THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-416

January 2008

Contract and Fiscal Law Developments of 2007—The Year in Review

Major Marci A. Lawson, USAF (Editor), Lieutenant Colonel Ralph J. Tremaglio, III, Chair, Lieutenant Colonel Michael L. Norris, Vice-Chair, Colonel John Siemietkowski, Major Jose A. Cora, Major Mark A. Ries, Major Michael Wong, Major Jennifer C. Connelly, Major Peter D. DiPaola, Major Brett Egusa Ms. Margaret K. Patterson

Contents

Editor, Captain Alison M. Tulud
Assistant Editor, Captain Ann B. Ching
Technical Editor, Charles J. Strong

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

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

The Editorial Board of the *Military Law Review* includes the Chair, Administrative and Civil Law Department; and the Director, Professional Writing Program. The Editorial Board evaluates all material submitted for publication, the decisions of which are subject to final approval by the Dean, The Judge Advocate General's School, U.S. Army. *The Army Lawyer* welcomes articles from all military and civilian authors on topics of interest to military lawyers. Articles should be submitted via electronic mail to charles.strong@hqda.army.mil. Articles should follow *The Bluebook, A Uniform System of Citation* (18th ed. 2005) and the *Military Citation Guide* (TJAGLCS, 12th ed. 2007). No compensation can be paid for articles.

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

Address changes for official channels distribution: Provide changes to the Editor, *The Army Lawyer*, The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781, telephone 1-800-552-3978 (press 1 and extension 3396) or electronic mail to charles.strong@hqda.army.mil.

Issues may be cited as ARMY LAW., [date], at [first page of article], [pincite].

CONTRACT AND FISCAL LAW DEVELOPMENTS OF 2007—THE YEAR IN REVIEW

Major Marci A. Lawson, USAF (Editor)
Lieutenant Colonel Ralph J. Tremaglio, III, Chair
Lieutenant Colonel Michael L. Norris, Vice-Chair
Colonel John Siemietkowski
Major Jose A. Cora
Major Mark A. Ries
Major Michael Wong
Major Jennifer C. Connelly
Major Peter D. DiPaola
Major Brett Egusa
Ms. Margaret K. Patterson

TABLE OF CONTENTS

FOREWORD

The Gansler Commission Report and Beyond

Welcome to the Contract and Fiscal Law Department's Year in Review.[*] While fiscal year (FY) 2007 brought us many highlights, the real news for those of us in the Army is the Gansler Commission Report which came out just after the FY closed. The participants at our annual Symposium discussed the Gansler Report during a variety of sessions, both plenary and elective. It is such a hot topic that we are dedicating this Foreword to it. Since it is not technically from the last FY, the report is not covered in the body of the Year in Review; however, now is the time for all of us to understand the report. It is important for all of us to know the findings, the recommendations, and what we can do to help. In a nutshell, the report determined that the Army contracting process is undermanned, overworked, inexperienced, and undervalued by the operational Army. This may be news for those outside the contracting community, but it is not a new theme for these pages. For several years, I have been encouraging contract and fiscal professionals to help share their wealth of knowledge with the young attorneys throughout their offices, and the Corps. Now, with the Gansler Report we have the empirical data to support the comments and recommendations people have had for years.

The Secretary of the Army established the Commission to provide an independent body to study lessons learned from recent operations in Iraq, Afghanistan, and Kuwait, and looked for the Commission to also provide recommendations for the future. The commission members' experiences crossed all sectors of the Department of Defense, from the institutional level to the operational level.[1] During the forty-five days in which the Commission conducted its research, the commission interviewed over 100 people both within the continental United States and deployed. Some of the more glaring facts include the following: the Army contracting workforce continues to decrease while there has been a seven-fold increase in the contracting workload; the Army contracting process has become more complex; and only 3% of Army contracting personnel are active duty, creating some obvious difficulties when we deploy. On the operational side, the Gansler Commission noted that essential segments of the institutional Army have not adapted to the Army's transformation into an expeditionary force. While the report lists several areas of improvement (financial management, personnel, contract management, training and education, and doctrine), the one essential area in which requiring activities must improve is defining their operational requirements.

The report makes four recommendations to improve the Army's contingency contracting capabilities. The first recommendation is to increase the stature, quantity, and development of both military and civilian contracting personnel. The second recommendation is to restructure organization and to restore responsibility to facilitate contracting and contract management in expeditionary and CONUS operations. This recommendation includes creating five new general officer billets for contracting-centric officers and the creation of a Contracting Command. The third recommendation is to provide training and tools for overall contracting activities. The fourth recommendation is to obtain legislative, regulatory, and policy assistance to increase contracting effectiveness in expeditionary operations. This includes increasing contracting personnel by 1,400 individuals and adding benefits for volunteer civilian personnel serving in a combat zone.

The Army has already initiated some of these reforms. On 6 December 2007, the Army briefed the Senate Armed Services subcommittee on its intent to increase contracting personnel by 1,400 people. As Dean Steve Schooner, George Washington University School of Law and noted commentator on Government procurement law, pointed out at our Symposium, that may be easier said then done. Similar to the operational Army's inability to adequately define its operational requirements, the government as a whole does not adequately describe the duties of our procurement professionals in order to entice college graduates to seek government employment. While government procurement positions may be challenged to compete with the salaries at large contractors, better government position descriptions may help draw graduates to the government instead of to large government contract firms. During the same briefing to the subcommittee, the Army announced that it intends to create a two-star Army Contracting Command that will fall under the Army Materiel Command. It is clear that the Army contracting community now has the momentum to pursue the changes recommended.

---

[*] The Contract and Fiscal Law Department is composed of six resident Judge Advocates: Lieutenant Colonel Ralph J. Tremaglio, III; Lieutenant Colonel Michael L. Norris; Major Michael Wong; Major Marci A. Lawson, USAF; Major Mark A. Ries; and Major Jose Cora, and our Administrative Assistant, Ms. Tammy Kern. Each officer has contributed sections to this work. The Department would like to thank our outside contributing authors: Major Peter D. DiPaola (ADK Drilling Individual Mobilization Augmentee), Major Brett Eugsa (ADK Drilling Individual Mobilization Augmentee), MAJ Jennifer Connelly, and Ms. Margaret Patterson. We greatly appreciate their expertise and contributions. Finally, the issue has benefited inordinately from diligent fine-tuning by the School's resident footnote gurus, Mr. Chuck Strong and Captain Alison Tulud. Thank you all!

[1] Dr. Jacques S. Gansler, former Under Secretary of Defense for Acquisition, Technology & Logistics; David J. Berteau, former Principal Deputy Assistant Secretary of Defense for Production and Logistics; and George T. Singley III, former Deputy Director, Defense Research & Engineering; General (GEN) (Retired) David M. Maddox, U.S. Army, former Commander, U.S. Army Europe; Rear Admiral (Ret.) David R. Oliver, U.S. Navy, former Director, Office of Management and Budget, Coalition Provisional Authority, Iraq; and GEN (Ret.) Leon E. Salomon, U.S. Army, former Commander, U.S. Army Materiel Command.

We will have to wait for next year's Year in Review to see how far that momentum will take us.

Year in Review articles are the Contract and Fiscal Law Department's annual attempt to capture and analyze the past FY's most important, relevant, and occasionally eccentric cases and developments. Although we could not cover every new decision or rule, we have tried to discuss topics most relevant to our readers. In addition, we have tried to spot trends and put developments into context. I hope we have succeeded and that you find these articles useful in your practice, thought provoking, and a "good read." If you have comments about this year's articles, or suggestions regarding how we can improve the Year in Review for future years, please email them to Contract-YIR@hqda.army.mil.

Lieutenant Colonel Ralph J. Tremaglio, III

CONTRACT FORMATION

Authority

"That's The Way We Do It" Does Not Necessarily Constitute Authority to Bind the Government

In one case this fiscal year, the Court of Federal Claims (COFC) provided a textbook examination of the authority of a Government representative to bind the government and clarified the circumstances under which a government representative has implied actual authority. In *SGS-92-X003 v. United States*,[1] the Assistant Special Agent in Charge (ASAC) of a Drug Enforcement Agency (DEA) district office had promised a confidential informant also known as "Princess" a 25% commission on the value of seizures made as a result of information she provided to the DEA, up to $250,000 per seizure.[2] Princess proved to be an extraordinarily effective confidential informant, resulting in "unparalleled" success by the agency in prosecutable cases against major Columbian drug traffickers and the seizure of drug proceeds.[3] While Princess received several payments for her services totaling approximately $2 million, the proceeds of the seized assets were considerably more than that, leading to her suit for nearly $34 million in damages for breach of the alleged oral implied-in-fact contract.[4] The Government moved for summary judgment, arguing that the ASAC lacked authority to bind the Government and that nobody with contracting authority ever ratified the promise to pay the informant.[5]

Because actual authority to bind the government is a necessary element of any implied-in-fact contract with the government,[6] the court examined each theory under which the ASAC might have possessed that actual authority or whether the promise was ratified by someone with such authority. Starting by searching for express actual authority, the court observed that the statute governing the Asset Forfeiture Fund did not authorize the ASAC to promise to pay the informant a commission.[7] The court quoted from the DEA Manual, which expressly provided that "DEA can pay an informant a commission based upon some percentage of the value of cases he provides."[8] However, the DEA Manual did not specify which particular DEA officials were authorized to pay such a commission.[9] The court explained that this vagueness as to whether the ASAC was authorized to make the promise to the informant, "certainly did not constitute an unambiguous grant of express actual authority to bind the Government even if the [c]ourt were to accept the DEA Manual as a 'regulation.'"[10]

Finding no unambiguous statute or regulation which granted the ASAC express actual authority to bind the government,[11] the court then turned to whether the ASAC possessed implied actual authority to enter into such a contract. A government official has implied actual authority to bind the government "when such authority is considered to be an integral part of the duties assigned to a government employee."[12] That authority is deemed an "integral" part of an official's duties

---

[1] 74 Fed. Cl. 637 (2006).

[2] *Id*. at 638.

[3] *Id*. at 648. Princess's efforts over the four years she served as a confidential informant resulted in the arrest of dozens of major Columbian drug traffickers, prosecutable cases against dozens of additional "cellheads" in the United States and elsewhere, many "spin-off" investigations, and the seizure of tens of millions of dollars of drug proceeds. *Id*. The DEA ASAC described her as "the best informant he had ever encountered in his 31-year tenure with DEA 'from the standpoint of value to the Agency . . . her abilities to follow direction, to be innovative and to infiltrate the very highest levels of the criminal element.'" *Id*. at 640.

[4] *Id*. at 638.

[5] *Id*. at 650.

[6] The court noted that establishing the existence of an implied-in-fact contract with the government requires the plaintiff to prove: "(1) mutuality of intent; (2) consideration; (3) lack of ambiguity in the offer and acceptance; and (4) actual authority to bind the Government in contract on the part of the Government representative whose conduct is relied upon." (citing Flexfab, L.L.C. v. United States, 424 F.3d 1254, 1258 (Fed. Cir. 2005)). *Id*.

[7] *Id*. at 651. The Asset Forfeiture Fund is governed by 28 U.S.C. § 524, which authorized the payment of awards of up to $250,000 "at the discretion of the Attorney General or his delegate," with limited delegation of award amounts greater than $250,000. The court cited previous cases holding that this statute did not grant DEA agents authority to bind the government to similar promises of awards to informants. *Id*. (citing Salles v. United States, 156 F.3d 1383, 1384 (Fed. Cir. 1998); Brunner v. United States, 70 Fed. Cl. 623, 641 (2006); Khairallah v. United States, 43 Fed. Cl. 57, 63–64 (1999); Cruz-Pagan v. United States, 35 Fed. Cl. 59, 59–60 (1996)).

[8] *SGS-92-X003*, 74 Fed. Cl. at 651 (quoting DRUG ENFORCEMENT ADMIN., U.S. DEP'T OF JUSTICE, DEA AGENTS MANUAL § 6612.44 (2002)).

[9] *Id.*

[10] *Id*. at 652. The court noted that an earlier case had "recognized that the DEA Manual was not a published regulation." *Id*. at 652 n.25 (citing *Brunner*, 70 Fed. Cl. at 645).

[11] *Id*. at 652.

[12] *Id*. (quoting H. Landau & Co. v. United States, 886 F.2d 322, 324 (Fed. Cir. 1989)).

when the official "cannot perform his assigned tasks without such authority and when the relevant agency's regulations do not grant the authority to other agency employees."[13]

Application of that standard normally results in a finding that law enforcement officers do not have inherent authority to make binding promises of compensation to informants, because "such officers can obtain authority from higher ranking officers via established procedures to pay informants and witnesses for their services, with the result that contracting authority is not needed for the agents to perform their jobs."[14] But unlike prior decisions of the court in which DEA agents were summarily found to lack this authority,[15] the court in this case found a genuine issue of material fact as to whether the ASAC had implied actual authority to make a binding promise to pay the informant a commission.[16] The record was not clear on the extent of the ASAC's duties as the head of a DEA office, but the ASAC believed that his actions were consistent with "accepted practices in these situations" and his authority as head of the district office.[17] Frequent meetings with high level DEA and Department of Justice (DOJ) officials regarding "Operation Princess," and the grant of an "Attorney General's exemption" to spend proceeds from undercover operations for expenses of the operation, further muddled the question as to whether the ASAC had this authority.[18] The court was unable to determine whether the authority to contract was an integral part of the ASAC's duties because "the 'procedures' for promising and paying Princess appear to have been anything but 'established'" for the ASAC in this case.[19] The court therefore denied the cross-motions for summary judgment on the issue of implied actual authority.[20]

If the ASAC lacked implied actual authority to bind the government to ASAC's promise to pay the informant a commission, there is also the question of whether someone with actual authority subsequently ratified ASCA's promise. The court found genuine issues of material fact as to this question as well.[21] Ratification requires that the person possessing actual authority have "full knowledge of all the facts" before ratifying the unauthorized act.[22] The ASAC believed that the high level DEA and DOJ officials who attended the frequent meetings on Operation Princess knew and approved of the promise.[23] However, those officials testified that they did not recall hearing about it.[24] Knowledge of the unauthorized promise is also a key requirement for institutional ratification, which "occurs when the Government seeks and receives the benefits from an otherwise unauthorized contract."[25] Because there were genuine issues of material fact as to whether DEA or DOJ officials with authority to contract knew about the promise, the court was unable to grant summary judgment on the issue of individual or institutional ratification.[26]

Contracting Officer's Representatives Do Not—and Cannot—Have Authority to Make Changes

The recent case of *Winter v. Cath-dr/Balti Joint Venture*, held that no matter what the Government does or says, no amount of apparent authority will give someone actual authority to modify a contract where a contract clause explicitly

[13] *Id.*

[14] *Id.* at 653 (quoting Gary v. United States, 67 Fed. Cl. 202, 214 (2005)).

[15] *See, e.g.*, *Gary*, 67 Fed. Cl. 202; Tracy v. United States, 55 Fed. Cl. 679 (2003); Doe v. United States, 48 Fed. Cl. 495 (2000); Khairallah v. United States, 43 Fed. Cl. 57 (1999); Cruz-Pagan v. United States, 35 Fed. Cl. 59 (1996).

[16] *SGS-92-X003*, 74 Fed. Cl. at 655.

[17] *Id.* at 652.

[18] *Id.* at 653.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 654.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

reserves that authority to the contracting officer.[27] This Federal Circuit case reversed a recent ASBCA decision that a contractor was entitled to an equitable adjustment for changes directed by contract's Project Manager (PM).[28]

In *Winter*, the Navy had given the contractor every indication that a Resident Officer in Charge of Contracts (ROICC), who was also the Project Manager (PM), had express or at least implied authority to make contract modifications during the course of performance of a facility renovation contract. Before construction began, the contractor was required to meet with the contracting officer at a preconstruction conference for the express purpose of clarifying contract administration. At the conference, which was attended by the ROICC PM and several other government representatives but not the contracting officer, the Navy "designated the ROICC PM to administer the contract and stated that all correspondence should be addressed to the attention of . . . the active ROICC PM."[29] The Navy's guidance to the contractor seemingly made it clear that the ROICC PM was authorized to make contract modifications, including in the presentation a slide that stated:

> Contract Modifications
>
> Modifications are written alterations to the contract which may change the work to be performed and/or the contract price and time. Oral modifications will not be used.
>
> • Bilateral modification—the contractor and the ROICC have agreed upon an adjustment to the contract
>
> • Unilateral modification—the ROICC can direct the contractor to take some action under the contract
>
> No work is to be performed beyond the contract requirements without written notification from the ROICC.[30]

The Navy's statements and actions during contract administration further reinforced the belief that the ROICC PM had this authority. The ROICC PM signed all responses to the contractor's numerous Requests for Information seeking clarification of contract requirements and decisions on contract deviations due to site conditions.[31] When a successor ROICC PM later assumed duties, the contractor specifically sought "documentation of assignment of authority" and his "level of authority," and the Navy's response indicated that the ROICC PM was responsible for "construction management and contract administration" and providing "technical and administrative direction to resolve problems encountered during construction."[32] The contracting officer apparently did nothing to dissuade the understanding that the ROICC PM had authority to direct contract changes. When the ROICC PM failed to timely act on the contractor's cumulative request for equitable adjustment when the contract was substantially completed, the contractor submitted a certified claim to the contracting officer for costs incurred in performing thirty-seven tasks alleged to be changed work.[33] The contracting officer

---

[27] 497 F.3d 1339 (Fed. Cir. 2007), *rev'g* Cath-dr/Balti Joint Venture, ASBCA Nos. 53581, 54239, 05-2 BCA ¶ 33,046.

[28] *Id.*

[29] *Id*. at 1342.

[30] *Id.* at 1346. Other information provided to the contractor at the preconstruction conference also seemingly suggested that the ROICC PM was the first level decision-making authority for contract changes. For example:

> The presentation directed the contractor to use the Requests for Information (RFI) form routinely and "[i]f necessary, forward RFI to *Navy PM* for action." . . . Another slide related to disputes directed the contractor to submit a request for equitable adjustment to the ROICC if it feels a contract modification is required and "[i]f the ROICC sees no entitlement, or the contractor doesn't agree with the entitlement, the contractor has the right to request a Contracting Officer's Final Decision, using the procedures outlined in the Disputes Clause" but that "[t]he contractor must proceed diligently with the work while awaiting the final decision."

Id. at 1342 (alteration in original).

[31] *Id*. at 1342–43.

[32] *Id*. at 1342. The Navy's response provided the following description:

> Project Manager: Serves as the Government Construction Manager on all assigned projects. Responsible for construction management and contract administration on assigned projects while providing quality assurance and technical engineering construction advice. Provides technical and administrative direction to resolve problems encountered during construction. A project manager analyzes and Interprets contract drawings and specifications to determine the extent of Contractors' responsibility. Prepares and/or coordinates correspondence, submittal reviews, estimates, and contract modifications in support to ensure a satisfactory and timely completion of projects.

Id.

[33] *Id.* at 1343.

issued a Final Decision finding entitlement as to several of the claims and recommended that the contractor and ROICC PM negotiate the amount the contractor should be paid on those claims.[34] The contracting officer's denial of most of the claims was not because of the issue of whether the ROICC PM had authority to direct the changes, but because he deemed them to be tasks that were already required by the contract, rather than being contract changes.[35]

Hearing the case two years ago, the ASBCA found that the contractor was entitled to an equitable adjustment with respect to some of the claims.[36] The Board determined that the ROICC PM's delegation of authority, which stated that he was "responsible for construction management and contract administration," had provided him "express actual authority to make any changes that were necessary to resolve problems at the site."[37]

On appeal this year, the Federal Circuit reversed the ASBCA decision, holding that the ROICC PM had neither express nor implied actual authority to make contract changes.[38] The court noted that the Department of Defense specifically prohibits delegating to a contracting officer's representative (COR) the authority to make contract changes that affect price or other contract terms,[39] and that this prohibition was incorporated into the contract by the clause at Defense Federal Acquisition Regulation Supplement (DFARS) 252.201-7000.[40] The contract also contained two Naval Facilities Engineering Command (NAVFAC) clauses that indicated that only the contracting officer had authority to make changes that are binding on the government.[41] Therefore, the ROICC PM did not have, and could not have had, express authority to make binding contract changes.[42]

The issue of implied actual authority, however, presented "a much closer case."[43] A government employee has implied actual authority to bind the government when such authority is considered to be "an integral part of the duties assigned to the particular government employee."[44] Despite the Navy's contract administration instructions to the contractor, and the contractor's dutiful compliance with those instructions, "[t]he problem is that these Navy directives contradicted the clear language of the contract and it is the contract which governs."[45] The court held that the explicit contract language granting to the contracting officer exclusive authority to modify the contract precluded anyone else from impliedly having that authority:

> Here, the ROICC could not have had the implicit authority to authorize contract modifications because the contract language and the government regulation it incorporates reference explicitly state that only the contracting officer had the authority to modify the contract. Modifying the contract would not be

---

[34] *Id.*

[35] *Id.* at 1349 (Prost, J., dissenting).

[36] Cath-dr/Balti Joint Venture, ASBCA Nos. 53581, 54239, 05-2 BCA ¶ 33,046.

[37] *Id.* at 33,046. The board noted that the ROICC PM was also "the key government person with respect to performance," a fact which in a past decision had caused the board to find that a Project Officer "was impliedly authorized to make changes where expeditious action was required." *Id.* (citing Urban Pathfinders, Inc., ASBCA No. 23134, 79-1 BCA ¶ 13,709). This suggests that had the board not determined that the ROICC PM had express actual authority, it would have found he had implied actual authority.

[38] *Cath-dr/Balti*, 497 F.3d at 1341.

[39] U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. pt. 201.602-2 (July 2007) [hereinafter DFARS]. The relevant portion provides that a contracting officer representative "[h]as no authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract . . . ." *Id.* at 201.602-2(2)(iv).

[40] *Cath-dr/Balti*, 497 F.3d at 1345. The COR clause provides, in relevant part:

> If the Contracting Officer designates a contracting officer's representative (COR), the Contractor will receive a copy of the written designation. It will specify the extent of the COR's authority to act on behalf of the contracting officer. The COR is not authorized to make any commitments or changes that will affect price, quality, quantity, delivery, or any other term or condition of the contract.

DFARS, *supra* note 40, at pt. 252.201-7000(b).

[41] The contract contained NAVFAC clause 5252.242-9300 entitled "Government Representatives," and NAVFAC clause 5252.201-9300 entitled "Contracting Officer Authority," both of which provided that changes directed by government employees other than the contracting officer are not binding unless formalized by a document executed by contracting officer. *Cath-dr/Balti*, 497 F.3d at 1345.

[42] *Id.*

[43] *Id.* at 1346.

[44] *Id.* (citing H. Landau & Co. v. United States, 886 F.2d 322, 324 (Fed. Cir. 1989)).

[45] *Id.*

> "considered to be an integral part of [the ROICC project manager's] duties" when the contract explicitly and exclusively assigns this duty to the [contracting officer] CO.[46]

There being no express or implied authority for the ROICC PM to make contract changes, the court remanded the case to the ASBCA to determine whether the contracting officer's initial Final Decision finding entitlement to some of the contractor's claims constituted a ratification of the changes directed by the ROICC PM, an issue that the board previously had no need to address since it had found express authority to make the changes.[47]

Both the *Cath-dr/Balti* decision, and the previously discussed COFC decision in *SGS-92-X003 v. United States*,[48] demonstrate that contracting officer's representatives cannot have either express or implied authority to bind the government to any contract changes they direct. While the Army and Air Force do not compel the use of clauses comparable to the NAVFAC clauses, the DFARS requires the use of the COR clause whenever the contracting officer anticipates appointing a contracting officer's representative.[49] That clause specifically states that contracting officer's representatives are "not authorized to make any commitments or changes that will affect price, quality, quantity, delivery, or any other term or condition of the contract."[50] Under the reasoning of *Cath-dr/Balti*, the fact that the contract and the DFARS explicitly reserves authority to make those changes to the contracting officer means that the COR cannot have implied authority to bind the government to such changes regardless of the circumstances. Similarly, the holding in *SGS-92-X003*, that implied authority is an "integral" part of the employee's duties when he "cannot perform his assigned tasks without such authority and when the relevant agency's regulations do not grant the authority to other agency employees,"[51] means that authority to make those changes will never be an integral part of the COR's duties because that authority has been granted to the contracting officer. This leaves ratification as the only viable theory under which a contractor can attempt to recover for increased costs occasioned by COR-directed changes.

Lieutenant Colonel Michael L. Norris

---

[46] *Id*. (citing *Landau*, 886 F.2d at 324) (alteration in original).

[47] *Id*. at 1346–47. The contractor argued that the contracting officer's final decision "reflects the fact that a person with actual authority and sufficient knowledge of the material facts endorsed the actions [of the ROICC PM] and found entitlement . . . ." *Id*. One factual issue still in dispute is whether the contracting office had full knowledge of the facts. The court noted: "While it appears from the detailed fifteen-page decision that the CO did have full knowledge, the government contends he did not." *Id*. Judge Prost dissented from this portion of the court's opinion, viewing the contracting officer's decision letter, which recommended that the contractor and ROICC PM go back and negotiate the amount the contractor should be paid on the claims to which the contracting officer found entitlement, "as simply an attempt by the CO to settle the claims" for work done beyond the terms of the contract. *Id*. at 1349. Additionally, Judge Prost noted that the contract provided that unauthorized changes would not be binding on the Government "unless formalized by proper contractual documents executed by the Contracting Officer prior to the completion of this contract," and that the alleged ratification did not meet those requirements. *Id*. at 1350.

[48] 74 Fed. Cl. 637 (2006).

[49] DFARS, *supra* note 38, at pt. 201.602-70.

[50] *Id*. at pt. 252.201-7000(b).

[51] *SGS-92-X003*, 74 Fed. Cl. at 652.

Competition

Failing to Consider Licensing and Alternatives from Previous Procurements Can Be Construed as Failing to Properly Plan for an Acquisition

In *eFEdBudget Corp.*,[1] the Government Accountability Office (GAO) sustained a protest while highlighting the importance of acquisition planning.[2] The GAO determined that the Department of State (DOS) gave up substantial rights in software that the incumbent contractor created under a developmental contract, and that DOS failed to explore the possibility of acquiring additional rights to software.[3] The protester alleged the justification and approval (J&A) was deficient and that the agency unreasonably refused to consider eFedBudget's approach in using non-proprietary software.[4] The GAO denied the protest on the grounds the protests alleged, but nevertheless found DOS had failed to adequately plan for the acquisition.[5] According to the GAO, the agency must consider whether the costs associated with continued relationship outweighs the anticipated benefits of completion and this must be included in the agency's acquisition planning.[6]

The protester challenged the DOS pre-solicitation notice for a sole-source contract for continued implementation, maintenance, enhancement, and support for the department's budget software systems alleging that the agency improperly refused to consider its alternative proposal.[7] The protester also alleged that the agency would not violate its license by allowing eFEdBudget Corp. to perform the requirements without holding explicit rights under the license.[8]

The DOS originally contracted with the incumbent, RGII Technologies Inc. (RGII), for a central management system in 1997 and relied upon it exclusively for nine years.[9] In 2000, DOS entered into a licensing agreement with RGII which limited the government's rights to the software created.[10] The licensing agreement only allowed the DOS to use the software within DoS, and prohibited the DOS from disclosing the licensed software to contractors or using the software with other software in order to implement the software.[11]

The agency, citing 41 U.S.C.§253(c)(1) (which states that there is only one responsible source and no other supplies or services will satisfy agency requirements), claimed that without this contract, the agency would experience an "immediate and substantial" delay in its ability to meet the budgetary and finance needs of DOS.[12] The J&A further stated that without this contract, DOS would have to redesign its budget system with another software product, given the licensing agreement with RGII.[13] The agency described the time needed to properly determine the requirements for a new system as "significant."[14]

The protester did not prevail on any of the grounds it proffered, however, the GAO sustained the protest on other grounds.[15] In looking at the reasonableness of the agency's rationale in the J&A,[16] the GAO found that the agency failed "to

---

[1] Comp. Gen. B-298627, Nov. 15, 2006, 2006 CPD ¶ 159.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.* at 2–8.

[6] *Id.* at 8.

[7] *Id.* at 5.

[8] *Id.*

[9] *Id.* at 2. eFEdBudget was a subcontractor under the original contract. The principal for eFEdBudget worked for RGII until 2004, leaving "under less than amicable circumstances." *Id.*

[10] *Id.* RGII copyrighted the software under the name "Monument." *Id.*

[11] *Id.* The agency expected to benefit from upgrades without having to expend additional funds for them. *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 4.

[15] *Id.* at 7.

[16] The GAO explained the criteria for determining reasonableness in Lockheed Martin Sys. Integration—Owego, Comp. Gen. B-287190.2, B287190.3, May 25, 2001, 2001 CPD ¶ 110.

satisfy its statutory obligation to engage in reasonable advance planning before proceeding with a sole-source award."[17] The DoS did not address the steps it took to end its reliance on the incumbent's software.[18] The agency failed to make long-term plans when it did not take advantage of an opportunity to purchase a source code license two years earlier.[19] The moral of the story is when an agency does its acquisition planning, it must consider the long-term ramifications and solutions.

If You Make a Claim Regarding Why a Specific Brand or Type Is Required, It Would Be Nice to Have the Data to Support It

In *General Electrodynamics Corp.* (GEC),[20] GEC protested the planned award of a five-year indefinite delivery indefinite quantity (ID/IQ) contract for digital aircraft weighing scales.[21] GEC complained that the requirement was unduly restrictive because it excluded scales with hydraulic components or mechanical load sensing devices.[22] While the GAO denied the protest, it did not agree with all the Government's arguments in response to the protest.[23] The GAO did, however, find that the requirements were reasonably related to the agency's needs and it found that the requirements as a whole were not unduly restrictive.[24] The teaching point in this case is the reasoning behind GAO's disagreements with the agency.

The agency posted a synopsis of its requirement on FedBizOpps requiring a purchase item description (PID) of Intercomp digital aircraft weighing scales (DAWS).[25] The PID stated that the scales "shall not utilize any hydraulic components or mechanical load sensing devices."[26] The Agency intended to use the scales worldwide to "weigh aircraft within the Army inventory, in and out of battle conditions, to ensure that the weight of the aircraft does not exceed safe limits."[27] When the agency denied a request to remove the PID, GEC protested claiming that the solicitation was unduly restrictive because it excluded scales with hydraulic or mechanical load sensing devices.[28]

While the Army offered no empirical data for its claims regarding the ease of calibration, maintenance, and reliability of the model it requested, the protester did offer empirical support for its position.[29] The protester submitted empirical data from the Air Force in 2002, that when "reasonably interpreted," showed that the GEC's scales were easier to calibrate than Intercomp's.[30] The agency then searched for data by sending an e-mail message to an Air Force Metrology and Calibration (AFMETCAL) Program employee who was a DAWS mechanical engineer, inquiring whether a rigorous study had been accomplished comparing the suitability of the two load cell technologies in platform scale applications for aircraft weighing operations. In the absence of such a study, the e-mail further asked whether the employee could obtain a memorandum describing the technologies.[31] The GAO found that the agency's claim that excluding scales that used hydraulic load cells from consideration because scales with electronic load cells are easier to calibrate was "unpersuasive."[32]

---

[17] *Id.* at 7.

[18] *Id.* at 8.

[19] *Id.*

[20] Comp. Gen. B-298698; B-298698.2, Nov. 27, 2006, 2006 CPD ¶ 180. Although the Army issued a synopsis on FedBizzOps.gov stating its intent to award a sole source contract to Intercomp Company Inc. pursuant to FAR 6.302 (One Source), the synopsis also stated that proposals received within forty-five days would be considered. *Id*. at 1-2. While the protester submitted a response, the agency issued a solicitation requiring the Intercomp brand digital aircraft weighing scales (DAWS). Subsequently, GEC protested and then the Army took corrective action withdrawing the original protest to be withdrawn. *Id.* at 2.

[21] *Id.*

[22] *Id.*

[23] *Id.* The Government claimed the scales they required were easier to calibrate, more reliable and easier to maintain and therefore, were at a lower risk of losing technical support due to the technology becoming obsolete. *Id.* at 3.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 4.

[31] *Id.* The GAO assumed that the AFMETCAL employee never sent any data since none was included in the agency record. *Id.*

[32] *Id.*

The agency's claim on this point was suspect at best. It would have been better to omit this point in the agency response and to proceed on the others.[33] While the GAO did not believe the agency showed the reasonableness of all of its assertions regarding fully electronic load cells, the GAO did find the decision to specify electronic load cells was reasonable on the whole and that the procurement was not the result of a lack of advance planning.[34] Thus, if an agency has not completed the proper research to support a particular belief during the acquisition planning stage, then during the protest stage, it is too late for the agency to conduct the research.

No Need to Compete Each Purchase Order Under BPAs—Competition for BPAs Meets "Maximum Extent Practicable" Requirement for Simplified Acquisitions

Given the attention that non-competitive contracts received within the last year from the Congressional Committee on Oversight, the protest in *Logan LLC*[35] seems to be very timely. Logan (referred to itself in the protest documents as Envirosolve), protested its exclusion from the rotation of purchases under a Blanket Purchase Agreement (BPA) for cleanup of hazardous waste with the Drug Enforcement Agency (DEA).[36] The protest dealt with BPAs for services in eighteen of their forty-four regions.[37] The agency had no contract vehicles in eighteen regions in 2004 and entered into ten noncompetitive BPAs for these services, although not with the protester.[38]

In March 2005, the DEA issued a request for quotations (RFQ) for hazardous waste cleanup services for twelve contract areas, contemplating the competitive establishment of one or more BPAs with various vendors for each contract area for a period up to five years.[39] The DEA notified potential offerors that actual purchase orders would be rotated amongst BPA holders for the particular contract area.[40] The DEA established a BPA with Envirosolve for nine contract areas.[41] In November of that year, the DEA requested quotations for another twenty-four contract areas, eventually signing a BPA with the protester for six of those areas.[42] This BPA also stated that actual purchase orders would be rotated amongst BPA holders.[43] In July 2006, the agency started excluding the protester from rotations after the DEA discovered hazardous chemicals buried at a site previously cleared by the protester.[44]

Envirosolve contended that the DEA's action excluding it from the rotation was in violation of the Competition in Contracting Act (CICA) and was not in accordance with applicable procurement statutes and regulations.[45] The GAO reminded the protester that simplified acquisitions are excluded from the CICA and instead require competition to the maximum extent practicable.[46] Here, the agency met this requirement by competing the original BPAs.[47] There was no further requirement to compete each individual purchase order amongst BPA holders.[48]

---

[33] *Id.* at 5–6. The agency argued that the hydraulic load cells and mechanical load sensing devices were less reliable and more difficult to maintain than fully electronic load cells. *Id*. at 5. The agency also argued that when performing a technical tradeoff for performance, reliability, maintainability, and affordability, the agency must consider the extremes of environmental design requirements, the experience of equipment operators, and the harsh operating conditions. *Id*.

[34] *Id.* at 7.

[35] Comp Gen. B-294974.6, Dec. 1, 2006, 2006 CPD ¶ 188.

[36] *Id.* The opinion stated that as part of DEA's mission, it seizes illegal drug laboratories and destroys them. Part of the destruction involves the disposal of environmentally hazardous chemicals costing from $1,000 to $100,000. *Id.* Envirosolve changed its name to Logan, LLC, however, the agency refused to recognize the name change. Since both the protester and agency referred to the protester as "Envirosolve" during the course of the protest, the GAO also referred to the protester as "Envirosolve" in its decision. *Id.*

[37] The opinion stated that the agency split the country into forty-four regions and established contract vehicles for services in each. *Id.*

[38] *Id*. at 2. The protester filed a protest with the GAO and the agency agreed to take corrective action by agreeing to discontinue the issuance of purchase orders under the BPAs and to create an acquisition strategy that addressed the competition requirements. The GAO dismissed the protest. *Id*.

[39] *Id.* at 3. The solicitation stated that BPAs would be established with those responsible vendors whose quotations were determined to be technically acceptable and whose prices were found to be fair and reasonable. *Id.*

[40] *Id.* Both the RFQ and BPAs informed vendors that the issuance of the actual purchase orders would be rotated among BPA holders. *Id.*

[41] *Id*.

[42] *Id*. at 4.

[43] *Id*.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 5.

In *Exploration Partners, LLC*, the GAO determined that Space Act agreements are not "tantamount to the award of contracts for the procurement of goods and services" and therefore, were outside the GAO's jurisdiction.[49] The National Aeronautics and Space Act[50] allows the National Aeronautics and Space Administration (NASA) to enter into "an agreement under which appropriated funds will be transferred to a domestic agreement partner to accomplish an Agency mission, but whose objective cannot be accomplished by the use of contract, grant, or Chiles Act cooperative agreement."[51]

NASA created the Commercial Crew/Cargo Project to implement space exploration policy by stimulating enterprises in space, sparking private industry technology in space cargo and crew transportation in order to create cost effective, reliable access to "low-Earth orbit," and creating a market environment for both the Government and private sector.[52] NASA envisioned a two step process.[53] In the first phase, NASA would work with industry to develop and demonstrate "various space transportation capabilities" and then determine which capabilities were the most desirable to the Government and private sector.[54] The second phase was "a potential competitive procurement of orbital transportation services to resupply the [International Space Station] with cargo and crew."[55] NASA was going to provide $500 million over a four-year period, but potential firms were expected to secure additional funding.[56] The vision was that potential businesses would provide business plans describing technical approaches, anticipated costs, estimated operational prices, and business financial information.[57] The NASA announcement stated that the Funded Space Act agreements would not be governed by the Federal Acquisition Regulation (FAR) or the agency's FAR supplement "because the announcement did not provide for the award "of a contract, grant, or cooperative agreement."[58] Although the protester submitted a proposal, it was not invited for further negotiation.[59]

Exploration argued that it should have received a Space Act agreement since its proposal was the only fully funded end-to-end transportation system. In the alternative, Exploration argued that the program should have been "re-bid under the original terms and conditions without interference in obtaining Shuttle hardware, cost data or interference in commercial business relations."[60] In response, NASA argued that the agreements were not contracts but agreements issued under the "other transactions" authority of the Space Act and therefore, not subject to CICA and also not subject to the GAO's jurisdiction.[61]

---

[47] *Id.*

[48] *Id.*

[49] Comp. Gen. B-298804, Dec. 19, 2006, 2006 CPD ¶ 201, at 4.

[50] 42 U.S.C. § 2473(c)(5) (2000).

> (5) without regard to section 3324(a) and (b) of title 31, to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate, with any agency or instrumentality of the United States, or with any State, Territory, or possession, or with any political subdivision thereof, or with any person, firm, association, corporation, or educational institution. To the maximum extent practicable and consistent with the accomplishment of the purpose of this chapter, such contracts, leases, agreements, and other transactions shall be allocated by the Administrator in a manner which will enable small-business concerns to participate equitably and proportionately in the conduct of the work of the Administration.

Id.

[51] *Exploration Partners, LLC.*, Comp. Gen. B-298804, at 2.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* at 2–3.

[58] *Id.* at 3.

[59] *Id.* The two firms that the agency invited to negotiate were SpaceX and Rocketplane. *Id*.

[60] *Id*. (citing TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001)).

[61] *Id.*

The GAO agreed that the agreements were governed by the "other transaction" authority under the Space Act, citing the statutory construction of the Act.[62] The GAO applied the principal of statutory construction whereby, if possible "no clause, sentence, or word shall be superfluous, void or insignificant," and since the act contained distinguished contracts and "other transactions," the GAO determined that the two arrangements could not be the same.[63] Because such "other transactions" are outside the GAO's protest jurisdiction, the GAO dismissed the protest.[64]

No Unlawful Bundling and Unduly Restrictive Specification Where the Agency Can Justify Bundling as the Best Method of Meeting Its Needs and Restrictive Specification is Reasonable

In *Outdoor Venture Corp.; Applied Companies*,[65] two companies protested an Army RFP for an ID/IQ contract for the Standardized Integrated Command Post System Family of Trailer Mounted Support Systems[66] (SICPS/TMSS) because they claimed the requirement was improperly bundled, the specifications were too restrictive, and the RFP gave the incumbent an unfair competitive advantage.[67] The GAO disagreed and denied the protest.[68]

The Army contemplated the award of a one-year ID/IQ fixed-price contract with four additional one-year ordering periods.[69] While the protesters could provide parts separately,[70] they could not provide all of the required products.[71] The protesters argued that the bundling of the requirement (the turnkey system as opposed to procuring the parts individually) violated the restrictions of the Small Business Act[72] and the Competition in Contracting Act (CICA),[73] and that the solicitation was unduly restrictive because it consolidated requirements while not providing enough information to submit a responsive offer or enough time for potential awardees to meet the government's time requirements for first shipment.[74] Finally, the protesters argued that the awardee, DHS Limited LLC, had an unfair competitive advantage because that firm had produced the systems for Defense Logistics Agency (DLA) under a similar contract.[75]

The GAO rejected the protesters' arguments concerning the unduly restrictive claim and improper bundling claims, and further found that the protesters were not interested parties concerning the unfair competitive advantage allegation.[76] First, the Army and both the Small Business Administration and Disadvantaged Business Utilization Specialist agreed that the requirement was not suitable for award to one or more small businesses.[77] In prior years, DLA had procured this system and the Army had ordered its requirements from DLA. However, the Army required its own contract due to its projection of increased demand and requirements exceeding the maximum ordering quantity under the DLA contract.[78] The Army needed

---

[62] *Id.* at 4. The grant of authority under the Space Act distinguished between contracts and "other transactions." *Id.*

[63] *Id.*

[64] *Id.* at 6.

[65] Comp. Gen. B-299675, B-299676, July 17, 2007, 2007 CPD ¶ 138.

[66] *Id.* The opinion described the command post as a "turnkey" system previously obtained through DLA that was a "commercial-off-the shelf solution which is comprised of a controlled-environment tent, an environmental control unit (ECU) [an air conditioner] and an auxiliary power unit for the ECU." *Id*. at 2. It was used as a battlefield communications center in Iraq and Afghanistan. *Id*. at 4.

[67] *Id.* at 1. Originally, protesters included an allegation that the solicitation did not provide enough information to permit potential offerors the opportunity to submit responsive offers. *Id.* at 2. The protesters later acknowledged that the agency provided additional information in amendments to the solicitation which addressed their concern. *Id.* at 3.

[68] *Id.*

[69] *Id*. at 2.

[70] Outdoor could provide the tent and Applied could provide the environmental control unit. *Id*.

[71] *Id.*

[72] 15 U.S.C. § 631 (2000).

[73] 41 U.S.C. § 253 (2000).

[74] *Outdoor Venture Corp.*, 2007 CPD ¶ 138, at 2, 4.

[75] *Id.* at 6.

[76] *Id.* at 4, 6.

[77] *Id.* at 3.

[78] *Id.*

a reliable system, not just conglomeration of independent parts, to meet its critical system needs in Iraq and Afghanistan.[79] After reviewing the Army's justification, the GAO believed that the Army had met its burden of proving its need for a total system.[80]

The GAO found that the agency also met its burden of establishing prima facie support that the Army had a reasonable requirement for the solicitation's restrictions.[81] The protesters argued the solicitation was unduly restrictive because it unnecessarily consolidated the requirements, it did not provide enough information to allow offerors to respond, and it did not provide enough time for potential offerors to meet the Army's delivery requirement.[82] Initially, the burden is on the agency to establish prima facie support for the alleged restriction and then the burden shifts to the protester to prove that the specifications were clearly unreasonable.[83] The agency explained that it needed the systems in the field as soon as possible and since the system was comprised of commercial items, a ninety-day period from award to delivery was reasonable. The protesters failed to clearly show that the restriction was unreasonable and instead merely repeated their argument that the ninety-day delivery schedule could only be met by DHS, the incumbent.[84] The GAO did not address the unfair competitive advantage claim of the protesters since, by their own admissions, they could not submit a proposal for the solicitation and therefore, they were not interested parties and cannot challenge the alleged unfair competitive advantage.[85]

Lieutenant Colonel Ralph J. Tremaglio, III

[79] *Id*. at 4.

[80] *Id.* The Army had been warned that requiring a separate contract for additional companies to integrate its systems would jeopardize the Army's ability to purchase enough systems "in the event of a surge requirement." *Id.*

[81] *Id.*

[82] *Id.* As discussed previously, the protesters later acknowledged the agency provided additional information through solicitation amendments which rectified their concerns regarding information to potential offerors allowing them to submit responsive offers. *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* at 6.

Contract Types

The Authorized Use of Time-and-Materials Contracts and Labor-Hour Contracts for Commercial Services

On 12 December 2006, Federal Acquisition Circular 2005-15 issued a final rule authorizing the use of Time-and-Materials (T&M) and Labor-Hour (LH) contracts for Commercial Services.[1] The authorization to use T&M and LH contracts, under certain conditions, became effective on 12 February 2007.[2] In implementing FAC 2005-15, the Federal Acquisition Regulation (FAR) retains the preference to procure commercial items with Firm-Fixed-Price and Fixed-Price with Economic Price Adjustment contracts.[3]

A contracting officer, however, may award T&M and LH contracts for commercial services[4] if prior to soliciting a T&M or LH contract (or issuing a task order under a delivery contract) for commercial services, the contracting officer executes a determinations and findings (D&F) document certifying that no other contract type is suitable for the agency requirements, the contract or task order includes a ceiling price, and the ceiling price may only be increased by a subsequent D&F that certifies that increasing the ceiling price is in the best interests of the procuring agency.[5] The contracting officer must then follow one of three procedures under the FAR to award the contract: the Full and Open Competition procedures;[6] the Other than Full and Open Competition procedures (as long as the agency receives two or more responsible offerors that satisfy the agency requirements);[7] or ordering the commercial services under a multiple award delivery contract (as long as they follow the fair opportunity ordering procedures of FAR 16.505).[8]

Warranties Survive a Termination for Convenience in a Fixed-Price ID/IQ

In *International Data Products Corp. v. United States*,[9] the Court of Appeals for the Federal Circuit overturned the Court of Federal Claims holding that a termination for convenience of a fixed-price indefinite-delivery indefinite-quantity (ID/IQ) contract also terminates the contractor's obligation to provide warranty and upgrade services for computer equipment purchased by the government prior to the termination.[10] The Court of Appeals held that the government paid for the warranty and upgrade services when it purchased the computer equipment.[11] The contractor's obligation attached to the purchased computer equipment, and not to the contract; therefore, this obligation to perform the warranty provisions survived beyond the contract's termination for convenience.[12]

In 1995, the U.S. Air Force awarded a contract to IDP, a computer manufacturer and retailer, for the purpose of providing computers to the agency.[13] The agency awarded the contract as a set aside pursuant to Section 8(a) of the Small Business Act.[14] The contract was a fixed-price multiple award ID/IQ with a guaranteed minimum of $100,000, an estimated value of $100 million, and a maximum of $729 million.[15] After supplying over $35 million in computer equipment to the Air

---

[1] Federal Acquisition Regulation, Federal Acquisition Circular 2005-15, Item II, Additional Commercial Contracts Types, 71 Fed. Reg. 74656, 74667 (Dec. 12, 2006), 2006 WL 3587719 (F.R.).

[2] *Id*.

[3] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 12.207(a) (July 2007) [hereinafter FAR].

[4] *Id*. at pt. 12.207(b)(1).

[5] *Id.* at pt. 12.207(b)(1)(ii).

[6] *Id.* at pt. 6.102; *see also id.* at pts. 13, 19.5.

[7] *Id.* at pt. 6.3.

[8] *Id.* at pt. 16.505.

[9] 492 F.3d 1317 (Fed. Cir. 2007).

[10] *Id*. at 1320.

[11] *Id*. at 1323.

[12] *Id*.

[13] *Id*. at 1320.

[14] *Id*.; *see also* Small Business Act, Pub. L. No. 85-536, 72 Stat. 384 (1958) (codified as amended in scattered sections of 15 U.S.C.).

[15] *Int'l Data Prods.Corp*., 492 F.3d at 1320–21.

Force over three years, Dunn Computer Corporation, a non-§8(a) entity, purchased IDP.[16] The Air Force requested a waiver from the Small Business Administration (SBA) to allow IDP to continue as a prime contractor on the Desktop V contract, but the SBA disapproved the request.[17] The Air Force subsequently terminated IDP for convenience on 8 October 1999.[18] After the termination, the Air Force demanded that IDP continue the warranty and upgrade services of the original contract.[19] Although IDP initially complied, by April 2000 it stopped providing any warranty and upgrade services to the computer equipment that the Air Force purchased prior to the termination.[20]

In determining whether the warranty and upgrade services for the computer equipment attached to the contract (as IDP argued) or the computer equipment purchased prior to the convenience termination (as the government argued), the Court of Appeals looked to both the language of the contract, and also to the FAR.[21] The court found that the warranty clause did not require the Air Force to pay any additional costs for the warranties on the computer equipment, implying that the warranty was "priced-in" to the costs of the computer equipment that the Air Force purchased before terminating the contract.[22] Additionally, the court found that even when the government completely terminates a fixed price contract, the FAR requires that the government retain all of the warranties that attach to the goods or services it had purchased prior to the termination.[23] As opposed to the contractual and regulatory language that supported the government's position that the warranties attached to the computer equipment, the court was unable to find any evidence that the warranties attached to the contract, and ceased upon termination.[24] As a result, the court held that the convenience termination of IDP did not extinguish the warranty services on the computer equipment that the Air Force purchased prior to the termination.[25] Finally, the court held that IDP could not recover any costs associated with their required provision of the warranty services from the Air Force, under any of the theories of recovery advanced by the contractor.[26]

Major Jose A. Cora

---

[16] *Id*. at 1321.

[17] *Id*.

[18] *Id*.

[19] *Id*.

[20] *Id*.

[21] *Id*. at 1323.

[22] The Warranty Clause of the Desktop V contract stated:

> The Contractor shall provide users with a minimum 3 year, on-site, full parts and labor warranty for all offered products (excluding software) which includes CLINS 0001-0005. The Contractor shall provide users with a minimum 5 year (4 years on-site, 5th year return to IDP) full parts and labor warranty for all offered products (excluding software), for SLINS 0007AA through 0007CE. For SLINS 0007AA though 0007CE, [the] contractor shall provide a three year on site, 24 hour fix or replace on hardware warranty, and a two year upgrade warranty on software. Computer system, printers, and peripheral shall be user expandable and maintainable without voiding the Contractor provided warranty. The warranty coverage shall be worldwide and provide for no charge problem reporting 24 hours per day, 7 days per week. The warranty shall provide for repairing or replacing products (excluding software) and prompt return to customer service after problem notification.

Id. at 1322.

[23] FAR, *supra* note 3, pt. 49.603-1(b)(7). The warranty clause required for all complete terminations stated: "(7) Regardless of any other provision of this agreement, *the following rights and liabilities of the parties under the contract are reserved . . .* (v) *All rights and liabilities* of the parties, arising under the contract or otherwise, and *concerning defects, guarantees, or warranties relating to any articles or component parts furnished to the Government by the Contractor* under the contract or this agreement." (emphasis added). *Id*.

[24] *Int'l Data Prods.Corp*, 492 F.3d at 1323.

[25] *Id*.

[26] *Id*. at 1323–26.

Sealed Bidding

Bighorn Fells Trapper

In *Bighorn Lumber Company, Inc*,[1] the Government Accountability Office (GAO) sustained a protest by a timber company and held that "[a] clerical error that is apparent on the face of a bid may be corrected by the contracting officer prior to award, if the contracting officer is able to ascertain the intended bid without the benefit of advice from the bidder."[2] The GAO further held that a "mistake can be corrected if the bidder presents clear and convincing evidence that a mistake occurred, the manner in which it occurred and the intended bid price."[3]

In this case, the Department of Agriculture's Forest Service issued a prospectus for the sale of government timber which stated that the award would be made based on "only one bid amount,"[4] described as a "weighted average minimum (WAM) bid rate."[5] The WAM is "the bid rate for the stumpage of various species of timber covered by the sale"[6] and was described in the prospectus as "the volume of each biddable species multiplied by its bid rate."[7] Since the contract involved the sale of government timber, rather than a procurement, the solicitation stated that the contract would be awarded to the bidder offering to sell at the highest price.[8]

The agency awarded the contract to Trapper Peak Timber Company ("Trapper") based on its determination that the company had made an apparent mistake in its bid that was correctable.[9] The contracting officer made a determination that there was legal justification for Trapper to correct its bid, and, as corrected, the bid was the highest.[10] As a result, the contracting officer awarded the contract to Trapper.[11] Bighorn Lumber Company, the second highest bidder, protested the agency's decision to correct Trapper's bid.[12] The agency responded "that Trapper's bid [would] be corrected to reflect the [higher] bid rate because the contracting officer found clear and convincing evidence to support that an error had been made in Trapper's bid, the manner in which it was made and Trapper's intended bid price."[13]

GAO stated the general rule of correction of mistakes as, "[a]n agency may allow a bidder to correct a mistake in its bid after bid opening when the bidder presents clear and convincing evidence that a mistake occurred, the manner in which it occurred and the intended bid price."[14] "A clerical error that is apparent on the face of a bid may be corrected by the contracting officer prior to award, if the contracting officer is able to ascertain the intended bid without the benefit of advice from the bidder."[15] Here, the contracting officer made the determination that there was, in fact, clear and convincing evidence of the intended bid; however, the bid was "not supported by worksheets or any other form of bid calculation documents. In fact, the record shows that it was not Trapper who calculated this amount, but the agency's bid official."[16]

---

[1] Bighorn Lumber Co., Inc., Comp. Gen. B-299906, Sept. 25, 2007, 2007 CPD ¶ 173.

[2] *Id*. at 4 (citing SCA Servs. of Georgia, Inc., Comp. Gen. B-209151, Mar. 1, 1983, 83-1 CPD ¶ 209 at 4; G.S. Hulsey Crushing, Inc., Comp. Gen. B-197785, Mar. 25, 1980, 80-1 CPD ¶ 222, at 2).

[3] *Id*. (citing A & J Constr. Co., Inc., Comp. Gen. B-213495, Apr. 18, 1984, 84-1 CPD ¶ 443).

[4] *Id*.

[5] *Id*.

[6] *Id*. at 5 n.1.

[7] *Id*. (citations omitted).

[8] *Id.* at 2.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id*. at 3.

[14] *Id*. (citing A & J Constr. Co., Inc., Comp. Gen. B-213495, Apr. 18, 1984, 84-1 CPD ¶ 443, at 5).

[15] *Id*. at 4 (citations omitted).

[16] *Id*.

It is apparent that GAO was disappointed with the lack of evidence procured by the contracting officer. Because of this, GAO sustained the protest and recommended award to Bighorn Lumber Company.[17]

Responsiveness v. Responsibility

In its decision in *SourceLink Ohio, LLC*,[18] the GAO sustained an appeal by a protestor whose bid was rejected for a lack of responsiveness based on a failure to sign a Data Use Agreement (DUA). The Government Printing Office (GPO) provided the DUA to bidders as part of a solicitation issued on behalf of the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), for the "produc[tion] and mail[ing] of Medicare and Medicaid beneficiary notices and related documents to designated recipients."[19] The DUA "is an agreement required by CMS's policies when an external entity requests individual identifying data covered by the Privacy Act . . . . The purpose of the DUA is to secure the data that resides within the CMS Privacy Act System of Records."[20] The GPO solicitation required the bidders to submit a signed DUA, and stated: "Contractor must sign and submit with their bid a 'Data Use Agreement' to ensure the integrity, security and confidentiality of information maintained by CMS and for release of furnished data tapes."[21] Further, the solicitation stated: "Failure to complete and submit this agreement may cause the contractor to be found NON-responsive."[22]

In its submission, the protestor failed to include a completed DUA.[23] After opening the seven sealed bids, the contracting officer determined that SourceLink's bid was non-responsive because it did not include the DUA.[24] SourceLink's bid was the lowest, but since the contracting officer found it non-responsive, the contracting officer awarded to the next lowest bidder.[25] After award, SourceLink protested and argued that "the agency should not have rejected its bid as nonresponsive because the failure to submit a DUA is not a matter of responsiveness, inasmuch as a DUA need only be in place prior to the release of the CMS data to perform the contract."[26]

The general rule for responsiveness is that "a bid must be an unequivocal offer to perform without exception all the material terms and conditions of the solicitation. . . . Where a bidder provides information with its bid that does not constitute an unequivocal offer or which reduces, limits, or modifies a material requirement of the solicitation, the bid must be rejected as non-responsive."[27] Responsibility, on the other hand, "refers not to a bidder's promise to perform, but rather its apparent ability and capacity to perform the contract requirements, and is determined not at the time of bid opening, but at any time prior to award, based on any information received by the agency up to that time."[28] Here, GAO held that the contracting officer's determination that SourceLink was non-responsive was improper because the issue was one of responsibility. GAO explained "the DUA is similar to an application for a license, permit, or other approval required prior to performance, and thus can be provided any time prior to award."[29] GAO further found that the contract to the second lowest bidder should be terminated and recommended that award be made to SourceLink should CMS approve SourceLink's DUA.

Major Jennifer C. Connelly

---

[17] *Id.*

[18] Comp. Gen. B-299258, Mar. 12, 2007, 2007 CPD ¶ 50.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 2 (citations omitted).

[22] *Id.* (citations omitted).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* (citations omitted).

[28] *Id.* (citations omitted).

[29] *Id.* (emphasis added); *see* Victory Van Corp.; Columbia Van Lines, Inc., Comp. Gen. B-180419, Apr. 8, 1974, 74-1 CPD ¶ 178, at 2; Midwest Sec. Agency, Inc., Comp. Gen. B-222424, Apr. 7, 1986, 86-1 CPD ¶ 345, at 2; Carolina Waste Sys., Inc., Comp. Gen. B-215689.3, Jan. 7, 1985, 85-1 CPD ¶ 22, at 2; Astro-Med, Inc., Comp. Gen. B-232633, Dec. 22, 1988, 88-2 CPD ¶ 619, at 3.

If the Proposal Is Sent Electronically, Either, Get It There by 5:00 p.m. the Day Before or Contractor Bears the Risk of Late Proposals

In today's age where e-mail is so prevalent and an almost instantaneous method of communication, the Government Accountability Office (GAO) reaffirmed the rule that if proposals are not sent by 5:00 p.m. the day prior to the time due to the agency, the contractor bears the risk. In *Symetrics Industries, LLC*,[1] the GAO denied a protest alleging the agency improperly rejected Symetrics' final proposal revision (FPR).[2]

The Air Force refused to consider the protester's FPR when the electronic version arrived in the contracting officer's e-mail inbox one minute after the designated time for submissions.[3] The Air Force requested FPRs from those offerors in the competitive range for AN/ALE-47 Countermeasures Dispensing System, pointing out certain items to be reviewed prior to each offeror's submission of its FPR.[4] The solicitation stated that FPRs could be electronically submitted to the contracting officer's e-mail address, but the agency warned that the FPRs must be received no later than 3:00 p.m. Eastern Standard Time (EST) on the day in question.[5] Any FPRs received after 3:00 p.m. would be considered late in accordance with the RFP provision and FAR 52.215-1 and would therefore not be considered.[6]

Although Symetrics sent its FPR from its offices before the 3:00 p.m. deadline, the contracting officer did not receive the e-mail in her e-mail system until 3:01 p.m.[7] At 2:58 p.m. on the final date designated for the receipt of FPRs, the president of Symetrics phoned the contracting officer to state that Symetrics had submitted its FPR via e-mail. The e-mail arrived at the contracting officer's inbox at 3:01 p.m., during the conversation.[8] There was a variety of evidence that Symmetrics' e-mail worked its way through the company's e-mail system starting at 2:54 p.m. and the base server received the email at 2:57:41 p.m., but it did not ultimately reach the contracting officer until 3:01 p.m.[9] Symetrics argued that its submission was under government control by the deadline, and that it was unreasonable to reject its FPR. The GAO rejected that reasoning stating that the FAR is clear.[10] By not submitting the proposal to the government by 5:00 p.m. the day before it was due, the contractor bore the risk (and ramifications) of a late submission.[11] Here, the contracting officer received the FPR one minute after proposals were due which clearly made it late and the GAO denied the protest.[12]

Section L Counts—Agency Not Required to Allow Offerors the Opportunity to Correct Proposals That Do Not Comply with the Clear Requirements of the Solicitation

In case you thought otherwise, the directions in Section L concerning submissions count. In *Mathews Associates, Inc.*,[13] the GAO denied a protest alleging that it was unfair or unduly burdensome to require offerors to assume the risks associated with failing to comply with clearly stated solicitation formatting requirements.[14] In preparing its proposal in *Mathews*, the

---

[1] Comp Gen. B-298759, Oct. 16, 2006, 2006 CPD ¶ 154.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id*;. GENERAL SERVS. ADMIN. ET AL., FED. ACQUISITION REG. pt. 52.215-1(c)(3)1(c)(1)(ii). This provision provides "if no time is specified in the solicitation, the time for receipt is 4:30 p.m., local time, for designated Government office on the date that proposal or revision is due." *Id.* In this case, the Government did designate the time, 3:00 p.m. *Symetrics*, 2006 CPD ¶ 154, at 1.

[7] *Symetrics Indus., LLC*, 2006 CPD ¶ 154, at 3.

[8] *Id.*

[9] *Id.* Symetrics sent the email at 2:54 p.m., which then started transmitting from its mail server at 2:55:44 p.m. The intended recipient was identified and located at 2:58:30 p.m. and completed at 2:58:30 p.m. and completed at 2:58:31 p.m. returning the message "SMTP session successful." *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Comp. Gen. B-299305, Mar. 5, 2007, 2007 CPD ¶ 47.

[14] *Id.* at 1.

protester failed to follow the solicitation's requirements regarding page formatting and as a result, the agency refused to consider the proposal.[15]

The Army Communications-Electronics Life Cycle Management Command issued a request for proposals for loudspeakers and battery boxes to use in the single channel ground airborne radio system.[16] The solicitation anticipated the award of up to two fixed-price indefinite-delivery indefinite-quantity (ID/IQ) contracts for up to five years that offered the best value to the government.[17] Section L notified prospective offerors that proposals were limited to twenty-five pages and specified one-inch margins.[18] In formatting its proposal, Mathews modified the page margins to less than the one-inch prescribed in the solicitation.[19] The Agency realized this and then notified Mathews that the agency would not evaluate its offer because it violated the solicitation's formatting requirements.[20]

After the agency refused to reconsider, Mathews filed a protest alleging unreasonableness because either Mathews or the Army could have easily reformatted the proposal.[21] The protester also alleged that the formatting requirements were created as a public policy to create a level playing field and that there is no public policy reason to uphold the agency's decision not to reformat its proposal.[22] Neither of these allegations convinced the GAO. For the GAO, the question was not what the agency could do, but what the agency is required to do with an offer that is not within the agency's clear guidelines.[23] Since the agency is not required to allow the offeror to reformat a proposal if it is drafted within the agency's clear guidelines, the agency should not be required to allow the offeror to reformat its proposal when it is not drafted within the agency's clear guidelines. Consequently, the GAO denied the protest.[24]

Conditional Pricing

In a challenge to the Air Force's evaluation of its offer, the GAO sustained SunEdison, LLC's[25] protest of an RFP for construction and operation of a photovoltaic array to supply solar power to Nellis Air Force Base in Nevada.[26] The agency's goal was to reduce the unit cost of electrical service it presently paid to the local utility company; however, if the cost of the contract was more than its present cost of service, the Air Force might elect not to award.[27] The awardee was responsible for all equipment necessary to connect to the base's current electrical distribution system and for an interconnect agreement with the power company to be secured prior to award.[28] The Air Force would award to the lowest cost, technically acceptable proposal.[29]

The agency evaluated four factors on a pass/fail basis and intended to award to the offeror with the lowest cost of the technically acceptable proposals.[30] Three proposals were received and they all passed all four factors. Therefore, the determining factor was price.[31] The awardee's price was contingent upon the successful completion of a Renewable Energy

---

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 2. In Mathews' proposal, the top margin was .87 inches (versus 1 inch as was required), the bottom margin was .5 inches (versus 1 inch as was required), the header was .28 inches (versus .5 inches as was required), and the footer was .18 inches (versus .5 inches as was required). *Id.*

[20] *Id.*

[21] *Id.* According to the protester, any portion being more than the twenty-five pages the Army could reasonably refuse to consider. *Id.*

[22] *Id.*

[23] *Id.* at 3.

[24] *Id.*

[25] Comp. Gen. B-298583, B-298583.2, Oct. 30, 2006, 2006 CPD ¶ 168.

[26] *Id.* Photovoltaic array produces both renewable energy (solar power) and renewable energy credits. The Government understood that while the awardee would have to sell both in order to have a viable project, the government was only interested in the solar power or kilowatt-hours. *Id.* at 1–2.

[27] *Id.* at 1.

[28] *Id.* at 2. The new system was to intended to operation "in parallel" with the present electrical supply system from the local power company, Nevada Power Company. *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

Credit (REC) purchase agreement with Nevada Power.[32] While the agency argued its decision was permissible because the other offerors also contained similar contingencies on price, the GAO disagreed.[33] SunEdison's price proposal was unconditional.[34] SunEdison assumed the risk and stated so in its proposal.[35] Since the Air Force awarded to an offeror whose proposal was conditional, the GAO sustained the protest.[36]

Not Meaningful Discussions

In *Multimax Inc.*,[37] several unsuccessful offerors to the Army's proposed award of multiple ID/IQ contracts actions for worldwide Information Technology (IT) services protested at the GAO.[38] The protesters asserted that the agency failed to conduct meaningful discussions, and that the agency's evaluation of proposals and source selection were unreasonable.[39] The GAO agreed.[40] The protesters asserted that the agency applied an unreasonable "mechanistic formula" in evaluating proposed labor rates, which resulted in the Army failuring to conduct meaningful discussions.[41] The GAO sustained the protests finding that the Army failed to hold meaningful discussions because "the agency's reliance on a two-standard–deviation formula to identify 'outlier' rates—and the broad range of acceptable prices resulting from the formula" caused the agency to failed to bring to numerous other rates to the protesters' attention that reasonably should have been considered significantly overstated.[42]

The Army drafted an expansive statement of objectives for the IT services solicitation, looking for contractors to provide "a full range of IT equipment, operation, maintenance, sustainment requirements, and to analyze requirements, develop solutions and implement them."[43] The Army contemplated eight contract awards and intended generally to compete requirements among the awardees and issue task orders primarily based on fixed-price or a time-and-materials basis.[44] Offerors were required to propose fully-loaded hourly labor rates for 104 labor categories at both government and contractor sites.[45] Their rates were subject to annual escalation rates proposed by the offeror and applied to the annual estimated hourly requirements for each labor category.[46] The resulting totals were combined with annual other direct costs (ODC) as specified

---

[32] *Id.* at 4. It was clear to all that in order to be viable, an awardee would have to sell both kilowatt hours and RECs to have a viable project. *Id.* at 2. The awardee made clear that it did not believe it could predict the amount at which Nevada Power would purchase the RECs. *Id.* at 5.

[33] *Id.*

[34] *Id.*

[35] *Id.* The proposal stated, "SunEdison assumes the risk of final PCPA [Portfolio Energy Credit Purchase Agreement] pricing and the final PCPA price will not [a]ffect [the price]." *Id.*

[36] *Id.*

[37] Multimax, Inc.; NCI Info. Sys., Inc.; BAE Sys. Info. Tech. LLC; Northrop Grumman Info. Tech., Inc.; Pragmatics, Inc., Comp Gen. B-298249.6, B-298249.7, B-298249.8, B-298249.9, B-298249.10, B-298249.11, B-298249.12, B-298249.13, B-298249.14, B-298249.15, B-298249.16, B-298249.17, B-298249.18, B-298249.19, B-298249.20, Oct. 24, 2006, 2006 CPD ¶ 165.

[38] *Id.* at 2.

[39] *Id.* Multimax, NCI Info. Sys., Inc.; BAE Sys. Info. Tech. LLC, and Northrop Grumman Info. Tech., Inc. also alleged the agency changed its requirements, however, this claim was denied.

[40] *Id.* at 5–6.

[41] *Id.* at 8.

[42] *Id.* at 12.

[43] *Id.* The solicitation's statement of objectives stated:

> ITES-2S contemplates services-based solutions under which contractors may be required to provide a full range of IT equipment. Therefore, end-to-end solutions to satisfy worldwide development, deployment, operation, maintenance, and sustainment requirements are included. Additionally included is support to analyze requirements, develop and implement recommended solutions, and operate and maintain legacy systems, and equipment. It is the intention of the Government to establish a scope that is broad, sufficiently flexible to satisfy requirements that may change over the period of performance, and fully comprehensive so as to embrace the full complement of services that relate to IT.

Id.

[44] *Id.* at 2–3. Even though the Army contemplated award to eight contractors, it reserved the right to make more, less, or none. *Id.*

[45] *Id.*

[46] *Id.*

in the solicitation and increased by a fixed markup proposed by each offeror for each ODC category, to yield an overall Total Proposed Contract Price (TPCP).[47]

The Army intended to make offers to those offerors whose proposals were determined to be the best value based upon: (1) mission support (with subfactors for performance-based approach, performance-based task approach, and small business participation); (2) performance risk (past performance, corporate experience, and financial; and (3) price with non-price factors significantly more important than price.[48] The agency determined sixteen of the submitted proposals had no deficiencies or weaknesses, and none were unreasonably high.[49] After a protest and subsequent corrective action, the Army awarded eleven contracts and the disappointed offerors again protested.[50] The protesters complained of problems revolving around the price evaluation methodology the Army used.[51]

In order to determine price reasonableness, the Army employed a two-step approach to evaluate labor rates, detect unbalanced pricing, and identify labor rates to question during discussions.[52] The price evaluation team compared an offeror's rate for a labor category to the independent government cost estimate rate, and "then it compared the rate to the mean of all offerors' evaluated rates for each labor category using a two-standard-deviation measure."[53] The results showed that the offerors all fell between one and three standard deviations.[54] The agency therefore determined that a price within two standard deviations was the most appropriate measure of comparison to use for reasonableness assessment.[55]

The problem is that the agency referred to the offerors labor costs and "mechanistically applied" their formula and accepted the results without further analysis.[56] The GAO determined that instead, the agency should have reviewed the results of applying their formula and sought to ensure the prices at the extreme ranges reflected reasonable pricing.[57] The two standard deviation formula the agency created resulted in a wide range of acceptable rates for labor categories.[58] Therefore, the GAO determined the agency's decision was unreasonable because this did not provide a valid means for identifying questionable rates.[59]

The GAO then determined that the Army's price discussions with three offerors were inadequate. According to the GAO the agency's reliance on the two-standard-deviation formula to identify "outlier" rates (and the broad range of acceptable prices resulting from the formula) failed to bring to the protesters' attention numerous rates that reasonably should have been considered significantly overstated.[60] During discussions, the agency failed to identify rates that significantly exceeded the IGCE, which misled offerors into believing these significantly higher rates did not require further adjusting.[61] While the agency notified several offerors that some of their proposed labor rates were significantly higher than the IGCE rates for certain labor categories, they did not reveal the agency's reliance on the standard deviation formula.[62] The offerors incorrectly, but reasonably, reached the conclusion that their rates were not significantly higher than the IGCE.[63] The GAO concluded "that not only were offerors not adequately advised of all of their significantly overstated rates, but the agency's

---

[47] *Id.*

[48] *Id.* at 3.

[49] *Id.* at 3, 5. The Army received seventeen proposals and entered into discussions with all seventeen offerors; one offeror withdrew its offer. *Id.* at 3.

[50] *Id.* The Army originally awarded eleven contracts, but several of the disappointed offerors protested. The agency advised that it failed to account for all information received during discussions in its evaluation ratings for the financial subfactor under performance risk evaluation. It therefore took corrective action and the GAO dismissed the protests. *Id.*

[51] *Id.* at 8.

[52] *Id.*

[53] *Id.* Standard deviation is a statistical tool.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 11.

[57] *Id.*

[58] *Id.* at 10.

[59] *Id.* at 11.

[60] *Id.* at 12.

[61] *Id.* at 13.

[62] *Id.* at 12. The agency also recommend that the offerors consider revising the price proposal or provide an explanation for the basis of the rate. *Id.*

[63] *Id.* at 13.

failure to identify the additional rates actually misled the offerors into believing that those rates did not require further adjustment."[64] Since the offerors were unaware of the issues with their rates they did not change their final rates and therefore the discussions were misleading.[65] Since the agency did not reveal all potential issues with the protesters, the GAO found that the agency failed to conduct meaningful discussions with them.[66]

Lieutenant Colonel Ralph J. Tremaglio, III

[64] *Id.*

[65] *Id.*

[66] *Id.*

Contracting Officer Not Reasonable in Failing to Set-Aside Acquisition for Service-Disabled Veteran-Owned Small Business Concerns

In *MCS Portable Restroom Service*,[1] the Government Accountability Office (GAO) sustained a pre-award protest regarding an Air Force contracting officer's decision not to set aside a procurement for service-disabled veteran-owned small business concerns (SDVOSBCs). The GAO found that the contracting officer's decision not to set aside the procurement was unreasonable, and therefore recommended that the contracting officer conduct market research to determine whether he should set aside the procurement for SDVOSBCs on either a competitive or sole-source basis.[2]

The subject acquisition involved the provision of portable restroom services at the U.S. Air Force Academy and at Farish Memorial Park in Colorado.[3] The Air Force contracting officer in this matter conducted the procurement as a regular total set aside for small businesses.[4] Before deciding that such a set aside was appropriate, the contracting officer conducted some market research.[5] Based on her research, she found that there was no reasonable expectation of receiving offers from two or more HUBZone small business concerns or SDVOSBCs.[6] Consequently, she did not conduct this acquisition as a set aside for either HUBZone small business concerns or for SDVOSBCs.[7] Rather, the contracting officer set aside the acquisition for small businesses. The contracting officer issued a notice on the Federal Business Opportunities (FedBizOpps) website of this intent.[8]

Following the contracting officer's posting on FedBizOpps, MCS Portable Restroom Service (MCS), a SDVOSBC, filed a protest with the GAO arguing that the contracting officer should have conducted this procurement as either: (1) a set aside for SDVOSBCs on a competitive basis or (2) a sole source set aside to MCS as a SDVOSBC.[9] The GAO considered both of MCS's arguments separately.

Regarding the protester's first contention that the contracting officer should have conducted the procurement as a competitive set aside for SDVOSBCs, the GAO concluded that the protester was correct.[10] In making its determination, the GAO referred to the Small Business Administration (SBA) regulations which state, "the contracting officer should consider setting aside the requirement for 8(a), HUBZone, or [SDVOSBC] participation before considering setting aside the requirement as a small business set-aside."[11] Additionally, the GAO referred to the criteria in the Federal Acquisition Regulation (FAR)[12] for deciding whether such a set aside is appropriate.[13]

> (a) The contracting officer *may* set aside acquisitions exceeding the micro-purchase threshold for competition restricted to [SDVOSBCs] when the requirements of paragraph (b) of this section can be satisfied. The contracting officer shall consider [SDVOSBC] set-asides before considering [SDVOSBC] sole source awards . . . .
>
> (b) To set-aside an acquisition for competition restricted to [SDVOSBCs], the contracting officer must have a reasonable expectation that--
> (1) Offers will be received from two or more [SDVOSBCs]; and

[1] Comp. Gen. B-299291, Mar. 28, 2007, 2007 CPD ¶ 55.

[2] *Id*. at 7–8.

[3] *Id*. at 1.

[4] *Id*. at 2.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id*.

[9] *Id*.

[10] *Id*. at 5.

[11] *Id*. at 3. *See also* 13 C.F.R. § 125.19 (2007).

[12] *See also* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 19.1405 (a), (b) (July 2007) [hereinafter FAR].

[13] *MCS Portable Restroom Serv.*, 2007 CPD ¶ 55, at 3.

(2) Award will be made at a fair market price.[14]

The GAO further explained that while the contracting officer has discretion in deciding whether a set aside for SDVOSBCs is appropriate, that discretion is limited by reasonableness.[15]

Significantly, the GAO found that the contracting officer's decision in the instant case was not reasonable.[16] The GAO arrived at this conclusion after considering the SBA's opinion in light of the facts of this case. Notably, the SBA found the contracting officer's actions unreasonable in that while two SDVOSBCs expressed interest in the acquisition (MCS and a Florida-based SDVOSBC), the contracting officer disregarded the Florida firm.[17] The SBA was also disappointed that the contracting officer did not seek the advice of the SBA in this matter prior to issuing the solicitation as a total set aside for small businesses. In brief, the GAO stated that, "we conclude that the Air Force failed to make reasonable efforts to ascertain whether this acquisition was suitable for [a competitive] SDVOSBC set-aside."[18]

Regarding the protester's second contention that the contracting officer should have conducted the procurement as a sole source SDVOSBC set aside (to MCS), the GAO concluded again that the Air Force contracting officer's decision was not reasonable.[19] Specifically, the contracting officer believed that in this case a sole source set aside was impermissible when, in fact, it was permissible.[20] On this point, the GAO explained that while a literal reading of the FAR could lead a contracting officer to suppose that a sole source award to a SDVOSBC was impermissible in this case, the Veteran's Benefit Act of 2003 would permit such an award.[21] The GAO reasoned that the FAR should be read harmoniously with the foregoing statute. As such, a sole source award was, in fact, permissible. The GAO concluded that the Air Force "did not reasonably exercise its discretion in determining whether this acquisition was appropriate for award on a sole-source basis to an SBVOSBC because it erroneously believed that the FAR precluded such an award."[22]

Therefore, based upon the foregoing reasons, the GAO sustained the protest. The GAO further recommended that the contracting officer conduct additional market research to determine whether this procurement should be conducted as either a competitive set aside for SDVOSBCs or rather, as a sole source set aside.[23]

Not So Fast . . . Contracting Officer Cannot Award While Size Status Protest Pending

---

[14] *See* FAR, *supra* note 12, at pt. 19.1405.

[15] *MCS Portable Restroom Serv.*, 2007 CPD ¶ 55, at 3–4.

[16] *Id.*

[17] *Id.* at 4. The SBA criticizes the contracting officer's summary disregard of the Florida firm merely because it did not express interest (to the contracting officer) a second time following the contracting officer's public posting of a second query regarding interest in the service. *Id.*

[18] *Id.* at 5.

[19] *Id.* at 8.

[20] *Id.* at 7.

[21] *Id.* at 6; *see also* 15 U.S.C. § 657f (2000). FAR, *supra* note 12, pt. 1406(a) states that a contracting officer may award a contract to a SDVOSBC on a sole source basis if "only one SDVOSBC can satisfy the requirement." *MCS Portable Restroom Serv.*, 2007 CPD ¶ 55, at 6–7. The Air Force contracting officer contended that because more than one SDVOSBC existed that could perform the requirement, a sole source award would be improper. *Id.* FAR, *supra* note 12, pt. 19.1406(a) states in pertinent part:

> (a) A contracting officer may award contracts to [SDVOSBCs] on a sole source basis . . . provided—
>
> (1) Only one [SDVOSBC] can satisfy the requirement; [and]
>
> (2) The anticipated award price for the contract (including options) will not exceed—
>
> (i) $5.5 million for a requirement within the NAICS codes for manufacturing; or
>
> (ii) $3 million for a requirement within any other NAICS code; [and]
>
> (3) The [SDVOSBC] has been determined to be a responsible contractor with respect to performance; and
>
> (4) Award can be made at a fair and reasonable price.

See FAR, *supra* note 12, at pt. 19.1406(a).

[22] *MCS Portable Restroom Serv.*, 2007 CPD ¶ 55, at 8.

[23] *Id.*

In *Alliance Detective & Security Serv., Inc.*,[24] the GAO sustained a protest in a case with a complicated procedural history. Prior to the protester's filing this GAO protest, the SBA considered two pre-award protests and one post-award size status protest in a small business set aside procurement.[25] In sustaining the GAO protest, the GAO concluded that the contracting officer improperly awarded two contracts to a business that was not "small" under the Small Business Act[26] and as such, the firm was ineligible for award.[27] Although the GAO did not recommend that the agency terminate the subject contract, it did recommend that the agency not exercise any of the contract options.[28]

On 4 April 2006, a Department of Homeland Security (DHS) contracting officer issued, as small business set asides, two requests for proposals (RFPs) for security guard services in Massachusetts, Rhode Island, and Connecticut.[29] In response, DHS received twenty-one proposals including one from the protester, Alliance Detective & Security Systems (Alliance), one from American Sentry, and one from C&D Security Management, Inc. (C&D).[30] After the contracting officer notified the offerors that DHS intended to award both contracts to C&D, both American Sentry and Alliance filed size status protests with the contracting officer.[31] Five days after receiving the second protest the contracting officer forwarded both size status protests to the SBA.[32] Before forwarding these protests to the SBA, the contracting officer awarded the two contracts to C&D.[33]

The SBA considered both size status protests separately.[34] On 3 October 2006, the SBA dismissed Alliance's protest because it was not sufficiently specific.[35] On 13 October 2006, in reviewing American Sentry's protest, the SBA found C&D was "other than small"[36] under the SBA and was ineligible for award.[37]

Following the SBA's decision that C&D was not a small business, a number of key events occurred. On 23 October 2006, the contracting officer notified the awardee, C&D, that it was suspending performance of the contract pending the resolution of the size status protests.[38] Then C&D appealed the SBA's determination to the SBA's Office of Hearings and Appeals (OHA).[39] After considering this appeal, the OHA granted C&D's appeal finding that American Sentry's protest was not sufficiently specific and so was not a proper protest.[40] As a result, on 21 November 2006, the OHA "vacated" the SBA's earlier determination that C&D was "other than small."[41] Dissatisfied with this outcome, on 28 November 2007, the Area Director of the SBA filed yet another size status protest arguing that "even though OHA had vacated the earlier SBA determination [finding that C&D was not small] for procedural reasons, the OHA's decision would not and did not change the financial structure or size of C&D as other than small."[42] Consequently, on 14 December 2006, the SBA issued its decision on the Area Director's protest finding once again that C&D was "other than small."[43] The SBA forwarded this final size status determination to DHS on 15 December 2006.[44]

---

[24] Comp. Gen. B-299342, Apr. 13, 2007, 2007 CPD ¶ 56.

[25] *Id.* at 2–6.

[26] 15 U.S.C. §§ 631–657a.

[27] *Alliance Detective & Sec. Serv.*, 2007 CPD ¶ 56, at 7.

[28] *Id.*

[29] *Id.* at 2.

[30] *Id.*

[31] *Id.* at 2–3.

[32] *Id.*

[33] *Id.* at 3.

[34] *Id.*

[35] *Id.*

[36] *Id.* The SBA based this finding on C&D annual receipts which exceeded the size standard of for this acquisition which was $11.5 million. *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 4.

[42] *Id.*

[43] *Id.* at 5.

[44] *Id.*

After DHS replied to the SBA that it did not intend to terminate its contracts with C&D, Alliance filed the instant GAO protest.[45] Alliance argues that DHS should terminate both of its contracts with C&D because C&D is not a small business under the SBA and was therefore, ineligible for both award in a small business set asides.[46]

In considering Alliance's protest, the GAO referenced the applicable small business regulations.[47] In particular, one SBA provision states, "[a] timely filed [SBA] protest applies to the procurement in question even though a contracting officer awarded the contract prior to receipt of the protest."[48] Additionally, the GAO referred to a relevant FAR provision which states:

> After receiving a [size] protest involving an offeror being considered for award, the contracting officer *shall not* award the contract until (i) the SBA has made a size determination or (ii) 10 business days have expired since SBA's receipt of a protest, whichever comes first; however, award shall not be withheld when the contracting officer determines in writing that an award must be made to protect the public interest (emphasis added).[49]

While FAR 19.302(h)(1) requires that a contracting officer receiving a size status protest withhold award for the period stated in the provision, in the instant case, the GAO noted that the DHS contracting officer improperly awarded the contracts to C&D.[50] After receiving two size status protests, the contracting officer awarded both contracts to C&D without waiting either ten business days or waiting for SBA's decisions on the protests.[51] Specifically, the contracting officer awarded the contracts within five days after receiving the second protest and before the SBA had issued its decisions on the size status protests.[52] Additionally, the contracting officer made no determination that contract award was necessary to protect the public interest.[53] Significantly, the GAO reasoned that even though these protests were later found to be procedurally defective,[54] those findings do not transform the improper awards into proper awards.[55] Moreover, because the protest that the SBA filed later filed on 28 November 2006 was not only timely, but also resulted in a finding that C&D was not small, that determination applies to the procurement in question.[56]

Thus, the GAO concluded that the award of the two contracts to C&D was improper because the contracting officer failed to follow the FAR requirement that the contracting officer withhold award for the prescribed time period.[57] The GAO's opinion hinges upon two key events. First, the contracting officer failed to follow the small business regulations by improperly awarding contracts to C&D after receiving two pending size status protests. Second, after reviewing the Area Director's timely size status protest, the SBA determined that C&D was not a small business. Hence, for the foregoing reasons, the GAO found that award to C&D was improper and sustained Alliance's protest.[58]

---

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*; *see also* 13 C.F.R. § 121.1004(c) (2007). The SBA found both protests filed by Alliance and American Sentry to be timely under the SBA regulations; the SBA's post-award protest was also timely. *Alliance Detective & Sec. Serv.*, 2007 CPD ¶ 56, at 3–4.

[49] *See* FAR, *supra* note 12, at pt. 19.302(h)(1).

[50] *Alliance Detective & Sec. Serv.*, 2007 CPD ¶ 56, at 6–7.

[51] *Id.* FAR, *supra* note 12, at pt. 19.302(h)(1) (stating that in a small business set aside, after the contracting officer receives a protest, the contracting officer may not award the contract until: "(i) the SBA has made a size determination or (ii) 10 business day s have expired since SBA's receipt of a protest, which ever occurs first . . . ")

[52] *Id.*

[53] *Id.*

[54] The SBA found that Alliance's protest was not sufficiently specific and as such, dismissed the protest. *Id.* at 3. Similarly, the OHA found that American Sentry's protest was not sufficiently specific and then vacated the SBA's determination that C&D was "other than small." *Id.* at 4.

[55] *Id.*

[56] *Id.* at 6–7. FAR, *supra* note 12, at pt. 19.302(h)(1).

[57] *Id.*

[58] *Id.* at 7.

While the GAO could have recommended that DHS terminate its contracts with C&D, it did not.[59] The GAO did, however, recommend that DHS not exercise any of the options under the contracts. Additionally, the GAO recommended that DHS re-solicit the services covered by the contracts for a period commencing after the expiration of the existing contracts.[60]

DOD Price Evaluation Adjustment for Small Disadvantaged Businesses Still Suspended

As in previous years, the Department of Defense (DOD) has again suspended the price evaluation adjustment for small disadvantaged businesses (SDBs) pursuant to 10 U.S.C. § 2323(e).[61] This statute generally allows a contracting officer from the DOD, the U.S. Coast Guard or the National Aeronautics and Space Administration (NASA) to award contracts to SDBs for up to 10% more than fair market price.[62] The statute also requires the Secretary of Defense to make an annual determination of whether DOD has met its SDB contracting goal for the prior fiscal year as described in 10 U.S.C. § 2323(a).[63] If DOD has met that goal, then the Secretary of Defense must suspend this price evaluation adjustment for one year as described in implementing regulations.[64] On 9 February 2007, based on data from fiscal year 2006, the Undersecretary of Defense made the determination that the "DoD exceeded the five percent goal . . . for contract awards to SDBs. Accordingly, the use of the price evaluation adjustment prescribed in FAR 19.11 and DFARS part 219.11 is suspended for the DoD."[65]

The statute's price evaluation adjustment is only authorized for the DOD, NASA, and the U.S. Coast Guard. The adjustment is not available for civilian agencies.[66] Additionally, the aforementioned suspension of the price evaluation adjustment only applies to DOD so, NASA and the Coast Guard may still use the adjustment in their evaluation of offers submitted by SDBs.[67]

Major Marci A. Lawson

---

[59] *Id.*

[60] *Id.*

[61] Memorandum, Shay D. Assad, 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. 2007) [hereinafter Assad Memorandum]. This memorandum suspended the price evaluation adjustment from 10 March 2007 to 9 March 2008. *Id.*

[62] 10 U.S.C. § 2323(e) (2000). The purpose of this price evaluation adjustment is to facilitate the achievement of the goal of awarding at least five percent of the value of federal contracts to small disadvantaged businesses. *Id.*

[63] *Id.* The "SDB contracting goal" is the goal described in the preceding footnote.

[64] *See* FAR, *supra* note 12, at pt. 19.11 for an explanation of the 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.

[65] Assad Memorandum, *supra* note 61.

[66] *See* FAR, *supra* note 12, at pt. 19.11.

[67] Assad Memorandum, *supra* note 61.

Required Sources

Javits-Wagner-O'Day (JWOD) Required Source Program Changes Name, But Maintains Same Mission

The Committee for Purchase from People Who Are Blind or Severely Disabled is a federal agency that administers the JWOD program.[1] The program's "mission is to provide employment opportunities for people who are blind or have other severe disabilities in the manufacture and delivery of products and services to the federal government."[2] When purchasing supplies and services, government buyers must use JWOD as a priority source before buying from Federal Supply Schedules or other commercial sources.[3]

Effective 27 November 2006, the JWOD is now known as AbilityOne.[4] According to a Federal Register notice, the "name of the program is being changed . . . to give a stronger, more unified identity to the program and to show a connection between the program name and the abilities of those who are blind or have other severe disabilities."[5] The notice notes that "JWOD" will remain as part of the program name for "at least 18 months," and mentions no changes to the program's mission.[6] There also is no reason for buying agents and their legal advisors to believe that the name change will affect the program's place as a priority in the Federal Acquisition Regulation.

Buy American Act No Longer Applies to Acquisitions of IT Commercial Items

As of 28 September 2006, the FAR "authorizes an exception to the Buy American Act for acquisitions of information technology that are commercial items."[7] When buying "[i]nformation technology that is a commercial item,"[8] "the contracting officer may acquire a foreign end product without regard to the restrictions of the Buy American Act."[9] This is significant, as it opens up more sources of commercial IT to government buyers.

[1] *See generally* The Committee for Purchase from People Who Are Blind or Severely Disabled, http://www.abilityone.gov/jwod/index.html (last visited Jan. 22, 2008).

[2] *Id.*

[3] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 8.002(a) (Dec. 2007) [hereinafter FAR]; *see also id.* at 8.700–716.

[4] Committee for Purchase from People Who Are Blind or Severely Disabled, 71 Fed. Reg. 68,492 (Nov. 27, 2006) (codified at 41 C.F.R. pts. 51-1, 51-2, 51-3, 51-4, 51-6).

[5] *Id.* (summary)

[6] *Id.* at 68,493 (supp. info.).

[7] Exception to the Buy American Act for Commercial Information Technology, 71 Fed. Reg. 57,382 (Sept. 28, 2006) (codified at 48 C.F.R.§ 25.103(e)). The Buy American Act generally requires government purchasers to buy from American sources. Buy American Act, 41 U.S.C. § 10a (LEXIS 2008).

[8] FAR, *supra* note 4, at 25.103(e).

[9] *Id.* at 25.103.

Interested Party—Really, Submit an Offer. Seriously . . .

The Court of Federal Claims (COFC) determined that a protest timely filed with the Government Accountability Office (GAO) does not ensure that a protestor qualifies as an interested party in a subsequent protest to the COFC.[1] The COFC exercises jurisdiction over protests under the Tucker Act, as amended by the Administrative Dispute Resolution Act (ADRA) of 1996.[2] The Tucker Act grants the COFC power to:

> [R]ender judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.[3]

An "interested party" is defined as "an actual or prospective bidder or offeror" who has a direct economic interest in the procurement.[4] The COFC considered the effect of a prior GAO protest on interested party status in *Shirlington*.[5]

In 2006, the Department of Homeland Security (DHS) restructured its transportation plan and decided to procure comprehensive transportation services through contract.[6] The transportation services included shuttle bus transport between DHS offices and executive sedan transport for VIPs.[7] After reviewing results obtained from a Request for Information, the DHS determined that an insufficient number of capable Historically Underutilized Business Zone (HUBZone) businesses existed for a HUBZone set-aside.[8] Nevertheless, sufficient numbers of capable small businesses existed, and the DHS conducted the procurement as a regular small business set-aside.[9] Shirlington Limousine & Transportation, Inc. (Shirlington), a HUBZone business and the incumbent contractor performing an existing shuttle service contract, timely protested to the GAO that the procurement should be conducted as a HUBZone set-aside.[10] While the protest was pending, the offer due date came, and Shirlington submitted its offer to an incorrect location.[11]

When the DHS responded to Shirlington's GAO protest by challenging Shirlington's standing because it had not submitted an offer, Shirlington learned that it had submitted its offer to the wrong location.[12] Shirlington then filed another GAO protest challenging the DHS rejection of its offer as late.[13] The GAO denied both protests; Shirlington then filed its

---

[1] Shirlington Limousine & Transp., Inc. v. United States, 77 Fed. Cl. 157 (2007).

[2] Tucker Act, Pub. L. No. 104-320, §§ 12(a), (b), 110 Stat. 3870 (1996) (LexisNexis 2008).

[3] *Shirlington Limousine & Transp., Inc.*, 77 Fed. Cl. at 164 (quoting 28 U.S.C. § 1491(b)(1) (2000)).

[4] *Id*. (citing Rex Serv. Corp. v. United States, 448 F.3d 1305, 1307 (Fed. Cir. 2006) ("[T]he term 'interested party' [in the Tucker Act is] . . . synonymous with 'interested party,' as defined by the Competition in Contracting Act, 31 U.S.C. § 3551.")).

[5] *Id.*

[6] *Id.*

[7] *Id*. at 159.

[8] *Id*. at 160.

[9] *Id*.

[10] *Id*. at 161. The GAO decided Shirlington's initial protest on 13 March 2007. Shirlington Limousine & Transp., Comp. Gen. Inc., B-299241, 2007 CPD ¶ 52 (Mar. 13, 2007). Shirlington protested:

> [T]hat the solicitation is unduly restrictive of competition because it requires the secured [vehicle] storage facility to be accessed by an electronic access system, that the contractor supply sedans, and that all shuttle buses be equipped with wheelchair lifts. Shirlington also asserts that the solicitation, issued as a small business set-aside, instead should have been set aside for Historically Underutilized Business Zone (HUBZone) small business concerns.

Id. The GAO denied the protest finding that the DHS justified its requirements and its decision to conduct the procurement as a small business set aside rather than a HUBZone small business set aside. *Id*.

[11] *Shirlington Limousine & Transp., Inc.*, 77 Fed. Cl. at 162. The solicitation as originally issued listed two separate addresses for offer delivery in two separate sections of the solicitation. *Id*. at 160, 161. Prior to the offer due date, the DHS issued an amendment responding to a question clarifying to which of the two locations must be delivered. *Id*. at 161. Shirlington delivered its offer to the incorrect location the morning offers were due. *Id*. at 162.

[12] *Id*.

[13] *Id*. at 163. The GAO denied this protest by Shirlington, finding that Shirlington's late offer submission was not caused by the agency. Shirlington Limousine & Transp., Inc., Comp Gen. B-299241.2, Mar. 30, 2007, 2007 CPD ¶ 68, at 1.

protest at the COFC, requesting a temporary restraining order and preliminary injunction, as well as seeking adjudication on the merits.[14]

As stated above, to be an interested party with standing to protest, the protestor must be either an actual or a prospective offeror. Shirlington argued that it was a prospective offeror because it had filed a timely protest with the GAO challenging the solicitation terms, thus preserving its prospective offeror status.[15] The COFC held otherwise.[16] Once the deadline for receipt of offers has passed, so has the opportunity to be a prospective offeror.[17] The COFC relied on a Court of Appeals for the Federal Circuit (CAFC) case from 2006, *Rex Service Corporation v. United States*,[18] which held that filing an agency protest prior to the deadline for receipt of offers did not maintain prospective offeror status.[19] As the COFC stated in *Shirlington*, "the relevant principle [is] that a timely *pre-award* protest submitted to GAO does not confer plaintiff standing to later bring a protest in the United States Court of Federal Claims."[20] The COFC also quoted approvingly the government's argument that Shirlington chose the forum for its protest and it "must bear the consequences of that choice."[21]

Subject Matter Jurisdiction—Task Orders

The COFC appears to have settled the debate[22] regarding protest jurisdiction over orders placed under indefinite-delivery, indefinite-quantity (ID/IQ) contracts in *IDEA International, Inc. v. United States*[23] (*IDEA*). Judge Wheeler determined in *IDEA* that the COFC has jurisdiction over protests filed regarding task orders placed under General Service Administration (GSA) Federal Supply Schedule (FSS) contracts.[24] Prior case law provided inconsistent opinions regarding such jurisdiction, but had not addressed the issue squarely.[25] *IDEA* seems to provide a final determination at the COFC that jurisdiction exists over protested FSS task orders but not non-FSS ID/IQ contract orders.

The Federal Acquisition Streamlining Act (FASA)[26] removed bid protest jurisdiction over task orders placed against ID/IQ contracts.[27] Nevertheless, interpretation of the jurisdictional limits continues to evolve. In the 2006—Year in Review,[28] we discussed two COFC cases addressing this jurisdictional issue in *Group Seven Associates v. United States*[29] (*Group Seven*) and *A&D Fire Protection, Inc. v. United States* (*A&D*).[30] The *A&D* court addressed the FASA bar as applied to non-FSS ID/IQ contracts, and determined that the FASA does indeed bar protest jurisdiction over task orders placed under such contracts.[31] The *Group Seven* court addressed an order placed under an FSS ID/IQ contract, and while stating that "jurisdiction is doubtful,"[32] nonetheless decided the case.[33] Closing out fiscal year (FY) 2006, it was reasonably clear that the FASA bars protests of non-FSS orders, but jurisdiction over orders placed under FSS contracts was as murky as ever.

---

[14] *Shirlington Limosine & Transp., Inc.* v. United States, 77 Fed. Cl. 157, 163 (2007).

[15] *Id.* at 166, 167.

[16] *Id.* at 167.

[17] *Id.*

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

[19] *Shirlington Limousine & Transp.*, Inc., 77 Fed. Cl. at 167. *Rex* was discussed in last year's Year in Review. Major Andrew S. Kantner et al., *Contract and Fiscal Law Developments of 2006—Year in Review*, ARMY LAW., Jan. 2007, at 62.

[20] *Shirlington Limousine & Transp.*, Inc., 77 Fed. Cl. at 167.

[21] *Id.*

[22] *See generally* Kantner et al., *supra* note 19, at 64, 65.

[23] IDEA Int'l, Inc. v. United States, 74 Fed. Cl. 129 (2006).

[24] *Id.* at 130.

[25] *Id.* at 136; *see also* Kantner et al., *supra* note 19, at 64, 65.

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

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

[28] Kantner et al., *supra* note 19, at 64, 65.

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

[30] A&D Fire Prot., Inc. v. United States, 72 Fed. Cl. 126 (2006).

[31] *Id.* at 134.

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

Early in FY 2007, the COFC decided *IDEA*.[34] In this case, the Department of Defense Education Activity (DODEA) awarded a contract to ICATT Consulting, Inc. (ICATT) on 7 August 2006 under a Request for Quotations (RFQ) issued to GSA FSS contract holders.[35] The contract was intended to provide a home school program for Department of Defense (DOD) dependents outside the United States.[36] IDEA International, Inc. (IDEA) protested the award to the Government Accountability Office (GAO).[37] When DODEA chose to proceed with contract performance despite the protest, IDEA filed its protest in the COFC.[38] The government moved to dismiss two counts of the protest arguing that the COFC lacked jurisdiction over task order contracts.[39]

Judge Wheeler analyzed the FASA, the Federal Acquisition Regulation (FAR), and the case law addressing task order protest jurisdiction and concluded that the COFC maintains jurisdiction over task orders placed under FSS contracts despite the FASA.[40] First, the FASA task order protest prohibition states that it "'applies to task and delivery order contracts *entered into under sections 2304a and 2304b of this title*.'"[41] Sections 2304a and 2304b of Title 10, United States Code, provide authority to enter into ID/IQ contracts; but, authority for the FSS system and its ID/IQ contracts existed prior to, and is authorized separately from, sections 2304a and 2304b.[42] The FASA also states "that '[n]othing in this section may be construed to limit or expand any authority of the head of an agency or the Administrator of General Services to enter into schedule, multiple award, or task order or delivery order contracts under any other provision of law.'"[43] Thus, the COFC determined that the language of the FASA itself indicates that FSS contracts remain separate and unaffected by the protest jurisdiction bar.[44]

Judge Wheeler next considered the FAR treatment of ID/IQ contracts.[45] The FAR addresses generic indefinite delivery contracts in Subpart 16.5.[46] This subpart contains the FASA protest bar, but distinguishes FSS contracts stating that the FSS is governed by Subpart 8.4 and Part 38.[47] Thus, the procurement regulations recognize that the FASA protest bar does not extend to FSS orders.[48]

Finally, Judge Wheeler analyzed the inconsistent case law, and determined that, "while not entirely uniform, [it] supports the above statutory and regulatory interpretation."[49] Of COFC cases, Judge Wheeler relied on *Labat-Anderson Inc. v. United States*,[50] the 2001 case with which *Group Seven* disagreed, finding that the FASA does not bar protests regarding task orders

---

[33] *Id*.

[34] IDEA Int'l Inc. v. United States, 74 Fed. Cl. 129, 129 (2006).

[35] *Id*. at 132.

[36] *Id*. at 134.

[37] *Id.*

[38] *Id*.

[39] *Id*. at 135.

[40] *Id*. at 137.

[41] *Id*. at 135 (quoting 10 U.S.C. § 2304c (f) (2000)) (emphasis added by court). Section 2304a of Title 10 United States Code (U.S.C.) provides, in pertinent part,

> Task and delivery order contracts: general authority
>
> (a) Authority to award. Subject to the requirements of this section, section 2304c of this title [10 USCS § 2304c], and other applicable law, the head of an agency may enter into a task or delivery order contract (as defined in section 2304d of this title [10 USCS § 2304d]) for procurement of services or property.

10 U.S.C. § 2304a(a). Section 2304b of Title 10, U.S.C., provides similar authority to "enter into a task order contract . . . for procurement of advisory and assistance services." 10 U.S.C. § 2304b(a)(1).

[42] *IDEA Int'l Inc.*, 74 Fed. Cl. at 135.

[43] *Id*. (quoting 10 U.S.C. § 2304a (g)).

[44] *Id.* at 135.

[45] *Id*. at 135, 136.

[46] *Id*.

[47] *Id*. at 136.

[48] *Id*.

[49] *Id*.

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

under FSS contracts.[51] Judge Wheeler also cited to the GAO case law reaching the same conclusion.[52] The GAO has asserted jurisdiction over FSS orders since 1997.[53] The court rejected the Government reliance on *A&D* and *Group Seven*.[54] First, the *A&D* court was not presented with an FSS contract order, thus its holding was limited to non-FSS contracts.[55] Second, the *Group Seven* court exercised jurisdiction even while professing its doubt that jurisdiction existed.[56] Judge Wheeler concluded by stating that,

> [t]o the extent that the discussion of jurisdiction in *A&D* and *Group Seven* might be regarded as inconsistent with the holding here, the Court finds that Labat-Anderson and Severn are more in line with the cited provisions of FASA and FAR, and that FASA's prohibition on bid protests does not cover GSA Federal Supply Schedule orders. Therefore, the Court possesses subject matter jurisdiction under the Tucker Act to review this protest.[57]

To the extent a COFC case can provide a definitive answer, *IDEA* appears to have settled the issue regarding jurisdiction over protests of task orders placed under FSS contracts.

Timeliness: Solicitation Errors and Consistency

After discussing the COFC case of *Transatlantic Lines v. United States*[58] in the 2006—Year in Review,[59] this year, the CAFC joined the fray. Last year we said, "[*Transatlantic*] appears to continue a trend that the COFC is moving further away from the GAO timelines in bid protest actions"[60] because the COFC had declined to follow the GAO rule that protests regarding solicitation improprieties be filed prior to bid opening or the due date for receipt of proposals.[61] This year, the CAFC ended the trend and added consistency to bid protest timeliness rules.

In *Blue & Gold, Fleet, L.P. v. United States*,[62] the CAFC faced an issue of first impression as described in pertinent part:

> [Whether] a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims.[63]

The CAFC held that its jurisdictional statute evidences intent in favor of recognizing just such a waiver rule.[64] This holding appears to settle protest timeliness in solicitation error cases.

In *Blue & Gold*, the National Park Service (Park Service) solicited ferry transportation and other services to support Alcatraz Island.[65] Blue & Gold Fleet, L.P. (Blue & Gold) was the incumbent ferry transportation contractor, but received the second-highest score for its proposal in the instant procurement.[66] The Park Service awarded the contract to the highest

[51] *IDEA Int'l Inc.*, 74 Fed. Cl. at 136.

[52] *Id.* (citing Severn Cos., Inc., Comp. Gen., B-275717, Apr. 28, 1977, 97-1 CPD ¶ 181).

[53] *IDEA Int'l Inc.*, 74 Fed. Cl. at 136.

[54] *Id.* at 137.

[55] *Id.*

[56] *Id.*

[57] *Id.*

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

[59] Kantner et al., *supra* note 19, at 66, 67.

[60] *Id.*

[61] *Id.*

[62] 492 F.3d 1308 (2007).

[63] *Id.* at 1313.

[64] *Id.*

[65] *Id.* at 1311.

[66] *Id.*

scored proposal, and Blue & Gold protested to the GAO.[67] Due to "concerns about the GAO jurisdiction,"[68] Blue & Gold also filed a protest in the COFC; GAO then dismissed the protest because of the COFC action.[69]

Blue & Gold asserted that the awardee failed to comply with the Service Contract Act (SCA)[70] in setting its wages and benefits, and that this failure allowed the awardee's proposal to offer better incentives to the Park Service.[71] Despite Blue & Gold's argument that the Park Service improperly *evaluated* the awardee's proposal, the COFC determined that Blue & Gold was protesting the *solicitation*.[72] The Park Service is required to evaluate proposals consistent with the solicitation, and the solicitation did not require offerors to comply with the SCA.[73] Therefore, argument regarding failure to apply the SCA implicates the solicitation, not the evaluation.[74]

Blue & Gold appealed the COFC decision to the CAFC.[75] The CAFC affirmed the COFC decision, requiring that protestors that encounter patent defects in the solicitation must raise those defects prior to the bid opening or due date for receipt of proposals.[76] The CAFC began its analysis with its protest jurisdiction.[77] In addition to providing "jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency," the statute requires that the COFC "give due regard to . . . the need for expeditious resolution of the action."[78] The CAFC determined that recognizing a waiver rule regarding solicitation errors furthers this statutory mandate.[79]

The CAFC also looked to patent ambiguity issues in other areas of government contract law.[80] For example, if a contract contains a patent ambiguity, the contractor will not be entitled to additional recovery because it should have raised the issue with the government prior to bidding.[81] The CAFC determined that the absence of a waiver rule allows a contractor to take advantage of the government and other bidders.[82] The court found further support for its waiver rule by looking to the GAO protest regulation, which "requires that '[p]rotests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals.'"[83] Unfortunately, the CAFC did not explicitly address any recent COFC cases in which the court did not apply the waiver doctrine to determine if factual differences would still lead to the same result.[84]

The COFC followed *Blue & Gold* in *Moore's Cafeteria Services v. United States*.[85] In this case, the Department of the Army (Army) solicited for food services at Fort Campbell, Kentucky.[86] The Army awarded the contract to the Kentucky

---

[67] *Id.*

[68] *Id.* at 1312.

[69] *Id.*

[70] Service Contract Act, 41 U.S.C. §§ 351-358 [hereinafter SCA].

[71] *Blue & Gold, Fleet, L.P.*, 492 F.3d at 1313. One of the evaluation factors was the franchise fee the awardee would provide back to the National Park Service (Park Service). *Id.* at 1311. By not complying with the SCA, the awardee could lower its wages and benefits, and bid a lower amount while still providing a higher franchise fee to the Park Service. *Id.*

[72] *Id.* at 1313.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 1310.

[76] *Id.* at 1313.

[77] *Id.*

[78] *Id.* (quoting 28 U.S.C. § 1491(b)).

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.* at 1314 (quoting 4 C.F.R. § 21.2(a)(1) (2006)).

[84] *See, e.g.*, Transatlantic Lines LLC v. United States, 68 Fed. Cl. 48 (2005). In that case, the COFC justified its decision not to follow the solicitation error timeliness rule in the GAO regulations because the solicitation error constituted a statutory violation. *Id.* at 53. In *Blue & Gold*, the solicitation error also involved a statutory violation: failing to apply the SCA to the contract. *Blue & Gold Fleet, L.P.*, 492 F.3d at 1312. Again, the CAFC did not address this issue specifically to analyze whether any factual differences may justify the disparate results or *Blue & Gold* overturns *Transatlantic Lines*. *Id.*

[85] 77 Fed. Cl. 180 (2007).

[86] *Id.* at 181.

Office for the Blind, a state licensing agency (SLA), and Moore's Cafeteria Services, d/b/a MCS Management (MCS), the incumbent, protested to the GAO.[87] The GAO denied the protest, and MCS filed its action in the COFC.[88]

MCS protested the Army's decision not to follow guidance in a joint report to Congress that defined a fair and reasonable price offered by an SLA as one that does not exceed the offer representing the best value by more than 5%.[89] In the initial solicitation, the Army stated that the procurement was *subject to* the Joint Report 5% requirement.[90] The contracting agency's regional counsel then informed the agency that the Joint Report was not effective until implemented by regulations, and that solicitations should not reference the Joint Report.[91] The Army amended the solicitation by removing reference to the Joint Report.[92]

The COFC determined that MCS had the opportunity to protest the removal of the Joint Report language and policy after the solicitation amendment and before offers were due.[93] MCS failed to protest and thus, under the rule dictated by the CAFC in *Blue & Gold*, MCS waived its right to protest the solicitation issue in a protest before the COFC.[94]

When Is an E-mail to the GAO Received?

The GAO took two unusual steps in a case in December 2006. In *Guldmann, Inc.* (*Guldman IV*),[95] the GAO reconsidered an earlier decision and changed its stance.[96] With this reconsideration, the GAO also allowed a request for reconsideration (Request) regarding an earlier protest despite the fact that the request was received in the GAO e-mail mailbox after the 5:30 p.m. deadline at 5:31 p.m.[97]

The GAO issued its decision in *Guldmann, Inc.* (*Guldmann II*)[98] on 3 November 2006.[99] On 13 November 2006, Guldmann, Inc. (*Guldmann I*) filed its Request.[100] Guldmann filed the Request via e-mail, and the e-mail arrived in the GAO e-mail mailbox at 5:31 p.m.[101] Under the GAO filing rules, documents must be received by the GAO by 5:30 p.m. on the last day of the filing period; any documents received after 5:30 p.m. are deemed filed the following day.[102] Because the Request was received on the eleventh day, it was late and the GAO dismissed the Request as untimely filed.[103]

---

[87] *Id*.

[88] *Id*. at 183, 184.

[89] *Id*. at 183.

[90] *Id*. at 182. The solicitation stated:

> [A] technically acceptable offer from a qualified State Licensing Agency will receive preference in accordance with the Joint Report to Congress, dated August 29, 2006. This notice is not designed to discourage competition from HUB Zone certified small businesses not eligible for the preference. . . . Application of this preference may result in award to other than the lowest priced technically acceptable offeror.

Id. (citing the Administrative Record, pp. 44–45).

[91] *Id.* The COFC quoted an email from Lieutenant Colonel Karl Kuhn, Regional Counsel to the U.S. Army Contracting Agency in which he forwarded and email discussing Department of Defense policy that the Joint Report was not to be cited until implemented by regulation. *Id*. Lieutenant Colonel Kuhn's email also advised that contracting officers could use the five percent standard from the Joint Report voluntarily so long as the use was based on the contracting officer's independent business judgment. *Id*.

[92] *Id*.

[93] *Id*. at 185.

[94] *Id*.

[95] Guldmann, Inc. (*Guldmann IV*), Comp. Gen. B-298585.4, Dec. 13, 2006 (unpublished decision) (on file with author).

[96] *Id*.

[97] *Id*.

[98] Guldmann, Inc. (*Guldmann II*), Comp. Gen. B-298585.2, Nov. 3, 2006 (unpublished decision) (on file with author).

[99] Guldmann, Inc. (*Guldmann I*), Comp. Gen. B-298585.4, Dec. 13, 2006 (unpublished decision) (on file with author).

[100] *Id*.

[101] *Id*.

[102] 4 C.F.R. § 21.0 (2007).

[103] *Guldmann I*., Comp. Gen. B-298585.4.

On 8 December 2006, Guldmann requested that the GAO reconsider its decision dismissing the Request, and specifically asked the GAO to review its e-mail records.[104] Upon review, the GAO discovered that it actually received the Request at the GAO server at 5:28:22 p.m., and the Request passed through the firewall at 5:30:29 p.m.[105] With this evidence, the GAO reversed its dismissal of the Request as untimely filed, and re-opened the original Request.[106] Thus, a document sent to the GAO via e-mail now appears to be filed as of the time the document arrives at the GAO server.[107]

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

GAO Bid Protest Statistics for Fiscal Years 2003–2007[108]

	FY 2007	FY 2006	FY 2005	FY 2004	FY 2003
Cases Filed	1,411 (up 6%[1])	1,327 (down 2%)	1.356 (down 9%)	1,485 (up 10%)	1,352 (up 12%)
Cases Closed	1,393	1,274	1,341	1,405	1,244
Merit (Sustain + Deny) Decisions	335	249	306	365	290
Number of Sustains	91	72	71	75	50
Sustain Rate	27%	29%	23%	21%	17%
Effectiveness Rate (reported)[2]	38%	39%	37%	34%	33%
ADR[3] (cases used)	62	91	103	123	120
ADR Success Rate[4]	85%	96%	91%	91%	92%
Hearings[5]	8% (41 cases)	11% (5 cases)	8% (41 cases)	9% (56 cases)	13% (74 cases)

[1] From the prior fiscal year.
[2] Based on a protester's obtaining some form of relief from the agency, as reported to GAO.
[3] Alternative Dispute Resolution.
[4] Percentage resolved without a formal GAO decision.
[5] Percentage of fully developed decisions in which GAO conducted a hearing.

Major Mark A. Ries

[108] Letter from Gary L. Kepplinger, General Counsel, U.S. Government Accountability Office, to The Honorable Nancy Pelosi, Speaker of the House of Representatives, subject: B-158766 (10 Dec. 2007), *available at* http://www.gao.gov/special.pubs/bidpro07.pdf.

CONTRACT ADMINISTRATION

Contract Interpretation

COFC Considers Defective Specifications Claim Applying Contract Interpretation Principles

In *Travelers Casualty and Surety of America v. United States*,[1] the Court of Federal Claims (COFC) considered a contract claim filed under the Contract Disputes Act[2] regarding a contract for the construction of the United States Department of Agriculture's (USDA) Vegetable Laboratory in Charleston, South Carolina. The COFC decision focused on a portion of the contract involving replacing and paving two turn lanes and replacing concrete aprons adjacent to drainage pipes alongside the roadway.[3] In applying two constructive change theories, the theory of defective specifications and the theory of contract interpretation, the court denied one part of the contractor's claim and granted another.[4]

The USDA awarded the subject contract on 29 February 1999 to Adams Construction Company.[5] Subsequently, the USDA terminated its contract with Adams, and then the plaintiff, Traveler's Casualty and Surety of America (Traveler's), assumed responsibility for the contract under the contract's performance bond.[6] Traveler's then contracted with Alcon Associates, Inc. (Alcon) to complete contract performance.[7] Next, Alcon contracted with Landscape Pavers Ltd. (LPL) to pave the turn lanes and replace the concrete aprons.[8] LPL's paving work on two northbound turn lanes and on the concrete aprons was the focus of this contract claim.[9]

With respect to contract interpretation, the interesting part of the case is the work concerning the paving of the northbound turn lanes. After LPL finished paving the northbound turn lanes, Alcon informed LPL that because it had not performed in accordance with the contract terms, LPL would have to remove the pavement and then re-install it.[10] LPL complied with Alcon's orders.[11] Specifically, Alcon advised LPL that it had constructed the turn lanes in such a way that the pavement's slope was excessive.[12] Additionally, Alcon stated that because LPL failed to comply with the contract terms, LPL was responsible for any additional costs it incurred to correct its deficiencies.[13] On 4 April 2002, LPL filed a claim for costs it incurred in repaving the northbound turn lanes.[14] LPL submitted the claim to its contractor, Alcon, which forwarded the claim to Traveler's, which then submitted it to the USDA contracting officer.[15]

In its claim, LPL argues that the drawings and specifications related to the slope of the northbound turn lanes were "design specifications" that were defective in that they did not indicate the amount of allowable slope.[16] Thus, LPL asserts that although it closely followed the design specifications, the resulting pavement was unacceptable because the specifications were defective.[17] As a result, LPL argues that the government is responsible for the additional costs it incurred

---

[1] 74 Fed. Cl. 75 (2006).

[2] 41 U.S.C. §§ 601–613 (2000).

[3] *Traveler's*, 74 Fed. Cl. at 77.

[4] *Id*. at 105–06.

[5] *Id*. at 77–78.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id*.

[10] *Id*. at 82–83.

[11] *Id.*

[12] *Id.* In highway construction, the court stated that the "slope" represented "how quickly the height of the surface [of the pavement] drops as the median or shoulder is approached horizontally." *Id.* at 90.

[13] *Id*. at 83.

[14] *Id.*

[15] *Id*. at 85.

[16] *Id*. at 87. The court defined "design specifications" as specifications that describe in "precise detail and permit the contractor no discretion." *Id*. at 89. The court stated that the significance of design specifications is risk. The court stated further that if the government requires the contractor to follow defective design specifications, then the government bears the risk that the contractor will incur additional costs during contract performance. *Id*.

[17] *Id.*

in complying with the defective specifications.[18] These additional costs included the removal and re-installation of the pavement.[19]

In response to this claim, the government maintained that the contract provisions controlling the paving of the turn lanes were "performance specifications."[20] As such, the contractor was responsible for any failure to perform the contract's requirements. The government further argued that the cause of the unacceptable pavement was the contractor's failure to comply with the contract.[21] The government asserted that while the contract required the contractor to construct the turn lanes with a 2% slope, the pavement's slopes ranged from 5% to 9%.[22] Further, the government stated that contract's drawings and the South Carolina Department of Transportation (SCDOT) Highway Design Manual, which was widely known by LPL, dictated the slope of the pavement.[23] Because the contracting officer believed that the contract's relevant provisions were "performance specifications" and that the cause of contract failure was the contractor's faulty performance, the contracting officer denied the claim.[24]

The court considered the defective specifications claim by applying the "normal principles of contract interpretation."[25] Generally speaking, in interpreting ambiguities in a contract, courts and boards will first look to the contractual document itself. The court will "interpret a contract in such a way as to give meaning to all the provisions of the contract in light of the parties' intent at the time they entered the agreement."[26] If a court finds that the meaning of a contract term is clear and unambiguous, then the court will adopt that meaning.[27] On the other hand, if the court finds that a contract term is ambiguous, then the court will determine whether the ambiguity is patent or latent.[28] If the contract term is a patent ambiguity, then the contractor has a duty to seek clarification from the government prior to submitting its offer; if the contractor fails to seek clarification, then it will be bound by the government's reasonable interpretation of the patent ambiguity. If the term is a latent ambiguity, then the contractor has no duty to seek clarification. In the latter case, the court will adopt the contractor's reasonable interpretation of the latent ambiguity.[29]

After reviewing the contract drawings and the SCDOT manual, the court found that the amount of slope allowed for the turn lanes was unclear.[30] In attempting to resolve the ambiguity, the court referenced the language of the contract itself.[31]

The court referenced the contract drawings and found that while many of the drawings indicated that maximum allowable slope for the turn lanes was 2%, the drawings did not directly reference the slope for the northbound turn lanes.[32]

---

[18] *Id.*

[19] *Id*. at 87.

[20] *Id*. The court defines "performance specifications" as specifications which "set forth simply an object or standard and leave the means of attaining that end to the contractor." *Id.* at 89. In contrast to design specifications, if a government requires a contractor to follow performance specifications, then the contractor bears the financial risk of contract failure. *Id*.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 90–91. One drawing (CV6.4) indicated a slope of 2% but it stated that it applied to the southbound turn lanes and did not clearly apply to the northbound turn lanes. Another drawing (Detail D of drawing CV6.1) indicated a slope of 2%, but it referred to "asphalt lanes" and did not seem to generally apply to turn lanes as was at issue in this case. Other drawings indicated the allowable slope, but they did not specifically apply to turn lanes. The SCDOT Highway Design Manual (SCDOT manual) stated that the slope should be 2.08%. *Id*.

[24] *Id*. at 86.

[25] *Id*. at 86–87. The principles of contract interpretation have been disputed. In an unrelated case with the same named plaintiff, the COFC provided a detailed explanation of the two competing views of contract interpretation regarding the appropriateness of referring to extrinsic evidence (evidence other than the contract document itself). Traveler's Cas. & Sur. of America v. United States, 75 Fed. Cl. 696 (2007). In that unrelated case, the COFC compared the majority view which the COFC follows and the minority view which the Court of Appeals for the Federal Circuit (CAFC) follows. *Id.* at 705–11. In interpreting contractual terms, the COFC will admit extrinsic evidence in determining the meaning of the contractual language. *Id.* at 706. In contrast, in interpreting contractual terms, the CAFC will not admit extrinsic evidence where a contract's terms are clear. *Id.* at 707–08. In the instant *Travelers* case involving paving the turn lanes, the COFC analyzed the facts using the "normal principles of contract interpretation" as the COFC (and the majority of courts) applies them. *Id.*; *see also Travelers*, 74 Fed. Cl. at 87.

[26] *Id.* at 87.

[27] *Id.* at 88.

[28] *Id.*

[29] *Id.*

[30] *Id*. at 91.

[31] *Id*.

[32] *Id.*

Additionally, while the SCDOT manual referenced the allowable slope for South Carolina highways (stating that they should be 2.08%), the court noted that the contract did not specifically incorporate the manual.[33] So, while the court found that a reasonable interpretation of the contract was that the slope on the turn lanes should be 2%, the court also found that another reasonable interpretation was that the contract did not require any particular slope.[34] The court further determined that this was a "patent" ambiguity.[35] The court reasoned that where an ambiguity is patent, a contractor has a duty to seek clarification from the government regarding the ambiguity prior to submitting its offer.[36] In this case, the LPL failed to seek clarification until after contract performance.[37]

The court next considered whether the contract provisions referencing the allowable slope in the turn lanes were design specifications or performance specifications.[38] As mentioned above, where the government requires a contractor to follow design specifications, the government warrants that the specifications are free from defects and that the contractor can successfully perform the contract.[39] Here, the court concluded that the specifications were design specifications because they "set forth in precise detail the materials to be employed and the manner in which the work was to be performed."[40] The court further found the design specifications to be defective because they did not clearly explain the allowable slope for the northbound turn lanes.[41] Although normally a contractor would prevail in a case where a court found the government's design specifications defective, in this case, the contractor did not prevail because it failed to seek clarification regarding the patent ambiguity.[42]

Since the contractor "failed to satisfy its duty to inquire about [the] patent ambiguity . . . [it] cannot recover damages based on the implied warranty that specifications are free from design defects."[43] Therefore, the court denied the contractor's claim for its costs to remove and re-install the northbound turn lanes.[44]

Major Marci A. Lawson

---

[33] *Id.* at 92.

[34] *Id.*

[35] *Id.* at 93.

[36] *Id.*

[37] *Id.* at 94.

[38] *Id.*

[39] *Id.* at 89.

[40] *Id.* at 94 (quoting J.L. Simmons Co., v. United States, 188 Ct. Cl. 684, 689 (1969)).

[41] *Id.*

[42] *Id.*

[43] *Id.* at 105.

[44] *Id.* at 105–06.

Contract Changes

Oral Contract Modifications Still Unenforceable

In *Trawick Contractors, Inc. v. United States*,[1] the Armed Services Board of Contract Appeals (ASBCA) considered a contractor's (Trawick) appeal of a Navy contracting officer's final decision denying a claim to remit $68,394 in liquidated damages. Trawick contended that the contracting officer verbally agreed to remit $68,394 in liquidated damages.[2] The government contended that the contracting officer made no such oral agreement with Trawick.[3] After examining both parties' arguments, the ASBCA decided in favor of the government.[4] Even assuming that the contracting officer did orally agree to modify the contract by agreeing to remit a certain amount of liquidated damages, the ASBCA affirmed that oral agreements were unenforceable.[5]

In the instant case, the Navy awarded a firm-fixed price contract to Trawick on 6 February 2002 for the "revitalization" of housing at a Naval base in Millington, Tennessee.[6] The contract's original completion date was 6 February 2004.[7] The contract contained a liquidated damages clause providing that if the contractor failed to complete the project on time, then the government would be entitled to damages in the amount of either $4,351 or $200 per day (depending up the line item number) for each day of delay.[8] The contract also contained a clause advising the contractor that only the contracting officer had the contractual authority to make agreements regarding the "contract, modification, [or] change order . . . ."[9] This contract clause also stated that if the contracting officer modified the contract, then "all such actions must be formalized by a proper contractual document executed by an appointed contracting officer."[10]

During contract performance, the contractor failed to complete the project by the completion date.[11] Although the parties modified the contract to adjust the contract completion date to 1 July 2004, the contractor did not complete the project until 19 November 2004.[12] Since Trawick completed the project after the completion date, the government assessed liquidated damages by retaining progress payments in the amount of $98,394.[13]

On 4 April 2005, Trawick contacted the contracting officer stating that the contracting officer had improperly assessed liquidated damages.[14] As such, the contractor stated that it was due the entire contract price.[15] Two months later, Trawick revised its earlier contention by informing the contracting officer that the government owed it a lesser amount of $68,394 in progress payments and further that Trawick owed the government only $30,000 in liquidated damages.[16] Trawick based its contention on its allegation that the contracting officer orally agreed that the contractor owed the government only $68,394 (vice $98,394) in liquidated damages.[17] On 29 June 2005, Trawick filed a proper claim with the contracting officer for the

---

[1] ASBCA No. 55097, 07-1 BCA ¶ 33,499.

[2] *Id.* at 166,025.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.* at 166,021.

[7] *Id.*

[8] *Id.* at 166,022.

[9] *Id.* (citing a clause that the contract termed the "Contracting Officer Authority Clause").

[10] *Id.*

[11] *Id.*

[12] *Id.* at 166,022–23.

[13] *Id.* at 166,023.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* Consequently, the government contracting officer issued a unilateral contract modification on 8 July 2005 stating that the contractor owed the government the $98,394 in liquidated damages; this modification justified the contracting officer's retention of this amount in progress payments. *Id.*

differing amount of $68,394 that the government was retaining as liquidated damages.[18] The contracting officer denied the claim.[19] The contractor then filed an appeal with the ASBCA.[20]

The government argued that it properly assessed liquidated damages in the amount of $98,394.[21] Further, the government issued a written modification to the contract on 8 July 2005 articulating that the contractor owed this amount in liquidated damages.[22] Moreover, the government argued that there was no oral agreement to reduce the amount of liquidated damages and even if there had been such an agreement, oral contract modifications are unenforceable.[23] Finally, the government moved for summary judgment contending that the government should prevail as a matter of law.[24]

After examining both parties' arguments, the ASBCA was unpersuaded by the contractor's theory.[25] The Board found that even if the Navy contracting officer did attempt to orally settle the contract claim by agreeing that the total amount of liquidated damages was $68,394 (vice $98,394), such an agreement would constitute an oral contract modification.[26] In particular, the Board acknowledged that an oral contract modification "is unenforceable without a written contract modification to decrease the contract price . . . ."[27] Consequently, the Board granted the government's motion for summary judgment.[28]

Out-of-Scope Contract Modification Violates Competition Rule . . . But COFC Does Not Order Relief

In *IDEA International, Inc. v. United States*,[29] the Court of Federal Claims (COFC) considered a protester's argument that a contract modification was outside the scope of the original contract because the contract, as modified, would have significantly altered the field of competition if the contract, as modified, had been contained in the original solicitation.[30] The protester, IDEA International Inc. (IDEA), demanded declaratory and injunctive relief arguing that the Department of Defense Education Activity (DODEA) issued an out-of-scope contract modification "materially altering the contract payment provisions shortly after contract award."[31] In response, the government contended that the subject modification was within the scope of the original contract.[32] After considering arguments from both sides, the court ruled in favor of the protester finding that the contract modification was out-of-scope.[33] Nevertheless, the court did not award the protester declaratory or injunctive relief; the court did, however, award the protester reasonable proposal preparation costs.[34]

On 18 May 2006, DODEA issued a solicitation for the provision of home-schooling services to dependents of DOD service members and civilian employees assigned to overseas locations.[35] The intent of the resulting contract was to support DOD's Remote Location Home School Program which assists parent's kindergarten through twelfth grade students in home schooling where there is no DOD school nearby.[36] The DODEA restricted the solicitation to holders of General Services

---

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* at 166,024.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] 74 Fed. Cl. 129 (2006).

[30] *Id.* at 141.

[31] *Id.* at 130.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 143.

[35] *Id.* at 131.

[36] *Id.*

Administration (GSA) Federal Supply Schedule (FSS) "69 contracts" which covered information technology services.[37] The solicitation stated that the contract price would be based upon the total number of enrolled students, estimated to be no more than 700.[38] Thus, the government would pay the contractor's invoices based on the total number of enrolled students. The solicitation did not, however, state how often invoices could be submitted.[39]

In response to the solicitation, the government received two proposals, one from the protester (IDEA) and one from the awardee, ICATT Consulting, Inc. (ICATT).[40] While ICATT proposed a price of $4,800 per student, IDEA proposed a slightly higher price of $4,900 per student. After evaluating the proposals, the government awarded to ICATT.[41]

On 22 August 2006, ICATT submitted an invoice to the government requesting to be paid the entire contract price of $3,360,000 in one lump sum, without indicating the number of enrolled students.[42] Four days later, the government and the contractor issued a bi-lateral contract modification changing the method of contract payment.[43] Pursuant to the modification, instead of paying the contractor based on the total number of enrolled students, the government would pay the contractor in four increments based on new contract line items (CLINs): (1) initial start up materials ($764,855), (2) initial program instruction ($827,453), (3) balance of program materials ($883,846), and (4) balance of program instruction ($883,846).[44] Thus, under the new contract pricing method, the contractor would receive the entire contract price regardless of the total number of enrolled students.

After the government debriefed IDEA of its intent to award the task order to ICATT, IDEA first filed a protest with the Government Accountability Office (GAO) on 28 August 2006.[45] On 29 August 206, the agency then issued an opinion stating that it would override a stay of contract performance.[46] On 14 September 2006, IDEA filed an action in the COFC requesting declaratory and injunctive relief. The COFC exercised jurisdiction to hear the merits of IDEA's three-part protest. This article focuses solely on the third portion of the protest that "DoDEA unlawfully issued an out-of-scope contract modification materially altering the contract payment provisions shortly after contract award."[47]

After considering the arguments of the protester and the government, the court concluded that the modification of the task order was out-of-scope.[48] Specifically, the court stated that the government's modification to the contract "caused a material change to the Solicitation's requirements."[49] The court explained that proper contract modifications must be within the scope of the original contract.[50] Specifically, the court stated that contract modifications must not alter the contract to the extent that the modified contract is no longer "the one for which offerors have competed."[51] Further, the court stressed that these rules apply equally to modifications of task orders, as is the case here.[52] In this case, had the solicitation contained the contract modification at issue, IDEA may have offered a lower price since the total number of enrolled students would ultimately become irrelevant.[53]

---

[37] *Id.* at 132.

[38] *Id.* at 131–32.

[39] *Id.* at 140.

[40] *Id.* at 133.

[41] *Id.*

[42] *Id.* at 134.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 130.

[48] *Id.* at 141 (quoting Hunt Bldg. Co., Ltd. v. United States, 61 Fed. Cl. 243, 277 (2004)).

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

Remarkably, although the court apparently agreed with the protester that the modification to the task order was out-of-scope, the court did not order relief other than to award the protester protest costs.[54] The court could have ordered the government to terminate the task order and then re-compete the acquisition including the work as modified.[55] The court's rationale in not ordering relief was based on its conclusions that (1) the balance of hardships on all parties does not favor the protester and (2) that granting the injunction (to terminate the task order) would not serve the public interest.[56] First, the court explained that ordering a termination of the task order would constitute a severe hardship on the school age children benefiting from this contract.[57] Second, terminating the contract and re-soliciting would be so costly as to be contrary to the public interest.[58] Although the *IDEA* court did not provide relief to the protester, the court certainly could have done so. Practitioners should continue to caution their clients about the pitfalls of out-of-scope contract modifications.

Constructive Change or Differing Site Condition?

In *Beyley Construction Group Corp. v. Dept. of Veterans Affairs*,[59] the United States Civilian Board of Contract Appeals (CBCA) considered an appeal concerning two issues. First, the CBCA considered whether a limestone hill (called a "mogote") with a significant amount of rock located at a construction site constituted a differing site condition. Second, the CBCA considered whether the government's deletion of the requirement to remove the mogote constituted a constructive change to the contract entitling the contractor to additional compensation.[60] The CBCA granted the appeal based on the theory of constructive change.[61]

This appeal arose from a contract the Department of Veterans Affairs (VA) awarded to the appellant, Beyley Construction Group Corporation (Beyley), for the "development of burial areas at the Puerto Rico National Cemetery" in Puerto Rico.[62] The contract required the contractor to prepare a tract of the land so that it would be suitable for burials.[63] One difficult aspect of contract performance was the requirement to remove a mogote from the construction site.[64] The "contract documents required [that a] mogote be excavated, backfilled with suitable materials, and graded for burial sites."[65] During contract performance, Beyley encountered more rock in the mogote than it anticipated.[66] While the contract drawings and specifications required the contractor to excavate rock in order to complete the project, Beyley contended that the amount of rock in the mogote constituted a differing site condition.[67] After considering Beyley's position, the contracting officer issued a unilateral contract modification deleting the requirement to excavate the mogote reducing the overall contract price.[68]

Beyley then filed two appeals.[69] In the first claim, the contractor argued that the mogote was a differing site condition. In the second claim, the contractor argued that the government's deletion of the requirement to remove the mogote constituted a constructive change for which the contractor was entitled additional compensation, not less as the government held.[70] Beyley argued the deletion of this work was a constructive change because without the requirement to excavate the mogote, the contractor would not have sufficient fill material (that it would have obtained at the worksite) to complete the

---

[54] *Id.* at 143.

[55] *Id.* at 142–43.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] CBCA Nos. 5 and 763, 07-2 BCA ¶ 33,639.

[60] *Id.*

[61] *Id.* at 166,603.

[62] *Id.* at 166,589.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 166,590.

[66] *Id.* at 166,593.

[67] *Id.* at 166,692.

[68] *Id.*

[69] *Id.* at 166,594–95. Both appeals (CBCA Nos. 5 and 763) were consolidated into one appeal. *Id.* at 166,599.

[70] *Id.* at 166,600.

project. Thus, in this case, the government's deletion of work actually resulted in additional contract costs.[71] Beyley contends that because of the contract change, it would have to purchase fill material at its own expense thus increasing its costs dramatically. Accordingly, the contractor demanded compensation for the alleged constructive change in the amount of $483,001.32.[72]

In response, the Government denied the existence of a differing site condition existed and also denied that it had constructively changed the contract.[73] Regarding the deleted work, the government asserts that the contractor had no "contractual right to expect that it would be able to use the excavated materials from the mogote as usable fill."[74] Further, the contract itself states that the contractor could use either excavated material or "borrow" (material brought from another site) as fill and that the costs of obtaining and transporting such borrow would be at no expense to the government.[75] Therefore, the government posited that Beyley was not entitled to additional compensation [76]

After considering the arguments of both parties, the CBCA granted the two-part appeal, in part, based on the theory of constructive contract change.[77] The CBCA conveyed that where a contract permits one method of contract performance, the government's later prohibition of that method of performance is a constructive change under the contract's Changes Clause.[78] The CBCA agreed with the appellant that the government's deletion of the work involving the mogote constituted a constructive change increasing the contractor's cost.[79] The CBCA also agreed that the appellant had a reasonable expectation that it would use excavated fill from work at the mogote and further that after the government deleted the mogote portion of the contract, the contractor was deprived of that fill material.[80] As a result, the contractor incurred additional costs in transporting borrow from another location to the worksite.[81] Therefore, the CBCA granted the appeal reasoning that the government had constructively changed the contract requirements by deleting work from the contract.[82]

It is debatable as to whether the CBCA reached the right result in this case. Whether the deletion of the mogote portion of the contract is a constructive change depends upon whether it was reasonable for the contractor to anticipate that it would have to provide its own fill material.[83] Witnesses for both sides testified that in Puerto Rico, mogotes are of varying density and of varying usefulness for fill material.[84] Further, the contract clearly stated that the contractor would be responsible for providing its own fill material either by utilizing fill from the worksite or by transporting fill from another site.[85] Interestingly, the contract appears to specifically require the contractor to perform the work that the CBCA held was a contract change. Hence, in this case, the CBCA may have stretched the facts to provide a recovery for the appellant. This case should alert contract law practitioners to remain mindful of the considerable economic powers of the Boards of Contract Appeals.

Major Marci A. Lawson

---

[71] *Id.*

[72] *Id.*

[73] *Id.* The contract stated, "removal of rocks as specified on drawing L-7 is part of the contract and no separate payment will be made." *Id.* Drawing L-7 indicated the tract of land to be converted into a burial area and showed a mogote which the contractor was required to remove. *Id.* at 166,692.

[74] *Id.* at 166,600.

[75] *Id.* at 166,692. The contract required the contractor to "use excavated material and borrow [material that the contractor could transport from other locations to the worksite]. . . . Borrow will be supplied at no additional cost to [the] Government." *Id.*

[76] *Id.*

[77] *Id.* at 166,602–03.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* The CBCA awarded the contractor the amount of $232,821.48 based upon what it considered to be a reasonable estimate of the contractor's additional costs. *Id.*

[83] *Id.* at 166,602.

[84] *Id.* at 166,596–600.

[85] *Id.* at 166,692.

Contract Disputes Act (CDA)[1] Litigation

If It Looks Like the Same Claim, It May Be the Same

In order to file a claim at the Court of Federal Claims (COFC), the claim must be the same claim that was submitted to the contracting officer.[2] The Court of Appeals for the Federal Circuit (CAFC) recently reaffirmed this jurisdictional rule in *Ace Constructors, Inc.*[3] Before proceeding with its COFC appeal, Appellant must first exhaust its administrative remedies by submitting the claim to the contracting officer.[4]

In *Ace Constructors, Inc. v. United States*, the Government argued that the claim as presented to the COFC was not the same claim that the appellant submitted to the contracting officer.[5] The COFC decided that although the Appellant's argument may have been slightly more refined, the operative facts were the same as those described in the requests for equitable adjustment, and addressed the same basic problem that the contracting officer addressed.[6] The CAFC affirmed, citing *Scott Timber Co. v. United States.*[7] The CAFC explained the rule in *Scott Timber* as:

> [T]he same claim must be presented to the Court of Federal Claims as was decided by the contracting officer, but that that standard "does not require rigid adherence to the exact language or structure of the original administrative CDA claim [when] they arise from the same operative facts, claim essentially the same relief, and merely assert differing legal theories for that recovery."[8]

The CAFC found that the claim was "based on the same contract provisions, the same requirements made by the Army Corps of Engineers, the same costs, the same requested relief, and the same legal theories."[9] It was the same claim after all.

More Litigation over Where to Litigate

In *Suburban Mortgage Associates, Inc. v. United States Department of Housing and Urban Development*,[10] the CAFC discussed the jurisdictional boundary between the Tucker Act[11] and the Administrative Procedure Act,[12] in the light of the Supreme Court's decision in *Bowen v. Massachusetts*.[13] Judge Plager framed the issue as forum shopping after the *Bowen* decision:

---

[1] Contract Disputes Act, 41 U.S.C.S. §§ 601–613 (LexisNexis 2008) [hereinafter CDA].

[2] *See id*. 41 U.S.C. § 605(a) requires the contractor to submit the claim to a contracting officer, and the contracting officer then issues a final decision concerning that claim. *See, e.g.*, England v. Swanson Group, Inc., 353 F.3d 1375, 1379 (Fed. Cir. 2004); Bath Iron Works Corp. v. United States, 20 F.3d 1567, 1578 (Fed. Cir. 1994).

[3] Ace Constructors, Inc., v. United States, 499 F.3d 1357 (Fed. Cir. 2007).

[4] *Id*. at 1361.

[5] *Id*.

[6] Ace Constructors, Inc. v. United States, 70 Fed. Cl. 253 (2006). The COFC indicated that is natural for legal arguments to "sharpen" as they develop for trial:

> The government seeks to establish a distinction between inapplicability and the lack of a requirement, but any such distinction is too attenuated to be significant; in its claim to the Contracting Officer, ACE manifestly was challenging the need for profilograph testing. In this context, there is no material difference between inapplicability of and the lack of a requirement for such testing. It is hardly unusual for a litigant's arguments to sharpen between the time of the original claim and the time of trial, and the government was given ample notice by ACE's contention that profilograph testing was not applicable.

Id. at 266–67.

[7] 333 F.3d 1358 (Fed. Cir. 2003)

[8] *Ace Constructors, Inc.*, 499 F.3d at 1361 (quoting *Scott Timber*, 333 F.3d at 1365).

[9] *Id*.

[10] 480 F.3d 1116, 1118 (Fed. Cir. 2007) ("Litigation over where to litigate is the unfortunate consequence of the complex of statutes and courts that comprise the federal system.").

[11] 28 U.S.C.S. § 1491 (LexisNexis 2008).

[12] 5 U.S.C.S. §§ 551–559 (LexisNexis 2008).

[13] *Suburban Mortgage*, 480 F.3d at 1117 (citing Bowen v. Massachusetts, 487 U.S. 879 (1988)).

> One consequence of the Bowen case has been to create a sort of cottage industry among lawyers attempting to craft suits, ultimately seeking money from the Government, as suits for declaratory or injunctive relief without mentioning the money. If successful, a plaintiff could have the case heard under the [Administrative Procedure Act] APA in one or another district court, with appeal to a regional circuit, rather than in the Court of Federal Claims, where money claims against the Government are routinely heard and decided, with appeal in the Federal Circuit.[14]

In the instant case, the contractor wanted to exercise its contractual right to assign a defaulted mortgage to the U.S. Department of Housing and Urban Development (HUD).[15] But HUD declined to accept the assignment, believing that Suburban had committed fraud or made material misrepresentations.[16] Suburban then sued in the District Court for the District of Columbia, under 28 U.S.C. § 1331,[17] the Administrative Procedure Act (APA),[18] the Declaratory Judgment Act,[19] and the Fifth Amendment of the Constitution.[20]

Suburban first alleged that the Government acted arbitrarily, capriciously, and in violation of Suburban's due process rights under the Fifth Amendment, and second "asked the court for 'specific relief in the form of payment of the insured loan amount' and reimbursement of certain taxes and fees as losses."[21] The Government moved to dismiss for lack of subject matter jurisdiction arguing that the suit was essentially a contract action, properly before the COFC under the Tucker Act, 28 U.S.C. § 1491(a)(1).[22]

The District Court analyzed subject matter jurisdiction and concluded that the APA provided a waiver of sovereign immunity for challenges to agency action, subject to three exceptions found in 5 U.S.C. §§ 702 and 704.[23] The court stated, "the APA excludes from its waiver of sovereign immunity (1) claims for money damages, (2) claims for which an adequate remedy is available elsewhere, and (3) claims seeking relief expressly or impliedly forbidden by another statute."[24]

The CAFC rejected Suburban's characterization of the case as an action for specific performance and declaratory judgment.[25] The CAFC instead stated that what Suburban wanted was a declaratory judgment that HUD's action was improper and specific performance in the form of payment.[26] The court stated, "[t]he thrust of Suburban's claim [was] that HUD breached the insurance contract when it refused to accept assignment of the mortgage and pay Suburban the insurance proceeds."[27] The court then concluded that the COFC could provide an adequate remedy, and was therefore the proper forum.[28] In a final note, the CAFC stated that since the Tucker Act specifically allows for contract actions against the

---

[14] *Id*. at 1124.

[15] *Id*. at 1119.

[16] *Id*.

[17] 28 U.S.C.S. § 1331. This statute states, "the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.*

[18] 5 U.S.C.S. §§ 701–06.

[19] 28 U.S.C.S. §§ 2201–02.

[20] *Suburban Mortgage*, 480 F.3d at 1119.

[21] *Id*.

[22] *Id*. As an alternative to dismissal, the Government requested that the district court transfer the case to the COFC pursuant to 28 U.S.C. § 1631. *Id.*

[23] *Id.*

[24] *Id*. at 1119 (quoting Suburban Mortgage Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev., 2005 WL 3211563, at *6 (D.D.C. 2005)).

[25] *Id*. at 1117. Judge Plager writes:

> The suit was cast in part as an action for specific performance of the contract and in part as a declaratory judgment action. The relief sought was to require the Government to perform its contract obligations so that Suburban Mortgage could get the money allegedly due it under the insurance agreement.

Id.

[26] *Id*. at 1117–18, 1126.

[27] *Id*. at 1127.

[28] *Id*. With regard to other relief sought, the CAFC stated:

> Nor are Suburban's concerns about possible bankruptcy, loss of reputation, and lost future profits a basis for saying that there is not an adequate remedy in the Court of Federal Claims. Those concerns can be alleged by any claimant seeking money from the

government, other courts have decided that the Tucker Act precludes APA contract claims of any kind, either for damages or specific performance.[29] The CAFC decided not to rule on that issue, and instead based its decision on the limitations of the APA.[30] That argument would not have helped Suburban in any event.

Which Act Has Jurisdiction When the Government Sells Services?

In *North Star Steel Co. v. United States*, the CAFC reversed a COFC decision that jurisdiction was under the CDA, where the plaintiff was a third party beneficiary to a contract in which the government was selling services.[31] Nevertheless, the CAFC concluded that the COFC did have jurisdiction to hear the case under the Tucker Act.[32]

The Department of Energy's Western Area Power Administration (WAPA), is one of four power marketing administrations within the U.S. Department of Energy, marketing and delivering hydroelectric power and related services within a fifteen-state region of the central and western United States.[33] North Star was a steel manufacturer with an agreement for power from Arizona Electric Power Cooperative, Inc. (AEPCO), a generation and transmission cooperative organized under the Department of Agriculture's Rural Utility Service Administration.[34] Under what was known as the Consolidated Arrangements Contract (CAC) between WAPA and AEPCO for the benefit of North Star, WAPA agreed to provide both non-firm transmission service and regulating services for North Star's power requirement.[35] North Star brought suit in the COFC for breach of the CAC.[36]

The COFC held that it had jurisdiction over North Star's suit under 28 U.S.C. § 1491(a)(2) because the suit involved a claim arising under section 10(a)(1) of the CDA.[37] At the CAFC, both parties argued that the CDA did not apply to a contract involving the provision of services by the government, but applied only when the government is the acquiring party.[38] The CAFC agreed and stated "The CDA applies to contracts entered into by an executive agency for: (1) the procurement of property, other than real property in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair or maintenance of real property; or (4) the disposal of personal property."[39]

Although the CDA did not apply to the CAC because it was a contract for the provision of services by the government, the CAFC found jurisdiction with the COFC under the Tucker Act.[40] The CAFC concluded that North Star's claim arose out of an express contract with the government, and therefore the Tucker Act gave the COFC jurisdiction.[41] Consequently, COFC had jurisdiction either way.

> Government for an allegedly wrongful failure to pay a claim; to the extent they have merit in a given case, money usually can assuage the wrong.

Id. (citing Bowen v. Massachusett, 487 U.S. 879, 925 (Scalia, J., dissenting)).

[29] *Id.* at 1128.

[30] *Id.*

[31] N. Star Steel Co. v. United States, 477 F.3d 1324 (Fed. Cir. 2007).

[32] *Id.* at 1332; 28 U.S.C.A. § 1491(a)(1) (LexisNexis 2008).

[33] *N. Star Steel Co.*, 477 F.3d at 1326.

[34] *Id.* at 1327.

[35] *Id.*

[36] *Id.* at 1329–30.

[37] *Id.* at 1330 (citing *N. Star Steel*, 68 Fed. Cl. 696 (Fed. Cl. 2005)).

[38] *Id.* at 1331.

[39] *Id.* at 1331–32 (citing 41 U.S.C. § 602(a)).

[40] *Id.* at 1332 (quoting 28 U.S.C. § 1491(a)(1)). The Tucker Act states in relevant part:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C.A. § 1491(a)(1) (LexisNexis 2008).

[41] *N. Star Steel Co.*, 477 F.3d at 1332.

Is It the Same Claim? Even with Different Theory, Claim is Barred by Res Judicata

A COFC issue can be precluded when the Armed Services Board of Contract Appeals (ASBCA) has already made a decision on the same set of transactional facts. This is true even if the legal theory was not presented or considered at the board, such as in the recent case of *Phillips/May Corp. v. United States.*[42]

The case arose from a contract for construction at the Religious Ministry Facility at the Naval Air Station-Joint Reserve Base in Fort Worth, Texas.[43] From July to November 2003, the plaintiff submitted nine claims related to its work under the contract.[44] In November 2003, the plaintiff submitted a claim for "delay, mal-administration of the contract, over-zealous inspection and impossibility."[45] The contracting officer did not act on any of the claims.[46] The plaintiff appealed each of the first nine claims to the ASBCA.[47]

Although the plaintiff raised a claim of over-zealous inspection during one of the ASBCA hearings, the ASBCA did not rule on that claim.[48] The ASBCA did not address over-zealous inspection in any of the other appeals.[49] As for mal-administration or impossibility of performance, the plaintiff did not raise the issue, nor did the ASBCA make a decision on those grounds.[50] As of January 2006, the contracting officer still had not issued a final decision on plaintiff's November claim, and the plaintiff filed a COFC appeal of that claim.[51]

The government moved to dismiss on the basis of res judicata.[52] The court agreed with the plaintiff in that the specific claims it raised before COFC differ from the claims it raised in its ASBCA appeals, but the court recognized that the claims were all "based on the same, or nearly the same, factual allegations, that is, that the Government's failure to timely act and its penchant for changing the design led to delays for which plaintiff contends it is entitled to be compensated."[53] The court goes on to state that because the plaintiff's COFC claims were based on the same transactional facts as its nine appeals to the ASBCA, the claim preclusion aspect of res judicata barred the action.[54] The case was dismissed.[55]

Equal Access to Paralegals at Cost, Not at Market Rate

In *Richlin Security Service Company v. Chertoff*,[56] the CAFC decided that paralegal services could be reimbursed under the Equal Access to Justice Act (EAJA) at actual cost to the attorney and not at prevailing market rates.[57] The main focus of the case was whether to call the paralegal services and "expense" or a "fee."[58] If paralegal services are to be considered part of attorney's fees, they could be billed at market rates, however, as expenses, they could only be billed at cost. The court

---

[42] 76 Fed. Cl. 671 (2007).

[43] *Id.* at 672.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* at 673.

[50] *Id.*

[51] *Id.* at 672.

[52] *Id.* at 673–74. "Although plaintiff chose not to raise its claims of over-zealous inspection, mal-administration of the Contract, and impossibility before the ASBCA, defendant argues that it could have, and thus *res judicata* precludes litigation of those claims, as well as the claims actually litigated before the ASBCA." *Id.*

[53] *Id.* at 675–76.

[54] *Id.* at 676 (citing Pactiv Corp. v. Dow Chem. Co., 449 F.3d 1227, 1230 (Fed. Cir. 2006) ("[T]he defense of claim preclusion will generally be available where the asserted claim was, or could have been, raised in a prior action between the parties which has been adjudicated on the merits.")).

[55] *Id.*

[56] 472 F.3d. 1370 (Fed. Cir. 2006) (rehearing denied).

[57] *Id.* at 1381.

[58] *Id.* at 1374.

recognized that EAJA "fees and expenses" included the reasonable expenses of expert witnesses and reasonable attorney or agent fees.[59] Although the wording of the EAJA statute could be read to include other types of fees, the court concluded that "the statutory text compels a conclusion that EAJA permits only reimbursement of expert, agent, and attorney's fees."[60] In fact, Richlin argued that paralegal services should be reimbursed under the specific category of "attorney's fees."[61] Accordingly, the court considered whether paralegal services could fall within the definition of attorney's fees.[62]

The CAFC distinguished the previous Supreme Court's treatment of paralegal services under section 1988 of the Civil Rights Attorney's Fees Awards Act (Civil Rights Act)[63] by stating that where there are "differences in the surrounding language, structure and purpose of the statute, the Supreme Court has interpreted identical language in different statutes differently."[64] The CAFC noted that the under the Civil Rights Act § 1988 the effect of denying "fee" recovery for paralegal services would be to deny recovery completely, whereas EAJA allows for recovery of "expenses."[65] The CAFC then discusses how allowing paralegal services to be billed as "fees" subject only to the cap on attorney fees would create a "perverse incentive" to shift legal work from attorneys onto paralegals and "distort the normal allocation of work," creating "less efficient legal services."[66]

The court then discussed the Senate report accompanying EAJA bill of 1984.[67] The court concluded that Congress did not intend to include paralegal expenses in "attorney's fees," but rather intended that paralegal services be billed as expenses limited to the attorney's cost.[68] Ultimately, the interests of legal efficiency triumph over the creation of perverse incentives.

Attorney's Fees Have to Be Reasonable?

In addition to paralegal services, the CAFC also looks at EAJA fees for attorneys in *Hubbard v. United States*,[69] where an award of $400 in damages resulted in an award of $110,000 in attorney's fees. At the COFC, Hubbard originally sought damages of $627,000, mostly in lost profits.[70] The COFC rejected the lost profits claim and awarded damages of only $400 for repaving a damaged concrete slab.[71] The government argued that the COFC's award of $400 represented only nominal damages and that Hubbard should not receive any attorney fees,[72] or in the alternative, that Hubbard failed to prove the lost profits (the majority of its claim), and therefore was not entitled to EAJA attorney's fees.[73]

---

[59] *Id.* (citing 5 U.S.C. § 504(b)(1)(A) (2000)).

[60] *Id.*

[61] *Id.*

[62] *Id.* at 1375.

[63] 42 U.S.C. § 1988 (LexisNexis 2008).

[64] *Richlin Sec.*, 472 F.3d. at 1378.

[65] *Id.* at 1378–79.

[66] *Id.* at 1379–81.

[67] *Id.* at 1381 (citing S. REP. NO. 98-586, 98th Cong., at 15 (1984)).

[68] The court's analysis of the Senate report was as follows:

> When Congress acted to make EAJA permanent in 1984, the Senate report accompanying the bill clarified the meaning of "fees and expenses." S. Rep. No. 98-586, 98th Cong., 2d Sess., at 15 (Aug. 8, 1984). The Senate report stated that "though no language change takes place, clarification of the term [fees and expenses] is necessary" because there was a dispute about whether "fees and expenses," as listed in the statute, is exclusive or whether it included other reasonable expenses. Id. The Senate report clarified that the term "fees and expenses" is inclusive and permits the reimbursement of all "reasonable expenses." The report then stated that "[e]xamples of the type of expenses that should ordinarily be compensable include paralegal time (billed at cost)."

Id.

[69] 480 F.3d 1327 (Fed. Cir. 2007).

[70] *Id.* at 1330.

[71] *Id.*

[72] *Id.* at 1331. The government cited the Supreme Court in *Farrar v. Hobby*, 506 U.S. 103, 115 (1992), "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all."

[73] *Id.* at 1332.

The CAFC affirmed the COFC's determination as to the award of fees, but questioned the amount of the fee and the way it was determined.[74] The court referred to the Supreme Court's rule on the fee shifting provision of the Civil Rights Act established in *Hensley v. Eckerhart* [75] and noted that the degree of success is the most critical factor in determining the reasonableness of a fee award.[76] Although those cases involved the Civil Rights Act, the CAFC applied the same logic to the fee shifting provision of EAJA.[77]

The CAFC concluded that the COFC had correctly taken the first step of the *Hensley* analysis by multiplying the hours spent by the hourly rate; however, the COFC failed to determine "whether there were circumstances that required a reduction in the fee thus calculated—particularly whether such fee would be excessive in light of the results achieved."[78] The court vacated the award of attorney fees and remanded the case for COFC for reconsideration.[79] Maybe the award will be more reasonable next time.

CDA and Prompt Payment Act Interest: You Might Have It Both Ways

After recovering CDA interest, why not ask for Prompt Payment Act (PPA) Interest as well?[80] That is what the Plaintiff attempted in *Laurelwood Homes LLC v. United States*.[81] The Plaintiff asserted a claim for PPA interest after the Navy had already paid CDA interest on damages due to vandalism at residential military housing.[82]

Plaintiff Laurelwood and the Navy entered into a lease agreement for residential real property located within a Naval station.[83] Laurelwood had been submitting invoices to the Navy for vandalism repairs to the housing, and the Navy had consistently paid those claims.[84] In August 2006, the contracting officer notified Laurelwood that the Navy would no longer pay invoices for vandalism repairs.[85] Laurelwood then submitted a formal CDA claim for the vandalism repairs.[86] In October 2006, another contracting officer issued a final decision denying the claim and also determining that previous payments were "erroneous."[87]

Laurelwood filed suit in the COFC requesting damages plus interest, for vandalism to its property and a denial of the Navy's claim for the erroneous payments.[88] In March 2007, the contracting officer revoked her previous demand for repayment and notified Laurelwood of the Navy's payment of damages plus CDA interest, for the vandalism damages sought in its claim.[89] In April 2007, Laurelwood amended its complaint to seek PPA interest.[90]

---

[74] *Id.*

[75] *Id.* (citing Hensley v. Eckerhart, 461 U.S. 424 (1983), *Farrar*, 506 U.S. 103; Marek v. Chesny, 473 U.S. 1 (1985)).

[76] *Id.*

[77] *Id.*

[78] *Id.* at 1333. The CAFC continued to describe the problem in more detail:

> Although at trial Hubbard sought damages of $627,000, he recovered only $400— less than 1/10th of 1% of the amount sought. The $110,000 attorney's fee awarded was 275 times the amount of the recovery. The trial court made no attempt to explain why that fee—which on its face seems grossly excessive in light of the small recovery—could be deemed a reasonable one in the light of "the degree of success obtained."

Id. (quoting *Farrar*, 506 U.S. at 114).

[79] *Id.* at 1335.

[80] Prompt Payment Act, 31 U.S.C. §§ 3901–3907 (2000).

[81] 78 Fed. Cl. 290 (2007).

[82] *Id.* at 292.

[83] *Id.* at 291.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* at 291–92.

[88] *Id.* at 292.

[89] *Id.*

[90] *Id.*

Citing the PPA and case law, the COFC explained that the PPA only required interest for untimely payments, but not for payments that are under dispute.[91] Laurelwood contended that there was no "objectively discernable dispute," and since the contracting officer reversed her decision and paid the invoices in full, the government had essentially conceded there was no actual dispute.[92] The court disagreed, and held that the claim was in a legitimate dispute at the time the Defendant was initially denied payment.[93]

Laurelwood offered by way of comparison, the case of *North Star Alaska Housing Corporation* (*North Star*)[94] which involved a similar agreement between an Alaska corporation and the Army Corps of Engineers to lease property located on an Army installation.[95] In that case, the government was held liable for vandalism damages that occurred while the government occupied the property.[96] The court distinguished the *North Star* case due to different lease provisions.[97] Since there was a legitimate dispute in the *Laurelwood* situation, PPA interest did not apply.[98]

When the Fax Confirmation Doesn't Confirm Receipt

As it turns out, that fax confirmation sheet that agencies often save as proof of receipt, does not prove much, at least by itself. In the case of *Brickwood Contractors, Inc. v. United States*,[99] the government offered a fax confirmation sheet as proof that the contractor received a termination notice.[100] The plaintiff denied receiving the fax, and filed its appeal within one year of receiving notice by certified mail.[101]

The government moved to dismiss for lack of jurisdiction because the complaint was filed more than twelve months after the fax was received, so the statute of limitations period had expired.[102] The government argued that the fax confirmation sheet together with a declaration by the contracting officer stating that the fax was successfully transmitted, proved contractor receipt of the final decision of the contracting officer.[103]

Citing a CAFC case, the COFC held that a fax confirmation sheet by itself, without a confirming phone call, did not constitute adequate notice for CDA purposes.[104] The COFC noted that there was "understandable confusion" since the government failed to communicate which receipt date was to start the clock for the statutory period, nor did the government reference the earlier faxed copy in its certified copy.[105] The COFC followed the rule according to the ASBCA, that the

---

[91] *Id.* The court quoted the PPA:

> Except as provided in section 3904 of this title, this chapter does not require an interest penalty on payment that is not made because of a dispute between the head of an agency and a business concern over the amount of payment or compliance with the contract. A claim related to the dispute, and interest payable for the period during which the dispute is being resolved, is subject to the Contract Disputes Act of 1978. 31 U.S.C. § 3907(c) (2000).

Id.

[92] *Id*. at 293. The phrase "objectively discernable dispute" was mentioned in *Arkansas Best Freight Sys., Inc. v. United States*, 20 Cl. Ct. 776, 779 (1990).

[93] *Id*. at 294.

[94] *Id*. at 293 (citing N. Star Alaska Hous. Corp. v. United States, 30 Fed. Cl. 259 (1993)).

[95] *Id*. (citing *N. Star Alaska*, 30 Fed. Cl. at 265).

[96] *Id*. at 293.

[97] *Id.* In the *North Star* case, the Government was liable for any damage beyond normal wear and tear. The evidence showed that the Army left an area of base open and unguarded. In the *Laurelwood* case, the lease agreement put the burden on the contractor for "malicious damage (other than Government-caused)." *Id.*

[98] *Id*. at 294.

[99] 77 Fed. Cl. 624 (2007).

[100] *Id*. at 625.

[101] *Id*. at 625, 627.

[102] *Id*. at 627.

[103] *Id*. at 625. The government also asserts that contractor's subsequent evasive behavior after the date the fax was transmitted served as additional evidence that Plaintiff did, in fact, receive the default termination notice.

[104] *Id.* at 632 (citing Riley & Ephriam Constr. Co. v. United States, 408 F.3d 1369 (Fed. Cir. 2005)). Another court stated, "All the government has to do is make a simple telephone call to the contractor or its authorized representative to affirm actual receipt of the fax. This simple step would give the government assurance of actual receipt that the regulation requires it to have." *Riley*, 408 F.3d at 1373.

[105] 77 Fed. Cl. at 633 (2007).

contractor is entitled to compute the statutory period from the latter date of receipt of the final decision. The COFC stated, "in this case, the date that the final decision was received via certified mail."[106] The government's motion to dismiss was denied.[107] The fax confirmation sheet alone did not meet the standard.

New Interim Rules of Procedure Similar But Different

The Civilian Board of Contract Appeals (CBCA) published interim rules of procedure which became effective on 5 July 2007.[108] The public comment period ended on 28 September 2007.[109] The CBCA incorporated many of the rules of its predecessor boards into the new rules.[110] Chairman of the CBCA, Judge Stephen Daniels, told *The Government Contractor*, "For practitioners who understood the procedure before, things should remain pretty much the same . . . ."[111] The Board expects to issue final rules of procedure some time in the first half of 2008.[112] In addition to hearing and deciding contract disputes, the new CBCA has inherited many other types of proceedings as required by statutes and regulation, such as: grants and contracts under the Indian Self-Determination and Education Assistance Act, Federal Crop Insurance cases, Federal Employee travel claims, etc.[113] Also of note, Judge Daniels indicates in his introduction that the CBCA does not have the legal authority to enforce subpoenas against a federal agency.[114] This comment will likely draw many further comments.[115]

One Contractor Sues to Enforce the Contracting Officer's Decision

In *Lavezzo v. United States*,[116] a contractor sued to enforce a contracting officer's final decision in its favor, which the government disclaimed for lack of authority.[117] Due to "considerable agency discord,"[118] the plaintiff's claim was handed over to a contracting officer from another agency, resulting in a second "final decision."[119] The court described the government's handling of plaintiff's claims as being "at odds with the requirement of the Contract Disputes Act that contracting officers act independently when adjudicating disputes."[120] Citing the CDA[121] and case law,[122] the court outlined

---

[106] *Id*.

[107] *Id*.

[108] Rules of Procedure of the Civilian Board of Contract Appeals, 72 Fed. Reg. 36,793 (July 5, 2007) (to be codified at 48 C.F.R. pts. 6101, 6102).

[109] *Id*. at 36,794.

[110] *Id*. at 36,795.

[111] *Civilian Board of Contract Appeals Releases Interim Rules of Procedure*, 49 GOV'T CONT. ¶ 264 (2007).

[112] *Id*.

[113] 72 Fed. Reg. 36,794.

[114] *Id*. at 36,795.

[115] *See, e.g.*, David M. Nadler & Joseph R. Berger, *Subpoena Power at the Civilian Board of Contract Appeals—GSA Should Reconsider Its Position and Reverse Course*, 49 GOV'T CONT. ¶ 349 (2007).

[116] 74 Fed. Cl. 502 (2006).

[117] *Id*. at 503.

[118] The contracting officer's supervisor was not a contracting officer, but gave direct orders not to process the claim, then later reassigned the claim processing by paying an outside agency to handle the claim for a fee. *Id.*

[119] *Id*. The opinion stated that, "The record reflects considerable agency discord in the handling of Plaintiff's claims, and Plaintiff's understandable confusion upon receiving two conflicting contracting officer final decisions addressing the same claims." *Id*.

[120] *Id*. at 509. The court describes the situation from the plaintiff's point of view:

> From [Plaintiff's] vantage, in its first Government contracting foray, it received two conflicting contracting officer final decisions within a month addressing the same claims. One of these decisions was an 18-page document filled with personal attacks on an agency supervisor, and the other was a set of rubber-stamp claim denials from the Department of Treasury. With even a rudimentary knowledge of the federal procurement process, [the plaintiff] may have rightly wondered why an agency supervisor tried to prevent the assigned contracting officer from deciding its claims, and why it was necessary to go outside the agency to another contracting officer.

Id.

[121] *Id*. The Contract Disputes Act gives contracting officers "final and conclusive authority" to decide claims, and their decisions are "not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced . . . . " 41 U.S.C. § 605(b) (2000).

the rule that, "[w]hile contracting officers are encouraged to seek advice from legal counsel and other agency experts, their decisions must be 'personal [and] independent,' and 'even the appearance of coercion [must] be avoided.'"[123] The case was remanded to the agency for yet another final decision by an impartial contracting officer.[124] In agencies with contracting officers who work with inexperienced supervisors, it is "remarkable" that this type of situation does not occur more frequently.[125] One may hope that the next final decision will be better.

Major Michael Wong

[122] *Id*. at 509 (citing Pacific Architects & Eng'rs, Inc. v. United States, 491 F.2d 734, 744 (1974); New York Shipbuilding Corp. v. United States, 385 F.2d 427, 435 (1967)) ("Ultimately, the contracting officer must "put his own mind to the problems and render his own decisions.").

[123] *Id*. (quoting Edmund Leising Bldg. Contr., Inc., VABCA No. 1428, 81-1 BCA 14,925).

[124] *Id*.

[125] 21 NASH & CIBINIC REP. ¶ 20 (2007).

Terminations for Default

You Can't Play Games With Contract Claims

In *Moreland Corp. v. United States*,[1] the Department of Veterans Affairs (VA) had contracted with Moreland to build a medical clinic which the VA would then lease from Moreland for a term of fifteen years. After five years of occupancy, latent defects became apparent which posed no danger to the occupants and which the court found to be "largely cosmetic and easily could have been repaired if the VA had permitted Moreland to do so."[2] The VA, however, prevented Moreland from timely making the repairs by prohibiting any repair work until Moreland submitted a "comprehensive remediation plan," which was not required by the contract, and by making other "extra-contractual" demands that prevented Moreland from making the repairs.[3] Just days after giving Moreland authorization to begin work but before the weekend on which work was to begin, the VA's engineering consultant alleged that the building was "unsafe for continued occupancy."[4] Three days later, the VA notified Moreland the lease was terminated for default because of Moreland's alleged failure to make satisfactory progress to repair the defects.[5] As the owner of the building, Moreland made the repairs notwithstanding the termination, while the VA continued to occupy the building. Several months later, the VA moved out of the building and stopped making lease payments.

The court held that Moreland was not in default, finding that the VA's actions had prevented the repairs prior to termination.[6] The clauses of the lease did not provide the VA with the right of termination for default anyway, instead providing other remedies governing defective work such as having the repairs performed at Moreland's expense.[7] The repairs could have been completed within thirty days with work performed only during non-duty hours.[8] The VA was required by the lease to allow Moreland access to the building to make the repairs, but breached the lease by preventing Moreland from making the repairs until after the termination.[9] The VA also failed to show constructive eviction, since the VA's occupancy and use of the building was never impacted in any way by the defects and the VA continued to occupy the building for nine months after the default termination.[10]

Whenever the government has a right to terminate for default, the contracting officer must still exercise "reasoned discretion" in making the decision to terminate for default.[11] The court found that this contracting officer abused his discretion in that regard.[12] In view of the fact that the defects did not hinder the clinic's operation, the building was safe for continued occupancy, and that necessary repairs could be quickly made without interrupting the clinic's operation, the decision to terminate the lease for default and move nine months later to another facility costing $4,000,000 per year more "was an irrational decision by any measure, and one that cannot have resulted from the exercise of reasoned discretion."[13]

---

[1] 76 Fed. Cl. 268 (2007).

[2] *Id*. at 270.

[3] *Id*. at 289. The VA later required a more detailed remediation plan, denied Moreland's initial request to inspect the facility defects during non-duty hours, and gave belated approval for Moreland to proceed with the work, conditioned upon Moreland executing an Indemnification and Remediation agreement which was also not required by the contract. *Id*. at 278–79, 289–90.

[4] *Id*. at 279–80. The court found that assertion by the VA's consultant to be "incorrect and unreliable." *Id*. at 286. In fact, both before that letter, and after termination, the VA's consultant indicated that the building was safe for occupancy. *Id*. at 287. The court suspected that "some of his professionalism may have been compromised to satisfy the desires of his client," and noted that he had a conflict of interest. *Id*. at 283. The court placed greater weight in the testimony of Moreland's structural expert, who convincingly showed that the defects never posed any threat to continued safe occupancy of the building. *Id*. at 287.

[5] *Id*. at 279.

[6] *Id.*

[7] *Id*. at 285–86.

[8] *Id*. at 289.

[9] *Id*. at 290.

[10] *Id*. at 286. The standard for establishing a constructive eviction is a two-part test: "(1) Whether the landlord's acts or omissions 'substantially interfered with the beneficial use or enjoyment of the premises' by the tenant; and (2) if so, whether the tenant abandoned the premises within a reasonable time." *Id*. at 287 (quoting Richardson v. United States, 17 Cl. Ct. 355, 357 (1989)).

[11] *Id*. at 290 (citing GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 49.402-3 (July 2007) [hereinafter FAR]).

[12] *Id.*

[13] *Id*. Moreland offered evidence showing that "the VA's real motive was to move eventually to a new facility better able to accommodate the rapid population growth in the Las Vegas area." *Id*. The court found it unnecessary to make findings on that issue, but noted that "it may be that Plaintiff's

What makes this case more interesting is the conduct of the government that the court held to be a breach of the covenant of good faith and fair dealing.[14] Prior to the discovery of the latent defects, Moreland had submitted two claims relating to the construction of building that the contracting officer determined to be meritorious and was prepared to pay.[15] The contracting officer nonetheless denied the valid claims on advice of counsel, as a tactic in negotiating a settlement on other claims.[16] The court noted that contractors are legally required to submit claims in good faith, certifying that the claim "accurately reflects the contract adjustment for which the contractor believes the government is liable,"[17] and that this requirement of good faith with regard to claims runs both ways. The contracting officer's treatment of claims "is not intended to be a negotiating game where the agency may deny meritorious claims to gain leverage over the contractor."[18] Thus, claims must be both submitted and decided in good faith, and neither party may stray from that standard in order to gain some tactical advantage over the other.[19]

The court found that this and other conduct by the VA constituted bad faith,[20] under either the "clear and convincing evidence" standard "or some lesser measure."[21] The court rejected the government's argument that the standard Termination clauses[22] incorporated by reference into the lease prevented Moreland from recovering future lost rent under the lease, finding that the government's right to terminate for the convenience of the government was applicable only during the construction of the building but had been specifically deleted by the parties with respect to the lease agreement.[23] The court therefore awarded Moreland the unpaid rent that it would have received over the remainder of the fifteen-year lease.[24]

A Small Change Is a Cardinal Change If It Is Not Permitted under the Changes Clause

The Court of Federal Claims recently overturned a termination for default resulting from a contractor's refusal to perform a unilateral change that, while small, was not permitted by the Changes clause. In *Keeter Trading Co., Inc. v. United States*,[25] the United States Postal Service (USPS) had a contract with a company owned and operated by Mr. Edward Keeter, for the delivery of mail to 250 rural residences in Arkansas. Over a year into the successful contract performance, the USPS contracting officer issued a unilateral change instructing Keeter to service an additional fifty-two mailboxes located along

---

assessment of the VA's motive is correct. Certainly, the court can see no other explanation from the record, except perhaps bureaucratic ineptitude, to account for such a senseless decision." *Id*. at 290–91.

[14] *Id.*

[15] *Id*. at 291.

[16] *Id*. at 291–92.

[17] *Id*. at 292 (quoting 41 U.S.C. § 605(c)(1) (2000)).

[18] *Id*.

[19] The court concluded: "The Contracting Officer's outright denial of meritorious claims to gain some advantage over the contractor will not be condoned by this Court." *Id*.

[20] *Id*. at 293. The court also found bad faith on the part of the VA in its attempt to create a justification to require Moreland to perform a comprehensive structural study at Moreland's expense—an expense for which the VA would otherwise be responsible to determine whether the VA could install a heating ventilation and air conditioning system on the roof of the building. *Id*. at 292–93.

[21] *Id*. at 291. The court cited the "clear and convincing evidence" standard set forth in *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239–40 (Fed. Cir. 2002), which suggested that courts and boards require "clear and convincing evidence" (formerly described as "well-nigh irrefragable proof") of malice or "designedly oppressive conduct" to overcome the presumption that public officials act in good faith in the exercise of their responsibilities. *Id.* However, the court also cited as a "but see," without any discussion, *Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 771 (2005), in which the COFC had suggested that the presumption of good faith has limited applicability, and that where it does apply, the heightened standard of proof to overcome the presumption is limited only to cases in which government officials are accused of fraud or quasi-criminal conducts in performing their duties. *Id.* The court also noted:

> A breach of the covenant of good faith occurs when there has been "sharp dealing," such as taking "deliberate advantage of an oversight by your contract partner concerning his rights under the contract." *Mkt. St. Assocs. L.P. v. Frey*, 941 F.2d 588, 594 (7th Cir. 1991). *See also North Star Alaska Housing Corp. v. United States*, 76 Fed. Cl. 158, 2007 U.S. Claims LEXIS 108, 2007 WL 1041442 (Fed. Cl. Apr. 2, 2007).

Id. The court did not specifically identify the applicable standard in this case, finding that the VA's conduct "was deplorable by any measure, be it 'clear and convincing' or some lesser standard." *Id*.

[22] FAR, *supra* note 11, at pts. 52.249-2, 52.249-8.

[23] *Moreland*, 76 Fed. Cl. at 291.

[24] *Id*. at 295.

[25] 79 Fed. Cl. 243 (2007).

Keeter's existing route and increasing annual compensation by $1,087.56.[26] Keeter refused to perform the additional work, believing that the price adjustment was undervalued.[27] Ultimately, the USPS agreed and further increased the annual compensation by $1,602.72, for a total of $2,690.28.[28] Nevertheless, the contract's Changes clause permitted the contracting officer to make unilateral changes that would increase compensation by no more than $2,500—any changes in excess of that amount could be made only by mutual agreement.[29] When Keeter refused to perform the additional work on the ground that the unilateral change was not permitted by the Changes clause, the USPS procured that work from another source and deducted the cost of that "reprocured" work from payments due Keeter.[30] In response, Keeter ceased all work under the contract, resulting in the termination for default.[31]

While repudiation by a contractor constitutes a valid ground for the government to terminate a contract for default, the court noted that a contractor's refusal to perform is not a repudiation if it was in response to a material breach of the contract by the government.[32] The court therefore considered whether the contracting officer's unilateral change in violation of the Changes clause was a cardinal change which constituted a breach of the contract and entitled Keeter to stop performance.[33]

In its Motion for Summary Judgment, the Government relied upon *Becho, Inc. v. United States*,[34] in which the COFC had stated that,

> while there is no precise calculus for determining whether a cardinal change has occurred, the courts have considered, *inter alia*, the following factors: (i) whether there is a significant change in the magnitude of work to be performed; (ii) whether the change is designed to procure a totally different item or drastically alter the quality, character, nature or type of work contemplated by the original contract; and (iii) whether the cost of the work ordered greatly exceeds the original contract cost.[35]

Applying these factors, the government argued that the change of adding mailboxes within Keeter's delivery route was minor in magnitude of the work to be performed, was the identical type of work required by the contract, and was only a slight increase in the original cost, and therefore could not be deemed a "cardinal change" of the contract.[36]

The court noted that "[t]hose factors are especially helpful in cases in which a challenged contract includes a standard changes clause which provides little specific guidance regarding changes,"[37] and agreed with the government that the increase in the workload and compensation occasioned by the change in this case did not appear to be a substantial alteration of the contract.[38] Yet, those factors cannot "override the specific contractual terms of the parties' narrowly drafted Changes clause, as those terms represent the essence of the agreement to contract."[39] The court held that because the unilateral change in this case violated the express terms of the Changes clause, "[i]t follows that the modification was, in fact, a cardinal change which entitled [Keeter] to cease performance."[40] Accordingly, the USPS had failed to show that the decision to terminate the contract for default was proper.[41]

---

[26] *Id*. at 246.

[27] *Id*. The contract contained a precise formula for valuing the additional work caused by adding mailboxes to the route which, when applied to these facts, resulted in an increase of more than $2,500 to the annual contract price. *Id*. at 255.

[28] *Id*. at 246.

[29] *Id*. at 254.

[30] *Id*. at 247.

[31] *Id*.

[32] *Id*. at 253 (citing Murdoch Mach. & Eng'g Co. v. United States, 873 F.2d 1410, 1413 (Fed. Cir. 1989)).

[33] *Id.*

[34] 47 Fed. Cl. 595 (2000).

[35] *Id.* at 601.

[36] *Keeter Trading Co.*, 79 Fed. Cl., at 260.

[37] *Id*.

[38] *Id*. at 261.

[39] *Id*.

[40] *Id*. (citing PCL Constr. Servs., Inc. v. United States, 47 Fed. Cl. 745, 804 (2000)).

[41] *Id*.

Having concluded that the USPS breached the contract by making a unilateral change that was not permitted under the Changes clause, the court needed to address Keeter's request for breach damages. The court noted that "in government contract cases in which a termination for default is found to be improper, it will be converted to a termination for the convenience of the government, and damages calculated accordingly,"[42] and that the contract's Termination for Default clause specifically provided for that same result.[43] However, if the contractor can show that the termination was made in bad faith, then he can be entitled to traditional breach damages, including expectation damages, rather than the lesser damages resulting from a termination for convenience.[44]

The court recited some allegations made by Keeter in his attempt to show that the government had acted in bad faith in terminating the contract for default.[45] Although opining that "[t]here can be no real dispute that [Keeter's] allegations, even when coupled with the documentation contained in the record, do not meet the standard of 'well-nigh irrefragable proof' required to establish bad faith on the part of the government,"[46] the court noted that the issue of bad faith in this case was an "intensely factual question" for which more information was needed and which was inappropriate for summary judgment.[47] The court therefore stayed the issue of quantum pending the development of further facts needed to resolve the issue.

Anticipatory Repudiation Clearly Not Clear

What is the difference between saying that you will not perform unless certain conditions are met, and saying that you intend to perform once certain issues are resolved? The Civilian Board of Contract Appeals (CBCA) this year found that there was a "big difference."[48] In *David/Randall Associates*, the National Park Service (NPS) suspended performance of a roofing contract. Fifteen months later, the NPS forwarded to the contractor a copy of a report alleging deficiencies in the work and asked the contractor about its intentions in fulfilling its obligations under the contract.[49] After examining the report, the contractor disputed some of the issues in the report and ultimately replied that "[i]t is David/Randall's intention, upon satisfactory resolution of a number of outstanding issues, to complete performance of this suspended project," identifying issues that required resolution including the scope of the remaining work, structural issues, performance schedule, and payment issues.[50] Within hours of that response, the contracting officer terminated the contract for default, explaining that the contractor's response indicated that the contractor will not complete performance unless certain conditions are met, and that "such preconditions constitute an anticipatory breach of the contract."[51]

---

[42] *Id*. at 262 (citing Best Foam Fabricators, Inc. v. United States, 35 Fed. Cl. 627, 638 (1997)).

[43] *Id*. The relevant portion of the Termination for Default clause used in the contract was nearly verbatim with the corresponding paragraph of the clause at FAR 52.249-8 Default (Fixed-Price Supply and Service), which states:

> If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

FAR, *supra* note 11, at pt. 52.249-8(g).

[44] *Keeter Trading Co.*, 79 Fed. Cl. at 263

[45] *Id*. at 264–65. These included Keeter's detailed allegations of personal bias against him by the Postmaster, who he alleged was the driving force behind the decision to change his duties and the decision to terminate the contract, and that the amount that USPS deducted from his pay to cover the cost of procuring alternative delivery services for the extra mailboxes "were based on a much larger number of work hours than [USPS] had proposed to pay [Keeter]" for the work. *Id*. at 265. The court also noted that the government's attempt to make the change using two unilateral change orders, each under the $2,500, rather than with one change order over $2,500, "raises the question of whether the agency had a specific intent to deprive [Keeter] of [his] contractual rights." *Id*. (citing Libertatia Assocs., Inc. v. United States, 46 Fed. Cl. 702, 707 (2000)).

[46] *Id*. at 265. In articulating the standard the contractor must meet to show bad faith, the court had earlier also made reference to the "clear and convincing evidence" standard enunciated in *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002):

> It cannot be disputed that, in attempting to make such a showing, a contractor "must meet a high burden because this Court assumes that the Government acts in good faith." This requires "well-nigh irrefragable proof" that the government acted in bad faith. Stated more plainly, a plaintiff is required to raise "clear and convincing" evidence of improper motive on the part of the government. This standard, while somewhat daunting, "is not intended to be impenetrable," and it "does not insulate government action from *any* review by courts." Instead the relevant question is whether the plaintiff has presented evidence that the government had a specific intent to injure it, or was motivated by animus toward the plaintiff. Indeed, the concept of "bad faith" has traditionally been equated with "actions motivated by malice or the specific intent to injure."

Keeter Trading Co., 79 Fed. Cl. at 263–64 (emphasis in original) (citations omitted).

[47] *Id.* at 265.

[48] David/Randall Assocs., Inc., v. Dep't of the Interior, CBCA Nos. 162, 243, 07-2 BCA ¶ 33,598.

[49] *Id*. at 166,414.

[50] *Id*. at 166,415.

[51] *Id*.

The CBCA found that the contractor's response was "clearly" not an anticipatory repudiation of the contract.[52] Citing long-standing precedent,[53] the Board stated that anticipatory repudiation required a "distinct and unequivocal absolute refusal to perform the promise."[54] Contrary to the NPS's characterization of the contractor's response, the contractor did *not* refuse to perform, but was instead "stating its willingness to perform and at the same time trying to get to a situation where it could reasonably begin performance under a considerable suspension period."[55] The Board stated that "[t]here is a big difference between an absolute refusal to perform unless certain conditions are met, and a statement of intent to perform upon the 'resolution' of certain issues."[56] The Board recognized that after a long suspension period, it is not clear whether the "performance was sufficiently defined to enable [the contractor] to proceed," and that the contractor's response was simply an attempt to get such matters resolved so that it could proceed with performance.[57] This, the Board concluded, does not constitute the absolute refusal to perform required for anticipatory repudiation.[58]

Lieutenant Colonel Michael L. Norris

[52] *Id.* at 166,416.

[53] The Board stated that the standards for anticipatory repudiation were set forth in *United States v. DeKonty Corp.*, 922 F.2d 826 (Fed. Cir. 1991), which relied on *Dingley v. Oler*, 117 U.S. 490 (1886), in which the U.S. Supreme Court stated: "When one party to [a] . . . contract absolutely refuses to perform his contract, and before the time arrives for performance distinctly and unqualifiedly communicates that refusal to the other party, that other party can, if he choose, treat that refusal as a breach . . . ." *David/Randall Assocs.*, CBCA Nos. 162, 243, 07-2 BCA ¶ 33,598, at 166,415 (quoting *Dingley*, 117 U.S. at 499–500).

[54] *David/Randall Assocs.*, CBCA Nos. 162, 243, 07-2 BCA ¶ 33,598, at 166,416 (quoting *Dingley*, 117 U.S. at 503).

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

Terminations for Convenience

Warranty and Upgrade Obligations Survive Contract Termination

Reversing a Court of Federal Claims (COFC) decision from two years ago,[1] this year the U.S. Court of Appeals for the Federal Circuit held that the termination of a contract for convenience does *not* terminate the contractor's obligation to continue providing warranty and upgrade services for the goods purchased under the contract prior to termination. In *International Data Products Corp. v. United States*,[2] the contractor provided computer systems and related services to the Air Force under an indefinite-delivery indefinite quantity (ID/IQ) contract awarded under section 8(a) of the Small Business Act.[3] The Air Force was ultimately compelled to terminate the contract for convenience when the contractor corporation was purchased by a non-section 8(a) concern.[4] At that time, the Air Force had already purchased over $35 million in goods and services under the contract, far in excess of the contract's $100,000 minimum quantity.[5] Upon termination, the Air Force 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.[6] The contractor objected, but continued to provide the warranty services under threat of default and debarment.[7]

At the COFC, the contractor sought 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.[8] 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.[9] But the court also held that the contractor was not required to continue to perform the warranty and upgrade services after the contract was terminated, finding that the statute which required the government to terminate the contract for convenience in these circumstances does not permit a "partial termination of the contract."[10] The court recognized that this holding would result in the Air Force's loss of the warranty and upgrade services for which it had already paid, but noted such losses were contemplated by Congress when it enacted the statute.[11] Still, in the subsequent trial on quantum,[12] the court held that there was no theory under which the contractor could recover for the post-termination warranty services it provided. The court found that the post-termination services were not provided under the terms of either an express or implied contract, because no such contract existed after the termination.[13] And because the COFC lacked jurisdiction over contracts implied in law, the contractor also could not recover in quantum meruit.[14]

---

[1] Int'l Data Prods. Corp. v. United States, 64 Fed. Cl. 642 (2005).

[2] 492 F.3d 1317 (Fed. Cir. 2007).

[3] 15 U.S.C.S. § 637(a) (LexisNexis 2008).

[4] *Int'l Data Prods.*, 492 F.3d at 1321. The Small Business Act required the government to terminate the contract under those circumstances:

> Subject to the provisions of subparagraph (B), a contract (including options) awarded pursuant to this subsection shall be performed by the concern that initially received such contract. Notwithstanding the provisions of the preceding sentence, if the owner or owners upon whom eligibility was based relinquish ownership or control of such concern, or enter into any agreement to relinquish such ownership or control, such contract or option shall be terminated for the convenience of the Government, except that no repurchase costs or other damages may be assessed against such concerns due solely to the provisions of this subparagraph.

15 U.S.C.S. § 637(a)(21)(A).

[5] *Int'l Data Prods.*, 492 F.3d at 1321.

[6] *Id*.

[7] *Id*.

[8] Int'l Data Prods. Corp. v. United States, 70 Fed. Cl. 386, 393 (2006).

[9] Int'l Data Prods. Corp. v. United States, 64 Fed. Cl. 642, 647.

[10] *Id.* at 650 (citing 15 U.S.C. § 637(a)(21)(A)) (LexisNexis 20087).

[11] *Id*. at 651. 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.

Id.

[12] *Int'l Data Prods*. 70 Fed. Cl. at 386.

[13] *Id.* at 399. In a footnote, the court also 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. 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

The Federal Circuit, however, held that the statute did not terminate the contractor's obligation to continue performing the warranty and upgrade services after the termination for convenience.[15] The court first found that the Air Force had already paid for the warranty services, because the warranty accompanied, and was included in the cost of, the equipment that the Air Force had purchased.[16] The court also observed that the COFC's holding was inconsistent with the Federal Acquisition Regulation (FAR), which specifies that termination does not affect the parties' rights and liabilities "concerning defects, guarantees, or warranties relating to any articles or component parts furnished to the Government by the Contractor under the contract," which survive termination.[17] The regulation, the contract, and Air Force's termination notice which tracked the language in the regulation, all supported the court's conclusion.[18] While the court reversed the COFC as to whether the contractor's warranty and upgrade services obligation survives termination for convenience, the court affirmed the COFC's determination that the contractor was not entitled to any termination costs,[19] finding each of the contractor's theories of recovery to be without merit.[20]

A Contractor Being a Pain in the Butt Is a Good Enough Reason to T4C Contract

The government's right to terminate a contract for the convenience of the government is, of course, a very broad right. In a case more notable for its entertainment value than for legal developments, a decision by the Civilian Board of Contract Appeals this year further illustrates the breadth of this right. In *Greenlee Construction, Inc. v. General Services Administration*,[21] a job order contract for construction work was terminated for the convenience of the government after the contractor failed to provide a price proposal for a payment bond required as a result of the contracting officer's unilateral change and for which the government agreed to pay. The contractor, who at the time of termination had not yet performed any work or apparently incurred any costs, appealed the contracting officer's deemed denial of the contractor's claim for $2,282,822 and the contracting officer's final decision denying a $165,000 claim for termination settlement charges, alleging that the termination was unreasonable and in bad faith.[22]

The Board noted that a failure to provide a required bond was a valid ground even for a termination for default, so it was certainly an adequate justification for terminating the contract for convenience.[23] However, the Board noted that even if that justification had not sufficed, "the contracting officer had another, ample reason for issuing the termination: Greenlee was a consistently uncooperative contractor, and it is unquestionably in the Government's interest to be free from such a party."[24] Among the contractor's several other failures to endear himself to the General Services Administration (GSA) were the contractor's demand, two days after award, that GSA not issue any orders for work under certain contract line items because those tasks would net little profit, informing the GSA that if it were given only the guaranteed minimum instead of the

---

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*. at 399 n.11.

[14] *Id*. at 404.

[15] Int'l Data Prods. Corp. v. United States, 492 F.3d 1317, 1320 (Fed Cir. 2007) (LEXIS 2008).

[16] *Id*. at 1322–23.

[17] *Id*. at 1323 (quoting U.S. GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 49.603-1(b)(7)(v) [hereinafter FAR]).

[18] *Id*. While not specifically noted by the court, the statute that compelled termination in this case merely directed that the contract "shall be terminated for the convenience of the Government," giving no indication that the effect of termination under these circumstances would be different from any other termination for convenience. 15 U.S.C.S. § 637(a)(21)(A) (LexisNexis 2008). This point by itself seemingly supports the court's holding that the warranty obligations survive the termination for convenience.

[19] *Int'l Data Prods.*, 492 F.3d at 1320.

[20] *Id.* at 1323–27. The contractor's theories of recovery included "expectation damages, warranty services under an express contract, warranty services under an implied in fact contract, warranty work under a theory of constructive change or equitable adjustment or cardinal change, and quantum meruit based on an implied in fact contract." *Id*. at 1323. Except for the theory of implied in fact contract, over which the COFC lacked jurisdiction, the Federal Circuit rejected each of these theories for essentially the same reasons as had the COFC.

[21] CBCA Nos. 415, 448, 07-2 BCA ¶ 33,619.

[22] *Id*. at 166,509. The claims for these amounts are as interesting as the contractor's conduct before termination, and included such things as anticipated overhead and profits during the base year, both unexercised option years, and two additional years that the contractor alleged would be granted to "favored contractors"; the wages that the contractor's president would allegedly have received over those five years; attorney fees; and an amount the contractor erroneously alleged to be the contract's guaranteed minimum for both the base year as well as for each of the contract's unexercised option years. *Id*.

[23] *Id*. at 166,511.

[24] *Id*.

contract maximum "then we will have more problems." The contractor sought to have the contract prices increased, complaining that the contract provided the contractor with too little profit. The contractor asked for a different start date, different line items, two additional option years, and a payment of $73,400. Lastly, the contractor demanded that GSA not issue any orders under the contract unless GSA amended the contract to increase the percentage adjustment to the same percentage that another contractor was allegedly receiving under a different contract in a different geographical area.[25] "It does not take much imagination," the Board stated, "to see how a contracting officer would find it advantageous to end legal entanglements with a contractor who behaved in this fashion."[26]

Finding that the termination was not motivated by bad faith, the Board denied the breach of contract claim. Because the contractor failed to show any incurred costs, and finding the claim "misguided in several ways,"[27] the Board also denied the claim for termination settlement charges.

Lieutenant Colonel Michael L. Norris

[25] *Id.* at 166,511–12.

[26] *Id.* at 166,512.

[27] *Id.*

Government Property

Electronically Accounting for DOD Property

On 13 September 2007, the Department of Defense (DOD) published an interim rule through Defense Federal Acquisition Regulation Supplement (DFARS) Case 2005-D015 requiring contractors to provide Item Unique Identification (IUID) data electronically in the IUID registry for all DOD personal property in the possession of the contractor (PIPC).[1] In the past, contractors were able to report PIPC annually using Department of Defense (DD) Form 1662 pursuant to DFARS 245.505-14 and DFARS 252.245-7001.[2] On 1 October 2005, DOD began to phase out the DD Form 1662 manual reporting process and started to migrate towards electronic reporting.[3] Under the interim rule, the DFARS sections authorizing the use of DD Form 1662 have been removed and replaced by new DFARS provisions that require use of the IUID registry.[4] This registry is accessible via the internet.[5] Through its use, DoD hopes to achieve more efficient and accurate PIPC reporting.[6] In accordance with Federal Acquisition Regulation (FAR) 1.108(d)(1), the interim rule applies to all contracts resulting from solicitations issued on or after its 13 September 2007 effective date.[7] The public comment period for this interim rule will expire on 13 November 2007.[8]

A New Government Property Regime Begins: Are Contracting Professionals Prepared?

In the late 1990s, DOD initiated a complete rewrite of Federal Acquisition Regulation (FAR) Part 45,[9] the Government Property section, and its associated clauses.[10] The proposed amendments sought to encourage efficiency, flexibility, and innovation by adopting a life-cycle, performance-based approach to property management that allowed DOD to take advantage of commercial business practices.[11] More than a decade in the making, the efforts of the DOD finally came to fruition on 14 June 2007 when a final rule proposed by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) became effective.[12] In evaluating the changes, one of the goals of the Councils was to simplify procedures, clarify language, and eliminate obsolete requirements,[13] and to this end, the success of the drafters is readily apparent from even a cursory review of the new regulations. First, the drafters reorganized FAR Part 45 making it

---

[1] Defense Federal Acquisition Regulation Supplement; Reports of Government Property (DFARS Case 2005-D015), 72 Fed. Reg. 52,293 (Sept. 13, 2007) [hereinafter DFARS Interim Rule].

[2] U.S. DEP'T OF DEFENSE, ITEM UNIQUE IDENTIFICATION OF GOVERNMENT PROPERTY GUIDEBOOK: REPORTING GOVERNMENT PROPERTY IN THE POSSESSION OF THE CONTRACTOR (PIPC), at 3 (Sept. 21, 2007) [hereinafter 2007 GUIDEBOOK] (version 1.0), *available at* http://www.acq.osd.mil/dpap/pdi/uid/guides.html (then follow "Item Unique Identification of Government Property Guidebook (September 21, 2007)" hyperlink).

[3] *Id.*

[4] DFARS Interim Rule, *supra* note 1, at 52,297–52,299. The new regulations may be found in the following DFARS sections: 211.274-4, 211.274-5, 252.211-7003, and 252.211-7007. *Id.*

[5] 2007 GUIDEBOOK, *supra* note 2, at 10. The IUID registry may be accessed through the Government's Business Partner Network (https://www.bpn.gov/iuid). After accessing the registry, the information is then available in Wide Area Workflow (WAWF). *Id.* WAWF is a "secure real-time web-based DoD enterprise system for electronic invoice submission, receipt, acceptance, processing, and reporting." U.S. DEP'T OF DEFENSE, DEFENSE ACQUISITION TRANSFORMATION: REPORT TO CONGRESS 43–44 (July 2007).

[6] DFARS Interim Rule, *supra* note 1, at 52,293.

[7] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 1.108(d)(1) (July 2007) [hereinafter FAR].

[8] DFARS Interim Rule, *supra* note 1, at 52,293.

[9] Federal Acquisition Regulation; Government Property, 70 Fed. Reg. 180, 54,878 (Sept. 19, 2005) [hereinafter FAR Change].

[10] *See* Douglas N. Goetz, *The Rewrite of FAR Part 45: Government Property and Its Associated Clauses*, CONTRACT MANAGEMENT 31 (July 2006) (summarizing the "long and arduous process" of rewriting FAR Part 45).

[11] FAR Change, *supra* note 9, at 54,879.

[12] Federal Acquisition Regulation; Final Rule, 72 Fed. Reg. 27,363 (May 15, 2007) [hereinafter Final FAR Rule].

[13] *Id.*

more user-friendly[14] and tailored its language so that it now only applies to the Government.[15] Another obvious and dramatic change was the drafters' reduction of the number of FAR property clauses from nineteen to just three overarching clauses.[16]

In light of this improved organization and clause reduction, contracting professionals may be inclined to breathe a sigh of relief by concluding that under the new Government property regime, they will have easier roles to play. Such a conclusion, however, would be inaccurate. While the new regulation has simplified certain aspects of handling Government property, it has also placed a considerable burden on contracting officers, property administrators, and other personnel involved in the awarding and administering of Government property because these personnel are now being asked to be aware of and to understand voluntary consensus standards (VCS)[17] and industry-leading practices (ILP)[18] applicable to the management of that property.[19] In the discussion that follows, this article will briefly explore the scope, the genesis, and the implications of the new Government property regime's VCS and ILP knowledge requirement. This analysis will raise the question of whether the Government's acquisition personnel are adequately prepared to effectively execute their additional duties under the new rules.

The concept of incorporating VCS and ILP into the Government sector is not new. In fact, the incorporation VCS is required by statute,[20] policy,[21] and regulation,[22] and the use of VCS is prevalent within DOD.[23] The use of ILP within the Government is also routinely encouraged.[24] The Government's goals in using VCS, which can also be attributed to ILP, are:

---

[14] Goetz, *supra* note 10, at 31.

[15] *Id*. According to Goetz, the purpose of this change was to bring FAR Part 45 in concert with FAR protocol calling for all requirements contractually imposed upon the contractor to be in a clause. *Id.*

[16] *See* FAR, *supra* note 7, pts. 52.245-1, 52.245-2, 52.245-9. First, FAR 52.245-1, Government Property, is the default property clause and, as described in FAR 45.107(a) (Contract Clauses), it is required in almost every contract. Second, FAR 52.245-2, Government Property Installation Operation for Services, was written in response to exponential growth in Government service contracts and the Office of Management and Budget A-76 process. Goetz, *supra* note 10, at 37. This clause applies to installation service contracts where the Government provides the property "as-is" for the purpose of initial provisioning only and bears no responsibility for its repair or replacement. FAR, *supra* note 7, at 45.107(b). Lastly, FAR 52.245-9, Use and Changes, was carried-over virtually unchanged from the old Part 45 clauses. It is now required whenever FAR 52.245-1 is used in a contract. *Id*. at 45.107(c).

[17] As a part of the Government property rewrite, the drafters added a definition of VCS to FAR Part 2.101. Final FAR Rule, *supra* note 12, at 27,383. This definition reads:

> [C]ommon and repeated use of rules, conditions, guidelines or characteristics for products, or related processes and production methods and related management systems. Voluntary Consensus Standards are developed or adopted by domestic and international voluntary consensus standard making bodies (*e.g.*, International Organization for Standardization (ISO) and ASTM-International).

Id.

[18] The Councils did not define ILP in the FAR. In an unpublished version of the DOD MANUAL FOR THE PERFORMANCE OF CONTRACT PROPERTY ADMINISTRATION (DOD 4161.2-M), however, one can find a proposed definition:

> Industry leading practices (ILP) are generally accepted processes, including best practices, that have been proven throughout related businesses, to be managerially and economically effective, efficient, and successful at meeting particular objectives of a contractor's management system, and where specified, in compliance with the required Government Outcomes. The ILP should be based on empirical research, evidence and literature pertaining to that business practice, product or system as a "leading" practice. In order for a process to become an ILP, it should be widely used. Generally, there should be supporting historical data from an accepted source, e.g., trade publications, literature, etc., to support that process as being repeatable, efficient, measurable, and verifiable.

Douglas N. Goetz, *Applications of Voluntary Consensus Standards and Industry Leading Practices within the Federal Acquisition Regulation Government Property Clause–52.245.1*, 10-11 (quoting the unpublished version of DOD 4161.2-M), *available at* https://acc.dau.mil/GetAttachment.aspx?id=172702&pname=file&lang=en-US&aid=30927 (last visited Feb. 24, 2008).

[19] FAR Change, *supra* note 9, at 54,879.

[20] National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, 110 Stat. 775 (codified as amended in scattered sections of 15 U.S.C.). With limited exceptions, Section 12(d) of this Act directs that Federal agencies and departments "shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments." *Id.*

[21] FEDERAL OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-119, FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES (Feb. 10, 1998) [hereinafter OMB CIR. A-119].

[22] *See* FAR, *supra* note 7, pt. 11.101(c). This provision states:

> In accordance with OMB Circular A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities," agencies must use voluntary consensus standards, when they exist, in lieu of Government-unique standards, except where inconsistent with law or otherwise impractical. The private sector manages and administers voluntary consensus standards. Such standards are not mandated by law (*e.g.*, industry standards such as ISO 9000).

Id.

[23] In Fiscal Year 2006, DOD participated in 110 VCS bodies and began to use 9,204 VCS. ADDENDUM TO THE TENTH ANNUAL REPORT ON FEDERAL AGENCY USE OF VOLUNTARY CONSENSUS STANDARDS AND CONFORMITY ASSESSMENT D-33, D-34 (2006).

> a) Eliminate the cost to the Government of developing its own standards and decrease the cost of goods procured and the burden of complying with agency regulation; b) Provide incentives and opportunities to establish standards that serve national needs; c) Encourage long-term growth for U.S. enterprises and promote efficiency and economic competition through harmonization of standards; and d) Further the policy of reliance upon the private sector to supply Government needs for goods and services.[25]

The application of VCS and ILP to Government property in order to achieve those goals is a sound decision that will likely lead to significant rewards in the long term. In the short term, however, the mandatory use of these standards and practices entails a certain amount of risk because Government contracting officers and property administrators are not familiar with these standards and practices. Further, applying VCS and ILP is not simple. Numerous VCS bodies exist,[26] and if a VCS body promulgates standards applicable to Government property, those standards may also be numerous.[27] With regard to ILP, one of the qualities that makes ILP appealing is their dynamic nature. Unfortunately, this dynamism also makes it difficult to readily understand them because ILP is constantly changing. Because ILPs frequently change, one author proposes that Government personnel faced with these practices should research professional property manuals and commercial literature to determine what these materials say about the practices.[28] This proposal is certainly valid, but it still constitutes a daunting task for an understaffed contracting office that is struggling to comply with the new Government property requirements.

Delving into these requirements, the genesis for the use of VCS and ILP in Government property management originates from the new primary property clause, which mandates:

> [T]he Contractor *shall* initiate and maintain the processes, systems, procedures, records, and methodologies necessary for effective control of Government property, *consistent with voluntary consensus standards and/or industry-leading practices* and standards for Government property management except where inconsistent with law or regulation.[29]

As a result of contractors being required to use VCS and ILP, Government personnel responsible for awarding and administering those contracts must also understand VCS and ILP in order to effectively execute their duties and to protect the Government from abuse.[30] That supposition is explicitly and implicitly reaffirmed throughout the new FAR Part 45, but it is especially important in three distinct areas: (1) Acquisition planning, (2) Evaluation of contractor proposals, and (3) Monitoring of contractor performance.

---

[24] *See, e.g.*, U.S. GEN. ACCOUNTABILITY OFF., REP. NO. GAO-02-447G, EXECUTIVE GUIDE: BEST PRACTICES IN ACHIEVING CONSISTENT, ACCURATE PHYSICAL COUNTS OF INVENTORY AND RELATED PROPERTY (Mar. 2002).

[25] OMB CIR. A-119, *supra* note 21, at sec. 2.

[26] In Fiscal Year 2006, federal agencies participated in 413 VCS bodies, which is only a segment of the community of VCS bodies. FY 2006 VOLUNTARY CONSENSUS STANDARDS BODIES IN WHICH FEDERAL AGENCIES PARTICIPATED (n.d.). It is uncertain how many VCS bodies might publish standards that would be applicable to Government property management. Goetz, *supra* note 18, at 8–9.

[27] When gauging the scope of this problem, consider that a recent article on this subject identified fifteen different Property Management VCS published by just one VCS body. Goetz, *supra* note 18, at 7–8. For illustrative purposes, these fifteen VCS's are listed below:

> E2132-01 Standard Practice for Physical Inventory of Durable, Moveable Property; E2221-02 Standard Practice for Administrative Control of Property; E2279-03 Standard Practice for Establishing the Guiding Principles of Property Management; E2497-06 Standard Practice for Calculation of Equipment Movement Velocity; E2499-06 Standard Practice for Classification of Equipment Physical Location Information; E2219-02 Standard Practice for Valuation and Management of Moveable, Durable Property; E2220-02 Standard Practice for Establishing the Full Valuation of the Loss/Overage Population Identified During the Inventory of Moveable, Durable Property; E2378-05 Standard Practice for the Recognition of Impaired or Retired Personal Property; E2453-05 Standard Practice for Determining the Life-Cycle Cost of Ownership of Personal Property; E2131-01 Standard Practice for Assessing Loss, Damage, or Destruction of Property; E2306-03 Standard Practice for Utilization and Disposal of Personal Property; E2379-04 Standard Practice for Property Management for Career Development and Training; E2452-05e1 Standard Practice for Equipment Management Process Maturity Model; E2495-07 Standard Practice for Prioritizing Asset Resources in Acquisition, Utilization, and Disposition; E2135-06 Standard Terminology for Property and Asset Management.

Id. at 8.

[28] *Id.* at 16.

[29] *See* FAR, *supra* note 7, pt. 52.245-1(b)(1) (emphasis added).

[30] When private entities are involved in the setting of contractual standards, even by proposing VCS, Government agencies must close the knowledge gap to be effective because "[w]hen the transaction takes place under conditions of uncertainty, the private actor may be able to exploit an information advantage to take actions that are in its self-interest, but not in the agency's self-interest." Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 405 (2003).

In the area of acquisition planning, the new Government property rules require contracting officers to specifically discuss government-furnished property issues in acquisition plans.[31] These rules also require contracting officers to provide property to contractors only when the contracting officer determines that four criteria are met.[32] These criteria include a finding that providing property is in the Government's best interest and that the overall benefit of furnishing the property significantly outweighs the increased cost of administration.[33] In order to responsibly execute these requirements and make reasoned findings about matters like acquisition strategy and administration costs, a contracting officer is going to have to possess at least a general understanding of the VCS and/or ILP that a contractor might employ to manage the property in question.

In the area of proposal evaluation, the new Government property rules mandate that contracting officers require all offerors to submit with their offers information on the "voluntary consensus standard or industry leading practices and standards to be used in the management of Government property, or existing property management plans, methods, practices, or procedures for accounting for property."[34] Obviously, in order to understand and evaluate these "property management plans," contracting officers and Government personnel involved in the acquisition process must first understand VCS and ILP.

Finally, in the area of monitoring contract performance, if a contractor is utilizing a property management system rooted in VCS and/or ILP, then to properly administer the contract the Government personnel will have to understand what the standards and practices require and how they should operate in practical application. Specifically, this knowledge would be necessary to conduct the analysis of the contractor's property management policies, procedures, practices, and systems, which the new regulations require.[35] Under the new rules, contracting officers may revoke the Government's assumption of risk "when the property administrator determines that the contractor's property management practices are inadequate and/or present an undue risk to the Government."[36] Without a substantial understanding of VCS and ILP, however, contracting professionals will be unable to protect the Government from contractors, whose property management systems are not in compliance with the contractual requirements.[37]

As the three scenarios discussed above demonstrate, contracting professionals will need to understand VCS and ILP in order to function responsibly under the new Government property regime. This reality raises the question of whether these personnel are adequately prepared. During the public comment period for the new rules, one respondent raised this very issue, by inquiring, "How are contracting officers to be aware of industry leading practices? Will the council direct the creation of new Defense Acquisition University (DAU) courses specifically for this purpose?"[38] The response to this question was, "The Councils believe that contracting officers are professionals in their fields of acquisition and are capable of assessing the necessary information from various sources applicable in their respective fields. The Councils will work with DAU to determine if and to what extent course revisions or new courses are required."[39] While all contracting officers should be professionals in their fields of acquisition and capable of assessing the necessary information to effectively execute the new Government property rules, the public forum is unfortunately full of reports bemoaning the health and capabilities of an exceedingly taxed Federal acquisition corps.[40] Fortunately, DOD officials also recognized the need for training early in the process and developed a four-phase training plan to meet those needs,[41] which DAU is currently implementing.[42] The

---

[31] *See* FAR, *supra* note 7, 7.105(b)(14).

[32] *Id.* at pt. 45.102(b).

[33] *Id.*

[34] *Id.* at pt. 45.201(c)(4).

[35] *Id.* at pt. 45.105(a).

[36] *Id.* at pt. 45.104(b).

[37] *Id.* at pt. 45.105(b).

[38] Final FAR Rule, *supra* note 12, at 27,369.

[39] *Id.*

[40] *See, e.g.*, REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS ch. 5 The Federal Acquisition Workforce (Jan. 2007), *available at* http://www.acqnet.gov/comp/aap/documents/Chapter5.pdf. In this report, the Panel found that "[t]he federal government does not have the capacity in its current acquisition workforce necessary to meet the demands that have been placed on it." *Id.* at 361. It also found that "[t]he pace of acquisition reform initiatives has outstripped the ability of the federal acquisition workforce to assimilate and master their requirements so as to implement these initiatives in an optimal fashion." *Id.* at 369; *see also* THE PROFESSIONAL SERVICE COUNCIL PROCUREMENT POLICY SURVEY, TROUBLING TRENDS IN FEDERAL PROCUREMENT (2006).

[41] Thomas Ruckdaschel, Presentation at the National Property Management Association, National Education Seminar: The Property Code Parts 45 & 52 (Sept. 2005) (unpublished PowerPoint Presentation *available at* http://www.knownet.hhs.gov/log/propmanDR/PPMPdf/nes.ppt).

billion dollar question, however, remains. In short, will enough Government personnel receive the in-depth training they need in time to effectively implement the new regime in a manner that can mitigate its risks and realize its potential?

Major Peter D. DiPaola

[42] Charles Waszczak, Presentation at the Defense Acquisition University 2007 St. Louis Acquisition Insight Day: FAR Part 45—Government Property Requirements for Program Managers and Contracting Officers, (May 23, 2007) (PowerPoint Briefing Slides *available at* http://www.dau.mil/regions/Midwest/docs/2007%20STL%20Acq%20Ins%20Day%20--%20FAR%2045a.ppt).

CAFC and COFC Consider Jurisdiction Applying "NAFI Doctrine"—Reaching Different Results

In the following two cases, both the Court of Federal Claims (COFC) and the Court of Appeals for the Federal Circuit (CAFC) consider whether the COFC can properly exercise jurisdiction over a contract award or over a bid protest involving a non-appropriated fund instrumentality (NAFI). While the COFC decision determines that the exercise of jurisdiction is proper,[1] the CAFC decision determines that the exercise of jurisdiction is improper.[2] Practitioners may be puzzled by these two cases which reach different results but which have marked similarities.

In *Southern Food, Inc. v. United States*, the COFC considered a post-award protest requesting declaratory and injunctive relief from the United States, acting through the United States Army Community and Family Support Center (USACFSC).[3] In this protest, Southern Foods requested a declaratory judgment that USACFSC's decision to award a food service contract to United States Foodservice, Inc. (USF) was "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law."[4] The protester also requested that the COFC order USACFSC to set aside the award to USF and re-solicit the requirement. While the United States moved to dismiss the protest on jurisdictional grounds, the COFC denied the motion to dismiss and considered the protest on the merits.[5] This article will focus primarily on the jurisdictional issues raised in this case.

In *Southern*, USACFSC awarded a food service contract on 24 February 2006 as part of the Joint Services Prime Vendor Program (JSPV Program).[6] The JSPV Program is a group of separate contracts between commercial vendors and the Army which supply all of the food requirements for the Army's Morale, Welfare, and Recreation (MWR) activities. The JSPV Program is regulated by Army non-appropriated fund (NAF) regulations. The particular contract at issue affected food services at Fort Knox, Kentucky and Fort Campbell, Kentucky. The solicitation stated that only NAFs would be obligated for this contract.[7]

The government argued that the entity which awarded the food service contract, USACFSC, is a NAFI and as such, the COFC has no jurisdiction over the protest.[8] Conversely, while the COFC agreed that USACFSC is a NAFI, the court nevertheless found that the court does have jurisdiction over this protest involving a NAFI contract.[9]

The *Southern* court meticulously explained the circumstances under which the COFC has jurisdiction over NAFI contracts.[10] The COFC's jurisdiction over actions against the United States over government contracts originates from the Tucker Act.[11] The Tucker Act is a specific waiver of sovereign immunity and grants jurisdiction to the COFC to hear contract claims filed against the United States; the act states in pertinent part:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department or upon any express or implied contract with the United States . . . .[12]

The Alternative Dispute Resolution Act (ADRA) [13] amends the Tucker Act by specifically granting the COFC jurisdiction over protests. The ADRA states that the COFC has jurisdiction to:

---

[1] S. Foods, Inc. v. United States, 76 Fed. Cl. 769, 771 (2007).

[2] Smith v. United States, (*Smith II*) No. 2007-5008, 2007 U.S. App. LEXIS 5686 (Mar. 8, 2007).

[3] *S. Foods, Inc.*, 76 Fed. Cl. at 770.

[4] *Id.*

[5] *Id.* at 771.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 774. The court stated that, "non-appropriated fund instrumentalities (NAFIs) are federal government entities whose 'monies do not come from congressional appropriation but rather primarily from their own activities, services, and product sales.'" *Id.* (citing El-Sheikh v. United States, 177 F.3d 1321, 1322 (Fed. Cir. 1999)).

[9] *Id.* at 776.

[10] *Id.* at 775–76.

[11] 28 U.S.C.S. § 1491(a)(1) (LexisNexis 2008).

[12] *Id.*

[13] *Id.* § 1491(b).

> render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with procurement or a proposed procurement.[14]

The so-called "NAFI Doctrine" is a limit on the COFC's jurisdiction under the Tucker Act and the ADRA. This doctrine originated in *United States v. Hopkins*[15] in which the United States Supreme Court case defined a NAFI as a federal entity that "does not receive its monies by congressional appropriation."[16] The *Hopkins* Court stated that because the Tucker Act does not waive sovereign immunity with respect to NAFIs (with the exception of military exchanges), the COFC has no jurisdiction in these cases. Hence, if the NAFI Doctrine applies then the COFC has no jurisdiction over the matter.

In *AINS v. United States*,[17] the CAFC relied upon earlier decisions concerning the NAFI Doctrine in crafting the following four-part test for determining whether a court could exercise jurisdiction under the Tucker Act:

> A government instrumentality is a NAFI if: (1) It does "not receive its monies by congressional appropriation"; (2) It derives its funding "primarily from its own activities, services, and product sales"; (3) Absent a statutory amendment, there is no situation in which appropriated funds could be used to fund the federal entity; and (4) There is "a clear expression by Congress that the agency was to be separated form general federal revenues."[18]

Consequently, if all four of the above factors are met, then a government entity is a NAFI and thus, the COFC does not have Tucker Act jurisdiction. Conversely, if an entity cannot meet all four factors, then it is not a NAFI under the test and so, COFC does have jurisdiction.[19] The court indicated that it would strictly construe its jurisdiction over protests and claims in light of this four-part test.[20]

In applying the *AINS* test to the instant case, the COFC found that because USACFSC did not meet all four prongs, the COFC could not exercise jurisdiction over the case.[21] Specifically, the court reasoned that USACFSC did not meet the first prong of the test. In reaching its conclusion, the COFC references Army Regulation (AR) 215-1 which states that all Army NAFIs receive some appropriated funds.[22] Therefore, because USACFSC does receive appropriated funds, its funding source precludes it from being considered a NAFI under the NAFI Doctrine and thus, the COFC may exercise jurisdiction.[23]

Interestingly, in a separate unpublished decision, *Smith v. United States*,[24] the CAFC applied the NAFI Doctrine and summarily decided that the doctrine precluded the COFC from exercising Tucker Act jurisdiction. The CAFC considered *Smith* on appeal of an earlier unpublished COFC decision[25] dismissing a contractor's claim for lack of jurisdiction.[26] Unlike the CAFC's rigorous application of the *AINS* test in the case by that name[27] and also unlike the COFC's application of the

---

[14] *Id.* § 1491(b)(1).

[15] 427 U.S. 123 (1976).

[16] *Id.* at 125 n.2.

[17] AINS, Inc. v. United States, 365 F.3d 1333, 1342 (Fed. Cir. 2004). In this case, the CAFC determined that the United States Mint did, in fact, meet all four of the above factors and so, the COFC did not have jurisdiction over a claim filed against the Mint. *Id.*

[18] *Id.* (citations omitted).

[19] *Id.*

[20] S. Foods, Inc. v. United States, 76 Fed. Cl. 769, 775 (2007). The jurisdictional key is whether a government entity is a NAFI under the NAFI Doctrine's four-part test and not merely whether the government considers the entity to be a NAFI. *Id*. So, if an entity is a NAFI under the NAFI Doctrine, then the COFC may not exercise Tucker Act jurisdiction. *Id*.

[21] *Id.*

[22] U.S. DEP'T OF ARMY, REG. 215-1, MILITARY MORALE, WELFARE, AND RECREATION PROGRAMS AND NONAPPROPRIATED FUND INSTRUMENTALITIES paras. 3–7, 3–8, 3–9 (31 July 2007).

[23] *S. Foods, Inc.*, 76 Fed. Cl. at 775.

[24] *Smith II*, No. 2007-5008, 2007 U.S. App. LEXIS 5686, at *9 (Mar. 8, 2007).

[25] Smith v. United States (*Smith I*), No. 05-1246C, slip. op. (Ct. Fed. Cl. Aug. 22, 2006). The CAFC reviews jurisdictional issues de novo. *Smith II*, 2007 U.S. App. LEXIS 5686.

[26] *Id.*

[27] AINS, Inc. v. United States, 365 F.3d 1333, 1342 (Fed. Cir. 2004).

test in *Southern*,[28] in *Smith*, the CAFC did not appear to apply the test at all.[29] In its brief analysis, the CAFC determined that the COFC did not have jurisdiction to hear a breach of contract claim filed against an Air Force NAFI.[30]

On 4 November 1998, on behalf of the Air Force's MWR Office, an Air Force contracting officer awarded a concession contract to Rodgers Travel Service (Rodgers), a company owned by Mr. Rodger Smith.[31] The purpose of the contract was to "serve the recreational needs of Air Force servicemen through the MWR."[32] The contract required the contractor to pay a concession fee that was based on the total sales of travel services.[33] In July of 2005, Rodgers filed a claim with the Air Force contracting officer seeking reimbursement of concession fees that he had paid on international airline tickets in the amount of $3,116.[34] About four months later, prior to the contracting officer's issuance of a decision on the claim, Rodgers filed an appeal at the COFC under the Contract Disputes Act[35] seeking reimbursement of the concession fees and also its other expenses totaling $82,635.97.[36] The COFC dismissed the appeal for lack of jurisdiction because the appeal concerned a contract between a Rodgers and a NAFI, which is not an entity subject to the Tucker Act.[37]

Rodgers appealed the COFC's decision to the CAFC which affirmed the lower court's decision.[38] The CAFC purportedly based its decision on the NAFI Doctrine stating that the CAFC "lacks jurisdiction over an action against the United States in which congressionally appropriated funds cannot be used to pay the resulting judgment."[39] Nevertheless, the court did not apply the *AINS* test to the facts of this case.[40]

Although *Smith II* is an unpublished decision without precedential value, it is intriguing that the CAFC did not analyze this case using the *AINS* test, a test the CAFC created in 2004 for the purpose of applying the NAFI Doctrine.[41] If the *Smith II* court had applied the *AINS* test, it seems probable that it would have exercised jurisdiction because Air Force NAFIs generally do receive some appropriated funds, thus failing the first prong of the test.[42] Whether the *Smith II* decision signals a move by the CAFC away from a strict application of the *AINS* test remains a topic for future editions of the *Year in Review*.

Major Marci A. Lawson

---

[28] *S. Foods, Inc.*, 76 Fed. Cl. at 775.

[29] *Smith II*, 2007 U.S. App. LEXIS 5686, at *4–*5.

[30] *Id.*

[31] *Id.* at *2.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] 28 U.S.C. § 1491(a)(1) (LexisNexis 2008). The court stated that enough time had elapsed after Rodgers filed its claim with the contracting officer such that the contracting officer's failure to issue a decision could be considered a deemed denial under the Contract Disputes Act. *See Smith II*, 2007 U.S. App. LEXIS 5686, at *4 n.3; *see also* 41 U.S.C.S. § 605(c)(5) (LexisNexis 2008).

[36] *Smith II*, 2007 U.S. App. LEXIS 5686, at *2–*3.

[37] *Id.* at *3.

[38] *Id.* at *9.

[39] *Id.* at *4.

[40] *Id.* at *4–*6. In affirming the lower court's decision, it appears that the CAFC rather summarily agreed with the Air Force's characterization of the entity as a NAFI. After determining that the entity was a NAFI, the CAFC then concluded that the COFC could not exercise jurisdiction under the NAFI Doctrine. *Id.*

[41] *Id.* In *AINS*, before articulating the "*AINS* test," the CAFC declared, "the NAFI Doctrine has evolved slowly since the Supreme Court first recognized the existence of NAFIs . . . [we] distill[s] from case law an analytic four-factor test." AINS, Inc. v. United States, 365 F.3d 1333, 1342 (Fed. Cir. 2004).

[42] U.S. DEP'T OF THE AIR FORCE, INSTR. 65-106, APPROPRIATED FUND SUPPORT OF MORALE, WELFARE, AND RECREATION (MWR) AND NONAPPROPRIATED FUND INSTRUMENTALITIES (NAFIs) 9–10 (11 Apr. 2006).

SPECIAL TOPICS

Competitive Sourcing[1]

Timing Is Everything—GAO's Jurisdiction over Agency Tender Official's Protest Applies Only If Competition Initiated "On or After January 26, 2005"

As discussed in the *2006—Year in Review*,[2] protesters continue to argue unsuccessfully that the Government Accountability Office (GAO) has jurisdiction to hear protests concerning a competition[3] conducted under Office of Management and Budget (OMB) Circular A-76 filed on behalf of the losing federal government employees. A recent amendment to the Competition in Contracting Act (CICA) expanded the GAO's protest jurisdiction concerning OMB Circular A-76 (A-76 competitions).[4] The CICA amendment grants the GAO jurisdiction to hear protests filed by the agency tender official (ATO)[5] in an A-76 competition involving more than sixty-five full-time equivalent (FTE) employees.[6] No protester has yet succeeded in relying on that amendment. This article addresses *James C. Trump*,[7] a case involving another such unsuccessful A-76 protest, filed by the ATO in a U.S. Navy competition. The GAO dismissed the protest reasoning that the agency tender official was not an "interested party" under the CICA.[8]

Mr. Trump's protest arose from the Navy's decision to award a contract for operations and maintenance services for communications satellite systems to Rome Research Corporation (Rome Corp.) following an A-76 competition.[9] The competition affected over sixty-five FTE employees. The Navy formally announced its intent to conduct a standard competition under OMB Circular A-76 on 11 January 2005 on the federal business opportunities (FedBizOpps) internet website.[10] Subsequently, the Navy issued a solicitation. In response, Rome Corp. submitted an offer to the contracting officer; likewise, the ATO submitted the agency tender[11] on behalf of the government's most efficient organization (MEO).[12] On 4 January 2007, after evaluating the submissions from the private sector and from the ATO, the Navy announced its

---

[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. FEDERAL OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES pmbl. (May 2003) [hereinafter REVISED CIR. A-76]. "Competitive sourcing" is the term used to describe the policy in REVISED CIR. A-76. Generally, this policy requires private sector performance of commercial activities unless performance by government employees is more cost-effective. *Id.*

[2] *See* Major Andrew S. Kantner et al., *Contract and Fiscal Law Developments of 2006—Year in Review*, ARMY LAW., Jan. 2006, at 112.

[3] REVISED CIR. A-76, *supra* note 1. This policy also prescribes the procedures that federal agencies must follow in conducting what it calls "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.*

[4] National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 326, 118 Stat. 1811, 1848 (2004) [hereinafter NDAA 2005, CICA Amendment]. 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) 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.* The effective date of the amendment is "on or after the end of the 90-day period beginning on the date of the enactment [October 28, 2004] of this Act." *Id.*; *see also* 31 U.S.C. § 3551 (2000). *Id.*

[5] 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 CIR. 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 a "most efficient organization" (MEO) agency cost estimate, an MEO quality control plan, an MEO phase-in plan, and copies of any MEO subcontracts." *Id.* An "MEO" is "the staffing plan of the agency tender, developed to represent the agency's most efficient and cost-effective organization." *Id.*

[6] A "full-time equivalent" (FTE) is defined as the "staffing of federal civilian employee positions, expressed in terms of annual productive work hours . . . FTE employees 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 CIR. A-76, *supra* note 1, at attch. D.

[7] Comp. Gen. B-299370, Feb. 20, 2007, 2007 CPD ¶ 40.

[8] *Id.* at 2.

[9] *Id.* 1–2.

[10] *Id.*

[11] *See supra* note 5 (defining "agency tender").

[12] *See supra* note 3 (discussing "most efficient organization").

decision to award a contract to Rome Corp. Thereafter, Mr. Trump, the ATO, filed a GAO protest stating that the "competition contained various flaws."[13]

In determining whether the GAO had jurisdiction to hear the ATO's protest, the GAO focused on the effective date of the CICA amendment.[14] The GAO cited the language of the statute which states, "this section shall apply to protests . . . that relate to studies initiated under Office of Management and Budget Circular A-76 on or after the end of the ninety-day period beginning on the date of the enactment of this Act."[15] The GAO stated that the "date of the enactment" of the CICA amendment was 28 October 2004 and further, that ninety days after that date was 26 January 2005.[16] Therefore, the GAO concluded that the amendment applied to only protests filed by on or after 26 January 2005 by an ATO in a competition involving more than sixty-five FTE employees.[17]

In *Trump*, however, the Navy initiated the competition on 11 January 2005, two weeks before the CICA amendment became effective.[18] While the ATO argued that the Navy initiated the competition on 30 June 2007, six months after the Navy first announced the competition on FedBizOpps, the GAO disagreed.[19] The GAO stated that the Navy's announcement on 30 June 2007 was merely a modification to the earlier announcement it made on 11 January 2005.[20] As such, the GAO found that it did not have jurisdiction to hear the protest and so, the GAO dismissed it.[21] Accordingly, those on the A-76 sidelines will continue to wait until an ATO relies successfully on the CICA amendment in filing a protest on behalf of the losing government employees.

OMB's Latest A-76 Report

In May 2007, the OMB released its annual report on the federal government's competitive sourcing efforts during fiscal year (FY) 2006.[22] In this report, the OMB tracked competitive sourcing data pursuant to the President's Management Agenda.[23] The OMB reported that in FY 2006, federal agencies conducted 183 competitions involving 6,678 employees resulting in over $1.3 billion dollars in expected net savings over the next five to ten years.[24] In contrast, in FY 2005, the total number of competitions was nearly identical (181), however, the total number of affected employees was higher (9,979) and the expected net savings was higher ($3 billion dollars).[25]

In its FY 2006 report, the OMB identified some competitive sourcing trends.[26] In FY 2006, federal agencies determined that performance of commercial activities by in-house personnel was more cost-effective than private sector performance for 87% of the FTE employees competed.[27] The average number of FTE employees per standard competition[28] was 72%, while

---

[13] *Trump*, 2007 CPD ¶ 40, at 2–3.

[14] *Id.* at 3.

[15] NDAA 2005, CICA Amendment, *supra* note 4; *see also Trump*, 2007 CPD ¶ 40, at 3.

[16] *Trump*, 2007 CPD ¶ 40, at 3–4.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 4–5.

[20] *Id.* at 5–6.

[21] *Id.* at 7.

[22] U.S. OFFICE OF MANAGEMENT AND BUDGET, REPORT ON COMPETITIVE SOURCING RESULTS FISCAL YEAR 2006 (May 2007) [hereinafter OMB 2006 REPORT], *available at* http://www.whitehouse.gov/omb/procurement/comp_src/cs_report_fy2006.pdf. This report compiles government-wide competitive sourcing data. *Id.*

[23] *Id.* at 2. *See generally* U.S. OFFICE OF MANAGEMENT AND BUDGET, THE PRESIDENT'S MANAGEMENT AGENDA: FISCAL YEAR 2002, 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).

[24] OMB 2006 REPORT, *supra* note 22, at 5. Of these 183 competitions, 120 were streamlined competitions and 63 were standard competitions. *Id.* at 27.

[25] *Id.* at 5, 27; *see also* U.S. OFFICE OF MANAGEMENT AND BUDGET, REPORT ON COMPETITIVE SOURCING RESULTS FISCAL YEAR 2005, at 1, 14 (Apr. 2006) [hereinafter OMB 2005 REPORT], *available a*t http://www.whitehouse.gov/omb/procurement/comp_src/cs_annual_report_fy2005_results.pdf.

[26] OMB 2006 REPORT, *supra* note 22, at 5.

[27] *Id.* As in prior years, the OMB compiled data regarding the performance decision as a percentage of FTE employees competed rather than as a percentage of the total number of competitions completed. *Id.* Thus, the OMB states that competitions completed in FY 2006 resulted in performance by in-house employees for 87% of all of the FTE employees competed; the OMB does not report the percentage of the time in-house employees won for all competitions completed. *Id.*

the average number of FTE employees per streamlined competition was eighteen.[29] The OMB states that from FY 2004 to FY 2006, 85% of the FTE employees involved in competitions fell into one of six categories: (1) maintenance and property management; (2) information technology; (3) logistics; (4) human resources, personnel management and education; (5) administrative support; and (6) finance and accounting.[30] The average length of standard competitions was thirteen months while the average length of streamlined competitions was three months.[31] Similar to FY 2005,[32] in FY 2006, the clear majority of the competitions were streamlined.[33]

Regarding the level of participation by the private sector, the OMB reported that agencies received at least two private sector offers in the majority of standard competitions conducted.[34] For example, agencies received two or more private sector offers in 53% of the standard competitions conducted in FY 2006.[35] Agencies received only one private sector offer in 30% of the standard competitions.[36] Agencies received no private sector offers in 17% of the standard competitions.[37]

The aforementioned OMB report also provides data specifically on competitive sourcing results in the Department of Defense (DOD) for FY 2006.[38] During this timeframe, DoD completed fourteen competitions involving 454 FTE employees.[39] Of these competitions, only one was a standard competition and thirteen were streamlined; there were no direct conversions.[40] The average number of FTE employees involved in DOD standard competitions was sixty-nine, while the average number of FTE employees in DOD streamlined competitions was thirty.[41] The most frequently competed commercial activity in DOD was "maintenance and property management."[42] In contrast to the other federal agencies as a whole, the performance decisions following DOD competitions favored in-house employees in only 22% of the competitions based on the number of FTE employees competed.[43]

The OMB also tracked DOD's incremental costs[44] resulting from conducting the 2006 competitions and DOD's expected cost savings.[45] Additionally, OMB reported DOD's actual savings resulting from conducting the competitions from FY 2003

---

[28] REVISED CIR. 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 FTE employees. *Id.* Conversely, an agency may utilize "streamlined competition" procedures if on the start date, a commercial activity is performed by sixty-five or less FTE employees. *Id.*

[29] OMB 2006 REPORT, *supra* note 22, at 27

[30] *Id.* at 9. OMB did not report separate statistics regarding the commercial activities most frequently competed in only FY 2006; rather, OMB combined these statistics for FYs 2004, 2005, and 2006. *Id.*

[31] *Id.* at 11. *See generally* REVISED CIR. A-76, *supra* note 1, at attach B. REVISED CIR. A-76 requires agencies to complete standard competitions in twelve months and streamlined competitions in ninety days. *Id.*

[32] OMB 2005 REPORT, *supra* note 25, at 28. In FY 2005, federal agencies completed 124 streamlined competitions and 57 standard competitions. *Id.*

[33] OMB 2006 REPORT, *supra* note 22, at 27. In 2006, federal agencies completed 120 streamlined competitions and 63 standard competitions. *Id.*

[34] *Id.* at 15.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* at 27. This total includes all competitions completed in FY 2006 regardless of when initiated.

[40] *Id.* Although not permitted under the current version, the previous version of OMB Circular A-76 permitted a "direct conversion" of a commercial activity from government employee performance to contractor performance if the activity was performed by ten or fewer FTE employees so long as the contracting officer determined that the contractor could perform at a fair and reasonable price. FEDERAL OFFICE OF MANAGENMENT. & BUDGET, CIRCULAR NO. A-76, REVISED SUPPLEMENTAL HANDBOOK, PERFORMANCE OF COMMERCIAL ACTIVITIES 5 (Mar. 1996).

[41] OMB 2006 REPORT, *supra* note 22, at 27.

[42] *Id.* at 31.

[43] *Id.* at 32. Note that in prior years, the OMB has reported that DOD competitions have resulted in favor of in-house performance at a far higher frequency. In FY 2005, DOD A-76 competitions resulted in in-house performance for 71% of the FTE employees competed. *See* OMB 2005 REPORT, *supra* note 25, at 56. In FY 2004, DOD A-76 competitions resulted in in-house performance for 90% of the FTE employees competed. FEDERAL OFFICE OF MANAGEMENT AND BUDGET, REPORT ON COMPETITIVE SOURCING RESULTS FISCAL YEAR 2004, at 10, 33 (May 2005), *available at* http://www.whitehouse.gov/omb/procurement/comp_sourcing_results_fy04.pdf.

[44] OMB 2006 REPORT, *supra* note 22, at 24. "Incremental costs" include: (1) the "costs of consultants or contractors" participating in the competition, (2) the "costs of travel, training or other incremental expenses directly attributed" to the competitions, and (3) "incremental in-house staff costs that were incurred" due to the competitions. *Id.*

[45] *Id.* at 33–35.

through FY 2005.[46] During FY 2006, the DOD incurred costs totaling approximately $1.6 million attributable to conducting the competitions.[47] Despite the costs of conducting competitions, the DOD expects that it will realize gross savings of over $23 million and net savings of over $21 million for competitions conducted in FY 2006.[48] Further, from FY 2003–FY 2005, the DOD reported actual saving of over $701 million from competitions completed during that timeframe.[49]

To some extent, FY 2006 competitive sourcing trends in the DOD mirror the trends in other government agencies. For instance, in FY 2006, both the DOD and federal agencies as a whole completed far more streamlined competitions than standard competitions.[50] Likewise, maintenance and property management was the most frequently competed commercial activity for both DOD and also for federal agencies as a whole.[51] In contrast, while for federal agencies as a whole, the A-76 competitions resulted in in-house performance for 87% of the FTE employees competed, in DOD, the competitions resulted in in-house performance for only 22% of the FTE employees competed.[52] Nonetheless, the OMB was not the only federal entity to compile a report on OMB Circular A-76 in 2006.

GAO's Latest Report on the Real Costs of A-76 Competitions

In May 2007, the GAO released a report concerning, in part, the benefits of competitive sourcing in DOD.[53] The GAO prepared the report in response by a tasking by the House Appropriations Committee (HAC) to analyze the "costs and consequences of contracting out" for DOD services from fiscal years 1995–2005.[54] Since DOD normally funds service contracts with operation and maintenance (O&M) appropriations, in examining the costs of contracting for services, the GAO concentrated on O&M expenses.[55] The GAO's report discusses: (1) DOD trends in O&M costs and service contracting, (2) whether the increase in service contracting has led to increased expenditures from operation and maintenance (O&M) appropriations, and (3) advantages and disadvantages of increased service contracting.[56] In conducting its analysis, the GAO reviewed data concerning the costs of DOD A-76 competitions.[57]

Regarding the GAO's analysis of the cost of DOD A-76 competitions, the GAO compared the cost estimates for the performing particular commercial activities with government personnel to the cost of performing these activities with contractors.[58] In most cases, the GAO found that performance of commercial activities with contractors was far less expensive than performance with government employees.[59] In compiling its analysis, the GAO visited three military installations that had recently completed A-76 competitions (Fort Hood, Texas; Naval Air Station, Florida; and Langley Air Force Base, Virginia).[60]

Regarding DOD trends in O&M costs and service contracting, GAO concluded that DOD's O&M expenditures increased dramatically from fiscal years 1995–2005 with the most significant increased from 2001–2005.[61] Additionally, DOD dramatically increased its reliance on service contractors during this same time period.[62] The GAO states that DoD

---

[46] *Id.* at 19.

[47] *Id.* at 33–35.

[48] *Id.*

[49] *Id.* at 19.

[50] *Id.* at 27.

[51] *Id.* at 9, 31.

[52] *Id.* at 32.

[53] GOV'T ACCOUNTABILITY OFFICE, GAO-07-631, DEFENSE BUDGET: TRENDS IN OPERATION AND MAINTENANCE COSTS AND SUPPORT SERVICES CONTRACTING (May 2007) [hereinafter GAO REPORT ON O&M COSTS].

[54] *Id.* at 7.

[55] *Id.* at 1.

[56] *Id.* at 1–2.

[57] *Id.* at 2.

[58] *Id.* at 4–5.

[59] *Id.*

[60] *Id.* at 24–27.

[61] *Id.* at 7.

[62] *Id.* at 15. From fiscal years 2000–2005, the costs of DOD service contracts have increased by over $40 billion or 73%. *Id.*

attributes both increases primarily to military operations in support of the Global War on Terrorism (GWOT).[63] In supporting the GWOT, one method that DOD has utilized to conserve its financial resources is by conducting A-76 competitions of DOD commercial activities.[64] The A-76 competition process is designed to result in performance by the most-effective provider.[65] Consequently, some of these A-76 competitions have resulted in the award of additional service contracts.[66]

Regarding the issue of whether the increase in DOD service contracting has led to increased O&M expenditures, the GAO concluded that there was insufficient evidence to make that determination.[67] The GAO reported that DOD does not maintain data on whether the increase in DOD service contracting has, in fact, directly caused the increase in O&M expenditures.[68] The DOD does not generally maintain data comparing the cost of performing services work with contractors to government personnel. While DOD does track the costs of conducting commercial activities with government personnel versus with contractors as part of the A-76 process, contracts following A-76 competitions are only a fraction of DOD's service contracts.[69] Where DOD has decided to award contracts following A-76 competitions, case studies have shown that they are generally cost-effective.[70]

Regarding the advantages and disadvantages of increased service contracting in DOD, GAO reported that both exist.[71] DOD has noted that there are a number of benefits to increased service contracting.[72] First, hiring contractors to perform services formerly performed by civilian employees allows those civilian employees to perform other vital jobs elsewhere in the federal government. Second, contractors can perform services formerly performed by uniformed personnel thus, expanding the pool of service members available for deployments. Third, DOD reports that in most cases, contracts awarded as a result of A-76 competitions are cost-effective.

The DOD also noted some disadvantages to increased service contracting.[73] First, there is concern that more service functions should be performed by government employees. As a result, in the National Defense Authorization Act (NDAA) for FY 2006, Congress required DOD to create a policy giving preference to government employees for performance of commercial activities under certain circumstances.[74] Second, there is concern that service contract costs are spiraling out of control. Consequently, the Army and the Air Force have issued memoranda "calling for review and reduction in services contracts."[75] Third, DOD has complained that increased service contracting has led to less operational flexibility.[76] For example, some commanders state that it is more difficult to respond to changing requirements when a service is performed by contractors vice by government employees.[77]

---

[63] *Id.* at 1. The report states that between fiscal years 2000 to 2005, DOD's O&M expenditures increased from $133.4 billion to $209.5 billion amounting to an increase of $76.1 billion or 57%. *Id.* at 2, 10. While the O&M expenditures of each of the Armed Services increased during this period, the Army's increase was the most remarkable at 137%. *Id.*

[64] *Id.* at 16–17.

[65] *Id.*

[66] *Id.* From 1995–2005, DOD A-76 competitions have resulted in 570 decisions to award contracts for work that was formerly performed by over 39,000 government personnel. *Id.*

[67] *Id.* at 18.

[68] *Id.*

[69] *Id.* at 23.

[70] *Id.* at 22.

[71] *Id.* at 29.

[72] *Id.*

[73] *Id.* at 29–30.

[74] *Id.* *See also* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 343, 119 Stat. 3136 [hereinafter NDAA 2006]. For a discussion on this recent preference for government employee performance of commercial activities, *see infra* to this following subsection *Implementing Section 343 of FY 2006 NDAA.*

[75] GAO REPORT ON O&M COSTS, *supra* note 53, at 30.

[76] *Id.*

[77] *Id.*

Hence, the trends in DOD O&M expenditures and in service contracting are closely related to A-76 competitions.[78] Even so, A-76 competitions are only a small part of a much larger DOD effort to increase service contracting.[79] As discussed below, in the NDAA 2006, Congress has taken steps to increase the opportunities for federal civilian employees to perform commercial activities.[80]

Implementing Section 343 of FY 2006 NDAA—Giving More Consideration to Federal Employees

On 27 July 2007, the Under Secretary of Defense issued a policy memorandum[81] to the secretaries of the military departments implementing Section 343 of the National Defense Authorization Act for Fiscal Year 2006 which permanently amended 10 U.S.C. § 2461.[82] Under certain circumstances, Section 343 allows DOD to give preference to government employees in the performance of commercial activities.[83]

The DOD policy memorandum responds to the Section 343 requirement that the Secretary of Defense develop policy ensuring that "consideration is given to using Federal Government employees for work that is currently performed or would otherwise be performed"[84] under DOD contracts. The memorandum states that its overriding purpose is to ensure that DOD affirmatively considers who could best perform a commercial activity—military members, civilian employees, or contract employees.[85] Significantly, the memorandum states that Section 343 "authorizes . . . the use of federal government employees without first conducting a public-private competition under the A-76 Circular, when appropriate."[86]

In implementing Section 343, the memorandum states that federal employees may perform commercial activities "when an economic analysis shows they are the low-cost provider for contracts"[87] specified under the amended statute. Specifically, Section 343 requires that this DOD policy should provide this special consideration for government employees regarding contracts that:

> (A) have been performed by Federal Government employees at any time on or after October 1, 1980;
> (B) are associated with the performance of inherently governmental functions:
> (C) were not awarded on a competitive basis; or
> (D) have been determined by a contracting officer to be poorly performed due to excessive costs or inferior quality.[88]

The memorandum further explains that government employees will also receive special consideration for the performance of commercial activities which are the subject of a new requirement or which are currently being performed by a contractor (unless the contract was awarded following an A-76 competition).[89] This special consideration amounts to permitting DOD to utilize an economic analysis "in lieu of recompeting the contract or of performing a public-private competition under OMB Circular A-76."[90] This guidance also requires DOD components to report to the creation of any new DOD authorizations resulting from converting a commercial activity from contract performance to government performance.[91]

---

[78] *Id.* at 24–25.

[79] *Id.* at 23.

[80] NDAA 2006, *supra* note 74.

[81] Memorandum, Deputy Under Secretary of Defense (Acquisitions, Technology, and Logistics), to Secretaries of the Military Departments, subject: Implementation of Section 343 of the 2006 National Defense Authorization Act (27 July 2006) [hereinafter Section 343 Memo], *available at* http://sharea76.fedworx.org/inst/sharea76 (follow the "library" hyperlink and then use the search engine).

[82] NDAA 2006, *supra* note 74; *see also* 10 U.S.C.S. § 2461 (LexisNexis 2008).

[83] Section 343 Memo, *supra* note 81.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] NDAA 2006, *supra* note 74, at 3195.

[89] Section 343 Memo, *supra* note 81.

[90] *Id.*

[91] *Id.*

Section 343 and DOD's implementation of it seems to be a sweeping change to the application of OMB Circular A-76 in DOD competitions. Practitioners in this area should carefully advise their commanders and other clients on this potentially fundamental shift in A-76 policy.

Major Marci A. Lawson

When a Notice to Proceed is Not a Notice to Proceed

The Civilian Board of Contract Appeals (CBCA) determined that the latitude that the Federal Acquisition Regulation (FAR) Subsection 1.102-4(e) grants contracting officers to innovate and use sound business judgment does not allow the government to bifurcate the notice to proceed.[1] The contract included FAR Clause 52.211-10, Commencement, Prosecution and Completion of Work—Alternate I,[2] which provided for a notice to proceed, and coordinated the notice to proceed with several other contractual requirements.[3] The contracting officer issued an "off-site" notice to proceed directing the contractor to begin necessary operations away from the construction site.[4] The government then attempted to require the contractor to meet completion dates tied to the notice to proceed by using the off-site notice to proceed. The problem with the government's strategy was that the government did not issue the full notice to proceed until three months later.[5]

In this case, the Department of Transportation, Federal Highway Administration (FHA) contracted with Tidewater Contractors, Inc. (Tidewater) for road work in California.[6] The contract required the government to issue the notice to proceed by the seventieth day following bid opening, and provided a day-for-day extension of the completion date if the contractor received the notice to proceed later than that seventieth day.[7] The contract also stated that "'a preconstruction conference will be held . . . before beginning any work. . . . [T]he notice to proceed must be issued before the commencement of any work.'"[8] On the sixty-sixth day following bid opening, the contracting officer sent Tidewater a letter directing that off-site construction operations begin two days later.[9] This letter, while directing that the off-site work begin, was not designated as a notice to proceed. The letter also stated that an "on-site" notice to proceed would be issued after the preconstruction conference and after other requirements were met.[10] The parties held the preconstruction conference on the ninety-seventh day following bid opening; the Government issued the "on-site" notice to proceed on the 158th day following bid opening.[11]

Following the government's notice that Tidewater had failed to meet contract deadlines, Tidewater requested that the contract be extended by eighty-nine days to account for the late notice to proceed.[12] The contracting officer denied the requested extension basing the completion date on the off-site notice to proceed,[13] and Tidewater appealed to the CBCA.[14]

---

[1] Tidewater Contractors, Inc. v. Dep't of Trans., CBCA No. 50, 07-1 BCA ¶ 33,525, at 166,102. Federal Acquisition Regulation (FAR) Subsection 1.102-4(e) states in pertinent part:

> If a policy or procedure, or a particular strategy or practice, is in the best interest of the Government and is not specifically addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, Government members of the [Acquisition] Team should not assume it is prohibited. Rather, absence of direction should be interpreted as permitting the Team to innovate and use sound business judgment that is otherwise consistent with law and the limits of their authority.

GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 1.102-4(e) (July 2007) [hereinafter FAR].

[2] FAR, *supra* note 2, at 52.211-10.

[3] *Tidewater*, 07-1 CBCA ¶ 33,525, at 166,097. The Clause, as used in the subject contract, stated in pertinent part:

> The Contractor shall be required to (a) commence work under this contract within 10 calendar days after the date the Contractor received the notice to proceed . . . . The completion date is based on the assumption that the successful offeror will receive the notice to proceed by the 70th day following the bid opening. The completion date will be extended by the number of calendar days after the above date that the Contractor receives the notice to proceed, except to the extent that the delay in issuance of the notice to proceed results from the failure of the contractor to execute the contract and give the required performance and payment bonds within the time specified in the offer.

Id. at 166,097.

[4] *Id*. at 166,098.

[5] *Id*. at 166,100.

[6] *Id*. at 166,097.

[7] *Id*.

[8] *Id*. (citing the subject contract).

[9] *Id*. at 166,098.

[10] *Id*.

[11] *Id*. The "on-site" notice to proceed was delayed from the preconstruction conference because Tidewater and the contracting officer could not agree on the quality control plan. *Id*. at 166,104.

[12] *Id*. at 166,100.

[13] *Id.* The "off-site" notice to proceed is the letter directing that the contractor begin off-site work discussed in the immediately preceding textual paragraph. *Id.*

The CBCA dismissed the government's argument that the broad grant of authority to innovate in FAR 1.102-4(e) allowed the two-step notice to proceed used in the subject contract.[15]

The CBCA first noted that FAR 1.102-4(e) applies only when the issue "'is not specifically addressed in the FAR.'"[16] Thus, this grant of broad innovative authority does not permit the alteration of the notice to proceed which is addressed in the FAR at Section 11.404(e) and Clause 52.211-10.[17] The CBCA further found that the government's attempted use of the off-site notice to proceed conflicted with other contract provisions and government correspondence to the contractor.[18] Because the off-site notice to proceed failed to comply with the contract, the CBCA granted Tidewater a portion of its extension request.[19]

When a Person Is a "United States Person"

Last fiscal year, the Department of State (DOS) grappled with the eligibility standards for contractors interested in competing for new embassy construction contracts. Embassy construction projects are subject to the Omnibus Diplomatic Security and Antiterrorism Act of 1986[20] (Security Act) which limits the field of competition to "United States persons and qualified United States joint venture persons" (U.S. Persons.)[21] The exact definition of "U.S. Persons" is further explained in the Security Act and in the DOS implementing regulations, but it was also the subject of two Government Accountability Office (GAO) opinions and a decision from the United States Court of Federal Claims (COFC).[22]

In the first case, Caddell Construction Company, Inc. (Caddell) protested the award of a contract to American International Contractors (Special Projects), Inc. (AICI-SP) for the construction of a new embassy in Djibouti.[23] Caddell

---

[14] *Id*.

[15] *Id*. at 166,102.

[16] *Id*. (citing FAR, *supra* note 2, pt. 1.102-4(e)).

[17] *Id*.

[18] *Id*. The contract stated that the notice to proceed would be issued after the preconstruction conference, but the off-site notice to proceed was issued prior to the conference. *Id.* Further, the contracting officer sent Tidewater several letters including language indicating that no work would be allowed until approval of the quality control plan, which had not happened prior to the off-site notice to proceed. *Id*.

[19] *Id*. at 166,104. The CBCA granted only a portion of Tidewater's extension request because the Board found that the delay in approval of the quality control plan was caused at least partially by Tidewater. *Id*.

[20] Omnibus Diplomatic Security and Antiterrorism Act of 1986, 22 U.S.C. § 4852 (2000) [hereinafter Security Act].

[21] *Id*. § 4852(a). The Security Act limits the field of competition, where adequate competition exists, to construction or design contracts exceeding $10,000,000. *Id*. Relevant portions of the definition of United States person are:

> (2) [T]he term "United States person" means a person which—
>
> . . . .
>
> (C) has been incorporated or legally organized in the United States—
>
> (i) for more than 5 years before the issuance date of the invitation for bids or request for proposals with respect to a construction project under subsection (a)(1) [of this section]; and
>
> . . . .
>
> (D) has performed within the United States or at a United States diplomatic or consular establishment abroad administrative and technical, professional, or construction services similar in complexity, type of construction, and value to the project being bid;
>
> (E) with respect to a construction project under subsection (a)(1) [of this section], has achieved total business volume equal to or greater than the value of the project being bid in 3 years of the 5-year period before the date specified in subparagraph (C)(i);
>
> . . . .
>
> (3) the term "qualified United States joint venture person" means a joint venture in which a United States person or persons owns at least 51 percent of the assets of the joint venture.

Id. § 4852(c).

[22] Caddell Constr. Co., Inc. (*Caddell I*), Comp. Gen. B-298949, Jan. 10, 2007, 2007 CPD ¶ 24; Caddell Constr. Co., Inc. (*Caddell II*), Comp. Gen. B-298949.2, June 15, 2007, 2007 CPD ¶ 119; Grunley Walsh Int'l, LLC v. United States, 78 Fed. Cl. 35, 37 (2007).

[23] *Caddell I*, 2007 CPD ¶ 24, at 1.

argued that AICI-SP did not qualify as a "U.S. Person," and thus was ineligible for award.[24] Among other requirements, the Security Act defines U.S. Person as an entity which was incorporated or legally organized in the United States for more than five years before the solicitation is issued.[25] In response to the DOS prequalification of sources, AICI-SP stated that it was incorporated in November 2005.[26] AICI-SP thus did not qualify on its own as a U.S. Person. Also in response to the prequalification, AICI-SP indicated that it was not part of a joint venture.[27] The GAO sustained Caddell's protest as the DOS decision that AICI-SP qualified as a U.S. Person lacked a rational basis.[28] The GAO recommended that the DOS reconsider its determination, better document its decision, and if the DOS should determine that additional information is needed, ensure that such information is sought in accordance with procedural requirements.[29]

Following the GAO decision, the DOS requested additional information from AICI-SP to verify its eligibility for the contract award.[30] AICI-SP then indicated that it was a de facto joint venturer with American International Contractors, Inc. (AICI), and the DOS then affirmed its earlier decision to award the contract to AICI-SP.[31] Caddell again protested to the GAO claiming that AICI-SP still did not qualify as a U.S. Person.[32] The GAO dispensed with Caddell's arguments that AICI-SP should not be allowed to use AICI's incorporation status and performance history to meet the Security Act requirements.[33] The GAO then analyzed a final statutory provision in the Security Act—the requirement that to be a U.S. Person a firm must have "achieved total business volume equal to or greater than the value of the project being bid in 3 years of the 5-year period" preceding the solicitation.[34]

The exact meaning of "total business volume . . . in 3 years of the 5-year period" became the key issue in this GAO opinion and the later COFC case.[35] The DOS implemented this language by cumulating the business volume from any 3 years in the prior 5-year period.[36] If this sum equaled or exceeded the value of the project under bid, the statutory requirement was met.[37] Caddell argued that the DOS used an erroneous interpretation, and that each of 3 years in the 5-year period had to equal or exceed the value of the current project.[38] The GAO held that Caddell's interpretation was correct, and thus that AICI-SP was not a "U.S. Person" because it could not meet this requirement.[39] The GAO did not give deference to the DOS interpretation because the DOS position was not the result of formal rulemaking and the plain meaning of the statute contradicted the DOS stance.[40]

About the time that the GAO issued its first *Caddell* opinion, the DOS was conducting the prequalification of offerors for the Fiscal Year (FY) 2007 embassy construction program.[41] Grunley Walsh International, LLC. (GWI) sought prequalification for the FY 2007 program.[42] Later in the Spring of 2007, the DOS notified GWI that it was prequalified for

---

[24] *Id*. at 1–2, 4.

[25] *Id*. at note 4.

[26] *Id.* at 2.

[27] *Id*. at 3.

[28] *Id*. at 5.

[29] *Id*. at 6.

[30] *Caddell II*, Comp. Gen. B-298949.2, June 15, 2007, 2007 CPD ¶ 119, at 2.

[31] *Id*. at 4.

[32] *Id*.

[33] *Id*. at 5–8. The Department of State (DOS) found that AICI-SP met the statutory requirements by looking to the parent company, AICI. *Id*. Caddell argued that nothing in the Security Act allowed a bidder to use the qualifications of a parent company to meet the statutory requirements. *Id*. The GAO determined that the DOS regulations reasonably implemented the statute and allowed a joint venturer to use the qualifications of one member of the venture. *Id*.

[34] *Id*. at 8.

[35] Grunley Walsh Int'l, LLC v. United States, 78 Fed. Cl. 35, 37 (2007).

[36] *Id*. at 9.

[37] *Id*.

[38] *Id*. at 10.

[39] *Id*. at 13.

[40] *Id*. at 10–11.

[41] *Id*. at 37.

[42] *Id*. Grunley Walsh International, LLC (Grunley) also presented an offer to the agency concerning the Djibouti contract, the contract that lead to the *Caddell* protest, but Grunley did not protest. *Id*.

all ten projects for the year and should expect to receive the Requests for Proposal (RFP).[43] Nevertheless, following the second GAO opinion in June 2007 interpreting the business volume requirement and finding that the Security Act required a volume equaling or exceeding contract value in each of 3 years in the previous 5-year period, the DOS notified GWI that it was no longer qualified based on the new interpretation.[44] GWI then filed a protest in the COFC.[45]

The COFC reviewed the prior GAO opinions and the statutory language and determined that the Security Act language is not ambiguous.[46] The plain language requires a cumulative total of 3 of the previous 5 years' business volume to equal or exceed the current contract value.[47] This determination contradicted the GAO interpretation in *Caddell* and the revised DOS stance.[48] The proper standard in implementing the Security Act, as determined by the COFC, is the DOS standard it had been using prior to the second GAO opinion.[49] The COFC concluded that:

> [b]ecause the GAO failed to properly read the business volume requirement contained in [the Security Act], its recommendation to the DOS was not in accordance with the law and lacked a rational basis. Therefore, the DOS's reliance on the GAO's decision and withdrawal of plaintiff's and intervenor's pre-qualification for the FY 2007 NEC Program was arbitrary, capricious, and not in accordance with the law.[50]

Major Mark A. Ries

[43] *Id.*

[44] *Id.* at 38.

[45] *Id.*

[46] *Id.* at 39–44.

[47] *Id.* at 40–41.

[48] *Id.* at 43.

[49] *Id.*

[50] *Id.* at 44.

Foreign Military Sales

Foreign Governments Conducting Foreign Military Sales (FMS) Purchases May Not Sue FMS Contractors in U.S. Federal Courts

In *Secretary of State for Defence v. Trimble Navigation Limited*[1] (*Trimble II*), the Fourth Circuit Court of Appeals held that the United Kingdom Ministry of Defence (UK MOD) was not a third-party beneficiary of Trimble Navigation Limited (Trimble), a U.S. Government contractor. Trimble was awarded a contract to produce global positioning satellite electronic chips for the UK MOD via a FMS purchase.[2] As a result of this holding, UK MOD could not sue Trimble in U.S. federal courts for the alleged damages that Trimble's defective global positioning satellite electronic chips caused.[3] The Court of Appeals reasoned that recognizing a third-party beneficiary right for the United Kingdom to sue Trimble under the FMS program "would be contrary to the AECA [Arms Export Control Act] because it would afford UK MOD a right exclusive to DCS [Direct Commercial Sales] transactions . . . . Accordingly, any recognition of third-party rights in UK MOD would be an end-run around the AECA and is prohibited."[4]

In *U.K. Ministry of Defence v. Trimble Navigation* (*Trimble I*),[5] the Fourth Circuit Court of Appeals previously held that the district court has jurisdictional to hear the merits of a case between a foreign government and an FMS contractor, since foreign nation disputes against FMS contractors do not fall within the scope of the Contracts Dispute Act's (CDA) mandate.[6] The Court of Appeals held that the CDA's jurisdictional mandate was inapplicable in this case because the CDA's jurisdictional reach "is limited to claims by the [U.S.] Government against a contractor, or by a contractor against the [U.S.] Government."[7] The Court of Appeals reasoned that since the claim did not fall within the CDA's jurisdictional mandate, then the district court had jurisdiction to hear this case;[8] the CDA did not displace the district court's jurisdictional mandate in 28 U.S.C.A. § 1332(a), which included hearing "all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between— . . . (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States."[9] As a result, the Court of Appeals remanded the case to the district court to determine whether UK MOD was a third-party beneficiary of the contracts between the U.S. Government and Trimble.[10] In effect, the Court of Appeals in *Trimble I* determined that the district court had jurisdiction to hear the case, and remanded the case to the district court to determine whether UK MOD had standing to sue Trimble under the AECA.

In *Trimble II*, the Court of Appeals upheld the district court decision that the UK MOD did not have standing to sue Trimble since the AECA's structure barred third-party beneficiary suits by foreign governments against U.S. Government contractors performing FMS contracts.[11] The *Trimble II* holding may have long-term effects on U.S. foreign policy. In the future, developed nations may opt out of the FMS program and choose to finance their own military research and development programs, since they may have no legal recourse to resolve disagreements with FMS contractors.

Major Jose A. Cora

---

[1] Sec'y of State for Defence v. Trimble Navigation Ltd. (*Trimble II*), 484 F.3d 700 (4th Cir. 2007).

[2] *Id*. at 707.

[3] *Id*.

[4] *Id*.

[5] United Kingdom Ministry of Defence v. Trimble Navigation Ltd. (*Trimble I*), 422 F.3d 165 (4th Cir. 2005).

[6] *Id*. at 166.

[7] *Id*.

[8] *Id*. at 168.

[9] 28 U.S.C.A. § 1332(a)–(a)(4) (LexisNexis 2008).

[10] *Trimble I*, 422 F.3d at 173.

[11] *Trimble II*, 484 F.3d 700, 707 (4th Cir. 2007).

Payment and Collection

Third Party Beneficiary Prevents Setoff Against Prime

"[T]he government cannot setoff payments owed to [plaintiff], a subcontractor and third party beneficiary, with debts owed by [the] prime contractor . . . on other, unrelated contracts that do not involve [plaintiff]."[1] In *J.G.B. Enterprises*,[2] the Court of Appeals for the Federal Circuit (CAFC) affirmed the Court of Federal Claims (COFC) holding as stated above, limiting the Government's right of setoff.[3] In its opinion, the CAFC provides an explanation of the difference in standing between a subcontractor that is also a third party beneficiary and one that is not.[4]

The Defense Supply Center Columbus (DSCC) contracted with Capital City Pipes (CCP) to supply hose assemblies under the small and disadvantaged business program.[5] All of CCP's required work was subtracted to J.G.B. Enterprises, Inc. (JGB), and the DSCC understood that JGB would perform the work.[6] During the period of performance, JGB informed the DSCC that CCP had not paid JGB on several contracts, and that JGB would halt future deliveries of the hose assemblies until payment was arranged.[7] An escrow payment arrangement was eventually implemented with the understanding and cooperation of all three parties, the DSCC, CCP, and JGB.[8] When the government made the payment to the escrow agent, the DSCC set off amounts owed by CCP under unrelated contracts.[9]

The CAFC began its analysis by recognizing that the government is entitled to recoup amounts owed it by a contractor through retaining amounts the government owes that contractor under the same or other contracts.[10] This right remains despite the fact that the indebted contractor owes amounts under the various contracts to subcontractors that perform some of the work; ordinarily subcontractors may not pursue claims against the government because they lack privity of contract.[11] Nevertheless, if a subcontractor is also a third party beneficiary of the contract, then the subcontractor has standing to bring its own claim.[12]

In this case, JGB was a third party beneficiary of the contract between the DSCC and CCP.[13] "A subcontractor is a third party beneficiary to the government contract when the [contracting officer] knew or should have known that the government's payment on the contract was intended to directly benefit the subcontractor."[14] The DSCC contracting officers knew of the change of payment instructions requiring payment to an escrow agent to ensure JGB received payment.[15] Thus, the government's payment on the contract would be made to the escrow agent for the sole purpose of benefiting JGB.[16]

When a third party beneficiary sues to enforce the contract against the government, the government retains all defenses as it would against the prime contractor.[17] This rule appears to allow the government to use its setoff claim against JGB's

---

[1] J.G.B. Enters., Inc. v. United States, 497 F.3d 1259, 1260 (2007) (citing J.G.B. Enters. v. United States, 63 Fed. Cl. 319 (2004)).

[2] *Id.*

[3] *Id.*

[4] *Id.* at 1261.

[5] *Id.* at 1260.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at 1260–61.

[10] *Id.* at 1261.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at note 1 (citing D&H Distrib. Co. v. United States, 102 F.3d 542, 546–47 (Fed. Cir. 1996)).

[15] *Id.*

[16] *Id.*

[17] *Id.*

claim for full payment on the contract. The CAFC found that setoff is not a *defense*, but rather a *claim*.[18] Because setoff is a claim, the government must address the setoff to the owing party, CCP in this case.[19] In other words, in order to claim a setoff against a third party beneficiary claim, the government must have a valid claim as against the third party beneficiary, not against the prime contractor.[20]

Prompt Payment Act Interest Claim Cognizable at ASBCA

In *Gosselin World Wide Moving NV*,[21] the Armed Services Board of Contract Appeals (ASBCA) determined that it has jurisdiction over claims for Prompt Payment Act (PPA)[22] interest even if it lacks jurisdiction over the original claim.[23] The Surface Deployment and Distribution Command (SDDC) contracted with Gosselin World Wide Moving NV (Gosselin) to provide movement of service members' household goods in Europe.[24] Gosselin fully performed its contractual obligations and the SDDC paid Gosselin.[25] Gosselin then filed a certified claim with the contracting officer for PPA interest on claims that SDDC paid late.[26] Gosselin appealed the contracting officer's failure to issue a final decision on the PPA interest claim with the ASBCA.[27]

The Government argued that "'when a common carrier is seeking payment from the government for charges owed on a GBL [government bill of lading] contract for transportation, the applicable statute is the ICA [Interstate Commerce Act].'"[28] The ASBCA does not have jurisdiction over such claims under the ICA; rather, the ICA provides its own administrative review process.[29] The Government then argued that as the PPA interest claim relates to the underlying transportation services claim, the ASBCA likewise has no jurisdiction over Gosselin's claim.[30]

The ASBCA found that jurisdiction is determined by analyzing the claim, not the contract.[31] In this case, Gosselin is claiming PPA interest, not payment due under the terms of the transportation contract.[32] Therefore, the starting point for a jurisdictional analysis is the PPA.[33] First, there is no exemption in the PPA for transportation services contracts, so the late SDDC payments are subject to the PPA.[34] Next, "[t]he PPA provides that a claim for an interest penalty not paid may be filed under section 6 of the CDA [Contract Disputes Act] . . . ."[35] Therefore, the CDA provides the mechanism for resolving PPA interest claims.[36] The ASBCA concluded:

> Because Gosselin's appeal does not involve the performance of the underlying contract for transportation service (TDS or GBL) but involves interest penalties under the PPA, and because the PPA applies to DoD, and designates the CDA as the statute for resolving PPA interest penalty disputes, we hold

[18] *Id.* "'The right of setoff . . . allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding the absurdity of making A pay B when B owes A.'" *Id.* at 1261–62 (quoting Citizen Bank of Md. v. Strumpf, 516 U.S. 16, 18 (1995) (internal quotes omitted)).

[19] *Id.*

[20] *Id.*

[21] Gosselin World Wide Moving NV, ASBCA No. 55365, 06-2 BCA ¶ 33,428.

[22] Prompt Payment Act (PPA), 31 U.S.C. §§ 3901–3907 (2000).

[23] *Gosselin*, 06-2 BCA ¶ 33,428, at 165,733.

[24] *Id.* at 165,728.

[25] *Id.* at 165,729.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 165,730.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

that the ASBCA, as the agency board designated for resolution of DoD CDA appeals, has jurisdiction to decide this appeal.[37]

DFARS Final Rule—Electronic Payment Request Submission and Processing

In the *2006—Year in Review*,[38] we discussed a proposed change to the Defense Federal Acquisition Regulation Supplement (DFARS) regarding electronic submission of payment requests.[39] In response to comments received by the DOD regarding the proposed rule, the DOD clarified in the final rule that responsibility for approving non-electronic payment requests lies with the contracting officer administering the contract, and limits the alternative methods available for non-electronic payment request submissions.[40] This final rule, amending the DFARS Subpart 232.70 and the corresponding clause at 252.232-7003, clarifies exceptions to the requirement that all payment requests be submitted electronically.[41]

Major Mark A. Ries

[37] *Id*. at 165,733.

[38] Major Andrew S. Kantner et al., *Contract and Fiscal Law Developments of 2006—Year in Review*, ARMY LAW., Jan. 2007, at 146.

[39] *Id*. (discussing Defense Federal Acquisition Regulation Supplement; Electronic Submission and Processing of Payment Requests, 71 Fed. Reg. 14,149 (Mar. 21, 2006)).

[40] Defense Federal Acquisition Regulation Supplement; Electronic Submission and Processing of Payment Requests, 72 Fed. Reg. 14,240 (Mar. 27, 2007). One comment indicated that the proposed rule use of the term "administrative contracting officer" is overly narrow as many procuring contracting officers administer contracts. *Id*. The final rule uses the language, "the contracting officer administering the contract for payment." *Id*. Another comment recommended limiting the non-electronic alternative payment request options to those for which systems are already in place. *Id*. The final rule adopted this recommendation and limits non-electronic methods to conventional mail or facsimile. *Id*.

[41] *Id*.

Original Source

The Supreme Court took on the issue of the meaning of "original source" under the False Claims Act (FCA) in *Rockwell Int'l Corp. v. United States*[1] and, as a result, greatly narrowed the definition.[2] In *Rockwell*, former employee Mr. James Stone filed a *qui tam* action for FCA violations involving the contractor at the Energy Department's Rocky Flats, Colorado nuclear weapons plant.[3] In determining that the relator was not an "original source" within the meaning of the FCA, the majority of the Court determined that Mr. Stone did not have "direct and independent knowledge" of the information that was the basis for the amended complaint in this case.[4] In fact, Mr. Stone had predicted, while still employed with the contractor, that the technique used for storing pond sludge would fail, but the court found that a prediction was not "knowledge" within the meaning of the statute.[5] Moreover, the court held that the relator's prediction was at odds with the amended complaint which stated a different basis for the failure.[6]

The reality of the decision threw the relator's *qui tam* action out of the legal arena. The decision did not, however, prevent the Government from bringing a civil action.[7] In the end, Mr. Stone's willingness to assist the Government seemed to be his undoing, and as a result, the decision is likely to have a chilling effect on a relator's willingness to come forward, to work with Government investigators, and to allow the Government to amend the complaint for strategic purposes.

Publicly Disclosed Material In Relation to Determining Original Source

In *United States* ex rel. *Atkinson v. PA. Shipbuilding Co.*,[8] the court addressed the issue of whether a relator could be an original source when the action is based on material that is publicly disclosed.[9] In *Atkinson*, the relator claimed the defendants committed multiple FCA violations that were partially based upon public disclosures.[10] The court evaluated the relator's claims by determining whether the relator's knowledge was based in whole or in part on information available in the public domain that was not identified in the FCA because "it is the nature and extent of reliance upon that information that determines whether the relator is an original source."[11] Declining to follow the Ninth Circuit's lead in adopting a "rigid rule" of always requiring disqualification, Judge Jane R. Roth announced that the court must consider the availability of the public information and the amount of work and analysis required to craft the particular FCA claim.[12]

Presentment for the FCA . . . Required or Not Required, That Is (Still) the Question[13]

The court in *United States* ex rel. *Sanders v. Allison Engine Co., Inc.*[14] confronted the difficult task of disagreeing with a previous opinion of a district court judge.[15] Although disagreements between circuits occur regularly, the opinion with which the court disagreed was written by none other than, Chief Justice John Roberts, when he was serving as a district court

---

[1] 127 S. Ct. 1397 (2007).

[2] *Id*. at 1403.

[3] *Id*.

[4] *Id*. at 1410.

[5] *Id*. at 1402.

[6] *Id*.

[7] *Id.*

[8] 473 F.3d 506 (3d Cir. 2007).

[9] *Id.*

[10] *Id.* at 509–11.

[11] *Id*. at 522.

[12] *Id.*

[13] *See* Brian A. Hill & Lara A. Covington, *The Preeminence of Presentment: Important Developments Under the False Claims Act*, FED. CONT. REP., Nov. 21, 2006, at 523–27, *available at* http://www.wsgr.com/attorneys/NEWBIOS/PDFs/covington1.pdf (analyzing the presentment issue in pre-*Sanders* appellate case).

[14] 471 F.3d 610, 616 (6th Cir. 2006).

[15] *Id.*

judge.[16] In that opinion, Judge Roberts determined that a presentment requirement applied to subsections (a)(2) and (a)(3) of the FCA even though the language of those subsections do not facially contain a presentment requirement.[17] Judge Roberts reasoned that because subsection (a)(2) was once part of the same clause as subsection (a)(1), it must be read as incorporating that subsection's presentment text.[18]

After issuing the opinion, Judge Roberts became the Chief Justice of the Supreme Court. With confidence in hand, however, the *Sanders* court determined that presentment is not always required for FCA liability.[19] The *Sanders* court determined that although 31 U.S.C. 3729(a)(1) refers to a "knowing presentment of a false or fraudulent claim to an officer or employee of the U.S. government," subsections 3729(a)(2) and (a)(3) contain no such requirement.[20] The *Sanders* court looked to the language of the statute itself as well as the legislative history in determining that Judge Roberts got it wrong.[21]

In another case on presentment, the court in *United States* ex rel. *Howard v. Lockheed Martin Corp*.[22] held that for purposes of pleading fraud with particularity, as required by Federal Rule of Civil Procedure 9(b), there is no requirement to plead presentment by a subcontractor to the prime contractor.[23] In that case, the FCA whistleblowers alleged that Lockheed and eight subcontractors improperly charged the United States for nonconforming tooling made by the companies and used by Lockheed to manufacture the F-22 fighter plane and the C-130J cargo plane.[24] While the whistleblowers provided what the court described as "specific and detailed information about the alleged fraud," the whistleblowers also identified particular difficulties that have hindered their ability to identify specific false claims submitted.[25]

Accordingly, the court determined that to the extent the relators' fraud claims are based on subsections (a)(2) and (3), the fraud claims are pleaded with sufficient particularity and will not be dismissed.[26] To the extent the relators' claims are based solely on subsection (a)(1), however, which imposes liability for knowing presentation of a false claim to the Government, the court dismissed the relators' claims because the whistleblowers did not plead presentment to the United States with particularity.[27] With regard to these claims, the court also said it would entertain a motion to amend the complaint if warranted after discovery.[28] In basing its decision on what it called the "recent seminal decision" in *Sanders*, the court also stated, "[T]he concern that Lockheed raises—that there must have been the presentment of a claim to *someone* if not directly to the government—is merely a matter of practical proof and not an element of the cause of action."[29]

---

[16] *See* United States *ex rel.* Totten v. Bombardier Corp. (*Totten II*), 380 F.3d 488 (D.C. Cir. 2004).

[17] *Id.*

[18] *See id.* at 507.

[19] *Sanders*, 471 F.3d at 615–16.

[20] *Id.* at 615–17.

[21] *Id.* at 618.

[22] 499 F. Supp. 2d 972 (S.D. Ohio 2007).

[23] *Id.*

[24] *Id.* at 975.

[25] *Id.* at 979.

[26] *Id.* at 980.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 978.

Custer's Revenge?

In last year's *Year in Review*, we discussed the ongoing developments of one of the first *qui tam* actions to arise out of Operation Iraqi Freedom.[30] The opinion in *United States* ex rel. *DRC Inc. v. Custer Battles, LLC*,[31] struck the latest blow to relators suing the firm, Custer Battles LLC, in *qui tam* actions.[32]

In this FCA whistleblowers case, the relators lost their sole remaining claim against Custer Battles. In finding for Custer Battles, the federal district court found no support for allegations that the contractor fraudulently induced the Coalition Provisional Authority (CPA) to award it a $16.8 million fixed-price contract to provide security services at Baghdad International Airport (BIAP).[33] Specifically, the court stated:

> [T]he undisputed facts manifestly demonstrate that Relators cannot establish a fraudulent inducement claim under the FCA because they have failed to show (i) that Custer Battles made a false statement regarding fixed security personnel staffing levels; (ii) that Custer Battles knowingly made the allegedly false statement; and (iii) that this allegedly false statement was material to the CPA's decision to award the BIAP contract to Custer Battles.[34]

This case is notable because of the notoriety the company received as one of the first contractors to be identified as allegedly defrauding the United States in the Iraq war.[35] Although one could argue that there was ample evidence of fraud, in passing laws which criminalize fraud, Congress did not seem to contemplate the contracting problems that arose with the creation of the CPA. In response to some of these problems, the House of Representatives, on 9 October 2007, passed the War Profiteering Prevention Act of 2007.[36] This law aims to add to the criminal statute provisions that would apply:

> [I]n any matter involving a contract with, or the provision of goods or services to, the United States or a provisional authority, in connection with a mission of the United States Government overseas . . . .[37]

Curiously, the latest Custer Battles' case was decided after *Sanders* and took the opportunity to address the *Sanders* opinion when reciting the history of the Custer Battles litigation. In doing so, the court dismissed *Sanders* as "unpersuasive" in its of the construction of the statute.[38] The court instead chose to follow Judge Roberts' opinion in *Totten II*.[39]

Be Careful What You Ask For . . .

When Daewoo Engineering and Construction (Daewoo) submitted a claim to the U.S. Army Corps of Engineers (ACE) for an equitable adjustment for building a road, it may not have been prepared for would happen next. Daewoo was the low bidder on a road construction contract on the island of Palau.[40] Daewoo had difficulty completing the project on time and attempted to shift the blame to the contract's specifications, particularly those concerning the embankment construction and soil compaction; Daewoo claimed it was impossible to meet the requirements of these specifications.[41] Daewoo then

---

[30] Major Andrew S. Kantner et al., *Contract and Fiscal Law Developments of 2006—The Year in Review*, ARMY LAW., Jan. 2007, at 153–54; *see also* Major Andrew S. Kantner et al., *Contract and Fiscal Law Developments of 2005—The Year in Review*, ARMY LAW., Jan. 2006, at 133–34.

[31] 472 F. Supp. 2d 787 (E.D. Va. 2007).

[32] *Id.*

[33] *Id.* at 800.

[34] *Id.*

[35] *See BBC News 24: Security Worker Killed in Iraq* (BBC television broadcast Apr. 9, 2004); T. Christian Miller, *Contractor Accused of Fraud in Iraq*, SEATTLE TIMES, Oct. 9, 2004; Eric Eckholm, *Memos Warned of Billing Fraud by Firm in Iraq*, N.Y. TIMES, Oct. 23, 2004; *Nightly News: U.S. Contractors in Iraq Allege Abuses: Four Men Say They Witnessed Brutality* (MSNBC television broadcast Feb. 17, 2005); *60 Minutes: Billions Wasted in Iraq?* (CBS television broadcast Feb. 12, 2006).

[36] *See* War Profiteering Prevention Act of 2007, H.R. 400, 110th Cong. § 1040 (2007).

[37] *Id.*

[38] *See DRC, Inc.*, 472 F. Supp. 2d at 790 n.4.

[39] *See Totten II*, 380 F.3d 488 (D.C. Cir. 2004).

[40] *See* Daewoo Eng'g & Constr. Co., Ltd. v. United States, 73 Fed. Cl. 547, 554 (2006).

[41] *Id.* at 560.

submitted a claim to the ACE for additional costs it incurred for its attempt to comply with the specifications.[42] When the ACE denied the claim, after offering a no-cost time extension, Daewoo appealed the contracting officer's final decision at the Court of Federal Claims (COFC), ultimately requesting $13 million in excess of current costs and $50.6 million in alleged future costs.[43]

In deciding for the Government, the court found that the contract specifications for embankment construction and soil compaction were not defective, but were rather performance specifications that required pre-bid investigation and judgment on the part of the contractor.[44] The court concluded that "[w]hether Daewoo wanted the money or wanted the Government's attention, $64 million was not an amount the Government owed . . . and [Daewoo] knew it."[45] The court, however, only entered judgment for the Government in its counterclaims against Daewoo in the amount of $50.6 million for the Contract Disputes Acts (CDA) violation and $10,000 for the FCA violation.[46]

Of note and possibly of warning to future litigants wishing to use the court as part of a bargaining game, the court stated that:

> Plaintiff did not present a clear legal theory to support its large claim against the government. It appeared that Daewoo did not expect to find itself in court trying to justify its case; perhaps it thought the defendant would pay a negotiated amount. The purpose of the Contract Disputes Act is to prevent this sort of gamesmanship.[47]

Underbidding Alone Is Not Fraud

In a Fifth Circuit case, the court addressed the issue of whether underbidding alone is fraud.[48] In deciding that these concepts were indeed not one in the same, the court affirmed a district court's ruling in favor of the defendant in an FCA whistleblower action alleging that it deliberately underbid a cost-plus-award-fee (CPAF) National Aeronautics and Space Administration (NASA) research contract and then knowingly failed to report anticipated cost overruns in order to obtain award fees under the contract. Although the defendant was alleged to have committed fraud in three instances, the court addressed the issue of whether there was a nexus between the alleged underbidding and the request for payment.[49] The court found that the defendant's projected labor costs were derived from NASA's model and that there was no FCA liability.[50] Further, the court determined that from the beginning, the research contract was "doomed to run over-budget" and that cost overruns due to changes in the "skill mixes" of workers were "government directed."[51] The court wrote, "Without more, a contract underbid is not a false claim. For FCA liability, there must be a nexus between the underbidding and a request for payment that the contractor would not have been entitled to absent the contract. That nexus is absent here."[52]

---

[42] *Id.*

[43] *Id.*

[44] *Id.* at 593–94.

[45] *Id.* at 596.

[46] *Id.* at 595–96. In discounting the award to the government by $13 million, the court harshly-worded its analysis by stating:

> We suspect that Daewoo's entire claim is fraudulent. However, plaintiff's apparent incompetence in putting together its claim, along with the unwillingness of its witnesses to explain the process, provides it an ironic benefit. That is, we found it difficult to locate the line between fraud and mere failure of proof in this case.

Id.

[47] *Id.* at 568–69.

[48] United States *ex rel.* Laird v. Lockheed Martin Eng'g & Sci. Servs. Co., 491 F.3d 254 (5th Cir. 2007).

[49] *Id.* at 260.

[50] *Id.*

[51] *Id.*

[52] *Id.*

Let's Continue to Do the Numbers

Fiscal Year (FY) 2006 set records for settlements and judgments in cases involving allegations of fraud against the government.[53] The Department of Justice (DOJ) announced 21 November 2006 that the amount in recoveries reflected a record of more than $3.1 billion. This was significantly more than the last record of $2.2 billion in recoveries set in FY 2003.[54] The FY 2006 recoveries more than doubled the amounts recovered in FY 2005 for DOJ.[55] According to the DOJ, government-initiated claims accounted for $1.8 billion in recoveries, while whistleblower suits under the *qui tam* provisions of the FCA accounted for $1.3 billion.[56] Unfortunately, FY 2007 is doomed to disappoint as almost half the total recoveries resulted from the DOJ's settlements with Tenet Healthcare and the Boeing Co., the nation's second-largest hospital chain and second-largest defense contractor, respectively.[57]

But That's Why They Play the Game

One does not want to pin the success of fighting fraud on purely numbers, but the metric is hard to pass up as a litmus test for success. Notwithstanding, 2007 had seeds sown of possible recoveries as evidenced by the United States intervening in three FCA whistleblower lawsuits alleging that Hewlett-Packard Co., Accenture LLP, and Sun Microsystems Inc. "submitted false claims to the United States for information technology (IT) hardware and services on numerous government contracts from the late 1990s to the present."[58] The lawsuits were originally filed in U.S. District Court in Little Rock, Arkansas, by Norman Rille and Neal Roberts.[59] The core of the allegations is that the three companies have "systematically solicited and/or made payments of money or other things of value, known as 'alliance benefits,' to a number companies with whom they had global 'alliance relationships' or an agreement to work together."[60] The Government's complaints assert that "these 'alliance relationships' and the resulting alliance benefits amount to kickbacks and undisclosed conflict of interest relationships."[61]

National Procurement Fraud Task Force (NPFTF)

The NPFTF continues to make its mark in the criminal prosecution of fraud. One of its biggest improvements is the NPFTF's website which centralizes the coordinated efforts in the fight against procurement fraud.[62] The website has dramatically increased the dissemination of information regarding events such as arrests, indictments, verdicts, and settlements.[63] As evidenced by the NPFTF's July 2007 Progress Report, the strides made by the coordination between DOJ, the Federal Bureau of Investigations (FBI), and other federal agency Inspector Generals have been impressive.[64] The task force has held 3 full meetings with more than 125 representatives attended by more than 30 agencies.[65] The task force has taken a coordinated and unified approach to combating procurement fraud related to the wars and reconstruction efforts in Iraq and Afghanistan.[66] Two entities that are supported or integral to the mission and goals of the NPFTF are the Office of

---

[53] *See* Press Release, Dep't of Justice, Justice Department Recovers Record $3.1 Billion in Fraud and False Claims in Fiscal Year 2006 (Nov. 21, 2006) [hereinafter DOJ FY06 Recovery], *available at* http://www.usdoj.gov/opa/pr/2006/November/06_civ_783.html.

[54] *Id.*

[55] *See* Press Release, Dep't of Justice, Justice Department Recovers $1.4 Billion in Fraud & False Claims in FY 2005; More Than $15 Billion Since 1986 (Nov. 5, 2005), *available at* http://www.usdoj.gov/opa/pr/2005/November/05_civ_595.html.

[56] DOJ FY06 Recovery, *supra* note 53.

[57] *Id.*

[58] *See* Press Release, Dep't of Justice, U.S. Joins Cases Against Hewlett-Packard, Sun Microsystems & Accenture Alleging False Claims on Hardware, Software & Technology Services Sales (Apr. 19, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/April/07_civ_265.html.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *See* Dep't of Justice, Nat'l Procurement Fraud Task Force, Press Room website, *available at* http://www.usdoj.gov/criminal/npftf/pr/press_releases/.

[63] *Id.*

[64] *See* U.S. DEP'T OF JUSTICE, NAT'L PROCUREMENT FRAUD TASK FORCE: PROGRESS REPORT (July 2007) [hereinafter NPFTF Progress Report], *available at* http://www.usdoj.gov/criminal/npftf/update/pr/2007/jul/07-01-07progress-rpt.pdf. I need to be able to find this to verify format.

[65] *Id.*

[66] *Id.*

the Special Inspector General for Iraq Reconstruction (SIGIR) and the Logistics Civil Augmentation Program (LOGCAP) Working Group.[67]

Special Inspector General for Iraq Reconstruction (SIGIR)

The Office of the SIGIR is the successor to the Coalition Provisional Authority Office of Inspector General (CPA-IG). The Office of the SIGIR was created in October 2004 by a Congressional amendment to Public Law 108-106.[68] The amendment allows the Office of the SIGIR to continue the oversight that the CPA-IG had established for Iraq reconstruction programs and operations. Specifically, Office of the SIGIR is responsible for overseeing the use and misuse of the Iraq Relief and Reconstruction Fund (IRRF) and all obligations, expenditures, and revenues associated with reconstruction and rehabilitation activities in Iraq. Stuart W. Bowen, Jr., Special Inspector General for Iraq Reconstruction, who served as the CPA-IG since 20 January 2004, continues as the SIGIR and reports administratively to the Secretaries of State and Defense. In addition, the Office of the SIGIR provides quarterly and semi-annual reports directly to the U.S. Congress.[69]

The Office of the SIGIR's duties and responsibilities are extensive.[70] First, it must provide for the independent and objective execution and supervision of audits and investigations. Second, it must provide objective leadership and coordination of, and recommendations on, policies designed to promote economy, efficiency, and effectiveness in the management of Iraq reconstruction programs and operations. Third, it must attempt to prevent and detect fraud, waste, and abuse. Fourth, it must review existing and proposed legislation and regulations and make appropriate recommendations. Fifth, it must maintain effective working relationships with other governmental agencies and non-governmental organizations regarding oversight in Iraq. Sixth, it must inform the Secretaries of State and Defense, and the Congress of significant problems, abuses, and deficiencies in operations, and track the progress of corrective actions. Seventh, it must report violations of law to the U.S. Attorney General and report to Congress on the prosecutions and convictions that have resulted from referrals. Eighth, it must submit regular reports (Quarterly and Semiannual) to Congress.[71]

The Office of the SIGIR has been quite active in the last year with investigations resulting in many indictments and convictions. One of the most important indictments to date is an example of the work by the Office of the SIGIR. On 22 August 2007, a U.S. Army major, John Cockerham, his wife, Melissa, and his sister, Carolyn Blake, were indicted on charges of bribery, money laundering, and conspiracy in connection with his service as an Army contracting officer in Kuwait in 2004 and 2005 (*United States v. Cockerham*, W.D. Tex., No. SA-07-492M, 7/23/07).[72] The alleged bribery began in 2005 when Major Cockerham began accepting millions of dollars in bribes in connection with Defense Department contracts in Iraq and Kuwait that were either awarded or managed by Cockerham. Melissa Cockerham, following instructions from her husband, allegedly received millions of dollars in U.S. and foreign currency from the contractors and deposited the money into bank accounts and safe deposit boxes in Kuwait and Dubai. The three charged may have received up to $9.6 million in bribe payments from at least eight contractors, and Cockerham allegedly anticipated receiving as much as $5.4 million more.

LOGCAP Task Force

Another new entity that has added to the arsenal of fraud fighting tools is the Logistics Civil Augmentation Program (LOGCAP) Working Group.[73] The LOGCAP Working Group operates in the Central District of Illinois and is responsible for investigating allegations of fraud, waste, and abuse on the LOGCAP III, ten-year competitive contract awarded to Kellog, Brown, and Root (KBR) which incorporates task orders issued by the U.S. Army in support of Operation Iraqi Freedom. As of July 2007, the Working Group was responsible for at least five cases involving bribery in the issuance of task orders.[74]

---

[67] *Id.*

[68] *See* SIGIR, http://www.sigir.mil/ (last visited Feb. 24, 2008).

[69] *Id.*

[70] *See id.*

[71] *See id.*

[72] *See* Press Release, Dep't of Justice, Three Defendents Indicated in Case Involving Bribery, Conspiracy, Money Laundering, and Obstruction Offenses Related to Contracts in Iraq and Kuwait (Aug. 27, 2007), *available at* http://www.usdoj.gov/criminal/npftf/pr/press_releases/2007/aug/08-22-07three-indict.pdf.

[73] *See* NPFTF Progress Report, *supra* note 64, at 10–11.

[74] *Id.*

Safavian Sentenced

The continued aftermath of Jack Abramoff's web of bad acts culminated for the former head of the Office of Management and Budget's Office of Federal Procurement Policy David Safavian.[75] After a court found him guilty on four counts of making false statements about and concealing his relationship with lobbyist Jack Abramoff, Mr. Safavian was sentenced in federal court on 27 October 2007 to eighteen months in prison.[76]

Care with the Administrative Record

The U.S. District Court for the District of Columbia set aside the Treasury Department's three-year debarment of a former federal official from eligibility for government contracts.[77] In this case, Maria Canales was employed by the Department of the Treasury and served in various capacities in the agency.[78] Before Canales resigned from the Treasury, she received gifts from a contractor whom she had also approved as a sole-source award for a Treasury contract. The IG for the Treasury did an investigation and interviewed Canales. During the interviews, Canales made false statements and was later prosecuted by the Department of Justice for these false statements. Canales pled guilty to making false statements but the plea agreement stated that no connection had been established between the gifts Canales received and the contract awarded to the contractor in question.[79] The Treasury's suspension and debarment official (SDO) initiated debarment proceedings in November 2005 against Canales and gave Canales an opportunity to provide legal arguments and present factual documentation in opposition. During that process Canales raised mitigating factors that made the debarment inappropriate.[80] The SDO informed Canales on 27 June 2006 of his decision to debar Canales.

After review, the court found that "[the SDO]'s failure to address in any detail the mitigating factors Canales raised, or to explain why he gave them so little weight, makes it impossible to evaluate where there was a 'rational connection' between the facts of her case and his decision to impose debarment."[81] Specifically the court found that because the SDO did not "explain his decision to impose debarment rather than a lesser sanction, given the strength of the mitigating factors, the court cannot conclude that that decision was rational or that [the SDO] satisfied the procedures" outlined in the FAR.[82]

This case highlights the care necessary in creating an administrative record that sufficiently explains the SDO's reasoning behind a debarment decision. It is not sufficient for an SDO to rely on, as in the foregoing case, a conviction and a cursory mention of the existence of mitigating factors. This case seems to illustrate the requirement of the SDO to ensure the administrative record properly reflects the analysis of an agency's decision in balancing the best interest of the government with the mitigating factors a contractor raises.

---

[75] *See* Press Release, Dep't of Justice, Former GSA Chief of Staff David Safavian Sentenced to 18 Months in Prison on Charges of Obstruction, Making False Statements (Oct. 27, 2006), *available at* http://www.usdoj.gov/criminal/pr/press_releases/2006/10/2006_4825_CRM_06-733_Safavian_102706.pdf.

[76] *Id.*

[77] *See* Canales v. Paulson, 2007 U.S. Dist. LEXIS 50924 (D.D.C. 2007).

[78] *See id*. at 2.

[79] *Id.*

[80] Canales offered mitigating factors to include her "spotless record before" her criminal offense, the fact that five years had passed without incident since the offense, and her "extensive business" with several other federal agencies in the interim, all of which were aware of her misdemeanor conviction when they chose to contract with her. *Id.* at 13.

[81] *Id*. at 17.

[82] *Id*. at 19.

Contractor Must Exhaust Administrative Remedies

In another case decided in 2007, plaintiffs sued the U.S. Army Suspension and Debarment Official, Mr. Robert W. Kittel, after Mr. Kittel proposed that they be suspended.[83] Plaintiffs are defense contractors who allegedly bribed Army officials in exchange for assistance in contract awards. During the Army's investigation, Criminal Investigation Division (CID) Special Agent (SA) Larry Moreland interviewed a contracting official, Major Gloria Davis, who admitted that Plaintiff George Lee gave her at least $225,000 for assistance in obtaining government contracts. Soon after giving the interview, Major Davis committed suicide. Special Agent Moreland reduced his interview into a sworn declaration and the SDO used that declaration as the basis for the proposed suspension. After the Plaintiffs received the notice of proposed suspension, but before final action, they filed suit to enjoin the SDO from implementing an agency decision.

In finding for the Government, the court found that Plaintiffs did not exhaust all their administrative remedies; therefore, the court could not enjoin the agency from taking action. The court stated that the Plaintiffs were offered a chance for a hearing, but decided instead to file an action attempting to enjoin the Army from initiating the suspension action. In citing *Curry v. Contract Fabricators, Inc.*,[84] the court found that when the government refuses access to administrative remedies, a plaintiff would not have to exhaust remedies.[85] That, however, was not the situation here. The court found that the Plaintiffs were offered administrative remedy access, but failed to avail themselves of the process and, therefore, denied Plaintiffs' request to enjoin the government's action.[86]

Major Brett Egusa

[83] *See* Lee v. Kittel, Civil Action No. 5:07-cv-1455-UWC (N.D. Ala. 2007) (unpublished).

[84] 891 F.2d 842 (11th Cir. 1990).

[85] *Lee*, Civil Action Number 5:07-cv-1455-UWC, at 5.

[86] *Id.* at 8.

Taxation

Update on 3% Withholding Tax on Government Contractors

Last year[1] we reported that Section 511 of the "Tax Increase Prevention and Reconciliation Act of 2005"[2] amended the Internal Revenue Code to generally impose a three percent withholding tax on payments for property and services made to contractors by Federal, state, and local government agencies, effective January 2011. Currently, there are three bills pending in Congress which would either repeal this provision in its entirety, or limit its application.[3] So, this is something to continue watching, keeping in mind that implementation in both Internal Revenue Service (IRS) regulations and the Federal Acquisition Regulation (FAR) will be required, should Section 511 not be repealed.

Failing to Include Mississippi Use Tax Equals Tough Luck X 2

Where a contractor's two sole-source fixed price contracts for renovation work included FAR 52.229-4, Federal, State, and Local Taxes (Noncompetitive Contract),[4] the Armed Services Board of Contract Appeals (ASBCA) denied the contractor's appeal for an equitable adjustment for payment of Mississippi use tax, which the contractor had neglected to include in its price.[5] The contractor's sole argument to the ASBCA was that it was not bound by FAR 52.229-4 because of its own unilateral mistake in omitting Mississippi's 3.5% use tax from its total contract price.[6] The Board said this was not a clerical or mathematical error that would entitle the contractor to reformation of the contract, but rather a judgmental error, since the contract and case law placed the burden of ascertaining applicable taxes squarely on the contractor.[7]

Law Firm Has No Standing for Tax Recovery

In an interesting case raising issues of standing relating to tax recovery matters,[8] the Court of Appeals for the 9th Circuit decided whether a law firm had standing to bring an action against the United States to recover attorney's fees from monies that its client was awarded as a result of a contract settlement.[9] Previously, the firm's client had agreed with the Federal Highway Administration to a contract settlement, but the contractor never received any compensation from that settlement because the IRS requested that payment be withheld to offset the contractor's unpaid taxes.[10] The circuit court vacated the district court's summary judgment for the Government and ordered the case to be dismissed, as the trial court lacked jurisdiction to hear the law firm's case.[11]

The law firm attempted to invoke 28 U.S.C. § 1346(a)(1), which waives the sovereign immunity of the United States to permit suit in the U.S. District Courts for the recovery of taxes which have been erroneously collected.[12] In response, the Circuit Court pointed out that a condition of that waiver of sovereign immunity is compliance with 26 U.S.C. § 7422(a), which first requires the filing of an administrative claim.[13] The Circuit Court rejected the law firm's "curious" argument that

---

[1] Major Andrew S. Kantner et al, *Contract and Fiscal Law Developments of 2006—Year in Review*, ARMY LAW., Jan. 2007, at 160.

[2] Pub. L. No. 109-222, 120 Stat. 345 (2006) (codified as amended in scattered sections of 26 U.S.C.).

[3] H. R. 1023, 110th Cong. (2007) ("To repeal the imposition of withholding on certain payments made to vendors by government entities.): Withholding Tax Relief Act of 2007, S. 777, 110th Cong. (2007) repealing § 511 of the Tax Increase Prevention and Reconciliation Act of 2005); Small Business Tax Fairness and Simplification Act of 2007, H. R. 46, 110th Cong. (2007) (exempting specified small businesses).

[4] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 52.229-4 [hereinafter FAR]. This clause states, in para (b): "Unless otherwise provided in this contract, the contract price includes all applicable Federal, State, and local taxes and duties." *Id.*

[5] Ellis Envtl. Group, LC, ASBCA Nos. 54066, 54067, 07-1 BCA ¶ 33,551.

[6] *Id.* at 166,161.

[7] *Id*. at 166,163.

[8] Dunn & Black, P.S. v. United States, 492 F.3d 1084 (9th Cir. 2007).

[9] *Id.* at 1086. After terminating the contractor for default and being sued for wrongful termination, the Federal Highway Administration stipulated to an entry of judgment, without admission of liability, in favor of the contractor. *Id.*

[10] *Id.*

[11] *Id.* at 1093–94.

[12] *Id.* at 1088.

[13] *Id.* Section 7422(a) states, in pertinent part:

section 7422(a) did not apply to them (inasmuch as it was not the taxpayer), while at the same time the law firm asserted standing under section 1346(a)(1).[14] If the court accepted the law firm's argument, it said, "we would find ourselves pointed in diametrically opposite directions with respect to nearly identical statutory language."[15]

Representations & Certifications—Tax Delinquency

In March of this year, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council published a proposed rule, which would amend FAR Parts 9 and 52 provisions covering contractor certification regarding debarment, suspension, proposed debarment, and other responsibility matters, by adding language regarding nonpayment of taxes.[16] As of the date of the writing of this article, the period for public comment had closed, and the final rule was awaiting publication.

Margaret K. Patterson

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

26 U.S.C. § 7422(a) (2000).

[14] *Dunn & Black*, 492 F.3d at 1088. Section 1346(a)(1) states:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of . . . [a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

28 U.S.C. § 1346(a)(1).

[15] *Dunn & Black*, 492 F.3d at 1090.

[16] *See* 72 Fed. Reg. 15,093 (proposed 30 Mar. 2007).

Contingency Contractor Personnel

What to Do with Security Contractors?

While government use of security contractors in support of operations in Iraq and Afghanistan has been the source of simmering controversy for several years,[1] the issue has now come to a rapid boil. Over the past year, numerous allegations have surfaced regarding excessive use of force by security contractor personnel.[2] These allegations have led to new efforts to permit the exercise of criminal jurisdiction[3] and to new proposals to increase and unify oversight over such personnel.[4] As often seems to be the case, reactionary changes during times of high profile allegations and media attention appear to lack thorough analysis and planning, and none will completely solve the issues caused by contracting for security services.

Contractor personnel misconduct has been a difficult issue for several years.[5] However, recent allegations of security contractor misconduct are leading to much greater scrutiny and support for change.[6] One case causing this issue to boil occurred on Christmas Eve, 2006.[7] Andrew Moonen, an employee of Blackwater USA and a former member of the 82nd

---

[1] *See, e.g.*, 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)); Major Andrew S. Kantner et al., *Contract and Fiscal Law Developments of 2006—Year in Review*, ARMY LAW., Jan. 2007, at 161–68.

[2] *See, e.g.*, C.J. Chivers, *Contractor's Boss in Iraq Shot at Civilians, Workers' Suit Says*, N.Y. TIMES, Nov. 17, 2006, *available at* http://query.nytimes.com/gst/fullpage.html?res=9B0CE4D9143EF934A25752C1A9609C8B63&scp=1&sq=Contractor%92s+Boss+in+Iraq+Shot+at+Civilians%2C+Workers%92+Suit+Says%2C&st=nyt (stating that two former Triple Canopy, a private security firm, employees alleging that "their shift leader fired deliberately and unnecessarily at Iraqi vehicles and civilians in two incidents"); Steve Fainaru, *A Chaotic Day on Baghdad's Airport Road*, WASH. POST, Apr. 15, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/04/14/AR200704101490 (providing more information about the Triple Canopy team leader and three incidents of alleged excessive force used on July 8, 2006); John M. Broder, *Ex-Paratrooper is Suspect in Blackwater Killing*, N.Y. TIMES, Oct. 4, 2007, *available at* http://www.nytimes.com/2007/10/04/world/middleeast/04contractor.html?_r=1&hp&oref=slogin (discussing 24 December 2006 killing of the Iraqi vice president's body guard allegedly by a former Blackwater USA, another private security firm); Sudarsan Raghavan et al., *Blackwater Faulted in Military Reports from Shooting Scene*, WASH. POST, Oct. 5, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/10/04/AR2007100402654.html (describing military reports about an alleged excessive use of force by Blackwater USA personnel on 16 September 2007 in Baghdad); Janessa Gans, *I Survived Blackwater*, L.A. TIMES, Oct. 6, 2007, *available at* http://www.latimes.com/news/opinion/la-oe-gans6oct06,0,1155563.story (providing a first-person account from a former government employee protected by Blackwater USA in Iraq, now condemning Blackwater USA for excessive use of force); Steven R. Hurst, *Probe Launched in Women's Deaths*, BOSTON GLOBE, Oct. 11, 2007, *available at* http://www.boston.com/news/world/middleast/articles/2007/10/11/probe_launched_in_womens_deaths/ (stating that Unity Resources Group, another private security firm "guards gunned down two Iraqi Christian women in their car . . .").

[3] The Uniform Code of Military Justice (UCMJ), the criminal code for the U.S. Armed Forces, was amended by the John Warner National Defense Authorization Act for Fiscal Year 2007 (NDAA 2007) to provide UCMJ jurisdiction over civilians accompanying the armed forces in time of declared war or contingency operation. John Warner National Defense Authorization Act, 2007, Pub. L. No. 109-364, 120 Stat. 2083, §552 (2007) [hereinafter 2007 NDAA]. This change may allow for prosecution of contractor employees in Iraq and Afghanistan. *See* Kantner et al., *supra* note 1, at 161; *see also* William Matthews, *New Law Subjects Contractors to Military Justice*, FED. TIMES, Jan. 5, 2007, at 10, *available at* http://www.federaltimes.com/index.php?S=2464127 (discussing the UCMJ change). The Military Extraterritorial Jurisdiction Act (MEJA), providing criminal jurisdiction over contractor personnel supporting the Department of Defense (DOD) for certain crimes, may also soon be amended to include contractor personnel under other federal agency contracts. David M. Herszenhorn, *House's Iraq Bill Applies U.S. Laws to Contractors*, N.Y. TIMES, Oct. 5, 2007, *available at* http://www.nytimes.com/2007/10/05/washington/05cong.html. The House of Representatives has passed a bill amending the MEJA and the Senate is considering a similar bill. *Id*. *See* H.R. 2740, 110th Cong. (2007) (passed by the House and on the calendar in the Senate).

[4] "A Pentagon review team has recommended the U.S. military have more control over contractors hired in Iraq and private security guards fall under the [UCMJ] in some cases, Defense Secretary Robert Gates said . . . ." Lolita C. Baldor, *DoD Recommends More Control Over Contractors*, ARMY TIMES, Oct. 4, 2007, *available at* http://www.armytimes.com/news/2007/10/ap_contractors_071003/. The Department of State (DOS) instituted new oversight measures following the 16 September 2007 Blackwater USA shooting incident in Baghdad. John M. Broder, *State Dept. Plans Tighter Control of Security Firm*, N.Y. TIMES, Oct. 6, 2007, *available at* http://www.nytimes.com/2007/10/06/washington/06blackwater.html. The DOS began sending DOS employees along with Blackwater USA escorted convoys and also installed video cameras in Blackwater USA vehicles. *Id*.

> Defense Secretary Robert M. Gates is pressing for the nearly 10,000 armed security contractors now working for the United States government in Iraq to fall under a single authority, most likely the American military, in an effort to bring Blackwater USA under tighter control, senior administration officials and Pentagon advisers say.

Eric Schmitt & Thom Shanker, *Pentagon Sees One Authority Over Contractors*, N.Y. TIMES, Oct. 17, 2007, *available at* http://www.nytimes.com/2007/10/17/washington/17blackwater.html.

[5] *See, e.g.*, articles cited *supra* note 2; *see also* Kathy Benz, *Lawsuit Targets Abu Ghraib Contractors*, CNN.COM, July 27, 2004, http://www.cnn.com/2004LAW/07/27/abu.ghraib.lawsuit/ (discussing a law suit filed against private contractors alleged to have committed abuses at the Abu Ghraib prison); Oliver Poole, *Iraq to Bring Private Armies Under Control*, DAILY TELEGRAPH (London), Sept. 9, 2005, *available at* http://www.telegraph.co.uk/news/main.jhtm1?xml=/news/2005/09/09/wirq09.xml (explaining how in 2005 private security contractors were seen as causing problems); Major Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1 (2003) (discussing the history of private military companies and the benefits and drawbacks of their use).

[6] *See supra* notes 2 and 3 and accompanying text.

[7] *See, e.g.*, Yochi J. Dreazen, *New Scrutiny for Iraq Contractors*, WALL ST. J., May 14, 2007, *available at* http://online.wsj.com/public/article/SB117910638122101554-TMh1_CHvlvg_IlgHL0V7fFcXJd4_20070613.html?mod=fpa_editors_picks ("A Blackwater USA contractor's killing of an Iraqi security guard is putting new pressure on the Bush administration to prosecute private-company employees accused of crimes in Iraq . . . ."); Broder, *supra* note 2 (stating

Airborne Division serving in Iraq in 2003 and 2004,[8] allegedly shot and killed Iraqi Vice President Adil Abd-al-Mahdi's body guard inside Baghdad's International Zone.[9] Prior to the shooting, Moonen had apparently been drinking alcoholic beverages and had engaged in a verbal altercation with the same body guard.[10] Blackwater USA fired Moonen and arranged his return to the United States.[11] No jurisdiction has yet filed criminal charges against Moonen, and he was in Kuwait working for a Department of Defense (DOD) contractor a few weeks after this incident.[12]

Tempers settled temporarily following the Christmas Eve shooting of the body guard. In September 2007, while providing personal security transportation under its Department of State contract,[13] members of a Blackwater USA team (Team) allegedly shot and killed between eleven and seventeen Iraqis.[14] The Team was traveling in Western Baghdad's Nisoor Square; multiple investigations indicate that the Team opened fire without provocation, resulting in the deaths, multiple injuries, and property damage.[15] In response to the allegations, the Team maintains that hostile individuals opened fire on the Team first, and then the Team returned gunfire appropriately.[16] This incident led to the Iraqi government's request that the United States deliver custody of the Team members to the Iraqi government, that the United States sever all contracts with Blackwater USA, and that the United States pay $136 million dollars to the victims and families.[17] Both governments then investigated the incident.[18] The Department of State also reviewed all of its security contracts.[19] Significantly, this incident accelerated Congressional and Executive proposals concerning jurisdiction over security contractors.

Uniform Code of Military Justice

Months before the above incidents, Senators Lindsay Graham and John Kerry sponsored an amendment to the Uniform Code of Military Justice (UCMJ),[20] through the John Warner National Defense Authorization Act for Fiscal Year 2007 (2007 NDAA),[21] extending UCMJ jurisdiction to civilians accompanying the armed forces in the field during contingency operations.[22] This new jurisdiction is limited to contractors accompanying the armed forces,[23] calling into question its

---

that the Christmas Eve incident "has had wide reverberations from Baghdad to Washington . . . . [T]he episode has become one of the central exhibits in numerous investigations by Congress, the Justice Department and Iraqi authorities into the operations of Blackwater and [] other private security contractors working in Iraq.").

[8] Robert Brodsky, *Lawmaker Demands Records on Fired Blackwater Employee*, GOVEXEC.COM, Oct. 9, 2007, http://www.govexec.com/dailyfed/1007/100907rb1.htm; Broder, *supra* note 2.

[9] STAFF OF H. COMM. ON OVERSIGHT AND GOV. REFORM, 110TH CONG., MEMORANDUM RE: ADDITIONAL INFORMATION ABOUT BLACKWATER USA 9 (Oct. 1, 2007) [hereinafter HOUSE COMMITTEE MEMO].

[10] *Id.*

[11] *Id.*

[12] Joanne Kimberlin, *CNN Says Blackwater Slaying Suspect Hired Again*, VIRGINIAN-PILOT, Oct. 6, 2007, *available at* http://hamptonroads.com/node/340731. Details regarding the DOD contract work in Kuwait remain unclear. *Id.* The incident is still under investigation by the Federal Bureau of Investigation more than ten months later. HOUSE COMMITTEE MEMO, *supra* note 9, at 12.

[13] The Department of State (DOS) contract is called the Worldwide Personal Protective Services (WPPS) II contract. *See* HOUSE COMMITTEE MEMO, *supra* note 9, at 4. The WPPS II contract is a multiple award Indefinite Delivery/Indefinite Quantity (ID/IQ) contract awarded to DynCorps, Triple Canopy, and Blackwater USA. *Id.* The DOS paid the three private security firms for "'protection of U.S. and/or certain foreign government high-level officials whenever the need arises.'" *Id.* (quoting the WPPS I contract).

[14] HOUSE COMMITTEE MEMO, *supra* note 9, at 6 (putting the reported number of Iraqis killed at eleven). *See also* Raghavan et al., *supra* note 2 (reporting the number of Iraqis killed as fourteen); and Steven R. Hurst & Qassim Abdul-Zahra, *Iraqi Probe Implicates Blackwater*, USA TODAY, Oct. 5, 2007, *available at* http://www.usatoday.com/news/world/2007-10-04-2366534641_x.htm (reporting the number of Iraqis killed as thirteen or seventeen depending on which investigation is used). In addition to this September incident, two Iraqi Christian women were allegedly killed by employees of an Australian security contractor, Unity Resources Group, less than a month later on Oct. 10, 2007. Hurst, *supra* note 2.

[15] Steven R. Hurst & Qassim Abdul-Zahra, *Iraq: Blackwater Should Pay; $136 Million is Demanded for the Shootings*, CHI. SUN-TIMES, Oct. 9, 2007; *see also* Raghavan et al., *supra* note 2.

[16] *See* Hurst & Abdul-Zahra, *supra* note 15; Raghavan et al., *supra* note 2.

[17] Hurst & Abdul-Zahra, *supra* note 15.

[18] *Id.*

[19] Broder, *supra* note 4.

[20] UCMJ (2008); *see* Matthews, *supra* note 3 (including quotes from Senator Graham).

[21] NDAA2007, *supra* note 3, § 552; *see* Kantner et al., *supra* note 1, at 161.

[22] *See* Kantner et al., *supra* note 1, at 161; *see also* Matthews, *supra* note 3.

coverage over those contractor employees working under contracts with the Department of State, the United States Agency for International Development, and any other agency outside the DOD.[24] Moreover, jurisdiction over civilians under the UCMJ is also of questionable Constitutional validity.[25] Apart from these limitations, the DOD has not yet implemented this new jurisdiction.[26]

Although this jurisdictional change to the UCMJ became effective on 17 October 2006 when the President signed the NDAA 2007,[27] the DOD has not yet promulgated regulations implementing it. Nevertheless, Deputy Secretary of Defense (DEPSECDEF) Gordon England issued a memorandum to the Department titled: "Management of DoD Contractors and Contractor Personnel Accompanying U.S. Armed Forces in Contingency Operations Outside the United States."[28] Among reminders of regulatory guidance and responsibilities, this memorandum states:

> Commanders *have UCMJ* authority to disarm, apprehend, and detain DoD contractors suspected of having committed a felony offense in violation of the [Rules for the Use of Force] RUF, or outside the scope of their authorized mission, and to conduct the basic UCMJ pretrial process and trial procedures currently applicable to the courts-martial of military service members.[29]

Although this sentence is not highlighted in any way,[30] several portions seem particularly important. The sentence states that commanders have UCMJ authority.[31] No DOD regulation has implemented the UCMJ jurisdiction change, yet the memorandum directs commanders to begin processing cases as though a system currently existed for doing so.[32] The sentence also purports to limit this authority to DOD contractors suspected of committing felony offenses.[33] Neither the terms of the new UCMJ provision nor the Military Extraterritorial Jurisdiction Act (MEJA) limit jurisdiction to DOD contractors; rather, each apply by their specific terms to contractor employees supporting a DOD mission.[34] Further, the MEJA applies only to felony-level offenses,[35] but the UCMJ jurisdiction applies to misdemeanors as well. The memorandum thus appears to limit the authority commanders possess; however, the memorandum otherwise appears to state simply the applicable authorities and responsibilities rather than providing new authority or limiting existing authority.[36]

Finally, the sentence states that commanders have authority to conduct pretrial and trial processes against contractor employees under the UCMJ.[37] As discussed above, no procedures exist relative to civilian prosecutions by court-martial.

---

[23] UCMJ art. 2(a)(10) (2008). "(a) The following persons are subject to this chapter: . . . (10) In time of *declared* war *or contingency operation*, persons serving with or accompanying an armed force in the field." *Id*. (emphasis added, indicating the words added by the NDAA 2007).

[24] *See, e.g*., Alissa J. Rubin & Paul Von Zielbauer, *Blackwater Case Highlights Legal Uncertainties*, N.Y. TIMES, Oct. 11, 2007, *available at* http://www.nytimes.com/2007/10/11/world/middleeast/11legal.html.

[25] Military and civilian courts, including the U.S. Supreme Court, have rejected military jurisdiction over civilians in several circumstances. *See, e.g*., United States *ex rel*. Toth v. Quarles, 350 U.S. 11 (1955) (holding that a former service member cannot be court-martialed for a crime committed while on active duty); Reid v. Covert, 354 U.S. 1 (1957) (holding that a civilian dependent of a service member cannot be court-martialed in time of peace for a capital offense committed abroad); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960) (extending the *Kinsella* holding to non-capital offenses); United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970) (holding that a contractor employee in could not be court-martialed in Vietnam because jurisdiction required a declared war). It is unclear whether this new attempt at statutorily extending UCMJ jurisdiction over civilians will be upheld.

[26] *See, e.g*., Rubin & Von Zielbauer, *supra* note 24.

[27] NDAA 2007, *supra* note 3, § 552.

[28] Memorandum, The Deputy Secretary of Defense, to Secretaries of the Military Departments et al., subject: Management of DOD Contractors and Contractor Personnel Accompanying U.S. Armed Forces in Contingency Operations Outside the United States (Sept. 25, 2007) [hereinafter DEPSECDEF Memo].

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

[30] *Id*.

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

[32] *Id*.

[33] *Id*.

[34] The UCMJ provides jurisdiction over contractor personnel who are "serving with or accompanying an armed force in the field." UCMJ art. 2(a)(10) (2008). The MEJA provides jurisdiction over contractor personnel employed by DOD contractors or contractors of any federal agency "to the extent such employment relates to supporting the mission of the Department of Defense overseas." 18 U.S.C. § 3267 (1)(A) 2000).

[35] 18 U.S.C. § 3261(a).

[36] For example, the memorandum begins by recognizing that defense contractors are important and directs addressees to ensure that "relevant DoD policies and processes are being followed." DEPSECDEF Memo, *supra* note 28. Perhaps this memorandum simply follows the standard set by the NDAA 2007 change to the UCMJ which provided UCMJ jurisdiction over contractor personnel for the first time since World War II yet was titled, "Clarification of application of Uniform Code of Military Justice during time of war." NDAA 2007, *supra* note 3, § 552; *see also* Kantner et al., *supra* note 1, at 161.

[37] DEPSECDEF Memo, *supra* note 28.

Proper procedures should be directed through changes to the Manual for Courts-Martial prior to any implementation of UCMJ jurisdiction in an *ad hoc* manner as is directed.[38] Without implementing regulations, substantial risk exists that U.S. civilians will be incarcerated by the military in Iraq with no meaningful opportunity for review.

Military Extraterritorial Jurisdiction Act

The U.S. House of Representatives (House) passed a bill on October 4, 2007 amending the MEJA (House Bill).[39] Currently, MEJA jurisdiction is limited to civilians supporting a DOD mission.[40] This limitation most likely excludes jurisdiction over the Blackwater USA employees discussed above because they were working under contracts supporting a traditional DOS mission, and not under contracts supporting a DOD mission.[41] The House Bill attempts to provide jurisdiction over all contractor employees in a contingency operation location by adding a new category of persons covered by the MEJA:

> [W]hile employed under a contract (or subcontract at any tier) *awarded by any department or agency* of the United States, where the work under such contract is carried out in an area, or in close proximity to an area (as designated by the Department of Defense), where the Armed Forces is conducting a contingency operation.[42]

While this language should be broad enough to cover the Blackwater USA personnel discussed above,[43] it is unclear why Congress physically limits this jurisdiction to areas where the Armed Forces are conducting contingency operations.[44] The criteria for determining "in close proximity to an area" of a contingency operation remains unclear and is left to the discretion of the Department of Defense.[45]

Jurisdiction over contractor personnel has not been the only problem with the MEJA. The MEJA has provided jurisdiction over contractor personnel supporting DOD missions overseas for more than five years,[46] but since that time there has been only one indictment of a contractor employee.[47] The first problem is that while the MEJA requires the DOD to

---

[38] These procedures can be implemented through interim changes prior to a new edition of the Manual for Courts-Martial, but the procedures should be published officially and applies uniformly.

[39] H.R. 2740, 110th Cong. (2007). Representative David E. Price, Democrat of North Carolina, first introduced the bill in January 2007. David M. Herszenhorn, *House's Iraq Bill Applies U.S. Laws to Contractors*, N.Y. TIMES, Oct. 5, 2007, *available at* http://www.nytimes.com/2007/10/05/washington/05/washington/05cong.html. The bill passed the House by a vote of 389-30. *Id*. A similar bill sponsored by Senator Barrack Obama is pending in the Senate. *Id*.

[40] 18 U.S.C. § 3267 (1)(A).

[41] Marcia Croyle, *Problems with Iraq Contractors Present Legal Puzzle*, NAT'L L.J., Oct. 26, 2007, *available at* http://www.law.com/jsp/article.jsp?id=1193303020578.

[42] H.R. 2740, § 2(a)(1) (emphasis added).

[43] The Blackwater personnel worked under a contract with the DOS, an agency of the United States. HOUSE COMMITTEE MEMO, *supra* note 9, at 4. The Blackwater personnel performed the work in Iraq, which meets the definition of a contingency operation area. *See* Memorandum, Under Secretary of Defense, to the Secretary of the Army et al., subject: Authorization to Utilize Contingency Operations Contracting Procedures (Oct. 9, 2001); Memorandum, Assistant Secretary of the Air Force, to All Major Command Commanders et al., subject: Emergency Acquisitions in Direct Support of U.S. or Allied Forces Deployed in Military Contingency Operations during Operation Iraqi Freedom (21 Mar. 2003).

[44] H.R. 2740 (adding MEJA jurisdiction over contractor employees "where the work under such contract is carried out in an area, or in close proximity to an area (as designated by the Department of Defense), where the Armed Forces is conducting a contingency operation.").

[45] *Id*.

[46] 18 U.S.C. §§ 3261–3267. The MEJA was enacted in 2000, but the DOD did not promulgate its implementing regulation until 2005. U.S. DEP'T OF DEFENSE, INSTR. 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS (Mar. 3, 2005) [hereinafter DODI 5525.11].

[47] Dreazen, *supra* note 7. Aaron Langston is the only contractor employee indicted under MEJA for criminal conduct in Iraq or Afghanistan. *Id*. Langston was a Kellogg, Brown and Root (KBR) employee working in Al Asad, Iraq under the Logistics and Civil Augmentation Program (LOGCAP) contract supporting military operations in Iraq. Memorandum, Staff Judge Advocate, 2d Marine Aircraft Wing (Forward), to Staff Judge Advocate, Marine Central Command, subject: Temporary Detention of U.S. Citizen Under the Military Extraterritorial Jurisdiction Act (n.d.) [hereinafter Langston Memo]. A grand jury in the United States District Court, District of Arizona, indicted Langston on February 27, 2007 for assault with a deadly weapon and assault resulting in serious bodily injury. United States v. Langston, D. Ariz. CR07-210PHX (Indictment). Langston allegedly stabbed an acquaintance in the throat following an argument. Langston Memo, *supra*.

prescribe regulations,[48] the DOD did not prescribe implementing regulations until 2005, thus greatly limiting any ability to use the MEJA.[49] Another problem is that the MEJA provides jurisdiction in the federal district courts, and vests prosecutorial authority in the Department of Justice (DOJ) and responsible U.S. Attorneys.[50] Procedurally, the DOJ reviews each case and determines whether to forward it to the U.S. Attorney in the district where jurisdiction would otherwise exist over the suspect.[51] This U.S. Attorney then reviews the case and determines whether to prosecute.[52] This burdensome and intricate system frustrates efforts to prosecute.

The House Bill attempts to resolve some of the procedural shortcomings of the MEJA. The House Bill requires the DOJ Inspector General (IG) to report to Congress case referrals, investigations, and cases pursued.[53] The House Bill also requires the Federal Bureau of Investigations (FBI) to open a Theater Investigative Unit in a theater in which jurisdiction would lie and report to Congress.[54] These provisions appear intended to entice the DOJ to prosecute without overt interference in prosecutorial discretion. The TIU extends the working relationship between the FBI and the U.S. attorneys, increasing the likelihood of prosecution. By requiring the FBI and the DOJ to report allegations and resultant actions to Congress, transparency increases the likelihood that meritorious allegations are investigated and prosecuted. Whether these measures, if enacted, will succeed in providing accountability for criminal action is an issue for future editions of the *Year in Review*.[55]

Major Mark A. Ries

[48] 18 U.S.C. § 3266(a). The MEJA requires that the Secretary of Defense consult with the Secretary of State and the Attorney General before prescribing the regulations. *Id*.

[49] DODI 5525.11, *supra* note 46.

[50] *Id*.

[51] *Id*.

[52] *Id*.

[53] H.R. 2740, 110th Cong. (2007).

[54] *Id*.

[55] Congress should take care to resource these new offices and requirements if there is to be any hope of using them effectively.

FISCAL LAW

Time

Can I Get a Subscription for That?

The Government Accountability Office (GAO) approved the obligation by the National Labor Relations Board (NLRB) of its fiscal year (FY) 2006 annual funds for several subscriptions beginning on the first day of FY 2007.[1] In reaching this conclusion, the GAO recognized the key issue as whether the subscriptions were the *bona fide* need of FY 2006.[2] Historically, the GAO has analyzed *bona fide* needs issues based on the specific facts and circumstances of each case. The GAO's starting point was classifying the acquisition as one for materials or services.[3] In determining that the NLRB subscriptions were the *bona fide* need of FY 2006, the GAO appears to have placed acquisition form (subscription) over substance (material or service) and thus strained the *bona fide* needs rule analysis.[4]

In the instant case, the NLRB renewed seven subscriptions for on-line research tools[5] in September 2006, with five beginning on 1 October 2006 and two beginning on 1 November 2006.[6] In renewing these subscriptions in September 2006, the NLRB obligated FY 2006 funds even though the contract would be performed entirely in FYs 2007 and FY 2008.[7] The NLRB justified its actions regarding these obligations by asserting that the research tool subscriptions were critical to NLRB operations, and that to ensure uninterrupted service on 1 October 2006, the NLRB had to renew the subscriptions in September 2006.[8] The GAO accepted the NLRB position, stating that,

> NLRB reasonably determined that it should place the renewal orders before the subscription ended, which would necessarily be FY 2006. . . . While Web site database subscription renewals can be effectuated quickly, we do not believe that the agency should run the risk of the subscription lapsing by waiting until October 1 to renew the subscription that is to begin that same day.[9]

Thus, the GAO determined that the NLRB's need for contract performance beginning on 1 October 2006 made the subscriptions the *bona fide* need of the prior FY, FY 2006.[10]

---

[1] Nat'l Labor Relations Bd., B-309530, 2007 U.S. Comp. Gen. LEXIS 172, at *2 (Sept. 17, 2007).

[2] *Id*. at *10. "Over a century ago, the Comptroller of the Treasury stated, 'An appropriation should not be used for the purchase of an article not necessary for the use of a fiscal year in which ordered merely in order to use up such an appropriation.'" OFF. OF THE GEN. COUNSEL, U.S. GOV'T ACCOUNTABILITY OFF., PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, VOL. I, at 5-11 (3d ed. 2006) [hereinafter GAO REDBOOK] (citing 8 Comp. Gen. 346, 348 (1901)). The Government Accountability Office (GAO), Principles of Federal Appropriations Law (Redbook) continues, stating, "[t]he *bona fide* needs rule is one of the fundamental principles of appropriations law: A fiscal year appropriation may be obligated only to meet a legitimate, or *bona fide*, need arising in . . . the fiscal year for which the appropriation was made." *Id*. "The *bona fide* needs rule has a statutory basis." *Id*. at 5-12. "The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability . . . . " 31 U.S.C. § 1502(a) (2000).

[3] *See* GAO REDBOOK, *supra* note 2, at 5-22 (Delivery of Materials beyond the Fiscal Year), 5-23 (Services Rendered beyond the Fiscal Year). Note that there are only two categories of acquisitions noted in the Redbook, "materials" and "services." *Id*.

[4] A similar form over substance issue also arose in the context of the distinction between severable and nonseverable services. *Id.* at 5-27. The GAO stated in 1985, that level-of-effort contracts are by definition severable services, placing emphasis on the form of the contract vehicle used for the acquisition. *Id*. However, the GAO corrected this error in 1990 when it determined that the application of the *bona fide* needs rule depends not on contract type, but rather on the nature of the service performed. *Id*.

[5] These tools included Westlaw, LexisNexis Online Service, BNA, PACER, GalleryWatch, LexisNexis Shepard's Online Service, and Dun & Bradstreet. *Nat'l Labor Relations Bd*., 2007 U.S. Comp. Gen. LEXIS 172, at *4.

[6] *Id*. at *5. The GAO found that the subscriptions scheduled to commence on 1 October 2006 could be renewed and funded in FY 2006. *Id*. at *2. This article addresses this portion of the GAO decision. The GAO also found that the subscriptions scheduled to commence on 1 November 2006 were the *bona fide* need of FY 2007, and thus the agency improperly awarded the contracts in FY 2006 and also improperly obligated FY 2006 funds. *Id*. As this portion of the GAO decision does not appear noteworthy, this article does not address these particular subscriptions.

[7] *Id*. at *5.

[8] *Id*. at *12.

[9] *Id*. at *12–*13. The GAO did not address alternative solutions, such as modifying the existing subscription period to end in September 2006. This solution would have allowed the NLRB to renew the subscription to begin in FY 2006, thus satisfying the *bona fide* needs rule. Prior GAO opinions regarding subscriptions had previously approved crossing FYs. *See* note 14 *infra*.

[10] Nat'l Labor Relations Bd., 2007 U.S. Comp. Gen. LEXIS 172, at *13.

Antideficiency Act

Something for Nothing? GAO Considers Voluntary Services Prohibition

In an 8 June 2007 opinion,[1] the GAO considered whether the President's appointment of Mr. Sam Fox as the ambassador to Belgium during a congressional recess (called a "recess appointment") violated the Antideficiency Act's (ADA)[2] prohibition against voluntary services. The GAO concluded that because 5 U.S.C.S. § 5503 prohibits the payment of individuals receiving recess appointments, Mr. Fox's appointment would not violate the ADA.[3]

On 9 January 2007, the President nominated Mr. Sam Fox to be the United States' ambassador to Belgium.[4] On 27 February 2007, the Senate Foreign Relations Committee discussed the nomination and scheduled the entire Senate to vote on the nomination on 28 March 2007. Before the Senate voted, however, the President withdrew his nomination of Mr. Fox. On 4 April 2007, while the Congress was in recess, the President made a "recess appointment" of Mr. Fox as ambassador to Belgium.[5]

Under the United States Constitution, the President has the responsibility to nominate ambassadors and the Senate has the responsibility to confirm them.[6] The Constitution also authorizes the President to nominate ambassadors while the Senate is in recess.[7] In such cases, the Senate would convene a confirmation hearing once it was in session again. Per 5 U.S.C.S. § 5503, an individual receiving a recess appointment may not be paid while awaiting the Senate to vote on his or her appointment. This section states in pertinent part:

> Payment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate.[8]

In this case, Mr. Fox's appointment fits with the conditions of 5 U.S.C.S. § 5503 and as such, he could not receive payment for his services unless the Senate confirmed his nomination as ambassador to Belgium.[9] Specifically, the President appointed Mr. Fox during the Senate's recess, the position of ambassador to Belgium was an "existing office" when the President appointed him, the vacancy existed while the Senate was in session, and the vacancy was one that the Senate was required to confirm.[10]

The GAO focused its opinion on whether Mr. Fox's service as ambassador to Belgium during the Senate's recess would violate the ADA's prohibition against accepting voluntary services.[11] In analyzing the facts of this case, the GAO described the history and significance of the voluntary services prohibition. Federal law has prohibited the acceptance of voluntary services since 1884. Congress passed the first law prohibiting voluntary services because it was "faced with claims 'presented for extra services performed here and elsewhere by [employees] of the Government who had been engaged after hours.'"[12] Congress was concerned that government supervisors were routinely forcing subordinates to "volunteer" their services in situations where they would not otherwise entitled to payment.[13] Subsequently, the subordinates would file claims

---

[1] Recess Appointment of Sam Fox, B-309301, 2007 U.S. Comp. Gen. LEXIS 97 (June 8, 2007).

[2] The Antideficiency Act (ADA) is actually a series of statutes codified at 31 U.S.C.S. §§ 1341-1354 (LexisNexis 2008). The voluntary services prohibition, located at 31 U.S.C.S. § 1342, states, "An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services . . . exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property."

[3] *Sam Fox*, 2007 U.S. Comp. Gen. LEXIS 97, at *1–*2.

[4] *Id.*

[5] *Id.*

[6] U.S. CONST. art. II, § 2.

[7] *Id.*

[8] 5 U.S.C.S. § 5503 (LexisNexis 2008).

[9] *Sam Fox*, 2007 U.S. Comp. Gen. LEXIS 97, at *2.

[10] *Id.*

[11] *Id.* at *3.

[12] *Id.* at *7 (quoting 15 CONG. REC. 3411 (1884) (statement of Rep. Randall)).

[13] *Id.* at *4.

to compensate them for these "voluntary services," thereby coercing Congress to appropriate additional funds. In other words, Congress feared that agencies would demand employees to engage in additional work for which agencies had insufficient appropriated funds. Then, the employees (or the agencies) would request Congress to appropriate additional funds to compensate the employees and that Congress would feel a moral obligation to do so. Congress sought to prevent such requests by prohibiting the acceptance of voluntary services.[14] The GAO refers to this evil as a "coercive deficiency."[15]

The GAO explained that while the acceptance of voluntary services is clearly prohibited by the ADA, the acceptance of "gratuitous services" is not.[16] On that point, the GAO has issued a number of opinions distinguishing prohibited "voluntary services" from permissible "gratuitous services."[17] When an individual performs gratuitous services, the individual agrees (often in writing in advance) that he will not request payment for his services. Thus, acceptance of these services will not result in a moral obligation to pay for a coercive deficiency.[18]

The GAO related Mr. Fox's recess appointment to gratuitous services.[19] When the President appointed Mr. Fox during Congress' recess, a separate federal statute barred compensating Mr. Fox for his services. Thus, by accepting the recess appointment, Mr. Fox was, in essence, agreeing that he would not be paid unless the Senate confirmed his appointment. So, since 5 U.S.C.S. § 5503 prohibits compensating Mr. Fox, Congress would not entertain a claim for payment for these services.[20]

Therefore, the GAO concluded that Mr. Fox's recess appointment as ambassador to Belgium did not violate the ADA's voluntary services prohibition.[21] The GAO stated, "we will not interpret the voluntary services prohibition to bar Mr. Fox from serving as Ambassador to Belgium, even though he may not receive a salary . . . until he is confirmed by the Senate."[22] While Mr. Fox performed the services of ambassador without compensation, he did so only because a statute precluded payment and thus, these services were not "voluntary" under 31 U.S.C.S. § 1342. Hence, Mr. Fox's service as ambassador following his recess appointment does not violate the ADA.[23]

While government attorneys working in the fiscal law field will likely have infrequent encounters with recess appointments, the GAO's consideration of the topic of voluntary services is yet noteworthy. While the voluntary services prohibition has existed since 1884, there are few opinions interpreting that statute. Still there are many instances in the modern government workplace where the voluntary services issue arises. Practitioners should be wary of the often subtle circumstances where individuals attempt to volunteer their services to the government and the overriding prohibition against accepting them.

Awarding a Lease Contract Without Authority Does Not Violate ADA

The Department of Defense Inspector General (DOD IG) and the Department of Interior Inspector General (DOI IG) audited a series of transactions conducted between the Counterintelligence Field Activity (CIFA) of the DOD and GovWorks (a Department of Interior franchise fund) for the purpose of leasing office space.[24] Following these audits, the DOI IG requested that the GAO issue an opinion addressing two issues—the authority to lease and the ADA.

In a 17 August 2007 opinion, the GAO considered whether the CIFA or GovWorks had the authority to acquire office space through a lease and additionally whether doing so violated the ADA.[25] The GAO concluded that neither CIFA nor

---

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at *5–*6.

[20] *Id.*

[21] *Id.* at *7.

[22] *Id.* at *18.

[23] *Id.*

[24] Interagency Agreements—Use of an Interagency Agreement between the Counterintelligence Field Activities, Dep't of Defense, and GovWorks to Obtain Office Space, B-309181, Aug. 17, 2007, 2007 CPD ¶ 163.

[25] *Id.* at *1–*2.

GovWorks had the requisite authority to acquire office space by entering into a lease. Nonetheless, the GAO found that awarding a lease contract did not result in an ADA violation by either organization.[26]

In February of 2003, the Office of the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence and GovWorks signed an interagency agreement addressing CIFA's need for additional office space.[27] The agreement stated that GovWorks would enter into an indefinite delivery indefinite quantity (ID/IQ) contract, for the benefit of CIFC, to provide this office space. The agreement also stated that GovWorks would oversee and administer the contract for office space. The agreement required CIFA to reimburse GovWorks for the cost of the contract. On 30 April 2003, CIFA executed a Military Interdepartmental Purchase Request (MIPR) for the purpose of transferring funds from CIFA to GovWorks for the first payment on the lease.[28] This MIPR transferred $4,070,311 in fiscal year 2003 Defense-wide Operations and Maintenance (DOD-wide O&M) funds to GovWorks.[29]

On 12 June 2003, GovWorks awarded an IDIQ contract (Contract 70941) to TKC Communication, Inc. (TKC).[30] This contract required TKC to "provide services, including office space and facilitate management services not to exceed $100 million."[31] That same day GovWorks issued a Task Order 73001 requiring TKC to lease office space for a period of ten years and seven months and for GovWorks to pay TKC the annual rent listed on the schedule attached to the task order. As described above, CIFC would reimburse GovWorks for all costs associated with this contract. The total rent cost for the period of the contract was about $90 million.[32]

From 2003 to 2007, CIFA issued a series of MIPRs to GovWorks for both the cost of rent under the lease with TKC and also for GovWorks' administrative fee to oversee the IDIQ contract.[33] All of the MIPRs CIFA issued to GovWorks transferred DOD-wide O&M funds.[34]

In analyzing the issue of authority to lease, the GAO reviewed the relevant contractual documents.[35] While CIFA and GovWorks referred to the IDIQ contract as a "service contract" and not a "lease," the GAO reasoned that Contract 70941 was actually a lease since nearly 90% of the contract costs arose from the lease portion of the contract.[36] The GAO explained that generally, it characterized a contract based on its overall purpose and not upon any particular name the awarding entity used to refer to the contract. The GAO's characterization of Contract 70941 as a "lease" is central to its analysis and conclusions. Thus, the GAO viewed the instant contract as a long-term lease for office space.[37]

After determining that the instant contract was a lease, the GAO next focused on whether the contracting parties had the requisite authority to award a lease contract.[38] The GAO referred to the statute which vests in the Administrator of the General Services Administration (GSA) the authority for "[a]ll functions with respect to acquiring space in buildings by lease, and all functions with respect to assigning and reassigning space in buildings for use by agencies (including both space acquired by lease and space in Government-owned buildings) . . . ."[39] While the Administrator of the GSA may delegate this authority to lease to certain officials in the GSA and also to the head of another federal agency,[40] in the instant case, no such delegation occurred.[41] The GAO further stated that it was aware of no other authority which would authorize either

---

[26] *Id.*

[27] *Id.* at *6–*7.

[28] *Id.* at *8.

[29] *Id.*

[30] *Id.* at *9.

[31] *Id.*

[32] *Id.* at *11.

[33] *Id.*

[34] *Id.*

[35] *Id.* at *12–*13.

[36] *Id.*

[37] *Id.* at *13–*14.

[38] *Id.* at *14.

[39] *Id.*; 40 U.S.C.S. § 301 (LexisNexis 2008).

[40] 40 U.S.C.S. § 585.

[41] *Interagency Agreements*, 2007 CPD ¶ 163, at *15.

GovWorks or CIFA to award this particular lease. While the GAO stated that statutory authority exists authorizing DoD to enter into building leases under certain circumstances, this authority is inapplicable in the instant case.[42]

Regarding the issue of whether GovWorks or CIFA had the authority to enter into a lease, the GAO concluded that both entities did not.[43] The GAO further concluded that since neither entity had the authority to award a lease contract, the subject lease was either void or voidable.[44] Further, the GAO found that the funds CIFA transferred to GovWorks (via MIPR) and which GovWorks, in turn, distributed to TKC were improper payments.[45] Accordingly, the GAO recommended that the agencies attempt to recover these improper payments from the contractor. Moreover, GAO recommended that all future contract payments cease.[46]

Regarding the issue of whether GovWorks and CIFA violated ADA in obligating and expending appropriated funds pursuant to Contract 70941, the GAO concluded in the negative.[47] In analyzing this issue, the GAO found that the obligation of DOD-wide O&M funds to pay for the lease contract did not exceed an amount available in an appropriation nor was it made in advance of an appropriation.[48]

Moreover, the GAO stated that the DOD-wide O&M appropriation was the correct appropriation to fund the lease contract. The GAO made this determination after referring to the relevant section of the DOD Appropriations Act and the DoD Financial Management Regulation (FMR). Specifically, regarding proper uses of DOD-wide O&M, the Fiscal Year 2003 DoD Appropriations Act states that such funds may be used for "for expenses . . .for the operation and maintenance of activities and agencies of the Department of Defense"[49] Further, the FMR states in that DOD-wide O&M appropriations are the proper funding source for real property leases.[50] The GAO reasoned that because there were sufficient DoD-wide O&M funds to cover the obligations and expenditures for the subject lease contract, neither CIFA nor GovWorks violated the ADA.[51]

Based upon the GAO's reasoning, it would seem logical to conclude that no obligation of funds occurred at all. Consequently, where if no appropriated funds were obligated, then no ADA violation could have occurred. Recall that the GAO concluded that because neither CIFC nor GovWorks had the requisite authority to award a lease contract, that the instant contract was void or voidable.[52] Therefore, it would seem to follow that if the contracting officer had no contractual authority to award the contract, then the funds would never have been obligated (which occurs at the time of contract award).[53] Remarkably, the GAO did not mention this analysis. Instead, the GAO's ADA analysis, again, concentrated on the availability of the proper source of appropriated funds, DoD-wide O&M.

---

[42] *Id.* at *16–*17.

[43] *Id.* at *19.

[44] *Id.*

[45] *Id.* at *20.

[46] *Id.* at *20–*21.

[47] *Id.* at *23.

[48] *Id.* at *22–*23. The ADA states that:

> An officer or employee of the United States Government or of the District of Columbia government may not—
>
> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or]
>
> (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;

31 U.S.C.S. § 1341 (LexisNexis 2008).

[49] Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, 116 Stat. 1519, tit. I (2004).

[50] *Id.* The GAO referred to the DOD Financial Management Regulation which states that Operations and Maintenance appropriations are the appropriate funds to pay for lease payments. U.S. DEP'T OF DEFENSE 7000.14-R, DOD FINANCIAL MANAGEMENT REG., vol. 2A, ch. 1, para. 0106 (June 2006) [hereinafter DOD FMR].

[51] *Interagency Agreements*, 2007 CPD ¶ 163, at *23.

[52] *Id.* at *19.

[53] The GAO has stated that the government's legal obligation to compensate a contractor arises at the moment of contract award. United States Fish and Wildlife Service—Installment Payments for Real Property, B-114841, 56 Comp. Gen. 351 (1997).

In government legal practice, ADA issues arise in a variety of different forms. Regardless of the type of violation, if a government employee suspects a potential violation of the ADA, he or she must follow the reporting requirements located in the DoD FMR.[54] An initial ADA report often leads to an ADA investigation.[55]

These investigations are normally time-consuming and lengthy. If an investigation leads to a final determination of an ADA violation, then the agency head must report the violation to the President and to Congress.[56] Government attorneys should keep a constant watchful eye over government monetary transactions and attempt to avoid violations whenever possible.

Major Marci A. Lawson

[54] DOD FMR, *supra* note 50, vol. 14, ch. 3, para. 0301.

[55] *Id.*

[56] *Id.* at ch. 7.

GAO Implies that Severable Services Exception to Bona Fide Needs Rule Applies to Guaranteed Minimum in ID/IQ Contracts for Services

In *Interagency Agreements—Obligation of funds under an Indefinite Delivery, Indefinite Quantity Contract* (hereinafter *Interagency Agreements*),[57] the Government Accountability Office (GAO) explored the issue of whether a Department of Interior (DOI) one-year Indefinite Delivery, Indefinite Quantity (ID/IQ) contract, awarded on behalf of DOD's Personnel Security Research Center (PERSEREC) for support services, violated the Antideficiency Act's (ADA) "in advance of"[58] prohibitions when the contract specified a guaranteed minimum of $1 million over a three-year period.[59] The DOI, on behalf of DOD via an Economy Act transaction, awarded an ID/IQ contract to Northrop Grumman Mission Systems with a period of performance from 1 July 2003 to 30 June 2004.[60] The funding source was DOD Operations and Maintenance funds (O&M), which are available for a period of one year.[61] The Department of Interior Inspector General (DOI IG) reported a potential ADA violation, and opined to the GAO that "by agreeing to pay a minimum $1 million over a 3-year period at a time before Congress had appropriated funds for all 3 years,[the DOI] violated the Antideficiency Act, 31 USC § 1341(a)(1)(B), because it obligated funds in advance of appropriations."[62] The GAO disagreed with the DOI IG's opinion, finding that although the DOI may have violated the Antideficiency Act in executing this contract, a one-year contract with a three-year guaranteed minimum over a three-year period would not automatically violate the Antideficiency Act.[63]

The GAO reasoned that had DOI and DOD obligated the minimum $1 million in O&M required under the contract within the first year, even though the contract would allow three years to order the minimum, DOI "would have completely satisfied the government's initial liability under the contract. No further obligation would remain . . . that would require an appropriation in a future fiscal year."[64] As a result, although DOI and DOD may have violated the Antideficiency Act by failing to obligate the minimum $1 million in O&M at the time of contract award in Fiscal Year (FY) 2003, the GAO opined that it is not a *per se* violation of the Antideficiency Act for the government to obligate one-year funds for a one-year ID/IQ contract which permits a three-year time period during which to order the minimum, as long as the minimum is obligated during the funds' period of availability.[65] Ultimately, the GAO ordered DOI and DOD to adjust its accounts by de-obligating $955,000 in FY 2004 O&M funds and then obligating $955,000 in FY 2003 O&M funds, since $45,000 of FY 2003 funds had been previously obligated under the ID/IQ contract.[66] Thus, the GAO recommended that DOI and DOD obligate a total of $1 million in FY 2003 O&M to satisfy the minimum order under the FY 2003 ID/IQ contract.[67]

From an obligations perspective, DOD and DOI would have avoided the issues cited by GAO if they had issued a task order against the ID/IQ contract for the minimum obligation, $1 million, in the fiscal year of the contract award, FY 2003. Contracting officers and resource managers should consider executing the first task order, for the full minimum obligation, concurrently with contract award. Such a practice would ensure that the contracting officer meets the minimum obligation under the ID/IQ contract immediately, and the resource manager would ensure that the minimum obligation is charged against current year funds. This recommendation, however, assumes that the minimum obligation cited in the ID/IQ contract is actually a bona fide need of the current year.

It is curious that the GAO did not address the Bona Fide Needs (BNF) rule in its analysis. The BFN rule states that appropriated funds are available only for an agency's requirements occurring during the period of availability of those

[57] Comp. Gen. B-308969, May 31, 2007, 07-1 CPD ¶ 120.

[58] The Antideficiency Act's "in advance of" prohibition states, "An officer or employee of the United States Government or of the District of Columbia government may not . . . involve either government in a contract or *obligation for the payment of money before an appropriation is made* unless authorized by law." 31 U.S.C. § 1341(a)(1)(B) (2000) (emphasis added).

[59] *Interagency Agreements*, 07-01 CPD ¶ 120.

[60] *Id*. at 3–4.

[61] *Id*. at 4.

[62] *Id*. at 5.

[63] *Id*. at 7.

[64] *Id*.

[65] *Id*.

[66] *Id*.

[67] *Id*.

funds.[68] The severable services exception to the BFN rule, however, allows the DOD to enter into severable services contracts that cross fiscal years as long as the contracts do not exceed one year (civilian agencies like DOI have the same authority under 41 U.S.C. 253l).[69] In the instant ID/IQ contract, the initial period of performance was 1 July 2003 through 30 June 2004, with a contract option of 1 July 2004 – 30 June 2005.[70] The chart below shows the funds that DOD transferred to DOI, via military interagency purchase requests (MIPRs), to execute task orders on the contract:[71]

DOD MIPR Date	**DOD MIPR Amount**	**DOI ORDER Date**	**DOI ORDER Amount**
18 October 2002	$175,000	30 September 2003	$45,000
3 November 2003	$422,454	3 December 2003	$422,454
12 February 2004	$291,000	20 February 2004	$291,000
4 April 2004	$3,138,834	20 April 2004	$3,138,834
20 July 2004	$795,350	6 August 2004	$795,350
29 September 2004	$200,000	30 September 2004	$200,000

The GAO opined that the minimum obligation of $1 million should be recorded against FY2003 appropriations, even though the majority of task orders occurred in FY 2004. Does this mean that the severable services exception applies to the guaranteed minimum in ID/IQ contracts? Although the GAO left this question unaddressed, the implication of its order to record the full minimum against FY 2003 appropriation is that the severable services exception applies to the guaranteed minimum in ID/IQ contracts.[72] In this case, DOD obligated a total of $4,027,288 prior to the expiration of the contract's first period of performance on 30 June 2004, but the GAO ordered only $1 million to be charged to FY 2003 accounts. GAO's recommendation that DOD charge the $1 million minimum to FY 2003 O&M appropriations, even though $955,000 of that minimum was used to order supplies for Bona Fide Needs of FY 2004, seems to apply the severable services exception to the guaranteed minimum of the ID/IQ contract. On the other hand, the GAO did not allow obligations that exceeded *t*he ID/IQ guaranteed minimum (the additional $3,027,288 obligated during the first year of contract performance after it had crossed into FY 2004) to be charged against FY 2003 appropriated funds; the implication is that the Severable Services Exception does not apply to obligations exceeding the guaranteed minimum that arise after the fiscal year in which the ID/IQ was awarded (FY1). Finally, obligating FY1 funds before the end of the fiscal year (30 September) to order services that exceed the minimum obligation in severable service ID/IQ contracts should be consistent with the BFN rule.

If this is the correct understanding of *Interagency Agreements*, then for one-year ID/IQ contract crossing fiscal years from FY1 to FY2, resource managers should continue to charge the FY1 appropriation, even during FY2, until the task orders have satisfied the guaranteed minimum. Caution is warranted, however, since it is unclear whether the GAO truly considered the Bona Fide Needs Rule and the severable services exception in *Interagency Agreements*, or whether they had a different rationale that led to its decision. A definitive answer to the obligations rules for severable service ID/IQs that cross fiscal

---

[68] Modification to Contract Involving Cost Underrun, 1995 U.S. Comp. Gen. LEXIS 258 (Apr. 18, 1995).

[69] The severable services exception to the Bona Fide Needs Rule states:

> (a) Authority.—
>
> (1) The Secretary of Defense, the Secretary of a military department, or the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, *may enter into a contract for a purpose described in paragraph (2) for a period that begins in one fiscal year and ends in the next fiscal year if (without regard to any option to extend the period of the contract) the contract period does not exceed one year.*
>
> (2) The purpose of a contract described in this paragraph is as follows:
>
> *(A) The procurement of severable services.*
>
> (B) The lease of real or personal property, including the maintenance of such property when contracted for as part of the lease agreement.
>
> (b) Obligation of funds.--Funds made available for a fiscal year may be obligated for the total amount of a contract entered into under the authority of subsection (a).

See 10 U.S.C.S. § 2410a (LexisNexis 2008) (emphasis added); *see also* 41 U.S.C. § 253l (2000) (severable services exception for civilian agencies).

[70] *Interagency Agreements*, 07-1 CPD ¶ 120, at 2.

[71] *Id*. at 3.

[72] Mr. Vernon Edwards provides an excellent discussion of how the BFN rule and the Severable Services Exception might apply to the ID/IQ services contracts. Mr. Edwards identified six possibilities as to how the BFN rule might apply to severable services ID/IQs, depending on whether or not the Severable Services Exception applies to ID/IQs, whether the exception applies only to the guaranteed minimum or new obligations exceeding the guaranteed minimum, and whether at the time of the obligation, the agency is in FY1 or FY2 of a 1 year severable services contract that straddles fiscal years. *See* Vernon Edwards, *Obligating Funds for Services Under IDIQ Contracts that Cross Fiscal Years: What Are the Rules?*, NASH & CIBINIC REP., Aug 2007, ¶ 42.

years will be topic for a future Year in Review. Until then, contracting officers and resource managers may wish to avoid this thorny issue by ensuring that they order the guaranteed minimum in services ID/IQs prior to the beginning of the new fiscal year.

Government is Only Obligated to Order the Guaranteed Minimum in an ID/IQ—Even if Minimum is Based on a Negligently Prepared Annual Estimated Value of the Contract

In *Transtar Metals, Inc.*,[73] the Armed Services Board of Contract Appeals granted the government's motion for summary judgment holding that in an ID/IQ contract, the government met its required minimum obligation to the contractor, Transtar Metals Inc. (hereinafter Transtar), when the required minimum obligation under the contract was calculated as 10% of the annual estimated value of the contract, even though the government negligently prepared this annual estimated value.[74] On 30 September 1999, the contracting officer awarded an ID/IQ contract to Transtar for delivery of aluminum products to the Defense Industrial Supply Center (DISC).[75] The total annual estimated value of the contract at award was $2,923,206.50.[76] The guaranteed minimum in both the solicitation for the ID/IQ and the award stated that "The Government guarantees that it will order under this contract. . . . [s]upplies which have a dollar value of at least 10 percent of the annual estimated value. . . ."[77] Transtar alleged that the annual estimates on which the guaranteed minimum was based on were negligently prepared by the contracting officer, because the government had not informed Transtar "that its 'annual estimated quantities' included prior sales under Regional Supplier Contracts,"[78] which would remain in effect during Transtar's contract.[79] Transtar also alleged that due to the government's negligent estimates, it had incurred additional costs to service the contract in the amount of $644,349.63.[80] Transtar alleged that these additional costs were incurred as a direct result of the government ordering only fifty to sixty percent of the annual estimated value of the contract.[81] For purposes of the summary judgment motion, the Board assumed that Transtar's allegations that the government negligently prepared the annual estimated value of the contract were factually correct.[82]

The Board granted the government's motion for summary judgment, and denied all of Transtar's claims.[83] The Board reasoned that under the ID/IQ contract, Transtar was guaranteed no more than ten percent of the annual estimated value of the contract, and the government had ordered amounts which exceeded the guaranteed minimum, $292,320.65.[84] As a result, the government fulfilled its obligations to Transtar under this contract, even if the annual estimates were negligently prepared.[85] The Board cited *Travel Centre v. Barram*[86] as a case with a similar set of operative facts and cited the *Travel Center* Court's reasoning that "'[r]egardless of the accuracy of the estimates delineated in the solicitation, based on the language of the solicitation for the IDIQ contract, Travel Centre could not have had a reasonable expectation that any of the government's needs beyond the minimum contract price would necessarily be satisfied under this contract.'"[87] The Board reasoned that as

[73] Transtar Metals, Inc., ASBCA No. 55039, 07-3 BCA ¶ 33,482, 165,955.

[74] *Id.* at 165,959.

[75] *Id.* at 165,957.

[76] *Id.*

[77] *Id.* at 165,956.

[78] *Id.* at 165,958.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* at 165,959.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] 236 F.3d 1316 (Fed. Cir. 2001).

[87] *Transtar Metals*, 07-1 BCA ¶ 33,482, at 165,959 (quoting *Travel Centre*, 236 F.3d at 1319).

in *Travel Center*, Transtar could not have reasonably expected that they were entitled to meet any of the government's needs beyond the guaranteed minimum.[88] As a result, the Board approved the government's motion for summary judgment and denied all of Transtar's claims.[89]

Major Jose A. Cora

[88] *Id.*

[89] *Id.*

The GAO defined this procurement as a "subscription."[11] The GAO then rejected the NLRB's assertion that the *bona fide* needs rule does not apply to subscriptions.[12] The GAO determined that although prior GAO interpretations of the advance payment statute[13] allowed some special treatment of periodical subscriptions,[14] these opinions had not exempted subscriptions from the requirement to comply with the *bona fide* needs rule.[15] In each of the prior GAO subscription opinions, the subscription had begun in the same FY as ordered and needed, thus complying with the *bona fide* needs rule.[16] Although these prior opinions implicitly recognized *bona fide* needs rule applicability, none specifically analyzed how the *bona fide* needs rule should apply to subscriptions.[17]

In the author's opinion, computer access to legal research tools, like internet service or cable or satellite television service, is more closely related to a "service" than to a "material."[18] If the NLRB subscriptions are for services, then the GAO should have applied the principle from its prior opinions addressing the *bona fide* needs rule concerning service contracts.[19] The GAO has stated, "services procured by contract are generally viewed as chargeable to the appropriation current at the time the services are rendered."[20] Application of this principle to the instant NLRB subscription would result in the determination that the NLRB should have obligated FY 2007 funds—vice FY 2006 funds.[21]

Had the GAO analyzed this case's *bona fide* needs issues similar to how it has analyzed prior subscription cases, the materials *bona fide* needs analysis most likely would have been proper if the NLRB's subscriptions involved paper periodicals to be delivered to the agency.[22] The GAO appears to have applied a materials *bona fide* needs analysis to the NLRB subscriptions, even though the NLRB's subscriptions involved an online subscription and not a paper subscription.[23] The GAO recalled past materials opinions in which it stated that,

> [M]aterials may be needed in the future when related work or processes currently under way may be completed. If such material is not obtainable on the open market at the time needed for use, a contract for its delivery when needed may be considered a *bona fide* need of the fiscal year in which the contract is made, provided the time intervening between contracting and delivery is necessary.[24]

The GAO also mentioned an opinion approving the purchase of stock materials which the agency knows it will not use until the next FY.[25] Because these past materials *bona fide* needs opinions approved the obligation of funds in one FY for delivery of materials in the next FY, the GAO determined the same concept should apply for the NLRB subscriptions.[26]

---

[11] *Id.* at *10.

[12] *Id.* at *7–*8.

[13] 31 U.S.C. § 3324 (2000). The advance payment statute generally prohibits an agency from paying a contractor before receiving the goods or services under the contract. *Id.* § 3324(a). Section (d), however, provides an exception allowing agencies to pay in advance "charges for a publication printed or recorded in any way for the auditory or visual use of the agency." *Id.* § 3324(d).

[14] *Nat'l Labor Relations Bd.*, 2007 U.S. Comp. Gen. LEXIS 172, at *7. Based upon the exception in the advance payment statute allowing payment in advance for publications, the GAO addressed the proper funding of subscriptions in a number of early opinions. First, the GAO determined that a subscription beginning and funded in one fiscal year (FY) may extend into the next FY so long as it does not exceed one year. Decision by Comp. Gen. McCarl, 2 Comp. Gen. 451 (Jan. 24, 1923). Next, the GAO determined that a subscription may exceed one year in length, and is funded in the year it begins. Comp. Gen. Warren to the Sec'y of Agric., B-37388, 23 Comp. Gen. 326 (Nov. 2, 1943). The GAO then determined that payments may be made by lump sum or installments during the period of the subscription. Acting Comp. Gen. Yates to the Dir., Div. of Cent. Admin. Servs., Office for Emergency Mgmt., B-43844, 24 Comp. Gen. 163 (Aug. 29, 1944). Finally, the GAO determined that a subscription needed and ordered in FY1 may be funded with FY1 annual funds even though the period of performance was subsequently reduced to only FY2 due to the contractor's inability to perform. Decision of the Comp. Gen., B-129390, 1956 U.S. Comp. Gen. LEXIS 2614 (Nov. 28, 1956).

[15] *Nat'l Labor Relations Bd.*, 2007 U.S. Comp. Gen. LEXIS 172, at *9.

[16] *Id.*

[17] *Id.*

[18] The NLRB does not appear to receive anything tangible under this contract; rather, NLRB personnel are granted access to information on the internet. *Id* at *4.

[19] *See, e.g.*, Nat'l Labor Relations Bd., B-308026, 2006 Comp. Gen. LEXIS 149 (Sept. 14, 2006). *See generally* GAO REDBOOK, *supra* note 2, at 5-23 thru 5-28.

[20] GAO REDBOOK, *supra* note 2, at 5-23. Because the GAO apparently did not analyze the provision of web-based database access as a service, this article provides only a surface discussion of the *bona fide* needs rule as applied to services.

[21] *See, e.g.*, *Nat'l Labor Relations Bd.*, 2006 Comp. Gen. LEXIS 149.

[22] *See, e.g.*, *Decision of the Comptroller General*, 1956 U.S. Comp. Gen. LEXIS 2614.

[23] *See Nat'l Labor Relations Bd.*, 2007 U.S. Comp. Gen. LEXIS 172, at *11.

[24] *Id.* (citations omitted).

[25] *Id.*

If subscription contracts are to be treated as materials for *bona fide* needs analysis, the GAO stretched the rules for the NLRB subscriptions. First, generally speaking,

> [a]n appropriation may not be used for the needs of some time period subsequent to the expiration of its period of availability. With respect to annual appropriations, a more common statement of the rule is that an appropriation for a given fiscal year is not available for the needs of a future fiscal year.[27]

Applying this basic premise to the NLRB subscriptions appears to require the determination that access to a legal research tool on 1 October 2006 cannot possibly be a need earlier than the day that access will be provided. "[W]here an obligation is made toward the end of a fiscal year and it is clear from the facts and circumstances that the need relates to the following fiscal year, the *bona fide* needs rule has been violated."[28] Thus, the subscriptions would be the *bona fide* need of FY 2007 and must be funded with FY 2007 appropriations.

Of course, the GAO has developed exceptions to the general rule for materials, and it is these exceptions that the GAO relied on in approving the NLRB subscriptions.[29] In an oft-cited opinion, the GAO indicated that material needed in the next FY could be considered the *bona fide* need of the current FY if the material would not be available on the open market at the time needed for use and the time between contracting and delivery was needed for production of the material.[30] This opinion lacks persuasiveness as applied to the NLRB subscriptions. While the GAO accepted the NLRB position that it had to order the subscription in FY 2006 to ensure uninterrupted service,[31] there is no indication that the time between contracting and delivery, or access in this case, was needed for production of "the material."[32] Rather, the NLRB asserted that the intervening time was needed for internal agency coordination.[33]

The GAO next relied on reasoning found in its opinions addressing agency acquisition of materials as stock.[34] The GAO has determined that ordering stock items an agency knows will not be used until the next FY does not violate the *bona fide* needs rule so long as the type and amount of stock is reasonable.[35] Under this rationale, "readily available common use standard items"[36] may be purchased to replace items used during the FY.[37] This stock-level exception does not apply neatly to the NLRB subscriptions. While some new documents will be available through the research tools, these new documents generally are not provided to replace documents used during FY 2006. Further, these research tools do not appear to qualify as "readily available common use standard items."[38]

Thus, it appears that the GAO, rather than considering the funding of the NLRB subscriptions as already authorized by the existing *bona fide* needs rule exceptions, has crafted a new *bona fide* needs rule exception. Agencies may now enter subscription contracts for delivery in the next FY so long as the time between contracting and delivery is necessary.[39] The

---

[26] *Id.* at *12.

[27] GAO REDBOOK, *supra* note 2, at 5-15.

[28] *Id.* at 5-16.

[29] *Nat'l Labor Relations Bd.*, 2007 U.S. Comp. Gen. LEXIS 172, at *11.

[30] To the Chairman, U.S. Atomic Energy Comm'n, B-130815, 37 Comp. Gen. 155 (Sept. 3, 1957). In the actual opinion, the GAO stated that "the time intervening between contracting and delivery is necessary for production or fabrication of the material." *Id.* at *13. In the 2007 NLRB opinion, the GAO truncated the sentence, ending with "necessary." *Nat'l Labor Relations Bd.*, 2007 U.S. Comp. Gen. LEXIS 172, at *11.

[31] *Nat'l Labor Relations Bd.*, 2007 U.S. Comp. Gen. LEXIS 172, at *12. The GAO noted that, "[w]ebsite renewals can be effectuated quickly," but accepted the NLRB position regardless. *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at *11.

[35] GAO REDBOOK, *supra* note 2, at 5-23.

[36] *Id.*

[37] *Id.*

[38] *Id.* If the subscriptions are viewed as readily available common use standard items, this fact would cut directly against one of the limiting factors pertaining to the lead time exception. *See id.* at 5-22.

[39] *See Nat'l Labor Relations Bd.*, 2007 U.S. Comp. Gen. LEXIS 172, at *11.

GAO accepted about one month as necessary in this case.[40] Unfortunately, the opinion itself does not expressly state this new *bona fide* needs exception.

Finally, the lead time approved by the GAO in this case is not the result of normal business considerations as had been the underpinning for the prior lead time exceptions.[41] Rather, the GAO allowed for the agency's own administrative lead time "to place and coordinate the orders administratively within the agency."[42] This consideration has not supported funding future FY needs with current FY funds in any cited GAO opinions, and its use in this case provides concerning precedent.[43] In this case, the GAO's reference to selected portions of distinguishable prior opinions to support its new exception to the *bona fide* needs rule may leave fiscal law practitioners frustrated as they struggle to determine just how broad this new exception really is.

Major Mark A. Ries

[40] *Id.* at *12.

[41] *See, e.g.*, GAO REDBOOK, *supra* note 2, at 5-22.

[42] *Nat'l Labor Relations Bd.*, 2007 U.S. Comp. Gen. LEXIS 172, at *12.

[43] Much like appellate court opinions, it is impossible to know the import of any given GAO fiscal opinion at the time it is published. The GAO opinion discussed in this article may fade away before the turn of the next fiscal year. Alternatively, the opinion may change the face of the *bona fide* needs rule, much like the past opinions discussed in this article. For example, the opinions cited by the GAO in the instant opinion, and in the Redbook, allowing for materials to be delivered in the next FY actually determined that the agency action involved violated the *bona fide* needs rule. Only in what should be termed *dicta* did the GAO express the concepts we now cite freely as authorizing the "lead time" exception. *See* To the Chairman, U.S. Atomic Energy Comm'n, 37 Comp. Gen. 155; To the Adm'r, Gen. Servs. Admin., B-138574, 38 Comp. Gen. 628 (Mar. 25, 1959).

Appendix A

Department of Defense Legislation for Fiscal Year 2008

FY 2008 Department of Defense Appropriations Act

Congress Took Away My GWOT Appropriations and I Didn't Even Get a Lousy T-shirt . . . .

On 13 November 2007, President Bush signed House Resolution 3222,[90] enacting the fiscal year (FY) 2008 Department of Defense Appropriations Act (DODAA).[91] Unlike the FY 2007 DODAA,[92] the FY 2008 DODAA does not include Title IX to provide funding for the Global War on Terror (GWOT) operations.[93] The result is that the Department of Defense (DOD) received no additional appropriations to help fund DoD operations in Iraq and Afghanistan, minus a few exceptions discussed below.[94] Although there is no statutory prohibition against DOD's funding current GWOT operations in Iraq and Afghanistan, DOD must fund such operations with its "baseline" appropriations until the President signs a FY 2008 GWOT Wartime Appropriations Act.[95]

As of the submission of this article, however, the National Defense Authorization Act (NDAA) of 2008 and the Consolidated Omnibus Appropriation Act (COAA) of 2008 passed both the House and Senate and are awaiting signature by the President.[96] Once signed, the 2008 NDAA and the 2008 COAA will provide the funds requested by the President and DOD to prosecute the Global War on Terror (GWOT), including operations in Iraq and Afghanistan.[97] This article will only discuss the 2008 DODAA, since the 2008 NDAA and additional DoD appropriations have not been enacted as of the submission of this article.

OK, So Exactly How Much Money Did Congress Appropriate for DOD?

Initially, Congress appropriated funds for the following activities in the FY 2008 DODAA: $105.29 billion for Military Personnel (MILPER) in Title I,[98] $140.09 billion for Operations and Maintenance (O&M) in Title II,[99] $98.20 billion for Procurement activities in Title III,[100] $77.27 billion for Research, Development, Test, and Evaluation (RDT&E) in Title IV,[101] $2.70 billion for Working Capital Funds (WCF) (also referred to as Revolving Funds) in Title V,[102] $26.31 billion for Other DOD Programs in Title VI,[103] $988 million for Related Agencies in Title VII,[104] and $12.22 billion for the General Provisions in Title VIII.[105]

---

[90] Press Release, Office of the Press Sec'y, *President Bush Signs H.R. 2779 and H.R. 3222 into Law* (Nov. 13, 2007), *available at* http://www.whitehouse.gov /news/releases/2007/11/20071113-3.html.

[91] Department of Defense Appropriations Act for 2008, Pub. L. No. 110-116, div. A (Nov. 13, 2007) [hereinafter DODAA FY 2008].

[92] Department of Defense Appropriations Act for 2007, Pub. L. No. 109-289 (Sept. 29, 2006).

[93] *See* DODAA 2008, *supra* note 2.

[94] *Id.*

[95] *See id.* div. A.

[96] *See* National Defense Authorization Act for 2008, H.R. 1585 (unenacted as of the submission of this article for publication); *see also* Consolidated Omnibus Appropriations Act of 2008, H. R. 2764 (unenacted as of the submission of this article for publication).

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

In Title VIII, Congress also ordered two sets of reductions in the initially appropriated amounts of Titles II, III, IV, and V.[106] In Section 8097 of the FY 2008 DoDAA, Congress ordered a reduction of $506.9 million against the amounts initially appropriated for Titles II, III, and IV activities, as a result of so-called "contractor efficiencies."[107] Congress stated that "[t]he Secretary of Defense shall allocate this reduction proportionately to each budget activity, activity group, subactivity group, and each program, project and activity within each applicable appropriation account."[108] In addition to the Section 8097 reductions, in Section 8104, Congress stated that Titles II, III, IV, and V will be reduced by $470 million, $506 million, $367 million, and $10 million, respectively.[109] Congress stated that the reductions were attributable to "savings from revised economic assumptions," and shall be distributed proportionately within each title.[110]

To determine the final amounts appropriated funds for DOD activities, the initial amounts that Congress appropriated to Titles II, III, IV, and V must be adjusted downward to reflect the Section 8097 and Section 8104 reductions.[111] The author has created a chart listing the initially appropriated amounts in the 2008 DoDAA and calculating the proportionate reductions, as ordered by Congress. The chart provides the final appropriated amounts, and is located at Attachment 1 to Appendix A.[112] Once the initial amounts are adjusted to reflect the Section 8097 and Section 8104 reductions, Titles II, III, IV, and V are reduced by 0.497%, 0.676%, 0.636%, and 0.371%percent, respectively.[113] Therefore, the final amounts appropriated for Titles II – V activities are: $139.39 billion for O&M in Title II, $97.54 billion for Procurement in Title III, $76.78 billion for RDT&E in Title IV, and $2.69 billion for WCF in Title V.[114]

So What Does This Mean for My GWOT Appropriation or Authorization?

Generally, the FY 2008 DODAA appropriated the "baseline" funds needed by DOD to conduct non-GWOT activities.[115] The FY 2008 DODAA did not include appropriations for Title IX, which funded GWOT activities in the FY 2007 DODAA.[116] Congress did not prohibit the use of the "baseline" funds in the FY 2008 DODAA for GWOT activities.[117] The current operations of Operation of Iraqi Freedom (OIF) and Operation Enduring Freedom (OEF), for example, may be funded with the baseline O&M funds appropriated by Congress in Title II of the FY 2008 DODAA. If an activity or mission does not fall within the purpose of the appropriation, however, DOD may not obligate the appropriated funds for that activity or mission.

What's the Status of the Commander's Emergency Response Program (CERP)?

As of the date of this article, CERP is available for new obligations until the earlier of the enactment of the FY 2008 National Defense Authorization Act (NDAA) or the end of the Continuing Resolution Authority (CRA), currently 21 December 2007.[118] While enactment of the FY 2008 DODAA, terminated most provisions of the CRA with respect to DoD, Congress linked CERP's temporary authorization in the FY 2008 CRA's to the enactment of the FY 2008 NDAA, instead of the FY 2008 DODAA. As a result, CERP remains available for new obligations.

---

[106] *Id*.

[107] *Id*.

[108] *Id*.

[109] *Id*.

[110] *Id*.

[111] *Id*.

[112] *See infra* app. A, Attachment (FY2008 DODAA Appropriations Chart).

[113] *Id*.

[114] *Id*.

[115] *Id*.

[116] *See* DODAA FY 2008, *supra* note 2.

[117] *Id*.

[118] *See* First Continuing Resolution Authority for 2008, Pub. L. No. 110-92 § 118 (Sept. 29, 2007) [hereinafter First CRA]; *see also* Second Continuing Resolution Authority for 2008, Pub. L. No. 110-116, div. B, § 101 (Nov. 13, 2007) [hereinafter Second CRA]; Third Continuing Resolution Authority for 2008, Pub. L. No. 110-137 (Dec. 14, 2007) [hereinafter Third CRA].

On 29 September 2007, the President enacted the first CRA, P.L. 110-92, to appropriate funds and to continue the federal government's operations, including DoD's operations.[119] In Section 118 of the first CRA, Congress extended the CERP authority in Section 1202 of P.L. 109-163, the 2006 National Defense Authorization Act (NDAA),[120] until the earlier of the enactment of the FY08 NDAA, or the date in Section 106(3) of the first CRA.[121] In Section 106, Congress defined the end date of the first CRA as the earlier of: (1) the enactment into law of an appropriation for any project or activity provided for in this joint resolution, (2) the enactment into law of the applicable appropriations Act for fiscal year 2008 without any provision for such project or activity; or (3) November 16, 2007.[122] As a result, the first CRA extended CERP authorization until the enactment of the 2008 NDAA, or the date in Section 106(3), whichever occurs first.[123]

On 13 November 2007, the President enacted the P.L. 110-106, which provided the 2008 DODAA in Division A and the second CRA for non-DoD agencies in Division B.[124] In Section 101 of the second CRA (Division B), Congress amended the first CRA "by striking the date specified in section 106(3) and inserting 'December 14, 2007.'"[125] The third CRA, signed by the President on 14 December 2007, extends the CRA to 21 December 2007.[126] Since the temporary CERP authorization of the first CRA is tied to the date of Section 106(3) in accordance with Section 118 of the first CRA, CERP is currently available until the enactment of the 2008 NDAA or 21 December 2007, whichever occurs first.[127]

The DOD's response to the uncertainty of many of the GWOT appropriations and authorizations, including CERP, has been swift. On 31 October 2007, Secretary of Defense Robert M. Gates submitted a memorandum to the Chairman of the Senate Committee on Armed Services to reinforce the importance of re-authorizing a number of programs that critically impact DOD's operations, including CERP.[128] Secretary Gates reiterated that DOD's "[t]op three priorities are: (1) extension and expansion of 1206 authority [Global Train and Equip]; (2) global CERP authority, and (3) extension and expansion of 1207 authority [Security and Stabilization Assistance]."[129] Secretary Gates also requested that the 2008 NDAA include CERP authorization of $977 million.[130]

What about Iraq and Afghanistan Security Forces Funds and the Iraq Freedom Fund?

Congress did not appropriate additional funds for the Iraq Security Forces Fund (ISFF), the Afghanistan Security Forces Fund (ASFF), or the Iraq Freedom Fund (IFF) in the FY 2008 DODAA.[131] Nevertheless, since the FY 2007 DODAA authorized the use of ISFF, ASFF, and IFF until 30 September 2008, those funds currently remain available for new obligations.[132] Additionally, Section 8107 of the FY 2008 DODAA authorized the obligations of supervision and administration costs associated with a construction project funded with ISFF and/or ASFF, as long as the supervision and administration costs obligated included all in-house government costs.[133]

By the Way, Congress Is Fed Up with the "Gifting" of Unearned Award Fees To Contractors . . . .

---

[119] First CRA, *supra* note 29.

[120] National Defense Authorization Act for 2006, Pub. L. No. 109-163 § 1202, 119 Stat. 3136.

[121] First CRA, *supra* note 29, § 118.

[122] *See id*.

[123] *See id*.

[124] DODAA FY 2008, *supra* note 2, div. A; Second Continuing Resolution for 2008, Pub. L. No. 110-116, div. B (Nov. 13, 2007).

[125] Second CRA, *supra* note 29.

[126] Third CRA, *supra* note 29 (Pub. L. No. 110-137 states "That Public Law 110-92 is further amended by striking the date specified in section 106(3) and inserting December 21, 2007.'").

[127] *See* First CRA, *supra* note 30, § 118; *see also* Second CRA, *supra* note 29.

[128] Letter from The Honorable Robert M. Gates, Secretary of Defense, to The Honorable Carl Levin, Chairman, Senate Committee on Armed Services (Oct. 30, 2007) (on file with author).

[129] *Id* (emphasis added).

[130] *Id*.

[131] *See* DODAA FY 2008, *supra* note 2, div. A.

[132] *Id*. tit. IX.

[133] *Id*. tit. VIII.

In Section 8117 of the FY 2008 DODAA,[134] Congress withheld all appropriated funds for award fees contrary to the provisions of Section 814 of the FY 2007 NDAA.[135] Section 814 of the FY 2007 NDAA required DoD to issue guidance on the linking of award and incentive fees to acquisition outcomes.[136] On 24 April 2007, Mr. Shay Assad, the Director, Defense Procurement and Acquisition Policy, issued a policy memorandum delineating the proper use of award fee contracts and award fee provisions.[137] The required award fee provisions for all DOD award fee contracts in accordance with the 24 April 2007 policy memorandum are summarized in the chart below: [138]

Rating	Definition of Rating	Award Fee
Unsatisfactory	Contractor had failed to meet the basic (minimum essential) requirements of the contract.	0%
Satisfactory	Contractor has met the basic (minimum essential) requirements of the contract.	No Greater than 50%
Good	Contractor has met the basic (minimum essential) requirements of the contract, and has met at least 50% of the award fee criteria established in the award fee plan.	50% – 75%
Excellent	Contractor has met the basic (minimum essential) requirements of the contract, and has met at least 75% of the award fee criteria established in the award fee plan.	75% – 90%
Outstanding	Contractor has met the basic (minimum essential) requirements of the contract, and has met at least 90% of the award fee criteria established in the award fee plan.	90% – 100%

Isn't There Any Good News from the 2008 DODAA?
Yes! I Didn't Get a Lousy T-shirt, But at Least I Got a Flag . . .

The FY 2008 DODAA appropriated $11.6 billion for the Mine Resistant Ambush Protected (MRAP) Vehicle Fund.[139] Section 8122 authorized new obligations against this appropriation until 30 September 2008.[140] Additionally, Congress authorized the Secretary of Defense to present promotional materials, including a United States flag, to Active or Reserve service-members returning from OIF/OEF, as long as the presentation occurs during a presidentially-declared "week-long national observation and day of national celebration."[141]

Major Jose A. Cora

[134] *Id.*

[135] National Defense Authorization Act for 2007, Pub. L. No. 109-364, § 814, 119 Stat. 3136 (Oct. 17, 2006).

[136] *Id.*

[137] Memorandum from Mr. Shay Assad, Director, Defense Procurement and Acquisition Policy, to The Secretaries of the Military Departments (ATTN: Acquisition Executives), subject: Proper Use of Award Fee Contracts and Award Fee Provisions (24 Apr. 2007) (on file with author).

[138] *Id.*

[139] DODAA FY 2008, *supra* note 2, div. A.

[140] *Id.*

[141] *Id.*

Attachment to Appendix A

FY 2008 DOD Appropriations Act (DODAA) Chart

FY 2008 DOD Appropriations Act (DODAA)

Title I: Military Personnel (MilPer)

APPR. NAME	INITIAL AMOUNT	HR 3222 Pg. #	AVAIL THRU DATE	FINAL AMOUNT
Army MilPer	$31,535,016,000	2	30-Sep-2008	$31,535,016,000
Navy MilPer	$23,318,476,000	2	30-Sep-2008	$23,318,476,000
Marine MilPer	$10,280,180,000	2	30-Sep-2008	$10,280,180,000
Air Force (AF) MilPer	$24,194,914,000	2	30-Sep-2008	$24,194,914,000
Army Reserve MilPer	$3,684,610,000	2	30-Sep-2008	$3,684,610,000
Navy Reserve MilPer	$1,790,136,000	3	30-Sep-2008	$1,790,136,000
Marines Reserve MilPer	$583,108,000	3	30-Sep-2008	$583,108,000
AF Reserve MilPer	$1,363,779,000	3	30-Sep-2008	$1,363,779,000
Army National Guard (NG)	$5,924,699,000	3	30-Sep-2008	$5,924,699,000
AF NG	$2,617,319,000	4	30-Sep-2008	$2,617,319,000
Initial Title I (MilPer):	$105,292,237,000		**Total FINALTitle I:**	$105,292,237,000

Title II: Operations and Maintenance (O&M)

APPR. NAME	INITIAL AMOUNT	HR 3222 Pg. #	AVAIL THRU DATE	FINAL AMOUNT
Army Emer.&Ext.Exp. (EEE)	$11,478,000	4	30-Sep-2008	$11,421,053.48
Army O&M	$27,361,574,000	4	30-Sep-2008	$27,225,823,321.17
Navy/Marine EEE	$6,257,000	4	30-Sep-2008	$6,225,956.76
Navy O&M	$33,087,650,000	4	30-Sep-2008	$32,923,490,184.18
Marines O&M	$4,792,211,000	4	30-Sep-2008	$4,768,435,105.52
AF EEE	$7,699,000	4	30-Sep-2008	$7,660,802.47
AF O&M	$32,176,162,000	4	30-Sep-2008	$32,016,524,406.29
DOD O&M	$22,693,617,000	5	30-Sep-2008	$22,581,025,746.56
Army Reserve O&M	$2,510,022,000	6	30-Sep-2008	$2,497,568,871.74
Navy Reserve O&M	$1,148,083,000	6	30-Sep-2008	$1,142,386,944.41
Marines Reserve O&M	$208,637,000	6	30-Sep-2008	$207,601,876.28
AF Reserve O&M	$2,815,417,000	6	30-Sep-2008	$2,801,448,696.53
Army NG O&M (+Sec. 8086)	$5,765,848,000	6	30-Sep-2008	$5,737,241,539.71
Air National Guard O&M	$5,468,710,000	7	30-Sep-2008	$5,441,577,748.95
CAAF	$11,971,000	7	30-Sep-2008	$11,911,607.53
Army Envrnmntl. Restrtn.	$439,879,000	7	Various (Transfer Auth.)	$437,696,600.96
Navy Envrnmntl. Restrtn.	$300,591,000	7	Various (Transfer Auth.)	$299,099,659.18
AF Envrnmntl. Restrtn.	$458,428,000	8	Various (Transfer Auth.)	$456,153,572.65
DOD Envrnmntl. Restrtn.	$12,751,000	8	Various (Transfer Auth.)	$12,687,737.67
Former DoD Base ER (Army)	$280,249,000	8	Various (Transfer Auth.)	$278,858,583.21
OHDACA (DOD)	$103,300,000	9	30-Sep-2010	$102,787,491.29
CCCP Threat Reduction	$428,048,000	9	30-Sep-2010	$425,924,298.84
Total Initial Title II (O&M):	$140,088,582,000		**Total FINAL Title II:**	$139,393,551,805.38

FY 2008 DOD Appropriations Act

Title III: Procurement (Proc.)

APPR. NAME	INITIAL AMOUNT	HR 3222 Pg. #	AVAIL THRU DATE	FINAL AMOUNT
Army Aircraft	$4,185,778,000	9	30-Sep-2010	$4,157,486,293.86
Army Missile	$1,911,979,000	10	30-Sep-2010	$1,899,055,919.03
Army Weapons and Tracks	$3,021,889,000	10	30-Sep-2010	$3,001,464,028.69
Army Ammo	$2,223,176,000	10	30-Sep-2010	$2,208,149,536.08
Army Other	$11,428,027,000	10	30-Sep-2010	$11,350,784,876.41
Navy Aircraft	$12,464,284,000	11	30-Sep-2010	$12,380,037,807.27
Navy Weapons	$3,113,987,000	11	30-Sep-2010	$3,092,939,537.59
Navy/Marine Ammo	$1,064,432,000	11	30-Sep-2010	$1,057,237,495.81
Navy Ships	$13,597,960,000	12	30-Sep-2012	$13,506,051,282.34
Navy Other	$5,317,570,000	12	30-Sep-2010	$5,281,628,502.91
Marines Proc. - ALL	$2,326,619,000	13	30-Sep-2010	$2,310,893,364.04
AF Aircraft	$12,021,900,000	13	30-Sep-2010	$11,940,643,884.17
AF Missiles	$4,985,459,000	13	30-Sep-2010	$4,951,762,243.75
AF Ammo	$754,117,000	13	30-Sep-2010	$749,019,917.32
AF Other	$15,440,594,000	14	30-Sep-2010	$15,336,230,904.77
DOD Proc. - ALL	$3,269,035,000	14	30-Sep-2010	$3,246,939,566.95
NG & Reserve Proc. - ALL	$980,000,000	14	30-Sep-2010	$973,376,172.36
DOD Production Act	$94,792,000	14	30-Sep-2010	$94,151,300.13
Total INITIAL Title III:	$98,201,598,000		**Total FINAL Title III:**	$97,537,852,633.50

Title IV: Research, Development, Test, and Evaluation (RDT&E)

APPR. NAME	INITIAL AMOUNT	HR 3222 Pg. #	AVAIL THRU DATE	FINAL AMOUNT
Army RDT&E	$12,126,591,000	15	30-Sep-2009	$12,049,516,443.56
Navy RDT&E	$17,918,522,000	15	30-Sep-2009	$17,804,634,912.10
AF RDT&E	$26,255,471,000	15	30-Sep-2009	$26,088,595,677.71
DOD RDT&E	$20,790,634,000	15	30-Sep-2009	$20,658,492,255.17
DOD Op. Testing & Eval	$180,264,000	15	30-Sep-2009	$179,118,272.58
Total INITIAL Title IV:	$77,271,482,000		**Total FINAL Title IV:**	$76,780,357,561.13

Title V: Revolving Funds/Working Capital Funds (WCF)

APPR. NAME	INITIAL AMOUNT	HR 3222 Pg. #	AVAIL THRU DATE	FINAL AMOUNT
DOD WCF	$1,352,746,000	16	Until Expended	$1,347,739,241.64
Sealift (Merchant Marines)	$1,349,094,000	16	Until Expended	$1,344,100,758.36
Total INITIAL Title V:	$2,701,840,000		**Total FINAL Title IV:**	$2,691,840,000.00

FY 2008 DOD Appropriations Act

Title VI: Other DOD Programs (Other)

APPR. NAME	INITIAL AMOUNT	HR 3222 Pg. #	AVAIL THRU DATE	FINAL AMOUNT
DOD Health Program	$23,458,692,000	16	Various	$23,458,692,000
DOD Chem Weapons Dest.	$1,512,724,000	17	Various	$1,512,724,000
DOD Counter-Drug Ops	$984,779,000	17	Transfer Auth.	$984,779,000
Joint IED Defeat Program	$120,000,000	17	Transfer Auth.	$120,000,000
Office of IG	$239,995,000	18	Various	$239,995,000
Total Initial Title VI (Other):	$26,316,190,000		**Total Initial Title VI:**	$26,316,190,000

Title VII: Related Agencies

APPR. NAME	INITIAL AMOUNT	HR 3222 Pg. #	AVAIL THRU DATE	FINAL AMOUNT
CIA Retirement Fund	$262,500,000	18	30 Sep 08 (Sec. 8035)	$262,500,000
Intell Community Mgmt	$725,526,000	18	Various	$725,526,000
Total INITIAL Title VII:	$988,026,000		**Total FINAL Title VII:**	$988,026,000

Title VIII: General Provisions Additions

APPR. NAME	INITIAL AMOUNT	HR 3222 Pg. #	AVAIL THRU DATE	NOTES
Sec. 8020 - Indian Fin. Act	$15,000,000	24	30-Sep-2008	
Sec. 8023 - Kuwait Reimb.	$350,000,000	25	30-Sep-2008	
Sec. 8077 - Fischer House	$10,000,000	38	Until Expended	
Sec. 8086 - AR NG O&M	$0	40	30-Sep-2008	$990,000 added Title II
Sec. 8087 - Public Schools	$5,500,000	40	Until Expended	
Sec. 8089 - Various Grants	$62,700,000	41	30-Sep-2008	
Sec. 8112 - AF Tankers	$150,000,000	45	Various (Transfer)	
Sec. 8121 - MRAPs	$11,630,000,000	47	Various (Transfer)	
Total Title VIII (Additions):	$12,223,200,000		**Total Title VIII (Addns):**	$12,223,200,000
Initial Amounts 2008 Appr. Act	$463,083,155,000			

Title VIII: General Provisions REDUCTIONS

APPR. NAME	INITIAL AMOUNT	HR 3222 Pg. #	How allocated?
Sec. 8097	($506,900,000)	43	Proportionally to and within Titles II, III, and IV
Sec. 8104	($470,000,000)	44	Proportionally within Title II (O&M)
Sec. 8104	($506,000,000)	44	Proportionally within Title III (Procurement)
Sec. 8104	($367,000,000)	44	Proportionally within Title IV (RDT&E)
Sec. 8104	($10,000,000)	44	Proportionally within Title V (Revolve/WCF)
Total Title VIII (Reductions):	($1,859,900,000)		
2008 DOD Appr. Act FINAL Amount Appropriated:			**$461,223,255,000.00**

FY 2008 DOD Appropriations Act

I. Proportional Calculations of Section 8097 Reductions (2008 Initial Appropriation is $463,083,155,000)

Title II Initial Amount:	$140,088,582,000	**2008 Appr. Act Title II Proportion:**	44.3934099%
Title III Initial Amount:	$98,201,598,000	**2008 Appr. Act Title III Proportion:**	31.1196225%
Title IV Initial Amount:	$77,271,482,000	**2008 Appr. Act Title IV Proportion:**	24.4869676%
Title V Initial Amount:	$2,701,840,000 .	**TITLE V NO Sec. 8097 Reduction**	

2008 Appr. Act Title II After Section 8097 Reduction:	$139,863,551,805.38
2008 Appr. Act Title III After Section 8097 Reduction:	$98,043,852,633.50
2008 Appr. Act Title IV After Section 8097 Reduction:	$77,147,357,561.13

II. 2008 Appr. Act Titles II, III, IV, and V Final Amounts after Sec. 8104 Reductions (with 8097 Reduction)

2008 Appr. Act Title II after Sec. 8104 Reduction:	$139,393,551,805.38
2008 Appr. Act Title III after Sec. 8104 Reduction:	$97,537,852,633.50
2008 Appr. Act Title IV after Sec. 8104 Reduction:	$76,780,357,561.13
2008 Appr. Act Title V after Sec. 8104 Reduction:	$2,691,840,000

III. Proportional Calculations of Titles II – V; (Final amounts after Reductions)/(Initial Amounts Appropriated)

Title II Proportion of: (Final Reduced Amount)/(Initial Amounts Appropriated) -	99.5038638%
Title III Proportion of: (Final Reduced Amount)/(Initial Amounts Appropriated) -	99.3240992%
Title IV Proportion of: (Final Reduced Amount)/(Initial Amounts Appropriated) -	99.3644170%
Title V Proportion of: (Final Reduced Amount)/(Initial Amounts Appropriated) -	99.6298819%

Appendix B

Government Contract and 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. It may be easier to access the Air Force secure sites through WebFLITE.

The second table on the final page contains links to websites that allow you to subscribe to various electronic newsletters of interest to practitioners. Once you have joined one of these news lists, the list administrator will automatically forward electronic news announcements to your email address. These electronic newsletters are convenient methods of keeping informed about recent and/or upcoming changes in the field of law.

Website Name	Web Address
A	
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
AFARS – Army Federal Acquisition Regulation Supplement	http://farsite.hill.af.mil/vfafara.htm
Acronym Index	https://www.dmso.mil/public/resources/glossary/
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.afcap.com/index.html
Air Force Contracting Home Page	www.safaq.hq.af.mil/contracting/mission.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 Contracting Toolkit	https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pkopr1.htm
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/ Investigation Guide	http://www.asafm.army.mil/fo/fod/ada/ada.asp
Anti-Deficiency Act violation database - GAO	http://www.gao.gov/ada/antideficiencyrpts.htm
Armed Services Board of Contract Appeals (Rules, EAJA, ADR)	http://www.law.gwu.edu/asbca/
Army Acquisition (ASA(ALT))	https://webportal.saalt.army.mil/
Army Audit Agency	http://www.hqda.army.mil/AAAWEB/
Army Contracting Agency	http://www.aca.army.mil/index.htm
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 Knowledge Online	https://www.us.army.mil/portal/portal_home.jhtml
Army Materiel Command (AMC) Command Counsel	http://www.amc.army.mil/amc/command_counsel/
Army Materiel Command Web Page	http://www.amc.army.mil/
Army Procurement Fraud Web Page	www.jagcnet.army.mil/8525701800059EE93/(JAGCNETDocID)/HOME?OPENDOCUMENT
Army Publications	http://www.army.mil/usapa/
Army Purchase Card Program	http://aca.saalt.army.mil/army/
Army STRICOM (Simulation, Training, and Instrumentation Command) Home Page	www.peostri.army.mil
Army Sustainment Command	http:///www.aschq.army.mil/home/index.htm
ABA Lawlink Legal Research Jumpstation:	http://www.abanet.org/lawlink/home.html
ABA Network	http://www.abanet.org/
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
CENTCOM Contracting Webpage	http://www.centcom.mil/sites/contracts/default.aspx
Centernet	https://centernet.hanscom.af.mil
Central Contractor Registration (CCR)	http://www.ccr.gov/
Civilian Board of Contract Appeals	http://www.cbca.gsa.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
Congressional Bills	http://www.gpoaccess.gov/bills/index.html
Congressional Documents	http://www.gpoaccess.gov/legislative.html
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/
D	
DA OGC Ethics	http://www.hqda.army.mil/ogc/eandf.htm
Davis Bacon Wage Determinations	http://www.gpo.gov/davisbacon/
Debarred List (known as the Excluded Parties Listing System)	http://epls.arnet.gov
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/
DCAA - Electronic Audit Reports	www.dcaa.mil/readingroom.htm
DCAA Contract Audit Manual	www.dcaa.mil/cam.htm
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 (DOJ)	http://www.usdoj.gov
Department of Justice Legal Opinions	http://www.usdoj.gov/olc/opinionspage.htm
DOJ Procurement Fraud Task Force	http://www.usdoj.gov/criminal/npftf/
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 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.fai.gov/
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	https://www.fpds.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	
Gansler Report	http://www.army.mil/docs/Gansler_Commission_Report_Final_071031.pdf
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
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/8525736A005BC8F9
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://www.loc.gov/index.html
Logistics Civil Augmentation Program	http://www.amc.army.mil/LOGCAP/
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) Acquisition	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	http://govinfo.library.unt.edu/npr/index.htm

closed & only maintained in archive.	
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.finance.hq.navy.mil/fmc/
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 transportation 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
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	
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/sharea76/Home.aspx
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. 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 2007 - October 2008) (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	56th Judge Advocate Officer Graduate Course	13 Aug 07 – 22 May 08
5-27-C22	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C20 (Ph 2)	175th JAOBC/BOLC III	22 Feb – 7 May 08
5-27-C20 (Ph 2)	176th JAOBC/BOLC III	18 Jul – 1 Oct 08
5F-F1	202d Senior Officers Legal Orientation Course	9 – 13 Jun 08
5F-F1	203d Senior Officers Legal Orientation Course	8 – 12 Sep 08
5F-F52	38th Staff Judge Advocate Course	2 – 6 Jun 08
5F-F52S	11th SJA Team Leadership Course	2 – 4 Jun 08
JARC-181	2008 JA Professional Recruiting Conference	15 – 18 Jul 08

NCO ACADEMY COURSES		
600-BNCOC	3d BNCOC Common Core	10 – 28 Mar 08
600-BNCOC	4th BNCOC Common Core	8 – 29 May 08
600-BNCOC	5th BNCOC Common Core	4 – 22 Aug 08
512-27D30 (Ph 2)	3d Paralegal Specialist BNCOC	2 Apr – 2 May 08
512-27D30 (Ph 2)	4th Paralegal Specialist BNCOC	3 Jun – 3 Jul 08
512-27D30 (Ph 2)	5th Paralegal Specialist BNCOC	26 Aug – 26 Sep 08
512-27D40 (Ph 2)	3d Paralegal Specialist ANCOC	2 Apr – 2 May 08
512-27D40 (Ph 2)	4th Paralegal Specialist ANCOC	3 Jun – 3 Jul 08
512-27D40 (Ph 2)	5th Paralegal Specialist ANCOC	26 Aug – 26 Sep 08
WARRANT OFFICER COURSES		
7A-270A2	9th JA Warrant Officer Advanced Course	7 Jul – 1 Aug 08
7A-270A0	15th JA Warrant Officer Basic Course	27 May – 20 Jun 08
7A-270A1	19th Legal Administrators Course	16 – 20 Jun 08
ENLISTED COURSES		
512-27D/20/30	19th Law for Paralegal Course	24 – 28 Mar 08
512-27DC5	25th Court Reporter Course	28 Jan – 28 Mar 08
512-27DC5	26th Court Reporter Course	21 Apr – 20 Jun 08
512-27DC5	27th Court Reporter Course	28 Jul – 26 Sep 08
512-27DC7	9th Redictation Course	31 Mar – 11 Apr 08
512-27D-CLNCO	10th Chief Paralegal BCT NCO Course	21 – 25 Apr 08
512-27DCSP	17th Senior Paralegal Course	16 – 20 Jun 08

ADMINISTRATIVE AND CIVIL LAW		
5F-F23	62d Legal Assistance Course	5 – 9 May 08
5F-F202	6th Ethics Counselors Course	14 – 18 Apr 08
5F-F24	32d Administrative Law for Military Installations Course	17 – 21 Mar 08
5F-F24E	2008 USAREUR Administrative Law CLE	15 – 19 Sep 08
5F-F29	26th Federal Litigation Course	4 – 8 Aug 08
CONTRACT AND FISCAL LAW		
5F-F10	159th Contract Attorneys Course	3 – 11 Mar 08
5F-F10	160th Contract Attorneys Course	21 Jul – 1 Aug 08

5F-F101	2008 Procurement Fraud Course	26 – 30 May 08
5F-F103	2008 Advanced Contract Law Course	7 – 11 Apr 08
5F-F12	78th Fiscal Law Course	28 Apr – 2 May 08
5F-F13	4th Operational Contracting	12 – 14 Mar 08
CRIMINAL LAW		
5F-F33	51st Military Judge Course	21 Apr – 9 May 08
5F-F34	30th Criminal Law Advocacy Course	8 – 19 Sep 08

INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	4th Intelligence Law Course	23 – 27 Jun 08
5F-F42	90th Law of War Course	7 – 11 Jul 08
5F-F43	4th Advanced Intelligence Law Course	25 – 27 Jun 08
5F-F44	3d Legal Issues Across the IO Spectrum	14 – 18 Jul 08
5F-F45	7th Domestic Operations Law Course	26 – 30 Nov 07
5F-F47	50th Operational Law Course	28 Jul – 8 Aug 08
5F-F47E	2008 USAREUR Operational Law CLE	28 Apr – 2 May 08
5F-F48	1st Rule of Law Course	9 – 13 Jun 08

3. Naval Justice School and FY 2008 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
BOLT	BOLT (020) BOLT (020) BOLT (030) BOLT (030)	24 – 28 Mar 08 (USMC) 24 – 28 Mar 08 (USN 4 – 8 Aug 08 (USMC) 4 – 8 Aug 08 (USN)
900B	Reserve Lawyer Course (020)	22 – 26 Sep 08
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	12 – 23 May 08 28 Jul – 8 Aug 08
786R	Advanced SJA/Ethics (010) Advanced SJA/Ethics (020)	24 – 28 Mar 08 (San Diego) 14 – 18 Apr (Norfolk)

850V	Law of Military Operations (010)	16 – 27 Jun 08
4044	Joint Operational Law Training (010)	21 – 24 Jul 08
0258	Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	5 – 9 May 08 (Newport) 9 – 13 Jun 08 (Newport) 21 – 25 Jul 08 (Newport) 18 – 22 Aug 08 (Newport) 22– 26 Sep 08 (Newport)
4048	Estate Planning (010)	21 – 25 Jul 08
748A	Law of Naval Operations (020)	15 – 19 Sep 08
7485	Litigating National Security (010)	29 Apr – 1 May 08 (Andrews AFB)
748K	USMC Trial Advocacy Training (020) USMC Trial Advocacy Training (030) USMC Trial Advocacy Training (040)	12 – 16 May 08 (Okinawa) 19 – 23 May 08 (Pearl Harbor) 15 – 19 Sep 08 (San Diego)
2205	Defense Trial Enhancement (010)	12 – 16 May 08
3938	Computer Crimes (010)	19 – 23 May 08 (Newport)
961J	Defending Complex Cases (010)	18 – 22 Aug 08
525N	Prosecuting Complex Cases (010)	11 – 15 Aug 08
2622	Senior Officer (Fleet) (050) Senior Officer (Fleet) (060) Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110)	14 – 18 Apr 08 (Pensacola) 28 Apr – 2 May 08 (Naples, Italy) 9 – 13 Jun 08 (Pensacola) 16 – 20 Jun 08 (Quantico) 23 – 27 Jun 08 (Camp Lejeune) 14 – 18 Jul 08 (Pensacola) 11 – 15 Aug 08 (Pensacola)
961A (PACOM)	Continuing Legal Education (020)	1 – 2 May 08 (Naples)
7878	Legal Assistance Paralegal Course (010)	31 Mar – 5 Apr 08

03RF	Legalman Accession Course (020) Legalman Accession Course (030)	22 Jan – 4 Apr 08 9 Jun – 22 Aug 08
846L	Senior Legalman Leadership Course (010) Senior Legalman Leadership Course (010)	18 – 22 Aug 08
049N	Reserve Legalman Course (Phase I) (010)	21 Apr – 2 May 08
056L	Reserve Legalman Course (Phase II) (010)	5 – 16 May 08
846M	Reserve Legalman Course (Phase III) (010)	19 – 30 May 08
5764	LN/Legal Specialist Mid-Career Course (020)	5 – 16 May 08

4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020) Paralegal Research & Writing (030)	21 Apr – 2 May 08 16 – 27 Jun 08 (Norfolk) 14 – 25 Jul 08 (San Diego)
4046	SJA Legalman (020)	12 – 23 May 08 (Norfolk)
7487	Family Law/Consumer Law (010)	31 Mar – 4 Apr 08
627S	Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	31 Mar – 2 Apr 08 (Norfolk) 14 – 16 Apr 08 (Bremerton) 22 – 24 Apr 08 (San Diego) 28 – 30 Apr 08 (Naples) 19 – 21 May 08 (Norfolk) 8 – 10 Jul 08 (San Diego) 4 – 6 Aug 08 (Millington) 25 – 27 Aug 08 (Pendleton) 2 – 4 Sep 08 (Norfolk)
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	10 – 28 Mar 08 28 Apr – 16 May 08 2 – 20 Jun 08 7 – 25 Jul 08 8 – 26 Sep 08
	Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070)	21 Apr – 2 May 08 7 – 18 Jul 08 8 – 19 Sep 08
3760	Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	7 – 11 Apr 08 23 – 27 Jun 08 4 – 8 Aug 08 (Millington) 25 – 29 Aug 08
4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalman (020)	16 – 27 Jun 08

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	5 – 23 May 08 9 – 27 Jun 08 28 Jul – 15 Aug 08 8 – 26 Sep 08

947J	Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	31 Mar – 11 Apr 08 5 – 16 May 08 9 – 20 Jun 08 28 Jul – 8 Aug 08 8 – 18 Sep 08

3759	Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	31 Mar – 4 Apr 08 (San Diego) 14 – 18 Apr 08 (Bremerton) 28 Apr – 2 May 08 (San Diego) 2 – 6 Jun 08 (San Diego) 25 – 29 Aug 08 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

For information about attending the following courses, 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.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	**Dates**
Judge Advocate Staff Officer Course, Class 08-B	19 Feb – 18 Apr 08
Paralegal Apprentice Course, Class 08-03	25 Feb – 11 Apr 08
Paralegal Craftsman Course, Class 08-02	3 Mar – 11 Apr 08
Pacific Trial Advocacy Course, Class 08-A (Off-site, Yokota AB, Japan)	10 – 14 Mar 08
Senior Defense Counsel Course , Class 08-A	14 – 18 Apr 08
CONUS Trial Advocacy Course, Class 08-A	7 – 11 Apr 08
Paralegal Apprentice Course, Class 08-04	15 Apr – 3 Jun 08
Reserve Forces Judge Advocate Course, Class 08-B	19 – 20 Apr 08
Area Defense Counsel Orientation Course, Class 08-B	21 – 25 Apr 08
Environmental Law Course, Class 08-A	28 Apr – 2 May 08
Defense Paralegal Orientation Course, Class 08-B	21 – 25 Apr 08
Advanced Trial Advocacy Course, Class 08-A	29 Apr – 2 May 08
Advanced Labor & Employment Law Course, Class 08-A	5 – 9 May 08
Operations Law Course, Class 08-A	12 – 22 May 08
Negotiation and Appropriate Dispute Resolution Course, Class 08-A	19 – 23 May 08
Environmental Law Update Course (DL), Class 08-A	28 – 30 May 08
Reserve Forces Paralegal Course, Class 08-B	2 – 13 Jun 08
Paralegal Apprentice Course, Class 08-05	4 Jun – 23 Jul 08
Senior Reserve Forces Paralegal Course, Class 08-A	9 – 13 Jun 08
Staff Judge Advocate Course, Class 08-A	16 – 27 Jun 08
Law Office Management Course, Class 08-A	16 – 27 Jun 08
Judge Advocate Staff Officer Course, Class 08-C	14 Jul – 12 Sep 08

Paralegal Apprentice Course, Class 08-06	29 Jul – 16 Sep 08
Paralegal Craftsman Course, Class 08-03	31 Jul – 11 Sep 08
Trial & Defense Advocacy Course, Class 08-B	15 – 26 Sep 08

5. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the September 2007 issue of *The Army Lawyer*.

6. Phase I (Non-Resident Phase), Deadline for RC-JAOAC 2009

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) materials is ***NLT 2400, 1 November 2008***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. This requirement includes submission of all writing exercises, whether completed under the old JA 151, Fundamentals of Military Writing subcourse, or under the new JAOAC Distributed Learning military writing subcourse. Please note that registration for Phase I through the Army Institute for Professional Development (AIPD) is now *closed* to facilitate transition to the new JAOAC (Phase I) on JAG University, the online home of TJAGLCS located at https://jag.learn.army.mil. The new course is expected to be open for registration on 1 April 2008.

This requirement is particularly critical for some officers. The 2009 JAOAC will be held in January 2009, and is a prerequisite for most Judge Advocate captains to be promoted to major, and, ultimately, to be eligible to enroll in Intermediate-Level Education (ILE).

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 Distributed Learning Department, TJAGLCS for grading by the same deadline (1 November 2008). If the student receives notice of the need to re-do any examination or exercise after 1 October 2008, the notice will contain a suspense date for completion of the work.

Judge Advocates who fail to complete Phase I Non-Resident courses and writing exercises by 1 November 2008 will not be cleared to attend the 2009 JAOAC resident phase. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

7. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within a three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in an even-numbered year, period ends in even-numbered years, etc.
Florida**	Assigned month every three years

Georgia	31 January annually
Idaho	31 December, every third year, depending on year of admission
Illinois*	Requirements vary; see www.mcleboard.org
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 ends 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 (2007-2008).

Date	Unit/Location	ATTRS Course Number	Topic	POC
29-30 Mar 2008	WIA&ARNG Fort McCoy, WI	NA	Air Force JAG School	Lt Col Julio R. Barron 608-242-3077 / DSN 724-3077 julio.barron2@us.army.mil
18-20 Apr 2008	1st LSO/90th RRC Oklahoma City, OK	008	International & Operational Law, Contract & Fiscal Law	LTC Randy Fluke, 409-981-7950; randall.fluke@us.army.mil
26-27 Apr 2008	91st LSO/9th LSO 1st Division Museum at Cantigny Wheaton, IL	009	Administrative & Civil Law, Contract & Fiscal Law	1LT Ewa Dabrowski Ewa.dabrowski@us.army.mil 773.593.5978
25-27 Apr 2008	8th LSO/89th RRC Kansas City, MO	010	Administrative & Civil Law, Contract & Fiscal Law	LTC Tracy Diel & SFC Larry Barker tracy.t.diel@us.army.mil SFC Larry Barker Larry.R.Barker@us.army.mil 816-836-0005 ext 2155/2156
26-27 Apr 2008	Indiana ARNG Indianapolis, IN	011	Administrative & Civil Law, International & Operational Law	1LT Kevin Leslie, (317) 247-3491, kevin.leslie@us.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 September 2007, 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 Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.

Individual Paid Subscriptions to *The Army Lawyer*

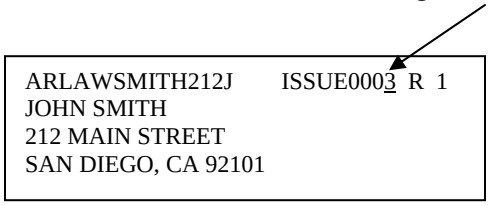
Attention Individual Subscribers!

The Government Printing Office offers a paid subscription service to *The Army Lawyer*. To receive an annual individual paid subscription (12 issues) to *The Army Lawyer*, complete and return the order form below (photocopies of the order form are acceptable).

Renewals of Paid Subscriptions

When your subscription is about to expire, the Government Printing Office will mail each individual paid subscriber only one renewal notice. You can determine when your subscription will expire by looking at your mailing label. Check the number that follows "ISSUE" on the top line of the mailing label as shown in this example:

A renewal notice will be sent when this digit is 3.



The numbers following ISSUE indicate how many issues remain in the subscription. For example, ISSUE001 indicates a subscriber will receive one more issue. When the number reads ISSUE000, you have received your last issue unless you renew.

You should receive your renewal notice around the same time that you receive the issue with ISSUE003.

To avoid a lapse in your subscription, promptly return the renewal notice with payment to the Superintendent of Documents. If your subscription service is discontinued, simply send your mailing label from any issue to the Superintendent of Documents with the proper remittance and your subscription will be reinstated.

Inquiries and Change of Address Information

The individual paid subscription service for *The Army Lawyer* is handled solely by the Superintendent of Documents, not the Editor of *The Army Lawyer* in Charlottesville, Virginia. Active Duty, Reserve, and National Guard members receive bulk quantities of *The Army Lawyer* through official channels and must contact the Editor of *The Army Lawyer* concerning this service (see inside front cover of the latest issue of *The Army Lawyer*).

For inquiries and change of address for individual paid subscriptions, fax your mailing label and new address to the following address:

United States Government Printing Office
Superintendent of Documents
ATTN: Chief, Mail List Branch
Mail Stop: SSOM
Washington, D.C. 20402

United States Government INFORMATION
PUBLICATIONS ★ PERIODICALS ★ ELECTRONIC PRODUCTS

Army Lawyer and Military Review SUBSCRIPTION ORDER FORM

Order Processing Code: 5937

Easy Secure Internet: bookstore.gpo.gov
Toll Free: 866 512-1800
Phone: 202 512-1800
Fax: 202 512-2104
Mail: Superintendent of Documents, PO Box 371954, Pittsburgh, PA 15250-7954

☐ **YES,** enter my subscription(s) as follows:

_____subscription(s) of the *Army Lawyer* (ARLAW) for $50 each ($70 foreign) per year.

_____subscription(s) of the *Military Law Review* (MILR) for $20 each ($28 foreign) per year. The total cost of my order is $_____.

Prices include first class shipping and handling and is subject to change.

Personal name (Please type or print)

Company name

Street address City, State, Zip code

Daytime phone including area code

Purchase Order Number

Check method of payment:

☐ Check payable to Superintendent of Documents

☐ SOD Deposit Account ☐☐☐☐☐☐ – ☐

☐ VISA ☐ MasterCard ☐ Discover/NOVUS ☐ American Express

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

☐☐☐☐ (expiration date)

Thank you for your order!

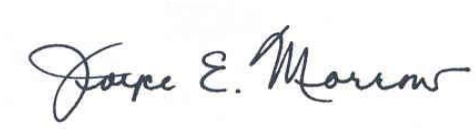
Authorizing signature

11/02

By Order of the Secretary of the Army:

GEORGE W. CASEY, JR
General, United States Army
Chief of Staff

Official:



JOYCE E. MORROW
Administrative Assistant to the
Secretary of the Army
0805903

Department of the Army
The Judge Advocate General's Legal Center & School
U.S. Army
ATTN: JAGS-ADA-P, Technical Editor
Charlottesville, VA 22903-1781

PERIODICALS