pricing data and certify that the pricing data submitted with the offer were accurate, complete and current representations of actual transactions to the date when price negotiations were concluded. *Id.*

[558] *Id.* (citing Sylvania Elec. Prods. v. United States, 479 F.2d 1342, 1349 (Ct. Cl. 1973); United States v. United Techs. Corp., 51 F. Supp. 2d 167, 168 (D. Conn. 1999); Gelco Space, GSBCA 7916, 91-1 BCA ¶ 23,387 (1990); Lockheed Martin Corp., ASBCA 50464, 02-1 BCA ¶ 31, 784, at 156,943.)

[559] *Id*. at *48 (citing *United Techs. Corp.*, 51 F. Supp. 2d at 189).

[560] *Id.*

[561] *Id.*

[562] Cost or pricing data is certified in a "Certificate of Current Cost or Pricing Data."

[563] *Id.* The Board provides ample support for its proposition:

> The relevant cost or pricing data is that data in existence at the time of price negotiations. McDonnell Aircraft Co., ASBCA 44504, 97-1 BCA ¶ 28,977 at 144,315 (contractor has no duty to supply accurate and complete subcontractor cost data after prime and subcontractor have reached agreement on price); Aydin Monitor Systems, NASA BCA 381-1, 8301 BCA ¶ 16,500 at 81,997 (1983), reconsideration granted on other grounds, 84-2 BCA ¶ 17, 297; see United States v. General Dynamics Corp., 19 F.3d 770 (2d Cir. 1994); Plessy Industries, Inc., ASBCA 16720, 74-1 BCA ¶ 10,603 at 50,277 (citing Paceco, Inc., ASBCA 16458, 73-2 BCA ¶ 10,119 (data created between cost and pricing data certification and award date not cost or pricing data that was required to be submitted)(in TINA context, duty to disclose complete, accurate and current data extends only to the date of price negotiations).

Id. at 48-49.

[564] *Id.* at 49.

[565] *Id.*

[566] *Id.* Note here that the contract specifically called for "complete workstations."

[567] *Id.* at 50.

The GSBCA, obviously frustrated with the GSA's failure to provide evidence to prove its claim against Westinghouse, ultimately concluded that "[t]he Government's claim of defective pricing is simply not salvageable by correction of error."[568]

Major Jennifer C. Santiago

Auditing

Special Inspector General Created in Iraq

There are many agencies performing audits in Iraq, to include the newly created Special Inspector General for Iraq Reconstruction (SIGIR).[569] Among other things, the SIGIR provides reports to Congress quarterly on the progression of Iraqi reconstruction, in which the status of various audits occurring in Iraq are listed.[570] In addition to the Congressional Reports, the SIGIR also releases audit memoranda, and in October, 2005, it released an audit examining the administration of the Commanders' Emergency Response Program (CERP) in Iraq.[571]

At the request of the Deputy Secretary of Defense, the SIGIR's objective for the audit "was to evaluate the adequacy of controls over CERP funds."[572] Specifically, the SIGIR examined whether and to what extent managers of the CERP "obtained and documented required contracting officer's approval. . . [and to what extent they] expended funds in accordance with authorized project limits [and] effectively controlled the distribution of appropriated funds."[573] The SIGIR "concluded that, while CERP appropriated funds were properly used for intended purposes, overall controls over CERP processes required improvement. Federal Acquisition Regulation and Department of Defense controls over the distribution of appropriated funds were not consistently followed and the required documents were not consistently used to maintain accountability of projects."[574]

Major Jennifer C. Santiago

Major Systems Acquisitions

Do Performance-Based Logistics Contracts Really Save Money?

In a report published in September 2005, the GAO found that the DOD cannot prove that it is saving money by engaging in performance-based logistics (PBL) contracts."[575] GAO studied PBL contracts in the DOD to determine whether the DOD could provide evidence that PBL was a cost-effective measure.[576] The report summarized the GAO's findings and

---

[568] *Id.* at 54. The Board also briefly addressed two other issues: one, whether the contracting officer detrimentally relied on any defective data, and two, whether the defective pricing calculations were reasonable. On both, the Board held against GSA. The Board did, however, award the $4,191 to the Government based on Westinghouse's failure to provide a two percent prompt payment discount.

[569] Currently, there are six agencies performing audits, drafting reports, and providing testimony on Iraq reconstruction. In addition to the newly created Special Inspector General for Iraq Reconstruction (SIGIR), established audit agencies performing audits in Iraq are the U.S. Army Audit Agency; Department of Defense Office of Inspector General; Department of State Office of Inspector General; the GAO; and U.S. Agency for International Development Office of Inspector General. *See* SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, QUARTERLY REPORT TO CONGRESS, APP. J (July 30, 2005), *available at* http://www.sigir.mil/reports_congress.html.

[570] *Id*.

[571] Memorandum, Special Inspector General for Iraq Reconstruction, to Deputy Secretary of Defense, subject: Management of Commanders' Emergency Response Program for Fiscal Year 2004 (Report No. SIGIR 05-014) (13 October 2005) (on file with the author).

[572] *Id.*

[573] *Id.*

[574] *Id.*

[575] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-966, DEFENSE MANAGEMENT: DOD NEEDS TO DEMONSTRATE THAT PERFORMANCE-BASED LOGISTICS CONTRACT ARE ACHIEVING EXPECTED BENEFITS (Sept. 2005) (report to Subcommittee on Readiness, Committee on Armed Servs., U.S. Senate) [hereinafter GAO PBL CONTRACTS REPORT]. The GAO report defined performance-based logistics as "a variation of other contractor logistics support strategies and involves defining a level of performance that the weapons system is to achieve over a period of time at a fixed cost to the government." *Id.* at 1.

[576] *Id.* at 2. Simply put, PBL is the DOD's typical model for long-term maintenance for major weapons systems. Before awarding a PBL contract, however, the agency should conduct an economic analysis determine whether such a contract would be cost-effective. *Id.* at 1.

recommendations after conducting a ten month-long study of fifteen of DOD's PBL programs.[577] Some of the contracts the GAO studied included the Air Force's C-17, F-117, and the C-130J programs; the Navy's F-18 E/F FIRST program; and the Army's TOW-ITAS and HIMARS programs.[578] In brief, the GAO found that in fourteen of the fifteen programs, the DOD failed to analyze whether such contracts actually resulted in cost savings.[579]

While the DOD formally encourages the use of PBL contracts for major weapons systems[580] maintenance as a cost-savings measure, the DOD also recommends that individual program offices collect data regarding cost savings.[581] In November 2004, the Office of the Undersecretary of Defense issued a memorandum urging all DOD program managers to use the guidebook attached to the memorandum (PBL Guidebook) in implementing performance-based logistics contracts.[582] The PBL Guidebook advises program offices to methodically collect cost data for the purpose of evaluating whether it would be economically wise to enter into performance-based logistics contracts.[583] The PBL Guidebook further advises that after entering into such contracts, program offices should continue collecting cost data so that they can evaluate whether the contracts have, in fact, resulted in cost savings.[584]

During the study, the GAO found that found that only one program office tracked cost data in accordance with the DOD guidance.[585] In other cases, while some of the offices collected certain cost data, their efforts did not conform to the DOD PBL Guidebook.[586] In four of the cases, the program offices had not collected any cost data.[587] In some cases, program offices acknowledged that they obtained their cost data from the same contractors these offices were evaluating.[588]

The GAO concluded that the DOD should gather sufficient data to prove that PBL contracts actually result in cost savings.[589] In order to provide this evidence, the GAO made two recommendations to the Secretary of Defense.[590] First, the GAO recommended that the Secretary "reaffirm DOD guidance that program offices updated their business case analyses following implementation of a performance-based logistics arrangements and develop procedures . . . to track whether program offices . . . validate their business case decisions consistent with DOD guidance."[591] Second, the GAO advised the Secretary to "direct program offices to improve their monitoring of performance-based logistics arrangements by verifying the reliability of contractor cost and performance data."[592] The DOD generally concurred with both recommendations.[593]

---

[577] *Id.* at 2-3. The weapons systems programs that GAO studied were ones that that DOD considered to be examples of successful PBL contracts. *Id.*

[578] *Id.* at 13-14. The other programs GAO studied included the following weapons systems: the Navy's ALR-67 (V3), the Navy's Auxiliary Power Units, the Navy's F-404, the Navy's T-45 engines, the Navy's V-22 engines, the Navy and Marine Corps' KC-130J, the Army's HIMARS, and Army's Javelin CLU, and the Army's TUAV Shadow.

[579] *Id.* at 7.

[580] *Id.* at 1. In a typical DOD performance-based logistics contract, the contractor is required to provide long-term maintenance of DOD weapon systems for a fixed price

[581] U.S. DEP'T OF DEF., *Performance-Based Logistics: A Program Manager's Product Support Guide* (March 2005) [hereinafter *PBL Guidebook*].

[582] *See* Memorandum, Michael W. Wynne, Acting Undersecretary of Defense of the United States, to Assistant Secretaries of the Military Departments, Director of Defense Logistics Agency, and President of Defense Acquisition University, subject: Performance-Based Logistics Product Support Guide (10 Nov. 2004) (advising DOD program managers to use the PBL Guidebook in overseeing PBL contracts).

[583] *PBL Guidebook*, *supra* note 581, at 3-27.

[584] *Id.*

[585] GAO PBL CONTRACTS REPORT, *supra* note 575, at 7.

[586] *Id.*

[587] *Id.*

[588] *Id*. at 9.

[589] *Id.* at 12.

[590] *Id.*

[591] *Id.*

[592] *Id.*

[593] *Id.* The DOD responded to the GAO by stating that it would re-affirm DOD guidance regarding business case analyses following the award of a PBL contract and also that it would direct program offices to carefully monitor the costs of such contracts. *Id*. at 17.

Practitioners working in the area of PBL contracts should be aware of this report because it highlights deficiencies in DOD's implementation of the PBL program. DOD's positive response to the GAO report emphasizes its relevance to military program offices.

Major Marci Lawson, USAF

Contractors Accompanying the Force

Contractor Personnel Supporting a Force Deployed Outside the United States

Last year, we discussed a proposed DOD rule governing contractor employees accompanying the forces on contingency, humanitarian, peacekeeping or combat operations.[594] This proposed rule, with changes, became final on 5 May 2005.[595]

Like the proposed clause, the final clause requires contractors to acknowledge the inherent danger in the operation;[596] specifies that contractors are required to comply with all host nation, U.S., and international laws;[597] details that contractor employees have to abide by the combatant commander's orders and policies;[598] requires contractors to provide current lists to the government identifying where their employees are located and have a plan for replacing deployed personnel;[599] states that contractor personnel cannot wear military uniforms and carry weapons unless specifically authorized;[600] addresses next of kin notification requirements;[601] contractor evacuation matters;[602] establishes that the contracting officer will identify the processing and departure locations;[603] covers the purchase of scarce commodities;[604] and, requires that the substance of this contract provision be included in all subcontracts.[605]

While the final rule adopted most of the proposal, it does differ in four ways. First, only a Contracting Officer may make changes to a contract governing contractors accompanying the force (not the ranking military commander).[606] Despite the seemingly plain language in this clause, the way the drafters wrote clause could generate confusion. Specifically, the clause states "[i]n addition to the changes otherwise authorized by the Changes clause of this contract, the Contracting Officer may, at any time, by written order identified as a change order, make changes in Government furnished facilities, equipment, material, services, or site . . ."[607] It is not clear what the term "[i]n addition to the changes otherwise authorized by the changes clause . . ." means. On its face, the clause appears to give the contracting officer authority to make out of scope changes related to Government furnished facilities, equipment, material, services, or site. If out of scope changes are authorized, then the government-contractor relationship has changed significantly. Contractors will now deploy with less

---

[594] Defense Federal Acquisition Regulation Supplement; Contractors Accompanying a Deployed Force, 69 Federal Register 13,500 (proposed Mar. 23, 2004) (to be codified at 48 C.F.R. pts. 207, 212, 225, and 252).

[595] Defense Federal Acquisition Regulation Supplement; Contractor Personnel Supporting a Force Deployed Outside the United States, 70 Federal Register 23,790 (May 5, 2005) (to be codified at 48 C.F.R. pts. 207, 212, 225, and 252).

[596] *Id.* at 23,790.

[597] *Id.*

[598] *Id.*

[599] *Id.*

[600] *Id.*

[601] *Id.*

[602] *Id.*

[603] *Id.*

[604] *Id.*

[605] *Id.*

[606] *Id.* The proposed rule attempted to give the ranking military commander authority to direct contractor employees to undertake any action, except engaging in armed conflict, when the forces are located outside of the United States, the contracting officer is not available, and enemy action, terrorist activity or a natural disaster requires emergency action. *See* Defense Federal Acquisition Regulation Supplement; Contractors Accompanying a Deployed Force, 69 Federal Register 13,500 (proposed Mar. 23, 2004) (to be codified at 48 C.F.R. pts. 207, 212, 225, and 252).

[607] *Id.* at 12. The full clause reads "In addition to the changes otherwise authorized by the Changes clause of this contract, the Contracting Officer may, at any time, by written order identified as a change order, make changes in Government furnished facilities, equipment, material, services, or site. Any change order issued in accordance with this paragraph (p) shall be subject to the provisions of the Changes clause of this contract. *Id.*

certainty and be required to adjust to circumstances it might not have contemplated. Similarly, critics could argue that the procurement process is becoming less transparent to the public.

Second, the clause clarifies that the security of contractor personnel operating in theater is the responsibility of the Combatant Commander.[608] Third, the Contracting Officer has the authority to direct the contractor to remove any of its employees at the contractor's expense.[609] Fourth, contractor personnel are entitled to resuscitative care, stabilization, and hospitalization at level III military treatment facilities and transportation in emergencies where loss of life, limb or eyesight could occur.[610] This medical care is provided on a reimbursable basis.

Training for Contractor Personnel Interacting With Detainees

On 1 September 2005, the DOD issued an interim rule[611] for DOD contractors who interact with individuals detained by the DOD in the course of their duties. The rule requires DOD contractors, and any subcontractors, who interact with detainees, to receive annual training regarding international obligations and U.S. laws applicable to the detention of such persons. Each contractor is then required to acknowledge receipt of the training.[612]

Major Steven R. Patoir

[608] *Id.*

[609] *Id.*

[610] *Id.* On 3 Oct. 2005, the DOD issued U.S. DEP'T OF DEF., INST. 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES (3 Oct. 2005). This instruction addresses some of the contractor issues in DFARS 225.7402 in more detail. This new DODI is available at: http://www.dtic.mil/whs/directives/corres/pdf/i302041_100305/i302041p.pdf.

[611] Defense Federal Acquisition Regulation Supplement; Training for Contractor Personnel Interacting With Detainees, 70 Fed. Reg. 52,032 (Sept. 1, 2005) (to be codified at 48 C.F.R. pts. 237 and 252).

[612] *Id.*

FISCAL LAW

Purpose

Food at Formal Meetings and Conferences—Not Just for Employees Anymore, Under New GAO Rule

In the past, the Government Accountability Office (GAO) has allowed the payment of meals for civilian employees attending formal meetings or conferences under the authority of section 4110 of the Government Employees Training Act, which permits the government to pay for "expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities."[1] This exception to the general rule that food for government employees is a personal expense is commonly known as the "formal meetings and conferences" exception. Because it is based on Title 5, United States Code, rather than under Title 10, this exception applies only to civilian employees and not to military members. Under a separate "training" exception, the GAO has also allowed agencies to pay for employee meals when "necessary to achieve the objectives of a training program,"[2] under the authority of 5 U.S.C. § 4109.[3]

This year, in *National Institutes of Health—Food at Government-Sponsored Conferences*,[4] the GAO created a new exception for that would permit agencies to pay for meals of attendees at government-sponsored conferences. In response to a certifying officer at the National Institutes of Health (NIH), the GAO opined that the agency may, under certain conditions, provide food to conference attendees at a NIH-sponsored conference on Parkinson's disease.[5] The significance of this decision is not that the conference was hosted by the government;[6] rather, it is that agencies may now provide meals to both its own attendees and non-agency attendees, to include non-government attendees, paid for with the agency's appropriated funds. The GAO reasoned that under some circumstances meals "are not significantly different" from other legitimate conference expenses. After discussing the criteria under which meals for employees attending formal conferences or training programs have been deemed "necessary expenses" of their attendance at conferences or training, the GAO opined that "similar criteria should apply to determining whether the costs of meals or refreshments are allowable expenses of the agency hosting a formal conference."[7] Under appropriate circumstances, meals for attendees—even if the attendees are non-government personnel—may be deemed allowable conference expenses:

> We think the presence of private citizens or federal employees from other agencies who are essential to achieve the program or conference objectives should not change the character of the expense from allowable to unallowable. The fact that the meals and refreshments also are available to private citizens and employees of other agencies should not be an obstacle so long as an administrative determination is made that their attendance is necessary to achieve the conference objectives.[8]

The GAO stated that once the agency hosting the conference makes the administrative determination that the attendance of the non-agency personnel is "necessary to achieve the conference objectives," the criteria for determining

---

[1] Government Employees Training Act, 5 U.S.C.S. §§ 4101-4118 (LEXIS 2005).

[2] *See, e.g.*, Coast Guard—Meals at Training Conference, B-244473, 1992 U.S. Comp. Gen. LEXIS 740 (Jan. 13, 1992). Under this exception, finding that the provision of meals to employees is "necessary to achieve the objectives of a training program" generally requires a determination that attendance during the meals is necessary in order for the attendees to obtain the full benefit of the training. *See* Coast Guard—Coffee Break Refreshments at Training Exercise—Non-Federal Personnel, B-247966, 1993 U.S. Comp. Gen. LEXIS 639 (June 16, 1993).

[3] 5 U.S.C.S. § 4109 (LEXIS 2005). While Title 5 applies only to civilian employees, the "training" exception also applies to service members under the authority of 10 U.S.C.S. § 4301, 10 U.S.C.S. § 9301, or 14 U.S.C.S. § 469.

[4] B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005).

[5] *Id*. at *3.

[6] While the "formal meetings and conferences" exception does not apply to "purely internal" government meetings/conferences, *see, e.g.*, Meals for Attendees at Internal Government Meetings, B-230576, 68 Comp. Gen. 604 (Aug. 14, 1989), nothing precludes its application to government-sponsored meetings/conferences per se, so long as the formal meeting/conference involves "topical matters of general interest to governmental and nongovernmental participants." Pension Benefit Guarantee Corporation—Provision of Food to Employees, B-270199, 1996 U.S. Comp. Gen. LEXIS 402 (Aug. 6, 1996). In contrast, the "training" exception is not limited in this manner, and applies to even purely internal training programs.

[7] National Institutes of Health—Food at Government-Sponsored Conferences, 2005 U.S. Comp. Gen. LEXIS 42, at *11.

[8] *Id.* at *12.

whether the cost of the meals are allowable expenses are essentially the same as for conferences sponsored by nongovernmental entities.[9] Specifically, the criteria are:

> (1) the meals and refreshments are incidental to the formal conference, (2) attendance at the meals and when refreshments are served is important for the host agency to ensure attendees' full participation in essential discussions, lectures, or speeches concerning the purpose of the formal conference, and (3) the meals and refreshments are part of a formal conference that includes not just the meals and refreshments and discussions, speeches, lectures, or other business that may take place when the meals and refreshments are served, but also includes substantial functions occurring separately from when the food is served.[10]

This three-part test is a near-verbatim adaptation of the criteria for the "formal meetings and conferences" exception, though it does represent a new, improved articulation of that criteria, applicable to both government sponsored and non-government sponsored conferences. Under the "formal meetings and conferences" exception, the criteria was that: (1) the meals are incidental to the conference or meeting; (2) attendance at the meals is necessary to full participation in the meeting; and (3) the employees are not free to take meals elsewhere without being absent from the essential business of the meeting.[11] Arguably, the second and third prongs of that test were redundant. To clarify that "stand-alone" luncheons do not meet the three-part test, the GAO has also previously clarified that the meal must be "part of a formal meeting or conference that includes not only functions such as speeches or business carried out during a seating at a meal but also includes substantial functions that take place separate from the meal."[12] In 1993, that clarification appeared as an enumerated fourth prong to the test in another GAO opinion.[13] In adapting the criteria for the newly-enunciated exception for food at government-sponsored conferences, the GAO in this recent decision refined the criteria, eliminating the redundancy and restoring it to a three-part test.

The GAO also noted that the "level of formality required is the same as what one would expect of a conference sponsored by a nongovernmental entity."[14] In order to be deemed a "formal" conference, the government-sponsored conference "must involve topical matters of interest to, and the participation of, multiple agencies and/or nongovernmental participants."[15] The conference must also have sufficient indicia of formality, including "registration, a published substantive agenda, and scheduled speakers or discussion panels."[16]

On its face, this new GAO decision may appear to be a natural extension of prior decisions. However, it actually represents a departure from past decisions. In the past, the GAO sanctioned paying for meals only where there was a specific statutory basis for doing so.[17] For example, in 1993, the GAO considered the payment for refreshments at a Coast Guard emergency response training exercise in which federal and non-federal personnel participated as a group.[18] Under the facts of that case, the provision of refreshments was found to have been "necessary to achieve the objectives of the training program," so payment for the refreshments for the federal personnel were appropriate under the applicable training statutes.[19] The GAO noted that "an agency may provide refreshments only when expressly authorized by statute,"[20] and found no express statutory

---

[9] *Id.*

[10] *Id*. at *13.

[11] *See*, *e.g*., Gerald Goldberg, B-198471, 1980 U.S. Comp. Gen. LEXIS 3212 (May 1, 1980); Coast Guard—Meals at Training Conference, B-244473, 1992 U.S. Comp. Gen. LEXIS 740 (Jan. 13, 1992). The third prong of this test is sometimes articulated as: "the employees are not free to take meals elsewhere without missing essential formal discussions, lectures, or speeches concerning the purpose of the meeting." *See*, *e.g*., Corps of Engineers—Use of Appropriated Funds to Pay for Meals, B-249795, 72 Comp. Gen. 178 (May 12, 1993).

[12] Randall R. Pope & James L. Ryan—Meals at Headquarters Incident to Meetings, B-215702, 64 Comp. Gen. 406 (Mar. 22, 1985). *See also* J.D. MacWilliams, B-200650, 65 Comp. Gen. 508 (Apr. 23, 1986).

[13] Corps of Engineers—Use of Appropriated Funds to Pay for Meals, B-249795, 72 Comp. Gen. 178 (May 12, 1993).

[14] National Institutes of Health—Food at Government-Sponsored Conferences, 2005 U.S. Comp. Gen. LEXIS 42, at *13.

[15] *Id*. at *13-14.

[16] *Id*. at *14.

[17] Decisions addressing food at conferences and training are typically based on section 4109 or 4110 of Title 5, United States Code.

[18] Coast Guard—Coffee Break Refreshments at Training Exercises—Non-Federal Personnel, B-247966, 1993 U.S. Comp. Gen. LEXIS 639 (June 15, 1993).

[19] For Coast Guard personnel, the applicable training statute is 14 U.S.C.S. § 469 (LEXIS 2005). For federal civilian personnel, the applicable statute is 5 U.S.C.S. § 4109.

[20] Coast Guard—Coffee Break Refreshments at Training Exercises—Non-Federal Personnel, 1993 U.S. Comp. Gen. LEXIS 639, at *7.

authority that would cover the refreshments for the non-federal personnel participating in the exercise.[21] Recognizing that the Coast Guard "had cogent reasons for providing the refreshments to all attendees on the same basis, and might reasonably have assumed that it was authorized to do so," the GAO elected not to object to payment of the voucher in that particular case.[22] "However," the GAO warned, "future conferences should not include providing refreshments at government expense to non-federal personnel."[23]Thus, the GAO's past insistence that food may only be provided under express statutory authority is difficult to reconcile with this year's decision in *National Institutes of Health—Food at Government-Sponsored Conferences*, which does not cite statutory authority for providing meals to the non-government personnel attending the government-sponsored conferences.

This new decision also explains that while agencies may now provide food to both government and non-government attendees under certain circumstances, they still may not charge the attendees for it and retain the money collected. The GAO advised that in addition to needing statutory authority in order to charge a fee, agencies would also need statutory authority to retain the amounts collected.[24] Otherwise, the GAO explained,[25] the amounts collected would constitute an improper augmentation of its appropriations and violate the Miscellaneous Receipts Statute.[26]

To assist agencies in sorting out the current rules on meals and refreshments, the GAO recently added a "decision tree" on meals and refreshments to its website, identifying the various exceptions that may allow an agency to purchase food with appropriated funds, as well as the applicable statutory authority and GAO decisions on which the exceptions are based.[27] The "decision tree" incorporates this new GAO decision. As of 1 June 2005, the Joint Travel Regulation has also been updated, to include a digest of this GAO decision, to be used as guidance on conference expenses.[28]

What "Expenses" Fall Under Procurement Appropriation?

In a recent GAO decision,[29] the U.S. Army Medical Research and Material Command properly purchased medical support items using FY 2004 Other Procurement, Army (OPA) funds, and needed logistical support for that equipment.[30] The OPA appropriation provided funds for "construction, procurement, production, and modification of . . . and other expenses necessary for the foregoing purposes . . . ."[31] The issue was whether that appropriation's "other expenses necessary for the foregoing purposes" language included the logistics support services required for the equipment. The GAO concluded that it did not.[32] The GAO read the OPA appropriation's "other expenses necessary" language as covering "expenses incurred in acquiring, or procuring, equipment."[33] The logistics support services for the equipment were not "procurement activities," because they had nothing to do with procuring the equipment.[34] Instead, those services were operational

---

[21] *Id.* at *6.

[22] *Id.* at *7.

[23] *Id.*

[24] National Institutes of Health—Food at Government-Sponsored Conferences, 2005 U.S. Comp. Gen. LEXIS 42, at *16-17.

[25] *Id*. at *17

[26] 31 U.S.C.S. § 3302(b) (LEXIS 2005). The Miscellaneous Receipts Statute provides: "Except as [otherwise provided], an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without any deduction for any charge or claim." *Id*.

[27] That meals and refreshments decision tree is located at: http://www.gao.gov/special.pubs/appforum2005/approfunds/index.html.

[28] U.S. DEP'T OF DEF., JOINT TRAVEL REG., vol. 2, ch. 4, pt. S., para. C4955-H (June 1, 2005).

[29] Army—Availability of Army Procurement Appropriation for Logistical Support Contractors, B-303170, 2005 U.S. Comp. Gen. LEXIS 71 (Apr. 22, 2005).

[30] The Command needed contractors to develop and implement Integrated Logistics Support Plans for the equipment and to assist in the operation of the equipment. *Id*. at *2-3.

[31] Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, 117 Stat. 1054, 1063 (Sept. 30, 2003).

[32] Army—Availability of Army Procurement Appropriation for Logistical Support Contractors, 2005 U.S. Comp. Gen. LEXIS 71, at *10.

[33] *Id*. at *6.

[34] *Id*.

activities, and therefore must be funded with Army Operation and Maintenance appropriations.[35]

Major Michael L. Norris

Time

Final Rule on Multiyear Contracting

The Department of Defense (DOD) has adopted as final, without change, an interim rule[36] which added restrictions to the funding of multiyear contracts.[37] The rule requires the DOD to notify the congressional defense committees in writing concerning any multiyear contract with a cancellation ceiling exceeding $100 million that is not fully funded.[38] Also, the DOD may not award a multiyear contract unless the Secretary of Defense has submitted a budget request for full funding of procured units.[39] A multiyear contract may also not be awarded if cancellation provisions include consideration of recurring manufacturing costs related to unfunded unit production; the contract provides for payment in advance of incurred costs on funded units; and there is a provision for a price adjustment due to a failure to award a follow-on contract.[40] The rule implements Section 8008 of the Defense Appropriations Act of 2005[41] and Section 814 of the National Defense Authorization Act for Fiscal Year 2005.

Major Andrew S. Kantner

Anti-Deficiency Act

Fringe Benefits Violate Antideficiency Act

In *Architect of the Capitol,* the GAO found that a federal agency's participation in an employee fringe benefit plan would violate the Antideficiency Act (ADA).[42] In this case, the Architect of the Capitol (AOC)[43] asked the GAO if its taking part in such an employee benefit plan would violate the ADA.[44] The GAO found that the AOC's participation in the plan would violate the ADA because it would commit the government to an indefinite future liability.[45]

The AOC attempted to provide fringe benefits[46] to its temporary employees[47] in a manner similar to its federal wage grade employees.[48] After the AOC negotiated with the temporary employees' unions, the unions informed the AOC that the employees would only accept these benefits if "AOC entered into a participation agreement and became a member of their

---

[35] *Id*. at *7.

[36] Defense Federal Acquisition Regulation Supplement; Multiyear Contracting, 70 Fed. Reg. 24,323 (May 9, 2005) (to be codified at 48 C.F.R. pt. 217).

[37] Defense Federal Acquisition Regulation Supplement; Multiyear Contracting, 70 Fed. Reg. 54,651 (Sept. 16, 2005) (to be codified at 48 C.F.R. pt. 217).

[38] *Id.* Multiyear contract authority is a statutory exception to the requirement to obligate only current funds for contracts on a yearly basis. 10 U.S.C.S. § 2306c (LEXIS 2005). A cancellation ceiling is the maximum a contractor can receive in the event of a termination of the contract. *See* U.S. GEN. SVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 17.103 (July 2005) [hereinafter FAR].

[39] 70 Fed. Reg. at 54,651.

[40] *Id.*

[41] Pub. L. No. 108-297, 118 Stat. 1095 (2004).

[42] Architect of the Capitol, B-303961, 2004 U.S. Comp. Gen. LEXIS 257 (Dec. 6, 2004).

[43] The Architect of the Capitol, http://www.aoc.gov/aoc/responsibilities/index.cfm (last visited Nov. 6, 2005). The Architect of the Capitol is a federal agency whose mission is to operate and maintain certain federal buildings designated by Congress. *Id.*

[44] *Id.* at *1. The purpose of the Employee Retirement Income Security Act (ERISA) is to protect the integrity of employee pension plans insuring that employers pay vested pension benefits to their employees. 29 U.S.C.S. § 1001(a) (LEXIS 2005).

[45] *Architect of the Capitol*, 2004 U.S. Comp. Gen. LEXIS 257, at *1.

[46] *Id.* at *2. The fringe benefits included life insurance, health insurance, and retirement.

[47] *Id.* at *2-3. The Architect of the Capitol traditionally hired temporary employees, represented by trade unions, to perform much of the construction or repair work involved in carrying out its mission. These temporary employees were ineligible for federal benefits. At the time the agency requested the GAO's opinion, it employed eighty-five temporary employees including masons, plumbers, electricians, carpenters, and ironworkers. *Id.*

[48] *Id.* at *3-4. Congress required the Architect of the Capitol to provide fringe benefits to its temporary employees that were similar to federal civilian employees. *See* Legislative Branch Appropriations Act, Fiscal Year 2002, Pub. L. No. 107-68, § 133(a), 115 Stat. 560, 581-2 (Nov. 12, 2001).

multiemployer defined benefit plans."[49] These multiemployer benefit plans are governed by the Employee Retirement Income Security Act (ERISA).[50]

The AOC was concerned that its participation such a benefit plan could subject the AOC to "withdrawal liability" and consequently, would violate the ADA.[51] Under ERISA, "withdrawal liability" is the amount of money that an employer must pay to fund its employees' benefits if that employer later withdraws from a multiemployer benefit plan.[52] Effectively, this means that an employer's obligation to such an employee benefit plan continues even after the employer withdraws from the plan.[53] Thus, the AOC's potential withdrawal liability would be indefinite at the time that the AOC entered into an agreement to participate in such an employee benefit plan.[54] Because of this concern, the AOC asked the GAO if its participation in this benefit plan would violate the ADA.[55]

Generally speaking, the ADA prohibits federal officials from obligating funds in advance or in excess of an appropriation.[56] For example, the GAO has interpreted the ADA to prohibit agencies from entering into contracts where termination costs are uncertain, or from entering into contracts with open-ended indemnification agreements.[57] Such contracts violate the ADA because they potentially commit the government to an indefinite future liability.[58]

Likewise, in *Architect of the Capitol*, the GAO found that the AOC could not enter into the agreement to participate in the multiemployer-defined benefit plan without violating the ADA.[59] The GAO stated that the possibility of withdrawal liability exposed the AOC to an obligation of undetermined amount at an undetermined time in the future.[60] If the AOC entered into this agreement and then later withdrew from the plan, then the AOC would be required to fund its proportionate share of the employees' benefits.[61] As such, the AOC's responsibility under the agreement could obligate funds in advance or in excess of an appropriation.[62] The GAO concluded that "since AOC has no assurance that appropriations will be available to cover this liability, the ADA would prohibit entering into a participation agreement that could subject the government to an indefinite withdrawal liability."[63]

Architect of the Capitol illustrates a potential ADA pitfall of which federal agency practitioners should be aware. Obligation of appropriated funds in advance of or in excess of their availability violates the ADA. Because withdrawal liability is a type of indefinite future liability that could obligate funds in advance of or in excess of their availability, the ADA clearly prohibits an agency from agreeing to an arrangement.

---

[49] *Id*. at *5. A "multiemployer defined benefit plan" is a type of benefit plan that guarantees a fixed return on the employee's investment; thus, the employer bears the risk of loss. In this case, a group of "employers" (the five unions representing the eighty-five employees and some other private employers) maintained five separate benefit plans in which they asked the agency to participate. The unions wanted the agency to make a "lump sum contribution for each of the temporary employees" to the unions who would then distribute the funds into each employee's benefit plan.

[50] *Id.* at *6 (citing 29 U.S.C.S. § 1001-1461). The purpose of the Employee Retirement Income Security Act (ERISA) is to protect the integrity of employee pension plans by insuring that employers pay vested pension benefits to their employees. *See* 29 U.S.C.S. § 1001(a) (LEXIS 2005).

[51] *Id*. at *7.

[52] *Id*. (citing 29 U.S.C.S. § 1381, 1391). The ERISA requires an employer, like the Architect of the Capitol, to continue funding a multiemployer benefit plan if that employer withdraws from the plan. Thus, an employer's liability under such a plan continues even if that employer withdraws from the plan. *See* 29 U.S.C.S. § 1381, 1391 (LEXIS 2005).

[53] *Id*. at *7-8

[54] *Id*.

[55] *Id*. at *9.

[56] 31 U.S.C.S. § 1341. The "Antideficiency Act" (ADA) is a series of statutes starting at 31 U.S.C.S. § 1341. It provides that an officer or employee of the United States government may not "make. . .an expenditure or obligation *exceeding* an amount available in an appropriation. . ." and may not involve the government "in a contract or obligation for the payment of money *before* an appropriation is made. . ." [italics added] *Id.*

[57] *Architect of the Capitol*, 2004 U.S. Comp. Gen. LEXIS 257, at *10.

[58] *Id.*

[59] *Id.* at *11.

[60] *Id.*

[61] *Id.*

[62] *Id.* at *23.

[63] *Id.*

GAO: There Are No Federal Funds for Publicity and Propaganda

On 17 February 2005, the GAO issued a memorandum to the heads of all federal agencies advising that expenditure of appropriated funds for publicity or propaganda purposes violates the ADA.[64] The objective of GAO's memorandum was to emphasize the publicity and propaganda prohibition—especially with regard to prepackaged news stories.[65] The GAO stated that during the year preceding its memorandum, it found some federal agencies violated the publicity and propaganda prohibition and also the ADA by obligating appropriated funds to purchase prepackaged news stories.[66] Nevertheless, the GAO further advised that agencies could avoid violating the ADA if the news stories contained an appropriate disclaimer.[67]

Congress has prohibited the use of appropriated funds for publicity or propaganda in each of its annual appropriations acts since 1951.[68] Consequently, because there are no appropriated funds available for this purpose, any expenditure of appropriated funds—even one dollar—would necessarily violate the ADA's prohibition against obligating funds in excess of the amount available in an appropriation.[69]

Prepackaged news stories are made-for-television audio or video presentations intended to appear as if they had been prepared by independent news organizations.[70] In these news stories, actors reading scripts portray "reporters" who look and sound like actual news reporters.[71] These news stories are then broadcast on television or radio, oftentimes without referring to the source of the presentations.[72]

Some federal agencies have commissioned private contractors to develop prepackaged news stories promoting the agencies' official functions.[73] When an agency spends appropriated funds for such a prepackaged news story, the GAO considers the expenditure violative of the "publicity and propaganda" prohibition, unless the story contains a clear disclaimer that it was prepared by the particular agency.[74] The GAO considers the absence of the disclaimer in a pre-packaged news story promoting a particular agency to constitute "covert propaganda" because the news story could mislead the audience regarding the source of the presentation.[75] Thus, since Congress has appropriated no funds for "covert propaganda," an agency's expenditure of appropriated funds for prepackaged news stories also violates the ADA, unless the news story contains the above-described disclaimer.[76]

The GAO stated that in a single year, it issued two opinions finding that agencies violated the "publicity and propaganda" prohibition by improperly obligating appropriated funds for pre-packaged news stories.[77] In the first case, the GAO stated that the Centers for Medicare and Medicaid Services' expenditure of funds for the production of prepackaged

---

[64] Prepackaged News Stories, B-304272, 2005 U.S. Comp. Gen. LEXIS 29 (Feb. 17, 2005).

[65] *Id*. at *1.

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

[67] *Id.* at *1.

[68] *Id.* at *3-4 (citing Pub. L. No. 108-447, § 601, 118 Stat. 2809 (2004) [hereinafter FY 2005 Consolidated Appropriations Act]. The FY 2005 Consolidated Appropriations Act states, "No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes within the United States not authorized by the Congress." The FY 2005 Department of Defense Appropriations Act contains identical language. *See* Pub. L. No 108-287, § 8001,118 Stat. 951 (2004).

[69] *Id.*

[70] *Id*. at *2.

[71] *Id*.

[72] *Id*.

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

[74] *Id*. at *2.

[75] *Id*. *See also* Office of National Drug Control Policy—Video News Release, B-303495, 2005 U.S. Comp. Gen. LEXIS 8 (Jan. 4, 2005) (explaining that "covert propaganda" violates the publicity and propaganda prohibition because it conceals the source of the information).

[76] *Prepackaged News Stories*, 2005 U.S. Comp. Gen. LEXIS 29, at *2.

[77] Department of Health and Human Services, Centers for Medicare & Medicaid Services (Medicare and Medicaid Svs.)—Video News Releases, B-302710, 2004 U.S. Comp. Gen. LEXIS 102 (May 19, 2004); Office of National Drug Control Policy—Video News Release, B-303495, 2005 U.S. Comp. Gen. LEXIS 8 (Jan. 4, 2005).

new stories promoting changes to Medicare violated the publicity and propaganda prohibition.[78] In the second case, the GAO opined that the Office of National Drug Control Policy's expenditure of funds to produce eight prepackaged news stories aimed at dissuading viewers from illicit drug use also violated the publicity and propaganda prohibitions.[79] In both cases, the news stories failed to disclose the fact that the news stories were produced by the very agencies upon which the stories focused.[80] The GAO cautioned agency officials to carefully examine such prepackaged news stories to ensure that the agency is making the necessary disclaimers before expending appropriated funds.[81]

. . .But Department of Justice Disagrees

In a memorandum dated 1 March 2005, Mr. Steven Bradbury, Principal Deputy Assistant Attorney General, instructed executive branch general counsels that the Department of Justice (DOJ) disagrees with the GAO's position[82] regarding the publicity and propaganda prohibition as it applies to prepackaged new stories.[83] The DOJ reminded agencies that GAO opinions are not binding on executive branch agencies because the GAO is a legislative branch organization.[84] Specifically, although the DOJ agrees that a prepackaged news story could violate the publicity and propaganda provisions of the appropriations acts, the controlling factor is whether the story advocates a particular viewpoint—not whether the story notifies the audience of the source of the story.[85] Therefore, a purely informational prepackaged news story (versus one advocating a particular opinion), would not violate the publicity and propaganda prohibition, even if the story did not contain a notice that an agency prepared it.[86]

Thus, although the DOJ agrees with the GAO that purchasing prepackaged news stories with appropriated funds could violate the publicity and propaganda prohibition, unlike the GAO, the DOJ does not contend that the absence of a disclaimer is the key issue. The DOJ argues that the central issue is whether the news story advocates a particular position—regardless of whether it contains a disclaimer. When reviewing the use of appropriated funds for prepackaged news stories, agency practitioners should proceed with caution due to opposing views from the GAO and from DOJ.

Major Marci Lawson, USAF

---

[78] Department of Health and Human Services, Centers for Medicare & Medicaid Services—Video News Releases, B-302710, 2004 U.S. Comp. Gen. LEXIS 102 (May 19, 2004), at *35.

[79] *Office of National Drug Control Policy,* 2005 U.S. Comp. Gen. LEXIS 8, at *36-37.

[80] *Medicare and Medicaid Servs.*, 2004 U.S. Comp. Gen. LEXIS 102, at *35 and *Office of National Drug Control Policy*, 2005 U.S. Comp. Gen. LEXIS 8, at *36-37.

[81] *Prepackaged News Stories*, 2005 U.S. Comp. Gen. LEXIS 29, at *3.

[82] *Id*. at *2. As stated above, the GAO contends that an agency's use of appropriated funds to purchase prepackaged news stories promoting the agency's mission violates the publicity and propaganda prohibition unless the story contains a notice that it was prepared by the agency. *Id.*

[83] Memorandum, Principal Deputy Assistant Attorney General, to General Counsels of Executive Branch, subject: Whether Appropriations May Be Used for Informational Video News Releases (1 Mar. 2005). The DOJ memo is available at http://omb.gov. The DOJ memo was disseminated throughout the federal executive branch by the OMB as an attachment to a letter dated 11 Mar. 2005. Memorandum, Office of Management and Budget, subject: Use of Government Funds for Video News Releases (11 Mar 2005). The OMB memo containing the DOJ memo is also available at http://omb.gov.

[84] *Id*. at 1.

[85] *Id.* at 2.

[86] *Id.*

Construction Funding

Contract and Fiscal Law Collide, Contract Survives

In an interesting case arising out of a construction default termination case, the Court of Federal Claims (COFC) considered a surety's claim for expenses incurred following a takeover agreement entered into with the government.[87] In that case, a construction contract for three buildings at McGuire Air Force Base was terminated for default, and the surety completed the work pursuant to a takeover agreement. The surety incurred costs far exceeding the amounts it received from the government, and its subsequent Request for Equitable Adjustment was denied by the contracting officer. Consequently, the surety argued, it is entitled to recover the costs it incurred on a *quantum meruit* basis, under a variety of theories.[88] The surety based its argument on the premise that the original contract was voidable based on illegality of the contract because the Air Force had incorrectly funded the contract with operations and maintenance funds instead of military construction appropriations as required by The Purpose Statute[89] and the Military Construction Codification Act.[90] The surety alleged that the Air Force had illegally split one project into three projects in order to avoid the O&M construction funding cap contained in 10 U.S.C. 2805 (which was $300,000 at the time the contract was awarded).[91]

Citing *American Telephone & Telegraph Company v. United States*,[92] the court observed that the precedent does not favor the invalidation of contracts that have been fully performed, and that to find the appropriate remedy for violation of a statute it was necessary to consider the public policy underlying the statute.[93] The court considered the policy underlying the enactment of the separate appropriations acts for larger military construction projects appropriations and minor military construction which can be funded with operations and maintenance funds. The court determined that the purpose of the statutes and appropriations "appears to be balancing agency flexibility in planning construction projects and legislative oversight of spending decisions."[94] Invalidating the fully-performed contract would not be essential to that public policy embodied in those statutes, but in fact would be contrary to it—if the agency already spent money on this construction project contrary to the will of Congress, giving the surety even more money for the same construction project without Congressional approval would hardly further the public policy.[95]

After finding that invalidation of the fully-performed contract was inappropriate,[96] the court turned to theories that did not require invalidation of the contract, such as reformation. The court found that Congress did not intend the statutes to provide a private cause of action for their violation,[97] and in fact there was "no nexus between the harms sought to be avoided and the harms suffered by the plaintiff here; the only harm Congress sought to avoid was the harm to itself or to the public when appropriated funds are obligated for military construction projects without its oversight."[98] The remedy for that harm is reimbursement from the correct appropriated funds, not a private cause of action by the surety.[99] The court held, therefore, that the surety failed to state a claim upon which relief may be granted.[100]

Major Michael S. Devine

---

[87] United Pac. Ins. Co. v. United States, 2005 U.S. Claims LEXIS 289 (Sept. 28, 2005).

[88] *Id.* at *6-7.

[89] 31 U.S.C.S. § 1301(a) (LEXIS 2005).

[90] 10 U.S.C.S. §§ 2801- 2885.

[91] *United Pac. Ins. Co.*, 2005 U.S. Claims LEXIS 289, at *6.

[92] 177 F.3d 1368 (Fed. Cir. 1999) (en banc).

[93] *United Pac. Ins. Co.*, 2005 U.S. Claims LEXIS 289, at *19.

[94] *Id.*

[95] *Id.*

[96] *Id.* at *23.

[97] *Id.* at *28.

[98] *Id.* at *33.

[99] *Id.*

[100] *Id.* at *34.

Intragovernmental Acquisitions and Revolving Funds

FY 2005 was marked by intense scrutiny of the intragovernmental acquisition process, particularly with actions involving revolving funds.[101] Both the DOD Inspector General (IG)[102] and the GAO, in three separate reports, [103] identified significant problems with the DOD's use of revolving funds and other intragovernmental acquisitions over the past year.

The year in intragovernmental acquisitions got off to a dubious start with a GAO report in January that identified the "management of interagency contracting" as one of the twenty-seven federal programs and operations that are "high-risk" areas because of their greater vulnerability to fraud, waste, abuse, and mismanagement.[104] The purpose of the "high-risk" designation is to focus urgent attention on the problem in order to ensure that our government functions as economically, efficiently, and effectively as possible.[105]

The GAO recognized that in recent years, "federal agencies have been making a major shift in the way they procure many goods and services."[106] Government agencies have replaced the time and resources they used to spend on the contracting process by making use of "existing contracts already awarded by other agencies. These interagency contracts are designed to leverage the government's aggregate buying power and provide a much needed simplified method for procuring commonly used goods and services."[107] The GAO recognized that "these types of contracts have allowed customer agencies to meet the demands for goods and services at a time when they face growing workloads, declines in the acquisition workforce, and the need for new skill sets."[108]

However, the GAO decided to classify interagency contracting as "high-risk" because it found that in certain circumstances intragovernmental contracts are "(1) attracting rapid growth of taxpayer dollars; (2) are being administered and used by some agencies that have limited expertise with this contracting method; and (3) they contribute to a complex environment in which accountability has not always been clearly established."[109]

New GAO Reports on DOD's Use of Intragovernmental Acquisitions—We Are Not Getting It Right

In response to the criticism of an interrogation services contract performed in Iraq, and to learn more about the interagency contracting process in general, the GAO completed a highly anticipated report reviewing the process that the DOD used to acquire the interrogation and other services through the Department of the Interior.[110] The GAO found that "numerous breakdowns occurred in the issuance and administration of Interior's task orders to include: orders being placed for services beyond the scope of the contract in violation of the competition rules; the DOD failing to properly justify the decision to use interagency contracting; and all parties failing to adequately monitor contract performance.[111] The GAO further reported that "because DOD and Interior officials effectively abdicated certain contracting responsibilities, the

---

[101] *Revolving funds*, sometimes also known as *working capital funds* or *franchise funds*, rely on sales revenue instead of direct appropriations to finance their operations. These funds receive reimbursements from another organization for goods purchased or services rendered. Revolving funds generally operate on a break-even basis and rates are adjusted annually to maintain that status. Most large agencies have one or more revolving funds which are all created, individually, by statute.

[102] *See* U.S. DEP'T OF DEF., OFF. OF THE INSPECTOR GEN., DOD PURCHASES MADE THROUGH THE GENERAL SERVICES ADMINISTRATION, D-2006-096 (July 29, 2005) [hereinafter DOD IG GSA PURCHASES REPORT].

[103] *See generally* U.S. GOV'T ACCOUNTABILITY OFF., HIGH RISK SERIES: AN UPDATE, GAO-05-207 (Jan. 2005) [hereinafter HIGH RISK SERIES REPORT]; U.S. GOV'T ACCOUNTABILITY OFF., INTERAGENCY CONTRACTING: FRANCHISE FUNDS PROVIDE CONVENIENCE, BUT VALUE TO DOD IS NOT DEMONSTRATED, GAO-05-456 (July 2005) [hereinafter FRANCHISE FUND REPORT]; and U.S. GOV'T ACCOUNTABILITY OFF., INTERAGENCY CONTRACTING: PROBLEMS WITH DOD'S AND INTERIOR'S ORDERS TO SUPPORT MILITARY OPERATIONS, GAO-05-201 (April 2005) [hereinafter MILITARY OPERATIONS REPORT].

[104] HIGH RISK SERIES REPORT, *supra* note 103.

[105] *Id*. at 1.

[106] *Id*. at 24.

[107] *Id*.

[108] *Id*. at 26.

[109] *Id*. at 25.

[110] MILITARY OPERATIONS REPORT, *supra* note 103.

[111] *Id*. at 3.

contractor was allowed to play a large role in aspects of the procurement process normally performed by government personnel."[112]

The GAO report recognized, of course, that the wartime environment created an urgent situation but found, nevertheless, that a lack of management controls led to the contract process breakdowns.[113] The GAO report notes that when proper management controls are not in place, "particularly in a fee-for-service contract environment, more emphasis can be placed on customer satisfaction and revenue generation than on compliance with sound contracting policy and required procedures."[114] Interestingly, the Department of the Interior made a conscious decision to bypass an internal legal review requirement because the contracting office believed the reviews took too long.[115]

In another report critical of the DOD's use of the interagency process, the GAO assessed: whether franchise funds,[116] a type of revolving fund, ensured fair and reasonable prices for goods and services provided; whether the DOD analyzed purchasing alternatives; and whether DOD and franchise funds ensured value by defining contract outcomes and overseeing contract performance.[117] The GAO analyzed DOD purchases from GovWorks and FedSource, two of the franchise funds that the DOD has relied on for contracting services.[118] Identifying the fundamental problem with franchise fund contracting, the GAO found that the "fee for service arrangement provides incentives to emphasize customer service to ensure sustainability of the contracting operation at the expense of proper use of contracts and good value."[119] The GAO went on to find that "DOD, GovWorks, and FedSource paid little attention to sound contracting practices for which they shared responsibility to help ensure value."[120] The report states that DOD customers reported that "they were under the impression that franchise funds ensure competition and analyze prices," but the GAO found numerous cases in which these practices did not occur.[121]

The GAO concluded that the franchise funds assessed have streamlined the contracting process to provide customers with greater flexibility and convenience, but have not always adhered to competitive procedures and other sound contracting practices to ensure that taxpayer dollars are spent wisely.[122] The GAO recommended that DOD customers "be cautious when deciding whether franchise fund contracting services are the best available alternative . . . should ensure that taxpayer dollars are widely spent by sharing in the responsibilities of developing clear contract requirements and oversight mechanisms."[123]

DOD Inspector General Weighs In

The DOD IG also got into the act of investigating and criticizing the DOD's use of interagency acquisitions. The IG audited DOD purchases of information technology products and services through the General Service Administration's (GSA's) Federal Technology Service which uses a revolving fund called the Information Technology (IT) Fund to fund its

---

[112] *Id*.

[113] *Id*.

[114] *Id*. at 15.

[115] *Id*.

[116] *Franchise funds* are a type of intragovernmental revolving fund, all of which have similar legal authority and operations, and are generally created to provide common administrative services. The funds are "government-run, self supporting business like enterprises managed by federal employees. Franchise funds provide a variety of common administrative services, such as payroll processing, information technology support, employee assistance programs, public relations, and contracting." FRANCHISE FUND REPORT, *supra* note 103, at 4.

[117] *Id*.

[118] *Id*. GovWorks is a franchise fund run by the Department of the Interior and FedSource is a franchise fund run by the Department of the Treasury. "In fiscal year 2004, DOD paid these franchise funds more than $1.2 billion for purchases of goods and services." *Id*. at 1.

[119] *Id*. at 3.

[120] *Id*. at 21.

[121] *Id*. at 8.

[122] *Id*. at 28.

[123] *Id*. at 29.

acquisitions before billing the requesting agency.[124] The IG found that in FY 2004, the DOD sent approximately 24,000 Military Interdepartmental Purchase Requests to the GSA totaling approximately $8.5 billion in purchases for purchases of technology related products and services.[125] The IG reviewed a sampling of these orders and found that over ninety percent lacked proper acquisition planning; over ninety-eight percent did not have adequate interagency agreements sufficiently outlining the terms and conditions of the purchases; and over fifty percent were improperly funded due to either lack of a bona fide need for the requirement in the year of the appropriation or use of an incorrect appropriation to fund the requirement.[126] The IG found that failures and mismanagement of funds over the last five years has caused "from $1 billion to $2 billion of DOD funds to either expire or otherwise be unavailable to support DOD operations."[127] Critically, the DOD IG Report indicts both the GSA and their DOD customers were misreading a statutory provision in order to "park" or bank" funds at the GSA for future purchases.[128] The report states that:

> [b]ecause 40 U.S.C. 757, the law that establishes the IT fund, states that the fund 'shall be available without fiscal year limitation,' both GSA and DOD officials thought that funds accepted by GSA into the revolving IT Fund were available without limitation by fiscal year or use. This lead to the idea that expiring funds could be 'parked' or banked' at GSA for future purposes. To the contrary, the statement, "shall be available without fiscal year limitation' applies to the capitalized fund itself. The funds reimbursing the capitalized funds [by the customer] must follow appropriation law. By not following the legal restrictions on appropriations to have a bona fide need for the funds in the year appropriated, GSA and DOD organizations incorrectly used the GSA IT Fund to extend the time periods of availability for use.[129]

The DOD Reacts to the Criticisms

This intense scrutiny from both internal and external sources contributed to the DOD issuing a clarifying memorandum on the proper use of non-DOD contracts and required each military department "to establish procedures for reviewing and approving the use of non-DOD contract vehicles when procuring supplies and services . . . for amounts greater than the simplified acquisition threshold."[130] This rule applies to direct and assisted acquisitions that use DOD funds.[131] The required procedures are evaluating whether using a non-DOD contract for such actions is in the best interest of the DOD;[132] determining that the tasks to be accomplished or supplies to be provided are within the scope of the contract to be used; reviewing funding to ensure it is used in accordance with appropriation limitations; providing unique terms, conditions and requirements to the assisting agency for incorporation into the order or contract as appropriate to comply with all applicable DOD-unique statutes, regulations, directives and other requirements; and, collecting data in the use of assisted acquisitions for analysis.[133]

The memorandum recognized the work by the DOD IG in discovering that "some interagency agreements continue to be used in attempt to keep funds available for new work after the period of availability for those funds has expired" and further recognized, by reference to an earlier DOD memorandum that "every order under an interagency agreement must be based upon a legitimate, specific, and adequately documented requirement representing a bona fide need of the year in which

---

[124] DOD IG GSA PURCHASES REPORT, *supra* note 102, at 1. The Information Technology (IT) Management Reform Act of 1996, also known as the Clinger-Cohen Act assigns responsibility for the acquisition and management of IT to the Director, Office of Management and Budget, and specifically authorized the GSA's IT Fund.

[125] *Id*. at ii.

[126] *Id*.

[127] *Id*. at 5.

[128] *Id*. at 13.

[129] *Id*.

[130] Memorandum, Under Secretary of Defense (Acquisition, Logistics, and Technology), to Chairman of the Joint Chiefs of Staff, subject: Fiscal Principals and Interagency Agreements (25 Sept. 2003).

[131] *Id.* Direct buys are orders placed by DOD. Assisted acquisitions are contracts awarded or orders placed by non-DOD entities, include franchise funds, using DOD funds. *Id.*

[132] *Id.* Factors to consider include satisfying customer requirements; schedule; cost effectiveness; and, contract administration. *Id.*

[133] *Id.*

the order is made."[134] Each of the military departments complied with the DOD requirement and issued their own guidance over the past year.[135]

It is a critical that contracting officers, resource managers and attorneys in the field all work together to ensure compliance with the new policies. Given the intense scrutiny that intragovernmental acquisitions have been under for the past year, it is foreseeable that without strict compliance to the statutory and regulatory framework in place for such acquisitions, Congress may rescind, or at least further restrict, the authorities agencies currently rely on to make such acquisitions.

Major Michael S. Devine

Obligations

The Air Force Issues Reminder Concerning ID/IQ Obligations

The Air Force issued a reminder that the government must record an obligation for the minimum order quantity once an indefinite quantity contract is awarded.[136] The DOD Financial Management Regulation (FMR) requires that obligations be recorded at the time a legal obligation is incurred.[137] In the case of an indefinite quantity contract, the legal obligation would be the cost of the specified minimum quantity in the contract.[138] The memorandum stressed that the contracting officer should not be satisfied with only receiving a certification of availability of funding from the finance office, but should verify that an obligation in the appropriate amount is recorded.[139]

Multiple Year Versus Multiyear

In *Bureau of Customs and Border Protection—Automated Commercial Environment Contract,*[140] the GAO reviewed a dispute between the Bureau of Customs and Border Protection (Customs) and the Department of Homeland Security (DHS) Office of the IG concerning the contract type classification of a contract pursuant to 31 U.S.C. § 3529.[141] The DHS IG conducted two audits of Customs's Automated Commercial Environment (ACE) contract. In its second audit, the DHS IG found that the ACE contract was both a multiyear and an Indefinite Delivery / Indefinite Quantity (ID/IQ) contract, and that Customs had failed to obligate the required estimated termination costs under the relevant regulations concerning multiyear contracts.[142] The DHS IG found that it was a multiyear contract because Customs prepared the required determination and findings (D&F) for multiyear contracts and included the required multiyear contract clause in both the solicitation and the awarded contract.[143] Customs disagreed, instead contending that the plain language of the contract made it an ID/IQ contract and not subject to the § 254c requirements.[144]

---

[134] *Id.*

[135] *See* Memorandum, Acting Assistant Secretary of the Air Force (Financial Management and Comptroller), to ALMAJCOM-FOA-DRU/CV/LG/FM/PK, subject: Military Interdepartmental Purchase Request (MIPR) Revised Procedures (4 Apr. 2005); Memorandum, Assistant Secretary of the Army (Acquisition, Logistics, and Technology), to MACOM Commanders, subject: Proper Use of Non-Department of Defense (Non-DOD) Contracts (12 July 2005); and Memorandum, Assistant Secretary of the Navy, Financial Management and Comptroller, to Department of the Navy Staff Offices, subject: Proper Use of Non-DOD Contracts (20 Dec. 2004).

[136] Memorandum, Associate Deputy Assistant Secretary (Contracting) & Assistant Secretary (Acquisition), U.S. Air Force, to ALMAJCOM/FOA/DRU (Contracting), subject: Obligation of Funds Upon Award of Indefinite-Quantity Contracts (29 Mar. 2005) [hereinafter ID/IQ Memo].

[137] U.S. DEPT. OF DEF., DOD 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION para. 080301 (Sept. 2005) [hereinafter DOD FMR].

[138] *Id.* para. 080504

[139] ID/IQ Memo, *supra* note 136.

[140] Comp. Gen. B-302358, 2004 U.S. Comp. Gen. LEXIS 271 (Dec. 27, 2004).

[141] Disbursing or certifying officials, and heads of agencies, may ask the Comptroller General for decisions potential payments or question concerning the proper certification of vouchers. 10 U.S.C.S. § 3529 (LEXIS 2005).

[142] *Bureau of Customs and Border Protection,* 2004 U.S. Comp. Gen. LEXIS 271, at *6.

[143] *Id.* at *7. The contract file also repeatedly referred to multiyear contracting, which the GAO prescribed to "imprecise usage and apparent confusion." *Id.* at *27.

[144] *Id.* at *8. As a multiyear contract, Customs was required to comply with 41 U.S.C.S. § 254c allowing agencies to enter into contracts for five years but requirement them to obligate funds at contract award for the estimated cost of termination. 41 U.S.C.S. § 254c (LEXIS 2005).

The GAO agreed with Customs that a reading of the plain language of the contract, particularly the inclusion of various ID/IQ clauses, resulted in the finding that the contract was an ID/IQ contract.[145] The GAO found, however, that Customs failed to record an obligation for that minimum order at the time the contract was awarded.[146]

The Obligations of Obligations

The GSA Board of Contract Appeals (GSBCA) rejected a contractor's attempt to convert the obligation of funds for option years into a constructive exercise of options in *Integral Systems, Inc. v. Dep't of Commerce.*[147] The Department of Commerce, at the time of the award of the Geostationary Operation Environmental Satellite Backup Acquisition, Command and Control Station contract,[148] obligated funds for the contract which included the two option contract line item numbers (CLINs).[149] Since an obligation could only be recorded when supported by documentary evidence of a binding agreement, the contractor argued that the act of obligation indicated that Commerce exercised the option CLINs.[150] While denying summary judgment, the GSBCA noted the general rule which states that the recording of an obligation, which is an internal government matter, does not create contractual rights for the contractor.[151]

Matching Obligations to Disbursements

The GAO issued a report calling for the strengthening of the annual review process of military personnel (MILPERS) appropriations to better match disbursements with obligations, particularly during the five years after the obligations were made.[152] MILPERS appropriations are available for up to six years,[153] but review at the line item level was only done for the first year.[154] Because of data limitations, review of obligations past the first year can only be done at the budget and subactivity level, but not at the line item level.[155]

The GAO recommended that the Office of the Secretary of Defense add explicit instructions in the Financial Management Regulation to better guide services in their year-end reviews and better monitor compliance by the services.[156] The GAO also recommend that the Defense Finance and Accounting Service (DFAS) provide better data to help track the appropriation until the appropriation cancels.[157]

Major Andrew S. Kantner

---

[145] The contract contained FAR clause 52.216-22, Indefinite Quantity; a minimum order clause; a Contract Type clause which stated that the government contemplated the award of an ID/IQ contract; and ordering procedures typical of ID/IQ contract. *Id.* at *15.

[146] *Id.* at *29.

[147] GSBCA 16321-COM, 05-1 BCA ¶ 32,946.

[148] *See* section labeled Contract Types, at 19, for a later ruling in the same case.

[149] *Integral Systems,* 05-1 BCA ¶ 32,946, at 163,228.

[150] *Id.*

[151] The GSA BCA referred to a GAO case and the GAO Redbook. *Id.* at 163,229.

[152] U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-05-87R, MILITARY PERSONNEL: DOD NEEDS TO STRENGTHEN THE ANNUAL REVIEW AND CERTIFICATION OF MILITARY PERSONNEL OBLIGATIONS (Nov. 29, 2004).

[153] *Id.* at 3.

[154] *Id.* at 4.

[155] *Id.*

[156] *Id.* at 11.

[157] *Id.*

Operational Funding

Congress Increasing Reporting Requirements on CERP Spending

In 2003, the Coalition Provisional Authority established the Commanders' Emergency Response Program (CERP). The CERP was originally funded with assets seized during Operation Iraqi Freedom and was established "to respond to urgent humanitarian relief and reconstruction requirements by allowing military commanders to carry out programs and projects that would immediately assist the Iraqi people and support the reconstruction of Iraq. Projects funded through the program were for immediate requirements of relatively small dollar-value procurements."[158]

As the seized assets dwindled, Congress was faced with the question of whether to provide appropriations to continue the program. In the Emergency Supplemental Appropriations Act, 2004, Congress answered that question and provided $180,000,000 in a specific appropriation for the continued funding of the CERP.[159] In the appropriation, Congress also dictated that a similar program be set up in Afghanistan. In the DOD Appropriations Act of 2005, Congress provided $300,000,000 of appropriated funds for CERP,[160] and then increased the total amount available to $500,000,000 in the Consolidated Appropriations Act.[161] This total amount increased to $854,000,000 through an additional appropriation in the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief for Fiscal Year 2005.[162] The DOD Appropriations Act of 2006, provides only $500,000,000; however, if the past year is any indicator, Congress would likely increase that amount through additional appropriations if the DOD requires it.[163]

Originally, Congress had not imposed any strict reporting requirements for appropriated CERP spending. Congress has, however, become increasingly interested in how the funds are being spent. The purpose of CERP, as articulated in the Emergency Supplemental for FY 2004, was "notwithstanding any other provision of law . . . [to enable] military commanders in Iraq [and Afghanistan] to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the Iraqi [and Afghan] people.[164]

In Section 1201 of the Ronald W. Reagan National Defense Authorization Act, 2005, Congress deleted the "notwithstanding any other provision of law language" and replaced it with what Congress termed "waiver authority."[165] The language in the Authorization Act states that,

> [f]or purposes of the exercise of the authority provided by this section or any other provision of law making funding available for the Commanders' Emergency Response Program . . . the Secretary may waive any provision of law not contained in this section that would (but for the waiver) prohibit, restrict, limit, or otherwise constrain the exercise of that authority.[166]

Section 1202 of the National Defense Authorization Act of 2006 has the same language and requires a report to be submitted to Congress detailing which, if any, provisions of law would be waived.[167] In addition, Congress requires quarterly

---

[158] Memorandum, Special Inspector General for Iraq Reconstruction, to Deputy Secretary of Defense, subject: Management of Commanders' Emergency Response Program for Fiscal Year 2004 (Report No. SIGIR 05-014) (13 Oct. 2005); *see also* Major Kevin J. Huyser et al., *Contract and Fiscal Law Developments of 2004—Year in Review*, ARMY LAW., Jan. 2005, at 185 [hereinafter *2004 Year in Review*].

[159] Emergency Supplemental Appropriations Act for Defense and the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, 117 Stat. 1209, 1215 (2003) [hereinafter Emergency Supplemental, FY 2004].

[160] Department of Defense Appropriations Act, 2005, Pub. L. No. 108-287, 118 Stat. 951, 1007 (2004).

[161] Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 3341 (2004).

[162] Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231, 243 (2005).

[163] Department of Defense Appropriations Act, FY 2006, Pub. L. No. 109-148, 119 Stat. 2680 (2005).

[164] Emergency Supplemental, FY 2004, *supra* note 159.

[165] Ronald W. Reagan National Defense Authorization Act, 2005, Pub. L. No. 108-375, 118 Stat. 1811, 2077-78 (2004).

[166] *Id*.

[167] National Defense Authorization Act, 2006, Pub. L. No. 109-163, 119 Stat. 3136 (2006).

reports.[168] The Senate Armed Services Committee explained its expectations in the report accompanying the draft of the Authorization Act before passage, as follows:

> The provision would require the Secretary to provide quarterly reports to the congressional defense committees on the source, allocation, and use of funds pursuant to this authority. The committee expects the quarterly reports to include detailed information regarding the amount of funds spent, the recipients of the funds, and the specific purposes for which the funds were used. The committee directs that funds made available pursuant to this authority be used in a manner consistent with the CERP guidance that the Under Secretary of Defense (Comptroller) issued in a memorandum dated February 18, 2005. This guidance directs that CERP funds be used to assist the Iraqi and Afghan people in the following representative areas: water and sanitation; food production and distribution; agriculture; electricity; healthcare; education; telecommunications; economic, financial and management improvements; transportation; irrigation; rule of law and governance; civic cleanup activities; civic support vehicles; repair of civic and cultural facilities; and other urgent humanitarian or reconstruction projects.[169]

On 27 July 2005, the Under Secretary of Defense (Comptroller) issued an update to the 18 February 2005 memorandum cited by the Senate Armed Services Committee in their report.[170] The new guidance added in four representative areas for which CERP can be used, as follows:

> (15) Repair of damage that results from U.S., coalition, or supporting military operations and is not compensable under the Foreign Claims Act;
> (16) Condolence payments to individual civilians for death, injury, or property damage resulting from U.S., coalition, or supporting military operations;
> (17) Payments to individuals upon release from detention;
> (18) Protective measures, such as fencing, lights, barrier materials, berming over pipelines, guard towers, temporary civilian guards, etc., to enhance the durability and survivability of a critical infrastructure site (oil pipelines, electric lines, etc.). . . .[171]

Additionally, the guidance added new areas in which the CERP can NOT be used, as follows:

> (2) Providing goods, services, or funds to national armies, national guard forces, border security forces, civil defense forces, infrastructure protection forces, highway patrol units, police, special police, or intelligence or other security forces.[172]

Further, the newly issued guidance includes language that makes it apply "to all organizational entities within DoD,"[173] and all of these entities are now required to incorporate the guidance into "contracts, as appropriate."[174]

In the initial guidance, the Army was required to notify the Undersecretary of Defense (Comptroller) (USD(C)) and the Central Command (CENTCOM) J8 of all CERP projects that were "$1,000,000, or greater."[175] The current guidance tightens the requirement, requiring a report for all individual projects that are $500,000 or greater.[176] Additionally, CERP Project Status Reports are now required to be submitted to the USD(C) and the CENTCOM J8 and the Joint Staff, J8, "as of the last day of the preceding month."[177] The reporting requirement must include the name of the unit, the project number, the

---

[168] *Id*.

[169] Senate Armed Service Committee Report No. 109-69, at 383 (2005).

[170] Memorandum, Under Secretary of Defense (Comptroller), to Secretaries of the Military Departments, et. al, subject: Commanders' Emergency Response Program Guidance (27 July 2005) [hereinafter July 2005 CERP Guidance].

[171] *Id*.

[172] *Id*.

[173] *Id*.

[174] *Id*.

[175] Memorandum, Under Secretary of Defense (Comptroller), to Secretaries of the Military Departments et. al, subject: Commanders' Emergency Response Program Guidance (18 Feb. 2005)

[176] July 2005 CERP Guidance, *supra* note 170.

[177] *Id*.

payment date, the description and location of the project, and "[t]he amount committed, obligated and disbursed for the project."[178] The reporting requirement applies only to appropriation-funded CERP.[179]

I'll tell you if you pay me . . .

In April 2005, the Multinational Corps - Iraq (MNC-I) issued new guidance in its Rewards Program Standard Operation Procedures (SOP).[180] The program is funded with regular operations and maintenance funds.[181] Three types of awards are authorized in the battle space: micro, small, and large rewards.[182] Of note is the micro reward, which is a reward that a company commander can pay out immediately to get immediate information, such as the location of an improvised explosive device or a witness.[183] Company level commanders have the authority to pay out less than $20 per reward, up to a total of $125 per month.[184]

Rewards funds cannot be used for weapons buyback and generally cannot be used to pay U.S. personnel, allied or coalition forces, Iraqi Security Forces, deceased persons, and individuals claiming inhumane treatment during capture.[185]

Major Jennifer C. Santiago

Foreign Military Sales

Mind the Act

In a case involving the United Kingdom's purchase of items under a Foreign Military Sales case,[186] the Court of Appeals for the Fourth Circuit addressed the issue of whether a third-party beneficiary to a contract covered by the Contract Disputes Act (CDA) can bring an action under the CDA.[187] In 1998, the DOD entered into a Letter of Offer and Acceptance with the United Kingdom (UK) Ministry of Defence (MOD) to sell "more than 2,000 GPS-related 'auxiliary output chips' manufactured by [the contractor], an approved US company."[188] The UK later reported that the chips did not conform to "the applicable military specifications or standards and were returned for repair or replacement."[189] The contractor repaired the chips, but the MOD contended that the chips were still defective. The MOD then solicited the assistance of the United States for help in recovering its alleged losses. The Air Force, with the Air Force General Counsel's concurrence, responded in an opinion stating "that it could not recommend any action against [the contractor]," but that the Air Force would continue to "fully monitor" the issue.[190]

---

[178] *Id*.

[179] *Id*.

[180] MULTI-NATIONAL CORPS—IRAQ, MNC-I REWARDS PROGRAM STANDARD OPERATING PROCEDURES (SOP), 1 Apr. 2005 (on file with the author).

[181] *Id*.

[182] *Id*.

[183] *Id*.

[184] *Id*.

[185] *Id*.

[186] The foreign military sales program provides authority for the Government sell defense articles and services to foreign countries or entities. Before defense articles and/or services can be sold under a foreign military sales case, an LOA must be executed in accordance with the provisions of a base Memorandum of Understanding (MOU). U.S. DEP'T OF DEFENSE, DIR. 5105.38-M, SECURITY ASSISTANCE MANAGEMENT MANUAL (3 Oct. 2003), *available at* http://www.dsca.mil/samm/.

[187] United Kingdom Ministry of Defence et al. v. Trimble Navigation, Ltd, No. 04-1129, 2005 U.S. App. LEXIS 19221 (4th Cir. Sept. 6, 2005). The UK and fourteen other NATO countries were parties to the base MOU that created the FMS case.

[188] *Id*. at *5.

[189] *Id.* at *6.

[190] *Id.* at *7.

The UK MOD then filed a breach of contract action in federal district court. The basis for its argument was that the contractor breached its contract with the U.S. and that the UK was harmed as a third-party. The contractor then moved to dismiss the case, arguing that the CDA "divested the court of subject-matter jurisdiction."[191] The court agreed and dismissed the case. The UK MOD appealed, and argued, that "as a matter of law, the CDA does not apply to its claims against [the contractor] . . . [and] the CDA applies only to disputes between the U.S. Government and its contractors and not to third-party beneficiary suits brought by a foreign government against a contractor."[192]

The court examined the issue of "whether a claim made by a third-party beneficiary that is related to a CDA-covered procurement contract must be resolved under the procedures established by the CDA," and held that "the language and framework of the CDA require[d] [them] to answer that question in the negative."[193] The court further held that the CDA, by its clear and unambiguous language, only applies to disputes between parties to a contract and the U.S. government.[194] In conclusion, since the CDA did not divest the district court of subject-matter jurisdiction, the case would be remanded for further proceedings as to the UK MOD's third-party beneficiary argument.

Major Jennifer C. Santiago

Liability of Accountable Officers

DOD Enlists in the Battle Against GAO Authority

By statute, Congress vested the GAO with, among other things, the authority to settle all accounts of the U.S. government,[195] to render advance decisions to assist certifying officers and disbursing officers when they are in doubt as to the legality or propriety of certifying or paying certain questionable expenses,[196] and to relieve accountable officials from liability under certain conditions.[197] Ever since the GAO was established in 1921,[198] however, the DOJ has disputed the Comptroller General's authority to make decisions that are binding on the executive branch.[199] In 1986, the Supreme Court added weight to DOJ's concerns, holding that because the Comptroller General could be removed from office only by Congress, he is subservient to Congress, and that therefore a statute conferring upon him "executive" powers was unconstitutional as a separation of powers violation.[200]

Using similar reasoning, the DOJ, in a 1991 Office of Legal Counsel opinion,[201] concluded that "the statutory mechanism that purports to authorize the [Comptroller General] to relieve Executive Branch Officials from liability (see, 31 U.S.C. § 3527, 3528, and 3529) is unconstitutional. . . ."[202] Consistent with that legal conclusion, Attorney General Janet Reno issued a DOJ Order in 1995 advising DOJ accountable officers that "an opinion from the Comptroller General cannot itself absolve such officers from liability for the loss or improper payment of funds for which they are accountable,"[203] and that they should instead seek advance decisions from their component general counsel when they question the legality of

---

[191] *Id.*

[192] *Id.* at *8.

[193] *Id.* at *9.

[194] *Id.* at *10-21.

[195] 31 U.S.C.S. § 3526(a). Further, the statute provides that "[o]n settling an account of the account of the Government, the balance certified by the Comptroller General is conclusive on the executive branch of the Government." *Id.* § 3526(d).

[196] *Id.* § 3529.

[197] *Id.* § 3527; *Id.* § 3528.

[198] The Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20 (1921).

[199] *See* Edward R. Murray, Note, *Beyond Bowsher: The Comptroller General's Account Settlement Authority and Separation of Powers*, 68 GEO. WASH. L. REV. 161, 162, 169 (1999).

[200] Bowsher v. Synar, 478 U.S. 714, 732 (1986) (invalidating portions of the Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings Act), 2 U.S.C. § 901 (1985)).

[201] Comptroller General's Authority to Relieve Disbursing and Certifying Officials from Liability, 15 Op. Off. Legal Counsel 80 (1991).

[202] U.S. Dep't of Justice, DOJ Order 2110.39A, Legality of and Liability for Obligation and Payment of Government Funds by Accountable Officers (Nov. 15, 1995).

[203] *Id*.

authorizing an obligation or of making a disbursement.[204] The DOD and other Executive Branch agencies, however, continued to maintain relief procedures consistent with the statutory law, explicitly recognizing the Comptroller General's statutory authority to relieve accountable officers from liability and to render advance decisions that will shield them from liability.

In 2003, the Department of the Treasury revived the issue by requesting DOJ assistance in implementing the DOJ opinions.[205] In response, the DOJ Office of Legal Counsel advised the agency to adopt an internal order based on the 1995 DOJ Order, and provided a draft model.[206] This year, the DOD followed suit. The April and May 2005 revisions to the DOD FMR instruct "accountable officials"[207] to seek the advice of the Office of the Deputy General Counsel (Fiscal), rather than the Comptroller General, when they are in doubt as to the legality of a particular use of appropriated funds.[208] In so doing, the DOD FMR specifically makes clear that this change is based on the DOJ Office of Legal Counsel opinion as to the constitutionality (or lack thereof) of the relevant statutes:

> While an opinion of the [Comptroller General] may have persuasive value, it cannot itself absolve an accountable official . . . . The Department of Justice has concluded as a matter of law that the statutory mechanism that purports to authorize the [Comptroller General] to relieve Executive Branch Officials from liability (i.e., 31 U.S.C. §§ 3527, 3528, and 3529) is unconstitutional because the [Comptroller General], as an agent of Congress, may not exercise Executive power, and does not have the legal authority to issue decisions or interpretations of law that are binding on the Executive Branch.[209]

To date, no court has decided on the constitutionality of the relief from liability statutes.[210] In any event, for the DOD, the practical effect of this change may be less significant than it may appear. The pre-2005 version of the DOD FMR had already required that all requests for advance decisions were first to be forwarded to the DOD Deputy General Counsel (Fiscal) before referral to the Comptroller General or other official outside the DOD.[211] Additionally, the GAO had already delegated the authority to issue advance decisions in some instances to the DOD, the Office of Personnel Management, and the General Services Administration Board of Contract Appeals.[212]

---

[204] *Id*.

[205] Letter, Kenneth Schmalzbach, Office of Gen. Counsel, U.S. Dep't of the Treasury, to Office of Gen. Counsel, U.S. Dep't of Justice (May 7, 2003) (cited in Memorandum, Jack L. Goldsmith III, Assistant Attorney General, U.S. Dep't of Justice, to Gen. Counsel, U.S. Dep't of Treasury, subject: Response to Department of Treasury (28 Jan. 2004)).

[206] Memorandum, Jack L. Goldsmith III, Assistant Attorney General, U.S. Dep't of Justice, to Gen. Counsel, U.S. Dep't of Treasury, subject: Response to Department of Treasury (28 Jan. 2004).

[207] "Accountable officials" include "[disbursing officers], certifying officers, cashiers, procurement officers, departmental accountable officials, and other employees who by virtue of their employment are responsible for the obligation, custody and payment of government funds." DOD FMR, supra note 137, at para. 010802.B. "Departmental accountable officials," in turn, are defined as "[i]ndividuals who are responsible in the performance of their duties for providing to a certifying officer information, data, or services that the certifying officer directly relies upon in the certification of vouchers for payment." *Id.* at vol. 5, ch. 33, para. 330812. The DOD FMR also uses the term "accountable individuals" as another general term apparently meaning the same thing as "accountable officials."

[208] *Id.* at vol. 5, ch. 1, para. 010801, and vol. 5, Appendix E.

[209] *Id.* at vol. 5, ch. 1, para. 010802.E.

[210] In a Department of Veterans Affairs case involving the issue of payment of attorney fees, the U.S. Court of Appeals for Veterans Claims expressly declined to decide whether Comptroller General opinions can be binding on the VA. The VA had argued consistent with the DOJ position and cited the 1991 DOJ Office of Legal Counsel opinion and the 1995 DOJ Order. The court acknowledged that the issue raised "serious separation-of-powers concerns," but stated:

> [C]ontrary to the arguments raised by the Secretary, it is not a settled matter that the Comptroller General decisions cited by the Court are not binding on VA. The Supreme Court in *Bowsher* invalidated ***legislation*** that purported to give a particular decision of the Comptroller General the authority to bind the President. The Supreme Court did not, however, state that ***any*** decision of the Comptroller General could not have binding authority over an executive agency. Nor is there any authority binding on this Court to support such a conclusion. The only authority that the Secretary offers in this regard are the two Justice Department issuances cited above, both of which concluded that the Comptroller General, as an agent of Congress, does not have the legal authority to issue decisions or interpretations of law that are binding on the Executive Branch. Although these Justice Department issuances may be instructive, they are not binding on this Court and hence do not settle this issue.

Snyder v. Principi, 15 Vet. App. 285, 290 (2001) (citations omitted) (emphasis in original).

[211] DOD FMR, *supra* note 137, at vol. 5, ch. 25, para. 250302.B.

[212] The GAO delegated the authority to issue advance decisions to the DOD in cases of military pay allowances, travel, transportation costs, survivor benefits, and retired pay; to the Office of Personnel Management in cases regarding civilian employee compensation and leave; and to the General Services

With regard to relief from liability, the statute itself treats the DOD differently than other Executive Branch agencies. Under 31 U.S.C. § 3527(b), the Comptroller General is required to relieve DOD accountable officials from liability for physical losses when the military department makes the necessary findings, and those findings are "conclusive on the Comptroller General."[213] Because the statute gives the Comptroller General no discretion as to relief from liability in such cases, the GAO had notified the military departments that there is no need to forward those requests for relief to the GAO at all.[214]

GAO Won't Overrule DOD on Relief Decisions for Physical Losses

Regardless of whether the Comptroller General may constitutionally relieve Executive Branch accountable officials from financial liability at all, the GAO normally defers to the DOD on relief decisions. While 31 U.S.C. § 3527(b) requires the Comptroller General to relieve DOD accountable officials when the appropriate DOD official finds that the statutory criteria are satisfied,[215] the language of the statute arguably does not preclude the GAO from also granting relief in cases where the DOD makes an adverse determination.

In *Decision of Managing Associate General Counsel Poling*,[216] however, the GAO reiterated that it defers to the DOD's adverse determinations as well. In that case, a DOD disbursing officer had attempted to deposit funds by mail, but the deposit was never located.[217] After the DFAS found the disbursing officer negligent and denied his request for relief, the disbursing officer appealed to the GAO. The GAO noted that that the disbursing officer had not provided a "basis to suggest that DFAS's decision was improper,"[218] and declined to consider the request. The GAO explained that it will not review military physical loss relief requests "where the determinations and the subsequent decision to grant or deny relief appear to be properly considered."[219]

Administration Board of Contract Appeals for civilian employee travel, transportation, and relocation allowances. *See* The General Accounting Act of 1996, Pub. L. 104-316. § 204, 110 Stat. 3826, 3845-46.

[213] Title 31, section 3527(b) states, in its entirety:

> (b) (1) The Comptroller General shall relieve an official of the armed forces referred to in subsection (a) responsible for the physical loss or deficiency of public money, vouchers, or records, or a payment described in section 3528(a)(4)(A) of this title, or shall authorize reimbursement, from an appropriation or fund available for reimbursement, of the amount of the loss or deficiency paid by or for the official as restitution, when—
>
> (A) in the case of a physical loss or deficiency—
>
> (i) the Secretary of Defense or the appropriate Secretary of the military department of the Department of Defense (or the Secretary of Transportation, in the case of a disbursing official of the Coast Guard when the Coast Guard is not operating as a service in the Navy) decides that the official was carrying out official duties when the loss or deficiency occurred;
>
> (ii) the loss or deficiency was not the result of an illegal or incorrect payment; and
>
> (iii) the loss or deficiency was not the result of fault or negligence by the official; or
>
> (B) in the case of a payment described in section 3528(a)(4)(A) of this title, the Secretary of Defense or the Secretary of the appropriate military department (or the Secretary of Transportation, in the case of a disbursing official of the Coast Guard when the Coast Guard is not operating as a service in the Navy), after taking a diligent collection action, finds that the criteria of section 3528(b)(1) of this title are satisfied.
>
> (2) The finding of the Secretary involved is conclusive on the Comptroller General.

31 U.S.C.S. §3527(b) (LEXIS 2005).

[214] U.S. GOVT. ACCOUNTABILITY OFF., OGC-91-5, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 9-34 (2d ed. 1992) (citing circular letter B-198451, Feb. 5, 1981).

[215] The Secretary of Defense has delegated relief authority under that statute to DFAS. DFAS Regulation No. 005, Delegation Statutory Authority, 5 Apr 1991 (cited in Decision of Managing Associate General Counsel Poling, B-303671, 2004 U.S. Comp. Gen. LEXIS 262 (Dec. 3, 2004), at n.2).

[216] Decision of Managing Associate General Counsel Poling, B-303671, 2004 U.S. Comp. Gen. LEXIS 262 (Dec. 3, 2004).

[217] *Id*. at *4.

[218] *Id*.

[219] *Id*. In discussing 31 U.S.C. § 3527(b), the GAO first noted that if DFAS had found that the three requirements for relief had been met, then "the granting of relief follows automatically." *Id*. at *3. But "[w]here the Secretary, or DFAS in his behalf, is unable to agree with any one of the three considerations, relief is not available." *Id*. From this language, it is unclear whether GAO believes it lacks authority to grant relief where DFAS makes an adverse finding.

"Departmental Accountable Officials"—DOD Gets Right and VA Gets Schooled

A few years ago, the DOD revised the DOD FMR in an attempt to impose pecuniary liability on "accountable officials," other than certifying and disbursing officers, who negligently provide inaccurate information relied upon by certifying or disbursing officers.[220] The rationale was that it is extremely difficult for any single official to ensure the accuracy, propriety, and legality of every payment, and therefore certifying officers and disbursing officers as a practical matter must rely upon information provided by others in performing this difficult task.[221] However, the GAO held that this was improper because, unlike for certifying and disbursing officers, there was no statutory basis for imposing liability against "accountable officials," and agencies may not impose pecuniary liability on employees in the absence of statutory authority.[222] In response to that decision, the DOD sought the statutory authority, which Congress provided in the 2003 National Defense Authorization Act,[223] codified at 10 U.S.C. § 2773a.

The DOD FMR was recently revised to implement this law,[224] and now provides that "[d]epartmental accountable officials shall be pecuniarily liable for illegal, improper or incorrect payments that result from information, data or services they negligently provide to a certifying officer, and upon which, the certifying officer directly relies in accordance with the provisions of 10 U.S.C. 273a."[225] The definition of "departmental accountable officials" itself sheds no further light on this statement.[226]

The revised DOD FMR provides a partial list of functional areas in which departmental accountable officials may have responsibilities, including functions relating to the Government Purchase Card program, temporary duty travel, contract and vendor pay, civilian and military pay, permanent change of station processing, and Centrally Billed Accounts.[227] This can include, but is not limited to, persons such as Agency Program Coordinators, approving officials, authorizing officials, cardholders, resource managers, fund holders, Automated Information System administrators, contracting officers, receiving officials, personnel officers, employees' supervisors, and supervisors of time and attendance clerks.[228]

Departmental accountable officials must be designated as such in writing, and apprised by letter of their potential pecuniary liability for "illegal, improper, or incorrect payments that result from negligent performance of duties."[229] Like DOD certifying officers, departmental accountable officials are appointed on a Department of Defense (DD) Form 577 ("Appointment/Termination Record/Authorized Signature").[230] The formal written designation is a statutory requirement,[231]

However, the GAO qualified that statement by saying that GAO would not review such requests where the DFAS relief decision is "properly considered," thus suggesting that the GAO would consider the request if the DFAS decision had been improperly considered.

[220] U.S. DEPT. OF DEF., DOD 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION para. 080301 (Aug. 1998).

[221] *Id*. para. 330102.

[222] Department of Defense—Authority to Impose Pecuniary Liability by Regulation, B-280764, 2000 U.S. Comp. Gen. LEXIS 159 (May 4, 2000).

[223] Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 1005, 116 Stat. 2458, 2631 (2002).

[224] DOD FMR, *supra* note 137, at vol. 5, ch. 33.

[225] *Id*. para. 3307.

[226] The DOD FMR defines "departmental accountable officials" as:

> Individuals who are responsible in the performance of their duties for providing to a certifying officer information, data, or services that the certifying officer directly relies upon in the certification of vouchers for payment. They are pecuniarily liable for erroneous payments resulting from their negligent actions in accordance with section 2773a of title 10, United States Code.

Id. para. 330812.

[227] *Id*. para. 330302.

[228] *Id.*

[229] *Id*. para. 330505.

[230] *Id.*

[231] 10 U.S.C.S. § 2773a(a) (LEXIS 2005).

and a fair reading of the statute compels a conclusion that a person not formally designated as a "departmental accountable official" cannot be held pecuniarily liable under the statute.[232]

Recently, the Department of Veterans Affairs (VA) learned a similar lesson. In *Veterans Affairs—Liability of Alexander Tripp*,[233] the GAO considered a request for relief from a VA employee who had approved payment for a "sunset cruise" as part of a staff retreat.[234] The VA held the employee financially liable for the payment of this improper entertainment expense after he had "certified" in writing that the payment was proper.[235] The employee held "a position of senior stature with responsibility for compliance with applicable laws,"[236] but had not been formally designated in writing as a certifying officer.[237] Consequently, the GAO held that the employee was not a certifying officer, but was essentially an "approving" official.[238] Citing the DOD's previous unsuccessful attempt to impose pecuniary liability against departmental accountable officials prior to the enactment of 10 U.S.C. § 2773a,[239] the GAO explained that agencies may not impose pecuniary liability on employees in the absence of statutory authority, and that there was no statutory basis for holding VA "approving" officials financially liable for improper payments.[240] Accordingly, the GAO found no need to consider the employee's request for relief from liability, because he had no financial liability from which to be relieved.[241] But that doesn't necessarily mean that the employee is completely off the hook. The GAO informed the employee, "Because federal officials are responsible for ensuring that federal funds are not used improperly, VA, within its discretion, may still impose administrative sanctions against you for your role in approving the improper payment."[242]

Major Michael L. Norris

---

[232] The statute permits the Secretary of Defense to subject only a "departmental accountable official" to pecuniary liability under certain conditions. 10 U.S.C.S. § 2773a(c). Subsection (a) of the statute makes clear that an employee cannot be a "departmental accountable official" unless he is designated in writing:

> (a) Designation by Secretary of Defense. The Secretary of Defense may designate any civilian employee of the Department of Defense or member of the armed forces under the Secretary's jurisdiction who is described in subsection (b) as an employee or member who, in addition to any other potential accountability, may be held accountable through personal monetary liability for an illegal, improper, or incorrect payment made [by] the Department of Defense described in subsection (c). *Any such designation shall be in writing.* Any employee or member *who is so designated* may be referred to as a "departmental accountable official."

Id. (emphasis added).

[233] Veterans Affairs—Liability of Alexander Tripp, B-304233, 2005 U.S. Comp. Gen. LEXIS 158 (Aug. 8, 2005).

[234] *Id*. at *4.

[235] The employee had signed the voucher, which contained the sunset cruise charge and the accompanying statement, "I certify that the articles or services listed hereon . . . are proper for payment . . . ." *Id.* at *6.

[236] *Id*. at *10 (quoting a reply to GAO from the Office of Gen. Counsel, Dep't of Veterans Affairs, dated Jan. 28, 2005). The employee served as the director of the Financial Assistance Office of the Veterans Health Administration. *Id*. at *3.

[237] *Id*. at *10.

[238] *Id*. at *7.

[239] Department of Defense—Authority to Impose Pecuniary Liability by Regulation, B-280764, 2000 U.S. Comp. Gen. LEXIS 159 (May 4, 2000).

[240] Veterans Affairs—Liability of Alexander Tripp, 2005 U.S. Comp. Gen. LEXIS 158, at *7.

[241] *Id*. at *10-11.

[242] *Id*. at *11-12.

Index of Cases

SUBJECT MATTER INDEX

V

W

Appendix

Websites & Electronic Newsletters

The first table below contains hypertext links to websites that practitioners in the government contract and fiscal law fields utilize most often. If you are viewing this document in an electronic format, you can click on the web address in the second column and open the requested website. Particularly useful websites are in **bold** type. It may be easier to access the Air Force secure sites through WebFLITE.

The second table on the final page contains links to websites that allow you to subscribe to various electronic newsletters of interest to practitioners. Once you have joined one of these news lists, the list administrator will automatically forward electronic news announcements to your email address. These electronic newsletters are convenient methods of keeping informed about recent and/or upcoming changes in the field of law.

Website Name	**Web Address**
A	
Acquisition Network (AcqNet)	http://www.arnet.gov
Acquisition Review Quarterly (from DAU)	http://www.dau.mil/pubs/arqtoc.asp
AT&L Knowledge Sharing System (formerly the Defense Acquisition Deskbook)	http://deskbook.dau.mil/jsp/default.jsp
Acquisition Streamlining and Standardization Information System (ASSIST)	http://dodssp.daps.mil/assist.htm
ACQWeb (Office of Undersecretary of Defense for Acquisition Logistics & Technology)	http://www.acq.osd.mil
Agency for International Development	http://www.usaid.gov/
Air Force Acquisition	http://www.safaq.hq.af.mil/
Air Force Acquisition Training Office	http://www.safaq.hq.af.mil/acq_workf/training/
Air Force Alternative Dispute Resolution (ADR) Program	http://www.adr.af.mil
Air Force Audit Agency	https://www.afaa.hq.af.mil/domainck/index.shtml
Air Force Contracting	**http://www.safaq.hq.af.mil/contracting/**
Air Force Contracting Toolkit	**http://www.safaq.hq.af.mil/contracting/toolkit/**
Air Force FAR Site	**http://farsite.hill.af.mil**
Air Force FAR Supplement	http://farsite.hill.af.mil/vfaffar1.htm
Air Force Materiel Command FAR Supplement	http://farsite.hill.af.mil/vfafmc1.htm
Air Force Materiel Command Homepage	https://www.afmc-mil.wpafb.af.mil/index.htm
Air Force Materiel Command Contracting Toolkit	**https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pkopr1.htm**
Air Force Financial Management & Comptroller	http://www.saffm.hq.af.mil/
Air Force General Counsel	http://www.safgc.hq.af.mil/
Air Force Home Page	http://www.af.mil/
Air Force Logistics Management Agency	https://www.aflma.hq.af.mil/
Air Force Materiel Command	https://www.afmc-mil.wpafb.af.mil/
Air Force Materiel Command Staff Judge Advocate	https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/JA/
Air Force Publications	**http://www.e-publishing.af.mil/**
American Bar Administration (ABA) Legal Technology Resource Center	http://www.lawtechnology.org/lawlink/home.html
American Bar Administration (ABA) Network	http://www.abanet.org/
American Bar Administration (ABA) Public	http://www.law.gwu.edu/pclj/

Contract Law Journal (PCLJ)	
American Bar Administration (ABA) Public Contract Law Section	**http://www.abanet.org/contract/**
American Bar Administration (ABA) Public Contract Law Section Webpage on Agency Level Bid Protests	http://www.abanet.org/contract/federal/bidpro/agen_bid.html
Armed Services Board of Contract Appeals (ASBCA)	http://www.law.gwu.edu/asbca
Army Acquisition (ASA(ALT))	https://webportal.saalt.army.mil/
Army Acquisition Corps	http://asc.rdaisa.army.mil/default.cfm
Army Audit Agency	http://www.hqda.army.mil/AAAWEB/
Army Contracting Agency	http://aca.saalt.army.mil/
Army Corps of Engineers Home Page	http://www.usace.army.mil/
Army Corps of Engineers Legal Services	http://www.hq.usace.army.mil/cecc/maincc.htm
Army Financial Management & Comptroller	http://www.asafm.army.mil/
Army General Counsel	http://www.hqda.army.mil/ogc/
Army Home Page	http://www.army.mil/
Army Materiel Command	http://www.amc.army.mil/
Army Material Command Contracting Policy Vault	http://www.amc.army.mil/amc/rda/pvault.html
Army Materiel Command Counsel	**http://www.amc.army.mil/amc/command_counsel/**
Army Portal	https://www.us.army.mil/portal/portal_home.jhtml
Army Publications	http://www.usapa.army.mil
Army Single Face to Industry (ASFI)	https://acquisition.army.mil/asfi/

B

Bid Protests Webpage from the American Bar Administration (ABA) Public Contract Law Section	http://www.abanet.org/contract/federal/bidpro/agen_bid.html
Boards of Contract Appeals Bar Association	http://www.bcabar.org/
Budget of the United States	http://www.gpoaccess.gov/usbudget/

C

Central Contractor Registration (CCR)	http://www.ccr.gov/
Checklist (AF Electronic Systems Command Contract Review Checklist)	**https://centernet.hanscom.af.mil/JA/CRG/checklist.htm**
Coast Guard Home Page	http://www.uscg.mil
Code of Federal Regulations	**http://www.access.gpo.gov/nara/cfr/cfr-table-search.html**
Electronic Code of Federal Regulations (eCFR)	**http://www.gpoaccess.gov/ecfr**
Comptroller General Appropriation Decisions	http://www.gao.gov/decisions/appro/appro.htm
Comptroller General Bid Protest Decisions	http://www.gao.gov/decisions/bidpro/bidpro.htm
Comptroller General Decisions via GPO Access	**http://www.gpoaccess.gov/gaodecisions/index.html**
Comptroller General Legal Products	**http://www.gao.gov/legal.htm**
Comptroller General Principles of Federal Appropriations Law	**http://www.gao.gov/legal.htm**
Comptroller General Principles of Federal Appropriations Law Update Service (A Commercial Source)	http://www.managementconcepts.com/publications/financial/ALMGAO.asp
Congressional Bills	http://www.gpoaccess.gov/bills/index.html
Congressional Documents	http://www.gpoaccess.gov/legislative.html
Congressional Documents via Thomas	**http://thomas.loc.gov/**

Congressional Record	http://www.gpoaccess.gov/crecord/index.html
Contingency Contracting (Army AMC)	http://dasapp.saalt.army.mil/Contingency%20Contracting%20Site/ck/ck-prime.htm
Contract Pricing Reference Guides	http://www.acq.osd.mil/dp/cpf/pgv1_0/pgchindex.html
Contract Review Checklist (AF Electronic Systems Command)	**https://centernet.hanscom.af.mil/JA/CRG/checklist.htm**
Cornell University Law School (extensive list of links to legal research sites)	www.law.cornell.edu
Cost Accounting Standards (CAS – found in the Appendix to the FAR)	http://farsite.hill.af.mil/reghtml/regs/far2afmcfars/fardfars/far/farapndx1.htm
Cost Accounting Standards Board (CASB)	http://www.whitehouse.gov/omb/procurement/casb.html
Court of Appeals for the Federal Circuit (CAFC)	http://www.fedcir.gov/
Court of Federal Claims (COFC)	http://www.uscfc.uscourts.gov/

D

Davis Bacon Wage Determinations	http://www.gpo.gov/davisbacon/
Debarred List (known as the Excluded Parties Listing System)	http://epls.arnet.gov
Defense Acquisition Deskbook (now known as the AT& L Knowledge Sharing System)	**http://deskbook.dau.mil/jsp/default.jsp**
Defense Acquisition Regulations Directorate (the DAR Council)	**http://www.acq.osd.mil/dpap/dars/index.htm**
Defense Acquisition University (DAU)	**http://www.dau.mil/**
Defense Competitive Sourcing & Privatization	http://www.acq.osd.mil/installation/csp/
Defense Comptroller	http://www.dtic.mil/comptroller/
Defense Contract Audit Agency (DCAA)	http://www.dcaa.mil/
Defense Contract Management Agency (DCMA)	http://www.dcma.mil/
Defense Procurement and Acquisition Policy (DPAP) Electronic Business	http://www.acq.osd.mil/dpap/ebiz/
Defense Finance and Accounting Service (DFAS)	http://www.dfas.mil/
DFAS Electronic Commerce Home Page	http://www.dfas.mil/ecedi/
Defense Logistics Agency (DLA) Electronic Commerce Home Page	http://www.supply.dla.mil//Default.asp
Defense Procurement and Acquisition Policy (DPAP)	http://www.acq.osd.mil/dpap/
Defense Standardization Program	http://dsp.dla.mil/
Defense Technical Information Center	http://www.dtic.mil
Department of Commerce, Office of General Counsel, Contract Law Division	http://www.ogc.doc.gov/ogc/contracts/cld/cld.html#Contract Law
Department of Energy Acquisition Guide	http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement/Acquisition+Guide?OpenDocument
Department of Energy Acquisition Regulation	http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement/Acquisition+Regulation?OpenDocument
Department of the Interior Acquisition Regulation	http://www.ios.doi.gov/pam/aindex.html
Department of Justice	http://www.usdoj.gov
Department of Justice Legal Opinions	http://www.usdoj.gov/olc/opinionspage.htm
Department of Labor Acquisition Regulation	http://www.dol.gov/dol/allcfr/OASAM/Title_48/Part_2901/toc.htm
Department of State Acquisition Regulation	http://www.statebuy.state.gov/dosar/dosartoc.htm
Department of Transportation Acquisition	http://www.dot.gov/ost/m60/tamtar/

Regulation	
Department of Transportation Acquisition Manual	http://www.dot.gov/ost/m60/earl/tam.htm
Department of Veterans Affairs	http://www.va.gov
Department of Veterans Affairs Board of Contract Appeals	http://www1.va.gov/bca/
Directorate for Information Operations and Reports Home Page - Procurement Coding Manual/FIPS/CIN	http://web1.whs.osd.mil/diorhome.htm
DOD Acquisition Reform (DUSD(AR)) (has been merged into the DPAP site)	http://www.acq.osd.mil/dpap/
DOD Busopps (has been merged into the FedBizOpps site)	http://www.dodbusopps.com/
DOD Contract Pricing Reference Guide	http://www.acq.osd.mil/dp/cpf/pgv1_0/index.html
DOD E-Mall	https://emall.prod.dodonline.net/scripts/emLogon.asp
DOD Financial Management Regulations	http://www.dtic.mil/comptroller/fmr/
DOD General Counsel	http://www.defenselink.mil/dodgc/
DOD Home Page	http://www.defenselink.mil
DOD Inspector General (Audit Reports)	http://www.dodig.osd.mil
DOD Instructions and Directives	**http://www.dtic.mil/whs/directives/**
DOD Purchase Card Program	http://purchasecard.saalt.army.mil/default.htm
DoD Single Stock Point for Military Specifications, Standards and Related Publications	http://www.dodssp.daps.mil/
DOD Standards of Conduct Office (SOCO)	http://www.defenselink.mil/dodgc/defense_ethics/

E

ESI, International (training in government contracts)	http://www.esi-intl.com/public/contracting/governmentcontracting.asp
Excluded Parties Listing System	http://epls.arnet.gov
Executive Orders	http://www.gpoaccess.gov/wcomp/index.html
Executive Orders (alternate site)	http://www.archives.gov/federal_register/executive_orders/disposition_tables.html
Export Administration Regulations	http://www.gpo.gov/bis/index.html

F

FAR Site (Air Force)	http://farsite.hill.af.mil
FAR – GSA Alternate Site	http://www.arnet.gov/far/
Federal Acquisition Institute (FAI)	http://www.faionline.com/kc/login/login.asp?kc_ident=kc0001
Federal Business Opportunities (FedBizOpps)	http://www.fedbizopps.gov/
Federal Legal Information Through Electronics (FLITE) (AF – Registration)	**https://aflsa.jag.af.mil/php/dlaw/dlaw.php**
Federal Marketplace	http://www.fedmarket.com/
Federal Prison Industries, Inc (UNICOR)	http://www.unicor.gov/
Federal Procurement Data System	https://www.fpds.gov/
Federal Publications	http://www.fedpubseminars.com/seminar/gcplist.html
Federal Register via GPO Access	**http://www.gpoaccess.gov/fr/index.html**
Federally Funded R&D Centers (FFRDC)	http://www.nsf.gov/sbe/srs/nsf99334/start.htm
Financial Management Regulations	**http://www.dod.mil/comptroller/fmr/**
FindLaw	http://www.findlaw.com

FirstGov	http://www.firstgov.gov/

G

Government Accountability Office (GAO) Comptroller General Appropriation Decisions	http://www.gao.gov/decisions/appro/appro.htm
Government Accountability Office (GAO) Comptroller General Bid Protest Decisions	http://www.gao.gov/decisions/bidpro/bidpro.htm
Government Accountability Office (GAO) Comptroller General Decisions via GPO Access	**http://www.gpoaccess.gov/gaodecisions/index.html**
Government Accountability Office (GAO) Comptroller General Legal Products	http://www.gao.gov/legal.htm
Government Accountability Office (GAO) Principles of Federal Appropriations Law Update Service (A Commercial Source)	http://www.managementconcepts.com/publications/financial/ALMGAO.asp
Government Accountability Office (GAO) Home Page	http://www.gao.gov
General Services Administration (GSA) Acquisition Manual	http://www.arnet.gov/GSAM/gsam.html
General Services Administration (GSA) Advantage	http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8199&channelId=-13827
General Services Administration (GSA) Federal Supply Service (FSS)	http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=10322&contentType=GSA_BASIC
General Services Administration Board of Contract Appeals (GSBCA)	http://www.gsbca.gsa.gov/
GovCon (Government Contracting Industry)	http://www.govcon.com/content/homepage
Government Contracts Resource Guide	http://www.law.gwu.edu/burns/research/gcrg/gcrg.htm
Government Online Learning Center	http://www.golearn.gov/
Government Printing Office (GPO) Access	**http://www.gpoaccess.gov/index.html**
Government Printing Office Board of Contract Appeals (GPOBCA) (As of 1 Jul 04, appeals go to VABCA)	http://www.gpo.gov/contractappeals/index.html

J

JAGCNET (Army JAG Corps Homepage)	**http://www.jagcnet.army.mil/**
JAGCNET (The Army JAG Legal Center & School Homepage)	**http://www.jagcnet.army.mil/TJAGSA**
Javits-Wagner-O'Day Act (JWOD)	http://www.jwod.gov/jwod/index.html
Joint Electronic Library (Joint Publications)	http://www.dtic.mil/doctrine/jel/jointpub.htm
Joint Travel Regulations (JFTR/JTR)	http://www.dtic.mil/perdiem/trvlregs.html

L

Library of Congress	http://lcweb.loc.gov
Logistics Joint Administrative Management Support Services (LOGJAMMS)	http://www.forscom.army.mil/aacc/LOGJAMSS/default.htm

M

Marine Corps Home Page	http://www.usmc.mil
Marine Corps Regulations	http://www.usmc.mil/directiv.nsf/web+orders
MEGALAW	http://www.megalaw.com
Mil Standards (DoD Single Stock Point for Military Specifications, Standards and Related	http://www.dodssp.daps.mil/

Publications)	
MWR Home Page (Army)	http://www.ArmyMWR.com

N

NAF Financial (Army)	http://www.asafm.army.mil/fo/fod/naf/naf.asp
National Aeronautics and Space Administration (NASA) Acquisition	http://prod.nais.nasa.gov/cgi-bin/nais/index.cgi
National Contract Management Association	http://www.ncmahq.org/
National Industries for the Blind (NIB)	www.nib.org
National Industries for the Severely Handicapped (NISH)	www.nish.org/
National Partnership for Reinventing Government (aka National Performance Review or NPR). Note: the library is now closed & only maintained in archive.	http://govinfo.library.unt.edu/npr/index.htm
Naval Supply Systems Command (NAVSUP)	http://www.navsup.navy.mil/npi/
Navy Acquisition One Source	http://www.abm.rda.hq.navy.mil/

Navy Acquisition Reform	http://www.acq-ref.navy.mil/index.cfm
Navy Electronic Commerce On-line	http://www.neco.navy.mil/
Navy Financial Management and Comptroller	http://www.fmo.navy.mil/policies/regulations.htm
Navy General Counsel	http://www.ogc.navy.mil/
Navy Home Page	http://www.navy.mil
Navy Directives and Regulations	http://neds.nebt.daps.mil/
Navy Research, Development and Acquisition	http://www.hq.navy.mil/RDA/
North American Industry Classification System (formerly the Standard Industry Code)	http://www.osha.gov/oshstats/sicser.html

O

Office of Acquisition Policy within GSA	http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8203&channelPage=/ep/channel/gsaOverview.jsp&channelId=-13069
Office of Federal Procurement Policy (OFPP) Best Practices Guides	http://www.acqnet.gov/Library/OFPP/BestPractices/
Office of Government Ethics (OGE)	http://www.usoge.gov
Office of Management and Budget (OMB)	http://www.whitehouse.gov/omb/
Per Diem Rates (GSA)	http://policyworks.gov/org/main/mt/homepage/mtt/perdiem/travel.htm
Per Diem Rates (DoD)	http://www.dtic.mil/perdiem/
Per Diem Rates (OCONUS)	http://www.state.gov/m/a/als/prdm/
Producer Price Index	http://www.bls.gov/ppi/
Program Manager (a periodical from DAU)	http://www.dau.mil/pubs/pmtoc.asp
Public Contract Law Journal	http://www.law.gwu.edu/pclj/
Public Papers of the President of the United States	http://www.access.gpo.gov/nara/pubpaps/srchpaps.html
Purchase Card Program	http://purchasecard.saalt.army.mil/default.htm

R

Rand Reports and Publications	http://www.rand.org/publications/

S

SearchMil (search engine for .mil websites)	http://www.searchmil.com/
Service Contract Act Directory of Occupations	http://www.dol.gov/esa/regs/compliance/whd/wage/main.htm
Share A-76 (DOD site)	http://emissary.acq.osd.mil/inst/share.nsf
Small Business Administration (SBA)	http://www.sba.gov/
Small Business Administration (SBA) Government Contracting Home Page	http://www.sba.gov/GC/
Small Business Innovative Research (SBIR)	http://www.acq.osd.mil/sadbu/sbir/
Standard Industry Code (now called the North American Industry Classification System)	http://www.osha.gov/oshstats/sicser.html
Steve Schooner's homepage	http://www.law.gwu.edu/facweb/sschooner/

T

Travel Regulations	http://www.dtic.mil/perdiem/trvlregs.html

U

U.S. Business Advisor (sponsored by SBA)	http://www.business.gov
U.S. Code	http://uscode.house.gov/search/criteria.php
U.S. Code	http://www.gpoaccess.gov/uscode/index.html
U.S. Congress on the Net-Legislative Info	http://thomas.loc.gov
U.S. Court of Appeals for the Federal Circuit (CAFC)	http://www.fedcir.gov/
U.S. Court of Federal Claims	http://www.uscfc.uscourts.gov/
U.S. Department of Agriculture (USDA) Graduate School	http://grad.usda.gov/
UNICOR (Federal Prison Industries, Inc.)	http://www.unicor.gov/

W

Where in Federal Contracting?	http://www.wifcon.com/

Electronic Newsletters

Air Force Contracting	http://www.safaq.hq.af.mil/contracting/toolkit/distribution-list.html
Air Force Materiel Command (AFMC) Contract Update	https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pkp/polvault/e-signup.htm
Army Material Command (AMC) Updates (see subscribe link bottom of website)	http://www.amc.army.mil/amc/rda/pvault.html
Defense and Security Publications via GPO Access	http://listserv.access.gpo.gov/scripts/wa.exe?SUBED1=gpo-defpubs-l&A=1
Defense Federal Acquisition Regulation Supplement (DFARS) News	http://www.acq.osd.mil/dp/dars/dfarmail.htm
DOD Acquisition Initiatives (DUSD(AR))	http://acquisitiontoday.dau.mil/
Federal Acquisition Regulation (FAR) News	http://www.arnet.gov/far/mailframe.html
Federal Register via GPO Access	http://listserv.access.gpo.gov/scripts/wa.exe?SUBED1=fedregtoc-l&A=1
Government Accountability Office (GAO) Reports Testimony, and/or Decisions	http://www.gao.gov/subtest/subscribe.html
GPO Listserv	http://listserv.access.gpo.gov/
GSA Listserv	http://listserv.gsa.gov/archives/index.html
Navy Acquisition One Source website updates	http://www.abm.rda.hq.navy.mil/navyaos/content/view/full/3218

CLE NEWS

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule (June 2005 - September 2007) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS No.	Course Title	Dates
GENERAL		
5-27-C22	54th Graduate Course	15 Aug 05 – thru 25 May 06
5-27-C22	55th Graduate Course	14 Aug 06 – thru 24 May 07
5-27-C22	56th Graduate Course	13 Aug 07 – thru 23 May 08
5-27-C20	169th Basic Course	3 Jan – 27 Jan 06 (Phase I – Ft. Lee)
		27 Jan – 7 Apr 06 (Phase II – TJAGSA)
5-27-C20	170th Basic Course	30 May – 23 Jun 06 (Phase I – Ft. Lee)
		23 Jun – 31 Aug 06 (Phase II – TJAGSA)
5-27-C20	171st Basic Course	12 Sep – 6 Oct 06 (Phase I – Ft. Lee)
		6 Oct – 14 Dec 06 (Phase II – TJAGSA)
5-27-C20	172d Basic Course	2 Jan – 2 Feb 07 (Phase I – Ft. Lee)
		2 Feb – 6 Apr 07 (Phase II – TJAGSA)
5-27-C20	173d Basic Course	29 May – 22 Jun 07 (Phase I – Ft. Lee)
		22 Jun – 30 Aug 07 (Phase II – TJAGSA)
5-27-C20	174th Basic Course	11 Sep – 5 Oct 07 (Phase I – Ft. Lee)
		5 Oct – 14 Dec 07 (Phase II – TJAGSA)

5F-F70	37th Methods of Instruction Course	30 May – 2 Jun 06
5F-F70	38th Methods of Instruction Course	29 May – 1 Jun 07
5F-F1	190th Senior Officers Legal Orientation Course	30 Jan – 3 Feb 06
5F-F1	191st Senior Officers Legal Orientation Course	27 – 31 Mar 06
5F-F1	192d Senior Officers Legal Orientation Course	12 – 16 Jun 06
5F-F1	193d Senior Officers Legal Orientation Course	11 – 15 Sep 06
5F-F1	194th Senior Officers Legal Orientation Course	13 – 17 Nov 06
5F-F1	195th Senior Officers Legal Orientation Course	5 – 9 Feb 07
5F-F1	196th Senior Officers Legal Orientation Course	26 – 30 Mar 07
5F-F1	197th Senior Officers Legal Orientation Course	11 – 15 Jun 07
5F-F1	198th Senior Officers Legal Orientation Course	10 – 14 Sep 07
5F-F3	13th RC General Officers Legal Orientation Course	24 – 26 Jan 07
5F-F52	36th Staff Judge Advocate Course	5 – 9 Jun 06
5F-F52	37th Staff Judge Advocate Course	4 – 8 Jun 07
5F-F52-S	9th Staff Judge Advocate Team Leadership Course	5 – 7 Jun 06
5F-F52-S	10th Staff Judge Advocate Team Leadership Course	4 – 6 Jun 07
5F-F55	2006 JAOAC (Phase II)	8 – 20 Jan 06
5F-F55	2007 JAOAC (Phase II)	7 – 19 Jan 07
5F-JAG	2006 JAG Annual CLE Workshop	2 – 6 Oct 06
JARC-181	2006 JA Professional Recruiting Seminar	11 – 14 Jul 06
JARC-181	2007 JA Professional Recruiting Seminar	17 – 20 Jul 07
ADMINISTRATIVE AND CIVIL LAW		
5F-F21	5th Advanced Law of Federal Employment Course	25 – 27 Oct 06
5F-F22	60th Law of Federal Employment Course	23 – 27 Oct 06
5F-F23	58th Legal Assistance Course	15 – 19 May 06
5F-F23	59th Legal Assistance Course	30 Oct – 3 Nov 06
5F-F23	60th Legal Assistance Course	14 – 18 May 07
5F-F24	30th Admin Law for Military Installations Course	13 – 17 Mar 06
5F-F24	31st Admin Law for Military Installations Course	26 Feb – 2 Mar 07
5F-F28	Tax Year 2006 Basic Income Tax CLE	11 – 15 Dec 06
5F-F29	24th Federal Litigation Course	31 Jul – 4 Aug 06
5F-F29	25th Federal Litigation Course	30 Jul – 3 Aug 07
5F-F202	4th Ethics Counselors Course	17 – 21 Apr 06
5F-F202	5th Ethics Counselors Course	16 – 20 Apr 07
5F-F24E	2006 USAREUR Administrative Law CLE	11 – 14 Sep 06
5F-F24E	2007 USAREUR Administrative Law CLE	10 – 13 Sep 07
5F-F26E	2006 USAREUR Claims Course	27 Nov – 1 Dec 06
5F-F28E	Tax Year 2006 USAREUR Basic Income Tax CLE	4 – 8 Dec 06

5F-F28H	Tax Year 2005 Hawaii Basic Income Tax CLE	9 – 13 Jan 06
5F-F28P	Tax Year 2005 PACOM Basic Income Tax CLE	3 – 6 Jan 06
5F-F28P	Tax Year 2006 PACOM Basic Income Tax CLE	8 – 12 Jan 07
CONTRACT AND FISCAL LAW		
5F-F10	156th Contract Attorneys Course	17 – 28 Jul 06
5F-F10	157th Contract Attorneys Course	23 Jul – 3 Aug 07
5F-F11	2006 Government Contract Law Symposium	5 – 8 Dec 06
5F-F12	74th Fiscal Law Course	1 – 5 May 06
5F-F12	75th Fiscal Law Course	30 Oct – 3 Nov 06
5F-F12	76th Fiscal Law Course	30 Apr – 4 May 07
5F-F13	2d Operational Contracting Course	10 – 14 Apr 06
5F-F13	3d Operational Contracting Course	12 – 16 Mar 07
5F-F14	18th Comptrollers Accreditation Course (Ft. Bragg)	21 – 24 Feb 06
5F-F101	7th Procurement Fraud Course	31 May – 2 Jun 06
5F-F102	6th Contract Litigation Course	16 – 20 Apr 07
5F-F103	7th Advanced Contract Law	12 – 14 Apr 06
5F-F15E	2006 USAREUR Contract & Fiscal Law CLE	28 – 31 Mar 06
5F-F15E	2007 USAREUR Contract & Fiscal Law CLE	27 – 30 Mar 07
N/A	2006 Maxwell AFB Fiscal Law Course	6 – 9 Feb 06
N/A	2007 Maxwell AFB Fiscal Law Course	5 – 8 Feb 07
CRIMINAL LAW		
5F-F31	12th Military Justice Managers Course	21 – 25 Aug 06
5F-F31	13th Military Justice Managers Course	20 – 24 Aug 07
5F-F33	49th Military Judge Course	24 Apr – 12 May 06
5F-F33	50th Military Judge Course	23 Apr – 11 May 07
5F-F34	25th Criminal Law Advocacy Course	13 – 24 Mar 06
5F-F34	26th Criminal Law Advocacy Course	11 – 22 Sep 06
5F-F34	27th Criminal Law Advocacy Course	12 – 23 Mar 07
5F-F34	28th Criminal Law Advocacy Course	10 – 21 Sep 07
5F-F35	29th Criminal Law New Developments Course	29 Nov – 2 Dec 05
5F-F35	30th Criminal Law New Developments Course	14 – 17 Nov 06
5F-301	9th Advanced Advocacy Training	16 – 19 May 06
5F-301	10th Advanced Advocacy Training	15 – 18 May 07
INTERNATIONAL AND OPERATIONAL LAW		
5F-F42	85th Law of War Course	30 Jan – 3 Feb 06
5F-F42	86th Law of War Course	10 Jul – 14 Jul 06
5F-F42	87th Law of War Course	29 Jan – 2 Feb 07

5F-F42	88th Law of War Course	16 – 20 Jul 07
5F-F44	1st Legal Aspects of Information Operations Course	26 – 30 Jun 06
5F-F44	2d Legal Aspects of Information Operations Course	25 – 29 Jun 07
5F-F45	6th Domestic Operational Law Course	30 Oct – 3 Nov 06
5F-F47	45th Operational Law Course	27 Feb – 10 Mar 06
5F-F47	46th Operational Law Course	31 Jul – 11 Aug 06
5F-F47	47th Operational Law Course	26 Feb – 9 Mar 07
5F-F47	48th Operational Law Course	30 Jul – 10 Aug 07
LEGAL ADMINISTRATORS COURSES		
7A-270A1	17th Legal Administrators Course	19 – 23 Jun 06
7A-270A1	18th Legal Administrators Course	18 – 22 Jun 07
7A-270A2	7th JA Warrant Officer Advanced Course	10 Jul – 4 Aug 06
7A-270A2	8th JA Warrant Officer Advanced Course	9 Jul – 3 Aug 07
7A-270A0	13th JA Warrant Officer Basic Course	30 May – 23 Jun 06
7A-270A0	14th JA Warrant Officer Basic Course	29 May – 22 Jun 07
PARALEGAL AND COURT REPORTING COURSES		
512-27DC4	11th Speech Recognition Training	23 Oct – 3 Nov 06
512-27DC5	19th Court Reporter Course	30 Jan – 31 Mar 06
512-27DC5	20th Court Reporter Course	24 Apr – 23 Jun 06
512-27DC5	21st Court Reporter Course	31 Jul – 29 Sep 06
512-27DC5	22d Court Reporter Course	29 Jan – 30 Mar 07
512-27DC5	23d Court Reporter Course	23 Apr – 22 Jun 07
512-27DC5	24th Court Reporter Course	30 Jul – 28 Sep 07
512-27DC6	7th Court Reporting Symposium	30 Oct – 3 Nov 06
512-27D/20/30	17th Law for Paralegal NCOs Course	27 – 31 Mar 06
512-27D/20/30	18th Law for Paralegal NCOs Course	26 Mar – 6 Apr 07
512-27DCSP	2d Combined Sr. Paralegal NCO Course	12 – 16 Jun 06
512-27DCSP	3d Combined Sr. Paralegal NCO Course	11 – 15 Jun 07
5F-F58	Paralegal Sergeant Majors Symposium Course	9 -13 Jan 06

3. Naval Justice School and FY 2006 Course Schedule

Please contact Monique, E. L. Cover, Other Services Quota Manager/Analyst, SRA International, Inc., Naval Personnel Development Command, Code N72, NOB, 9549 Bainbridge Ave., N-19, Room 121, at (757) 444-2996, extension 3610 or DSN 564-2996, extension 3610, for information about the courses.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (020)	17 Jan – 17 Mar 06

0257	Lawyer Course (030)	5 Jun – 4 Aug 06
0257	Lawyer Course (040)	7 Aug – 6 Oct 06
NA	Brigade Oriented Legal Team (020)	9 – 13 Jan 06 (NJS)
NA	Brigade Oriented Legal Team (010)	20 – 24 Mar 06 (USMC)
NA	Brigade Oriented Legal Team (030)	7 – 11 Aug 06 (NJS)
0259	Legal Officer Course (010)	6 -24 Feb 06
0259	Legal Officer Course (202)	12 – 30 Jun 06
900B	Reserve Lawyer Course (010)	1 – 5 May 06
900B	Reserve Lawyer Course (020)	11 – 15 Sep 06
914L	Law of Naval Operations (010)	8 – 12 May 06
914L	Law of Naval Operations (020)	18 – 22 Sep 06
850T	SJA/E-Law Course (010)	30 May – 9 Jun 06
850T	SJA/E-Law Course (020)	24 Jul – 4 Aug 06
786R	Advanced SJA/Ethics (010)	27 – 31 Mar 06 (San Diego)
786R	Advanced SJA/Ethics (020)	24 – 28 Apr 06 (Norfolk)
850V	Law of Military Operations (010)	12 – 23 Jun 06
961D	Military Law Update Workshop (Officer) (010)	20 – 21 May 06 (East)
961D	Military Law Update Workshop (Officer) (020)	17 – 18 Jun 06 (West)
961M	Effective Courtroom Communications	5 – 9 Dec 05 (Norfolk)
961M	Effective Courtroom Communications	27 – 31 Mar 06 (San Diego)
961J	Defending Complex Cases (010)	17 – 21 Jul 06
525N	Prosecuting Complex Cases (010)	10 – 14 Jul 06
4048	Estate Planning (010)	14 – 18 Aug 06
7487	Family Law/Consumer Law (010)	22 – 26 May 06
7485	Litigation National Security (010)	6 – 8 Mar 06 (Washington, DC)
748K	National Institute of Trial Advocacy (010)	24 – 28 Oct 06 (Camp Lejeune)
748K	National Institute of Trial Advocacy (020)	30 Jan – 3 Feb 06 (San Diego)
748K	National Institute of Trial Advocacy (030)	22 – 26 May 06 (Hawaii)
748B	Naval Legal Service Command Senior Officer Leadership (010)	21 – 25 Aug 06
2205	Defense Trial Enhancement (010)	9 – 13 Jan 06
3938	Computer Crimes (010)	3 – 7 Apr 06
0258	Senior Officer (NewPort) (020)	23 – 27 Jan 06
0258	Senior Officer (NewPort) (030)	13 – 17 Mar 06
0258	Senior Officer (NewPort) (040)	8 – 12 May 06
0258	Senior Officer (NewPort) (050)	10 – 14 Jun 06
0258	Senior Officer (NewPort) (060)	14 – 18 Aug 06

0258	Senior Officer (NewPort) (070)	25 – 29 Sep 06
2622	Senior Officer (Fleet) (040)	13 – 17 Feb 06 (Pensacola)
2622	Senior Officer (Fleet) (050)	27 – 31 Mar 06 (Camp Lejeune)
2622	Senior Officer (Fleet) (060)	3 – 7 Apr 06 (Quantico)
2622	Senior Officer (Fleet) (070)	17 – 21 Apr 06 (Pensacola)
2622	Senior Officer (Fleet) (080)	8 – 12 May 06 (Pensacola)
2622	Senior Officer (Fleet) (090)	10 – 14 Jul 06 (Pensacola)
2622	Senior Officer (Fleet) (100)	28 Aug – 1 Sep 06 (Pensacola)
7878	Legal Assistance Paralegal Course (010)	22 – 26 May 06
3090	Legalman Course (010)	17 Jan – 17 Mar 06
932V	Coast Guard Legal Technician Course (010)	11 – 22 Sep 06
846L	Senior Legalman Leadership Course (010)	24 – 28 Jul 06
049N	Reserve Legalman Course (Phase I) (010)	10 – 21 Apr 06
056L	Reserve Legalman Course (Phase II) (010)	24 Apr – 5 May 06
846M	Reserve Legalman Course (Phase III) (010)	8 – 19 May 06
5764	LN/Legal Specialist Mid-Career Course (020)	24 Apr – 5 May 06
961G	Military Law Update Workshop (Enlisted) (010)	TBD
961G	Military Law Update Workshop (Enlisted (020)	TBD
4040	Paralegal Research & Writing (010)	20 – 31 Mar 06 (Newport)
4040	Paralegal Research & Writing (020)	24 Apr – 5 May 06 (Norfolk)
4040	Paralegal Research & Writing (030)	17 – 28 Jul 06 (San Diego)
4046	SJA Legalman (020)	30 May – 9 Jun 06 (Newport)
627S	Senior Enlisted Leadership Course (050)	10 – 12 Jan 06 (Pendleton)
627S	Senior Enlisted Leadership Course (060)	11 – 13 Jan 06 (Jacksonville)
627S	Senior Enlisted Leadership Course (070)	21 – 23 Feb 06 (San Diego)
627S	Senior Enlisted Leadership Course (080)	22 – 24 Feb 06 (Norfolk)
627S	Senior Enlisted Leadership Course (090)	21 – 23 Mar 06 (Hawaii)
627S	Senior Enlisted Leadership Course (100)	4 – 6 Apr 06 (Bremerton)
627S	Senior Enlisted Leadership Course (110)	12 – 14 Apr 06 (Naples)
627S	Senior Enlisted Leadership Course (120)	2 – 4 May 06 (San Diego)
627S	Senior Enlisted Leadership Course (130)	22 – 24 May 06 (Norfolk)
627S	Senior Enlisted Leadership Course (140)	19 -21 Jul 06 (Millington)
627S	Senior Enlisted Leadership Course (150)	1 – 3 Aug 06 (San Diego)
627S	Senior Enlisted Leadership Course (160)	16 – 18 Aug 06 (Norfolk)
627S	Senior Enlisted Leadership Course (170)	12 – 14 Sep 06 (Pendleton)
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (020)	30 Jan – 17 Feb 06
0376	Legal Officer Course (030)	6 – 24 Mar 06
0376	Legal Officer Course (040)	24 Apr – 12 May 06
0376	Legal Officer Course (050)	5 – 23 Jun 06
0376	Legal Officer Course (060)	24 Jul – 11 Aug 06
0376	Legal Officer Course (070)	11 – 29 Sep 06

0379	Legal Clerk Course (030)	23 Jan – 3 Feb 06
0379	Legal Clerk Course (040)	6 –17 Mar 06
0379	Legal Clerk Course (050)	3 – 14 Apr 06
0379	Legal Clerk Course (060)	5 – 16 Jun 06
0379	Legal Clerk Course (070)	31 Jul – 11 Aug 06
0379	Legal Clerk Course (080)	11 – 22 Sep 06
3760	Senior Officer Course (030)	9 – 13 Jan 06 (Jacksonville)
3760	Senior Officer Course (040)	27 Feb – 3 Mar 06
3760	Senior Officer Course (050)	15 –19 May 06
3760	Senior Officer Course (060)	26 – 30 Jun 06
3760	Senior Officer Course (070)	17 – 21 Jul 06 (Millington)
3760	Senior Officer Course (080)	28 Aug – 1 Sep 06
4046	Military Justice Course for SKA/Convening Authority/Shipboard Legalman (030)	10 – 21 Jul 06
Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (030)	17 Jan – 3 Feb 06
947H	Legal Officer Course (040)	27 Feb – 17 Mar 06
947H	Legal Officer Course (050)	8 – 26 May 06
947H	Legal Officer Course (060)	12 – 30 Jun 06
947H	Legal Officer Course (070)	14 Aug – 1 Sep 06
947J	Legal Clerk Course (030)	6 – 17 Feb 06
947J	Legal Clerk Course (040)	27 Feb – 10 Mar 06
947J	Legal Clerk Course (050)	17 – 28 Apr 06
947J	Legal Clerk Course (060)	8 – 19 May 06
947J	Legal Clerk Course (070)	12 – 23 Jun 06
947J	Legal Clerk Course (080)	14 – 25 Aug 06
3759	Senior Officer Course (030)	9 – 13 Jan 06 (Pendleton)
3759	Senior Officer Course (040)	13 – 17 Feb 06 (San Diego)
3759	Senior Officer Course (050)	3 – 7 Apr 06 (Bremerton)
3759	Senior Officer Course (060)	24 – 28 Apr 06 (San Diego)
3759	Senior Officer Course (070)	5 – 9 Jun 06 (San Diego)
3759	Senior Officer Course (080)	24 – 28 Jul 06 (San Diego)
3759	Senior Officer Course (090)	11 – 15 Sep 06 (Pendleton)
2205	CA Legal Assistance Course (010)	6 – 10 Feb 06 (San Diego)
4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalmen (010)	17 – 27 Jan 06

4. Air Force Judge Advocate General School Fiscal Year 2006 Course Schedule

Please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445) for information about attending the listed courses.

Air Force Judge Advocate General School Maxwell AFB, AL	
Course Title	**Dates**
Paralegal Apprentice Course, Class 06-B	9 Jan – 22 Feb 06
Trial & Defense Advocacy Course, Class 06-A	9 – 20 Jan 06
Total Air Force Operations Law Course, Class 06-A	20 – 22 Jan 06
Homeland Defense Workshop, Class 06-A	23 – 27 Jan 06
Environmental Law Course, Class 06-A	23 – 27 Jan 06
Claims & Tort Litigation Course, Class 06-A	30 Jan – 3 Feb 06
Reserve Forces Judge Advocate Course, Class 06-A	6 – 10 Feb 06
Legal Aspects of Sexual Assault Workshop, Class 06-A	8 – 10 Feb 06
Fiscal Law Course (DL) , Class 06-A	13 – 17 Feb 06
Judge Advocate Staff Officer Course, Class 06-A	13 Feb – 14 Apr 06
Paralegal Craftsman Course, Class 06-B	22 Feb – 31 Mar 06
Paralegal Apprentice Course, Class 06-C	3 Mar – 14 Apr 06
Accident Investigation Board Legal Advisors' Course, Class 06-A	19 – 21 Apr 06
Advanced Trial Advocacy Course, Class 06-A	24 – 28 Apr 06
Military Judges' Seminar, Class 06-A	25 – 28 Apr 06
Paralegal Apprentice Course, Class 06-D	24 Apr – 6 Jun 06
Military Justice Administration Course, Class 06-A	1 – 5 May 06
Reserve Forces Judge Advocate Course, Class 06-B	8 – 12 May 06
Advanced Labor & Employment Law Course, Class 06-A	8 – 10 May 06
Operations Law Course, Class 06-A	15 – 25 May 06
Negotiation & Appropriate Dispute Resolution Course, Class 06-A	22 – 26 May 06
Air National Guard Annual Survey of the Law (Class 06-A & B) (Off-Site)	2 – 3 Jun 06
Air Force Reserve Annual Survey of the Law (Class 06-A & B) (Off-Site)	2 – 3 Jun 06

Staff Judge Advocate Course, Class 06-A	12 – 23 Jun 06
Law Office Management Course, Class 06-A	12 – 23 Jun 06
Paralegal Apprentice Course, Class 06-E	19 Jun – 1 Aug 06
Environmental Law Update Course, Class 06-A	28 – 30 Jun 06
Computer Legal Issues Course, Class 06-A	10 – 14 Jul 06
Legal Aspects of Information Operations Law Course, Class 06-A	12 – 14 Jul 06
Reserve Forces Paralegal Course, Class 06-A	17 – 28 Jul 06
Judge Advocate Staff Officer Course, Class 06-C	17 Jul – 15 Sep 06
Paralegal Craftsman Course, Class 06-C	1 Aug – 26 Sep 06
Paralegal Apprentice Course, Class 06-F	14 Aug – 8 Sep 06
Trial & Defense Advocacy Course, Class 06-B	18 – 29 Sep 06

5. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the September 2005 issue of *The Army Lawyer*.

6. Phase I (Correspondence Phase), Deadline for RC-JAOAC 2007

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2007***, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in the year 2008. This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2007 JAOAC will be held in January 2008, and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2007). If the student receives notice of the need to re-do any examination or exercise after 1 October 2006, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2006 will not be cleared to attend the 2007 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

7. Mandatory Continuing Legal Education Jurisdiction 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	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
Florida**	Assigned month every three years
Georgia	31 January annually
Idaho	31 December, every third year, depending on year of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	Thirty days after program, hours must be completed in compliance period 1 July to June 30
Kentucky	10 August; completion required by 30 June
Louisiana**	31 January annually; credits must be earned by 31 December
Maine**	31 July annually
Minnesota	30 August annually
Mississippi**	15 August annually; 1 August to 31 July reporting period
Missouri	31 July annually; reporting year from 1 July to 30 June
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually; 1 July to 30 June reporting year
New Mexico	30 April annually; 1 January to 31 December reporting year
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually

North Dakota	31 July annually for year ending 30 June
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed and reported by last day of birth month each year
Utah	31 January annually
Vermont	2 July annually
Virginia	31 October Completion Deadline; 15 December reporting deadline
Washington	31 January triennially
West Virginia	31 July biennially; reporting period ends 30 June
Wisconsin*	1 February biennially; period ends 31 December
Wyoming	30 January annually

CURRENT MATERIALS OF INTEREST

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2004-2005)

Note: Due to funding constraints, there have been significant changes to this on-site schedule. This list is current as of 2 February 2006. Please confirm the course date with the listed-POCs before traveling to the on-site.

ATRRS No.	Dates	Location/Unit	Departments Assigned	POC
003	28-29 Jan 06	Seattle, WA 70th RRC	Administrative & Civil Law; Contract & Fiscal Law	LTC Lloyd Oaks (253) 301-2392 lloyd.d.oaks@us.army.mil
004	11-12 Feb 06	Miami, FL 174th LSO/12th LSO	Administrative & Civil Law; Criminal Law	MSG Timothy Stewart (305) 779-4022 tim.stewart@usar.army.mil
005	25-26 Feb 06	Draper, UT 115th En Grp UTARNG/ 87th LSO	Administrative & Civil Law; Criminal Law	CPT Daniel K. Dygert (115th En Grp) (435) 787-9700 (435) 787-2455 (fax) daniel.k.dygert@us.army.mil SFC Matthew Neumann (87th LSO) (801) 656-3600 (801) 656-3603 (fax) matthew.neumann@us.army.mil
006	4-5 Mar 06	Fort Belvoir, VA 10th LSO	Administrative & Civil Law; Criminal Law	CPT Eric Gallun (202) 514-7566 frederic.gallun@usdog.gov
007	11-12 Mar 06	San Francisco, CA 75th LSO	TCAP	LTC Burke Large (213) 452-3954 burke.s.large@us.army.mil
010	22-23 Apr 06	Indianapolis, IN INARNG	International & Operational Law; Contract & Fiscal Law	COL George Thompson (DSN) 369-2491 george.thompson@in.ngb.army.mil
011	22-23 Apr 06	Boston, MA 94th RRC	International & Operational Law; Contract & Fiscal Law	MAJ Angela Horne (978) 784-3940 angela.horne@usar.army.mil
012	6-7 May 05	Oakbrook, IL 91st LSO	International & Operational Law; Contract & Fiscal Law	MAJ Douglas Lee (312) 338-2244 (office) (630) 728-8504 (cell) (630) 375-1285 (home Douglas.lee1@us.army.mil
013	6-7 May 06	Columbia, SC 12th LSO	International & Operational Law; Contract & Fiscal	MAJ Lake Summers (803)413-2094 lake.summers@us.army.mil
014	19-21 May 06	Kansas City, MO 8th LSO/89th RRC	Criminal Law; Contract & Fiscal Law	COL Meg McDevitt SFC Larry Barker (402) 554-4400, ext. 227 mmcdevitt@bqlaw.com larry.r.barker@us.army.mil
015	20-21 May 06	Nashville, TN 139th LSO	Criminal Law; International & Operational Law	COL Gerald Wuetcher (502) 564-3940, ext. 259

2. The Judge Advocate General's School, U.S. Army (TJAGLCS) Materials Available through the Defense Technical Information Center (DTIC)

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $7, $12, $42, and $122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

**AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95.
**AD A301095	Government Contract Law Desk book, vol. 2, JA-501-2-95.
**AD A265777	Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

AD A384333	Soldiers' and Sailors' Civil Relief Act Guide, JA-260 (2000).
AD A333321	Real Property Guide—Legal Assistance, JA-261 (1997).
AD A326002	Wills Guide, JA-262 (1997).
AD A346757	Family Law Guide, JA 263 (1998).
AD A384376	Consumer Law Deskbook, JA 265 (2004).
AD A372624	Legal Assistance Worldwide Directory, JA-267 (1999).

AD A360700 Tax Information Series, JA 269 (2002).

AD A350513 The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (1998).

AD A350514 The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (1998).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).

**AD A360704 Uniformed Services Former Spouses' Protection Act, JA 274 (2002).

AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

AD A351829 Defensive Federal Litigation, JA-200 (2000).

AD A327379 Military Personnel Law, JA 215 (1997).

AD A255346 Reports of Survey and Line of Duty Determinations, JA-231 (2004).

**AD A347157 Environmental Law Deskbook, JA-234 (2002).

AD A377491 Government Information Practices, JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241 (2000).

AD A332865 AR 15-6 Investigations, JA-281 (1997).

Labor Law

AD A360707 The Law of Federal Employment, JA-210 (2000).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (1999).

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).

AD A302674 Crimes and Defenses Deskbook, JA-337 (1994).

AD A274413 United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522 Operational Law Handbook, JA-422 (2005).

* Indicates new publication or revised edition.
** Indicates new publication or revised edition pending inclusion in the DTIC database.

3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information of TJAGSA Publications Available Through the LAAWS XXI JAGCNet, see the September 2005 issue of *The Army Lawyer*.

5. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

6. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mrs. Dottie Evans, The Judge Advocate General's School, U.S. Army, ATTN: CTR-MO, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3278, commercial: (434) 971-3278, or e-mail at Dottie.Evans@hqda.army.mil.

Individual Paid Subscriptions to *The Army Lawyer*

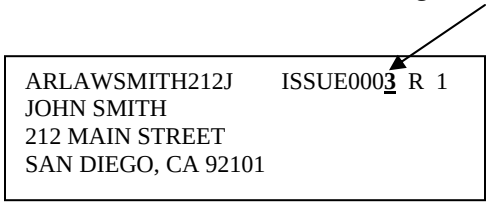
Attention Individual Subscribers!

The Government Printing Office offers a paid subscription service to *The Army Lawyer*. To receive an annual individual paid subscription (12 issues) to *The Army Lawyer*, complete and return the order form below (photocopies of the order form are acceptable).

Renewals of Paid Subscriptions

When your subscription is about to expire, the Government Printing Office will mail each individual paid subscriber only one renewal notice. You can determine when your subscription will expire by looking at your mailing label. Check the number that follows "ISSUE" on the top line of the mailing label as shown in this example:

A renewal notice will be sent when this digit is 3.



The numbers following ISSUE indicate how many issues remain in the subscription. For example, ISSUE001 indicates a subscriber will receive one more issue. When the number reads ISSUE000, you have received your last issue unless you renew.

You should receive your renewal notice around the same time that you receive the issue with ISSUE003.

To avoid a lapse in your subscription, promptly return the renewal notice with payment to the Superintendent of Documents. If your subscription service is discontinued, simply send your mailing label from any issue to the Superintendent of Documents with the proper remittance and your subscription will be reinstated.

Inquiries and Change of Address Information

The individual paid subscription service for *The Army Lawyer* is handled solely by the Superintendent of Documents, not the Editor of *The Army Lawyer* in Charlottesville, Virginia. Active Duty, Reserve, and National Guard members receive bulk quantities of *The Army Lawyer* through official channels and must contact the Editor of *The Army Lawyer* concerning this service (see inside front cover of the latest issue of *The Army Lawyer*).

For inquiries and change of address for individual paid subscriptions, fax your mailing label and new address to the following address:

United States Government Printing Office
Superintendent of Documents
ATTN: Chief, Mail List Branch
Mail Stop: SSOM
Washington, D.C. 20402

United States Government INFORMATION
PUBLICATIONS ★ PERIODICALS ★ ELECTRONIC PRODUCTS

Army Lawyer and Military Review SUBSCRIPTION ORDER FORM

Order Processing Code: 5937

Easy Secure Internet: bookstore.gpo.gov

Toll Free: 866 512-1800
Phone: 202 512-1800
Fax: 202 512-2104

Mail: Superintendent of Documents
PO Box 371954
Pittsburgh, PA 15250-7954

☐ **YES,** enter my subscription(s) as follows:

_____subscription(s) of the *Army Lawyer* (ARLAW) for $50 each ($70 foreign) per year.

_____subscription(s) of the *Military Law Review* (MILR) for $20 each ($28 foreign) per year. The total cost of my order is $_____.

Prices include first class shipping and handling and is subject to change.

Check method of payment:

Personal name (Please type or print)

Company name

Street address City, State, Zip code

Daytime phone including area code

Purchase Order Number

☐ Check payable to Superintendent of Documents

☐ SOD Deposit Account ☐☐☐☐☐☐ – ☐

☐ VISA ☐ MasterCard ☐ Discover/NOVUS ☐ American Express

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

☐☐☐☐ (expiration date)

Thank you for your order!

Authorizing signature

11/02

By Order of the Secretary of the Army:

PETER J. SCHOOMAKER
General, United States Army
Chief of Staff

Official:

SANDRA L. RILEY
Administrative Assistant to the
Secretary of the Army
0535402

Department of the Army
The Judge Advocate General's School
U.S. Army
ATTN: JAGS-ADA-P
Charlottesville, VA 22903-1781

PERIODICALS