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Contract and Fiscal Law Developments of 2006—The Year in Review

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CONTRACT AND FISCAL LAW DEVELOPMENTS OF 2006—THE YEAR IN REVIEW

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FOREWORD

Welcome to this year's Contract and Fiscal Law *Year in Review*! 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 a variety of procurement and fiscal subject matter areas. While the *Year in Review* is always helpful in training new and old alike, this year's edition is a great place to start if you are relatively new to government and contract and fiscal law because it is a blend of basic procurement principals, new rulings, and guidance. Whether you are a member of the Armed Forces procurement society or another governmental agency, there are lessons for everyone. This edition is full of worthwhile teaching points and reinforcements, starting with a Court of Federal Claims case that provides a history of agency authority. There are other great "teaching cases" on unduly restrictive specifications, lack of advanced planning, the Federal Supply Schedule (FSS), and what constitutes notice of an award.

So "What's new?," you may ask. One of the most significant new developments is the creation of the new Civilian Boards of Contract Appeals, which is covered in our Contract Disputes Act section. For those of us in the military, the change has no direct effect on us. For procurement associates working in non-Department of Defense (DoD) government contract positions, the move to a consolidated board marks a change of where their claims will be heard. There is also new guidance from the DoD and the services on such issues as increasing the ordering period for task order or delivery orders, and award-and incentive-fee contracts. There is also new guidance concerning the FSS and whether or not the FSS is a mandatory source for purchases. Not to be outdone, there are new developments in the area of fiscal law as well; whether you are interested in the new authorization for DoD to accept conference fees or the new Government Accountability Office Anti-Deficiency Act Violation webpage, there are positive reinforcements to your fiscal law teaching.

The *Year in Review* was previewed at the 2006 Contract and Fiscal Law Symposium which was held at the Judge Advocate General's Legal Center and School from 6-9 December 2006. This year's Symposium brought in some new faces and new topics to the Judge Advocate General's Legal Center and School that sparked wonderful discussions of the blended workforce and organizational conflict of interest. In addition to an array of panel discussions from chief trial attorneys and acquisition and industry personnel on fiscal law issues, the attendees heard from the Services Acquisition Reform Act (SARA) Advisory Panel, the Special Inspector General for Iraq Reconstruction's office, and Mr. Vern Edwards who spoke on the acquisition challenges. The week ended with the Honorable Kenneth J. Krieg, Under Secretary of Defense for Acquisition, Technology and Logistics delivering our Cuneo Lecturer and Mr. T. Christian Miller delivering the Creekmore Lecturer. Professor Steve Schooner, the perennial favorite, closed the Symposium with a look back at procurement trends and where we go from here.

In last year's foreword, I encouraged practitioners to help share their wealth of knowledge with the young attorneys throughout your organizations, something the Army worked to do in several ways. First, the Army created an informal reachback group to help young judge advocates work through contract and fiscal problems they encounter. The reachback group primarily focuses on questions from deployed Judge Advocates, promising to get proposed courses of action back with seventy-two hours; however the group helps anybody with a question. Naturally, questions from a person deployed in support of our troops takes precedence.

The second change that the Army undertook in recognizing a contract and fiscal law emphasis throughout the Corps was the creation of the Contract and Fiscal Law Division (KFLD) at The Office of the Judge Advocate General. On 17 July 2006, Major General Scott Black, The Judge Advocate General of the U.S. Army, authorized a change that combined the former Contract Appeals Division with a new actions branch, to act as a "strategic hub" for contract and fiscal law for the Judge Advocate General's Corps. The new division is headed by Colonel Sam Rob and all assets are collocated at the United States Legal Services Agency in Balston, Virginia.

Third, the Army is looking for ways to train and mentor new contracts attorneys. Several young judge advocates volunteered for training under the mentorship of trusted contract and fiscal law attorneys who have been practicing in this area for years. The goal is to prepare these captains to be contract attorneys at divisions and corps before they deploy. These

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* The Contract and Fiscal Law Department is composed of seven judge advocates (Lieutenant Colonel Ralph J. Tremaglio, III; Lieutenant Michael L. Norris; Major Michael S. Devine; Major Andrew S. Kantner, Major Marci A. Lawson, USAF; Major Mark Ries; and Major Jennifer C. Santiago) and our Administrative Assistant, Ms. Dottie Gross. Each officer has contributed sections to this work. The Department would like to thank our outside contributing authors: Major Danielle Conway-Jones, Major Art Coulter, Ms. Margaret Patterson, Lieutenant Colonel (P) John Siemietkowski, and Lieutenant Colonel Kathy White. Their time and effort continue to make this publication what it is. Last, but not least, the issue would be disharmonious without the diligent fine-tuning by the School's resident footnote guru, Mr. Chuck Strong. Thank you all!

captains are training with procurement attorneys in Germany, Fort Bragg, and Fort Lewis, and their experiences will provide us important feedback on how to make the program even better.

Last, the Judge Advocate General's Legal Center and School has reinstituted a spring Contract Attorneys Course (CAC). Unlike the summer offering of nine and a half days, the spring CAC will be seven days, running from Monday through the following Tuesday. The curriculum is almost identical to the summer CAC, but shifts operational-oriented classes to the 3rd annual Operational Contracting Course, which starts immediately following the CAC. This year's Operational Contracting Course will begin on Wednesday and will last two-and-a-half days. This two-week combined schedule will give more attorneys access to the basic contract attorneys course and afford "newbies" the opportunity to learn the basics of contracting before attending the more advanced Operational Contracting Course.

Significantly, the 2006 Contract and Fiscal Law Symposium focused on several speakers, such as Secretary Krieg (Under Secretary of Defense for Acquisition, Technology, and Logistics), Vern Edwards, and Steve Schooner. The aging procurement workforce and the gap the government will suffer when the present force retires was brought to the attention of all attendees. The Army JAG Corps is attempting to address this potential shortfall through the measures listed above, but what about your agency? I encourage folks to actively plan how the government is going to find, recruit, and train the next generation of procurement workforce. As a final note, I'd like to publicly acknowledge Major Andrew Kantner's contribution to the Year in Review. For the past two years, Andrew has been the editor of the edition and has kept everyone focused and on task. He will be leaving the department this coming summer and we wish him well. There is much to be gleamed from this year's edition, so enjoy.

Lieutenant Colonel Ralph J. Tremaglio, III

CONTRACT FORMATION

Authority

The History of Apparent and Actual Authority Revealed

In *Brunner v. United States*,[1] the Court of Federal Claims (COFC) provided a detailed explanation of authority and analyzed when a government representative's action will bind the government. In its opinion, the COFC thoroughly examined the history of agency authority and the basis for prior decisions.

Brunner, a "cooperating individual" for the Drug Enforcement Administration (DEA),[2] testified that he entered into an agreement with the DEA in which he was orally promised the following compensation package: "(1) a salary of $2,000 per month, plus expenses; (2) an award of $2,500 per defendant indicted by the government as a result of his cooperation; (3) an award of twenty-five percent of any assets seized as a result of his work; and (4) relocation expenses for his family."[3] The record indicates that Brunner was paid in excess of $13,000. Brunner, however, asserts that he should have been paid a much higher amount in accordance with the original agreement.[4] The DEA "contends that, as a matter of law, [Brunner] may not enforce his various agreements—if any existed—because no one who dealt with him was authorized to contract on behalf of the DEA, and anyone purporting to do so was without authority."[5]

The COFC explained that the two parties' motions "concern[ed] the existence and validity of an alleged oral contract."[6] To prove the existence and validity of an express contract, "[t]he party alleging a contract must show a mutual intent to contract including an offer, and acceptance and consideration."[7] The elements necessary to prove the existence of an oral, or implied-in-fact, contract are the same.[8] "The difference between an express and an implied-in-fact contract is that the 'lack of ambiguity in offer and acceptance' . . . or meeting of the minds . . . is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding."[9]

When the government is a party to the contract, one additional element must be proven: Brunner must prove that the government representative upon whom it was relying had "'actual authority' to bind the government in contract."[10] So, unlike other contracts not involving the government as a party, "even if a government employee purports to have authority to bind the government, the government will not be bound unless the employee *actually* has that authority."[11] Actual authority may be express or implied, "as opposed to the apparent authority that enables agents to bind other entities," in contracts not involving the government.[12] The COFC stated further that even though this line of reasoning is well-based in case law, "the meaning of this rule, its reason for being, and its practical consequences are all far from clear."[13]

The COFC then examined and recited the tenets of agency law that form the basis for authority in government contracts. The COFC provided the following explanation of the *actual* authority requirement in order to bind the government:

> (1) Authority can be created either expressly or by implication; (2) public entities act publicly, using the same means to communicate the grant of authority to their agents that they use to communicate this to third parties; (3) apparent authority describes the situation when a principal has placed restrictions on an agent

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[1] Brunner v. United States, 70 Fed. Cl. 623 (2006).

[2] *Id*. at 625.

[3] *Id*.

[4] *Id*. at 626.

[5] *Id*.

[6] *Id*.

[7] *Id*. (citing Trauma Svc. Grp. v. U.S., 104 F.3d 1321, 1324 (Fed. Cir. 1997) (citing City of El Centro v. U.S., 922 F.2d 816, 820 (Fed. Cir. 1990))).

[8] *Id*.

[9] *Id*. at 626-27 (citing City of El Centro v. U.S., 922 F.2d at 820; Baltimore & Ohio R.R. Co. v. U.S., 261 U.S. 592, 597 (1923)).

[10] *Id*. at 627.

[11] *Id*. (citing Tracy v. U.S., 55 Fed. Cl. 679, 682 (2003) (citing Humlen v. U.S., 49 Fed. Cl. 497, 503 (2001)) (emphasis added).

[12] *Id*. (citing e.g., H. Landau & Co. v. U.S., 886 F.2d 322, 324 (Fed Cir. 1989)).

[13] *Id*.

> that are not known to a third party; (4) restrictions on government agents are accomplished in the open, through laws and regulations; (5) everyone, including contractors, are supposed to know the laws and regulations of our government; and thus (6) the concept of "apparent authority" is often inapt when dealing with the government, insofar as the only cognizable restrictions on the agent's authority are deemed known to third parties, shattering any appearance of authority.[14]

The court explains that since the government is a "public entity," its representatives presumably act publicly, and individuals dealing with the government are presumed to understand the extent of authority of a government agent.[15] Before binding the government, an official must have more than apparent authority, unlike a private agent whose conduct is not regulated to the extent of a government employee.[16] While the COFC opinion does not change the rules regarding the requirement that a government representative have actual authority in order to bind the government, it certainly provides a detailed and colorful history of the concepts surrounding authority.

Major Jennifer C. Santiago

[14] *Id*. at 629.

[15] *Id*.

[16] *Id*.

While the Transportation Security Administration Falls under the Department of Homeland Security, and the GAO Has Jurisdiction over DHS Procurements, the GAO Does Not Have Jurisdiction over TSA Procurements Because of the Administration Acquisition Management System

In *Knowledge Connections, Inc.*,[1] the Government Accountability Office (GAO) confirmed that while the Transportation Security Administration (TSA) falls within the Department of Transportation (DOT), the GAO does not have jurisdiction over TSA procurements.[2] Knowledge Connections protested a TSA solicitation for reservation center support services.[3] The Aviation and Transportation Security Act (ATSA)[4] established the TSA as an agency under the Department of Transportation.[5] The Homeland Security Act of 2002[6] transferred the TSA to Department of Homeland Security (DHS), but did not effect the specific exemption of the Federal Aviation Administrations Acquisition Management System (AMS) from GAO bid protest jurisdiction.[7]

The GAO had previously determined that TSA solicitations and contracts for services did remain part of their jurisdiction because the ATSA limited the bid protest exemption to procurements for equipment, supplies and services.[8] In 2005, Congress specifically stated that "[f]or fiscal year 2006 and thereafter, the acquisition management system of the [TSA] shall apply to the acquisitions of services, equipment, supplies, and materials.[9] Therefore, the GAO dismissed the protest.[10]

Is It Reasonable to Expect the Contracting Officer to Read Information Provided for a Pending Procurement?

Europe Displays, Inc., successfully protested a Federal Transit Administration's (FTA) sole source procurement to Connexion for the design, construction, maintenance, and dismantling of a pavilion at the Mobility and City Transport Exhibition held in Rome, Italy, on the grounds that the contracting officer's negligence can erode the grounds for a sole source procurement.[11] The FTA first misinterpreted the exhibition requirements, and then attempted to justify the sole source selection under a misguided theory.[12]

The FTA published an announcement on FedBizOpps that it intended to negotiate with Connexion on a sole source basis for the design and construction of a U.S. pavilion at the biannual exhibition.[13] Believing that the exhibition required the use of a particular contractor, the FTA based its sole source selection on the "only one responsible source" exception to competition.[14] The notice went on to state that interested potential sources could submit a written response to the agency "no later than 15 days" after publication.[15]

Europe Displays, Inc. submitted a proposal on day fourteen, within the time limit placed on FedBizOpps. Relying on the government's misinterpretation of the exhibition requirements, the contracting officer stated the agency would not "give the

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[1] Comp Gen. B-298172, Apr. 12, 2006, 2006 CPD ¶ 67.

[2] *Id.*

[3] *Id*. at 1.

[4] 49 U.S.C. §114 (2004 Supp.).

[5] *Knowledge Connections, Inc.*, 2006 CPD ¶ 67, at 1.

[6] Pub. L. No. 107-296, 116 Stat. 2135, 2173 (2002).

[7] *Knowledge Connections*, 2006 CPD ¶ 67, at 1.

[8] *Id.* (citing Resource Consultants, Inc., Comp. Gen. B-290163, B-290163.2; June 7, 2002, 2002 CPD ¶ 94, at 5).

[9] Pub. L. No. 109-90, 119 Stat. 2064 (2006).

[10] *Knowledge Connections*, 2006 CPD ¶ 67, at 1.

[11] Europe Displays, Inc., Comp. Gen. B-297099, Dec. 5, 2005, 2005 CPD ¶ 214.

[12] *Id.*

[13] *Id.* at 2.

[14] *Id. See* U.S. GEN. SVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 6.302-1(2) [hereinafter FAR], and 41 U.S.C.S. § 253(c)(1) (LEXIS 2006).

[15] *Europe Displays*, 2005 CPD ¶ 214, at 2.

firm an opportunity to compete."[16] Initially the agency was under the mistaken impression that the exhibition organizer required the participants to use Connexion to build and maintain the exhibitions.[17] The agency believed this in spite of the fact that the exhibitor's handbook specifically addressed custom-designed stands and the thirty days required for custom project approvals.[18] By the time the agency realized its mistake, the exhibition was less than thirty days away and the organizers denied FTA's request for a waiver of the thirty-day deadline.[19] The FTA then issued a justification and approval (J&A) for a sole source award to Connexion based upon the exception allowing award of a follow-on contract for the continued development of a major system or highly specialized equipment when it is likely that an award to a source other than the incumbent would result in unacceptable delays in fulfilling the requirement.[20]

Europe Displays, Inc. filed an agency level protest which the agency denied.[21] In the interim, the agency determined that it was in its best interest to continue performance with the contract as awarded.[22] Europe Displays, Inc. then filed a protest with the GAO alleging that the J&A did not support award to Connexion and that the agency had no reasonable basis to determine that the awardee was the only firm permitted to design and construct the exhibits.[23] Unfortunately for Europe Displays, Inc., by the time the protest was heard, the protested procurement had been fully performed.[24]

In response to the protest, the agency acknowledged that the authority cited in the J&A did not apply to this procurement, and that Europe Displays, Inc. was qualified and capable of performing the contract.[25] Instead, the agency claimed that the acquisition was conducted under the simplified acquisition procedures and, therefore, *FAR part 13* applied.[26] While the GAO agreed, it reminded the agency that even under the simplified acquisition procedures, it was still required to obtain competition "to the maximum extent practicable."[27] While an agency may solicit from a sole source, the contracting officer has to determine that only one source is reasonably available.[28] In this case the agency did not clearly identify the basis of its belief that the exhibition organizer required participants to use Connexion.[29] In fact, the belief was not reasonable given that the information in the handbook specifically addressed custom designs there was no basis for a sole source award.[30] The GAO sustained the protest, but since the contract was fully performed, awarded Europe Displays, Inc. its costs and attorneys fees.[31]

The Reverse Sole-Source Bid Protest

In *Metro Home Medical Supply, Inc*.,[32] the contractor protested a request for proposals (RFP) for home oxygen supplies and services for patients of seven Veterans Affairs (VA) Hospitals claiming that the agency should have sole-sourced the requirement to Metro, a certified Historically Underutilized Business Zone (HUBZone).[33] The RFP provided for a cascading

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[16] *Id.*

[17] *Id*.

[18] *Id.* at 4.

[19] *Id.* at 2.

[20] *Id. See also* FAR, *supra* note 14, at 6.302-1(a)(2)(ii)(B) and 41 U.S.C.S. § 253(d)(1)(B) (2000).

[21] *Europe Displays,* 2005 CPD ¶ 214, at 3.

[22] *Id*.

[23] *Id.*

[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] *Id.* (citing Info. Ventures, Inc., Comp. Gen. B-293541, Apr. 9, 2004, 2004 CPD ¶ 81, at 3).

[28] *Id.* at 3-4 (citing FAR, *supra* note 14, at 13.106-1(b)(1)).

[29] *Id.* at 4.

[30] *Id.* at 5.

[31] *Id*.

[32] Comp Gen. B-297262, Dec. 8, 2005, 2005 CPD ¶ 220.

[33] *Id.* at 1.

set-aside award process.[34] For the facility in Detroit and three other locations, if two or more responsible HUBZone small businesses responded and award would be at a fair market price, the VA would award to a HUBZone small business.[35] For the remaining three locations and any of the previously mentioned facilities not resulting in award to a HUBZone small business, if technically acceptable competitive offers were received from two or more responsible small businesses, the VA would award to a small business.[36] If award was not made to either HUBZone or small businesses under the conditions previously described, then award would be made on the basis of full and open competition, regardless of that contractor's size or socio-economic status.[37]

Metro protested to the GAO three days prior to bid closing, claiming that the Detroit location should be removed from the cascading set-aside process and awarded to Metro on a sole source basis.[38] Metro claimed that the VA failed to comply with the goals for HUBZone small businesses that it had set out for itself and, therefore, the agency should sole-source the procurement to remedy their noncompliance.[39]

The agency stated that it could not award the Detroit contract sole-source because the requirements of *FAR part 19.1306* were not satisfied. Neither the requirement for only one HUBZone business capable of satisfying the requirement nor the contract price limitation of $3 million could be met.[40] The Small Business Administration also pointed out that the language at *FAR part 19.1306* is discretionary, not mandatory.[41] In the end, the GAO denied the protest.[42]

Requirement to Adequately Disclose the Desired Services?

In *M.D. Thompson Consulting, LLC; PM Tech, Inc.*,[43] the GAO sustained a protest where an agency failed to adequately disclose the services required and then awarded a sole source bridge contract.[44] It makes it hard to compete for a procurement, or even to know whether to compete, when the synopsis does not accurately reflect what the agency seeks. In a protest of the Department of Energy's (DOE) nine-month extension of a sole-source "bridge contract," two firms alleged that they had been excluded for failing to provide a requirement that was not in the synopsis.[45] Two small businesses, M.D. Thompson Consulting, LLC, and PMTech, Inc., argued that the DOE failed to properly synopsize its requirement to allow for meaningful responses from prospective bidders, thereby making DOE's sole-source contract improper.[46]

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[34] *Id.* at 1-2. Cascading award procurements an award preference order for socio-economic qualifying businesses allowing contracting officers to consider and award to small business offerors before non-preferenced firms during the evaluation.

[35] *Id.*

[36] *Id.* at 2.

[37] *Id*.

[38] *Id.*

[39] *Id.* Metro did not, however, protest the use of the cascading set-aside award process.

[40] *Id.* FAR part 19.1306 states: A participating agency contracting officer may award contracts to HUBZone small business concerns on a sole source basis without considering small business set-asides . . . provided—

> (1) Only one HUBZone small business concern can satisfy the requirement:
>
> (2) Except as provided in paragraph (c) of this section, the anticipated price of the contract, including options will not exceed-
>
> (i) $5,000,000 for a requirement within the North American Industry Classification System (NAICS) code:
>
> (ii) $3,000,000 for a requirement within any other NAICS code
>
> (3) The requirement is not currently being performed by a non-HUBZone small business concern;
>
> (4) The acquisition is greater than the simplified acquisition threshold
>
> (5) The HUBZone small business concern has been determined to be a responsible contractor with respect to performance.

FAR, *supra* note 14, at pt. 19.1306.

[41] Comp Gen. B-297262, Dec. 8, 2005, 2005 CPD ¶ 220, at 5.

[42] *Id*.

[43] Comp. Gen. B-297616, B-297616.2; Feb. 14, 2006, 2006 CPD ¶ 41, at 1.

[44] *Id.*

[45] *Id.*

[46] *Id*.

The DOE published a pre-synopsis notice on FedBizOpps stating its intent to extend the contract with CSC Systems & Solutions LLC for "unspecified services" for up to nine months.[47] Both M.D. Thompson and PMTech submitted capability statements.[48] The agency rejected both in part because the firms did not propose personnel experienced in "isotope separation technology," although such a requirement was not apparent from the synopsis.[49]

The GAO sustained the protest stating that the *FAR* requires publication of a synopsis of sole-source procurements unless a regulatory exception applies. In this case, no exception applied.[50] The GAO stated that the "synopsis must provide an 'accurate description' of the property or services to be purchased and must be sufficient to allow a prospective contract to make an informed business judgment as to whether to request a copy of the solicitation."[51] In this case, the GAO determined that the agency failed to meaningfully describe the requirement.[52] The synopsis identified the contract being extended and that it involved "critical, highly specialized technical and administrative support," but did not provide any details concerning specifics needed for successful performance.[53] Instead, the synopsis in this case discouraged responses.[54] Since the synopsis inadequately described the services, the GAO sustained the protest.[55]

Lack of Advanced Planning Not an Authorized Exception to the Competition in Contracting Act (CICA)

The GAO sustained a VA sole source procurement of ophthalmology equipment for several of its facilities, finding that the award was improper where the awardee was determined to be the only responsible source, but the capabilities of other interested firms were not considered.[56] Bausch & Lomb, Inc. protested the VA sole source procurement of ophthalmology equipment used in cataract procedures. The VA based the sole source procurement on unusual and compelling urgency exception of the CICA.[57]

The ophthalmology department at the Albany VA Medical Center identified a need to replace the machines used for cataract surgery after several patients developed eye infections from improperly cleaned machines.[58] Since the staff was familiar with one brand name machine from their private practice experiences and the current machines were outdated and needed replacing, the Chief of Ophthalmology recommended in a memorandum the Infiniti machine produced by a company named Alcon. [59] That same day the VA publicized its intent to sole source the contract to Alcon and invited response by 1630 that afternoon.[60] Later that day, the VA purchased the Alcon machines, despite knowing that the protester and a third firm expressed an interest in competing for the procurement.[61]

The agency's J&A contended that urgent circumstances required the sole source purchase of the Alcon machine for the Albany and Syracuse VA hospitals.[62] According to the J&A, the Alcon machines were the only ones which would meet the needs of the government because its equipment was "state of the art" and other machines lacked the "advanced design features," referring in particular to a "torsional phaco handpiece" and "aqualase technology."[63]

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[47] *Id.* at 2.

[48] *Id.*

[49] *Id.* at 3.

[50] *Id.* at 4 (citing to 15 U.S.C.S. § 637(e) (LEXIS 2006), and FAR, *supra* note 14, at 5.101(a)(1) and 6.302-1(d)(2)).

[51] *Id.* at 4.

[52] *Id.* at 5.

[53] *Id*.

[54] *Id.* at 6.

[55] *Id.*

[56] Bausch & Lomb, Inc., B-298444, 2006 U.S. Comp. Gen. LEXIS 147 (Sept. 21, 2006), at 1.

[57] *Id.*

[58] *Id*.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.* at 2.

[63] *Id.*

The VA relied on anecdotal evidence from one hospital that had not replaced their cataract machine in twelve years that the machine had proven unreliable in the operating room.[64] The J&A went on to state that other vendors did not have updated technology.[65]

Bausch & Lomb alleged that the J&A did not justify a sole source award, but revealed a lack of advanced planning.[66] The company went on to state that the agency's determination that only Alcon's machines could meet the requirement was inaccurate because its cataract machines were the "most advanced system on the market."[67]

While the GAO recognized an important need for a replacement machine, at least at the hospital where patients were getting eye infections, the agency failed to reasonably demonstrate why a limited competition including those firms expressing an interest was unreasonable.[68] Bausch & Lomb responded to the agency's request, yet there was no evidence that the VA ever considered the response.[69] Therefore, the GAO found the sole source award unjustified when the agency failed to consider the equipment of other interested vendors.[70]

When Ordering Off the Federal Supply Schedule (FSS) the Question Is Not "Is the vendor willing to provide the services sought?" But "Are the services/positions offered actually included on the FSS Contract, as interpreted?"

In a protest where Tarheel Specialties challenged its exclusion from a procurement, the GAO found that the awardee was not qualified and should have been excluded also.[71] The protest revolved around services to support the DHS Immigration and Customs Enforcement (ICE). The RFP informed potential contractors that the agency intended to award a competitive task order to an offeror who had a current Federal Supply Schedule (FSS) with the General Services Administration (GSA) which included each of the applicable labor categories listed, and provided the best value to the government.[72] The ICE would make the best value determination based off of "three evaluation factors: demonstrated technical capability, past performance/experience, and price (including discount terms)."[73] The ICE issued the RFP to the incumbent (USIS) and to the protester (Tarheel), both who held FSS schedule contracts for law enforcement, security, and facility management systems.[74]

After entering discussions with both firms about their proposals, the agency determined that Tarheel's lower-priced proposal unacceptable because "none of the labor categories in the PWS (Performance Work Statement) were mapped to the positions listed in Tarheel's schedule contract."[75] Tarheel submitted a protest, claiming its proposal was wrongfully rejected.[76] Based upon its conversations with the GSA, Tarheel believed that the positions did not need to be in the present GSA contract, just added later as new categories on the FSS contract after award.[77] In a supplemental protest filed after receipt of the agency report, Tarheel alleged that it had not been treated equally because USIS's FSS contract also lacked the labor categories required by the RFP.[78]

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[64] *Id.*

[65] *Id*.

[66] *Id*.

[67] *Id.*

[68] *Id.* at 3.

[69] *Id.*

[70] *Id.*

[71] Tarheel Specialties, Inc., Comp. Gen. B-298197, B-298197.2, July 17, 2006, 2006 CPD ¶ 151.

[72] *Id.* at 2.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 3.

[76] *Id*.

[77] *Id*.

[78] *Id*.

In sustaining the protest, the GAO determined that while Tarheel's proposal did not adequately list or map all the labor categories to their FSS contract, neither did USIS.[79] Therefore, "USIS's proposal should have been regarded as unacceptable."[80] The contractor failed to explain why labor categories in the RFP were "within the scope of USIS's FSS contract." [81] The DHS maintained that the descriptions were "sufficiently similar" to those required in the RFP.[82] The GAO stated that "[w]hen a 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 is seeking but whether the services or positions offered are actually included on the vendor's FSS contract, as reasonably interpreted."[83] The Administrative Specialist-Level II position listed on USIS's FSS contract did not match the attributes and responsibilities to the three positions in the RFP.[84] "The mere fact that some of the duties of the RFP required positions were administrative in nature is an insufficient basis" to map the positions to the Administrative Specialist position.[85]

Notice in DefenseLINK Does Not Equal Notice on FedBizOpps

In *Worldwide Language Resources, Inc; SOS International Ltd.*,[86] the GAO sustained a protest against the U.S. Air Force (USAF) challenging its sole source award of bilingual-bicultural advisors to Russian and Eastern European Partnership, Inc. (REEP) doing business as Operational Support Services, Inc. (OSS). The USAF attempted to justify its sole source procurement under the statutory exception to the Competition in Contracting Act (CICA) for "unusual and compelling urgency" or as "only one responsible source."[87]

First, the GAO denied an agency attempt to have protests deemed untimely. Then, the GAO found that DefenseLINK is not designated by statute or regulation as the public medium for announcing procurements, and therefore publishing solely on DefenseLINK was not acceptable.[88]

Then, the GAO addressed the sole source procurement. The USAF attempted to sole-source two contracts to OSS for $10.7 million and $34.5 million respectively to support the Civil Affairs Command mission with Multinational Forces-Iraq (MNF-I).[89] Each contract called for "50-75 bilingual-bicultural advisor-subject matter experts (BBA-SME)" who could speak English and Iraqi dialect "who are committed to a democratic Iraq."[90] The requirement evolved from a previous contract that the Iraqi Reconstruction and Development Council (IRDC) had with Science Applications International Corporation (SAIC).[91] When the Coalition Provisional authority dissolved in June 2004, so did the IRDC. However, during the next month the deputy secretary of defense determined that the success of the war effort relied on these BBA-SMEs to help the country establish its constitutional government and made a determination to contract for BBA-SMEs.[92]

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[79] *Id.*

[80] *Id.*

[81] *Id.* at 4.

[82] *Id.* at 5.

[83] *Id. See also* Am. Sys. Consultation, Inc., Comp Gen B-294644, Dec. 13, 2004, 2004 CPD ¶ 247.

[84] *Tarheel Specialties, Inc.*, 2006 CPD ¶ 151, at 8.

[85] *Id*.

[86] Comp. Gen. B-296984, B-296984.2, B-296984.3, B-296984.4, B-296993, B-296993.2;,B-296993.3, B-296993.4, Nov. 14, 2005, 2005 CPD ¶ 206.

[87] *Id*. *See also* FAR, *supra* note 14, pts. 6.302-2 and 6.302-1. The agency also unsuccessfully attempted to have the protests dismissed as untimely because the contract award was announced on www.DefenseLink.mil, the DoD's official website. Worldwide Language Resources, Inc; SOS Int'l Ltd, Comp. Gen. B-296984, B-296984.2, B-296984.3, B-296984.4, B-296993, B-296993.2, B-296993.3, B-296993.4, Nov. 14, 2005, 2005 CPD ¶ 206.

[88] *Id.* at 1-2. To compare constructive notice of postings on DefenseLINK to the constructive notice the GAO recognized for Commerce Business Daily or the FedBizOpps website is unfair since CBD and now FedBizOpps are expressly designated by statute and regulation as the official public medium for providing public notice, where DefenseLINK is not. The constructive notice doctrine imputes knowledge without regard to actual knowledge. The statute tells a prospective bidder where to look as the Government point of entry (GPE). DefenseLINK is not a GPE. *Id.* at 9.

[89] *Id.* at 2. The contracts were awarded to OSS on 3 December 2004 and on 29 July 2005, respectively. *Id*.

[90] *Id.* The services included advising government ministers, planning for and implantation of elections, drafting of constitutional documents, advising neighborhood, municipal and national councils and public services, training of security forces and details, translation and interpretation of conversations, documents an cultural matters in support of democratic objectives. *Id*.

[91] *Id.* at 3.

[92] *Id*.

Originally, the USAF attempted to compete the contract through the Air Force's Center for Environmental Excellence's (AFCEE) global engineering, integration, and technical assistance (GEITA) contract.[93] Five months later, the Office of the Secretary of the Air Force cancelled the action when it determined that the required service did not fit within the AFCEE's charter.[94] The contract action then fell to the Commander for the 11th Contracting Squadron at Bolling Air Force Base, Washington, who perceived significant pressure coming from Office of the Secretary of Defense (OSD) to meet the BBA-SME requirement.[95]

The 11th Contracting Squadron decided to sole-source the contract to OSS "[b]ecause there was no way to competitively go out and get that effort done in a way that probably wouldn't result in a minimum four to six month slip of the schedule, maybe longer. . . ." [96] The J&A cited 10 U.S.C. § 2304(c)(2) and *FAR part 6.302-2* (unusual and compelling circumstances) as the authority because the "OSS is the only known contractor who is in the position to provide deployed BBAs to Iraq in time to support the Iraqi national elections in January 2005."[97] The J&A claimed that there was not sufficient time to compete the requirement in order to meet the 1 December 2004 deadline for the contract and that the agency could not locate an existing contract vehicle to support the requirement. [98] Finally, the J&A stated that the requirement was for twelve months with no follow-on contract expected but if a similar requirement arose they would conduct a market research.[99]

By late January or early February, OSS began performing and was producing positive feedback to the OSD.[100] In May 2005 the Deputy Secretary of Defense approved an expansion of the program to two hundred individuals and extended the contract through June 2006.[101] When the OSD went back to the contracting activity to expand the program, there was a problem. Awarding the contract in June 2005 was not possible because full and open competition would take a minimum of six to eight months to coordinate and select an awardee.[102] The only option, according to the contracting activity, was for the OSD to "conduct adequate market research to certify that only one source can provide the required service without significant duplication of cost and loss of schedule."[103] Despite this exchange, the original J&A, approved by the USAF, cited "urgent and compelling needs" as the justifying exception, and stating that without this contract the missions in Iraq could not be performed.[104] The J&A claimed that "OSS is the only contractor who is capable of meeting the government's requirement in the unusual and compelling timeframe" and the national security interests of the United States would be harmed without the contract.[105]

The GAO pointed out that the exception for urgent and compelling needs does not give agencies a blank check to sole source.[106] Instead, the GAO stated that the "exception only allows an agency to 'limit the number of sources.'"[107] The agency was still required to "request offers from as many potential sources as is practicable under the circumstances."[108] In sustaining the protests of each of the two sole-source awards, albeit on separate grounds, the GAO reminded the agency that it must make reasonable efforts to meet the mandatory requirement of advanced planning of procurements.[109]

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[93] *Id.* at 4. The GEITA contract was to provide advisory and assistance series in support of AFCEE's continued excellence in the world environmental stewardship market in programs involving environmental restoration, compliance, pollution prevention, conservation and planning, fuel facility engineering, base realignment and closure activities and military housing initiatives including privatization and outsourcing. *Id*.

[94] *Id.* at 5.

[95] *Id.* The squadron originally contemplated placing the requirement under an existing contract with its two language contractors, one of which was OSS. *Id*.

[96] *Id.* (quoting the GAO hearing transcript, at 27).

[97] *Id.* at 6.

[98] *Id*.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.* at 7.

[103] *Id*

[104] *Id*.

[105] *Id*.

[106] *Id.* at 11.

[107] *Id*.

[108] *Id.* (quoting FAR, *supra* note 14, at 6.302-2(c)(2)).

[109] *Id.* at 12.

Examining the initial sole source award, the GAO stated that "the agency's efforts—as described and explained by the agency itself—were so fundamentally flawed as to indicate an unreasonable level of advance planning" directly resulting in the sole source award to OSS.[110] The GAO rejected the recommendation from the USAF to evaluate its actions based on the circumstances faced by the contracting activity when the OSD sent them the requirement.[111] The GAO recognized the abbreviated window, but pointed out that the time crunch was the result of the "unreasonable actions and acquisition planning by the Air Force and the Department of Defense."[112]

In reference to the July 2005 sole-source contract, the GAO examined the conclusion that OSS was the only one responsible source.[113] The GAO dismissed the J&A's rationale of "unusual and compelling urgency" because the facts only justified the "one responsible source" exception, and pointed out that there was no proof of the required market research.[114] Instead, the testimony showed that the contracting officer believed Mr. Rostow, from the OSD, performed the market research since the J&A placed the burden on the OSD to conduct the market research. Unfortunately, Mr. Rostow testified that he had not considered whether other contractors had the capability to perform and did not know whether the USAF had considered other contractors.[115] Therefore, the GAO determined that the USAF did not consider other firms and the conclusions supporting the J&A were faulty and unreasonable.[116] The GAO did not, however, recommend termination of the first contract as it was near completion. The GAO did recommend prompt action to compete the second contract or support the sole source through a properly documented J&A.[117]

Solicitation Requirements for a Mass Notification System Requiring a Specific Frequency and Range Are Unduly Restrictive If the Agency Cannot Provide a Reasonable Basis for Their Inclusion

In another case where brand name or equal requirements cause agencies angst, *MadahCom, Inc.*[118] successfully protested the DoD's RFP for a mass notification system (MNS) on the ground that the solicitation was unduly restrictive.[119] The MNS transmits emergency and related information via radio signal among a group of buildings during emergency situations.[120] The GAO determined that the DoD failed to demonstrate that its requirement to be in compliance with the Association of Public Safety Communications Officials International Project 25 (APCO 25) standard for radio transmissions and ten kilometer range requirement for transmission/receiving stations was reasonably related to its need for the MNS.[121]

On several occasions, the DoD attempted to address a need for MNSs to bring facilities and bases in Europe in line with its Unified Facilities Criteria (UFC) 4-010-01, DoD Minimum Antiterrorism Standard for Buildings, which required a "timely means to notify occupants of threats and instruct them on what to do in response."[122] While the USAREUR

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[110] *Id*.

[111] *Id*.

[112] *Id* at 13. Specifically pointing to the 2-3 months lost during the initial attempt to have the contract placed under the GEITA contract which was clearly outside the scope of an environmental contract. *Id*.

[113] *Id.* at 14.

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

[115] *Id.* at 15.

[116] *Id*.

[117] *Id.* at 17.

[118] Comp. Gen. B-298277, Aug. 7, 2006, 2006 CPD ¶ 119.

[119] *Id*.

[120] *Id*. The system can work in a single building or a group of buildings and allows an authorized individual to trigger emergency alert notifications. In this case an authorized person could send the emergency information throughout the base from his central location. *Id*.

[121] *Id*. at 4

[122] *Id*. The U.S. Army Europe (USAREUR) issued its original solicitation in December 2003 for the MNS requirement for seventeen bases. The Corps of Engineers (COE) assumed the procurement requirements in December 2004 and issued a solicitation based upon USAREUR's requirements. The RFP called for anticipated award of an indefinite delivery, indefinite quantity contract that required, among other things, that the equipment be "Motorola, system ASTRO 25, repeater site trunking system or equal." Two months later the COE planned to fulfill its requirements through a competition for task orders open only to those companies who had been awarded a multiple award task order contract for construction of family housing. The protester here, MadahCom, protested this action. Subsequently the COE abandoned this avenue when the multiple award task order contracts expired and the COE chose not to extend them. Instead, the COE returned to the earlier version of the RFP, reissuing an RFP for indefinite delivery, indefinite quantity (ID/IQ) contracts. MadahCom again protested the solicitation claiming several of the provisions were unduly restrictive. The agency and MadahCom counsels reached agreement on what corrective action would be taken and MadahCom withdrew its protest. When the agency reissued the solicitation most of the provisions originally protested had been resolved, however the provision for APCO 25 remained. *Id.* at 3-4.

attempted on several occasions to procure MNSs, there always seemed to be an unforeseen bump in the road.[123] This solicitation followed a cancelled solicitation in which MadahCom protested, then withdrew its protest when the agency revised its solicitation and agreed to address the concerns in the new solicitation.[124]

The solicitation at issue in this protest looked to procure a MNS system for Landstuhl, Vilseck, Grafenwoehr, and Kaiserslautern (Kleber Kaserne) in Germany.[125] The solicitation called for compliance with the APCO 25 standard for radio transmissions and a ten-kilometer-range for transmission and receiving stations,[126] the DoD failed to show that the solicitation requirements were reasonably related to its needs.[127] The APCO 25 standard is a set of standards for digital transmissions put out by a public safety organization that normally applies to land mobile radios (LMRs), but to be adapted and applied to wireless communications from the primary control center to the individual buildings.[128]

MadahCom claimed the APCO 25 standard was unduly restrictive because it was not required by DoD policy requirements and not necessary to meet the agencies general requirements for a MNS.[129] MadahCom also argued that the MNS transmitting and receiving station range requirements should have been stated in terms of coverage area for the individual installations as opposed to the ten-kilometer-range standard.[130] Therefore, the ten-kilometer-range standard was also unduly restrictive.[131]

While the agency first claimed the APCO 25 standard was a requirement, it conceded that it was not a requirement in a supplemental submission.[132] The agency also claimed the APCO 25 standard would make the system interoperable with related communications systems.[133] In regards to the ten kilometer range standard the agency argued that the requirement allowed future integration with other sites and it kept the system flexible for this future integration.[134]

The GAO sustained the protest, in part because the requirement that the MNS be APCO 25 compliant lacked a reasonable basis.[135] The GAO stated that since the RFP did not require the LMRs accompanying the system to be APCO 25 compliant and the agency did not know how the requested radios would be used by installations that would receive the MNS under the contract there was no reasonable basis to include the requirement.[136] In regards to the ten-kilometer-range-requirement, the agency was unable to articulate its rationale for that as well. Once again, the GAO found it was not reasonably related to the agency's legitimate need.[137]

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[123] *Id.*

[124] *Id.* at 3.

[125] *Id.*

[126] *Id.* at 5.

[127] *Id.* at 4. The APCO 25 standard is a set of standards put out by an association of public safety organization that is supposed to enable them to "procure and operate compatible LMRs." *Id*.

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

[129] *Id.* at 5.

[130] *Id.* at 10.

[131] *Id.*

[132] *Id.* at 5.

[133] *Id.* at 7.

[134] *Id.* at 10.

[135] *Id.*

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

[137] *Id.* at 11.

Terms of a Solicitation Are Not Unduly Restrictive as Long As the Terms Are Reasonably Aimed at Satisfying the Agency's Legitimate Needs

In two separate bid protests this year, the GAO denied protests based upon unduly restrictive requirements in solicitations for GSA-leased office space.[138] In both cases, the GAO found the solicitation terms reasonably addressed the agency's needs and therefore denied the protests.[139]

In *Bristol Group—Union Station Venture*,[140] the protester alleged the terms of solicitation for offers (SFO) were unduly restrictive because it required the building space for the VA to be "within 2500 walkable linear feet" of amenities such as inexpensive fast food, inexpensive cafeteria or table service restaurants and other retail stores, cleaners, and banks, etc..[141] Bristol asserted that the proximity requirements of the local amenities was unduly restrictive to competition.[142] The GAO disagreed, stating the requirement was reasonable based upon the VA's legitimate needs.[143] The VA employees had only thirty minutes for lunch and needed to have these amenities close by in order to allow them to walk to and from the locations within the time requirement.[144]

In *Paramount Group, Inc.*,[145] the GAO determined a requirement for open area office space[146] that forced potential bidders who had interior offices already built in potential office space to demolish the existing offices thereby creating the open area office space was not unduly restrictive.[147] The protester was the present landlord for the DHS ICE in a building where the interior was already divided into separate offices.[148] Paramount alleged the requirement to renovate its current space placed it at a competitive disadvantage.[149]

The GAO restated the default rule that a contracting agency has the discretion to determine its needs and best methods to accommodate them, but those needs have to be specified in terms designed to achieve full and open competition.[150] In this case, the agency cited two reasonable reasons for the "warm lit shell" requirement: giving flexibility to GSA clients and allowing the agency to more easily compare the offers.[151] Since the agency demonstrated a reasonable basis for requiring the open office space, the GAO denied the protest.[152]

Lieutenant Colonel Ralph J. Tremaglio, III

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[138] Bristol Group, Inc.-Union Station Venture, Comp. Gen B-298110, June 2, 2006, 2006 CPD ¶ 89; Paramount Group, Inc. Comp. Gen. B-298082, June 15, 2006, 2006 CPD ¶ 98.

[139] *Id.*

[140] Comp. Gen. B-298110, June 2, 2006, 2006 CPD ¶ 89.

[141] The GAO denied a subsequent protest by Bristol where they challenged their elimination from the competitive range and having their proposal improperly rejected. Bristol Group, Inc.-Union Station Venture, Comp. Gen B-298086, B-298086.3, May 30, 2006, 2006 CPD ¶ 92.

[142] *Bristol Group*, 2006 CPD ¶ 89, at 2.

[143] *Id.*

[144] *Id.*

[145] Comp. Gen. B-298082, June 15, 2006, 2006 CPD ¶ 98.

[146] Open area office space is referred to as "warm lit shell." *Id*. at 2.

[147] *Id*. at 3.

[148] *Id*. at 1.

[149] *Id*. at 3.

[150] *Id*. (citing Mark Dunning Indus., Inc., B-289378, Feb 27, 2002, 2002 CPD ¶ 46).

[151] *Id*. at 4.

[152] *Id*. at 5.

Contract Types

Final Rule on Contract Period for Task and Delivery Orders

The Department of Defense (DoD) issued a final rule which allows the ordering period of a task or delivery order contract to be up to five years, and up to ten years with options or modifications.[1] The ten year limit can be modified by written documentation of exceptional circumstances by the head of the agency.[2] The rule adds an annual reporting requirement to Congress of any extensions granted under the "exceptional circumstances" authority.[3]

Transformation of Contract Types

As part of the *Defense Federal Acquisition Regulation Supplement* (*DFARS*) Transformation, the DoD issued a final rule amending the *DFARS* in the area of contract types.[4] The main changes included increasing the standard maximum ordering period under basic ordering agreements from three to five years; deleting unnecessary text on cost-plus-fixed-fee contracts for environmental restoration and design stability and use of incentive provisions; and relocating procedures for selecting contract types and using special economic price adjustment clauses, incentive contracts and basic ordering agreement to the procedures, guidance and information companion resource.[5]

The Death of Share-in-Savings Contracting

The Civilian Agency Acquisition Council and the Defense Acquisition Council (FAR Councils) withdrew the proposed rule on share-in-savings contracting discussed in the *2004 Year in Review*[6] because Congress failed to reauthorize the new contact type.[7] The rule would have allowed a contractor in information technology contracts to get a percentage of any realized savings.

Reviewing Award and Incentive Fees

The Government Accountability Office (GAO) unfavorably reviewed the use of award and incentive fees in the DoD in a December 2005 report.[8] These types of contracts accounted for 4.6 percent of all contracts, but twenty percent of obligated dollars.[9] The GAO examined ninety-three contracts out of a study population of five hundred ninety-seven award-fee and incentive-fee contracts active between 1999 and 2003.[10] The GAO was especially concerned about these contracts since most involved the acquisition of weapons systems, a GAO-declared high risk area since 1990.[11]

The GAO concluded that award fees "have generally not been effective at helping DoD achieve its desired acquisition outcomes."[12] In addition, the estimated eight billion dollars in award fees were paid regardless of how well the contractor

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[1] Defense Federal Acquisition Regulation Supplement; Contract Period for Task and Delivery Order Contracts, 70 Fed. Reg. 73,151 (Dec. 9, 2005) (to be codified at 48 C.F.R. pts. 216 and 217).

[2] *Id.*

[3] *Id.*

[4] Defense Federal Acquisition Regulation Supplement; Types of Contracts, 71 Fed. Reg. 39,006 (July 11, 2006) (to be codified at 48 C.F.R. pts. 216).

[5] *Id.* at 39,006-07.

[6] Major Kevin Huyser et al., *Contract and Fiscal Law Developments of 2004—The Year in Review*, ARMY LAW., Jan. 2005, at 16.

[7] Federal Acquisition Regulation; FAR Case 2003—008, Share-in-Savings Contracting, 71 Fed. Reg. 4854 (30 Jan. 2006).

[8] U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-06-66, DOD HAS PAID BILLIONS IN AWARD AND INCENTIVE FEES REGARDLESS OF ACQUISITION OUTCOMES (Dec. 2005).

[9] *Id.* at 10.

[10] *Id.* at 2. The subject contracts had at least one action coded as cost-plus-award-fee, cost-plus-incentive-fee, fixed-price-award-fee of fixed-price-incentive valued at $10 million or more. *Id.* In addition, fifty-two contracts had only award-fee provisions; twenty-seven contracts had only incentive-fee provisions; and fourteen had both types. *Id.* at 9. Fifty-one percent of the obligated dollars in the sample was research and development contracts. *Id.* at 10.

[11] *Id.* at 13.

[12] *Id.* at 3.

met contract objectives.[13] The GAO perceived a general reluctance "to deny contractors significant amounts of fee, even in the short term."[14] In the sample contracts, the median percentage of the award fee was ninety percent of the award fee pool.[15]

The GAO cited the Comanche, F/A-22, Joint Strike Fighter, and the Space-Based Infrared System High satellite system as problematic programs in which the contractors have received a substantial portion of the award fees.[16] In addition, the government often gave contractors a second chance to receive an unpaid award fee.[17] The GAO did point out two programs which used fee criteria effectively: the Missile Defense Agency's Airborne Laser Program[18] and the Terminal High Altitude Area Defense Program.[19]

The GAO felt that award fees should be focused on acquisition outcomes, rather than the perceived DoD focus on contractor responsiveness to feedback, quality of proposals or timeliness of contract data requirements.[20] Incentive fee contacts fared better; still, half of the twenty-seven contracts reviewed failed to meet the target price, a key component of mission success.[21] The GAO was also concerned by a lack of data evaluating how well incentive and award fees work. Generally, contract effectiveness is backed by anecdotal evidence, rather than hard evidence.[22] The GAO did note that the DoD possessed adequate guidance and training and structured the review of award-fees properly.[23]

The GAO issued three recommendations with which the DoD concurred: the focus of these types of contracts should be outcome based, more guidance should be provided on the rollover of award fees, and central means to share lessons learned should be developed.[24]

The DoD partially concurred with four recommendations. The GAO felt that award fees should never be paid for satisfactory performance; the DoD maintained that some portion of the fee should be paid under these circumstances.[25] The DoD stated that it would conduct a study on the remaining disputed recommendations: a review of new contracts, a mechanism for capturing award and incentive fee data in a central system, and performance measures to evaluate how effective award and incentive fee contracts are in motivating contractor performance and achieving program success.[26]

The DoD Response

Deputy Under Secretary of Defense James Finley issued a policy memorandum which addresses the GAO's concerns on 29 March 2006.[27] The memorandum stated that award fees should be tied to identifiable interim outcomes, discrete events, or milestones; and that relevant provisions should clearly lay out how to evaluate performance.[28] Satisfactory performance should receive less award fees than excellent ratings; if the performance is less than satisfactory, the contractor should not

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[13] *Id.* at 14.

[14] *Id.* at 19.

[15] *Id.*

[16] The prime contractors received eighty-five, ninety-one, one hundred, and seventy-four percent respectively. *Id.* at 26.

[17] *Id.* The report noted the Joint Strike Fighter routine rolled over the entire unearned fee for later periods. *Id.* at 22.

[18] The contract was changed to shift award fees toward successful system demonstration; the demonstration failed and contractor did not receive any of the seventy-three million dollars available for award fee. *Id.* at 27.

[19] The contract was tied to conducting successful flight tests. *Id.* at 28.

[20] *Id.* at 4.

[21] *Id.*

[22] *Id.* Seventy-seven percent of employees who responded to a GAO survey indicated that fees have improved performance, pointing to increased responsiveness at the management level. *Id.* at 32.

[23] *Id.* at 25.

[24] *Id.* at 5.

[25] *Id.*

[26] *Id.* at 6.

[27] Memorandum, Deputy Under Secretary of Defense (Acquisition and Technology), to Secretaries of the Military Departments and Directors of the Defense Agencies, subject: Award Fee Contracts (29 Mar. 2006).

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

receive an award fee.[29] The "rollover" of unearned award fee should be the exception, and not the rule. If a rollover provision is used, only a portion of an unearned fee should be moved to later provisions.[30] The memorandum also announced the formation of the "Award and Incentive Fees" Community of Practice through the Defense Acquisition University.

The USAF Response

The Secretary of the Air Force issued a memorandum announcing a "cultural shift" in the incentives for award and incentive fee contracts.[31] Incentive contracts should use "objectively verifiable" criteria; award fees should reward "only realized superior performance leading to successful end-item delivery or performance."[32]

The Next Generation of ID/IQ contracts

The Director of Defense Procurement and Acquisition Policy issued guidance on indefinite delivery, indefinite quantity (ID/IQ) contracts.[33] The memorandum noted that some agencies had not been structuring ID/IQ contracts in accordance with the *Federal Acquisition Regulation* (*FAR*). Specifically, agencies were issuing ID/IQ contracts without required *FAR* clauses, and were not buying supplies and services through the issuance of delivery or task orders.[34] In addition, agencies must record an obligation for the minimum order amount at the time of contract award and process the obligation through the Federal Procurement Data System—Next Generation.[35]

Reconsidering ID/IQs

The GAO reconsidered a decision discussed in the negotiations section[36] and clarified an alleged apparent confusion regarding variable quantity contract types in *Department of Agriculture—Reconsideration*.[37] The Department of Agriculture (USDA) alleged that the GAO had misapplied rules governing ID/IQ contracts onto the requirements contract in question.[38]

In the earlier case, the GAO sustained a protest stating that the Forest Service must consider cost in analyzing competitive proposals.[39] In its request for reconsideration, the USDA argued that a cost estimate for a requirements contract was more difficult that an ID/IQ contract, which at least had a minimum guaranteed quantity around which to base the estimate.[40] In addition, forcing an agency to calculate an uncertain estimate exposes an agency to liability to a breach of contract suit if that estimate is wrong.[41]

The GAO, while noting that it correctly identified the type of contract in the original case,[42] denied the reconsideration request, stating that the USDA was the one that misapplied the original decision. The GAO recommended "employing a

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[29] *Id.* at 2.

[30] *Id.*

[31] Memorandum, Secretary of the Air Force, to SEE Distribution, subject: Contract Incentives (4 Apr. 2006).

[32] *Id.*

[33] Memorandum, Director of Defense Procurement and Acquisition Policy, to Directors of the Defense Agencies, Assistant Secretary of the Army (Acquisition, Logistics and Technology), Deputy Assistant Secretary of the Navy (Acquisition Management), ASN (RDA), Deputy Assistant Secretary of the Air Force (Contracting), SAF/AQC, subject: Indefinite Delivery Contracts (21 Sept. 2006).

[34] *Id.* at 1.

[35] *Id.* at 2.

[36] *See* Negotiated Acquisitions section, *infra*.

[37] Comp. Gen. B-296534.12, Nov. 3, 2005.

[38] *Id.* at 3.

[39] *Id.* at 4.

[40] *Id.*

[41] *Id.*

[42] "We fully recognized, *as noted four times in the decision*, that a requirements contract was at issue." *Id.* (emphasis added).

price evaluation method that allows comparison of the relative cost."[43] While the agency was left to decide how to do that, an estimate is only one method available. Another method that the agency could use to compare relative costs would be notional or hypothetical work orders.[44] However, the GAO noted that the Forest Service had historical data under prior contracts and actually compared the offeror's mileage costs in the original evaluation.[45]

No Windfall for Negligent Estimates

In *S.P.L. Spare Parts Logistics, Inc*. (*S.P.L.*),[46] the ASBCA ruled that the damages for a negligent government estimate in a requirements contract should be based on the fixed costs in the offeror's proposal rather than the company's actual costs performing the contract.[47] In an earlier entitlement case,[48] the ASBCA found that the U.S. Army Tank-Automotive and Armaments Command (TACOM) negligently prepared estimates for a contract for new roadwheels for various combat vehicles. The TACOM failed to adjust the estimate for the following causes: a new "repair first" policy; the reduction in the use of the M60 tank, and the last-minute procurement of rebuilt wheels made after a congressional inquiry caused a delay in the instant procurement.[49]

The dispute revolved on reimbursing S.P.L. for its inability to spread out its costs during the contract since it built fewer wheels than anticipated in the contract due to the government's negligent estimate. The contractor argued that it should receive $1,215,021.40, calculating the increased costs per wheel by comparing the negligent estimate with a non-negligent estimate and reimbursing S.P.L. for its increase in costs by multiplying that figure by the wheels actually purchased.[50] The government agreed with S.P.L.'s methodology, but argued that the contractor should receive an award of $152,154.28 limiting the contractor to the fixed costs around which S.P.L. calculated its proposal; the government also calculated the proper, or non-negligent, estimate of roadwheels differently and lower than the contractor's estimate.[51]

The ASBCA agreed with the government that basing entitlement on S.P.L. alleged actual costs[52] would result in a windfall. The ASBCA stated that the general rule would be "to place the non-breaching party in as good a position as it would have been had the breaching party fully performed."[53] Since the dispute involved a fixed-price requirements contract, the award would be limited to the fixed costs in S.P.L.'s offer, and not its disputed higher actualized costs.[54]

The ASBCA followed the government's general calculation of the proper estimate with some adjustments and awarded S.P.L. $ 421,269.26. The ASBCA looked at the historical data and created a baseline which was partially reduced due to the actual decline in TACOM's requirements due to various factors.[55] The ASBCA denied a claim for excess strips, discs, painting and vulcanization equipment because S.P.L. failed to prove that these costs were incurred based on the negligent

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[43] *Id.* at 5.

[44] *Id.*

[45] *Id.* at 6.

[46] ASBCA Nos. 54435, 54360, 06-2 BCA ¶ 33,135.

[47] *Id.* at *14.

[48] *S.P.L. Spare Parts Logistics*, ASBCA Nos. 51118, 51384, 02-2 BCA ¶ 31,982.

[49] *S.P.L. Spare Parts Logistics*, 06-2 BCA ¶ 33,135 at *7.

[50] *Id.* at *9. The contractor alleged that it spent $1,829,718.80 in its production of 10,537 wheels. The increase in fixed cost per wheel was calculated to be $155.31, or spreading out the costs with 10,537 wheels (non-negligent estimate) vice 31,361 wheels (negligent estimate). The contractor calculated its entitlement by multiplying the increase in fixed costs by the actual number of produced wheels (10,537). *Id.*

[51] *Id.* at *10. In its proposal, *S.P.L.* included a figure of $743,569.31 in fixed costs in its proposal. The government also calculated a different actual estimate of 19,493 based on an average of new wheels purchased in a five year period, multiplied by three (the life of the contract), reduced by the wheels ordered before award and by ten percent due to the actual reduction in requirements of the M60 tank. *Id.*

[52] The government disputed this figure but the ASBCA did not need to address the allegation. *Id.* at *11 n.4.

[53] *Id.* at *11.

[54] *Id.* at *14.

[55] The ASBCA computed a base-line of 24,918 wheels, reduced that figure by twenty percent due to the move away from the M60 tanks, subtracted five thousand wheels due to the decline in wheel demand, and reduced the number of wheels as a result of the Congressional inquiry delay. The ASBCA then divided the fixed costs in the offeror's price by the resulting figure, 11,675, and computed the fixed costs per wheel as $ 63.39 per wheel. The difference between the non-negligent cost per wheel and the actual negligent cost per wheel ($63.39 - $23.71 = $39.98) was then multiplied by the total number of new wheels ordered by the TACOM (10,537) to come up with the award figure. *Id.* at *15-16.

estimate.[56] In addition, the ASBCA denied a claim for excess inventory, since the cost of that risk should be borne solely by the contractor.[57]

Locked and Captured Costs

In *Bannum, Inc.*,[58] the Department of Transportation Board of Contract Appeals (DOT BCA) held that in an ID/IQ contract in which the government failed to order the guaranteed minimum, the contactor's entitlement should be reduced by the costs it would have incurred for the guaranteed minimum amount of work.

The Bureau of Prisons (BOP) awarded an ID/IQ contract to provide community correctional center services for federal offenders in the Washington, D.C. area.[59] Following a Department of Justice legal memorandum which Bannum felt affected the potential number of inmates; Bannum submitted a monthly invoice billing for the guaranteed monthly minimum of twenty-six inmates instead of the actual number of inmates. The contracting officer denied the claim, stating that the guaranteed minimum kicked in only after the contract's yearly term ended.[60]

Following a summary judgment motion, the DOT BCA found that the contract was an ID/IQ contract and that the contract referred to a total minimum of inmates on a yearly basis.[61] Bannum argued that its entitlement should be one hundred percent of its unit price multiplied by the number of unordered minimum guaranteed inmate days for the year.[62] The DOT BCA followed *White v. Delta Construction International Inc.*,[63] holding that the contractor's recovery should be reduced by the amount of additional work the contractor would have been required to provide, but did not, due to the government's breach.[64] The DOT BCA rejected Bannum's argument that the government's failure resulted in the company being unable to capitalize its cost over the yearly contract, finding that *Delta* meant that the company must reduce its claim by any unrealized costs.[65]

The DOT BCA held open the question of how much the guaranteed minimum was. Although the Request for Proposals contained a guaranteed yearly minimum of 19,345 inmates, Bannum's final revised proposal contained a figure of 28,470 inmates. The board left open the question of whether the BOP incorporated Bannum's figures and changed the terms of the contract. and that summary judgment could not be rendered based on the record.[66]

The Magnification of a Fixed Price Contract

In *Magni Environmental. Group, Inc.*,[67] the DOT BCA denied a contractor's attempt to unilaterally create a fixed-price level-of-effort contract. The Forest Service awarded a single task order with Magni through the Federal Supply Schedule for environmental advisory services in the Finger Lakes area of New York.[68] In its submission, Magni identified an expected level of effort and anticipated costs in addition to the fixed price, which it stated "is based to be reviewed in light of scoping."[69] However, in response to a Forest Service request for clarification, Magni "apologize[d] if our presentation led

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[56] *Id.* at *17.

[57] *Id.* at *19.

[58] DOT BCA No. 4452, 06-1 BCA ¶ 33,228.

[59] *Id.* at *2.

[60] *Id.* at *11.

[61] Bannum argued that, since the contract required monthly billing, the guaranteed minimum should be derived also on a monthly basis. The DOT BCA read the plain meaning of the contract to be a contract for services on a yearly basis. *Id.* at *27.

[62] *Id.* at *32.

[63] 285 F.3d 1040 (Fed. Cir. 2002).

[64] *Delta*, 285 F.3d at 1043.

[65] *Bannum*, 06-1 BCA ¶ 33,228, at *37. The board did leave open the opportunity for Bannum to produce evidence of damages cause by the government's failure to order the guaranteed minimum. *Id.*

[66] *Id.* at *30.

[67] AGBCA Nos. 2005-101-1, 2004-102-1, 2005-103-1, 06-1 BCA ¶ 33,233.

[68] *Id.* at *2.

[69] *Id.* at *14.

you to believe that we were offering merely a level of effort of hours rather than deliverable results."[70] After a unilateral modification which increased the contract price by $ 45,000, Magni filed a claim for additional funds based on the additional increased effort to complete the contract.[71] This claim was based on both "growth in technical lead efforts and related issues" and the fact that Magni had "expended the proposed effort" in the fixed-price level of effort contract.[72]

The board looked at the terms of the contract and found that the parties had agreed to a fixed price contract based on the completion of designated tasks, despite Magni's extraneous language in its submission regarding its expected levels of effort.[73] However, the board rejected the Forest Service's argument that the fixed price precluded Magni's claim for equitable adjustment. Since the changes clause allows disputes under the CDA, a fixed price contract does not preclude a contractor's claim for contract adjustments based on increased or decreased work or costs.[74] The board did not allow summary judgment for the government based on the fixed price nature of the contract.[75]

Major Andrew S. Kantner

[70] *Id.*

[71] *Id.* at *21.

[72] *Id.* at *27.

[73] *Id.* at *35

[74] *Id.* at *38.

[75] *Id.*

Sealed Bidding

Agencies Should Not Rely on Protestor to Determine Validity of Mistakes

In *Odyssey International, Inc.*,[1] the Government Accountability Office (GAO) examined a protest from the low bidder in an invitation for bids (IFB) case from the Department of Labor (DOL) for construction of a three-story dormitory.[2] The low bidder, Odyssey, bid $6,246,616, while the next lowest bid was from Allied Contractors and Eng'rs (Allied) for $7,319,800.[3] There were six other bids, and the government estimate was $7,352,357.[4]

About a month after bid opening, the agency asked the lowest three bidders to verify their bids, at which time Odyssey reported "'a dramatic posting error' in its bid tabulation sheet."[5] Apparently, Odyssey had "mistakenly recorded a $1,275,000 quote for structural steel from a subcontractor as $275,000 in its electronic spreadsheet." [6] To prove the mistake, Odyssey "furnished the subcontractor's proposal of $1,275,000, as well as printed copies of the original bid tabulation spreadsheet and the corrected spreadsheet."[7] The DOL then requested additional evidence in order to "establish[] the existence of the error, and the manner in which it occurred, and the bid actually intended."[8]

About a week later, Odyssey provided additional information, "including a compact disc (CD) containing the electronic version of the previously printed spreadsheets."[9] In addition to the $1,000,000 mistake, Odyssey also adjusted its bid to reflect the increase in profit based on the increased price.[10] The final bid submitted was $7,317,216, only $2,584 less than the next lowest bidder, Allied.[11] At that point, Allied submitted an agency protest concerning the "propriety of permitting Odyssey to correct its bid."[12] At some point after receiving the protest, the DOL accepted Odyssey's bid, "finding clear and convincing evidence of the mistake and the intended bid," resulting in a denial of Allied's protest.[13] Allied then filed a protest with the GAO based on a review of Odyssey's submitted spreadsheet.[14] As a result of Allied's position, the DOL "reversed its prior position and advised that it would now not accept Odyssey's corrected bid because of 'a number of other serious errors, related to [the] initial mistake in bid claimed by Odyssey.'"[15]

Ultimately, the GAO found that there was clear and convincing evidence of the mistake that Odyssey provided based on "hidden" information contained on the CD. Odyssey hid two rows of a spreadsheet for confidentiality purposes (profit markup) that was later viewed and interpreted by Allied, and later determined by DOL as being insufficient to establish clear and convincing evidence of the mistake.[16] I determined that the information contained in the spreadsheet did not allow DOL to "determine[e] Odyssey's intended bid price."[17]

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[1] Comp. Gen. B-296855.2, 2005 U.S. Comp. Gen. LEXIS 249 (Nov. 16, 2005).

[2] *Id*. at 1.

[3] *Id*.

[4] *Id*. at 2.

[5] *Id.*

[6] *Id*.

[7] *Id*.

[8] *Id*.

[9] *Id*.

[10] *Id*. This information was deleted from the GAO opinion as it is proprietary or confidential information.

[11] *Id*.

[12] *Id*. at 3.

[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] *Id*. at 5.

[17] *Id*. at 3.

The GAO held that the DOL "did not act reasonably in determining that Odyssey's spreadsheets were not in good order and did not provide clear and convincing evidence of Odyssey's intended bid."[18] The GAO further recommended to "permit Odyssey to correct its mistake in bid, and award the contract to that firm, if otherwise appropriate."[19]

Failing to Acknowledge Amendment Is Not Always Non-Responsive

In its successful protest, Fort Mojave/Hummel argued that DOL's rejection of its bid based on the failure to acknowledge an amendment was improper.[20] The IFB required the successful bidder to "construct nine new buildings totaling approximately 190,997 gross square feet, including . . . [dormitories, an administrative medical/dental building, an education building, a cafeteria, and a warehouse]."[21] The amendment at issue "answered 28 bidder questions and clarified the period of performance."[22] Fort Mojave/Hummel failed to acknowledge the amendment, and as a result, the agency rejected the bid as non-responsive.[23]

The GAO provides a detailed review of precedent on failing to acknowledge material amendments to IFBs, to include defining what "material" amendments include.[24] The basis for the agency rejecting the protestor's bid was that there were two items set forth in the amendment that were in fact material: "one item pertains to the insulation of certain pipes and the other item pertains to the placement of certain pipes in five of the rooms in the vocational education building."[25] The protestor argued that, contextually, neither of the two provisions should be interpreted as material. The GAO agreed, and held that the amendment items were "no more than [ ] minor modification[s] of what was already required by the IFB, not as the agency suggests, the imposition of a material, new and separate legal obligation."[26]

The GAO further recommended that the protestor be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees."[27]

Major Jennifer C. Santiago

[18] *Id*. at 5.

[19] *Id*. at 9.

[20] Comp. Gen. B-296961, Oct. 18, 2005.

[21] *Id*.

[22] *Id*. at 2.

[23] *Id*.

[24] *Id*.

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

[26] *Id*. at 7.

[27] *Id*.

Late Proposals

Lost

In *Project Resources, Inc.*,[1] the Government Accountability Office (GAO) placed a high burden on an offeror attempting to gain relief from a proposal lost by the government. The case involved a request for proposals (RFP) for environmental remediation services for the U.S. Army Corps of Engineers.[2] Project Resources timely sent its proposal to the Corps of Engineers, but apparently the government lost its proposal.[3] After the Corps of Engineers failed to award Project Resources one of the five awarded contracts, Project Resources contacted the government who informed the company that its proposal could not be found.[4]

Project Resources filed a protest with the GAO along with a copy of the submitted proposal requesting that the GAO direct the agency to evaluate its proposal. The GAO refused, stating the general rule that the "negligent loss of proposal information does not entitle the offeror to relief."[5] Although agencies have a "fundamental obligation" to safeguard information, the overarching goal of having an open playing field for all competitors trumps the "occasional loss" of a contractor's proposal since it would be unfair to allow an offeror reconstruct an offer after the closing date of proposals.[6] Although the GAO conceded that this might be an "arguably harsh result," Project Resources did not provide "pre-closing evidence" of the proposal which might allow the GAO to disturb the Corps of Engineer's decision not to reopen the competition.[7]

The Corps of Engineers contracting officer testified that she knew of no other "comparable disappearance of a proposal" within the Sacramento District.[8] This testimony precluded Project Resources from using the limited exception of allowing relief in the case of a "systemic failure resulting in multiple or repetitive instances of lost information."[9]

Late Rejection of Late Proposal

In *Argencord Machinery & Equipment, Inc. v. United States*,[10] the Court of Federal Claims (COFC) ruled that the Army could reject a late proposal even though it had not discovered the submission was untimely until midway through the procurement. The U.S. Army Aviation and Missile Command (AMCOM) at Redstone Arsenal, Alabama, issued a RFP for tie rod structural support assemblies for Black Hawk helicopters.[11] Argencord faxed the first thirteen pages of its offer on 18 August 2006, or six days after the due date for initial offers, and delivered the rest the next day.[12] The Army issued an amendment, sending it to three additional offerors and Argencord, approving a request from Tek Precision Company, the ultimate winning offeror, to proffer alternate materials for the requested parts.[13] In what the contracting officer characterized as a "boo-boo" and a "rookie mistake,"[14] the Army evaluated Argencord's offer and determined that it was in the competitive

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[1] B-297968, 2006 U.S. Comp. Gen. LEXIS 58 (Mar. 31, 2006).

[2] The RFP contemplated the award of five indefinite delivery, indefinite quantity (ID/IQ) contracts to section 8 (a) contractors. *Id.* at *1.

[3] *Id.* at *2. The RFP was due at the Sacramento District Corps of Engineers office in Sacramento, California, no later than 1400 on 12 October 2006. Project Resources shipped its proposal via Federal Express and the tracking slip shows the government received the proposal that day at 0938. *Id.*

[4] *Id.*

[5] *Id.* at *3.

[6] *Id.*

[7] *Id.* at *4.

[8] *Id.* at *2.

[9] *Id.* at *4.

[10] 68 Fed. Cl. 167 (2005).

[11] *Id.* The RFP was a small business set-aside for an ID/IQ contract.

[12] The fax cover sheet indicated that the company thought the solicitation was due on 29 August 2006. *Id.* at 170.

[13] *Id.* The COFC also rejected a challenge to this amendment stating that authorizing an alternate material was not so substantial as to require the Army to cancel the solicitation and reissue a new one. *Id.* at 174.

[14] *Id.* at 171.

range for discussion purposes before realizing that it was late.[15] At that point, the Army notified Argencord that its proposal was rejected because the Army received it after the due date for initial offerors.[16]

Argencord made two arguments to revive its admittedly late proposal. Its first argument was that it was the only responsive proposal received. This argument ignored the fact that the AMCOM, in a negotiated procurement, has no obligation to reject non-responsive offers, as in a sealed bid procurement. The COFC rejected Argencord's theory, citing the agency's right to amend a solicitation based on an offeror's deviation from stated requirements.[17]

The second argument was that the AMCOM's amendment and Argencord's timely response to the amendment essentially waived the lateness of its initial proposal.[18] The COFC cited a GAO opinion with approval, holding that *Hausted, Inc*.[19] stated the settled rule regarding late proposals: "An extended period of negotiation that includes the submission of revised proposals cannot legally cure an initial late submission."[20]

Competitive Range

A Global Mess

In *Global, A 1st Flagship Company*,[21] the GAO sustained a protest on behalf of an offeror who was excluded from the competitive range based solely on a cost/price differential.[22] The Navy issued a RFP for a cost-reimbursement contract to operate and maintain inactive ships on the U.S. east coast.[23] The RFP indicated that technical factors were more important than cost/price.[24] The RFP indicated that the government would apply "plug-in" numbers for certain costs for materials; however those numbers were not specifically identified[25] and the government did not choose to provide that info in a solicitation amendment.[26]

After submission of initial proposals, the choice was between Global, the incumbent, and George G. Sharpe, Inc. Under the technical evaluation, Global was rated "highly acceptable," while Sharpe was rated "unacceptable, but capable of being made acceptable."[27] The Navy conducted a cost realism analysis on both proposals. The Navy, suspecting a clerical error, projected labor costs for option years that were missing from Sharpe's proposal. In analyzing Global's proposal, the Navy replaced proposed costs with actual cost figures from the previous year of the contract. The end result was that Global's contract was about $5 million more than Sharpe's.[28]

The contracting officer established a competitive range of just Sharpe's proposal, reasoning that Global could never realistically lower its cost enough to be competitive for award.[29] The GAO agreed with Global's protest, stating that the Navy committed errors in its cost realism analysis which tainted its exclusion from the competitive range.

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[15] *Id.* at 170 n.6.

[16] *Id.* at 172.

[17] *Id.* at 173-74.

[18] *Id.* at 174.

[19] Comp. Gen. B-257087, 94-2 CPD ¶ 49.

[20] *Id.* at 3.

[21] Comp. Gen. B-297235, B-297235.2, Dec. 27, 2005, 2006 CPD ¶ 14**.**

[22] *Id.* at 10.

[23] *Id.* at 2.

[24] *Id.* The factors in descending order of importance were: technical and management approach, corporate experience, past performance, personnel resources, and small business participation. *Id.*

[25] *Id.*

[26] *Id.* at 3.

[27] *Id.* at 4.

[28] *Id.*

[29] *Id.* at 5.

The Navy conceded that Sharpe's evaluated cost/price should have been higher since some costs attributed to the indirect cost pool should have been categorized as other direct costs and included in the overall cost.[30] In addition, when the Navy projected the labor costs, it forgot to include the fee in the cost projections.[31] There were also problems with the cost realism evaluation of Global's proposal. When the Navy substituted the costs using the old contract, it failed to take into account that the direct labor projected for the new contract would be lower and that Global's figures accurately represented the changes for the new contract.[32] As a result, the adjusted difference between the two would have been $1 million less.

The key for the GAO was the fact that the only difference was cost/price. Since the RFP indicated that technical factors were more important than cost/price, it did not seem to make sense that the only initially "highly acceptable" proposal would have been excluded from the competitive range. The bottom line was that the GAO did not find sufficient support for the argument that Global could not have lowered its cost/price enough "to make it competitive for award."[33]

Discussions

A Cogent Argument

The GAO, in *Cogent Systems, Inc.*,[34] faulted the Army for not discussing a significant weakness with an offeror during discussions in a procurement for an Automated Fingerprint Identification System (AFIS) to be used by the government of Iraq. The Army issued a RFP under the *FAR*'s commercial item authority contemplating the award of a fixed price contract for the Rapid Equipping Force.[35] The RFP stated that the basis for award would be a cost-technical tradeoff and that non-price factors were more important than price.[36]

In a litigious procurement, Cogent first submitted a protest after the Army awarded the contract without discussions to Motorola, partly because it evaluated Cogent's proposal as technically unacceptable.[37] The Army took corrective action and amended the RFP, conducting discussions with Cogent and Motorola. The Army again evaluated Cogent's proposal as unacceptable and sent Cogent a discussion letter to that effect. Cogent again submitted a protest to the GAO, which was dismissed as premature.[38] After both companies submitted revised proposals, the Army reopened discussions and provided Cogent a more detailed discussion letter highlighting areas of its design that were judged to be a significant risk[39]

Cogent filed an agency-level protest which the Army dismissed as premature. Cogent submitted another final revised proposal which the Army again evaluated as unacceptable. The Army again awarded the contract to Motorola, who provided the only technically acceptable proposal. Cogent filed the instant protest with the GAO complaining that the Army's evaluation was unreasonable.

In looking at Cogent's proposal, the GAO focused on the Army's evaluation of a proposed scanner that the Army evaluated as too slow for the requirement. Cogent's initial proposal involved a critique of the Army's minimum requirements for the scanner.[40] After the Army reopened the competition, Cogent substituted another scanner which met the Army's requirements but did not change the overall unsatisfactory rating. Subsequent discussion letters did not mention the scanner problem.[41]

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[30] The GAO noted that those costs were billed as such in Sharpe's similar contract for the west coast. *Id.* at 7.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 10.

[34] Comp. Gen. B-295990.4, B-295990.5, Oct. 6, 2005, 2005 CPD ¶ 179.

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

[36] *Id.* at 3. The RFP included the following factors: technical/management with experience, integrated technical/management, design, risk management, and key personnel as subfactors; past performance, price, and subcontracting plan. *Id.* at 2.

[37] *Id.* at 4.

[38] *Id.*

[39] *Id.* at 5. These risks included a design change that was not explained, a radical change in proposed performance that raised questions concerning its stability, disconnects in calculations of response times, and an unexplained price decrease for upgrades. *Id.*

[40] The scanner had to be certified by the FBI and able to scan a fingerprint card at 1,000 pixels per inch in ninety seconds. *Id.* at 7.

[41] *Id.*

The proposal evaluation board (PEB), in its evaluation of Cogent's proposal, seemed to focus on the delay caused by Cogent's protests,[42] noting that the board found it odd that Cogent's initial protest stated that a scanner could not be found, but the revised proposal contained an allegedly compliant product.[43] Unfortunately for the Army, the hearing testimony indicated that the Army failed to realize that Cogent had substituted a scanner which met the Army's requirements. Since the Army had labeled this area as a significant weakness, yet the Army never raised the issue in discussions, the GAO opined that the Army had not conducted meaningful discussions with Cogent.[44]

Reopening Discussions

Ford Tough

In *Al Long Ford*,[45] the GAO informed the Army that it must reopen discussions if the agency realizes, while reviewing an offeror's final proposal revision that a problem in the initial proposal was vital to the source selection decision but not raised with the offeror during discussions. The U.S. Army Tank-Automotive and Armaments Command (TACOM) issued a RFP for light utility trucks and accompanying spare parts and manuals to be delivered in Iraq.[46] The solicitation informed offerors that this was an urgent requirement and that timely delivery and performance was of the essence.[47] The RFP indicated that timeliness would be based on delivering the minimum guaranteed quantity within one hundred twenty days after receipt of the order. The agency would conduct a risk assessment on whether an offeror could meet the proposed delivery schedule.[48]

The TACOM conducted discussions and received final revised proposals (FRP) for seven offerors. Al Long Ford proposed a delivery period of one hundred and ten days and its total price was $207,824,347. The Army evaluated the proposed schedule as a "very high risk."[49] The source selection evaluation board contacted Ford's regional marketing manager who informed the Army that Ford would need ninety days of production lead time for any truck deliveries. The Army then added thirty-seven days to Al Long Ford's one hundred and ten-day delivery schedule.[50]

American Equipment Company, the winning proposal, proposed one hundred and fifty days and its total price was $191,443,169. The source selection authority, in its cost-technical tradeoff, determined that three earlier days of delivery did not warrant's Al Long Ford's additional price.[51]

Al Long Ford filed a protest arguing that its delivery schedule should not have been recalculated since it intended to comply with its proffered schedule. In addition, the company should have been given a chance to validate its schedule before the Army conducted its recalculation.[52]

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[42] The PEB noted:

> . . . in their first Protest (sic) they explained how they nor anyone else not meet (sic) this rated requirement . . . they have still not explained how they meet it not and there is still no AFIS in Iraq because they protested saying no such system existed. What are we to believe? When will we have permission to move on and meet our critical need?

Id. at 8.

[43] *Id.*

[44] *Id.* at 9.

[45] Comp. Gen. B-297807, Apr. 12, 2006, 2006 CPD ¶ 67.

[46] *Id.* The RFP contemplated the award of a two-year fixed-price ID/IQ contract for a minimum quantity of five hundred and a maximum quantity of six thousand trucks. *Id.*

[47] *Id.* at 2.

[48] *Id.* The solicitation also cautioned that a schedule which did not meet the estimated guideline of one hundred twenty days may be considered unacceptable for award. *Id.*

[49] *Id.* at 3.

[50] *Id.* at 4. Al Long Ford incorporated fifty-three days of production lead-time in its proposal. *Id.* at 3.

[51] *Id.* at 4.

[52] *Id.* at 5.

The GAO agreed with Al Long Ford. Although the general rule is an agency is not required to reopen discussions for new problems in the final proposal revision, the GAO focused on the fact that Al Long Ford's initial proposal contained the same alleged problems which triggered the recalculation.[53] Therefore, the perceived flaws in the proposed schedule was not a new problem, but a new realization on the part of the government about an existing problem, which should have been discussed before the final proposal revisions were due. As the GAO states, the key fact was that the concerns "relate to the proposal as it was prior to discussions."[54] In order for those prior discussions to be meaningful, the agency was required to reopen discussions and inform the offeror of the agency's concerns.[55]

Improper Communications

The CIGNAfigance of Changes

The GAO used two cases to reinforce the idea that agencies may not allow offerors to correct mistakes unless the mistakes are minor and "both the existence of the mistake and what was actually intended are clearly apparent from the face of the proposal.[56]

In *CIGNA Government Services, LLC*,[57] the Department of Health & Human Services (HHS) issued a RFP for Medicare claims processing services for suppliers and beneficiaries of durable medical equipment. After receiving initial proposals, the HHS discovered that offerors had difficulty proposing the required level of effort (LOE). The HHS subsequently created a template for offerors to compete, which it provided to offerors along with the discussion letters.[58]

The source selection authority chose Palmetto GBA, LLC over CIGNA in one of the jurisdictions for the RFP.[59] CIGNA subsequently filed a protest with the GAO over the conduct of the source selection process. During the review of the agency record, CIGNA discovered that there was different data in Palmetto's final revised proposal (FRP), particularly in its LOE template, than in the source selection decision memorandum.[60] The HHS informed the GAO that there had been an exchange of e-mails between Palmetto and the HHS concerning errors in the FRP. The chair of the business evaluation panel, in charge of evaluating cost and price, asked Palmetto to confirm the hours in the LOE template. Palmetto, in an e-mail, responded by stating that the hours were "grossly overstate(d)" and attached corrections.[61] Additional e-mails and corrections followed.[62]

The GAO focused on testimony by the chair of the business evaluation panel that it was impossible to figure out Palmetto's intent behind its LOE submission without the follow-up e-mails.[63] As a result, the post-FRP communications equaled improper discussions.

In *University of Dayton Research Institute*,[64] the Air Force issued a RFP for design, engineering, and technical support services for weapons systems. The RFP requested that offerors propose a total evaluated price (TEP),[65] which basically was

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[53] *Id.* at 7.

[54] *Id.* at 8.

[55] The Army had already issued the delivery order and due to the urgent requirements, the GAO did not recommend to overturn the Army's award of the contract. The GAO did recommend that Al Long Ford receive reimbursement of its proposal preparation costs. *Id.* at 11.

[56] *CIGNA Gov't Svs., LLC*, B-297915.2, 2006 U.S. Comp. Gen. LEXIS 75 (May 4. 2006) at *17; University of Dayton Research Inst., Comp. Gen. B-296946.6, June 15, 2006, 2006 CPD ¶ 102, at 8.

[57] *CIGNA Gov't Svs., LLC*, 2006 U.S. Comp. Gen. LEXIS 75 at *17.

[58] *Id.* at *7.

[59] The RFP split the HHS requirement into four different jurisdictions. The jurisdiction in question involved the following states and territories: Alabama, Arkansas, Colorado, Florida, Georgia, Louisiana, Mississippi, New Mexico, North Carolina, Oklahoma, Puerto Rico, South Carolina, Tennessee, Texas, Virgin Islands, Virginia, and West Virginia. *Id.* at *4 n.3.

[60] *Id.* at *12.

[61] *Id.* at *13.

[62] *Id.* at *15.

[63] *Id.* at *18.

[64] *Dayton,* 2006 CPD ¶ 102.

[65] This acronym was used by the solicitation. *Id.* at 3.

a mechanical sum of individually required labor rates.[66] The Air Force would use the TEP "for evaluation/selection purposes only."[67] In evaluating individual proposals, the Air Force discovered that offerors had trouble filling out the rate tables, using numbers for the TEP that deviated from "official" rate tables.[68] The Air Force then issued clarifications to some offerors, asking, for example, for one to correct evaluated rates, and another to reconcile its printed and electronic versions of the proposed subcontractor rates.[69] The Air Force then selected ten proposals for award "without discussions."[70]

The Dayton Research Institute protested to the GAO on the basis that it did not have a chance to revise its proposal like the others.[71] The GAO, in its review of the record, found that in the so-called clarifications, several offerors were allowed to make dozens of changes to the rates initially proposed. The multiple changes decreased an offeror's TEP by $6 million and increased another's by $6 million.[72] The GAO determined, as a result, that the mistakes in the initial proposals were not minor. In addition, the Air Force could not determine, by looking at the initial proposals, what the offerors' ultimate intent were regarding the TEP.[73] Because the Air Force used the TEP to ensure price reasonableness and to ultimately make the source selection decision, the alleged communications "clearly constituted discussions" which the Air Force should have held with all offerors.[74]

Past Performance

Where's the Dirt?

In *Clean Harbors Environmental Services, Inc.*,[75] the GAO criticized a past performance evaluation for failing to consider the relevancy of the work of the incumbent. In addition, the GAO stated that, to analyze the relevancy of past performance, an agency should do more than just average the numerical ratings of submitted past performance questionnaires.[76]

The National Institutes of Health (NIH) issued a RFP for comprehensive chemical and low-level radioactive waste management for its main campus.[77] The NIH would make a best value selection looking at the following factors, in descending order of importance: technical, cost/price, and past performance.[78] Offerors would submit five contracts completed within the past two years, as well as current contracts similar in nature. The NIH would consider the "currency and relevance of the information, source of the information, context of the data, and general trends in the offeror's performance."[79] The source selection decision was between Clean Harbors and Clean Venture. The source selection authority selected Clean Venture, since the proposals were deemed to be technically equal, both received "satisfactory" past performance ratings, and Clean Venture offered a cost savings.[80]

Clean Harbors challenged the past performance evaluation. The GAO looked at the past performance evaluation to see if it was fair, reasonable and in accordance with the evaluation scheme, and if it was "based on relevant information sufficient to make a reasonable determination."[81] The GAO agreed with Clean Harbors, stating that the NIH failed to analyze the

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[66] *Id.*

[67] *Id.*

[68] The Air Force used two different sets of pricing tables: one for evaluation and one used for the resulting contract. *Id.* at 11.

[69] *Id.* at 6.

[70] *Id.* at 7.

[71] *Id.*

[72] *Id.* at 8.

[73] *Id.*

[74] *Id.* at 9.

[75] Comp. Gen. B-296176.2, Dec. 9, 2005, 2005 CPD ¶ 222.

[76] *Id.* at 3.

[77] *Id.* at 1.

[78] *Id.* at 2.

[79] *Id.*

[80] *Id.*

[81] *Id.* at 3.

relevance of the past performance questionnaires and solely "considered the scores derived from the questionnaire responses received for the two firms."[82] The GAO criticized the NIH's evaluation of the relevancy of the past performance information, stating that Clean Venture's references appeared to be smaller and less complex than the solicitation, while Clean Harbor's evaluation received no weight for the experience of being the incumbent.[83]

The Wright Weight of Experience

In *United Paradyne Corp.*,[84] the GAO criticized the Air Force's past performance methodology as improper because its mechanical application of numerical scores resulted in skewed final ratings. The Air Force issued a RFP for fuels management services at Wright-Patterson Air Force Base. The basis for award was a price/past performance tradeoff.[85] The RFP indicated that the ratings would be based on performance confidence, a mix of relevance and experience. The Air Force chose Four Winds Services, which had a lower price, but a lower past performance rating, than United Paradyne.[86]

United Paradyne, the incumbent, submitted a protest to the GAO, stating that the Air Force did not properly evaluate its performance at a highly similar contract in Puerto Rico, or did not give proper credit to the company for its excellent performance in other contracts.[87] The GAO looked at the Air Force's undisclosed past performance methodology with critical eyes. The Air Force averaged its evaluation of relevance into an overall rating, and then integrated that overall rating with the past performance rating, based on the point scores from the reference's questionnaires. The end result was incongruous; essentially a contractor with four excellent highly relevant contracts would be rated higher than a contractor with four excellent highly relevant contracts and four excellent non-relevant contracts (which would bring down his total average).[88] In addition, the methodology gave equal weight to United Paradyne's excellent performance as an incumbent as its performance on non-relevant contracts.

The GAO, ultimately, would have preferred a more through analysis of individual contracts rather than lumping all the contracts together in the Air Force's mechanical fashion.[89] The GAO finally criticized the Air Force for asking for references concerning terminated contracts, ironically under the heading "Relevant Contracts" and not evaluating the offeror's past performance under those contracts on the ground that they were "irrelevant."[90]

Price Evaluation

The Pit and the Pendulum

The GAO sustained a protest in *R&G Food Service, Inc., d/b/a Port-A-Pit Catering*,[91] holding that the agency's price evaluation was faulty when it only looked at unit prices without comparing the overall cost estimates. The Forest Service's National Interagency Fire Center issued a RFP for mobile food services for field locations during wildland fires. The RFP contemplated multiple awards of fixed-price requirements contracts for a base year and four option years.[92] Offerors were required to submit unit prices for meal services, mileage, and handwashing units for the requirements contract.[93] The source

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[82] *Id.* at 4.

[83] *Id.*

[84] B-297758, 2006 U.S. Comp. Gen**.** LEXIS 46 (Mar. 10, 2006).

[85] *Id.* at *2-*3. There were three evaluation factors: mission capability, past performance, and price. The RFP evaluated mission capability as acceptable/unacceptable. *Id.* at *2.

[86] *Id.* at *3.

[87] *Id.* at *4.

[88] *Id.* at *12.

[89] *Id.* at *13.

[90] *Id.* at *14.

[91] Comp. Gen. B-296435.4, B-296435.9, Sept. 15, 2005, 2005 CPD ¶ 194.

[92] *Id.* at 1.

[93] *Id.* at 2. The offerors also submitted unit prices for additional refrigeration storage space, additional tents and seating, additional tents and seating, and supplemental food and beverage items for a blanket purchase agreements. *Id.*

selection official made contracts awards to twelve offerors for twenty-one field locations; Port-A-Pit received no awards because the Forest Service determined that its prices were not fair and reasonable.[94]

Port-a-Pit submitted a protest arguing that the determination was based on only one element of its offer, mileage price, and its overall price could have been reasonable based on lower unit prices in the other areas.[95] The GAO agreed, holding that the Forest Service's price evaluation did not reflect the actual cost of the offeror's proposals.[96]

The GAO felt that a price reasonableness analysis should also look at quantity estimates and agreed with Port-a-Pit that its overall cost may have been lower depending on the relative percentages of the elements of the contract.[97] Since Port-A-Pit had a higher mileage price but lower meal and sink prices than the awardee, the offer could have been competitive if the Forest Service had used historical data to create realistic estimates to better conduct the price reasonableness evaluation.[98] Limiting the evaluation to analyzing the unit prices in isolation resulted in an improper basis to consider the proposed costs to the government.[99]

Cost Realism

Serco-stantial Evidence

The GAO, in *Serco, Inc.*,[100] informed agencies that cost realism should not be done in a vacuum when evaluating proposals. The U.S. Navy Space and Naval Warfare Systems Command (SPAWAR) issued a RFP for various support services for the maintenance, modernization, and new system installation for the command, control, communications, computer, intelligence, surveillance and reconnaissance (or C4ISR) requirements on the U.S. west coast.[101] The RFP called for the award for ID/IQ performance-based contract for all requirements. Non-price evaluation factors would be significantly more important than price; the key non-price evaluation factors assigned points were: understanding of work–sample tasks, and management plan.[102] Offerors were also required to respond to sample tasks which would be evaluated for cost/price.[103]

The Navy received two timely proposals: Serco and AMSEC. After reviewing the evaluation and realizing that there was some confusion regarding the sample tasks, the SPAWAR amended the RFP to disclose the Independent Government Estimate (IGE), conduct discussions, and request revised proposals.[104] The amended RFP warned offerors that unsubstantiated estimates would result in cost realism adjustments[105] and may affect the offeror's technical evaluation.[106]

AMSEC's revised proposal did not use the IGE in its staffing estimate and relied on its initial proposal along with a written explanation of how the staffing levels were calculated.[107] The SPAWAR found the explanation unsatisfying and

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[94] *Id.* at 3.

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

[96] *Id.* at 5.

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

[98] *Id.* at 7.

[99] *Id.* at 8.

[100] Comp. Gen. B-298266, Aug. 9, 2006, 2006 CPD ¶ 120. Serco filed the protest on behalf of Resource Consultants, Inc.; the Navy conceded that Serco had standing as the parent firm. *Id.* at 1. For the sake of clarity, this note will refer to Serco as the offeror.

[101] *Id.*

[102] The evaluation factors were: corporate experience, past performance, management plan, understanding of work-sample tasks, small business participation, cost/price, professional employee compensation plan, and small business subcontracting plan. *Id.* at 2.

[103] *Id.*

[104] *Id.* at 3.

[105] *Id.*

[106] *Id.* at 4.

[107] *Id.* at 5.

normalized AMSEC's evaluated cost to reflect the IGE.[108] Despite this increase in overall price, the Navy awarded the contract to AMSEC because, as the source selection official stated, there was no "significant risk."[109]

Serco challenged the evaluation, stating that the cost realism adjustment should have affected the evaluation of AMSEC's understanding of work and management plan since the proposed staffing levels showed a fundamental misunderstanding of the requirements.[110] The GAO agreed, stating that the judgment that the offeror's staffing levels were unrealistically low should have been reconciled with the positive assessment of the technical approach.[111] This result is especially reinforced by the fact that the RFP amendment contained a requirement to review the effect cost realism adjustments on the ultimate technical evaluation.[112] Here the fact that the SPAWAR more than doubled AMSEC's sample task hours should have impacted the acceptability of the technical piece, or at least raised the risk assessment of AMSEC's proposal.[113]

Machines Challenge Mechanical Evaluation

In *Metro Machine Corp.*,[114] the GAO rejected a challenge to the Navy's overall cost realism analysis while ultimately sustaining the protest based on the Navy's failure to account for a teaming agreement on the awardees probable cost of performance. The Naval Sea Systems Command (NAVSEA) issued a RFP for a cost-plus-award-fee contract for maintenance and modernization work on ships in Norfolk, Virginia.[115] The RFP proposed two notional work item packages (one for each type of ship) for which offerors were required to use the government's estimated labor hours and material costs. The offeror could deviate from these estimates with "clear and compelling evidence" that its proposed changes were proper and warranted. [116]

After discussions, the NAVSEA conducted a cost realism analysis of each offerors' final revised proposal by essentially using the government's estimates as the base and rejecting any attempted deviation.[117] After labor hours and material costs were normalized, the cost realism analysis essentially boiled down to the offeror's rate information[118] which was adjusted to create the Navy's best estimate for each proposal.[119]

Metro challenged this technique as a mechanical application of normalization which failed to take into account individual technical approaches.[120] The GAO disagreed, stating that the reasonableness of a cost realism evaluation does not need to "achieve scientific certainty."[121] All the government would need to show was that the evaluation was "reasonably adequate" and the agency's conclusions were "reasonable and realistic in view of other cost information reasonable available" to the government.[122] Given the government's declaration in the RFP that the Navy would use the government's estimates absent "clear and convincing" evidence to the contrary, the NAVSEA's approach was reasonable.[123] The GAO

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[108] *Id.*

[109] *Id.* at 6.

[110] *Id.*

[111] *Id.* at 7.

[112] *Id.*

[113] *Id.*

[114] B-297879.2, 2006 U.S. Comp. Gen. LEXIS 87 (May 3, 2006).

[115] *Id.* at *1-*2. The RFP stated that award would be made to the best value based on technical factors and cost. *Id.* at *3.

[116] *Id.* at *7.

[117] *Id.* at *14.

[118] The rate information consisted of the direct composite weighted labor rate, general and administrative, and subcontractor rates. *Id.* at *14.

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

[120] *Id.* at *17.

[121] *Id.* at *20.

[122] *Id.*

[123] *Id.* at *25.

also rejected a challenge to the underlying evaluation scheme as untimely since the cost realism approach should have been challenged prior to the submission of proposals.[124]

The GAO agreed with Metro in the challenge to the cost realism evaluation of the individual awardee, Earl Industries, LLC. Metro argued that the NAVSEA failed to take into account potentially different subcontract direct labor rates that Earl would achieve as a result of its teaming agreement.[125] The Navy raised the question with Earl, but ultimately made no effort to capture the cost of the teaming agreement. The GAO noted that this was significant, not only because the NAVSEA noted that the teaming agreement was a strength of Earl's proposal, but also because the normalization scheme magnified the importance of individual offeror's labor rates.[126] Since the end result was that the NAVSEA "ignored an actual cost" of Earls' proposal, Metro's proposal was sustained on this ground.[127]

Nothing Ventured, Nothing Gained

In *Information Ventures, Inc.*,[128] the GAO sustained a challenge to the government's normalization of costs and a contradictory evaluation which both praised and criticized proposed staffing levels. The Centers for Disease Control and Prevention (CDC) issued a RFP for a cost-plus-fixed-fee contract for information development and dissemination activities for priority cancer efforts for the Division of Cancer Prevention and Control (DCPC).[129] The RFP identified a project director position without identifying duties or responsibilities or suggested or minimum proposed hours.[130] An amendment did suggest a level of effort of about 25-30 hours per month.[131]

The CDC included the offeror and BRI Consulting Group in the competitive range.[132] During discussions, both offerors reduced the number of hours for the program director.[133] The agency conducted then a cost realism analysis of the final proposal revisions. The technical evaluation panel added hours to that position based on the government's estimate of the hours per year.[134] The CDC then awarded the contract to BRI based on its lower evaluated cost.[135]

After a protest, the CDC conducted a corrective action which included a reevaluation of the proposals and a cost analysis by the CDC Acquisition Oversight and Evaluation Branch (OEB). Although the OEB had some concerns regarding the proposed costs, it made no changes to the CDC's initial evaluations which were used in the new source selection determination which again awarded the contract to BRI.[136]

Information Ventures challenged the technical evaluation, stating that the CDC praised both offerors for having "more than adequate staff" in the technical evaluation[137] while both offerors' costs were increased because their "hours had been lowered to unrealistic expectations."[138] The GAO agreed, stating that the contradiction between the cost evaluation and technical evaluation resulted in flawed evaluations which warranted a new source selection decision.[139]

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[124] *Id.*

[125] *Id.* at *25-*26.

[126] *Id.* at *28.

[127] *Id.* at *28-*29.

[128] B-297276.2, B-297276.3, B-297276.4, 2006 U.S. Comp. Gen. LEXIS 47 (Mar. 1, 2006).

[129] *Id.* at *1.

[130] *Id.* at *13.

[131] *Id.* at *15.

[132] *Id.* at *3.

[133] *Id.* at *13.

[134] *Id.* at *19.

[135] *Id.* at *4.

[136] *Id.* at *5-*6.

[137] *Id.* at *8.

[138] *Id.* at *9.

[139] *Id.* at *11.

In addition, Information Ventures challenged the CDC's normalization of cost. The GAO again sided with the protestor, stating that the agency's mechanical normalization did not take into account different technical methods which offerors were free to propose based on the terms of the RFP.[140] A key fact was that the RFP suggested "25-30 hours per month" while the normalization assumed a minimum of sixty-six hours per month.[141]

Researching Copying Costs

In a case discussed in last year's *Year in Review*,[142] the GAO denied a protest challenging an agency's upward adjustment to an offeror's proposed reproduction costs in *University Research Company, LLC*.[143] The Substance Abuse and Mental Health Services of the Department of Health and Human Services (HHS) issued a RFP to realign health information dissemination efforts under one contract.[144] The GAO sustained an initial proposal from University Research, based on the source selection authority's misstatement of an award recommendation.[145] Following a revised source selection decision, the GAO denied a second protest;[146] University Research then filed with the COFC which sustained the protest in one area normalized by the HHS: reproduction costs.[147]

The HHS reopened the competition on limited grounds, clarifying the requirement for reproduction work and seeking revised cost information in that area.[148] The HHS issued an amendment with significant upward revisions to the photocopying requirement.[149] University Research submitted a revised proposal which included a "two-tiered, fixed-price cap" pricing feature. The offer included a fixed price, for both color and black-and-white, for photocopying capped at one-twelfth of the total annual estimate. If the photocopying needs exceeded this figure, University Research raised its fixed price.[150] University Research based its cost estimate on the lower price, assuming that the HHS would balance its photocopying throughout the year.[151] IQ Solutions, the other competitor, offered separate costs for color and black-and-white photocopying with a detailed calculation concerning its estimates.[152]

In looking at the cost estimates, the HHS obtained historical data. Since the monthly limit would be exceeded in five months, the HHS recalculated University Research's costs. The source selection official did not change the technical scores, noting that photocopying represented less than ten percent of the total estimated costs.[153] Since both companies were essentially technically equal, the source selection official selected IQ, whose proposal cost $7.3 million less.[154]

University Research again submitted a protest to the GAO, challenging the HHS's failure to alter the technical evaluation scores, the HHS's upward adjustment of the photocopying costs, and the agency's decision not to adjust IQ's proposed costs.[155] The GAO denied the protest, holding that the narrow photocopying revaluation would not affect the overall

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[140] *Id.* at *19.

[141] *Id.* at *29. The GAO also sustained a challenge to the final contract, which contained a ceiling rate for general and administrative costs which was not in BRI's final proposal revision. The GAO viewed this addition as a material change which should have triggered a new round of discussions. *Id.* at *26.

[142] Major Andrew S. Kantner et al., *Contract and Fiscal Law Developments of 2005—Year in Review,* ARMY LAW., Jan. 2006, at 38-39 [hereinafter *2005 Year in Review*].

[143] Comp. Gen. B-294358.8, B-294358.9, B-294358.10, Apr. 6, 2006, 2006 CPD ¶ 61.

[144] *Id.* at 2. The RFP was set aside for small businesses and HHS intended to award a cost-plus-award-fee contract for one year with four option years. The RFP identified four technical evaluation criteria including (1) understanding the project; (2) technical approach, (3) key personnel, and (4) management plan and facilities. *Id.*

[145] *University Research Co., LLC*, B-294358, B-29435.2, B-294358.3, B-294358.4, B-294358.5., Oct. 28, 2004, 2004 CPD ¶ 217.

[146] *University Research Co., LLC,* B-294358.6, B-294358.7, Apr. 20, 2005, 2005 CPD ¶ 83.

[147] *University Research Co., LLC v. United States*, 65 Fed. Cl. 500 (2005).

[148] *University Research*, 2006 CPD ¶ 61, at 5.

[149] *Id.* at 5-6.

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

[151] *Id.* at 7.

[152] *Id.*

[153] The reproduction costs were approximately $4 to $5 million out of a total contract between $60 and $65 million. *Id.* at 8.

[154] *Id.* at 9.

[155] *Id.* at 10.

technical evaluation. Since reproduction was a small part of the total performance work statement, two-and-a-half lines out of a thirty-three page description, any changes in reproduction would be *de minimis* to the larger scheme.[156]

The GAO approved of the HHS's cost adjustment, stating that the agency should evaluate "contractor-imposed conditions on cost-control devices."[157] The two-tiered price approach "raised cost issues the agency needed to consider if it was not planning to make changes in how it managed its workload, which the agency was neither inclined, nor required, to do."[158]

The GAO denied the overall protest, essentially because, even if it had won each aspect of its allegations, IQ's proposal would still be $1.2 million less than University Research's.[159] Since the proposals were essentially equal, it seemed doubtful that the HHS would select University Research's more expensive proposal.[160]

Seeking Closure

In *EPW Closure Services, LLC; FFTF Restoration Co., LLC*,[161] the GAO sustained a challenge to a cost realism analysis that failed to show that the agency could justify the cost figures used in the source selection analysis. The Department of Energy (DOE) issued a RFP for the award of a cost-plus-incentive-fee contract to a small business for the deactivation and decommissioning of the Fast Flux Test Facility, a nuclear test reactor located in southeastern Washington State.[162] The RFP contemplated a best-value award considering both cost/fee and five technical/management evaluation criteria.[163] As part of the proposed cost, offerors were required to submit a fully supported target cost[164] including an allowance for contingencies.[165]

Three proposals made the competitive range: SEC Closure Alliance, EPW and FFTF Restoration. The DOE selected SEC Closure for the award since SEC Closure had a "slight advantage" over FFTF restoration "because of its schedule and its approaches to the other technical issues."[166] SEC Closure was the only offeror to offer a cost savings under the maximum allowed funding, although the other two proffered earlier completion schedules.[167] Both EPW and FFTF Restoration submitted protests to the GAO.[168]

FFTF Restoration challenged SEC Closure's contingency allowance. SEC Closure identified one hundred and five separate risks which were rated for probability, cost, or schedule impact and for which the company proposed a mitigation approach. SEC Closure also ran the risks through a simulation to arrive at a contingency allowance of $14,274,050 with an eighty percent confidence level that the project cost would not exceed the offeror's proposed costs.[169]

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[156] *Id.* at 12.

[157] *Id.* at 14.

[158] *Id.*

[159] *Id.* at 15.

[160] The GAO also dismissed additional allegations concerning adjusting IQ's costs as untimely even though the GAO noted that IQ would still be the lower-priced proposal. *Id.* at 15-16.

[161] B-294910, et al., Jan. 12, 2005, 2006 CPD ¶ 3.

[162] *Id.* at 2.

[163] The evaluation criteria were: (1) technical approach (weight of thirty percent), (2) key personnel, (fifteen percent with project manager weighed higher), (3) experience and past performance (each worth ten percent for a total of twenty percent), (4) environment, safety and health (fifteen percent), and (5) business management (twenty percent). *Id.* at 3.

[164] The offeror needed to show a target cost for each activity was shown in a work breakdown statement, the completion date, the target fee, the minimum fee, the maximum fee, the share line (ratio) for cost overruns or underruns, and a detailed basis of estimates. *Id.*

[165] The total contract target cost and target fee could not exceed $43.5 million for fiscal year 2005 and $46.1 million for each subsequent fiscal year. *Id.*

[166] *Id.* at 4.

[167] *Id.*

[168] *Id.* at 6.

[169] *Id.* at 9.

The GAO noted that the evaluation of the contingency allowance was important since it was the main difference between the three proposal's evaluated costs which were wildly divergent.[170] The GAO's main concern with the agency's evaluation of these allowances was that the DOE appeared not to be able to verify any of the proposed costs and merely accepted the proposals' figures without question.[171] The GAO felt merely concluding that the offeror used a sound method to calculate the costs was not enough; the DOE's acknowledged limited review failed to adequately capture the difference between the offeror's approaches and was, therefore, unreasonable.[172]

The GAO also sustained RRTF's protest on the ground that, while the RFP made it clear that an accelerated schedule was desired, the DOE did not give offeror's an advantage for the "degree to which the offeror's proposed to accelerate completion ahead of the 2012 required site closure date. . ."[173] The GAO also denied EPW's protest challenging the DOE's evaluation of a proposed technical approach as a weakness based on a risk that approval of the technical approach would not be granted by the lead regulatory agency.[174]

Evaluations

In *Magnum Medical Personnel, A Joint Venture*,[175] the GAO sustained a protest in which the agency failed to evaluate the protestor on the same terms as the awardee. The Air Force issued a RFP for direct care clinical support services for Air Force Medical Treatment Facilities (MTF). The Air Force intended to award up to five ID/IQ contracts with a four-year base contract period and two three-year option periods.[176] The evaluation factor of mission capability had three subfactors, in descending order of importance: retain, recruit, and qualify.[177] The RFP required that the healthcare employees obtain security clearance in order to be qualified to work in the MTF; the Air Force also performed a risk assessment for each subfactor.[178]

The Air Force rated Magnum, whose offer had the lowest price, as having a marginal mission capability and a moderate risk under the qualify subfactor.[179] This rating ultimately doomed Magnum's chance for selection for award, since the source selection authority selected the five most highly rated offerors for award.[180]

Magnum challenged the evaluation, stating that an evaluator who questioned its internal security process raised similar questions with an awardee's proposal which had similar faults.[181] The GAO agreed, stating that Magnum provided the same information as the awardee while arguably providing more detail regarding an internal process for complying with the RFP's security requirements.[182] The GAO noted that the awardee only added the word, "security," in flowcharts and milestones, while Magnum used a narrative description to show how it would issue credentials to its workers.[183] The GAO concluded that it was not reasonable for the Air Force to give Magnum a lower rating than the awardee.[184]

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[170] FFTF Restoration proposed $22,114,000 with a fifty percent confidence rating; EPW proposed $25,836,000. The agency cost estimate was 18.3 percent. *Id.* at 10.

[171] The agency's contingency analysis noted that "the (offeror's) techniques used to arrive (at the final calculation) . . . and the amount of information that was provided varied, making it difficult to assess whether any of the three offerors assessed the variability more accurately than the others. *Id.* The testimony of the source evaluation board was ". . . if you're looking at a hundred different categories, I mean, it requires a lot of analysis. . . So we accepted the information that was provided by the offerors. . ." *Id.* at 11.

[172] *Id.* at 12.

[173] *Id.* at 8.

[174] *Id.* at 16. The technical approach dealt with sodium residue removal; EPW proposed to leave 350 gallons or less in the inside of the vessels and piping. *Id.* at 14.

[175] B-297687.2, 2006 U.S. Comp. Gen. LEXIS 105, June 20, 2006.

[176] *Id.* at *3.

[177] Mission capability and past performance were equal in importance, and proposal risk was more important than price. *Id.*

[178] *Id.* at *7.

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

[180] *Id.* at *18.

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

[182] *Id.* at *22-*23.

[183] *Id.*

[184] *Id.* at *24-*25.

The GAO sustained a protest in *KIC Development, LLC*,[185] holding that the agency could not evaluate a proposal as technically acceptable for relying on a subcontractor to meet the RFP's experience requirement. The Department of Housing and Urban Development issued a RFP for lead evaluation services for single-family properties.[186] The RFP contemplated award to the lowest-price, technically acceptable proposal in four geographical areas: Atlanta, Denver, Philadelphia, and Santa Ana.[187] Under the experience and past performance factor, the RFP stated, "[t]he Offeror and/or its proposed key personnel and/or its proposed subcontractors must have performed the same or similar service as required by the solicitation over approximately the last three years."[188]

The technical evaluation panel judged KIC's proposal to be technically unacceptable since "KIC relies completely on a sub for the work;" based on this evaluation, KIC did not receive the award for the Atlanta region.[189] KIC challenged this evaluation because it met this requirement through a properly-committed subcontractor.[190]

The GAO agreed with the protestor, holding that the HUD strayed from the stated evaluation scheme. The GAO found that the term "and/or" could be met jointly or by only one of the named entities and the HUD could not penalize KIC for relying on a subcontractor.[191]

Valid Passports

The COFC found that the Government Printing Office (GPO) used undisclosed criteria in a binding manner and was therefore required to disclose that criteria to all competitors in *OTI America v. United States*.[192] The GPO issued a solicitation for a new electronic U.S. passport; the GPO set up the procurement in stages in which competitors would be eliminated from the competition.[193] OTI joined a final field of eight contractors after filing a GAO protest, withdrawn after corrective action by the GPO.[194]

During stage two, the GPO tested samples from all contractors. The GPO issued a "cure notice" to OTI concerning test failures of sample electronic passport book covers.[195] OTI submitted a second set that contained a different flaw in an adhesive material. OTI discovered that it had received the wrong ingredient from a supplier, but the GPO refused to accept the new sample. The GPO then informed OTI that it would be eliminated from stage two.[196]

OTI filed a protest with the GAO which was denied.[197] OTI then filed a complaint with the COFC, arguing that GPO used an internal document, labeled "E-Passport Selection Guidance," as undisclosed evaluation criteria in contravention of the *FAR*. The GPO argued that the Selection Guidance was merely "an internal set of guidelines" which did not need to be disclosed in the initial solicitation.[198]

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[185] Comp. Gen. B-297525.2, Jan. 26, 2006, 2006 CPD ¶ 27.

[186] *Id.* at 1.

[187] *Id.* at 2.

[188] *Id.*

[189] *Id.* at 4.

[190] *Id.*

[191] *Id.* at 5.

[192] 68 Fed. Cl. 646 (2005).

[193] *Id.* The solicitation contained mandatory CLINs with guaranteed minimum amounts. The goal was either to award the contract to a single company or to multiple awardees using optional CLINs. *Id.* at 649.

[194] *Id.* at 650.

[195] *Id*.

[196] *Id.* at 651.

[197] *OTI America*, Comp. Gen. B-295455.3, 2005 CPD ¶ 157.

[198] *OTI*, 68 Fed. Cl. at 652.

The COFC agreed with OTI, finding that the Selection Guidance, never published to any of the contractors,[199] was used as evaluation criteria to assess proposals. Although the protest involved test and evaluation in a second stage of a procurement, the COFC applied "principles pertinent to evaluation criteria in procurements" since the evaluative stages ultimately would result in the award of a contract for "full agency deployment."[200]

The COFC agreed with a GAO case, *Telos Field Engineering*,[201] which struck down an undisclosed point system which had been used in a binding fashion against competitors. The COFC found that the GPO had used the Selection Guidance as binding evaluation criteria without prior notice to the competing contractors.[202] The COFC also criticized the Selection Guidance as being internally inconsistent, since the elimination rules were mandatory and discretionary in different areas of the Guidance.[203] In a redacted section, the COFC found that the GPO had also applied the Selection Guidance in an inconsistent manner.[204]

The COFC also found that the contracting officer failed to use independent judgment in eliminating OTI on the basis of the conclusions by the technical evaluation team.[205] The COFC focused on the contracting officer's testimony that she had "no idea" concerning a question about whether a clerical error would result in elimination under one of the rules of the Selection Guidance.[206]

The COFC declined to issue an injunction of the competition; however, the COFC instructed the GPO to accept OTI's product as a restored competitor of the competition to see if OTI should graduate to the second stage of the procurement.[207]

Getting Hung Up on the Numbers

In *BAE Technical Services, Inc.*,[208] the GAO sustained a protest in which the agency applied two different standards in the evaluation process. The Air Force issued a RFP for a cost-plus-award fee contract for the operations and maintenance of the Eglin Test and Training Complex in Eglin Air Force Base, Florida.[209] The protest surrounded the evaluation of the program management subfactor of the mission capability factor of the "best value" award decision.[210] The Air Force intended to evaluate "innovation and efficiency initiatives . . . that would produce reasonable qualitative improvements, cost reductions, or cost avoidance."[211]

Three offerors provided final proposal revisions, including BAE, the incumbent; and InDyne, the awardee.[212] The critical difference between BAE and InDyne was within the program management, agility, and organizational conflict of interest subfactors. The key aspect for both program management and agility was plans to reduce full-time equivalent (FTE) personnel over the life of the contract.[213]

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[199] *Id.* at 653.

[200] *Id.* at 655.

[201] Comp. Gen. B-253492.6, Dec. 15, 1994, 94-2 CPD ¶ 240.

[202] *OTI*, 68 Fed. Cl. at 656.

[203] *Id.* Rule 2 stated that a product may be eliminated if it fails more than once in a single phase; Rule 4 stated that a second failure would result in a mandatory elimination unless the product was in "significant compliance," and Rule 3 stated that a second failure which was a different problem would receive a cure notice and an opportunity to correct. *Id.*

[204] *Id.* at 657.

[205] *Id.*

[206] *Id.* at 658.

[207] *Id.* at 660.

[208] B-296699, 2005 U.S. Comp. Gen. LEXIS 250 (Oct. 5, 2005).

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

[210] *Id.* at *2-*3. There were four evaluation factors: Mission capability and past performance were of equal importance and each was more important than proposal risk; mission capability, past performance and proposal risk, when combined, were significantly more important than cost/price. *Id.* at *3.

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

[212] *Id.* at *4.

[213] *Id.*

BAE used a business process reengineering program to develop its FTE personnel reduction and efficiency plans;[214] the Air Force did not trust the modeling methodology of its program and doubted BAE's ability to achieve its planned reduction in FTEs.[215] The GAO did not find the Air Force's concerns about the program to be unreasonable. The main problem was that a similar type of scrutiny was not applied to InDyne's FTE reduction plans.[216]

As the GAO stated, while BAE at least tried to present a coherent analytical calculation, InDyne's calculations used general references to prior attempts, e.g. "we have always successfully employed continuous improvement on our contracts."[217] As the chairman for the source selection evaluation team testified, "we didn't get hung up on the numbers."[218] The scrutiny applied to BAE's methodology should have been extended to InDyne's generalities.[219]

A Weird Evaluation

The GAO disapproved of an agency's evaluated weaknesses of a proposal, finding them unsupported or unreasonable in *Intercon Associates, Inc*.[220] The General Services Administration (GSA) issued a RFP for a fixed-price ID/IQ contract for a comprehensive electronic forms system.[221] The GSA received eleven proposals, including eight in the competitive range. The agency awarded the contract to Information Analysis; Intercon, the incumbent, submitted a protest to GAO, challenging the evaluation of its proposal.[222]

The GAO agreed with Intercon, finding that the GSA's brief evaluation record, which included initial evaluation scoring sheets, no consensus evaluation report, a brief summary of advantages and disadvantages of each offer's operational demonstration, and a brief source selection document, was "either factually incorrect, internally contradictory, or so cryptic that (the GAO was) unable to discern either the basis for the evaluators' concerns or how their concerns related to the solicitation's evaluation criteria."[223]

The GAO found that the GSA's determination that Intercon's proposal could not generate "true" electronic forms to be unsupported.[224] In addition, the GAO found that the GSA's conclusion that the file sizes of electronic forms were larger than Information Analysis's proposal was unsupported by comparing the offeror's file size with the Adobe Acrobat forms used by the awardee's.[225] The GAO also dismissed an assessment of the wizard function which shows a split screen with the electronic form and a text window as "weird," stating that it was not clear what the evaluator meant while noting that the source selection decision referred to Intercon's "nice wizard function."[226] Finally, the source selection decision criticized Intercon's proposal stating that it required a separate application that needed to be downloaded and was not available to most agencies.[227] The GAO noted that Adobe Acrobat, the awardee's preferred program, also needed to be downloaded and that thirty-seven different federal agencies had installed seventy-seven thousand copies of the software for Intercon's product, Accessible FormNet.[228]

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[214] *Id.* at *7-*8.

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

[216] *Id.* at *22.

[217] *Id.* at *23.

[218] *Id.* at *16.

[219] In a redacted section, the GAO applied similar logic to the Air Force's evaluation of agility. *Id.* at 11-12. The GAO recommended that the Air Force reopen discussions and request revised proposals. *Id.* at 12.

[220] Comp. Gen. B-298282, B-298282.2, Aug. 10, 2006, 2006 CPD ¶ 121.

[221] *Id.* at 1.

[222] *Id.* at 2.

[223] *Id.* at 3.

[224] *Id.*

[225] *Id.* at 5. For example, the file size of the Standard Form 278 for Accessible FormNet, used by the protestor, was 407.6 kilobytes while the PDF version is 1799.3 kilobytes. *Id.*

[226] *Id.* at 5-6.

[227] *Id.* at 6.

[228] *Id.* The GAO also addressed a criticism of the use of digital certificates, stating, *inter alia*, that the RFP did not address a preference regarding this detail. *Id.* at 7. Also, in a heavily redacted section, the GAO found that the GSA's evaluation of Intercon's key personnel proposal was unsupported. *Id.* at 8.

In a case discussed in last year's *Year-in-Review*,[229] the GAO again sustained a protest of the U.S. Forest Service's solicitation for the National Recreation Reservation Service (NRRS) in *Spherix, Inc*.[230] The GAO issued a RFP for a multi-year fixed-unit-price requirements contract with six yearly options for the NRRS, which is a one-stop reservation system for the public use of recreational facilities and activities on federal lands.[231] The basis for award was a cost-technical tradeoff with the following evaluation factors in descending area of importance: technical approach, management approach, reservation system demonstration, past performance and price.[232]

After the sustained protest, the Forest Service amended the RFP and reopened the competition. The Forest Service narrowed the competitive range between Spherix, the incumbent contractor for the National Park Reservation Service run by the National Park Service, and ReserveAmerica, the NRRS incumbent contractor.[233]

Spherix challenged the Forest Service's award of the contract to ReserveAmerica, arguing that the agency's evaluation of its proposal was unreasonable. The GAO agreed, finding that the agency did not fairly consider the differences between the two proposals[234] and that the source selection authority had an incorrect understanding of the relative strengths of the two proposals.[235]

First, the GAO determined that the agency misunderstood Spherix's proposal concerning field control of inventory. The agency's report stated that the inventory management capability did not address tours and ticketing. Spherix's proposal, however, states that its capability applies to both recreation facilities and recreation activities.[236] Second, the agency's report mistakenly asserted that Spherix's proposal did not offer automatic uploading of data. In fact, even though ReserveAmerica received a more favorable assessment, the GAO felt that Spherix's proposal offered more offline capabilities than ReserveAmerica.[237]

In addition, ReserveAmerica received credit for proposing an alternative implementation plan.[238] In response to a question from Spherix, the Forest Service seemed to imply that the agency wanted a one-time deployment of the system. The GAO felt that this statement misled Spherix into not submitting an alternative plan.[239]

The GAO also noted that the source selection decision may have exaggerated a strength for ReserveAmerica in the "ease of use" discriminator involving customization of the system. At the hearing, a software consultant for ReserveAmerica testified that the requested customization was as easy as picking which shirt or tie to wear, and that the Forest Service's use of this aspect as a key discriminator was "silly."[240] The GAO noted that ReserveAmerica's incumbency may have given the company an unfair advantage in this area.[241]

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[229] *2005 Year in Review*, *supra* note 142, at 28.

[230] Comp. Gen. B-294572.3, B-294572.4, Oct. 20, 2005, 2005 CPD ¶ 183.

[231] *Id.* at 2.

[232] *Id.* at 3. The technical factors were significantly more important than price, with price becoming more important if the differences in technical matter were narrow. *Id.*

[233] *Id.* at 4.

[234] *Id.* at 9.

[235] *Id.* at 8.

[236] *Id.* at 6.

[237] *Id.* at 7.

[238] *Id.* at 8.

[239] *Id.* at 9.

[240] *Id.* at 10.

[241] *Id.* The GAO also noted that there was some confusion about the solicitation's requirement for offline capability. The GAO sided with Spherix in its interpretation that offline capability should be greater than the interpretation of the Forest Service and ReserveAmerica. *Id.*

Turning Over a Green Leaf

In a procurement covered in last year's *Year in Review*,[242] the GAO sustained a protest in *Greenleaf Construction Company,*[243] finding that an alleged "bait and switch" of proposed key personnel rendered the evaluation process unfair. The HUD issued a RFP for the award of fixed-unit-price ID/IQ contract for single-family home management and marketing services.[244] The protest involved the award of the contract for properties in the Ohio/Michigan area.[245] Following a COFC decision, the HUD awarded the contract to Chapman Law Firm. Greenleaf then filed a protest with the GAO, alleging that the evaluation was improper.

The GAO agreed, finding that Chapman had notice that two key personnel would be unavailable for work under the awarded contract at least two months prior to the HUD's final evaluation.[246] In addition, Chapman knew, at around the same time period, that the company would use a different software package and company than proposed in its initial offer.[247] In addition, the contracting officer failed to take into account Chapman's sale of one of its principal assets, which would have changed a positive DCAA audit, relied upon by the contracting officer, on Chapman's responsibility to perform the contract.[248]

Hitting the Golf Ball FAT

In *Novex Enterprises*,[249] the GAO found that an agency unreasonably selected an awardee based on an evaluation that failed to fully consider the overall impact of different delivery schedules, a key factor of the solicitation. The Defense Logistics Agency (DLA) Defense Supply Center in Columbus, Ohio, issued a RFP for an urgent requirement for 15,887 steel side rings.[250] The RFP contained two required delivery schedules: if the part required a first article test (FAT), the FAT would be completed in forty-five days, the company would deliver 3000 rings in 165 days, and 3000 rings every thirty days thereafter until complete. If the DLA waived the testing requirement, the required schedule was 3000 rings in ninety days and 3000 rings every thirty days thereafter until complete.[251] The RFP stated that preference may be given for "offered deliveries that are shorter than the required delivery."[252]

Novex proposed a unit price of $38.50 and two delivery schedules: if the DLA waived the FAT requirement, Novex could provide 3000 rings in 120 days, with 3000 rings every thirty days thereafter; if FAT was not waived, it would comply with the proposed government schedule.[253] Badger, the awardee, relied on a FAT waiver proposing to deliver 3000 initial units in 150 days, with 1800 rings every thirty days until complete; and a unit price of $39.11.[254] Essentially, Badger would provide the required units in sixty more days than the proposed government schedule, while Novex's schedule, which mirrored the government estimate, was fifteen days behind Badger's since the DLA ultimately did not waive FAT for Novex.

The DLA selected Badger, the only offeror for whom FAT was waived. The source selection decision stated that, since the DLA had a limited supply, the extra time needed for the FAT approval for the other offerors and the urgency of the requirement gave Badger the advantage, since the DLA estimated that FAT would take at least seventy-five days.[255]

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[242] *2005 Year in Review*, *supra* note 142, at 24.

[243] Comp. Gen. B-293105.18, B-293105.19, Jan. 17, 2006, 2006 CPD ¶ 19.

[244] The contract supervised the maintenance and sale of foreclosed properties under the Federal Housing Authority's role in administering the home mortgage insurance program. *Id.* at 2.

[245] The contract was a small business cascading set-aside. *Id.*

[246] *Id.* at 7.

[247] *Id.* at 10. The court also sustained an OCI allegation.

[248] *Id.* at 15.

[249] B-297660, B-297660.2, 2006 U.S. Comp. Gen. LEXIS 41 (Mar. 6, 2006).

[250] *Id.* at *2.

[251] *Id.*

[252] *Id.* at *3.

[253] *Id.*

[254] *Id.* at *4.

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

Novex challenged the review, stating that Badger's offer did not meet the required delivery schedule and should not be eligible for award.[256] The GAO agreed, finding that the Badger's offer did not seem to be the best value. The GAO felt that Novex would complete the entire contract of 15,887 steel rings seventy-five days earlier than Badger. In addition, a gain of fifteen days for the initial delivery of the 3000 units did not seem to be worth the additional cost of Badger's proposal.[257] The GAO recommended that, given the urgency of the requirement, Badger should be allowed to furnish the initial quantity, but the DLA should redo the RFP for the remaining steel side rings.[258]

Improper Weights for YORK

In *YORK Building Services*,[259] the GAO found that the Department of Agriculture (USDA) improperly converted a RFP into a lowest-price, technically acceptable procurement due to a thin source selection document and summary evaluation. The USDA issued a RFP for janitorial and recycling services for buildings in Washington, D.C.[260] The RFP emphasized technical superiority and listed three technical factors in descending order of importance: technical approach, management plan, and past performance.[261] Out of twenty-five proposals, the USDA found twenty-three technically acceptable and included only YORK and Obsi1, the awardee, in the competitive range. After discussions, the source selection authority found both proposals technically equal and selected Obsi1 due to its lower price.[262]

YORK submitted a protest to the GAO, alleging that the USDA improperly gave technical approach and management plan equal weight.[263] The GAO agreed, finding that the evaluators gave both factors a maximum score of thirty-five points, which was contrary to the RFP. In addition, the evaluators seemed to strive for technical acceptability, and the final report, which was only one page and two lines in length, only confirmed technical acceptability.[264]

In addition, the GAO felt that the source selection authority relied upon the point scores in a mechanical fashion in awarding the contract to Obsi1.[265] The source selection authority total evaluation of Obsi1 was that "Obsil, Inc. clarified all technical concerns and submitted final proposal revisions that are inclusive of work statement requirements." Her evaluation of York was that the company "too has responded satisfactorily to the panel concerns and demonstrates its capacity to perform required services and its proposal is substantially equal to Obsi1."

Other than that, the GAO found that the record contained no discussion of the technical evaluation factors, and the source selection official and the technical evaluators looked at the final proposal revisions "merely to verify their acceptability, rather than to assess relative quality or to evaluate whether either proposal was superior to the other under the evaluation factors and weightings required by the RFP."[266] The GAO also dismissed the agency's supplemental argument which contained "new rationales, based on a hypothetically correct evaluation, for which there is no support in the contemporaneous record."[267]

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[256] *Id.* at *6.

[257] *Id.* at *8-*9. The GAO noted that in an alternative dispute resolution submission, the DLA proposed different rationale but gave little weight to this submission since it was made "in the heat of litigation." *Id.*

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

[259] Comp. Gen. B-296948.2, B-296948.3, B-296948.4, Nov. 3, 2005, 2005 CPD ¶ 202.

[260] *Id.* at 1.

[261] *Id.*

[262] *Id.* at 2.

[263] *Id.* at 3.

[264] *Id.* at 5.

[265] *Id.*

[266] *Id.* at 7.

[267] *Id.*

Simplified Acquisitions

Micro-Purchase Threshold Raised to $3,000

The Civilian Agency Acquisition Council and the Defense Acquisition Council (FAR Councils) increased the maximum purchase threshold for micro-purchases from $2,500 to $3,000.[1] Section 807 of the Ronald Reagan National Defense Authorization Act of 2005 mandated this action directing that certain acquisition thresholds be adjusted in response to future inflation every five years.[2]

The micro-purchase threshold for construction contracts remains $2,000 because Congress did not alter the threshold for applicability of the Davis-Bacon Wage Act. The Davis-Bacon Act still applies to contracts over $2,000, so that remains the limit of the micro-purchase threshold for construction contracts.

Because many service contracts are subject to the Service Contract Act which applies to certain service contracts exceeding $2,500, there is now a new, separate micro-purchase threshold of $2,500 for contracts subject to the Service Contract Act.[3] Prior to adjusting the micro-purchase threshold up from $2,500 to $3,000, there was no need for a separate "service contracts micro-purchase threshold" because the old micro-purchase threshold of $2,500 was consistent with the Service Contract Act.

The result of these threshold changes is that we now have three separate micro-purchase thresholds: $2,000 (construction); $2,500 (contracts subject to the Service Contract Act); and $3,000 for all other contracts, in addition to the adjustments for contingency operations.[4] Congress did not change any of the micro-purchase contingency thresholds.

Optional FSS Schedules Are Merely a "Preferred Source," Not a Required Source

In a case where the Defense Logistics Agency elected not to order from a contractor's optional Federal Supply Schedule (FSS), the Government Accountability Office (GAO) denied a protest against that decision finding that "while the list of required sources found in *FAR part 8.002* places non-mandatory FSS contracts above commercial sources in priority, it does not *require* an agency to order from the FSS."[5]

In this case, Murray-Benjamin protested an unrestricted Request for Proposals (FRP) for fiber optic cables. Murray-Benjamin's FSS schedule included fiber-optic cables and Murray-Benjamin believed that "instead of competing the requirement, the agency should have purchased certain of the RFP's line items under its FSS contract."[6] While that would seem to be a reasonable interpretation of the *FAR part 8.002*, the GAO instead relied on the GSA's slightly more flexible policy interpretation of regulatory language to reach its conclusion.[7] The General Services Administration's interpretation of *FAR part 8.002* is that the optional FSS schedules[8] are a:

> preferred source of supply for Government agencies. As such, Government agencies should first consider whether it can best fulfill its requirements through the use of an FSS schedule contractor. Where it can do so, agencies should generally use the FSS schedule in accordance with the procedures set forth in 48 C.F.R. § 8.401 *et seq*.

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[1] Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds, 71 Fed. Reg. 188, at 57,365 (effective 28 Sept. 2006). *See also* U.S. GEN. SVS. ADMIN, ET. AL., FEDERAL ACQUISITION REG. pt. 2.101 (July 2006) [hereinafter FAR]. Note that following Hurricane Katrina the President temporarily increased the micro-purchase threshold to $250,000 under certain Office of Management and Budget (OMB) set conditions. That temporary increase ended on 3 October 2005 by memorandum from the Office of Management and Budget. *See* Chris Gossier, *OMB Restores $2,500 Limit on Micro-Purchases*, FederalTimes.com, http://www.federaltimes.com/index.php?S=1151186.

[2] Pub. L. No. 108-375, 118 Stat. 1811 (2004).

[3] 71 Fed. Reg. 188 at 57,365. *See also* FAR, *supra* note 1, at pt. 2.101.

[4] 71 Fed. Reg. 188 at 57,365. *See also* FAR, *supra* note 1, at pt. 2.101.

[5] Murray-Benjamin Elec. Co., LLP, B-298481; 2006 U.S. Comp. Gen. LEXIS 143 (Sept. 7, 2006) (emphasis added).

[6] *Id*. at 2.

[7] *Id*. at 3.

[8] While FAR part 8.002 still lists mandatory and optional schedules as separate priority sources, mandatory schedules have not been in use by GSA since the mid-1990s. Today, all schedules are "optional use," but are still listed as a required source of supply. Telephone interview with Roger Waldron, Acting Senior Procurement Executive, General Services Administration, in Washington, D.C. (Oct. 19, 2006).

> However, assuming the agency concludes that it is not in its best interest to utilize an FSS schedule contract, the agency is free to meet its needs through an open-market procurement.[9]

The GAO further stated that "although an agency's placement of an FSS order indicates that the agency has concluded that the order represents the best value . . ., the regulation does not establish a presumption that all FSS contractors represent the best value, such that the agency would be required to purchase from a FSS. . . ."

Interestingly, the GAO's approach is similar to the DoD's previous policy. The *DFARS* previously stated that the DoD should "make maximum use of the [optional] schedules. Other procedures may be used if further competition is judged to be in the best interest of the Government in terms of quality, responsiveness, or cost."[10] This provision was deleted from the *DFARS* in 2006, however, as being apparently superfluous after revisions were made at *DFARS 217.7802* adding language to ensure "best value" in intragovernmental acquisitions which became effective in 2005.[11] It is unclear from the GAO decision how, if it all, this now-deleted *DFARS* clause affected the procurement.

Even in Simplified Acquisitions, Government Must Still Follow Stated Evaluation Criteria

The GAO reminded everyone that simplified acquisitions are just *simplified*, not simple, in *Low and Associates*, *Inc*.[12] In this case, the GAO recommended that the National Science Foundation (NSF) review their needs and then either amend their prior solicitation and reopen negotiations, or terminate award and resolicit where the NSF awarded a contract based on a proposal that failed to follow the agency requirements stated in the solicitation.[13]

The NSF awarded a contract to Dynamic Research Corporation (DRC) to provide visual information support services. The contract included seven required duty positions. The solicitation stated that only one of the duty positions could be performed off-site, but specified that both of the two web-designer positions would be required to work on-site.[14] Ignoring the solicitation's requirement, the DRC's proposal stated that one of its web designer positions would work off-site (in New York City). Nonetheless, its proposal received high marks for "personnel plan."[15] By the time GAO considered this protest, the awardee was performing with individual personnel it had not proposed and *neither* of the web designers had ever worked on-site as required in the solicitation.[16]

The GAO stated that in a "competitive procurement, a proposal that fails to conform to one or more of the solicitation's material requirement is technically unacceptable and cannot form the basis for an award."[17] The GAO further stated that "an agency may not make an award, then immediately modify or waive the material requirements included in the solicitation which formed the basis of the competition; rather the awards must be based on the requirements and criteria disclosed in the solicitation."[18] In addition to directing the NSF to re-open the competition in one form or another based on their redefined needs, the GAO also recommended that the agency reimburse the protester for its cost of filing and pursuing the protest, to include reasonable attorney's fees.[19]

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[9] *Id*. at 3 n.4. The quoted language comes from a GAO memorandum that was prepared during consideration of this protest and is referenced in the decision footnote. *See* Memorandum, Michael J. Noble, Assistant General Counsel, Personal Property Division, GSA, for Paul E. Jordan, subject: Protest of Murrary-Benjamin Electric Co., B-298481 (Aug. 23, 2006) (on file with author).

[10] U.S. DEP'T OF DEF., DEFENSE FEDERAL ACQUISITION REG. SUPP. 208.404-2, Optional Use (July 2006) [hereinafter DFARS].

[11] Defense Federal Acquisition Regulation Supplement; Competition Requirements for Federal Supply Schedules and Multiple Award Contracts, 71 Fed. Reg. 14,106 (Mar. 21, 2006).

[12] B-297444.2, 2006 U.S. Comp. Gen. LEXIS 82 (Apr. 13, 2006).

[13] *Id*. at 6.

[14] *Id*. at 3.

[15] *Id*.

[16] *Id*. at 6.

[17] *Id*.

[18] *Id*. at 7.

[19] *Id*. at 8.

FSS Awards Must Match FSS Schedules

The GAO sustained a protest in *Tarheel Specialties, Inc.*[20] where the Department of Homeland Security (DHS) awarded a labor-hour services contract to an FSS contractor despite the fact that the specific services required in the task order were not within the scope of the vendor's FSS contract.

In this case, the DHS solicitation was for nine labor positions under a labor-hour contract for a base year and four option years.[21] Among the nine labor positions were requirements for a site supervisor, a material management specialist, and a ballistic engineering technician. Because the labor categories in Tarheel's proposal were not listed or mapped to the labor categories in Tarheel's FSS contract, the agency properly determined that Tarheel's proposal was unacceptable.[22] Tarheel protested because it believed that the proposal of the awardee, USIS, also failed to map the required labor positions to their FSS contract.[23]

The proposal from USIS mapped the labor positions of site supervisor, material management specialist, and ballistic engineering technician to its FSS contract position of Administrative Assistant-Level II[24] and compared the attributes listed for the Administrative Assistant-Level II from USIS's schedule against the duty descriptions of the three positions in the RFP.[25] The GAO concluded that "the attributes and responsibilities of the Administrative Specialist-Level II position in USIS's FSS contract did not match the attributes and responsibilities" of these three positions as stated in the RFP.[26] The GAO concluded that "the mere fact that some of the duties of the RFP-required positions were administrative in nature is an insufficient basis to determine that these positions match up against the FSS contract" positions.[27] As a result, because non-FSS products and services may only be purchased using competitive procedures, the GAO sustained the protest and recommended termination of the contract awarded to USIS.

The lesson to take from this decision is that broadly-worded labor descriptions on an FSS schedule do not a guarantee that such descriptions can be used to fill a wide variety of task orders. The government must carefully match its requirements to the FSS schedule to ensure a proper fit before award. If the FSS schedules do not match the government's requirements, then the contracting officer must follow the full and open competition procedures to procure the non-matching FSS line items.

Small Business Set-Aside Requirements Not Applicable to FSS Purchases

The GAO took the opportunity in *Global Analytic Information Technology Services, Inc.*,[28] to reiterate what the *FAR* already states—the small business set-aside requirements in *FAR part 19* do not apply to FSS purchases.

In this case, the Army originally set-aside an FSS solicitation for management and support services for small business concerns.[29] A task order was awarded to the low bidder but, upon receipt of a size protest, the SBA determined the awardee was not a small business.[30] The government then changed its procurement strategy and posted a request for quotations (RFQ) on the General Service's Administrations "e-Buy" electronic service as an FSS solicitation without set-aside restrictions.[31] The decision to do so resulted in this protest based on the belief that even the FSS RFQ should be set aside for small businesses because it was previously issued as a task order set-aside.

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[20] Comp. Gen. B-298197, B-298197.2, July 17, 2006, 2066 CPD ¶ 151.

[21] *Id*. at 2.

[22] *Id*. at 4.

[23] *Id*. at 3.

[24] *Id*. at 5.

[25] *Id*.

[26] *Id*.

[27] *Id*.

[28] B-297200.3, 2006 U.S. Comp. Gen. LEXIS 50 (Mar. 21, 2006).

[29] *Id*. at 1.

[30] *Id*. at 2.

[31] *Id*.

The GAO held that the protest was without merit because the Army conducted this procurement under the provisions of *FAR part 8.4* which specifically provides that *FAR part 19* (Small Business Programs) does not generally apply to orders placed against FSS contracts.[32] The GAO was not persuaded by the protestor's equity arguments based on the initial solicitation and dismissed the protest.

Agency Not Required to Make Responsibility Determination for FSS Order

The GAO denied a protest against an FSS task order award concluding that an ordering agency is not required to make a responsibility determination each time it places a task or delivery order.[33] Advanced Technology Systems (ATS) protested the Department of Housing and Urban Development's (HUD) issuance of an FSS task order to Pyramid Systems for operational support and corrective maintenance services. ATS argued that the HUD failed to make a proper responsibility determination on Pyramid Systems before awarding the task order.[34]

The company argued that the GSA's responsibility determination, made at the time of the award of the FSS contract, is "only as valid as the facts before GSA at that time, and that changes to the indicia of responsibility may exist at the time orders are actually places."[35] The GAO held that "because [GSA] is tasked with making determinations of responsibility pertaining to the award if FSS contracts, ordering agencies, while not precluded from doing so, are not required to make a responsibility determination prior to placing an FSS order."[36] In making its determination, the GAO relied on the *FAR*'s concept of responsibility applying to "prospective contractors," and not "current contractors."[37]

In dismissing the protest, the GAO compared the award of a task order to the exercise of an option and restated the fact that "once an offeror is determined to be responsible and is awarded a contract, there is no requirement that an agency make additional responsibility determinations during contract performance."[38] The GAO concluded that this principle applies regardless of the "type of contracting vehicle the Government elects to use for an acquisition."[39]

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[32] *Id*.

[33] Advanced Tech. Sys., Inc., B-296493.6, 2006 U.S. Comp. Gen. LEXIS 164 (Oct. 6, 2006).

[34] *Id*. at 4.

[35] *Id*.

[36] *Id*. at 5.

[37] *Id*. (citing 41 U.S.C. § 403 (LEXIS 2006); FAR §§ 9.100 and 9.103).

[38] *Id*. (citing E. Huttenbauer & Son, Inc., Comp. Gen. B-258018.3, Mar. 20, 1995, 95-1 CPD ¶ 148).

[39] *Id*.

Commercial Items

Commercial Items Test Program Thresholds Raised

The Civilian Agency Acquisition Council and the Defense Acquisition Regulation Council (FAR Councils) raised the maximum purchase threshold for using simplified acquisition procedures for the purchase of commercial items under the Commercial Items Test Program (*FAR part 13.5*) from $5 million to $5.5 million.[1] This threshold doubles to $11 million for acquisitions that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack.[2] The FAR Councils executed this action in accordance with section 807 of the Ronald Reagan National Defense Authorization Act of 2005 which directed that certain acquisition thresholds be adjusted in response to future inflation every five years.[3]

DoD IG Reports Problems in Commercial Contracting for Defense Systems

The Department of Defense (DoD) Office of the Inspector General (IG) issued a report criticizing the DoD's over-reliance on the very broad definition of "commercial item" to purchase defense systems.[4] The DoD IG audited eighty-six contract actions involving forty-two DoD contracts for which DoD purchased what it considered to be "commercial items" as the *FAR* defines that term.[5] The DoD IG concluded that DoD "contracting officials did not adequately justify the commercial nature of 35 of 42 (83%) commercial contracts for the defense system and subsystems awarded in FYs 2003 and 2004."[6] The DoD IG found that as a result of these insufficient justifications, "contracting officials inappropriately awarded contracts that did not achieve the benefits of buying truly commercial products and relinquished price and other oversight protections under the Truth in Negotiations Act that would have allowed better visibility to establish fair and reasonable prices."[7]

The DoD IG also found that contracting officials have "used loopholes within the broad [categorical definitions of commercial items] without justification to support the availability in the commercial marketplace for these defense systems and subsystems."[8] The report cited abuses of the *FAR* commercial items definitions with regard to several sub-definitional terms including: "of a type" items;"[9] "offered and available for sale;"[10] and "modified commercial items."[11] As a result of these abuses, contracting officers were unable to obtain sufficient information regarding commercial availability of these items and failed to ensure the government was getting the benefit of competitive prices established by the commercial marketplace, or other benefits normally associated with acquiring commercial items.[12]

By awarding these non-commercial items contracts under *FAR part 12* procedures, the government could not obtain certified cost or pricing data and, therefore, "limited their ability to ensure that fair and reasonable prices were paid on these contract actions."[13] The DoD IG concluded that "the Government lost oversight and control over the development and quality of the defense systems and subsystems when it awarded commercial contracts . . . and the Government's rights were compromised because it had no access to contractor facilities to monitor" progress.[14]

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[1] Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds, 71 Fed. Reg. 57,363 (effective 28 Sept. 2006).

[2] *Id*.

[3] Pub. L. No. 108-375, 118 Stat. 1811 (2004).

[4] U.S. DEP'T OF DEF., OFF. OF THE INSPECTOR GEN., D-2006-115, COMMERCIAL CONTRACTING FOR THE ACQUISITION OF DEFENSE SYSTEMS (29 Sept. 2006) [hereinafter COMMERCIAL CONTRACTING REPORT].

[5] U.S. GEN. SVS. ADMIN, ET. AL., FED. ACQUISITION REG. pt. 2.101 (July 2006) [hereinafter FAR].

[6] COMMERCIAL CONTRACTING REPORT, *supra* note 4, at i.

[7] *Id*. at ii.

[8] *Id*. at 7.

[9] *Id*.

[10] *Id*. (Air Force contracting officials justified award of four contracts for the Joint Primary Aircraft Training System as commercial even though the commercial version only existed on paper and there was no evidence of a commercial marketplace.).

[11] *Id*. at 8 (The Army classified its purchase of High Mobility Multi-Wheeled Vehicle (HMMWV) as a commercial item based on modifications of the HUMMER H1 commercial sport utility vehicle despite the fact that the contractor's website states that the HMMWV is not available for sale to the public.).

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

[13] *Id*. at 12.

[14] *Id*.

The DoD IG recommended that: (1) commercial item legislation be amended to allow for the exclusion of certified cost and pricing data only for commercial items that *are sold in substantial quantities to the general public*; and (2) "when commercial items determinations are made, these determinations should be in writing and included in the contract file."[15]

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[15] *Id*. at 12-13.

Suspension of the Price Evaluation Adjustment for Small Disadvantaged Businesses

In accordance with subsection 10 U.S.C. § 2323(e), the Department of Defense (DoD) continues to suspend the use of any price evaluation adjustment for small disadvantaged businesses in DoD procurements.[1] This statute requires the DoD to suspend the regulation[2] implementing the authority to enter into a contract for a price exceeding fair market cost if the Secretary determines at the beginning of the fiscal year that the DoD achieved the five percent goal established in 10 U.S.C. § 2323(a) for contracts awarded to small disadvantaged businesses during the previous year.[3] Based on data from 2005, "the determination was made that the DoD exceeded the five percent goal established and, accordingly, the use of the price evaluation adjustment prescribed in *FAR part 19.11* and *DFARS part 219.11* is suspended for the DoD."[4]

In addition to the statutory suspension provisions applicable to the DoD, there is also no current authority for civilian agencies to apply the preference either.[5] Currently, only the Coast Guard and the NASA are both authorized and required to provide a price preference under *FAR part 19.11*. The Coast Guard and the NASA must continue to apply the preferences because neither of these agencies is covered by the suspension of the application of the price adjustment otherwise applicable to the DoD or other civilian agencies.[6]

Democratic Congressional leaders continue to question the accuracy of the data on which the DoD relied to conclude that the DoD has met its five percent statutory goal.[7] Should the method in which this data is collected and reported change in the near future, as some in the procurement community would like, the price preference suspension era that the DoD has enjoyed over the past decade may come to a close.

Defense Authorization Act Limits U se of Tiered Set-Asides; Renames SADBU

Last year's *Year in Review* discussed the future of tiered, or cascading, set-asides as an issue which needed clarification.[8] Congress took action this year to clarify the limits of this controversial procurement method. Section 816 of the National Defense Authorization Act of 2007 (2007 NDAA) says that a contracting officer can use tiered set-asides only if he or she first conducts proper market research seeking qualified small business offerors.[9] Contracting officers must also document in

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[1] Memorandum, Domenic C. Cipicchio, Acting Director, Defense Procurement and Acquisition Policy, to Directors of Defense Agencies, subject: Class Deviation and Suspension of the Price Evaluation Adjustment for Small Disadvantaged Businesses (8 Feb. 2006); *see also* Suspension of the Price Evaluation Adjustment for Small Disadvantaged Businesses, 71 Fed. Reg. 9320 (Feb. 23, 2006).

[2] *See* U.S. GEN. SVS. ADMIN, ET. AL., FEDERAL ACQUISITION REG. pt. 19.11 (July 2006) [hereinafter FAR] for details regarding the application of price evaluation adjustments to offers from small disadvantaged business concerns. Ultimately, the Department of Commerce is responsible for determining which industries are eligible for the price preference and the specific price adjustment factor preferences to be given to each industry.

[3] *Id*.

[4] *Id*.

[5] *See* Major Andrew S. Kantner, et. al., *Contract and Fiscal Law Developments of 2005—Year in Review,* ARMY LAW., Jan. 2006, at 56 [hereinafter *2005 Year in Review*]. *See also* 71 Fed. Reg. 20,304 (Apr. 19, 2006) (adopting as a final rule the interim rule canceling for civilian agencies—except for the NASA and Coast Guard—the small disadvantaged business price-evaluation adjustment authorized under the Federal Acquisition Streamlining Act of 1994).

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

[7] Chris Strohm, *House Democrats Blast Small Business Contracting Efforts*, GovExec.com, Oct. 20, 2005, http://www.ogovexec.com/dailfed/1005/102005 cl.htm (citing a report issues by Democrats on the House Business Committee which asserts that government-wide contracting with small businesses was actually only 21.5 percent in 2004, the lowest in five years; disadvantaged businesses received 3.78 percent of government contracts; women-owned businesses 3.11 percent; and HUBZone businesses 3 percent).

[8] *See 2005 Year in Review*, *supra* note 5, at 53. Under cascading set-aside procedures agencies solicit bids from all socio-economic classes, but only open bids in order of legal socio-economic status preference. If the agency finds two satisfactory proposals from one socio-economic class, the agency does not proceed to open offers from offerors in other socio-economic strata.

[9] John Warner National Defense Authorization Act for 2007, Pub. L. No. 109-364, § 816 (2006). The statutory section reads:

> (a) Guidance Required—The Secretary of Defense shall prescribe guidance for the military departments and the Defense Agencies on the use of tiered evaluations of offers for contracts and for task or delivery orders under contracts.
>
> (b) Elements—The guidance prescribed under subsection (a) shall include a *prohibition* on the initiation by a contracting officer of a tiered evaluation of an offer for a contract or for a task or delivery order under a contract *unless* the contracting officer—

writing why he or she was unable to make a determination of whether or not small business offerors in the proper socio-economic categories were available for limiting a contract action to certain socio-economic categories.[10] The DoD published an interim rule implementing the Authorization Act's language.[11] While the current restrictions only apply to the DoD, that may change in the near future. Robert Burton, Acting Administrator of the Office of Federal Procurement Policy at the Office of Management & Budget said that "we certainly, in this office, have our reservations, and some concerns about it . . . [The cascading set-aside procedures] could possibly be abused, so I think we do need to take a look at it."[12]

In addition to the changes discussed above, the 2007 NDAA also renamed all Offices of Small and Disadvantaged Business Utilization across the DoD as Offices of Small Business Programs.[13]

GAO Report: Alaska Native Corporations Need More Oversight

The favored treatment afforded to Alaska Native Corporations (ANC)[14] under the Small Business Administration's (SBA) 8(a) Program remained a hot topic in 2006. The GAO issued a report critical of the SBA's oversight of ANC contracts and recommended that the SBA tailor its policies and practices to account for ANCs unique status and rapid growth over the last five years.[15] The GAO specifically recommended that the SBA investigate and determine whether more than one subsidiary of the same ANC is generating a majority of its revenue in the same primary industry and whether awards to 8(a) ANCs have resulted in other small businesses losing contract opportunities.[16] The GAO further recommended that the SBA ensure partnerships between 8(a) ANC firms and large firms are functioning in the way they were intended.[17]

The GAO reported that while dollars obligated to ANC firms through the 8(a) Program only represent a small percentage of total federal spending, dollars obligated to ANCs through the 8(a) program quadrupled to $1.1 billion between 2000 and 2004. The GAO reported that several restrictions placed upon other 8(a) contractors do not apply to ANC 8(a) contractors which encourages agencies to turn to them for a quick and easy method of awarding contracts, regardless of dollar value, with the added bonus of counting the award towards their small business quotas.[18]

The SBA responded to the GAO report by stating that the report showed that the ANCs have successfully used the 8(a) Program the way Congress intended: to benefit the local economic conditions in Alaska.[19] The SBA also pointed out that

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> (1) has conducted market research in accordance with part 10 of the Federal Acquisition Regulation in order to determine whether or not a sufficient number of qualified small businesses are available to justify limiting competition for the award of such contract or task or delivery order under applicable law and regulations;
>
> (2) is unable, after conducting market research under paragraph (1), to make the determination described in that paragraph; *and*
>
> (3) includes in the contract file a written explanation of why such contracting officer was unable to make such determination.

Id. (emphasis added).

[10] *Id*.

[11] Defense Federal Acquisition Regulation Supplement; Limitations on Tiered Evaluation of Offers, 71 Fed. Reg. 53,042 (proposed Sept. 8, 2006).

[12] Chris Gosier, *Contractor Wins Limits on Disfavored Procurement Practice*, FED. TIMES, Jan. 16, 2006, at 5.

[13] John Warner National Defense Authorization Act for 2007, Pub. L. No. 109-364, § 904, 120 Stat. 2083 (2006).

[14] Alaska Native Corporations were created in 1971 by the Alaska Native Claims Settlement Act, 43 U.S.C.S. § 1601 – 1629e (LEXIS 2006). ANCs became a vehicle for distributing land and monetary benefits to Alaskan Natives in lieu of a reservation system. In exchange for the release of aboriginal land claims potentially affecting hugely valuable oil deposits, the Act permitted about forty-four million acres of Alaska to be conveyed to ANCs, along with a payment of nearly one billion dollars. The Regional ANCs (total of twelve covering Alaska and one for Alaskans outside of the U.S.) are required to be formed as profit-making entities and they provide a variety of direct and indirect benefits to their shareholders who are entitled to membership based on where they live. U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-399, CONTRACT MANAGEMENT—INCREASED USE OF ALASKA NATIVE CORPORATIONS' SPECIAL 8(A) PROVISIONS CALLS FOR TAILORED OVERSIGHT 1 (Apr. 2006) [hereinafter GAO ANC REPORT].

[15] GAO ANC REPORT, *supra* note 14, at 40-41.

[16] *Id*. at inside cover.

[17] *Id*.

[18] *Id*. at 6. Among the benefits that ANC contractors enjoy, that other 8(a) small and disadvantaged contractors do not, are limitless dollar threshold sole source awards and exclusion of affiliates from the determination of size status. *Id*. at 3. *See also* FAR, *supra* note 2, pt. 19.805.

[19] GAO ANC REPORT, *supra* note 14, at 53-55.

there were no reports of wrongdoing among 8(a) participants.[20] While this is correct, the real focus of the report and later Congressional hearings was how the ANC rules could be tightened to ensure that other 8(a) contractors are not being treated unfairly.[21]

HUBZone Designation Is Mandatory If Statutory Criteria Are Met

The United States Court of Appeals for the Ninth Circuit affirmed the judgment of a district court in *Contract Management Industries, Inc., v. Rumsfeld*,[22] a case dealing with mandatory HUBZone set-asides. The Ninth Circuit granted the government's summary judgment motion to dismiss a small business contractor's suit to prevent award of a custodial services contract to a HUBZone small business concern.[23] The Court stated that, unlike the discretionary awards under the 8(a) program,[24] the HUBZone program is statutorily mandated.[25] Consequently, the Court held that the contracting officer did not have the discretion to elect not to set aside a contract when two or more responsible HUBZone small businesses were expected to compete and award would be made at a fair market price.[26]

Contract Management Industries, Inc. (CMI) was a small business incumbent contractor performing several custodial services contracts at Pearl Harbor Naval Base.[27] When the contracting officer decided to consolidate several installation custodial contracts into one contract and to set-aside the procurement for HUBZone small businesses concerns (HSBC), CMI was no longer eligible for award because it was not a HSBC.[28] CMI believed that the HUBZone statutory language should be read as permitting the contracting officer discretion in deciding to set-aside solicitations for HSMCs, much like the contracting officer has discretion in set-aside awards for 8(a) small businesses.[29] CMI further believed, though the record failed to support, that the contracting officer would have chosen to award to CMI if the statute did not require the contracting officer to set-aside the award for HSBCs.[30] CMI asserted that failing to read contracting officer's discretion into the HUBZone statute put the separate provisions of the Small Business Act (the HUBZone portions and the section 8(a) portions) in conflict with each other.[31]

Ultimately, the court read the statute to clearly require contracting officers to set-aside contract awards to HSBCs where, as here, the statutory requirements to do so are met.[32] The court found no merit in CMI's claim that such a ruling would create an internal conflict in the statute.[33]

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[20] *Id*.

[21] Jenny Mandel, *House Committees Probe Native Alaska Contracting Program*, GovExec.com. June 21, 2006, *available at* http://www.govexec.com/dailyfed/0606/062106m1.htm.

[22] Contract Mgmt. Indus., Inc. v. Rumsfeld, 734 F.3d. 1145 (9th Cir. 2006).

[23] *Id*.

[24] *See* 15 U.S.C.S. § 637(a)(1)(A) (LEXIS 2006).

[25] *See id.* 657a(b)(2).

[26] *Contract Mgmt.*, 734 F.3d. at 1148.

[27] *Id*. at 1146.

[28] *Id*. at 1147.

[29] *Id*. at 1148.

[30] *Id*.

[31] *Id*.

[32] *Id*.

[33] *Id*. at 1149.

The GAO recommended that the U.S. Immigration and Customs Enforcement, Department of Homeland Security (ICE) terminate a small business set-aside award where it failed to provide pre-award notification of a prospective awardee's identity prior to award.[34] After award, Spectrum Security Services, Inc., an unsuccessful offeror, protested the size status of the awardee, Ahuska Security Corporation.[35] The contracting officer forwarded the post-award protest to the Small Business Administration (SBA) which determined that Ahuska was other than a small business.[36] Due to administrative processing problems, the SBA did not respond to the protest in the required ten days so the ICE argued that contract award should not be terminated.[37] The ICE argued that since *FAR part 19.302(h)(1)* permits contracting officers to *award* a contract if the SBA has not ruled on a size protest within ten days in a *pre-award* protest situation, the same analysis should apply in this *post-award* size protest.[38] Since the SBA failed to take action until the fourteenth day in this post-award case, ICA argued that the award should not be terminated.[39]

Spectrum also protested on other grounds in time to stay performance of the contract by Ahuska.[40] The ICE decided to override that Competition in Contracting Act (CICA) stay, finding instead that performance of Ahuska's contract was in the best interest of the United States pursuant to 31 U.S.C. § 3553(d)(3)(A).[41] The ICE further argued that its written CICA-stay override served a dual purpose of also satisfying the requirement at *FAR part 19.302(h)(1)* permitting award in the face of a size status protest when a contracting officer makes a written determination that "award must be made to protect the public interest."[42]

The GAO accepted neither of the ICE's arguments. First, regarding the delayed SBA determination on the size status protest, the GAO was unwilling to speculate on whether the SBA would have responded within ten days had the ICE complied with the pre-award notice requirement.[43] Second, and somewhat more surprisingly, the GAO denied the ICE's arguments that its CICA override determination should also permit award in the face of the size status protest.[44] The GAO questioned the grounds on which the ICE justified its CICA override and, perhaps for that reason, refused to allow that determination to satisfy the requirement for a written determination for award in the face of a size status protest.[45] Although reaching the same conclusion on other grounds, it is unclear why the GAO did not simply rely on SBA regulations which state that "a timely filed protest applies to the procurement in question even though a contracting officer awarded the contract prior to receipt of the protest."[46]

Different Rules Apply for Post-Award Size Status Determinations in Small Business Set-Asides and Service Disabled Veteran-Owned (SDVO) Small Business Set-Asides

Unlike the *Spectrum* case discussed above where the GAO recommended contract termination for failing to notify losing offerors of the proposed awardee prior to a small business set-aside award, in *Veteran Enterprise Technology Services, LLC*,[47] the GAO denied a protest seeking termination of a Department of the Army award under a SDVO set-aside. In this case, the Army did not terminate the set-aside contract it awarded Wexford Group International (WGI) even though the Army

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[34] Spectrum Security Servs., Inc., Comp. Gen. B-297320.2, Dec. 29, 2005, 2005 CPD ¶ 227. *See* FAR, *supra* note 2, at 15.503(a)(2) for agency requirements to notify unsuccessful small business offerors of the proposed awardee's identity prior to award of a contract set-aside for small businesses.

[35] *Spectrum Sec. Servs.,* 2005 CPD ¶ 227, at 2.

[36] *Id*. at 5.

[37] *Id*. at 8.

[38] *Id*.

[39] *Id*.

[40] *Id*. at 5.

[41] *Id*.

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

[43] *Id*. at 9.

[44] *Id*. at 10.

[45] *Id*. at 11.

[46] 13 C.F.R. §121.1004(c) (2006).

[47] Comp. Gen. B-298201.2, July 13, 2006, 2006 CPD ¶ 108.

did not give pre-award notification to the other SDVO offerors and the SBA determined *after* contract award that the awardee was not a small business concern.[48]

The GAO decided that the Army contracting officer had properly waived pre-award notification of unsuccessful SDVO small business offerors after reasonably determining that the urgency of the procurement required award without delay pursuant to the *FAR* requirements.[49] Despite the fact that VETS timely protested after receiving notice of award, the GAO determined that the SBA regulations size status determinations in SDVO set-aside cases only apply prospectively.[50] Therefore, the Army was not required to terminate the award to WGI.[51]

The Army awarded the SDVO set-aside to WGI for support services to the Rapid Equipping Force (REF) which "develops strategies and methodologies to swiftly introduce material innovations into the U.S. Army by taking emerging technologies to operational environments for initial field evaluation."[52] The award of this contract comprised a consolidation of several other contracts, several of which were expiring with no additional options.[53] Prior to award, the contracting officer determined that award should be made without delay and executed a written determination, pursuant to *FAR part 15.503(a)(2)(iii)*, that urgency necessitated award to WGI without providing the other offerors the pre-award notice required by *FAR part 15.503(a)(2)(i)(D)*[54] After award, VETS protested to the GAO on the ground that WGI was not a small business.[55] A month later, the SBA determined that the awardee, WGI, was not a small business and VETS protested, seeking termination of award to WGI and requesting recommendation that award be made to VETS.

The GAO denied the protest finding that Army properly executed the urgency determination to waive the pre-award notification and, therefore, award was proper.[56] Following award of an SDVO set-aside contract, any determination by SBA that the awardee was other than a small business has only prospective effect in accordance with SBA regulations and does not require terminating the properly awarded SDVO contract.[57] The GAO explained that a different result would occur if the award was a simple small business set-aside, as opposed to a SDVO set-aside. In such a case, SBA regulations state that a post-award determination by the SBA that the awardee was other than a small business applies to the current contract.[58] Therefore, such a post-award determination would, generally, require termination of such a contract.[59]

Agency May Require Recertification of Small Business Status Prior to Placing Task Order Under a MAS Contract

The Court of Federal Claims (COFC) held that an Air Force contracting officer acted properly within his discretion in requiring a multiple-award schedule contractor to recertify its small business status before being eligible for award of a task order under a multiple award schedule contract.[60] The court determined labeled the task order a "new contract" for which the Air Force was entitled to demand renewed certification.[61] The court did not accept the plaintiff's argument that if this task

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[48] *Id*.

[49] *Id*. at 2-4.

[50] *Id*. at 3.

[51] *Id*.

[52] *Id*. at 4.

[53] *Id*.

[54] *Id*. at 2. "The agency concluded that WGI would need three weeks prior to contract start date to assemble its work force and delaying award for pre-award notice was not feasible because it could delay contract performance." *Id*.

[55] *Id*.

[56] *Id*.

[57] *Id*. at 3. *See also* 13 C.F.R. § 125.27(g) describing the effect of an SBA determination on SDVO status as follows:

> SBA's determination is effective immediately and is final unless overrules by OHA on appeal. If SBA sustains the protest, and the contract has not yet been awarded, then the protested concern is ineligible for an SDVO SBC contract award. If a contract has already been awarded, and SBA sustains the protest, then the [agency] can not count the award as an award to an SDVO SBC and the concern cannot submit another offer as an SDVO SBC on future procurements. . . .

[58] *Id*. at 3 n.5.

[59] *Id*.

[60] LB&B Assocs., Inc. v. United States, 68 Fed. Cl. 765 (2005).

[61] *Id*. at 772.

order was actually a "new contract," then the government violated the CICA by failing to allow all small businesses to compete for award, rather than only soliciting those contactors that had previously been awarded multiple award schedule (MAS) contracts.[62] The GAO dismissed this argument by relying on the broad discretionary language at *FAR part 15.505(b)(ii)*. This provision states that "the contracting officer may exercise broad discretion in developing appropriate order placement procedures" when administering ID/IQ contracts.

The COFC accepted the plaintiff's argument that generally a small business contractor retains that status for the life of a contract.[63] Nevertheless, the COFC deferred to the SBA Office of Hearings and Appeals (OHA) judge's decision on this case that the Air Force could require LB&B to recertify its size status.[64] The OHA judge determined that the Request for Proposals (RFP) for the task order was a "new procurement" for the following reasons: the original MAS award was structured to anticipate future set-asides; it utilized different evaluation criteria in the task order RFP than it did in the ID/IQ RFP; and it required future task or delivery orders to give the ID/IQ contract any status or meaning.[65] The OHA judge further found that the task order was a new procurement because the definition of a "procurement" or "acquisition" in the *FAR* requires the use of appropriated funds, a description of agency requirements, and an establishment of agency needs.[66] The OHA felt that the original ID/IQ contract did none of these things so the task orders would have to be new procurements.[67] The OHA was also persuaded in their decision by the fact that the task order RFP required offerors to re-certify their status and 13 C.F.R. section 121.405(a) requires an offeror to self-certify it is a small business under the relevant standards specified in the solicitation.[68]

Ultimately, the COFC gave great deference to the SBA's interpretation of its own regulations and precedents and found that the decision of the OHA was not clearly erroneous. The COFC, therefore, denied LB&B's request for injunctive relief.[69]

In response to this case, the Air Force published a clarifying memo explaining that

> this ruling should not be interpreted as precedence requiring recertification prior to awarding a delivery, task order, or the exercise of an option. The case stands only for the proposition that under appropriate circumstances, the Contracting Officer retains the discretion to request re-certification before the award of a delivery order, task order, or the exercise of an option.[70]

Berry Amendment Changes

Another year of wrangling between the House's special metal industry protectionists and the Senate's defense industry supporters resulted in a significant modification to the Berry Amendment[71] with regard to the purchase of specialty metals.[72] The debate primarily centered on whether or not the Berry Amendment's limitation on the purchase of "specialty metals"

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[62] *Id*. at 773.

[63] *Id*. at 772.

[64] *Id*.

[65] *Id*. at 768.

[66] *Id*.

[67] *Id*. It is unclear from the facts whether or not this ID/IQ contract had guaranteed minimum purchases as would the most typical ID/IQ contract. If the original contract did provide for a guaranteed minimum, it is further unclear as to why that would not satisfy the OHA judge's concern over the use of appropriated funds. The court does state that the underlying contract did not guarantee any specific future contract, but merely the opportunity to participate in future competitions against a smaller competitive pool (i.e. those that are awarded MAS contracts). The COFC accepted the OHA judge's decision that the original MAS contract provided a mere framework for future contracts. *Id*. at 772.

[68] *Id*. at 769.

[69] *Id*. at 773.

[70] Memorandum, Deputy Assistant Secretary (Contracting) and Assistant Secretary (Acquisition), Department of the Air Force, and Director Small Business Programs of the Department of the Air Force, to ALMAJCOMS/DRUs/FOAs, subject: Small Business Recertification (10 May 2006).

[71] 10 U.S.C.S. § 2533a (LEXIS 2006). The "Berry Amendment" is a sixty-five-year-old American industrial protectionist law that requires the DoD to buy certain listed items only from domestic sources. The statute is more draconian in its requirements than the Buy American Act because the Berry Amendment contains fewer exceptions. Among the listed items under the Berry Amendment are: food; clothing, and material components, thereof; tents, cotton and other natural fiber products, canvas, or wool; specialty metals (deleted, and re-inserted under specific criteria in FY 07 NDAA); and hand and measuring tools. *Id.*

[72] National Defense Authorization Act for FY 2007, Pub. L. No. 364, § 842, 120 Stat. 2083 (2006); *see also* GOVEXEC.com, *Negotiators Pressured to Resolve "Buy America" Dispute*, Sept. 12, 2006, http://www.govexec.com/story_page.cfm?articleid=34992&printerfriendlyVers=1&.

included a prohibition on the inclusion of "specialty metal" component parts for larger systems, or just applied to the direct purchase of specialty metals themselves. Section 842 of the 2007 NDAA makes clear that the Berry Amendment provisions should apply even to component parts in most major end items.[73]

The National Defense Authorization Act of 2007 added section 2533b, to title 10.[74] The new law follows immediately the traditional Berry Amendment provisions at 10 U.S.C. § 2533a. The new provisions, titled "Requirement to buy strategic materials critical to national security from American sources; exceptions," deletes "specialty metals" from the listed items in § 2533a and creates a new section to more fully address specialty metals. The new section provides that the use of appropriated funds may not be used to purchase the following end items, *or components thereof,* containing specialty metal not melted or produced in the United States: aircraft; missile and space systems; ships; tank and automotive items; weapon systems; ammunition; or specialty metals themselves that are purchased by DoD or a prime DoD contractor.[75]

The new law provides exceptions for some purchases including: procurements of commercially available electronic components whose specialty metal content is *de minimis* compared to the value of the overall item; procurements under the simplified acquisition threshold; procurements outside the United States in support of combat or contingency operations; procurements where purchase under other than competitive procedures has been approved for urgent and compelling urgency; and procurements where the Secretary of Defense or a military department determines that "compliant specialty metal of satisfactory quality and sufficient quantity, and in the required form, cannot be procured as and when needed."[76]

The FY07 NDAA also established a Strategic Materials Protection Board (SMP Board) under the Secretary of Defense.[77] The SMP Board's main purposes is to determine the need to provide long term domestic supply of materials designated as critical to national security to ensure that national defense needs are met and to recommend additions to or deletions from the list of "specialty metals" under 10 U.S.C. § 2533b.[78]

DOD Guidance on Berry Amendment Compliance

Prior to the FY07 NDAA changes to the Berry Amendment, the DoD issued a memorandum authorizing both conditional acceptance and partially withholding payment in cases where a contractor submits items which the government believes does not comply with the Berry Amendment.[79] Recognizing that the delay caused by sorting out Berry compliance issues "may seriously impact our ability to meet military needs," the memorandum authorized commands to conditionally accept the items under dispute until a long-term remedy can be implemented.[80] The memorandum provided specific conditional acceptance and withholding language that should be used and attached to the receiving report to protect the government's interests.[81] Although the DoD has not rescinded this memorandum, it is unclear whether the FY07 NDAA provisions will effect its implementation.

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[73] National Defense Authorization Act for FY 2007, Pub. L. No. 364, § 842, 120 Stat. 2083.

[74] *Id*.

[75] *Id*. (emphasis added). The Act defines specialty metals to include steel, nickel, iron-nickel, cobalt based alloys, titanium, and zirconium. *Id*. U.S. Dep't of Defense, Defense Federal Acquisition Reg. Supp. 252.225-7014 (July 1, 2006) [hereinafter DFARS] also contains certain restrictions on the use of proper specialty metals on DoD contracts.

[76] National Defense Authorization Act for FY 2007, Pub. L. No. 364, § 842, 120 Stat. § 2083.

[77] *Id*. § 843.

[78] *Id*.

[79] Memorandum, The Undersecretary of Defense (Acquisition, Technology, and Logistics), to Commander, United States Special Operations Command, Directors of the Defense Agencies and Assistant Service Secretaries, subject: Berry Amendment Compliance for Specialty Metals (1 June 2006).

[80] *Id*.

[81] *Id*. The new mandatory language reads as follows:

> 1. This item is conditionally accepted with parts that have, or may have been, manufactured with non-compliant specialty metals as described in [*identify letter of other document form contractor disclosing actual or potential non-compliance*] pending completion of the contractor's investigation and Government concurrence. The contractor remains liable for any noncompliance with 10 U.S.C. 2533a as implemented in DFARS clause 252.225-7014, Preference for Domestic Specialty Metals, and Alternate I to the clause, where applicable. Further acceptance of this part does not constitute a waiver by the Government of any of its rights, contractual, statutory, or otherwise, relating to any matter involving the production or delivery of this part, and does not waive any claim by the United States for fraud, false claims, or other conduct on the part of any party which may be actionable under law.

FAR part 25.103 and *subpart 25.11* were amended by a final rule which provides an exception to the Buy American Act for the acquisition of information technology that satisfies the definition of commercial items.[82] The *FAR* changes implements the authority originally granted by section 535(a) of Division F of the Consolidated Appropriations Act, 2004.[83]

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> 2. Payments due under this contract shall include a withhold in the amount of [insert amount] based upon the contracting officer's assent to the contractor's representation of the estimated cost of the nonconforming specialty metal parts, plus applicable burden and profit.

[82] Federal Acquisition Regulation; Item VII—Exception to the Buy American Act for Commercial Item Technology, 71 Fed. Reg. 57,357 (effective Sept. 28, 2006).

[83] Pub. L. No. 108-99, 118 Stat. 3 (2004).

Successor Contractor Entitled to Increased Costs of Providing Fringe Benefits under "Defined Benefit" Plan

As noted in last year's *Year in Review*[1] the Armed Services Board of Contract Appeals (ASBCA) held in 2005 that a successor contractor who provided health insurance as fringe benefits consistent with the predecessor's collective bargaining agreement (CBA) was not entitled to a price adjustment in a subsequent year after the costs to provide that insurance had increased.[2] This year, in *Lear Siegler Services, Inc. v. Rumsfeld*,[3] the Court of Appeals for the Federal Circuit (CAFC) reversed the ASBCA decision and held that the contractor was entitled to a price adjustment for the increased costs of providing the benefits.[4]

In *Lear Siegler*, the wage determination applicable to the contract incorporated the wages and fringe benefits set forth in the previous contractor's CBA, which provided the health insurance benefits under a "defined-benefit" plan.[5] Under what is known as the "successor contractor rule" of the Service Contract Act (SCA),[6] a contractor must pay its employees no less than the amount of wages and fringe benefits that the employees would have been entitled to under the previous contractor's CBA that was effective under the previous contract.[7] The cost to the contractor to provide those defined health benefits increased during the course of contract performance, so the contractor submitted a request for a price adjustment for the option year.[8] The applicable Price Adjustment clause entitled the contractor to a price adjustment to the extent that the contractor was compelled by an applicable wage determination to pay increased wages or benefits.[9]

The ASBCA acknowledged that the contractor's payment of increased wages or benefits would entitle him to a price adjustment under the Price Adjustment clause "to the extent that the increase is made to comply with the applicable wage determination."[10] Here, however, the wages and benefits received by the employees did not increase, though the contractor's costs of providing those benefits had increased. The board also observed that under the Service Contract Act and applicable DOL regulations, a contractor may satisfy its obligation to provide fringe benefits under a wage determination "by making equivalent or differential payments in cash."[11] The board then reasoned that by choosing to continue providing the health

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[1] *See* Major Andrew S. Kantner, et al., *Contract and Fiscal Law Developments of 2005—The Year in Review*, ARMY LAW., Jan. 2006, at 63 [hereinafter *2005 Year in Review*].

[2] Lear Siegler Servs., ASBCA No. 54449, 05-1 BCA ¶ 32,937.

[3] 457 F.3d 1262 (Fed. Cir. 2006).

[4] *Id*. at 1269.

[5] *Id*. at 1265.

[6] McNamara-O'Hara Service Contract Act of 1965, 41 U.S.C.S. §§ 351-58 (LEXIS 2006).

[7] 41 U.S.C.S. § 353(c); 29 C.F.R. § 4.163(k) (2006).

[8] *Lear Siegler Servs.*, 457 F.3d at 1265.

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

> (a) This clause applies to both contracts subject to area prevailing wage determinations and contracts subject to collective bargaining agreements.
>
> * * *
>
> (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 . . . .

U.S. GEN. SVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 52.222-43 [hereinafter FAR].

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

[11] 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 the rules and regulations established by the Secretary." 41 U.S.C.S. § 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 my satisfy its fringe benefits obligations under any wage determination "by furnishing any equivalent

insurance benefits, which had increased in cost, rather than providing "equivalent" benefits under the CBA, the contractor incurred increased costs that were not compelled by a wage determination and was therefore not entitled to a price adjustment.[12]

That reasoning makes sense if one presumes, as the board apparently did, that the contractor could have provided "equivalent" benefits at no increase in cost; that is, that the contractor could have satisfied its obligation by providing cash benefits "equivalent" to the base year's cost of providing the health insurance, without regard to increases in insurance costs in subsequent years. But that is not how it works, the federal circuit explained this year, when the case was heard on appeal.

The court reversed the ASBCA, holding that the Price Adjustment clause entitled the contractor to a price adjustment for its increased costs of providing the required benefits, even though there was no change in the benefits received by its employees.[13] The court noted the distinction between a defined-benefit plan and a defined-contribution plan: "a defined-benefit plan obligates an employer to spend whatever is necessary to continue to provide its employees with an agreed-upon level of benefit."[14] This conclusion, the court explained, is consistent with the Price Adjustment clause itself, which provides for an adjustment to "reflect the Contractor's actual increase or decrease in applicable wages or benefits,"[15] as well as with "other provisions of the regulatory scheme, which provide for the 'equivalency' of fringe benefits to be measured not in terms of the value to the employee, but cost to the employer."[16] The court also relied upon the analogous case of *United States v. Service Ventures, Inc.*,[17] in which the court had similarly held that a contractor's increased costs in meeting its obligation to provide required benefits entitled it to a price adjustment even though the wage determination itself was "nominally unchanged."[18] "In short," the court concluded, "the Price Adjustment Clause is triggered by changes in an employer's cost of compliance with the terms of a wage determination,"[19] and the fact that the benefits received by the employees remains unchanged "is simply irrelevant."[20]

The court also disagreed with the ASBCA's implicit notion that the contractor could have satisfied its obligation to provide the benefits by paying an "equivalent" cash value to its employees without increased cost to the contractor, noting that to pay the "equivalent" of the health benefits, the contractor would have to pay its employees "an amount equal to its own costs of providing the benefit."[21] Therefore, in order to comply with the CBA, the contractor would have incurred the same increased costs regardless of whether it continued to provide the health benefits or an equivalent cash value.

That Ain't Workin', But Money for Being On-Call Is Still "Wages" for Purposes of Price Adjustment Clause

Early in Fiscal Year 2006, the ASBCA, in *ARCTEC Alaska*,[22] held that a contractor was entitled to a price adjustment for an increase in "response premium" pay that it was required to pay its employees under a wage determination. In that case, the Air Force had awarded ARCTEC a contract for the operation and maintenance of the Alaska radar system.[23] The wage determination incorporated into the contract required ARCTEC to pay its employees the wages and benefits contained in its

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> 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.

29 C.F.R. § 4.163(j).

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

[13] *Lear Siegler Servs.*, 457 F.3d at 1269.

[14] *Id*. at 1265. The court continued: "A defined-benefit plan thereby ensures that employees will continue to receive the same level of benefits (here health coverage), even as costs rise. *Id*.

[15] *Id*. at 1268 (quoting 48 C.F.R. § 52.222-43(d)) (emphasis supplied by the court).

[16] *Id*. (citing 48 C.F.R. § 4.177(a)(3)).

[17] 899 F.2d 1 (Fed Cir. 1990).

[18] *Lear Siegler Servs.*, 457 F.3d at 1269.

[19] *Id*.

[20] *Id*.

[21] *Id*. (citing 29 C.F.R. § 4.177(a)(3) ("[E]quivalent means equal in terms of monetary cost to the contractor.")).

[22] ASBCA No. 54946, 05-2 BCA ¶ 33,109.

[23] *Id*. at 164,091.

CBA.[24] Among other things, the CBA required ARCTEC to pay a "response premium" to its employees for each day they are required to carry a radio or cell phone for on-call purposes, regardless of whether it was a work day, non-work day, or even a vacation day.[25] In a subsequent year, the contract was modified to incorporate a wage determination requiring ARCTEC to comply with its new CBA, which contained a higher daily "response premium."[26] However, the contracting officer later denied ARCTEC's proposed price increase for the "response premium" under the Price Adjustment clause, finding that the on-call time was not compensable as because it did not constitute hours worked.[27]

The ASBCA agreed that the off-duty on-call time was not hours "worked."[28] However, the board held that the premium for the on-call time is nonetheless an element of the employee's "wages" for purposes of the contract's Price Adjustment clause.[29] The board determined that it is not necessary that the on-call time be hours "worked" in order for it to be compensable as wages.[30] The board also pointed to the fact that the Fair Labor Standard Act[31] overtime regulations include on-call time in determining the regular rate for overtime pay.[32] The board noted that the Service Contract Act "is remedial labor legislation which must be liberally construed,"[33] and that the "wages" referred to in the Price Adjustment clause "should be similarly so construed to affect the purposes of the Act."[34] Accordingly, ARCTEC was entitled to a price adjustment for the increased "wages" occasioned by the higher daily response premium it was required to pay its employees for being on-call.[35]

Later this fiscal year, the board reconsidered its *ARCTEC Alaska* decision, reaffirming its earlier decision.[36] The Air Force again argued that compensation for the on-call time does not constitute "wages" for purposes of the Price Adjustment clause.[37] The board found that neither 29 C.F.R. section 4.178,[38] which deals with the computation of hours worked under the contract, nor 29 C.F.R. section 785.17,[39] which defines when an employee on-call is deemed to be "working," address

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[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] *Id*. at 164,092.

[28] *Id*.

[29] *Id*. The applicable clause provided for a price adjustment "to reflect the Contractor's actual increase or decrease in applicable wages" compelled by a Department of Labor wage determination. FAR, *supra* note 9, at pt. 52.222-43(d).

[30] *ARCTEC Alaska*, 05-2 BCA ¶ 33,109, at 164,092.

[31] Fair Labor Standards Act of 1938, 29 U.S.C.S. §§ 201-19 (LEXIS 2006).

[32] *ARCTEC Alaska*, 05-2 BCA ¶ 33,109, at 164,092. In demonstrating this, the board quoted the following portion of 29 C.F.R. § 778.223 (2003):

> . . . . If the employees who are thus on call are not confined to their homes or to any particular place, but may come and go as they please, provided that they leave word where they may be reached, the hours spend "on call" are not considered as hours worked. *Although the payment received by such employees for such "on call" time is, therefore, not allocable to any specific hours of work, it is clearly paid as compensation for performing a duty involved in the employee's job . . . . The payment must therefore be included in the employee's regular rate in the same manner as any payment for services, such as an attendance bonus, which is not related to any specific hours of work.*

Id. (emphasis added by the board).

[33] *Id*.

[34] *Id*.

[35] *Id*.

[36] *ARCTEC Alaska*, ASBCA No. 54946, 06-1 BCA ¶ 33,192.

[37] *Id*. at 164,558.

[38] Section 4.178 provides, in part: "The hours worked which are subject to the compensation provisions of the [Service Contract] Act are those in which the employee is engaged in performing work on contracts subject to the Act." 29 C.F.R. § 4.178 (2006).

[39] Section 785.17 provides, in its entirety:

> § 785.17 On-call time.
>
> An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call". An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call (Armour & Co. v. Wantock, 323 U.S. 126 (1944); Handler v. Thrasher, 191 F.2d 120 (C.A. 10, 1951); Walling v. Bank of Waynesboro, Georgia, 61 F.Supp. 384 (S.D. Ga. 1945))

whether compensation for "non-working" on-call time constitute "wages" for purposes of the Service Contract Act. The board found that ARCTEC's payment of the response premium was required by the CBA which was made part of the wage determination, and was thus required by the SCA.[40] Finally, the board further supported its earlier decision that the premium pay for the non-working on-call time constituted "wages" by noting that it was "a direct and immediate economic benefit of the employment relationship. As such, it was within the meaning of 'wages' for purposes of the collective bargaining provisions of the National Labor Relations Act."[41]

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29 C.F.R. § 785.17.

[40] *ARCTEC Alaska*, 06-1 BCA ¶ 33,192, at 164,559.

[41] *Id*. (citing W.W. Cross & Co. v. NLRB, 174 F.2d 875, 878 (1st Cir. 1949)).

Bid Protests

Interested Party

The Court of Appeals for the Federal Circuit (CAFC) and the Court of Federal Claims (COFC) addressed protest standing issues in Fiscal Year 2006. The CAFC upheld the rule that post-award protesters must be actual bidders to be an interested party. The COFC overturned an agency attempt at depriving the COFC of jurisdiction *post hoc*.

Court of Appeals for the Federal Circuit

The CAFC affirmed a COFC finding that a protester that did not submit a bid does not have standing to pursue a bid protest before the COFC.[1] Prior to 2003, Rex Service Corporation (Rex) had supplied "thumbwheel switches" to the Defense Supply Center, Columbus (DSCC) as the sole approved source.[2] In 2003, the DSCC issued a request for proposals (RFP) for thumbwheel switches; the DSCC canceled this solicitation following an agency protest filed by Rex.[3] In 2004, the DSCC again issued an RFP for thumbwheels.[4] Rex again protested to the agency, but did not submit a proposal.[5] Rex's 2004 protest did not allege that any agency failure prevented Rex from submitting a proposal.[6] The DSCC denied Rex's 2004 protest in January 2005, and awarded the contract to a different contractor in February 2005.[7] Rex filed its protest with the COFC on 21 March 2005.[8]

The CAFC began by explaining the standard that standing to bring a protest before the court is based on a showing that the protester is an interested party as defined by the Competition in Contracting Act (CICA).[9] To meet this standard, the protester must show that it is an actual or prospective bidder whose direct economic interests are affected by the award or failure to award the contract.[10] Rex clearly did not submit a proposal, and is therefore not an actual bidder.[11] Rex argued that it was a prospective bidder because it filed an agency protest prior to the close of bidding and it was prejudiced, but not prevented, from bidding.[12]

The CAFC dispensed with Rex's argument, stating that "'in order to be eligible to protest, one who has not actually submitted an offer must be expecting to submit an offer prior to the closing date of the solicitation.'"[13] The CAFC continued relying on *MCI*,[14] stating "'the opportunity to qualify as an actual or a prospective bidder ends when the proposal period ends.'"[15] While Rex relied on its pre-closing date agency protest to preserve its standing, the CAFC rejected this reasoning.[16] Standing requires a protester to be an actual or prospective bidder.[17] Once the closing date has arrived, generally only actual

[1] Rex Serv. Corp. v. United States, 448 F.3d 1305 (Fed. Cir. 2006).

[2] *Id*. at 1306.

[3] *Id*. at 1306-07.

[4] *Id*. at 1307.

[5] *Id*.

[6] *Id*.

[7] *Id*.

[8] *Id*.

[9] *Id*.

[10] *Id*.

[11] *Id*.

[12] *Id.* at 1307-08.

[13] *Id*. at 1308 (citing MCI Telecomm. Corp. v. United States, 878 F.2d 362, 365 (Fed. Circ. 1989).

[14] *MCI Telecomm. Corp.*, 878 F.2d 362.

[15] *Rex*, 448 F.3d at 1308 (citing *MCI Telecomm. Corp.*, 878 F.2d at 365).

[16] *Id.*

[17] *Id.*

bidders are interested parties and have standing.[18] The CAFC expressly declined to address the situation in which the protester argues that the alleged agency violation prevented the protester from bidding.[19]

Court of Federal Claims

Systems Plus, Inc. protested a Department of Labor (DOL) procurement for network-infrastructure and operations-support services.[20] Following dismissal by the Government Accountability Office (GAO) on timeliness grounds, Systems filed its protest with the COFC.[21] On the merits of the original protest claim, the COFC found for the government.[22] The interesting procedural aspect of the case involves agency action while the protest was pending.

After the protest was filed and proceedings had begun at the COFC, the contracting officer issued a Determination and Findings (D&F) that the protester "would be ineligible to compete in any corrective competition that might be ordered as a result of this case."[23] Based on the contracting officer's (KO's) disqualification of the protester, the government moved to dismiss the protest because Systems was no longer an interested party.[24]

The KO disqualified Systems because an appearance of impropriety had developed from the discovery of a document containing sensitive awardee information at Systems' office.[25] Systems' employees stated that the document was delivered to its office more than two weeks after it was notified of award.[26] The KO speculated that because the document was created before proposals were due, Systems could have had access to the information and used the information in formulating its proposal.[27]

The COFC set aside the KO's disqualification of Systems "on three separate and independent grounds—the disqualification was procedurally flawed, it lacked a rational basis, and it constituted an improper post hoc attempt to remove System Plus's protest from this court's jurisdiction and thus insulate DOL's procurement decision from review."[28] First, the disqualification was procedurally flawed because the KO did not afford Systems minimal due process, i.e., the opportunity to be heard on the issue.[29] Second, the disqualification lacked a rational basis because the KO based her decision on erroneous facts and speculation.[30] The COFC did not fully explain these errors, but provided one example that the KO accepted a statement by agency counsel that Systems' building was locked to non-employees on Saturdays.[31] However, several Systems' employees, including the president and CEO, and the property manager of the building, all stated that the building was open Saturday mornings.[32]

Third, the disqualification action improperly attempted to remove the protest from COFC jurisdiction.[33] "The Contracting Officer rendered her decision only because of the pendency of this action . . . [t]his litigation-motivated contrivance by a contracting officer does not deserve any deference from this court."[34] The court explained, "[o]nce this

[18] *Id*.

[19] *Id.*

[20] Sys. Plus, Inc. v. United States, 69 Fed. Cl. 757 (2006).

[21] *Id*. at 762-63.

[22] *Id*. at 775.

[23] *Id.* at 759.

[24] *Id*.

[25] *Id.* at 763.

[26] *Id*. at 765.

[27] *Id*. at 765-66.

[28] *Id*. at 767.

[29] *Id*.

[30] *Id*. at 768.

[31] *Id*.

[32] *Id*.

[33] *Id*.

[34] *Id*.

court has been accorded jurisdiction over an action, events may occur which moot the controversy. However, those events may not be manufactured by the defending agency solely for the purpose of divesting the court of its juridical power."[35] While condemning the KO's actions in this case, the reasoning appears to allow COFC jurisdiction to be defeated in the case of justifiable post hoc disqualification decisions.

Subject Matter Jurisdiction

The COFC and the GAO both addressed protest subject matter jurisdiction in the past fiscal year. The COFC appears to be moving toward a conclusion regarding indefinite-delivery, indefinite-quantity (ID/IQ) task orders. The GAO addressed affirmative responsibility determinations.

Court of Federal Claims

The COFC decided two cases this past year addressing protests filed over ID/IQ task orders. Although the Federal Acquisition Streamlining Act (FASA)[36] removed bid protest jurisdiction over task orders,[37] interpretation of the jurisdictional limits continues to evolve.

In August 2005, Group Seven Associates (Group Seven) protested to the COFC a task order issued to CACI, Inc. (CACI) to perform contract administration support services under an existing General Service Administration (GSA) Federal Supply Schedule (FSS) contract.[38] Group Seven argued that the agency should not have considered CACI's alternate proposals submitted in response to the RFP because the solicitation did not specifically request or allow for alternate proposals.[39] The government argued that the COFC lacked jurisdiction over protests filed regarding task orders.[40]

Group Seven relied on an earlier COFC case, *Labat-Anderson, Inc. v. United States*,[41] in which the court maintained jurisdiction over a protest involving a blanket purchase agreement (BPA), stating the BPA "is not a task order itself, but rather a vehicle against which task orders will be placed."[42] The *Labat* court further stated that the FASA jurisdiction bar did not apply to the placement of BPAs against GSA FSS contracts.[43] The *Labat* court decided that, because GSA FSS contracts are governed by *FAR part 8* (*Required Sources of Supplies and Services*) and not *FAR subpart 16.5* (*Indefinite-Delivery Contracts*), the FASA jurisdiction bar does not apply to GSA FSS task orders.[44]

The Group Seven court did not agree with the *Labat* reasoning regarding the applicability of the FASA jurisdiction bar to GSA FSS contracts.[45] The court stated, "[w]hile we can follow the analysis of *Labat*, we find it less than compelling. . . . In short, jurisdiction is doubtful."[46] Doubtful as it was, the court determined that, with the *Labat* decision in place and the intervenor's reluctance to rely on the FASA bar in argument, the court would decide the case on the merits.[47] As the court ultimately found for the government, the court's jurisdiction decision was of less import.[48]

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[35] *Id*. at 768-69.

[36] Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, 108 Stat. 3243 (1994) (codified in scattered sections of 10 U.S.C. and 41 U.S.C.).

[37] The FASA ID/IQ provisions are codified identically at 10 U.S.C. §§ 2304a-2304d and 41 U.S.C. §§ 253h-253k.

[38] Group Seven Assocs., LLC v. United States, 68 Fed. Cl. 28, 29 (2005).

[39] *Id*. at 30.

[40] *Id.* at 31.

[41] 50 Fed. Cl. 99 (2001).

[42] *Group Seven Assocs*., 68 Fed. Cl. at 31 (citing *Labat-Anderson*, 50 Fed. Cl. at 105).

[43] *Id.*

[44] *Group Seven Assocs*., 68 Fed. Cl. at 32.

[45] *Id*.

[46] *Id*.

[47] *Id*.

[48] *Id*. at 33.

More recently, the COFC addressed the applicability of the FASA jurisdiction bar in *A&D Fire Protection, Inc, v. United States*.[49] The court noted the intent behind the FASA to gain more efficiency in federal procurements.[50] "In particular, when a procurement envisioned a multiple award ID/IQ contract, creating, through competition, a pool of contractors for certain work projects, the issuance of individual task order to these contractors would not be subject to protests."[51]

The court next recognized that the COFC had only addressed the FASA bar twice, in *Labat* and *Group Seven*.[52] The court explained that *Labat* "opined that [the FASA bar] would bar bid protests in this court for task orders on multiple award ID/IQ contracts, but not BPA awards under the FSS.[53] The court then explained that Group Seven "concluded that this court's 'jurisdiction[ ] is doubtful' over a task order protest, even if the task order is an FSS task order."[54]

The *A&D* court determined, in its case dealing with a multiple award ID/IQ not involving the FSS that the FASA bar applied.[55] "This court cannot frustrate the intent of Congress, which was to exempt from protest the issuance of individual task orders to contractors who had already received awards, subject to protest, of their master ID/IQ contracts."[56] Whether the FASA bar applies to task orders issues against the GSA FSS is beyond the scope of the case, and remains an open question.

The court then addressed whether any subsequent legislation had affected the FASA jurisdiction bar.[57] The court noted that although the Administrative Disputes Resolution Act of 1996 (ADRA)[58] expanded the COFC protest jurisdiction, nothing in the Act or legislative history indicated a congressional intent to reverse the FASA jurisdiction bar.[59] The FASA is an earlier, more specific statute; the ADRA is a later, more general statute.[60] In this case, "[r]epeal by implication is strongly disfavored . . ."[61] The court concluded by explaining, "the court understands that ADRA expanded this court's bid protest jurisdiction but left intact the bar against a specific type of bid protest, the protest of the issuance of a task order on a multiple award ID/IQ contract not alleging any of the exceptions enumerated in Section 253j(d)."[62]

Government Accountability Office (GAO)—Affirmative Responsibility Determination

Charter Environmental, Inc. protested the proposed award of a Forest Service contract for mine restoration services to ECI Northeast, LLC.[63] The main complaint was that the Forest Service should have rejected ECI Northeast's bid for failure to meet definitive responsibility criteria.[64] The GAO sustained the protest.[65]

The invitation for bids (IFB) contained affirmative responsibility criteria, including a past experience requirement of the successful completion of at least three similar projects.[66] The Forest Service determined that ECI Northeast met the

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[49] 72 Fed. Cl. 126 (2006).

[50] *Id*. at 133.

[51] *Id*.

[52] *Id*. at 133-34.

[53] *Id*. at 133.

[54] *Id*. at 133-34 (citing Group Seven Assocs., LLC v. United States, 68 Fed. Cl. 28, 32 (2005)).

[55] A&D Fire Protection, Inc. v. United States, 72 Fed. Cl. 126, 134 (2006).

[56] *Id.*

[57] *Id*.

[58] Pub. L. No. 104-320, 110 Stat. 3870 (1996).

[59] *A&D Fire Protection*, 72 Fed. Cl. at 134.

[60] *Id*.

[61] *Id*.

[62] *Id*.

[63] Charter Envtl., Inc., Comp. Gen. B-297219, Dec. 5, 2005, 2005 CPD ¶ 213.

[64] *Id*. at 2.

[65] *Id*. The GAO sustained in part and denied in part. *Id*. The GAO sustained the protest on the issue addressed in this article, but denied a separate argument that ECI Northeast's bid was nonresponsive. *Id*. at 7.

affirmative responsibility criteria and selected ECI Northeast for award of the contract.[67] As the GAO observed, "[a]lthough the relative quality of the evidence is a matter within the contracting officer's judgment, the contracting officer may only find compliance with the definitive criterion based on adequate, objective evidence."[68]

In this case, the agency contacted ECI Northeast requesting confirmation and evidence that ECI Northeast met the responsibility criteria.[69] ECI Northeast replied with information regarding projects completed by Environmental Contractors of Illinois (ECI), ECI Northeast's parent company.[70] The agency accepted ECI's experience as valid for ECI Northeast.[71] "As a general rule, the experience of a technically qualified subcontractor or third party – such as an affiliate or consultant – may be used to satisfy definitive responsibility criteria relating to experience for a prospective prime contractor."[72] The key determination ordinarily turns on the existence and evidence of a commitment by the third party to the prime contractor.[73]

The administrative record did not show any evidence of a commitment by ECI to ECI Northeast's performance of the contract.[74] ECI and ECI Northeast are separate business entities, and nothing supported the agency determination that ECI Northeast met the affirmative responsibility criteria.[75] The GAO recommended that the agency reconsider the responsibility determination.[76] The GAO also recommended that the agency reimburse the protester the costs of filing and pursuing the protest.[77]

Timeliness

Court of Federal Claims

The COFC, in *Transatlantic Lines LLC v. United States*,[78] rejected the government's motion to dismiss a protest regarding the terms of a solicitation filed after the due date for receipt of proposals.[79] This post-award bid protest involved a Military Surface Deployment and Distribution Command request for proposals to transport cargo between Florida and Guantanamo Bay.[80] The GAO dismissed the protest as untimely;[81] the COFC declined to follow the GAO protest timelines and considered the protest on the merits.[82]

This case appears to continue a trend that the COFC is moving further away from the GAO timelines in bid protest actions. In 1994, the COFC addressed a protest complaining of solicitation defects filed after proposal due date, stating, "[w]hile this Court declines to accept [the GAO protest regulation] as controlling in all cases, the defendant persuasively demonstrates the utility of the GAO rule in the bid protest arena."[83]

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[66] *Id.* at 2.

[67] *Id*. at 3.

[68] *Id*. at 4.

[69] *Id*. at 5.

[70] *Id*.

[71] *Id*.

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

[73] *Id*. at 5.

[74] *Id*. at 6.

[75] *Id*.

[76] *Id*. at 8.

[77] *Id*. at 9.

[78] 68 Fed. Cl. 48 (2005).

[79] *Id*.

[80] *Id*. at 50.

[81] *Id*. at 50-51.

[82] *Id*. at 52. The court ultimately enjoined the government from continuing with the awardee because the contracting officer failed to ensure the awardee could meet the government's stated needs and failed to enforce small business regulations. *Id*. at 57-58.

[83] Aerolease Long Beach & Satsuma Inv., Inc. v. United States, 31 Fed Cl. 342, 358 (1994).

In a 1999 case, the COFC stated that it "generally has endorsed the GAO's jurisprudence which dismisses a bid protest in which the protester failed to seek to clarify ambiguities or inconsistencies in the solicitation prior to the award of the contract."[84] However, in the same case, the COFC recognized that "it appears that this court has followed GAO's timeliness rule when the plaintiff's protest is founded upon alleged defects in the solicitation, but it has eschewed GAO's rule when the plaintiff has asserted a procurement violation."[85]

The COFC effectively distanced itself from the GAO timeliness regulations in a 2003 case.[86] The court stated, "this court, with all due respect, fails to see how a GAO rule that self-limits that agency's advisory role constitutes a limit, either legally or prudentially, on this court's exercise of jurisdiction."[87] Rather, the court determined that protest actions should be addressed under the same rules as other cases: protester delay in bringing the complaint to the court will be considered as part of the "multi-factored analysis of whether injunctive relief is warranted."[88]

The government again attempted to persuade the COFC to follow the GAO timeliness rule regarding complaints about the solicitation in the instant case.[89] The cargo transport solicitation was set aside for small business concerns.[90] The contracting officer failed to check the appropriate box on the solicitation to indicate that the Limitations on Subcontracting clause applied.[91] The protester failed to protest this issue prior to the date proposals were due.[92] The COFC dispensed with the timeliness argument swiftly, noting that the rule is not binding on the court, and "[i]n fact, it is not binding on GAO."[93] It thus appears that the COFC will not regard as untimely a protest challenging a solicitation filed after the proposal due date.

GAO Cases

DefenseLINK does not equal FedBizOpps

The GAO sustained a protest filed more than six months after award.[94] Worldwide Language Resources, Inc. and SOS International, Ltd. (SOSI) protested the sole-source award of two Air Force contracts for bilingual-bicultural advisor/subject matter experts (BBA-SME) in Iraq.[95] One of these contracts was awarded in December 2004, and the other in July 2005, expanding the scope and length of the contract.[96] The Air Force announced the award of the first sole-sourced contract on 6 December 2004 on the official Department of Defense website, DefenseLINK.[97] The Air Force publicized the July award on FedBizOpps.[98]

The Air Force argued that the protest should be dismissed as untimely because it was not filed until more than six months after publication on DefenseLINK, which placed the protesters on constructive notice of the sole-source award.[99]

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[84] Cubic Def. Sys., Inc. v. United States, 45 Fed. Cl. 239, 252 (1999).

[85] *Id*.

[86] Software Testing Solutions, Inc. v. United States, 58 Fed. Cl. 533 (2003).

[87] *Id*. at 535.

[88] *Id*.

[89] Transatlantic Lines, LLC v. United States, 68 Fed. Cl. 48 (2005).

[90] *Id*. at 50.

[91] *Id*. at 52. The Limitations on Subcontracting clause requires that at least half of the personnel cost in performing the contract be for employees of the awardee, not subcontractors. U.S. GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 52.219-14(b)(1) (July 2006).

[92] *Transatlantic Lines*, 68 Fed. Cl. at 52.

[93] *Id*. The court noted that the timeliness rules are not truly binding on the GAO, either, because the GAO has authority to consider an untimely protest for good cause shown or where a protest raises an issue important to the procurement system. *Id*.

[94] Worldwide Language Res., Inc., Comp. Gen. B-296993.4, Nov. 14, 2005, 2005 CPD ¶ 206.

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

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

[97] *Id*. at 17.

[98] *Id*. at 18.

[99] *Id*. at 17.

The protesters claimed to first learn of the contracts from the July award posting to FedBizOpps.[100] Thus, the protesters filed their protests regarding the sole-source award more than six months after the initial action.[101]

The GAO rejected the government argument that announcement on DefenseLINK provided constructive notice to the protesters.[102] The GAO recognized that constructive notice is "evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted."[103] Because of this harsh result, constructive notice is sparingly invoked, limited to "information published in the CBD and now on FedBizOpps."[104] These resources "have been expressly designated by statute and regulation as the official public medium for providing notice of contracting actions by federal agencies."[105]

GAO Dismisses as Untimely, Then Reverses Itself on Reconsideration

The GAO reversed, after a request for reconsideration, its decision to dismiss a protest as untimely.[106] The U.S. Army Corps of Engineers, Europe District (USACE) issued requests for proposals (RFP) on 7 and 8 September 2005 to procure custom emergency mass notification systems.[107] The USACE issued the RFPs to firms already holding existing task-order contracts.[108] MadahCom, Inc. (MadahCom), the protester, did not hold one of the existing task-order contracts.[109] MadahCom discovered on 8 September 2005 that the contract would be given to one of the existing task-order holders.[110]

MadahCom filed a GAO protest on 20 September 2005.[111] MadahCom claimed that the subject procurement exceeded the scope of the task-order contracts.[112] The GAO dismissed MadahCom's protest as untimely based on the requirement that protests based on other than solicitation issues be filed within ten days of when the protester knew or should have known of the basis for the protest.[113] In this case, MadahCom knew of the basis for the protest by 8 September but did not file its GAO protest until 20 September, outside the ten-day limit.[114]

MadahCom requested that the GAO reconsider its decision, arguing that the GAO applied the incorrect timeliness rule to the protest.[115] MadahCom argued that the basis for its protest was that the RFP was overly restrictive in limiting the competition to existing task-order contract holders.[116] As this is a solicitation issue, the correct timeliness rule requires the protester to file its protest prior to the proposal due date.[117] Proposals were due on 21 September and MadahCom filed its protest on 20 September, within the time limit.[118] The GAO agreed with MadahCom and reopened the protest.[119]

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[100] *Id*. at 18.

[101] *Id*. at 17.

[102] *Id*. at 21.

[103] *Id*. at 19.

[104] *Id*. at 20.

[105] *Id*.

[106] MadahCom, Inc., Comp. Gen. B-297261.2, Nov. 21, 2005, 2005 CPD ¶ 209.

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

[108] *Id*. at 2.

[109] *Id*.

[110] *Id*. at 3.

[111] *Id*.

[112] *Id*.

[113] *Id*.

[114] *Id*.

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

[116] *Id*. at 4.

[117] *Id*.

[118] *Id*.

[119] *Id*.

Pre-Award Debriefing

Remington Arms Company protested the award of a contract for sniper rifles by the Army to Knight's Armament Company.[120] The Army issued the RFP on 6 December 2004 and had a proposal due date of 11 March 2005.[121] The Army determined that Remington's proposal was unacceptable, and excluded Remington from the competitive range.[122] Remington received a pre-award debriefing on 14 September 2005.[123] Remington alerted the Army that the test which disqualified Remington's proposal was conducted incorrectly.[124] The Army agreed and reinstated Remington into the competitive range.[125]

After the Army awarded the contract to Knight's, Remington protested to the GAO on 6 October 2005.[126] One of the protest grounds was based on information Remington learned in the pre-award debriefing.[127] The Army argued that this protest ground should be dismissed as untimely because it was filed more than ten days from when Remington knew of the basis for the protest.[128] More specifically, in a case involving a required debriefing, a timely protest must be filed within ten days from when the debriefing is held.[129] Remington filed its protest outside either of these required timelines.[130]

The GAO declined to follow these timelines.[131] Subsequent to the debriefing in which Remington learned of the basis for its protest, the Army reinstated Remington into the competitive range.[132] Once that action occurred:

> there was no agency action prior to the award determination that was prejudicial to, and protestable by, Remington. In fact, had Remington filed a protest here [on this ground] after being reinstated in the competitive range and before award, the protest would have been speculative and premature because it would have merely anticipated prejudicial agency action.[133]

Therefore, Remington's protest was timely filed.[134]

Druyun Revisited

The GAO rejected a protest filed more than five years after the subject contract was awarded.[135] In 2001, the Air Force awarded a contract to Boeing Satellite Systems.[136] Ball Aerospace & Technologies Corp. (Ball) protested the award in July 2006, arguing that Darleen Druyun's bias resulted in an improper award to Boeing.[137] Ball protested the award to the GAO

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[120] Remington Arms Co., Comp. Gen. B-297374, Jan. 12, 2006, 2006 CPD ¶ 32.

[121] *Id*. at 3, 5.

[122] *Id*. at 5.

[123] *Id*.

[124] *Id*.

[125] *Id*. at 6.

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

[127] *Id*. at 14.

[128] *Id*.

[129] *Id*.

[130] *Id*.

[131] *Id*. at 16.

[132] *Id*. at 15.

[133] *Id*.

[134] *Id*. at 16.

[135] Ball Aerospace & Tech. Corp., Comp. Gen. B-298522, Aug. 11, 2006, 2006 CPD ¶ 113.

[136] *Id*. at 2.

[137] *Id*.

in 2001, but withdrew its protest.[138] The evaluation record, provided to Ball's attorneys, showed that the "evaluation ratings had been changed in a way that appeared to favor Boeing after an initial briefing to Ms. Druyun in her role as the SSA."[139]

Ms. Druyun pled guilty to conspiring with Boeing's chief financial officer in federal district court in 2004.[140] In a statement filed with the court, Ms. Druyun admitted favoring Boeing in several negotiations.[141] Four such negotiations were named, but the subject procurement was not.[142] This statement was publicly available after it was filed with the court.[143] In July 2006, the Department of Defense Inspector General (IG) issued a report concluding that Ms. Druyun had improperly favored Boeing in the subject contract.[144] The IG posted this report on its website, and Ball filed this protest within ten days of that posting.[145]

The Air Force argued that Ball knew of the basis for its protest in 2001 when it received the evaluation report.[146] Alternatively, the Air Force argued that Ball knew, at the latest, when the Druyun statement was filed and publicly available in connection with the criminal case.[147] Ball countered that neither of those earlier occurrences provided real evidence that Ms. Druyun improperly affected the subject procurement; thus, it was not until the IG report was posted that Ball learned of the basis for its protest.[148] The GAO determined that,

> although Ms. Druyun's supplemental statement of fact [in 2004] did not specifically identify this procurement as one that she steered to Boeing, Ball knew or should have known the basis of its protest that the award to Boeing was the result of Ms. Druyun's bias after Ball learned of the content of Ms. Druyun's statement.[149]

The GAO came to this conclusion based on a totality of the circumstances-type analysis. The GAO examined all the information available to Ball, and determined that, all of it together, put Ball on notice in 2004.[150] Thus, the protest was untimely.[151]

CICA OVERRIDES—Best Interests Really?

Time Sensitivity Counts

The government began the fiscal year by convincing the COFC to uphold the override of a CICA stay.[152] The Defense Information System Agency (DISA) issued a RFP for spectrum management engineering services.[153] Alion Science and

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[138] *Id*. at 3.

[139] *Id*. at 4.

[140] *Id*.

[141] *Id*.

[142] *Id*.

[143] *Id*.

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

[145] *Id*. at 5.

[146] *Id*.

[147] *Id*.

[148] *Id*. at 6.

[149] *Id*. at 7.

[150] *Id*. at 10.

[151] *Id*. at 2. The GAO also declined to consider the protest under the significant issue exception to its timeliness rules. *Id*. at 11-12. "While we recognize that the corruption that Ms. Druyun's actions represent has been of widespread interest well beyond the procurement community, the fact is that we have twice addressed the impact of her bias in favor of Boeing." *Id*. at 11.

[152] Alion Sci. & Tech. Corp. v. United States, 69 Fed. Cl. 14 (2005).

[153] *Id*. at 16.

Technology Corp. protested to the GAO the contract awarded to Advanced Engineering and Sciences (AES).[154] The protest triggered the statutory stay under the CICA, preventing contract performance by AES.[155] The DISA overrode the stay.[156]

The COFC determined that agency overrides based on a best interests determination are reviewable by the court.[157] The DISA justified its override of the stay based on both the best interests provision and the urgent and compelling provision of the CICA.[158] The government argued to the COFC that an agency override decision based on the best interests provision is not reviewable by the COFC, except in very limited circumstances.[159] This argument is based on language from a 1988 case in the District Court for the District of Columbia.[160] The COFC noted that, although this argument has not been adopted by the COFC, the government continues to press the issue because the CAFC has not directly answered the question.[161]

The COFC found that the DISA had justified that the override because the record supported the determination that both the best interests and the urgent and compelling provisions were satisfied.[162] The DoD requires ever-increasing dedicated spectrum to support its network-centric warfare.[163] The record established that various international governmental and commercial conferences and working groups were meeting to negotiate spectrum allocation.[164] These meetings, well beyond the control of the DoD or federal government, made the need for the subject contract time sensitive.[165] Finally, the DISA justified that continued contract performance was the only solution; the contract was for new work, so no incumbent contract could be temporarily extended to perform the time sensitive mission, and AES was the only offeror with adequate staffing to fulfill the contract.[166] For these reasons, the COFC upheld the override.[167]

Override Decision Arbitrary and Capricious

CIGNA Government Services, LLC protested to the GAO the award of a Medicare claims administration services contract awarded by the Department of Health and Human Services Centers for Medicare and Medicaid Services (CMS).[168] The CMS overrode the CICA stay based on the best interests provision of the CICA.[169] The COFC reinstated the stay because the CMS override decision contradicted evidence in the record and failed to consider relevant factors.[170]

The CMS justified the override in this case by claiming that the CICA stay would delay the implementation of the new Medicare claims system.[171] The COFC did not find this argument compelling because the CMS reported to Congress that "it had 'flexibility' in its procurement schedule which could accommodate 'any unforeseen changes in the marketplace or legislative environment' and still enable CMS to meet the Congressionally-mandated implementation date of 2011 for the

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[154] *Id*.

[155] *Id*.

[156] *Id*.

[157] *Id*. at 22.

[158] *Id*. at 16.

[159] *Id*. at 22.

[160] *Id*. The district court case is *Topgallant Group, Inc. v. United States*, 704 F. Supp. 265 (D.D.C. 1988). *Id*. "In *Topgallant,* the district court concluded that a 'best interests' determination was of the type 'committed to agency discretion by law' and 'traditionally exempt from judicial review.'" *Id*. (citing *Topgallant*, 704 F. Supp. at 266).

[161] *Alion Sci.*, 69 Fed. Cl. at 22.

[162] *Id*. at 32.

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

[164] *Id*. at 16.

[165] *Id*.

[166] *Id*. at 27.

[167] *Id*. at 32.

[168] CIGNA Gov't Servs., LLC v. United States, 70 Fed. Cl. 100 (2006).

[169] *Id*. at 101.

[170] *Id*. at 102.

[171] *Id*. at 101.

new contracts."[172] The COFC rejected the CMS attempt to assert flexibility when reporting to Congress and claim a "need to maintain its 'tight schedule'" when overriding the CICA stay.[173]

The COFC also rejected the CMS override because the CMS failed to consider relevant factors in making its override determination.[174] First, the CMS failed to consider the risks involved if the GAO were to sustain the protest.[175] No mention was made in the override decision addressing the possible costs involved if the GAO recommended that the CMS re-compete the contract.[176] The CMS also failed to evaluate the harm to CMS if the stay remained in place; rather, the CMS simply asserted that the harm outweighed the CICA stay mandate.[177] Finally, the CMS failed to consider the effect the override would have on competition.[178] For these reasons, the COFC reinstated the stay.[179]

$100,000/Month Savings Still Not Sufficient Override Justification

In *Automation Technologies, Inc.* (ATI),[180] the COFC reinstated the CICA stay that the Department of Homeland Security (DHS) had overridden.[181] The DHS awarded a contract to ATI for computer maintenance services in January, 2006.[182] Another offeror, Digital Technologies, Inc. (DTI) protested to the GAO, and contract performance was stayed under the CICA.[183] The DHS took corrective action, and after receiving revised price proposals, awarded the contract to DTI.[184] Another timely protest to the GAO, this time by ATI, again triggered the CICA stay.[185] The DHS overrode the stay, but with this decision the COFC vacated the override.[186]

The DHS executed a determination and findings (D&F) explaining its decision to override the stay.[187] The CICA allows the head of a procuring activity to override a post-award stay imposed under the statute if contract performance is in the best interests of the government or urgent and compelling circumstances preclude waiting for the protest decision.[188] In this case, the DHS overrode the stay because it determined that contract performance was in the best interests of the government.[189] The DHS D&F focused on the merits of the protested issues, and concluded that the estimated savings of approximately $100,000 per month expected by proceeding under the new contract justified the override.[190] The COFC reviews CICA overrides to ensure agency decisions are not arbitrary, capricious, or contrary to law.[191]

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[172] *Id*.

[173] *Id*.

[174] *Id*.

[175] *Id*.

[176] *Id*.

[177] *Id*.

[178] *Id*. at 102.

[179] *Id*.

[180] 2006 U.S. Claims LEXIS 278 (Fed. Cl. Sept. 11, 2006).

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

[182] *Id*. at 2.

[183] *Id*.

[184] *Id*. at 3.

[185] *Id*. at 4.

[186] *Id*. at 5.

[187] *Id*.

[188] *Id*. at 7-8 (citing 31 U.S.C. § 3553(d)(3)(c) (LEXIS 2006)).

[189] Automation Tech., Inc. v. United States, 2006 U.S. Claims LEXIS 278, at 6 (Fed. Cl. Sept. 11, 2006).

[190] *Id*.

[191] *Id*. at 12-13.

The COFC rejected the DHS's best interests justification.[192] First, the DHS failed to consider the impact of an adverse GAO decision on the protest merits.[193] While the DHS attempted to address the merits in the D&F finding that the protester would lose, the DHS failed to consider how the procurement would be affected if the GAO sustained the protest following the CICA override.[194] Second, the amount of savings the DHS expected was roughly the same amount as had been determined insufficient to justify an override in a separate 2003 case.[195] The COFC declined to foreclose the possibility that savings alone could ever justify an override.[196] However, in this case, the COFC determined that to allow this minimal amount of savings to justify an override would strip away the strength of the stay provisions.[197]

Costs

Standard for Attorney and Consultant Fees Clarified

Following a GAO recommendation for corrective action and the payment of costs,[198] the Department of the Army (DA) and ITT Federal Services International Corporation (ITT) sought an opinion from the GAO regarding the calculation of costs to be reimbursed to ITT.[199] Specifically, the GAO was asked to address the proper standard for determining the amount of a cost of living increase in the allowable hourly rate for attorney services and the maximum allowable amount for payment of consultant fees.[200]

The CICA allows the GAO to recommend that an agency reimburse a protester the reasonable costs of pursuing the protest, but limits the amount a protester may be paid for attorney fees to $150 per hour.[201] An agency may only pay a protester more than $150 per hour for attorney fees if the GAO recommends doing so justified by an increase in the cost of living or other special factors.[202] The CICA also limits the amount that can be paid to a protester for consultant and expert witness services to the highest rate of compensation for expert witnesses paid by the federal government.[203]

In this case, ITT requested payment for attorney fees at $238 per hour, justifying the higher amount on an increase in the cost of living.[204] ITT based the amount of increase on the Department of Labor (DOL) Consumer Price Index (CPI) specifically measuring costs of securing legal services.[205] The Army countered, and the GAO agreed, that the proper index to use in an upward adjustment in allowable attorney fees is the DOL CPI for All Urban Consumers, U.S. City Average for All Items (CPI-U).[206] This index more closely implements the CICA language of allowing an upward adjustment to account for an increase in the cost of living.[207]

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[192] *Id*. at 23-24.

[193] *Id*. at 16.

[194] *Id*.

[195] *Id*. at 14-15 (citing PGBA, LLC v. United States, 57 Fed. Cl. 655, 664 (2003)). *See also* Advanced Sys. Dev., Inc. v. United States, 72 Fed. Cl. 25 (2006) (setting aside a "best interests" agency override of the CICA stay that was a bare "allegation that the new contract is better than the old one").

[196] Automation Tech., Inc. v. United States, 2006 U.S. Claims LEXIS 278 at 18 (Fed. Cl. Sep. 11, 2006).

[197] *Id*.

[198] ITT Fed. Servs. Int'l Corp., Comp. Gen. B-296783, 296783.3 (Oct. 11, 2005). This decision is subject to a protective order and no redacted version has been released.

[199] ITT Fed. Servs. Int'l Corp., Comp. Gen. B-296783.4, Apr. 26, 2006, 2006 CPD ¶ 72.

[200] *Id*. at 2.

[201] *Id*. This limit applies to protesters that are not small businesses. *Id*. For a recent case addressing the payment of attorney fees to a successful small business protester *see* Blue Rock Structures, Comp. Gen. B-293134.2, Oct. 26, 2005, 2005 CPD ¶ 190. For small businesses, attorney fees must be reasonable. *Id*. The $150 per hour limit in the FAR is a benchmark for determining reasonableness, but the agency must challenge amounts claimed above $150 per hour on reasonableness grounds. *Id*. In this case, the GAO approved a rate of $350 per hour for a partner in a Washington D.C. firm because the agency provided no evidence that this rate was not reasonable. *Id*.

[202] *ITT Fed. Servs. Int'l Corp.*, 2006 CPD ¶ 72, at 2.

[203] *Id*. at 6.

[204] *Id*. at 2.

[205] *Id*. at 3.

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

[207] *Id*. at 5.

For consultant fees, ITT claimed reimbursement at a rate of $360 per hour, for a total amount of about $82,000.[208]

> ITT assert[ed] that the proper measure of the 'highest rate of compensation for expert witnesses paid by the Federal Government' is the rate that has been paid by any federal agency for any expert witness or consultant in any forum at any time. In support of its claimed amount, ITT has tendered evidence showing that the federal government has paid more than $360 per hour for expert witnesses in other litigation in various forums.[209]

The Army responded that the *FAR* limits consultant and expert witness fees to the highest federal pay rate, general schedule (GS) grade 15, step 10.[210]

The GAO agreed with the DA.[211] The *FAR* limits compensation for consultant and expert witness fees, referencing statutory and regulatory provisions that in turn list federal pay rates.[212] Further, nothing in the CICA "explains the 'highest rate of compensation' language."[213] The GAO also determined that this approach is consistent with court interpretation of fees allowed under the Equal Access to Justice Act (EAJA) which contains a provision identical to that in the CICA.[214] Therefore, consultant fees reimbursing protesters are capped at the GS 15, step 10 pay rate.[215]

Court Case Good Reason to Delay Paying Costs Claim

The GAO recommended that the Department of the Air Force reimburse BAE Technical Services, Inc. the costs of pursuing its protest, but refused to recommend that the Air Force reimburse the costs of pursuing the instant claim.[216] BAE submitted its claim to the contracting officer 2 December 2005.[217] By the time BAE filed its request for a GAO opinion on the amount of costs on 8 May 2005, the Air Force still hadn't issued a written response to the claim.[218] In addition to the substance of its protest costs claim, BAE requested that the GAO recommend that the DAF pay the costs BAE incurred in pursuing the costs claim to the GAO.[219]

The GAO denied the BAE request.[220] The GAO determined that the Air Force had delayed adjudicating the costs claim because a competitor in the same procurement had protested to the COFC.[221] The GAO decided that the Air Force decision to await the outcome of the COFC protest, which essentially challenged the result of the earlier BAE GAO protest, was reasonable and prudent.[222] Further, the GAO determined that although the Air Force had not issued a written response to BAE's claim, the Air Force had orally informed BAE that the Air Force disputed much of the claimed amount.[223] Despite finding that the Air Force should pay most of the costs claimed, the GAO did not recommend that the Air Force pay the additional expenses BAE incurred in pursuing the GAO opinion on the amount of costs due.[224]

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[208] *Id*. at 6.

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

[210] *Id*. at 7.

[211] *Id*. at 8.

[212] *Id*. at 7.

[213] *Id*. at 8.

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

[215] *Id*. at 11.

[216] BAE Technical Servs., Inc., Comp. Gen. B-296669.3, Aug. 11, 2006, 2006 CPD ¶ 122.

[217] *Id*. at 4.

[218] *Id*.

[219] *Id*. at 16.

[220] *Id*. at 19.

[221] *Id*. at 18.

[222] *Id*.

[223] *Id*. at 18-19.

[224] *Id*. at 19.

New GAO Publications

The GAO published updated versions of two guides: *Bid Protests at GAO: A Descriptive Guide* (*Bid Protest Guide*) and *Guide to GAO Protective Orders*. The new *Bid Protest Guide* is in its eighth edition, providing a comprehensive user's guide to protests at the GAO.[225] This new edition was necessary due to changes last year to the official GAO bid protest regulations.[226] The *Guide to GAO Protective Orders* was also updated in response to changes in the bid protest regulations.[227] These changes were brought about by the growing use of electronic information transmission and GAO experience in issuing protective orders.[228]

Bid Protest Statistics for Fiscal Years 2002-2006[229]

	FY 2006	FY 2005	FY 2004	FY 2003	FY 2002
Cases Filed	1,327 (down 2%[230])	1,356 (down 9%)	1,485 (up 10%)	1,352 (up 12%)	1,204 (up 5%)
Cases Closed	1,274	1,341	1,405	1,244	1,133
Merit (Sustain + Deny) Decisions	249	306	365	290	256
Number of Sustains	72	71	75	50	41
Sustain Rate	29%	23%	21%	17%	16%
Effectiveness Rate (reported)[231]	39%	37%	34%	33%	33%
ADR[232] (cases used)	91	103	123	120	145
ADR Success Rate[233]	96%	91%	91%	92%	84%
Hearings	11% (51 cases)	8% (41 cases)	9% (56 cases)	13% (74 cases)	5% (23 cases)

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[225] U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-797SP, BID PROTESTS AT GAO (2006).

[226] *Id*. The GAO bid protest regulations are found at 4 C.F.R. § 21 (2006).

[227] U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-716SP, GUIDE TO GAO PROTECTIVE ORDERS (May 2006).

[228] *Id.* at 2.

[229] E-mail from Mr. Louis A. Chiarella, Government Accountability Office, Bid Protest Section, to Major Mark A. Ries, Associate Professor, The Judge Advocate General's School, U.S. Army (20 Nov. 2006) (on file with author).

[230] From the prior fiscal year.

[231] Based on a protester's obtaining some form of relief from the agency, as reported to the GAO.

[232] Alternative Dispute Resolution.

[233] Percentage resolved without a formal GAO decision.

CONTRACT ADMINISTRATION

Contract Interpretation

Navy's Interpretation Not Reasonable

In *Harper/Nielsen Dillingham Builders*,[1] the Armed Service Board of Contract Appeals (ASBCA) held that the Navy's interpretation of contract terminology was unreasonable and sustained an appeal on that basis.[2] In this case, the Navy awarded a contract to Harper/Nielsen Dillingham Builders for remodeling a hospital and constructing a parking garage.[3] Harper/Nielsen subcontracted the relevant work to a fire protection subcontractor, Fireshield, Inc.[4] Harper/Nielsen later submitted a claim on behalf of Fireshield for additional work Fireshield stated it performed as a result of the Navy's unreasonable interpretation of the contract.[5] After the contracting officer denied the claim, Harper/Nielson filed a timely appeal with the ASBCA.[6]

Harper/Nielson claimed $21,698 for installing galvanized steel fittings for the sprinkler system in a parking garage in Bremerton, Washington.[7] Harper/Nielson contended that the government's requirement to install galvanized steel fittings (vice less expensive painted non-galvanized steel fittings) was a constructive contract change.[8] Conversely, the Navy argued that the contract clearly required both the piping and the fittings to be galvanized steel.[9] Specifically, Harper/Nielson argued that the contract referred to the words "piping" and "fittings" separately and that the contract imposed different requirements for each.[10] On the other hand, the Navy argued that the "word piping can be defined as a run of pipe including fittings."[11] Thus, the Navy posited that where the contract required piping to be galvanized steel, the contract also required fittings to be galvanized steel.[12]

The ASBCA analyzed this dispute under the generally-accepted principles of contract interpretation.[13] In determining whether the contract required fittings to be made of galvanized steel, the board first referred to the plain language of the contract to determine whether the contract language was ambiguous.[14] The board observed that the disputed contract specification mentioned the words "piping" and "fittings" separately.[15] Paragraph 2.1.1 of this specification states, "steel *piping* shall be hot dipped galvanized Schedule 40 [steel]" (emphasis added).[16] This paragraph later states that "sprinkler pipe and fittings shall be steel."[17] The board interpreted these two sentences to mean that while piping must be galvanized steel, the fittings may be non-galvanized steel. The board further stated that the "appellant's interpretation [was] the only reasonable interpretation."[18] The board supported its argument by stating that the disputed specification does not treat the

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[1] Harper/Nielsen Dillingham Builders JV, ASBCA Nos. 53211, 53363, 6-1 BCA ¶ 33,185.

[2] *Id.* at 164,495.

[3] *Id.* at 164,486.

[4] *Id.*

[5] *Id.* at 164,493.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 164,494.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at 164,494-95. It is a well-settled rule of contract interpretation that a court or board will first seek to determine the meaning of disputed terms by referring to the plain language of the contract itself. *See* M.G. Constr., Inc. v. United States, 67 Fed. Cl. 176, 181 (2005). A court or board will only resort to extrinsic evidence if it cannot determine the meaning of the disputed terms from the contract itself. *M.G. Constr.*, 67 Fed. Cl. at 181. *See also* Skyline Technical Constr. Srvcs., ASBCA No. 51076, 98-2 BCA ¶ 29,888 at 147,954.

[14] *Harper/Nielsen*, 6-1 BCA ¶ 33,185 at 164,494-95.

[15] *Id.*

[16] *Id.* at 164,494.

[17] *Id.*

[18] *Id.* The Board cited an unrelated case where the definitions of "piping" and "fittings" were at issue:

words "piping" and fittings" as synonyms.[19] Rather, this paragraph refers to piping and fittings as separate terms. Additionally, the board cited testimony stating that in the industry, galvanized steel piping is frequently used with non-galvanized fittings.[20]

The ASBCA concluded that because the Navy unreasonably interpreted the contract to require the contractor to install galvanized steel fittings, the Navy thereby constructively changed the contract. Consequently, the board sustained the contractor's claim for an equitable adjustment for that contract change.[21]

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> The meaning manifested by the specifications cannot be ascertained from the dictionary technical meaning of isolated words. Such terms as "piping" and "fittings" like many words in common usage, do not have fixed single word meanings, with the result that the intended meaning in a particular instance must be arrived at from the context in which they are used.

Northwestern Indus. Piping, Inc., ASBCA No. 12676, 70-2 BCA ¶ 8551 at 39,760-61.

[19] *Harper/Nielsen*, 6-1 BCA ¶ 33,185 at 164,494.

[20] *Id.* While the board recognizes that extrinsic evidence, such as industry standards, cannot be used for contract interpretation purposes where contract terms are clear, the board nevertheless relied on this testimony as evidence that the appellant's (and the board's) contract interpretation was reasonable. *Id.*

[21] *Id.*

Changes

Government Must Compensate Contractor for Defective Design

Lamb Engineering & Construction Company[1] contains an excellent discussion of the theory that defective specifications are a form of constructive change. In this case, the Armed Services Board of Contract Appeals (ASBCA) considered a series of appeals concerning a construction contract to modify twenty-eight ammunition storage facilities called "igloos."[2] While the board considered five appeals arising from this construction contract, this article focuses only on the appeal involving the installation of fiberglass plastic (FRP) ductwork. The board sustained the ductwork appeal holding that the government had constructively changed the contract by requiring the contractor to follow defective specifications.[3]

In 1998, the Army and Air Force National Guard Bureau, U.S. Property and Fiscal Officer for Arizona (the government) awarded the subject contract to Lamb.[4] The contract required Lamb to install eighteen-inch FRP ductwork as a component of the igloos' heating, ventilating, and air conditioning systems.[5] The contract further required Lamb to install the ductwork according to the manufacturer's instructions.[6] These manufacturer's instructions stated that the contractor should first dig a trench, and then place "backfill" (such as pea gravel or sand) into the trench.[7] Next, the contractor should place the ductwork into the trench and finally, the contractor should place more backfill around and over the ductwork.[8] The instructions also stated that the contractor should compact the backfill around and over the duct by hand to a density of 90%-95%.[9] The instructions explained that the trench, the backfill, and the hand compaction were necessary to ensure that the ductwork did not collapse under the weight of the backfill.[10]

On or about 5 January 1999, the government discovered that the underground ductwork had broken in various places at seven igloos, to include at the duct connections.[11] Consequently, the government directed Lamb to repair the damaged ducts.[12] Specifically, the government instructed Lamb to remove the backfill encasing the failed ductwork, to place pea gravel as backfill under, over, and around the ductwork, and then to place flexible connectors at the duct connections.[13] Lamb complied with these instructions and incurred additional costs.[14]

On 1 November 2000, Lamb submitted a claim to the contracting officer for the additional work it performed in remedying the damaged FRP ductwork.[15] Lamb argued that the ductwork failed because the government's design specifications were defective.[16] Consequently, Lamb argued that because of the government's faulty design, Lamb performed additional work and incurred additional costs associated with the ductwork failure.[17] Lamb stated its additional costs included removing the backfill around the failed ducts, replacing the damaged ducts, installing flexible connectors at the ductwork joints, and placing pea gravel backfill under and over the re-installed ductwork. [18] Lamb maintained that the

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[1] ASBCA Nos. 53304, 53356, 53357, 53358, 53359, 6-1 BCA ¶ 33,178.

[2] *Id*. at 164,388.

[3] *Id*. at 164,424.

[4] *Id*. at 164,397.

[5] *Id*. at 164,404.

[6] *Id*. at 164,396.

[7] *Id.* at 164,405.

[8] *Id*.

[9] *Id*.

[10] *Id*.

[11] *Id*. at 164,409.

[12] *Id*.

[13] *Id*. at 164,410.

[14] *Id*.

[15] *Id*. at 164,413.

[16] *Id*.

[17] *Id*. at 164,423.

[18] *Id.* The Board concluded that a "contributing cause" for the FRP ductwork failure was the contract requirement for flexible duct and inflexible steel connections. *Id*. In reaching this conclusion, the Board relied upon testimony that the contract's requirement for flexible ductwork and rigid steel

government's defective specifications constituted a constructive change to the contract for which Lamb was entitled compensation.[19] The contracting officer denied this claim and then Lamb filed a timely appeal.[20]

Conversely, the government contended that the ductwork failed because of Lamb's faulty workmanship.[21] Specifically, the government argued that if Lamb had complied with the specifications, then the FRP ductwork would have functioned properly. For example, Lamb did not place the backfill in the trench prior to installing the ductwork, as the contract required.[22] Additionally, Lamb did not compact the backfill to 90-95% density, as the contract required.[23] Thus, the government reasoned that Lamb's failure to follow the contract's specifications—not faulty design—caused the ductwork's failure.[24]

The ASBCA analyzed this claim as a constructive change.[25] The board stated, "a constructive change occurs where a contractor performs work beyond the contract requirements without a formal order under the Changes provision of the contract, due either to an informal order from, or through the fault of the government."[26] When a contractor performs additional work due to a constructive change, the contractor may file a claim under the Contract Disputes Act (CDA) for compensation.[27] The ASBCA has recognized a variety of types of constructive changes, to include defective specifications.[28]

If the government's design specifications are defective, then the government bears the risk that the project will fail as a result of its defective specifications.[29] Accordingly, the ASBCA recognizes that the government has an implied warranty for its specifications and thus, when a contractor complies with defective government specifications and the project is unsuccessful because of those specifications, the government must compensate the contractor for any additional work it performs to ensure the project succeeds.[30] The ASBCA views defective specifications as a constructive change for which the contractor is entitled to compensation.[31]

In this case, the ASBCA found that the ductwork failed partly because the specifications were defective and partly because the contractor did not fully comply with the contract requirements.[32] Regarding government fault, the Board found that the specifications were defective in three respects. First, the government's design required rigid steel connections at the ductwork joints.[33] The board relied upon testimony that such rigid connections would likely cause the flexible ductwork to flatten and break under the load of the backfill. Second, the government's design was based on the erroneous assumption that

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connections prevented the ductwork from deflecting and flattening without incurring structural damage. *Id*. The Board was persuaded that the connections should have been flexible. *Id*.

[19] *Id*. at 164,413.

[20] *Id*.

[21] *Id*. at 164,423.

[22] *Id.* at 164,409.

[23] *Id.*

[24] *Id*.

[25] *Id*. at 164,417.

[26] *Id*.

[27] *Id*. *See also* the Contract Disputes Act, 41 U.S.C.S. §§ 601-13 (LEXIS 2006).

[28] *See* Raytheon Serv. Co., ASBCA No. 36139, 92-1 BCA ¶ 24,696 (stating that the government's contract misinterpretation is a constructive change); Stanwick Corp., ASBCA 16113, 72-1 BCA ¶ 9285 (stating the government's failure to disclose vital information is a constructive change); Trepte Constr. Co., ASBCA No. 38555, 90-1 BCA ¶ 22,595 (stating that constructive acceleration is a constructive change).

[29] *Lamb Eng'g*, 6-1 BCA ¶ 33,178 at 164,417. In an unrelated case, the ASBCA explained the theory of defective specifications by stating:

> When the government provides specifications for a contractor to use in contract performance, it impliedly warrants that the contractor can successfully perform based upon those specifications and that a satisfactory product will result. Where successful performance based on the specifications is determined to be impossible, or even commercially impracticable, the contractor is entitled to recover its added performance costs for the constructive change.

Cable & Computer Tech., Inc., ASBCA Nos. 47420, 48846, 03-1 BCA ¶ 32,237, at 159,408.

[30] *Lamb Eng'g*, 6-1 BCA ¶ 33,178 at 164,417.

[31] *Id.*

[32] *Id*. at 164,423.

[33] *Id*.

the backfill and soil surrounding the ductwork would not shift.[34] The backfill and soil did shift around the ductwork, and that shifting also likely contributed to the ductwork failure. Third, regarding installing the ductwork and the compaction requirements, the government did not tailor the manufacturer's instructions for this particular project.[35] The Board implies that the manufacturer's generic installation instructions did not adequately guide the contractor in this project.[36]

Regarding contractor fault, the Board concluded that Lamb's performance also contributed to the ductwork failure.[37] First, Lamb did not compact the backfill under and around the FRP ductwork as the contract required.[38] Second, Lamb did not place the ductwork in trenches as the contract required.[39] Rather, Lamb installed the ductwork and then placed backfill under and around the ductwork, without digging a trench.[40]

After considering all the evidence, the Board found that the government's defective specifications were partially responsible for the FRP ductwork failure resulting in the contractor's additional work to remedy the ductwork.[41] The Board concluded that the contractor was entitled to an equitable adjustment to the extent that the defective specifications caused the contractor to incur additional costs.[42]

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[34] *Id*.

[35] *Id*. at 164,424.

[36] *Id*.

[37] *Id*.

[38] *Id*.

[39] *Id*.

[40] *Id*.

[41] *Id*.

[42] *Id*.

Contract Disputes Act (CDA) Litigation

The New Civilian Boards of Contract Appeal (CBCA)

The long rumored consolidation of the CBCA came to fruition with the passing of the National Defense Authorization Act for Fiscal Year 2006 (2006 NDAA).[1] All boards of contract appeals for civilian agencies, except the boards of the U.S. Postal Service and the Tennessee Valley Authority, will be consolidated into the new Civilian Board of Contract Appeals (CBCA), which will stand up effective 8 January 2007.[2] The Honorable Stephen M. Daniels, present Chairman of the General Services Administration Board of Contract Appeals, will become the Chairman of the new Board which will maintain its offices at 1800 M Street, Washington, D.C.[3]

Judges at the board will be selected and appointed to serve in the same manner as administrative judges appointed pursuant to section 3105 of Title 5, with the additional requirement that they have at least five years of public contract law experience.[4] The 2006 NDAA addressed the previous concerns about a consolidated board's inability to have jurisdiction over non-CDA cases[5] by including a clause allowing additional jurisdiction "over any additional category of laws or disputes over which an agency board of contract appeals established pursuant to section 8 of the Contract Disputes Act exercised jurisdiction before the effective date of this section."[6] Furthermore, the CBCA can "assume any other function performed by such a board before such effective date on behalf of such agencies" which allows the CBCA to continue to hear non-CDA disputes.[7]

Cases now pending before those agency boards soon to be consolidated into the CBCA will continue before the CBCA and any orders previously issued will be stay in effect until modified, terminate, superseded, or revoked by the CBCA.[8] While information concerning the interim rules is still scant, the Honorable Judge Daniels indicated that there will be greater emphasis on electronic filings, to the extent that the budget will allow. Information on the new Board may be found at their new webpage: www.cbca.gsa.gov.[9]

Contractors Are Expected to Know the FAR!

Contractors are expected to know the *Federal Acquisition Regulation* (*FAR*)! A recent Armed Services Board of Contract Appeals (ASBCA) case involving a Navy demolition contract served notice on contractors that they have to know the *FAR* too.[10] The Navy issued a solicitation in 2002 limited to 8(a) companies for the demolition of a number of buildings at the Great Lakes Training Center.[11] The contract did not include *FAR part 52.219-14*, [12] nor was it expressly incorporated

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[1] National Defense Authorization Act for Fiscal Year 2006, Public L. No. 109-163, 119 Stat. 136 (Jan. 7, 2006).

[2] *Id*. *See also* Board of Contract Appeals: The Establishment of the Civilian Board of Contract Appeals and the Termination of the Boards of Contract Appeals of the General Services Administration and the Departments of Agriculture, Energy, Housing and Urban Development, Interior, Labor, Transportation, and Veterans Affairs, 71 Fed. Reg. 65,825 (Nov. 9, 2006). While the NDAA stated that consolidation would be effective one year from the signing of the Act, that would be 6 January 2007, however that date is a Saturday. The first business day is 8 January, 2007.

[3] 71 Fed. Reg. at 65,825.

[4] *Id.*

[5] Major Andrew S. Kantner, et. al., *Contract and Fiscal Law Developments of 2005—Year in Review,* ARMY LAW., Jan. 2006, at 93 [hereinafter *2005 Year in Review*].

[6] National Defense Authorization Act for Fiscal Year 2006, Public L. No. 109-163, 119 Stat. 136.

[7] *Id*.

[8] *Id*. (c)(2)(b).

[9] 71 Fed. Reg. at 65,825.

[10] Sarang-Nat'l, ASBCA No. 54992, 06-2 BCA ¶ 33,347.

[11] *Id*.

[12] *Id.* at 165,352. FAR part 52.219-14, Limitations on Subcontracting, states:

> (a) This clause does not apply to the unrestricted portion of a partial set-aside.
>
> (b) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for—
>
> (1) *Services (except construction).* At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

as required by *FAR part 19.508(e)*.[13] *FAR part 52.219-14* requires the prime contractor to perform at least fifteen percent of the cost of general construction contracts, and at least twenty-five percent of the cost of construction contracts performed by a special trade.[14] While the solicitation did not specifically state that the work to be performed was special trade it did note that the North American Industry Classification System (NAICS) code for the acquisition was "235940."[15] NAICS code 235940 identifies "wrecking and demolition contractors" as "special trade contractors."[16]

Sarang is a certified 8(a) company that entered into a joint venture with national Wrecking Company to bid on the contract.[17] The companies planned to have the joint venture perform at least fifteen percent of the contract "pursuant to the requirements of FAR part 52.219-14."[18] In drafting their joint venture agreement the companies relied, in part, on an amendment to the solicitation issued by the Navy which stated that the "[p]rime must meet the Limitations in Subcontracting clause (FAR part 52.219-14) and be able to perform at least 15% of the cost of the contract."[19]

In April of that year, the Navy awarded the contract to the Sarang/National Venture.[20] After being awarded the contract the members of the joint venture disagreed as to the amount of work required to be done through a joint venture.[21] National wanted to act as a subcontractor to the joint venture and perform eighty-five percent of the work, leaving fifteen percent for the joint venture.[22] Sarang, however, believed the joint venture was required under *FAR part 52.219-14*, to perform twenty-five percent of the contract.[23] Once the government learned of the disagreement the contracting officer issued a unilateral modification clarifying that *FAR part 52.219-14* applied and that the joint venture must perform at least twenty-five percent of the work in accordance with the NAICS code that made demolition a specialty trade code.[24]

In January 2004, National challenged the modification on behalf of the joint venture by filing a claim.[25] When the contracting officer failed to respond to National's challenge, National appealed to the ASBCA claiming the joint venture had the contractual right to expect the prime to perform fifteen percent of the contract work.[26]

National claimed that its contractual right arose from the January 2003 amendment to the solicitation that specifically stated that the prime contractor must be able to perform at least 15% of the contract and the Small Business Association's approval letter of their joint venture agreement.[27] The ASBCA rejected this argument because, while the January 2003

> (2) *Supplies (other than procurement from a nonmanufacturer of such supplies).* The concern shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials.
>
> (3) *General construction.* The concern will perform at least 15 percent of the cost of the contract, not including the costs of materials, with its own employees.
>
> (4) ***Construction by special trade contractors.*** **The concern will perform at least 25 percent of the cost of the contract, not including the cost of materials, with its own employees.**

(emphasis added).

[13] Sarang-Nat'l, ASBCA No. 54992, 06-2 BCA ¶ 33,347 at 165,353. The opinion mistakenly cites FAR 15.508(e). FAR 19.508(e) states that the contracting officer shall insert FAR 52.219-14 in solicitations and contracts for supplies, services, and construction, if any portion of the requirement is to be set aside for small business and the contract amount is expected to exceed $100,000. U.S. GEN. SVS. ADMIN, ET. AL., FEDERAL ACQUISITION REG. pt. 19.508(e) (July 2006) [hereinafter FAR].

[14] *Id.* at pt. 52.219-14.

[15] Sarang-Nat'l, ASBCA No. 54992, 06-2 BCA ¶ 33,347 at 165,353.

[16] *Id*.

[17] *Id.*

[18] *Id.* at 165,354.

[19] *Id*.

[20] *Id*.

[21] *Id*.

[22] *Id*.

[23] *Id*.

[24] *Id*. at 165,355.

[25] *Id*.

[26] *Id.* at 165,356.

[27] *Id*.

amendment stated the prime must perform at least fifteen percent of the work, the amendment also incorporated *FAR 52.219-14*.[28] The Board stated that even given the Navy's mistakes and the SBA approval letter, Sarang and National "should have known better."[29] Due care required the joint venture to be familiar with the *FAR* and if it had, it would have been clear that the contractor was considered a special trade contractor and therefore required to perform at least twenty-five percent of the contract.[30]

Payment to the Wrong Bank Is No Payment at All

And you thought you were the only one who had problems with Bank of America! In *S.A.S. Bianchi*,[31] the ASBCA held that the government failed to make proper progress payments to the appellant because the government's electronic transfer of funds went to the wrong bank, after being duly notified by appellant that payments should be made to a different bank.[32]

The Bank of America, making payments to the appellant on behalf of the government, sent the payment to the appellant's "old" bank.[33] The "old" bank and appellant were having a dispute surrounding the appellant's line of credit[34] and the appellant directed the government to make its payments to a separate Italian bank.[35] The Corps of Engineers contracted with Bianchi for construction work in Livorno Italy.[36] The contract contained a local clause that mandated that the contract "be construed and interpreted in accordance with the substantive laws of the United States of America."[37]

In May 1999, in order to ensure the successful transfer of funds to its new bank, Bianchi spoke with both the government and the government's bank, Bank of America.[38] That month the Bank of America successfully transferred Bianchi's payment to Bianchi's new bank.[39] In June 1999 Bianchi again spoke with both the government and the Bank of America to ensure the government's next payment went to the correct bank.[40] Despite Bianchi's efforts, the government's written instructions directing the payment to the correct bank, and the correct transfer the month before, Bank of America sent the payment to "old" bank.[41]

Bianchi attempted to work through the situation for two years with the government.[42] The Bank of America contacted Bianchi's first bank in an attempt to have the funds returned but the bank refused because of its "unsettled relationship" with the Bianchi.[43] Relying on the interpretation of an Italian law by an Italian attorney that the Bank of America consulted, the government concluded that Bianchi's claim was against its first bank, not the government.[44]

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[28] *Id*.

[29] *Id*.

[30] *Id*. at 165,357.

[31] ASBCA No. 53800, 05-2 BCA ¶ 33,089.

[32] *Id.*

[33] *Id.* at 164,017.

[34] *Id.* at 164,021.

[35] *Id.* at 164,018.

[36] *Id.* at 164,017.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 164,018.

[40] *Id.*

[41] *Id.* The government initially admonished Bianchi that it needed "sufficient advance notice to ensure that such changes are passed on to and are understood by our agent" concluding that the government had already legally made its payment to an open account of Appellant's. *Id.* at 164,019. The government soon after admitted in internal documents that it made the erroneous payment due to administrative error on behalf of its bank, not government error. *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.* at 164,021. They contended that any additional payment by the Government would result in an unjust enrichment. *Id.*

The ASBCA disagreed "with both the government's legal argument and certain of its critical factual underpinnings."[45] The government attempted to deny that it paid the amount to an improper recipient because the ban was an "unauthorized creditor" since it was the named recipient in the contract and that the government was "never notified" that the bank was no longer authorized to receive funds for Bianchi.[46] Bianchi notified the government of the change, providing routing codes to make the payments to the correct bank, on at least three occasions.[47] It is different if the payment had gone awry, but "were made in accordance with an established course of dealing."[48] Here the payment went awry because the Bank of America (and therefore the government) failed to abide by a course of dealing it acknowledged and consented to when it made payment to the new bank in May of 1999.[49] Therefore, the government's payment to the "old" bank did not discharge its debt.[50]

After Appellant Testifies Is Too Late to Amend Your Answer

It is a rare case that covers both the areas of Competition and the Contract Disputes Act, but *Turner Construction Company v. General Services Administration* (GSA)[51] does. The GSA contracted with Turner to build the Federal Building and Courthouse in Islip, New York.[52] While the case before the board revolved around remission of liquidated damages, equitable adjustment, and rescission or reformation and restitution based upon superior knowledge,[53] the Board's review in October 2005 revolved around the government's request to amend its answer.[54]

The government moved to amend its answer after Turner's purchasing manager testified at trial about the company's "GSA Strategy."[55] The strategy amounted to locking its subcontractors into a low price and ensuring that the subcontractors would not give any Turner competitors a lower price for the same services.[56] The purpose, according to the program manager, was to provide them "protection with our competition" and give them an advantage over their competitors.[57] After the program manager testified at trial the government wanted to amend its answer to allege unenforceability due to fraudulent inducement, false certification, invalidity due to fraud, and excuse due to prior breach (violation of the False Claims Act & of the Anti-Kickback Act).[58] Turner argued that granting the motion would be severely prejudicial to them because the government brought the motion in the middle of trial that was anticipated to last seven months.[59] While the government's motion followed testimony at the trial, the government had information about the bidding practices as early as nineteen months earlier.[60]

The board denied the government's motion stating that it did not have jurisdiction over the new affirmative defenses[61] and, if it did, granting the motion would be unduly prejudicial to the appellant.[62] The government then, unsuccessfully

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[45] *Id.* at 164,025.

[46] *Id.* at 164,023.

[47] *Id.* at 164,025.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 164,025-26. The Board did not, however, find the government liable for recovery of third party legal expenses incurred by Bianchi.

[51] GSBCA Nos. 15502, 16055, 16551, 5-02 BCA ¶ 33,118.

[52] *Id.* at 164,117.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.* at 164,118. Turner referred to this process as closing. "Close" meant that Turner and the subcontractor committed to each other to "protect Turner from the market." *Id.*

[57] *Id.*

[58] *Id.* at 164,119-20.

[59] *Id.* at 164,121.

[60] *Id.* The Government did not refute the Appellant's claim that Appellant turned over the GSA Strategy to the Government as early as 3 November 2003. *Id*.

[61] *Id* at 164,123.

[62] *Id* at 164,124.

moved for a six month suspension to the trial.[63] The board refused since trial had been ongoing for four months and was expected to last for three more months.[64] I guess that is why they call the process before trial "discovery."

Defective Certification Can Be Cured

In a dispute that has worked its way through the courts up and back down again, the ASBCA this past year denied a government motion to dismiss *Swanson Group, Inc.* for lack of jurisdiction.[65] The dispute between Swanson and the Navy revolved around a termination for convenience settlement, but the appeal is significant to us because of issues of certification, assignment of claims, and statute of limitations on a claim.[66]

The cases arise from claim for termination expenses previously awarded and remanded in ASBCA case.[67] The ASBCA awarded appellant $278,076.25 in termination settlement costs but on appeal, the Court of Appeals for the Federal Circuit (CAFC) remanded the case for dismissal based upon lack of jurisdiction.[68] According to the CAFC, the appellant failed to present a "claim" to the contracting officer within the meaning of the Contract Disputes Act.[69] The CAFC stated that "[t]he fact that the board lacked jurisdiction over Swanson's previous appeal does not, however, bar Swanson from submitting a termination settlement proposal to the contracting officer" at this time.[70]

On 17 March 2004, following the board's dismissal of Swanson's earlier appeal, Swanson filed a "termination cost settlement" with the Navy's termination contracting officer (TCO) asking for a final decision if the government decided not to pay the amount as determined by the previously dismissed appeal.[71] The letter included a certification signed by Mr. Swanson stating "[a]s the President and Chief Executive Officer I am authorized to provide this certification. . . . I certify that the claim in this matter is made in good faith . . . and that the certifying information provided in ASBCA opinions as attached at TAB A are accurate as provided by the Armed Services Board of Contract Appeals."[72]

The termination contracting officer rejected appellant's request on 27 May 2004 stating that the appellant's claim was untimely.[73] Since the Court of Appeals established the date of contract termination as 17 November 1997, appellant had six years from that date to file its claim.[74] Appellant missed that six year requirement by approximately five months.[75] The Navy TCO went on to say that "[t]his is not a final decision. . . ."[76] After receiving the contracting officer's letter rejecting its claim, sppellant again contacted the TCO to acknowledge receipt of the rejection letter and requesting a final decision.[77] In her response, the TCO stated that her earlier letter rejecting the claim stood unchanged and that there would be no further action taken.[78] Swanson appealed to the board thirty days later.[79]

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[63] *Id.*

[64] *Id.*

[65] Swanson Group, Inc., ASBCA No. 54863, 05-2 BCA ¶ 33,108. For prior history *see* Swanson Group, Inc., ASBCA No. 52109, 02-1 BCA ¶ 31,836, *modified on reconsid.* 02-2 BCA ¶ 31906 (awarding appellant $278,076.25), England v. Swanson Group, Inc., 353 F.3d 1375 (Fed Cir. 2004) (remanding the appeal for dismissal), Swanson Group, Inc., ASBCA No. 52109, 04-1 BCA ¶ 32,603 (dismissing the appeal).

[66] *Swanson Group*, 05-2 BCA ¶ 33,108.

[67] *See* Swanson Group, Inc., ASBCA No. 52109, 02-2 BCA ¶ 31,906, and *Swanson Group*, 353 F.3d 1375.

[68] *Swanson Group,* 353 F.3d 1375.

[69] *Id*.

[70] *Id.* at 1380.

[71] *Swanson Group,* 05-2 BCA ¶ 33,108, at 164,087.

[72] *Id.* at 164,088.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

The government moved for summary judgment claiming that Swanson did not properly certify its claim because Mr. Swanson lacked standing.[80] The ASBCA disagreed, reiterating its stance that an incomplete or defective certification does not deprive the board of jurisdiction over the appeal and can be corrected.[81] While the certification submitted did not meet the statutory certification language, the certification could be, and was, corrected.[82] The Navy also claimed that 28 U.S.C. § 2501 barred Swanson because it failed to file its claim within six years of accrual.[83] The board again disagreed, stating that the appeal is not barred by the passage of time pursuant to 28 U.S.C. § 2501 but was governed by the Contract Disputes Act's statutory limitations for filing of appeals.[84] The Board determined that Swanson's right to appeal was not barred as a matter of law, by failing to submit a timely termination proposal.[85] Finally, the board stated that there were genuine issues of material fact concerning Swanson's request for extension to submit its termination settlement proposal and therefore denied the government's summary judgment motion.[86]

Dispute over a Transportation Contract, See the Transportation Act not the CDA

In an extremely interesting case, the ASBCA determined that the Transportation Act or Interstate Commerce Act (ICA) was the correct venue for implied-in-fact contracts concerning government bill of ladings and transportation services.[87] The appellant appealed the denial of its claim for $30,825.00 the basis of which was AIT's providing flatbed trucks to Johnson Controls World Services a contractor working for Fort Lee.[88] Johnson Controls had a contract to perform public works and logistical functions at Fort Lee, Virginia. As part of the logistical functions Johnson Controls provided installations transportation services, among other things.[89] These transportation services included freight and household goods movements which required them to maintain the official tender of freight services files of approved carriers and to assign freight shipments only to Military Traffic Management Command or Army Material command approved carriers and to prepare government bill of ladings (GBLs).[90] Johnson Controls contacted the appellant to request trucks to transport material from Fort Lee to Jacksonville, Florida, however they did so without first getting approval from the Army.[91] Appellant alleges that government employees with actual authority gave express authorization to Johnson Controls to use the appellant and that the appellant loaded and dispatched thirteen trucks.[92] The government contended that if the trucks were loaded and dispatched they were not processed through the Global Freight Management system.[93]

The board, relying on *Inter-Costal Xpress, Inc. v. United States*,[94] determined that it did not have jurisdiction to hear appellant's case regardless of the alleged theory because the Transportation Act Transportation Act is the proper venue.[95] Therefore, the Board dismissed the appeal for lack of subject matter jurisdiction.[96]

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[80] *Id.* at 164,088-89. The gvernment claimed that Johnny Swanson, III, lacked standing to bring the appeal because of a violation of the Assignment of Claims Act. The complaint alleged that the Appellant's included "The Swanson Group, Inc. and/or Johnny Swanson, III." Appellant alleged that Johnny Swanson, III, was an appellant as a result of a November 1993 assignment of Swanson Groups' rights to revenue under the claim. *Id.* at 164,088.

[81] The Swanson Group, Inc., ASBCA No. 54863, 05-2 B.C.A. ¶ 33,108 (citing IMS P.C. Envtl. Eng'g, ASBCA No. 53158, 01-2 BCA ¶ 31,422, at 155,163).

[82] *Id.* The Board also addressed a matter not formerly asserted by the government, but its supporting documentation with its motion suggested the appeal was not filed within ninety days of the government's 27 May 2004 letter, therefore failing to meet its 90-day statutory period for filing an appeal. In putting this theory to rest the Board stated that the government's denial letter of 27 May failed to notify Appellant of its ninety day appellate rights. Swanson's appeal does not concern the 27 May letter, but focuses on the subsequent letter. *Id.*

[83] *Id.* at 164,089.

[84] *Id.*

[85] *Id.* at 164,090.

[86] *Id.*

[87] AIT Worldwide Logistics, Inc., ASBCA No. 54763, 06-1 BCA ¶ 33,267.

[88] *Id.* at 164,856.

[89] *Id.*

[90] *Id.* at 164,857.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] 296 F.3d 1014 (Fed. Cir. 1995).

[95] *AIT Worldwide Logistics, Inc.,* 06-1 BCA ¶ 33,267 at 164,860.

[96] *Id.*

A couple of cases decided within the past year reminded appellants that requests for reconsideration before boards of contract appeals must amount to something more than alleging that the board got it wrong the first time.[97] Both case requested reconsideration of the board with no new evidence.[98]

In *Charitable Bingo*,[99] the board denied appellant's claim for breach of contract in the government's termination for convenience of its contract to manage bingo operations for several installations' Morale, Welfare, and Recreation offices.[100] Charitable Bingo requested reconsideration alleging the board "misconstrued or mischaracterized the documents underlying" its determination that the termination contracting officer's decision to terminate was from her independent judgment.[101] Charitable Bingo also claimed that the Board's conclusion that the government did not breach its duties of good faith "rested upon a misinterpretation of the Continuity of Service clause."[102]

The Board rejected the appellant's first argument because it was not based upon newly discovered evidence and did not cause the Board to alter its original findings.[103] The Board reminded Charitable Bingo that disagreement with the weight the Board gave evidence "is not grounds for reconsideration.'"[104] The Board also rejected the appellant's claim of bad faith while correcting appellant's misperception that the Continuity of Service Clause was the "legal underpinning" of the Board's decision.[105] Finally, in denying appellant's challenge of costs and pre-termination profit, the Board stated "Appellant's preference for its expert's testimony is not sufficient" and therefore denied the motion for reconsideration.[106]

In *Collazo Contractors, Inc.*,[107] the appellant filed a motion for reconsideration on six items claimed in its original appeal.[108] In its request for reconsideration Collazo alleged four grounds for reconsideration: (1) The board abused its discretion in allowing a government expert to testify to his conclusions that were not in his original report.[109] While appellant originally objected to this testimony, it later withdrew its objection as long as it would be able to have appellant's expert respond to the government expert's conclusions;[110] (2) The board committed clear error; (3) That the board incorrectly found appellant voluntarily submitted the test results for approval; and (4) The board erred in placing the burden on the appellant to change the test methodology.[111]

In a curt decision, the board denied Collazo's request based upon "largely . . . improper reargument."[112] In response to appellant's first ground (abuse of discretion) the board pointed out that while appellant originally objected to this testimony,

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[97] *See* Charitable Bingo Assocs., Inc., d/b/a Mr. Bingo, Inc., ASBCA Nos. 53249,53470, 05-2 BCA ¶ 33,088, and Collazo Contractors, Inc., ASBCA No. 53925, 06-1 BCA ¶ 33,212.

[98] *Id.*

[99] *Charitable Bingo Assocs., Inc.,* 05-01 BCA ¶ 32,863. The board held the government's right to terminate for convenience was near "at will" barring bad faith. The board stated that the evidence did not support a claim that termination contracting officer did not exercise her independent judgment in terminating the contracts. The board denied most of the Appellant's appeal but did view the $15,600 in termination settlement costs as that was the amount not challenged by DCAA as a stipulated entitlement agreement. *Id.*

[100] *Id.* at 162,840.

[101] *Charitable Bingo Assocs., Inc.*, 05-2 BCA ¶ 33,088 at 164,014.

[102] *Id.*

[103] *Id.*

[104] *Id.* (quoting Grumman Aerospace, ASBCA Nos. 46834,48006,51526, 03-2 BCA ¶ 32,289 at 159,770).

[105] *Id.* at 164,015. The board stated that its original decision was based upon both the TERMINATION FOR CONVENIENCE clause and the NONMONOPOLISTIC clause of the contract. *Id.*

[106] *Id.* at 164,016.

[107] ASBCA No. 53925, 06-1 BCA ¶ 33,212 at 164,594.

[108] *Id.* Collazo sought a 148-page contract extension and an equitable adjustment concerning its contract to clean and line water mains at the Naval Inventory Control Point in Mechanicsburg, Pennsylvania. The board determined that appellant was entitled to six day extension of time along with that appropriate contract price adjustment however denied claims concerning delays and costs resulting from the installation, remobilization, reinstallation, and removal of a temporary water bypass system required when the contractor cleaned and mortared the existing water lines. *Id.* at 164,594-95.

[109] *Collazo Contractors, Inc.*, 06-1 BCA ¶b33,212 at 164,595.

[110] *Id.*

[111] *Id.* The appellant failed to explain this contention or how it believed the board erred. *Id.*

[112] *Id.* at 164,595-96.

it later withdrew its objection as long as it would be able to have appellant's expert respond to the government expert's conclusions.[113] Since the appellant was given an opportunity to have its expert responds to the government's expert, appellant was not prejudiced.[114] The second grounds for reconsideration were not proper as it was the "crux of the appeal" that was fully considered and rejected initially.[115] The board rejected appellant's third contention that the original decision incorrectly found that Collazo voluntarily submitted its test results because appellant did not provide any evidence upon which to make such a determination.[116] Finally, the board rejected appellant's theory that the board erred in placing the burden on Collazo to change the test methodology used.[117] Again, the appellant provided no explanation.[118]

Quick Fire Not an Option When QuickHire System Fails

In an appeal over a termination for default (T4D) and reprocurement costs, the Department of Transportation Board of Contract Appeals (DOT BCA) determined that the ordering agency could not T4D Monster Government Solutions and recoup reprocurement costs because the government failed to first refer the matter to the GSA Contracting Officer for determination.[119] The U.S. Customs Service, now known as the United States Customs and Border Protection (CBP) and falling under the Department of Homeland Security, contracted with Monster using the GSA Federal Supply Schedule for its QuickHire system.[120] On 13 July 2004, the CBP placed an order that included a myriad of line items for other agencies that, like the CBP, had become part of the Department of Homeland Security.[121] The contract permitted the CBP to terminate the contract for default, but also contained a clause requiring the ordering activity to refer such termination cases to the GSA Contracting Officer when the contractor asserts its failure to perform was excusable.[122] In those cases, the GSA Contracting Officer determines whether the failure is excusable.[123] Ultimately, the GSA Contracting Officer's decision may then be appealed.[124]

Approximately five months after placing its order, the CBP experienced "system failures" with QuickHire. [125] Monster alleged that the significant increase in customer usage caused the system failures.[126] Even though the CBP understood the problem, they issued a cure notice and finally terminated the order for cause.[127] Monster appealed the termination and the CBP counter claimed for $1.2 million for the assessed reprocurement costs and another $1.2 million for breach of implied warranty.[128] Monster argued that the board lacked jurisdiction because the CBP failed to refer the matter to the GSA

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[113] *Id.*

[114] *Id.* at 164,595.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] Monster Gov't Solutions, Inc., v. United States Dep't of Homeland Security, DOT BCA No. 4532 - 4552, 06-2 BCA ¶ 33,236.

[120] *Id.* QuickHire is an internet system that allows employers to describe and post openings, sorts and ranks applications as well as other tasks normally performed by a human resource department. *Id.* at 164,697.

[121] *Id.*

[122] *Id.* at 165,698. The clause, I-FSS-249-B, provided

> Any ordering office may, with respect to any one or more delivery orders placed by it under the contract, exercise, the same right of termination, acceptance of inferior articles or services, and assessment of excess costs as might the Contracting Officer, except that when failure to deliver articles or services is alleged by the contractor to be excusable, the determination of whether the failure is excusable shall be made only by the Contracting Officer of the General Services Administration, to whom such allegation shall be referred by the ordering office and from whose determination an appeal may be taken as provided in the clause of this contract entitled "Disputes."

Id.

[123] *Id.* at 164,698.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.* at 164,698-99.

[128] *Id.* at 164,699.

contracting officer for a ruling on Monster's alleged excusable delay.[129] The CBP claimed that Monster never claimed the system failure was excusable delay and therefore, the CBP contracting officer had the authority to terminate and the DOT BCA now had jurisdiction.[130]

Reminding us that the contracting officer's decision under the CDA is "the very linchpin and necessary prerequisite for the board's jurisdiction" and absent a valid decision there can be no appeal, the DOT BCA dismissed the appeals without prejudice for lack of jurisdiction.[131] Here, Monster alleged its failure was due to the increased volume, which could potentially excuse the default.[132] The contract required CBP to first refer the failure to the GSA contracting officer which they did not do.[133] Since the GSA contracting officer was not the terminating contract officer, there was no valid termination, ergo no valid appeal.[134]

The DOT BCA upheld its previous dismissal in the request for reconsideration.[135] The DOT BCA refreshed the CBP's recollection that a motion for reconsideration "must be based upon newly discovered evidence or legal error by the board" and not a regurgitation of the previous claims and argument.[136] The CBP argued the board's previous decision was arbitrary and capricious because it failed to make binding findings.[137] The CBP pointed to a footnote in the original decision that noted the facts set out below were "solely for the purpose of resolving" the motion and not binding.[138] The DOT BCA stated the purpose of the footnote was to inform the parties that the facts set forth were for the purpose of determining jurisdiction and not the merits of the appeal.[139] The board went on to say that the federal circuit could still apply the statutory standard of appeal to the factual underpinning of the board's decision.[140]

No Unabsorbed Overhead for You!

In a quantum case the ASBCA ruled that Applied Companies was not entitled to unabsorbed overhead in its damages surrounding a termination for convenience case.[141] On entitlement the ASBCA found that the government negligently prepared its estimate for a RFP for the purchase of metal cylinders for two types of refrigerants. [142] In the entitlement case the ASBCA granted Applied's motion for summary judgment for the unabsorbed overhead and for breach of contract and lost profits, observing that breach damages may include anticipatory damages[143] but also granted a government summary judgment motion on a claim for lost profits on the option year.[144] The government then appealed to the federal circuit, which affirmed the ASBCA's decision on entitlement, but notified the bBoard that the government's negligence did not entitle

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[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] Monster Gov't Solutions, Inc., v. United States Dep't of Homeland Security, DOT BCA No. 4532, 06-2 BCA ¶ 33,312.

[136] *Id.* at 165,155. *See also* Charitable Bingo Assocs., Inc., d/b/a Mr. Bingo, Inc., ASBCA Nos. 53249,53470, 05-2 BCA ¶ 33088, and Collazo Contractors, Inc., ASBCA No. 53925, 06-1 BCA ¶ 33,212.

[137] *Id.* at 165,155.

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] Applied Companies., Inc., ASBCA No. 54506, 06-1 BCA ¶ 33,269.

[142] Applied Companies, Inc., ASBCA Nos. 50749,50896, 51662, 01-1 BCA ¶ 31,325. *See also Applied Companies*, 06-1 BCA ¶ 33,269. Several months before the government awarded the one year contract with one option year, it learned that the requirement would be "substantially lower" than the government estimate. However, the government did not inform Applied, the awardee, of the decrease in the estimated annual quantities until two months after award and five months after it determined the original estimate was incorrect. Shortly thereafter Applied submitted revised pricing to which the government did not agree. A month after Applied missed the delivery date the government issued a show cause notice, and eventually terminated for convenience. In its termination settlement proposal Applied included $1,115,509 in unabsorbed overhead. After the contracting officer denied the request for unabsorbed overhead and unilaterally determined $295,253 was the proper amount, Applied appealed to the ASBCA. *Id.* at 164,877.

[143] *Id.* at 164,876.

[144] *Id.* at 164,877.

Applied to anticipatory damages.[145] The federal circuit went on to state that if Applied never delivered any cylinders, "as appears to be the case," then the appellant "is limited to recourse under the Termination for Convenience of the Government Clause of the contract."[146]

Applied claimed that the government committed a material breach of the warranty and is liable for damages therefore, the ASBCA "has the power and duty to render a jury verdict."[147] They also claimed that their failure to meet the specific requisite of the Eichleay formula was not fatal, because the termination for convenience principles were inappropriate in this case and the alleged windfall would not occur if it recovered unabsorbed burden claimed.[148] The government, on the other hand claimed that the unabsorbed overhead cannot be recovered without proof of delay, which Applied did not allege.[149]

In deciding the appeal, the ASBCA found no deliveries were made, thereby limiting the recovery to the termination for convenience of the Government Clause of the contract in accordance with the federal circuit's decision.[150] The ASBCA noted that while the federal circuit had held that unabsorbed overhead is recoverable under the Termination for Convenience Clause, the burden of proof is on the contractor to prove a period of government-caused delay occurred.[151] While the ASBCA stated that unabsorbed overhead may be recovered only under the Eichleay formula, and a strict prerequisite for application of Eichleay is government-caused delay, Applied did not even contend it and, therefore, denied the appeal.[152]

Lobbying Not Reimbursable under EAJA

In *Marshall Associated Contractors, Inc.*,[153] the Department of the Interior Board of Contract Appeals (IBCA) ruled the reimbursement rate for Equal Access to Justice Act (EAJA) is based upon when the appellant appealed, not when the case is heard.[154] In an appeal that has seemingly gone forever, the IBCA determined fees allowable under the EAJA for an appeal originally filed in December 1984.[155] The case involved a Bureau of Reclamation (BOR) contract to supply sand and coarse aggregate for construction of the Upper Stillwater Dam near Duchesne, Utah.[156]

The contract in this case called for Marshall Associated Contractors, Inc. to provide the coarse aggregate from an area designated by the BOR, however the BOR's own tests showed the designated site contained "extremely hard and abrasive materials, . . . clearly incapable of meeting the contract's specifications.[157] While appellant attempted to meet its requirements under the contract, the company ultimately failed and went bankrupt.[158] The BOR subsequently terminated the contract for default.[159] The parties originally agreed to convert the termination for default into a termination for convenience and pay Marshall $3.3 million, however the "BOR headquarters rejected the agreement based upon erroneous information provided by its Denver laboratories," forcing Marshall to file its appeal on 26 December 1984.[160]

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[145] Rumsfeld v. Applied Companies, Inc., 325 F.3d 128 (Fed. Cir. 2003), *cert. denied*, 540 U.S. 981 (2003).

[146] *Id.*

[147] *Applied Companies*, 06-1 BCA ¶ 33,269 at 164,879-80.

[148] *Id*. at 164,880.

[149] *Id.*

[150] *Id.* at 164,879-80.

[151] *Id.* at 164,880. *See also* Nicon, Inc. v. United States, 331 F.3d 878 (Fed. Cir. 2003).

[152] *Applied Companies*, 06-1 BCA ¶ 33,269 at 164,882.

[153] IBCA Nos. 4397F, 4398F, 4400, 06-2 BCA ¶ 33,295.

[154] *Id.*

[155] *Id.*

[156] *Id.* at 165,100. The basis of the appeal was the BOR's misrepresentation as to the stone located in the area. *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.* at 165,100-01. The contracting officer and Marshall reached agreement which the BOR viewed as only "proposed" and claimed the contracting officer exceeded his authority. Marshall filed a complaint with the Board claiming that agreement had been achieved, however the Board determined the contracting officer did not have the authority. *Id.* at 165,101.

During its appeal Marshall continued to aggressively pursue the convenience termination. The company spent significant amounts traveling to meet "with Senators, Congressmen, the Secretary of BOR, and the Solicitor's office in Washington."[161] After thirteen years of wrangling, the Board granted Marshall's summary judgment motion on the merits.[162] After the Board granted Marshall's motion to convert the T4D to a termination for convenience (T4C), the Board remanded the matter for settlement.[163]

While the both parties negotiated for nearly four years and reached "considerable agreement on costs" they could not reach agreement for costs associated with Marshall's attempts to get other governmental officials to intervene or the appropriate hourly rate for attorney's fees.[164] Marshall sought over $1.8 million in attorney's fees and expenses under the EAJA. [165] The government, on the other hand, contended that only $962,093 in attorney's fees and expenses were allowable because the remaining fees were spent "principally or entirely on appellant's lobbying efforts.[166] Marshall claimed the hourly rate per hour should be $125, the EAJA rate as amended by the 29 March 1996 Contract with America Advancement Act.[167] The government believed the "old" rate of $75 per hour applied.[168]

The Board reminded all that the EAJA is not "a blanket cost reimbursement statute" and therefore it must be construed strictly, preventing courts and boards from granting "equity."[169] The goal is to allow prevailing parties to recover "fees and expenses in connection with a proceeding."[170] Since Marshall's attempts to have other governmental officials intervene on its behalf with the BOR and sign the termination for convenience compromise, the costs were not "in connection with a proceeding."[171] The IBCA also determined that the EAJA statute was clear that that the new rate applied to "adversary adjudications commenced on or after the enactment" of the Act.[172] Since Marshall's action commenced before the date of enactment of the new rate, the Board awarded Marshall attorney fees only at the old rate.[173]

No Money to Pay Back Wages, No Interest on Your Award

In an "interest"ing case before the Court of Federal Claims (COFC), the COFC affirmed a DOT BCA appeal disallowing CDA interest in an appeal concerning wage rate determinations.[174] The basis of the case revolved around back wages to be paid to Richlin's security guards guarding Immigration and Naturalization Service offices.[175] By mutual mistake, the guards were misclassified and therefore paid under a lower wage classification scheme of the Service Contract Act.[176]

In 1995 the Department of Labor determined that employees were entitled to back wages.[177] Richlin filed an appeal with DOT BCA requesting reformation of the contract after the contracting officer denied Richlin's claim.[178] The board granted in

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[161] *Id.* at 165,101.

[162] *Id.* at 165,102. During those years the appellant believed it had reached agreement with BOR on a termination for convenience settlement, filed another complaint, had its appeal removed for the Board's docket and restored on the docket, had a claim filed against it for surety, had its appeal dismissed sua sponte by the Board and redocketed after a successful request for reconsideration. *Id.* 165,101-02.

[163] *Id.* at 165,102.

[164] *Id.*

[165] *Id.* Marshall claimed $1,266,422 in attorney's fees and $616,083 in expenses. *See* Equal Access to Justice Act, 5 U.S.C.S. § 504 (LEXIS 2006).

[166] *Id.*

[167] Pub. L. No. 104-121, § 231(6)(1), 110 Stat. 857 (1996).

[168] *Marshall Associated Contractors*, 06-2 BCA ¶ 33,295 at 165,102.

[169] *Id.* at 165,103.

[170] *Id.*

[171] *Id.* at 165,104.

[172] *Id.* at 165,164.

[173] *Id.*

[174] Richlin Security Serv. Co. v. Chertoff, 437 F.3d 1296 (Jan. 31, 2006).

[175] *Id.*

[176] *Id.* at 1297.

[177] *Id.*

[178] *Id.* at 1298.

part and denied in part the request stating that while reformation was the proper remedy, the DOT BCA was not going to specify the terms until the back wage liability was formalized by the DOL.[179] Through a mutual agreement with the DOL, Richlin formalized its liability acknowledging that its employees were entitled to $636,818.72 in back wages that were to be paid into an escrow account administered by Richlin's counsel.[180] Richlin then went back to the DOT BCA to complete the reformation, but the board denied the request because the agreement was not "the equivalent of Richlin actually discharging its back wage liability to some or all of its employees."[181] The COFC reversed and remanded stating that there was no dispute that Richlin owed its employees.[182] The only reason Richlin had not paid them was because it did not have the money to do so before being paid by the INS.[183]

The case returned to the COFC when the DOT BCA only awarded Richlin the amount of back wages listed in the agreement with the DOL and no amount for "additional labor costs" or interest on the back wage liability.[184] This time, the COFC agreed with the board differentiating this case from most other quantum awards.[185] As the DOT BCA put it, "there is nothing upon which interest could accrue" since the amount due from INS was not Richlin's but its employees.[186] Before denying the Richlin's claim, the COFC gave a good review of when interest is allowed[187] and that the waiver must be strictly construed.[188] The court went on to state that Congress had hoped to address fully compensating contractors for their costs incurred when the contractor had to continue performance, despite a dispute.[189] The court looked to the Senate Report which specifically addressed the cost of money to finance the additional work.[190] In Richlin's case, the contractor did not incur a cost of money because Richlin could not, and did not, pay its employees the back wages out of its own funds.[191] Therefore, since Richlin was merely a conduit for paying these employees it was not entitled to interest.[192]

Lieutenant Colonel Ralph J. Tremaglio, III

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[179] *Id.*

[180] *Id.* The DOT BCA was concerned that due to the time lag between performance and payment of back wages, not all employees would be found to be paid. Therefore, the money remained in escrow. Any excess money due to the failure to locate individuals entitled would be remitted to DOL. *Id.*

[181] *Id.* (quoting *In re* Richlin Sec. Serv. Co., 99-1 DOT BCA ¶ 30,219).

[182] *Id.*

[183] *Id.*

[184] *Id. See also In re* Richlin Sec. Serv. Co., DOT BCA, 03-02 BCA ¶ 32,301.

[185] *Id.*

[186] *Id.* (quoting *In re* Richlin Sec. Serv. Co., 03-02 BCA ¶ 32,301).

[187] *Id.* Interest is recoverable only with an express waiver of sovereign immunity. *Id.* (citing Library of Congress v. Shaw, 478 U.S. 310, 311 (1986).

[188] *In re* Richlin Sec. Serv. Co., 437 F.3d at 1299.

[189] *Id.* at 1301.

[190] *Id.* (quoting S. Rep. No. 118, 954th Cong. 2d Sess. 32 (1978)).

[191] *Id.* at 1301-02.

[192] *Id.* at 1302.

Terminations for Default

Stopping Performance Over Slow Payments Can Get You Canned Immediately, Even If You Are a Small Business

In an Armed Service Board of Contract Appeals (ASBCA) case this year, *A-Greater New Jersey Movers, Inc*.,[1] the government awarded a requirements contract for baggage moving services to be performed in and around Fort Dix, New Jersey. Within the first few months, the government experienced a few problems with the contractor's performance,[2] while the contractor experienced problems getting paid from the Defense Finance Accounting Service. The payment problems were caused by a number of factors, not the least of which were the contractor's invoicing errors.[3] After three months of performance, the government met with the contractor to discuss the payment problems, and offered to release the contractor from the contract, which the contractor declined. Less than two months later, because of the payment delays, the contractor put the government on "a month trial."[4] The contractor notified the government that it was stopping performance, that it would not show up to conduct the scheduled pick-ups and deliveries, and that it was holding and would not release to service members any of the in-bound or out-bound shipments that were in its possession.[5] The contracting officer terminated the contract for default for the contractor's failure to provide the services, and for its failure to provide a quality control plan and evidence of insurance as required by the contract and requested by the contracting officer.[6]

Among the contractor's arguments on appeal was that its failure to submit the required documents could not be a sufficient basis for termination for default.[7] The board found that providing a quality control plan and evidence of insurance are "significant requirements of the contract" such that failure to provide them would support a termination for default relating to "any of the other provisions of the contract."[8] This basis for termination requires a cure notice,[9] which the government did not provide.[10] However, in this case, the contractor's words and actions with respect to the work stoppage constituted an unequivocal repudiation of the contract, which gives the government the right to terminate the contract for default without the use of a cure notice.[11]

The contractor's remaining arguments related to alleged government acts or omissions in dealing with the invoices and ultimately the delay in payment which allegedly "forced the company to abandon the contract."[12] The board held that none of these matters excused the contractor's failure to perform. When the government fails to timely pay invoices, the

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[1] ASBCA No. 54745, 06-1 BCA ¶ 33,179.

[2] "Instances of poor performance and misconduct led the government to request a copy of appellant's quality control plan in an effort to prevent future problems from arising." *Id.* at 164,431. The contractor also failed to provide a quality control plan and proof of insurance as required by the contract. *Id.*

[3] *Id.* at 164,430. The contractor's invoicing errors included improperly invoicing for household goods versus unaccompanied baggage, mistakes in listing the weight of the goods shipped, invoicing for unallowable charges, invoicing after each shipment instead of monthly, and other errors or irregularities. However, a DFAS-initiated investigation to prevent double billing under this contract apparently also contributed to the payment delays. *Id.* Also, the contractor apparently alleged in the appeal that government's "unauthorized changes to the invoices" and failure to timely notify the contractor of changes to invoices led to delay in payment. *Id.* at 164,433.

[4] *Id.* at 164,431.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 164,432.

[8] *Id.* This ground for termination of default is often referred to as an "(a)(1)(iii)" termination, based on the default clause for fixed-price supply and service contracts, which provides:

> (a)(1) The Government may, subject to paragraphs (c) and (d) of this clause, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to—
>
> (i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;
>
> (ii) Make progress, so as to endanger performance of this contract . . . ; or
>
> (iii) Perform any of the other provisions of this contract . . . .

U.S. GEN. SVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 52.249-8 [hereinafter FAR]. To use this ground for termination, the "other provision" of the contract that the contractor failed to perform must be a "material" or "significant" requirement. A-Greater New Jersey Movers, 06-1 BCA ¶ 33,179 at 164,432 (citing Precision Prods., ASBCA No. 25280, 82-2 BCA ¶ 15,981).

[9] The cure notice requirement for an "(a)(1)(iii)" termination is found in the termination clause. FAR, *supra* note 8, at pt. 52.249-8(2).

[10] *A-Greater New Jersey Movers*, 06-1 BCA ¶ 33,179 at 164,432.

[11] *Id.*

[12] *Id.* at 164,433.

contractor's remedy is Prompt Payment Act interest, not work stoppage. The board noted that while financial incapability is generally not an excuse for a contractor's default, it is possible for late payments caused by the government to excuse a default that was "beyond [the contractor's] control and without its fault or negligence,"[13] but only if the late payments "rendered the contractor financially incapable of continuing performance, are the primary or controlling cause of appellant's default, or are a material rather than insubstantial or immaterial breach of the contract."[14]

The board found that in this case, the payment problems were partially the fault of the contractor, and that it had failed to prove that the government's actions caused the contractor's failure to perform.[15] The fact that the contractor here was a small business did not change the analysis: "The Board does not accord special treatment in determining whether the burden of proof has been met to a contractor because of its status as a small business."[16]

Proper Withholding of Liquidated Damages Does Not Excuse Default

The ASBCA also decided another case this year in which a contractor stopped work because of money reasons. In *All-State Construction, Inc.*,[17] the contractor was continuously behind schedule in its construction of a hazardous waste storage facility. Each time the government accepted a revised completion date from the contractor, it expressly did so without waiving its right to assess liquidated damages.[18] Two months before the last revised completion date, when the construction was still only twenty-nine percent complete, the government issued a change order for a fire suppression system which allowed no time extension.[19]

One month before the completion date, it was apparent that the construction would not be complete by the new date, and the government issued a show cause notice for failure to make progress.[20] The contractor responded to the show cause notice, alleging various excusable delays, and submitted an invoice for a portion of work that had been completed.[21] The contracting officer returned the invoice without payment because "[t]he amount to be retained for liquidated damages exceeds the amount of the invoice."[22] A few days later, the contractor stopped work on the project altogether.[23] After some unsuccessful attempts by the government and the contractor (and its surety) to work out a solution for completion of the work, the contractor was ultimately unwilling and perhaps financially unable to resume work on the project, and the contract was terminated for default.[24]

The contractor appealed to the ASBCA, and in 2002 the board granted summary judgment for the contractor, finding that the government breached the contract by retaining thirty-eight percent of the amount that the contractor had otherwise earned because the contract payment clause limited the retention of progress payments to ten percent of the amount earned.[25] In

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[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] ASBCA No. 50586, 06-2 BCA ¶ 33,344.

[18] *Id.* at 165,337.

[19] *Id.* at 165,338. The change order allowed for no time extension because the contractor "could have performed the changed work without impacting its critical path to completion of the work." *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* at 165,339.

[23] *Id.*

[24] *Id.* at 165,340.

[25] *All-State Constr., Inc.*, ASBCA No. 50586, 02-1 BCA ¶ 31,794. The payment clause provided:

> (e) *Retainage*. If the Contracting Officer finds that satisfactory progress was achieved during any period for which a progress payment is to be made, the Contracting Officer shall authorize payment to be made in full. However, if satisfactory progress has not been made, the Contracting Officer may retain a maximum of 10 percent of the amount of the payment until satisfactory progress is achieved. When the work is substantially complete, the Contracting Officer may retain from previously withheld funds and future progress payments that amount the Contracting Officer considers adequate for protection of the Government and shall release to the Contractor all the remaining withheld funds. Also, on completion and acceptance of each separate building,

2003, the federal circuit reversed and remanded the case, holding that the *FAR* retention provision giving the government the right to retain up to ten percent of progress payments until satisfactory progress is made is different from, and does not trump, the government's common law "setoff" right to reduce contract payments by the amount of the contractor's debt to the government.[26] In this case, the government was not retaining a portion of the funds as an incentive for the contractor to complete the work or to protect the government against a potential default, as contemplated by the retention provision, but was "permanently and absolutely" keeping the funds to offset a current payable debt of the contractor.[27] The court concluded that the government properly executed the offset, even though the government had not formally terminated the contract for convenience yet.[28]

On remand to the ASBCA this year, the board found the termination for default to be otherwise proper. The board pointed to the contract's Disputes clause, which required the contractor to "proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract. . . ."[29] By completely stopping work in response to what the contractor alleged was a wrongful retention of liquidated damages, the contractor breached its obligation under the Disputes clause to continue performance pending resolution of the dispute.[30] This, the board explained, gave the government the common law right to terminate the contract:

> A failure to proceed pursuant to paragraph (i) of the Disputes clause is a material breach for which summary termination is proper under the government's common law rights reserved in paragraph (d) of the Default clause whenever it occurs and without regard to the specified completion date of the contract.[31]

While the issue of the *amount* of a contractor's payment that the government can retain for liquidated damages had been resolved by the Federal Circuit, the contractor argued to the board that *any* assessment of any liquidated damages in this case was wrongful because "(i) the government waived the contract completion date by issuing the . . . change order, (ii) the government failed to establish a new date based on the time required perform the change order, and (iii) there was consequently no valid completion date for which liquidated damages could be assessed."[32] This wrongful retention of liquidated damages, the contractor argued, caused its work stoppage, excusing the default.[33]

Noting that "[o]nly wrongful retentions are excusable causes of default,"[34] the ASBCA found that the retention of liquidated damages was not wrongful because the contract contained a provision that specifically rendered the government's obligation to make payments subject to "[a]ny claims which the Government may have against the contractor under or in connection with this contract."[35] Here, the government had a claim—albeit a disputed one—against the contractor for the amount retained, so the government could properly retain that amount under the terms of the contract.

> public work, or other division of the contract, for which the price is stated separately in the contract, payment shall be made for the completed work without retention of a percentage.

FAR, *supra* note 8, at pt. 52.232-5(e).

[26] Johnson v. All-State Constr., 329 F.3d 848 (Fed. Cir. 2003).

[27] *Id*. at 855.

[28] *Id*.

[29] *All-State Constr., Inc.*, 06-2 BCA ¶ 33,344 at 165,341 (FAR, *supra* note 8, at pt. 52.233-1(i)).

[30] *Id.*

[31] *Id.* at 165,341-42 (internal citation omitted).

[32] *Id.* at 165,342.

[33] *Id.* If, as the contractor argued, there was no established completion date at the time of termination, this would presumably make it improper to rely, as the contracting officer did in this case, on the ground of "failure to make progress so as to endanger performance," which requires the contracting officer to have a reasonable belief that there is no reasonable likelihood that the contractor can complete the project within the time remaining for contract performance. *See, e.g.*, Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987). The board did not mention this issue, upholding the termination for default on the alternate ground of the contractor's breach of the Disputes clause obligation.

[34] *All-State Constr., Inc.*, 06-2 BCA ¶ 33,344 at 165,342.

[35] *Id.*

The ASBCA recently upheld a termination for cause for a contractor's failure to provide flu vaccine after the FDA banned all shipments of a particular vaccine to the United States due to safety concerns and there were no alternative sources of supply from whom the contractor could obtain a comparable vaccine. In *General Injectables & Vaccines, Inc.*,[36] the contractor was to provide "Fluvirin® injectable flu vaccine to DoD employees for the 2004-2005 flu season."[37] However, before the contractor could deliver any vaccine, the manufacturer of the vaccine notified the U.S. Food and Drug Administration (FDA) that it had discovered contamination in some of its vaccine lots and that it was therefore unable to release any of the vaccine to the United States until both UK and US authorities deemed it safe.[38] The FDA inspected the manufacturer's facilities,[39] as did the British equivalent of the FDA;[40] the British authorities suspended the manufacturer's license to operate for three months,[41] and the FDA banned all shipments of Fluvirin® to the United States.[42] There was only one other manufacturer of an injectable flu vaccine, which could not produce enough of its vaccine to fulfill the demand for that flu season.[43] The worldwide flu vaccine shortage left the contractor with no alternative sources of supply and unable to deliver the vaccine required by the contract, so the government terminated the contract for cause.[44]

On appeal, the contractor argued that there was no default because its obligation to deliver the vaccine was expressly conditioned upon the "availability of the flu vaccine, and the release of the vaccine by both the manufacturer of the product and the FDA."[45] The contractor similarly argued that its failure to deliver was excused because the FDA refused to approve the vaccine.[46] The board rejected these arguments. Stating a long-standing "general principle of law,"[47] the board held that "a party may not use the non-performance of a condition precedent when that party . . . is responsible for the non-performance of the condition."[48] Here, the contractor's supplier, by producing vaccine that was found to be contaminated, caused the FDA and its British counterpart to withhold approval of the vaccine and caused the unavailability of the vaccine.[49]

The contractor argued, however, that it was not responsible for the manufacturer's inability to release the vaccine, because the manufacturer was not its subcontractor.[50] The board disagreed, finding that the manufacturer was a "subcontractor" as that term is defined under the contract's clause at *FAR part 52.219-9, Small Business Subcontracting Plan*.[51] Even if that clause were not in the contract, the board opined that the manufacturer would still be deemed a "subcontractor" under *FAR part 44.101*, which defines the term as "any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor."[52] The board noted that it has "generally held a

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[36] ASBCA No. 54930, 06-2 BCA ¶ 33,401.

[37] *Id.* at 165,587 (quoting the solicitation). The contract also noted that the manufacturing and packaging of the vaccine would be done by "Chiron Vaccines, Liverpool, England," the manufacturer of the Fluvirin®. *Id.* at 165,588.

[38] *Id.*

[39] *Id.* at 165,589.

[40] *Id.* at 165,588. The British equivalent of the FDA is the Medicines and Healthcare Products Regulatory Agency (MHRA). *Id.*

[41] *Id.*

[42] *Id.* at 165,589

[43] *Id.* at 165,588. The only other manufacturer was Aventis, which produced the Fluzone® vaccine. *Id.*

[44] *Id.* at 165,589.

[45] *Id.* at 165,590. General Injectable's solicitation response sheet had stated that it "m]ay have to alter delivery schedule outlined in bid due to releases of vaccine,"and a solicitation modification specifically stated that delivery was "d]ependent upon FDA release of vaccine." *Id.*

[46] *Id.*

[47] *Id.* (citing District of Columbia v. Camden Iron Works, 181 U.S. 453, 461-62 (1901)).

[48] *Id.*

[49] *Id.*

[50] *Id*.

[51] *Id.* at 165,592. The Small Business Subcontracting Plan clause defines "subcontract" as "any agreement (other than on involving an employer-employee relationship) entered into by a Federal Government prime Contractor or subcontractor calling for supplies or services required for performance of the contract or subcontract." FAR, *supra* note 8, at pt. 52.219-9(b). The contractor argued that it had requested a waiver of the requirement to submit a small business contracting plan, and that it had not submitted the plan, but failed to demonstrate to the board that the clause had been waived. *General Injectables*, ASBCA No. 54930, 06-2 BCA ¶ 33,401 at 165,591.

[52] *General Injectables*, ASBCA No. 54930, 06-2 BCA ¶ 33,401 at 165,592 (quoting FAR, *supra* note 8, at pt. 44.101).

contractor responsible for the actions of its subcontractors and suppliers."[53] Because the manufacturer's failures were the contractor's failures,[54] the board held that the contractor's failure to deliver was not excusable.[55]

The board also denied the contractor's request for summary judgment on the issue of reprocurement costs, finding that it lacked jurisdiction over that issue because the government had not issued a demand for reprocurement costs.[56]

Finally, the board stated that to prove that a termination for default is proper, it is generally "enough for the government to show that the contractor's supplier failed to deliver the necessary material."[57] While this was a commercial items contract and therefore involved a termination for cause rather than for default, the board stated, without further elaboration, that "the principles that apply under the *FAR* clauses that govern termination for default apply with equal force under the terminations for cause provision in this 'Commercial Items' contract."[58] The termination for cause provision of the clause at *FAR part 52.212-4, Contract Terms and Conditions—Commercial Items*, provides in relevant part: "The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance."[59] Unlike its termination for default counterpart at *FAR part 52.249-8*, the commercial items clause does not specifically address the issue of excusable delay. However, the holding in this case is consistent with the termination for default clause, which provides:

> (d) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.[60]

Under that termination for default clause, the fact that the supplies are not obtainable from other sources is not enough to excuse a contractor's performance; the cause of the default must also have been beyond the control and without the fault or negligence of either the contractor *or the subcontractor*. Applying these principles to the termination for cause provision applicable to commercial items leads to the result in this case.

Lieutenant Colonel Michael L. Norris

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[53] *Id.* at 165,591

[54] *Id*.

[55] *Id.* at 165,593.

[56] *Id.* Because there was no injectable flu vaccine available to reprocure, hence the contractor's inability to deliver it under the contract, the government instead procured a non-injectable product called FluMist®. *Id.* at 165,588. The issue of whether that was an acceptable substitute would be "properly raised in a future reprocurement appeal (if any)." *Id.* at 165,593.

[57] *Id.* at 165,593 (citing H.C. Mach. Co., ASBCA No. 32932, 89-1 BCA¶ 21,247).

[58] *Id.*

[59] FAR, *supra* note 8, at pt. 52.212-4(m).

[60] *Id.* at pt. 52.249-8(d).

Agriculture Board of Contract Appeals (AGBCA) Denies Use of Constructive Termination for Convenience to Avoid Breach Damages in an ID/IQ

In *Ardco, Inc.*,[1] the AGBCA, in deciding a Forest Service motion for partial summary judgment, held that a contractor can recover anticipatory profits for work it would have been given under an indefinite delivery, indefinite quantity (ID/IQ) contract had the government not hindered the contractor's ability to perform. In *Ardco*, the U.S. Forest Service awarded multiple ID/IQs based upon geographical locations for the services of aircraft to assist in fighting fires.[2] Under the contract, the contractor was paid a daily amount for keeping an aircraft and crew available for the exclusive use of the government, and a separate amount for flight hours ordered.[3] The contract contained no guaranteed minimum number of flight hours, and contained no assurance that the contractor would receive any flight hours.[4] A few months after the start of the contract, the aircraft became inoperable after being struck by a forklift driven by a Forest Service employee.[5] After the accident, the Forest Service did not terminate the contract. The Forest Service continued to pay the contractor the daily rate of $3,177 for having the aircraft on standby for exclusive use of the government, but ordered flight hours for that geographical area from another contractor,[6] presumably one whose aircraft had not been crashed into with a forklift.

The contractor sought profits for flight hours it believed it would have received had the Forest Service not interfered with its ability to perform by rendering its aircraft inoperable.[7] In its motion for summary judgment on that issue, the Forest Service argued that it could have terminated the flight hours portion of the contract for convenience, which precludes recovery of anticipated profits.[8] The board rejected the application of the theory of constructive termination for convenience in this case, finding no precedent for applying constructive termination for convenience to a case such as this.[9] The board noted that the termination for convenience (T4C) clause was developed to render a government cancellation of a contract, which would be a breach in common law, a non-breach by providing the government with a contractual right to end the contract.[10] In the absence of a breach, the contractor is not entitled to anticipatory profits. In this case, however, the government breached the contract by hindering the contractor's ability to perform.[11] The board was unaware of any case in which constructive termination for convenience was applied to "act as a shield for limiting breach damages, caused by an event not associated with any attempt to cancel."[12]

While generally acknowledging that there are factual differences between this case and cases involving alleged government breach of requirements contracts, the board noted a similarity: "The cases show that anticipatory profits are available as a remedy when the Government takes work that is earmarked for the claimant contractor and diverts it to another source."[13] In the board's view, the fact that this was an ID/IQ contract in which the government had no obligation to order any flight hours from the contractor did not preclude the recovery of anticipatory profits:

> The [Forest Service] contends that the Appellant cannot recover anticipatory profits because the contract had no set guarantee. We reject the argument that Appellant is not entitled to profits because the contract was of an indefinite quantity. Clearly, if no work had been performed, then the [Forest Service] would have a legitimate issue that the contractor should not be paid for work that was not required. However, that

[1] ASBCA No. 2003-183-1, 06-2 BCA ¶ 33,352.

[2] *Id.* at 165,380.

[3] *Id.* at 165,381.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at 165,382.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 165,383.

[13] *Id.*

> is not the fact here. Here the [Forest Service] had the flights performed by someone else. The Appellant lost the benefit of its bargain, and we can establish what that benefit would have been.[14]

Judge Vergilio's separate concurring opinion specifically acknowledged the important distinction between the contract in this case and a requirements contract, in which the government is obligated to use the contractor for any services it may require.[15] Still, he too opined that the contractor was not necessarily precluded from recovering anticipatory profits. Although the government had no obligation to use the contractor for any flight hours it needed, the contractor "cannot be foreclosed from demonstrating with reasonable certainty that it would have been selected."[16] The number of flight hours the contractor would have received under the contract had the government not damaged its aircraft, and the resulting amount of damages to which the contractor is entitled, is a factual matter that will require further information on how the contracting officer went about selecting aircraft to receive flight hours.[17]

The board seemed to view it as important that the Forest Service had not terminated the contract for convenience at any point during the contract period.[18] However, it is not clear whether that makes any difference—that is, whether the board would have precluded recovery of anticipatory profits if the government *had* timely terminated the contract for convenience.[19] The contractor was in no worse position as a result of the government's failure to terminate the contract, and in fact continued to get paid $3,177 per day under the contract for the stand-by time even though its aircraft was inoperable.[20] If timely termination would have made a difference in the contractor's recovery, then this case might represent a situation where contracting officers should consider terminating an ID/IQ contract for convenience, rather than simply refraining from placing additional orders until the contract term expires, when the government does not intend to place additional orders with the contractor.

Cost-Share Contractor Does Not Share Costs Under Standard T4C Clause

Upon the termination of a cost share contract for the convenience of the government, the contractor is entitled to recover all of its costs, rather than its allotted share, under the termination for convenience clause, according to the Federal Circuit in *Jacobs Engineering Group, Inc. v. United States*.[21] In *Jacobs*, the Department of Energy (DOE) entered into a cost-share contract with the contractor for the development of a gasification improvement facility.[22] Under the contract, the government would reimburse the contractor for eighty percent of its costs, while the contractor would bear twenty percent of the costs, and the contractor would receive patent rights for the technology it planned to develop.[23] Similarly, if there were a cost overrun, or if the contractor chose to discontinue performance after Phase I, the contractor would bear twenty percent of the costs.[24] The contract contained the standard termination for convenience clause at *FAR part 52.249-6, Termination* (*Cost-*

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[14] *Id*. at 165,384.

[15] *Id*. at 165,385.

[16] *Id*. at 165,386.

[17] *Id*.

[18] *Id*. at 165,383. In his separate concurring opinion, Judge Vergilio also viewed it as important, noting that he "would prohibit the Government from retroactively invoking the termination for convenience clause" because the government, by not terminating the contract, continued to receive the contract benefit of being able to exercise an option and of being able to utilize the contractor's services if the contractor had completed repairs during the base year. *Id*. at 165,385.

[19] Judge Vergilio's concurring opinion noted this issue:

> Given the existing material facts (with no actual or constructive termination for convenience), one need not here resolve the question of whether the issuance of a termination for convenience at the time of the accident would have altered the damages recoverable by a contractor, particularly one claiming Government breach of contract.

Id. at 165,385.

[20] *Id*. at 165,381. The opinion does not explain how the contractor was able to perform the stand-by portion of the contract with an inoperable aircraft. The contract contained a clause entitled "Substitution of Aircraft and Pilots." *Id*. at 165,385. The opinion does not reveal the substance of the clause, but the contractor was apparently not prohibited from providing a substitute aircraft with which to perform the stand-by services and any flight hours the government might require while the damaged aircraft was being repaired.

[21] 434 F.3d 1378 (Fed. Cir. 2006).

[22] *Id*. at 1379. "Gasification" is "a means of converting coal to electricity and fuel, as an alternative source of energy." Jacobs Eng'g Group, Inc. v. United States, 63 Fed. Cl. 451, 453 (2005).

[23] *Jacobs*, 434 F.3d at 1379.

[24] *Id.* at 1381.

Reimbursement), which required the government to pay, upon termination by the government, "all costs reimbursable under this contract."[25]

During the design phase of the contract, the parties found that the costs of development would be significantly greater than anticipated, and the DOE ultimately terminated the contract for convenience because it did not have sufficient funds for the project.[26] In its termination settlement proposal and subsequent appeal to the COFC last year, 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.[27] Consistent with the cost-sharing provisions, the COFC then held that the contractor was entitled to only eighty percent of his allowable incurred costs.[28] The COFC explained that the termination clause required the government to pay "*all costs reimbursable under this contract*,"[29] and that under this cost-sharing contract only eighty percent of the contractor's costs were reimbursable.[30] In that decision, the COFC 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."[31] 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."[32]

This year, the federal circuit reversed the COFC's decision. The federal circuit noted that "[t]hroughout the contract, when the parties intended the 80 percent—20 percent division of costs to cover particular situations, they explicitly so provided."[33] The termination clause, in contrast, did not mention the cost-sharing but instead required the government upon termination to pay "[a]ll costs reimbursable under this contract."[34] The court viewed the term "all costs reimbursable" as defining "the type or kind of costs for which the contract provides reimbursement and not the amount of such costs."[35] The court did not explain how it viewed the follow-on words "under this contract," or why the phrase taken together did not refer to the costs that were both of the correct type and which were allowable under the terms of this particular contract. However, given the explicit references to the cost-sharing percentages elsewhere in the contract, the court stated:

> In these circumstances, it seems most unlikely that if the parties had intended the termination clause to limit the contractor to 80 percent of the termination costs, they would not have said so instead of providing that the government would pay "[a]ll costs reimbursable" under the contract. We cannot read the latter phrase covering "all" reimbursable costs to mean 80 percent of such costs. In any event, to the extent there is an ambiguity on the point, it must be resolved in favor of Jacobs, the non-drafter of the contract.[36]

The court also noted that the contractor's motivation for agreeing to bear a percentage of the costs was to ultimately benefit from the patent rights in the technology that it hoped to develop under the contract.[37] The termination of the contract for the convenience of the government deprived the contractor of the opportunity to realize that benefit, so apply the cost-share percentages to the amount that the contractor is reimbursed would seem unfair to the court.[38]

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[25] U.S. GEN. SVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 52.249-6 [hereinafter FAR].

[26] *Jacobs*, 434 F.3d at 1379.

[27] *Jacobs Eng'g Group*, 63 Fed. Cl. at 455. In its argument before COFC, the contractor relied in part on the terms of the contract's "Project Continuance" clause, which allowed the contractor to discontinue the project in the event that it could not find subcontractors to help bear its twenty percent share of the costs, or if it were not granted an advanced patent waiver by the government. The clause provided that if the contractor did withdraw, he would bear twenty 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.

[28] *Id*. at 457.

[29] *Id*. (quoting FAR, *supra* note 25, at pt. 52.249-6(h)(1)) (emphasis provided by the court).

[30] *Id*.

[31] *Id*.

[32] *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 25, at pt. 31.201-2(a).

[33] *Jacobs*, 434 F.3d at 1381.

[34] *Id*. at 1380.

[35] *Id*. The court cited examples of the types of costs that were reimbursable, such as completed work, and types of costs that are not, such as entertainment costs.

[36] *Id*. at 1381.

[37] *Id*.

[38] *Id*. The court also cited FAR part 16.303(b), which states that "[a] cost-sharing contract may be used when the contractor agrees to absorb a portion of the costs, in the expectation of substantial compensating benefits." *Id*. (quoting FAR, *supra* note 25, at pt. 16.303(b)).

Contractor Provided Services after Termination, But Could Not Provide COFC with a Workable Theory of Recovery

In *International Data Products Corp. v. United States*,[39] 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.[40] When the contractor subsequently entered into an agreement to sell its stock to a non-8(a) concern, the Air Force terminated the contract for convenience.[41] 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.[42] Notwithstanding the termination of the contract, the government insisted that the contractor continue to fulfill its contract obligations for warranty services and software upgrades that accompanied the products purchased prior to the contract termination, for the reason that those services had already been bought and paid for prior to the contract termination.[43]

The contractor believed it was not required to continue performing the warranty services after the termination, for the reason that the contract no longer existed.[44] However, it continued to provide the warranty services over its objection because the Air Force threatened that failure to meet the warranty obligations could negatively impact the contractor's ability to receive future contracts and could result in debarment.[45] After several months of performing the warranty services and unsuccessfully requesting that the government terminate that obligation,[46] the contractor discontinued providing the services, and requested a contracting officer's final decision on the matter.[47] The contractor ultimately filed a claim at COFC for approximately $1.7 million in termination costs, which included $440,990 for providing the warranty services and software upgrades after the contract had been termination.[48]

In last year's proceedings, the COFC granted summary judgment for the government on the issue of termination settlement costs, 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.[49] The court, however, also granted summary judgment for the contractor on the issue of whether government could continue to require the contractor to provide the software upgrades and warranty services that accompanied the products already purchased under the contract. The court found that the statute which required the government to terminate the contract for convenience 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.[50] 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.[51]

Accordingly, the COFC held that the contractor was not required to continue to perform the warranty and upgrade services after the contract was terminated.[52]

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[39] 70 Fed. Cl. 386 (2006).

[40] 15 U.S.C.S. § 637(a) (LEXIS 2006).

[41] *Int'l Data Prods.*, 70 Fed. Cl. at 391.

[42] *Id.*

[43] *Id*.

[44] *Id*. at 392.

[45] *Id*.

[46] *Id*.

[47] *Id*. at 393.

[48] *Id*.

[49] *Int'l Data Prods.*, 64 Fed. Cl. 642, 647 (2005).

[50] *Id.* at 650 (citing 15 U.S.C. § 637(a)(21)(A)) (2005).

[51] *Id.* at 651.

[52] *Id*.

In the subsequent trial on quantum this fiscal year, the contractor sought damages for the warranty services it provided after the contract was terminated. The COFC found that the services were not provided under the terms of an express contract, because no such contract existed after the termination.[53] In a footnote, the court noted that even if the services had been provided pursuant to the contract, the cost of the services were included as part of the unit prices of the products purchased and already paid for by the government.[54] The court also rejected the contractor's implicit argument that the services were provided pursuant to an implied-in-fact contract. An implied-in-fact contract requires, among other things, a mutual intent to contract, or "a meeting of the minds."[55] Although the contractor may have hoped to be compensated for the post-termination services, neither party had agreed, or even believed, that the government would pay the contractor any additional amounts for these services.[56]

There being no express or implied-in-fact contract at the time the services were performed, the court held that the contractor could not recover under any breach of contract theory.[57] With no contract, the services could not be viewed as a cardinal change to the contract that would entitle the contractor to breach damages. [58] Similarly, the services could not be viewed as a constructive change to a contract which would entitle the contractor to an equitable adjustment, because no contract existed.[59]

This left the contractor with only a claim for recovery in *quantum meruit* under a contract implied in law. "A contract implied in law," the court explained, "is one in which there is no actual agreement between the parties, but the law imposes a duty in order to prevent injustice."[60] It is also one over which the COFC lacks jurisdiction.[61] Therefore, there was no theory under which the contractor could recover at the COFC.

Notification of Board's Conversion of T4D to T4C Starts the Termination Settlement Proposal Clock

Early this fiscal year, the Armed Services Board of Contract Appeals (ASBCA) held that a contractor's receipt of the board's decision converting a termination for default to a termination for convenience is the "effective date of termination" for purposes of the one-year time limit for submitting a termination settlement proposal. In *Ryste & Ricas, Inc.*,[62] the ASBCA had earlier converted the termination of an Army building renovation contract for default to a termination for convenience.[63] Notice of that decision was delivered to the contractor's attorney on 8 June 2002.[64] Over a year later, the contractor submitted a termination settlement proposal.[65] The contracting officer never responded to the settlement proposal,[66] and the contractor appealed to the ASBCA.

The contractor argued that the settlement proposal, though submitted after 9 June 2003, was not late because the clock should not start until one hundred and twenty days from the date of the decision the date at which the board's decision could

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[53] *Int'l Data Prods.*, 70 Fed. Cl. at 399.

[54] *Id*. at 399 n.11. The contractor argued that it still hadn't been "fully" compensated for the services because it had based its pricing on an expectation that all four of the contract's option periods would be exercised. The court rejected this argument, noting that the government had no obligation to exercise any options, and if the warranty services had been priced "based upon the assumption that all four option periods would be exercised, it did so at its own risk." *Id*.

[55] *Id*. at 400.

[56] *Id*. at 402.

[57] *Id*. at 404.

[58] *Id*. at 403.

[59] *Id*.

[60] *Id*. at 404.

[61] *Id*.

[62] ASBCA No. 54514, 06-1 BCA ¶ 33,124.

[63] Ryste & Ricas, Inc., ASBCA No. 51841, 02-2 BCA ¶ 31,883.

[64] *Ryste & Ricas, Inc.*, 06-1 BCA ¶ 33,124 at 164,145.

[65] *Id*. The actual date that the contractor submitted the termination settlement proposal was at issue in its appeal, but was unnecessary to resolve given the board's decision that any submission after 9 June 2003 was too late. *Id*. at 165,148.

[66] *Id*. at 165,146.

no longer be appealed to the federal circuit.[67] The board rejected that argument, holding that no such tolling provision applied to the procedure for submitting termination for convenience settlement proposals.[68] The contract's Termination for Convenience clause gave the contractor one year from the effective date of termination, unless extended by the contracting officer, to submit its termination settlement proposal.[69] If the contractor fails to submit a settlement proposal within that time, the contracting officer "may determine . . . the amount, if any, due the Contractor because of the termination,"[70] and that determination may not be appealed.[71] Because the contractor failed to submit its settlement proposal within one year of being notified of the termination for convenience, the board denied the contractor's appeal.[72]

Lieutenant Colonel Michael L. Norris

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[67] *Id*. at 165,147. The board does not detail the contractor's argument in this regard, but makes reference to the contractor's reliance upon cases such as *Melkonyan v. Sullivan*, 501 U.S. 89 (1991), which was decided under the Equal Access to Justice Act (EAJA). The EAJA defines "final judgment" as "a judgment that is final and not appealable, and includes an order of settlement." 28 U.S.C.S § 2412 (d)(2)(G) (LEXIS 2006).

[68] *Ryste & Ricas, Inc.*, 06-1 BCA ¶ 33,124 at 165,147.

[69] FAR, *supra* note 25, at pt. 52.249-2(e).

[70] *Id*.

[71] *Id*. at pt. 52.249-2(j). In this case, rather than determining the amount due the contractor, the contracting officer refused to take any action at all on the late settlement proposal. *Ryste & Ricas, Inc.*, 06-1 BCA ¶ 33,124 at 164,145. This inaction by the contracting officer is deemed to be a decision:

> Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this Act.

41 U.S.C.S. § 605 (LEXIS 2006). However, this operation of law does nothing for a contractor who fails to submit his settlement proposal within the one-year period, because in that event "there is no right of appeal." FAR, *supra* note 25, at pt. 52.249-2(j).

[72] *Ryste & Ricas, Inc.*, 06-1 BCA ¶ 33,124 at 164,148.

Inspection, Acceptance, and Warranty

IAW Transformed!

The Department of Defense (DoD) issued a final rule on quality assurance as part of the *Defense Federal Acquisition Regulation Supplement* (*DFARS*) transformation.[1] The final rule updates requirements for warranties and contract quality assurance; removes unnecessary text on technical requirements matters, responsibilities of contract administration offices, and material inspection and receiving reports; and moves guidance on the preparation of quality assurance instructions, quality inspection approval stamps and quality evaluation data to the Procedures, Guidance, and Information supplement.[2]

Audit of Quality Assurance

The DoD Inspector General (IG) published a report on the adequacy of contract surveillance for service contracts.[3] The DoD IG concluded that the government "could not be assure[d] that it received the best value when contracting for services,"[4] particularly in the area of cost-reimbursement and time-and-materials contracts.

The DoD IG reviewed service contracts due to the 'impressive growth' of DoD contracts in this area. In Fiscal Year (FY) 2004, fifty-five percent of DoD spending for goods and services was for service contracts.[5] The report noted that the cost of services alone increased one hundred and six percent between FY 1998 and FY 2004.[6]

The report reviewed twenty-three contracts, valued at $ 670.4 million.[7] Eighty-seven percent of the contracts did not have adequate quality assurance surveillance plans.[8] The report noted four different incorrect rationales by agencies for not preparing a quality assurance plan as required by the *Federal Acquisition Regulation* (*FAR*).[9] The DoD IG lauded three contracts for its detailed quality assurance surveillance plan.[10]

Fifty-two percent of the audited contracts contained insufficient reviews of contract vouchers.[11] The report cited, as an example, reviews by technical monitors who were focused more on analyzing performance than scrubbing costs while looking at the vouchers.[12] The report praised four U.S. Army Corps of Engineers Iraqi Captured Enemy Ammunition contracts in Iraq in which program officials conducted a comprehensive review of all contractor vouchers while in a war zone.[13]

Fifty-seven percent of the contracts contained vouchers for provisional payments that were approved by non-Defense Contract Audit Agency (DCAA) officials.[14] Only twenty-two percent used performance-based contracting standards.[15] Forty-three percent of the contracts did not have adequately documented past performance records.[16]

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[1] Defense Federal Acquisition Regulation Supplement; Quality Assurance, 71 Fed. Reg. 27,646 (May 12, 2006) (to be codified at 48 C.F.R. pts. 246).

[2] *Id.*

[3] U.S. DEP'T OF DEF. OFF. OF THE INSPECTOR GEN., REP. NO. D-2006-010, CONTRACT SURVEILLANCE FOR SERVICE CONTRACTS (28 Oct. 2005).

[4] *Id.* at i.

[5] *Id.* at 1.

[6] The DoD spent $61.9 billion in 1993 and $ 230.7 billion in 2004. *Id.*

[7] *Id.*

[8] *Id.* at 4. Six of these contracts had surveillance plans but were not adequately documented as required by the FAR. *Id.* at 11.

[9] *Id.* at 19. The rationales included "not required at contact award," "not required for commercials services," "not conducive to time-and-materials," and "not required for non-performance-based contracts." *Id.*

[10] *Id.* at 12. The contracts were in the Electronic Systems Center at Hanscom Air Force Base, Massachusetts; the Aeronautical Systems Center, Wright-Patterson Air Force Base, Ohio; and the Naval Air Systems Command, Patuxent River, Maryland. *Id.*

[11] *Id.* at 4. The DoD IG noted cursory or nonexistent voucher reviews for contracts in which either DCAA was provisionally approving interim vouchers or approved direct billing for the contractors. *Id.* at 13.

[12] The contract in question was from the Defense Information Technology Contracting Organization. *Id.* at 14.

[13] *Id.* at 16.

[14] *Id.* at 4. Under *DFARS 242.803(b)*, DCAA has the assigned responsibility for receiving and approving interim vouchers for provisional payment. *Id.* at 17.

[15] *Id.*

The DoD partially concurred with the DoD IG's recommendation for officials to coordinate with DCAA for all service contracts, indicating that this coordination should be only when required by the complexity of the contract.[17] The DoD also partially concurred with the IG's recommendation to coordinate with DCAA for voucher reviews, stating that guidance will be forthcoming.[18] Finally, the DoD partially concurred with the last recommendation to clearly define roles and responsibilities in section G of contracts, stating that such detail should only be in contracts where deviation from the standard requirements is necessary.[19]

"In the Process" Is Not a Plan

In *Marine Industries NW*,[20] the Government Accountability Office (GAO) denied a protest of an offeror who failed to submit a brief description of the company's quality assurance plan for certifying completed work rendering the offer technically unacceptable.[21] The Navy's Fleet and Industrial Supply Center in Puget Sound issued a Request for Proposals for up to four fixed price, indefinite-delivery / indefinite-quantity contracts for repair services on Navy vessels.[22] Marine Industries submitted an offer which stated that it was "in the process of implementing a Quality Assurance Plan."[23] Because the Navy felt that such an implementation could take years and asking for more detail would constitute discussions, the Navy eliminated Marine Industries from the competition.[24]

The GAO agreed with the Navy that Marine Industries' offer contained no information which would lead the Navy to assume that Marine Industries had a quality assurance plan in place, as the company alleged in its protest.[25] The GAO also dismissed Marine's argument that past performance submission, which showed prior quality performance, should have established the existence of the company's quality assurance plan.[26]

Strict Compliance Flushed Down the Drain

In *Bath Iron Works Corp.*,[27] the Armed Services Board of Contract Appeals (ASBCA) awarded a contractor damages to recover its costs in replacing damaged piping despite the Navy's Insurance clause.[28] The dispute involved a fixed-price incentive fee contract to construct six DDG 51 Class Guided Missile Destroyers, including the DDG 90 involved in the dispute.[29] The Insurance clause in question excluded coverage "for the inspection, repair, replacement, or renewal of any defects themselves in the vessel . . . due to . . . defective workmanship."[30]

On 6 September 2002, the supervisor of operating engineers for Bath Iron Works flushed the DDG 90's fuel oil and transfer piping with "tidal" Keenebec River water without notice to the Navy and without knowledge that river or salt water could damage stainless steel.[31] In order to repair the resulting damage, Bath Iron Works spent $388,966 in material costs and

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[16] *Id.*

[17] *Id.* at 26.

[18] *Id.* at 27.

[19] *Id.* at 28.

[20] Comp. Gen. B-297207, Dec. 2, 2005, 2005 CPD ¶ 217.

[21] *Id.* at 2.

[22] *Id.* at 1.

[23] *Id.* at 2.

[24] *Id.*

[25] Marine Industries contended that the language used in the offer should have led the Navy to assume that the company was updating an existing quality assurance plan. *Id.* at 3.

[26] *Id.*

[27] ASBCA 54544, 06-1 BCA ¶ 33,158.

[28] NAVSEA 5252.228-9105 INSURANCE-PROPERTY LOSS OR DAMAGE-LIABILITY TO THIRD PERSONS (FT) (Jan 1990) (Modified, July 1997).

[29] *Bath Iron Works Corp.*, 06-1 BCA ¶ 33,158 at 164,296.

[30] *Id.* at 164,305.

[31] *Id.* at 164,299.

16,893 in labor hours, which the ASBCA found to be reasonable.[32] The contacting officer denied Bath Iron Works' claim, finding that the knowing deviation from the contract's requirements to flush the piping with either fuel or fresh water precluded payment of the claim.[33]

Bath Iron Works argued that the insurance clause incorporated an "all risks" clause which shielded claims for damage from any fortuitous events causing vessel damage during construction. This clause, based on the Navy's past practices, would allow payment for the claim as long as the damage results from a number of causes, only one of which is an excluded risk.[34] The government argued that the Insurance clause was on point because the damage was deliberate and that strict compliance excluded any entitlement for the costs incurred by Bath Iron Works.[35]

The ASBCA found that the Insurance clause excluded damage for defective work, but would allow payment for repairing or replacing the resulting damage from a casualty or disastrous occurrence.[36] The board found that the damage was the result of an accident, and could not fall into the rubric of "defective workmanship."[37] In addition, the board found that the Navy in the past had allowed recovery for loss or damage resulting from defective work or negligent actions.[38] Also, as Bath Iron Works argued, risk insurance law would allow coverage for a casualty with more than one cause, other than the excluded risk of defective workmanship in this case.[39] The board found that strict compliance was not applicable since the Navy deviated from the contract by allowing a fresh water flush and had allowed Bath Iron Works to use a fresh water flush on DDGs under several contracts between 1998 and 2002.[40]

The ASBCA awarded Bath Iron Works $1,130,314.05 for the costs of the repair less the amount used for the "defects themselves," or re-performance of the test flush with the proper water; some undocumented attorney's fees; and the Insurance clause deductible.[41]

Major Andrew S. Kantner

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[32] *Id.* at 164,301.

[33] *Id.* at 164,300.

[34] *Id.* at 164,305. The flushing procedure, modified by a Departmental Operating Instruction, deviated from the original specification which mandated the use of flushing fuel, rather than water. *Id.* at 164,298. In addition, other exacerbating causes were design flaws of the piping, and the use of a level transfer facility instead of inclined which allowed the water to stay in the destroyer. *Id.* at 164,303.

[35] *Id.*

[36] *Id.* at 164,305.

[37] The board noted that "(i)t is a fair inference that . . . (the Bath Iron Works employee) did not design or plan the corrosion damage." *Id.* at 164,306.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 164,308.

Value Engineering Change Provisions

Contractor Entitled to the Value of Its Proposal—Not a Penny More

Last year, the *Year in Review*[1] discussed a case affirming an earlier Armed Services Board of Contract Appeals (ASBCA) decision concerning a value engineering change proposal (VECP).[2] On reconsideration, the ASBCA determined that because the contractor failed to prove it was entitled to additional cost savings resulting from a VECP, the contractor was not entitled to additional compensation.[3] The contractor appealed the ASBCA decision to the Court of Appeals for the Federal Circuit (CAFC) and the CAFC affirmed the ASBCA decision.[4] While last year's *Year in Review* discussed the contractor's (Applied) contract appeal to the ASBCA, this article addresses only the CAFC appeal.

The CAFC case arose from two contracts the Army awarded to Applied in 1985 for horizontal air conditioning units.[5] Both contracts contained a VECP clause[6] encouraging Applied to present the government with cost savings measures by permitting the government to compensate Applied for any savings realized as a result of the VECP.[7] After Applied submitted a VECP to the government, Applied disputed the amount the government owed it, resulting in an appeal to the ASBCA and then another appeal to the CAFC.[8]

The sole issue the CAFC considered was whether the VECP applied to cost savings on future purchases of the 36K BTU/HR model air conditioner only, or rather, whether the VECP also applied to cost savings on future purchases of other air conditioning unit models.[9] In its analysis, the CAFC applied the basic principles of contract interpretation in attempting to resolve any ambiguities by first relying on the plain language of the contract.[10] In examining the scope of the VECP, the court considered the language of the contractor's VECP, contract modification P9 (which incorporated the VECP into the contract), and also contract modification P15 (which stated the amount of cost savings to which the contractor was entitled). The court found that the language of the VECP referred only to the 36K BTU/HR model because it specified "the commercialization of the 36K horizontal unit."[11] Similarly, the court found that contract modification P9 referred only to that particular model because the modification stated the VECP applied to the "[horizontal AC] 36,000 BTU/HR."[12] Finally, the court found that modification P15 also referred only to that particular model (mentioned in modification P9) by detailing the total amount of cost savings to which the contractor was entitled resulting from its VECP.[13]

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[1] *See* Major Andrew Kantner et al., *Contract and Fiscal Law Developments of 2005—Year in Review*, ARMY LAW., Jan. 2006, at 79.

[2] Applied Cos., ASBCA No. 50593, vol. 05-2 BCA ¶ 32,986 at 163,475.

[3] *Id.*

[4] Applied Cos., 456 F.3d 1380, 1385 (Fed. Cir. 2006).

[5] Applied presented the Army with a value engineering change proposal (VECP) for cost savings for future purchases of 36K BTU/HR air conditioners. *Applied Cos.*, 05-2 BCA ¶ 32,986 at 163,475. The government accepted the VECP and determined that Applied's share of the cost savings was $1,540,181; the contracting officer determined that the VECP pertained only to the 36K BTU/HR model. *Applied Cos.*, 456 F.3d at 1385. Later, Applied submitted a claim for $81,000,000 arguing that it was entitled to cost savings not only for future purchases of 36K BUT/HR air conditioners, but also for future purchases of other related air conditioners. *Id.* The government denied the claim but later settled the matter of "instant savings," leaving $19,806,796 in dispute regarding future savings. *Id.* at 1382. Applied appealed the disputed amount to the Board. *Id.* The Board awarded Applied nearly $1,000,000 representing a fifty percent cost savings for future purchases of 36K BTU/HR air conditioners. *Id.* The Board found that Applied failed to prove that the VECP pertained to future purchases of other air conditioners. *Id.* Upon a request for reconsideration, the Board affirmed its earlier decision. *Id.*

[6] The contract contained the 1984 version of *FAR 52.248-1* (Value Engineering) which stated that "the contractor is encouraged to develop, prepare, and submit value engineering change proposals (VECPs) voluntarily, in accordance with the incentive sharing rates in paragraph (f) below [in this case, the rates are fifty percent]." Applied Companies, ASBCA Nos. 50593, 52102, vol. 99-2 BCA ¶ 30,554 at 150,880. *See also* U.S. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REGULATION REG. pt. 52.248-1 (1984 version) [hereinafter FAR].

[7] *Applied Cos.*, 456 F.3d at 1381.

[8] *Id*. at 1382.

[9] *Id*. Although the CAFC and the ASBCA considered the same evidence in rendering their opinions, the CAFC decision focused on contract interpretation while the ASBCA decision focused on the contractor's burden of proof in a VECP claim. *Id*. *See also Applied Cos.*, 05-2 BCA ¶ 32,986 at 163,475.

[10] *Applied Cos.*, 456 F.3d at 1383.

[11] *Id.* at 1383.

[12] *Id*.

[13] *Id.* at 1383-84.

The court found that the contract language unambiguously showed that the VECP applied only to the 36K BTU/HR model air conditioning unit.[14] Accordingly, the court found that the VECP did not apply to other models. The court stated that the contract language was unambiguous, and so, any consideration of extrinsic evidence would be inappropriate.[15] Therefore, the court held that contractor was entitled only to future savings related to the 36 BTU/HR model. Because the government had already compensated Applied for future savings related to the 36K BTU/HR model, the CAFC affirmed the ASBCA decision.[16]

No Appeal of ASBCA Decision at COFC: Contractor Doesn't Get Second Bite at the Apple

In an unrelated case, the Court of Federal Claims (COFC) considered a contractor's appeal involving another VECP,[17] however, the court dismissed the appeal on procedural grounds.[18] Specifically, the court found that it lacked subject matter jurisdiction to hear the case. The course also noted that even if it did possess jurisdiction, the contractor would not prevail on its legal theories.[19]

This case arose from a series of contracts that the Defense Logistics Agency awarded to Bianchi in 1979 and 1980 to manufacture military clothing.[20] Pursuant to the contracts' value engineering clauses, in two separate earlier decisions, the ASBCA awarded Bianchi a VECP payment of $58,613 and another VECP payment of $16,754.[21] Subsequently, the government paid the Bank of America, as the contractor's assignee, the amounts it owed to the contractor for the VECPs.[22]

In a motion for summary judgment, Bianchi requested that the COFC determine whether the government had complied with the earlier ASBCA decisions by paying the bank (rather than the contractor) compensation resulting from the contractor's VECPs.[23] First, the court found that it lacked subject matter jurisdiction under the Contract Disputes Act[24] to hear the case because the contractor had elected to pursue its contract appeal at the ASBCA; once the ASBCA rendered a decision in the case, the contractor could not then appeal that decision to the COFC.[25] Second, the court noted that even if it did have jurisdiction, Bianchi could not prevail on its motion for summary judgment.[26] Although the court agreed that there were no genuine issues of material fact, the case was not so one-sided that the contractor must prevail as a matter of law.[27] While the court did not make a determination on the merits of the contractor's argument (that the government should have paid the contractor the VECP royalties directly), the court stated that under the facts of this case, the law did not clearly mandate the government to pay the contractor directly.[28]

Major Marci A. Lawson

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[14] *Id.*

[15] *Id.* at 1384. The court mentioned the testimony of retired Colonel Mills stating that the "Army intended Applied's VECP to apply to the entire family of (air conditioners)." *Id.* The contractor presented this testimony as evidence that the government should apply the VECP to other air conditioning unit models. *Id.* Nevertheless, because this testimony was extrinsic evidence and also because the contract language was unambiguous, the court did not rely upon this testimony in its interpretation of the contract. *Id.* The court opined that if the contracting officer did, in fact, intend the VECP to apply to other models of air conditioners, then the contracting officer should have incorporated that intent into the contract. *Id.*

[16] *Id*. at 1385.

[17] *See generally supra* note 6 for explanation of VECP.

[18] Bianchi v. United States, 68 Fed. Cl. 442 (2005).

[19] *Id*.

[20] *Id.* at 443.

[21] *Id.* at 445.

[22] *Id.* at 451.

[23] *Id*.

[24] 41 U.S.C.S. §§ 601-13 (LEXIS 2006).

[25] *Bianchi*, 68 Fed. Cl. at 450. The court stated that its jurisdiction to hear contract claims is based upon the Contract Disputes Act (CDA). *Id.* Under the CDA, a contractor may appeal an adverse contracting officer's final decision either to the appropriate Board of Contract Appeals or to the Court of Federal Claims (COFC), but not to both. *Id.* The court stated that when the contractor elects to proceed to one forum, that election is binding and it may not then elect to proceed to another forum. *Id. See also* 41 U.S.C.S. §§ 601-13 (LEXIS 2006).

[26] *Bianchi*, 68 Fed. Cl. at 464-65.

[27] *Id.*

[28] *Id.* at 465-66. The court explained that in a motion for summary judgment, the movant must prove that there are no genuine issues of material fact and that the moving party must prevail as a matter of law. *Id.*

SPECIAL TOPICS

Alternative Dispute Resolution

Paying the Piper: Government Accountability Office (GAO) Recommends Agency Pay Protest Costs After Undue Delay in Taking Corrective Action

In the following two protests,[1] the GAO considered protesters' requests for reimbursement of protest costs following the parties' participation in outcome prediction alternative dispute resolution (ADR) conferences.[2] In each case, the GAO attorney assigned to the case opined at the ADR conference that if the GAO issued a formal opinion, the protest would likely be sustained.[3] Subsequently, in each case, the government stated it would take corrective action in response to the protest and as a result, the GAO dismissed each protest as academic.[4] The protesters later filed separate actions requesting that the GAO recommend the agencies reimburse the protesters' costs.[5]

In *T Square Logistics Services*,[6] the GAO recommended that the Air Force reimburse the protester its protest costs. After the protester filed the protest, the parties participated in an outcome prediction ADR conference with a GAO attorney. Following the ADR conference, the Air Force agreed to take corrective action and then the GAO dismissed the protest as academic. Because the Air Force delayed taking corrective action, the GAO recommended that the Air Force pay protest costs.[7]

In *T Square Logistics*, the Air Force issued a request for proposals (RFP) for the base operating support services at Grissom Air Reserve Base.[8] The RFP stated that the agency would evaluate past performance based on recency, relevancy, and quality. The possible ratings for past performance were "high confidence," "significant confidence, "confidence," "unknown confidence," "little confidence," and "no confidence."[9] In response to the solicitation, the Air Force received ten proposals; of these, the Air Force considered nine of them to be technically acceptable. The agency conducted written discussions with the remaining nine offerors. Data Monitor was the lowest priced offeror of those offerors that received the highest past performance rating of "significant confidence." While the protester's price was lower than Data Monitor's price, the protester received an overall past performance rating of "little confidence." The agency then determined that Data Monitor's proposal was the best value for the government and the agency awarded it the contract.[10]

Following contract award, the protester filed three protests arguing that the Air Force should have included in its discussions with the protester the basis of the Air Force's determination that it had "little confidence" in the protester's past performance.[11] In response to the protests, the Air Force submitted a report to the GAO responding to the protests. In its report, the Air Force argued that it was not required to discuss with the protester its determination that it had "little confidence" in the protester's past performance because the Air Force believed such a deficiency was not the type of deficiency that the protester could have corrected.[12]

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[1] T Square Logistics Servs. Corp.—Costs, B-297790.4, 2006 U.S. Comp. Gen. LEXIS 79 (Apr 26, 2006); Honeywell Tech. Solutions, Inc.—Costs, Comp. Gen. B-296860.3, Dec. 27, 2005, 2005 CPD ¶ 226.

[2] Outcome prediction is a form of alternative dispute resolution (ADR) that the GAO offers in which the GAO attorney assigned to the protest holds a conference with both parties and then provides what he or she predicts will be the likely outcome of the protest if the GAO later issues a written opinion. *T Square Logistics*, 2006 U.S. Comp. Gen. LEXIS 79, at *5 n.1. An outcome prediction is not an official GAO opinion and as such, it is not binding upon the GAO. *Id.*

[3] *T Square Logistics*, 2006 U.S. Comp. Gen. LEXIS 79, at *5; *Honeywell*, 2005 CPD ¶ 226, at 2.

[4] *T Square Logistics*, 2006 U.S. Comp. Gen. LEXIS 79, at *8; *Honeywell*, 2005 CPD ¶ 226, at 3.

[5] *T Square Logistics*, 2006 U.S. Comp. Gen. LEXIS 79, at *9; *Honeywell*, 2005 CPD ¶ 226, at 4.

[6] *T Square Logistics*, 2006 U.S. Comp. Gen. LEXIS 79.

[7] *Id.* at *8-10. The "protest costs" that GAO recommended the Air Force pay include the costs of filing and pursuing the protest. *Id.*

[8] *Id.* at *2.

[9] *Id.* at *3.

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

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

[12] *Id.*

On 13 February 2006, the parties engaged in an outcome prediction ADR conference with the GAO attorney assigned to the protest.[13] After considering the arguments of the parties, the GAO attorney predicted that if the GAO issued a decision on these protests, the protester would prevail. On 3 March 2006, the Air Force agreed to take corrective action in the form of re-evaluating the offers for past performance purposes.[14] The Air Force further agreed that if it concluded that any offeror besides Data Monitor presented the best value to the government, then the Air Force would award the contract to that other offeror. Because the Air Force agreed to take corrective action which could result in contract award to the protester, the GAO dismissed the protest as academic.[15]

The protester subsequently requested that the GAO recommend that the Air Force reimburse it for protest costs because the Air Force unduly delayed taking corrective action.[16] Although the Air Force did not agree to pay protest costs, the Air Force did not reply to the protester's request.[17]

While the GAO did not specify the basis of its conclusion, the GAO found that the Air Force unduly delayed taking corrective action in this case and recommended that the Air Force pay the protester protest costs.[18] Pursuant to the GAO's bid protest regulations,[19] the GAO may recommend the agency pay protest costs where "based on the circumstance of the case," the GAO finds that "the agency unduly delayed taking corrective action in the face of a clearly meritorious protest thereby causing protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief."[20] Generally, the GAO will find that corrective action is not prompt if it is taken, as here, after the agency files its agency report. In this case, because the GAO found the protest to be clearly meritorious and also because it found the Air Force unduly delayed taking corrective action, the GAO recommended the Air Force pay protest costs.[21]

In *Honeywell Technology Solutions*,[22] the GAO recommended that the Navy not reimburse the protester its protest costs arising from an issue that was not clearly meritorious and that was severable from the issue which prompted corrective action.[23] After the protester filed the protest, the parties participated in an outcome prediction ADR conference with a GAO attorney.[24] Following the ADR conference, the Navy agreed to take corrective action regarding an issue deemed clearly meritorious and then the GAO dismissed the protest as academic.[25] Subsequently, the protester requested that the GAO recommend the Navy reimburse it for protest costs related to two separate organizational conflict of interest (OCI) issues. The GAO recommended that the Navy reimburse the protester only for the protest costs which arose from the one OCI issue deemed meritorious during the ADR conference.[26]

In this case, after issuing a RFP for technical and engineering support services, the Navy awarded a contract to Assurance Technology Corporation (ATC).[27] Honeywell protested the award to ATC on multiple grounds, to include allegations that ATC had OCIs that should have prevented contract award.[28] Regarding the OCI allegations, Honeywell presented two separate arguments. First, Honeywell contended that ATC acquired "non-public proprietary cost and technical

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[13] *Id.* at *5.

[14] *Id.* at *8.

[15] *Id.*

[16] *Id.* at *9.

[17] *Id.*

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

[19] 4 C.F.R. § 21.8(e) (2006).

[20] *T Square Logistics*, 2006 U.S. Comp. Gen. LEXIS 79, at *9.

[21] *Id.* at *11-12. The GAO found it noteworthy to mention that the Air Force did not dispute the argument that the protests were clearly meritorious or that the Air Force unduly delayed taking corrective action. *Id.*

[22] *Honeywell*, 2005 CPD ¶ 226.

[23] *Id*. at 5.

[24] *Id*. at 2. *See also* explanation of outcome prediction ADR conference *supra* note 2.

[25] *Honeywell*, 2005 CPD ¶ 226, at 3.

[26] *Id.* at 5.

[27] *Id.* at 1.

[28] *Id.* at 2.

data"[29] about Honeywell resulting from Honeywell's performance as previous technical and engineering support services contractor. Honeywell stated that ATC acquired this non-public information during ATC's performance of a separate, but related, space systems development department (SSDD) contract. Consequently, Honeywell contended that this knowledge gave ATC an unfair advantage in the contract award at issue. Second, Honeywell contended that ATC's performance of the SSDD contract would lead to ATC's supervision of its own work under the technical and engineering support services contract leading to ATC's "impaired objectivity."[30]

After the GAO received the agency report, the parties participated in an outcome prediction ADR conference with the GAO attorney assigned to the case.[31] The GAO attorney advised the parties that if the GAO issued a written decision, the GAO would likely sustain the protest on the protester's first OCI argument because that issue was clearly meritorious. The GAO attorney did not opine on the merits of the protester's second OCI argument.[32]

Following the outcome prediction conference, the Navy took corrective action in the form of re-evaluating the proposals in light of the potential for OCIs. Because the Navy took corrective action, the GAO dismissed the protest as academic.[33]

Although the protester requested that the GAO recommend that the Navy reimburse it for its protest costs related to both OCI issues, the GAO recommended that the Navy only reimburse the protester for the one OCI issue found to be clearly meritorious.[34] While the GAO normally recommends that the agency reimburse a successful protester for all of its protest costs, the GAO may limit its recommendation under certain circumstances. For example, if the GAO finds that losing protest issues are "so severable as to essentially constitute a separate protest," then the GAO will recommend that the agency pay only those protest costs which are allocable to the winning protest issues.[35] In this case, at the ADR conference, the GAO attorney found only the first OCI issue to be meritorious. Further, the GAO viewed these two OCI issues as separate. Thus, because the GAO found that the two OCI issues were so severable as to constitute, essentially, separate protests, the GAO recommended that the Navy reimburse the protester only for the first OCI issue.[36]

Major Marci A. Lawson

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[29] *Id*.

[30] *Id*.

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

[32] *Id*.

[33] *Id*.

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

[35] *Id*.

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

Competitive Sourcing[1]

Deputy Garrison Commander Is Not an "Interested Party"

A recent amendment to the Competition in Contracting Act (CICA)[2] expanded the definition of "interested party" for the purpose of filing a General Accountability Office (GAO) protest of an Office of Management and Budget (OMB) Circular A-76 competition (A-76 competition). Nevertheless, the expanded definition does not include a representative of affected employees.[3] This article discusses an A-76 competition protest filed by Mr. Alan King, Deputy Garrison Commander of the Department of the U.S. Army's Walter Reed Medical Center in Washington, D.C.[4] The GAO dismissed the protest reasoning that Mr. King was not an "interested party" under the CICA.[5]

Mr. King's protest arose from the Army's decision to award a contract for base operations support services to a contractor, (Johnson Controls World Services, Inc. (JCWS), following a cost comparison[6] conducted under the 1999 version of the OMB Circular A-76 (Old A-76).[7] Although the Army ultimately decided to award a contract to JCWS, the Army initially decided to continue performing the subject services with government employees.[8] After the initial decision favoring the in-house employees, JCWS filed two GAO protests arguing that the Army's decision to implement the most-efficient organization (MEO)[9] was based on inaccurate cost data. JCWS contended, essentially, that if the Army had accurately figured the cost of implementing the MEO, then JCWS's offer would have been more cost-effective. After a GAO hearing, the Army agreed to take corrective action by reanalyzing the MEO's cost estimate. Because of this corrective action, the GAO dismissed the protests as academic.[10] Following the Army Audit Agency's review of the MEO, the Army made changes to the MEO resulting in an increase in the cost of in-house performance and consequently, the Army revised its earlier decision and determined that it would be more cost-effective to award a contract to JCWS.[11] Mr. King's protest followed ten days later.[12]

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[1] *Office of Management and Budget (OMB) Circular A-76* is a statement of federal policy concerning the performance of commercial activities in the federal government. U.S. OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES pmbl. (2003) [hereinafter REVISED A-76]. Generally, this policy requires private sector performance of commercial activities unless performance by government employees is more cost-effective. *Id.* This policy also prescribes the procedures that federal agencies must follow in conducting so-called "competitions" of commercial activities; in such competitions, agencies must determine whether private sector performance or government performance would be more cost-effective [hereinafter A-76 competition]. *Id.* at attch. B. If the agency finds that private sector performance is more cost-effective, then at the conclusion of an A-76 competition, the agency awards a contract to a contractor. *Id.* Conversely, if the agency finds that government performance is more cost-effective, then the agency issues a "letter of obligation" to the "official responsible for performance of the MEO" (most-efficient organization). *Id.*

[2] National Defense Authorization Act for FY 2005, Pub. L. No. 108-375, § 326, 118 Stat. 1848 (2004). The National Defense Authorization Act for FY 2005 amended the definition of "interested party" for protests under the Competition in Contracting Act, Pub. L. No. 98-369, tit. VII, § 2701, 98 Stat. 1175 (1989) to include the "official responsible for submitting the Federal agency tender in a public-private competition" completed pursuant to OMB Circular A-76 regarding an activity performed by more than 65 full-time equivalent employees. *Id. See also* 31 U.S.C. § 3551 (LEXIS 2006). Thus, this amendment permits the agency tender official in a competition of this magnitude to file a protest at the GAO. *Id.*

[3] Alan D. King, Comp. Gen. B-295529.6, Feb. 21, 2006, 2006 CPD ¶ 44.

[4] *Id.* Last year's *Year in Review* discussed two earlier GAO protests (filed by JCWS) concerning this same competition. *See* Major Andrew Kantner et al., *Contract and Fiscal Law Developments of 2005—Year in Review*, ARMY LAW., Jan. 2006, at 107.

[5] *King*, 2006 CPD ¶ 44, at 7.

[6] A "cost comparison" is the "process of developing an estimate of the cost of Government performance of a commercial activity and comparing it. . .to the cost to the Government for contract performance of the activity." U.S. OFF. OF MGMT. & BUDGET, CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES para. 6(1999) [hereinafter OLD A-76]. *See generally* U.S. OFF. OF MGMT. & BUDGET, CIRCULAR NO. A-76, REVISED SUPPLEMENTAL HANDBOOK, PERFORMANCE OF COMMERCIAL ACTIVITIES app. 1 (1996) [hereinafter A-76, REV. SUPPL HANDBOOK]. *Revised A-76* replaced and superseded *old A-76* for streamlined and standard competitions commenced after its effective date. REVISED A-76, *supra* note 1, at pmbl.

[7] *King*, 2006 CPD ¶ 44, at 4-5.

[8] *Id*. at 4.

[9] Under the 1999 version of *OMB Circular A-76*, the most-efficient organization (MEO) is defined as the "government's in-house organization to perform a commercial activity." The MEO is based on the performance work statement and is, in effect, the government's "offer" which is compared to private sector offers during the cost comparison process. A-76, REV. SUPPL HANDBOOK, *supra* note 6. Similarly, under the current version of the circular, the MEO is defined as the "staffing plan of the agency tender, developed to represent the agency's most efficient and cost-effective organization." REVISED A-76, attch. D, *supra* note 1, at attch. D.

[10] *King*, 2006 CPD ¶ 44, at 4.

[11] *Id*.

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

Substantively, Mr. King argued that the Army's authority to conduct a cost comparison under the Old A-76 had expired and thus, the Army should have proceeded under 2003 version[13] of the circular (Revised A-76).[14] Mr. King further argued that in conducting the cost comparison, the Army violated the Anti-Deficiency and other statutes.[15]

Procedurally, Mr. King argued that he was an "interested party" under Revised A-76 claiming that he was the "functional and legal equivalent" of an agency tender official.[16] Although the Army posited that the 1999 version of the circular applied to this cost comparison, Mr. King contended that the 2003 version of the circular applied in this case.[17] The GAO disagreed and concurred with the Army that the 1999 version applied in this case. Nevertheless, the GAO stated that Mr. King would not be an "interested party" under either version of the circular because Mr. King did not fall within the definition of "interested party" under the version of the CICA that was in effect at the time the cost comparison began.[18] Thus, the GAO reasoned that it was the CICA, not the version of the circular, which provided the protester with standing to file a GAO protest. The GAO concluded that Mr. King had no standing because he was "not an interested party to pursue this protest before our Office."[19]

. . . And Neither Is the Union President

Similarly, in *Lawrence C. Drake*,[20] the GAO dismissed an unrelated protest stating again that the protester was not an "interested party"[21] under the CICA. After reviewing a protest filed by the president of a chapter of the American Federation of Government Employees, Lawrence C. Drake, the GAO dismissed the protest stating that the president was not an "interested party."[22]

Mr. Drake protested the Department of Labor's classification of accounting services as a "commercial activity."[23] Mr. Drake filed this protest prior to the agency's issuance of a solicitation for the proposed competition under Revised A-76.[24] In the protest, Mr. Drake argued that he was an "interested party" due to his status as the president of the local chapter of affected union employees.[25] The GAO disagreed.[26]

The GAO examined the expanded definition of "interested party" under the CICA, as amended in 2004,[27] and concluded that Mr. Drake was not an "interested party."[28] The GAO further stated that while the term "interested party" under both the

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[13] REVISED A-76, *supra* note 1, at pmbl.

[14] *King*, 2006 CPD ¶ 44, at 2.

[15] *Id.*

[16] An "agency tender official" (ATO) is an "inherently governmental agency official with decision-making authority who is responsible for the agency tender and represents the agency tender during source selection." REVISED A-76, *supra* note 1, at attch. D. The "agency tender" is the "agency management plan submitted in response to a solicitation for a standard competition. *Id.* The agency tender includes an MEO agency cost estimate, MEO quality control plan, MEO phase-in plan, and copies of any MEO subcontracts." *Id.* Prior to the 2004 amendment to the CICA permitting the agency tender official to file a GAO protest on behalf of the unsuccessful government employees, no one had standing to file such a protest on behalf of the government employees. *King*, 2006 CPD ¶ 44, at 5.

[17] *King*, 2006 CPD ¶ 44, at 5.

[18] *Id.* While the GAO did not respond to Mr. King's assertion that he was the "functional and legal equivalent" of an ATO, it is clear that Mr. King would not be considered an ATO under Revised A-76. REVISED A-76, *supra* note 1, at attch. D. Under the current circular, an ATO is a responsible party charged with representing the agency during source selection. *Id.* There is no evidence that Mr. King was named as an ATO in this case. *King*, 2006 CPD ¶ 44, at 2-4.

[19] *King*, 2006 CPD ¶ 44, at 7.

[20] Comp. Gen. B-298143, Apr. 7, 2006, 2006 CPD ¶ 63.

[21] *Id*. at 4.

[22] *Id.*

[23] *Id.* 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." REVISED A-76, *supra* note 1, at attch. A, ¶ B.2.

[24] *Drake*, 2006 CPD ¶ 63, at 1.

[25] *Id*. at 2

[26] *Id*. at 4.

[27] National Defense Authorization Act for FY 2005, Pub. L. No. 108-375, § 326, 118 Stat. 1848 (2004).

[28] *Drake*, 2006 CPD ¶ 63, at 3.

CICA and its own bid protest regulations now includes the agency tender official in a competition involving more than sixty-five employees, the new definition does not include a union representative of the affected employees.[29] The GAO opined that the protester may have confused the term "interested party" under the CICA with the term "intervenor."[30] While an interested party has standing to file a protest regarding an A-76 competition in its own right, an intervenor does not have standing to file a protest.[31] Nevertheless, one meeting the definition of intervenor may only intervene in a protest previously filed by an interested party. Thus, the GAO dismissed this protest stating that Mr. Drake was not an "interested party" under the CICA eligible to file such a protest.[32]

GAO Disagrees that Evaluators Were Directly-Affected Employees

In *CRAssociates, Inc*.,[33] the GAO considered a protest following the agency's exclusion of the sole private offeror's proposal from the competitive range. The protester, CRAssociates (CRA), argued that some of the agency's evaluators had conflicts of interest preventing them from serving as evaluators and also that the agency should have permitted it to correct the deficiencies in its offer. The GAO denied the protest on both grounds.[34]

The contractor's protest arose from an A-76 competition conducted by the Department of Health and Human Services (HHS) concerning medical services for individuals in the custody of the Department of Homeland Security.[35] The solicitation stated that it would use a cost-technical trade-off analysis in evaluating the private offers and the agency tender.[36] In response to the solicitation, the HHS received one private offer (from CRA) and the agency tender. After the evaluators found numerous deficiencies in CRA's offer, the agency found CRA's offer to be technically unacceptable and excluded it from the competitive range. After learning of its exclusion from the competitive range, CRA filed a protest with the GAO.[37]

The GAO considered each of CRA's arguments separately. First, CRA argued that because five of the eleven source selection evaluators were employed at a particular organization within the agency, Revised A-76 precluded their participation as evaluators. In response, the HHS argued that these five evaluators held positions that were "inherently governmental" and thus, Revised A-76 did not prohibit their participation as evaluators.[38] The GAO agreed with the agency in that Revised A-76 does not prohibit agency employees holding "inherently governmental" positions from serving as evaluators.[39] In contrast, the GAO stated that Revised A-76 does prohibit "directly-affected" employees from serving as evaluators.[40] The

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[29] *Id*.

[30] *Id*. at 3 n.9. The GAO's Bid Protest Regulations define an "intervenor" as "an awardee if the award has been made or, if no award has been made, all bidders or offerors who appear to have a substantial prospect of receiving an award if the protest is denied." 4 C.F.R. § 21.0(b)(1) (2006). Additionally, these regulations state, "if an interested party files a protest in connection with a public-private competition conducted under Office of Management and Budget Circular A-76 regarding an activity or function of a Federal agency performed by more than 65 full-time equivalent employees of the Federal agency, a person representing a majority of the employees of the Federal agency who are engaged in the performance of the activity or function subject to the public-private competition. . .may also be intervenors." *Id*. § 21.0(b)(2). Thus, GAO's regulations would permit a union president to intervene, but not to file an initial protest. *Id.*

[31] *Drake*, 2006 CPD ¶ 63, at 3.

[32] *Id.* at 4.

[33] CRAssociates, Inc., Comp. Gen. B-297686, Mar. 7, 2006, 2006 CPD ¶ 62.

[34] *Id*. at 1.

[35] *Id*. at 2.

[36] *See generally supra* note 16 (defining "agency tender").

[37] *CRAssociates*, 2006 CPD ¶ 62, at 3.

[38] *Id.* at 3.

[39] *Id.* at 4-5. An "inherently governmental" activity is "an activity that is so intimately related to the public interest as to mandate performance by government personnel." REVISED A-76, *supra* note 1, at attch. D. In contrast, 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.* A commercial activity is the type of activity for which agencies conduct competitions pursuant to *Revised A-76*. *Id.* Employees holding inherently governmental positions are not involved in commercial activities and so, will never be the subject of a competition under *Revised A-76*. *CRAssociates*, 2006 CPD ¶ 62, at 5.

[40] "Directly affected" employees are "civilian employees whose work is being competed in a streamlined or standard competition." REVISED A-76, *supra* note 1, at attch. D. Since only commercial activities are the subject of a competition under *Revised A-76*, inherently governmental positions will also never be "directly-affected" employees. *Id.* The GAO clarified that *Revised A-76* precludes directly-affected employees (employees whose positions the competition is studying) from serving as evaluators on the source selection evaluation board. *CRAssociates*, 2006 CPD ¶ 62, at 4-5. In this case, however, the GAO concluded that the subject HHS evaluators were not directly-affected employees; these evaluators merely worked at the HHS. *Id*. So, the employees were not precluded on that basis from serving as evaluators. *Id.*

GAO determined that the subject evaluators were simply HHS employees—vice "directly-affected" employees. Because the subject evaluators were not directly-affected employees, the GAO found that Revised A-76 did not prohibit their participation as evaluators.[41] GAO concluded that it had no reason to question HHS's contention that the evaluators in question held positions that were inherently governmental and therefore, denied the protest on this basis.[42]

Second, CRA argued that the solicitation required the HHS to allow it to correct deficiencies in its proposal. The HHS responded that the solicitation only required it to conduct discussions with (and allow revisions to proposals submitted by) offerors whose offers were in the competitive range.[43] Because CRA's proposal was not in the competitive range, the HHS argued, HHS had no obligation to permit CRA to revise its proposal.[44] The GAO agreed. Therefore, after considering CRA's protest on both of the aforementioned grounds, the GAO denied the protest.[45]

IRS Can't "Convert" Mailroom to Contract Performance Without a Competition

The District Court for the District of Columbia considered a case filed by the National Treasury Employees Union (National) contending that the Internal Revenue Service (IRS) improperly obligated fiscal year (FY) 2004 funds[46] to convert IRS mailroom services from government employees to contractors without first conducting an A-76 competition.[47] The Court granted National's request for declaratory judgment in holding that IRS did, in fact, improperly obligate FY 2004 funds in order to convert performance of its mailroom services to contractors without first conducting a competition pursuant to Revised A-76.[48]

On 31 October 2003, the IRS awarded a contract to ServiceSource for the operation of the IRS mailroom. This contract permitted the IRS to issue task orders for the operation of its mailroom; the contract did not require, however, the IRS to issue any task orders. From January to December 2004, the IRS issued task orders to ServiceSource for performance of mailroom activities obligating funds appropriated to the IRS under the Consolidated Appropriations Act of 2004 (2004 Act). During this timeframe, the IRS gradually terminated the employment of government employees who had been performing the mailroom services by replacing them with ServiceSource employees. By December 2004, the IRS mailroom was operating solely by ServiceSource employees. The IRS did not conduct a competition under Revised A-76 prior to converting mailroom performance to the contractor.[49]

The 2004 Act provides:

> None of the funds appropriated by this Act shall be available to convert to contractor performance an activity or function of an executive agency, that on or after the date of enactment of this Act, is performed by more than 10 Federal employees unless—the conversion is based on the result of a public-private competition plan [under Revised A-76].[50]

National argued that the IRS improperly obligated FY 2004 funds appropriated under the 2004 Act by converting the operation of its mailroom from government employees to contractors without first conducting a competition pursuant to Revised A-76.[51] The IRS responded by arguing that it completed its conversion of the mailroom no later than 31 October

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[41] *CRAssociates*, 2006 CPD ¶ 62, at 4-5.

[42] *Id.*

[43] *Id.* at 6.

[44] *Id.*

[45] *Id*. at 7.

[46] Consolidated Appropriations Act, 2004 Pub. L. No. 108-199, div. F, § 647(a), 118 Stat. 3 (2004).

[47] Nat'l Treasury Employees Union v. Internal Revenue Serv., 2006 U.S. Dist. LEXIS 9719 (2006).

[48] *Id.* at *19.

[49] *Id. at* *13. *See generally supra* note 1 (explaining A-76 competition).

[50] Consolidated Appropriations Act, Pub. L. No. 108-199, § 647(a) (2004). The Court applies the term, "public-private competition" (used in the 2004 Act) interchangeably with the term, "competition" (used in the *Revised A-76*) where the agency formally compares the cost of performance of a commercial activity by government employees versus by a private contractor. *Nat'l Treasury*, 2006 U.S. Dist. LEXIS 9719, at *17.

[51] *Nat'l Treasury*, 2006 U.S. Dist. LEXIS 9719, at *12-13.

2003 when it awarded the contract to ServiceSource—months before the 2004 Act's effective date of 23 January 2004.[52] Thus, FY 2004 funds were not used in the conversion.[53] The Court disagreed. The Court stated that the key was not the date of contract award, but rather the obligation of FY 2004 funds when the IRS issued task orders under the contract.[54] As such, the court held that the IRS "illegally used 2004 Act funds, without having first held a public-private competition" pursuant to Revised A-76.[55]

OMB's Latest A-76 Report

In April 2006, the OMB released its annual report concerning FY 2005 competitive sourcing in the federal government.[56] In this report, the OMB tracked competitive sourcing data pursuant to the President's Management Agenda (PMA).[57] The OMB reported that during FY 2005, federal agencies conducted 181 competitions involving 9,979 employees resulting in over $3 billion dollars in expected net savings.[58] The total number of competitions and number of affected employees were higher in FY 2004.[59]

The OMB identified some competitive sourcing trends for FY 2005.[60] Federal agencies determined that performance of commercial activities by in-house personnel was more cost-effective than private sector performance for sixty-one percent of the full-time equivalent (FTE) [61] employees competed.[62] The average number of FTEs per standard competition was 152, while the average number of FTEs per streamlined competition was ten.[63] During FY 2004 and FY 2005, eighty-two 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.[64] The average length of standard competitions was eleven months while the average length of streamlined competitions was two and one-half months.[65] In contrast to FY 2004,[66] the clear majority of the competitions in FY 2005

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[52] *Id.* at *16. The IRS, apparently, asserts its argument that the FY 2004 Act was not in effect on 31 October 2003 because the FY 2004 Act became law on 23 January 2004. *Id.*

[53] *Id.* at *16.

[54] *Id.* at *17.

[55] *Id.* at *19.

[56] U.S. OFFICE OF MANAGEMENT & BUDGET, REPORT ON COMPETITIVE SOURCING RESULTS FISCAL YEAR 2005 (April 2006), *at* http://www.whitehouse.gov/omb [hereinafter OMB 2005 REPORT]. This report compiles government-wide competitive sourcing data. *Id.*

[57] *See* U.S. OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE 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 (explaining that competitive sourcing is one of the key methods by which President Bush seeks to improve government performance).

[58] OMB 2005 REPORT, *supra* note 56, at 1, 14. The OMB explains that agencies predict that they will save in excess of $3 billion over the next five to ten years resulting from A-76 competitions completed in FY 2005. *Id.* Agencies achieve these savings by "modernization of facilities, the consolidation of operations and other process reengineering, the adoption of new technologies, improved performance standards, [and] workforce realignments. . ." *Id.*

[59] In contrast, in 2004, government agencies completed 229 competitions, cost comparisons and conversions, involving 13,323 FTEs resulting in only $1.4 billion in expected net savings. U.S. OFFICE OF MANAGEMENT AND BUDGET, REPORT ON COMPETITIVE SOURCING RESULTS FISCAL YEAR 2004, at 10, 33 (May 2005), *at* http://www.whitehouse.gov/omb [hereinafter OMB 2004 REPORT].

[60] OMB 2005 REPORT, *supra* note 56, at 3.

[61] A "full-time equivalent" (FTE) is defined as the "staffing of federal civilian employee positions, expressed in terms of annual productive work hours . . . FTEs may reflect civilian positions that are not necessarily staffed at the time of public announcement . . . The staffing and threshold FTE requirements stated in this circular reflect the workload performed by these FTE positions, not the workload performed by actual government personnel." REVISED A-76, *supra* note 1, at attch. D.

[62] OMB 2005 REPORT, *supra* note 56, at 12. As in prior years, the OMB compiled data regarding the performance decision as a percentage of FTEs competed rather than as a percentage of competitions completed. *Id.* Thus, the OMB states that competitions completed in FY 2005 resulted in performance by in-house employees for 61 percent of all of the FTEs competed; the OMB does not report the percentage of the time in-house employees won for all competitions completed. *Id.*

[63] REVISED A-76, *supra* note 1, at attch. B. An agency must utilize "standard competition" procedures if on the competition's start date, a commercial activity is performed by more than sixty-five FTEs. *Id.* Conversely, an agency may utilize "streamlined competition" procedures if on the start date, a commercial activity is performed by sixty-five or less FTEs. *Id.*

[64] OMB 2005 REPORT, *supra* note 56, at 9. OMB did not report separate statistics for FY 2005 regarding the commercial activities most frequently competed; rather, OMB combined these statistics for FY 2004 and 2005. *Id.*

[65] *Id.* at 12.

[66] OMB 2004 REPORT, *supra* note 59, at 33. In FY 2004, seventy-nine percent of the competitions were standard competitions. *Id.*

(sixty-nine percent) was streamlined.[67] Regarding the level of participation by the private sector, the OMB reported that agencies received two or more private sector offers in sixty-three percent of the standard competitions conducted in FY 2005.[68] Agencies received no private sector offers in eleven percent of the standard competitions.[69] Finally, agencies pursued larger standard competitions in FY 2005 (average of 152 FTEs) than in FY 2004 (average of 113 FTEs).[70]

Reports on Competitive Sourcing in DoD

The aforementioned OMB report,[71] a separate DoD report,[72] and a GAO report[73] provide data specifically on competitive sourcing results in the DoD. According to the OMB Report, in FY 2005, the DoD completed thirty-five competitions involving 2,500 FTEs.[74] Of these competitions, nine were standard competitions and twenty-six were streamlined; there were no direct conversions.[75] The average number of FTEs involved in the DoD standard competitions was two hundred and forty-four, while the average number of FTEs in DoD streamlined competitions was twelve.[76] The most frequently competed commercial activity in DoD was "maintenance and repair of buildings and structures."[77] Resembling the trend in other federal agencies, the performance decisions following DoD competitions favored in-house employees seventy-one percent of the time.[78]

The DoD Report also tracked the cost of conducting FY 2005 competitions, the expected cost savings resulting from conducting the 2005 competitions, and the actual savings from competitions completed.[79] During FY 2005, the DoD incurred costs totaling approximately $15.4 million attributable to conducting the competitions.[80] The DoD expects that it will realize savings of over $177 million for the competitions conducted in FY 2005.[81] From FY 2003-FY 2005, the DoD reported it actually saved over $308 million due to competitions completed during those three years.[82]

To a great extent, competitive sourcing trends in the DoD mirror the trends in other government agencies. For instance, in FY 2005, both the DoD and other federal agencies determined that in-house performance was less expensive than private sector performance the majority of the time.[83] Additionally, in both the DoD and other federal agencies, the vast majority of competitions in FY 2005 were streamlined competitions.[84]

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[67] OMB 2005 REPORT, *supra* note 56, at 28. In 2005, federal agencies completed 124 streamlined competitions and 57 standard competitions. *Id.*

[68] *Id*. at 11. This statistic covers seventy-five percent of the FTEs competed during FY 2005.

[69] *Id*.

[70] *Id.* at 28. *See also* OMB 2004 REPORT, *supra* note 59, at 33.

[71] OMB 2005 REPORT, *supra* note 56.

[72] U.S. DEP'T OF DEFENSE, REPORT: FY 2005 COMPETITIVE SOURCING EFFORTS (29 Dec. 2005), *at* http://sharea76.fedworx.org/inst/sharea76 [hereinafter DoD REPORT].

[73] U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT NO. GAO-06-72, HEALTH BENEFITS COST COMPARISON HAD MINIMAL IMPACT, BUT DOD NEEDS UNIFORM IMPLEMENTATION PROCESS (Dec. 2005) [hereinafter GAO A-76 REPORT] (Report to Congressional Committees).

[74] OMB 2005 REPORT, *supra* note 56. This total includes all competitions completed in FY 2005 regardless of when initiated.

[75] *Id.* While the OMB report states that DoD completed nine "standard competitions," these nine competitions were actually "cost comparisons" conducted under the previous circular. DoD REPORT *supra* note 72, at 1-3.

[76] OMB 2005 REPORT, *supra* note 56, at 28.

[77] *Id.* at 32.

[78] *Id.* at 33.

[79] DoD REPORT, *supra* note 72, at 4-5.

[80] *Id*.

[81] *Id*.

[82] *Id*.

[83] OMB 2005 REPORT, *supra* note 56, at 33.

[84] *Id.* at 11 and 28.

The reports from both the OMB and the GAO analyzed a recurring provision in the annual DoD appropriations acts[85] requiring that contractors competing in a competition involving more than ten FTEs under Revised A-76 provide a minimum amount of health care for its employees.[86] Specifically, this provision prohibits the DoD from giving any advantage to a private sector proposal where (1) the proposal either provides no health benefits at all or (2) the proposal requires the employer to contribute less for such benefits than the DoD contributes for its civilian employees.[87] The OMB took the position that this requirement creates a disincentive for private contractors to participate in a Revised A-76 competitions referring to these provisions as "statutory constraints on the use of competitive sourcing."[88] The OMB stated that this restriction is especially harsh for small businesses and that it "eliminates incentives for contractors to provide cost-effective health benefits, such as through health saving and medical saving accounts."[89]

Similarly, the GAO report analyzed the effect of the health benefits language on DoD A-76 competitions.[90] The GAO analyzed how the DoD was applying the above provision and also what impact, if any, the provision had on DoD's competitive sourcing program.[91] The GAO determined that this language affected only twelve of the fifty-four competitions the GAO studied. Of these twelve competitions, the GAO found that the health benefits cost provision did not affect the outcome of the final sourcing decision, and thus, had little impact on DoD's competitive sourcing program.[92] The GAO also concluded that the DoD did not have a consistent policy for implementing this health benefits provision in its A-76 competitions.[93]

Following the above GAO report, the Deputy Under Secretary of Defense (Installations and Environment) issued a policy memorandum implementing the above health benefits provision of the FY 2006 DoD Appropriations Act.[94] This policy requires the DoD to use a uniform process, outlined in the memorandum, to evaluate the health benefits portion of a private sector offer submitted in an A-76 competition. In particular, this policy requires the DoD to state in all A-76 solicitations that a private sector offeror must state in the offers whether it includes a health benefits plan. If the offer does include a health benefits plan, then the DoD will assess the "ratio of a private sector offeror's health insurance contribution to its direct labor costs to determine if the ratio is equal to, or greater than, the standard health benefit cost factor used in the agency cost estimate" [in calculating the total cost of the agency tender].[95] Regarding the ratio of the private sector offer's health insurance contribution to its direct labor costs, the memorandum states:

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[85] National Defense Appropriations Act for FY 2006, Pub. L. No. 109-148, § 8014(a)(3), 119 Stat. 2680; National Defense Appropriations Act for FY 2005, Pub. L. No. 108-287 § 8014(a)(3), 118 Stat. 951 (2004). This recurring provision, also present in the National Defense Appropriations Act for FY 2007, Pub. L. No. 109-289, § 8013(a)(3) (2006) limits DoD's A-76 competitions involving more than ten FTEs by providing no funding for competitions resulting in contract performance where the contractor does not afford a certain minimal amount of health care benefits for its employees. This provision provides:

> None of the funds appropriated by this Act shall be available to convert to contractor performance an activity or function of the Department of Defense that. . .is performed by more than 10 Department of Defense civilian employees unless. . .
>
> (3) the contractor does not receive an advantage for a proposal that would reduce costs for the Department of Defense by—
>
> (A) not making an employer-sponsored health insurance plan available to the workers who are to be employed in the performance of that activity or function under the contract; or
>
> (B) offering to such workers an employer-sponsored health benefits plan that requires the employer to contribute less towards the premium or subscription share than the amount that is paid by the Department of Defense for health benefits or civilian employees under chapter 89 of title 5, United States Code.

Id. § 8014(a)(3).

[86] *Id.*

[87] *Id.*

[88] OMB 2005 REPORT, *supra* note 56, at 20.

[89] *Id.*

[90] GAO A-76 REPORT, *supra* note 73, at 27. This report analyzed fifty-four DoD A-76 competitions that were either in progress or were completed in FY 2005. *Id.* The GAO's study encompassed more competitions than only the thirty-five which DoD completed in FY 2005. *Id.*

[91] *Id.* at 2.

[92] *Id.* at 19.

[93] *Id.*

[94] Memorandum, Deputy Under Secretary of Defense (Installations and Environment), to DoD Components, subject: Competitive Sourcing Program Policy—Private Sector Health Insurance Costs in Public-Private Competitions, (1 May 2006), *available at* http://sharea76.fedworx.org/inst/sharea76 [hereinafter Competitive Sourcing Memo].

[95] *Id.*

> If the ratio is less than the standard health benefit cost factor used in the agency cost estimate, the DoD . . . shall make an upward adjustment for all performance periods to the evaluated cost of the private sector offer's cost proposal, so that the ratio is equal to the standard health benefit cost factor.[96]

In summary, regarding the aforementioned health benefits language required by a recurring provision in the DoD appropriations acts, the GAO determined that the language did not affect the outcome of any sourcing decisions.[97] Additionally, while the GAO found that the DoD did not have a consistent policy for implementing this provision, the DoD issued a memorandum requiring the armed services to implement a consistent policy.[98]

Extra! Extra! Read All About the Amendment to the A-76 Statute

On 6 January 2006, section 341 of the National Defense Authorization Act for FY 2006 permanently amended 10 U.S.C. § 2461[99] making significant changes to DoD public-private competitions under Revised A-76.[100] The statute imposes a number of requirements upon a DoD agency conducting a competition under Revised A-76 if the commercial activity is being performed "by 10 or more Department of Defense civilian employees."[101] Consequently, if a particular DoD competition meets the "10 or more" threshold, the agency must: (1) develop an agency tender and an MEO, (2) issue a solicitation, (3) utilize a cost conversion differential in determining whether to award a contract,[102] and (4) submit a report to Congress prior to commencing the competition.[103]

This amendment to the public-private competition statute is significant for two reasons. First, the amended statute permanently imposes additional restrictions on DoD A-76 competitions over a certain threshold.[104] Prior to the amendment, Congress had imposed some of the same restrictions on an annual basis in the yearly appropriations act.[105] Second, the statute apparently conflicts with another threshold in the National Defense Appropriations Act for FY 2007 (FY07 Appropriations Act) for some of the same requirements.[106] For example, while 10 U.S.C. § 2461 now states that the key threshold is "10 or more"[107] DoD employees, the FY07 Appropriations Act states that the key threshold is "more than 10"[108] (meaning 11 or more). So, while the statute requires the DoD to create an MEO and utilize the cost conversion differential when the function is being performed by "10 or more" employees, the FY07 Appropriations Act imposes this requirement only when the function is being performed by "more than 10" employees. Despite this apparent conflict in the law, because the amended statute—unlike the similar language in the appropriation act—is a permanent change to the law, the permanent statutory language should take precedence over any conflicting language in the annual appropriations act.

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[96] *Id.*

[97] GAO A-76 REPORT, *supra* note 73, at 27.

[98] Competitive Sourcing Memo, *supra* note 94.

[99] 10 U.S.C.S. § 2461 (LEXIS 2006).

[100] National Defense Authorization Act for FY 2006, Pub. L. No. 109-163, § 341, 119 Stat. 3195 (2006).

[101] *Id.*

[102] National Defense Appropriations Act for FY 2006, § 341. The "cost conversion differential" contained in the amended statute states that after the completion of a competition under OMB Circular A-76, government employees will continue to perform the function "unless the difference in the cost of performance by a contractor compared to the cost of performance of the function by . . . civilian employees would exceed the lesser of 10 percent" of the agency tender's personnel-related costs or $10,000,000. *Id.* So, this cost conversion differential prevents the DoD from converting a commercial activity to private performance when savings would be insignificant. *Id.*

[103] *Id.*

[104] 10 U.S.C.S. § 2461.

[105] National Defense Appropriations Act for FY 2006, Pub. L. No. 109-148, § 8014, 119 Stat. 2814 (2005). This section requires DoD to create an MEO and to use a cost conversion differential in determining whether to award a contract in A-76 competitions involving "more than 10" FTEs. *Id.* The prior year's appropriations act contained identical language. National Defense Authorization Act for FY 2005, Pub. L. No. 108-287, § 8014, 118 Stat. 951 (2004).

[106] National Defense Appropriations Act for FY 2007, Pub. L. No. 109-289, § 8014, 120 Stat. 1257 (2006).

[107] 10 U.S.C.S. § 2461.

[108] National Defense Appropriations Act for FY 2007, § 8014.

GAO's Latest Housing Privatization Report

In April 2006, the GAO issued a report[1] on the military's family housing privatization program.[2] The GAO's objective in undertaking this study was to assess "whether opportunities exist to improve DoD's oversight of awarded housing privatization projects and to what extent projects are meeting occupancy expectations."[3] The GAO made two major findings.[4] First, it found that the DoD could improve its oversight of awarded privatization projects. Second, it found that the low actual occupancy rates of some privatization projects could create future problems. Finally, the GAO made specific recommendations addressing these findings.[5]

The GAO explained three reasons for its finding that the DoD could improve oversight of awarded housing privatization projects.[6] First, the GAO stated that the Navy's privatization program failed to identify internal problems and further that the Navy reported inaccurate information to the Office of the Secretary of Defense (OSD) for five of the eight projects the GAO reviewed.[7] Second, the GAO stated that the OSD's privatization oversight report was inadequate in that the document was too long, untimely, and often inaccurate.[8] Third, the GAO stated that the armed services used varying methods to gather data regarding housing occupants' satisfaction with the privatization program. The GAO opined that these varying methods reduced the value of the data.[9]

The GAO next explained the reasons for finding that the low occupancy rates in privatized housing could create future problems for housing projects.[10] While the DoD originally anticipated occupancy rates ranging from ninety to ninety-five percent, the actual occupancy rates were much lower. For example, the occupancy rates were below ninety percent in six of nineteen Army projects, four of thirteen Navy and Marine Corps projects, and six of twelve Air Force projects. Additionally, the GAO found that the recent increase in DoD's housing allowances has encouraged many service members to forego living in privatized housing.[11] Consequently, lower occupancy rates results in a decreased cash flow to the developer which, in turn, results in decreased funds to operate the privatization projects. At worst, these reduced funds could result in the

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[1] U.S. GOV'T ACCOUNTABILITY OFF., REPORT NO. GAO 06-438, MILITARY HOUSING: MANAGEMENT ISSUES REQUIRE ATTENTION AS THE PRIVATIZATION PROGRAM MATURES (Apr. 28, 2006) [hereinafter GAO PRIVATIZATION REPORT].

[2] The DoD has permanent authority to privatize military family housing. 10 U.S.C.S. §§ 2871-85. When a military service decides to privatize military family housing at a particular installation, the service normally conveys the housing units to a developer and then it leases the underlying land to the same developer. Office of the Deputy Undersecretary of Defense, Installations and Environment, Military Housing Privatization, Military Housing Privatization Initiative (MHPI) (10 Sept. 2006), http://www.acq.osd.mil/housing (last visited 5 Nov 2006). The developer is then responsible for providing suitable housing to military families. *Id.* The privatization project developer's income stream is the service members' housing allowance. *Id.*

[3] GAO PRIVATIZATION REPORT, *supra* note 1, at 1.

[4] *Id.* at 2-4.

[5] *Id*. at 5.

[6] *Id*. at 11.

[7] *Id*. at 12-14. In criticizing the Navy's oversight program, the GAO explained how the Navy failed to identify operational issues and where it failed to report accurate information to the Office of the Secretary of Defense (OSD). *Id.* For example, while a GAO team visited a Navy privatization project at the Naval Air Station in Kingsville, Texas, the GAO found that housing privatization project funds had not been disbursed as the project agreement required. *Id.* Regarding the Navy's reporting inaccurate information to OSD, the GAO stated that the Navy erroneously reported to OSD that the total cost of the San Diego II housing privatization project was $304 million, while the correct amount was $427 million. *Id.* The report listed other examples of inaccurate reporting. *Id.*

[8] *Id*. at 15-16. In criticizing the OSD's privatization oversight report, the GAO stated that the sheer number of DoD housing privatization projects has resulted in the report becoming too lengthy and unfocused. *Id.* The GAO recommended that OSD streamline its report format so that the report will not continue to expand as more privatization projects are awarded. *Id.* The GAO further stated that because of sluggish reporting by the armed services, by the time OSD compiles its report, the information it contains is out-of-date. *Id.* Because OSD relied upon some inaccurate information in compiling its report, OSD's report also contained inaccuracies. *Id.*

[9] *Id*.

[10] *Id.* at 19. GAO based its conclusions about occupancy rates on a review of all of DoD's awarded privatization projects. *Id.* As of September of 2005, the services had awarded forty-four housing privatization projects. *Id.* In twenty of these forty-four projects, project managers had rented housing units to non-target tenants (i.e. single individuals, military civilians, and the general public). *Id.* In particular, at Patrick Air Force Base, military families occupied only 172 of the 592 available units in September of 2005; non-target tenants occupied 261 units, to include 126 civilians. *Id.* at 25.

[11] Until 2001, the DoD housing allowance only partially reimbursed service members for their off-base housing costs. *Id.* at 27. For example, in 2000, the average housing allowance reimbursed only eighty-one percent of a member's off-base housing costs; currently, the average housing allowance reimburses all of a member's off-base housing costs. *Id.*

developer's default on the project. Thus, lower occupancy rates could place privatization projects at risk by leading to a developer's financial instability.[12]

The GAO made five recommendations to DoD regarding its findings in this report.[13] First, the GAO recommended that the Navy improve oversight of its privatization program. Second, the GAO recommended that the DoD streamline its privatization program report and to make efforts to ensure its accuracy. Third, the GAO recommended that the DoD require the armed services to collect customer satisfaction data—concerning housing privatization—in a consistent manner. Fourth, the GAO recommended that the DoD determine how low occupancy rates in privatized housing will affect DoD's overall privatization program. Finally, the GAO recommended that the DoD revise its housing privatization manual in order to more accurately predict future privatized housing requirements.[14]

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

[13] *Id.* at 31-32.

[14] *Id*.

Specifications Trump Drawings Where Drawings Conflict with Specifications

The Court of Appeals for the Federal Circuit (CAFC) reversed the Armed Services Board of Contract Appeals' (ASBCA's) grant of a summary judgment motion in favor of the government in a case where drawings and specifications conflicted.[1] The court held that where construction drawings only indicate one of two options that the contract specifications listed, the contractor is entitled to use either of the two options listed in the specifications.[2] The ASBCA earlier interpreted the contract in a way that the drawings merely narrowed the specifications, but did not conflict with them and, therefore, entered summary judgment for the government.[3] The CAFC disagreed and found that the specifications conflicted with the drawings.[4]

The contract giving rise to this disputed claim required the construction of a vehicle maintenance facility at Fort Hood, Texas. The specifications in the contract stated that either polystyrene rigid insulation or pre-cast concrete were approved materials for concrete framework.[5] The drawing detail indicated required dimensions for pre-cast concrete forms, but was silent on polystyrene forms.[6] The contractor elected to use the cheaper polystyrene forms but the government later directed the contractor to use pre-cast concrete in accordance with the drawing detail.[7] The contractor filed a claim for the increased cost to use the concrete forms.[8]

The contract contained the standard construction clauses, including *FAR part 52.236-21, Specifications and Drawings for Construction*, which basically states that in the case of a conflict between the specifications and drawings, the specifications control.[9] The government argued at both the ASBCA and in the appeal that the drawings merely narrowed the specifications and did not conflict with them.[10] The contractor argued at the Board and on its appeal that the "contract must be interpreted in its entirety, giving meaning to all its terms," and that in so doing *FAR 52.236-21* demands that the specifications prevail.[11] The ASBCA, relying on a short line of cases, ruled in favor of the government on the grounds that "a specification provision that allows latitude or options is not in conflict with contracting drawings that narrow the latitude or options."[12]

The court reversed the ASBCA.[13] The court correctly points out that the government's interpretation of the contract does not merely *narrow* the scope of the contractor's options, it *eliminates* an option and the court rejects the cases upon which the

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[1] Medlin Constr. Group, Ltd v. Harvey, 449 F.3d 1195 (Fed. Cir. 2006).

[2] *Id*.

[3] Medlin Constr. Group, ASBCA No. 54772, 05-1 BCA ¶ 32,939.

[4] *Medlin*, 449 F. 3d at 1196.

[5] *Id*. at 163,179.

[6] *Id*. at 163,180.

[7] *Id*.

[8] *Id*.

[9] This clause states in pertinent part that:

> (a) The Contractor shall keep on the work site a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. *Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern.* In case of discrepancy in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without such a determination shall be at its own risk and expense. The Contracting Officer shall furnish from time to time such detailed drawings and other information as considered necessary, unless otherwise provided. (emphasis added).

[10] Medlin Constr. Group, ASBCA No. 54772, 05-1 BCA ¶ 32,939, at 163,181.

[11] *Id*.

[12] *Id*. at 163,182. Interestingly, none of the cases cited by the ASBCA dealt with specification options being eliminated in the drawings as in this case, only that the latitude on how to do the work was limited.

[13] Medlin Constr. Group, Ltd v. Harvey, 449 F.3d 1195 (Fed. Cir. 2006).

government and the ASBCA relied.[14] Then, rather than simply relying on the Specifications and Drawings for Construction Clause, the court applied the basic contract interpretation principle that contracts should first be looked at to give meaning to each and every provision of the contract.[15] Under this analysis, the court held that only the contractor's interpretation of the specifications and drawings give meaning to both and remanded the case to the ASBCA with instructions to enter summary judgment for the contractor and to determine quantum.[16]

Procedurally Deficient Type II Differing Site Condition Claim Sustained Where Government Can't Show Prejudice

The ASBCA sustained a contractor's Type II Differing Site Condition claim despite the fact that the contractor did not comply with the written notice provision's in the Differing Site Conditions Clause.[17] The Board held that the procedural deficiency did not prejudice the government.[18]

In this case, the contractor damaged its equipment when it encountered unexpected obstacles and debris while digging electrical conduit lines.[19] Although the government was aware of the conditions based on meetings and site visits, the government argued that the contractor could not recover because it failed to provide the prompt written notice required by the contract clause.[20]

In sustaining the contractor's clam, the Board held that "[t]he written notice requirements are not construed hypertechnically to deny legitimate contractor claims when the government was otherwise aware of the operative facts."[21] The Board also stated that "[t]he written notice requirement is waived if the government has actual or constructive notice of the conditions encountered and is thus not prejudiced by lack of [written] notice from the contractor."[22] The Board found that the government failed to make any showing of prejudice "from the passage of time or an inability to minimize extra costs resulting from any delay in receiving prompt written notice"[23] and the case was remanded to the parties to negotiate the quantum.[24]

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[14] *Id*. at 1202.

[15] *Id*. at 1201.

[16] *Id*. at 1204.

[17] FAR 52.236-2, Differing Site conditions (Apr 1984), which states in pertinent part that:

> (a) The contractor shall *promptly*, and before the conditions are disturbed, give a written notice to the Contracting Officer of . . . (2) unknown physical conditions at the site, of an unusual nature, which differs materially from those ordinarily encountered and generally recognized as in inhering in work performed of the character provided for in the contract. . . .
>
> (c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the *written* notice required; . . . .

U.S. GENERAL SERVS. ADMIN ET. AL., FEDERAL ACQUISITION REGULATION PT. 55.236.2 (July 2006) (emphasis added).

[18] Parker Excavating, Inc., ASBCA No. 54637, 06-1 BCA ¶ 33,217.

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

[20] *Id*. at 21.

[21] *Id*. at 24.

[22] *Id*.

[23] *Id*.

[24] *Id*. at 25.

Increased Threshold for Requirement to Provide Performance and Payment Bonds for Construction Contracts

The Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council (FAR Councils) raised the minimum purchase threshold from $25,000 to $30,000 for requiring performance and payment bonds in construction contracts, or alternative payment protections in the case of contracts not greater than $100,000.[1] The Council took this action in accordance with section 807 of the Ronald Reagan National Defense Authorization Act of 2005 directing that certain acquisition thresholds be periodically adjusted in response to future inflation.[2]

Bid Bond Broker's Questionable Conduct Not Imputed to Bidder

The Court of Federal Claims (COFC) declined to impute an insurance broker's questionable conduct to a bidder whose bid a contracting officer determined to be nonresponsive because the amount of the contractor's bid bond exceeded the amount authorized by their surety.[3]

In this case arising out of a construction and repair contract at the Fresno Air National Guard Station, Aeroplate submitted a bid bond to cover the value of its apparent winning bid of $7.3 million. When the government called the surety to validate the bid bond before award, the surety informed the official that the bid bond was only for bids not exceeding $5.5 million. Upon further investigation, the contracting officer discovered that the surety's broker was aware of this limitation, but prepared a bid bond for $7.3 to cover Aeroplate's bid.[4] Because the contracting officer knew of this information before award, the contracting officer found Aeroplate's bid nonresponsive even though the bid bond was facially valid.[5]

The COFC first restated the basic principle of suretyship law that the government generally cannot challenge a facially valid bid bond. The government must instead rely on other remedies after the bidder is awarded the contract if it later fails to submit the required performance and payment bonds.[6] The COFC went on to address the government's "unclean hands" argument and stated that although the broker knew they were submitting a bid bond that exceeded the surety's authorization, there was no evidence that the bidder knew that the bid bond exceeded the surety's authorization.[7] Therefore, the COFC declined to impute the broker's knowledge to the bidder to tarnish it with "unclean hands" and thus prevent it from recovering in a court of equity.[8] In reaching its conclusion, the court relied on the relatively common industry practice of brokers issuing bid bonds that exceed a surety authorization.[9]

Payment Bond Surety Can Bring Action under Tucker Act[10]

In a case arising out of a U.S. Army Corps of Engineers contract in Massachusetts, the Court of Federal Claims rejected the government's challenge to the long-standing authority permitting a payment bond surety to bring suit under the Tucker

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[1] Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds, 71 Fed. Reg. 188, at 57,366 (effective 28 Sept. 2006). *See also* U.S. GEN. SRVS. ADMIN, ET. AL., FEDERAL ACQUISITION REG. pt. 28.102 (July 2006).

[2] Pub. L. No. 108-375, 118 Stat. 1974 (2004).

[3] Aeroplate Corp. v. United States, 71 Fed. Cl. 568 (2006).

[4] *Id*. at 569.

[5] *Id*.

[6] *Id*.

[7] *Id*.

[8] *Id*. at 571.

[9] *Id*. at 570.

[10] The case discussed below is one representative case out of a series of at least five cases the Court of Federal Claims decided the past year in which they came to a consistent conclusion – that the Tucker Act gives even a *payment* bond surety the jurisdictional predicate to step in the shoes of the contractor to recover retained funds. Only one case is discussed for economy of space purposes. For additional cases on point, *see* Commercial Cas. Ins. Co. of Ga. v. United States, 71 Fed. Cl. 104 (2006); Liberty Mutual Ins. Co. v. United States, 70 Fed. Cl. 37 (2006); Nova Cas. Co. v. United States, 69 Fed. Cl. 284 (2006); and Nat' l Am. Ins. Co. v. United States, 72 Fed. Cl. 251 (2006).

Act to recover for payments made to subcontractors when the government releases retained funds to the contractor after notification by the surety of their performance.[11]

In this case, the contractor, M.A.T. Marine, Inc., successfully completed performance on a project but arguably defaulted on its obligation to pay certain laborers and materialmen. Traveler's Insurance, the payment and performance surety, paid the subcontractors and suppliers and notified the government of their action.[12] Following completion of the project, and *after* the surety had notified the government of their actions under their payment bond and requested that the government withhold payment to the contractor, the government nonetheless released retained funds to M.A.T Marine, Inc. Traveler's then brought suit to recover their payments under the doctrine of equitable subrogation.[13]

The COFC held that the

> Tucker Act's waiver of sovereign immunity encompasses the claim of a surety that has satisfied all of its obligations under a payment bond and is therefore subrogated to the equitable rights of the contractor, to recover from the United States an amount equal to the damages it suffered with respect to the payment bond."[14]

Before finding in favor of the surety in this case, the court summarized the surety's equitable rights to subrogation as follows:

> a surety that satisfies its payment, but not its performance, bond and settles all unpaid claims of laborers and materialmen is subrogated to the equitable rights both of the subcontractors and of the prime contractor in any retained contract funds, with the limitation that a payment-bond surety has a priority inferior to the government's right to set off the remaining contract balance if the United States has an unsettled claim against the contractor.

Major Michael S. Devine

[11] The Traveler's Indemnification Co. v. United States, 72 Fed. Cl. 56 (2006).

[12] *Id*. at 58.

[13] *Id*. "The doctrine of equitable subrogation has been described by the Supreme Court as one 'not founded in contract [, but rather,] . . . a creature of equity . . . enforced solely for the purpose of accomplishing the ends of substantial justice . . . and independent of any contractual relations between the parties.'" *Id.* at 60 (quoting Memphis & L.R.R. Co. v. Dow, 120 U.S. 287, 301-302 (1887).

[14] *Traveler's Indemnification*, 72 Fed. Cl. 56, at 66.

New FAR Part 18

The Civilian Agency Acquisition Council and the Defense Acquisition Council (FAR Councils) published an interim rule through FAR Case 2005-038, Emergency Acquisitions.[1] This interim rule revises *FAR part 18, Emergency Acquisitions*, "to provide a single reference to acquisition flexibilities that may be used to facilitate and expedite acquisitions of supplies and services during emergency situations."[2] The interim rule does not provide any additional emergency acquisition flexibilities, policies, or procedures.[3] Rather, part 18 provides a single reference for the various flexibilities located throughout the *FAR*.[4] The interim rule became effective on 5 July 2006, and comments were due by 5 September 2006.[5]

Part 18 is divided into two subparts: *subpart 18.1, Available Acquisition Flexibilities*, which "identifies the flexibilities that may be used anytime and do not require an emergency declaration;"[6] and *subpart 18.2, Emergency Acquisition Flexibilities*, which "identifies the flexibilities that may be used only after an emergency declaration or designation has been made by the appropriate official."[7] The Emergency Acquisition Flexibilities subpart is further divided into three sections: Contingency Operation, Defense or Recovery from Certain Attacks, and Incidents of National Significance, Emergency Declaration, or Major Disaster Declaration.[8]

SIGIR Reports

The Special Inspector General for Iraq Reconstruction (SIGIR) published a report titled, Iraq Reconstruction: Lessons in Contracting and Procurement (Iraq Contracting Report), in July 2006.[9] The Iraq Contracting Report is the second in a series of three reports published by the SIGIR addressing the reconstruction efforts in Iraq under the SIGIR's Lessons Learned Initiative (LLI).[10] The Iraq Contracting Report "provides a chronological review of the U.S. government's contracting and procurement experience during the Iraq relief and reconstruction program."[11] Following the review, the SIGIR then provides lessons learned from this process and recommendations for improving contingency contracting in the future.[12]

The Iraq Contracting Report explores the variety of planning approaches used by different agencies involved in the Iraq reconstruction effort, and reviews funding allocations provided by Congress through various stages of the reconstruction.[13] For the uninitiated, the Iraq Contracting Report gives a look into the complex process of planning for and executing a massive foreign rebuilding effort. For those with prior exposure to the Iraq reconstruction effort, the Report reminds how the process began and highlights the successes, failures, and lessons learned. "SIGIR divides this report into four chronological periods and one functional concept area."[14] The Iraq Contracting Report begins in the summer of 2002 with what it terms the "Pre-ORHA Period,"[15] and follows through "The ORHA and Early-CPA Period,"[16] "The Later CPA Period,"[17] and "The

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[1] Federal Acquisition Regulation; Emergency Acquisitions, 71 Fed. Reg. 38,247 (July 5, 2006) (to be codified at 48 C.F.R. pt. 18).

[2] *Id*.

[3] *Id*. at 38,248.

[4] *Id*.

[5] *Id*. at 38,247.

[6] *Id*. at 38,248.

[7] *Id*.

[8] *Id*.

[9] SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, IRAQ RECONSTRUCTION: LESSONS IN CONTRACTING AND PROCUREMENT (July 2006).

[10] *Id*. at 9. The Special Inspector General for Iraq Reconstruction (SIGIR) Lessons Learned Initiative (LLI) began in September 2004, and includes reports addressing three areas: human capital management, contracting and procurement, and program and project management. *Id*.

[11] *Id*.

[12] *Id*.

[13] *Id*. at 10.

[14] *Id*. at 11.

[15] *Id*. The Pre-ORHA Period covers the period from the summer of 2002 to January 2003. *Id*. "ORHA" stands for Office of Reconstruction and Humanitarian Assistance. *Id*. at 14. This period was characterized by classified, uncoordinated agency action. *Id*.

Post-CPA Period."[18] The functional area addresses the Commander's Emergency Response Program (CERP) and the Commanders Humanitarian Relief and Reconstruction Program (CHRRP).[19]

Following the historical review, the SIGIR provides key lessons learned and recommendations.[20] Lessons learned were broken into two sections: strategy and planning, and policies and process.[21] Lessons in strategy and planning consisted of: including contracting staff in the planning process; ensuring all agencies operate under the same system of roles and responsibilities; emphasizing flexible programs for smaller-scale reconstruction such as the CERP; and generally avoiding sole-sourced and limited competition procurements.[22] Lessons learned in policies and process consisted of: establishing a single, simple, uniform set of contracting regulations; developing contracting systems for contingency operations; designating a single contracting entity to coordinate all contracting in theater; ensuring adequate requirements data; avoiding design-build contracts for small-scale projects; and using assessment and audit teams.[23]

The SIGIR then provides six recommendations to address the lessons learned.[24] First, DoD should lead "[a]n interagency working group . . . [to develop] a single set of simple and accessible contracting procedures for use in post-conflict reconstruction situations."[25] The SIGIR refers to this as the "Contingency FAR (CFAR)."[26] Second, Congress should "legislatively institutionalize" programs such as CERP and CHRRP for use in future operations.[27] Third, contracting staff should be included at all planning stages for contingency operations.[28] Fourth, a "deployable reserve corps of contracting personnel" should be created to be called on in contingency operations.[29] Fifth, information systems for managing contracts in contingency operations should be developed.[30] Finally, the SIGIR recommends that a "diverse pool of contractors with expertise in specialized reconstruction areas" be pre-qualified, and contracts possibly pre-competed.[31]

The SIGIR also published a report titled Review of Task Force Shield Programs (TFS Report) in April 2006.[32] The TFS Report "addressed the U.S.-led effort, implemented by Task Force Shield, from September 2003 through April 2005, to build the capacity of the Iraqi government to protect its oil and electrical infrastructure."[33] The SIGIR notes that "during the course of this review there was a lack of available program, financial, and contract records" and that "we did not receive access to selected information we requested from the Multi-National Force-Iraq subordinate commands . . ."[34]

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[16] *Id*. at 11. The ORHA and Early-CPA Period covers the time from January 2003 to August 2003. *Id*. The ORHA was created in January 2003 to manage reconstruction and humanitarian activities in Iraq, but was based in Washington, D.C. *Id*. at 18. The Coalition Provisional Authority (CPA) was created to replace the ORHA between April and June 2003. *Id*. at 23.

[17] *Id*. at 11. The Later CPA Period covers August 2003 to June 2004. *Id*. This period was characterized by a shift in contracting emphasis from humanitarian relief and restoration of essential services to large-scale infrastructure projects. *Id*. at 34.

[18] *Id*. at 11. The Post-CPA Period covers the period from June 2004 to the time of the Report. *Id*. "On June 28, 2004, the CPA Administrator transferred sovereignty to the Iraq Interim Government (IIG)." *Id*. at 68. Despite this transfer of authority, the U.S. government maintained a substantial contracting presence in Iraq. *Id*.

[19] *Id*. at 11. The Commander's Emergency Relief Program (CERP) was created to assist lower level commanders to "contract, procure, and implement small projects in a short timeframe." *Id*. at 81. The Commanders Humanitarian Relief and Reconstruction Program (CHRRP) was developed to "target reconstruction of water and sewerage services, primarily in Baghdad." *Id*.

[20] *Id*. at 93.

[21] *Id*. at 94-95.

[22] *Id*. at 94.

[23] *Id*. at 95.

[24] *Id*. at 97.

[25] *Id*.

[26] *Id*.

[27] *Id*.

[28] *Id*. at 98.

[29] *Id*.

[30] *Id*.

[31] *Id*. at 99.

[32] SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, REVIEW OF TASK FORCE SHIELD PROGRAMS (REPORT NO. SIGIR-06-009) (Apr. 28, 2006).

[33] *Id*. at i.

[34] *Id*.

Aside from a lack of access to information, the SIGIR reported that "[m]ost of the information we gathered generally indicates that the lack of a clear management structure for the U.S. agencies responsible for the protection of Iraq's security degraded the ability of Task Force Shield to effectively manage the [Oil Protective Force] OPF and [Electrical Power Security Service] EPSS."[35] The SIGIR found that OPF was not successful and that EPSS "barely got started before it was cancelled."[36] The SIGIR further found that money management was not documented and there were indications of potential fraud.[37] From these findings, the SIGIR recommends that the Iraq Reconstruction Management Office (IRMO) and the Joint Contracting Command—Iraq/Afghanistan (JCC-I/A) cooperate to solve these issues.[38]

Major Mark A. Ries

[35] *Id*.

[36] *Id*.

[37] *Id*. at i-ii.

[38] *Id*. at ii-iii.

Information Technology (IT)

These Laptops Are Not *Made for Walkin'*

The main development this past year in IT was the potential compromise of personal data from government laptop computers. In early May, the Department of Veterans Affairs (VA) reported the theft of a department laptop computer from an employee's home.[1] Law enforcement officials later recovered the stolen computer, which contained personal information on approximately 26.5 million people.[2] This theft prompted the Government Accountability Office (GAO) to warn that "[r]obust federal security programs are critically important to properly protect this information and the privacy of individuals."[3] Heeding this warning, the VA awarded a $3.7 million contract to install encryption software on "department computers and portable media, such as mobile e-mail devices, flash drives and CDs."[4]

The VA was not alone in reporting such security breaches. The Commerce Department reported the loss or theft of 1,137 laptops since 2001, and also could not account for fifteen handheld devices and forty-six thumb drives since 2003.[5] An internal report at the Department of Homeland Security also noted problems with laptop security.[6] The Department of Education acknowledged losing personal information of 11,000 student aid borrowers.[7] Within the Department of Defense (DoD), "a Navy recruiter . . . lost 30,000 records when a bag holding his laptop fell off his motorcycle in August."[8]

These security breaches prompted the Chairman of the House Committee on Government Reform to require all agencies to report similar losses or breaches of security.[9] As of this writing, the departments of Defense, Treasury and Health and Human Services had not reported their losses.[10] With Congress considering a data breach bill,[11] all agencies should expect to see greater reporting requirements, as well as an increased procurement focus on data security.

Do NOT Go to the Head of the Class

In March 2006, the House Committee on Government Affairs issued its annual "federal computer security scorecards,"[12] tracking agency compliance with the Federal Information Security Management Act (FISMA).[13] Using inflammatory language in an accompanying press release,[14] Committee Chair Tom Davis released computer security "grades" for twenty-

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[1] Daniel Pulliam, *House Passes IT Security Bill*, GovExec.com (Sept. 27, 2006), *at* http://www.govexec.com/dailyfed/0906/092706pl.htm.

[2] *Id.*

[3] U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-06-897T, INFORMATION SECURITY: LEADERSHIP NEEDED TO ADDRESS WEAKNESSES AND PRIVACY ISSUES AT VETERANS AFFAIRS, at Highlights (June 20, 2006).

[4] Daniel Pulliam, *VA Installs Encryption Software on Thousands of Laptops*, GovExec.com (Sept. 26, 2006), *at* http://www.govexec.com/dailyfed/0906/092606pl.htm.

[5] Daniel Pulliam, *Commerce Reports Loss of More Than 1,100 Laptops*, GovExec.com (Sept. 22, 2006), *at* http://www.govexec.com/dailyfed.0906/092206pl.htm.

[6] Daniel Pulliam, *Review: Security Flaws Place DHS Inspectors' Laptops at Risk*, GovExec.com (Oct. 2, 2006), *at* http://www.govexec.com/dailyfed/1006/100206pl.htm.

[7] CBS News, *More Government Laptops Missing* (Sept. 22, 2006), *available at* http://www.cbsnews.com/stories/200609/22/national/printable2032797.shtml [hereinafter CBS News].

[8] *Id.*

[9] Committee on Government Reform, *Davis Data Breach Bill Approved by House* (Sept. 27, 2006), *available at* http://reform.house.gov/GovReform/News/DocumentSingle.aspx?DocumentID=50834.

[10] CBS News, *supra* note 7.

[11] H.R. 5838, 109th Cong. (2006), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.05838 (last visited Oct. 13, 2006).

[12] Committee on Government Reform, *Leave No Computer System Behind: A Review of the 2006 Federal Computer Security Scorecard* (Mar. 16, 2006), *available at* http://reform.house.gov/GovReform/Hearings/EventSingle.aspx?EventID=40364 [hereinafter *Leave No Computer System Behind*].

[13] Pub. L. No. 107-347, 116 Stat. 2899 (2002).

[14] *Leave No Computer System Behind*, *supra* note 1607. ("If FISMA was the No Child Left Behind Act, a lot of critical agencies would be on the list of 'low performers.'").

four agencies, which averaged a D+ across the government.[15] According to Davis, the DoD dropped from a D in Fiscal Year (FY) 2004 to an F in FY 2005.[16]

Also in March 2006, the Office of Management and Budget (OMB) released its annual assessment of FISMA compliance across the government.[17] Though not assigning grades, OMB's report analyzed agency FISMA compliance in more detail than Congressman Davis' report.[18] In its report, the OMB noted "progress in . . . several key security performance measures,"[19] but also found "areas requiring strategic and continued management attention over the coming year. . . ."[20] Crediting input to the report from agency Inspectors General and Chief Information Officers (CIOs),[21] the OMB relayed several statistics from DoD's CIO.[22] Perhaps most interestingly, the DoD's CIO reported that "76%" of its employees had received IT security awareness training, while "85%" of employees with "significant responsibilities" had received such training.[23]

Until these grades improve, and until these percentages increase, procurement officials should expect to see more of their agency dollars earmarked for IT security.

Invest Wisely

Whether budgeting specifically for IT security or other IT needs, agencies must justify their requests for major IT investments. Agencies do this through a Capital Asset Plan and Business Case, usually called an "exhibit 300."[24] In January 2006, the GAO released a report criticizing the lack of "[u]nderlying support" found in exhibit 300s.[25] Specifically, the GAO noted deficiencies in supporting documentation, policy compliance, and cost-information processes.[26] The danger of this, according to the report, is that the "OMB and agency executives may be depending on unreliable information to make critical decisions on IT projects, thus putting at risk millions of dollars."[27] Though the report examined only five agencies,[28] it noted that the identified "weaknesses and their causes are . . . consistent with problems in project and investment management that are pervasive governmentwide, including at such agencies as the Department of Defense. . . ."[29]

Agencies should get their exhibit 300s in order because it looks as if there will be plenty of opportunity to spend billions of dollars on IT in the coming years. On 29 September 2006, the General Services Administration (GSA) posted a Request for Proposal in support of its "Alliant" government-wide acquisition contract (GWAC).[30] Valued at $65 billion over ten

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[15] *Id.*

[16] *Id.*

[17] U.S. OFF. OF MGMT. & BUDGET, FY 2005 REPORT TO CONGRESS ON IMPLEMENTATION OF THE FEDERAL INFORMATION SECURITY MANAGEMENT ACT OF 2002 (Mar. 1, 2006). The GAO's Director, Information Security Issues, also provided congressional testimony that commented on OMB's findings. *See* U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-06-527T, INFORMATION SECURITY: FEDERAL AGENCIES SHOW MIXED PROGRESS IN IMPLEMENTING STATUTORY REQUIREMENTS (Mar. 16, 2006).

[18] *Id.* at tbl. of contents.

[19] *Id.* at 2.

[20] *Id.* at 4. According to OMB, the first such area needing more attention is "[o]versight of contractor systems." *Id.*

[21] *Id.* at 5.

[22] *Id.* at 27.

[23] *Id.*

[24] U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-06-250, INFORMATION TECHNOLOGY: AGENCIES NEED TO IMPROVE THE ACCURACY AND RELIABILITY OF INVESTMENT INFORMATION at highlights (Jan. 2006).

[25] *Id.*

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

[27] *Id.* at highlights.

[28] *Id.* (Agriculture, Commerce, Energy, Transportation, Treasury.)

[29] *Id.*

[30] U.S. GEN. SERV. ADMIN., *What's New on Alliant* (Sept. 29, 2006), *available at* http://www.gsa.gov/Portal/gsa/ep/contentView.do?programID=8957&channelId=-14865&ooid=14264&contented=14628&pageTypeId=8199&contentType=GSA_BASIC&programPage=%2Fep%2Fprogram%2FgsaBasic.jsp&P=9FG4.

years,[31] the Alliant GWAC will "provide[ ] IT solutions through performance of a broad range of services . . . ."[32] The GSA will manage the GWAC both through a full and open competition and through a small business set-aside.[33]

Within the DoD, the Army announced "a $5 billion . . . contract designed to standardize desktop and notebook purchases."[34] The Army awarded the ten-year "Army Desktop and Mobile Computing-2 (ADMC-2)" contracts to "three large businesses and six small businesses."[35] The Navy also announced a $3.1 billion three-year extension of its contract with Electronic Data Systems to build the Navy Marine Corps Intranet.[36]

Given the burgeoning opportunities to buy IT,[37] and given congressional and GAO scrutiny of IT matters, procurement officials should invest wisely when buying goods and services in this exploding acquisition area.

Lieutenant Colonel John J. Siemietkowski

Agencies Should Increase Scrutiny of Risky Information Technology Projects

In June 2006, the GAO issued a report on high-risk[38] information technology (IT) projects in twenty-four government agencies.[39] The GAO's objectives in this study were to (1) summarize high-risk projects, (2) determine how each agency identified its high-risk projects and how each agency managed them, and (3) determine the relationship between the high risk list and the OMB's Management Watch List.[40] The GAO made three major findings and it also made recommendations to OMB for future action.[41]

The GAO made three primary findings in its report on high-risk IT projects.[42] First, agencies identified two hundred twenty-six IT projects as high-risk.[43] Normally, agencies identified these projects as high-risk because the projects met one

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[31] Jenny Mandel, *GSA Solicits Input on IT Contracts Worth $65 Billion*, GovExec.com (June 2, 2006), *at* http://www.govexec.com/dailyfed/0606/060206m1.htm.

[32] U.S. GEN. SERVS. ADMIN., *Alliant Overview* (Oct. 12, 2006), *available at* www.gsa.gov/alliant.

[33] *Id.*

[34] Dawn S. Onley, washingtonpost.com, *Army Computer Initiative Awards Work to 9 Firms* (May 1, 2006), *available at* http://pqasb.pqarchiver.com/washingtonpost/access/1029503671.html?dids=1029503671:1029503671&FMT=ABS&FMTS=ABS:FT&fmac=&date=May+1%2C+2006&author=Dawn+S.+Onley&desc=Army+Computer+Initiative+Awards+Work+to+9+Firms.

[35] *Id.*

[36] Daniel Pulliam, *Navy Intranet Contractor Receives Three-Year Extension*, GovExec.com (Mar. 28, 2006), *at* http://www.ogovexec.com/story_page.cfm?articleid=33704&dcn=e_gvet.

[37] Along with the examples above, we also expect agencies to increase IT spending on continuity of operations plans—those arrangements necessary for employees to work remotely during natural disasters, viral epidemics, and terrorist attacks. *See* U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-06-713, CONTINUITY OF OPERATIONS: SELECTED AGENCIES COULD IMPROVE PLANNING FOR USE OF ALTERNATE FACILITIES AND TELEWORK DURING DISRUPTIONS (May 2006).

[38] In most instances, projects are considered "high-risk" because these projects are so essential that delay or failure in contract performance would have a significant impact on the agency's essential functions. The OMB has specified that agencies should consider IT projects as high-risk if a project meets one of more of the following four reasons.

> [T]he agency failed to demonstrate the ability to manage complex projects; the projects had exceptionally high development, operation or maintenance costs; the projects are addressing deficiencies in the agencies' ability to perform mission critical business functions; or the projects' delay or failure would impact the agencies' essential business functions.

U.S. GOV'T ACCOUNTABILITY OFF., GAO 06-647, INFORMATION TECHNOLOGY: AGENCIES AND OMB SHOULD STRENGTHEN PROCESSES FOR IDENTIFYING AND OVERSEEING HIGH RISK PROJECTS 1-2 (June 15, 2006).

[39] These 226 IT projects were valued at approximately $6.4 billion and represented about ten percent of the President's total IT budget for FY 2007. *Id*. at 3.

[40] *Id.* at 2. In the President's budget request for FY 2007, the OMB listed about thirty percent of the federal government's major IT projects on the OMB's "Management Watch List." *Id.* at 9. This list, also known as OMB's At-Risk List, is an OMB tool to monitor the performance of the federal government's IT contracts. The OMB places a project on this list if the project does not demonstrate sufficient indications of successful performance. In the OMB's evaluation, the OMB gives each project a score in ten different categories and then determines whether the project should be placed on the Management Watch List. *Id.* at 7.

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

[42] *Id.*

[43] *Id.*

or more of OMB's four high-risk criteria.[44] In about seventy percent of the cases, an agency listed a project as high-risk because a delay or failure in the project's performance would have a significant impact on the agency's functions. Second, the GAO found that while it is significant that agencies identified high-risk IT projects, agencies did not always follow OMB's four-part criteria in determining a project to be high-risk.[45] As such, the GAO opined that it is likely that there are IT projects that should be identified as high-risk which have not been so identified. Third, the GAO stated that while the criteria the OMB uses for determining a high-risk IT project and for placement on OMB's Management Watch List differ, agencies should monitor both types of projects.[46]

The GAO summarized its findings, by agency, regarding high-risk IT projects in a series of tables in an appendix to the report.[47] Table seven summarizes DOD's high-risk IT projects.[48] The GAO lists these DOD IT projects as high-risk because in each case, the project (1) has very high development, operating, or maintenance costs, (2) is intended to address deficiencies in performance of an "essential mission program or function of the agency," and (3) would be so affected by delay or failure that this would constitute "unacceptable or inadequate performance or failure of an essential mission function of the agency."[49]

The GAO recommended three courses of action to OMB.[50] First, the GAO recommended that each agency consistently applies OMB's criteria for identifying high-risk IT projects. Second, the GAO recommended that each agency develops a standardized method for placing new high-risk projects on its list and also for removing high-risk projects from its list. Third, the GAO recommended that OMB establishes a consolidated list of all government high-risk IT projects and report that list to Congress.[51]

Major Marci A. Lawson

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[44] *Id.*

[45] *Id.*

[46] *Id*.

[47] *Id*. at 31-69.

[48] The DOD's six high-risk IT projects are: the Joint Tactical Radio System, the Defense Integrated Military Human Resources System, the Expeditionary Combat Support System, the Global Combat Support System—Army, the Logistics Modernization Program, the Navy Enterprise Resource Planning. *Id.* at 34-35. In the DOD's 2007 budget request, DOD requested over $782 million to fund these six high-risk IT projects. *Id.*

[49] *Id.*

[50] *Id.* at 4, 24.

[51] *Id.* at 24.

Government Accountability Office (GAO): DoD Is Failing to Acquire Technical Data Rights (a.k.a. You Can't Repair Your Car Without the Repair Manual)

In July 2006, the GAO issued a report[1] on the DoD's failure to obtain sufficient technical data rights[2] for seven major weapons systems. The GAO's objective in undertaking this study was to assess how "Army and Air Force sustainment plans for fielded weapon systems had been affected by technical data rights" and to evaluate "requirements for obtaining technical data rights under current DoD acquisition policies."[3] The GAO made two major findings. First, it found that the Army and Air Force's failure to obtain technical data rights in procuring certain weapons systems had resulted in problems in sustaining these weapons systems.[4] Second, it found that DoD's acquisition policies do not require obtaining technical data rights when procuring major weapons systems.[5] The GAO also made specific recommendations addressing these shortcomings.[6]

The GAO first found that the Army and Air Force's failure to obtain technical data rights resulted in problems in sustaining particular weapons systems.[7] Specifically, the GAO reviewed seven major weapons systems to include the C-17 aircraft, the F-22 aircraft, the C-130J aircraft, the up-armored High-Mobility Multipurpose Wheeled Vehicle (HMMWV), the Stryker family of vehicles, the Airborne Warning and Control Systems (AWACS) aircraft, and the M-4 carbine.[8] In each of these weapons systems, the GAO found that because the government lacked technical data rights, it in competitively acquiring additional weapons systems, in acquiring needed spare parts, and in performing maintenance on these weapon systems.[9]

While the GAO also found that that DoD's acquisition polices do not require obtaining technical data rights when procuring major weapons systems, the GAO noted that both the Army and the Air Force are working independently toward drafting guidance.[10] In 2005, the Army created a working group to explore problems and solutions concerning technical data for weapons systems.[11] This group will likely produce proposed guidance on this topic.[12] The Air Force Materiel Command is currently developing proposed procedures to identify technical data rights issues early in the acquisition process.[13] In fact, in May 2006, the Secretary of the Air Force issued a memorandum mandating that technical data rights be considered in all acquisition "strategy plans, reviews, and associated planning documents for major weapon systems programs and subsequent source selections."[14]

After discussing its findings, the GAO made recommendations to the Secretary of Defense.[15] First, the GAO recommended that the Secretary of Defense require program managers to "assess long-term technical data needs and

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[1] U.S. GOV'T ACCOUNTABILITY OFF., GAO 06-839, WEAPONS ACQUISITION: DOD SHOULD STRENGTHEN POLICIES FOR ASSESSING TECHNICAL DATA NEEDS TO SUPPORT WEAPON SYSTEMS (July 14, 2006).

[2] Technical data is defined as "recorded information used to define a design and to produce, support, maintain, or operate the item." *Id*. at 1. When DoD contracts to purchase weapons systems, it may also purchase the technical data rights associated with those systems. *Id*. As intellectual property, data rights have intrinsic value and thus, purchasing these rights costs money. *Id*. Because DoD may utilize some major weapons systems for many years, purchasing technical data rights may be worthwhile so that DoD may competitively solicit other vendors for follow-on contracts and also so that DoD may be able to maintain the weapons systems. *Id.*

[3] *Id*. at 2.

[4] *Id*. at 3.

[5] *Id*. at 4.

[6] *Id.* at 2-4.

[7] *Id*. at 6.

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

[9] *Id*. at 6.

[10] *Id*. at 11.

[11] *Id*. at 15.

[12] *Id*.

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

[14] *Id*. at 18. In this memorandum, the Secretary of the Air Force stated that the best time to assess the need for technical data rights is prior to contract award. *Id.*

[15] *Id.* at 19.

establish corresponding acquisition strategies that provide for technical data rights needed to sustain weapon systems."[16] Second, the GAO recommended that the Secretary of Defense require any new DoD policies implementing the GAO's recommendations be included in mandatory acquisition guidance such as DoD Directive 5000.1 and DoD Instruction 5000.2.[17] In response to the GAO's recommendations, the DoD submitted a statement concurring with the GAO's report.[18]

Verdict Is In on Major Systems—Cost of Research, Development and Production Is Up

In its annual audit of DoD's major acquisition programs, the GAO found that the cost of research, development and production has increased dramatically over the past five years.[19] In an effort to control costs, the DoD implemented a policy in May of 2003 implementing a "knowledge-based evolutionary framework."[20] The framework requires DoD acquisition decision makers to possess a certain level of technical knowledge at certain key time periods in the life cycle of each weapon system: at the time development starts, at the time of DoD design review, and at the time of the production decision.[21] This policy further requires decision makers to possess the requisite technical knowledge at each critical juncture prior to moving on to the next phase of development.[22]

In this report, the GAO assessed fifty-two DoD weapons systems on three knowledge-based criteria: (1) the level of technology maturity at the start of development, [23] (2) the level of design and technology maturity at the point of the DoD's design review, [24] and (3) the level of production, design and technology maturity at the point of the production decision.[25] The GAO opined that DoD's lack of sufficient technical knowledge at these three critical junctures (at development start, at the point of DoD review, and at the point of the production decision) was the primary cause for cost overruns in the fifty-two systems studied.[26]

In reviewing the level of knowledge at the three critical junctures, the GAO reported that at the start of development, the DoD possessed sufficient knowledge in only ten percent of the programs studied.[27] By the time of design review, the GAO stated that the DoD possessed sufficient knowledge in only forty-three percent of the programs.[28] By the time of the production decision, the DoD possessed sufficient knowledge in only sixty-seven percent of the programs.[29]

For example, the GAO's report assessed the Air Force's F-22A Raptor,[30] the Army's Future Combat Systems,[31] and the Navy's Multi-mission Maritime Aircraft.[32] While the GAO analyzed fifty-two weapons systems, these three systems

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[16] *Id*.

[17] *Id.*

[18] *Id*. at 43. In DoD's response, the Deputy Undersecretary of Defense commented that "guidance on technical data rights will be incorporated into DoD Instruction 5000.2 when it is next updated." *Id.*

[19] U.S. GOV'T ACCOUNTABILITY OFF., GAO 06-391, DEFENSE ACQUISITIONS: ASSESSMENTS OF SELECTED MAJOR WEAPON PROGRAMS (Mar. 31, 2006). From 2001 to 2006, DoD's budget for major weapons has nearly doubled from approximately $700 billion to almost $1.4 trillion. *Id*. at 3.

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

[21] *Id*. at 11.

[22] *Id*.

[23] The GAO defines sufficient "technology maturity" at the start of development as the point when the "technologies needed to meet essential product requirements have been demonstrated to work in their intended environment." *Id.* at 9.

[24] The GAO defines sufficient "design and technology maturity" at the point of DoD design review as when "at least 90 percent of engineering drawings . . . provides tangible evidence that the design is stable." The GAO also refers to this as a "stable design." *Id.*

[25] *Id.* The GAO defines sufficient "production, design and technology maturity" at the point of the production decision as when "all key manufacturing process are in statistical control—that is, they are repeatable, sustainable, and capable of consistently producing parts within the product's quality tolerances and standards—at the start of production." *Id.* For each weapons system it studied, the GAO inserted a bar graph showing what it considered to be the optimal level of knowledge at the three critical junctures—at the start of development, at DoD's design review, and at the time of the production decision. *Id.* at 16-17.

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

[27] *Id*. at 11.

[28] *Id.*

[29] *Id.*

[30] The F-22A Raptor is an air superiority fighter aircraft with air-to-ground attack capability. *Id.* at 59.

illustrate some of the problems with cost overruns the GAO noted throughout its report. In each of these three weapons systems, the GAO found that the DoD did not possess sufficient knowledge at all three critical junctures resulting in increased costs.[33]

The tone of the GAO's report expressed some frustration with the DoD's inability to control the costs of its weapons systems.[34] The GAO takes the position that the DoD could better control costs if the DoD ensured that its acquisition decision makers possessed the requisite technical knowledge at the three critical junctures discussed above.[35]

Major Marci A. Lawson

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[31] The FCS is a system of related systems "composed of advanced networked combat and sustainment systems, unmanned ground and air vehicles, and unattended sensors and munitions." *Id.* at 61.

[32] The Multi-mission Maritime Aircraft (MMA) is "part of the Broad Area Maritime Surveillance (BAMS) family of systems, along with the BAMS unmanned aerial vehicle and the aerial common sensor. *Id*. at 89. The family of systems is intended to sustain and improve the Navy's maritime warfighting capability." *Id*.

[33] *Id.* at 59. 61 and 89.

[34] *Id.* at 3. The GAO stated in the letter forwarding this report to Congress, "it is imperative that these investment deliver as promised not only because of their value to the warfighter but because every dollar spent on weapons systems means one dollar less of something else DoD or the Government can do."

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

One Step Outside the Country, One Step Back from Patent Infringement

In *Zoltek Corp. v. United States*,[1] the federal circuit addressed two questions related to the remedy available for a government contractor's unauthorized use of a patentee's patent. The court found that (1) 28 U.S.C. § 1498 is inapplicable if some of the steps in the claims of a method patent are practiced in a foreign country; and (2) an unauthorized use of a patentee's patent by a government contractor does not amount to a separate taking action under the Fifth Amendment. Although the court agreed on the aforementioned points, it could not agree on a rationale as to why. Such lack of clarity makes this opinion incorrigible because it is impossible to wade through its murky waters.

Further confusing the landscape, the court also fails to address in its controlling opinion how 28 U.S.C. § 1498(c), the extraterritoriality limitation provision confining U.S. liability to certain domestic activity, fits into the landscape. Omitting a discussion on subsection 1498(c), the only part of the statute addressing territoriality, is confusing and unhelpful. At the heart of failing to write an informative and useful decision is the court's lack of appreciation as to the purpose and underlying principles behind why section 1498 was written. Unfortunately, the Federal Circuit has denied a petition to rehear *Zoltek* or to hear it en banc.[2] Thus, no solution to calm the churned-up waters appears to be on the horizon.

In *Zoltek*, the plaintiff owned a patent on a method to produce silicon fiber products that could be used in stealth aircraft.[3] The U.S. government, through its contractors, used patentee's invention in designing and building the F-22 fighter.[4] In producing patentee's silicon fiber products, the government contractors manufactured and processed some of the sheets entirely abroad, and some, the Tyranno fibers, were manufactured abroad and processed in the United States.[5] Subsequently, patentee sued the United States for unauthorized use of its patent under 28 U.S.C. § 1498.[6] The government moved for partial summary judgment stating that patentee's claims were barred under 28 U.S.C. § 1498(c), which prohibits any claim arising in a foreign country.[7] The Court of Federal Claims dismissed the motion, agreeing that the claim was barred under section 1498(c), and "directed plaintiff to amend its complaint to allege a taking under the Fifth Amendment."[8] The trial court certified its section 1498 analysis and its holding that the plaintiff's claims of patent infringement "sounded in the Fifth Amendment, under section 28 U.S.C. § 1292(d)(2)" for interlocutory appeal.[9] Although the trial court's analysis addressed 1498(c) as the reason for why no patent infringement liability attached, the federal circuit did not address that statute in its holding.

Section 1498 in pertinent part reads:

> (a) Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without a license of the owner thereof or lawful right to manufacture the same, the owner's remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his **reasonable and entire compensation** for such use and manufacture.
> . . .
> (c) The provisions of this section shall not apply to any claim arising in a foreign country.

The federal circuit produced four opinions in *Zoltek*, each having different rationales. In the controlling *per curiam* opinion, two judges (Dyk and Gajarsa) agreed that 28 U.S.C. § 1498 would only hold the United States liable for the use of a method patent if each and every step of the claimed method was practiced within the boundaries of the United States.[10] They

[1] 442 F.3d 1345 (Fed. Cir 2006).

[2] Zoltek Corp. v. United States, 464 F.3d 1335 (2006).

[3] *Zoltek*, 442 F.3d at 1347.

[4] *Id.* at 1349.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] 442 F.3d at 1347.

also agreed that direct infringement under section 271(a) is a necessary predicate for government liability to attach under section 1498, but not agree as to why.[11] In addition, the two judges held that alleged patent infringement against the United States is not a taking of private property for public use under the Fifth Amendment.[12]

The second opinion, a concurring opinion by Judge Gajarsa, agrees that 271(a) is a necessary predicate for infringement because *NTP, Inc. v. Research In Motion (NTP*)[13] stated as much in its reasoning, however erroneously. Judge Gajarsa opines that the rationale for that proposition is weak and is better justified through another line of reasoning.[14] He notes that in *NTP*, the federal circuit mischaracterized the holding of *Decca v. United States*[15] in the footnote of another decision, *Motorola, Inc. v. United States*.[16] In that case, the court merely was articulating that the government, under 28 U.S.C. § 1498, cannot be sued for active inducement infringement under 35 U.S.C. § 271(b) or for contributory infringement under 35 U.S.C. § 271(c).[17] Thus, finding infringements of sections 271(b) and (c) is precluded in a § 1498 action. This does not mean, however, that a §1498 infringement must be a predicate for a 35 U.S.C. § 271(a) infringement as *NTP* interpreted the situation.[18] This mischaracterization is the catalyst for how the waters started to become cloudy.

Instead of relying on *NTP*'s weak reasoning to reject Zoltek's claims against the government under § 1498, Judge Gajarsa concluded that a "use" of a method claim of a patented invention occurs only when each and every step of that method is practiced.[19] Further, a use "arises in a foreign country" under 28 U.S.C. § 1498 (c) when any one of the claimed steps is practiced abroad.[20] Thus, Judge Gajarsa would have affirmed the trial court's findings with respect to its section 1498(c) analysis and barred plaintiff from its suit, regardless of the *NTP* precedent.[21]

Judge Dyk, in his concurring opinion, expressed why he believes *NTP* was correctly decided in concluding that the government "can only be liable for infringement under section 1498(a) if the same conduct would render a private party liable for the infringement under section 271(a)."[22] Judge Dyk saw the purpose of section 1498(a) as making the government and its contractors liable for "use" of a patented invention under the similar circumstances upon which a private party would be liable for a direct infringement under section 271(a) in the patent laws. He did not see a broader and separate purpose for why section 1498 was written.

Judge Plager dissented from the *per curiam* opinion and wrote his views separately. He did not agree that a claim under section 1498 is governed by the limitations of section 271(a). Judge Plager saw section 271(a) as solely addressing infringements among private litigants.[23] The only issue Judge Plager agreed with the panel on is that, for an infringement of a method claim to occur under 1498(a) or 271(a), each and every step of the method must be practiced.[24] He did not agree, however, that each step must be practiced within the United States, as is required under section 271(a).[25] "[D]ealing with infringement litigation between private parties [has] no direct application to infringement litigation against the United States under 28 U.S.C. § 1498.[26] Accordingly, Judge Plager would have held that plaintiff has stated a cause of action under § 1498

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[11] *Id.* at 1372 (J. Plager, dissenting).

[12] *Id.* at 1347.

[13] 418 F.3d 1282 (Fed. Cir. 2005).

[14] *Zoltek*, 442 F.3d at 1353.

[15] 640 F.2d 1156 (Ct. Cl. 1980).

[16] 729 F.2d 765, 768 n.3 (Fed. Cir. 1984).

[17] *Id.*

[18] *See NTP*, 418 F.3d at 1282.

[19] *Zoltek*, 442 F.3d at 1358.

[20] *Id.*

[21] *Id.*

[22] *Id* .at 1368.

[23] *Id.* at 1372.

[24] ***Id.* at 13779.**

[25] *Id.*

[26] *Id.* (citing Motorola, Inc. v. United States, 729 F.2d 765, 768 (Fed. Cir. 1984)).

with regard to the Tyranno mats manufactured in Japan, but processed in the United States.[27] He would have found no cause of action for all activity occurring entirely outside U.S. boundaries.[28]

In addition, Judge Plager analyzed in great detail why the unauthorized use of a patent by the government or its contractors exercises the taking power of the government requiring just compensation under the Fifth Amendment.[29] His professorial opinion exhibited an incredible command of takings law and is extremely convincing. For example:

> In my view, the existence of a proper takings claim is an issue wholly independent of whether under § 1498 there is a valid claim that triggers a remedy under that statute. The latter is a question of statutory right granted by Congress under its legislative authority pursuant to the Constitution; the former is a matter of constitutional principle the vindication of which Congress has properly provided for by remedy in the Court of Federal Claims pursuant to the provisions of the Tucker Act. The mixing and merging of these two separate legal concepts in the manner the majority has done is incorrect as a matter of law, and leads them to an erroneous conclusion.[30]

In reading through these four opinions, very little is agreed upon and the sole areas of agreement have no common rationale. What is missing in all of these opinions is the purpose behind why section 1498 was written and the underlying policy reasons behind the statute. Judge Plager noted that section 1498 and section 271 relate to different players, the government and private litigants, but did not delve into this issue more deeply.

In 1928, the Supreme Court of the United States, with Chief Justice Taft writing for the Court, addressed the purpose of granting patentees a remedy against the United States where the government, through its own use or through that of its contractors, used a patent without a license.[31] The Court referred to the Naval Appropriations Act of 1918, the precursor to 1498(a), in holding that the "purpose of the [act] was to stimulate contractors and furnish what was needed for the war, without fear of becoming liable themselves for infringements to inventors or owners or assignees of patents."[32] The Court further held that Congress, in passing the 1918 Act, "intended to secure to the owner of the patent the exact equivalent of what it was taking away from him. . . ."[33] Although the Court was clear in the purpose of the 1918 Act, the Federal Circuit failed to adequately address the purposes behind 28 U.S.C. § 1428 in *Zoltek.*

Instead, the federal circuit compared the scope of 35 U.S.C. § 271(a) of the Patent Act with that of 28 U.S.C. § 1498(a) instead of looking at the broad policy reasons behind section 1498 on its own merits. In other words, the court failed to acknowledge that the purpose of 28 U.S.C. 1498 is to protect the procurement process from any disruption through eliminating the threat of patent infringement lawsuits against U.S. government contractors.[34] Evidence that the purpose of 1498 is distinct from that of the Patent Act lies in the different remedies available. The Patent Act in Title 35 of the United States Code, allows for adequate compensation for patent infringement in various forms, including but not limited to, lost profits,[35] reasonable royalty,[36] treble damages,[37] injunctions,[38] and attorney fees.[39] In contrast, the remedy under 28 U.S.C. § 1498 is limited to "reasonable and entire compensation," which disfavors awarding lost profits,[40] and punitive damages,[41] and

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[27] *Id.* at 1385

[28] *Id.*

[29] *Id.* at 1374-78.

[30] *Id.* at 1378.

[31] Richmond Screw Anchor Co., Inc. v. United States, 275 U.S. 331, 343-45 (1928).

[32] *Richmond*, 275 U.S. at 345. David R. Lipson, *We're Not Under Title 35 Anymore: Patent Litigation Against the United States Under 28 U.S.C. 1498(A)*, 33 PUB. CONT. L.J. 243, 247 (Fall 2003).

[33] *Richmond,* 275 U.S. at 345.

[34] *See id.* at 343-45; *see also* Coakwell v. United States, 372 F.2d 508, 511 (Ct. Cl. 1967) (citing *Richmond*, 275 U.S. at 343).

[35] 35 U.S.C.S. § 284 (LEXIS 2006).

[36] *Id.*

[37] *Id.* § 284.

[38] *Id.* § 283.

[39] *Id.* § 285.

[40] Brunswick Corp. v. United States, 36 Fed. Cl. 204, 208 (1996) (rejecting the trial court's award of lost profits because such a remedy assumes a right of exclusivity that does not exist in 1498 actions, which allow the United States to take a compulsory license) (quoting DONALD S. CHISUM, PATENTS § 20.03[6], at 20-27 (1992). Lessona Corp. v. United States, 36 Fed. Cl. 204, 208 (1979) (en banc) (rejecting the trial court's award of lost profits and double

injunctions are generally unavailable.[42] Thus, the remedies alone make recovery under 28 U.S.C. § 1498 different from that under 35 U.S.C. § 271.

Instead of being a case that clarifies a patentee's remedy for the government's unauthorized use of a patent, *Zoltek* creates more questions than answers.

Lieutenant Colonel Katherine E. White

Government Contractor and Grant Researcher Affirmative Defenses Against Patent Infringement

I. Introduction

Acquisition personnel are being tasked to keep pace with as well as innovate in the procurement and management of intellectual property assets for the benefit of the U.S. government. Along these lines, the U.S. government has increased federal spending for the development of research laboratories and research programs within private and public university settings. Practical and technical procurement and grant issues arise when the U.S. government undertakes research relationships with universities and private laboratories. These issues range from whether procurement regulations apply to agreements entered into between the federal government and contractors or grant recipients, to whether universities are performing research "on behalf of the government" in order to qualify for immunity from claims of infringement of intellectual property. The Federal District Court for the Middle District of North Carolina recently considered the latter issue in *Madey v. Duke University*.[43] This case represents protracted litigation which begun in 1995 involving claimed patent rights of a university researcher and alleged patent infringement based on unauthorized use of patented inventions by Duke University.

The issues raised and addressed in the district court's decision in *Madey v. Duke University* are significant to the U.S. government, specifically the Department of Defense's research and technology innovation missions. Specifically, universities represent fertile ground for conducting cutting-edge basic and applied research. In fact, the research being done by university faculty and graduate students is often a major component in the federal government's race to remain ahead of foreign governments in the development of dual-use technologies. Accordingly, *Madey v. Duke University* is an important case for government attorneys, acquisition/grant professionals, and technical managers to consider so that the U.S. government can better ensure that universities and their talented personnel remain willing and able to perform research under government contracts or federal grants, absent the specter of potential claims of intellectual property infringement.

II. Background

In 1988, Duke University hired Dr. John M.J. Madey, a prominent scientist in the field of laser technology, as a professor in the physics department. Duke expected Dr. Madey to assist in establishing a Free Electron Laser Laboratory (FEL Lab) as well as assist the university to obtain federal research grants.[44] Dr. Madey in fact assisted Duke in obtaining federal research grants from the Office of Naval Research (ONR).[45] Dr. Madey's FEL Lab contained substantial equipment that required Duke to construct an extension onto its physics building in order to house the equipment. Several pieces of equipment contained in Dr. Madey's lab were covered by patents owned by Madey, i.e., U.S. Patent No. 4,641,103 covering a microwave electron gun, and U.S. Patent No. 5,130,994 covering a free-electron laser oscillator for simultaneous narrow spectral resolution and fast time resolution spectroscopy.[46]

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damages as beyond the reasonable and entire compensation damages permitted under 1498). *See* Lipson, *supra* note 32, at 253-54 (discussing the disfavored status of lost profits in § 1498 actions because they are based in an eminent domain theory that allows the United States to take a license and is at odds with an exclusive right).

[41] *Lessona*, 36 Fed. Cl. at 208.

[42] W.L. Gore & Assocs., Inc. v. Garlock, Inc., 842 F.2d 1275, 1282 (Fed. Cir. 1988) (stating: "In our view, the statute, 28 U.S.C. § 1498(a), which the injunction is said to contravene, assures it that right without interference from [alleged infringer]."

[43] 413 F. Supp. 2d 601 (M.D.N.C. 2006).

[44] *Id*. at 603.

[45] *Id*.

[46] *Id*.

Dr. Madey was employed at Duke for nearly a decade before resigning in 1998 following a dispute with Duke concerning his ability to manage the FEL Lab effectively. Specifically, Dr. Madey contended that as a result of this dispute, Duke conspired to take control of the FEL Lab and his patented technology, removed him from his position as Director of the Lab, and petitioned the Office of Naval Research to remove him from his position as Principal Investigator on the ONR grant.[47] Despite Dr. Madey's resignation, Duke continued to use the lab's equipment, including the equipment covered by Dr. Madey's patents. Based on this unauthorized use of his patents, Dr. Madey sued Duke for patent infringement. In response, Duke contended that all uses of the FEL equipment were pursuant to the ONR grant or other government research grants or authorization.[48]

III. Issues

Madey v. Duke University raises significant issues regarding affirmative defenses available to federal contractors and researchers performing under government contracts or federal research grants when private parties sue those contractors or researchers for infringement. Specifically, the case addresses the findings required to demonstrate what government statements or activities will qualify as government authorization and consent and the scope of such authorization and consent for contractors or researchers seeking immunity from patent infringement. In addition, the *Madey* case discusses the question regarding standing to raise the government license defense created by the Bayh-Dole Act in response to a claim of patent infringement between private parties.

IV. Section 1498 Immunity from Suit for Patent Infringement

Federal law immunizes government contractors and researchers from claims of patent infringement in certain circumstances. Section 1498 provides in part:

> Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture. . . .
>
> For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.[49]

The Court of Appeals for the Federal Circuit described section 1498 as having two features: to relieve a third party from patent infringement liability and to waive sovereign immunity and consent to liability by the United States.[50] The courts cite the purpose of section 1498 as being a stimulant to contractors to furnish the government's needs for goods, services, or research without fear of becoming liable themselves for infringements to inventors or owners or assignees of patents.[51] Accordingly, a contractor or researcher who demonstrates that it used a patented invention with the authorization and consent of the U.S. government as well as for the benefit of the government, cannot be held liable for patent infringement in a lawsuit between private parties.

A. Authorization and Consent to Infringe a Patent

As an initial matter, the section 1498 affirmative defense requires a party to establish authorization and consent. A use is with the authorization and consent of the government if the government either expressly or implicitly consents to the infringement.

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[47] *Id*.

[48] *Id*.

[49] 28 U.S.C. § 1498(a) (LEXIS 2006).

[50] *Madey*, 413 F. Supp. 2d at 606.

[51] *See id*.

1. Express Authorization and Consent

In some circumstances, the government clearly and expressly authorizes and consents to infringement of a patented invention in the performance of a government contract or research grant. Such express consent is often contained in the language of the government contract or grant itself, or in other formal, written authorization from the government.[52] Even though a formal writing is evidence of authorization and consent, it need not take a specific form.[53] Moreover, the authorization and consent can be broad or limited, depending on the intent of the parties.

a. Broad Authorization and Consent

If the parties intend an authorization and consent that is broad it could extend to any patented invention and any infringing use. For example, the *Federal Acquisition Regulation* (*FAR*) and contract clauses for federal research and development contracts provide an example of broad authorization and consent language. Specifically, *FAR part 52.227-1* provides:

> The Government authorizes and consents to all use and manufacture of any invention described in and covered by a United States patent in the performance of this contract or any subcontract at any tier.[54]

By choosing to negotiate a broad authorization and consent clause, the government ensures that its contractors or researchers have the freedom to use patented inventions to accomplish any work that is required to be performed under the government program or contract.

b. Limited Authorization and Consent

The government may choose to negotiate a more limited authorization and consent for patent infringement. A limited authorization and consent may restrict the contractor or researcher to using only certain patented inventions or to only those uses that are necessary for completing contract or research work. For example, *FAR part 52.227-1* also provides for a more narrow or limited authorization and consent. The clause states in pertinent part:

> (a) The Government authorizes and consents to all use and manufacture, in performing this contract or any subcontract at any tier, of any invention described in and covered by a United States patent
> (1) embodied in the structure or composition of any article the delivery of which is accepted by the Government under this contract or
> (2) used in machinery, tools, or methods whose use necessarily results from compliance by the Contractor or a subcontractor with
> (i) specifications or written provisions forming a part of this contract or (ii) specific written instructions given by the Contracting Officer directing the manner of performance.[55]

By limiting the scope of the authorization and consent, the government controls the extent of patent infringement by its contractors or researchers and also controls the extent of its liability to inventors, owners, or assignees of patents.[56] Accordingly, limited authorization and consent operates as a limited, as opposed to a full, waiver of sovereign immunity.[57]

2. Implied Authorization and Consent to Infringe a Patent

In other circumstances, the government might not expressly consent, either using broad or narrow language, to contractor/researcher use of patented inventions; instead, the government may be found to have provided implied consent.[58]

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[52] *See id*. at 607-08.

[53] *See id*.

[54] 48 C.F.R. 52.227-1 (1984) (Authorization and Consent, Alternate I).

[55] 48 C.F.R. 52.227-1 (July 1995) (Authorization and Consent; *see also* 48 C.F.R. 27.201-2(a).

[56] *Madey*, 413 F. Supp. 2d at 608.

[57] *Id*. at 609.

Implied authorization and consent may be found in situations where "(1) the government expressly contracted for work to meet certain specifications; (2) the specifications cannot be met without infringing on a patent; and (3) the government had some knowledge of the infringement; or where the government requires the private contractor to use or manufacture the allegedly infringing device."[59]

Because implied consent also operates as a waiver of sovereign immunity pursuant to section 1498, such authorization and consent must be narrowly construed.[60] The contractor or researcher carries the burden of proof that the government authorized and consented to its patent infringement because section 1498 is an affirmative defense that will immunize otherwise infringing conduct.[61] In addition, the contractor or researcher must demonstrate that its infringing conduct falls within the scope of the government's authorization and consent.[62]

For the Benefit of the Government

The second prong of the section 1498 affirmative defense requires the contractor or researcher to show that its use of a patented invention was for the government. A use is for the government if it is in furtherance and fulfillment of a statement of government policy that serves the government's interests.[63]

Assertion of § 1498 Affirmative Defense in Private Party Litigation

Generally, when a patent holder asserts patent infringement against the government's agent, either contractor or researcher, section 1498 provides an affirmative defense that applies only when an invention is used without a license. Thus, section 1498 provides and affirmative defense to contractors or researchers, acting without a license, who use a patented invention with the government's authorization and consent for the benefit of the government without regard to the rights that the government may ultimately hold in the invention.[64] As a practical matter, section 1498 grants the government a compulsory, compensable license in the patent, which only requires the government to pay just compensation for a contractor's or researcher's use of the patented invention. Moreover, the section 1498 affirmative defense was meant to protect contractors or researchers who are required to use the patented inventions of others from patent infringement suits where the government is not a party to such litigation.

Duke University found itself party to such litigation. Importantly, Dr. Madey did not sue the government for patent infringement; rather, Dr. Madey only sued Duke University for its continued use of his patented inventions in the operation of the FEL Lab. In response to Dr. Madey's claims of patent infringement, Duke University asserted the section 1498 affirmative defense. Specifically, Duke University contended that it remained a researcher for the Office of Naval Research and performed under ONR federal research grants that provided either express or implied authorization, and consent for the use of patented inventions for the benefit of the government. Furthermore, Duke University contended that all of its uses fell within the scope of the government's authorization and consent because it was undertaking federally sponsored research.

The district court concluded, while a research grant in and of itself does not necessarily provide authorization and consent, a grant recipient may still avail itself of the section 1498 affirmative defense if the grantee demonstrates the necessary predicates. Accordingly, the district court stated that the statements or aspects of the particular governmental grant purportedly providing the government's authorization and consent had to be analyzed. As such, the district court analyzed federal grant funding agreements, log books, and operating notebooks to determine whether the uses of the FEL Lab equipment were within the scope of the relevant federally funded programs.[65]

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[58] *Id*.

[59] *Id*. at 620.

[60] *Id*. at 609.

[61] *Id*.

[62] *Id*. at 610.

[63] *Id*. at 607.

[64] *Id*. at 614.

[65] *Id*. at 616.

With respect to two funding agreements with the Department of Defense and the Department of Energy, respectively, the District Court concluded that Duke University's uses of Dr. Madey's 103 and 994 patents fell within the scope of the federal grant programs and were protected by the section 1498 affirmative defense. The district court found that "the Office of Naval Research specifically amended the terms of the grant to include a clause from the Department of Defense providing that the 'work under this agreement is of vital interest to the U.S. government' and that 'the U.S. Government authorizes and consents to all past and future use and manufacture of the invention described in and covered by [the 103 patent] in the performance of work under this agreement or any subagreement at any tier.'"[66] The district court cited another provision of the funding agreement that stated: "In accordance with 28 U.S.C. § 1498, the use or manufacture of [the 103 patent] by the recipient under this agreement or by any person, firm or corporation under any subagreement is construed as use or manufacture for the United States."[67] The district court cited similar language of authorization and consent in Department of Energy grant funding agreements with respect to [the 994 patent].

Based on these findings, the district court concluded that the specific grant provisions clearly provided express government authorization and consent for uses of the patents in the performance of the specific projects covered by the relevant funding agreements. The district curt further concluded that there was no question that uses within the scope of the grants were for the government and with the authorization and consent of the government. For example, the district court noted that "research for the Army that was 'militarily relevant' to the 'warfighter' would be squarely within the original contemplation of Section 1498 as a use for the Government."[68] The district court explained that because of its holding regarding authorization and consent for uses that benefit the government, all Duke University would have to do in subsequent proceedings is present testimony and evidence that its research undertakings were within the scope of the DoD and DOE grants in order to assert successfully the § 1498 affirmative defense.[69]

V. Government License Defense

The Government License Defense created by the Bayh-Dole Act[70] was meant to benefit and regulate the relationship between the government and its contractors or funding recipients.[71] The Government License Defense cannot be invoked by a private party as a defense to a patent owner's claim of infringement because the defense only belongs to the Government. In order to take advantage of the Government License Defense, the government would actually have to be a party to the patent infringement litigation involving otherwise only private parties.

In *Madey*, Duke University contended that the government held a license to practice or have practiced on its behalf the 103 and 994 patents because the inventions described in these patents were originally developed as part of government sponsored research.[72] Accordingly, Duke argued that the license extended at least to all uses that would be considered "for the United States."[73] Duke University's attempt to raise the Government License Defense was unsuccessful because Dr. Madey sued only Duke University for patent infringement, not the government. Accordingly, Duke University's motion for summary judgment as to the Government License Defense was denied because Duke could not, as a matter of law, raise that affirmative defense on behalf of federal agencies that were not party to Dr. Madey's patent infringement suit. Thus, the Government License Defense is best raised by the government as an affirmative defense, not by a private party in a patent infringement action against only itself.[74]

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[66] *Id*. at 617.

[67] *Id*.

[68] *Id*. at 618.

[69] *See id*.

[70] **35 U.S.C.S. § 200 - _____ (LEXIS 2006)**. The Act allows nonprofit organizations and small and large businesses to retain title to any subject inventions that result from federally funded projects. Congress passed the Act "to promote commercialization and public availability of inventions made in the United States by United States industry and labor," and "to encourage maximum participation of small business firms in federally supported research and development efforts." *Id*. § 200. The Act also sought "to ensure that the Government obtains rights in federally supported inventions to meet the needs of the Government" and to ensure that inventions could be used "without unduly encumbering future research and discovery." *Id*.

[71] *Madey,* 413 F. Supp. 2d at 613.

[72] *See id*. at 605.

[73] *See id*.

[74] *See id.* at 613.

A. Statutory Government License

The Bayh-Dole Act creates a government license by statute. The statute retains for the federal funding agency a paid-up license. The Act states, in pertinent part:

> With respect to any invention in which the contractor elects rights, the Federal agency shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States any subject invention throughout the world.[75]

As the statutory language indicates, the nonexclusive license that the government retains is not transferable. Accordingly, the statutory license right belongs only to the government and can be invoked only by the government. Thus, the government, if party to a patent infringement suit, is the only party able to raise the statutory Government License Defense. In order to establish that it is entitled to the Government License Defense, the government must proffer a funding agreement between itself and the patent holder; as well, the government must establish that the patented invention was conceived or first reduced to practice under that funding agreement.[76]

In *Madey*, the district court concluded that Duke University could not avail itself of the statutory Government License Defense. The district court held that the statutory "Government License created by the Bayh-Dole Act [was] designed to regulate the relationship between the Government and its funding recipients, but it would not be available to a private third party as the basis or a private right of action or, [as in this case,] a private defense."[77]

B. Contractual/Regulatory Government License

The Bayh-Dole Act creates a government license by reference to incorporated contract language. The Act requires that all federal funding agreements must include language that reserves for the government the license specified in 35 U.S.C. § 202(c)(4). As with the statutory Government License, the contractual Government License is not transferable and, therefore, remains a right only for the government. Moreover, the contractual Government License cannot be invoked as an affirmative defense to patent infringement by a private third party.

VI. Practical Implications of the Affirmative Defenses to Patent Infringement

Madey v. Duke University raised several implications for the drafting of government contracts and grant funding agreements. First, the government as well as its contractors and grant recipients must pay keen attention to the purpose and goals of the contract or research grant. The parties to the contract or grant must identify their intentions before executing contracts or funding agreements. In particular, the government and its contractors or grant recipients must ensure that agreements are unambiguous as to the scope and extent of authorization and consent for certain activity or conduct occurring under or pursuant to contracts or funding agreements.

Second, with respect to grant funding agreements in particular, the parties to such a grant cannot merely rely on the grant itself to establish the necessary predicates for invoking a section 1498 affirmative defense. For example, the government's mere approval of a research proposal, standing alone, is insufficient to show implied authorization and consent.[78] Instead, the government and its grant recipients should consider the more prudent course of including express language of authorization and consent and express statements regarding how grant activity will benefit the government in relevant funding agreements. By relying on express authorization and consent as opposed to implied authorization and consent, the government and its grant recipients can be confident of meeting the burden of proof for showing the applicability of section 1498 in a patent infringement suit between private parties.

Third, the government and its contractors or grant recipients should negotiate the proper type of authorization and consent based upon the contract work or federally supported research to be undertaken. The type of work or research to be performed will dictate whether the parties should contemplate broad or limited authorization and consent language in

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[75] 35 U.S.C.S. § 202 (c)(4) (LEXIS 2006).

[76] *Madey,* 413 F. Supp. 2d at 612.

[77] *Id*. at 613.

[78] *Id*. at 620.

contracts or grant funding agreements. If broad authorization and consent language is intended and if such language is consistent with the work or research to be performed, it would be prudent to rely on express as opposed to implied authorization and consent.

Finally, a contractor or a grant recipient being sued for patent infringement where the government is not a party cannot rely on the Government License Defense. The Government License Defense is a right belonging only to the government and not to a private third party. Accordingly, a contractor or grant recipient must find its defense to patent infringement arising from private litigation in the application of section 1498.

Major Danielle M. Conway

Payment and Collection

Central Contractor Registration—Tax Identification Number Validation

The Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council (FAR Councils) issued a proposed rule requiring tax identification number (TIN) validation with the Internal Revenue Service for Central Contractor Registration (CCR) registrants.[1] Although TIN validation had been planned since CCR was implemented,[2] technological constraints prevented its requirement until now.[3] This proposed rule would amend the definition of "registered in CCR" in *FAR part 2.101* to include the requirement for TIN validation.[4] Comments regarding this proposal were due by 19 December 2005.[5]

Fast Payment Procedures

The FAR Councils issued a final rule revising fast payment procedures effective 19 May 2006.[6] The new rule allows the payment office flexibility for situations in which a contractor fails to follow the fast payment procedures.[7] Under the Fast Payment Procedure clause, contractors are required to prominently mark invoices with "FAST PAY."[8] Prior to this rule change, the Fast Payment Procedure clause required payment offices to reject invoices that were not marked prominently with "FAST PAY."[9] This revision allows the payment office the flexibility to pay the invoice using either fast payment or normal payment procedures, and eliminates the inefficiency of rejecting otherwise proper invoices.[10]

Electronic Payment Requests

The Department of Defense (DoD) has issued a proposed rule through DFARS Case 2005-D009 to clarify procedures for granting an exception to the requirement that payment requests be submitted electronically.[11] Section 1008 of the 2001 National Defense Authorization Act (2001 NDAA) required the use of electronic invoicing in the DoD by October 2002.[12] While the DoD did not meet this deadline for technological reasons,[13] the *DFARS* was amended to comply with the 2001 NDAA through an interim rule in February 2003.[14] This interim rule allowed an exception to electronic invoicing if either the contractor or the DoD was unable to comply.[15] An earlier proposed rule requiring Secretary of Defense approval was rejected as unduly burdensome, and the interim rule required instead that the contracting officer, payment office, and contractor mutually agree on an alternate method.[16] Following comments on the interim rule, the final rule in December 2003 added the contract administration office to the list of entities to agree to an alternate invoicing system.[17]

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[1] Federal Acquisition Regulation; Central Contractor Registration—Taxpayer Identification Number (TIN) Validation, 70 Fed. Reg. 60,782 (Oct. 19, 2005).

[2] *Id.* The Department of Defense (DOD) required Central Contractor Registration beginning in 1988 and the civilian agencies required its use beginning in 2003. *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Federal Acquisition Regulation; Fast Payment Procedures, 71 Fed. Reg. 20,308 (Apr. 19, 2006) (to be codified at 48 C.F.R. pt. 52)

[7] *Id*.

[8] U.S. GENERAL SERVS. ADMIN. ET AL., FED. ACQUISITION REG. pt. 52.213-1(c)(1)(ii) [hereinafter FAR].

[9] 71 Fed. Reg. at 20,308.

[10] *Id.*

[11] Defense Federal Acquisition Regulation Supplement; Electronic Submission and Processing of Payment Requests, 71 Fed. Reg. 14,149 (Mar. 21, 2006)

[12] Pub. L. No. 106-398, 114 Stat. 1654 (2000).

[13] Defense Federal Acquisition Regulation Supplement; Electronic Submission and Processing of Payment Requests, 68 Fed. Reg. 8450 (Feb. 21, 2003).

[14] *Id.*

[15] *Id.* at 8455.

[16] *Id.*

[17] Defense Federal Acquisition Regulation Supplement; Electronic Submission and Processing of Payment Requests, 68 Fed. Reg. 69,628 (Dec. 15, 2003).

The inclusion of several different offices in the current *DFARS* language caused problems determining who decides whether an exception to the requirement for electronic invoicing applies.[18] The proposed rule clarifies that the administrative contracting officer (ACO) is the approval authority for determining that electronic invoicing is too burdensome for a contractor.[19] For the exception to apply, the ACO must make this determination in writing.[20] Further, rather than leaving the alternate invoicing system open for post-hoc mutual agreement, the proposed rule requires that the alternate system be included in section G of the contract.[21] Comments regarding this proposed rule were due by 22 May 2006.[22]

Contract Financing

The DoD issued a final rule through DFARS Case 2003-D043 amending *DFARS* text pertaining to contract financing as part of the *DFARS* Transformation.[23] As part of the process of changing the purpose and content of the *DFARS*, obsolete text has been deleted and instructional text has been moved to the *DFARS* companion resource, *Procedures, Guidance, and Information* (*PGI*). These changes include moving instructional text regarding distribution of financing payments to multiple appropriations accounts to the *PGI*;[24] amending the dollar value from $500 to $2,500 in section 232.404(a)(9);[25] and adding text at *section 232.906(a)(i)* requiring "contracting officers to insert the standard due date for interim payments on cost-reimbursement contracts for services."[26] No comments were submitted regarding the changes, and the final rule became effective 20 December 2005.[27]

Payment and Billing Instructions

The DoD continued its *DFARS* transformation initiative by issuing a final rule intended to "streamline payment procedures and ensure line item accountability in contractor payment requests."[28] Consistent with the transformation initiative in general, the final rule moves *DFARS* text not containing significant legal or policy-driven requirements to the *DFARS PGI*.[29] In this case, the transformation moves former *DFARS* text addressing topics such as distribution of contracts and modifications, contract line item numbering, and inclusion of payment instructions in contracts to the *PGI*.[30]

Additionally, the final rule amends *DFARS 204.7103-1* by requiring that contracts containing a combination of fixed-price line items, Time-and-Materials/Labor-Hour line items, and/or cost-reimbursement line items, identify the contract type for each line item.[31] This amendment also requires that all subline items and exhibit line items under one contract line item be the same contract type as the contract line item.[32]

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[18] 71 Fed. Reg. at 14,150.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] Defense Federal Acquisition Regulation Supplement; Contract Financing, 70 Fed. Reg. 75,412 (Dec. 20, 2005) (to be codified at 48 C.F.R. pt. 232).

> DFARS Transformation is a major DoD initiative to dramatically change the purpose and content of the DFARS. The objective is to improve the efficiency and effectiveness of the acquisition process, while allowing the acquisition workforce the flexibility to innovate. The transformed DFARS will contain only requirements of law, DoD-wide policies, delegations of FAR authorities, deviations from FAR requirements, and policies/procedures that have a significant effect beyond the internal operating procedures of DoD or a significant cost or administrative impact on contractors or offerors. *Id.*

[24] *Id.*

[25] *Id.* This section pertains to advance payments for non-commercial items involving high school and college publications for military recruiting. *Id.*

[26] *Id.*

[27] *Id.*

[28] Defense Federal Acquisition Regulation Supplement; Payment and Billing Instructions, 70 Fed. Reg. 58,980 (Oct. 11, 2005) (to be codified at 48 C.F.R. pts. 204, 215, 252, and app. F to ch. 2).

[29] *Id.*

[30] *Id.*

[31] *Id.* at 58,983.

[32] *Id.*

The final rule also amends *DFARS 204.7106* to clarify that contract modifications decreasing the amount obligated require prior coordination between the PCO and ACO and shall not be issued unless sufficient unliquidated obligation exists or the purpose is to recover monies owed to the government.[33]

The final rule adds the clause at *DFARS 252.204-7006, Billing Instructions*.[34] Contracting officers must incorporate this clause into solicitations and contracts if any standard payment instructions from *PGI 204.7108(d)(1)-(6)* or other payment instructions in accordance with *PGI 204.7108(d)(12)* are used.[35] The clause requires the contractor to identify the contract line item on the payment request that reasonably reflects the work performed, and to separately identify an amount for each contract line item.[36]

The final rule amends Appendix F to require submission of payment requests in electronic form unless an exception in *DFARS 232.7002* applies.[37]

DOD IG Payment Reports

The Office of Management and Budget (OMB) requires agencies to determine the amount of improper payments made each year. The DoD Office of Inspector General (IG) published three financial management reports in FY2005 addressing payments within DoD. These reports included a report on compliance with the Prompt Payment Act (PPA) in April 2006, a report on improper payments for fuel in June 2006,[38] and a report on proper interim payments in September 2006.

The DoD IG issued its Report on DoD Compliance with the Prompt Payment Act on Payments to Contractors on 19 April 2006.[39] The PPA requires agencies to make payment to contractors not later than thirty days after receipt of invoice, and not earlier than seven days before payment due date.[40] Late payment results in the accrual of interest in favor of the contractor;[41] early payments result in lost interest for the government.[42] According to the Defense Finance and Accounting Service (DFAS) Columbus database provided to the DoD IG, contractors were paid within the seven-day window allowed under the PPA eighty-five percent of the time.[43] Of the remaining fifteen percent of payments, early payments cost the government $919 thousand dollars in lost interest, and late payments cost the government $850 thousand dollars in interest payments to contractors.[44]

While the DoD IG found that the "DFAS Columbus paid most of the contractor invoices it received in FY 2004 in accordance with the requirements of the [PPA],"[45] errors committed in a projected 61,000 invoice payments (roughly ten percent of total processed) cost the government an additional $1.8 million dollars.[46] These errors included calculating improper invoice dates, processing improper invoices, and incorrectly calculating payment windows based on invoice dates.[47]

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[33] *Id.*

[34] *Id.*

[35] *Id.* at 58,980.

[36] *Id.* at 58,983.

[37] *Id.*

[38] U.S. DEP'T OF DEFENSE, OFF. OF THE INSPECTOR GEN., REP. NO. D-2006-094, FINANCIAL MANAGEMENT: IMPROPER PAYMENTS FOR DEFENSE FUEL (29 June 2006). This article does not address this report because the report focuses more on management and coordination issues than payment issues.

[39] U.S. DEP'T OF DEFENSE, OFF. OF THE INSPECTOR GEN., REP. NO. D-2006-076, FINANCIAL MANAGEMENT: REPORT ON DOD COMPLIANCE WITH THE PROMPT PAYMENT ACT ON PAYMENTS TO CONTRACTORS (19 Apr. 2006). The DoD IG has issued one other report addressing this same topic in the last five years, DoD IG Report No. D-2004-058. *Id.* at 19.

[40] *Id*. at 6.

[41] *Id*. at 1.

[42] *Id*. at 13.

[43] *Id.* at 3.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 4. The IG discovered the errors through a statistical sampling of the payments shown in the database to be early, on time, or late. *Id.*

The IG identified several management and training deficiencies and issued recommendations to the DFAS Columbus Director.[48] The DFAS Columbus Director submitted comments indicating that most of the recommendations will be implemented to address the noted deficiencies.[49]

The DoD IG issued its Report on Providing Interim Payments to Contractors in Accordance with the Prompt Payment Act on 1 September 2006.[50] This report focuses on the payment of interim payments on cost-reimbursement service contracts for which the National Defense Authorization Act of 2001[51] (2001 NDAA) requires compliance with the PPA.[52] The DoD paid approximately $32.1 billion dollars in such payments in FY 2005.[53] The report concluded that the DoD paid about 291,000 interim payments on cost-reimbursement contracts early, resulting in $9.4 million dollars in lost interest for the government.[54] The DoD and DFAS Columbus disagreed with much of the report.[55]

The report noted that the 2001 NDAA made the PPA applicable to interim payments under cost-reimbursement service contracts, and that the OMB was tasked with publishing implementing regulations.[56] Relevant to this report, the PPA permits agencies to make payments up to seven days prior to the payment due date, "or earlier as determined by the agency to be necessary on a case-by-case basis."[57] The *OMB regulation* states that "[t]he payment due date for interim payments under cost-reimbursement service contracts shall be 30 days after the date of receipt of a proper invoice."[58]

The report determined that DFAS Columbus paid ninety percent of all interim payments on cost-reimbursement service contracts prior to seven days before the payment due date.[59] The report found that several regulations and policies, including the *FAR*,[60] *DFARS*,[61] and the *DoD Financial Management Regulation*,[62] conflicted with the *PPA* and *OMB regulation* and led to the early payments.[63] The DoD disagreed with the report that the *PPA* requires (1) a payment due date of thirty days after receipt of a proper invoice, and (2) payment no earlier than seven days prior to the payment due date.[64] The DoD argues that the regulations in place comply with the intent of the PPA of setting a baseline for assessing interest payments due to contractors.[65] The report was returned to DoD for additional consideration following the IG rebuttal to initial DoD comments.[66]

Major Mark A. Ries

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[48] *Id.* at 14.

[49] *Id.*

[50] U.S. DEP'T OF DEFENSE, OFF. OF THE INSPECTOR GEN, REP. NO. D-2006-108, FINANCIAL MANAGEMENT: PROVIDING INTERIM PAYMENTS TO CONTRACTORS IN ACCORDANCE WITH THE PROMPT PAYMENT ACT (1 Sept. 2006) [hereinafter INTERIM PAYMENTS REPORT].

[51] Floyd D. Spence National Defense Authorization Act for FY 2001, Pub. L. No. 106-398, 114 Stat. 1654 (2000).

[52] INTERIM PAYMENTS REPORT, *supra* note 50, at 1.

[53] *Id.*

[54] *Id.* at 3.

[55] *Id.* at 8-9. The DoD disagreement was expressed by the Deputy Chief Financial Officer for the Under Secretary of Defense (Comptroller)/Chief Financial Office. *Id.* The DFAS Columbus disagreement was expressed by the Center Site Deputy Director for Defense Finance and Accounting Service Columbus. *Id.*

[56] *Id.* at 3.

[57] 31 U.S.C. § 3903(a)(8) (LEXIS 2006).

[58] 5 C.F.R. 1315.4 (g)(2).

[59] INTERIM PAYMENTS REPORT, *supra* note 50, at 3-4.

[60] FAR, *supra* note 8, at pt. 32.908(c)(2) (July 2006) (allowing agency policies and procedures to amend the thirty-day payment due date).

[61] U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. pt. 232.906 (July 2006) (stating that generally the contracting officer should insert a payment due date of fourteen days from invoice receipt).

[62] U.S. DEP'T OF DEFENSE, DOD 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION para. 070205 (July 2002).

[63] INTERIM PAYMENTS REPORT, *supra* note 50, at 5-7.

[64] *Id*. at 8.

[65] *Id*. at 9.

[66] *Id*. at ii.

Performance-Based Acquisitions

Defining Performance-Based

The Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council (FAR Councils) issued a final rule amending the *FAR* concerning performance-based acquisitions (PBAs).[1] The rule changed the terms "performance-based contracting" and "performance-based service contracting" to "performance based acquisitions."[2] The FAR Councils refined the definition of PBAs as focused on results rather than "required performance objectives and/or desired outcomes."[3] The rule added definitions for both performance work statements and a statement of objectives.[4] The FAR Councils eliminated a preference for fixed-price contracts for follow-on acquisitions in order to provide more flexibility to agencies to craft more complex contracts.[5] In general, the rule streamlined the *FAR subpart* to only address those issues which are unique to PBAs.[6]

Office of Federal Procurement Policy (OFPP) Goal

The OFPP of the Office of Management and Budget (OMB) issued a memorandum requesting that government agencies prepare a PBA plan by 1 October 2006.[7] The OFPP set a goal of PBA methods for forty percent of eligible service acquisitions over $25,000. The memorandum indicated that PBA reports will be reviewed every fiscal year through the Federal Procurement Data System.[8]

Defense Procurement and Acquisition Policy (DPAP) Guidance

The Director of the DPAP issued a memorandum updating DoD requirements based on the OFPP guidance.[9] The memorandum retained the DoD goal of fifty percent of eligible service actions over $25,000, given the success rate of fifty-five percent in FY 2005.[10] Contracts would be coded as performance-based as long as more than fifty percent of the requirement was performance-based.[11] The memorandum noted that PBAs should have appropriate metrics, a quality assurance surveillance plan, and properly trained contracting officer representatives assigned before contract award.[12]

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[1] Federal Acquisition Regulation; Change to Performance-based Acquisition, 71 Fed. Reg. 211 (Jan. 30, 2006).

[2] *Id.*

[3] *Id.* at 214.

[4] *Id.* at 217.

[5] *Id.* at 211.

[6] *Id.* at 212.

[7] Memorandum, Associate Administrator, Office of Management and Budget, to Chief Acquisition Officers and Senior Procurement Executives, subject: Use of Performance-Based Acquisitions (21 July 2006).

[8] *Id.* at 2.

[9] Memorandum, Director, Defense Procurement and Acquisition Policy, to SEE DISTRIBUTION, subject: Performance Based Acquisition (6 Sept. 2006).

[10] *Id.*

[11] *Id.*

[12] *Id.*

Procurement Fraud

". . .the United States has been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war."[1]

Sadly, the rhetoric has not changed since the Civil War as procurement fraud is daily news today as it was during the 1860s. Bottom line: as in the day of Lincoln, when there is a war, there are those who seek to be war profiteers. The purpose of this update is to examine how the combined forces of the government's civil, criminal, and administrative fraud fighters, along with private citizen whistleblowers, held defense contractors accountable this past year and how the mission to fight fraud continues to evolve. An important practical tip for the government contracts practitioner to keep his eye on all False Claims Act (FCA)[2] developments, not just cases involving the Department of Defense (DoD), as the courts rarely draw a distinction between the two.

On the Civil Side of the House

Let's Start with the Numbers[3]

The Department of Justice (DOJ) reports that fiscal year (FY) 2005 was a record-setting year for False Claims Act recoveries.[4] The DOJ announced that the United States attained over $3.1 billion in settlements and judgments in cases involving allegations of fraud against the government in FY 2005. The total recoveries since 1986, when Congress strengthened the civil False Claims Act and enhanced its whistle blower provisions,[5] are estimated to be over $18 billion. Defense procurement fraud accounted for $609 million in settlement and judgment awards in FY 2005, as recoveries broke down to seventy-two percent health care, twenty percent defense, and eight percent non-health care/non-defense federal agencies.

The Bigger They Are . . .

In the "show me the money" category, the Boeing company set the new standard. In June 2006, Boeing finally put the long-standing saga of Darleen A. Druyun behind it as the company paid the United States a $615 million settlement to resolve criminal and civil allegations that the company improperly used competitors' information to procure contracts for launch services worth billions of dollars from the Air Force and the National Aeronautics and Space Administration.[6]

As referenced in last year's *Year In Review,*[7] the focal point of the government's investigation was Boeing's hiring of the former Principal Deputy Assistant Secretary of the Air Force for Acquisition and Management, Darleen A. Druyun, by its then-Chief Financial Officer, Michael Sears. The investigation focused on Boeing's relationship with Darleen A. Druyun ("the self-proclaimed Godmother of the C-17"[8]) as Druyun was the Air Force's top career procurement officer when she retired from the Air Force in 2002. In 2000, Druyun used her position to have Boeing hire her daughter and future son-in-

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[1] United States v. McNinch, 356 U.S. 595, 599 (1958) (citing H.R. Rep. No. 2, Part 2, 37th Cong., 2d Sess. (1862)).

[2] 32 U.S.C.S. § 3729 (LEXIS 2006). The *qui tam* provisions of the False Claims Act authorize "private persons" to bring actions for a violation of the FCA in the government's place. 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.

[3] American Public Media, Marketplace, http://marketplace.publicradio.org (last visited 16 Nov. 2006).

[4] Department of Justice, Press Release, *Justice Department Recovers Record $3.1 Billion in Fraud and False Claims in Fiscal Year 2006,* http://www.usdoj.gov/opa/pr/2006/November/ 06_civ_783.html (last visited14 Dec. 2006).

[5] Whistleblower or *qui tam* suits are filed under the FCA pursuant to 31 U.S.C. 3730 whereby private individuals known as "relators" are permitted to act as private attorney generals and file action alleging fraud against the United States. Under the FCA, the government may or may not join the relator's suit, but regardless whether or not the government joins the suit, relators are entitled to share in the any recoveries. RALPH C. NASH ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK: A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT (2d ed. 1998); *see also* TAF Education Fund, The False Claims Act Legal Center, http://www.taf.org/faq.htm (last visited 16 Nov. 2006).

[6] Department of Justice, Press Release, *Boeing to Pay United States Record $615 Million to Resolve Fraud Allegations,*http://149.101.1.32/opa/pr/2006/June /06_civ_412.html (last visited 16 Nov. 2006) [hereinafter *DOJ Press Release*].

[7] Major Andrew S. Kantner, et. al., *Contract and Fiscal Law Developments of 2005—Year in Review,* ARMY LAW., Jan. 2006, at 137 [hereinafter *YIR 05*].

[8] Project on Government Oversight, Press Release, The Pentagon's Self-Proclaimed "Godmother of the C-17" Takes a Top Position with the Aircraft's Manufacturer, http://www.pogo.org/p /contracts/ca-030103-c17.html (last visited 16 Nov. 2006).

law. Then in 2002, Sears recruited Druyun for an executive position with Boeing following her retirement. During this period (2000 - 2002), Druyun was responsible for dozens of Boeing contracts, as well as for the controversial $23 billion procurement to lease a fleet of KC-767 aerial refueling tankers that has since been canceled. As reported in last year *YIR*, Sears and Druyun both pled guilty to violations of the conflict of interest statutes.[9] In documents filed with the criminal court, Druyun admitted that Boeing's favors in hiring her children and in offering her a position influenced her contracting decisions.[10]

The investigation also focused on Boeing's use of competitors' information in connection with the Evolved Expendable Launch Vehicle (EELV) Program and certain NASA launch services contracts EELV program. The Air Force's strategy called for two sources to reduce the risk of failure and cost through competition. Those sources ended up being Boeing and Lockheed, with Boeing's low pricing leading the Air Force to favor Boeing in awarding it nineteen of the original twenty-eight launch services contracts awarded in October 1998. The investigation uncovered that, prior to the award, Boeing obtained confidential competition-sensitive or other proprietary documents from Lockheed Martin which contained information related to Lockheed's EELV program. Some of this information was used to unfairly assist Boeing in the EELV competition.

The $615 million global settlement included a defense procurement fraud record $565 million civil settlement and a $50 million monetary penalty according to a separate criminal agreement.[11]

Can I Keep the Change?

It's always good to get a rebate, but what happens when companies do not share the existence of the rebate with the federal government? Stemming from a *qui tam* suit first filed in 2001, consulting firms BearingPoint, Inc., Booz Allen Hamilton, Inc., Ernst & Young, LLP, and KPMG, LLP settled allegations that they submitted false claims to various governmental agencies, including of the Army, in connection with travel costs in January 2006. [12] And when I speak of "change," I am talking about change with a significant number of zeros attached as BearingPoint agreed to pay $15 million, Booz Allen agreed to pay $3,365,664, Ernst & Young agreed to pay $4,471,980 and KPMG agreed to pay $2,770,000.[13]

Each of the companies had received rebates on travel expenses charged to government contracts. The rebates were paid by credit card companies, airlines, hotels, rental car agencies and other travel service providers. The investigation uncovered that these companies failed to fully disclose the existence of these travel rebates and did not reduce cost reimbursement claims by the amounts of the rebates on numerous government contracts.

Can I File?

As part of the growing body of jurisprudence focusing on what happens when government employees want to be relators, the U.S. District Court of Colorado, in *United States ex rel. Maxwell v. Kerr-McGee Chem. Worldwide, LLC* [14] reviewed a government auditor's status as a person under the False Claims Act. The would-be relator, Mr. Maxwell, was a senior auditor with the Program of Minerals Management. The defendant sought dismissal on conflict of interest and public disclosure grounds based on Maxwell's work auditing the substance of the allegations as part of his official duties. The Court noted that "any conflict of interest comes only between the government and [relator]" and "does not affect his status as a person under the FCA nor deprive the Court of jurisdiction."[15] The court further noted that there was a public disclosure, but as the relator had "direct and independent knowledge of the information on which the allegations are based and have voluntarily provided the information to the government prior to filing an action"[16] and he was the original source of that

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[9] *YIR 05*, *supra* note 7, at 137-39.

[10] Supplemental Statement of Facts, the Defendant's Post Plea Admissions, U.S. v. Druyun, U.S. District Court of the E.D. of Va, Crim. No. 04-150-A, at http://www.pogo.org/m/cp/cp-druten-postpleaadmission-2004-odf (last visited 20 Oct 2006).

[11] *DOJ Press Release*, *supra* note 6.

[12] Ellen McCarthy, *BearingPoint Settles Probe Into Overbilling*, WASH. POST, Jan. 4, 2006, at D3.

[13] Department of Justice, Press Release, *Four Multinational Consulting Firms Pay Millions to Settle Case Alleging they Overbilled U.S. for Travel,* http://www.usdoj.gov/usao/cac /pr2006/001.html (last visited 16 Nov. 2006) [hereinafter *DOJ Overbilling Press Release*].

[14] 2006 U.S. Dist. LEXIS 73014 (D. Colo. Oct. 6, 2006).

[15] *Id.* at *3 (citing Holmes v. Consumer Ins. Group, 318 F.3d 1199 (10th Cir. 2003)).

[16] *Id.* at *5 (citing United States ex rel. Fine v. MK Ferguson Co. 99 F.3d 1538, 1543 (10th Cir. 1996)).

information, the plaintiff survived a summary judgment motion against him.[17] Further, the court took into account that Mr. Maxwell went beyond his government official duties and was acting as a private citizen, and not as the government, when he filed his suit.[18]

Little Big Horn Revisited?

Last year's *YIR* wondered if relator's survival from a motion for summary judgment in *United States ex rel. DRC, Inc. et al. V. Custer Battles, LLC*[19] was "Custer (Battle)'s Last Stand."[20] That question was answered in part on 16 August 2006 by Judge T.S. Ellis.[21] As the reader might recall, the Coalition Provisional Authority (CPA)[22] awarded a start-up Virginian corporation, Custer Battles LLC, a time-and-materials contract to provide support services while the CPA launched the Iraqi Currency Exchange Program, among other contracts. The relators, former Custer Battles employees and subcontractors, alleged that Custer Battles used shell subsidiaries to submit fraudulent invoices to justify getting an advance payment. After an investigation, the Department of Justice declined to intervene in this matter, and realtors' counsel proceeded to discovery and an eventual trial in federal court.

After a twelve-day jury trial in Alexandria, Virginia, both the relator and the defendant moved for a judgment as a matter of law.[23] Judge Ellis deferred ruling on the motion and sent the jury off to deliberate. The jury returned a verdict on all counts that Custer Battles had knowingly presented both false claims and false reports to justify obtaining the $3 million advance payment received on this contract.[24]

Prior to entry of the judgment, Judge Ellis ordered additional hearings on the pending Rule 50 motions and ultimately ruled that relator had failed to introduce evidence that any claims were presented to the United States. The court relied heavily on the *Totten* decision that both sections 3729(a)(1) and (2) of the False Claims Act require a presentment to the U.S. government. Judge Ellis stated that "just as § 3729(a)(1) requires proof that false claims have been presented, or caused to be presented, to a United States government officer or employee working in his or her official capacity, § 3729(a)(2) also requires proof that any false records or statements were presented or caused to be presented, to a United States government employee or officer working in their official capacity."

A "claim" exists only if there is "a request or demand for payment that if paid would result in economic loss to the [U.S.] government fisc." A "claim" does not exist "where the government acts solely as a custodian, bailee, or administrator, merely holding or managing property for the benefit of a third party." The court then notes that the contractor's $3 million request was submitted to the CPA. The court held that even though most CPA workers were employees of the U.S. government, the CPA was not an agency or instrumentality of the United States and the U.S. government employees working in the CPA were not working in their official capacity as employees or officers of the U.S. government. Judge Ellis focused on the fact that relators were given "fair warning that the denial of defendant's motion for summary judgment in *DRC* I did not relieve them of their burden of proving the element of presentment." [25]

As this matter is currently on appeal, and there are other FCA cases[26] dealing with CPA contracts, this issue is far from dead. The trial advocacy lesson learned from Judge Ellis strongly worded opinion is that the moving party has to establish

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[17] Under § 3730(e)(4)(A), "[n]o court shall jurisdiction over [a qui tam] action . . . based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or [GAO] report, hearing, audit, or investigation, or from the news media, unless the action is brought by . . . an original source of the information." 31 U.S.C.S. § 3730(e)(4)(A) (LEXIS 2006).

[18] *DOJ Overbilling Press Release*, *supra* note 13, at 7.

[19] 376 F. Supp. 2d 617 (E.D. VA 2005).

[20] *YIR 05*, *supra* note 7, at 133.

[21] 415 F. Supp. 2d 628 (E.D. Va. Aug. 16, 2006).

[22] The CPA documents can still be found at http://www.cpa-iraq.org/. There have been a number of books documenting the trials and tribulations of the CPA, *see e.g.* T. CHRISTIAN MILLER, BLOOD MONEY (2006), and BOB WOODWARD, STATE OF DENIAL (2006).

[23] FED. R. CIV. P. 50(A).

[24] The jury had been instructed that the $3 million was the maximum amount of damages they could award. This award would have been trebled under the False Claims Act. 31 U.S.C.S. § 3729(a) (LEXIS 2006).

[25] *Id.*

[26] There is also a Custer Battles security contract for Baghdad International Airport (BIAP) which was severed from this case by Judge Ellis. Order Severing ICE Claims from BIAP (E.D. Va. Aug. 16, 2006) (on file with author).

the evidence chain of presentment through federal government witnesses to create the necessary nexus on false claims cases. From a jurisprudential point of view, Judge Ellis relied heavily on *Totten*. However, the rationale behind *Totten* is currently being evaluated in various circuits and two district courts have rejected *Totten* already.[27]

Wave of the Future?

In this era of globalization, where three of the top ten defense contractors are foreign corporations,[28] it is increasingly important that the government finds a way to keep these foreign corporations in check. In the first False Claims Act settlement involving a foreign corporation committing fraud on a foreign base, Shinwha Electronics Inc. paid the United States $1,200,000 to resolve allegations brought to light in a *qui tam* case filed in Hawaii.[29] The investigation focused on Shinwha's billing the U.S. Army Contracting Command, Korea, for inspection, test and maintenance work that was not done on a fire system inspection contract.

Shhhh. . .

In a reminder that *qui tam* cases are filed under seal, Judge George O'Toole took a proactive approach.[30] In a non-DoD *qui tam* case, *United States ex rel. Driscoll v. Serono, Inc*., a principal of one of the relators discussed the case, while it was under seal, with a Wall Street Journal reporter resulting in a 5 August 2005 news article. The seal was lifted two months later as part of settlement negotiations, and, on 16 March 2006, Judge O'Toole ordered that the admitted source pay the United States the cost of its investigation into the leak.

Let's Be More Exact

A trio of declined cases this year reminds those who allege fraud to plead with particularity or face the wrong end of a motion to dismiss.[31]

In a case in the Southern District Court of Ohio, *United States ex rel. Zeller v. Cleveland Construction, Inc*.,[32] the relators alleged that the prime contractor and one of its subcontractors conspired to submit false claims during the construction of a Navy medical facility in Portsmouth, Virginia. As the defendant contractor moved to dismiss under Federal Rule of Civilian Procedure 9(b)[33] and 12(b)(6),[34] Judge Susan Dlott required the relator to provide a more definitive statement identifying which prime and subcontractor employees were involved in the alleged conspiracy. The court reasoned that the relator must allege the "who" involved in the alleged fraud before it could move forward.

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[27] *See* United States *ex rel.* Wong v. Consul-Tech Eng'g, Inc., No. 02-023081 (S.D. Fla. Mar. 16, 2005); United States *ex rel.* Maxfield v. Wasatch, No. 2:99 CV 00040 (D. Utah, May 27, 2005).

[28] DefenseNews.com, Defense News Top 100, http://www.defensenews.com/content/features /2005chart1.html (last visited 16 Nov. 2006).

[29] Department of Justice, Press Release, http://www.usdoj.gov/usao/hi/pressreleases/ 0601shinwha.html, and Davis, Levin, Livingston, and Grande, www.DavisLevin.com, Press Release, *Settlement of False Claims Act Case Against Korean Fire Inspection Company,* http://davislevin.com/ShinwhaPressRelease.pdf (last visited 16 Nov. 2006).

[30] 2006 WL 355392 (S.D. Ohio Feb 15. 2006)

[31] "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. malice, intent, knowledge, and other condition of mind of a person may be averred generally." FED. R. CIV. P. 9(b).

[32] United States *ex rel.* Driscoll, 2006 WL 355392.

[33] FED. R. CIV. P. 9(b).

[34] FED. R. CIV. P. 12(b)(6) states:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . (6) failure to state a claim upon which relief can be granted . . . [i]f, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

In *United States ex rel Smith v. Boeing and Ducommun Inc.*,[35] the District Court in Kansas granted Boeing's motion to dismiss for failure to plead fraud with particularity because the Relator's complaint was comprised of "blanket allegations." Judge Brown noted that even though "the complaint is already extensive and contains significant details about Ducommun's alleged manufacturing deficiencies and Boeing's alleged response to Relator's investigation, it addresses only in conclusory terms the submission of false or fraudulent claims to the U.S. Government."[36] Relator had alleged that that Boeing and its subcontractor, Ducommun, Inc., violated the False Claims Act by submitting false claims for payment because Ducommun lacked manufacturing and quality control processes resulting in the delivery of "bogus" or "unapproved" aircraft parts over thirty-two different aircraft. Judge Brown noted that the relators were correct to point out that Rule 9(b) does not require a description of all of the evidence supporting a fraud claim, but that the rule is designed to afford a defendant fair notice of claims by setting forth the time, place, and contents of the alleged fraud. The relators allegations that the defendants violated terms of the contract, military specifications and Federal Aviation Administration requirements, without identifying any of those terms. The court allowed the relator leave to amend the complaint, but without showing the nexus with particularity will have to defend their complaint once again.

The relators in *United States ex rel Brooks v. Lockheed Martin Corp.*[37] were not lucky enough to get another chance. In a FCA suit stemming from a 1984 Department of Energy contract with Martin Martietta to operate a uranium enrichment plant in Piketon, Ohio, the relator, to quote the judge, "cribbed" the general allegations from another case at a similar plant, *United States ex rel. NRDC v. Lockheed Martin*,[38] still under discovery, but did not have any specific claims to bring to the court. As this was the defendant's second 9(b) motion, the Court concluded that although the relator had the opportunity to amend his complaint and did not then he must not know any details of fraud conduct at Piketon, Ohio and dismissed the case with prejudice.

Criminal—The Good, the Bad, and the Ugly

The Good: New Task Force

On 10 October 2006, Deputy Attorney General (DAG) Paul J. McNulty announced a new National Procurement Fraud Task Force established by the Justice Department's Criminal Division in partnership with the Civil Division and the U.S. Attorneys' offices to promote the early detection, prevention and prosecution of procurement fraud.[39] The DAG pronounced the task force, working with various agencies, inspector generals (OIG), and investigative organizations will focus on:

> (1) Identification and prosecution of viable procurement fraud cases through coordination with U.S. Attorneys' Offices and OIG field offices;
> (2) Ensuring adequate resources are available to successfully investigate and prosecute procurement fraud cases; Standardization of "best practices" (e.g., recruitment of sources, consensual calls, and witness interviews);
> (3) Better coordination between agency auditors and investigators to ensure that red flags and badges of fraud are promptly reported to criminal investigators for follow-up investigation;
> (4) Better identification and resolution of investigative and coordination issues as they arise in joint cases (e.g., audit support and expanded efforts to share information);
> (5) Specialized training for OIG agents and auditors on the development and prosecution of procurement fraud cases;
> (6) Examination of existing laws and policies to determine if they need to be strengthened or changed;
> (7) Development of strategies encouraging agencies to refer more cases for civil and criminal prosecution; and
> (8) Better coordination of targeted civil, regulatory and criminal enforcement actions.

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[35] 2006 WL 542851 (D. Kan. Feb 27, 2006).

[36] *Id.*

[37] 423 F.Supp. 2d 522 (D. Md. Mar. 27, 2006).

[38] No. 99-CV-00170-M.

[39] Department of Justice, Press Release, *Deputy Attorney General Paul J. McNulty Announces Formation of National Procurement Fraud Task Force*, http://www.usdoj.gov/opa/pr/2006/ October/06_odag_688.html (last visited 16 Nov. 2006).

The Bad: Thompson Memo

As the DOJ turns to a new task force to fight procurement fraud, an old task force's methods has been called into question. In *United States v. Stein*,[40] Judge Lewis A. Kaplan, of the United States District Court for the Southern District of New York, examined the methods of how the DOJ prosecutes business organization targets under the "Thompson Memo." On 20 January 2003, then-United States Deputy Attorney General Larry D. Thompson issued what has been commonly referred to as the "Thompson Memo." The "Thompson memo" set forth nine factors to guide federal prosecutors in their determination whether to charge a business organization stemming from the DOJ's Corporate Fraud Task Force, but applicable to all charging decisions involving business organizations. One of those factors is "whether the corporation appears to be protecting its culpable employees and agents . . . through [among other things] the advancing of attorneys' fees."[41]

It was DOJ's handling of this factor in a tax-shelter case,[42] against former professionals of KPMG that Judge Kaplan ruled unconstitutional under the Sixth and Fourteenth Amendments.[43] As Judge Kaplan noted, prior to the investigation KPMG had been the longstanding practice to advance and pay legal fees for partners, principals and employees, without a preset cap or condition of cooperation with the government, in any civil, criminal or regulatory proceedings arising within the scope of their duties at KPMG. In looking for the spirit of corporate cooperation with DOJ investigation into KPMG tax shelters KPMG first capped advanced attorney fees at $400,000 and then provided it only on the condition that its employees did not invoke their Fifth Amendment privilege against self-incrimination. According to the Court, DOJ took advantage of this corporate level of cooperation and repeatedly notified KPMG when its personnel did not cooperate leading KPMG to advise the attorney for the individual in question that the payment of legal fees would be terminated "[a]bsent an indication from the government within the next ten business days that your client no longer refuses to participate in an interview with the government." When the government indicted a number of KPMG employees, the company, following this new spirit of cooperation, cut off payments of those employees' legal fees and expenses. Skipping the possibility that both DOJ and KPMG were trying to establish a groundwork to settle this matter, Judge Kaplan found that the government "conducted itself in a manner that evidenced a desire to minimize the involvement of defense attorneys."

As for the remedy, Judge Kaplan found that the sovereign immunity doctrine prevented him from directing the government to pay the KPMG employees' legal fees, but that the affected defendants could seek payment from KPMG.

In a sign that this matter is a long way from resolved, Deputy Attorney General Paul McNulty defended the use of the Thompson Memo before the Senate Judiciary Committee on 12 September 2006

> The Thompson Memo is a set of principles, the basic structure of which is used every day in the criminal justice system. We ask cooperating drug dealers, bank robbers and gun-toting felons to waive their Fifth Amendment privilege against self-incrimination all the time – and the vase majority of them do not have access to the high-priced legal talent corporations do. If a corporation has committed a crime, it is no more deserving of special treatment than any of these defendants. The American public rightly demands that we judge all defendants by the severity of their crime, not the size of their pocketbook.[44]

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[40] 435 F.Supp.2d 330 (S.D.N.Y. 2006).

[41] Memorandum, Deputy Attorney General, Department of Justice, to Heads of Department Components and United States Attorneys, subject: Principles of Federal Prosecution of Business Organizations (20 Jan. 2003), at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

[42]

> This . . . has been described as the largest tax fraud case in United States history. The government thus far has produced in discovery . . . at least 5 million to 6 million pages of documents plus transcripts of 335 depositions and 195 income tax returns. The briefs on pretrial motions passed the 100-page mark some time ago. The government expects its case in chief to last three months, while the defendants expect theirs to be lengthy as well. To prepare for and try a case of such length requires substantial resources.

Id.

[43] U.S. CONST. amend. VI and XIV.

[44] Deputy Attorney General Paul McNulty, Testimony before U.S. Senate Judiciary Committee, (Sept. 12, 2006), http://www.usdoj.gov/dag/testimony/2006/091206dagmcnulty_testimony_ thompson_memo.htm (last visited 31 Oct 2006).

The Ugly: War Profiteers

Continuing the push to provide law and order to the "Wild Middle East," there were a number of high profile pleas and convictions this past year. The U.S. Attorney Office for the Central District of Illinois and the U.S. Department of Justice's Criminal Division has been leading the criminal charge as evidenced by these three cases involving the work of Halliburton's subsidiary, Kellogg, Brown & Root Services Inc. (KBR), on the Logistics Civil Augmentation Program (LOGCAP III). The LOGCAP III supports the logistical needs of U.S. military forces in Iraq.[45]

On 18 November 2005, Glenn A. Powell, a former employee of KBR was sentenced to fifteen months in prison for taking a $121,800 kickback to award a subcontract from the LOGCAP III prime contract to an Iraqi subcontractor.

On 23 March 2006, Stephen L. Seamans, a former 'Procurement Materials and Property Manager' of KBR pled guilty to wire fraud and conspiracy to launder money related to the awarding of a subcontract under the LOGCAP III contract. According to the plea agreement and statements made in court, Seamans accepted kickbacks in excess of $124,000 to improperly award a dining facility services contract at Camp Arifjan in Kuwait. He awaits sentencing.[46]

On 23 June 2006, Mohammad Shabir Khan, Tamimi Global Company's former Director of Operations for Kuwait and Iraq pled guilty to paying KBR employees kickbacks to secure two military dining facility contracts.[47]

Administrative

APA Review

As a reminder that suspension and debarment officials (SDO) are reviewable there was a rare challenge of that authority this year: *WEDJ et al. v. Department of Defense.*[48]

WEDJ Inc., a small air conditioner manufacturer in York, Pennsylvania, had numerous government contracts with the Communications and Electronics Command (CECOM) and the Defense Logistics Agency to provide environmental control units—military air conditioners—on various weapon systems. WEDJ used the Administrative Procedure Act (APA)[49] to attack the Army's SDO decision to debar WEDJ and its principles under *Federal Acquisition Regulation* (*FAR*) *part 9-406*. The Army's SDO debarred WEDJ and its principles for improperly using surplus parts and falsifying first article test results on air conditioners for Patriot Missile Shelters, Firefinder Radar Control Shelters and Navy Hovercraft.

WEDJ contention was that the SDO had acted arbitrary and capriciously by relying on the factual record before him. Judge James McClure reviewed the administrative record and noted that each of WEDJ's "spurious" allegations had been heard by the SDO in the hearing and in the written materials and had been properly considered. Key to this decision is that Army had kept a complete administrative record and that the SDO had what he needed before him to make a decision that survived APA scrutiny.

There is nothing new here, but the case is a classic textbook manner in which coordination between the buying command (CECOM), the investigators (Defense Criminal Investigative Service and the Army's Criminal Investigative Command-Major Procurement Fraud Unit), the DOJ, and the agency headquarters element (Army Procurement Fraud Branch) resulted in a solid administrative record supporting a fact-based debarment.

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[45] Department of Justice, Press Release, Former KBR Employee Sentenced to 15 Months in Prison for Accepting Kickbacks (18 Nov. 2006), http://www.usdoj.gov/usao/ilc/press/ (last visited 16 Nov. 2006).

[46] Department of Justice, Press Release, *Former KBR Employee Pleads Guilty to AcceptingKickbacks Related to Award of Military Subcontract* (23 Mar. 2006), http://www.usdoj.gov/ usao/ilc/press/ (last visited 16 Nov. 2006)

[47] Department of Justice, Press Release, *Former Tamimi Global Excecutive Admits Paying Kickbacks for Military Subcontracts in Kuwait,* (23 June 2006), http://www.usdoj.gov/usao /ilc/press/ (last visited 16 Nov. 2006).

[48] 2006 WL 2077021 (M.D. Pa.)

[49] 5 U.S.C.S. § 551 et seq. (LEXIS 2006).

Information is key and each of the DoD administrative fraud agencies has established webpages and regular updates to spell out their policies and publicize their actions.[50] To wrap up this note, the FY 2005 administrative numbers are as follows:[51] the Army SDO suspended fifty-six, proposed sixty-two for debarment and debarred fifty-two; the Air Force SDO suspended five, proposed seventy-nine for debarment and debarred fifty-one; the Defense Logistics Agency SDO suspended eleven, proposed 101 for debarment and debarred sixty-six; and last but not least, the Navy SDO suspended fourteen, proposed sixty for debarment and debarred fifty-three.

Major Art J. Coulter

[50] Army at https://jagcnet.army.mil/JAGCNETInternet/Homepages/AC/ ArmyFraud.nsf/(JAGCNetDocID)/HOME?OpenDocument; Navy at http://ogc.navy.mil/ogcwww/aio.asp; and Air Force at http://www.safgc.hq.af.mil/safgcr.htm.

[51] Administrative numbers gathered through e-mail correspondence with agency point of contacts (on file with author).

Surface Water Management Fee Is All Wet

If you have a situation where you are unsure whether a charge being assessed against the federal government by a state or local municipality is a fee (and thus payable) or a tax (and thus not payable), turn to *Forest Service-Surface Water Management Fees*[1] for a thorough discussion of the distinctions between the two. That opinion addressed the propriety of the Forest Service using appropriated funds to pay surface water management (SWM) fees assessed by King County, Washington, against federal lands located within its jurisdiction. Applying the three-part test of a classic tax, [2] the GAO found that the King County SWM fee was a tax and not a "reasonable service charge" allowable under the Clean Water Act's sovereign immunity waiver.[3] Conceding that King County's SWM fee also had some characteristics of a classic "regulatory fee," the GAO said that was not enough to convert it from a "tax" into a "fee." Furthermore, the GAO noted that even if it had found the SWM fee to be service charges rather than taxes, it would still have concluded that the fee was not payable by the Forest Service because of its discriminatory nature—King County gave a discount to the Washington State Department of Transportation, but no similar discount to federal agencies.

Government Not Stuck, After All, with Individual Shareholder's Tax Bill

Last year we reported on a Court of Federal Claims decision[4] that allowed a Subchapter S corporation's[5] sole shareholder to be reimbursed for state income taxes she paid, on the basis that, as a Subchapter S corporation, its income tax liability is "passed through" to its sole shareholder and that state income taxes paid by the shareholder are allowed under the Taxes cost principle applicable to the corporation's cost-reimbursement contracts.[6] On appeal, however, the Court of Appeals for the Federal Circuit (CAFC) reversed,[7] finding 48 C.F.R. section 31.205-41[8] inapplicable because the corporation never paid any state income taxes; only the shareholder paid state income taxes on dividends paid to her by the corporation. Because the shareholder was not the contracting entity, her state income tax payments could not be an allowable cost for the corporation.

Title Means Title, Not Lien

Northrop Grumman successfully challenged an ad valorem personal property tax assessment by the County of Los Angeles, [9] by asserting that specified portions of the property belonged to the federal government and were not taxable by the county. Northrop relied on title provisions of the Progress Payment clause[10] of its fixed-price defense contracts, which states that title to property allocable or chargeable to the contracts vests in the federal government. The Court of Appeals affirmed,[11] rejecting the County's interpretation of the clause as giving the federal government only a lien or security interest in the property. Because the county cannot tax property owned by the United States, it had to refund the taxes paid by Northrop Grumman on property allocated to the performance of its military contracts, including overhead property allocated as an indirect cost.

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[1] B-306666, 2006 U.S. Comp. Gen. LEXIS 93 (June 5, 2006).

[2] An assessment that (1) is imposed by a legislature upon many, or all, citizens, (2) raises money, and (3) is spent for the benefit of the entire community. *See* Comp. Gen. B-30666, at 12.

[3] 33 U.S.C.S. § 1323(a) (LEXIS 2006).

[4] Info. Sys. & Networks Corp. v. United States, 48 Fed. Cl. 265 (2000).

[5] Subchapter S corporations are so called because they are organized under Subchapter S of the Internal Revenue Code, 26 U.S.C. §§ 1361-79 (LEXIS 2006). They are typically small businesses, closely held by no more than 75 shareholders, and often by a sole shareholder.

[6] Part 31.205-41 provides that certain federal, state, and local taxes are allowable if they are required to be paid or accrued in accordance with generally accepted accounting principles. GENERAL SERVS. ADMIN.ET AL., FEDERAL ACQUISITION REGULATION REG. pt. 31.205-41 (July 2006) [hereinafter FAR].

[7] Information Sys. & Networks Corp. v. United States, 437 F.3d 1173 (Fed. Cir. 2006); *rehearing denied*, 2006 U.S. App. LEXIS 10778 (Apr. 14, 2006).

[8] FAR, *supra* note 6, at pt. 31.205-41,

[9] Superior Court of Los Angeles County, No. BC279303.

[10] FAR, *supra* note 6, at pt. 52.232-16.

[11] 134 Cal. App. 4th 424; 2005 Cal. App. LEXIS 1837 (Nov. 28, 2005), *petition for review denied*, 2006 Cal. LEXIS 2779 (Feb. 22, 2006).

Don't Give Tax Advice to Contractors!

GarCom, Inc., a recent Armed Services Board of Contract Appeals decision,[12] illustrates once more the dangers of providing tax advice to prospective contractors, as well as the misunderstanding surrounding the proper use of the Standard Form (SF) 1094, a U.S. tax exemption form.[13] GarCom attempted to recover the cost of the Arizona's Transaction Privilege Tax (TPT),[14] which it failed to include in its price, but for which, after being audited by the State of Arizona, it was in fact found liable. At the board proceedings, the applicability of the TPT was not in dispute. However, GarCom argued that the government misled it into excluding the TPT costs from its proposal. For one thing, GarCom alleged that prior to award, they were verbally advised by the government's contract administrator not to include state and local taxes in their price. For another, GarCom requested and received an SF 1094 signed by the government contracting officer. The board neither accepted the contractor's version of its conversations with the government representative, nor found the SF 1094 misleading. While we find the board's interpretation of the application of the SF 1094 a bit misguided (in implying that the SF 1094 covers a contractor's purchases for the federal government), the board did seem to understand that the form evidences the federal government's tax immunity, not the contractor's. None of this ultimately factored into the board's decision anyway. In denying GarCom's appeal, the board relied on the terms of GarCom's written contract, which included the standard clause for commercial items,[15] making the contract price inclusive of all applicable taxes.

Recent Tax Legislation Imposes New Withholding Tax on Government Contractors—But Not for a While and Maybe Never

The "Tax Increase Prevention and Reconciliation Act of 2005"[16] included a provision which generally imposes a three percent withholding tax on payments for property and services made to contractors by federal, state, and local government agencies.[17] However, this new law is not scheduled to take effect until 2011 and a bill[18] has already been introduced to repeal this particular provision, so we will have to wait and see what the results are.

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[12] ASBCA No. 55034, 06-1 BCA ¶ 33,146; 2005 ASBCA LEXIS 105 (Dec. 14, 2005).

[13] FAR, *supra* note 6, at pt. 53.301-1094 (providing a copy of the form).

[14] Arizona imposes a transaction privilege tax (TPT) on the privilege of doing business in Arizona, on persons doing business in the State, pursuant to § 42-5008 of the Arizona Revised Statutes. The tax is based on the amount or volume of business transacted.

[15] FAR 52.212-4, Contract Terms and Conditions – Commercial Items, states in para (k) that "The contract price includes all applicable Federal, State, and local taxes and duties." FAR, *supra* note 6, at pt. 52.212-4.

[16] Pub. L. No. 109-222, 120 Stat. 345 (2006).

[17] Note that although federal, state, and local governments will be required to withhold the tax, private companies will not.

[18] S. 2821. To repeal the imposition of withholding on certain payments made to vendors by government entities. The bill was referred to the Committee on Finance, where it remains as of this writing.

Contractors Accompanying the Force

National Defense Authorization Act for Fiscal Year 2007

Contractor employees in Iraq and Afghanistan may now be subject to the Uniform Code of Military Justice (UCMJ). Until now, the UCMJ asserted jurisdiction over "persons serving with or accompanying an armed force in the field" only in "time of war."[1] Courts have interpreted the phrase "time of war" as being limited to a congressionally declared war for more than thirty years.[2] However, the John Warner National Defense Authorization Act for Fiscal Year 2007 (2007 NDAA)[3] amended the UCMJ to provide jurisdiction over these persons "in time of declared war **or a contingency operation.**"[4]

The 2007 NDAA couched the change to the UCMJ as a "clarification" of the application of the UCMJ.[5] However, subjecting contractor personnel to the UCMJ during all contingency operations appears to constitute a significant change rather than a clarification.[6] No legislative history explains this change. Further, as there is no published guidance, it is unclear how this change will be implemented and precisely what the ramifications will be.

Contractor Personnel Authorized to Accompany the United States Armed Forces

Last year's *Year in Review*[7] discussed a final Department of Defense (DoD) rule governing contractor employees accompanying the forces on contingency, humanitarian, peacekeeping or combat operations.[8] Four months following the effective date of the *DFARS* final rule, the DoD published *Department of Defense Instruction (DODI) 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces*,[9] to serve "as a comprehensive source of DoD policy and Procedures concerning DoD contractor personnel authorized to accompany the U.S. Armed Forces."[10]

In general, the *DODI* applies to all contractors and subcontractors at all levels, and their employees, authorized to accompany U.S. Armed Forces.[11] Specifically, the *DODI* also applies to third country national (TCN) and host nation (HN) contractor personnel.[12] These personnel are now called "contingency contractor personnel" (CCP).[13] This broad category of contractor personnel includes employees of systems support, external support, and theater support contracts.[14] All CCP must possess a proper Geneva Convention Identification (ID) card.[15]

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[1] UCMJ art. 2(a)(10) (2006).

[2] *See* United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970) (holding "that the words 'time of war' mean . . . a war formally declared by Congress"). *See also* United States v. Castillo, 34 M.J. 1160 (N.M.C.M.R. 1992) (noting the difference in interpretation of "time of war" for punitive articles versus Article 2(a)(10)). *See generally* Mark J. Yost & Douglas S. Anderson, *Current Development: The Military Extraterritorial Jurisdiction Act of 2000: Closing the Gap*, 95 AM. J. INT'L L. 446 (2001) (discussing the history of and recent changes to subjecting civilians to military justice).

[3] John Warner National Defense Authorization Act, 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2007).

[4] *Id*. § 552 (emphasis added).

[5] *Id*. The title of the Section is "Clarification of application of Uniform Code of Military Justice during a time of war." *Id*. The full text of the Section states, "Paragraph (10) of section 802(a) of title 10, United States Code (article 2(a) of the Uniform Code of Military Justice), is amended by striking ''war'' and inserting ''declared war or a contingency operation''. *Id*.

[6] *See supra*, note 2, discussing application of the UCMJ to civilians. *See also Castillo*, 34 M.J. at 1163 (citation omitted) (noting that there have only been five declared wars in the history of the United States, and none since the enactment of the UCMJ).

[7] Major Andrew S. Kantner et al, *Contract and Fiscal Law Developments of 2005—Year in Review*, ARMY LAW., Jan. 2006 at 149 [hereinafter *2005 Year in Review*].

[8] Defense Federal Acquisition Regulation Supplement; Contractor Personnel Supporting a Force Deployed Outside the United States, 70 Fed. Reg. 23,790 (May 5, 2005) (codified at 48 C.F.R. pts. 207, 212, 225, and 252).

[9] U.S. DEP'T OF DEFENSE, INSTR. 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES (3 Oct. 2005) [hereinafter DoD INSTR. 3020.41].

[10] *Id*. para. 1.

[11] *Id*. para. 2.2.

[12] *Id*. para. E2.1.3.

[13] *Id*.

[14] *Id*.

[15] *Id*.

A subset of CCP, subject to specific deployment and accountability requirements, are "contractors deploying with the force (CDF)."[16] These personnel "usually work for the U.S. military forces under a deployable contract[,] . . . have a long-term relationship with a specific unit . . . [and] live with and provide services directly to U.S. military forces and receive Government-furnished support similar to DoD civilians."[17] The TCN and HN personnel contracted in theater are not CDF.[18] Certain sections of the *DODI* apply to all CCP, and others apply only to CDF.[19]

The *DODI* provides general DoD policy regarding contractor personnel authorized to accompany U.S. Armed Forces.[20] First, predeployment planning must include contractor issues, and operations plans and orders must implement the *DODI* requirements.[21] Also, DoD policy is to limit the logistics support provided to contractor personnel to those situations in which the commander or contracting officer determines that such support is necessary to ensure continued contractor support.[22] The *DODI* also establishes general policy regarding contractor security, arming, accountability, and deployment processing.[23]

Section six provides more specific DoD guidance covering a wide range of CCP issues, and is the "authoritative and comprehensive roadmap of policy and procedures applicable" to CCP.[24] The next few paragraphs will highlight some of the provisions of this roadmap. First, the *DODI* requires that every service provided by CCP in contingency operations be reviewed "on a case-by-case basis in consultation with the servicing legal office to ensure compliance with relevant laws and international agreements."[25] The *DODI* also explains that CCP may be subject to various HN, TCN, and even U.S. laws, depending on application of international agreements.[26]

The *DODI* directs the establishment or designation of a joint web-based contractor database as the central repository for CDF personnel and contract capability for all external and systems support contracts.[27] This goal of this database is to provide by-name accountability of all CDF.[28] Military departments are required to designate the database for required use in all external and systems support contracts, and populate the database with summary contract information when contracts are awarded.[29] Contractors awarded such contracts are responsible for inputting and maintaining CDF data and by-name accountability.[30]

The *DODI* explains that DoD policy is that logistical support of contractor personnel should be borne by the contractor.[31] The *DODI* states that the DoD should provide logistical support to contractor personnel "only when the commander or the contracting officer determines provision of such support is needed to ensure continuation of essential contractor services and adequate support cannot be obtained by the contractor from other sources."[32] Where the DoD is to provide support, the contracting officer is required to issue a Letter of Authorization detailing the specific privileges to which the named contractor employee is entitled.[33]

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[16] *Id*. at E2.1.4.

[17] *Id*.

[18] *Id*.

[19] *See, e.g.*, *id*. para. 6.2.7.4 (requiring a Letter of Authorization for CDF); and *Id.* at para. 6.2.7.10 (stating that generally CCP are not entitled to legal assistance).

[20] *Id*. para. 4.

[21] *Id*.

[22] *Id*.

[23] *Id*.

[24] *Id*. para. 6.

[25] *Id*. para. 6.1.1.

[26] *Id*. para. 6.1.2.

[27] *Id*. para. 6.2.6.

[28] *Id*. para. 6.2.6.1.

[29] *Id*. para. 6.2.6.2.

[30] *Id*. para. 6.2.6.4.

[31] *Id*. para. 4.3.

[32] *Id*.

[33] *Id*. para. 6.2.7.4.

The *DODI* establishes DoD policy regarding the arming of contractor employees.[34] The combatant commander may authorize, on a case-by-case basis, CCP to be armed for individual self-defense.[35] Self-defense arming must be voluntary, permitted by the contract and the contractor, and the government must ensure personnel are trained.[36] Further, the combatant commander, following review on a case-by-case basis by the supporting staff judge advocate, can approve the arming of contractor personnel to provide private security services.[37] Use of such private security service contractors must comply with applicable United States, HN, and international law, and must not be for uniquely military functions.[38]

Arguably one of the most significant aspects of the *DODI* is *section 6.3.3, Contractor Direction and Discipline*.[39] This section begins by stating the general rules that contractors are responsible for the direction and discipline of employees and the contracting officer (KO) is the liaison between the commander and the contractor because commanders have no contract authority.[40] The *DODI* then states, "However, the ranking military commander may, in emergency situations (e.g., enemy or terrorist actions or natural disaster), direct contingency contractor personnel to take lawful action as long as those actions do not require them to assume inherently governmental responsibilities . . ."[41] This language is almost identical to language rejected by the *DFARS*.[42]

The proposed *DFARS* clause, published for comment in 2004, included a provision allowing the ranking military commander in the immediate area authority to direct contractor personnel to take lawful action in emergency situations.[43] The final rule effective in June 2005 rejected that portion of the proposed rule.[44] In response to comments, including "The contractor should not be put in position of determining . . . whether a commander giving an order has authority,"[45] and explaining the rejection of the proposed commander authority, the DAR Council stated the "proposed language is not consistent with existing procurement law and policy."[46] The final *DFARS* rule contains no reference to the ranking military commander.[47]

The *DODI* was issued four months after the effective date of the *DFARS* changes rejecting the on-scene commander's emergency authority.[48] The *DODI* includes a provision similar to that which was rejected, without any reference to the earlier rejection.[49] The two authorities conflict without any indication as to precedence. Subsequently, the *DFARS* was amended again through an interim change in June 2006.[50]

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[34] *Id*. paras. 4.4.1 and 4.4.2.

[35] *Id*. para. 6.3.4.1.

[36] *Id*.

[37] *Id*. para. 6.3.5.1.

[38] *Id*. para. 6.3.5.

[39] *Id*. para. 6.3.3.

[40] *Id*.

[41] *Id*.

[42] *Compare* Defense Federal Acquisition Regulation Supplement; Contractors Accompanying a Deployed Force, 69 Fed. Reg. 13,500 (Mar. 23, 2004) *with* Defense Federal Acquisition Regulation Supplement; Contractor Personnel Supporting a Force Deployed Outside the United States, 70 Fed. Reg. 23,790 (May 5, 2005).

[43] 69 Fed. Reg. at 13,502. The language appeared in proposed paragraph (q) of the clause:

> [I]f the Contracting Officer or the Contracting Officer's representative is not available and emergency action is required because of enemy or terrorist activity or natural disaster that causes an immediate possibility of death or serious injury to contractor personnel or military personnel, the ranking military commander in the immediate area of operations may direct the Contractor or contractor employee to undertake any action as long as those actions do not require the contractor employee to engage in armed conflict with an enemy force. *Id*.

[44] 70 Fed. Reg. at 23,800.

[45] *Id*.

[46] *Id*. The DoD also concurred with objections to the proposed commander contract authority based on concerns that allowing such authority could lead to the appearance of personal services contracts, and could violate the CICA and the ADA. *Id*.

[47] *Id*.

[48] DoD INSTR. 3020.41, *supra* note 9.

[49] *Id*. para. 6.3.3.

[50] Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized to Accompany U.S. Armed Forces, 71 Fed. Reg. 34,826 (June 16, 2006) (to be codified at 48 C.F.R. pts. 212, 225, and 252).

The interim rule was published "to implement the policy in DoD Instruction 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces, dated October 3, 2005."[51] This rule amended the *DFARS* to address issues such as authority for contractor personnel use of deadly force, responsibility of the combatant commander relative to contractor personnel security, and logistical issues.[52] While the interim amendment purports to align the *DFARS* with the *DODI*,[53] nothing is mentioned or amended regarding the commander's emergency authority present in the *DODI*, but specifically rejected by the *DFARS*.

The interim rule became effective on 16 June 2006.[54] Comments were due by 18 September 2006.[55]

GAO Protest: Brian X. Scott—Security Contracts OK

Contracts for cargo transportation and security services and for base security services are permissible guard and security services, and not impermissible quasi-military armed forces.[56] A contractor challenged two solicitations issued by the Joint Contracting Command—Iraq/Afghanistan alleging that the contracts would violate the Anti-Pinkerton Act[57] and DoD policies[58] regarding contractor personnel.[59] The Government Accountability Office (GAO) held that the solicitations did not implicate the Anti-Pinkerton Act, and DoD policy provides explicit authorization for use of contracted security services.[60]

The Anti-Pinkerton Act was passed in 1892 in response to violent confrontations between labor and factory owners in which the factory owners would employ the Pinkerton Agency to provide armed men as strikebreakers.[61] The Act prohibits the government from employing such tactics.[62] The GAO determined that the key prohibition of the Act was the employment of "quasi military forces as strikebreakers," and that the Act does not prohibit government contracting for security guards.[63]

Although it is unclear how the analysis pertains to the Anti-Pinkerton Act, the GAO also appears to have addressed whether security services in Iraq constitute inherently governmental functions.[64] The protester claimed that the security requirements would constitute impermissible "offensive or defensive combat."[65] In rejecting this portion of the protest, the GAO stated, "[t]he provisions of the SOWs [statements of work] describe guard or protective services that are often performed in the private sector, such as bank guards or armed escorts for valuable cargo, as opposed to combat operations reserved solely for performance by the armed forces."[66] The GAO went on to note that the contractor would be required to summon military assistance in the event of any armed altercation.[67]

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[51] *Id*.

[52] *Id*. at 34,826-34,827.

[53] *Id*. at 34,826.

[54] *Id*.

[55] *Id*.

[56] Brian X. Scott, Comp. Gen. B-298370, Aug. 18, 2006, 2006 CPD ¶ 125.

[57] 5 U.S.C.S. § 3108 (LEXIS 2006).

[58] DoD INSTR. 3020.41, *supra* note 9.

[59] *Brian X. Scott*, 2006 CPD ¶ 125, at 3.

[60] *Id*. at 6, 9.

[61] *Id*. at 3.

[62] *Id*. The full text states, "An individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the government of the District of Columbia." *Id*.

[63] *Id*. at 6.

[64] *See* Federal Activities Inventory Reform (FAIR) Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998). The FAIR Act defines inherently governmental function as "so intimately related to the public interest as to require performance by Federal Government employees." *Id*. § 5(2).

[65] *Brian X. Scott*, 2006 CPD ¶ 125, at 5.

[66] *Id*. at 6.

[67] *Id*.

The protester also asserted that *DODI 3020.41* only allows contingency contractor personnel to be armed for individual self-defense, and specifically precludes mutual defense.[68] The GAO addressed this protest ground by first noting that ordinarily an internal agency regulation would fall outside the GAO protest jurisdiction.[69] However, in this case, the *DODI* was followed by an amendment to the *DFARS* to mirror the *DODI*; therefore, the GAO considered an alleged violation of the *DODI* as though it would constitute violation of a procurement regulation.[70]

The GAO dispatched this protest ground because "the DODI provides explicit instruction for authorizing the 'Use of Contingency Contractor Personnel for Security Services."[71] The *DODI* includes instructions for arming contingency contractor personnel "that clearly [anticipate] performance of security or guard services similar to those sought under the solicitations."[72] The GAO also noted that the protester again alleged under this ground that the solicitations would result in the performance of "'uniquely governmental' work."[73] The GAO determined that the solicitations did not require the performance on combat operations, and thus did not violate the prohibition against inherently governmental contract services.[74]

GAO Report—Actions Still Needed to Improve the Use of PSPs

In June 2006, the Government Accountability Office (GAO) provided testimony to Congress addressing the use of private security providers (PSP) in Iraq.[75] The GAO was asked to follow-up on a report issued in July 2005 addressing the same issues.[76] The GAO found three significant problem areas: (1) coordination between the U.S. military and PSPs;[77] (2) the DoD and PSPs are not adequately completing security screening of PSP personnel;[78] and (3) no U.S. or international standards governing PSPs exist.[79]

Military-PSP coordination still needs improvement despite the creation of the Reconstruction Operations Center (ROC).[80] Lack of communication between the military and the PSPs results in PSPs entering military battle space without the awareness of the local military unit, putting personnel within both entities at increased risk.[81] Further, the DoD has not developed any predeployment training for military units regarding PSP operating procedures or the role of the ROC, despite agreement with the 2005 GAO recommendation to do so.[82]

As the GAO stated, "[b]ecause of the numerous difficulties in screening employees, particularly those who do not live in the United States, it may not be possible to know the true identities and backgrounds of the thousands of private security provider employees working in Iraq."[83] The inability to completely screen the PSP employees presents a significant risk to U.S. military forces and civilians in Iraq because the PSP employees have access to weapons and U.S. bases and personnel.[84]

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[68] *Id*. at 7.

[69] *Id*. at 7 n.6.

[70] *Id*.

[71] *Id*. at 7.

[72] *Id*. at 8.

[73] *Id*. at 7 n.7.

[74] *Id*.

[75] U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-06-865T, REBUILDING IRAQ: ACTIONS STILL NEEDED TO IMPROVE THE USE OF PRIVATE SECURITY PROVIDERS (June 13, 2006) (Testimony Before the Subcommittee on National Security, Emerging Threats, and International Relations, Committee on Government Reform (statement of Mr. William Solis, Director, Defense Capabilities and Management)).

[76] *Id*. at 1.

[77] *Id*. at 8.

[78] *Id*. at 10.

[79] *Id*. at 14.

[80] *Id*. at 8. The Reconstruction Operations Center (ROC) provides services such as disseminating unclassified intelligence information, recording incident information, and facilitating military assistance and communication. *Id*. at 2 n.2.

[81] *Id*. at 9.

[82] *Id*.

[83] *Id*. at 10.

[84] *Id*.

No standards exist to ensure that background screening investigations of U.S. personnel are complete.[85] Security investigations of personnel from other countries encounter additional challenges due to privacy laws, incomplete record keeping, and a general lack of obtainable, verifiable information.[86]

In addition to standard background screenings, the DoD uses biometric screening for security purposes.[87] "In March 2005, shortly after a dining facility bombing at a U.S. installation in Iraq killed fourteen U.S. soldiers and wounded at least fifty, the Deputy Secretary of Defense issued a policy requiring the biometric screening of most non-U.S. personnel (including private security provider employees) seeking access to U.S. installations in Iraq."[88] As with the background screenings, the lack of international information available hinders the effectiveness of this technology.[89] The biometric screening has successfully identified several individuals with criminal records in the U.S. seeking access to a military base in Iraq.[90]

No standards exist governing private security provider training and experience requirements.[91] This lack of standards has led to reconstruction contractors replacing security contractors during contract performance.[92] Private security provider associations and companies support the creation of governing standards.[93] Following the 2005 GAO Report, representatives from the Department of State, the DoD, and the U.S. Agency for International Development met to discuss PSP standards.[94] The Agencies determined that the best course of action was to provide reconstruction contractors with access to information about PSPs.[95]

The GAO concluded its report by stating that two recommendations from the 2005 Report remain valid and unimplemented.[96] First, the DoD should develop a training package for deploying military units regarding PSP operating procedures and the role of the ROC.[97] Second, additional efforts should be undertaken to assist contractors with obtaining suitable PSP support.[98] Additionally, the GAO recommends considering a contractual requirement that PSPs coordinate with the military.[99]

DODD 2311.01E DoD Law of War Program

The DoD published *DoD Directive (DODD) 2311.01E, DoD, Law of War Program*,[100] on 9 May 2006, to "ensur[e] DoD compliance with the law of war obligations of the United States."[101] This new DODD includes contractors in DoD law of war policy and purports to place requirements on contractors.[102] "It is DoD Policy that . . . [t]he law of war obligations of the United States are observed and enforced by the DoD Components **and DoD contractors assigned to or accompanying deployed Armed Forces.**"[103]

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[85] *Id*.

[86] *Id*. at 11.

[87] *Id*. at 12.

[88] *Id*.

[89] *Id*. at 13.

[90] *Id*.

[91] *Id*. at 14.

[92] *Id*.

[93] *Id*.

[94] *Id*.

[95] *Id*.

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

[97] *Id*.

[98] *Id*. at 15.

[99] *Id*.

[100] U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM (9 May 2006).

[101] *Id*. para. 1.1.

[102] *Id*. para. 4.2.

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

The Directive tasks the heads of DoD Components to ensure that contract statements of work comply with the *DoD Law of War Program Directive* and *DODI 3020.41*.[104] Significantly, statements of work must require that contractors implement effective programs to prevent employee law of war violations.[105] The program developed must include law of war training.[106] Interestingly, nothing limits this requirement to those contracts which implicate law of war concerns.

The DODD also directs that contracts require contractor employees to relate "reportable incidents" to the local commander or combatant commander.[107] "Reportable Incidents" are "possible, suspected, or alleged, violation of the law of war, for which there is credible information."[108]

Training for Contractor Personnel Interacting with Detainees

Last year's *Year in Review*[109] discussed an interim rule for DoD contractors who interact with individuals detained by DoD in the course of their duties.[110] This rule implements section 1092 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005.[111] The interim rule required DoD contractors to train employees dealing with detainees regarding applicable laws, and each employee was required to acknowledge receipt of the training.[112] The interim rule has now been adopted, with changes, as final, effective 8 September 2006.[113]

The DoD adopted the rule as final, with changes, after receiving comments provided by one industry association.[114] The final rule clarifies the training responsibility sections by stating that the government will provide the required training.[115] There is also no longer a requirement that each contractor employee acknowledge receipt of the required training.[116] This requirement has been replaced by a requirement that the contractor employee provide a copy of the training receipt document to the contractor.[117] Finally, the rule no longer requires the combatant commander to "provide" the training; the combatant commander must "arrange" the training.[118] This clarifies that the combatant commander is not required personally conduct the training.[119]

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[104] *Id*. para. 5.7.4.

[105] *Id*.

[106] *Id*.

[107] *Id*. para. 6.3.

[108] *Id*. para. 3.2.

[109] *2005 Year in Review*, *supra* note 7, at 150.

[110] Defense Federal Acquisition Regulation Supplement; Training for Contractor Personnel Interacting With Detainees, 70 Fed. Reg. 52,032 (September 1, 2005) (codified at 48 C.F.R. pts. 237 and 252).

[111] Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811 (2004).

[112] 70 Fed. Reg. at 52,032.

[113] Defense Federal Acquisition Regulation Supplement; Training for Contractor Personnel Interacting With Detainees, 71 Fed. Reg. 53,047 (Sept. 8, 2006) (to be codified at 48 C.F.R. pts. 237 and 252).

[114] *Id*.

[115] *Id*. at 53,048. The final rule provides the Combatant Commander flexibility to determine whether the training will be provided by government personnel or contractors. *Id*.

[116] *Id*.

[117] *Id*.

[118] *Id*.

[119] *Id*.

Contractor Personnel in a Theater of Operations or at a Diplomatic or Consular Mission

The Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council (FAR Councils) issued a proposed rule that would create a new *FAR subpart 25.3* addressing issues with contractor personnel outside the United States.[120] The new subpart would include a clause specifically regarding contractor personnel "providing support to the mission of the U.S. government in the theater of operations or at a diplomatic or consular mission outside the United States, but are not covered by the DoD Clause for contractor personnel authorized to accompany the U.S. Armed Forces."[121] The proposed rule is similar to *DFARS section 225.7402* and its associated clause, *Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States*, which was implemented in May 2005.[122] Comments were due by 18 September 2006.[123]

Combating Trafficking in Persons

The FAR Councils issued an interim rule[124] to implement the Trafficking Victims Protection Reauthorization Act of 2003, as amended by the Trafficking Victims Protection Reauthorization Act of 2005.[125] This Act "requires that the contract contain a clause allowing the agency to terminate the contract if the contractor or subcontractor engages in severe forms of trafficking in persons or has procured a commercial sex act, or used forced labor in the performance of the contract."[126] The Council has added *FAR subpart 22.17* with an associated clause, which applies to non-commercial service contracts.[127] The interim rule also requires the contractor to establish prevention programs and obtain employee agreement to abide by the law.[128] Comments on the interim rule were due by 19 June 2006.[129]

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[120] Federal Acquisition Regulation; Contractor Personnel in a Theater of Operations or at a Diplomatic or Consular Mission, 71 Fed. Reg. 40,681 (July 18, 2006) (to be codified at 48 C.F.R. pts. 2, 7, 12, 25, and 52).

[121] *Id*.

[122] U.S. Dep't of Defense, Defense Federal Acquisition Reg. Supp. 225.7402 (June 16, 2006).

[123] 71 Fed. Reg. at 40,681.

[124] Federal Acquisition Regulation; Combating Trafficking in Persons, 71 Fed. Reg. 20,301 (Apr. 19, 2006) (to be codified at 48 C.F.R. pts. 12, 22, and 52).

[125] 22 U.S.C.S. § 7104 (g) (LEXIS 2006).

[126] 71 Fed. Reg. at 20,301.

[127] *Id*.

[128] *Id*.

[129] *Id*.

FISCAL LAW

Purpose

GAO Red Book Updating Update

The Government Accountability Office's (GAO's) *Principles of Federal Appropriations Law*,[1] more commonly known as the Red Book, has been an excellent reference for appropriations law for nearly twenty-five years. Volume I, Chapter 4, *Availability of Appropriations: Purpose*, provides a comprehensive examination of the Purpose rules, and application of those principles to specific categories of expenditures, incorporating all relevant Comptroller General opinions and other authorities. This year, the GAO has begun its process of annual updates to the third edition of the Red Book. Because the third edition of Volume II was just released this year,[2] this first annual update included only an update of Volume I, which includes last year's GAO opinions.[3] Next year's update will include both Volume I and Volume II updates.[4] When the third edition of Volume III is published, subsequent annual updates will update all three volumes.[5]

On 7 November 2006, the GAO reposted Adobe Acrobat portable document file (.pdf) versions of both Volumes I and II on their website,[6] including within those versions updated electronic links to the GAO decisions cited therein. Clicking on the links will take you directly to the Comptroller General decision on the GAO website. The GAO has also released a new Index and Table of Authorities for the third edition of the Red Book.[7]

Conference Registration Fees

One hot issue this year was the issue of defraying conference expenses by charging attendees a conference registration fee. Agencies have often collected registration fees to help offset the cost of hosting conferences, but have not necessarily been doing so in accordance with the law. The new interest in conference registration fees arose following a GAO opinion cited in last year's *Year in Review*.[8] Last year, in *National Institutes of Health—Food at Government-Sponsored Conferences*,[9] the GAO enunciated a new food exception permitting the National Institutes of Health (NIH) to use appropriated funds to pay for meals and refreshments for conference attendees—including non-agency and non-government personnel—under certain circumstances as an expense of hosting the conference.[10]

However, a secondary issue in that opinion, which did not represent a new development in fiscal law, generated the most interest by agencies this year. The NIH asked the GAO the follow-up question of whether it may collect conference fees

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[1] OFF. OF THE GEN. COUNSEL, U.S. GOV'T ACCOUNTABILITY OFF., PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (3d ed. 2004).

[2] OFF. OF THE GEN. COUNSEL, U.S. GOV'T ACCOUNTABILITY OFF., PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, VOL. II (3d ed. 2006).

[3] OFFICE OF THE GENERAL COUNSEL, U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, ANNUAL UPDATE OF THE THIRD EDITION (Apr. 2006).

[4] *Id*. at i.

[5] *Id*.

[6] The Red Book is located online at http://www.gao.gov/legal.htm.

[7] OFFICE OF THE GENERAL COUNSEL, U.S. GOV'T ACCOUNTABILITY OFFICE Principles of Federal Appropriations Law, Index and Table of Authorities (Sept. 2006).

[8] *See* Major Andrew S. Kantner et al., *Contract and Fiscal Law Developments of 2005—The Year in Review*, ARMY LAW., Jan. 2006, at 151 [hereinafter *2005 Year in Review*].

[9] B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005).

[10] *Id*. at *3. Specifically, once the agency hosting a formal conference makes an administrative determination that the attendance of the non-agency personnel is "necessary to achieve the conference objectives," appropriated funds may be used to purchase meals and refreshments if:

> (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.

Id. at *13. To use this exception, the government-sponsored conference must also "involve topical matters of interest to, and the participation of, multiple agencies and/or nongovernmental participants." *Id*. at *13-14. Additionally, the conference must have sufficient indicia of formality, including "registration, a published substantive agenda, and scheduled speakers or discussion panels." *Id*. at *14.

from the attendees to defray the costs of the food it wanted to provide to the conference attendees. The GAO explained that an agency must have statutory authorization in order to charge a fee for one of its programs or activities.[11] Even if the NIH had statutory authority to collect such a fee,[12] it would still not be able to retain and use the collected fees, but would instead have to deposit that money into the general fund of the Treasury as miscellaneous receipts.[13] In the absence of statutory authority to retain the amounts collected, which the NIH did not have,[14] retaining the fees to offset conference costs would constitute an improper augmentation of the agency's appropriations and would violate the Miscellaneous Receipts Statute.[15] This is true regardless of whether the agency collects and uses the fees directly, or does it indirectly by having a contractor receive the money for the government to pay for the conference costs.[16]

This year, Senator Barbara A. Mikulski, on behalf of the National Security Agency, asked the GAO to reconsider its *National Institutes of Health* opinion prohibiting collecting conference fees. In *Contractors Collecting Fees at Agency-Hosted Conferences*,[17] Senator Mikulski noted that agencies have for many years specifically sought to avoid violating the Miscellaneous Receipts Statute by having contractors collect fees from conference attendees to defray conference expenses,[18] and prohibiting this practice would hinder the ability of agencies to conduct important conferences.[19]

Upon considering the request, the GAO reiterated its decision in *National Institutes of Health* that an agency cannot collect fees to offset the costs of the conference unless Congress provides statutory authority to do so.[20] The GAO explained that "[a] government agency that lacks the authority to charge and retain fees may not cure that lack of authority by engaging a contractor to do what it may not do."[21] On the other hand, if Congress were to grant an agency authority to collect and retain a conference fee, the agency could then allow a contractor to do it on behalf of the agency.[22] Without a statutory exception to the Miscellaneous Receipts Act, a contractor collecting such fees would be "receiving money for the Government," and that money must be deposited in the Treasury.[23]

The GAO also noted that "Congress, of course, may enact legislation authorizing an agency hosting a conference on behalf of the government to collect and retain an attendance fee,"[24] and suggested that Congress could accomplish that on a

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[11] *Id*. at *16-17 (citing B-300248, Jan. 15, 2004).

[12] The GAO did not resolve that issue, but noted:

> In a recent decision we explained that the Independent Offices Appropriations Act, 31 U.S.C. § 9701, known as the user fee statute, provides general authority for an agency to impose a fee if certain conditions are met. *Id*. The user fee statute authorizes and agency to charge recipients of special benefits or services a user fee. 62 Comp. Gen. 262 (1983). Our decisions have not addressed specifically whether the user fee statute authorizes an agency to charge a conference registration or attendance fee, and we need not address that question here.

Id. at *17-18.

[13] *Id*. at *18.

[14] *Id*.

[15] 31 U.S.C. § 3302(b) (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*.

[16] National Institutes of Health—Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 at *18 (citing B-300248, Jan. 15, 2004)

[17] B-306663, 2006 U.S. Comp. Gen. LEXIS 2 (Jan. 4, 2006).

[18] *Id*. at *2.

[19] *Id*. at *1. The opinion indicates that Senator Mikulski "expressed concern that this conclusion would reduce federal efforts to bring experts together a federally hosted conferences, particularly conferences hosted by the National Security Agency (NSA), to address evolving threats to the nation." *Id*.

[20] *Id*. at *3.

[21] *Id*. at *4.

[22] *Id*. at *5.

[23] *Id*. at *4.

[24] *Id*.

broad scale,[25] such as by amending the Government Employees Training Act,[26] or on an individual agency basis, through an agency's authorization legislation or through its appropriation act.[27]

With respect to the DoD at least, Congress has recently done just that in the Fiscal Year 2007 Defense Authorization Act.[28] Section 1051 of the Act amends Title 10 by creating a section 2262, specifically authorizing the Secretary of Defense to collect fees, directly or through a contractor, from participants at conferences or similar events.[29] This legislation further specifies that the collected fees "shall be available to pay the costs of the Department of Defense with respect to the conference or to reimburse the Department for costs incurred with respect to the conference."[30] If the amount of fees collected exceed the actual cost of the event, "the amount of such excess shall be deposited into the Treasury as miscellaneous receipts."[31] The law also contains an annual reporting requirement, requiring the Secretary of Defense to submit to Congress "a budget justification document summarizing the use" of the new authority.[32]

By its express language, the statute gives this new authority to "the Secretary of Defense." The Department of Defense has not yet published policy on the use of this authority.

Lieutenant Colonel Michael L. Norris

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[25] *Id*.

[26] Government Employees Training Act, 5 U.S.C.S. §§ 4101-18 (LEXIS 2006).

[27] Contractors Collecting Fees at Agency-Hosted Conferences, B-306663, 2006 U.S. Comp. Gen. LEXIS 2, at *6.

[28] John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (Oct. 17, 2006).

[29] 10 U.S.C. § 2262(a) (LEXIS 2006).

[30] *Id*. § 2262(b).

[31] *Id*. § 2262(c).

[32] *Id*. § 2262(d).

Time

Final Rule on Incremental Funding of Fixed-Price Contracts—Finally!

The Department of Defense adopted as final, with changes, an interim rule, published in September 1993,[1] amending the *Defense Federal Acquisition Regulation Supplement*, regarding incremental funding of fixed-price contracts.[2] The interim rule provided a standardized clause and guidance on the situations in which this incremental funding is permissible.[3] Changes were made to the interim rule in response to several comments submitted.[4]

The final rule adds new *paragraph 232.703-1(i)*, addressing the use of incremental funding for severable services.[5] The new paragraph allows a fixed-price severable services contract to be incrementally funded if the contract period is one year or less and the contract is "funded using funds available (unexpired) as of the date the funds are obligated."[6] The final rule also eliminated the requirement for the head of the contracting activity to approve the use of incremental funding for base services or hazardous/toxic waste remediation contracts.[7] The final rule also clarifies that "[t]he contractor is not authorized to continue work" beyond the amount actually funded.[8] Finally, new paragraph 252.232-7007(i) states that nothing in the clause should be construed to authorize otherwise prohibited voluntary services.[9]

Major Mark A. Ries

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[1] Defense Federal Acquisition Regulation Supplement; Incremental Funding of Fixed-Price Contracts, 58 Fed. Reg. 46.091 (Sept. 1, 1993) **(**to be codified at 48 C.F.R. pts. 232 and 252**).**

[2] Defense Federal Acquisition Regulation Supplement; Incremental Funding of Fixed-Price Contracts, 71 Fed. Reg. 18,671 (Apr. 12, 2006) (to be codified at 48 C.F.R. pts. 232 and 252).

[3] *Id*. at 18,672.

[4] *Id*. at 18,673.

[5] *Id*.

[6] *Id*.

[7] *Id*. at 18,672.

[8] *Id*. at 18,673.

[9] *Id*.

Antideficiency Act

Armed Services Board of Contract Appeals (ASBCA) Has Jurisdiction Over Claim Involving Open-Ended Indemnification Clause

In *The Boeing Co.*,[1] the ASBCA determined that the Antideficiency Act (ADA) [2] did not bar its jurisdiction to hear a claim involving contracts containing open-ended indemnification clauses.[3] In this appeal of a sponsored claim, Boeing alleged that the Air Force was contractually liable to indemnify Boeing for its subcontractor's (the predecessor of Lockheed Martin Corporation, hereinafter Lockheed) costs for environmental investigation, remediation, and litigation.[4] Both Boeing's contracts with the Air Force and Lockheed's subcontracts with Boeing contained indemnification clauses for "unusually hazardous risks" citing either 10 U.S.C. § 2354[5] or Public Law Number 85-804 (codified at 50 U.S.C. § 1431)[6] or both, which permit agencies, under limited circumstances, to insert indemnification clauses into their contracts.[7] After Boeing filed its appeal, the ASCBA denied the Air Force's motion to dismiss on jurisdictional grounds finding that the board did, in fact, have jurisdiction to hear the case[8] under the Contract Disputes Act (CDA).[9]

The subject appeal arose out of a series of contracts the Air Force awarded to Boeing from 1966 to 1973 for the development and production of short range attack missiles.[10] Both the development contract and the subsequent four production contracts contained nearly identical indemnification clauses obligating the Air Force to indemnify Boeing for specified losses to Boeing and also for certain claims filed against Boeing by third persons.[11] The contracts limited the Air Force's indemnification obligation to claims for loss or damage arising "out of the direct performance of the contract" which was "not compensated by insurance" and which "results from a risk defined in [the] contract to be unusually hazardous."[12] The contracts also authorized Boeing to insert similar indemnification language into its subcontracts so long as Boeing received prior written approval from the contracting officer; Boeing relied upon this authority and inserted this indemnification language into its related subcontracts with Lockheed.[13] As a result, the Air Force's contracts with Boeing stated that the Air Force would indemnify Boeing for certain losses to Boeing and also for claims filed against Boeing by third parties. Similarly, Boeing's subcontracts with Lockheed stated that Boeing would indemnify Lockheed for certain losses to Lockheed and also for claims filed against Lockheed by third parties.[14]

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[1] ASBCA No. 54853, 6-1 BCA ¶ 33,270.

[2] The Antideficiency Act (ADA) is actually a series of statutes codified at 31 U.S.C. § 1341 *et seq*. The ADA prohibits an officer or employee of the government from obligating in excess or in advance of available appropriations. *Id*. The United States Supreme Court has stated, "the Antideficiency Act bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, an existing appropriation." Hercules, Inc. v. United States, 516 U.S. 417 (1996). Both the federal courts and the GAO have held that absent statutory authority, open-ended indemnification clauses violate the ADA's prohibition against obligating appropriations in excess or and in advance of their availability because such clauses potentially obligate the government to unlimited liability. E.I. Du Pont De Nemours v. United States, 365 F.3d 1367 (2004); Honorable Alan K. Simpson, B-197742, 1986 U.S. Comp. Gen. LEXIS 758 (Aug. 1, 1986).

[3] *Boeing*, 6-1 BCA ¶ 33,270 at 164,890.

[4] *Id*. at 164,887.

[5] 10 U.S.C.S. § 2354 (LEXIS 2006). This statute authorizes the military services, with the approval of the military service secretary concerned, to insert indemnification clauses into "unusually hazardous" research and development contracts. *Id.* Such clauses state that the military service will indemnify the contractor for certain property losses or damages to the contractor and also for certain third party claims filed against the contractor. *Id.*

[6] 50 U.S.C.S. § 1431 (LEXIS 2006). This statute permits the President to authorize an agency to enter into contracts "without regard to other provisions of law. . .whenever he deems that such action would facilitate the national defense." *Id.*

[7] *Boeing*, 6-1 BCA ¶ 33,270 at 164,883-86. These statutes permitting indemnification are implemented by FAR 50.403-2 wherein it allows the agency secretary to approve the insertion of indemnification clauses into contracts which are "unusually hazardous or nuclear." GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REGULATION REG. pt. 50.403-2 (July 2006) [hereinafter FAR]. STOP

[8] *Boeing*, 6-1 BCA ¶ 33,270 at 164,890.

[9] 41 U.S.C.S. §§ 601-613 (LEXIS 2006).

[10] *Boeing*, 6-1 BCA ¶ 33,270 at 164,883.

[11] *Id.* at 164,883-86.

[12] *Id*. at 164,883-84. The indemnification clauses in Boeing's contracts and Lockheed's subcontracts appears to be the FAR contract clause located at FAR 52.250-1. *See* U.S. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REGULATION REG. pt. 50.403-2 (July 2006).

[13] *Boeing*, 6-1 BCA ¶ 33,270 at 164,884-86.

[14] *Id.*

After Lockheed performed its subcontracts in Redlands, California from 1966 to 1975, Lockheed incurred financial losses for environmental investigation, remediation, and litigation for activities directly related to its subcontracts.[15] During performance of the subcontracts, Lockheed used trichloroethylene (TCE) and ammonium perchlorate (perchlorate) as the subcontracts required.[16] In 1997, the Santa Ana Regional Water Quality Control Board discovered TCE and perchlorate in the groundwater.[17] As a result, the water control board required Lockheed to perform environmental investigation and remediation at the site.[18] Between 1996 and 1999, Lockheed was named as a defendant in multiple lawsuits alleging its responsibility for the presence of TCE and perchlorate in the groundwater.[19] Although Lockheed attempted to recover its financial losses from its insurance carriers, Lockheed has been only partially indemnified.[20]

In February 2004, after Boeing submitted a sponsored claim on behalf of Lockheed pursuant to the indemnification clauses of its prime contracts, the contracting officer denied the claim.[21] Subsequently, Boeing appealed to the ASBCA arguing that the Air Force is contractually obligated to indemnify Boeing for Lockheed's financial losses directly resulting from Boeing's contracts with the Air Force and from Lockheed's subcontracts with Boeing. Because the Air Force denied Boeing's sponsored claim, Boeing further argued that the Air Force breached its contracts with Boeing by refusing to honor the contracts' indemnification provisions.[22]

The Air Force argued in its motion to dismiss that the ASBCA did not have jurisdiction to hear this claim because it was based on the contracts' "open ended indemnification clauses."[23] The ASBCA disagreed.[24] The Air Force contended that the ASBCA lacks jurisdiction because the Congress has not waived sovereign immunity in such indemnification cases. The Air Force argued that neither 50 U.S.C. § 1431 nor 10 U.S.C. § 2354 constitutes a waiver of sovereign immunity and further, that Boeing's and Lockheed's sole remedy under these open-ended indemnification clauses is to seek relief from the Secretary of the Air Force—vice from the ASBCA. Additionally, the Air Force contended that the ASBCA's exercise of jurisdiction in this case involving open-ended indemnification clauses would violate the ADA.[25]

In denying the motion to dismiss, the ASBCA held that the CDA clearly grants it jurisdiction to hear breach of contract appeals and further, that the ADA does not bar its exercise of jurisdiction in this case.[26] The ASBCA responded to the Air Force's ADA argument challenging jurisdiction to hear this appeal because it was based upon "open-ended indemnification clauses" by finding that the ADA is a "valid affirmative defense [and] . . . does not oust a tribunal of jurisdiction."[27] Thus, while the ASBCA may exercise jurisdiction in cases involving alleged open-ended indemnification clauses, the government may nevertheless prevail on the merits of the case if it presents its ADA argument as an affirmative defense.[28]

GAO Reiterates: There Are No Federal Funds for Publicity and Propaganda

Last year, the *Year in Review*[29] discussed a series of GAO opinions stating that the expenditure of appropriated funds for publicity or propaganda purposes violates the ADA.[30] The GAO addressed this issue again in a 6 July 2006 letter to the

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[15] *Id*.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 164,887.

[20] *Id*.

[21] *Id*.

[22] *Id*.

[23] *Id*.

[24] *Id.*

[25] *Id*.

[26] *Id*. at 164,888.

[27] *Id*. at 164,890 (citing Do-Well Machine Shop, Inc. v. United States, 870 F.2d 637, 639 (Fed. Cir. 1989)).

[28] *Id*.

[29] *See* Major Andrew Kantner et al., *Contract and Fiscal Law Developments of 2005—Year in Review*, ARMY LAW., Jan. 2006, at 156-57.

[30] The GAO has held in numerous cases that obligating and expending funds for publicity or propaganda purposes violates the ADA's prohibition against obligating and expending funds in excess of their availability. *Id*. The GAO reasons that where an agency's appropriations act contains the typical

Department of Education's General Counsel Office.[31] The GAO's letter responded to the Department of Education's transmission of its ADA report for "No Child Left Behind Act promotional activities, including a prepackaged news story and the Armstrong Williams subcontract."[32] The GAO stated plainly that the Department of Education violated that ADA.[33]

The GAO's letter referenced two separate cases involving the Department of Education's expenditure of appropriated funds for producing promotional materials.[34] In the first case, the GAO found that the agency violated the ADA by using appropriated funds for the production and distribution of prepackaged news stories promoting the activities of that agency.[35] Specifically, the agency contracted for the production of audio and video news stories which explained the agency's programs pursuant to the No Child Left Behind Act; these news stories did not disclose that the source of the stories was the Department of Education.[36] The GAO stated that these expenditures violated the ADA by obligating appropriations (for publicity and propaganda) in excess of their availability, because no funds were available for this purpose. Significantly, the GAO opined that if these news stories had clearly disclosed that their source was the Department of Education, then the GAO would not have considered the stories to violate the publicity and propaganda prohibition or the ADA.[37] It is significant that the Department of Justice recently issued a memorandum[38] stating that it disagreed, in part, with GAO's focus on disclosure of the source as the key to determining whether an agency had violated the publicity and propaganda prohibition.[39]

In the second case, the GAO found that the agency violated the ADA by using appropriated funds for a contract to pay an individual to comment on the agency's programs pursuant to the No Child Left Behind Act during his weekly television and radio programs.[40] Again, the GAO stated this contract violated the ADA by obligating and expending appropriations (for publicity and propaganda) in excess of their availability. As in the earlier related case, the GAO opined that if this contract had required the commentator to disclose that the agency was funding his comments, then the GAO would not have considered the comments to violate the publicity and propaganda prohibition. Expenditure of funds, in that case, would not have violated the ADA.[41] While this July 2006 GAO letter does not raise any unexplored issues, the fact that agencies

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Congressional prohibition against the use of funds for publicity or propaganda, there are no federal funds available for publicity or propaganda purposes. *See* Dep't of Health and Human Serv., Ctrs. for Medicare & Medicaid Servs.—Video News Releases, B-302710, 2004 U.S. Comp. Gen. LEXIS 102 (May 19, 2004); Office of Nat'l Drug Control Policy—Video News Release, B-303495, 2005 U.S. Comp. Gen. LEXIS 8 (Jan. 4, 2005). Thus, the expenditure of even one federal dollar for publicity and propaganda purposes would violate the ADA because the agency expended in excess of funds available. *Office of Nat'l Drug Control Policy*, 2005 U.S. Comp. Gen. LEXIS 8, at * 37.

[31] Dep't of Educ.—No Child Left Behind Newspaper Article entitled "Parents Want Science Classes That Make the Grade," B-307917, 2006 U.S. Comp. Gen. LEXIS 136 (July 6, 2006).

[32] *Id.* at *1.

[33] *Id.*

[34] *Id.* In both cases, the agency obligated funds appropriated to it pursuant to the 2004 Consolidated Appropriations Act. This Act states, "No part of any appropriation contained in this or any other Act shall be used for publicity or propaganda purposes within the United States not heretofore authorized by the Congress." Pub. L. No. 108-199, § 624, 118 Stat. 3 (2004). Thus, Congress has made no funds available in this appropriations act for publicity and propaganda purposes. Congress has prohibited the use of appropriated funds for publicity or propaganda purposes in each of its annual appropriations acts since 1951. Prepackaged News Stories, B-304272, 2005 U.S. Comp. Gen. LEXIS 29 (Feb. 17, 2005).

[35] Dep't of Educ.—No Child Left Behind Act Video News Release and Media Analysis, 2006 U.S. Comp. Gen. LEXIS 171 (Sept. 30, 2005).

[36] *Id.* at *2.

[37] *Id. at* *15.

[38] The Department of Justice (DOJ) disagrees with the GAO's opinion that an agency's mere failure to disclose the source of the prepackaged news story is the key factor in determining whether the agency has violated the publicity and propaganda prohibition. *See* Memorandum, Principal Deputy Assistant Attorney General to General Counsels of Executive Branch, subject: Whether Appropriations May Be Used for Informational Video News Releases (Mar. 1, 2005). The DOJ memo is available at http://omb.gov. DOJ opines that the central issue is whether the news story advocates a particular position—regardless of whether it discloses the news story's source. *Id.* Moreover, the DOJ memorandum clearly articulated that executive department agencies receive legal advice from DOJ and not from the GAO. *Id.* The DOJ memo was disseminated throughout the federal executive branch by the OMB as an attachment to a letter dated 11 March 2005. Memorandum, Principal Deputy Assistant Attorney General, to General Counsels of Executive Branch, subject: Whether Appropriations May Be Used for Informational Video News Releases (Mar. 1, 2005). The OMB memo containing the DOJ memo is also available at http://omb.gov (last visited Nov. 6, 2006). *See also* Memorandum, Office of Management and Budget, Use of Government Funds for Video News Releases (Mar. 11, 2005).

[39] Dep't of Educ.—No Child Left Behind Newspaper Article entitled "Parents Want Science Classes That Make the Grade," B-307917, 2006 U.S. Comp. Gen. LEXIS 136 (July 6, 2006). The GAO further commented in this letter to the Department of Education that Congress endorsed GAO's opinion in a conference report (unrelated to the Department of Education) accompanying the Emergency Supplemental Appropriations Act for FY 2005 specifically requiring an agency to disclose the source of the prepackaged new story. *Id. See also* H.R. Rep. No. 109-72 (2005). The Emergency Supplemental Appropriations Act for FY 2005 contains language similar to the language in the conference report. Pub. L. No. 109-13, § 6076, 119 Stat. 231 (2005).

[40] *Contract to Obtain Servs. of Armstrong Williams*, B-305368, 2005 U.S. Comp. Gen. LEXIS 173, at * 1.

[41] *Id*. at *34.

continue to violate the ADA by expending large sums of appropriated funds for publicity and propaganda purposes[42] is a sufficient reason for agency counsel to be aware of these cases. Moreover, agency counsel should also understand DOJ's differing view on what constitutes a violation of the publicity and propaganda prohibition.[43]

GAO's Antideficiency Act Database

Two years ago, an amendment to the ADA first required agencies to submit completed ADA violation reports to the GAO, in addition to submitting such reports to the President and to Congress.[44] The amended reporting statute now states in pertinent part:

> If an officer or employee of an executive agency. . .violates [the ADA], the head of the Agency. . .shall report immediately to the President and Congress all relevant facts and a statement of actions taken. A copy of each report *shall also be transmitted to the Comptroller General* on the same date the report is transmitted to the President and Congress.[45] (italics added)

The Senate Committee Report which accompanied the foregoing amendment also required the GAO to "establish a central repository of Antideficiency Act reports" for all federal agencies.[46] In response to this requirement, the GAO has created a publicly-accessible ADA database containing the agencies' letters to the President, Congress, and the GAO for each reported ADA violation.[47] The database also lists the agency involved, the appropriation, the amount of the violation, and the facts surrounding the violation. The GAO maintains a file for FY 2005 violations and a separate file for FY 2006 violations. These files do not include, however, the agency's entire investigative report explaining the details of the individuals involved or any disciplinary action taken.[48]

For example, in the FY 2006 file on the website, the GAO lists thirteen ADA violations originating from both DOD and non-DOD organizations.[49] During this timeframe, nine of the reported ADA violations originated from DOD organizations.[50] Of these nine ADA violations originating from DOD, the type of appropriation misused most frequently was operations and maintenance (O&M). In one such case, the Army expended O&M funds to purchase commemorative coins to be used as gifts. In that case, no appropriation was proper because appropriated funds are generally unavailable to purchase gifts.[51] In another case, the Air Force expended O&M funds for a lease with an option to purchase an "Explosive Ordinance Disposal Vehicle." In that case, the Air Force should have used Other Procurement, Air Force funds.[52]

The GAO's ADA database is useful not only as a historical reference. It is also a practical resource that attorneys, commanders, service members and other government employees can use as a training tool. It is certainly less costly and less time-consuming to prevent ADA violations than it is to report and investigate them.

Major Marci A. Lawson

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[42] In 2006, the GAO released a report concerning government contracts awarded for the purpose of advertising agencies' internal programs. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-305, at 2 and 23, Media Contracts: Activities and Financial Obligations for Seven Federal Departments (Jan. 13, 2006). While this report did not consider whether such contracts were permissible under the ADA, the report provides some perspective on the amount of money DOD spends on media advertising. *Id.* at 2-3. This report stated that from fiscal year 2003 to fiscal year 2005, DOD alone expended over $1.1 billion on 152 media advertising contracts. *Id.* at 23.

[43] See explanation of DOJ's view at *supra* note 38.

[44] 31 U.S.C.S. § 1351 (LEXIS 2006). *See also* Consol. Appropriations Act, Pub. L. No. 108-447, § 1401, 118 Stat. 2809, 3192 (2004) (amending the ADA by requiring agencies to submit ADA reports to the GAO). Prior to the amendment, agencies were required to submit ADA reports to the President and to Congress, but not to the GAO. *Id.*

[45] 31 U.S.C.S. § 1351.

[46] S. REP. NO. 108-307, at 43 (2004). *See also* Transmission of Antideficiency Act Reports, B-304335, 2005 U.S. Comp. Gen. LEXIS 47 (Mar. 8. 2005).

[47] Gov't Accountability Office, Legal Products, Antideficiency Act Violations, http://www.gao.gov (last visited 3 Dec. 2006).

[48] *Id.*

[49] *Id.*

[50] *Id.* Of the nine DOD ADA violations listed on GAO's ADA website for FY 2006, six originated from Army organizations, two originated from Air Force organizations, and one originated from a Navy organization. *Id.*

[51] *Id.*

[52] *Id.* The Army reported a similar violation where it used O&M funds for the lease of armored vehicles where it should have used the Other Procurement, Army appropriation. *Id.*

Construction Funding

Military Contingency Construction Authority Levels

Congress made only limited changes to our construction funding authorities from previous years. Significant again this year is the one-year extension of the temporary, limited authority for DoD to use Operations and Maintenance (O&M) funds for contingency construction projects.[1] The funding authorization level remains $100 million, consistent with last year's authorization.[2] Congress also increased the maximum annual amount authorized to be obligated for emergency military construction pursuant to 10 U.S.C 2803(c) from $45 million to $50 million.[3]

A significant change almost developed with regard to statutory cap on the authorization to use O&M funds for minor construction projects. The Senate version of the FY07 Authorization Act included provisions to amend 10 U.S.C. § 2805, Unspecified Minor Construction, to expand the threshold authority for the use O&M funds for construction projects to $1.5 million[4] and expand the threshold authority for the use of Unspecified Military Construction funding to $3 million.[5] Those provisions, however, did not survive the conference committee or make it into the final legislation.[6] It is worth noting though, that at least the Senate considers the expansion of the minor construction thresholds to be important. It will be interesting to see if the whole Congress will come to that consensus next year.

Use of Wrong Appropriation Is Not a Ground for Protest

The Court of Appeals for the Federal Circuit (CAFC) affirmed a decision of the Court of Federal Claims (COFC)[7] from late last year holding that the fact that the government may have used the wrong appropriation to fund a contract does not necessarily make the contract illegal.[8]

In this case, a Miller Act surety in a connection with a construction project sought to recover in *quantum meruit* the amount over the original contract price that it was required to pay in order to complete the project after the contractor defaulted. The Air Force in this case had used O&M to separately fund three buildings totaling over $3 million. The surety argued that the government's expenditure of O&M funds, vice Military Construction funds (MILCON), was inappropriate for this construction project. The surety cited the statute generally requiring the use of MILCON for construction projects exceeding $750,000.[9] Consequently, the surety argued that the use of the wrong appropriation made the contract illegal and, therefore, voidable.[10]

The CAFC, citing its earlier decision in *AT&T III*,[11] stated that "invalidation of the contract is not a necessary consequence when a statute or regulation has been contravened, but must be considered in light of the statutory or regulatory purpose, with recognition of the strong policy of supporting the integrity of contracts made by and with the United

[1] National Defense Authorization Act for FY 2007, Pub. L. No. 109-364, § 2802 (2006).

[2] National Defense Authorization Act for FY 2006, Pub. L. No. 109-163, § 2809 (2005).

[3] National Defense Authorization Act for FY 2007, Pub. L. No. 109-364, § 2801.

[4] National Defense Authorization Act for Fiscal Year 2007, S. 2507 § 2901, 109th Cong. (2007) (introduced in Senate).

[5] *Id*.

[6] *See* National Defense Authorization Act for FY 2007, Pub. L. No. 109-364 .

[7] United Pac. Ins. Co. v. United States, 68 Fed. Cl. 152 (2005)

[8] United Pac. Ins. Co. v. United States, 464 F.3d. 1325 (Fed. Cir. 2006).

[9] *See* 10 U.S.C. § 2805 which generally requires the use of Military Construction Appropriations to be used for construction projects over a certain threshold. The current threshold is $750,000, but at the time of this contract the limitation was $500,000. 10 U.S.C.S. § 2805 (LEXIS 2006).

[10] *United Pac.*, 464 F. 3d. at 1325.

[11] Am. Telephone & Telegraph Co. v. Unites States, 177 F.3d 1368, 1377 (Fed. Cir. 1999).

States."[12] The Court found that the statutes in question did not specifically provide for the invalidation of contracts violating their provisions and further found that there was nothing in the relevant statutes or legislative history regarding military construction appropriations that supported the surety's argument that this contract was voidable. Consequently, the CAFC affirmed the decision of the COFC and denied the surety's appeal.[13]

Major Michael S. Devine

[12] *Id*. at 1332.

[13] *Id*. at 1335.

Intragovernmental Acquisitions

The OFPP Creates Interagency Acquisition Working Group

With the ever-increasing need to increase interoperability, intragovernmental acquisitions have come under increasing scrutiny.[1] In November 2005, the Office of Federal Procurement Policy (OFPP) created a working group "to improve the management and use of interagency contracts,"[2] citing "a number of documented weaknesses in the management and use of interagency contracts [which] have prevented taxpayers from getting the best value in some cases."[3] The OFPP memo also notes that for the first time, interagency contracts have been put on the Government Accountability Office's (GAO's) "high-risk list."[4]

The OFPP notes that the Department of Defense (DoD) is one agency with "large customers of interagency contracts," and as such, is one of the required members of the new working group.[5] The initial focus of the group will be to create "(1) guidance to clarify the roles and responsibilities of interagency contract managers and their customers; (2) program management reviews, including common metrics to benchmark results, quality assurance plans, and improved reporting on activities; and (3) training to address the challenges associated with interagency contracting."[6] Future goals for the group include improving "the governance structure for creating and renewing interagency contracts."[7]

GSA Contracting Merger Finalized

On 6 October 2006, President Bush signed into law the new "General Services Administration Modernization Act,"[8] which amends the U.S. Code "to establish a Federal Acquisition Service, to replace the General Supply Fund and the Information Technology Fund with an Acquisition Services Fund, and for other purposes."[9] Congress created a new position to head the new service, the Commissioner of the Federal Acquisition Service (FAS), who "shall be responsible for carrying out functions related to the uses for which the Acquisition Services Fund is authorized . . . including any functions that were carried out by the entities known as the Federal Supply Service and the Federal Technology Service and such other related functions as the [Administrator of General Services] considers appropriate."[10] The Administrator, currently Lurita Doan, "named Jim Williams commissioner of the division this summer . . . [and] said she would sign an order formally acknowledging the new law and finalizing changes to the FAS as recommended by Williams in September."[11]

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[1] *See generally* JOINT CHIEFS OF STAFF, JOINT PUB. 3-08, INTERAGENCY, INTERGOVERNMENTAL ORGANIZATION, AND NONGOVERNMENTAL ORGANIZATION COORDINATION DURING JOINT OPERATIONS, VOLS. I & II (17 Mar. 2006).

[2] Memorandum, Office of Federal Procurement Policy, to Chief Acquisition Officers, Agency Senior Procurement Executives, subject: Establishment of Interagency Acquisition Working Group (21 Nov. 2005), *available at* http://www.whitehouse.gov/omb/procurement/publications/interagency_work_group .pdf [hereinafter OFPP Memo].

[3] *Id*.

[4] *Id*. The GAO's high risk series is explained at: http://www.gao.gov/docsearch/ abstract.php?rptno=GAO-05-207, and states:

> GAO's audits and evaluations identify federal programs and operations that, in some cases, are high risk due to their greater vulnerabilities to fraud, waste, abuse, and mismanagement. Increasingly, GAO also is identifying high-risk areas to focus on the need for broad-based transformations to address major economy, efficiency, or effectiveness challenges. Since 1990, GAO has periodically reported on government operations that it has designated as high risk. In this 2005 update for the 109th Congress, GAO presents the status of high-risk areas identified in 2003 and new high-risk areas warranting attention by the Congress and the administration. Lasting solutions to high-risk problems offer the potential to save billions of dollars, dramatically improve service to the American public, strengthen public confidence and trust in the performance and accountability of our national government, and ensure the ability of government to deliver on its promises.

U.S. GOV'T ACCOUNTABILITY OFFICE, REP. NO. GAO-05-207, HIGH RISK SERIES: AN UPDATE 1 (Jan. 2005).

[5] OFPP Memo, *supra* note 2.

[6] *Id*.

[7] *Id*.

[8] General Services Administration Modernization Act, Pub. L. No. 109-313, 120 Stat. 1734 (2006).

[9] *Id*.

[10] *Id*.

[11] Rob Thormeyer, *Bush Signature Completes GSA Reorganization*, WASHINGTON TECHNOLOGY, Oct. 9, 2006, *available* at http://www.washingtontechology.com/news/1_1/daily _news/29473-1.html.

Recently, an official Army website indicated that UNICOR, which is the trade name for Federal Prison Industries (FPI), is the mandatory source for furniture. That means federal law prescribes the way we are to purchase furniture. The government (including all IMPAC purchase cardholders) must either (1) purchase furniture from UNICOR, or (2) obtain a waiver from UNICOR before purchasing furniture from any other source."[12] This information is not correct, as "Congress eliminated FPI's mandatory source statues with the enactment of section 811 of the National Defense Authorization Act for Fiscal Year 2002 . . . and section 819 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003. . . . Under these provisions, [DoD] may not purchase any FPI product or service unless a contracting officer of [DoD] determines that the product or service is comparable to products or services available from the private sector, and meets [DoD] need in terms of price, quality and time of delivery."[13] No waiver is required if there are "better products or services [] available from the private sector."[14]

Major Jennifer C. Santiago

[12] S. REP. NO. 109-254, at 370 (2006).

[13] *Id.*

[14] *Id.*

Obligations

The Spirit of the Law

In *National Labor Relations Board—Improper Obligation of Severable Service Contract*,[1] the Government Accountability Office (GAO) held that an agency may not correct an "inadvertent ministerial error" in obligation by adjusting a completed contract from a previous fiscal year.[2]

The National Labor Relations Board (NLRB) issued a service contract to the Electronic Data Systems for maintaining the Case Activity Tracking System (CATS), which is a database for tracking the NLRB caseload.[3] The contract was from 1 October 2001 through 30 September 2002, with option years until 2015. The NLRB Inspector General (IG) audited the NLRB's acquisition process for information technology services, and found that the NLRB inappropriately obligated fiscal year (FY) 2005 funds for the CATS contract's fourth option year, which ran from 1 October 2005 through 30 September 2006.[4]

The NLRB responded by proposing to amend the contract by modifying the option years in question in order to comply with the severable service contract exception of 41 U.S.C. § 253l, i.e. resetting the contract so that it ran from 30 September 2005 to 29 September 2006.[5] The agency's argument was that the NLRB's "intended actions were with the letter of the law and the actual actions were within the spirit of the law."[6]

The GAO refused to allow an agency to "alter executed contracts in order to reach expired funds."[7] An agency is allowed to adjust obligations if an investigation shows that its records do not reflect what actually occurred during the period of the fund's availability.[8] In this case, however, the GAO felt that the NLRB would not be adjusting "an erroneous under-recording, over-recording, or failure to record," but revising what actually occurred.[9] Since those funds have expired, the agency lost its ability to fix the error; the GAO stated that, "(t)o ensure the reliability and accuracy of the accounting for obligations, the emphasis need to be on what actually happened, not on what one would have wished had happened."[10]

Arbitrating the Obligations of Arbitrators

The GAO issued an obligations primer in *National Mediation Board—Compensating Neutral Arbitrators Appointed to Grievance Adjustment Boards Under the Railway Labor Act*.[11] The National Mediation Board (NMB) asked the GAO for guidance concerning obligating funds for neutral arbitrators. The NMB appoints arbitrators for grievance adjustment boards under section 3 of the Railway Labor Act.[12] Generally, the NMB issues a certificate of appointment to hear either a single case or a specified group of related cases.[13] Before the arbitrator can work on a case, he or she must also receive approval from the NMB for expenses and compensation, which the NMB approves in advance on a month-to-month basis.[14] The NMB pays arbitrators monthly for expenses, but pays for the work on the decision after the arbitrator submits the award.[15]

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[1] B-308026, 2006 U.S. Comp. Gen. LEXIS 149 (Sept. 14, 2006).

[2] *Id.* at *8.

[3] *Id.* at *3.

[4] *Id.*

[5] The Federal Acquisition Streamlining Act allows a federal agency to fund a severable service contract for up to twelve months using current year funds, even though a part of that contract may extend into the next fiscal year. 41 U.S.C. § 253l (LEXIS 2006).

[6] *Nat'l Labor Relations Bd.*, 2006 U.S. Comp. Gen. LEXIS 149, at *5-*6.

[7] *Id.* at *10.

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

[9] *Id.* at *12.

[10] *Id.*

[11] Comp. Gen. B-305484, June 2, 2006.

[12] 45 U.S.C. § 153 (LEXIS 2006).

[13] *Nat'l Mediation Bd.*, Comp. Gen. B-305484, at 3.

[14] *Id.* at 4.

[15] *Id.*

Since an obligation represents a legal liability, the GAO concluded that the NMB's moment of liability occurred when the NMB issues the certificate of appointment along with the compensation letter approving expenses.[16] However, the GAO disapproved of the NMB's practice of only obligating funds on a month-to-month basis based on pre-approved expenses.[17] The GAO felt that since the arbitration agreement was a non-severable service, the NMB should obligate funds for an appointed arbitrator based on an estimate of the total number of days the arbitrator is expected to work.[18]

As the GAO stated, when the NMB "appoints an arbitrator, it is the amount of the commitment, not the commitment itself, that is uncertain."[19] Therefore, the key event was the appointment letter, and not necessarily the pre-approval of monthly expenses, which the NMB was using as the basis for obligating funds.[20] The proper method was for the NMB to obligate funds for the estimated cost of the arbitrator for the entire case or series of cases for which he or she was appointed.[21]

The NMB asked if language in the compensation letter which stated that "such compensation is subject to the availability of government funds" saved NMB from a potential Antideficiency Act (ADA) violation.[22] The GAO replied in the negative, stating that it is only the act of recording an obligation which could protect NMB from an ADA violation.[23] The proper policy would be to obligate funds at the time the NMB issues the appointment certificate.[24]

In addition, the NMB did not have to obligate funds for arbitrators for pending cases, since those were properly characterized as contingent liabilities.[25] The GAO made clear that the "obligating event" for the NMB was the appointment of the arbitrator by an authorized NMB official.[26] Finally, the NMB would have to issue a new certification letter and obligate new funds in order to add cases to an arbitrator's docket;[27] the NMB would be prohibited from issuing an open-ended agreement.[28]

"You can learn a lot from a dummy."

The Special Inspector General for Iraq Reconstruction (SIGIR) also issued a good primer on obligations in an interim audit report on the Iraq Relief and Reconstruction Fund 2 (IRRF2).[29] The SIGIR found that the Army Corps of Engineers (COE) entered ninety-six obligations under the vendor name, "Dummy Vendor" in order to enter data into a data field for vendors when no specific vendor existed.[30] The SIGIR made it clear that there was no chicanery in this terminology, but that the COE intended to obligate in-scope modifications and estimated cost-to-complete projects.[31]

Congress appropriated the IRRF2 in November 2003 for three years; the funds were available for obligations until 30 September 2006.[32] The SIGIR found that the COE inappropriately obligated $362 million in five different categories:

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[16] *Id.* at 6.

[17] *Id.*

[18] *Id.* at 7.

[19] *Id.* at 8.

[20] *Id.* at 9.

[21] *Id.* at 8.

[22] *Id.* at 9.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 10.

[26] *Id.* at 14.

[27] *Id.* at 15.

[28] *Id.* at 14.

[29] OFF. OF THE SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, SIGIR-06-037, INTERIM AUDIT REPORT ON IMPROPER OBLIGATIONS USING THE IRAQ RELIEF AND RECONSTRUCTION FUND (IRRF 2) (22 Sept. 2006).

[30] *Id.* at 1.

[31] *Id.*

[32] *Id.* at 2.

Contingency; Design/Build Program Close Out; Public Works Center Costs; Supervision & Administration; and Claims & Unknown.[33] On 25 August 2006, the COE informed the SIGIR that the "dummy vendors" were miscellaneous obligation documents; on 7 September 2006, that the COE planned to use IRRF2 funds for in-scope modifications and close-out costs.[34]

Since there was a chance that the COE could not complete this request prior to 30 September 2006 SIGIR found that the obligations in question were improper. The COE informed the SIGIR that the funds would be deobligated.[35] The SIGIR commented that the expired funds could be used "to liquidate obligations properly chargeable to the account prior to deobligation" and "to make legitimate obligations adjustments."[36]

Major Andrew S. Kantner

[33] *Id.* at 3.

[34] *Id.* at 4.

[35] *Id.* at 5.

[36] *Id.* at 6.

Operational Funding[1]

"Train and Equip" Authority No Longer Available

Unlike past years, Congress did not include section 9006, or "train and equip" authority," in this year's Defense Appropriations Act.[2] Previously, Congress had authorized the use of up to $500,000,000 in Department of Defense (DoD) Operation and Maintenance (O&M) funds to be used to "train, equip and provide related assistance only to military or security forces in Iraq and Afghanistan."[3] Historically, the DoD has not exercised its authority under this section, possibly because of the weighty notification requirements. The provision required the DoD to notify, before providing assistance, *all* of the Congressional Defense committees, as well as the Committee on International Relations and the Senate Committee on Foreign Relations.[4] In the conference report accompanying the Appropriations Act for this year, Congress explained that, "[t]he conferees delete language as proposed by the House, which provided funds for support to the military and security forces of Iraq and Afghanistan. These matters are addressed in the relevant appropriations accounts."[5]

Congress Facilitates Increased Interoperability with Coalition Partners

In the Authorization Act[6] for this year, Congress included several provisions which will increase the DoD's ability to transfer equipment and provide logistic support to allied forces. One change is the addition of a new section to Title 10, entitled, "Logistic Support for Allied Forces Participating in Combined Operations."[7] This section gives the Secretary of Defense (SECDEF) the authority to "provide logistic support, supplies, and services to allied forces participating in a combined operation with the armed forces."[8] Prior to using this authority, however, the SECDEF must obtain the concurrence of the Secretary of State.[9] The authority is limited in scope and may only be used for combined operations:

> that [are] carried out during active hostilities or as part of [] contingency operation[s] or [] noncombat operation[s] (including [] operation[s] in support of the provision of humanitarian or foreign disaster assistance, [] country stabilization operation[s], or peacekeeping operation[s] under chapter VI or VII of the Charter of the United Nations); and . . .
> [where SECDEF] determines that the allied forces to be provided logistic support, supplies, and services (i) are essential to the success of the combined operation; and (ii) would not be able to participate in the combined operation but for the provision of such logistic support, supplies, and services by the Secretary.[10]

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[1] *See also infra*, app. A.

[2] *See* Department of Defense Appropriations Act, 2007, Pub. L. No. 109-289, 120 Stat. 1257 (2006); Department of Defense Appropriations Act, 2006, Pub. L. No. 109-148, 119 Stat. 2680 (2005); Department of Defense Appropriations Act, 2005, Pub. L. No. 108-287, 118 Stat. 951 (2004).

[3] Department of Defense Appropriations Act, 2006, § 9006 states in full:

> SEC. 9006. Notwithstanding any other provision of law, of the funds made available in this title to the Department of Defense for operation and maintenance, not to exceed $500,000,000 may be used by the Secretary of Defense, with the concurrence of the Secretary of State, to train, equip and provide related assistance only to military or security forces of Iraq and Afghanistan to enhance their capability to combat terrorism and to support United States military operations in Iraq and Afghanistan: *Provided*, That such assistance may include the provision of equipment, supplies, services, training, and funding: *Provided further*, That the authority to provide assistance under this section is in addition to any other authority to provide assistance to foreign nations: *Provided further*, That the Secretary of Defense shall notify the congressional defense committees, the Committee on International Relations of the House of Representatives, and the Committee on Foreign Relations of the Senate not less than 15 days before providing assistance under the authority of this section.

Id.

[4] *Id*.

[5] H.R. REP. NO. 109-676 (2006).

[6] John Warner National Defense Authorization Act, 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2007).

[7] *Id*. § 1201.

[8] *Id.*

[9] *Id.*

[10] *Id.*

For this expanded new authority, Congress tied the definition of "logistic support, supplies, and services" to the one in the acquisition and cross servicing agreement (ACSA) statute, which allows the transfer of:

> food, billeting, transportation (including airlift), petroleum, oils, lubricants, clothing, communications services, medical services, ammunition, base operations support (and construction incident to base operations support), storage services, use of facilities, training services, spare parts and components, repair and maintenance services, calibration services, and port services. Such term includes temporary use of general purpose vehicles and other nonlethal items of military equipment which are not designated as significant military equipment on the United States Munitions List promulgated pursuant to section 38(a)(1) of the Arms Export Control Act.[11]

In a related action, Congress updated the definition of ammunition transfers under the ACSA authority.[12] Historically, certain ammunition was specifically excluded, including "demolition munitions and training ammunition; cartridge and propellant-actuated devices; [and] chaff and chaff dispensers,"[13] which as a result of the change by Congress may now be transferred under an ACSA.[14]

Rewards Program Limits and Delegation Authority Increased

Rewards may be paid to individuals who provide U.S. government personnel with "information or nonlethal assistance that is beneficial to . . . an operation or activity of the armed forces conducted outside the United States against international terrorism; or . . . force protection of the armed forces."[15] This year, Congress amended the rewards statute (10 U.S.C. § 127B) to increase the monetary amounts available to commanders on the ground as well as the delegation authority of certain commanders.[16] Before the amendment, the Secretary of Defense had authority to pay rewards up to $200,000 and could delegate his authority to "the Deputy Secretary of Defense [DEPSECDEF] and an Undersecretary of Defense without further redelegation," and to combatant commanders in an amount not to exceed $50,000.[17] Combatant commanders delegated this authority could then redelegate this authority to their deputy commanders for the same amount and as well as delegate the authority to subordinate commanders in an amount not to exceed $2,500.[18] This year's amendment increases the $2,500

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[11] 10 U.S.C.S. § 2350(1) (LEXIS 2006).

[12] S. REP. 109-72 (2006). The Conference report states:

> The conferees further note their agreement on the desirability of updating their understanding of the term "ammunition" under section 2350(1) of title 10, United States Code. The definition of "ammunition" provided in this conference report is meant to supersede the definition of `ammunition' that was provided in Senate Report 96-842 and Senate Report 96-795, both of which accompanied the legislation (H.R. 5580) that first codified ACSA authority in title 10, United States Code.
>
> Specifically, the conferees agree that the term "ammunition" in section 2350(1) of title 10, United States Code, includes: transfers of small arms ammunition between forces on exercises when one side runs low and another has sufficient supplies with repayment in cash or kind; replacement-in-kind of ammunition expended at allied ranges; exchange unit firing to determine compatibility of ammunition between nations and its suitability for use in different weapon systems; emergency acquisition of provisions of conventional ammunition (small arms, mortar, automatic cannon, artillery, and ship gun ammunition); bombs (cluster, fuel air explosive, general purpose, and incendiary); unguided projectiles and rockets; riot control chemical ammunition; land mines (ground-to-ground and air-to-ground delivered); demolition material; grenades; flares and pyrotechnics; and all items included in the foregoing, such as explosives, propellants, cartridges, propelling charges, projectiles, warheads (with various fillers such as high explosives, illuminating, incendiary, antimaterial, and anti-personnel), fuses, boosters, and safe and arm devices, in-bulk, combination, or separately packaged items of issue for complete round assembly; demolition munitions; training ammunition; cartridge and propellant-actuated devices; chaff and chaff dispensers; and expendable sonobuoys. Specifically excluded are the following: guided missiles; naval mines and torpedoes; nuclear ammunition and included items such as warheads, warhead sections, and projectiles; guidance kits for bombs or other ammunition; and chemical ammunition (other than riot control).

[13] CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 2120.01 27, ACQUISITION AND CROSS SERVICING AGREEMENTS (4 Apr. 2004). Note that the language in this instruction is based on the historical definition of ammunition, which is specifically overridden by the language in this year's conference report. SEN. R. 109-702, *supra* note 12.

[14] *Id*.

[15] 10 U.S.C.S. § 127b.

[16] 2007 Authorization Act § 1401.

[17] 10 U.S.C.S. § 127b(c)(1).

[18] *Id.* § 127b (c)(2).

amount to $10,000.[19] The provision will give increased flexibility to commanders on the ground. To illustrate, the authority for commanders to approve rewards may be raised from $2,500[20] to $10,000.

Reassignment and Designation of Army Reserve Civil Affairs and Psychological Operations Forces

On 14 November 2006, the DEPSECDEF directed that the Secretary of the Army (SECARMY) "assign all Army Reserve Component Civil Affairs and Psychological Operations units currently assigned to the Special Operations Command to the United States Joint Forces Command, effective 1 October 2006. . . and all . . . units in the continental United States . . . further assigned to the United States Army Reserve Command."[21] The official reassignment and designation will impact fiscal analysis because special operations forces (SOF), among other special funding provisions, have authority under Title 10, United States Code, § 2011, to fund the training of the "armed forces and other security forces of a friendly foreign country."[22] The provision currently defines SOF as including civil affairs forces and psychological operations forces, however, based on the guidance issued by DEPSECDEF, "[e]ffective immediately upon reassignment, the Army Reserve Civil Affairs and Psychological Operations forces will no longer be designated a Special Operations Force (SOF) for purposes of § 167, Title 10, United States Code."[23]

Major Jennifer C. Santiago

[19] 2007 Authorization Act § 1401.

[20] MULTI-NATIONAL CORPS—IRAQ, MNC-I REWARDS PROGRAM STANDARD OPERATING PROCEDURES (1 Apr. 2005) (on file with the author). All brigade/regimental level commanders and Multinational Corps - Iraq separate brigade commanders are specifically included in the U.S. Central Command delegation. *Id*.

[21] Memorandum, Deputy Secretary of Defense, to the Secretary of the Army and the Chairman of the Joint Chiefs of Staff, subject: Reassignment and Designation of Army Reserve Civil Affairs and Psychological Operations Forces (14 Nov. 2006) [hereinafter DEPSECDEF CA Memorandum].

[22] 10 U.S.C.S. § 2011 (LEXIS 2006).

[23] DEPSECDEF CA Memorandum, *supra* note 21. *See also* 10 U.S.C.S. § 167, which establishes the Unified combatant command for special operations forces.

The Price of Bottled Water

The GAO refined the definition of "good faith" in analyzing the liability of disbursing and certifying officers in *Clarence Maddox—Relief of Liability for Improper Payment for Bottled Water.*[1] The GAO opined that the standard is whether a certifying officer "did not have, nor should reasonably have had, doubt regarding propriety of payment," taking the totality of circumstances into account.[2]

The Administrative Office of the U.S. Courts (AOUSC) asked the GAO to relieve Mr. Maddox, its Clerk of Court for the U.S. District Court of the Southern District of Florida, of liability for improper payments for bottled water purchased for employees of the Fort Bierce Division courthouse. The GAO reiterated the general rule that bottled drinking water is a personal expense.[3] The GAO treated Mr. Maddox, titled as a disbursing officer,[4] as a certifying officer for the analysis of his potential liability for the improper payments.

The three-part test for reliving a certifying official from liability is: the obligation was incurred in good faith, no law specifically prohibited the payment, and the U.S. received value for payment.[5] Mr. Maddox's main theory to avoid liability was that he was not aware of the purchase of bottled water for employees.[6] In addition, he cited the fact that the start of the practice of purchasing the bottled water for employees preceded his arrival as clerk of court. Also, he noted the high volume of vouchers in his office and the distance between his office and the Fort Pierce courthouse.[7] Last, he pointed to audits which failed to catch the bottled water payments.[8]

The GAO felt that Mr. Maddox should have been in doubt regarding propriety of payment.[9] Internal directives of the AOUSC specifically cited bottled water as an unauthorized purchase.[10] The bottled water purchase came from a different fund than the authorized purchases of water for jurors.[11] Further, the GAO will not relieve an accountable officer solely due to a heavy workload.[12] In addition, a failure for an audit to catch an erroneous payment does not waive Mr. Maddox's responsibility to properly certify the government payment.[13]

The GAO strongly underscored the importance of a certifying officer's responsibility to accurately certify payments. The GAO's ultimate conclusion was that Mr. Maddox should be personally liable for eleven payments totaling $485.60 because he should have been aware that the payments were for unauthorized purchases of bottled water for employees.[14]

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[1] Comp. Gen. B-303920, 2006 U.S. Comp. Gen. LEXIS 54 (Mar. 21, 2006).

[2] *Id.* at *9.

[3] Appropriated funds may be used upon a showing of necessity, such as a heath risk documented by expert analysis. *Id.* at *5. Although Mr. Maddox alluded to sewer and plumbing problems in his request, no analysis of the water had been performed. *Id.*

[4] There appeared to be some question as to his role. The Administrative Office of the U.S. Courts told the GAO that Mr. Maddox certified the legal availability of appropriations prior to signing the relevant checks. *Id.* at *7.

[5] 31 U.S.C.S. § 3528(b)(1)(B) (LEXIS 2006).

[6] *Clarence Maddox*, 2006 U.S. Comp. Gen. LEXIS 54, at *10.

[7] *Id.*

[8] *Id.* at *12.

[9] *Id.* at *10.

[10] ADMINISTRATIVE OFFICE OF THE U.S. COURTS, GUIDE TO JUDICIARY POLICIES AND PROCEDURES (Jan. 1, 2001).

[11] Water for jurors came out of a "Jurors and Commissioners" appropriation while the water for employees came from the "Salaries and Expenses of the U.S. Courts" fund. *Clarence Maddox*, Comp. Gen. B-303920, at *11.

[12] *Id.* at *12.

[13] *Id.*

[14] The GAO noted that twenty-seven payments, totaling $947.60 were waived by operation of law because the purchases occurred more than three years after the time the agency identified the discrepancy in its account. *Id.* at *5.

Keine Verbindlichkeit[15]

The GAO held that the DoD may employ local nationals as Departmental Accountable Officers even though local laws may shield those employees from pecuniary liability under U.S. law.[16] A certifying official at the U.S. Army Material Command submitted an advance decision on the question of using appropriated funds to hire foreign employees for this type of work, even though the traditional safeguards for the expenditure of government funds, the potential liability for improper purchases, would be absent.[17]

The DoD has statutory authority to create Departmental Accountable Officials which encompass various functions that provide "information, data or services that are directly relied upon by the certifying official in the certification of vouchers for payment."[18] These officials then possess joint and several liability with any certifying or disbursing officer who relies on the improper information.[19]

Local nationals overseas fill Departmental Accountable Official positions although some national laws may impose different standards of liability than U.S. law.[20] Even though this may result in a local national not being held liable for an erroneous payment, the GAO could find no prohibition against the practice of hiring local nationals for these positions.[21] The GAO questioned the wisdom of the practice of hiring employees for a position for which they might not be held accountable.[22]

A Self-Definitive Officer

In *United States Capitol Police—Waiver of Erroneous Salary Payments*,[23] the GAO stated that "waiving erroneous payments is not a statutory function, duty, or authority of a disbursing officer."[24] In 2003, Congress designated the Chief of Police as the single disbursing officer of the United States Capitol Police (USCP).[25] The USCP asked the GAO if this designation allowed the Chief of Police to waive erroneous salary payments.

The GAO stated that there is no government-wide statutory definition of a disbursing officer, because it is "self-definitive," i.e. an officer who disburses funds.[26] The GAO noted that Harvey C. Mansfield, a historian, noted that disbursing is a "clerical task whose virtues are accuracy, fidelity, and dispatch," which would not encompass settling questions of law.[27]

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[15] "No liability." German language.

[16] *Department of Defense Accountable Officers—Local Nationals Abroad,* Comp. Gen. B-305919, 2006 U.S. Comp. Gen. LEXIS 56 (Mar. 27, 2006).

[17] *Id.*

[18] 10 U.S.C.S. § 2773a(b)(1) (LEXIS 2006).

[19] *Id.*

[20] An example cited by the opinion is a German law which restricts liability for certain categories of "damage-prone" work. U.S. ARMY EUROPE, REG. 690-62, U.S. FORCES CLAIMS AGAINST LOCAL NATIONAL EMPLOYEES IN GERMANY para. 5b (30 Oct. 1984).

[21] *Department of Defense Accountable Officers,* 2006 U.S. Comp. Gen. LEXIS 56, at *11.

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

[23] Comp. Gen. B-307529, Mar. 28, 2006.

[24] *Id.* at 1.

[25] 2 U.S.C.S. § 1907 (LEXIS 2006).

[26] *United States Capitol Police*, Comp. Gen. B-307529, at 3.

[27] *Id.* (quoting HARVEY MANSFIELD, THE COMPTROLLER GENERAL 123 (1939).

The GAO concluded that, since the waiver involves the relinquishment of a government claim for funds, the waiver of an erroneous payment would require statutory authority.[28] Generally, this waiver authority lies with the head of the agency.[29] The GAO then found that the USCP had dual tracks to seek a waiver: from either the Speaker of the House or the Secretary of the Senate.[30]

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[28] *Id.*

[29] *Id.* at 4.

[30] The Act which created the disbursing officer removed the designation of the USCP as either House or Senate employees. The GAO looked at the plain meaning of the statute to read that the act shifted waiver authority to either side of the bicameral legislature. *Id.* at 4-5.

Appendix A

Department of Defense Legislation for Fiscal Year 2007

Department of Defense Appropriations Act, 2007

President Bush signed into law the Department of Defense (DoD) Appropriations Act, 2007, on 29 September 2006.[1] The Act appropriates over $453 billion[2] to the DoD for fiscal year (FY) 2007, an amount which includes a $70 billion "bridge fund"[3] to fund military operations in Iraq and Afghanistan. The amount is an increase from the approximately $358 billion[4] that Congress appropriated in the FY 2006 Defense Appropriations Act[5] and is approximately $4.1 billion less than President George W. Bush requested for the current fiscal year.[6]

Basic Yearly Appropriations

While this year's appropriations increased from FY 2006, there are some appropriations that actually decreased from last year. Congress appropriated over $86 billion[7] for Military Personnel (MILPER), a decrease from almost $96 billion[8] appropriated last fiscal year. Congress decreased Operation and Maintenance (O&M) as well, appropriating $119.8 billion,[9] a decrease from approximately $121.7[10] billion last fiscal year. While Congress decreased its appropriations for MILPER and O&M, appropriations for Procurement and Research, Development, Test, and Evaluation (RDT&E) increased. Congress appropriated $80.9 billion[11] for Procurement, an increase from $76.5[12] billion last year; while RDT&E increased to $75.7 billion,[13] an increase from $71.9 billion last year.[14]

Emergency and Extraordinary Expenses (EEE) and Combatant Commander Initiative Fund (CCIF)

Congress again authorized the Secretary of Defense (SECDEF) and the service secretaries to use a portion of their Operation and Maintenance (O&M) appropriations for "emergencies and extraordinary expenses" (EEE), in an amount totaling $61,306,000,15, increasing last year's appropriation for the DoD and the service secretaries for EEE by approximately $10.5 million.[16] In addition, Congress again authorized the use of $25 million of the DoD O&M appropriation for the Combatant Commander Initiative Fund (CCIF), authorized under the provisions of 10 U.S.C. § 166a.[17]

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[1] Department of Defense Appropriations Act, 2007, Pub. L. No. 109-289, 120 Stat. 1257 (2006).

[2] S. REP. NO. 109-292, at 1 (2006).

[3] House Appropriations Comm., Press Release, *Conferees Approve FY07 Defense Appropriations Bill*, *available at* http://appropriations.house.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id =646.

[4] Department of Defense Appropriations Act, 2006, Pub. L. No. 109-148, 119 Stat. 2680 (2005)

[5] Including supplemental appropriations, Congress appropriated a total of $510,941,226,000 in FY06. S. REP. NO. 109-292, at 1.

[6] *Id*.

[7] Department of Defense Appropriations Act, 2007, Pub. L. No. 109-289, tit I.

[8] *Id.*

[9] *Id.* tit. II.

[10] *Id.*

[11] *Id.* tit. III.

[12] *Id.*

[13] *Id.* tit. IV.

[14] *Id.*

[15] *Id.* tit. II.

[16] *Id.* The DoD may use its O&M for EEE in an amount not to exceed $36 million; the Army, $11,478,000; the Navy, $6,129,000; and the Air Force, $7,699,000. The Marine Corps does not receive special authority to expend EEE funds. *Id*.; *see also* 10 U.S.C.S § 127 (LEXIS 2004), which authorizes the Secretary of Defense and the Secretary of a military department to spend EEE funds for "any purpose [they] determine to be proper, and such a

The United States Court of Appeals for the Armed Forces

The United States Court of Appeals for the Armed Forces again received an appropriation for salaries and expenses in the amount of $11,721,000,[18] up from $11,236,000[19] last fiscal year.

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determination is final and conclusive." The most commonly used subset of EEE is "official representation funds," which are available to extend official courtesies to authorized guests, including dignitaries and officials of foreign governments, senior U.S. Government officials, senior officials of state and local governments, and certain other distinguished and prominent citizens.

[17] Department of Defense Appropriations Act, 2007, tit. II; *see also* 10 U.S.C.S. § 166a (LEXIS 2006) (providing the underlying authority for the Combatant Commander Initiative Fund), which provides:

> (a) Combatant Commander Initiative Fund.— From funds made available in any fiscal year for the budget account in the Department of Defense known as the "Combatant Commander Initiative Fund", the Chairman of the Joint Chiefs of Staff may provide funds to the commander of a combatant command, upon the request of the commander, or, with respect to a geographic area or areas not within the area of responsibility of a commander of a combatant command, to an officer designated by the Chairman of the Joint Chiefs of Staff for such purpose. The Chairman may provide such funds for any of the activities named in subsection (b).
>
> (b) Authorized Activities.— Activities for which funds may be provided under subsection (a) are the following:
>
> (1) Force training.
>
> (2) Contingencies.
>
> (3) Selected operations.
>
> (4) Command and control.
>
> (5) Joint exercises (including activities of participating foreign countries).
>
> (6) Humanitarian and civil assistance.
>
> (7) Military education and training to military and related civilian personnel of foreign countries (including transportation, translation, and administrative expenses).
>
> (8) Personnel expenses of defense personnel for bilateral or regional cooperation programs.
>
> (9) Force protection.
>
> (10) Joint warfighting capabilities.
>
> (c) Priority.— The Chairman of the Joint Chiefs of Staff, in considering requests for funds in the Combatant Commander Initiative Fund, should give priority consideration to—
>
> (1) requests for funds to be used for activities that would enhance the war fighting capability, readiness, and sustainability of the forces assigned to the commander requesting the funds; and
>
> (2) the provision of funds to be used for activities with respect to an area or areas not within the area of responsibility of a commander of a combatant command that would reduce the threat to, or otherwise increase, the national security of the United States.
>
> (d) Relationship to Other Funding.— Any amount provided by the Chairman of the Joint Chiefs of Staff during any fiscal year out of the Combatant Commander Initiative Fund for an activity referred to in subsection (b) shall be in addition to amounts otherwise available for that activity for that fiscal year.
>
> (e) Limitations.—
>
> (1) Of funds made available under this section for any fiscal year—
>
> (A) not more than $10,000,000 may be used to purchase items with a unit cost in excess of $15,000;
>
> (B) not more than $10,000,000 may be used to pay for any expenses of foreign countries participating in joint exercises as authorized by subsection (b)(5); and
>
> (C) not more than $5,000,000 may be used to provide military education and training (including transportation, translation, and administrative expenses) to military and related civilian personnel of foreign countries as authorized by subsection (b)(7).
>
> (2) Funds may not be provided under this section for any activity that has been denied authorization by Congress.

Id.

[18] Department of Defense Appropriations Act, 2007 tit. II. The appropriation also authorizes the use of up to $5,000 of this appropriation for official representation purposes. *Id*.

[19] Department of Defense Appropriations Act, 2006.

Overseas, Humanitarian, Disaster, and Civic Aid (OHDACA)

Congress provided $63,204,000 in funds, which are available until 30 September 2008, for the programs authorized under a number of sections of Title 10 relating to humanitarian assistance, to include demining, excess property programs, and "Humanitarian Assistance (Other)" or HAO.[20] The appropriation is up slightly from $61.5 million last fiscal year.[21]

Former Soviet Union Threat Reduction

Congress appropriated $372,128,000 for assistance to the republics of the former Soviet Union.[22] This assistance is limited to activities related to the elimination, safety and security transportation, and storage of nuclear, chemical, and other weapons in those countries, which also includes efforts aimed at non-proliferation of these weapons.[23] Of the amount appropriated, $15 million specifically supports the dismantling and disposal of nuclear submarines, submarine reactor components and warheads in the Russian Far East.[24] Congress again included authority to use these funds for "defense and military contacts."[25] These funds are available until 30 September 2009.[26]

Revolving Funds

Congress appropriated $1.3 billion for the Defense Working Capital Fund, $1.1 billion for the National Defense Sealift Fund, and $18.5 billion for the Pentagon Reservation Maintenance Revolving Fund.[27]

Drug Interdiction and Counter-Drug Activities

Congress again appropriated funds ($977,632,000) for DoD drug interdiction and counter-drug activities.[28] The funds are transferable to other appropriations, to include: military personnel of the reserve components, O&M, procurement, and RDT&E.[29]

General Transfer Authority

Over the past three years, Congress increased the level of DoD's general transfer authority from $3.5 billion (FY 2005) to $3.75 billion (FY 2006) to $4.5 billion for FY 2007.[30] General transfer authority Congress also provided $2.7 billion of additional DoD O&M.[31]

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[20] *Id.*; *see also* 10 U.S.C.S. §§ 401, 402, 404, 2557, 2561 (LEXIS 2004).

[21] Department of Defense Appropriations Act, 2006, tit. II.

[22] Department of Defense Appropriations Act, 2007, tit. II (Former Soviet Union Threat Reduction Account). Department of Defense Appropriations Act, 2006 tit. II.

[23] Department of Defense Appropriations Act, 2007, tit. II.

[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] *Id.* tit. v. The funds appropriated for the Pentagon Reservation Maintenance Revolving Fund remain available until 30 September 2011.

[28] *Id.* tit. vi.

[29] *Id*. The appropriation includes transfer to military personnel appropriations for the reserve component serving in either Title 10 or Title 32 status. *Id*. The transferred funds take on the attributes of the appropriation to which they are transferred with regard to purpose and time. *Id*.

[30] *Id*. § 8005. In the fiscal years preceding FY 2005, the level of the DoD's general transfer authority had been between $2 and $2.5 billion. *See* Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8005, 117 Stat. 1054, 1071 (2003); Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8005, 116 Stat. 1519, 1537 (2002); Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, § 8005, 115 Stat. 2230, 2247 (2002); Department of Defense Appropriations Act, 2001, Pub. L. No. 106-259, § 8005, 114 Stat. 656, 674 (2000).

[31] Department of Defense Appropriations Act, 2007, tit. IX (Additional Appropriations).

Congressional Prohibitions

As in previous years, Congress placed prohibitions in Title VII of the Appropriations Act. Section 8001 of the Bill prohibits the use funds for "publicity or propaganda not authorized by Congress,"[32] and for the purpose of influencing congressional action on any legislation or appropriation matters, either directly or indirectly.[33] Congress also limited the ability of the SECDEF and the Service Secretaries to obligate funds during the last two months of the fiscal year to twenty percent of one-year appropriations contained in the Act.[34] Congress again limited the availability of funds for the conversion of functions of the DoD to contractors.[35] Further, Congress directed that no "funds appropriated by [the Act] shall be available to perform any [A-76 study] if the study being performed exceeds a period of 24 months after initiation of such study with respect to a single function activity or 30 months [for a multi-function activity]."[36] Congress also prohibited the sale of the F/A-22 advanced tactical fighter to any foreign country.[37]

Investment Threshold

Congress again directed that O&M funds may be used "to purchase items having an investment unit cost of not more than $250,000."[38]

Limitations of Transfer of Defense Articles and Services

During an international peacekeeping, peace enforcement, or humanitarian assistance operation, Congress prohibits the DoD from using its authority to obligate any funds to transfer defense articles and services to other countries or international organizations, "unless the congressional defense committees, the Committee on International Relations of the House of Representative, and the Committee on Foreign Relations of the Senate are notified 15 days in advance of such transfer."[39]

Human Rights Vetting Requirement

As in previous years, Congress placed a requirement for human rights vetting prior to the use of any appropriated funds for the training of security forces of a foreign country.[40] The section prohibits DoD support of such training, "if the [SECDEF] has received credible information from the Department of State that the unit has committed a gross violation of human rights, unless all necessary corrective steps have been taken."[41]

Government Credit Card Refunds

The FY 2007 Appropriations Act allows refunds from government travel cards, Government Purchase Cards, official travel arranged by Government Contracted Travel Management Centers, to "be credited to operation and maintenance, and

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[32] *Id*. tit. VIII, § 8001.

[33] *Id*. § 8011.

[34] *Id*. § 8004, not to include "obligations for support of active duty training of reserve components or summer camp training of the Reserve Officers' Training Corps." *Id.*

[35] The Appropriations Act uses the language in the first paragraph of section 8013, "performed by more than 10 Department of Defense civilian employees . . . ," *Id.* § 8014. Note, however, that the Authorization Act language for the same paragraph indicates "10 or more." Department of Defense Appropriations Act, 2006 § 341. The Authorization Act amends subsection (a) of the controlling statute, 10 U.S.C.S. § 2461 (LEXIS 2004), while the Appropriations Act does not.

[36] *Id.* § 8019.

[37] *Id.* § 8058.

[38] *Id.* § 8031.

[39] *Id.* § 8050.

[40] *Id*. § 8060.

[41] *Id*.

research, development, test, and evaluation accounts of the Department of Defense which are current when the funds are received."[42]

Financing and Fielding of Key Army Capabilities

Congress directed the DoD and the Department of the Army to "make future budgetary and programming plans to fully finance the Non-Line of Sight Future Force Cannon and resupply vehicle program (NLOS-C) in order to field this system in FY 2010, consistent with the broader plan to field the Future Combat System (FCS) in FY 2010."[43] Additionally, Congress provided that if the Army is unable to field the FCS by 2010, that the NLOS-C will still be developed independent of the FCS timeline.[44] Further, Congress requires the Army to have eight "combat operational pre-production" NLOS-C systems by the end of calendar year 2008.[45] Finally, Congress dictated that the Army "shall ensure that budgetary and programmatic plans will provide for no fewer than seven (7) Stryker Brigade Combat Teams."[46]

Promotional Materials for Operations in Iraq and Afghanistan

The SECDEF is authorized to present "promotional materials, to include a United States flag . . . to any member . . . who . . . participates in Operation Enduring Freedom or Operation Iraqi Freedom, along with other recognition items in conjunction with any week-long national observation and day of national celebration, if established by Presidential proclamation. . . ."[47]

Additional and Special Appropriations

Basic Appropriations

Through the DoD, Congress appropriated $5,386,505,000[48] of additional MILPER. Congress also appropriated an additional $39,090,034,000[49] of O&M, of which up to $900,000,000 of the portion appropriated to DoD ($2,774,963,00) are no-year funds[50] and "may be used to reimburse Pakistan, Jordan, and other key cooperating nations, for logistical, military, and other support provided, or to be provided to United States military operations."[51] Congress appropriated additional funding for procurement in the amount of $19,825,782,000 and for RDT&E in the amount of $407,714,000.[52]

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[42] *Id*. § 8065.

[43] *Id*. § 8086.

[44] *Id*.

[45] *Id*.

[46] *Id*.

[47] *Id*. § 8104.

[48] *Id*. § tit. IX (Army, $4,346,710,000; Navy, $143,296,000; Marine Corps, $145,576,000; Air Force, $351,788,000; Reserve Personnel, Army, $87,756,000; Reserve Personnel, Marine Corps, $15,420,000; National Guard Personnel, Army, $295,959,000).

[49] *Id*. Army, $28,364,102,000; Navy, $1,615,288,000 (up to $90,000,000 shall be transferred to the Coast Guard "Operating Expenses" account); Marine Corps, $2,689,006,000; Air Force, $2,688,189,000; Defense-Wide, $2,774,963,000; Army Reserve, $211,600,000; Navy Reserve, $9,886,000; Marine Corps Reserve, $48,000,000; Air Force Reserve, $65,000,000; Army National Guard, $424,000,000; Air National Guard, $200,000,000.

[50] These funds are not subject to the regular time requirements of most appropriations and are available until expended.

[51] *Id*. "Key cooperating nation support" expenditures require the approval of the Secretary of Defense, with the concurrence of the Secretary of State, in coordination with the Director of the Office of Management and Budget, and the fifteen-day prior notification to the appropriate committees. *Id*.

[52] *Id*. (Procurement: Army Aircraft, $1,461,300,000; Army Weapons and Tracked Vehicles, $3,393,230,000; Army Ammunition, $237,750,000; Other Procurement, Army, $5,003,995,000; Navy Aircraft, $486,881,000; Navy Weapons, $109,400,000; Navy and Marine Corps Ammunition, $127,880,000; Other Procurement, Navy, $319,965,000; Marine Corps, $4,898,269,000; Air Force Aircraft, $2,291,300,000; Air Force Missile, $32,650,000; Other Procurement, Air Force, $1,317,607,000; Defense-wide, $145,555,000. RDT&E: Navy, $231,106,000; Air Force, $36,964,000; and Defense-wide, $139,644,000). *Id*.

Iraqi Freedom Fund

Congress this year appropriated $50,000,000[53] for the "Iraq Freedom Fund," down from $4.658 billion last year. These funds may be transferred into military personnel, O&M, OHDACA, procurement, RDT&E, or working capital funds.[54] In the appropriation, Congress mandates quarterly reports "summarizing the details of the transfer of funds from this appropriation."[55]

Afghan Security Forces Fund and Iraq Security Forces Fund

In the Afghan Security Forces Fund (ASFF) and Iraq Security Forces Fund (ISFF) appropriations, Congress provided funds to "provide assistance" to Iraq and Afghan security forces.[56] Congress appropriated $1.5 billion for the ASFF and $1.7 billion for the ISFF. In Afghanistan, the Commander, Office of Security Cooperation—Afghanistan is responsible for coordinating the assistance, while in Iraq, the Commander, Multinational Security Transition Command—Iraq (MNSTC-I) is responsible.[57]

Joint Improvised Explosive Device Defeat Fund (JIEDDF)

This year, Congress made a separate appropriation for the Joint Improvised Explosive Device Defeat Fund (JIEDDF) in the amount of $1,920,700,000.[58] The appropriation is for two years and is for "the purpose of allowing the Director of the Joint Improvised Explosive Device Defeat Organization to investigate, develop and provide equipment, supplies, services, training facilities, personnel and funds to assist United States forces in the defeat of improvised explosive devices."[59] Congress requires within 60 days of the enactment of the Appropriations Act that SECDEF provide a plan "for the intended management and use of the Fund" and further requires quarterly reporting to the congressional defense committees.[60] The funds in the appropriation may be transferred to MILPER, O&M, procurement, RDT&E, or working capital funds if they "accomplish the purpose provided [for in the appropriation]."[61]

Drug Interdiction and Counter-Drug Activities

Congress appropriated an additional $100,000,000 for general drug interdiction and counter-drug activities.[62]

The Commander's Emergency Response Program

Congress continues to provide funding authority, this year again up to $500 million in DoD O&M, for the Commander's Emergency Response Program (CERP) for "the purpose of enabling military commanders in Iraq [and Afghanistan] to respond to urgent relief and reconstruction efforts within their areas of responsibility by carrying out programs that will immediately assist the Iraqi [and Afghan] people."[63] Congress continues to require the DoD to submit quarterly reports and

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[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* Congress requires, however, that no fewer than 5 days before any transfer, that SECDEF notify the congressional defense committees. *Id.*

[62] *Id.*

[63] *Id.* § 9007.

requires the DoD to provide guidance to the field.[64] The most recent guidance was issued in July of 2005.[65] Of note, too, is that last year, in addition to the $500,000,000 in authority from the Defense Appropriations Act, [66] Congress provided $432,000,000 in authority in the Emergency Supplemental for the Global War on Terrorism (GWOT).[67]

Force Protection Vehicles

Just as it did last year, Congress provided for the purchase of up to twenty heavy and light armored vehicles for force protection, "notwithstanding price or other limitations . . . or any other provision of law," to be paid for with any funding provided to the DoD "for operations in Iraq and Afghanistan."[68]

Lift and Sustain

Congress again provided for the use of DoD O&M for "supplies, support, services, transportation, including airlift and sealift, and other logistical support to coalition forces supporting military and stability operations in Iraq and Afghanistan."[69] This authority continues without a specific dollar limitation; however, quarterly reporting on expenditures for lifting and sustaining coalition forces is required.[70] Before invoking this authority, judge advocates in the field should check with their resource management or comptroller personnel to determine whether the authority has been implemented.

Supervision and Administration Costs in O&M Funded Construction Projects

Congress directed that "[s]upervision and administration costs associated with a construction project funded with [O&M], and executed in direct support of the Global War on Terrorism only in Iraq and Afghanistan, may be obligated at the time a construction contract is awarded."[71]

Reporting Requirements

As last year, Congress is requiring extensive reporting of a "comprehensive set of performance indicators and measures for progress toward military and political stability in Iraq."[72] Some of the indicators required to be reported on stability and security are "key measures of political stability," "indicators of a stable security environment," an estimate of the "strength of the insurgency," "[a] description of all the militias in Iraq," "[k]ey indicators of economic activity," and the "criteria the

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[64] *Id*. The Senate Armed Services Committee explained its expectations in the report accompanying last year's Bill, 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.

S. REP. NO. 109-69, at 383 (2005).

[65] Memorandum, Under Secretary of Defense (Comptroller), to Secretaries of the Military Departments, et. al, subject: Commanders' Emergency Response Program Guidance (27 July 2005).

[66] Department of Defense Appropriations Act, 2007 § 9006.

[67] Emergency Supplemental Appropriations Act, 2007, Pub. L. No.109-234, 120 Stat. 418 (2006).

[68] Department of Defense Appropriations Act, 2007 § 9007.

[69] *Id*.

[70] *Id*. § 9008.

[71] *Id*. § 9009. Congress added the proviso that "for the purpose of [the] section, supervision and administration costs include all in-house Government costs.

[72] *Id*. § 9010.

Administration will use to determine when it is safe to begin withdrawing United States forces from Iraq."[73] Some of the indicators required to be reported on training and performance of the security forces include: "training provided Iraqi military," "criteria for assessing the capabilities and readiness of the Iraqi military," "operational readiness status of the Iraqi military forces," "the rates of absenteeism in the Iraqi military forces and the extent to which insurgents have infiltrated such forces," "training provided [to the] Iraqi police," and "the effectiveness of the Iraqi military and police officer cadres and the chain of command."[74]

Additional Prohibitions

This year, Congress included language in the Appropriations Act specifically prohibiting the DoD from "establish[ing] any military installation or base for the purpose of providing for the permanent stationing of United States Armed Forces in Iraq," and from "exercis[ing] United States control over any oil resource in Iraq."[75] In addition, Congress included a prohibition on the payment of award fees to defense contractors in the event of the contractor's non-performance, and stated that no funds "may be obligated of expended to provide award fees to any defense contractor for performance that does not meet the requirements of the contract."[76] Congress also prohibited funding from being used "to enter into an agreement with the Government of Iraq that would subject members of the Armed Forces of the United States to the jurisdiction of Iraq criminal courts or punishment under Iraq law."[77]

Reimbursement of Preparation for or Execution of Military Orders Expenditures

Using broad language, Congress granted the Secretary of the Army the authority "notwithstanding any other provision of law,"[78] to "reimburse a member for expenses incurred by the member or family member when such expenses are otherwise not reimbursable under law."[79] Congress provided further that reimbursement would only be allowed "in situations wherein other authorities are insufficient to remedy a hardship determined by the Secretary [of the Army] and only when the Secretary determines that reimbursement of the expense is in the best interest of the member and the United States."[80]

National Defense Authorization Act for Fiscal Year 2007

On 17 October 2006, the President signed into law the John Warner National Defense Authorization Act for FY 2007 (Authorization Act).[81] Upon signing the Authorization Act, the President issued his "signing statement," in which he declared that he would construe certain provisions in a certain manner.[82] Specifically, "[s]everal provisions of the Act call for executive branch officials to submit to the Congress recommendations for legislation, or purport to regulate the manner in which the President formulates recommendations to the Congress for legislation."[83] The signing statement further explains that "[t]he executive branch shall construe [certain sections] of the Act, which purport to make consultation with specified member of Congress a precondition to the execution of the law, as calling for but not mandating such consultation, as is consistent with the Constitution's provisions concerning the separate powers of the Congress to legislate and the President to

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[73] *Id.*

[74] *Id.*

[75] *Id.* § 9012

[76] *Id.* § 9016

[77] *Id.* § 9017

[78] *Id.* § 9018.

[79] *Id.*

[80] *Id.*

[81] John Warner National Defense Authorization Act, 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2007).

[82] White House, Press Release, President's Statement on H.R. 5122, the "*John Warner National Defense Authorization Act for Fiscal Year 2007*," *available at* http://www.whitehouse.gov/news/releases/2006/10/prin/20061017-9.html.

[83] *Id.*

execute the laws."[84] Congress also required the executive branch to provide information on a number of other subjects, and the President directed that "the executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative process of the Executive, or the performance of the Executive's constitutional duties."[85]

Procurement

Army

Congress authorized a total of $17,048,719,000 for the Army procurements of aircraft, missiles, weapons and tracked combat vehicles, ammunition, other procurement and for National Guard equipment.[86]

Congress also authorized the Secretary of the Army to enter into multiyear contracts for the procurement of MH-60R Blackhawk helicopters and mission equipment[87] and suggested that "the Secretary of the Army should request from Congress authority by law to enter into a multiyear procurement (MYP) contract for the Family of Medium Tactical Vehicles (FMTV) program."[88] Congress directed the Secretary of the Army to "set forth in the budget presentation materials of the Army . . . for any fiscal year after fiscal year 2007 . . . all amounts for procurement for the M1A2 Abrams tank System Enhancement Program (SEP) and for the Bradley A3 fighting vehicle as elements within the amounts requested for the Modular Force Initiative."[89]

Congress also directed that the Comptroller General submit a report to the congressional defense committees "on the participation and activities of the lead systems integrator in the Future Combat Systems (FCS) program under the contract of the Army for the [FCS]."[90]

Navy and Marine Corps

Congress authorized the Navy and Marine Corps a total of $31,351,433,000 for the procurement of aircraft, weapons (including missiles and torpedoes), shipbuilding and conversion, ammunition, and for other procurement.[91] They also provided multiyear procurement authority for the V-22 Tiltrotor Aircraft Program[92] and directed that the Navy "take all reasonable efforts to accelerate the construction of Virginia Class submarines to maintain the attack submarine force structure at not less than 48 submarines."[93]

Air Force

Congress authorized the Air Force a total of $32,867,075,000 in procurement for aircraft, ammunition, missiles and other procurement.[94]

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[84] *Id.*

[85] *Id.*

[86] John Warner National Defense Authorization Act, 2007 § 101.

[87] *Id.* § 112.

[88] *Id.* § 111.

[89] *Id.* § 113

[90] *Id.* § 115

[91] *Id.* § 102

[92] *Id.* § 127.

[93] *Id.* § 129.

[94] *Id.* § 103.

Like the Army, Congress also granted the Air Force the authority to enter into multiyear contracts for F-22A Raptor fighter aircraft[95] and limited the retirement of several aircraft, namely the U-2, KC-135E, F-117A, and C-130.[96]

Defense-Wide

Congress authorized $2,886,361,000 in funding for Defense-wide procurement.[97] They directed that SECDEF "shall ensure that priority for the distribution of new and combat-serviceable replacement equipment . . . is given to operational units (regardless of component) based on combat mission deployment schedule."[98]

Research, Development, Test, and Evaluation

Congress authorized the following amount for RDT&E: $10,876,609,000 for the Army, $17,383,857,000 for the Navy, $24,235,951,000, and $21,111,559,000 for Defense-wide activities (of which $181,520,000 is authorized for the Director of Operational Test and Evaluation).[99]

Operation and Maintenance

In Title III, Congress authorized the following amounts for O&M funding: Army, $24,416,352,000; Navy, $31,157,639,000; Marine Corps, $3,863,462,000; Air Force, $31,081,257,000; Defense-wide activities, $20,093,876,000; Army Reserve, $2,260,802,000; Naval Reserve, $1,275,764,000; Marine Corps Reserve, $211,311,000; Air Force Reserve, $2,698,400,000; Army National Guard, $4,776,421,000; Air National Guard, $5,292,517,000; United States Court of Appeals for the Armed Forces, $11,721,000; Environmental Restoration, Army, $413,794,000; Environmental Restoration, Navy, $304,409,000; Environmental Restoration, Air Force, $423,871,000; Environmental Restoration, Defense-wide, $18,431,000; Environmental Restoration, Formerly Used Defense Sites, $282,790,000; Former Soviet Union Threat Reduction programs, $372,128,000; Overseas Humanitarian Disaster and Civic Aid, $63,204,000.[100] Additionally, Congress provided for the following funding for working capital funds and other DoD programs: Defense Working Capital Funds, $161,998,000; National Defense Sealift Fund, $1,071,932,000; Defense Working Capital Fund, Defense Commissary, $1,184,000,000; Pentagon Reservation Maintenance Revolving Fund, $18,500,0001; Defense Health Program, $21,426,621,000 (of which $20,894,663,000 is for Operation and Maintenance; $135,603,000 is for Research, Development, Test, and Evaluation; and $396,355,000 is for Procurement); Chemical Agents and Munitions Destruction, Defense, $1,277,304,000 (of which $1,046,290,000 is for Operation and Maintenance and $231,014,000 is for Research, Development, Test, and Evaluation); Drug Interdiction and Counter-Drug Activities, Defense-Wide, $926,890,000; Defense Inspector General, $216,297,000 (of which $214,897,000 is for Operation and Maintenance; and $1,400,000 is for Procurement).[101]

Extensions of Authority

As in past years, Congress extended temporary authority for contractor performance of security guard functions until 2009.[102] Interestingly, included in this year's extension, Congress limited the number of contracted security personnel to the number of contractor security guard personnel employed on 1 October 2006, and further limits the numbers for FYs 2008 and 2009 to ninety percent and eighty percent of the 1 October 2006 number respectively.[103] Congress directed the SECDEF to

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[95] *Id.* § 134.

[96] *Id.* §§ 133, 135, 136, 137.

[97] *Id.* § 104.

[98] *Id.* § 116.

[99] *Id.* § 201.

[100] *Id.* at 301.

[101] *Id.* at 302-03.

[102] *Id.* at 333.

[103] *Id.*

"submit to [Senate and House Armed Services Committees] a report on contractor performance of security guard functions,"[104] which has been a requirement since 2003.[105] Congress also extended the funding for the DoD Telecommunications Benefit Program[106] and the Commemoration of Success of the Armed Forces in Operations Enduring and Iraqi Freedom program.[107]

Reports

Congress directed that the DoD submit reports to include the Navy Fleet Response Plan,[108] Navy surface ship rotational crew programs,[109] Army live-fire ranges in Hawaii,[110] Air Force safety requirements for Air Force flight training operations at Pueblo Memorial Airport in Colorado,[111] Personnel Security Investigations for Industry and National Industrial Security Program,[112] training range sustainment and inventory,[113] withdrawal or diversion of equipment from reserve units for support of reserve units being mobilized and other units,[114] and directed that the GAO report on joint standards and protocols for access control systems at DoD installations,[115]and the readiness of the Army and Marine Corps ground forces.[116]

Military Horses Included in Adoption Section

In § 352, Congress amended 10 U.S.C. § 2583 to allow horses to be adopted under the same provisions as military working dogs.[117]

Sale and Use of Proceeds of Recyclable Munitions Materials

This year, Congress amended Title 10 U.S.C. Chapter 443 to allow the Army, with certain restrictions, to "sell recyclable munitions materials resulting from the demilitarization of conventional military munitions."[118] Congress further directed that the Army "shall use competitive procedures . . . in a manner consistent with Federal procurement laws and regulations,"[119] and that the "[a]mounts credited . . . shall be available for obligation for the fiscal year during which the funds are so credited and for three subsequent fiscal years."[120]

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[104] *Id*.

[105] Bob Stump National Defense Authorization Act, 2003, Pub. L. 107-314, § 332, 116 Stat. 2458 (Nov. 23, 2003).

[106] John Warner National Defense Authorization Act, 2007 § 355.

[107] *Id*. § 356.

[108] *Id*. § 341. The Secretary of the Navy (SECNAV) is responsible for submitting this report. *Id.*

[109] *Id*. § 342. The SECNAV is responsible for this report. *Id.*

[110] *Id*. § 343. The SECARMY is responsible for this report. *Id*.

[111] *Id*. § 346. The Secretary of the Air Force (SECAF) is responsible for the submission of this report. *Id*.

[112] *Id*. § 347. The SECDEF is responsible for this report. *Id*.

[113] *Id*. § 348.

[114] *Id*. § 349. This section applies to "the Secretary concerned (as that term is defined in section 101(a)(9) of Title 10, United States Code." *Id*.

[115] *Id*. § 344.

[116] *Id*. § 345.

[117] *Id*. § 352. *See also* 10 U.S.C.S. § 2583 (LEXIS 2006), which this section amends.

[118] John Warner National Defense Authorization Act, 2007 § 353. The sales may be made "notwithstanding section 2577 of [Title 10]" and "without regard to chapter 5 of title 40."

[119] *Id*.

[120] *Id*.

Storage of Personal Property Outside of Family Housing Units

Congress recognized the fact that many families move out of military family housing when one member of the family deploys and directed that the Service Secretaries must provide "adequate storage space to secure personal property that the member is unable to secure"[121] when the member is deployed to a special pay area for more than one hundred eighty days and where the dependent family members move out of the family housing unit for more than thirty days.

Military Personnel Authorizations and Policy

End Strengths

Congress authorized the following active duty end strengths for the DoD: Army, 512,400; Navy, 340,700; Marine Corps, 180,000; and Air Force, 334,200.[122] Congress placed limitations on these end strength numbers, namely that any personnel numbering over 482,400 for the Army and 175,000 for the Marine Corps must be funded out of a "contingency emergency reserve fund or [from an] emergency supplemental appropriation."[123] Congress also authorized additional authority for 2008 and 2009 to increase the Army and Marine Corps number of active duty personnel.[124] For Selected Reserve Personnel, Congress authorized the following: Army National Guard of the United States, 350,000; Army Reserve, 200,000; Navy Reserve, 71,300; Marine Corps Reserve, 39,600; Air National Guard of the United States, 107,000; Air Force Reserve, 74,900; and Coast Guard Reserve, 10,000.[125] End strengths for reserve component personnel serving on active duty in support of the Reserves are authorized as follows: Army National Guard of the United States, 27,441; Army Reserve, 15,416; Navy Reserve, 12,564; Marine Corps Reserve, 2,261; Air National Guard of the United States, 13,291; and the Air Force Reserve, 2,707.[126] The maximum number of reserve component personnel authorized to be on active duty in support of an operation (under the provisions of § 115(b) of Title 10) is 17,000 for the Army National Guard of the United States; 13,000 for the Army Reserve; 6,200 for the Navy Reserve; 3,000 for the Marine Corps Reserve; 16,000 for the Air National Guard of the United States; and 14,000 for the Air Force Reserve.[127]

Expansion of Authority

Congress passed many provisions with regard to extending authority or lessening restrictions for personnel, to include extending the age for mandatory retirements for active duty general and flag officers[128] and reserve officers.[129] Congress also temporarily reduced the time-in-grade requirements for eligibility for promotion for certain active duty first lieutenants and lieutenants (junior grade).[130]

Reserve Call-Up Authority Increase

Congress increased the maximum number of days allowed under reserve call-up authority from 270 to 365 days.[131]

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[121] *Id*. § 362.

[122] *Id*. § 401.

[123] *Id*.

[124] *Id*. § 403.

[125] *Id*. § 411.

[126] *Id*. § 412.

[127] *Id*. § 420.

[128] *Id*. § 502.

[129] *Id*. § 503.

[130] *Id*. § 506.

[131] *Id*. § 522 (amending section 12304 of Title 10, United States Code).

Report on Extent of Provision of Timely Notice of Long-Term Deployments

By March of 2007, the SECDEF must provide a report to Congress on the number of servicemembers[132] who did not receive notice by way of official orders of any deployment that would last more than one hundred days. The SECDEF is further directed to "describe the degree of compliance (or noncompliance) with [DoD] policy concerning the amount of notice to be provided before long-term mobilizations or deployments,"[133] for reserve component deployments.

Military Justice Matters

By March of 2007, the Service Secretaries are required to promulgate regulations, or amend current regulations, "in order to provide that members of the Armed Forces who are ordered to duty at locations overseas in inactive duty for training status are subject to the jurisdiction of the Uniform Code of Military Justice . . . continuously from the commencement of execution of such orders to the conclusion of such orders."[134] Additionally, Congress expanded the applicability of the UCMJ by amending Article 2(a) of the UCMJ to include "persons serving with or accompanying an armed force in the field,"[135] during both a time of war and during a contingency operation.[136]

Report on DoD Awards Process for Reserve Component and Active Duty

By 1 August 2007, the SECDEF is required to submit to the House and Senate Armed Services Committees a report detailing the "policy, procedures, and processes of the military departments for awarding decorations to members of the Armed Forces,"[137] to include comparing the time frames for both the active duty and reserve components from submission of the recommendation for award to approval and from approval to presentation.[138]

Report on Omission of Social Security Account Numbers from Military ID Cards

This year, Congress required the SECDEF to submit a report which will determine whether it is feasible to use military ID cards that do not have the social security account number of servicemembers.[139]

Comptroller General Report on Military Conscientious Objectors

By September of next year, Congress directed that the Comptroller General submit a report on those servicemembers who have "claimed status as a military conscientious objector between September 11, 2001, and December 31, 2006."[140] Congress further requires that the Comptroller General "specifically address . . . [t]he number of all applications for status as a military conscientious objector, broken down by Armed Force, including the Coast Guard, and regular and reserve components."[141] Some of the other requirements for the report include the "[n]umber of discharges or reassignments given . . . [t]he process . . . used . . . including average processing times and any provision for assignment or reassignment of members

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[132] "Shown by service and within each service by reserve component and active component." *Id*. § 548.

[133] *Id*.

[134] *Id*. § 551.

[135] UCMJ art. 2(a)(10).

[136] John Warner National Defense Authorization Act, 2007, § 552. The section will now read, "[t]he following persons are subject to this chapter. . . . 10). In time of *declared war or a contingency operation*, persons serving with or accompanying an armed force in the field." (emphasis added.). *Id*.

[137] *Id*. § 557.

[138] *Id*.

[139] *Id*. § 585.

[140] *Id*. § 587.

[141] *Id*.

while their application is pending . . . reasons for disapproval . . . any difference in benefits . . . compared to other discharges . . . [and] [p]re-war statistical comparisons."[142]

Compensation and Other Personnel Benefits

Congress authorized a total of $110,098,628,000 for the military personnel appropriation for FY 07.[143] Effective on 1 January 2007, the monthly base pay of uniformed service members will increase by 2.2 percent,[144] down from a 3.1 percent increase last year[145] and 3.5 percent increase for fiscal year 2005.[146] As of 1 April 2007, Congress also directed targeted pay raises "for warrant officers and enlisted members serving in the E-5 to E-7 grades… and extension of the basic pay table to 40 years, providing longevity step increases for the highest officer, warrant officer, and enlisted grades."[147] In the Committee Report accompanying the Authorization Act, the Senate also added that:

> [it] supports the goal of [DoD], as recommended by the 9th Quadrennial Review of Military Compensation, to bring regular military compensation to the 70th percentile of private civilians when comparing experience and education. This provision contributes to its achievement. The provision would also accommodate longer career lengths and provide appropriate financial incentives for continued active-duty service beyond 30 years by the most experienced and capable military, officer and enlisted leaders of the armed forces.[148]

Special Operations Retention

Congress directed that a study of Special Operations training costs, manning, operational temp and other factors be submitted not later than 1 August 2007.[149] In particular, Congress directed the SECDEF to report "[t]he percentage of members of the Armed Forces with a special operations forces designation who have accumulated over 48 months of hostile fire pay and the percentage who have accumulated over 60 months of such pay."[150]

Legal Assistance Issues

Congress amended 10 U.S.C. § 49 by adding a new section entitled, "Limitations on Terms of Consumer Credit Extended to Servicemembers and Dependents."[151] Of note is that the annual percentage rate for a creditor extending credit to servicemembers and their dependents is capped at thirty-six percent, and the notice requirements under the Truth in Lending Act.[152] The amendment makes "[a]ny credit agreement, promissory note, or other contract prohibited under [the new section] void from the inception of [the] contract."[153]

Congress also enhanced the authority to waive claims for overpayment of pay and allowances and travel and transportation allowances[154] and made an exception for notice to consumer reporting agencies regarding debts or erroneous

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[142] *Id*.

[143] *Id*. § 421.

[144] *Id*. § 601.

[145] Department of Defense Appropriations Act, 2006, Pub. L. No. 109-148, § 601, 119 Stat. 2680 (2006).

[146] Ronald W. Reagan National Defense Authorization Act, 2005, Pub. L. No. 108-375, § 601, 118 Stat. 1811 (2004).

[147] S. REP. NO. 109-254, § 601 (2006)

[148] *Id*.

[149] John Warner National Defense Authorization Act, 2007 § 645.

[150] *Id*.

[151] *Id*. § 670.

[152] *Id*.

[153] *Id*.

[154] *Id*. § 671.

payments.[155] Congress also changed the requirements for recovery of overpayments of pay made to servicemembers,[156] established a joint family support assistance program,[157] and mandated the establishment of a special working group on transition to civilian employment of National Guard and reserve component members returning from deployments to Iraq and Afghanistan.[158] Congress further directed an audit of pay of Army servicemembers evacuated from a combat zone for inpatient care,[159] directed a report on the eligibility and provision of certain assignment incentive pay for Army National Guard and Army Reserve,[160] and called for the entire Congress to pass a bill paying World War II veterans who survived the Bataan Death march (indicating that survivors should receive adequate compensation).[161]

Health Care

Among other reforms, Congress directed that SECDEF "establish within the [DoD] a task force to examine matters relating to the future of military health care."[162] They also directed a study relating to chiropractic health care services[163] and instructed the Comptroller General to audit DoD health care costs and cost-saving measures[164] and the pharmacy benefits program.[165] Finally, Congress created enhanced programs for mental health screening and early diagnosis of post traumatic stress disorder.[166]

Major Defense Acquisition Programs

Congress directed the SECDEF to create a panel of various acquisition representatives to "conduct reviews of progress made by the DoD to eliminate areas of vulnerability of the defense contracting system that allow fraud, waste, and abuse to occur," to review the Comptroller General report "relating to areas of vulnerability of [DoD] contracts to fraud, waste, and abuse" and to "recommend changes in law, regulations, and policy that [DoD] determines necessary to eliminate such areas of vulnerability."[167]

Congress also directed the SECDEF to "establish a panel to be known as the 'Panel on Contracting Integrity," composed of the Under Secretary of Defense for Acquisition, Technology, and Logistics, and representatives from the service acquisition executives from each service, the DoD Inspector General, the Inspectors General from each service, each "Defense Agency involved with contracting," and "other representative as may be determined appropriate by the [SECDEF]."[168]

Congress went on to provide guidance on the linking of award and incentive fees to acquisition outcomes, and directed that the SECDEF report to the congressional defense committees on the established standards for ensuring that "all new contracts using award fees link such fees to acquisition outcomes (which shall be defined in terms of program cost, schedule, and performance."[169]

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[155] *Id*. § 672.

[156] *Id*. § 674.

[157] *Id*. § 675.

[158] *Id*. § 676.

[159] *Id*. § 677.

[160] *Id*. § 678.

[161] *Id*. § 679.

[162] *Id*. § 711.

[163] *Id*. § 712.

[164] *Id*. § 713.

[165] *Id*. § 718.

[166] *Id*. §§ 738, 741.

[167] *Id*. § 813.

[168] *Id*.

[169] *Id*. § 814.

With regard to contractor personnel, Congress directed the SECDEF to submit a report including "[i]nformation on the status of the implementation of [DoD Instruction 3020.41][170] . . . [and a] discussion of how the instruction is being applied. . . ."[171]

Congress set a goal for "critical acquisition functions," and dictated that "each of the military departments [will ensure] that [within five years] for each major defense acquisition program and each major automated information systems program, each of the following positions is performed by a properly qualified member of the Armed Forces of full-time employee of [the DoD]: (1) Program manager[] (2) Deputy program manager[] (3) Chief Engineer[] (4) Systems engineer[] (5) Cost estimator."[172]

Use of Federal Supply Schedules by State and Local Governments

The Administrator of the General Services, "may provide for the use by State or local governments of Federal supply schedules of the General Services Administration for goods or services that are to be used to facilitate recovery from a major disaster declared by the President under the [Stafford Act] or to facilitate recovery from terrorism or nuclear, biological, chemical, or radiological attack."[173]

Former DoD Officials Employed by DoD Contractors

By 1 December 2007, the Comptroller General is required to submit to the House and Senate Armed Services Committees, "a report on the employment of former officials of [the DoD] by major defense contractors during the most recent calendar year for which, in the judgment of the Comptroller General, data are reasonably available.[174]

Program Manager Empowerment and Accountability

Congress directed the SECDEF to "develop a comprehensive strategy for enhancing the role of [DoD] program managers in developing and carrying out defense acquisition programs."[175] The strategy must include "enhanced training and educational opportunities for program managers," "increased emphasis on the mentoring of current and future program managers by experience senior executives and program managers within the Department," "improved career paths and career opportunities for program managers," "additional incentives for recruitment and retention of highly qualified individuals to serve as program managers," "improved resources and support…," "improved means of collecting and disseminating best practices and lessons learned to enhance program management . . .," "increased accountability of program managers for the results of defense acquisition programs," and "enhanced monetary and nonmonetary awards for successful accomplishment of program objectives by program manager."[176]

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[170] U.S. DEP'T OF DEF., INSTR. 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES (3 Oct. 2006). The instruction is available at http://www.dtic.mil/whs/directives/ corres /pdf/i302041_100305 /i302041p/pdf, and provides its "purpose" as:

> Under the authority of references (a) and (b), this Instruction establishes and implements policy and guidance, assigns responsibilities, and serves as a comprehensive source of DoD policy and procedures concerning DoD contractor personnel authorized to accompany the U.S. Armed Forces. This includes defense contractors and employees of defense contractors and their subcontractors at all tiers under DoD contracts, including third country national (TCN) and host nation (HN) personnel, who are authorized to accompany the U.S. Armed Forces under such contracts. Collectively, these persons are hereafter referred to as contingency contractor personnel. One significant sub-category of contingency contractor personnel, called contractors deploying with the force (CDF), is subject to special deployment, redeployment, and accountability requirements and responsibilities.

Id.

[171] John Warner National Defense Authorization Act, 2007 § 815.

[172] *Id.* § 818.

[173] *Id.* § 833.

[174] *Id.* § 851.

[175] *Id.* § 853.

[176] *Id.*

Joint Policies on Requirements Definition, Contingency Program Management and Contingency Contracting

Congress amended Chapter 137 of Title 10, requiring SECDEF, "in consultation with the Chairman of the Joint Chiefs of Staff . . . [to] develop joint policies for requirements definition, contingency program management, and contingency contracting during combat operations and post-conflict operations."[177] The policy must, in part, include, "[a] preplanned organizational approach to program management during combat operations, post-conflict operations, and contingency operations," identifying a "deployable cadre of experts" in program management, training provided by the Defense Acquisition University to include the "use of laws, regulations, policies, and directives related to program management in combat or contingency environments," "the integration of cost, schedule, and performance objectives into practical acquisition strategies aligned with available resources and subject to effective oversight," and "procedures of [the DoD] related to funding mechanisms and contingency contract management."[178]

Modifications to the Combatant Commanders' Initiative Fund

Prior to this year's funding authority, § 166a of Title 10 defined what activities can be accomplished with Combatant Commanders' Initiative Funds (CCIF). The authorized activities included force training, contingencies, selected operations, command and control, joint exercises (including activities of participating foreign countries, military education and training to military and related civilian personnel of foreign countries (including transportation, translation, and administrative expenses), personnel expenses of defense personnel for bilateral or regional cooperation programs, force protection, joint warfighting capabilities and humanitarian and civil assistance.[179] This year, Congress amended "humanitarian and civil assistance," to read, "humanitarian and civic assistance, to include urgent and unanticipated humanitarian relief and reconstruction assistance," and by adding to the priority consideration list, "the provision of funds to be used for urgent and unanticipated humanitarian relief and reconstruction assistance, particularly in a foreign country where the armed forces are engaged in a contingency operation."[180]

Report on Defense Travel System (DTS)

Congress has directed the SECDEF to submit to the defense committees a report on the "results and recommendations of an independent study of the Defense Travel System . . . to determine the most cost-effective method of meeting [DoD] travel requirements."[181]

Report on the Posture of the Special Operations Command to Conduct the Global War on Terrorism

The 2006 Quadrennial Defense Review (QDR) recommended an increase in the size of the Special Operations Command (SOCOM) "as a fundamental part of the efforts of [the DoD] to fight the global war on terrorism."[182] As a result, this year Congress directed SECDEF to submit a report to the defense committees on "whether [SOCOM] is appropriately manned, resourced, and equipped to successfully meet the long-term requirements of the global war on terrorism." "whether the expansion of that command . . . provides an appropriate balance between active and reserve component capabilities," "whether [SOCOM] has sufficient Army Special Forces to meet the 2006 [QDR] objective of building allied and partner nation capacity through security assistance and other training missions such as the Joint Combined Exchange Training program," "the efforts of the commander of [SOCOM] to provide special operations forces personnel with specialized environmental training in preparation for operations across the globe and in extreme and varied operational environments such as mountain, jungle, or desert environments."[183]

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[177] *Id*. § 854.

[178] *Id*. (amending 10 U.S.C. § 137).

[179] 10 U.S.C.S. § 166a (LEXIS 2006).

[180] John Warner National Defense Authorization Act, 2007 § 902.

[181] *Id*. § 943.

[182] *Id*. § 946.

[183] *Id*.

For every year after FY 07, Congress directed that the President's budget "shall include . . . a request for the appropriation of funds for . . . ongoing military operations in Afghanistan and Iraq," "an estimate of all funds expected to be required . . . for such operations," and "a detailed justification of the funds requested."[184]

Congress extended DoD authority to provide support for counterdrug activities for another two fiscal years and expanded the list of nations eligible to receive this support to include Azerbaijan, Kazakhstan, Kyrgyzstan, Armenia, Guatemala, Belize, and Panama.[185] Congress also extended the authority to support unified counterdrug expenditures in Columbia was also extended by two years, along with the already established reporting requirements.[186]

Congress directed that the SECDEF submit a report to the House and Senate Armed Services Committees on the feasibility of establishing a regional combatant command for Africa no later than six months after the enactment of the Authorization Act.[187] The report will include "an assessment of the benefits and problems associated with establishing" the command and "an estimate of the costs, time, and resources needed to establish such a command."[188]

No later than April 2007, the President must submit a report to Congress on "building interagency capacity and enhancing the integration of civilian capabilities of the executive branch with the capabilities of the Armed Forces to enhance the achievement of Unites States national security goals and objectives."[189] Issues which must be in the report include planning and assessment capabilities, leadership issues, acquisition authorities, budgetary impediments, personnel policies, and integration of civilians.[190]

Congress amended chapter 134 of Title 10 to accept and retain funds collected from non-federal sources to defray the costs of conferences.[191] The DoD is now authorized to collect fees for conferences, which fees "shall be available to pay the costs of [the DoD] with respect to the conference or to reimburse [the DoD] for costs incurred with respect to the conference."[192] Any funds in excess of the reimbursement amounts, however, must be deposited into the Treasury as miscellaneous receipts.[193] While the authority has been granted, the actual procedures are not yet in place. According to the Act, only the SECDEF has the authority to invoke the statute.

This year, Congress specifically prohibited the "parking" of funds, by adding chapter 165 to title 10 of the US Code. The new section, § 2773a states that "[a]n officer or employee of [The DoD] may not direct the designation of funds for a particular purpose in the budget of the President . . . with the knowledge or intent that such funds, if made available to the Department, will not be used for the purpose for which they are designated."[194] If an officer or employee does direct the funds in this manner, it is a violation of § 1341(a)(1)(A), which is part of the Antideficiency Act.[195]

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[184] *Id*. § 1008.

[185] *Id*. § 1022.

[186] *Id*. §§ 1023-26.

[187] *Id*. § 1033.

[188] *Id*.

[189] *Id*. § 1040.

[190] *Id*.

[191] *Id*. § 1051.

[192] *Id*.

[193] *Id*.

[194] *Id*. § 1053

[195] *Id*.

Congress added § 127c to Title 10, which gives SECDEF the authority to provide logistic support, supplies, and services to allied forces during combined operations.[196] The new section limits the authority to operations "carried out during active hostilities or as part of a contingency operation or a noncombat operation (including an operation in support of the provision of humanitarian or foreign disaster assistance, a country stabilization operation, or a peacekeeping operation under chapter VI or VII of the [UN Charter]."[197]

Congress provided temporary authority (until the end of FY 2008) to use acquisition and cross-servicing agreements (ACSAs) to "lend certain military equipment to foreign forces in Iraq and Afghanistan for personnel protection and survivability," for not longer than a year.[198] The section provides for semiannual reporting to the Senate Armed Services and the Senate Foreign Relations Committees and the House Armed Services and International Relations Committees.[199]

During FY 2007, Congress authorized DoD military and civilian personnel, with the concurrence of the Secretary of State, to participate in any multinational military center of excellence for the purpose of "enhancing the capabilities of military forces and civilian personnel of the nations participating in such center to engage in join exercises or coalition or international military operations," or to "improv[e] interoperability between the Armed Forces of the United States and the military forces of friendly foreign nations."[200] Funding is available from the O&M appropriations "[t]o pay the United States share of the operating expenses of any multinational military center of excellence in which the United States participates under this section," and "[t]o pay the costs of the participation of members of the Armed Forces and Department of Defense civilian personnel in multinational military centers of excellence under this section, including the costs of expenses of such participants."[201]

As long as it increases interoperability between the US Armed Forces and friendly foreign forces, Congress has authorized SECDEF to provide "military and civilian personnel of a friendly foreign government"[202] training materials, to include "electronically-distributed learning content for education and training . . . for the development and enhancement of allied and friendly military capabilities for multinational operations, including joint exercises and coalition operations . . . [and to] provide information technology, including computer software developed for such purpose, but only to the extent necessary to support the use of such learning content for the education and training of such personnel."[203]

Congress commended the SECDEF "for his initiative in providing for the safe return of [110 Iraqi] children to Iraq by military aircraft"[204] pursuant to his authority to permit space-available travel for humanitarian purposes. The children needed medical care and traveled by bus to Amman, Jordan. On the way there, armed insurgents attacked the children. For their return trip, SECDEF authorized the military flight.[205] Congress was apparently pleased with the decision, and stated, "[i]t is the sense of Congress that the [SECDEF] should continue to provide space-available travel on military aircraft for humanitarian reasons to Iraqi children who would otherwise have no means available to seek urgently needed medical care such as that provided by a humanitarian organization in Amman, Jordan."[206]

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[196] *Id*. § 1201.

[197] *Id*.

[198] *Id*. § 1202.

[199] *Id*.

[200] *Id*. § 1205.

[201] *Id*.

[202] *Id*. § 1207 (the friendly foreign government must also approve the training).

[203] *Id*.

[204] *Id*.

[205] *Id*.

[206] *Id*.

Enhanced Rewards Authority

Section 127b of Title 10 provides the authority for the DoD to pay rewards for, "information or nonlethal assistance that is beneficial to: (1) an operation or activity of the armed forces conducted outside the United States against international terrorism; or (2) force protection of the armed forces."[207] Prior to this year's Authorization Act, the provision further detailed that "[a] commander of a combatant command to whom authority to provide rewards under this section is delegated under paragraph (1) may further delegate that authority, but only for a reward in an amount or with a value not in excess of $2,500. . . . "[208] In the Authorization Act, Congress increased the $2,500 limit to $10,000.[209]

Wheeled Vehicle Improvised Explosive Device (IED) Jammer Requirement

Congress directed the SECDEF to "ensure that by the end of fiscal year 2007 all United States military wheeled vehicles used in Iraq and Afghanistan outside of secure military operating bases are protected by Improvised Explosive Device (IED) jammers.[210] Funding authority is provided in § XV of the Authorization Act.[211]

Authorization for Increased Costs Due to Operation Iraqi Freedom and Operation Enduring Freedom

Title XV provides authority for increased GWOT funding, to include increased authority for The DoD, Army, Navy and Marine Corps, and Air Force Procurement; RDT&E; O&M; the Defense Health Program; classified programs; MILPER; and several Iraq and Afghanistan specific authorities.[212]

One of the specific authorities is the Joint Improvised Explosive Device Defeat Fund (JIEDDF).[213] The JIEDDF authorizes $2.1 billion dollars to be used to "investigate, develop, and provide equipment, supplies, services, training, facilities, personnel, and funds to assist United States forces in the defeat of improvised explosive devices."[214] The section contains transfer authority, under which funds may be transferred from the JIEDDF to MILPER, O&M, procurement, RDT&E and/or Defense Working Capital Funds.[215] This authority is in addition to other general and specific transfer authority in the Authorization Act.[216]

Congress again provided authority for the Iraq Freedom Fund in the amount of $50,000,000.[217] Like the JIEDDF, the provision contains transfer authority, allowing transfer of funds into Service O&M, MILPER, DoD RDT&E, DoD procurement, classified programs, and Coast Guard operating expenses.[218]

The Act also contains authority for the Iraq Security Forces Fund (ISFF) and the Afghanistan Security Forces Fund (ASFF).[219] The two funds provide authority for "the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, construction, and funding."[220] The two sections provide transfer authority to MILPER,

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[207] 10 U.S.C.S. § 127b (LEXIS 2006).

[208] *Id*.

[209] John Warner National Defense Authorization Act, 2007 § 1401.

[210] *Id*. § 1403.

[211] *Id.* tit. XV.

[212] *Id*.

[213] *Id*. § 1514.

[214] *Id*.

[215] *Id*.

[216] *Id*.

[217] *Id*. § 1515.

[218] *Id*.

[219] *Id*. §§ 1516, 1517 (The ISFF provides for $1.7 billion in authority and the ASFF, $1.5 billion).

[220] *Id*.

O&M, procurement, RDT&E, Defense Working Capital Funds, and Overseas Humanitarian, Disaster, and Civic Aid accounts. [221] Interestingly, for both funds, Congress provided authority to accept contributions to the accounts from "any person, foreign government, or international organization," unless the contribution would "compromise, or appear to compromise the integrity of any program of [the DoD]."[222]

Like the Appropriations Act, the Authorization Act limits the availability of funds for certain purposes relating to Iraq, namely prohibiting the establishment of "any military installation or base for the purpose of providing for the permanent stationing of United States Armed Forces in Iraq," and prohibiting the exercise of "economic control of the oil resources of Iraq."[223]

Military Construction Authorizations

Division B of the Authorization Act contains authorizations for military construction.[224] Of note is the increase in the maximum annual amount authorized to be obligated for emergency military construction from $45,000,000 to $50,000,000.[225] Additionally, Congress again provided for a one-year extension of temporary, limited authority to use O&M funds for construction outside the United States.[226]

Major Jennifer C. Santiago

[221] *Id*.

[222] *Id*.

[223] *Id*. § 1519.

[224] *Id*. div. B.

[225] *Id*. § 2801.

[226] *Id*. § 2802.

Appendix B

Government Contract & Fiscal Law 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	Web Address
A	
ABA Lawlink Legal Research Jumpstation:	http://www.abanet.org/lawlink/home.html
ABA Network	http://www.abanet.org/
ABA Public Contract Law Journal (PCLJ)	http://www.abanet.org/contract/operations/lawjournal/journal.html
ABA Public Contract Law Section	http://www.abanet.org/contract/admin/home.html
ACQ Web- Office of the Undersecretary Of Defense for Acquisition & Tech	http://www.acq.osd.mil/
Acquisition Central	www.acquisition.gov
Acquisition Review Quarterly	http://www.dau.mil/pubs/arqtoc.asp
Acquisition Sharing Knowledge System (formerly the Defense Acquisition Deskbook)	http://deskbook.dau.mil/jsp/default.jsp
AFARS – Army Federal Acquisition Regulation Supplement	http://farsite.hill.af.mil/vfafara.htm
Air Force Acquisition	www.safaq.hq.af.mil/index-2.html
Air Force Alternative Dispute Resolution (ADR) Program	http://www.adr.af.mill
Air Force Audit Agency	https://www.afaa.hq.af.mil/domainck/index.shtml
Air Force Civil Engineer Support Agency	http://www.afcesa.af.mil/
Air Force Contingency Contracting handbook	http://www.aflma.hq.af.mil/lgj/contingency%20Contracting%20Mar03_corrections.pdf
Air Force Contract Augmentation Program	http://www.afcesa.af.mil/cex/cexx/cex_afcap.asp
Air Force Contracting Home Page	www.safaq.hq.af.mil/contracting/mission.cfm
Air Force Electronic Commerce Mall	www.safaq.hq.af.mil/contracting/electronic/e-mall.cfm
Air Force FAR Site	FARSite (Federal Acquisition Regulation Site)
Air Force FAR Supplement	www.safaq.hq.af.mil/contracting/affars/whats-new.html
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	http://www.aflma.hq.af.mil/
Air Force Materiel Command FAR Supplement	http://farsite.hill.af.mil/vfafmc1.htm
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/
Air Force Site , FAR, DFARS, Fed Reg	http://farsite.hill.af.mil/
Anti-Deficiency Act Guidance	http://www.asafm.army.mil/fo/fod/ada/ada.asp
Anti-Deficiency Act Investigation Guide	http://www.asafm.army.mil/fo/fod/ada/ada.asp
Anti-Deficiency Act violation database - GAO	http://www.gao.gov/ada/antideficiencydb.pdf
Armed Services Board of Contract Appeals	http://www.law.gwu.edu/asbca/
Armed Services Board of Contract Appeals Rules, EAJA and ADR procedures	http://docs.law.gwu.edu/asbca/rule.htm
Army Acquisition (ASA(ALT))	https://webportal.saalt.army.mil/

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 Fiscal Law Webpage	www.jagcnet.army.mil//852570FA0037A6FC/(JAGCNETDocID)/HOME?OPENDOCUMENT
Army General Counsel	http://www.hqda.army.mil/ogc/
Army Home Page	http://www.army.mil/
Army Materiel Command Command Counsel	http://www.amc.army.mil/amc/command_counsel/
Army Materiel Command Web Page	http://www.amc.army.mil/
Army Portal	https://www.us.army.mil/portal/portal_home.jhtml
Army Procurement Fraud Webpage	www.jagcnet.army.mil/8525701800059EE93/(JAGCNETDocID)/HOME?OPENDOCUMENT
Army Publications	http://www.army.mil/usapa/
Army STRICOM (Simulation, Training, & Instrumentation Command) Home Page	www.peostri.army.mil
Assistant Secretary of the Army (Financial Management and Comptroller)	www.asafm.army.mil/
B	
Bid Protest GAO Procedures	www.gao.gov/decisions/bidpro/bid/bibreg.html
Bid Protest, GAO Decisions	www.gao.gov/decisions/bidpro/bidpro.htm
Budget of the United States	http://www.gpoaccess.gov/usbudget/fy06/index.html
Buisness.GOV Database of Government Websites	http://www.business.gov/
C	
CASCOM Home Page	U.S. Army Combined Arms Support Command (CASCOM)
CECOM	U.S. Army CECOM
Central Contractor Registration (CCR)	http://www.ccr.gov/
Coast Guard Home Page	http://www.uscg.mil
Code of Federal Regulations	http://www.gpoaccess.gov/cfr/index.html
Comptroller General Bid Protest Decisions	http://www.gao.gov/decisions/bidpro/bidpro.htm
Comptroller General Decisions	www/gap/gpv/decisions/decision.htm
Comptroller General Legal Products	http://www.gao.gov/legal.htm
Congress on the Net-Legislative Info	http://thomas.loc.gov/
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
Contract Pricing References Guides	http://www.acq.osd.mil/dpap/contractpricing/chap-index.htm
Cornell University Law School (extensive list of links to legal research sites)	www.law.cornell.edu
Cost Accounting Standards	http://www.arnet.gov/far/current/html/FARTOCP30.html
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	www.uscfc.uscourts.gov
D	
DA OGC Ethics	http://www.hqda.army.mil/ogc/eandf.htm
Davis Bacon Wage Determinations	http://www.gpo.gov/davisbacon/
DCAA - Electronic Audit Reports	www.dcaa.mil/readingroom.htm

DCAA Contract Audit Manual	www.dcaa.mil/cam.htm
DCAA Web page	Defense Contract Audit Agency (DCAA)
Debarred List (known as the Excluded Parties Listing System)	http://epls.arnet.gov
Defense Acquisition Deskbook (now known as the Acquisition 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 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 Finance and Accounting Service (DFAS)	http://www.dod.mil.dfas/
Defense Finance and Accounting Service (DFAS) IN Manual 37-100	http://www.asafm.army.mil/secretariat/document/dfas37-100/dfas37-100.asp
Defense Logistics Agency (DLA) Electronic Commerce Home Page	http://www.supply.dla.mil//Default.asp
Defense Standardization Program	http://dsp.dla.mil/
Defense Tech Info. Ctr home page	http://www.dtic.mil
Department of Justice	http://www.usdoj.gov
Department of Justice Legal Opinions	http://www.usdoj.gov/olc/opinionspage.htm
Department of Navy Issuances (DONI) website (formerly called the Navy Electronic Directives (NEDS))	http://doni.daps.dla.mil/default.aspx
Department of Veterans Affairs	http://www.va.gov
DFARS Web Page (Searchable)	www.acq.osd.mil/dpap/dars/dfars/index.html
DOD Busopps	http://www.dodbusopps.com/
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 Pubs & Regs	http://www.dtic.mil/whs/directives/corres/pub1.html
DOD Purchase Card Program	http://purchasecard.saalt.army.mil/default.htm
DOD Standards of Conduct Office (SOCO)	http://www.defenselink.mil/dodgc/defense_ethics/
E	
Excluded Parties Listing System	http://epls.arnet.gov
Executive Orders	http://www.access.gpo.gov/nara/nara003.html
F	
FAR Site (Air Force)	http://farsite.hill.af.mil/
Federal Acquisition Institute (FAI)	http://www.faionline.com/kc/login/login.asp?kc_ident=kc0001
Federal Acquisition Regulation (FAR) (GSA)	http://www.arnet.gov/far/
Federal Acquisition Regulation (FAR)/DFARS (searchable)	www.regulations.gov
Federal Business Opportunities (FedBizOpps)	http://www.fedbizopps.gov/
Federal Legal Information Through Electronics (FLITE)	https://aflsa.jag.af.mil/flite/home.html
Federal Marketplace	http://www.fedmarket.com/
Federal Prison Industries, Inc (UNICOR)	http://www.unicor.gov/
Federal Procurement Data System	http://www.fpdc.gov/
Federal Register via GPO Access	http://www.gpoaccess.gov/nara/index.html
Financial Management Regulations	http://www.dtic.mil/comptroller/fmr/

Financial Operations (Jumpsites)	http://www.asafm.army.mil
FindLaw	http://www.findlaw.com
FirstGov	http://www.firstgov.gov/
Fiscal Budget Process Dictionary	http://www.gao.gov/new.items/d05734sp.pdf
G	
GAO Home Page	http://www.gao.gov/
General Accounting Office (GAO) Comptroller General Appropriation Decisions	http://www.gao.gov/decisions/appro/appro.htm
General Accounting Office (GAO) Comptroller General Bid Protest Decisions	http://www.gao.gov/decisions/bidpro/bidpro.htm
General Accounting Office (GAO) Comptroller General Decisions via GPO Access	http://www.gpoaccess.gov/gaodecisions/index.html
General Accounting Office (GAO) Comptroller General Legal Products	http://www.gao.gov/legal.htm
General Services Administration Board of Contract Appeals (GSABCA)	http://www.gsbca.gsa.gov/
GovCon (Government Contracting Industry)	http://www.govcon.com/content/homepage
Government Online Learning Center	http://www.golearn.gov/
Government Printing Office (GPO)	http://www.gpo.gov
GSA Advantage	www.fss.gsa.gov
J	
JAGCNET (Army JAG Corps Homepage)	http://www.jagcnet.army.mil/
JAGCNET (The Army JAG 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
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
MEGALAW	http://www.megalaw.com
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) Aquisition	http://prod.nais.nasa.gov/cgi-bin/nais/index.cgi
National Industries for the Blind	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
Navy Electonic Directives (NEDS) now called the Department of Navy Issuances (DONI) website	http://doni.daps.dla.mil/default.aspx

Navy Financial Management and Comptroller	http://www.fmo.navy.mil/policies/regulations.htm
Navy Forms online	http://forms.daps.dla.mil/
Navy General Counsel	http://www.ogc.navy.mil/
Navy Home Page	http://www.navy.mil
North American Industry Classification System (formerly the Standard Industry Code)	http://www.osha.gov/oshstats/sicser.html
The Navy Acquisition, Research and Development Information Center (NARDIC)	http://www.onr.navy.mil/sci_tech/3t/transition/nardic/about.asp
O	
Office of Federal Procurement Policy (OFPP) Best Practices Guides	http://www.whitehouse.gov/omb/procurement/pbsa/guide_pbsc.html
Office of Government Ethics (OGE)	http://www.usoge.gov
Office of Management and Budget (OMB)	http://www.whitehouse.gov/omb/
OGE Ethics Advisory Opinions	http://usoge.gov/pages/advisor_opinions/advisory_opins.html
P	
Per Diem Rates Travel and transportion allowance committee	https://secureapp2.hqda.pentagon.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.gpoaccess.gov/pubpapers/search.html
Purchase Card Program	http://purchasecard.saalt.army.mil/default.htm
R	
Rand Reports and Publications	http://www.rand.org/publications/
Redbook	GAO: Legal Products
Regulations / DA pams Army Publishing Agency	http://www.usapa.army.mil/
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://sharea76.fedworx.org/inst/sharea76.nsf/CONTDEFLOOK/HOME-INDEX
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/
Special IG For Iraq Reconstruction	http://www.sigir.mil/
Standard Industry Code (now called the North American Industry Classification System)	http://www.osha.gov/oshstats/sicser.html
Steve Schooner, Professor, GW School of Law's homepage	http://www.law.gwu.edu/facweb/sschooner/default.htm
T	
Thomas website	http://thomas.loc.gov/

U	
UNICOR (Federal Prison Industries, Inc.)	www.unicor.gov
U.S. Business Advisor (sponsored by SBA)	http://www.business.gov
U.S. Code	http://www.gpoaccess.gov/uscode/index.html
U.S. Code	http://uscode.house.gov
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/
W	
Where in Federal Contracting?	http://www.wifcon.com/
Wright Patterson Ethics Site	http://www.afmc-pub.wpafb.af.mil/HQ-AFMC/JA/lo/lojaf/ethics/

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. TJAGLCS CLE Course Schedule (June 2006 - October 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	55th Graduate Course	14 Aug 06 – 24 May 07
5-27-C22	56th Graduate Course	13 Aug 07 – 22 May 08
5-27-C20	172d JA Officer Basic Course	4 – 16 Feb 07 (BOLC III) Ft. Lee
		16 Feb – 2 May 07 (BOLC III) TJAGSA
5-27-C20	173d JA Officer Basic Course	1 – 13 Jul 07 (BOLC III) Ft. Lee
		13 – Jul – 26 Sep 07 (BOLC III) TJAGSA **(Tentative)**
5F-F70	38th Methods of Instruction Course	26 – 27 Jul 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-F52	37th Staff Judge Advocate Course	4 – 8 Jun 07
5F-F52-S	10th Staff Judge Advocate Team Leadership Course	4 – 6 Jun 07
5F-JAG	2007 JAG Annual CLE Workshop	1 – 5 Oct 07
JARC-181	2007 JA Professional Recruiting Seminar	17 – 20 Jul 07
NCO ACADEMY COURSES		
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	2 Apr – 4 May 07
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	2 Apr – 4 May 07
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	11 Jun – 13 Jul 07
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	13 Aug – 14 Sep 07
512-27D40 (Phase 2)	Paralegal Specialist ANCOC	11 Jun – 13 Jul 07
512-27D40 (Phase 2)	Paralegal Specialist ANCOC	13 Aug – 14 Sep 07
WARRANT OFFICER COURSES		
7A-270A1	18th Legal Administrators Course	2 – 6 Apr 07
7A-270A2	8th JA Warrant Officer Advanced Course	16 Jul – 3 Aug 07
7A-270A0	14th JA Warrant Officer Basic Course	29 May – 22 Jun 07
ENLISTED COURSES		
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	8th Court Reporting Symposium	29 Oct – 3 Nov 07
512-27D/20/30	18th Law for Paralegal NCOs Course	26 – 30 Mar 07
512-27D/40/50	16th Senior Paralegal Course	18 – 22 Jun 07
512-27D-CSP	1st BCT NCOIC Course	18 – 22 Jun 07
512-27D-C7	2d Redictation Course	2 – 13 Apr 07

ADMINISTRATIVE AND CIVIL LAW		
5F-F21	6th Advanced Law of Federal Employment Course	17 – 19 Oct 07
5F-F22	61st Law of Federal Employment Course	15 – 19 Oct 07
5F-F23	60th Legal Assistance Course	7 – 11 May 07
5F-F23	61st Legal Assistance Course	29 Oct – 2 Nov 07
5F-F29	25th Federal Litigation Course	30 Jul – 3 Aug 07
5F-F202	5th Ethics Counselors Course	16 – 20 Apr 07
5F-F23E	2007 USAREUR Legal Assistance CLE	22 – 26 Oct 07
5F-F24E	2007 USAREUR Administrative Law CLE	17 – 21 Sep 07
5F-F26E	2007 USAREUR Claims Course	15 – 19 Oct 07

CONTRACT AND FISCAL LAW		
	158th Contract Attorneys Course	23 Jul – 3 Aug 07
5F-F12	76th Fiscal Law Course	30 Apr – 4 May 07
5F-F13	3d Operational Contracting Course	14 – 16 Mar 07
5F-F102	6th Contract Litigation Course	9 – 13 Apr 07
5F-F14	Comptrollers Accreditation Fiscal Law Course (Ft. Monmouth, NJ)	5 – 8 Jun 07
CRIMINAL LAW		
5F-F31	13th Military Justice Managers Course	15 – 19 Oct 07
5F-F33	50th Military Judge Course	23 Apr – 11 May 07
5F-F34	28th Criminal Law Advocacy Course	10 – 21 Sep 07
5F-F35	31st Criminal Law New Developments Course	5 – 8 Nov 07
5F-301	10th Advanced Advocacy Training	29 May – 1 Jun 07
INTERNATIONAL AND OPERATIONAL LAW		
5F-F42	3d Intelligence Law Course	25 – 29 Jun 07
5F-F42	3d Advanced Intelligence Law Course	27 – 29 Jun 07
5F-F42	88th Law of War Course	9 – 13 Jul 07

5F-F44	2d Legal Issues Across the Information Operations Spectrum	16 – 20 Jul 07
5F-F45	7th Domestic Operational Law Course	29 Oct – 2 Nov 07
5F-F47	48th Operational Law Course	30 Jul – 10 Aug 07

3. Naval Justice School and FY 2007 Course Schedule

Please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131, for information about the courses.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (030) Lawyer Course (040)	4 Jun – 3 Aug 07 13 Aug – 12 Oct 07
BOLT	BOLT (020) BOLT (020) BOLT (030) BOLT (030)	26 – 30 Mar 07 (USMC) 26 – 30 Mar 07 (NJS) 6 – 10 Aug 07 (USMC) 6 – 10 Aug 07 (NJS)
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	7 – 11 May 07 10 – 14 Sep 07
914L	Law of Naval Operations (Reservists) (010) Law of Naval Operations (Reservists) (020)	14 – 18 May 07 17 – 21 May 07
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	29 May – 8 Jun 07 6 – 17 Aug 07
850V	Law of Military Operations (010)	11 – 22 Jun 07
786R	Advanced SJA/Ethics (010) Advanced SJA/Ethics (020)	26 – 30 Mar 07 (San Diego) 16 – 20 Apr 07 (Norfolk)
	National Institute of Trial Advocacy (020)	14 – 18 May 07 (San Diego)
0258	Senior Officer (040) Senior Officer (050) Senior Officer (060)	7 – 11 May 07 (New Port) 23 – 27 Jul 07 (New Port) 24 – 28 Sep 07 (New Port)
4048	Estate Planning (010)	23 – 27 Jul 07
748B	Naval Legal Service Command Senior Officer Leadership (010)	20 – 31 Aug 07
3938	Computer Crimes (010)	21 – 25 May 07 (Norfolk)
961D	Military Law Update Workshop (Officer) (010) Military Law Update Workshop (Officer) (020)	TBD TBD

961M	Effective Courtroom Communications (020)	26 – 30 Mar 07 (San Diego)
961J	Defending Complex Cases (010)	16 – 20 Jul 07
525N	Prosecuting Complex Cases (010)	9 – 13 Jul 07
2622	Senior Officer (Fleet) (060) Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110) Senior Officer (Fleet) (120) Senior Officer (Fleet) (130)	26 – 30 Mar 07 (Pensacola, FL) 2 – 6 Apr 07 (Quantico, VA) 9 – 13 Apr 07 (Camp Lejeune, NC) 23 – 27 Apr 07 (Pensacola, FL) 23 – 27 Apr 07 (Naples, Italy) 4 – 8 Jun 07 (Pensacola, FL) 9 – 13 Jul 07 (Pensacola, FL) 27 – 31 Aug 07 (Pensacola, FL)
961A	Continuing Legal Education (EUCOM) (020)	23 – 24 Apr 07 (Naples, Italy)
7878	Legal Assistance Paralegal Course (010)	16 Apr – 20 Apr 07
3090	Legalman Course (010) Legalman Course (020)	16 Jan – 30 Mar 07 16 Apr – 29 Jun 07
846L	Senior Legalman Leadership Course (010)	23 – 27 Jul 07
049N	Reserve Legalman Course (Phase I) (010)	9 – 20 Apr 07
056L	Reserve Legalman Course (Phase II) (010)	23 Apr – 4 May 07
846M	Reserve Legalman Course (Phase III) (010)	7 – 18 May 07
5764	LN/Legal Specialist Mid Career Course (020)	17 – 28 Sep 07
961G	Military Law Update Workshop (Enlisted) (010) Military Law Update Workshop (Enlisted (020)	TBD TBD
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020) Paralegal Research & Writing (030)	19 – 30 Mar 07 (Newport) 7 – 18 May 07 (Norfolk) 16 – 27 Jul 07 (San Diego)
4046	SJA Legalman (020)	29 May – 7 Jun 07 (Newport)
627S	Senior Enlisted Leadership Course (100) Senior Enlisted Leadership Course (110) Senior Enlisted Leadership Course (120) Senior Enlisted Leadership Course (130) Senior Enlisted Leadership Course (140) Senior Enlisted Leadership Course (150) Senior Enlisted Leadership Course (160) Senior Enlisted Leadership Course (170) Senior Enlisted Leadership Course (180)	28 – 30 Mar 07 (Norfolk) 25 – 27 Apr 07 (Norfolk) 24 – 26 Apr 07 (Bremerton) 1 – 3 May 07 (San Diego) 23 – 25 May 07 (Norfolk) 17 – 19 Jul 07 (San Diego) 18 – 20 Jul 07 (Great Lakes) 15 – 17 Aug 07 (Norfolk) 28 – 30 Aug 07 (Pendleton)

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	30 Apr – 18 May 07 4 – 22 Jun 07 23 Jul – 10 Aug 07 10 – 28 Sep 07
0379	Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	2 – 13 Apr 07 4 – 15 Jun 07 30 Jul – 10 Aug 07 10 – 21 Sep 07
3760	Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	2 – 6 Apr 07 25 – 29 Jun 07 16 – 20 Jul 07 (Great Lakes) 27 – 31 Aug 07
4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalmen (030)	18 – 29 Jun 07
Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	7 – 25 May 07 11 – 29 Jun 07 30 Jul – 17 Aug 07 10 – 28 Sep 07
947J	Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	2 – 13 Apr 07 7 – 18 May 07 11 – 22 Jun 07 30 Jul – 10 Aug 07
3759	Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	2 – 6 Apr 07 (San Diego) 23 – 27 Apr 07 (Bremerton) 4 – 8 Jun 07 (San Diego) 20 – 24 Aug 07 (San Diego) 27 – 31 Aug 07 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2007 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**
Judge Advocate Staff Officer Course, Class 07-B	20 Feb – 20 Apr 07
Paralegal Apprentice Course, Class 07-03	2 Mar – 13 Apr 07
Environmental Law Update Course (DL), Class 07-A	26 – 30 Mar 07

Paralegal Craftsman Course, Class 07-003	2 Apr – 4 May 07
Interservice Military Judges' Seminar, Class 07-A	10 – 13 Apr 07
Advanced Trial Advocacy Course, Class 07-A	23 – 27 Apr 07
Paralegal Apprentice Course, Class 07-04	22 Apr – 5 Jun 07
Environmental Law Course , Class 07-A	30 Apr – 4 May 07
Reserve Forces Judge Advocate Course, Class 07-A	7 – 11 May 07
Reserve Forces Paralegal Course, Class 07-A	7 – 18 May 07
Operations Law Course, Class 07-A	14 – 24 May 07
Military Justice Administration Course, Class 07-A	21 – 25 May 07
Accident Investigation Board Legal Advisors' Course, Class 07-A	4 – 8 Jun 07
Staff Judge Advocate Course, Class 07-A	11 – 22 Jun 07
Law Office Management Course, Class 07-A	11 – 22 Jun 07
Paralegal Apprentice Course, Class 07-05	18 Jun – 31 Jul 07
Advanced Labor & Employment Law Course, Class 07-A	25 – 29 Jun 07
Negotiation and Appropriate Dispute Resolution Course, Class 07-A	9 – 13 Jul 07
Judge Advocate Staff Officer Course, Class 07-C	16 Jul – 14 Sep 07
Paralegal Craftsman Course, Class 07-04	7 Aug – 11 Sep 07
Paralegal Apprentice Course, Class 07-06	13 Aug – 25 Sep 07
Reserve Forces Judge Advocate Course, Class 07-B	27 – 31 Aug 07
Trial & Defense Advocacy Course, Class 07-B	17 – 28 Sep 07
Legal Aspects of Sexual Assault Workshop, Class 07-A	25 – 27 Sep 07

5. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the March 2006 issue of *The Army Lawyer*.

6. Phase I (Correspondence Phase), Deadline for RC-JAOAC 2008

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 January 2008. This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2008 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 2007, 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 2007 will not be cleared to attend the 2008 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 regarding attendance at Phase II (Residence Phase) or completion of Phase I writing exercises, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil.

For system or help desk issues regarding JAOAC or any on-line or correspondence course material, please contact the Distance Learning Department at jagc.training@hqda.army.mil or commercial telephone (434) 971-3153.

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

* Military exempt (exemption must be declared with state).
**Must declare exemption.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2006-2007).

Date	Unit/Location	ATTRS Course Number	Topic	POC
20-22 Apr 07	90th RRC Tulsa, OK	Class: 008	Domestic Operations; Deployment Law; Administrative & Civil Law	LTC Baucum Fulk (501) 771-8765 baucum.fulk@us.army.mil
28-29 Apr 07	Indiana ARNG Indianapolis, IN	Class: 009	Contract & Fiscal Law Administrative & Civil Law/Legal Assistance	LTC Brian Dickerson (317) 247-3491 brian.c.dickerson@in.ngb.army.mil
4-6 May 07	213th LSO Atlanta, GA	Class: 010	International & Operational Law Contract & Fiscal Law	LTC Robin Allen (404) 562-9583 allen.robin@epamail.epa.gov
4-6 May 07	89th RRC Kansas City, KS	Class: 014	TCAP; Administrative & Civil Law	LTC Ismael Sanabria (316) 681-1759, ext. 1341 Ismael.sanabria@usar.army.mil
19-20 May 07	139th LSO Nashville, TN	Class: 011	Contract & Fiscal Law Criminal Law	LTC Kymberly Haas (615) 256-3148 attorneykhaas@aol.com
19-20 May 07	91st LSO Oak Brook, IL	Class: 012	International & Operational Law Administrative & Civil Law/Legal Assistance	CPT Bradley Olson (309) 782-3361 bradley.olson@us.army.mil
23-24 Jun 07	94th RRC Boston/Devins, MA	Class: 013	International & Operational Law Administrative & Civil Law/Legal Assistance	CPT Susan Lynch (978) 784-3933 susan.lynch@usar.army.mil

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

A384333 Servicemembers Civil Relief Act Guide, JA-260 (2006).

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 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).

AD A350514 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).

AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).

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 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).

AD A452516 Environmental Law Deskbook, JA-234 (2006).

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 (1998).

Labor Law

AD A360707	The Law of Federal Employment, JA-210 (2000).
AD A360707	The Law of Federal Labor-Management Relations, JA-211 (2001).

Criminal Law

AD A302672	Unauthorized Absences Programmed Text, JA-301 (2003).
AD A302674	Crimes and Defenses Deskbook, JA-337 (2005).
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 TJAGLCS Publications available through the LAAWS XXI JAGCNet, see the March 2006, 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.

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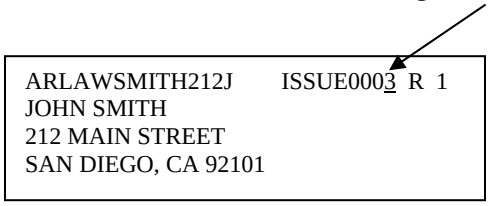

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