THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-338
January 2001

Contract and Fiscal Law Developments of 2000—The Year in Review

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The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's School, U.S. Army, 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 $29 each ($36.25 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 School, U.S. Army, 600 Massie Road, ATTN: JAGS-ADL-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.

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

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FOREWORD

In a year filled with turbulence—crises in Africa and the Middle East; the potential rebirth of democracy in Serbia; the New York Yankees winning the World Series (again)—the greatest democracy in history once again peacefully observed the transfer of power from one Chief Executive to another. Well, sort of, anyway. In spite of a few warts on the process, the strength and resiliency of the American democratic system has never been more clearly displayed.[1]

While the past year in government contracting was relatively quiet, there are many things developing that could foreshadow some interesting and busy years to come. Outsourcing and privatization continue at the forefront of government efforts to streamline infrastructure, generating work for lawyers as creative efforts in housing and utilities, especially, create unique legal issues. The inherent tension between the quest for contract efficiency (leading to contract bundling) and the need to provide opportunities for small business resulted in new rules from the Small Business Administration and expressions of concern from Congress that may result in legislation in 2001. The use of "e-commerce" as a vehicle for government procurement continues to develop with techniques such as reverse auctioning generating a lot of interest throughout the acquisition community. The award of the nearly $7 billion Navy-Marine Corps Intranet contract may signal a new era in agency purchase, operation, and maintenance of information technology resources. Last, but certainly not least, the Army has begun to struggle with the mammoth undertaking of transforming itself into an organization matching the vision expressed by the Chief of Staff.

As usual, the courts, boards, and the General Accounting Office (GAO) have been busy issuing guidance touching on all aspects of our practice, including some of the areas mentioned above. We can expect much more from these fora on those topics in the year ahead. In addition, there was a significant amount of rule-making activity covering the entire spectrum of issues. On the legislative front, perhaps the biggest news this year was the enactment of the Military Extraterritorial Jurisdiction Act of 2000, which, depending on implementation, should provide commanders a new tool for use in dealing with contractor employees and other civilians engaging in misconduct overseas. As usual, Congress gave us numerous other points of "guidance" in a variety of legislation, the high points of which we have included in this article.

As always, this article is our[2] attempt to look back on the past year and pick the most important, most relevant, and sometimes the most entertaining, cases and developments of the past year. While we cannot possibly cover every decision or rule issued, we have attempted to address those most beneficial to government contract law practitioners. We hope that we have hit the mark and that you find this article both useful and enjoyable.

CONTRACT FORMATION

Authority

The Ghost of Farmer Merrill

Most government contract attorneys know the sad story of Farmer Merrill and how he learned the hard way of the difference between actual and apparent authority.[3] Half a century later, another farmer has learned the hard way that only those with actual authority can bind the government. In *Mark L. McAfee v. United States*,[4] the Court of Federal Claims (COFC) held that an Assistant U.S. Attorney (AUSA) lacked actual authority to forgive Mark McAfee's loan in exchange for his cooperation in a related matter. Mark McAfee, a farmer, agreed to help the U.S. Attorney's office foreclose on his father's property in exchange for the government forgiving his $400,000 Farm Services Administration (FSA) loan.[5] When the FSA did not forgive his indebtedness, McAfee filed suit alleging that the assigned AUSA, with the knowledge and concurrence of the U.S. Attorney, had agreed to forgive the loan in exchange for his cooperation.[6]

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1. If nothing else, we've all learned about "chads," "dimples," and butterfly ballots!

2. Special thanks to those from outside the Department who helped make this a comprehensive, timely, and relevant article: Colonel Jonathan H. Kosarin, Lieutenant Colonel Steven Tomanelli (USAF), Lieutenant Colonel Warner Meadows (USAF), Lieutenant Colonel Mary E. Harney (USAF), Ms. Margaret Patterson, and Major Corey Bradley.

3. In *Fed.Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947), the Supreme Court held that only actual authority binds the government, and that potential contractors must ascertain the actual authority of the government agents with whom they deal.

4. 46 Fed. Cl. 428 (2000).

5. *Id.* at 430.

6. *Id.* The government denied agreeing to this loan forgiveness in exchange for McAfee's assistance in quelling "Rodger's Rebellion." *Id.* "Rodger" was plaintiff's father, whose property was the subject of the government's foreclosure action. *Id.*

The COFC held, however, that McAfee was out of luck. It ruled that had such a promise been made, the AUSA and the U.S. Attorney lacked actual authority to make this deal regardless of what McAfee believed.[7] "The fact that plaintiffs believed that [the AUSA] had authority or obtained the [United States Attorney]'s ratification is irrelevant; plaintiffs must assert facts that, if proven, show actual authority to contract in this matter."[8]

No Authority at 10,000 Feet

The ghost of Farmer Merrill also lives on in our country's national forests. In *Hawkins & Powers Aviation, Inc. v. United States*,[9] the COFC held that an Assistant Director of the Forest Service lacked actual authority to contractually bind the government.[10] Hawkins had contracted with the Forest Service to provide aerial fire fighting services.[11] In the fall of 1990, Hawkins and Forest Service employees began discussing modifying the P-2 fire fighting aircraft to make it more effective and efficient.[12] In furtherance of this effort, the Assistant Director for Aviation and Management agreed to provide surplus aircraft and aircraft parts to Hawkins, and to transfer title to the modified aircraft to Hawkins.[13] Hawkins later filed suit when the Forest Service refused to supply any additional surplus aircraft and refused to transfer title to the aircraft it had already supplied.[14]

The COFC found no contract ever existed between Hawkins and the government because the Assistant Director lacked actual authority to contract on behalf of the government.[15] The court drew a distinction between private and public contract law, stating that: "Although private parties can be bound by the apparent authority of a contractor, the doctrine of apparent authority does not apply to contracts with the government."[16] As an additional slap in the face, the court also found that Forest Service regulations would have prohibited this type of agreement even if the Assistant Director had a contracting warrant.[17] In other words, even if a government agent possesses actual authority by virtue of his position, his failure to follow all regulatory steps in contracting may result in a loss of the actual authority, at least for that transaction.[18]

Not So Fast on that Actual Authority Requirement

While the general rule is that only actual authority binds the government, courts have created various legal theories to avoid harsh results for sympathetic plaintiffs. In *Confidential Informant v. United States*,[19] the COFC relied upon the theory of "implied actual authority" to do just that. In *Confidential Informant*, the plaintiff gave information to the Internal Revenue Service (IRS) that helped it assess over $72,000,000 in taxes and penalties against delinquent taxpayers, seize over $5,000,000 in cash and property, and arrest a delinquent taxpayer.[20] When plaintiff then filed a reward application with the IRS, the agency denied it because, *inter alia*, "[r]ecovery was too small to warrant payment of reward."[21] The IRS later sent plaintiff a check for $1,401.35.[22]

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7. *Id.* at 438.

8. *Id.*

9. 46 Fed. Cl. 238 (2000).

10. *Id.* at 249.

11. *Id.* at 239.

12. *Id.* at 240.

13. *Id.*

14. *Id.* at 241.

15. *Id.* at 245. The court also noted that no one at the Forest Service attempted to ratify the unauthorized commitment made by the Assistant Director. *Id.*

16. *Id.* at 246 (citations omitted). The court also reasoned that Hawkins could have attempted to accurately ascertain the boundaries of the Assistant Director's actual authority. *Id.*

17. *Id.*

18. *Id.*

19. 46 Fed. Cl. 1 (2000).

20. *Id.* at 3.

21. *Id.*

When plaintiff filed suit demanding a greater reward, the government argued that the oral assurances that plaintiff had received only came from IRS and Federal Bureau of Investigation (FBI) agents, all of whom lacked the actual authority to bind the government.[23] Though the court agreed that the IRS and FBI agents lacked "express" actual authority to bind the government, it found that they may have possessed "implied" actual authority.[24] The court stated that implied actual authority may exist when "such authority is considered an integral part of the duties assigned to a Government employee."[25] The court thus denied the government's summary judgment motion and allowed plaintiff to address the implied actual authority of the IRS and FBI agents.[26]

So how does the *Confidential Informant* decision square with the *Merrill* line of cases, to include *McAfee*?[27] It may be just a matter of different judges deciding the cases[28] or perhaps a matter of plaintiffs having unequally-sympathetic stories. On the other hand, the contrasting decisions may rest upon the concept of "integral" duties. In *McAfee*, the court expressly found that "avoiding violent situations [such as foreclosing on the senior McAfee's property] where lives may be lost . . . is not essential to the successful performance of [an AUSA]'s duties."[29] The *Confidential Informant* court, by contrast, expressly left open the possibility for the plaintiff to establish that offering rewards could be an integral part of an IRS or FBI agent's duties.[30] When government representatives extend promises and assurances that are an integral part of those duties, then the COFC may be more likely to find implied actual authority.

The Contracting Officer's "Eyes and Ears" Can Also Bind the Government

An easier way to cross the no-actual-authority hurdle is to invoke the doctrine of imputed knowledge.[31] Such was the holding this past year in *Sociometrics, Inc.*[32] The case involved a contract to provide support for the fall and spring conferences of the Defense Technical Information Center (DTIC).[33] The DTIC exercised the first three contract options, but never formally exercised the fourth one. Unfortunately, a Sociometrics employee incorrectly informed contractor's president that DTIC had exercised the fourth option. Based on this mistaken belief, Sociometrics then supported DTIC's fall conference, corresponding regularly with the contracting officer's representative (COR) in the process. Before the spring conference, however, the contracting officer refused to pay Sociometrics for the previous fall conference because of the unauthorized commitment. Sociometrics subsequently appealed the denial of its claim.

In addressing the contractor's claim, the Armed Services Board of Contract Appeals (ASBCA) first established the existence of an implied-in-fact contract. The board found that "[w]hile the option was not formally exercised, the parties conducted themselves as if it was."[34] The board next turned to the issue of imputed knowledge. Although the COR lacked actual authority to exercise the fourth option, the board imputed his knowledge and acts to one with actual authority:

We are not unmindful that the contracting officer was not the Government representative the appellant dealt with in this matter. Appellant appears to have dealt exclusively with the contracting officer's representative who appears to have had day to day control over the contract. We conclude it is fair in these cir-

22. *Id.*

23. *Id.* at 6.

24. *Id.* at 7.

25. *Id.* (citing H. Landau & Co. v. United States, 886 F.2d 322, 324 (Fed. Cir. 1989) (quoting JOHN CIBINIC, JR. & RALPH C. NASH, FORMATION OF GOVERNMENT CONTRACTS 43 (1982)); Khairallah v. United States, 43 Fed. Cl. 57, 63 (1999); Roy v. United States, 38 Fed. Cl. 184, 189 (1997)). "Integral" means "necessary" or "essential to form a whole." *Id.*

26. 46 Fed. Cl. at 7.

27. 46 Fed. Cl. 428 (2000).

28. Judge Hewitt decided *Confidential Informant* while Senior Judge Tidwell decided *McAfee*.

29. *McAfee*, 46 Fed. Cl. at 437.

30. 46 Fed. Cl. at 7.

31. Where the relationship between two government agents creates a presumption that the agent without actual authority would have informed the agent with actual authority of the unauthorized commitment, courts and boards may impute the knowledge of the unauthorized agent to the authorized agent. Williams v. United States, 127 F. Supp. 617 (Ct. Cl. 1955).

32. ASBCA No. 51620, 00-1 BCA ¶ 30,620.

33. The contract involved service for the base year, and had four one-year options. *Id.*

cumstances to impute the knowledge of the contracting officer's representative to the contracting officer where we can draw no conclusion but that the contracting officer's representative was the "eyes and ears" of the contracting officer.[35]

Competition

The underlying goal of the Competition in Contracting Act (CICA)[36]—that of inserting competition into federal procurements—has no doubt resulted in both costs savings and product innovation. The existence of such mandatory competition requirements nonetheless continues to provide the basis for many a legal challenge to the public contracting process.

In-Scope Modifications—Getting Back to Basics!

In last year's *Year in Review*,[37] we chided the General Accounting Office (GAO) for its decision in *Access Research Corp.*,[38] which did more to cloud than to clarify the means by which practitioners determine whether contract modifications are in-scope and exempt from CICA, or out-of-scope and subject to competitive procurement.[39] The new development this year is that GAO has returned to its old course.

In *Paragon Systems, Inc.*,[40] the US Army Communications and Electronics Command competitively awarded an indefinite-delivery/indefinite quantity (ID/IQ) contract to Halifax Corporation in 1997 to engineer, furnish, and install a wide range of communications and computer equipment and systems as required to support the agency's Technology Applications Office. In February 2000, the agency issued a delivery order requiring Halifax to "provide system administration, system and network engineering, configuration management, technical assistance, troubleshooting, and support for network administration and associated components . . . . "[41] Paragon protested this delivery order and its underlying modification, claiming that both "called for network engineer services relating primarily to software services that were not within the scope of the original, [hardware-focused] contract."[42]

In determining whether the subject modification triggered CICA's competition requirements, the GAO looked to whether there was a material difference between the modified contract and the contract as originally awarded.[43] Pleasantly absent from the GAO's "material difference" analysis was any reference to intervening modifications, which while they "serve several useful purposes,"[44] "create new legal relations between the parties,"[45] and "accommodate [an] agency's overall need[s],"[46] are completely irrelevant to whether the protested modification

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34. *Id.* The ASBCA commented that:

> Appellant performed in accordance with the terms of the express contract, billing the contract prices, and the Government participated in the … conference (including acceptance of funds) as if the option had been exercised. The record is replete with evidence that appellant kept the contracting officer's representative fully informed of appellant's actions and indeed the Government actively encouraged and participated with [sic] appellant's efforts.

Id.

35. *Id.*

36. The Competition in Contracting Act of 1984, Pub. L. No. 98-369, Div. B, tit. VII, 98 Stat. 1175 (codified as amended in various sections of 31 U.S.C. and 41 U.S.C.).

37. Major Mary E. Harney et. al., *1999 Contract and Fiscal Law Developments—The Year in Review*, ARMY LAW., Jan. 2000, at 4 [hereinafter *1999 Year in Review*].

38. B-281807, Apr. 5, 1999, 99-1 CPD ¶ 64.

39. Historically, the GAO has looked to whether there is a material difference between the modified contract and the contract as originally awarded when determining whether a modification triggered CICA's competition requirements. *See* L-3 Communications Aviation Recorders, B-281114, Dec. 28, 1998, 99-1 CPD ¶ 18 at 7; Sprint Communications Co., B-278407.2, Feb. 13, 1998, 98-1 CPD ¶ 60, at 6; Neil R. Gross & Co., B-237434, Feb. 23, 1990, 90-1 CPD ¶ 212 at 2-3, *aff'd on reconsideration*, B-237434.2, May 22, 1990, 90-1 CPD ¶ 491. By contrast, in *Access Research*, when determining whether the last modification of an engineering services contract was out-of-scope and subject to CICA, the GAO factored the intervening modifications into its analysis. *Access Research*, 99-1 CPD ¶ 64 at 4. We found the GAO's decision to do so both novel and questionable. If the bottom line inquiry is "whether the modification is of a nature which potential offerors would reasonably have anticipated prior to initial award," then considering intervening changes obscures this determination. *1999 Year in Review, supra* note 37, at 5 (quoting *Gross*, 90-1 CPD ¶ 212 at 3, *cited in* AT&T Communications, Inc. v. Wiltel, 1 F.3d 1201, 1207 (Fed. Cir. 1993)).

40. B-284694.2, 2000 U.S. Comp Gen. LEXIS 101 (July 5, 2000).

41. *Id.* at *4.

42. *Id.* at *5.

43. *Id.* at *6-7 (citing *Sprint*, 98-1 CPD ¶ 60 at 6). Evidence of a material difference included the extent of changes in the type (or amount) of work, performance period, and contract price. *Id.* at *7 (citing MCI Telecomms. Corp., B-276659.2, Sept. 29, 1997, 97-2 CPD ¶ 90 at 7-8). The GAO also considered "whether the solicitation for the original contract adequately advised offerors of the potential for the type of change found in the modification or whether the modification is of a nature which potential offerors would reasonably have anticipated at the time of the original award." *Id.*

significantly alters the field of competition from that of the original solicitation. Here, based upon the software installation and integration work required in the original contract, as well as the "wide range of services relating to communications systems, including installation and configuration of network software" envisioned by the original contract, the GAO concluded that the modification and delivery order were within the scope of the original contract.[47]

Using the Public Interest Exception to Full and Open Competition

In *Northrop Grumman Corp. v. United States*,[48] the Court of Federal Claims tackled a rarity—use of the "public interest" exception permitting other than full and open competition.[49] In 1984, NASA began work on the Space Station program with three prime contractors. In 1987, NASA awarded a smaller contract to Northrop Grumman that ultimately expanded into program-wide integration support. After significant cost overruns and schedule slippages, NASA decided to restructure the program and select one prime contractor without formal competition.[50] In August 1993, NASA selected Boeing as the single prime contractor. The head of NASA then submitted a written Determination and Findings to Congress stating that it was "in the public interest to use other than full and open competition to make Boeing the single prime contractor for the Space Station . . . ."[51] NASA terminated Northrop's Space Station integration contract in the following months, and the contractor subsequently appealed.[52]

In reviewing NASA's use of the public interest exception to CICA, COFC found that the agency did not have to "obtain the consent of the contractors or of Congress to make a noncompetitive selection of a single prime contractor . . . ."[53] Instead, 10 U.S.C. § 2304(c)(7) only requires that the agency give Congress notice.[54] While appellant could have lobbied Congress in opposition to the sole-source selection, its decision not to do so does not create a legal cause of action. Furthermore, as the public interest exception gives an agency head complete discretion to use non-competitive procedures, NASA's decision to select Boeing noncompetitively was legally "non-reviewable."[55]

So, Can There Be "Fair Competitive Disadvantages?"

During the past year the GAO decided several protests where the unsuccessful offerors alleged that the agency's requirements were unduly restrictive, thereby providing other offerors with an unfair competitive advantage.[56] On each and

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44. *Access Research*, 99-1 CPD ¶ 64 at 5.

45. *Id.*

46. *Id.*

47. *Paragon Systems*, 2000 U.S. Comp Gen. LEXIS 101, at *10.

48. 46 Fed. Cl. 622 (2000).

49. *See* 10 U.S.C. § 2304(c)(7) (2000); GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REGULATION 6.302 (June 1997) [hereinafter FAR].

50. NASA clearly feared the loss of the entire project if the contract management structure and contractual relationships were not adjusted. "The prime would be given overall responsibility for the project. The remaining contractor would be 'novated' and reassigned to the selected prime." *Northrop Grumman*, 46 Fed. Cl. at 624.

51. *Id.*

52. *Id.* In its appeal, Northrop Grumman alleged that the termination was in bad faith and constituted a breach of contract, and that a meeting between the NASA Administrator and the chief executive officers of the four original contractors gave rise to an implied-in-fact contract. *Id. See infra* notes 533-36 and accompanying text for a review of the bad faith convenience termination issue.

53. *Id.* at 625.

54. 10 U.S.C. § 2304(c)(7) states, in relevant part, that:

> (c) The head of an agency may use procedures other than competitive procedures only when—
>
> (7) the head of an agency—
>
> (A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and
> (B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

Id.

55. *Northrop Grumman*, 46 Fed. Cl. at 625 (citing Varicon Int'l v. Office of Pers. Mgmt., 934 F. Supp. 440, 443-44 (D.D.C. 1996)).

every occasion the GAO continued to emphasize that unfair is not the same as unequal.

In *CHE Consulting, Inc. v. United States*,[57] the Defense Information Systems Agency solicited proposals for the maintenance of its computer equipment at various locations throughout the United States. The protesters objected to the provision requiring offerors to obtain support agreements with original equipment manufacturers (OEM) for at least sixty-five percent of the equipment to be maintained. They contended that such a requirement was unduly restrictive of competition, and furthermore, provided an unfair competitive advantage to those offerors who had, or were able to secure, exclusive agreements with some of the OEMs.

The GAO rejected both arguments. While "[p]rocuring agencies are required to specify their needs in a manner designed to permit full and open competition . . . ,"[58] the GAO will afford agencies the discretion to define their own requirements. Such discretion extends to restrictive requirements as well, so long as they are necessary to satisfy the agency's legitimate, minimum needs.[59] While offerors with OEM exclusive agreements may very well have a competitive advantage, that does not *per se* make it an unfair one that the agency is required to eliminate. When competitive advantages result solely by virtue of an offeror's own particular and unique business circumstances, the agency has no "neutralizing" responsibility.[60]

CICA Violations When Ordering off of Federal Supply Schedules?

If you did not think it possible to violate CICA when ordering off of a Federal Supply Schedule (FSS), then read on! In *DRS Precision Echo, Inc.*,[61] the GAO ruled that where the FSS contract against which the agency placed its order had expired, and no replacement contract was in place at the time of the order, the agency's purchase order was improper.

The protest arose from the Navy's attempt to order 238 cockpit video recorder systems for F/A-18 aircraft against a General Services Administration (GSA) FSS contract with TEAC America, Inc. (TEAC). At the time of the order, however, the GSA schedule contract had expired and a bilateral modification exercising GSA's option to extend performance had yet to be signed by the contracting officer.[62] Once the Navy and GSA had finally sorted out the facts,[63] the GAO legal decision became quite clear. "Without an FSS contract against which to place its order, the Navy, in effect, made an improper sole-source award."[64] As a result, the GAO concluded that the Navy's actions had violated CICA's requirement that agencies obtain full and open competition through the use of competitive procedures absent a specific exception.[65]

Contract Types

COFC Denies Claim that Fixed Price Incentive Contract is Illegal

Last year the Court of Appeals for the Federal Circuit (CAFC) determined that improper use of a fixed-price type contract for development work did not render the contract void. The court then remanded the case to the COFC to determine what remedy, if any, existed for the contractor, AT&T.[66] In a case that addresses similar questions of contract validity and contractor remedies, the COFC provided a glimpse into how AT&T might fare on remand through its decision in *Northrop Grumman Corp. v. United States*.[67] After analyzing Northrop's multiple theories of relief in support of its claim for reformation and more than $14 million plus interest,[68] the COFC decided to enforce the contract as written.[69]

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56. Northrop Grumman Corp., B-285386, Aug. 1, 2000, 2000 U.S. Comp Gen. LEXIS 110; CW Gov't Travel, Inc., B-283408, B-283408.2, Nov. 17, 1999, 99-2 CPD ¶ 89.

57. B-284110, B-284110.2, B-284110.3, Feb. 18, 2000, 2000 CPD ¶ 51.

58. *Id.* at 4 (citing 10 U.S.C. §§ 2305(a)(1)(A)(i), (B)(ii)).

59. *Id.* Here, the GAO found the agency had demonstrated that the requirement represented such an actual and legitimate need. *Id.* at 4-7.

60. *Id.* at 8 (citing Precision Photo Labs. Inc., B-251719, Apr. 29, 1993, 93-1 CPD ¶ 359 at 3).

61. B-284080, B-284080.2, Feb. 14, 2000, 2000 CPD ¶ 26.

62. *Id.* at 2. TEAC's initial FSS contract extended from 21 August 1998 to 31 July 1999, with an option to continue performance for an additional five-year period. While TEAC signed a bilateral modification, which exercised GSA's option to extend performance on 9 July 1999, the GSA contracting officer did not sign the modification until 2 December 1999. By contrast, the Navy had issued its sole-source purchase order to TEAC, referencing the GSA FSS contract, on 23 September 1999. *Id.*

63. It took the Navy and GSA more than three months to determine and disclose that, when the Navy placed its order for recorder systems on 23 September 1999, there was no contract in place between GSA and TEAC. *Id.*

64. *Id.* (citing Anacomp, Inc., B-242029, Mar. 15, 1991, 91-1 CPD ¶ 291 at 2).

65. *Id.*

In 1987, the Navy issued a fixed-price incentive research and development solicitation for the Advanced Tactical Air Command Central (ATACC) system.[70] While preparing its ATACC proposal, Northrop evaluated the risk for the project as very low.[71] The Navy awarded the contract to Northrop[72] in July 1988, requiring delivery of a prototype for operational testing within twenty-seven months. Northrop delivered the prototype for testing, but the ATACC never went into production.[73] According to Northrop, it expended more than $34 million to perform the $22 million contract.

On appeal of its denied claim, Northrop alleged that the ATACC contract was illegal—and consequently should be reformed into a cost-reimbursement contract. Northrop contended that the Department of Defense (DOD) Appropriations Acts for fiscal years 1990 to 1992 restricted use of fixed-price type contracts for development of a major system or subsystem.[74] The COFC held that the Navy's failure to make risk determinations for the incremental funding of the contract for fiscal years 1990 through 1992 violated the Appropriations Acts for those years.[75] Despite this finding, the COFC held that it could not provide Northrop with relief under either an implied-in-law[76] or implied-in-fact theory.[77] The court also refused to reform the contract, finding that it did not fit "the mold" of a contract for which it would be appropriate,[78] and reformation from a fixed-price to a cost reimbursement contract would not solve the illegality, but rather would create a different one.[79]

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66. AT&T v. United States, 177 F.3d 1368 (Fed. Cir. 1999). AT&T held a fixed-price incentive fee contract with the Navy that required research, development, delivery, and testing of an engineering development model of the Reduced Diameter Array (RDA). The Navy exercised options for a second engineering development model and three production-level models. Section 8118 of the Department of Defense (DOD) Appropriations Act for Fiscal Year 1987 prohibited use of fixed-price contracts for certain developmental contracts unless the Under Secretary of Defense for Acquisition first determined a fixed-price contract was appropriate and notified Congress. The DOD did not meet these requirements prior to awarding the RDA contract to AT&T. *Id.*

AT&T performed the contract successfully at a final fixed-price of approximately $34.5 million, some $56 million less than its total costs of performance. After the contracting officer denied its claim, the COFC declared the contract *void ab initio* because of the Navy's noncompliance with Section 8118 and certified two questions to the CAFC: whether the contract was void from the start and, if so, whether AT&T could recover unjust enrichment damages based on an implied-in-fact theory. In a split decision, the full CAFC ruled the contract valid, holding that the statutory purpose for Section 8118 did not mandate voiding of the contract. The court also cited judicial precedent favoring the upholding of a fully performed contract. The court did not address what remedy–if any–existed for AT&T. *See also 1999 Year in Review, supra* note 37, at 1.

67. 47 Fed. Cl. 20 (2000).

68. At trial Northrop alleged breach due to extra work, breach of the duty to cooperate, superior knowledge, illegal contract type, and unilateral and mutual mistake. *Id.* at 35.

69. *Id.* at 44.

70. The ATACC, an improvement to the Vietnam-era Tactical Air Command Central (TACC) system, was to be a set of four modular shelters that could be transported onto the battlefield to provide local command and control for Marine Corps air operations. *Id.* at 26.

71. Northrop even reduced its best and final offer over $3 million. *Id* at 29.

72. The Navy actually awarded the ATACC contract to Grumman Data Systems, Inc., a division of Grumman Aerospace Corporation. In May 1994, Northrop Corporation acquired Grumman, forming Northrop Grumman Corporation (plaintiff). *Id.* at 27.

73. According to testimony the ATACC was not produced in part because of the existence of an Air Force program that fulfilled similar functions. *Id.* at 35.

74. The language in these acts was substantially similar to that included in the DOD Appropriations Act for 1987, which was also the act applicable to the AT&T contract:

> None of the funds provided for the Department of Defense in this Act may be obligated or expended for fixed price-type contracts in excess of $10,000,000 for the development of a major system or subsystem unless the Under Secretary of Defense for Acquisition determines, in writing, that program risk has been reduced to the extent that realistic pricing can occur.

Id. (quoting Pub. L. No. 100-102, 101 Stat. 1329 (1987)) (citing Pub. L. No. 102-72, § 8037, 105 Stat. 1150, 1179 (1991); Pub. L. No. 101-511, § 8038, 104 Stat.1856, 1882-83 (1990); Pub. L. No. 101-165, § 9048, 103 Stat. 1112, 1139 (1989)).

75. *Id.* at 39. This was the same failure identified by the courts in *AT&T. See* AT&T v. United States, 177 F.3d 1368, 1373 (Fed. Cir. 1999).

76. The COFC stated that it had no jurisdiction as an Article I court to afford Northrop with *quantum valebant* (the reasonable value in the marketplace of the supplies and services) recovery. *Northrop,* 47 Fed. Cl. at 41.

77. Since an implied-in-fact contract arises when all the elements of a contract exist but are not expressed in a written document, there could be no such contract where the parties had entered into an express written contract. *Id.*

78. *Id.* at 43. The COFC noted that reformation is a narrow remedy to be used to bring a contract into conformance with the parties' true agreement. *Id.* at 41.

Finally, the COFC rejected Northrop's claims that the Navy's failure to comply with Federal Acquisition Regulation (FAR) Parts 16 and 35 and DOD Directive 5000.1 entitled it to relief.[80] Northrop failed to prove that at the time the parties entered into the contract they did not possess adequate cost and pricing information, or reasonably apportion the risk of performance.[81] Even if the Navy had violated the FAR provisions, the court questioned whether a remedy now existed for Northrop.[82]

COFC Upholds Contract Type for Construction Project at Hoover Dam

After its contract to construct a visitor center and parking structure at the Hoover Dam was terminated for default, PCL Construction Services, Inc., filed a claim for over $31 million under breach of contract and illegal contract theories.[83] PCL alleged that the government's use of a firm fixed-price contract was not appropriate for the contract work because "the uncertainties related to the Contractor's performance were not identifiable or capable of bearing reasonable cost estimates at the time of the award."[84] The COFC disagreed, noting that the choice of contract type is a discretionary act that will be upheld if rational or reasonable.[85] Further, the court noted that FAR guidance and the use of sealed bid procedures supported the Government's choice of the firm fixed-price contract.[86] Since PCL bid on and signed the firm fixed-price contract, the court held that "[a]t this late date, plaintiff should not be heard to raise a breach of contract claim based on [contract type]."[87]

ASBCA Holds Navy Breached Duty to Negotiate Modification in Good Faith

Over a strong dissent, the ASBCA held that an Assistant Secretary of the Navy (ASN) unreasonably refused to approve a proposed definitization of option prices of a small disadvantaged business's supply contract.[88]

The dispute involved a cost reimbursement letter contract requiring definitization of firm fixed prices for the base and option years. During negotiations the contracting officer agreed to definitize the option prices at ceiling amounts subject to downward adjustment. In the contract modification definitizing the base year pricing, the parties also agreed to definitize the option year pricing on or before 21 October 1987—the contractor's 8(a) graduation deadline.[89] However, prior to the final negotiation of the option prices, the Navy discovered that the contractor was the subject of a fraud investigation. Pending receipt of additional information concerning the fraud, the ASN—the person with the authority to approve the definitization—refused to approve the proposed option definitization. Approval of the option pricing did not occur by the agreed-upon date, and the Navy had to issue a new solicitation to meet its needs during the "option" years. The contractor subsequently submitted claims for breach damages related to the Navy's failure to definitize the option prices.

The ASBCA found that the ASN's refusal to accept the option definitization was not done in bad faith. Still, the board majority held that the ASN was required to act reasonably within the terms of the prior agreements of the parties.[90] The board found that the ASN had no reasonable basis for not approving the option pricing, since the modification would not have obligated the Navy to exercise the options or have been otherwise detrimental to the Navy's interests.[91]

The dissent believed that the agreement to negotiate option year pricing did not guarantee that the option prices would be definitized by the 21 October date, but only provided that the parties would negotiate in good faith. Because the allegations of fraud came to light prior to approval of the option year

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79. Because 10 U.S.C. § 2306(c) (1988) provided that a cost-type contract could not be used unless the agency head first certified that no lower cost alternatives were available, and as that determination had not been made, the court was unwilling "to trade one illegality for another." *Id.* at 43.

80. *Id.* at 51.

81. *Id.* at 49.

82. *Id. See infra* notes 490-98 and accompanying text for a review of how the COFC quantified Northrop's remedy.

83. PCL Constr. Servs., Inc., v. United States, Nos. 95-666C, 96-442C, 2000 U.S. Claims LEXIS 198 (Fed. Cl. Sep. 20, 2000).

84. *Id.* at *201. PCL claimed that the chosen contract type violated FAR 16.103(a) and 16.202-2. *Id.*

85. *Id.* at *202.

86. *Id.* at *204-05. Specifically, the court recognized the preference for firm fixed-price contracts in construction enunciated at FAR 36.207, and the requirement to use a fixed-price contract when using sealed bid procedures. *Id.*

87. *Id.* at *208.

88. Sys. Mgmt. Am. Corp., ASBCA Nos. 45704, 49607, 52644, 2000 ASBCA LEXIS 149 (Sep. 19, 2000).

89. Small Business Administration policy precluded exercise of the contract options unless the prices were definitized before the contractor graduated from the 8(a) program. *Id.* at *4-5.

prices, the dissent found "it incredible" that the board would conclude the ASN's delay on the definitization proposal was arbitrary and capricious.[92]

Revised FAR Rule for Multiple Award Indefinite Quantity Contracts

Effective 25 April 2000, a final rule amending FAR Part 16 clarified the procedures for both awarding and ordering under multiple award task and delivery order contracts.[93] Much of the rule reorganized and revised the language of FAR 16.504 and 16.505. The change requires solicitations and contracts to identify: the method for issuing orders; the identity and means of contacting the agency task and delivery order ombudsman; a description of the activities authorized to issue orders; and authorization for placing oral orders if appropriate, provided that the government has established procedures for obligating funds and that the orders are confirmed in writing.[94]

Air Force Not Liable For Unused Vacation Days

The Air Force's short-term extensions of a service contract did not entitle the contractor to reimbursement for unused employee leave, the ASBCA held in *Tecom, Inc*.[95] As Tecom's fixed price award fee contract expired, the Air Force made award to another contractor under a new solicitation. After Tecom protested the award, the Air Force extended Tecom's contract for five months through a series of contract modifications. Tecom then filed its claim for payments made in lieu of employee vacation, alleging that due to the "month to month extension, we could not plan or schedule vacation."[96]

The ASBCA found that Tecom's inability to schedule vacation during the performance period extensions was a management issue.[97] The board held that Tecom's contract provided for a price adjustment only if the additional compensation was required by a wage determination from the Department of Labor, or an amendment of the Fair Labor Standards Act, neither of which was present in this case.[98]

ASBCA Holds Original Bargain Must be Maintained in Change to Lump Sum Fixed-Price Incentive Contract[99]

CTA Incorporated (CTA) received a Small Business 8(a) letter contract to provide training simulators to the Air Force, with an option to develop and fabricate an upgrade to the T-45 navigational training simulator ("T-45 prototype"). At definitization the Air Force awarded CTA a fixed-price incentive fee contract, under which the T-45 prototype was combined under one price ceiling with an option to purchase twelve T-45 upgrades ("production option"). After agreeing on a definitization price, but before contract definitization, CTA informed the Air Force that it might replace Merit, the subcontractor it had identified in its proposal as supplying a key T-45 component, the Digital Radar Landmass Simulator (DRLMS). As a result, the parties decided to add a "reopener" clause under which the Air Force could negotiate a decreased contract price if the new subcontractor's prices were less than Merit's.[100] To expedite agreement on the clause language, the Air Force agreed to add

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90. The dissent questioned whether a contracting officer could limit the discretion of the ASN, stating:

> The effect of the majority's opinion is to reduce the ASN to little more than a ministerial clerk, bound to sign the definitization modification without regard to any delay he felt was necessary to secure additional information and virtually powerless to arrive at any decision but to sign, regardless of any *bona fide* questions that he had.

Id. at *25.

91. The dissent seemed to characterize this rationale as impermissible second-guessing of the ASN's decision, concluding that the "[b]oard was not charged with making the ASN's decision at the time, is not charged with making it retroactively now, and our authority goes only to an examination as to whether the decision was arbitrary and capricious or taken in bad faith." *Id.* at *30.

92. *Id*. at *27.

93. Competition Under Multiple Award Contracts, 65 Fed. Reg. 24,317 (2000) (to be codified at 48 C.F.R. pts. 2, 16, 37) (incorporating Federal Acquisition Circular 97-17; FAR Case 1999-014).

94. FAR, *supra* note 49, at 16.504(a)(iv-vii).

95. ASBCA No. 51880, 00-2 BCA ¶ 30,944.

96. *Id*. at 152,738.

97. *Id*. at 152,739.

98. *Id*. The ASBCA noted that Tecom cited no price adjustment clause in support of its claim.

99. CTA Inc., ASBCA No. 47062, 00-2 BCA ¶ 30,947.

100. *Id. at 152,745.*

to its "stock" reopener clause the phrase "and any other adjustment as provided for in FAR 52.216-16."[101]

When the parties definitized the contract, it included 173 contract line item numbers (CLINs). The terms of FAR 52.216-16 applied to 45 CLINs, three of which concerned the T-45 prototype, and one which covered the option to purchase twelve T-45 upgrades with a target cost per unit of $734,979.21. CTA then subcontracted with Harris Corporation to provide the DRLMS. Pursuant to the terms of the reopener clause, CTA submitted a change proposal that reflected a $724,000 increase in the cost of the prototype, and a $448,000 decrease in the cost of the production option.[102]

While deciding whether to exercise the production option for twelve T-45 upgrades, the Air Force determined that it needed only five. Rather than issue a new solicitation to obtain the upgrades, the Air Force decided to negotiate a restructuring of the option to include only five T-45 upgrades.[103] As part of its cost proposal for the five T-45 upgrades, CTA sought an "offset" of $493,585 which recognized the increased prototype costs of the Harris DRLMS.[104] The contracting officer refused to include the "offset" in the subsequent contract modification, but advised CTA that it could pursue an equitable adjustment. CTA then filed a claim based on the subcontractor "offset," which the contracting officer denied, leading to CTA's appeal to the ASBCA.

Since the prices of the T-45 prototype and the T-45 production option were combined as a lump sum under the contract, the board determined that CTA was entitled to "one of the benefits of its original bargain—the difference between the cost of having Merit and Harris perform the production work—which the Air Force eliminated from the contract's ceiling when repricing the restructured production option with Harris."[105] The board remanded the case to the parties to resolve quantum, stating that "the Air Force is not entitled to wipe out CTA's decrease in production option cost, which partially offset CTA's increase in prototype cost."[106]

Sealed Bidding

While the area of sealed bidding did not see a year of marked change in the complexity of the issues presented before the GAO or the courts, some decisions are worth examining for the slight twist of facts that they present.

"Larry Harris" by Any Other Name is Still the Bid Bond Principal!

It is well established that when a solicitation requires a bid guarantee, the bid guarantee is a material requirement without which the bid must be found nonresponsive.[107] But what about when a bid guarantee is required and submitted with a bid, yet the bid and the bid guarantee are signed with different versions of the same name? If you think you are confused, now you know how the Corps of Engineers (COE) felt!

In *Harris Excavating*,[108] the COE issued a solicitation, which required bidders to submit a guarantee in the amount of twenty percent of their bid price.[109] Harris submitted the apparent low bid, identifying itself as "Harris Excavating." Larry Harris signed Harris' bid and identified himself as president. The included bid guarantee contained a blank space that was to state the name of the principal; however, the guarantee was signed by "R.L. Harris."[110]

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101. *Id.* The CTA contract administrator insisted on the language out of concern that the contract's targets and ceilings would not be adjusted downward. The Air Force believed that the adjustment of targets and ceilings was already in the contract under the terms of FAR 52.216-16 (Incentive Price Revision–Firm Target (Apr. 1984)). *Id.*

102. *Id.* at 152,746.

103. The board identified several regulations that may have been violated by the restructuring of the option in this manner, and stated that it did "not approve of or, in any manner, condone the course of conduct the parties selected." *Id.* at 152,764 n.2.

104. CTA alleged that "the production restructure results in a different (i.e. changed) 'total program' impact of ($724,470) in lieu of the [impact of] ($275,748) anticipated." *Id.* at 152,749.

105. *Id.* at 152,763. When pricing the modification that required CTA to provide only five T-45 upgrades, the Air Force used the lower production cost data of Harris, and the lower prototype cost data of Merit. *Id.* at 152,750.

106. *Id.*

107. *See generally* A.W. and Assoc., B-239740, Sept. 25, 1990, 90-2 CPD ¶ 254 at 2.

108. B-284820, June 12, 2000, 2000 CPD ¶ 103.

109. *Id.* The solicitation was for construction services and was a total small business set-aside. *Id.* A bid guarantee is a form of security assuring that a bidder will not withdraw its bid within a specified period of time and, if required, will execute a written contract and furnish required performance and payment bonds. FAR, *supra* note 49, at 28.001. The solicitation in question also included the required FAR clause found at Section 52.228-1(a) that notifies bidders, should they fail to furnish a bid guarantee in the proper form and amount, it may result in the agency rejecting the bid as nonresponsive. *Harris Excavating*, 2000 CPD ¶ 103 at 1.

Clearly the issue at stake was whether the nominal bidder and the bid bond principal were the same entity, thereby making it certain that the surety would be obligated under the bond to the government.[111] The COE rejected Harris' bid because the names of the bidding entity and of the principal on the required bid bond were different. The COE argued that it was unclear whether the bond would bind the surety.[112] The GAO, however, disagreed with the COE's argument and sustained the protest. The GAO held that where the entity that submitted the bid and that named as the bid bond principal are the same, any discrepancy between the bidder and the principal's names is a matter of form that does not render the bid nonresponsive.[113] The GAO chastised the COE and said that, had it requested information from Harris about the discrepancy before rejecting the bid, it would have concluded no question existed that Harris Excavating, R.L. Harris, and Larry Harris were the same entity and that the surety would be legally bound on the bid bond.[114]

The GAO raises a good point for agencies to consider when encountering an ambiguity between the bidding entity and bid bond principal. The focus of the agency's inquiry into an ambiguity of this nature should be whether the ambiguity is one that would prevent the government from holding a surety liable should the bidding entity withdraw its bid or not perform, not whether the names in the documents are an exact match. Before rejecting a bid, the agency should attempt to resolve any ambiguity by requesting extrinsic evidence from the bidder. This is especially true in a case, as was presented here, when the names in the two documents were substantially the same.

Oh, You Mean We Used the Wrong FAR Clause?

Ever have one of those days when everything is going wrong? Do you not want to just go back to the beginning and start it all over again? The COE did just that in *Hroma Corp*.[115] The only problem—starting a procurement over once bids have been exposed generally causes someone a little heartburn, which usually translates into a protest.

In *Hroma Corp.*, the COE issued a solicitation as a total small business set-aside, and included FAR clause 52.236-1, requiring the contractor to perform sixty percent of the work with its own employees.[116] The COE received and opened three bids, and Hroma was the low bidder. After determining that Hroma was not responsible because it did not have the ability to perform the requisite sixty percent of the work in-house,[117] the COE referred the nonresponsibility determination to the Small Business Administration (SBA) for a possible issuance of a Certificate of Competency (COC). Upon review, the SBA notified the agency that it was suspending the COC determination because the COE had used the incorrect FAR clause in its solicitation.[118] Once the COE learned of its error, the contracting officer determined that a compelling reason existed to cancel the solicitation, and notified the bidders of the decision to cancel.

Hroma protested the COE's decision to cancel as unreasonable, alleging that to cancel after bid opening "mars the integrity of the bidding process."[119] The GAO proceeded to look at the issue of whether the COE had a compelling reason to cancel the solicitation.[120] The GAO determined that by including the wrong subcontracting limitation clause in the Invitation for Bid (IFB), the COE had restricted competition improperly. The

110. R. L. Harris identified himself as the principal and listed his title as owner. *Id.* at 2. Additionally, the bid guarantee failed to contain the solicitation number; however, it did describe specifically the IFB work to be performed. *Id.*

111. *Id.* at 6. The obligation at stake with a bid guarantee is whether the surety is obligated to the government if the bidder should withdraw its bid within the stated bid acceptance period or should the bidder fail to execute a written contract or furnish the required performance under the contract. *Id.*

112. *Id.* at 5.

113. *Id.* at 8. If the bid bond names an entity "different" than the bidder, that would be a situation in which the agency must reject the bid as nonresponsive unless it can be proved that the different names identified the same entity. *Id.* This was not the case here, as the name was in substantially the same form. The GAO found, upon examining the bid, the bid bond, and other documentation that was "reasonably available . . . if [the contracting officer] had asked about the discrepancy," it was clear the bid bond principal and the bidder were in fact the same person, thereby obligating the surety to the government. The GAO examined additional information (that predated the bid opening) submitted by Mr. Harris to include a 1994 Internal Revenue Form 1099-MISC that was prepared by the COE's Omaha District, which was addressed to "R.L. Harris DBA Harris Excavating," and a 1995 IRS tax return, form 940-EZ, which uses a preprinted IRS mailing label that identifies the taxpayer as Robert L. Harris and Harris Excavating, and is signed by R.L. Harris, as owner. Additionally, the GAO relied upon a Dunn and Bradstreet report that would have clarified the discrepancy. *Id.* at 10.

114. *Id.*

115. B-285053, June 6, 2000, 2000 CPD ¶ 88.

116. *Id.* at 2. In addition to performing sixty percent of the work with its own employees, the subcontracting limitation clause requires the contractor to perform sixty percent of the work on site. *Id.*

117. Hroma also lacked the experience on a project of the solicited project's magnitude. *Id.*

118. *Id.* The SBA explained to the COE that because the procurement was a total small business set-aside, the correct subcontracting limitation clause is FAR 52.219-14, which requires the contractor to perform fifteen percent of the cost of the contract with its own employees. *Id.* at 3.

agency's subsequent decision to resolicit and obtain enhanced competition by making the specifications less restrictive was a valid reason to cancel the IFB after receipt of bids, even after bid opening.[121] The GAO denied the protest and found that the agency acted reasonably in canceling the IFB and resoliciting the procurement.

This GAO decision reemphasizes the overarching principle of full and open competition, which continues to apply even after bid opening. While the integrity of the competitive process should be paramount in an acquisition, an agency cannot refuse to act, even to the extreme of canceling the procurement, if the agency has violated a procurement regulation or statutory provision. But, that doesn't mean the agency won't have a protest filed against its action. Sometimes you pay a price for doing the right thing!

Quick Takes

The following is a quick glance at some of the GAO decisions in the sealed bidding area. Although these decisions do not reflect any new issues or unique facts or circumstances, they are provided as an update that may assist practitioners with their research in this area.

Insufficient Funds Compelling Reason to Cancel IFB

In *National Projects, Inc.*,[122] the GAO held that an agency properly canceled an IFB after bid opening where evidence indicated that the agency lacked sufficient funds to award the contract. After the agency canceled the IFB, it chose to conduct negotiations to obtain lower prices than those submitted during the sealed bidding acquisition.[123] Ultimately, the agency received a small increase in available funds and awarded the contract to one of the offerors. National Projects protested the award as flawed, arguing that the agency should have sought the additional funds prior to conducting negotiations. The GAO decided that the fact the agency did not seek additional funds until after negotiating with offerors did not render unreasonable the initial decision to cancel the IFB. The GAO found that the agency acted reasonably in first seeking bid prices that were consistent with the funding level allocated to the project, and then when this effort failed, in attempting to obtain additional funds.

Practice Tip: It is within the agency's discretion to seek additional funds for an acquisition. The fact that the agency seeks and receives additional project funds after canceling the IFB and conducting negotiations does not lend credence to a protester's argument that it would have received the award had the funds been obtained prior to negotiations.

What Are the Exceptions to the Late Bid Rule?

Last year we reported the change to the late bid rule exceptions found at FAR 14.304.[124] Instead of the previous four exceptions, the FAR now allows for two exceptions only—electronic submission exception and government control exception.[125] There were three GAO decisions this year regarding late bids or modifications; two of these decisions did not address either of the two FAR exceptions. Both of the acquisi-

119. *Id.* The COE requested that GAO dismiss the protest arguing that Hroma was not an interested party because the contracting officer had determined that Hroma was nonresponsible. The COE argued that because Hroma was nonresponsible it was ineligible for award of the contract even if the GAO sustained its protest allegation. *Id.* The GAO found that Hroma was an interested party. The GAO stated that even though the COE found Hroma nonresponsible, a COC determination was pending before the SBA, which allows a bidder to remain in line for award until resolution of the SBA's proceedings. *Id.* at 4. The GAO compared this situation that that in which a small business fails to apply for a COC after a nonresponsibility determination; in that case, the firm would not be an interested party to maintain a protest because it would not be eligible for award if the protest were sustained. *Id.*

120. Generally, an agency may cancel an IFB after bids are exposed only if a compelling reason exists and cancellation is in the public's interest. *Id.*

121. *Id.* The administrative record before GAO demonstrated that at least one potential bidder did not submit a bid on the original IFB because of it inability to fulfill the subcontracting limitation clause. Given this fact, and also that more than fifty contractors had requested the solicitation while only three had submitted bids, the GAO determined that the agency could have reasonably surmised that the incorrect clause restricted competition. *Id.* at 5.

122. B-283887, Jan. 16, 2000, 2000 CPD ¶ 16.

123. All bidders had submitted bids that were in excess of the independent government estimate, and in excess of the allocated funds for the project. After opening bids, the agency completed the procurement using negotiated procedures pursuant to FAR 14.404-1(f). *Id.* at 2.

124. *1999 Review in Year*, *supra* note 37, at 15.

125. *See* FAR, *supra* note 49, at 14.304(b)(1). This FAR provision states that there are only two circumstances when a late bid can be considered for award by an agency:

> (i) If it was transmitted through an electronic commerce method authorized by the IFB, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of bids; or
> (ii) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of bids and was under the Government's control prior to the time set for receipt of bids.

Id.

tions involved the sale of government property.[126] In both cases, the solicitations did not include the new provisions at FAR 52.214-7, but rather had language that mirrored two of the previous FAR exceptions. The third decision, a negotiated procurement, involved the FAR exception known as the "government control" exception.[127] In *States Roofing Corp.*,[128] the GAO found that the agency's rejection of a proposal was proper where the preponderance of the evidence showed that the proposal was not under government control prior to the time set for receipt of proposals.[129]

Practice Tip: Contracting personnel and attorneys need to ensure that solicitations contain the most current clauses and information. The agency should not place additional restraints on itself when there is no regulatory or statutory requirement to do so. By allowing for exceptions to the late bid rule other than those contained in the FAR, the agency is providing greater latitude to a bidder whose bid is not submitted in a timely manner. Additionally, the agency may be causing more problems for itself than need be. The only regulatory requirements that an agency should concern itself with are those found in the FAR. Any additional permissive avenue afforded to bidders may result in a higher potential for a protest.

Satisfactory Evidence to Prove a Mistake in Bid

Whenever the low bidder discovers a mistake in its bid, the FAR allows for the submission of extrinsic evidence to support the allegation of mistake.[130] One of the key pieces of evidence used in attempting to prove a mistake in bid is original worksheets. This was the case in *Cooper Construction, Inc.*[131] The low bidder, Cooper Construction, discovered a mistake in its bid prior to award and notified the agency. Cooper Construction submitted its original handwritten undated worksheets along with an affidavit by its president in which he represented that he prepared the worksheets prior to bid opening and used the submitted worksheets to prepare the bid. The agency rejected the worksheets because they were handwritten and undated. Likewise, the agency determined that it could not rely upon the self-serving statement of the bidder's president that the worksheets were authentic and in existence prior to bid opening.[132]

The GAO determined that the fact that the worksheets were handwritten is not dispositive, as the FAR places no requirements on bidders to prepare their worksheets in any particular manner. Likewise, no requirement existed that a bidder date its worksheets. In recommending that the agency accept Cooper Construction's submissions, GAO relied upon its findings that the worksheets appeared to be in good order with no internal discrepancies. Further, the agency could not produce any contravening evidence that would taint either the worksheets or the affidavit submitted by the bidder's president. Most importantly, the GAO found that the affidavit described succinctly how the mistake was made by the bidder and was entirely consistent with the bidder's worksheets. Furthermore, the GAO noted that the mistake and intended bid were evident from the worksheets themselves without reference to the affidavit.

Practice Tip: An agency should not be so quick to dismiss a "self-serving" sworn statement of a bidder that a mistake has occurred. The GAO's decisions in this area apply a totality of the circumstances test in determining whether the evidence submitted by a bidder is clear and convincing in proving its mistake and its intended bid. An agency should examine all the evidence submitted and then determine whether any other evidence exists to contradict what the bidder has submitted. The fact that the evidence is not neatly typed nor dated should not preclude the agency from accepting it as substantiating evidence of a mistake in bid.

Negotiated Acquisitions

First Things First: Start with Proper Evaluation Scheme

A solicitation that does not include evaluation of price or cost to the government is defective, the GAO held in a late 1999 case.[133] In *S.J. Thomas*, GSA only required offerors to submit

126. One concerned the sale of a number of lots of industrial diamond stones. Vijaydimon (U.S.A.) Inc., B-286013, 2000 U.S. Comp. Gen. LEXIS 143 (Sept. 29, 2000) (bid modification sent by certified mail earlier than five days prior to the bid opening date satisfies the solicitation's late bid exception provision). The other arose in the sale of timber. Carrol Gene Brewer, B-285484, Aug. 22, 2000 (unpublished) (agency mishandled late bid and properly considered it for award pursuant to the Forest Service's Timber Sale Preparation Handbook).

127. *See* FAR, *supra* note 49, at 14.304(b)(1)(ii).

128. B-286052, Nov. 8, 2000 (unpublished), *available at* http://www.gao.gov/decisions/bidpro/286052.htm.

129. *Id.* The GAO found the agency's rejection was proper because the protester did not arrive at the place designated for receipt of proposals until after the closing time had passed. *Id.*

130. Specifically, FAR 14.407(g)(2) allows for all pertinent evidence to be examined including ". . . original worksheets and other data used to prepare the bid, subcontractors' quotations, if any, published price lists, and any other evidence that establishes the existence of the error, the manner in which it occurred, and the bid actually intended." FAR, *supra* note 49, at 14.407(g)(2).

131. B-285880, 2000 U.S. Comp. Gen. LEXIS 136 (Sept. 18, 2000).

132. *Id.* at *6.

their "mark-up rate," which included all overhead, General & Administrative (G&A), and other indirect costs to be applied to specific projects under an ID/IQ contract for building repairs and alterations. The evaluation scheme envisioned by the request for proposal (RFP) proposed to award the contract after comparing mark-up rates. The GAO found such a scheme defective because merely comparing mark-up rates did not consider the overall cost to the government of the proposal, as required by CICA.[134] The GAO believed that just the mark-up rate was "too unreliable an indicator" to provide a rational basis to assess the relative costs of the competing proposals.[135] While agencies have considerable flexibility to fashion an evaluation scheme, the scheme must include an adequate basis to determine cost to the government.

Change of Scope Requires Amended Solicitation

In *MVM, Inc.*,[136] the Court of Federal Claims found the U.S. Marshal Service should have issued an amendment to a solicitation for court security when it changed a statement of work. The statement of work initially included nine federal court districts. After receipt of best and final offers, the Marshal Service decided to set-aside one district, the Northern District of Florida, for small businesses. The agency unilaterally removed the cost for the Northern District of Florida from the proposals. The contracting officer performed two price evaluations—the first with all nine districts and the second with the Northern District of Florida removed. After the first evaluation, MVM had the lowest price, but with the Florida district removed the low price belonged to Akal Security, Inc. The court held that, as a matter of law, the deletion of one of the districts originally included in the statement of work constituted a change necessitating an amendment to the solicitation under FAR 15.206.[137]

As intervenor Akal argued the elimination of the work was a risk assumed by all offerors. The court disagreed. It found that the Marshal Service had specifically anticipated removing the work for a small business set aside, prior to receipt of best and final offers, but did not communicate such to the offerors. Furthermore, the court felt that a competition in which one offeror was proposing price based on eight districts and another on nine districts is unfair. The court reasoned that the agency could not reasonably compare the competitors' proposals because they were based on conflicting assumptions regarding the agency's true scope of work. In subsequent proceedings, the court ordered the Marshal Service to amend the solicitation, inform all offerors in the competitive range of the elimination of the Northern District of Florida, and request new bids.[138]

If Late is Late—is Early Early?

In a case of first impression, GAO found that the FAR does not preclude considering a proposal submitted prior to the RFP issue date.[139] In December 1999, the Environmental Protection Agency (EPA) published notice in the Commerce Business Daily of the agency's requirement for information management services. On 22 December 1999, EPA posted a draft RFP on its Internet site and eight days later STG, Inc., submitted a proposal to the EPA for consideration under the RFP. Prior to submitting the proposal, STG inquired whether EPA would consider a proposal submitted in response to the draft RFP so long as the proposal was compliant with the final RFP. The contracting officer responded affirmatively.[140] The EPA finally issued the RFP on 2 March 2000, but determined that the STG's submission was not an "offer" as defined by the FAR and failed to consider it, despite the earlier communication. In response to STG's protest, GAO concluded that EPA's action was unfair, arbitrary and capricious, and recommended EPA consider STG's proposal an "offer" and evaluate it as such.

At first glance this case may appear limited to its facts because of the prior communication between STG and EPA. However, the case may have wider application because GAO did not focus solely on the fact that the contracting officer had previously agreed to evaluate the proposal. Instead, GAO examined the FAR definition of "offer," [141] which requires determining whether a proposal "responds" to the solicitation. The GAO focused on several factors in STG's proposal and

133. S.J. Thomas Co. Inc., B-283192, Oct. 20, 1999, 99-2 CPD ¶ 73.

134. 41 U.S.C. § 253a(c)(1)(B) (2000). The FAR, *supra* note 49, implements this CICA requirement at FAR 15.304(c)(1).

135. *S.J. Thomas*, 99-2 CPD ¶ 73 at 4.

136. MVM Inc. v. United States, 46 Fed. Cl. 126 (2000).

137. *Id.* at 132. FAR 15.206 requires a new solicitation when the government changes the requirements, terms, or conditions. FAR, *supra* note 49, at 15.206.

138. *MVM*, 46 Fed. Cl. at 145.

139. STG, Inc., B-285910, 2000 U.S. Comp. Gen. LEXIS 133 (Sept. 20, 2000).

140. The contracting officer stated, "I can't see any reason why we wouldn't consider/evaluate your proposal if submitted as you state. Obviously, you would be at your own risk in the event of changes from the draft to the final RFP–and you would have to meet the eligibility requirements of the 8(a) set aside." *Id.* at *3.

141. FAR 2.101 defines "offer" as a "response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract." FAR, *supra* note 49, at 2.101.

seemed to suggest that even without the previous communication this case would have the same result.[142] Although the agency possessed STG's proposal before it issued the solicitation, the proposal still "responded" to the solicitation, and hence, was an "offer."[143] Agencies issuing draft RFPs should be mindful of this holding and understand the importance of communicating with potential offerors regarding responses to draft RFPs.

More Discussion about Discussions

During the past year, the COFC and the GAO both addressed the issue of what constitutes "discussions" under FAR 15.306, but approached it differently.

Court of Federal Claims: "Mutual Exchange" Key to Discussions

In *Cubic Defense Systems*,[144] the COFC defined "discussion" as a mutual exchange between the offeror and the government. The case arose from the procurement of supply and support services for the Air Force's Rangeless Interim Training System. The solicitation provided for a pre-award demonstration, but the first attempt was unsatisfactory.[145] Finding that both offerors (Cubic and Metric) failed to meet the solicitation requirements, the Source Selection Authority reopened discussions with both offerors, and then conducted another demonstration successfully.[146] The Air Force subsequently notified both offerors to submit final offers. The Air Force informed both offerors that since it contemplated no further discussion after receipt of final proposals, the agency neither expected nor encouraged further technical revisions in the final submission. Shortly thereafter, Metric submitted data to confirm its remedy for the identified technical deficiency. Cubic claimed that the Air Force's consideration of this data amounted to "discussions." The Court disagreed, finding that "what Cubic cites as a 'discussion' is more accurately a monologue, with the Air Force listening but not responding. The vocal equivalent of one hand clapping."[147]

In defining discussions, COFC focused on the element of mutual exchange, finding that the "element of exchange that is explicit in the FAR's treatment of 'discussions'"[148] was not present in this case. The Court noted that the data responded to a concern previously raised by the Air Force. Therefore, the Air Force was under no obligation to reopen discussions with either offeror after receiving the additional data. Since the Air Force did not hold discussions with either offeror after receiving final proposals, the Court found no error.

GAO: "Opportunity to Revise" Equals Discussions

In contrast to the COFC, the GAO's approach to determining what constitutes "discussions" focused upon whether the offeror had an opportunity to revise its proposal. In *MG Industries*,[149] the protester claimed the agency conducted improper discussions with the successful offeror, BOC Gases and Praxair, Inc. (BOC), when it asked BOC whether the offeror had proposed a change to the contract type. BOC confirmed that the contract type conformed to that required by the solicitation. The GAO found no discussions because the agency's communication offered BOC "no opportunity to revise its offer and was not intended to permit submission of a revised offer."[150]

Continued Discussions about the Content of Discussions

Discussions Should Lead into the Areas Requiring More Information

In *Arctic Slope World Services, Inc.*,[151] GAO confirmed its 1998 ruling[152] that agencies are not obligated to "spoon feed" an offeror each and every item needing improvement during dis-

142. Specifically, GAO mentioned that STG's proposal was "clearly submitted for consideration under the RFP that subsequently was issued. *STG*, 2000 U.S. Comp. Gen. LEXIS 133, at *5. Furthermore, GAO noted the proposal addressed the requirements and terms in the RFP and agreed to comply with the final terms of the RFP. *Id.* There is an additional issue that is subtly raised by the facts, and mentioned in the final footnote. In this case, there may have been an issue of 8(a) eligibility, and GAO raised the issue that perhaps the date the offer was submitted (and size status determined) was significant. This discussion concerning the effect of an early certification raised an interesting issue that GAO did not address. Instead, GAO reaffirmed SBA's role in the size determination process.

143. Additionally, in a footnote, the GAO suggested that if an agency wanted to preclude evaluation of proposals received prior to RFP issue date, it could so advise offerors, so long as there was sufficient time to submit new proposals by the closing date. *Id. at* *5 n.3.

144. Cubic Def. Sys., Inc. v. United States, 45 Fed. Cl. 450 (2000).

145. The first demonstration was unsuccessful because one offeror (Metric) didn't participate and Cubic's results were insufficient. *Id.* at 455.

146. Although both systems performed satisfactorily, the Air Force identified some deficiencies in Metric's technical performance. *Id.*

147. *Id.* at 465.

148. *Id.*

149. B-283010.3, Jan. 24, 2000, 2000 CPD ¶ 17.

150. *Id.* at 9.

cussions.[153] In *Arctic*, the Air Force conducted successive rounds of discussions during negotiations for a base operations support services contract for Shemya Island, Alaska. Although the agency had sent three written evaluation notices (ENs) with questions about key personnel, Arctic Slope World Services (ASWS) complained that the Air Force failed to conduct meaningful discussions. The GAO disagreed, finding the Air Force's three sets of ENs sufficient to "lead ASWS into an area of its proposal requiring more information."[154] Additionally, GAO believed that even if ASWS had known of the specific deficiency and provided additional information, ASWS's ratings would not have changed significantly enough to show prejudice.[155]

Must We Talk of Price? Yes, When It's Unrealistic

Biospherics, Inc.,[156] reiterates that discussions must include price when the price is considered excessive or unreasonable. Biospherics complained that discussions were unequal because GSA only discussed price with the other offeror in the competitive range, Aspen. The GSA countered that price was not a discussion issue with Biospherics because its price was not considered unreasonable, while Aspen's price was well outside GSA's price analysis parameters. The GAO reinforced the permissive nature of FAR 15.306(e)(3), stating that only excessive or unreasonable price must be included in discussions.[157]

Don't Have to Explicitly State Prices Too High When it Can Be Deduced

National Projects, Inc.[158] further clarifies what a contracting officer must address in discussions. In this case, the GAO again had to determine what the "new" FAR part 15 requires of contracting officers during discussions. Specifically, GAO found that FAR 15.306 is permissive, allowing but not mandating a discussion of price. The protestor in *National Projects* alleged that the Army COE held flawed discussions because the agency did not tell the protestor that its proposal price was too high. The GAO felt the offeror must assume some responsibility for deducing that the agency's written evaluation questions related to line item pricing were related to the agency's concern about price. Additionally, given that the agency had canceled the original solicitation because prices exceeded the government estimate and available funding, GAO thought the protestor should have known from the written evaluation questions that its prices were too high even if not specifically stated by the agency.[159]

Some Help to Ease the Confusion?

A proposed rule would clarify what FAR 15.306(d) requires of contracting officers during discussions.[160] The rule explains that discussions of proposals beyond deficiencies and significant weaknesses are "a matter of contracting officer judgment."[161] Specifically, the new rule states that significant weaknesses, deficiencies, and adverse past performance information to which the offeror has not yet had an opportunity to respond are the minimum required areas of discussion.

151. B-284481, B-284481.2, Apr. 27, 2000, 2000 CPD ¶ 75.

152. Du & Assoc., Inc., B-280283.3, Dec. 22, 1998, 98-2 CPD ¶ 156.

153. *Id.* at 7. *See 1999 Year in Review, supra* note 37, at 21 for discussion of *Du & Associates, Inc.*

154. *Arctic Slope World Servs*., 2000 CPD ¶ 75 at 9; *accord* Info. Network Sys., Inc., B-284854, June 12, 2000, 2000 CPD ¶ 104.

155. *Id.*

156. B-285065, July 13, 2000, 2000 CPD ¶ 118.

157. *Id.* at 5 (citing Akal Sec. Inc., B-271385, B-271385.3, July 10, 1996, 96-2 CPD ¶ 77 at 3; Applied Remote Tech., B-250475, Jan. 22, 1993, 93-1 CPD ¶ 58 at 3). FAR 15.306(e)(3) provides:

> Government personnel involved in the acquisition shall not engage in conduct that . . . [r]eveals an offeror's price without that offeror's permission. However, the contracting officer may inform an offeror that its price is considered by the Government to be too high, or too low, and reveal the results of the analysis supporting that conclusion. It is also permissible, at the Government's discretion, to indicate to all offerors the cost or price that the Government's price analysis, market research, and other reviews have identified as reasonable.

FAR, *supra* note 49, at 15.306(e)(3).

158. B-283887, Jan. 19, 2000, 2000 CPD ¶ 16; *accord* AJT & Assoc., Inc., B-284305; B-284305.2, Mar. 27, 2000, 2000 CPD ¶ 60.

159. *Nat'l Projects, Inc.*, 2000 CPD ¶ 16 at 6.

160. Federal Acquisition Regulation; Discussion Requirements, 65 Fed. Reg. 17,582 (Apr. 3, 2000).

161. *Id.*

Although discussions about other aspects of the proposal such as cost, price, technical approach, and terms and conditions are encouraged if such discussions could materially enhance the offeror's potential for award, the new rule leaves unchanged the provision that specifically reserves the scope and extent of discussions to the contracting officer's judgment.[162] Additionally, the proposed rule would allow the government to suggest to offerors whose proposals exceed mandatory minimums (in ways that are not integral to the design) that removal of excesses and decrease of price would make the proposal more competitive.[163]

Court Cases on Evaluation of Proposals

By far the area generating the most protests is the area of proposal evaluation. Disappointed offerors consistently complain that agencies failed to follow stated evaluation criteria or otherwise failed to fairly consider proposals. Unfortunately, in many instances, the offerors were right—agencies did not use the evaluation criteria as promised. The CAFC and the COFC both heard cases about evaluation this year.

CAFC's Take on Proposal Evaluation

In two cases this year, CAFC reversed lower court holdings regarding proposal evaluations. In *Stratos Mobile Networks USA, LLC v. United* States,[164] the court reversed COFC's judgment granting injunctive relief to Stratos under an RFP for an ID/IQ contract for leased channel mode, high speed, satellite based communications services. The RFP notified offerors that the agency would evaluate price using the anticipated order amounts, applying any discounts offered as applicable. Both Stratos and COMSAT (the successful offeror) submitted proposals offering discounts, although the discounts were structured differently.[165] The Navy awarded to COMSAT, finding COMSAT's pricing more flexible and more advantageous to the government, in light of the uncertainties of an ID/IQ contract.

Stratos alleged that the evaluation scheme set out in the RFP required the Navy to evaluate prices strictly based on the anticipated order amounts set out in the RFP. The COFC agreed, finding that the RFP contained a latent ambiguity as to the method of evaluating bids, and ordered the Navy to rewrite and reissue the RFP.[166] The Navy successfully appealed to the CAFC which found Stratos' (and COFC's) interpretation of the evaluation scheme unreasonable because it expected the Navy to look to only one data point to establish the price, when the RFP clearly proposed to consider and apply any offered discounts.[167] Although the COFC treated the various price evaluation factors as mutually exclusive, thereby leading to the finding of latent ambiguity, the CAFC found no ambiguity in the factors the RFP proposed to consider to determine the evaluated price.[168] Finding the lower court's ruling in error, CAFC reversed and vacated the injunction.[169]

In another case, the CAFC overturned COFC's finding that an evaluation was properly conducted.[170] At issue was the evaluation of proposed compensation levels for professional employees. The RFP notified offerors that the agency would review compensation levels to ensure proposals reflected a clear understanding of the required work and indicated an ability to attract and keep suitable employees. To evaluate the compensation levels, the agency used a complicated two-step approach.[171] OMV argued that this method of evaluating compensation plans was irrational. COFC ruled that the calculation did not need to be rational, so long as it did not render the analysis inconsistent with the RFP's stated approach.[172]

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162. *Id.* (proposed FAR 15.306(d)(3)).

163. *Id.*

164. 213 F.3d 1375 (Fed. Cir. 2000).

165. Stratos' discount was more restrictive than COMSAT's, and tied discounts to the anticipated order quantities. *Id* at 1377.

166. Stratos Mobile Networks USA, LLC v. United States, 44 Fed. Cl. 634 (1999).

167. Given the restrictive nature of Stratos' discount, CAFC found that it was possible that the discount would never materialize, thereby raising reasonable doubt about whether Stratos' offer would actually result in the lowest overall cost to the government. *Stratos*, 213 F.3d at 1380.

168. In fact, CAFC found that the areas were not mutually exclusive and clearly delineated the factors to be used to evaluate price. *Id.* at 1381.

169. *Id.*

170. OMV Med., Inc., v. United States, No. 99-5098, 2000 U.S. App. LEXIS 17,451 (Fed. Cir. Jul. 18, 2000).

171. First, a budget analyst asked the incumbent, OMV, for the average salary figures for the various categories of employees. She then took the lower of the two average annual salary figures for each category and added a variance of $1000 below that figure, arriving at the minimum salary requirement. She next compared this "minimum salary requirement" to each offeror's professional compensation plan. Then, a second analyst determined the cost realism of the proposals by comparing the proposed salaries to the figures derived by the budget analyst and the salary data from the Department of Labor's Bureau of Labor Statistics. *Id* at *9.

172. The COFC focused on the fact that the outcome of the analysis was consistent with the Department of Labor's Handbook used by the second analyst. *Id.* at *16.

The CAFC disagreed with COFC's focus. It found that because the agency's analysis was two-fold, and because the award decision was influenced by this analysis, how the agency conducted the evaluation was indeed important to whether there was prejudicial error. Therefore, CAFC remanded the case for further proceedings to determine if the agency acted irrationally in its evaluation of compensation, and if so, whether any such error prejudiced OMV.[173]

COFC's Take on Proposal Evaluation

In *Antarctic Support Associations v. United States*[174] COFC upheld an award of a science, operations, and maintenance support contract for the U.S. Antarctica Program, despite claims from disappointed offerors that the evaluation focused upon undisclosed factors and that the award was arbitrary and capricious. Antarctic Support Associates and BR&S Polar Resources argued that the National Science Foundation (NSF) improperly focused on information technology (IT), although IT was not listed as a separately evaluated factor. The court disagreed, finding that the NSF had appropriately communicated the importance of IT in the solicitation as part of another evaluation category,[175] and reasonably evaluated IT as part of that category. The protesters also complained that selection of Raytheon was arbitrary and capricious because Raytheon proposed to use a bankrupt corporation as a key part of the proposal. Citing the fact that the technical evaluation team had considered the weaknesses of Raytheon's proposal and compared the weaknesses to those of the other proposals, the court declined to disturb the technical evaluation, relying on earlier cases requiring "great deference" in judicial review of technical matters.[176]

The GAO and How Not To Do Proposal Evaluation

The GAO issued no new rules this year regarding adherence to the stated evaluation criteria, only new examples of how agencies failed to do so in various situations.[177]

Duty to Reconcile Adverse Information

In *Maritime Berthing, Inc.*,[178] evaluators had significant countervailing evidence to a proposal's claim of meeting the technical requirements of the solicitation, yet accepted the proposal without question. The Navy's Military Sealift Command (MSC) was procuring layberth services,[179] and the solicitation required that the mooring plan allow no more than seven feet in surge direction. The proposal from Violet Dock Port, Inc., purported to meet that requirement. However, months before completing the evaluation or awarding the contract, MSC obtained evidence indicating the facility proposed by Violet had experienced surge problems. In spite of that evidence, and without further investigation into the facility, MSC awarded to Violet. The GAO found the lack of action to reconcile the adverse information in MSC's possession with the promises in the proposal unreasonable. It recommended MSC reopen discussions with offerors in the competitive range, request revised proposals, and make a new award decision.[180]

Evaluation Need Not Lead to Lowest Overall Cost to Government

In *SmithKline Beecham Corporation*,[181] GAO ruled that the Department of Veterans Affairs' (VA) price evaluation scheme was reasonable, even though it might not result in the lowest overall cost to the government in every instance. In a solicitation for anti-nausea drugs for its national formulary, the VA priced the proposals using FDA-approved dosing levels for moderate chemotherapy-induced nausea and vomiting

173. *Id.* at *20.

174. 46 Fed. Cl. 145 (2000).

175. The RFP listed a "Concept of Operations" factor. Section L instructed offerors to address four main areas in the proposal: (1) logistics; (2) station and ship operations; (3) information technology (IT) and communications systems; and (4) facilities engineering and construction. *Id.* at 155.

176. *Id.* (citing Cubic Def. Sys. Inc., 45 Fed. Cl. 450 (2000)).

177. *See, e.g.*, Saco Def. Corp., B-283885, Jan. 20, 2000, 2000 CPD ¶ 34 (holding that evaluation resulting in equal ratings for two proposals when one proposal failed to provide quality approach information as required by the solicitation was unreasonable); AIU N. Am., Inc., B-283743.2, Feb. 16, 2000, 2000 CPD ¶ 39 (sustaining protest where agency failed to consider protestor's corporate assets in contradiction of the stated evaluation criteria); SWR, Inc., B-284075; B-284075.2, Feb. 16, 2000, 2000 CPD ¶ 43 (finding the agency improperly relaxed material terms of the RFP when it awarded a contract based upon a proposal that did not comply with material provisions of the solicitation).

178. B-284123.3, April 27, 2000, 2000 CPD ¶ 89.

179. These services include, for example, electrical shore power, potable water, telephone service, and roving guard service. *Id.* at n.1.

180. *Id.* at 11.

181. B-283939, Jan. 27, 2000, 2000 CPD ¶ 19.

(CINV).[182] SmithKline Beecham (SKB) protested, claiming that the price evaluation scheme was faulty because if the VA used the selected drug at other than the moderate dosage level, the result could be a higher overall cost to the government. The GAO agreed with the VA that the method used to evaluate price was reasonable and provided an objective basis for comparing the costs of the three drugs, denying SKB's protest.[183]

Formatting Instructions Important—Ignore At Your Own Risk

The GAO found the COE's downgrading of a proposal that did not comply to the formatting instructions outlined in the solicitation was completely reasonable. In *Coffman Specialties, Incorporated*,[184] the disappointed offeror protested the Corps' refusal to consider numerous pages of the proposal that did not conform to the format limitations in the RFP. The GAO noted that the formatting instructions were clear in the RFP and Coffman chose to disregard them, thus assuming the risk that the agency would downgrade the proposal for non-compliance.[185]

Blanket Promise to Comply is Not Enough!

The GAO upheld the Coast Guard's actions in a case where the contracting officer rejected a proposal for failing to provide adequate technical information as required by the RFP.[186] The Coast Guard used FAR Part 12, Commercial Items, to procure buoy lanterns. The solicitation identified several technical evaluation criteria, including technical approach. Phantom Products submitted a proposal with a claim that the product would "fully comply with the required Coast Guard specification." However, the proposal did not provide any further information about the product to assist in an evaluation of whether the product in fact conformed to the specification. Hence, GAO held the rejection of the proposal was reasonable.[187]

"Get Real"—Cost/Price Realism in Proposal Evaluation

One aspect of evaluation that received plenty of attention this year was cost realism analysis. In *Sabreliner Corporation*,[188] the GAO upheld the use of cost realism in the evaluation of a fixed-price contract. In the RFP, the Navy notified potential offerors of its intention to evaluate price proposals for price realism. The solicitation further noted that the agency would assign a high proposal risk rating to proposals determined to be unrealistic. The Navy found Sabreliner's price, which was significantly lower than both the government estimate and the nearest proposal, unrealistic, resulting in a rating of high risk for the proposal.

The GAO upheld the use of price realism in this instance. It found the use of price realism as a method of assessing risk in an offeror's proposal appropriate. The GAO further noted the Navy did more than just look at the prices. By evaluating the underlying cause of the lower price, the Navy uncovered what about the proposal was unrealistic and reasonably decided that it presented an unreasonable level of risk.[189]

The United Stated Agency for International Development (USAID) did not fare as well when its cost realism analysis was challenged, however.[190] This case began with corrective action taken after GAO found USAID had improperly evaluated the realism of proposed indirect rates in a contract implementing a family planning and reproductive health project in developing countries.[191] To implement the corrective action, USAID requested that the Defense Contract Audit Agency (DCAA) audit the proposals of both Deloitte Touche Tohmatsu (Deloitte) and The Futures Group. When USAID became aware that DCAA had not performed any cost realism on the proposals, but merely verified the contractor's arithmetic, it asked for a realism analysis. The DCAA found that Deloitte's indirect costs were in fact understated, but attributed that understatement to the impact of the protests on the proposal subsequent to the original submission.[192]

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182. The dosage was used because it is the only dosage where there are FDA-approved oral dosage levels for the three known drugs used to treat CINV. *Id*. at 4.

183. *Id.*

184. B-284546, B-284546.2, 2000 U.S. Comp. Gen. LEXIS 58 (May 10, 2000).

185. *Id.* at *9.

186. Phantom Prods., Inc., B-283882, Dec. 30, 1999, 2000 CPD ¶ 7.

187. *Id.* at 6.

188. Sabreliner Corp., B-284240.2, B-284240.6, 2000 U.S. Comp. Gen. LEXIS 56 (Mar. 22, 2000).

189. *Id.* at *14.

190. Futures Group Int'l, B-281274.5, B-281274.6, B-281274.7, 2000 U.S. Comp. Gen. LEXIS 134 (Mar. 10, 2000).

191. *See* Futures Group Int'l, B-281274.2, 1999 U.S. Comp. Gen. LEXIS 248 (Mar. 3, 1999) (discussing the initial finding of improper cost realism evaluation).

The contracting officer again awarded to Deloitte on the basis of its lower evaluated costs. The GAO found that USAID's cost realism was again unreasonable, because it completely disregarded the documented understatement in Deloitte's proposed indirect costs.[193] The GAO went on to reiterate that a cost realism analysis must consider all information reasonably available at the time of evaluation, not just what the offeror submits with its proposal. A cost realism analysis is designed to "reflect the Government's best estimate of the cost of any contract that is most likely to result from the offeror's proposal."[194]

Who's In and Who's Out—Price Must Be Considered When Determining the Competitive Range!

One thing is crystal clear from the GAO cases this year on establishing the competitive range—agencies must consider and evaluate price beforehand.

The year's first case to highlight this point was *Kathpal Technologies, Incorporated*.[195] In *Kathpal*, the Department of Commerce issued an RFP for award of multiple ID/IQ contracts to provide a full range of information technology products and services.[196] After receiving over 200 proposals, the agency decided to limit oral presentation to only the "most competitive offerors" by evaluating only past performance and "team competition" factors.[197] Then the co-chairs determined a "cut-off" rating for each functional area, and eliminated those proposals that did not meet the cut-offs. The GAO sustained the protest because price was not included in the initial screening evaluation, emphasizing the requirement to evaluate price in all competitive proposals.[198] Bottom line: agencies may not exclude proposals from the competitive range without taking into account their relative costs.[199]

No Requirement to Delay Indefinitely To Allow for Defect Correction

In *Dismas Charities, Incorporated*,[200] the GAO upheld the protester's elimination from the competitive range for failing to comply with zoning requirements, even though Dismas later prevailed in its zoning appeal. The Bureau of Prisons solicited an inmate services facility in Phoenix, Arizona. The solicitation required offerors to show valid proof of compliance with all necessary zoning requirements and local ordinances. Dismas initially submitted a letter from the City of Phoenix Zoning Administrator stating that if the proposed facility met the definition of a recovery home then it could operate in its present location. The Zoning Administrator subsequently took the position that the proposal would not meet the zoning requirements and the Bureau of Prisons then eliminated Dismas from the competitive range for failing to provide proof of zoning compliance. Dismas appealed the zoning decision through the state Superior Court and ultimately succeeded. The GAO upheld the agency's action, however, finding that Dismas could not and did not submit "proof" that it complied with the zoning requirements at the time of final offer submissions. According to the GAO, an agency is not required to delay award indefinitely while an offeror attempts to cure defects in order to meet such a requirement.

Source Selection: Documentation is Key!

The FAR gives great latitude to source selection authorities to use their business judgment and to make tradeoffs that obtain the best value for the government. That discretion, however, is not unlimited.

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192. The contracting officer accepted DCAA's findings but made no adjustments to account for the $4.5 million understatement in indirect costs. The contracting officer believed that the proposed G&A and overhead rates were reasonable, in spite of the DCAA audit showing they were understated, because the contracting officer believed that the rates "would have been the likely result if Deloitte had been able to perform this contract consistent with their technical approach, and had not been impacted by the protest." *Futures Group Int'l*, 2000 U.S. Comp. Gen. LEXIS 134, at *14. In a footnote, GAO took exception to the contracting officer's position, noting that the record did not support the claim that the understatement resulted solely from the protest. *Id.* at *14 n.9.

193. *Id.* at *17.

194. *Id.* at *19 (citing FAR 15.404-1(d)(2)(i)).

195. B-283137.3 et al., Dec. 30, 1999, 2000 CPD ¶ 6.

196. The solicitation noted the agency's goal to award a reasonable number of contracts to allow for adequate task order competition, while avoiding unnecessary and burdensome contract administration and ensuring all contractors had an opportunity to receive a meaningful level of task order work. *Id.* at 2.

197. *Id.* at 5. The source selection evaluation board co-chairs then screened all proposals assigning a letter rating under the past performance ratings and either a "+" or "-"under the team competition factor. *Id.*

198. *Id.* at 9 (citing 41 U.S.C. § 253a (c)(1)(B) and FAR § 15.304(c)(1)).

199. The GAO decided several other cases on this issue. *See, e.g.*, Meridian Mgmt. Corp., B-285127, July 19, 2000, 2000 CPD ¶ 121; Columbia Research Corp., B-284157, 2000 U.S. Comp. Gen. LEXIS 115 (Feb. 28, 2000). *Cf.* Molina Eng'g, Ltd., B-284895, May 22, 2000, 2000 CPD ¶ 86 (finding unreasonably low priced proposal reasonably excluded from competitive range).

200. B-284754, May 22, 2000, 2000 CPD ¶ 84.

In *J&J Maintenance, Inc.*,[201] GAO reviewed a source selection decision containing unsupported evaluations and an undocumented cost/technical tradeoff. The Army solicited proposals for family housing maintenance and repair services and for operation of a "self-help" center at Fort Polk, Louisiana. The agency contemplated a best value award and intended to make award without discussions. Technical proposals consisted of only oral presentations, briefing slides and resumes.[202] Unfortunately, the evaluators' notes were not summaries of the proposals' contents, but rather sketchy, selective comments about the oral presentations. Notwithstanding the lack of technical documentation, the source selection authority concluded, based upon the initial evaluations, that "[Day & Zimmerman's] (D&Z) proposal represented the best overall value to the government and that it would be worth the additional expenditure to have D&Z, rather than J&J, perform the work."[203]

The GAO found the evaluation and selection decision fell far short of several requirements of FAR Part 15. First, the agency failed to maintain adequate records of oral presentations, as required by FAR 15.102(e).[204] Second, the agency failed to sufficiently document the relative strengths, deficiencies, significant weaknesses, and risks associated with the various proposals, as required by FAR 15.305(a).[205] Finally, the source selection memorandum did not address any of the perceived advantages or disadvantages of J&J's proposal.[206] This lack of documentation made it impossible for GAO to review the source selection decision for reasonableness. Therefore, GAO recommended that the Army conduct another round of oral presentations and render a new source selection decision.[207]

It Cannot Be Reasonable if It Is Wrong!

In *CRA Associated, Inc.* (CRA),[208] the GAO held that a source selection decision was unreasonable when based upon a misevaluation of the protestor's and awardee's proposals. The Department of Health and Human Services solicited proposals for health care services for alien detainees. The agency conducted two rounds of discussions and requested revised proposals. The technical evaluation panel (TEP) chairman recommended award to a higher priced offeror, United Payors and United Providers (UP), because its proposal was the best technically and therefore afforded the least amount of risk.[209] The contracting officer awarded the contract to UP, based upon the TEP chairman's recommendation.

The GAO sustained CRA's protest because it found the underlying evaluation, which formed the basis for the source selection authority's decision, flawed and the tradeoff decision unsubstantiated. The GAO found the evaluators made several errors during the evaluation process. First, the evaluators

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201. B-284708.2, B-284708.3, June 5, 2000, 2000 CPD ¶ 106.

202. The RFP did not allow written technical proposals, so the offerors' slides and evaluators' notes were the only record of what the oral presentations included. *Id.* at 4.

203. *Id.* at 3 (citing the Source Selection Decision Document).

204. This provision states:

> The contracting officer shall maintain a record of oral presentations to document what the Government relied upon in making the source selection decision. The method and level of detail of the record (e.g. videotaping, audio tape recording, written record, Government notes, copies of offeror briefing slides or presentation notes) shall be at the discretion of the source selection authority. A copy of the record placed in the file may be provided to the offeror
> .

FAR, *supra* note 49, at 15.102(e).

205. This provision states:

> Proposal evaluation is an assessment of the proposal and the offeror's ability to perform the prospective contract successfully. An agency shall evaluate competitive proposals and then assess their relative qualities solely on the factors and subfactors specified in the solicitation. Evaluations may be conducted using any rating method or combination of methods, including color or adjectival ratings, numerical weights, and ordinal rankings. The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file.

FAR, *supra* note 49, at 15.305(a).

206. Instead, the source selection authority simply compared overall scores and total prices and made a source selection decision. *J&J Maintenance*, 2000 CPD ¶ 106 at 9.

207. *Id.*; *accord* Future-Tec Mgmt. Sys., B-283793.5, B-283793.6, Mar, 20, 2000, 2000 CPD ¶ 59 (sustaining protest where documentation contained only minimal information and conclusory statement regarding expected benefits to support best value award decision). *Cf.* Basic Contracting Servs., Inc., B-284649, 2000 U.S. Comp. Gen. LEXIS 114 (May 18, 2000) (showcasing appropriate source selection decision memorandum).

208. B-282075.2, B-282075.3, Mar. 15, 2000, 2000 CPD ¶ 63.

209. The TEP chairman concluded that CRA's proposal "did not demonstrate . . . a clear, confident capability to perform." *Id.* at 3 (citing Tradeoff Memorandum).

improperly tallied the total point scores for both CRA's and UP's proposals.[210] Additionally, the GAO keyed on the fact that the source selection authority adopted, and based the award decision upon, the faulty evaluation. Furthermore, the source selection decision's conclusory findings were insufficient to establish that the "multiple, material [evaluation] errors"[211] did not prejudice CRA.

Cannot Be Reasonable if It Is Inconsistent

Not only must the source selection decision be properly documented, but it must also be consistent with the stated criteria and evaluation scheme. In *Beneco Enterprises*,[212] GAO sustained a protest when the Army COE failed to properly compare a higher quality proposal to the lower priced ones as required by the price/technical tradeoff advertised in the solicitation. To determine its three ID/IQ construction contract awardees, the agency conducted three rounds of price/technical tradeoffs following price and technical evaluations.[213] Beneco's highest-rated offer was compared to the lowest-priced offer, then eliminated from further competition, based on the contracting officer's determination that Beneco's higher rating did not justify the higher price. In the end, the contracting officer awarded to the lowest, third lowest, and fourth lowest priced acceptable proposals. In choosing these lower-priced offers, the contracting officer explained that when choosing between two "technically acceptable offers" it was unreasonable to pay the higher price for the work.[214] The GAO found that the contracting officer had essentially converted the decision from a price and technical tradeoff to a lowest priced technically acceptable decision despite the solicitation's notice to the contrary.[215]

Past Performance

When All Else Fails, Read the Modification!

In *KELO, Inc*.,[216] Federal Prison Industries (FPI) issued an RFP for fabric used to manufacture T-shirts for military physical training uniforms. The RFP required offerors to identify at least three and no more than five completed contracts similar to the current RFP, and set out specific performance areas FPI would consider in its past performance evaluation.[217] Offerors had the opportunity to submit information on problems with past customers and to address resolution of those problems. The RFP also stated FPI would examine recent contracts to ensure offerors had implemented corrective measures taken in response to problems.[218]

KELO submitted an offer and received a low past performance score. KELO had a number of performance problems, including a cure notice for late delivery on an ongoing contract and a termination for default on another.[219] In further checking the default termination, FPI found that while the default had been converted to a no-cost termination, the contracting officer still rated KELO's performance as marginal on that contract.

In its protest, KELO claimed that the terminated contract's specifications were "commercially impracticable" to meet.[220] The GAO noted that while the RFP provided the offerors the

210. The agency argued the error in point score did not effect the overall award decision. However, the GAO found that the TEP's recommendation was based in part on the disparity between the two proposal scores. The GAO believed that the change in point differential would affect the evaluation of the relative merits of the proposals. *Id* at 7.

211. *Id*. at 10. CRA also argued that the contracting officer did not exercise his independent judgment in his source selection decision because he did not create a separate source selection memorandum. However, the GAO found his assertion that he exercised his independent judgment sufficient to satisfy that requirement, finding that although FAR 15.308 "contemplates a separate source selection document, we do not believe the failure to create one is fatal to an otherwise reasonable selection determination." *Id*. at 10 n.1.

212. B-283154, 1999 U.S. Comp. Gen. LEXIS 246 (Oct. 13, 1999).

213. The first step of the tradeoff was a comparison of the lowest-priced proposal to the highest-rated one. The winner of that tradeoff was then compared to the remaining proposals. *Id.* at *3.

214. *Id.* at *15.

215. *Id.* at *16; *accord* Computer Prod., Inc., B-284702, May 24, 2000, 2000 CPD ¶ 95 (sustaining protest where agency announced price/technical tradeoff, yet awarded to lowest priced, technically acceptable proposal). *Cf.* MG Indus., B-283010.3, Jan. 24, 2000, 2000 CPD ¶ 17 (finding selection decision reasonable where contracting officer awarded to lowest priced proposal notwithstanding solicitation's emphasis on technical merit over price when contracting officer considered proposals technically equal and found no advantages of paying higher price).

216. B-284601.2, Jun. 7, 2000, 2000 CPD ¶ 110.

217. *Id.* at 1.

218. *Id.*

219. *Id.*

220. *Id.* at 3.

opportunity to submit information on the problems, KELO not only did not provide such information, but also failed to list the defaulted contract.[221] The GAO further stated that KELO's attempt to introduce evidence in the protest that should have been submitted with its proposal does not invalidate the contracting officer's contemporaneous source selection decision.[222]

Concerning the termination, there was no question that KELO was late in performing and FPI did terminate that contract for default. However, believing KELO might have a good defense against the default because it was a small business trying to meet requirements, FPI converted the default to a no cost termination.[223] In spite of the no-cost termination, the contracting officer gave KELO a marginal performance rating on that contract. KELO argued that by agreeing to a no-cost termination, it understood that FPI would not hold the failure to deliver against KELO.[224] The GAO disagreed, stating that nothing in the record or other documents supported KELO's contention that FPI had a similar understanding. The GAO would not infer such a condition to a settlement that is not clearly set out in the language of the settlement agreement.[225] Moreover, GAO said the fact that KELO appealed the termination did not mean that it was unreasonable for FPI to rely upon the underlying basis for termination as evidence of poor past performance.[226]

Whose Opinion Matters in Past Performance Evaluations?

The Air Force was faced with the issue of how much weight, if any, it should give to the opinions of its own Quality Assurance Evaluators (QAE) in determining an offeror's past performance score. In *Birdwell Brothers Painting and Refinishing*,[227] the Air Force issued a solicitation for housing maintenance services at Beale Air Force Base. Award was based on a tradeoff between past performance and price. Birdwell advised the Air Force that it had supplied references for two subcontracts it had with potential competitors, and was concerned that the potential competitors would be prejudiced against it.[228] Birdwell "strongly urged" the Air Force to obtain its past performance information on those subcontracts from government sources.[229] Several QAE inspectors provided information on Birdwell's past performance. Birdwell lost the competition as its past performance score was not as good as the awardee's.

Birdwell argued that the Air Force performed an unreasonable past performance evaluation because it accepted the QAE's past performance opinions, and that QAEs do not have the capacity to judge whether performance problems should be attributed to the prime contractor or to the subcontractor.[230] Rather than accept the QAEs' statements, Birdwell claimed the Air Force should have reviewed relevant contract files, which would contain information on who was responsible for deficient performance.

The Air Force acknowledged that QAEs work primarily with prime contractors and for that reason rarely documented subcontractor deficiencies.[231] It went on to argue, however, that the QAEs' satisfaction was a subfactor to the evaluation criteria and was relevant to the evaluation, and that the QAEs' comments were only used in evaluating that subfactor. Moreover, the QAEs did actually inspect Birdwell's work.

In denying the protest, GAO found the Air Force properly considered the QAE's comments on Birdwell's work as a subcontractor when performing the evaluation.[232] Birdwell was unable to prove or provide evidence that problems the QAE saw were attributable to the prime contractor. The GAO found the Air Force used the QAEs' comments for the limited purpose of evaluating customer satisfaction, and that it was not unreasonable for an agency to give some weight to the opinions of its own QAE inspectors in that aspect of the evaluation.[233]

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221. *Id.*

222. *Id.*

223. *Id.* at 4.

224. *Id.*

225. *Id.*

226. *Id.* The evidence showed KELO missed the delivery and admitted such on the record. GAO considered this an adequate basis for a marginal performance rating. *Id.*

227. B-285035, July 5, 2000, 2000 CPD ¶ 129.

228. *Id.* at 2.

229. *Id.*

230. *Id.* at 4.

231. *Id.*

232. *Id.*

When Must the Contracting Officer Request Clarification of Past Performance Information?

In *A.G. Cullen Construction, Inc.*,[234] the Air Force wanted to award a contract to maintain and alter a building at the Pittsburgh Air National Guard Center on the basis of initial proposals. The RFP required offerors to submit a reference list identifying all contracts awarded to them within the past three years. Award was based on a past performance and price tradeoff, with past performance significantly more important than price.[235]

One of Cullen's references gave it a marginal rating for four of nine key areas under the "timely performance" subfactor. The Air Force did not give Cullen the opportunity to address the adverse information.

Cullen argued it should have had the opportunity to address the adverse past performance information the Air Force obtained from this reference.[236] The GAO disagreed, stating that a contracting officer has broad discretion to decide whether to communicate with an offeror concerning its performance history.[237] The GAO reviews the exercise of that discretion to ensure that it was reasonably based on the particular circumstances of the procurement. This means the contracting officer must give an offeror the opportunity to respond where there is clearly a reason to question the validity of the performance information.[238]

The GAO held that in the absence of such a clear basis to question the past performance information, short of acting in bad faith, the contracting officer may reasonably decide not to ask for clarifications.[239] Nothing on the face of the reference caused the contracting officer concerns about its validity. The GAO stated that given the permissive nature of the language in FAR 15.306(a)(2),[240] the fact that an offeror may wish to respond to the adverse reference does not give rise to a requirement that the contracting officer give an offeror the opportunity to do so.[241]

Be Careful When Interviewing Past Performance References!

Agency evaluators often call an offeror's past performance references to obtain information necessary to determine that offeror's past performance rating. When making such calls, evaluators must ensure they ask the proper questions and give references a reasonable opportunity to respond. In *Clean Venture, Inc.*,[242] the Defense Logistics Agency (DLA) issued an RFP for hazardous waste disposal services at military facilities. Past performance was a major evaluation criterion, and Clean Venture received only a fair rating. In its GAO protest, Clean Ventures alleged DLA judged the complexity of its prior contract performance without conducting adequate interviews of its references.[243] Clean Venture claimed the contract specialist who conducted the interviews did not sufficiently question its experience in three key areas.

The GAO denied the protest stating that the record showed that while the interviews were brief, the contract specialist "strictly adhered" to the questions listed on the past performance questionnaires.[244] Clean Ventures introduced a statement from one of the government references, in which that reference said the contract specialist cut him off and did not allow him to give a full evaluation of either Clean Venture or the services it provided. During the protest hearing, the contract specialist stated that not only did he not cut the reference off, the reference did not indicate he felt "rushed" during the

233. *Id.*

234. B-284049.2, Feb. 22, 2000, 2000 CPD ¶45.

235. *Id.* at 1.

236. *Id.* at 4. Cullen alleged that FAR 15.306(a)(2) gave it the opportunity to clarify and explain the adverse past performance information. *Id.*

237. *Id.*

238. *Id.* The GAO offered an example of such a situation where there were obvious inconsistencies between a reference's narrative comments and the actual ratings the reference gives the offeror. *Id.*

239. *Id.*

240. *Id.* at 5. GAO stated: If award is made without conducting discussions, "offerors *may* be given the opportunity to clarify certain aspects of proposals (*e.g.*, the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor clerical errors." *Id.* quoting FAR, *supra* note 49, at 15.306(a)(2).

241. *A.G. Cullen Construction, Inc.*, 2000 CPD ¶ 45 at 4.

242. B-284176, Mar. 6, 2000, 2000 CPD ¶ 47.

243. *Id.* at 7.

244. *Id.* at 7-8.

interview.[245] The GAO was persuaded by the contract specialist's testimony, noting Clean Venture had the opportunity to have the reference rebut the contract specialist's testimony at the hearing, but chose not to do so.[246]

Analyze What They Gave You and Document That Analysis, or Else!

Offerors are asked to provide varying amounts of information concerning their past performance as part of their proposals. Agencies inundated with such information must carefully and rationally evaluate the information in accordance with the evaluation scheme, or suffer the consequences. In *Green Valley Transportation, Inc.*,[247] the Military Traffic Management Command (MTMC) issued an RFP for guaranteed traffic (GT) freight transportation. Past performance was a major evaluation criterion. One of the past performance subfactors was past performance actions, which were any problems that developed during performance including letters of concern, warning, withdrawal and removal and what corrective measures offerors took to resolve the problems.[248] While Green Valley received a number of awards, it did not receive as many as it expected, and filed a GAO protest.

Green Valley alleged MTMC's past performance evaluation was faulty in that it failed to consider all information available when evaluating proposals.[249] The GAO sustained the protest, holding that MTMC's evaluation was unreasonable. The Comptroller General found that the evaluation team was supposed to consider corrective actions to past performance problems submitted by offerors in assessing past performance, with particular attention to corrective measures taken at the site of the current contract.[250] The Technical Evaluation Team members summarized on the evaluation forms negative performance actions, letters of appreciation and total number of shipments handled for DOD and at the site in question. The evaluators gave Green Valley's proposal something less than the maximum rating for the past performance action subfactor.

Green Valley alleged the evaluation team improperly discounted its volume of shipments in rating its proposal.[251] Green Valley argued it had fewer negative performance actions relative to its number of shipments than other offerors. The GAO found that while MTMC considered the volume of freight offerors carried over the past, there was no indication how those considerations were factored into the overall rating.[252] The GAO said: "We view it as irrational to focus only on the absolute number of performance problems and not take into account the size of the universe of performance in which the problems occurred."[253] At the hearing, the Chairperson of the Technical Evaluation Team stated that if a proposal set out reasonable justifications for a past performance action, that action was not weighed as heavily against an offeror.[254] However, the contemporaneous evaluation documents contained no evidence that the evaluation team performed this reasoned analysis.[255]

The GAO found MTMC's factual assessment of Green Valley's past performance "devoid" of the qualitative analysis that the RFP required, resulting in a distorted evaluation. [256] The GAO stated that when an agency has explicit instructions in its RFP for it to consider all available information, it must do so, and must contemporaneously document its analysis supporting its decision.[257] MTMC clearly failed to comply with these requirements.

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245. *Id.* at 8

246. *Id.*

247. B-285283, Aug. 9, 2000, 2000 CPD ¶ 133.

248. *Id.* at 2-3.

249. *Id.* at 3.

250. *Id.*

251. *Id.*

252. *Id.* at 4.

253. *Id.*

254. *Id.* at 5.

255. *Id.*

256. *Id.*

257. *Id.* at 8.

Simplified Acquisitions

Charge It!

This past year saw an increase in the trend to use the government-wide purchase card as the preferred acquisition method whenever feasible. On 31 July 2000, the Defense Acquisition Regulations (DAR) Council issued a final rule requiring DOD contracting officers to use the purchase card for all acquisitions at or below the micropurchase threshold of $2,500.[258] The DOD has also proposed allowing contracting officers supporting a contingency, humanitarian, or peacekeeping operation to use the purchase card for purchases up to $200,000,[259] the simplified acquisition threshold for contingency, humanitarian, and peacekeeping operations.[260] Contracting officers could use the card for purchases up to $200,000 if the supplies or services are immediately available and there is only one delivery and one payment.[261]

Simplified Acquisitions Trump Negotiated Procedures

When given a choice, contracting officers will often choose the FSS[262] over negotiated procedures because the former offers simpler, less formal, solicitation and evaluation procedures. What happens, though, when an agency places an order against a FSS contract using negotiation-type procedures? The COFC addressed that question in *Ellsworth Associates, Inc. v. United States*.[263]

In *Ellsworth*, the Department of Health and Human Services (HHS) issued an FSS solicitation for its Child Care Information System Technical Assistance Project.[264] The solicitation contemplated a three-phase evaluation process but did not state the relative weight assigned to the different phases.[265] When HHS awarded the contract to a competitor, Ellsworth filed suit alleging that the agency had improperly used unstated criteria in its evaluation.[266]

The COFC rejected Ellsworth's arguments. It found that HHS conducted this solicitation as an FSS buy rather than a FAR Part 15 negotiated procurement.[267] The court specifically found that HHS' letter accompanying the solicitation clearly stated that the agency would place the order pursuant to the FSS program.[268] Moreover, the informality of the solicitation was more consistent with an FSS buy than with a negotiated procurement.[269] The court ultimately ruled that simply using some negotiation procedures does not turn a simplified procurement into a negotiated one.[270]

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258. Streamlined Payment Practices, 65 Fed. Reg. 46,625 (2000) (adding U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 213.202 (Apr. 1, 1984) [hereinafter DFARS]). The reasoning behind this new requirement is that use of the card streamlines both purchasing and payment procedures, increasing operational efficiency. *Id.*

259. Defense Federal Acquisition Regulation Supplement; Overseas Use of the Purchase Card in Contingency, Humanitarian, or Peacekeeping Operations, 65 Fed. Reg. 56,858 (Sept. 20, 2000) (amending DFARS, *supra*, note 258, at 213.301). Congress defines contingency operations at 10 U.S.C. § 101(a)(13) (2000) and humanitarian and peacekeeping operations at 10 U.S.C. § 2302(8) (2000).

260. FAR, *supra* note 49, at 2.101. Currently, the AFARS limits most uses of the purchase card to $2,500. U.S. DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP., pt. 13.9001(c) (Dec. 1, 1984) [hereinafter AFARS]. The DFARS permits purchases up to $25,000 for overseas buying. DFARS, *supra* note 258, at 213.301(2).

261. Defense Federal Acquisition Regulation Supplement; Overseas Use of the Purchase Card in Contingency, Humanitarian, or Peacekeeping Operations, 65 Fed. Reg. at 56,858.

262. The Federal Supply Schedules (FSS) program provides federal agencies with a simplified process for obtaining commonly used commercial supplies and services at prices associated with volume buying. *See* FAR, *supra* note 49, at 8.4. The GSA manages the FSS program pursuant to Section 201 of the Federal Property and Administrative Services Act of 1949. *See* 41 U.S.C. §§ 251-260 (2000).

263. 45 Fed. Cl. 388 (1999).

264. *Id.* at 390.

265. *Id.*

266. *Id.* at 391. Conceding that HHS advertised this contract under the streamlined FSS procedures of FAR Part 8, Ellsworth argued that HHS nonetheless conducted this solicitation more like the negotiated procurements regulated by FAR Part 15. *Id.* at 394.

267. *Id.*

268. *Id.*

269. *Id.* Finally, Ellsworth's own cost proposal stated that its price was based on the price provisions of FAR Part 8. *Id.*

270. In so ruling, the court affirmed the rule that a FSS solicitation need not state all of the agency's solicitation or evaluation criteria. *See* Pyxis Corp., B-282469, B-282469.2, July 15, 1999, 99-2 CPD ¶ 18.

Threshold? What Threshold?

It is well settled that agencies may not divide requirements into multiple purchases merely to justify using simplified acquisition procedures.[271] In *Petchem, Inc. v. United States*,[272] the U. S. District Court for the District of Columbia addressed how far an agency may divide its requirements without running afoul of this rule. In *Petchem*, the Navy issued a solicitation for an ID/IQ contract for tugboat maintenance services, estimated at $340,320 per year.[273] The Navy canceled the solicitation, however, when it determined that all responses to its solicitation exceeded the local port's commercial rates.[274] It then began acquiring the tugboat services on a piecemeal basis using simplified acquisition procedures.[275]

Petchem filed suit, claiming that the Navy had improperly fragmented the acquisition in order to avoid full and open competition.[276] The court disagreed, ruling that the Navy had not improperly fragmented the acquisition because it never intended to avoid full and open competition.[277] The court found the Navy only broke up the acquisition after failing to receive adequate bids. Reasoning that the Navy could not know the precise nature of its tugboat requirements,[278] the court held that the Navy had properly used simplified acquisition procedures, even though the aggregate value of the services acquired exceeded the simplified acquisition threshold.

Commercial Items

More Commercial Items Please

Last year saw a continuation in DOD's trend towards an increase in the use of commercial practices. The DOD stated that the military needed to further adopt private sector business practices in order to achieve its overall mission.[279] The DOD also issued guidance on 24 July 2000 emphasizing "massive technology investments" from the private sector to improve the cost-effectiveness of procurements.[280] The Navy in turn announced that it will begin contracting for commercial ideas rather than just for specific commercial goods or services.[281]

But What is a "Commercial Item"?

Late in 1999, Congress broadened the definition of "services" associated with "commercial items."[282] Under this new definition, accompanying services do not have to be available from the same source at the same time as the commercial item.[283] The amendment further broadens the definition of commercial services by stating that the source has only to provide "similar" services contemporaneously to the general public.[284]

The Federal Acquisition Regulatory (FAR) Council has also proposed expanding the current definition of "commercial

271. 10 U.S.C. § 2304(g)(2) (2000); FAR, *supra* note 49, at 13.003(c).

272. 99 F. Supp. 2d 50 (D.D.C. 2000).

273. *Id.* at 54.

274. *Id.* at 51.

275. *Id.* at 52.

276. *Id.*

277. *Id.* at 56.

278. The court found that the Navy reasonably bid the tug jobs separately because they were sufficiently spread out over time and subject to different requirements. *Id.* at 57. If the jobs were sufficiently separate, however, the issue of requirements splitting may have been moot. The court did not address this point.

279. *DOD Annual Report Emphasizes Business Process Reforms, Calls For Expanding Use of Commercial Practices*, 42 GOV'T CONTRACTOR 9, ¶ 81 (Mar. 1, 2000).

280. *Commercial Items Key to Fielding Lower-Cost Systems, DOD Says*, 42 GOV'T CONTRACTOR 30, ¶ 312 (Aug. 9, 2000).

281. Martha A. Matthews, *Navy Launches Contracting Strategy for "Commercial Ideas", Not End Items*, BNA FED. CONT. DAILY, May 3, 2000. Contracting for commercial ideas will involve seeking industry approaches to satisfying a generic requirement rather than seeking predefined products or services. After receiving these industry approaches, the government will then provide a statement of objectives to which industry can respond. The results will be fixed price or fixed price incentive contracts. *Id.*

282. National Defense Authorization Act for Fiscal Year 2000, 41 U.S.C. § 403(12)(E) (2000).

283. Formerly, the services had to be available to the general public and to the government at the same time and from the same work force as the commercial item. 41 U.S.C. § 403(12)(E).

284. Previously, the statute required the source to provide the same service to the general public in order to qualify as a commercial service. *Id.*

item."[285] The new definition would be: "Any item . . . that is of a type customarily used *by the general public or by non-governmental entities* for purposes other than governmental purposes . . . . *Purposes other than governmental purposes are those that are not unique to a government.*"[286] By stressing use by the general public, the new definition would therefore place more emphasis on the "commercial" aspect of a "commercial item."

What are Those Prisoners Up to Now?

Before agencies can even look to commercial sources to acquire commercial items, the FAR requires contracting officers to satisfy requirements through priority sources. One of those priority sources is Federal Prison Industries, Inc. (FPI). Some members of Congress, however, are unhappy with FPI's mandatory source status and its expansion in both the public and commercial marketplace. In one instance, a congressman has introduced legislation that would end FPI's mandatory source status, largely at the prompting of The Federal Prison Industries Competition in Contracting Coalition.[287] The same congressman also "blasted" FPI for refurbishing computer equipment and selling it in the commercial marketplace.[288]

Electronic Commerce

Another way that the government is becoming more like a commercial entity is through the increasing use of electronic commerce to conduct procurements. As of 1 October 2001, "FedBizOpps" will be the "single point of universal electronic public access to Government-wide procurement opportunities."[289] By providing for "one-stop shopping," FedBizOpps will further streamline the procurement process for both the government and for contractors.[290]

The government is further leveraging e-commerce to its benefit through the use of "reverse auctions." In a reverse auction, contractors compete in real time over the Internet as they bid for government contracts. Rather than raising their prices as buyers would in a normal auction, contractors lower their bids until one bidder stands lower than the rest. The Navy has already conducted one reverse auction.[291] The Defense Finance and Accounting Service (DFAS) also conducted a four-hour reverse auction[292] for computers and printers, among fifteen pre-qualified suppliers resulting in an estimated cost savings of $2.2 million. As with other aspects of e-commerce, reverse auctions have the potential to greatly streamline the acquisition process.

No Prejudice, No Protest

In *Johnson Controls World Services, Inc.*,[293] a protester claimed that the Army had improperly awarded a base operations and maintenance service contract using the streamlined commercial item procedures. The protester argued that the Army could not use commercial item procedures because the services contracted for were not commercial. Without ever addressing the substantive allegation, the GAO dismissed the protest because the protester could show no prejudice. Although the protester complained that the Army had improperly used the abbreviated response time allowed for commercial items, it never claimed that it actually needed more time to prepare its quotation. Additionally, while the protester asserted that the Army's price-only evaluation scheme was improper, it could not show how this scheme harmed it any more than it would harm other offerors. Absent proof of actual and individual harm, the GAO dismissed the protest as academic.

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285. Acquisition of Commercial Items, 65 Fed. Reg. 52,284 (Aug. 28, 2000) (amending FAR 2.101). FAR 2.101 currently defines "commercial item" as "any item, other than real property, that is of a type customarily used for nongovernmental purposes . . . ." FAR, *supra* note 49, at 2.101.

286. Acquisition of Commercial Items, 65 Fed. Reg. at 52,284 (emphasis added).

287. Leroy H. Armes, *Senate Judiciary Members May Tackle Federal Prison Industry Reforms*, 74 BNA FED. CONT. REP. 164 (2000). The Federal Prison Industries Competition in Contracting Coalition includes the American Apparel Manufacturers Association, the American Electronics Association, the American Furniture Manufacturers Association, the American Society of Interior Designers, the American Subcontractors Association, Associated General Contractors, and the Business Coalition for Fair Competition. *Id.*

288. George Cahlink, *Lawmakers Lament Prison Firm's Move Into Computer Sales*, GOV'T EXECUTIVE MAG. (Sep. 27, 2000), *available at* http://www.govexec.com/dailyfed/0900/092700g1.htm.

289. Federal Acquisition Regulation; Electronic Commerce in Federal Procurement, 65 Fed. Reg. 50,872 (2000) (amending FAR pts. 2, 4, 5, 6, 7, 9, 12, 13, 14, 19, 22, 34, 35, 36). The Web site, already up and running, is at http://www.fedbizopps.gov.

290. In a reverse sort of way, the GSA is also using "e-commerce" to make it easier for the government to find small-businesses to fulfill its requirements. On 3 April 2000, it powered up a new Web site–http://www.SmallBiz Mall.gov–to help agencies shop for information technology products from small, disadvantaged businesses. *Electronic Commerce: GSA Launches E-Commerce Site for Small Disadvantaged Businesses*, 73 BNA FED. CONT. DAILY 441 (2000).

291. *Navy Awards First Internet Reverse Auction Contract*, BNA FED. CONT. DAILY, May 19, 2000.

292. *DFAS Finds Significant Savings with Online Reverse Auction*, 42 GOV'T CONTRACTOR 37, ¶ 390 (Oct. 4, 2000).

293. B-285144, July 6, 2000, 2000 CPD ¶ 108.

A Helicopter by Any Other Name Is Still a Helicopter

The current commercial item test program permits agencies to purchase commercial goods and services up to $5 million using simplified acquisition procedures.[294] This authority allows contracting officers to obtain many big-ticket items using streamlined procedures. Offerors that did not benefit from the strict, streamlined procedures, however, will often allege that such big-ticket items are not "commercial" after all. Such was the case in *Crescent Helicopters*.[295]

In *Crescent*, the Department of the Interior contracted for helicopter services, including wildfire suppression, using the commercial item test program. Crescent protested, claiming that helicopter services did not fit the definition of a commercial item. The GAO disagreed. It held that agencies have broad discretion in determining what constitutes a commercial item. The Comptroller General then specifically found that the helicopter services that Interior sought qualified as a commercial item "because this type of service is offered and sold competitively by the aviation industry in substantial quantities to corporations and other private entities." The key, therefore, to successfully calling something a commercial item is ensuring that it is readily available in non-government, commercial industry.

I Can Feel You Breathe

It is completely discretionary for the government to seek further competition when buying from an FSS, as price is predetermined to be reasonable. When it asks for competition among FSS vendors, however, the government must give those vendors sufficient details about the solicitation to allow them to compete intelligently and fairly.

In *Draeger Safety, Inc.*,[296] the Navy sent a draft Blanket Purchase Agreement (BPA) to vendors holding FSS contracts for self-contained breathing apparatus (SCBA), stating that it would establish BPAs with the vendors who offered the best value. The draft BPA did not disclose to the vendors any evaluation scheme, source selection criteria, or testing criteria. When the Navy decided that Draeger's proposal did not meet the agency's needs, a protest ensued. Draeger argued that the Navy should have disclosed its evaluation criteria and the GAO agreed. In an interesting opinion, GAO held that disclosure of evaluation criteria was necessary to a fair competition, even if such competition was not conducted using negotiated procedures. Nonetheless, the GAO dismissed the protest because it found that Draeger could not have met the Navy's needs even if it knew the full evaluation criteria.

Don't Call Us, We'll Call You

Congress recognizes the FSS system as adequate competition if it represents the lowest overall cost alternative for the government.[297] The GAO reinforced this rule in *Sales Resources Consultants, Inc.*[298] Sales Resources sent an unsolicited proposal to the IRS, knowing that the agency was about to place an FSS order for computer software. However, the offeror was not an FSS vendor. Sales Resources then protested when the IRS did not consider its proposal and instead chose an FSS vendor. In finding for the IRS, the GAO held that the government need not consider unsolicited offers from non-FSS vendors when procuring an item under a FSS contract. Additionally, the GAO ruled that a non-FSS vendor is not an interested party with standing to protest the award of a FSS contract.[299]

Small Business

Adarand II: Supreme Court Orders Further Consideration

When we last left *Adarand*, the Court of Appeals for the Tenth Circuit had declared the controversy mooted by the self-certification of the plaintiff, Adarand Constructors, as a disad-

294. 10 U.S.C. § 2304 (g)(1)(B) (2000).

295. B-284706 et al., May 30, 2000, 2000 CPD ¶ 90.

296. B-285366, B-285366.2, Aug. 23, 2000 (unpublished).

297. 10 U.S.C. § 2302(2)(C) (2000).

298. B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102.

299. Contrast this decision with *Delta International, Inc.*, B-284364.2, May 11, 2000, 2000 CPD ¶ 78. In *Delta*, the GAO ruled that a FSS vendor does have standing to contest an agency's decision that the vendor's products do not meet its needs.

Adarand Constructors, Inc. v. Slater, 120 S. Ct. 722 (2000). The Supreme Court disagreed with the Tenth Circuit's analysis of the case, finding the Tenth Circuit had "confused mootness with standing . . . and as a result placed the burden of proof on the wrong party." *Id.* at 724. The issue would only be moot, according to the Supreme Court, if the voluntary cessation of the challenged conduct would not recur. *Id.* at 726. The court questioned whether the Colorado Department of Transportation's disadvantaged business certification procedures comply with federal regulations and whether Colorado's certification would be acceptable to the U.S. Department of Transportation. Given such a question the court said the respondents had failed to establish that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," and the cause of action was not moot, but rather, very much alive. *Id.*

vantaged business enterprise under Colorado's affirmative action program. [300] The Supreme Court, however, reversed the Tenth Circuit's decision and remanded the case.[301]

On remand, the Tenth Circuit reversed the district court and upheld Colorado's Subcontractor Compensation Clause (SCC) program and disadvantaged business enterprise (DBE) certification procedures.[302] The court noted that the district court was correct, given the state of the programs at the time of the initial challenge, that the SCC program was not narrowly tailored.[303] However, the Tenth Circuit considered the current state of the SCC and DBE programs, and found that the changes made to the programs satisfied strict scrutiny. [304] Particularly important to the court was the fact that the current regulatory scheme requires an individualized finding of economic disadvantage.[305] Adarand owner Randy Pech has vowed to appeal once again and challenge the court's application of strict scrutiny.[306]

Regulatory Changes to Small Business Programs

Small Disadvantaged Business Certification Appeal Procedures

The Small Business Administration (SBA) rules require SBA certification of a business' disadvantaged status. A new rule sets forth the appeal procedures for applicants denied disadvantaged status.[307] Applicants denied Small Disadvantage Business status may, within forty-five days, request that the Assistant Administrator, Office of Small Disadvantaged Business Certification and Eligibility (AA/SDBCE) reconsider the denial.[308] The new rule does not affect any current appeal rights.[309]

Small Business Specialist Review Threshold Changed

On 25 October 2000, the Director of Defense Procurement changed the threshold amount for small business specialist review of procurements.[310] The rule changed the previous procurement threshold of $100,000 to $10,000.[311] This final rule will allow small business specialists to make recommendations regarding award to small businesses for a greater number of small acquisitions.[312]

Governmental Actions to Increase Business Opportunities for SDBs

Small Disadvantaged Businesses (SDB) have two new programs designed to increase contracting opportunities with the federal government. On 23 May 2000, President Clinton signed Executive Order 13,157[313] highlighting his commitment to expanding opportunities for women-owned small businesses (WOSB). The Executive Order states the policy of the Executive Branch to "take all steps necessary to meet or exceed the

300. Adarand Constructors, Inc. v. Slater, 169 F.3d 1291, 1296 (10th Cir. 1999). *See 1999 Year in Review, supra* note 37, at 39 (discussing the Tenth Circuit decision).

301. Adarand Constructors, Inc. v. Slater, 120 S. Ct. 722 (2000). The Supreme Court disagreed with the Tenth Circuit's analysis of the case, finding the Tenth Circuit had "confused mootness with standing . . . and as a result placed the burden of proof on the wrong party." *Id.* at 724. The issue would only be moot, according to the Supreme Court, if the voluntary cessation of the challenged conduct would not recur. *Id.* at 726. The court questioned whether the Colorado Department of Transportation's disadvantaged business certification procedures comply with federal regulations and whether Colorado's certification would be acceptable to the U.S. Department of Transportation. Given such a question the court said the respondents had failed to establish that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," and the cause of action was not moot, but rather, very much alive. *Id.*

302. Adarand Constructors, Inc., v. Slater, et al., No. 97-1304, 2000 U.S. App. LEXIS 23725 (10th Cir. Sept. 25, 2000).

303. *Id.* at *79.

304. The court noted that Colorado no longer uses the SCC program. *Id.* at *22. Instead of addressing the SCC program, which is no longer used, the court focused on the DBE procedures found in the FAR. *Id.*

305. Current eligibility requirements for small disadvantaged businesses are found at FAR, *supra* note 49, at 19.001, and 13 C.F.R. pt. 124 (2000).

306. Tripp Baltz, *Constitutionality of Highway Programs Upheld by Tenth Circuit in Latest Adarand Ruling*, 74 BNA FED. CONT. REP. 302 (2000).

307. 8(a) Business Development/Small Disadvantaged Business Status Determinations , 65 Fed. Reg. at 33,249 (May 23, 2000) (amending 13 C.F.R. pt. 124).

308. *Id.* (amending 13 C.F.R. § 124.1008(f)(3)(i)).

309. If the denial is based solely on reasons of social or economic disadvantage, or disadvantaged ownership and control, applicants may appeal directly to the SBA's Office of Hearings and Appeals.

310. *See* Defense Federal Acquisition Regulation Supplement; Technical Amendments, 65 Fed. Reg. at 63,806 (Oct. 25, 2000).

311. *Id.*

312. *Id.*

313. Exec. Order No. 13,157, 65 Fed. Reg. 34,035 (2000).

five percent government-wide goal for participation in procurement" for WOSBs.[314] Another avenue of assistance for SDBs is a new partnership agreement between the SBA and the GSA.[315] The partnership is an effort to increase participation of 8(a)[316] firms in GSA's FSS program.[317] Under the agreement, SBA will accept all 8(a) contracts under GSA's Multiple Award Schedule program,[318] thereby relieving GSA from offering each schedule individually to SBA. Most significantly, the agreement allows federal agencies to count awards given to 8(a) firms under the FSS toward agency 8(a) goals.[319]

In October 2000, President Clinton signed Executive Order 13,170[320] reemphasizing the importance of adherence to the small disadvantaged procurement goals, and reinforcing the Executive Branch's policy of insuring inclusion of small disadvantaged businesses in federal procurement. The executive order encouraged federal agencies to take steps to ensure disadvantaged businesses are aware of business opportunities, to increase technical assistance to small disadvantaged businesses, and to increase the use of such businesses as prime and subcontractors.[321] The order specifically tasked the SBA to evaluate small disadvantaged business procurement goal accomplishment on a quarterly basis, to publicize how well federal agencies meet small business procurement goals, and to ensure local contract advisors receive adequate training on small disadvantaged business utilization.[322]

Contract Bundling—New Rules and Continued Congressional Concern

Last year saw the introduction of an interim rule implementing provisions of the Small Business Authorization Act of 1997.[323] The interim rule became a final one on 26 July 2000,[324] with a significant change affecting contracts valued above $75 million. In order to bundle requirements, the agency must show savings totaling $7.5 million or five percent of the contract value, whichever is greater.[325] The rule for contracts under $75 million remains unchanged—the benefits of consolidation must equal ten percent of the contract value.[326]

Improper Bundling in Action

N&N Travel & Tours, Inc.,[327] involved the provision of travel services at Travis Air Force Base, California. Here, instead of extending the incumbent's travel management services contract in anticipation of a DOD-wide regional travel system contract,

314. These steps include designating a senior acquisition official to work with SBA to identify and promote contracting opportunities, requiring contracting officers to include WOSBs in competitive acquisitions to the maximum extent practicable, structuring acquisitions to facilitate competition among small businesses, including HUBZone businesses, SDBs and WOSBs, and developing procedures to increase compliance by prime contractors with subcontracting plans, to include those involving WOSBs. *Id.*

315. Press Release, U.S. Small Business Administration, SBA and GSA Enter Into Partnership Agreement to Increase 8(a) Contracting Opportunities (June 13, 2000), *available at* http://ftp.sbaonline.sba.gov/news/ current00/00-58.pdf.

316. The primary program in the federal government designed to assist small disadvantaged businesses is commonly referred to as the 8(a) program. The program derives its name from Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (2000).

317. The FSS program provides federal agencies with a simplified process for obtaining commonly used commercial supplies and services at prices associated with volume buying. *See* FAR, *supra* note 49, at 8.4. The GSA manages the FSS program pursuant to Section 201 of the Federal Property Administrative Services Act of 1949. *See* 41 U.S.C. §§ 251-260 (2000).

318. A Multiple Award Schedule (MAS) is a schedule in the FSS that contains prices for comparable supplies or services being offered by more than one supplier. *See* FAR, *supra* note 49, at 8.404.

319. *See* Press Release, *supra* note 315.

320. 65 Fed. Reg. 60,828 (2000).

321. *Id.*

322. *Id.* The executive order reaffirmed the President's "commitment to ensuring all Americans share in our nation's prosperity" but did not set any new goals or create any new enforcement mechanisms. Press Release, Office of the Press Secretary, The White House, President Clinton and Vice President Gore: Increasing Opportunities and Access for Disadvantaged Businesses (Oct. 6, 2000) (on file with author).

323. *See 1999 Year in Review*, *supra* note 37, at 37, for discussion of the interim rule.

324. Government Contracting Programs, 65 Fed. Reg. 45,831 (July 26, 2000); Federal Acquisition Circular 97-19, 65 Fed. Reg. 46,052 (July 26, 2000) (incorporating these changes into the FAR).

325. Prime Contracting Assistance, 13 C.F.R. § 125.2(d)((3)(iii)(A)(2) (2000).

326. *Id.* § 125.2(d)(3)(iii)(A)(1).

327. B-285164.2, B-285164.3, 2000 U.S. Comp. Gen. LEXIS 128 (Aug. 31, 2000).

the contracting officer issued a task order against GSA's ID/IQ travel services contract. Four small businesses protested, claiming that provision of travel services at Travis should be set aside for small businesses.[328] The GAO sustained the protest. It found that the agency had improperly bundled work previously provided by a small business into a contract covering all federal travel work for the state of California. Additionally, GAO concluded that FAR 19.502-2 required purchase of travel services for Travis AFB as a small business set aside.[329] The GAO focused on the lack of evidence that bundling the services into the broader GSA ID/IQ contract was either necessary or justified as required by the Small Business Act.[330]

But, Congress Isn't Through Yet!

Just prior to publication of the new final rules regarding bundling, Representative Nydia Velazquez (Democrat-N.Y.) introduced two new bills designed to assist small businesses.[331] The first of Representative Velazquez' bills, "The Small Business Contract Equity Act,"[332] would prohibit any agency that fails to meet small business acquisition goals in any fiscal year from awarding a bundled contract during the following fiscal year.[333] The second bill offered by Representative. Velazquez, the "Equity in Contracting for Women Act,"[334] would authorize a set-aside for women owned small businesses (WOSB) in industries in which the SBA determines women owned small businesses are underrepresented. This act provides similar procedures to the benchmarking analysis for small disadvantaged businesses. The proposal does not require set aside, but merely allows agencies to set aside procurements specifically for WOSB.[335]

Finally, in the aftermath of an Air Force decision to issue a consolidated contract for weapons parts, equipment and associated services under the Flexible Acquisition Sustainment Tool (FAST) program, the House of Representatives passed a bill that would monitor the practice of contract bundling. The "Small Business Competition Preservation Act of 2000"[336] would require a database of all bundled contracts issued by federal agencies and authorize analysis of the effect of bundling on small businesses.[337] The Act would also require an annual report to Congress containing data on the number of small businesses displaced by bundled contracts, the number and dollar value of bundled contracts, a description of the activities subject to bundled contracts, and justification for each bundled

328. In essence, the protestors challenged whether the solicitation for GSA's ID/IQ contract properly included the services they claimed should be set aside for small businesses. *Id.*

329. Total small business set-asides are required for acquisitions of supplies and services when a) the anticipated dollar value exceeds $2500 but not $100,000, or b) the dollar value exceeds $100,000 but there is a reasonable expectation of offers from at least two responsible small business concerns and award can be made at fair market price. FAR, *supra* note 49, at 19.502-2.

330. *N&N Travel*, 2000 U.S. Comp. Gen. LEXIS 128, at *18. Interestingly, although this is the first case alleging improper bundling since the effective date of the new rules governing the subject, the GAO did not discuss the case in terms of the rules. Instead, they focused on the complete lack of *any* justification for including Travis in the government-wide contract. *Id.*

331. *House Bills Would Curb Contract Bundling, Establish Women-Owned Business Set-Asides*, BNA Fed. Cont. Daily, July 20, 2000. The impetus for her new legislation appears to be a concern that federal agencies are not meeting small business procurement goals, as highlighted by a staff report criticizing federal agencies for their efforts. Democratic Staff of the House Small Business Committee, 106th Cong., Failing to Meet the Grade: How the Federal Government is Failing America's Small Businesses in the Federal Procurement Process (Comm. Print 2000). This report concluded that contract bundling has had an adverse effect on small businesses, especially women owned and 8(a) firms. *Id.* The GAO's report on the effect of contract bundling reached a different conclusion. *See* General Accounting Office, Report No. GAO/GGD-00-82, Small Businesses: Limited Information Available on Contract Bundling's Extent and Effects (2000). The GAO concluded that while the number of contractors and contract dollars were generally reduced as a result of consolidation, consolidation did not necessarily result in bundling. *Id.* at 21. GAO found insufficient data on the extent of contract bundling and the resulting effect on small businesses. *Id.* However, in the one bundled contract identified by SBA, the resulting contractor was a small business. *Id.*

332. H.R. 4890, 106th Cong. (2000). It appears that this bill will not become law during the 106th Congress. However, it is likely that Representative Velazquez will reintroduce the measure in the 107th Congress.

333. *Id.* § 3(a)(1). This provision would apply to solicitations and the resulting contracts issued on or after 1 October 2000. To determine whether an agency was eligible to award bundled contracts, GSA would forward date from the Federal Procurement Data System on each agency to the SBA by 15 September of each year, demonstrating to what extent each agency met its small business goals. *Id.* § 3(b)(2)(4).

334. H.R. 4897, 106th Cong. (2000). It appears that this bill will not become law during the 106th Congress. However, Representative Velazquez may reintroduce it in the 107th Congress.

335. There are no penalties for agencies that do not set aside procurements for WOSB, and no mention of additional procurement goals for WOSB. In effect, this bill provides for a small disadvantaged business program for WOSB only. *Id.*

336. H.R. 4945, 106th Cong. (2000). As with the other measures, it appears that this bill will not become law during the 106th Congress, but may be reintroduced in the 107th Congress.

337. *Id.* The bill includes in the definition of a bundled contract any new procurement requirement that permits the consolidation of two or more procurement requirements, and requires analysis to determine whether the savings achieved by bundling the requirements will continue over the long term or whether the agency would achieve greater savings by dividing the requirement into separate solicitations suitable for award to small businesses. *Id.* § 2 (adding 15 U.S.C. § 644(p)(3)(B)).

contract, including the cost savings, both in the short and long term.[338]

Labor Standards

Service and Construction Contracts in Noncontiguous States

On 17 August 2000, the Director of Defense Procurement issued a final rule[339] implementing section 8071 of the Fiscal Year 2000 Defense Appropriations Act.[340] The rule applies to construction and service contracts to be performed in a noncontiguous state[341] in which the unemployment level exceeds the national average as determined by the Secretary of Labor.[342] Under the rule, contractors must employ residents of the qualifying noncontiguous state on construction or service work to be performed in that state.[343] The head of an agency may waive this requirement on a case-by-case basis "in the interest of national security."[344] The rule includes a new Defense Federal Acquisition Regulation Supplement (DFARS) clause, to be included in all solicitations and contracts subject to the new Subpart, to implement these requirements.[345]

The Service Contract Act (SCA): Application to Commercial Services

A flurry of regulatory activity with respect to the application of the SCA to subcontracts for commercial items took place this year, beginning with a change to the FAR. In a final rule published on 26 July 2000,[346] the FAR Council deleted the SCA from the list of laws inapplicable to subcontracts for commercial items.[347] In the background to the rule, the FAR Council explained that it had, in consultation with the Department of Labor (DOL), "concluded that it is not in the best interest of the Government to retain the SCA on the list of laws that are inapplicable to all subcontracts for commercial items,"[348] and that any exemptions for commercial items "should be accomplished under the Secretary of Labor's authority in the SCA."[349]

DOL Proposed Rule

On the same day, 26 July 2000, DOL issued a proposed rule that would provide for blanket exemptions for certain types of commercial items contracts.[350] The rule proposes a two-tiered process for determining whether a commercial item contract is exempt from SCA coverage. First, there are only nine categories of services to which the exemption could apply.[351] In addition to falling within one of the nine categories of services, the contract must meet all of seven criteria in order to qualify for the exemption.[352] The proposed rule would not apply to any contract entered into under the Javits-Wagner-O'Day Act or to any contract subject to section 4(c) of the SCA.[353]

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338. Additionally, the report must detail how the bundled contracts complied with the agency's small business subcontracting plan, and the impact on small businesses unable to compete as prime contractors. *Id.* (adding 15 U.S.C. § 644(p)(4)).

339. Defense Federal Acquisition Regulation Supplement; Construction and Service Contracts in Noncontiguous States, 65 Fed. Reg. 50,151 (2000). The final rule adopts, with two changes, the interim rule published on 16 March 2000. 65 Fed. Reg. 14,402 (2000). The interim rule also added a new Subpart 222.70 to the DFARS, *supra* note 258. *Id.*

340. Pub. L. No. 106-79, 113 Stat. 1212 (1999).

341. The term "noncontiguous state" is defined to include Alaska, Hawaii, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and a list of outlying islands under United States control. Defense Federal Acquisition Regulation Supplement; Construction and Service Contracts in Noncontiguous States, 65 Fed. Reg. 50,151 (Aug. 17, 2000).

342. Application of Labor Laws to Government Acquisitions, 65 Fed. Reg. 14,403 (Mar. 16, 2000).

343. *Id.*

344. *Id.*

345. DFARS, *supra* note 258, at 252.222-7000 (Restrictions on Employment of Personnel). *Id.*

346. Service Contract Act, Commercial Item Subcontracts, 65 Fed. Reg. 46,068 (July 26, 2000).

347. *Id.* (amending FAR 12.504 and FAR 52.212-5).

348. *Id.*

349. *Id.*

350. Service Contract Act; Labor Standards for Federal Service Contracts, 65 Fed. Reg. 45,943 (July 16, 2000). Note that this proposed rule applies to both prime contracts and subcontracts.

DOL Final Rule

In a companion action to the proposed rule discussed above, DOL published a final rule exempting certain subcontracts from SCA coverage.[354] DOL stated that this rule was necessary because of the combined effect of the FAR Council's action and the DOL proposed rule on this subject. In effect, subcontracts previously exempt under the FAR could be not exempt for a short period of time, then exempt again when the DOL proposed rule became final. In order to avoid "the serious impairment of government business," DOL determined it was necessary to issue this final rule exempting subcontracts that meet all of the requirements of the proposed rule discussed above.[355] This exemption will remain in effect for one year or until the proposed rule becomes final, whichever occurs first.[356]

DOD's Class Deviation

To implement the DOL rule discussed above, the Director of Defense Procurement issued a class deviation to the FAR.[357] This class deviation exempts from SCA coverage all subcontracts for commercial items meeting the requirements of the DOL proposed rule.

The Davis-Bacon Act (DBA)

CAFC Finds Ambiguity in Consent Decree; Overturns Default Termination

In the 1998 version of this article, we brought you the story of Herman B. Taylor Construction Company (Taylor).[358] At that time, the General Services Board of Contract Appeals

351. The notice states that additional categories could be proposed for comment if DOL receives sufficient justification to add additional categories. *Id.* at 45,946. The nine categories of services are:

> (1) Automatic data processing and telecommunications services;
> (2) Automobile or other vehicle (e.g., aircraft) maintenance services (other than contracts to operate a Government motor pool or similar facility);
> (3) Financial services involving the issuance and servicing of cards (including credit cards, debit cards, purchase cards, smart cards, and similar card services);
> (4) Lodging at hotels/motels and contracts with hotels/motels for conferences;
> (5) Maintenance services for all types of specialized building or facility equipment such as elevators, escalators, temperature control systems, security systems, smoke and/or heat detection equipment, etc.;
> (6) Installation, maintenance, calibration or repair services for all types of equipment where services are obtained from the equipment manufacturer or supplier of the equipment;
> (7) Transportation of persons by air, motor vehicle, rail, or marine on regularly scheduled routes or via standard commercial services (not including charter services);
> (8) Real estate services; and
> (9) Relocation services.

Id. at 45,946-45,948.

352. The seven criteria are:

> (1) The services under the contract are commercial;
> (2) The prime contract or subcontract will be awarded on a sole source basis or the contractor will be selected for award on the basis of other factors in addition to price. In these cases, price must be equal to or less important that the non price factors used in selecting the contractor;
> (3) The prime contract or subcontract services are furnished at prices which are, or are based on, established catalog or market prices;
> (4) All of the service employees who will perform the services under the Government contract or subcontract spend only a small portion of their time servicing the government contract. ("Small portion" is generally defined as less than 20 percent of available hours on a monthly basis.);
> (5) The contractor utilizes the same compensation plan for all service employees under the government contract as it does for employees servicing commercial customers;
> (6) The contracting officer (or prime contractor for a subcontract) determines in advance, based on the nature of the contract requirements and knowledge of the practices of likely offerors, that all or nearly all offerors will meet the first five criteria; and
> (7) The exempted contractor or subcontractor must certify in the contract that it is in compliance with criteria 1 and 3 through 5.

Id. at 45,945-45,946.

353. *Id.* at 45,946.

354. *Id.* at 45,903.

355. *Id.*

356. *Id.* The DOL stated that it hoped to have the final rule in place within six months. *Id.*

357. Memorandum, Director of Defense Procurement, subject: Class Deviation—Applicability of the Service Contract Act to Subcontracts for the Acquisition of Certain Commercial Services (25 Aug. 2000).

(GSBCA) had upheld the default termination of Taylor's contract for failure to comply with the labor standards provisions of the contract.[359] The board reached this conclusion even though Taylor had entered into a consent agreement with DOL under which it agreed, *inter alia*, to pay back wages due the employees. The GSBCA based its holding on its finding that DOL had determined that the violations had occurred.[360]

On appeal, the Federal Circuit overturned the default termination and remanded the case to the GSBCA.[361] The court noted that the consent agreement contained a clear statement that Taylor was not admitting wrongdoing or liability. The court also raised, then rejected, a possible argument that the DOL administrative law judge's (ALJ) adoption of "the consent findings as his own `findings of fact and conclusions of law . . . representing a full, final and complete adjudication of this proceeding'" could be used by the government as a basis for determining that the ALJ had adjudicated and accepted DOL's position in the case.[362] The court reasoned that the labor standards provision of the contract required disputes to be settled in accordance with DOL regulations. Those regulations required a final decision by the ALJ after a hearing or, if the contractor does not request a hearing, after the DOL finding of a violation becomes final.[363]

Since there had been no hearing and final adjudication of the issues, and since the consent agreement did not contain a clear acceptance of DOL's finding of violations, the court held that the consent agreement could not provide the basis for a default termination of Taylor's contract. Hopefully, the lesson for practitioners is clear—contracting officers must ensure that they are dealing with a final DOL determination of a violation before terminating a contract for default on the basis of that violation.[364]

Local Trade Practice Key to the Reasonableness of Contractor's Wage Determination Interpretation

In *Hunt Building Corp.*,[365] the ASBCA considered a contractor's claim of entitlement to a price adjustment under its fixed-price contract because it had reasonably misinterpreted the applicable wage determination. A subcontractor to Hunt had read the wage determination to allow it to use pipe layers (laborers) to install plumbing in the interior of a building rather than plumbers. After reaching an agreement with DOL that it would pay the workers the higher plumber's wages, Hunt filed a pass-through claim with the contracting officer seeking recovery under the changes clause. Among other things, Hunt argued that the subcontractor had reasonably interpreted the wage determination to allow the lower payments.

The board rejected Hunt's argument on two related grounds. First, the subcontractor was dealing with two wage determinations for the same work on related projects. These two wage determinations contained somewhat conflicting guidance regarding the classification at issue (pipe layer versus plumber). The board held that this conflict "should have alerted Hunt to the need for investigating the applicability of that classification."[366] In addition, the board found that Hunt "was obliged to apply any relevant 'technical and trade knowledge' which could be expected to be in the possession of a reasonably intelligent bidder."[367] Finding that there was a "well-established and recognized prevailing trade practice" in the localities where the contracts were performed that the installation of piping inside a building was plumber's work, not pipe layer's, the board held that the existence of this trade practice was the type of trade knowledge of "which Hunt could reasonably have been expected to have known or to have discovered before bidding."[368]

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358. *See* Major David A. Wallace, et al., *1998 Contract and Fiscal Law Developments—The Year in Review,* ARMY LAW., Jan. 1999, at 45.

359. Taylor failed to pay DBA and Contract Work Hours and Safety Standards Act wages. *See* Herman B. Taylor Constr. Co. v. Gen. Serv. Admin., GSBCA No. 12961, 98-2 BCA ¶ 29,836.

360. *Id.* at 147,715.

361. Herman B. Taylor Constr. Co. v. Barram, 203 F.3d 808 (Fed. Cir. 2000).

362. *Id.* at 814.

363. *Id.*

364. On remand, the GSBCA converted the default termination to a termination for convenience. *See* Herman B. Taylor Constr. Co. v. Gen. Serv. Admin., GSBCA No. 12961-R, 00-2 BCA ¶ 30,935.

365. ASBCA No. 50083, 2000 ASBCA LEXIS 146 (Sept. 11, 2000).

366. *Id.* at *22.

367. *Id.* (citing Adrian L. Roberson, ASBCA No. 6248, 61-1 BCA ¶ 2857 at 14,915).

368. *Id.*

Service Contract Act or Davis Bacon Act? Read the Solicitation!

In *Patriot Maintenance, Inc.*,[369] the ASBCA ventured slightly into the morass of "dual coverage"—requirements under contracts that potentially are subject to either the SCA or the DBA.[370] The case involved a fixed-price Air Force contract for maintenance of family housing, including painting. The Air Force amended the IFB for this requirement to respond to questions from potential bidders. One bidder questioned whether the SCA or the DBA would apply to the painting requirement. In response, the Air Force simply stated that the DBA applied. However, in a subsequent amendment, the Air Force "clarified" its answer by advising bidders to utilize the guidelines in DFARS 222.402-70 in determining which labor standard to apply.[371] Patriot's president reviewed this DFARS provision, reached the conclusion that the SCA applied to the painting work, and prepared his bid accordingly.

Fourteen months into contract performance, the contracting officer discovered that Patriot was paying SCA wages for the painting work. The contracting officer then directed Patriot to begin paying DBA wages and to make back-payment to the affected employees for the higher DBA wages. Patriot paid over $56,000 in back payments and filed a claim to recover this amount. On these facts, the board granted summary judgment in favor of the government. The board agreed with the government that the contractor was not "contractually permitted to choose to pay wages under either" the DBA or the SCA.[372] The board noted that the solicitation had clearly stated that painting was subject to the DBA. According to the board, to the extent that a subsequent amendment referring to DFARS 222.402-70 created an ambiguity, that ambiguity was patent and, therefore, Patriot should bear the risk of its failure to inquire.[373]

ASBCA Retains Jurisdiction Over Claim Involving DBA Investigation

In *Overstreet Electric Company, Inc.*,[374] the ASBCA dealt with a government motion to dismiss for lack of jurisdiction. Overstreet had become embroiled in a dispute with the government concerning the adequacy of its payments under a DBA-covered contract. Among many other things, Overstreet alleged that the government was improperly withholding funds under its contract because the government had not followed the procedures found in FAR and DFARS Parts 22 in conducting its investigation of Overstreet's alleged DBA violations.[375] The board first agreed with the government that "disputes arising out of the labor standards provisions of contracts are within the exclusive jurisdiction of DOL,"[376] but went on to state that "the board has jurisdiction over disputes which are centered upon the parties' contract rights and obligations, even though matters reserved to DOL may be part of the factual predicate."[377] The board found that this dispute fell into the latter category and therefore denied the government's motion to dismiss.

Bid Protests

The Meaning of Life

When the January 2001 edition of the The Army Lawyer hits the newsstands, many questions will remain for the reader to ask: What is the meaning of life? Why is it that we can put a man on the moon but we can't put aluminum foil in the microwave? Will the Pittsburgh Steelers ever be good again? While all of these important questions may be left unanswered, one significant issue should be resolved—will protest jurisdiction in the District Courts continue after 31 December 2000?

369. ASBCA No. 51756, 2000 ASBCA Lexis 125 (Sept. 6, 2000).

370. *Id.*; *see* DFARS, *supra* note 258, at 222.402-70.

371. DFARS, *supra* note 258, at 222.402-70(d)(3), states: "Painting work of 200 square feet or more to be performed under an individual service call or order shall be considered to be subject to the DBA regardless of the total work hours involved."

372. *Patriot*, 2000 ASBCA LEXIS 125, at *9.

373. *Id.* at *10-11.

374. ASBCA Nos. 51653, 51715, 2000 ASBCA LEXIS 111 (July 24, 2000).

375. *Id.* Overstreet alleged that a contracting officer had not properly delegated authority to the individuals who conducted the investigation (including a government attorney).

376. *Id.* at *7 (citing Emerald Maint., Inc. v. United States, 925 F.2d 1425 (Fed. Cir. 1991)).

377. *Id.* (citing Burnside-Ott Aviation Training Ctr., Inc. v. United States, 985 F.2d 1574 (Fed. Cir. 1993)).

As most practitioners in the area of bid protests are aware, the Administrative Dispute Resolution Act of 1996 (ADRA)[378] provides for the sunset of the District Courts' concurrent bid protest jurisdiction on 31 December 2000.[379] To assist it in determining whether to continue such protest jurisdiction, Congress directed the GAO to study the need for concurrent jurisdiction.[380] The GAO released its much-anticipated report on 17 April 2000. While private practitioners were in favor of retaining the district court jurisdiction,[381] the GAO comments appeared inconclusive as to whether small businesses would unduly suffer without the availability of this additional bid protest forum.

The GAO report provided information on bid protests filed by small businesses in district courts and the COFC since the ADRA took effect on 31 December 1996.[382] The report focused on, among other issues, the number of protests filed in both the COFC and the district courts[383] and the forum in which more small businesses filed protests.[384] While the report provided a comprehensive statistical overview of the case filings at the COFC and the district courts, the GAO offered no substantive comments on whether the sunset of district court jurisdiction would have a significant impact on small businesses. Even if the GAO had provided such comments, the effect would remain the same—on 1 January 2001, we will have watched the congressional sunset of jurisdiction. However, the question remains: Does the sun continue to rise under the *Scanwell*[385]-based jurisdiction? Read on for more!

District Courts: One District Court Enjoys Watching the Sunset!

At least one district court has already weighed in on the debate of whether the district courts will continue to have bid protest jurisdiction under the *Scanwell* theory, or if all bid protest jurisdiction expires by 1 January 2001. The U.S. District Court for the District of Columbia has drawn the conclusion that unless Congress acts affirmatively to extend bid protest jurisdiction to the district courts, all such jurisdiction will sunset by 1 January 2001.

In *Novell Inc. v. United States*,[386] the plaintiffs[387] filed an action for preliminary injunction and declaratory judgment in the District Court for the District of Columbia (D.C. District Court) against, among others, the Administrative Office of the United States Courts (AOUSC).[388] The plaintiffs asserted that the district court had jurisdiction to hear the case under the Administrative Procedures Act (APA). The government requested that the district court dismiss the case, arguing that the district court did not have jurisdiction to hear the bid protest under the APA because such jurisdiction "was subsumed by the . . . [ADRA]."[389] The government also argued that because the COFC had determined that the AOUSC did not fall within the definition of an "agency" pursuant to ADRA, the issue was *res judicata*.[390] The D.C. District Court agreed with the government and dismissed the complaint.

378. 28 U.S.C. § 1491(b)(1) (2000).

379. ADRA provided for the district courts' bid protest jurisdiction to be concurrent with that of the COFC. With the addition of this concurrent jurisdiction, disgruntled contractors presently have 4 fora in which to file bid protests: (1) the agency; (2) the GAO; (3) the COFC; and (4) the district courts. *Id.*

380. Congress asked the GAO to study the impact to small businesses should the district courts' jurisdiction sunset. *See* GENERAL ACCOUNTING OFFICE, BID PROTESTS: CHARACTERISTICS OF CASES FILED IN FEDERAL COURTS, REPORT NO. GAO/GGD/OGC-00-72 (April 2000) [hereinafter Bid Protest Characteristics Report].

381. *See Bid Protests: ABA Group Favors Keeping Scanwell Jurisdiction; GAO Report Due March 15*, 73 BNA FED. CONT. REP. 1 (2000).

382. Bid Protest Characteristics Report, *supra* note 380, at 4. The GAO focused on the number of small business bid protest filings in the district courts and COFC between 1 January 1997 and 30 April 1999. The GAO looked at the type of agencies involved and the amount of the procurement at issue. Second, GAO addressed perceived advantages and disadvantages for small businesses filing cases in each judicial forum; and characteristics of district court and COFC bid protest cases, particularly those filed by small businesses, that could be used to assess the perceived advantages and disadvantages. *Id.*

383. A total of 184 protests were filed in the COFC and the district courts. Since 1 January 1997, there were sixty-six district court protests filed and 118 COFC protests filed. *Id.* at 7.

384. More small business protests were filed in the COFC than in district courts–sixty-one in the COFC and thirty-three in district courts. *Id.* at 11.

385. *See* Scanwell Lab. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

386. 109 F. Supp. 2d 22 (D.D.C. 2000).

387. The plaintiffs in the cases consisted of unsuccessful offerors Novell, Inc., and Software Spectrum, Inc. *Id.* at 23.

388. The plaintiffs alleged that AOUSC evaluated improperly their bids and the bid of the awardee, Lotus Development Corporation and ASAP Software Express, Inc. (Lotus). *Id.* at 23. The solicitation requested bids on an e-mail software system and related training and technical support. *Id.* The plaintiffs originally filed a protest with the COFC, pursuant to the ADRA. *See* Novell Inc. v. United States, 46 Fed. Cl. 601 (2000). However, the COFC held it lacked jurisdiction under the ADRA because the AOUSC was not an "agency" as defined in ADRA. *Id.*

389. *Novell*, 109 F. Supp. 2d at 23.

390. *Id.* The term *res judicata* is defined as an issue that has been definitively settled by judicial decision. BLACK'S LAW DICTIONARY 546 (Pocket ed. 1996).

The D.C. District Court found that the ADRA had created coexisting jurisdiction for the district courts and the COFC with both courts operating under the statute for bid protest purposes. Although it was the COFC that decided the issue of whether the AOUSC was an "agency" for jurisdictional purposes, because the ADRA gave both of the courts their bid protest jurisdiction, the D.C. District Court held that the COFC's determination was *res judicata*.[391] As to the plaintiffs' argument that the court had jurisdiction to decide the protest based upon the APA and the district court's *Scanwell* jurisdiction, the D.C. District Court found this argument without merit. The D.C. District Court held that Congress subsumed the APA jurisdiction of the district courts into the more specific jurisdictional language of the ADRA.[392]

Putting the final nail in plaintiffs' jurisdictional coffin, the D.C. District Court held that even if some independent form of review existed under the APA, the court lacked jurisdiction because United States "courts," to include their administrative office, were specifically excluded from the terms of the APA.[393] Because the district court found no form of specific congressional exception to the APA that would be applicable to the AOUSC, the district court dismissed the complaint for lack of subject matter jurisdiction.

Court of Appeals for the Federal Circuit: No Pain, No Gain!

A basic tenet of bid protest decisions is that to be successful, a protester must show prejudice. In *OMV Medical, Inc.*,[394] the CAFC once again put protesters on notice that in order to prevail, a protester must show that but for the agency's error and its resulting prejudice to the protester, the protester would likely have been awarded the contract at issue.

OMV Medical, Inc. (OMV), raised allegations of impropriety on the part of the Air Force regarding the award of two contracts related to the Air Force's Family Advocacy Program.[395] OMV argued that on one of the contracts, the Air Force released price information improperly to one offeror without providing the same information to all offerors.[396] The CAFC disagreed and found that, even if the Air Force had released information improperly, OMV had failed to show any prejudice from the release.[397]

In the instant solicitation, the Air Force included a clause entitled "Evaluation of Compensation for Professional Employees." The clause explained that the agency would review proposed compensation levels to ensure that they reflected that the offeror understood the level of work required. The Air Force received seven proposals, including one from incumbent contractor OMV. The Air Force then compared the compensation levels of the submitted proposals to those of OMV as incumbent, and found that five offerors submitted proposals with compensation levels that were too low. After identifying this problem, the Air Force sent letters to the five offerors explaining that their proposals were unacceptable and why.[398] OMV argued to the court that the letter the Air Force sent to certain offerors effectively told these offerors the agency's minimum salary requirements for the contract.[399] While OMV conceded that the Air Force could properly release that type of information, it must release it to all offerors.[400] The court disagreed.

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391. *Novell*, 109 F.Supp. 2d at 24.

392. *Id.* The district court's determination appears to be based up two arguments. First, the D.C. District Court stated that because Congress chose to implement the APA standard of review for bid protest cases in the ADRA, it lends "credence to the argument that lawmakers believed they were codifying the *Scanwell* jurisdiction with the enactment of [ADRA]." *Id.* at 25. Second, the district court stated that because Congress chose to include a sunset provision to terminate the district courts' jurisdiction, it would defeat the intended result of this sunset if jurisdiction under *Scanwell* was expected to survive the termination of jurisdiction under ADRA. *Id.*

393. *Id.* The term "courts" and its exclusion from the APA extends to the judicial branch generally. *Id.*

394. 219 F.3d 1337 (Fed. Cir. 2000).

395. *Id.* at 1339. *See supra* notes 170-73 and accompanying text for review of the substantive issues of the OMV protest.

396. *Id.* at 1338. Also, as to the second contract, OMV alleged that the Air Force evaluated bids in an arbitrary and irrational manner. The CAFC found that whether OMV was able to prove prejudice regarding errors in the award of the second contract depended upon the nature of the error, if any, that COFC finds to have been made. The CAFC vacated the COFC decision as to the second contract and remanded the issue back to the COFC for further proceedings. *Id.* at 1344.

397. *Id.* at 1338. OMV filed its original protest with the GAO, which GAO denied. After appealing GAO's decision to the COFC, and COFC holding in favor of the defendants, OMV appealed to the CAFC which disagreed with OMV and affirmed the COFC decision on this issue. *Id.*

398. *Id.* at 1340. In the letter sent to the five offerors, the Air Force explained that the proposed compensation was inadequate to obtain and keep suitably qualified professional employees. *Id.* In one particular letter, the Air Force explained that the amount of compensation stated in the offer was "at least $1000 below the current average annual salaries," while for another position the compensation listed was "approximately . . . $4100 . . . below the current range . . . ." *Id.* All the offerors that received the type of letter in question revised their bids. *Id.* The Air Force did not send a letter to either OMV or the other offeror, Choctaw Management Services Enterprise, because the Air Force considered their compensation plans to be adequate. *Id.*

399. *Id.* at 1341.

400. *Id.* OMV argued also that the Air Force improperly released OMV's proprietary salary information to the offerors. The court rejected this argument and stated that the letter provided approximate amounts by which the offeror was below current average annual salaries only and did not specify OMV's actual salary rates. *Id.*

The court held that even if the Air Force's actions constituted error, OMV had not shown that it was prejudiced by the error. OMV maintained that if it had received the information that the Air Force sent to the other offerors, it would have modified its proposal and submitted a lower one than the awardee.[401] The court did not agree with OMV's contention, [402] stating that even if OMV was correct in its assertion and it would have provided a compensation package lower than the awardee's, OMV would not have received any benefit. Because the second lowest offeror, like OMV, did not receive a letter, it would have received the contract award if the current awardee had been eliminated.[403] Without a showing of prejudice resulting from the alleged error, the court found in favor of the defendants.

GAO: Come On, Get Automated!

In an attempt to automate the world of protests, the GAO announced that it is beginning a pilot program for the electronic filing of certain protest documents.[404] The pilot project will consist of five GAO attorneys who will accept certain filings pursuant to established rules. The project will focus on unprotected filings or other communications transmitted by e-mail,[405] as well as filings provided by electronic media.[406] Both parties to the protest must agree to the e-mail or electronic transmission of documents and agree to the established project rules prior to participating in the project.[407] The decision to accept electronic filings is an attempt by GAO to make the protest process more efficient by utilizing more of the 100-day statutory limit for protest resolution on substantive matters rather than for transmission of documents.[408]

He Who Hesitates is Late!

Picture it—a contracting office, 2000. You are the contracting officer on a negotiated procurement. You begin to exclude offers to form the competitive range. You inform the offerors about their exclusion. One of the offerors, within three days of receiving its notice, requests a debrief. You, being the quintessential contracting officer, are ready to hold the debrief within five days, but to your surprise the unsuccessful offeror says "let's wait until after you make award of the contract" before conducting the debrief. Okay. Three months later you award the contract, and within a few days of the award, you debrief the unsuccessful offeror of its exclusion from the competitive range. The offeror files a protest immediately with the GAO. So, here's the question: Is the protest timely (that is, is it within ten days of when the offeror knew or should have known of its basis for protest)? Does that rule even apply in this situation? The GAO has come forward with a resounding "*no*" to both of these questions.

In *United International Investigative Services, Inc.*,[409] the United States Marshals Service issued an RFP for court security services. In determining the competitive range of offers submitted, the Marshals Service excluded United International Investigative Services, Inc. (UIIS), and notified UIIS of its exclusion.[410] The day after receiving the notice, UIIS responded by letter requesting a debrief, but requested that the debrief not occur until after award of the contract.[411] The Marshals Service awarded the contract three months later and held the debrief with UIIS less than a week after that.[412] Three days after the debrief, UIIS filed its protest before the GAO.

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401. *Id.* at 1342.

402. *Id.* The court stated that OMV was fully aware of its own salary information and it knew from the clause in question that the Air Force would use its salary information as a benchmark to evaluate the offers submitted. In essence, the court held, the information in the letter would not have told OMV anything it did not already know. *Id.*

403. *Id.*

404. Melanie I. Dooley, *GAO Launches Pilot Project to Test E-Filings in Bid Protests*, 74 BNA FED. CONT. REP. 316 (2000).

405. *Id.* These filings must be post-protest filings only. A protest cannot be transmitted by e-mail. *Id.*

406. *Id.* Unlike with the e-mail transmission, protected documents and communications may be filed by electronic media. *Id.* Electronic media would include any device that the GAO has the capability to read, such as a CD or floppy diskette. The GAO does not presently have the capability to read DVDs or Zip Disks. *Id.*

407. *Id.* One of the rules that both parties must agree to is that the party sending the e-mail transmission bears the risk of non-receipt or late receipt. Additionally, the parties will be required to transmit the documents in a format that the GAO has the capability to access. *Id.*

408. *Id.*

409. B-286327, Oct. 25, 2000 (unpublished), *available at* http://www.gao.gov/decisions/bidpro/286327.htm.

410. *Id.* The Marshals Service issued the RFP on 5 Apr. 2000. UIIS submitted its proposal on 10 May 2000. The Marshals Service evaluated UIIS' proposal and determined that it contained deficiencies in several areas including contract management and past performance. On 8 June 2000, the Marshals Service notified UIIS of its exclusion. *Id.*

411. *Id.* UIIS requested the debrief in accordance with FAR 15.505 (a)(1) which allows an offeror to request a preaward debriefing by filing a written request with the agency within three days of receipt of the notice that the offeror was excluded from the competitive range. *Id.* Subsection (a)(2) of FAR 15.505 allows offerors to request a delay of the debrief until after award of the contract. *See* FAR, *supra* note 49, at 15.505(a)(2).

The Marshals Service filed a motion for summary dismissal contending that UIIS' protest was untimely. The agency argued, among other things, that UIIS failed to pursue its basis for protest in a diligent manner. The Marshals Service reasoned that the FAR provision that UIIS relied upon when requesting a delay of the debrief until after award states specifically that "[d]ebriefings delayed pursuant to this paragraph could affect the timeliness of any protest filed subsequent to the debriefing."[413] The GAO agreed with the Marshals Service and dismissed the protest as untimely.

In addressing whether the traditional ten-day timeliness rule applied in this case, the GAO determined that it did not. The GAO stated that the protest timeliness rules generally provide that for a protest to be timely, it must be filed within ten days of a "required" debrief, even as to issues that should have been known before the debriefing.[414] In the present case, the GAO determined that UIIS did not request a pre-award debriefing.[415] The GAO also found that because UIIS expressly requested that the Marshals Service delay the debrief until after award, the actual debriefing provided was not "required" as contemplated by CICA and the GAO's protest timeliness rules.[416] The GAO reasoned that UIIS could not rely on its own decision to delay the debrief to provide it with an additional three months to file a protest.[417] The failure to act by UIIS rendered its protest untimely as to issues that it could have discovered had it not requested that the Marshals Service delay the debrief.[418]

To Sell or Not to Sell, That is the Question!

Everyone who engages in the buying and selling process knows: "Let the buyer beware." However, when it comes to the government selling or transferring property, it is the agency that must beware—of protests that is!

It is clear that the GAO does not have authority to resolve all protests.[419] Specifically excluded from GAO's protest jurisdiction is the sale or transfer of government property. Without the consent of the military department secretary or agency head, the GAO may not review these non-statutory protests.[420] An exception to this general prohibition is that GAO may resolve a protest allegation concerning a government sale or transfer of property if the sale is intertwined with a procurement of supplies or services. Such was the issue in *Government of Harford County, Maryland*, [421] a case involving the privatization of Army utility systems.

The Harford County government protested the Army's award of a contract to the City of Aberdeen, Maryland, for the purchase of the Army's water and wastewater treatment facilities and the subsequent provision of potable water and wastewater services.[422] In response to Harford's protest allegations,[423] the Army asserted that the GAO lacked jurisdiction to hear the protest because the "procurement" in question was for the sale or transfer of government property and, therefore, was not subject to the GAO's protest authority. The GAO disagreed.

412. *United Int'l Investigative Servs., Inc.*, B-286327. Award of the contract was made on 13 September 2000. The Marshals Service debriefed UIIS on 19 September 2000. *Id.*

413. *Id.* (quoting FAR15.505(a)(2)).

414. *Id.* Additionally, the GAO also noted that CICA requires a contracting officer to provide a post-award debrief to an excluded offeror only if that offeror requested and was refused a pre-award debrief. *Id.* (citing 41 U.S.C. § 253b(f) (Supp. IV 1998)).

415. *Id.* The GAO decided that because UIIS had requested the debrief not be held until after the Marshals Service awarded the contract, the debrief requested did not qualify as a "pre-award" debrief. *Id.*

416. *Id.*

417. The GAO stated that a protester must act affirmatively and utilize the most expeditious information-gathering approach to ascertain whether it has a basis for protest. *Id.*

418. *Id.*

419. *See* 4 C.F.R. § 21.13 (2000).

420. *Id.* § 21.13(a).

421. B-283259, B-283259.3, Oct. 28, 1999, 99-2 CPD ¶ 81.

422. *Id.* at 2. The Army issued the RFP to solicit offers from public utility firms for the purchase of the water and wastewater treatment facilities at Aberdeen Proving Ground (APG), Maryland. *Id.*

423. Harford alleged that neither the solicitation nor discussions disclosed the evaluation impact of the Army's requirement of a particular technical approach. *Id.* at 4. Harford alleged further that the awardee's proposal contained material misrepresentations upon which the Army relied in making the award. *Id.* at 5. Upon review, the GAO denied Harford's protest. *Id.* at 11.

The GAO found that the procurement in question had a dual purpose. The RFP stated clearly that the Army contemplated not only the "transfer [of] ownership of . . . facilities to a regulated utility" but also "to contract with the [same] utility . . . for the provision of water and wastewater treatment services. . . ."[424] The GAO concluded that because one of the main objectives of the RFP was to procure services, it had the requisite jurisdiction to review the protest allegations.[425]

Procurement "by" the Government?

Subcontract procurements can cause a great deal of heartburn for prime contractors, but the agency also may suffer repercussions from such procurements. Although the GAO generally does not review protests filed by subcontractors,[426] it will entertain a protest by a subcontractor in the limited circumstance where the procurement was conducted "by" the government. Such was the allegation raised by the protester in *RGB Display Corporation*.[427]

The Army contracted with Lockheed Martin Information Systems (LMIS) for the production of close combat tactical trainers (CCTT), and RGB operated as a subcontractor to LMIS, supplying the twenty-six inch cathode ray tube monitors. RGB was unable to continue supplying the monitors to LMIS due to the discontinuation of a commercial off-the-shelf item it used in its manufacturing process.[428] The procuring agency then awarded a three-phase contract to Diamond Visionics for a study and prototype production of an alternative to RGB's monitors. After completion of the three-phase contract, the agency modified LMIS' contract, directing it to use Diamond's prototype as the monitor component for the CCTT.[429] RGB challenged the agency's decision, and requested that the GAO direct "a fair competition be conducted by an unbiased agency based on cost, performance, and long-term availability."[430]

The GAO never reached the issue of whether Diamond's monitors were inferior to those of RGB. Rather, the GAO dismissed the protest for lack of jurisdiction. The GAO stated that subcontract procurements were outside of its jurisdiction unless the procurement was conducted "by" the government.[431] Such circumstances must include an agency that handles substantially all the substantive aspects of the procurement, leaving only the ministerial aspects to be performed by the prime contractor.[432] In these situations, the prime contractor would be acting as a mere conduit for the agency's actions. This was not the case with the procurement at issue. The agency issued a change order pursuant to its contract administration duties to ensure that it received end items compliant with the specifications.[433]

CONTRACT PERFORMANCE

Contract Interpretation

An Objective Standard for Determining a Contract Ambiguity

In *Hensel Phelps Construction, Co*.[434] the ASBCA held that resolution of contract ambiguities occurs pursuant to an objective, as opposed to subjective, standard. The appeal arose from the construction of a laboratory at Kirtland Air Force Base, New Mexico. The government drawings for the project contained an inconsistency regarding furnishing and installation of metal wall liner panels (MLP).[435] The contractor, having used

424. *Id.* at 4. The GAO found that the prices at issue in the protest were prices that the Army was to pay to acquire services, not the prices that the Army would receive in a sale of property. *Id.*

425. *Id.* The GAO discussed that the plain language of the RFP indicated that the Army contemplated procurement for services, as such, CICA provided GAO with the requisite bid protest jurisdiction. *Id.* The GAO noted also that the Army relied upon the authority found in 10 U.S.C. § 2304c(1), a procurement statute, to limit the number of sources from which to procure the services. *Id.* Additionally, the GAO stated that it was undisputed that APG would continue to need potable water and wastewater treatment services and was going to acquire these services, pursuant to contract award under the RFP, to the transferee of the facilities. *Id.*

426. *See* 4 C.F.R. §§ 21.5(h) and 21.13(a) (2000). As a general rule, the GAO will review such procurements only when requested to do so by the agency involved.

427. B-284699, May 17, 2000, 00 CPD ¶ 80.

428. *Id.* at 2.

429. *Id.* Once the agency selected the prototype technology, it had LMIS negotiate with Diamond Visionics to establish pricing and terms and conditions. *Id.*

430. *Id.* at 3.

431. *Id.*

432. *Id.* Such examples of ministerial duties would include issuing the solicitation and receiving the proposals in response to the solicitation. *Id.* (citing St. Mary's Hosp. and Med. Ctr. of San Francisco, Ca., B-243061, June 24, 1991, 91-1 CPD ¶ 597 at 5-6; Univ. of Mich.; Indus. Training Sys. Corp., B-225756, B-225756.2, June 30, 1987, 87-1 CPD ¶ 643 at 5-6).

433. *Id.* at 4. The GAO found that the agency had no independent need for the monitors apart from the CCTTs. The monitors were merely components to be incorporated into the end item CCTTs and therefore a change order was a legitimate exercise of the agency's contract administration responsibility. *Id.*

434. ASBCA No. 49716, 00-2 BCA ¶ 30,925.

only four of the 173 drawings to arrive at its MLP estimate, did not discover the conflict in the provisions until after contract award. Upon discovery by the contractor, the government agreed that the contract provisions were ambiguous and informed the contractor which drawing was in error.

On appeal of its denied equitable adjustment claim, the contractor alleged that the contract ambiguity was latent in nature and supported that argument by pointing out that no one had discovered it during the pre-bid period. That fact did not matter to the ASBCA because it chose not to adopt the subjective standard advocated by the contractor. Instead, using an objective standard, the board held that a reasonable contractor would have recognized the readily apparent ambiguity in contract terms prior to bidding time (a patent ambiguity). Delivering the final coup de grace, the ASBCA held that a contractor assumes the risk of any patent ambiguity when it chooses not to review all of the documents prior to bid submission.[436]

COFC Finds Contract Provision Unambiguous, Despite Contrasting Interpretations

In *GPA-I, LP v. United States*,[437] the COFC confronted a situation where both parties agreed that a specific contract provision was unambiguous, but had vastly different opinions of what that provision meant. The Army COE entered into a lease with GPA-I for office space, parking, and other amenities. While the parities agreed upon what amounts were due, they disagreed about when such amounts were due.[438] The contractor asserted that lease payments were due within thirty days of the first workday of each rental month, while the government insisted that payments were due within thirty days of the first workday of the month following the rental month. At stake was plaintiff's claim for interest on prior "late payments" as well as judicial enforcement of plaintiff's contract interpretation.

The COFC held that "[w]hen a contract is susceptible to more than one reasonable interpretation, it contains an ambiguity,"[439] with allocation of risk depending upon whether the ambiguity is latent or patent, and the drafter of the ambiguous provision.[440] While the parties offered multiple and irreconcilable interpretations for this particular contract provision, COFC found the provision to be unambiguous and in the government's favor. The court found the government's interpretation of "in arrears" to be reasonable in light of previous decisions, federal leasing regulations, and internal contract consistency.[441] By contrast, the contractor's interpretation of the contract was not only incorrect but also unreasonable, as it would render other terms meaningless in many occasions.[442]

Next Time, Ask for Directions!

In *D & L Construction Co., Inc.*,[443] the Agriculture Board of Contract Appeals (AGBCA) determined that poor map reading and not ambiguous specifications was the true cause of the contractor's claimed additional costs. The contract involved the

435. *Id.* at 152,642. While the contract did contain the standard clause at FAR 52.236-21, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION, the contract's specifications did not resolve the ambiguity that existed between drawings. *Id.* at 152,642-43.

436. *Id.* at 152,644.

437. 46 Fed. Cl. 762 (2000).

438. The clause establishing rental payment due dates stated that:

> The initial monthly rental payment under this lease shall become due within 30 days of the first workday of the month following the month in which the lease or supplemental agreement establishing commencement of the lease term is executed. . . . Subsequent rent shall be paid in arrears, and will be due within 30 days of the first workday of each successive month, and only [sic] provided for by the lease.

Id. at 764-65.

439. *Id.* at 769 (citing Metric Constructors, Inc., v. NASA, 169 F.3d 747, 751 (Fed. Cir. 1999)).

440. In a succinct review of the principles of contract interpretation, the court stated:

> Ambiguities may be patent or latent. An ambiguity is patent if so glaring as to raise a duty to inquire, or if the ambiguity would be apparent to a reasonable person in the claimant's position, or if provisions conflict facially. If a contractor faced with a patent ambiguity fails to seek clarification, it is not entitled to rely upon its construction of the contract. An ambiguity is latent when there is no facial ambiguity, and it becomes evident only when considered in light of subsequent objective circumstances. If an ambiguity is latent, the court construes it against the drafter under the general rule of *contra proferentem*. However, the non-drafting party's interpretation must be reasonable, and the non-drafting party must show that it reasonably relied on its interpretation.

Id. (citations omitted).

441. "First, the . . . GSA acquisition regulations, although not applicable to this lease, illuminate the meaning of 'in arrears.'" *Id.* "Second, the courts that have considered the meaning of 'in arrears' have concluded that it means after the rental month." *Id.* at 770; *accord* Summerfield Hous. Ltd. v. United States, 42 Fed. Cl. 160, 173-74 (1998); North Star Alaska Hous. Corp. v. United States, 30 Fed. Cl. 259, 274-75 (1993). Lastly, the government's interpretation of "in arrears" and "within thirty days of the first workday of each successive month" is reasonable because it consistently gives the same meaning to the language allowing thirty more days to make payments. *Id.*

reconstruction of about 2.5 miles of the Resurrection Creek Road, in Chugach National Forest, Alaska. The solicitation identified three possible government source sites for the aggregate needed to perform the work.[444] Two of the material sources were located at road mileposts, and the third possible material source was described by distances from mileposts and by a drawing. Appellant made a pre-bid visit to the third site and discovered what it considered the "ideal location"[445] for the aggregate material. Unfortunately, the site that the contractor considered ideal was not the location that the specifications described. The discovery of this error after contract award resulted in D & L incurring costs above its bid for aggregate material.[446]

On appeal, the AGBCA found that the government specifications for the third material source were unambiguous: both the contract terms and drawings clearly identified the intended source of government material.[447] The fact that the contractor discovered the "ideal" source nearby did not transform unambiguous provisions into ambiguous ones.[448] By not asking for directions, appellant made a unilateral mistake that resulted in assumptions contrary to the express terms of the contract.[449] Since the contractor had no entitlement to use of the preferred material source location, any increased expenses associated with an alternative site were not recoverable.

Contract Changes

Proving Defective Specifications by the Defective Outcome?

In *Defense Systems Company (DSC), Inc.*,[450] the contractor entered into a $149 million fixed price contract with the Army to supply HRDRA-70 rockets.[451] DSC's many performance problems[452] resulted in the Army's decision not to exercise the second and third contract options, which in turn resulted in DSC filing a $72 million claim. Among its many assertions, DSC alleged that the technical data package (TDP) for the warhead fuzes was defective.[453] No doubt the contractor encountered various problems in producing the fuzes, and at hearing DSC relied upon an expert witness who testified that the "unattributable" failure rate experienced by DSC meant that the government's fuze design was a "weak" one.[454]

In reaching its decision, the ASBCA first found that the fuze TDP specified the dimensions, material, and finish (design type specifications), but not the production processes, methods, or machines (performance type specifications).[455] "Where there is a mixed design and performance specification, the moving party must either isolate the defective element of the TDP, or affirmatively demonstrate that it did not cause the failures."[456]

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442. In judging plaintiff's interpretation unacceptable, the court stated:

> Under plaintiff's interpretation, in any rental month with 31 days in which the first day also is the first workday of the month (e.g., the month of May 2000), payment would be required to be made during the current rental month (i.e. by May 31, 2000). This interpretation is in direct conflict with the term "in arrears" and renders it meaningless in the many months with 31 days, like the month of May 2000, in which the first workday of the month also is the first day of the month.

Id. at 770-71.

443. AGBCA No. 97-205-1, 00-2 BCA ¶ 31,001.

444. The government did not guarantee the suitability (nor quantity) of the three, free-of-charge sources, and contractors had the right to use aggregate sources of their own to meet the specification requirements. *Id.* at 153,112.

445. *Id.* at 153,113.

446. D&L sought a total of $163,605 for the direct and indirect costs associated with the contractor developing an aggregate site other than the one originally planned. *Id.* at 153,112.

447. "The specifications were not ambiguous. If in fact, Appellant traveled 'approximately' 0.35 miles and did not reach the actual creek area, but the bluff above the creek, Appellant was on notice from the material source description that the creek area . . . , not the 'ideal' bluff area, was the material source." *Id.* at 153,118-19.

448. *Id.* at 153,199. Further, "[e]ven if the specifications were ambiguous regarding the source location (ideal location versus express directions), the contractor was obligated to inquire and clarify the ambiguity because it was patent." *Id.*

449. *Id.*

450. ASBCA No. 50918, 00-2 BCA ¶ 30,991.

451. HYDRA-70 refers to a "family" of multi-service, air-launched rockets that perform a variety of functions. The range of available warheads permit the HYDRA-70 to be used for anti-material, anti-personnel, suppression, smoke screening, illumination, and training missions. DEP'T OF ARMY, WEAPON SYSTEMS 2000, 180-1 (2000) [hereinafter WEAPON SYSTEMS 2000].

452. The ASBCA found that a major reason for the contractor's many performance problems was DSC's decision to submit a bid at $32 million below its' estimated cost of $181 million. *Defense Systems Company, Inc.*, 00-2 BCA ¶ 30,991 at 152,956-57.

453. *Id.* at 152,989. The M230 and M231 fuzes used on the HYDRA-70 rocket warheads were very small, mechanically functioning devices. Such attributes made the M230/231 fuzes complex components with many manufacturing tolerances and dimensions. *Id.* at 152,973-74.

Here, DSC could do neither: it could not account for the root cause of a significant percentage of fuzes that failed testing, and in other instances DSC was the actual cause for the test failures.[457] Since the contractor could not exclude its own responsibility in this regard, the ASBCA concluded that DSC had failed to prove that the unexplained test failures were the direct and proximate result of the TDP design requirements.

Third Party Interference Is not a Compensable Constructive Change

In *Oman-Fischbach International, a Joint Venture*,[458] the ASBCA had to determine if the actions of a separate sovereign were to be imputed to the U.S. government when acting in a contractual capacity. In 1985, the Navy awarded a fixed-price contract to appellant for the construction of fuel tank facilities at Lajes Field, in the Azores Islands.[459] The contract permitted disposal of the contractor's rubbish and debris at three on-base sites, at the government's discretion. During contract performance, the Portuguese Armed Forces converted an unsecured area into a secured one, thereby restricting the contractor's access to the most convenient dumpsite.[460] As a result the contracting officer directed appellant to use one of the other dumpsites. The contractor then sought an adjustment for the increased costs it incurred hauling debris to the alternate site.[461]

The ASBCA found that the fundamental cause of appellant's claimed increased costs was the unilateral action of the Portuguese authorities, a cause over which the U.S. government had no control and authority.[462] The ASBCA then had to allocate the risk of increased costs due to a sovereign act of a government not a party to the contract. "It has long been settled that the government, under a firm fixed-price contract, has no legal duty to protect a contractor against increased costs, whether for material or labor."[463] Finding that the government neither explicitly nor implicitly agreed to indemnify the contractor for the acts of a third party, the ASBCA held that the appellant was not entitled to an equitable adjustment.[464]

Inspection, Acceptance, and Warranties

Who Bears the Risk of Loss?

As a general rule the contractor bears the risk of loss or damage to the contract work during testing but before acceptance by the government.[465] Every rule has its exceptions, however. In *Vought Aircraft Co.*,[466] the contractor modified a fighter jet by installing a Low Altitude Night Attack (LANA) system on the aircraft. The jet crashed during testing, destroying it and the LANA. The agency denied Vought's claim for the destroyed LANA, saying that Vought bore the risk of destruction during testing and before final acceptance. The board, citing the DFARS "Ground and Flight Risk" clause,[467] found that the government bore the risk in this situation. The board found the

454. *Id.* at 152,986. In this regard, "unattributable failure" meant no known root cause for failure of the fuze to perform in one or more tests. Such reverse engineering analysis of the Army's TDP was premised upon the contractor's representation to its expert witness that DSC's production was in accordance with the TDP and approved inspection equipment. *Id.* at 152,986-87. This turned out to be untrue in both regards: DSC had workmanship problems, non-conforming components, and lacked an approved quality program, all of which resulted from DSC's lack of cash. *Id.* at 152,987.

455. *Id.* at 152,989.

456. *Id.* (citing Transtechnology Corp. v. United States, 22 Cl. Ct. 349, 368-69 (1990)).

457. "We cannot accept the proposition that DSC built the fuzes to the TDP in that significant percentage of instances where the root cause of the testing failures could not be determined." *Id.* at 152,991.

458. ASBCA No. 44195, 00-2 BCA ¶ 31,022.

459. The naval air base on which the fuel tank farm was being constructed was under the command of the Portuguese Armed Forces. *Id.* at 153,213. "Neither the Portuguese Armed Forces not any other entity of the Portuguese government was a party to the subject contract." *Id.*

460. Approximately two months later, "agreement was reached with the Portuguese so that the gate controlling access to the . . . site would be open at least six hours per day, five days a week" though this did not completely resolve the problem. *Id.* at 153,214.

461. The appellant sought a total adjustment of $897,500, claiming that the contracting officer's direction to use an alternate dumpsite was a compensable change. *Id.* at 153,214-15.

462. *Id.* at 153,216.

463. *Id.* (citing D.P. Flores Construction Co., Inc., ASBCA No. 22973, 79-1 BCA ¶ 13,679)).

464. *Id.* at 153,218. "Unless the parties contract in unmistakable terms to shift the risk of increased costs due to acts by a third-party government, no liability on the part of the Government attaches from such acts." *Id.; accord* Pyramid Constr. & Eng'g Corp., ASBCA No. 15735, 71-2 BCA ¶ 9114 (an act by a government other than the one which is a party to the contract provides no right to an equitable adjustment under the contract).

465. FAR, *supra* note 49, at 52.246-16.

466. ASBCA No. 47357, 00-1 BCA ¶ 30,721.

government liable for the destroyed LANA and thus sustained the appeal.

Late is Late, Except for Latent Defects

Although acceptance by the government is generally conclusive, and precludes contractor liability for subsequently discovered deficiencies, latent defects may enable the government to avoid the finality of such acceptance.[468]

In *Stewart & Stevenson Services, Inc.*,[469] the contractor appealed a contracting officer's order to retrofit the Family of Medium Tactical Vehicles (FMTV) at an approximate cost of $40 million. In 1993, the contractor began deliveries of two and one-half and five ton trucks to the Army. When the vehicles passed all contract test requirements, the Army accepted them. The government subsequently discovered serious defects in the vehicle drive shaft, "as a result of several catastrophic failures." The Army then revoked acceptance of the vehicles already delivered and ordered Stewart & Stevenson to remedy the defect. The contracting officer later denied Stewart & Stevenson's $40 million claim associated with the vehicle drive shaft repairs.

On appeal, the contractor argued that passing all tests specified in the contract relieved it of any liability for any defects not discovered during testing. The ASBCA rejected this argument, stating that this "would mean that the Government would never be able to revoke acceptance even when it subsequently discovered defects which were latent."[470] In other words, if the government's testing should have revealed a defect, it's too late for the government to reject the product. By contrast, if a latent defect causes the problem, then the government may revoke its acceptance. In the area of acceptance, late is late except when it is latent.

Pricing of Adjustments

"Damnum absque injuria."[471] *Can I Still Say That?*

In *Cascade General, Inc.*,[472] the ASBCA proved that public contracting is not all that far removed from everyday life by reaffirming the old sandlot rule of, "no harm, no foul."

The case involved the overhaul of four naval utility landing craft by Cascade General, Inc. (CGI), at CGI's Portland, Oregon, facility.[473] During contract performance CGI contended that the Navy's specifications and drawings were defective and caused delays on various work items. CGI alleged entitlement of $5 million, which the contracting officer denied. The ASBCA denied CGI's subsequent appeal. To "establish a constructive change based on defective government specifications or drawings, [the contractor] has the burden of proving not only the defectiveness of the design or specifications, but also that the alleged defective specifications were the cause of the additional work claimed."[474] While CGI demonstrated *prima facie* specification deficiencies, it did not substantiate that such deficiencies caused any actual delays or additional work.[475] Because appellant could not substantiate what specific work and what specific delay periods result from alleged defective specifications, the claim failed because of the fatal defect of *damnum absque injuria*.[476]

Apportioning Concurrent Delays

In *Essex Electro Engineers., Inc. v. Danzig*,[477] the CAFC held that when concurrent delays by the government and contractor can be apportioned, they must be apportioned. The contract involved the production of skid-mounted floodlights in

467. *Id.* (citing DFARS, *supra* note 258, at 252.228-7001).

468. FAR, *supra* note 49, at 52.246-2(k).

469. ASBCA No. 52140, 2000 ASBCA LEXIS 115 (July 26, 2000).

470. *Id.* at *19.

471. "Loss, hurt, or harm without injury; a loss which does not give rise to an action for damages against the person causing it." BLACK'S LAW DICTIONARY 1071 (5th ed. 1979).

472. ASBCA No. 47754, 2000 ASBCA LEXIS ¶ 138 (Aug. 17, 2000).

473. *Id.* at *2.

474. *Id.* at *35 (citing Die-Matic Tool Co., ASBCA No. 31185, 89-1 BCA ¶ 21,342 at 107,603, *aff'd* 889 F.2d 1100 (Fed. Cir. 1989); Maitland Bros. Const. Co., ASBCA No. 24476, 86-3 BCA ¶ 19,172 at 96,958, *recon. den*. 87-3 BCA ¶ 20,194, *aff'd* 20 Cl. Ct. 53 (1990)).

475. Here, the "facts" cited to support CGI's claimed additional work were only statements in its request for equitable adjustment and its certified claim alleging same. *Id.* "Bare allegations are not evidence, and claim letters are not proof of disputed facts. *Id*. at *36 (citing *Burbank Sanitary Supplies, Inc.,* ASBCA No. 43477, 93-1 BCA P 25,397 at 126,489; *James Reeves Contractor, Inc.*, ASBCA No. 33744, 88-1 BCA P 20,426 at 103,317).

476. *Id.* (citing Coley Props. Corp. v. United States, 593 F.2d 380, 384, 219 Ct. Cl. 227, 234 (1979); *Gen. Dynamics Corp.*, ASBCA No. 13885, 73-2 BCA P 10,160 at 47,808).

accordance with government-furnished drawings. Of greater relevance, the case involved two parties that routinely engaged in almost childish squabbles.[478] Minor defects in the government drawings resulted in approximately a one-year delay in first article testing and production because of the parties' conduct. In ruling upon the contractor's denied delay claim, the ASBCA found that the drawings were defective but held that the government was not liable for those periods of government-caused delays because they were concurrent with contractor-caused delays.[479] Essex appealed the ASBCA's decision.

The CAFC found, in connection with the defective government drawings, that Essex did not act unreasonably by stopping work and incurring delays while pending formal ECP approval.[480] That judicial finding however, did not extend the government's liability to all the delays associated with the approval of the ECPs: "Delays caused by factors outside the government's control relieve the government of liability 'irrespective of its faulty specifications.'"[481] In the case of delays resulting from multiple causes, "a contractor cannot recover 'where the delays are concurrent or intertwined and the contractor has not met its burden of separating its delays from those chargeable to the Government.'"[482] Nevertheless, if "there is in the proof a clear apportionment of the delay and the expense attributable to each party," then the government will be liable for its delays.[483] Here, the sequential nature of Essex's submissions and the government's responses thereto rendered each party's delays inherently apportionable.[484] Thus, the CAFC vacated the ASBCA's decision in part, and remanded for further determination.

Damages Too Speculative to Count

We previously reviewed *Defense Systems Company*[485] on the issue of defective specifications.[486] However the ASBCA opinion in this case also provides guidance on when damages are too speculative in nature to count for much, if at all.

The Army entered into a fixed price contract with Defense Systems Company, Inc. (DSC), for production of HRDRA-70 rocket systems. DSC knowingly bid the contract at a $32 million loss, it planned to make up this deficit in part by aggressive commercial international sales. DSC assumed great success for various reasons, many of which did not occur as the contractor had expected.[487] DSC's drastic underbid and the resulting production and quality problems merely exacerbated each other, resulting in an unsuccessful outcome.

Among the many allegations in its subsequent $70 million claim, DSC contended that the Army was liable for damages (including lost profits) from the contractor's loss of direct international military sales. DCS specifically asserted that it was entirely foreseeable that: (1) the contractor would aggressively pursue direct international sales because its bid was so low; and (2) the direct international sales market would be

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477. 224 F.3d 1283 (Fed. Cir. 2000).

478. When submitting engineering change proposals (ECPs) in response to defective drawings, Essex needlessly wrangled about the appropriate form to use for the ECPs, and the cost detail required for each ECP. *Id.* The contracting officer was no better: the government rejected the contractor's First Article Inspection Procedure (FAIP) submittal for using the word "will" instead of "shall" when referring to test failures and defects being cause for rejection. The contractor argued over the government's insistence that the FAIP include a "step-by-step method to be followed for satisfying the particular requirements" of the contract. *Id.* at 1287-88.

479. The ASBCA concluded that Essex's decision to stop all work pending formal ECP approval was unreasonable, when the government had provided the additional information necessary to continue first article production twenty-five days after receiving notice of defective drawings. *Id*. at 1288. The ASBCA concluded that all government-caused delays after that point were concurrent. *Id.*

480. As no contract deviation was binding upon the government unless formally executed by the contracting officer, and, as the contract allowed the government to reject the first articles that were not in conformance with contract requirements, Essex's decision not to act upon the informal information provided by the government was not legally faulty. *Id.* at 1290; *accord* J.D. Hedin Constr. Co. v. United States, 171 Ct. Cl. 70, 347 F.2d 235, 252 (Ct. Cl. 1965).

481. *Id.* (citing J.D. Hedin Constr. Co. v. United States, 171 Ct. Cl. 70, 347 F.2d 235, 252 (Ct. Cl 1965)).

482. *Id.* at 1292 (quoting Blinderman Constr. Co. v. United States, 695 F.2d 552, 559 (Fed. Cir. 1982)).

483. *Id.* (quoting Coath & Goss, Inc. v. United States, 101 Ct. Cl. 702, 714-15 (1944)).

484. *Id.*

485. ASBCA No. 50918, 00-2 BCA ¶ 30,991.

486. *See supra* notes 450-57 and accompanying text for a full review of the facts in the case and the ASBCA decision on the issue of defective specifications.

487. *Id.* at 152,963. DSC assumed great success with its commercial international sales efforts because while prior solicitations had specifically identified FMS quantities in separate CLINs, this solicitation included none. This assumption proved incorrect; FMS quantities were included in the base CLINs. Further, the program under which the United States maintains a materiel stock for the urgent requirements of allied and friendly nations (the Special Defense Acquisition Fund (SDAF)) was also not specifically identified as such in DSC's contract. In total, the government purchased 8,908 FMS rockets and 14,212 SDAF rockets at bargain contract prices; DSC had hoped to sell these rockets to the United States and other nations at much higher, make-up-the-loss prices. *Id.* at 152,958-63. For full review of the FMS issues in the *Defense Systems Company* decision, to include the ASBCA's equitable adjustment remedy, see *infra* notes 916-21 and accompanying text.

adversely affected when the government made available below-cost prices for foreign customers.

The ASBCA ruled against DSC's claim. The board held that "[r]emote or speculative damages such as general loss of business or loss of potential contracts are, as a matter of law, not recoverable even assuming such damages could be proven."[488] Here, DSC's anticipated commercial international sales were not directly and naturally related to the government contract. "Even though such sales were [clearly] a part of DSC's bidding strategy, they were not a part of the parties' contract and therefore the damages arising out of the lack of such direct international sales were not foreseeable."[489]

Jury Verdicts Come in Handy

In *Northrop Grumman Corp. v. United States*,[490] the COFC had to determine the proper measure of damages when faced with clear proof of injury but murky proof of the amount of harm. In 1988, the Navy awarded a fixed-price incentive research and development contract to Northrop[491] for the Advanced Tactical Air Command Central (ATACC).[492] On appeal of its denied claim,[493] Northrop alleged that the contract was illegal, and consequently, should be reformed into a cost-reimbursement contract. The COFC found that while the contract was not illegal when awarded, the expenditures during subsequent fiscal years were. Still, because the illegal contract had been fully performed, COFC determined that the only remedy available to the contractor was enforcement of the contract as written.[494]

The COFC's rejection of plaintiff's argument for contract reformation meant that plaintiff's primary quantum argument—a total cost recovery—was not warranted.[495] Alternatively, the contractor sought a modified total cost recovery.[496] The court found this approach inappropriate as well, as plaintiff had failed to carry its burden.[497] Nonetheless, plaintiff had shown, in some instances, damages reasonably allocated to several cost categories. For such instances, the court must turn to the jury verdict method[498] to award damages. In finding that plaintiff had met all criteria for use of a jury verdict, the COFC granted partial recovery to plaintiff.

488. *Id.* at 152,965 (citing William Green Constr. Co. v. United States, 201 Ct. Cl. 616, 626, 477 F.2d 930, 936 (1973), *cert. denied*, 417 U.S. 909 (1974)). Further, "for lost profits to be recoverable as damages for breach of contract, they must be foreseeable and directly related to the contract that was breached." *Id.*

489. *Id.* at 152,966.

490. 47 Fed. Cl. 20 (2000). *See supra* notes 66-82 and accompanying text for further discussion of the issues presented in this case.

491. The Navy actually awarded the ATACC contract to Grumman Data Systems, Inc., a division of Grumman Aerospace Corporation. In May 1994, Northrop Corporation acquired Grumman, forming Northrop Grumman Corporation (plaintiff). *Id.* at 27.

492. The ATACC was to be a set of four modular shelters that could be transported onto the battlefield to provide local command and control for Marine Corps air operations. *Id.* at 26.

493. GDS incurred cost overruns of approximately $14 million on the $22 million contract. *Id.* at 35.

494. *Id.* at 40-44.

495. *Id.* at 91.

496. The court concisely set forth the quantum standard of review:

> Proof of the quantum of damages rests solely upon plaintiff. Such proof of damages must be made with sufficient certainty so that the determination will be more than mere speculation. As a method of tempering a total cost award, which is a last resort, the court may use a modified total cost award to estimate damages. To arrive at a modified total cost award, the court uses the total cost method, adjusted for any deficiencies in the plaintiff's proof in satisfying the requirements of the total cost method. The total cost method, which measures damages based on the difference between a plaintiff's actual incurred costs and its proposed costs, is appropriate when:
>
> (1) the nature of the losses makes it impossible or highly impracticable to determine the actual losses directly with a reasonable degree of accuracy; (2) the plaintiff's bid was reasonable; (3) its actual costs were reasonable; and (4) it was not responsible for the added costs.

Id. at 92 (citing Servidone Constr. Corp. v. United States, 19 Cl. Ct. 346, 384 (1990), *aff'd*, 931 F.2d 860 (Fed. Cir. 1991)). In order to justify a modified total cost award, "the contractor must adequately separate the additional costs for which it is responsible." *Id.* (citing Neal & Co. Inc. v. United States, 36 Fed. Cl. 600, 638 (1996)).

497. The court was not convinced that the decrement plaintiff took in its modified total cost claim was sufficient to cover all of the costs for which plaintiff was responsible, even putting aside the court's findings that the government was not liable for most of the constructive changes. *Id.* at 94-97.

498. A jury verdict may be appropriate when damages cannot be ascertained by any reasonable computation from actual figures. Before adopting the jury verdict method, the court must first determine three things: (1) that clear proof of injury exists; (2) that there is no more reliable method for computing damages; and (3) that the evidence is sufficient for a court to make a fair and reasonable approximation of the damages. *Id.* at 97-98.

Termination for Default

A-12 Litigation Enters Second Decade[499]

A review of the A-12 attack plane litigation has come to be a regular feature of our *Year in Review.* By all accounts, it has been a slow year here. After the CAFC reversed and remanded the case to the Court of Federal Claims,[500] the parties to the litigation have returned to court to conduct further discovery.[501] The pursuit of discovery followed the unsuccessful mediation by a team including former Secretary of State Warren Christopher, and the denial of review by the United States Supreme Court.[502] No doubt our next edition will again report on this seemingly never-ending saga.

Cure Notice Not Required for Construction Default

No cure notice is necessary before terminating a construction contract for defects in workmanship, held the COFC in *Professional Services Supplier, Inc. v. United States*.[503] After repeated complaints regarding the contractor's performance deficiencies in constructing two large bird pens for the Department of Interior, the government issued a show cause notice five days before the scheduled contract completion date. The contracting officer then terminated the contract for default several weeks later. The contractor filed suit, alleging that it should have been given the opportunity to cure any deficiencies prior to contract termination. In support of its allegation the contractor argued that the termination clause did not apply to workmanship defects,[504] and that common law required issuance of a cure notice.[505] The court rejected the contractor's arguments and held that a cure notice was not required.

COFC Finds COR's Coercion and Intimidation Amounted to Bad Faith[506]

Finding that the Army failed to meet the good faith standard required in administration of a government contract, the COFC converted a default termination to one for the government's convenience. The case highlights the need for contracting officers to take an active role in identifying and correcting deficient contract administration.

The Army terminated Libertatia Associates' grounds maintenance contract for default based on unsatisfactory performance. The contractor appealed the termination, arguing in part that both the contracting officer and the contracting officer's representative administered the contract in bad faith. In addition to presenting evidence that the COR wanted to benefit financially by causing the contractor to work additional hours,[507] the contractor also presented evidence of the COR's personal animosity toward the plaintiff.[508] Many of the contractor's allegations were uncontradicted and undeniable. Indeed, the COR admitted to telling the contractor's employees that they should think of him as "Jesus Christ," the contracting officer as "God," and the other inspectors as "disciples."[509] According to the court, this was not merely a case of a rogue COR, as it also found that the contracting officer was on notice of the COR's bad faith and failed to fix the problem, leading to the finding of government bad faith.

The Army argued unsuccessfully that despite the actions of the COR, the default termination should be upheld because other inspectors found deficiencies with the contractor's performance. Because of the COR's actions, however, the court noted that the Army's evidence of unsatisfactory performance may not have been accurate. Due to the determination of bad faith,

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499. In January 1991, the Navy terminated the contracts of McDonnell Douglas Corp. and General Dynamics Corp.

500. *See* McDonnell Douglas Corp. v. United States, 182 F.3d 1319 (Fed. Cir. 1999). The CAFC found that the Navy's default termination was not pretextual or unrelated to the contractors' alleged inability to fulfill their obligations under the contract, and remanded it to the COFC for full litigation of the default decision.

501. 42 GOV'T CONTRACTOR ¶ 301 (Aug. 2, 2000).

502. *See Default Termination: High Court Will Not Decide Whether A-12 Contractors Were Deprived of Due Process*, BNA FED. CONT. DAILY, May 2, 2000.

503. 45 Fed. Cl. 808 (2000).

504. *Id.* at 810. The FAR provides that the contract may be terminated "[i]f the contractor refuses or fails to prosecute the work, or any separable part, with the diligence that will insure its completion within the time specified in the contract." FAR, *supra* note 49, at 52.249-10. The court stated that acceptance of Professional Services' argument that the clause did not apply to workmanship defects "would leave the defendant with no express procedure to terminate a construction contract until such time as they prevented the contract from being timely completed." *Professional Servs. Supplier,* 45 Fed. Cl. at 810.

505. *Id.* at 811.

506. Libertatia Assoc. v. United States, 46 Fed. Cl. 702 (2000).

507. According to one witness, "he would talk about how he was working 100 hours overtime, 80 hours overtime a week and that was paying for his house." *Id.* at 709.

508. The COR referred to contractor employees in derogatory terms, and said he would "fix" and "break" them. *Id.* at 708.

509. *Id.* at 707-08. The COR explained that he explained the responsibilities of government employees in this manner because the contractor's employees were not "the most educated people" but they could relate to the Bible. *Id.*

the COFC did not decide whether any performance deficiencies could have justified the termination.[510]

Discretion Abused When Default Based on Misinformation

After making numerous findings that government personnel withheld information or provided "incorrect, false, and/or misleading advice and information" to the contracting officer with "the intended purpose of getting Ryan's contract terminated," the ASBCA converted the default termination in *The Ryan Company.*[511] Because the contracting officer did not know all of the facts, the board concluded that the contracting officer's decision to terminate was an abuse of discretion.[512]

Sexual Harassment Proper Basis for Termination of NAF Contract

A contractor's failure to investigate a sexual harassment charge, and its decision to reduce the pay of the complaining employee, equated to a violation of the contract's Equal Employment Opportunity clause, according to the ASBCA in *Pacrim Pizza Company.*[513] Pacrim held a ten-year contract for exclusive pizza delivery service at Marine Corps Air Station, Iwakuni, Japan. The contract included an Equal Employment Opportunity clause, as well as a clause making applicable to the contractor all directives and regulations of the installation. One of the directives in effect during contract performance was Marine Corps Order 5300.10A, which described sexual harassment and incorporated the DOD's definition of sexual harassment.

During contract performance, the Navy's Criminal Investigation Service (NCIS) began an investigation of fraud allegations against the store manager. Several months later a Pacrim employee (the complainant) reported that the store manager had engaged in unwanted touching, kissing, and attempted kissing. The contracting officer gave written notice of the complaint to Pacrim's president, warned him against retaliating against the complainant, and requested a written response. The NCIS thereafter compiled an investigative report documenting other complaints of unwelcome touching, which led to the store manager's denial of access to the base. Pacrim's president then appointed an acting store manager, and in a letter informed the acting manager that the company had lowered complainant's position and pay "last year."[514] The facts, however, showed that Pacrim had reduced complainant's position and pay only after the appointment of the acting manager. The president also called the complainant and asked why she made up the story and "complained around."[515]

Following the issuance of a "cure" or "show cause" letter, the contracting officer terminated the contract for default. Pacrim's post-termination response to the letter did little to convince the contracting officer of any error: in a nonchalant manner, Pacrim's president stated, "If I was wrong—so I was wrong."[516] The ASBCA upheld the default termination. It found that Pacrim's president had failed to cure the sexual harassment violations and, by demoting the complainant, condoned the sexual harassment activities of his manager.[517]

Government Waivers of its Default Termination Right

If a contractor experiences performance problems under a supply or service contract, the government must act consistently in its subsequent administration of the contract. That is the combined lesson of *Action Support Services Corp.*,[518] *Ming C. Phua*,[519] and *Aviation Technology, Inc*.[520]

In *Action Support*, the contractor missed the first incremental delivery of target holding mechanism and tank gunnery devices. The Army issued a show cause notice in which it reserved its right to terminate the contract and also requested the contractor to propose a new delivery schedule. Prior to

510. *Id.* at 706 n.6.

511. ASBCA No. 48151, 2000 ASBCA LEXIS 153 (Aug. 15, 2000).

512. *Id.* at *53.

513. ASBCA No. 51608, 00-2 BCA ¶ 30,928.

514. *Id.* at 152,669.

515. *Id.*

516. *Id.* at 152,671.

517. *Id.* at 152,672-73. The board also seized upon Pacrim's letter, finding that it "was reflective of a lack of concern about sexual harassment and its consequences at his company." *Id.* at 152,673.

518. ASBCA No. 46524, 00-1 BCA ¶ 30,701.

519. PSBCA No. 4180, 00-1 BCA ¶ 30,872.

520. ASBCA No. 48063, 2000 ASBCA LEXIS 117 (Aug. 8, 2000).

receiving the contractor's response, the Army made a progress payment. Action Support responded to the show cause notice and stated that it intended to complete the contract, but failed to propose a new delivery schedule. The contractor then missed the next two delivery dates, but continued to work on the contract and provide performance reports to the Army. The Army terminated the contract for default after Action Support missed the third delivery date, citing the first missed delivery as the basis for the termination. Despite the fact that the termination decision came only twenty days after the contractor missed the last delivery date, the board found that the time period was more than forbearance. The ASBCA found that the Army had waived the schedule and failed to establish new delivery dates, resulting in the conversion of the termination to one for convenience.[521]

Ming C. Phua involved a contract to transport mail, under which the contractor was to use a vehicle of a specified size. In October 1997, the government found that the vehicle used by the contractor was noncompliant, and gave the contractor until 15 January 1998 to correct the deficiency.[522] When the contractor sought another extension until 16 January, the contract specialist, after consulting with the contracting officer, told him that failure to provide an acceptable vehicle by 8:00 a.m. on 16 January would result in *suspension* of contract performance without pay. The contractor did not produce a compliant vehicle on 16 January, but did inform the contract specialist on 20 January[523] that he had his truck ready for inspection. That same day the contracting officer terminated the contract for default, effective on the close of business 15 January. The board sustained Ming's appeal, finding the government had lost its right to terminate for default until it first established a new deadline for providing a satisfactory vehicle.[524]

If an initial delivery date is waived, the government must establish a valid new delivery date by contract modification. The Army discovered in *Aviation Technology, Inc.*, that failure to do so may result in a faulty termination. After Aviation Technology missed its first article delivery, the parties discussed a new delivery date. The Army issued a proposed bilateral modification citing a new delivery date. Aviation Technology refused to sign the modification due to a perceived defect in the statement of work that Aviation felt justified a later delivery date than that proposed by the government. The Army never issued a unilateral modification setting a new date, but used the proposed new delivery date as the basis for a default termination. On appeal the ASBCA found that the Army had never established a new delivery date, thereby rendering invalid the default termination.[525]

CAFC Finds Contractor's Failure to Provide Government With Adequate Assurance Justified T4D

Looking at the totality of the contractor's conduct and responses after receiving a cure notice on a construction contract, the CAFC reversed the ASBCA's decision and upheld a default termination in *Danzig v. AEC Corp.*[526] After AEC experienced financial difficulties with its surety that delayed work progress on a Reserve Training Center, the Navy agreed to a revised completion date. Unfortunately, AEC soon was unable to progress on the contract because its surety would not release funds from the project's bank account. In response to the Navy's cure notice, AEC stated in two separate letters that it could not cure the defect.[527] During this time period AEC had only a handful of employees at the work site. AEC also disconnected the telephone and removed contract files and equipment from the work site.[528] The parties then held a meeting during which the Navy provided AEC with an unsigned show cause letter requesting a response within ten days. Two days later AEC received a signed copy of the show cause letter. AEC never responded to the show cause letter, and five days before the project completion date the Navy terminated the contract for default "due to failure to make progress in the work and for default in performance."[529]

Despite the seemingly insurmountable hurdle standing between AEC and contract completion, the ASBCA rejected

521. *Action Support Servs. Corp*., 00-1 BCA ¶ 30,801 at 151,686. Waiver existed because the Army knew the delivery dates had all been missed, gave signals to the contractor that the dates weren't firm, and knew the contractor continued to perform and incur costs. *Id.* The board found waiver despite recognizing the general rule that waiver of the government's right to one or more deliveries under an incremental delivery contract does not result in waiver of delivery dates for subsequent increments. *Id.* at 151,684-85.

522. The contracting officer advised the contractor in a letter that failure to provide a conforming vehicle by 15 January 1998 might result in termination for default. *Ming C. Phua*, 00-1 BCA ¶ 30,872 at 152,430.

523. 20 January was the first business day after an intervening weekend and a federal holiday. *Id.*

524. *Id.*

525. *Aviation Technology*, 2000 ASBCA LEXIS 117, at *16.

526. 224 F.3d 1333 (Fed. Cir. 2000).

527. *Id.* at 1335. AEC characterized the surety's actions in not releasing project funds as "financial strangulation," and opined that the lack of funds made it "doubtful that AEC will ever complete the project." *Id.* AEC also alleged that government-caused changes and delays prevented timely completion, which the Navy found to be vague and unsubstantiated. *Id.*

528. *Id.* at 1339.

the Navy's three bases for termination and overturned the default termination. The board identified government delay that entitled AEC to approximately three weeks of additional time to complete the project, and held that there was no evidence that AEC could not complete performance by the extended date. In rejecting the Navy's contention that AEC had breached the contract by anticipatory repudiation, the board held that there had been no expression of an "unequivocal unwillingness or inability to perform."[530] Finally, the board rejected the Navy's argument that the termination was justified because AEC had failed to give the Navy adequate assurance that it could timely complete the project. When analyzing this basis for termination, the ASBCA focused on the meeting between the parties during which the Navy failed to ask for assurances.

The CAFC reversed the ASBCA and upheld the default termination, finding that AEC had provided no adequate explanation of how government-caused delay related to its slow progress.[531] After analyzing AEC's letter responses and conduct following the Navy's cure notice, the CAFC concluded as a matter of law that AEC failed to give the Navy adequate assurance of timely performance.[532]

Termination for Convenience

Termination to Save Space Station Project Not Done in Bad Faith[533]

You cannot get too much of a good thing, and the COFC decision in Northrop Grumman provides *Year in Review* material for analysis of both competition[534] and termination for convenience issues.

Northrop's contract was one of four "space station" contracts awarded by NASA, with Northrop responsible for project coordination and program-wide integration. Members of Congress and the President expressed concern when the space station yielded large cost overruns and schedule delays. In an effort to save the entire project, NASA's administrator met with the chief executive officers of the four contractors to propose a non-competitive selection of a single prime contractor . Under NASA's plan, the remaining contractors would be "novated" and reassigned to the selected prime contractor, with no guarantee that all contractors would be kept whole. The COFC found that the contractors, understanding that the space station program was in jeopardy, acquiesced in the restructuring plan. Thereafter, NASA selected Boeing as the sole prime contractor, approved a plan that reduced significantly Northrop's role under the Boeing contract, and terminated Northrop's prime contract for convenience.

The COFC found that NASA's decision to terminate Northrop's contract was intended to save the Space Station program, and constituted a proper basis for a termination for convenience.[535] While the court found "rather troubling" allegations that government officials knew but kept secret information about Northrop's reduced role under Boeing, such information did not support a finding of bad faith or abuse of discretion.[536]

The Christian Doctrine Does Not Apply to the Short Form Clause[537]

When a contract lacks a termination clause, an agency cannot limit termination settlement costs by arguing that the Short Form termination clause applies through operation of law.[538] Such was the holding in *Empres de Viacao Terceirense*,[539] in which the contractor sought various costs associated with the

529. *Id.* at 1336.

530. *Id.*

531. *Id* at 1339. The court noted that the ASBCA had found that the one item of government-caused delay primarily affected performance before the parties modified the contract schedule. *Id.*

532. *Id.*

533. Northrop Grumman Corp. v. United States, 46 Fed. Cl. 622 (2000).

534. *See supra* notes 48-55 and accompanying text for review of the competition issues associated with the *Northrop Grumman* decision.

535. *Northrop Grumman*, 46 Fed. Cl. at 627. The court applied the tests for finding a termination improper that were suggested by the federal circuit in *Krygoski Const. Co. v. United States*, 94 F.3d 1537 (Fed. Cir. 1996). The court found that NASA did not terminate Northrop's contract "simply to acquire a better bargain from another source," nor did NASA enter its contract with Northrop with no intent of fulfilling its promises. *Id.*

536. *Id.* at 628.

537. The *Christian* court established the principle that a mandatory contract clause will be included in a contract by operation of law. G.L. Christian v. United States, 312 F.2d 418 (Ct. Cl. 1963).

538. The short form clause at FAR 52.249-1 is used primarily in fixed-price contracts of $100,000 or less. *See* FAR, *supra* note 49, at 49.502(a)(1). Standard Form 1438 is the prescribed settlement form. *Id.* at 49.602-1(d).

termination of its transportation contract in the Azores Islands. The contracting officer sought to apply the Short Form clause to the termination settlement, which the board noted would preclude recovery of costs claimed by the contractor. In rejecting the government's position, the ASBCA noted that use of the Short Form clause was predicated upon a contracting officer's determination and exercise of discretion, which were lacking in this case. Citing to its prior holding in *Muncie Gear Works, Inc*., [540] the board held that it was only proper to incorporate by operation of law the Long Form clause.[541]

CAFC Affirms ASBCA Holding Concerning Interest[542]

Stating that neither "[l]engthy negotiations [n]or passage of time" establishes an impasse,[543] the CAFC affirmed a decision of the ASBCA denying the contractor Contract Dispute Act (CDA) interest on its termination settlement agreement with the government. The CAFC analyzed factors it had applied in *Ellett Construction Co. v. United States*,[544] and also reviewed prior decisions of the Court of Federal Claims and the ASBCA. The appeals court found in each case there was "objective evidence that negotiations had reached an impasse and clear indication by the contractor that it desired a final decision . . . . Most significantly, in each case, including *Ellett*, the parties never reached a settlement."[545] The CAFC held "that the eventual settlement agreement is conclusive evidence that negotiations had not reached an impasse."[546]

ASBCA Defines "Delivery" for Purposes of Profit on Subcontract Items

What constitutes "delivery" for purposes of the profit limitation on termination settlements?[547] This was the critical question in the appeal of *TRW Inc*.[548] After the Air Force partially terminated TRW's satellite contract for convenience, the contractor sought profit on $92 million worth of subcontract materials and services it claimed had been delivered prior to the termination. The Air Force disputed TRW's claim, which was premised on delivery occurring upon completion of a milestone of the subcontract's progress payment liquidation schedule.[549] The ASBCA rejected TRW's position by using common definitions of delivery,[550] and the language in TRW's subcontract,[551] to hold that only items actually or constructively delivered to TRW by the date of the partial termination were includable in the subcontract cost base for purposes of determining profit.[552]

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539. ASBCA No. 49827, 00-1 BCA ¶ 30,796.

540. ASBCA No. 16153, 72-1 BCA ¶ 9,429. The *Muncie* board held that "[t]he *Christian* case does not require the incorporation of a clause whose applicability is based on the exercise of judgment or discretion." *Id.* at 43,794.

541. *Empres de Viacao Terceirense*, 00-1 BCA ¶ 30,796 at 152,050.

542. Rex Sys., Inc. v. Cohen, 224 F.3d 1367 (Fed. Cir. 2000).

543. It took two and one-half years to settle the costs of the termination for convenience. *Id.* at 1369-70.

544. 93 F.3d 1537 (Fed. Cir. 1996).

545. *Rex Sys., Inc*., 224 F.3d at 1372.

546. *Id.* at 1374.

547. FAR 49.202(a) provides in relevant part that "[p]rofit shall not be allowed the contractor for material or services that, as of the effective date of termination, have not been delivered by a subcontractor, regardless of the percentage of completion." FAR, *supra* note 49, at 49.202(a).

548. ASBCA No. 51003, 00-2 BCA ¶ 30,992.

549. *Id.* at 153,025-26. TRW argued that delivery had to occur prior to a liquidation payment, since FAR 32.503-9, LIQUIDATION RATES–ORDINARY METHOD, provides for payments only for "contract items delivered and accepted." The ASBCA rejected TRW's argument that this applied as a matter of law, and also noted that this "descriptive" provision did not flow down to the subcontract. Following-on to the latter point, the board stated that TRW and its subcontractor may have had financing arrangements different from the typical government–prime contractor arrangement. *Id.* at 153,026.

550. The board stated that delivery is actual or constructive transfer of possession or control of an item from one party to another, and cited definitions from *Black's Law Dictionary* and *Webster's Third New International Dictionary. Id.* at 153,024, 153,030 n.3 (quoting BLACK'S LAW DICTIONARY 428 (6th ed. 1990); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 597 (1986)).

551. The heading of the progress payment liquidation schedule stated it was for "billing purposes only," and the term "deliver" was used numerous times to refer to specific actions not involving delivery to TRW. *Id.* at 153,026.

552. *Id.* at 153,028.

ASBCA Holds Government Not Entitled to Offset For Allegedly Defective Work[553]

Following the ASBCA's conversion of the default termination of D.E.W., Inc. (D.E.W.), to a termination for convenience, the parties disputed the convenience settlement. The government claimed that it was due an offset in excess of the contractor's settlement proposal because of D.E.W.'s substandard workmanship and failure to provide the government with timely notice of connection misalignments in the structural steel erection of a fuel cell shop. The ASBCA held that the government failed to prove it was entitled to an offset, as the government's defective specifications and design led to the project's misalignment problems. Despite finding that D.E.W. failed to give the government timely notice of the misalignment problem, the board found no prejudice.[554] The board then sustained the contractor's appeal.

Contract Disputes Act (CDA) Litigation

District Court Lacks Jurisdiction over Lease Agreement with Army

Upholding the district court's dismissal of a suit against the Army, the Second Circuit Court of Appeals held that the COFC had exclusive jurisdiction over a claim by Up State Federal Credit Union.[555] The Second Circuit held that the Contract Disputes Act (CDA), not the Administrative Procedure Act (APA), was the applicable basis for government waiver of sovereign immunity.

Up State constructed a credit union on the Fort Drum, New York, military installation. During construction the parties held negotiations to determine who would own the building, since ownership determined who paid the property taxes. According to the credit union, the parties agreed that the credit union would own the building and obtain a land lease from the Army during the first year. At the end of year one, the Army would take title to the building and provide the credit union with a facility lease. Instead, the Army sought to renew the land lease at the end of year one, and ultimately served Up State with a notice to vacate the premises when the parties could not reach agreement on the ownership and lease issue. Up State filed suit in the district court for the Northern District of New York, seeking a declaratory judgment that the Army held title to the building, an injunction directing the Army to execute the facility lease, reimbursement for legal fees and property taxes, and monetary damages.[556]

The Second Circuit applied a "rights and relief" analysis employed by three other federal circuits to identify whether the CDA or the APA was the proper source for government waiver of sovereign immunity.[557] Finding that Up State's rights sprang from its lease with the Army, and that the relief sought was in the form of a request for specific performance, the court held that the case belonged properly at the COFC.[558]

Engineer BCA Merges with ASBCA

As of 12 July 2000, the four judges of the Corps of Engineers Board of Contract Appeals (ENGBCA) merged with the ASBCA.[559] A reduced number of cases justified the elimination of one of the two DOD boards of contract appeals.[560] Due to the merging of boards, for the first time in several years the total number of cases docketed at the ASBCA increased.[561] As contract dispute caseloads continue to fall, expect further consolidations amongst the BCAs.

"I've Never Seen This Claim Before"

The initial step in the CDA litigation process is the submission of a claim. Two cases this past year showed that it is not always crystal clear when a claim has been submitted.

In *J. Cooper & Assocs. v. United States*,[562] the government awarded a letter contract for marketing and advertising services. The government did not definitize the contract, and

553. D.E.W. Inc., ASBCA Nos. 50796, 51190, 2000 ASBCA LEXIS 145 (Oct. 31, 2000).

554. *Id.* at *48-49.

555. Up State Fed. Credit Union v. Walker, 198 F.3d 372, 377 (2d Cir. 1999).

556. *Id.* at 374.

557. *Id.* at 375-76. The Second Circuit cited *Megapulse, Inc., v. Lewis*, 672 F.2d 959 (D.C. Cir. 1982), in which the court looked at the source of rights forming the plaintiff's claims and the remedies sought to hold that the APA waived sovereign immunity over an alleged Trade Secrets Act violation. *Id.*

558. *Id.* at 377.

559. Melanie I. Dooley, *Engineers Board Being Merged with ASBCA*, 74 BNA FED. CONT. REP. 54 (2000).

560. All ENGBCA judges became judges on the ASBCA, and all pending ENGBCA cases received new ASBCA docket numbers. *Id.*

561. 42 GOV'T CONTRACTOR, No. 42, at 4 (Nov. 8, 2000). The number of docketed cases for FY 2000 increased from 663 in FY 1999 to 722. The board disposed of 857 appeals this fiscal year, dismissing 509, denying 81, and sustaining 186. *Id.*

allowed it to lapse. J. Cooper filed a certified claim for nearly $1 million for "changes, delays, and additional costs incurred . . . as a direct result of the government's actions in awarding, managing, and constructively terminating this contract."[563] After the contracting officer denied the claim, J. Cooper filed an eight-count suit in the COFC. The government moved to dismiss the one count alleging that the government had breached the contract by its failure to definitize. The COFC granted the motion, finding that J. Cooper had never presented the breach claim to the contracting officer for a final decision.[564] Labeling the breach claim as one for lost profits[565] that differed from the essential nature of the termination claim,[566] the COFC dismissed the breach of contract count without prejudice.[567]

In *American Service & Supply, Inc*,[568] the ASBCA held that an "invoice" may be a claim. Following the termination of its contract for default, American submitted an invoice based on a percentage of contract completion. The contractor properly certified the invoice under the CDA. Responding by letter, the Air Force contracting officer disagreed with the percentage of contract completion, and suggested that American discuss payment with its surety. American filed its appeal on a "deemed denial" basis with the ASBCA approximately eight months later. The Air Force filed a motion to dismiss, arguing that the invoice was an undisputed routine request for payment and therefore not a claim.[569] The ASBCA denied the motion, holding that the invoice included disputed points that formed in major part the basis of the default termination. As the invoice was not a routine request for payment, the appeal was proper.[570]

Certification Problems Result in No Claim

When is an attempted certification correctable? Eight years after Congress amended the CDA to recognize the validity of claims that included certifications with technical defects, the answer to what is correctable is still developing.[571] In *Walashek Industrial & Marine, Inc*.,[572] the contractor filed a request for equitable adjustment (REA) accompanied by a "home-grown" certification.[573] The contracting officer issued a final decision in October 1998, to which the contractor responded in a November letter that it believed the final decision was rendered in error. Walashek also requested a final decision and included a proper CDA certification. Approximately five months later, when the contracting officer failed to respond to Walashek's November letter, the contractor filed its board appeal of the "deemed denial." The government filed a motion to dismiss, alleging that the original certification was "correctable" under the CDA, making the October final decision valid and Walashek's board appeal untimely.

The ASBCA held that Walashek's original certification was not correctable because it reflected "an intentional or negligent disregard" of the CDA requirements.[574] Since the REA with the non-correctable certification was not a valid claim, the con-

562. 47 Fed. Cl. 280 (2000).

563. *Id.* at 282.

564. *Id.* at 288.

565. *Id.*

566. *Id.* at 287. The court held that the claim arose under the contract, while the breach claim related to the contract. *Id.* at 286. Additionally, the termination claim did not subsume the breach of contract claim. *Id*.

567. *Id.*

568. ASBCA No. 50606, 00-1 BCA ¶ 30,858.

569. *Id.* at 152,335.

570. *Id.* The ASBCA stated that even if the invoice was a routine request for payment, it was disputed.

571. 41 U.S.C. § 605(c)(6) (2000) provides in part:

> A defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency board of contract appeals, the court or agency board shall require a defective certification to be corrected.

Id. A certification is correctable if it is technical in nature, such as when the wrong contractor representative signs the certificate. It is not correctable if the contractor intentionally, recklessly, or negligently disregards the applicable certification requirements. See H.R. REP. NO. 102-1006, at 28 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3921, 3937.

572. ASBCA No. 52166, 00-1 BCA ¶ 30,728.

573. The four paragraph certification departed extensively from that required under the CDA. *Id.* at 151,788.

574. *Id.* at 151,791.

tracting officer's response was not a valid final decision. The appeal based on the deemed denial of Walashek's November claim was timely and provided the board with jurisdiction.[575]

The COFC also had an opportunity to apply the "correctable certification" standard in *Scan-Tech Security v. United States*.[576] After the Federal Aviation Administration (FAA) terminated for default Scan-Tech's cost reimbursement contract, Scan-Tech filed a "claim" that included a Standard Form (SF) 1411, Contract Pricing Proposal Cover Sheet, signed by one of its representatives. Several years later, Scan-Tech filed suit at the COFC, only to face the FAA's motion to dismiss for lack of jurisdiction. Since Scan-Tech had failed to use the certification language mandated by the CDA, it argued that its submission of the SF 1411 constituted a defective and correctable certification. The COFC held that the SF 1411 did not "bear sufficient semblance to the CDA-required language," and lacked the "contextual attributes" of a SF 1436 (Termination Settlement Proposal) such that it failed as a defective certification. Finding the complete lack of a certification, the court granted the government's motion to dismiss.

Final Decisions: Timing is Everything

The issuance of a contracting officer's final decision, whether in response to a contractor's claim or as an affirmative government claim, must be done in a timely fashion. In *Northrop Grumman Corp.*,[577] the ASBCA held that a contractor could file an appeal based on a deemed denial of its $195 million claim where the contracting officer deferred issuance of a final decision pending completion of alternative dispute resolution (ADR) procedures. The contracting officer sent a letter to Northrop, stating the intention to render a final decision ninety days after completion of the ADR, but never received the consent of the contractor. Under the CDA, the contracting officer must either issue a decision within sixty days of receipt of a certified claim, or notify the contractor of the time within which the decision will be issued.[578] Accordingly, the contracting officer's deferment of the final decision until an unspecified date was not in compliance with the law.

To establish a government claim, only a final decision—and not a debt determination—that predates a contractor's filing for bankruptcy will have effect. In *Santa Fe Builders, Inc.*,[579] the Air Force awarded a contract to renovate a fitness center. One of Santa Fe's subcontractors started a fire while welding, which resulted in the destruction of the fitness center. After terminating the contract for convenience and reserving the Air Force's right to assert a claim for the cost of the fitness center and its contents, the Air Force demanded approximately $3 million under the contract's Permits and Responsibilities clause. The contractor filed a Chapter 7 bankruptcy petition ten days before the contracting officer issued the final decision asserting the government claim. The ASBCA held that once Santa Fe filed its bankruptcy petition, the bankruptcy code's automatic stay provisions[580] rendered the final decision void.[581]

COFC Interprets Scope of CDA Anti-Fraud Provision

When a contractor engages in misrepresentation of fact or fraud, then the contractor is liable for the costs attributable to reviewing the fraudulent claim.[582] In a case of apparent first-impression, the COFC in *UMC Electronics Co. v. United States*[583] rendered a decision concerning the types of costs that are reimbursable under the CDA's anti-fraud provision.

After a lengthy trial, the COFC held that UMC had presented a fraudulent claim to the government, and ordered the

575. *Id.*

576. 46 Fed. Cl. 326 (2000).

577. ASBCA No. 52263, 00-1 BCA ¶ 30,676.

578. 41 U.S.C. § 605(c)(2) (2000). The date must be pinpointed, and cannot be a specified number of days after the occurrence of a future event. McDonnell Douglas, Corp., ASBCA No. 48432, 96-1 BCA ¶ 28,166.

579. Santa Fe Builders, Inc., ASBCA No. 52021, 00-2 BCA ¶ 30,983 (holding a contracting officer's final decision, not a debt determination, is required).

580. *See* 11 U.S.C. § 362 (2000).

581. *Santa Fe Builders, Inc.*, 00-2 BCA ¶ 30,983 at 152,919.

582. The Contract Disputes Act, 41 U.S.C. § 604 (2000) (fraudulent claims), provides:

> If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim *in addition to all costs to the Government attributable to the cost of reviewing said part of his claim.* Liability under this subsection shall be determined within six years of the commission of such misrepresentation of fact or fraud.

Id. (emphasis added).

583. 45 Fed. Cl. 507 (1999).

government to submit an accounting of its costs for review. The government sought costs associated with review of the claim by the contracting officer, the Department of Justice (DOJ), and the DCAA. The UMC company argued that the only costs recoverable under the CDA's anti-fraud provision were those attributable to the contracting officer's review of the claim, reasoning that the other costs were litigation costs. The court rejected UMC's position. It noted that there was "no ambiguity in the anti-fraud provision's phrase 'all costs to the government.'"[584] The court also agreed with the government that since a contracting officer has no authority under the CDA to "settle, compromise, pay, or otherwise adjust any claim involving fraud,"[585] the CDA contemplated review by the DOJ.[586] Finding it "only logical" that the DOJ would involve the DCAA to determine whether fraud was present, the court held the agency could recover the properly documented costs of review by the contracting officer, DOJ, and DCAA.[587]

Ultimately, the court decided that the government was entitled to reimbursement for the costs of auditor and attorney travel, salaries, benefits, and overhead of contracting officer level personnel,[588] DCAA auditors, and DOJ attorneys, and contracted copying services.[589] The COFC found UMC liable for a total of over $853,000, with the costs of review accounting for nearly $620,000.[590]

When Is a Board Decision Final for Purposes of Filing an Appeal?

Boards of contract appeals often decide multiple claims involving different or unrelated facts. Additionally, boards frequently remand issues of quantum to the parties for resolution. The question raised in *Kinetic Builder's, Inc. v. Peters*[591] was whether a board decision on a non-remanded claim was final and therefore ripe for appeal to the CAFC, when a second claim from the same decision had been remanded to the parties for quantum negotiation. In *Kinetic*, the ASBCA ultimately denied some of Kinetic's multiple claims, and remanded to the parties one quantum issue.[592] In response to Kinetic's appeal to the CAFC of the denied claims, the government argued that the board decision would not be final until the contracting officer rendered a decision on quantum for the remanded claim. The CAFC rejected the government's position, stating:

We think the better rule is that where separate claims by definition focus on a different or unrelated set of operative facts, and where issues of liability and quantum have been assumed and determined, the decision of the Board as to the non-remanded claims is to be deemed final for the purpose of conferring appellate jurisdiction on the Court of Appeals for the Federal Circuit.[593]

SPECIAL TOPICS

Competitive Sourcing and Privatization

More GAO Guidance on Cost Comparisons

During the past year, the GAO has continued its steady output of opinions[594] analyzing the private-public cost comparisons being conducted pursuant to Office of Management and Budget (OMB) Circular A-76.[595] The constant theme here is for agencies to "do the cost study the way you said you would."

In *Rice Services, Ltd.*,[596] the Navy conducted an A-76 cost comparison study for full food service activities at the United

584. *Id.* at 510.

585. *See* 41 U.S.C. § 605(a).

586. *UMC Electronics Co.*, 45 Fed. Cl. at 510.

587. *Id.*

588. The court awarded costs incurred by personnel at the contracting officer level, based on the contracting officer's estimates of hours worked. The contracting officer provided a signed declaration to the court, providing estimates of hours derived through discussions with employees, or his personal knowledge. *Id.* at 511.

589. *Id.* at 511-13.

590. UMC was also liable for the $10,000 civil penalty under the False Claims Act and $223,500 for the amount of the misrepresentation under Section 604 of the CDA. *Id.* at 513.

591. 226 F.3d 1307 (Fed. Cir. 2000).

592. Kinetic requested reconsideration of the ASBCA's original decisions on the claims. In its reconsideration decision, the ASBCA modified parts of its original decisions. *See* Kinetic Builders, Inc., ASBCA Nos. 51012, 51611, 99-2 BCA ¶ 30,450.

593. *Kinetic Builder's, Inc.*, 226 F.3d at 1314. The CAFC found that acceptance of the government's position "would reduce the efficiency and flexibility generally associated with administrative proceeding." *Id.* at 1313.

594. *See, e.g.*, Trajen, Inc., B-284310; B-284310.2, Mar. 28, 2000, 2000 CPD ¶ 61 (finding that the agency improperly evaluated the contractor proposal); Aberdeen Technical Serv., B-283727.2, Feb. 22, 2000, 2000 CPD ¶ 46 (finding that the agency improperly costed both the contractor and government proposals, and failed to ensure an equal level of performance when performing a best-value comparison between contractor and government proposals).

States Naval Academy in Annapolis, Maryland, and determined that it would be more economical to continue in-house performance. The GAO, however, sustained a protest filed by the best value offeror because the agency failed to determine that the level and quality of performance under the government's most efficient organization (MEO) were equivalent to the level and quality of performance offered by Rice's proposal.

The contract solicitation placed great emphasis upon the level and quality of performance,[597] and the agency identified Rice's robust proposal staffing levels as a strength under the evaluated factors.[598] Although Rice did not offer the lowest price, the agency still determined that Rice's proposal was the "best value" to the government in accordance with the terms of the solicitation.

The agency then reviewed a meagerly staffed MEO, first against the requirements of the performance work statement and then directly against Rice's proposal.[599] Despite the staffing disparity, the agency determined that the MEO and Rice's proposal were "technically equivalent,"[600] and that neither "propose[d] innovations or techniques that will produce results in excess of what is required by [the solicitation]."[601] The GAO found that not only was the agency's determination of technical equivalency unsupported by the record, but that it was also "directly contrary to the agency's own prior assessments regarding the strengths of Rice's proposal and on which the 'best value' selection of Rice was based."[602] As the agency record failed to support a valid head-to-head comparison of the level and quality of performance between the MEO and Rice, the GAO sustained the protest.

Federal Employees and Unions—"Can't We Even Be Heard?"

Adversely affected federal employees and their unions continue to find the waters rough-going in challenges to the competitive sourcing process.[603] The past year has been no exception. As in past years, displaced federal employees continue to have the doors of justice slammed in their face over the issue of standing.

The GAO and Employee Standing

In *American Federation of Government Employees*,[604] the GAO dismissed for lack of standing a protest filed by federal employees and their unions in connection with an OMB Circu-

595. Federal Office of Management and Budget Circular No. A-76, Performance of Commercial Activities (Aug. 4, 1983, Revised 1999) [hereinafter OMB Cir. A-76].

596. B-284997, June 29, 2000, 2000 CPD ¶ 113.

597. The Navy advised private offerors that non-price evaluation factors were significantly more important than cost or price. *Id.* at 2-3. Furthermore, the solicitation expressly stated that "the ultimate focus of the management team should be to not merely meet expectations, but to exceed them and make USNA the top service academy dining facility," and that "food quality and customer satisfaction shall always be the ultimate goal." *Id.* at 3.

598. *Id.* at 3-4. Although substantial portions of the published GAO opinion are deleted, it is clear that the agency found Rice's proposal staffing level as strongly supportive of an overall technical evaluation rating that "significantly exceeded many of the solicitation requirements . . . [in] areas . . . which . . . are anticipated to result in a high level of efficiency or productivity or quality. *Id.*

599. The GAO stated:

> [W]here, as here, a "best value" approach is taken in evaluating private-sector proposals, the agency must perform a direct comparison between the non-price aspects of the MEO and the "best value" private-sector proposal. More specifically, the agency must compare the MEO to the private-sector proposal to determine "whether or not the same level of performance and performance quality will be achieved."

Id. at 7 (citing Office of Management Budget Circular A-76 Revised Supplemental Handbook, Performance of Commercial Activities part I, ch. 3, para. H.3.d (Mar. 1996) [hereinafter Revised Supplemental Handbook].

600. *Id.* at 6.

601. *Id.* The agency's comparison of the MEO and Rice's proposal occurred in a teleconference that lasted between forty-five minutes and an hour, and resulted in a two-paragraph memorandum without supporting documentation. *Id.* at 5.

602. *Id.* at 8. The GAO also found that the Navy's attempts on appeal to recharacterize Rice's proposal staffing level as redundant, inefficient, and an unnecessary expense merely resulted in a "Catch 22" dilemma: "either the agency's initial evaluation of private-sector offerors–and the source selection decision resulting from that evaluation–was materially flawed, or the subsequent comparison of the MEO to the 'best value' proposal [was] based on inaccurate representations." *Id.*

603. From 1995 to the end of 1999, DOD conducted one hundred and thirty-eight cost comparisons, of which forty percent resulted in contract decisions, and sixty percent resulted in decisions to perform the work with in-house, DOD employees. During the same five-year period, the DOD also conducted one hundred and forty-eight direct conversions, of which all but twelve resulted in contract decisions. Letter, The Under Secretary of Defense (Acquisition, Technology and Logistics), to Honorable Albert Gore, Jr., President of the Senate, subject: DOD Report on A-76 Reviews as required by Section 8109 of the Fiscal Year 2000 Department of Defense Appropriations Act (July 14, 2000) [hereinafter Section 8109 Letter], *available at* http://www.hqda.army.mil/ acsimweb/ca/ca1.htm.

604. B-282904.2, June 7, 2000, 2000 CPD ¶ 87.

lar A-76 cost comparison study for lack of standing. The Defense Logistics Agency (DLA) conducted an A-76 cost comparison between private-sector offerors and the government's MEO for operation of the material distribution depot at Warner Robins, Georgia.[605] After a cost comparison between the most advantageous commercial source and the in-house MEO, DLA made a final decision to award a contract to EG&G Logistics.[606] Four affected employees and their unions then protested.[607]

As in prior decisions,[608] the GAO held that federal employees and their unions "are not 'interested parties' who may protest under the statue governing our process."[609] The GAO then confronted the protesters' novel contention that the FAIR Act[610] provided them with standing.[611] The GAO found that while affected employees and their unions might be "interested parties" for challenging an executive agency's inclusion or omission of particular activities from the FAIR Act lists, the statute "makes no mention of recognizing those parties as 'interested parties' for any other purpose."[612] Thus, the GAO declined to find that the employees had standing, and dismissed the protest.

COFC and Employee Standing

Displaced federal employees found the going no better in the Court of Federal Claims. In *AFGE, AFL-CIO, Local 1482 v. United States*,[613] the COFC dismissed a protest filed by displaced federal employees and their union in connection with an OMB Circular A-76 cost study. Here DLA issued a solicitation for a contract to operate the material distribution depot in Barstow, California.[614] DLA again selected EG&G Logistics as the best value offeror for comparison with the in-house proposal.[615] After a cost comparison between the selected commercial source and the in-house MEO, DLA made a final decision to award a contract to EG&G.[616] Two individual employees and their unions then protested the action.[617]

The COFC first tackled the issue of "interested parties" under the Administrative Dispute Resolution Act of 1996 (ADRA).[618] The court determined that while the ADRA does not limit standing to just parties who qualify as "interested parties" under CICA,[619] it is no broader than those "who would have standing in federal district court under the [Administrative Procedures Act (APA)][620] to challenge that same procurement

605. *Id.* at 1-2.

606. *Id.* at 3.

607. *Id.* The protesters in this case first challenged the award decision through the A-76 administrative appeals process (*see* REVISED SUPPLEMENTAL HANDBOOK, *infra* note 599, at 13, FAR, *supra* note 49, at 7.307), alleging that numerous prejudicial mistakes were made in the cost comparison process. The agency appeal authority ultimately rejected the bulk of the appeal, and the protesters subsequently filed the GAO protest. *Id.*

608. *See* Nat'l Fed'n of Fed. Employees, B-225335.2, Feb. 5, 1987, 87-1 CPD ¶ 124; American Fed'n of Gov't Employees, B-223323, June 18, 1986, 86-1 CPD ¶ 572; Am. Fed'n of Gov't Employees-Request for Reconsideration, B-219590.3, May 6, 1986, 86-1 CPD ¶ 436.

609. *Am. Fed'n of Gov't Employees*, 2000 CPD ¶ 87 at 1. "Under the Competition in Contracting Act (CICA), a protest may be brought only by an 'interested party,' defined as 'an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract,'" *Id.* at 3 (citing 31 U.S.C. § 3551(2)).

610. Federal Activities Inventory Reform (FAIR) Act, 31 U.S.C. § 501(note) (2000). The FAIR Act requires each executive agency to submit annually to the Office of Management and Budget (OMB) "a list of activities performed by Federal Government sources for the executive agency that, in the judgment of the head of the executive agency, are not inherently governmental functions." *Id.* § 501(2(a)). The statute also establishes an agency appeal process to challenge the contents of the list. *Id.* § 501(3).

611. *Am. Fed'n of Gov't Employees*, 2000 CPD ¶ 87 at 6. "The protesters contend that because the FAIR Act 'equates agency employees and their union representatives to 'actual or prospective offerors,'' the GAO should "find that displaced employees and their unions have standing to protest contracting out decisions." *Id.* at 7.

612. *Id.*

613. 46 Fed. Cl. 586 (2000).

614. *Id.* at 588.

615. *Id.* at 589.

616. *Id.* at 589-90.

617. *Id.* at 590. Both the contractor and the affected employees submitted administrative appeals to the agency appeal authority. While the appeal authority sustained a number of the appeal issues asserted by the employees, and recosted both the MEO and contractor proposals, the appeal authority ultimately upheld the tentative determination in favor of EG&G Logistics. *Id.*

618. *Id.* at 591 (citing the Administrative Dispute Resolution Act of 1996 (ADRA), 28 U.S.C. § 1491(b)(1) (2000)). "Although the ADRA allows only 'interested parties' to maintain a suit to challenge a procurement decision [before the Court of Federal Claims], the ADRA does not define 'interested party.'" *Id.*

619. *Id.* at 595. CICA, which governs bid protests before the GAO, defines "interested party" to mean "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C. § 3551(2) (2000).

decision."[621] The court then reviewed the requirements for establishing standing under the APA.[622] It determined that the plaintiffs were not within the zone of interests to be protected by the statutes that they alleged were violated: 10 U.S.C. § 2462(b)[623] and Section 2(e) of the FAIR Act.[624] As the FAIR Act limited challenges simply to the listing of "not inherently governmental positions,"[625] "Congress did not intend for federal employees and their unions to be able to challenge [subsequent public-private] cost comparisons."[626] Relying upon existing precedent,[627] the court also found that displaced federal workers and their labor unions were not within the zone of interests protected by 10 U.S.C. § 2462(b).[628]

What About Standing on Direct Conversions?

Displaced federal employees and their unions did achieve a minor victory, however, in the District of Columbia District Court in *AFGE v. United States*.[629] In this case the Air Force originally planned to conduct an A-76 cost comparison study for the civil-engineering and maintenance work at Kirtland Air Force Base in Albuquerque, New Mexico.[630] The agency then decided to perform a direct conversion of these stated functions to a corporation owned by Native Americans on the basis of a federal statute that granted preferential treatment to such firms.[631] The Air Force subsequently solicited proposals from three Native-American-owned firms and awarded a contract to the Chugach Alaska Corporation (Chugach).[632] The plaintiff employees and their unions then sought to enjoin the racial classification preference as constitutionally impermissible.[633]

In ruling upon plaintiffs' application for a temporary restraining order, the court ruled that the federal employees did have standing to challenge the planned award to Chugach pursuant to the Section 8014 preference.[634] Further, as federal employees have a constitutionally protected property interest in their employment,[635] and a right to continued federal employment absent just cause for their removal,[636] the deprivation of continued employment on the basis of an alleged unconstitutional provision would not constitute "just cause."[637] Although the court denied the requested preliminary injunctive relief,[638] it did permit federal employees and unions to at least be heard on the merits here.[639]

620. Administrative Procedures Act (APA), 5 U.S.C. § 702 (2000).

621. *AFGE, AFL-CIO, Local 1482,* 46 Fed. Cl. at 595.

622. *Id.* The court stated:

> Claimants challenging an agency decision under the APA must demonstrate that: (1) they have suffered sufficient "injury-in-fact;" (2) that the injury is "fairly traceable" to the agency's decision and is "likely to be redressed by a favorable decision;" and (3) that the interests sought to be protected are "arguably within the zone of interests to be protected or regulated by the statute . . . in question.

Id. (citing Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 488 (1998); Bennet v. Spear, 520 U.S. 154, 162 (1997)).

623. 10 U.S.C. § 2462(b) (2000).

624. Federal Activities Inventory Reform (FAIR) Act, 31 U.S.C. § 501(2(e)) (2000).

625. *Id.* § 501(2(a)).

626. *AFGE, AFL-CIO, Local 1482,* 46 Fed. Cl. at 598.

627. *See* AFGE v. Cohen, 171 F.3d 460, 470-71 (7th Cir. 1999) (holding that federal employees and their unions did not have standing to challenge the cost comparison process under 10 U.S.C. § 2462); NFFE v. Cheney, 883 F.2d 1038, 1047 (D.C. Cir. 1989) (finding that federal workers' interests were "indistinguishable from that of any taxpayer, which is insufficient to support standing under the zone-of-interest test" under 10 U.S.C. § 2462).

628. *AFGE, AFL-CIO, Local 1482,* 46 Fed. Cl. at 599.

629. 104 F. Supp. 2d 58 (D.C. Dist. Ct. 2000).

630. *Id.* at 61.

631. *Id.* at 61-62. Section 8014 of the Defense Appropriations Act for Fiscal Year 2000, Pub. L. No. 106-79, 113 Stat. 1212, 1234 (1999), generally prohibits the armed forces from expending appropriated funds to directly convert an activity or function that employs more than 10 DOD civilian employees. However, "[t]his section . . . shall not apply to a commercial or industrial type function of the Department of Defense that . . . (3) is planned to be converted to performance by a qualified firm under 51 percent Native American ownership." *Id.*

632. *AFGE*, 104 F. Supp. 2d at 61-62.

633. *Id.* at 62. The plaintiffs alleged that the preference in favor of Native-American firms violated the Equal Protection Clause of the Fifth Amendment, as the racial classification could not withstand a strict scrutiny analysis. *Id.* To survive strict scrutiny, any racial classification must satisfy a two-prong test: first, the classification must serve a compelling government interest; and second, it must be tailored narrowly to further that interest. Adarand Constructors, Inc., v. Pena, 515 U.S. 200, 235 (1995).

Untangling Conflicts of Interest

In last year's *Year in Review*, we took a look at "*When is a Conflict a Conflict*?" with regard to the A-76 process.[640] Although possessing no psychic powers, we did tell readers to stay tuned for more—and we are glad we did!

In *DZS/Baker LLC*,[641] the GAO found the A-76 evaluation process "fundamentally flawed" when fourteen of the sixteen agency evaluators who comprised the source selection team were employees whose jobs would be lost if a private offeror prevailed.[642] The Office of Government Ethics (OGE), however, subsequently criticized the DZS/*Baker* opinion.[643] The OGE argued that GAO should have applied conflict-of-interest standards from 18 U.S.C. § 208(b)(2) and the OGE exemptions thereto.[644] The GAO ever-so-politely countered that the OGE-cited statutory provisions imposed but a "minimum standard for acceptable conduct," and reaffirmed its view that appointing such an evaluation panel creates an inherent conflict of interest.[645]

Recognizing that the GAO, and not OGE, will entertain the protests from adversely affected contractors in the A-76 cost study process, OMB has now decided to adopt GAO's viewpoint on the issue. On 8 September 2000, OMB issued final guidance on conflicts of interest as part of the latest revision to the OMB Circular A-76 Revised Supplemental Handbook.[646] The OMB stated that it is a "better business practice" to limit participation on source selection teams of those personnel whose jobs are involved in a cost comparison.[647] Accordingly, "[i]ndividuals who hold position in an A-76 study should not be members of the Source Selection Team, unless an exception is authorized by the head of the contracting activity."[648] Exceptions, however, will only be authorized in "compelling circumstances" and must be justified in writing.[649]

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634. *AFGE*, 104 F. Supp. 2d at 69.

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Id. at 68 (citing Northeastern Fla. Chapter of Associated and Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 666 (1993)).

635. *Id.* at 69 (citing Arnett v. Kennedy, 416 U.S. 134, 164-67 (1974); Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 578 (1972)).

636. *Id.* (citing Stone v. FDIC, 179 F.3d 1368, 1375 (Fed. Cir. 1999)).

637. *Id.*

638. *Id.* at 75-79. The Court concluded that the Section 8014 preference was subject to strict scrutiny, but that the preference could reasonably be construed so as to save it from constitutional infirmity. *Id.* at 75. As such, the Court found that the employee's had not met all requisite requirements for a preliminary injunction. *Id.*

639. *Id.* at 70. While the Court found that affected employees did have standing to protest the direct conversion at Kirkland Air Force Base, it also found that plaintiffs did not have standing to challenge the planned renewal of a similar contract to Chugach pursuant to the Section 8014 preference at MacDill Air Force Base, Tampa Florida. The Court dismissed this part of complaint as none of the plaintiffs worked at or had any "discernible connection to MacDill." *Id.*

640. *1999 Year in Review, supra* note 37, at 82.

641. B-281224 et. al., Jan. 12, 1999, 99-1 CPD ¶ 19.

642. *Id.* at 3. In light of this "significant conflict of interest," and the contracting officer's failure to take appropriate remedial action, the GAO sustained the protest. *Id.* at 7-8.

643. Memorandum, Director, Office of Government Ethics, to Designated Agency Ethics Officials, subject: Section 208 Exemptions for Disqualifying Financial Interests that are Implicated by Participation in OMB Circular A-76 Procedures (9 Sept. 1999), *available at* http://www.usoge.gov/daeogram/1999 [hereinafter Section 208 Memorandum].

644. *Id.* at 1-2 (citing 5 C.F.R. § 2640.203(d)(1999)).

645. *Letter to OGE Regarding Conflicts of Interest in A-76 Cost Comparisons*, B-281224.8, Nov. 19, 1999, 1999 U.S. Comp. Gen. LEXIS 218, at *3, 5.

646. 65 Fed. Reg. 54,568-70 (2000) (issued as Federal Office of Management and Budget Circular No. A-76 (Revised) Transmittal Memorandum No. 22 (Aug. 31, 2000)).

647. *Id.* at 54,570.

648. *Id.*

649. *Id.*

Let's Do Utility Privatization

During the past year the Defense Department has continued its aggressive efforts to privatize ownership of its utility systems, [650] as part of the overall goal of getting out of the utility business.[651] The implementation of this novel program has not been without legal challenges.

In *Virginia Electric and Power Company; Baltimore Gas & Electric*,[652] the Army COE issued a competitive solicitation for the privatization of thirteen utility systems at five military installations in the National Capital Region.[653] The solicitation required offerors to propose on all utility systems at a particular installation and provided for no more than one consolidated contract to be awarded for each installation.[654] Virginia Electric and Power Company (VEPCO) and Baltimore Gas & Electric Company (BG&E) both protested the terms of the solicitation to the GAO.[655] The protesters alleged that the solicitation failed to recognize that the privatization of the utility systems was subject to state and local utility law and regulation, and that the bundling of utility systems at each installation was improper. [656] On both counts, the GAO held otherwise.

The determination of whether state law applies to federal utility privatization is essentially a constitutional issue,[657] and one that the GAO was clearly reluctant to resolve.[658] Nonetheless, the GAO held that federal agencies were entitled to view 10 U.S.C. § 2688 as not containing a waiver of federal sovereignty on the issue.[659] The GAO found the federal statute that authorizes utility privatization mandated a specific procurement approach: "Section 2688 expressly directs and requires that '[i]f more than one utility or entity . . . notifies the Secretary concerned of an interest in a conveyance . . . the Secretary shall carry out the conveyance through the use of competitive procedures.'"[660] In sum, "[n]othing in the protesters' pleadings suggest[ed] clear federal judicial precedent requiring the federal government to yield to state regulation over utility distribution services at federal installations."[661]

The GAO also denied the protest regarding the consolidation of utility systems into one contract per installation. "CICA generally requires that solicitations permit full and open competition and contain restrictive provisions or conditions only to the extent necessary to satisfy the needs of the agency."[662] Here, the agency's rationale for awarding no more than five consolidated

650. 10 U.S.C. § 2688, originally enacted as part of the FY 1998 National Defense Authorization Act, permits the service secretaries to convey all or part of a utility system to a municipal, private, regional, district, or cooperative utility company. 10 U.S.C. § 2688 (2000). Following enactment of this discretionary authority, the Secretary of Defense directed the military departments to privatize all utility systems (water, wastewater, electric, and natural gas) by 30 September 2003, except those needed for unique security reasons or when privatization is uneconomical.

Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, subject: Department of Defense Reform Initiative Directive 49: Privatizing Utility Systems (Dec. 23, 1998) [hereinafter DRID 49]; *see also* Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, subject: Department of Defense Reform Initiative Directive 9: Privatizing Utility Systems (Dec. 10, 1997). The privatization process generally consists of the competitive sale and conveyance of the utility system(s), together with a contract–for up to fifty years–for utility services. 10 U.S.C. § 2688(b), (c) (2000).

651. "The . . . objective is to get DOD out of the business of owning, managing, and operating utility systems by privatizing them." DRID 49, *supra* note 550, at Attachment.

652. B-285209, B-285209.2, 2000 U.S. Comp. Gen. LEXIS 125 (Aug. 2, 2000).

653. *Id.* at *5. The solicitation included various electric, natural gas, water and wastewater utility systems at Fort Meade, Maryland, Fort McNair, District of Columbia, Fort Myer, Virginia, Fort Belvoir, Virginia, and Fort A.P. Hill, Virginia. *Id.*

654. *Id.* at *6. The solicitation also permitted, but did not require, offerors to propose on more than one installation and offer a combination discounted price. *Id.* The contemplated term of the concomitant utility services contracts was 50 years. *Id.* at *6-7.

655. *Id.* at *2-3. In *Government of Harford County, Maryland*, B-283259; B-283259.3 (Oct. 28, 1999) 99-2 CPD 81, the GAO considered whether it had authority to consider protests regarding utility privatization. The GAO found that, notwithstanding the simultaneous sale and conveyance of government property, one of the solicitation's main objectives was to contract with the facility transferee for utility services. *Id.* at 4. As such, the GAO concluded that it had jurisdiction under the Competition in Contracting Act, 31 U.S.C. § 3551(1), to hear such protests. *Id. See supra* notes 421-25 and accompanying text for a full review of the *Harford* decision.

656. *Va. Elec.*, 2000 U.S. Comp. Gen. LEXIS 125, at *3. The GAO realized that the effect of applying state and local utility law and regulation to the privatization of federal utilities "would be that contracts for [utility services] would be awarded on a sole-source basis to the company holding the local utility franchise at each installation," to include the two protesters. *Id.* at *13.

657. It is well-settled that states may not regulate the activities of the federal government except to the extent that the Constitution so provides or Congress consents, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), and that for Congress to consent to such regulation, it must unequivocally and unambiguously waive the sovereign immunity of the United States, *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992).

658. *Va. Elec.*, 2000 U.S. Comp. Gen. LEXIS 125 at *13. "Our Office leaves to the courts the resolution of constitutional questions; we look only to whether contracting agencies are complying with clearly established judicial guidance in this area." *Id.*

659. *Id.* at *13-14.

660. *Id.* at *16 (citing 10 U.S.C.A. § 2688(b) (West 2000)).

contracts was not only the expectation of achieving significant cost savings, but also a means for ensuring the actual privatization of all utility systems.[663] Thus, the GAO found the Army's bundling of its utilities at each installation both reasonable and proper.[664]

Construction Contracting

"Beam Us Up Scotty!" Drawings and Specifications May Now Be Issued Solely in Electronic Format

The Director of Defense Procurement issued a final rule explicitly allowing contracting officers to issue contract drawings and specifications entirely in electronic format.[665] The rule requires contractors to print contract drawings and specifications on an as needed basis.[666] Prior to this change, the government was required to provide hard copies of all drawings and specifications.[667] One question still remains: Will the government now accept "as-built" drawings[668] in electronic format?[669]

The Road to Ruin Lies Between the Required Guardwalls

In *Fort Myer Construction Corp. v. United States*,[670] a construction contractor learned that mistaken interpretation does not mean contract ambiguity. The Federal Highway Administration (FHWA) contracted with the Fort Myer Construction Corporation (Fort Myer) to rehabilitate a 5.1 mile stretch of the Baltimore-Washington Parkway and to perform minor ramp construction. The contract required the installation of a number of ten-foot long segments of precast guardwalls. The contractor, however, planned to cast the concrete guardwalls in place.

When Fort Myer notified the government of its alternate plan, the contracting officer informed Fort Myer that the contract required precast walls: if Fort Myer wanted to use a different method, then it would have to submit a value engineering change proposal (VECP) for approval. Fort Myer did not submit a VECP and completed the contract using precast walls. The contractor then submitted a claim for the increase in cost between cast-in-place walls, and the precast walls actually installed.

On appeal, Fort Myer argued that the contract was ambiguous since it contained both the specifications for cast-in-place guardwalls and precast guardwalls.[671] In reviewing the contract in its entirety, the court noted that while the contract contained specifications for both cast-in-place and precast guardwalls, only the latter specifications applied.[672] While the court could discern no ambiguity, it also held that if any ambiguity existed, it was patent and Fort Myer had a duty to inquire.

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661. *Id.* at *14. In deciding this issue, the GAO both relied upon and affirmed the prior written opinion of the Department of Defense General Counsel addressing the same issue. The Role of State Laws and Regulations in Utility Privatization, Op. Gen. Counsel, DOD (Feb. 24, 2000). In a lengthy analysis, the DOD General Counsel opined that federal law preempted state law on the competitive sale of utility systems, and that "[n]othing in [10 U.S.C.] Section 2688 . . . can be interpreted as a waiver of the Government's sovereign immunity from state or local regulation with respect to the conveyance of the on-base utility system." *Id.* at 3.

662. *Va. Elec.*, 2000 U.S. Comp. Gen. LEXIS 125 at *25.

663. *Id.* at *26-31. The GAO determined that not all utility systems were equally attractive to prospective offerors. "Indeed, the agency concluded from the information available to it that there was so little interest in [some of the water and wastewater systems] . . . that there was a significant risk that the agency would be unable to obtain any offers for them if offerors were afforded the opportunity to propose on individual utility systems." *Id.* at *30-31.

664. *Id.* at *25-26.

665. Defense Federal Acquisition Regulation Supplement; Contract Drawings, Maps, and Specification, 65 Fed. Reg. 50,152 (2000) (to be codified at 48 C.F.R. Part 252).

666. DFARS, *supra* note 258, at 252.236-7001.

667. Defense Federal Acquisition Regulation Supplement; Contract Drawings, Maps, and Specification, 65 Fed. Reg. at 50,152. The prior version required the contracting officer to provide the contractor, at no cost, either (1) five sets of large-scale drawings and specifications, or (2) one set of reproducible or half-size drawings. *Id.*

668. FAR, *supra* note 49, at 36.102. As-built drawings, also known as "record drawings," are submitted by a contractor or subcontractor at any tier to show the construction of a particular structure or work as actually completed under the contract. *Id.*

669. For an overview of the impact of the Internet on construction contracting, see Frank J. Baltz & James P. Bobotek, *Construction Industry Use of the Internet: An Increasingly Necessary Marriage*, 35 PROCUREMENT LAW., ABA, No. 4, Summer 2000 at 7.

670. Fort Myer Construction Corp. v. United States, 99-5063, 2000 U.S. App. LEXIS 853 (Fed. Cir. Jan. 24, 2000).

671. *Id.* at *5-6.

672. *Id.* The solicitation included a three-item bid schedule: Schedule A included all work excluding the guardwall; Schedule B was for stone masonry guardwalls; and schedule C was for precast concrete guard walls. The solicitation clearly stated that the award would be made for either Schedules A + B, or Schedules A + C. Fort Myer received contract award for Schedules A + C.

The Ups and Downs of Elevator Installation

In *M.A. Mortenson Company*,[673] the ASBCA once again held that a contractor must resolve conflicts between information contained in drawings by reading the drawings together, and by following the requirements contained in the specifications.

Mortenson contracted with the government for construction of a multi-story, $120 million dollar joint Air Force-VA hospital located at Elmendorf Air Force Base, Alaska. The contract required installation of five hydraulic elevators and seven electrical elevators.[674] The electrical elevator specifications required the use of counterweight guide rails and guide rail supports.[675] The architectural drawings did not specify counterweight guide rail or guide rail supports, but referred to the elevator structural drawings for detailed elevator plans and sections.[676] The elevator structural drawings also did not include details relating to the counterweight guide rails or guide rail supports, but rather included a note requiring the provision of adequate structural supports for elevator cars and counterweights.[677]

Mortenson appealed the contracting officer's denial of its certified claim for $190,301 for the installation of counterweight guide rail supports for the electric elevators. The ASBCA denied the appeal. The board concurred with the contracting officer's determination that the contract clearly required Mortenson to supply the adequate structural support for the elevator counterweight guide rails.[678] In addition, the board found that Mortenson had also ignored a glaring inconsistency between the known need for counterweights and the failure of the structural drawings to depict the necessary counterweight support steel.[679] The ASBCA ruled that no government liability existed for such patent contract ambiguities.

It Never Rains in Southern California, But It Is Always Windy at White Sands

What happens when the government makes affirmative representations on the anticipated number of adverse weather days at a particular site and the bidder relies detrimentally upon that information? In the case of *D.F.K. Enterprises, Inc. v. United States*,[680] the government learned that no good deed goes unpunished.

D.F.K. Enterprises (DFK) secured an Army COE contract to repaint water towers at White Sands Missile Range, New Mexico (WSMR). The contract required construction of containment systems around the tanks to prevent lead-based paint waste from entering the environment during paint removal.[681] The contract included a special clause permitting time extensions for unusually severe weather, and referenced a particular engineer regulation that included weather data.[682] While the regulation specifically required the inclusion of wind conditions as a component of the development of adverse weather data, the COE engineers who developed the weather data failed to include wind in the anticipated adverse weather chart included in the solicitation.[683] When DFK representatives made a pre-bid site visit, they inquired about the expected wind conditions at the site.[684] A government representative responded that: "It's hot and we get some winds occasionally."[685]

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673. ASBCA 50,383, 00-2 BCA ¶ 30,936.

674. Electrical elevators require the use of counterweights to balance the elevator car while in use.

675. *Id.* at 152,699. The specifications laid out in detail the requirements for counterweight guides and guide rails, and also incorporated American Society of Mechanical Engineers (ASME) standard A17.1 (1993) Safety Code for Elevators and Escalators. *Id.*

676. *Id.* at 152,699.

677. *Id.* at 152,699-700. The note stated: "Provide adequate structural supports for attachment of elevator car and/or counterweight guide rails at each floor, pit, and overhead." *Id.*

678. *Id.* at 152,704. The contracting officer's final decision had stated that the architectural drawings, the specifications, and ASME A17.1 all required Mortenson to install "adequate structural support for the attachment of the elevator counterweight guide rails to the building frame, including elevator guide rail supports, brackets, and where necessary reinforcement of the building that formed support for the guard rails." *Id.* at 152,705.

679. *Id.* at 152,706.

680. 45 Fed. Cl. 280 (1999) (denying cross motions for summary judgment).

681. *Id.* at 281-82.

682. *Id.* at 282 (referencing U.S. Dep't of Army, Engineering Regulation 415-1-15 (31 Oct. 1989)). *Id.*

683. *Id.* at 283. The Corps only included adverse weather caused by rain and/or freezing precipitation. *Id.*

684. *Id.* at 282.

685. *Id.*

After beginning performance, DFK experienced a number of high-wind days. The windy conditions damaged the containment systems, created unsafe working conditions, and forced an extensive delay in performance until the winds subsided.[686] DFK claimed that the anticipated adverse weather data in the contract was an affirmative representation, and that the COE's failure to incorporate wind data constituted a breach of contract.[687] The government argued that despite referencing the weather chart, the "contract neither expressly warranted nor affirmatively represented information regarding wind conditions or even delays to the contractor."[688] The court agreed with DFK and found the weather chart was an affirmative representation of past weather conditions at the job site.[689]

What the Government Gives, the Government Can Take Away . . . Sometimes

In *Atherton Construction, Inc.*,[690] the ASBCA upheld the government's ability to provide greater access to a work site for a portion of the performance period without binding the government to increased access for the duration of the entire contract.

The Air Force awarded Atherton a contract to renovate military family housing units at Sheppard Air Force Base, Texas. By the terms of the contract, the government was responsible for removing existing ceiling diffusers and cutting holes for light fixtures. The Air Force subsequently employed a second contractor to accomplish this work. In order to accommodate the second contractor, the contracting officer directed Atherton to perform its work out of sequence. To help ease the burden that resulted, the government granted Atherton access to more than the contractually-required fourteen units at one time. After forty-eight days of increased access, the government then again restricted Atherton's access to only the fourteen units at a time. Atherton filed a claim seeking compensation for seventy-nine days of extended home office overhead.

The ASBCA denied this portion of Atherton's claim.[691] The board found that no agreement existed between the government and Atherton to provide greater access for the course of the contract.[692] The government unilaterally provided Atherton greater accesses as an accommodation, not as part of its contractual duties. As there existed no requirement that the government extend increased access indefinitely, there existed no contractor entitlement.[693]

Cost and Cost Accounting Standards

Ever-Growing Impact of the Northrop Decision on the Allocability of Legal Expenses

In last year's *Year in Review*,[694] we covered the CAFC's reversal of the ASBCA decision in Northrop Worldwide Aircraft Services, Inc.[695] In that case, the Federal Circuit held that the legal fees incurred by a contractor while unsuccessfully defending wrongful employee termination lawsuits based upon fraud were not allocable to the underlying contract because the government gained no benefit from the incurrence of such costs. The past year has shown the full fallout from the *Northrop* decision, both in subsequent court holdings as well as the fervor with which many in industry have responded.[696]

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686. *Id.* at 283.

687. *Id.* at 284.

688. *Id.* at 286.

689. *Id.* The court held that bidders would "naturally believe . . . anticipated delays due to adverse 'weather' included delays due to wind . . . ." *Id.* at 287.

690. ASBCA No. 48527, 00-2 BCA ¶ 30,968.

691. *Id. passim*. Atherton also claimed differing site conditions, cost of proposal preparation for the removal of ceiling diffusers and cutting the holes for new lights, delay damages, return of liquidated damages assessed, Prompt Payment Act interest, and claim preparation cost. The board awarded a portion of the differing site conditions claim, a partial return of liquidated damages assessed, and partial award on the Prompt Payment Act claim. The board denied all other claims. *Id.*

692. *Id.* at 152,822. The parties agreed Atherton was entitled to additional costs incurred to execute the out-of-sequence work. *Id.*

693. *Id.* at 152,823.

694. *1999 Year in Review*, *supra* note 37, at 90.

695. Caldera v. Northrop Worldwide Aircraft Servs., Inc., 192 F.3d 962 (Fed. Cir. 1999). For full development and analysis of the underlying ASBCA decision, see Major Thomas Hong, *Allowable Cost: Contractor Can Claim Legal Costs Even Though it Lost Wrongful Discharge Case*, ARMY LAW., July 1998, at 66.

696. *See* George M. Coburn & Darrell J. Oyer, *The Boeing North American and Northrop Cases: "Benefit to the Government" as an Erroneous Basis of Cost Allocation Under Government Contracts*, 74 BNA FED. CONT. REP 332 (2000); *Deciphering Caldera v. Northrop Worldwide Aircraft Services, Inc.–The Concept of "Benefit" and Its Role in Cost Allocation and Allowability*, 42 GOV'T CONTRACTOR 1 (2000); Ralph C. Nash & John Cibinic, *Allowability of Costs: Struggling with the Concept of "Benefit" to the Contract*, 13 NASH & CIBINIC REP. 62 (1999).

Legal Expenses for Wrongdoing on Other Contracts

In *Boeing North American, Inc.* (Boeing),[697] the ASBCA extended the *Northrop* rationale to contractor misconduct on other federal contracts. In 1990, the Air Force awarded a contract to Boeing[698] for certain parts for the Peacekeeper missile. Between 1982 and 1992, the contractor was charged with, or implicated in, various criminal, fraudulent, and improper acts in connection with other federal contracts.[699] In June 1989, four appellant shareholders filed a stockholders' derivative action against the corporate directors for breach of fiduciary duties.[700] In September 1991, the parties entered into a settlement agreement that terminated the stockholder lawsuit.[701] Boeing then included a total of $4.6 million in its corporate overhead for the legal fees, costs and settlement expenses incurred as a result of the shareholder lawsuit. The contracting officer, however, disallowed recovery of these costs on the instant contract.[702]

On appeal, Boeing argued that the disputed costs were allowable professional services costs,[703] reasonable in nature, and allocable because they conferred benefit on the contractor.[704] The ASBCA thought otherwise and found such costs were not allocable for two reasons. First, it is a "guiding principle" that federal agencies do not pay for the results or consequences of contractor wrongdoing,[705]and "but for" the criminal misconduct, the shareholder lawsuit costs would not have occurred. The ASBCA also opined that the rationale of *Northrop* could be properly extended here: "[w]e can discern no benefit to the Government" for the contractor's defense of lawsuits resulting from a contractor's misconduct.[706]

Legal Expenses for Prime-Sub Lawsuits

By contrast, in *Information Systems & Network (ISN) Corp.*,[707] the ASBCA held that the legal expenses incurred by a contractor while suing subcontractors to enforce performance were valid contract performance expenses, and therefore recoverable costs as part of a convenience termination settlement. The case involved a DLA contract with ISN to install intrusion detection systems at four U.S. military installations in Italy. ISN in turn entered into subcontracts for various components of the system. ISN then found itself suing and defending suits from its subcontractors.[708] The contracting officer subsequently terminated the contract for convenience and directed ISN to submit a convenience termination settlement claim.[709] Included in ISN's claim were the legal fees incurred in connection with the various vendor lawsuits.[710]

697. ASBCA No. 49994, 00-2 BCA ¶ 30,970.

698. The Air Force originally awarded the contract to Rockwell International Corporation. In December 1996, Rockwell merged with a wholly owned subsidiary of The Boeing Company and changed its name to Boeing North American, Inc. *Id.*

699. The ASBCA opinion lists five criminal and civil charges resulting in a combined $25.5 million in fines and restitution. *Id.*

700. The action alleged that "the directors failed to institute and enforce adequate internal controls, and fostered a 'corporate climate' that encouraged employee misconduct under federal contracts and resulted in criminal and civil penalties and fines." *Id.*

701. In this settlement, while admitting no corporate wrongdoing, Boeing did agree to pay $1.4 million in legal fees and expenses incurred by the plaintiffs. *Id.*

702. The contracting officer "asserted that, but for the admitted and proven 'criminal misconduct, civil fraud, and other contractor wrongdoing,' the [shareholder] suit would not have been filed. Therefore, it was 'patently unreasonable to expect [the government] to pay for the consequences of this wrongdoing.'" *Id.*

703. *See* FAR, *supra* note 49, at 31.205-33(b).

704. *Boeing North American*, 00-2 BCA ¶ 30,970 (citing FAR, *supra* note 49, at 31.201-4).

705. *Id.* (citing Lockheed Aircraft Corp. v. United States, 375 F.2d 786, 794, 179 Ct. Cl. 545, 558 (1967) and November 1988 DAR Committee Report implementing the Major Fraud Act of 1988).

706. *Id.*

707. ASBCA No. 42659, 00-1 BCA ¶ 30,665.

708. Information Systems & Network subcontracted with Bell South Telesensor (Bell South) to furnish a monitor and control system for the detection systems, and the two had several disputes concerning alleged defects in the subcontractor's product. Bell South sued ISN, and ISN counterclaimed, incurring a total of $353,950 in legal fees. Additionally, ISN fought a legal challenge brought by its electrical wiring supplier to recover amounts due, and incurred legal fees of $9631 in the process. ISN also incurred $7,500 in attorney fees when sued by the owner of a leased warehouse for unpaid rent. *Id.*

709. The contracting officer terminated ISN originally for defaulting through failure to commence installation of the intrusion-detection systems in a timely manner. Before the ASBCA had rendered its decision on the appealed default termination, the contracting officer agreed to retroactively convert the termination to one of convenience, and told ISN to then submit its settlement claim. *Id.* In converting to a convenience termination and considering the settlement claim piecemeal instead of all at once, the government gave up the bargaining power it had over such disputed costs.

710. Also included in ISN's convenience termination settlement proposal were the legal fees incurred for litigating the default termination ($124,267), for protesting the reprocurement contract ($83,698), and for performing nonlitigation tasks associated with the termination ($19,671). *Id.* The ASBCA only permitted recovery of the last claimed amount. *Id.*

Legal expenses, like all other expenses incurred in furtherance of performance of the terminated work, are generally recoverable when reasonable, allocable, and not prohibited.[711] Here, the government argued that because it had not chosen ISN's subcontractors, and had not received any benefit from defective subcontractor performance or from these lawsuits generally, such costs were not allocable. The ASBCA, however, found such arguments without merit. The board held that the legal fees were allocable to the contract because the lawsuits involved work performed under the contract.[712] As such, when ISN had a valid reason for litigating with a subcontractor, the attorney fees incurred in furtherance thereof were recoverable.[713]

Legal Expenses for Fraud Investigations

Lastly, in *DynCorp*,[714] the ASBCA held that the legal expenses incurred in connection with a criminal investigation for alleged contractor wrongdoing were allowable expenses of a cost contract. The case involved a contract for base support services at Fort Irwin, California. Beginning in 1992, the Army Criminal Investigation Division (CID) began investigating allegations of fraud involving both the contractor and its employees.[715] The United States Attorney eventually declined prosecution against the contractor, but did prosecute and convict one DynCorp employee.[716] The contractor subsequently submitted a claim for the $756,000 in legal costs incurred in connection with the criminal investigation.[717]

On appeal, the Army argued that FAR 31.205-47(b) expressly precluded the recovery of all of DynCorp's legal costs because of the employee conviction.[718] The ASBCA agreed with the Army's reading of FAR 31.205-47(b) but still ruled otherwise. The board found that the intent of the Major Fraud Act,[719] upon which the aforementioned FAR provision was derived, was not to impute employee liability to the contractor. Federal law, therefore, did not bar recovery of the incurred legal proceeding costs for such a criminal investigation absent, *inter alia*, a criminal conviction of the contractor itself.[720] The board then remanded the case back to the parties for a determination of quantum.[721]

DOD's New Profit Policy

The Defense Department is now amending its profit policy to reduce and eventually eliminate emphasis on facilities investment, to increase emphasis on performance risk, and to encourage contractor cost efficiency.[722] The DOD's existing profit policy, as set forth in DFARS Subpart 215.4,[723] has encouraged defense contractors to invest in productivity-enhancing facilities. In the fifteen years since establishment of this profit policy, smaller defense budgets and industry down-

711. FAR, *supra* note 49, at 31.205-42, 31.201-2.

712. While the board acknowledged the existence of the *Northrop* decision, in its view the CAFC had held that the legal fees did not benefit the government only because they were the result of proven contractor misconduct. *Info. Sys. & Network Corp.*, 00-1 BCA ¶ 30,665 at 151,421.

713. The ASBCA found that the legal fees incurred by ISN in the Bell South and electrical wiring supplier lawsuits met this standard. By contrast, as ISN's defense to the warehouse owner's claim for unpaid rent was not reasonable, the legal fees incurred were not recoverable. *Id.*

714. ASBCA No. 49714, 00-2 BCA ¶ 30,986, *motion for reconsideration denied*, 2000 ASBCA LEXIS 127 (Aug. 31, 2000).

715. The local United States Attorney's Office and the Federal Bureau of Investigation (FBI) later assumed investigative responsibility for this case.

716. The United States Attorney did convict, pursuant to a guilty plea, DynCorp employee Larry Marcum for unauthorized access to a government computer, in violation of 18 U.S.C. § 1030(a)(3) (a Class A misdemeanor). *Id.*

717. DynCorp's claim did not include legal costs incurred in connection with its representation of Mr. Marcum. *Id.* In an earlier decision, in denying the government's motion for summary judgment, the ASBCA held that while the government's criminal investigation was a sovereign act, that did not mean that the costs incurred by the contractor as a result of such sovereign act were not recoverable under a cost contract. *DynCorp*, ASBCA No. 49714, 97-2 BCA ¶ 29,233.

718. Specifically, the Army argued that FAR 31.205-47(b) makes unallowable the costs "incurred in connection with any proceeding brought by a Federal, State, local, or foreign government for violation of, or a failure to comply with, law or regulation by the contractor (*including its agents or employees*), . . . if the result is . . .[i]n a criminal proceeding, a conviction." *Id.* (emphasis added).

719. The Major Fraud Act of 1988, Pub. L. No. 100-700, 102 Stat. 4636 (amending various federal statutes to include 10 U.S.C. § 2324 (allowable costs under defense contracts)).

720. *Id.* With regard to FAR 31.205-47(b), the ASBCA held that "a regulation must maintain consistency with the statute it implements. Where it does not, it is entitled to no deference." *Id.* Accordingly, an interpretation of FAR 31.205-47 that would bar recovery of a contractor's proceedings costs based solely on an employee's conviction is "out of harmony with the statute, [and] is a mere nullity." *Id.* (citing *Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 134 (1936)).

721. While the ASBCA fully addressed the issue of allowability, the board made no mention of how DynCorp's legal proceeding costs were allocable (i.e., how such costs benefited the government) pursuant to the CAFC's decision in *Northrop*. The agency's final decision determined that the amount of recovery was $0, as none of the costs incurred were allocable. *Id.*

722. Defense Federal Acquisition Regulation Supplement; Changes to Profit Policy, 65 Fed. Reg. 45,574 (July 24, 2000).

sizing have resulted in excess capacity and under-utilized facilities. As a result, the primary purpose of the new profit policy "is to reduce and, over time, eliminate facilities investment as a factor in establishing profit objectives on sole-source, negotiated contracts." To offset this reduction, performance risk values will increase. Further, "contracting officers will be able to use the special cost efficiency factor to reward companies that undertake meaningful efforts to reduce contract costs with additional profit . . . ."[724]

Cost Accounting Standards (CAS) Board Implements Statutory Mandate

In last year's article, we reported that section 802 of the National Defense Authorization Act for Fiscal Year 2000 streamlined the applicability of CAS.[725] It was no surprise that this year the CAS Board developed final rules enacting the same,[726] as the statute directed it to do so.[727] What is of note is the absence of any differences whatsoever between the implementing CAS provisions and the underlying statute. Of primary importance, the threshold for "full" CAS coverage increased from $25 million to $50 million. The dollar threshold for filing CAS disclosure statements also increased from $25 million to $40 million.[728] The cumulative effect of these and other CAS changes is an estimated a 40% reduction in the number of contractor segments covered by CAS, the CAS Board said.[729]

Defective Pricing

TINA Threshold Raised[730]

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have issued a new rule revising the FAR provisions regarding the Truth in Negotiations Act (TINA).[731] The FAR revision resulted from the statutory requirement for review of the TINA threshold every five years.[732] The new rule amends FAR 15.403-4 and raises the threshold at which a contracting officer must obtain cost and pricing data before award of a negotiated contract or the modification of certain existing contracts from $500,000 to $550,000.[733]

Hidden in Plain Sight Is Not Defective Pricing

In *McDonnell Douglas Helicopter Systems*,[734] a case where the Army alleged contractor failure to disclose current, accurate, and complete cost or pricing data, the ASBCA ruled that information not noticed was different from information not disclosed. The case arose from a basic ordering agreement for spare parts for the Apache Helicopter. McDonnell Douglas Helicopter Systems (MD) chose to make the required spare parts in-house rather than to buy the parts from outside vendors—even though it was more costly to do so. The problem was that the Army did not realize the contractor's practice in this regard until after price negotiations had occurred.

723. DFARS, *supra* note 258, at subpt. 215.4.

724. Defense Federal Acquisition Regulation Supplement; Changes to Profit Policy, 65 Fed. Reg. at 45,574.

725. *1999 Year in Review*, *supra* note 37, at 138.

726. Cost Accounting Standards Board; Applicability, Thresholds and Waiver of Cost Accounting Standards Coverage; Final Rule, 65 Fed. Reg. 36,768 (June 9, 2000).

727. Section 802(c) required the Administrator for Federal Procurement Policy to amend 48 C.F.R. § 9903.201-2 to reflect the increased thresholds within 180 days after enactment of the Authorization Act. National Defense Authorization Act for Fiscal Year 2000, 41 U.S.C. § 802(c) (2000).

728. The CAS Board also excluded from CAS coverage firm-fixed-price contracts and subcontracts awarded on the basis of adequate price competition without submission of certified cost or pricing data. The final rule also added a "trigger" provision that exempts contracts and subcontracts valued at less than $7.5 million from CAS coverage if the contractor or subcontractor does not have another CAS-covered contract valued at more than $7.5 million. The rule also authorized the head of an agency to waive CAS applicability: (1) for contracts and subcontracts valued at less than $15 million with contractors or subcontractors that sell primarily commercial items, and (2) under "exceptional circumstances when necessary to meet the agency's needs." Cost Accounting Standards Board; Applicability, Thresholds and Waiver of Cost Accounting Standards Coverage; Final Rule, 65 Fed. Reg. at 36,768.

729. Martha A. Matthews, *CAS Board Seeks Public Input in Developing Plan for Streamlining Review*, 74 BNA FED. CONT. REP. 7 (2000)

730. *See* Federal Acquisition Regulation; Truth in Negotiations Act Threshold, 65 Fed. Reg. 60,553 (Oct. 11, 2000) (to be codified at 48 C.F.R. 15).

731. 10 U.S.C. § 2306(a) (2000); 41 U.S.C. § 254(b) (2000).

732. *Id.*

733. Federal Acquisition Regulation; Truth in Negotiations Act Threshold, 65 Fed. Reg. at 60,553. *See also* FAR, *supra* note 49, at 15.403-4.

734. ASBCA No. 50447, 2000 ASBCA LEXIS 142 (Aug. 29, 2000).

In asserting its defective pricing claim, the Army alleged that MD failed to disclose lower purchase prices for parts manufactured by outside sources as compared to the costs for making the parts actually provided.[735] The Army contended that if its negotiators had been aware that it would have been cheaper for MD to buy parts rather than making the parts in-house, then the negotiators would have started at a lower bargaining price and negotiated a lower price.

The ASBCA ruled, however, that the Army failed in its factual burden of proof for the following reasons. McDonnell Douglas maintained a detailed internal system for tracking the procurement histories of hundreds of parts, including parts that it manufactured in-house, parts that it purchased from outside suppliers, and parts that were both made and simultaneously purchased from outside sources. The company made this information available to DCAA and DLA[736] personnel in both hard copy and a read-only electronic format. Over time, DLA personnel became so comfortable with MD's internal practices that they no longer reviewed individual make/buy decisions. These facts, along with the government's subsequent decision not to challenge MD's make/buy decisions when negotiating prices, led the board to hold that such decisions were not subject to question,[737] and that the price increase was not a natural and probable consequence of non-disclosure.[738] After finding that MD adequately disclosed the relevant data (at least through the pre-award review stage), and noting that a contractor is simply not responsible for the inability of the government actors to work together successfully, the ASBCA denied the government's defective pricing claim.

"Exceptional Circumstances" Exemption from TINA Continues Until Reversed by Granting Official

A single "exceptional circumstances" exemption from the TINA requirement to submit certified cost or pricing data applied to the contract as a whole, including twelve modifications over sixteen years, according to the ASBCA in *City of Albuquerque*.[739]

In 1973, the Air Force awarded a contract to the City of Albuquerque (City) for the supply of water and sewer services.[740] At the time of award, the contract exceeded the existing TINA threshold; the Chief of the Purchasing Office determined, however, that "exceptional circumstances"[741] justified waiving the requirement for cost or pricing data.

In connection with a modification issued in 1988, the Air Force pricing analyst requested cost or pricing data from the City.[742] The City supplied excerpts from an existing study used to establish rates for its customers. After concluding negotiations, the City executed a certificate of current cost or pricing data at the contracting officer's request.[743] Several years later DCAA concluded that the modification had been defectively priced,[744] and the contracting officer issued a final decision demanding payment of $827,139 for the overcharges and interest.[745] The City appealed the final decision to the ASBCA.[746]

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735. To recover on a defective pricing claim under TINA, the government must prove (1) the information in dispute is cost or pricing data, (2) cost or pricing data were not meaningfully disclosed by the contractor, and (3) the government relied to its detriment on the inaccurate, incomplete, or non current data. Once nondisclosure is established, the government benefits from a rebuttable presumption that a contract price increase was the "natural and probable consequence" of the nondisclosure. *Id.* at *26-27.

736. The DLA maintained a Defense Plant Representative Office at the contractor's facility. At least once every year, MD provided the government representatives with a complete hard-copy purchase history by part number. However, DCAA and DLA personnel split responsibility for reviewing MD's data and failed to communicate effectively, thereby resulting in an inability to use the provided data efficiently. *Id.* at *34.

737. The evidence indicated the Army did not intend to challenge the make-or-buy decisions, with or without the undisclosed purchase histories. The fact that MD did in fact make the disputed parts also helped persuade the board that a price increase was not a natural and probable consequence of non-disclosure. *Id.* at *44.

738. This decision is unusual in that the ASBCA rarely finds that the rebuttable presumption of a price increase to have been overcome. *See, e.g.*, *Grumman Aerospace Corp.*, ASBCA No. 27476, 86-3 BCA P 19,091 at 96,494.

739. City of Albuquerque, ASBCA No. 49698, 98-BCA ¶ 30,018, *aff'd on reconsid*., 1999 ASBCA LEXIS 168 (Nov. 19, 1999).

740. *Id.* at 148,517. The contract term was unlimited, and the government could terminate the contract without cost upon thirty-days written notice. Either party could renegotiate rates for good cause. *Id.*

741. *Id.* In accordance with 10 U.S.C. § 2306(a), the Chief of the Purchasing office determined that the rates: (1) were not based upon labor hours, materials, subcontracts, and other normal costs of the services that the City sold to the government, and (2) were lower than the rates the City charged its citizens and other taxpayers. *Id.*

742. *Id.* at 148,519. The Air Force contracting officer never notified the City during the negotiations over the modification that TINA applied, or that the City was required to submit certified cost or pricing data on SF1411. As a result, the City did not in fact submit the information required on a SF 1411. *Id.*

743. *Id.*

744. *Id.* at 148,520. DCAA determined that the City had substantially overstated its proposed costs in connection with the subject modification when the City failed to disclose certain revenues and offsets. *Id.*

745. *Id.*

In its motion for summary judgment, the City argued that the modification was exempt from TINA's cost or pricing submission requirements as a matter of law.[747] The government argued that the contracting officer had reversed the exemption and placed the City on notice that TINA applied by sending the certificate of current cost or pricing data covering this particular modification.[748] In ruling for the appellant, the board found that the mere fact that the contracting officer sent a certificate to the City could not overcome the exemption in existence for sixteen years.[749] The board also determined that the government was not required to grant an exemption for each and every modification.[750] For these reasons, the board held that the TINA exemption continued until reversed by the Chief of the Purchasing Office that first granted the exemption.

The government then sought reconsideration, citing the board's erroneous use of a "class" exemption when the Chief of the Purchasing Office had granted only an "individual" exemption.[751] The board rejected the Air Force's contention. The board never stated that the special exemption approved for this contract was either a "class" or "individual" exemption.[752] The board simply held that the exemption existed for the contract as a whole and continued until reversed by the granting official.[753] The mere sending of a cost and pricing certificate after many years and a number of modifications, without any express assertion that TINA applied, was not sufficient to revoke the exemption approved by the Chief of the Purchasing Office.[754]

Deployment Contracting

Doctrine at Last!

It has been a very good year for operational contracting and funding doctrine. From the publication of the long awaited *Field Manual 27-100, Legal Support to Operations*,[755] to a Joint Publication on financial management during operations,[756] to new guidance governing contractors on the battlefield,[757] DOD finally has published operational doctrine for the contingency contracting attorney.

Field Manual 27-100 sets forth the basic operating doctrine for all elements of the Army Judge Advocate General's Corps. The manual describes how Army judge advocates provide legal support to military operations.[758] The new doctrine specifically includes contingency contracting and fiscal law within the gambit of Operational Law (OPLAW)[759] by including those disciplines as part of the sustainment function.[760] For the first

746. *Id.*

747. *Id* at 148,521. The board framed the questions as whether the CO could reduce the modified contract price because of alleged defective pricing even though neither the basic contract nor the modification contained a TINA "Price Reduction" clause. *Id.*

748. *Id.* The contracting officer never notified the City during the negotiations over the modification that TINA applied, or that the city was required to submit certified cost or pricing data on a SF 1411. *Id.*

749. *Id.* The board stated that the mere "sending of this certificate by the contracting officer is too thin a reed to overcome an exemption in existence for 16 years issued by a procurement official at a higher level than the contracting officer." *Id.*

750. Referring to the former FAR 15.804-3(g), which authorized "individual" or "class" exemptions, the board interpreted the regulation's use of the term "class" as clearly indicating that an exemption "decision does not have to be made for each procurement action." *Id.*

751. City of Albuquerque, ASBCA No. 49698, 1999 ASBCA LEXIS 168 (Nov. 19 1999).

752. *Id.* at *2.

753. *Id.*

754. *Id.*

755. U.S. Dep't of Army, Field Manual 27-100, Legal Support to Operations (1 Mar. 2000) [hereinafter FM 27-100].

756. The Joint Chiefs of Staff, Joint Pub. 1-06, Joint Tactics, Techniques, and Procedures for Financial Management During Joint Operations (22 Dec. 1999) [hereinafter Joint Pub. 1-06].

757. U.S. Dep't of Army, Reg. 715-9, Contractors Accompanying the Force (29 Oct. 1999). *See* U.S. Dep't of Army, Pam. 715-16, Contractor Deployment Guide (27 Feb. 1998), U.S. Dep't of Army, Army Materiel Command Pam. 715-18, AMC Contracts and Contractors Supporting Military Operations (Apr. 2000), U.S. Dep't of Army, Army Materiel Command Pam. 700-30, Logistics Civil Augmentation Program (LOGCAP) (31 Jan. 2000), U.S. Dep't of Army, Army Materiel Command, AMC Logistics Civil Augmentation Program (LOGCAP) Battle Book (31 Jan. 2000), U.S. Dep't of Army, Field Manual 100-21, Contractors on the Battlefield (26 Mar. 2000), and U.S. Dep't of Army, Field Manual 100-10-2, Contracting Support on the Battlefield (4 Aug. 1999).

758. FM 27-100, *supra* note 755, at vii.

759. *Id.* Operational Law (OPLAW), as defined by *Field Manual 27-100*, includes the legal services that relate directly to the command and control functions and to the sustainment functions. *Id.*

760. *Id.*

time, contract and fiscal lawyers can point to official Army doctrine in their quest for inclusion in the operations center.

Joint Publication 1-06[761] is the first attempt to standardize financial management doctrine for joint operations. Previously, joint forces accomplished the financial component of their operations in an *ad hoc* manner. This often resulted in additional friction and confusion in accomplishing the financial tasks necessary to execute the operation. *Joint Publication 1-06* now provides the specifics on conducting resource management and financial operations. Of particular importance to the operational contract attorney are the appendices on legal issues,[762] authorities and agreements,[763] combined operations,[764] and contingency contracting.[765] This joint publication serves as an excellent reference for both the experienced operational contracting attorney and the newly anointed novice.

Army Regulation 715-9, Contractors Accompanying the Force,[766] provides guidance to Army organizations to use in managing contractors in the operational arena. The regulation establishes Army policy and procedures for using contractors on the battlefield.[767] While the regulation also discusses the international law status of, and requirements placed upon, contractors,[768] it lacks guidance on how the contracting officer will enforce these requirements. The enforcement of these requirements often devolves to a question of jurisdiction over the individual contractor employees. For that reason, we now turn our attention to the ongoing effort to extend United States criminal jurisdiction over contractors employed by or accompanying the force.

"Go Ahead, Make My Day." Dirty Harry Is Coming for the Overseas Contractor

Jurisdiction—or more accurately, the lack thereof—over civilians accompanying a military force has been a thorn in the side of U.S. commanders since the late 1950s.[769] The general lack of jurisdiction has left commanders with but two bad options: merely sending the offending person home, or turning the person over to the host nation for possible prosecution. Over the last decade, the downsizing of the American military, combined with the dramatic increase in all types of military operations has led to a significant increase in the number of civilians employed by or accompanying the force, which has only exacerbated the problem.[770] On a number of occasions since the *Reid v. Covert* decision, Congress has considered legislative solutions to this jurisdictional issue.[771] Their most recent attempt to remedy the problem is the Military Extraterritorial Jurisdiction Act of 2000.[772]

The Military Extraterritorial Jurisdiction Act now subjects persons "employed by the Armed Forces outside the United States,"[773] or persons accompanying the force,[774] including contractor employees, to federal criminal jurisdiction. The Act extends jurisdiction over the aforementioned persons for felony

761. JOINT PUB. 1-06, *supra* note 756.

762. *Id.* at Appendix D (Legal).

763. *Id.* at Appendix E (Authorities and Agreements).

764. *Id.* at Appendix F (Financial Support to Military Operations in a Multinational Environment).

765. *Id.* at Appendix G (Contingency Contracting). The Joint Pub. also includes an appendix on references. This appendix includes the primary statutory, DOD, and service documents relating to financial issues during military operations. *Id.*

766. U.S. DEP'T OF ARMY, REG. 715-9, CONTRACTORS ACCOMPANYING THE FORCE (29 Oct. 1999).

767. *Id.* at 3. In this instance, the term "battlefield" should be read broadly to include all combat, contingency, and humanitarian deployments. *Id.* at 4, para. 1-1.

768. *Id.* para. 3-1g, 3-3d. The regulation also requires all contractor personnel to obey general orders and the force protection requirements established by the Army Service Component Commander. *Id.* para. 2-1e.

769. *See generally* Reid v. Covert, 354 U.S. 1 (1957) (overturning the court-martial convictions of two civilian spouses accused of murdering their service member husbands at locations outside the United States); Latney v. Ignatius, 416 F.2d 821 (D.C. Cir. 1969) (granting a merchant seaman's petition of a writ of habeas corpus after his court-martial conviction for a murder in the Republic of Vietnam), United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970) (dismissing the conviction of a civilian employee of an Army contractor for larceny because the conflict in Vietnam was not a "war" within the meaning of 10 U.S.C. § 802).

770. *See, e.g.*, United States v. Gatlin, 216 F.3d 207 (2d Cir. 2000). The Second Circuit reversed the conviction and dismissed the indictment against Gatlin. Galtin plead guilty to committing sexual acts with a minor under 18 U.S.C. § 2243(a) after engaging in intercourse with and impregnating his 13-year-old stepdaughter while his soldier wife was deployed to Bosnia. The court refused to uphold Galtin's conviction. After examining the history of the special maritime and territorial jurisdiction of the United States as defined in 18 U.S.C. § 7(3), and the NATO SOFA, the court ruled that since the charged acts took place in the Lincoln Village housing area in Darmstadt, Germany, the military installation was not under the special maritime and territorial jurisdiction of the United States, a requirement for conviction under Section 2243(a). *Id.*

771. For a general overview of the history of Congress's efforts, see, Michael J. Davidson & Robert E. Korroch, *Extending Military Jurisdiction to American Contractors Overseas*, 35 PROCUREMENT LAW. ABA, No. 4, Summer 2000, at 1.

772. Pub. L. 106-523, 114 Stat. 2488 (2000).

offenses, as if such conduct had been engaged in within the special maritime and territorial jurisdiction of the United States.[775] Congress has now given Inspector Harry Callahan his overseas license to hunt down offending contractor employees and other civilians accompanying the military force.

The Government "Credit Card": It's Everywhere You Want To Be, and Lots of Places You Do Not.

Micropurchases

During the past year, the Director of Defense Procurement issued a final rule that generally required the use of government-wide commercial purchase cards for all purchases at or below the micropurchase threshold.[776] The rule listed a number of exceptions applicable to deployed personnel.[777] Such exceptions should provide sufficient flexibility to allow the deployed contracting officer or ordering officer to execute the mission without having to rely solely on the card as the only authorized payment mechanism.

The $200,000 Debit Card!

Together with the new rule requiring the use of the government wide commercial purchase card for all purchases at or below the micropurchase threshold, the Director of Defense Procurement has also proposed expanding the limit on the card to match the expanded Simplified Acquisition threshold of $200,000 available during contingency operations.[778] The pro-

773. Section 3267(1) of the Act defines "employed by the Armed Forces outside the United States" as:

> (A) employed as a civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department), as a Department of Defense contractor (including a subcontractor at any tier), or as an employee of a Department of Defense contractor (including a subcontractor at any tier);
> (B) present or residing outside the United States in connection with such employment; and
> (C) not a national of or ordinarily resident in the host nation.

Id.

774. Section 3267(2) of the Act defines "accompanying the Armed Forces outside the United States" as:

> (A) a dependent of—
> (i) a member of the Armed Forces;
> (ii) a civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department); or
> (iii) a Department of Defense contractor (including a subcontractor at any tier) or an employee of a Department of Defense contractor (including a subcontractor at any tier);
> (B) residing with such member, civilian employee, contractor, or contractor employee outside the United States; and
> (C) not a national of or ordinarily resident in the host nation.

Id.

775. *Id.* at Section 3261. The "special maritime and territorial jurisdiction of the United States" is defined as:

> Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

18 U.S.C. § 7(3) (2000).

776. Defense Federal Acquisition Regulation Supplement; Streamlined Payment Practices, 65 Fed. Reg. 46,625 (July 31, 2000) (to be codified at 48 C.F.R. Parts 208, 212, 213, 214, 215, 232, and 252).

777. DFARS, *supra* note 258, at 213.270(c) This section provides nine exceptions. The first six may apply in deployed or operational environments:

> (c) The purchase or payment meets one or more of the following criteria:
> (1) The place of performance is entirely outside of any State, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.
> (2) The purchase is a Standard Form 44 purchase for aviation fuel or oil.
> (3) The purchase is an overseas transaction by a contracting officer in support of a contingency operation as defined in 10 U.S.C. 101(a)(13) or a humanitarian or peacekeeping operation as defined in 10 U.S.C. 2302(8).
> (4) The purchase is a transaction in support of intelligence or other specialized activities addressed by Part 2.7 of Executive Order 12333.
> (5) The purchase is for training exercises in preparation for overseas contingency, humanitarian, or peacekeeping operations.
> (6) The payment is made with an accommodation check.

Id.

778. Defense Federal Acquisition Regulation Supplement; Overseas Use of the Purchase Card in Contingency, Humanitarian, or Peacekeeping Operations, 65 Fed. Reg. 56,858 (Sept. 20, 2000) (to be codified at 48 C.F.R. pt. 213).

posed rule would raise the purchase card limit from $25,000 to $200,000.[779] The proposed rule also adds two additional qualifiers:[780] first, the supplies and services being purchased must be immediately available; and second, the purchase must involve only one delivery and one payment.[781] The increase in the card limit to $200,000 will be a welcome tool for deployed cardholders and their commands.[782]

Support Your Local Airline: Bonus Points for CRAF[783] and VISA[784]

With a CONUS-based expeditionary force, strategic lift,[785] both on the sea and in the air, is a critical component of the National Military Strategy.[786] Army Chief of Staff General Eric Shinseki's vision is to have the capability to deploy a war-fighting division on the ground within 120 hours from receiving a deployment order, with five divisions deployed within thirty days.[787] Both equipment and force structure play critical roles in the Army's ability to deploy quickly. Still, the critical limitation is strategic lift—something that the Army does not have within its organic capacity.

To assist in the development and preservation of domestic civilian airlift and sealift assets, DOD has now strengthened the preferences for contracting with members of the Civil Reserve Air Fleet (CRAF) and Voluntary Intermodal Sealift Agreement (VISA) programs.[788] For contracts that now include a significant requirement for overseas transportation of items, the contracting officer must include an evaluation factor or subfactor that supports using carriers that participate in the CRAF or VISA programs.[789]

You're in the Army Now: Basic Combat Training for Contracting Officers

With the ever-increasing number of contractors deployed to support U.S. military operations, more DOD civilian specialists must also deploy to manage the contractor's efforts. Transitioning from that comfortable government office with its stylish UNICOR furniture to an austere basecamp with its potentially hostile surroundings can be a daunting transition even for experienced active duty service members. In an effort to better prepare their deploying personnel,[790] the Defense Contract Management Agency (DCMA)[791] has now entered into a Memorandum of Agreement (MOA) with the U.S. Army Reserve

779. *Id. See* DFARS, *supra* note 258, at 213.301(2).

780. Defense Federal Acquisition Regulation Supplement; Overseas Use of the Purchase Card in Contingency, Humanitarian, or Peacekeeping Operations,65 Fed. Reg. at 56,859.

781. *Id.*

782. *Id.* The proposed rule is open for comment until 20 November 2000. *Id.*

783. Civil Reserve Air Fleet. *See* 10 U.S.C. §§ 9511-9514 (2000). The CRAF is composed of those civilian aircraft allocated, or made available to DOD to augment DOD's organic airlift capacity in times of emergency. 10 U.S.C. § 9511(6) (2000).

784. Voluntary Intermodal Sealift Agreement. *See* 46 U.S.C. §§ 1187-1187a (2000); *see also* USTRANSCOM PAM. 10-1, OPERATIONS: VISA (VOLUNTARY INTERMODAL SEALIFT AGREEMENT) AND THE SEALIFT MOBILIZATION PROGRAMS, 2 June 1998, *available at* http://public.transcom.mil/J6/j6o/j6_oi/pubs/USTCP10-1.pdf.

785. THE JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (10 June 1998). Strategic Airlift is common-user airlift linking theaters to the continental United States (CONUS) and to other theaters. These assets are assigned to the Commander in Chief, U.S. Transportation Command (USTRANCOM). Strategic Airlift is normally comprised of heavy, longer-range intercontinental aircraft. *Id.* at 427. Strategic Sealift is the afloat prepositioned and ocean movement of military materiel in support of U.S. and multinational forces. Sealift includes organic and commercially acquired shipping and shipping services, including chartered foreign-flag vessels and associated shipping services. *Id.* at 429.

786. Chairman, Joint Chiefs of Staff, *National Military Strategy: Shape, Respond, Prepare Now–A Military Strategy for a New ERA* (1997), *available at* http://www.dtic.mil/jcs/core/nms.html.

787. Army Vision Statement, *available at* http://www.army.mil/armyvision/armyvis.htm (last visited Oct. 7, 2000).

788. Defense Federal Acquisition Regulation Supplement; Transportation Acquisition Policy, 65 Fed. Reg. 50,143 (Aug. 17, 2000) (to be codified at 48 C.F.R. Parts 212, 242, 247, and 252). Under the new rule, contracting officers are encouraged to use the following criteria as evaluation factors or subfactors in contracts for transportation and transportation related services:

> a. record of claims involving loss or damage;
> b. provider availability; and
> c. commitment of transportation assets to readiness support (e.g., Civil Reserve Air Fleet and Voluntary Intermodal Sealift Agreement).

Id.

789. *Id.*

790. DMCA personnel include not only government civilian employees, but also active duty and reserve component service personnel.

Command (USARCS) to obtain pre-deployment basic contingency training. The training program, entitled "Basic Contingency Orientation Training Course" provides basic soldier and survival skills.[792] The course includes such topics as force protection, mine and unexploded ordinance awareness, survival skills, life support skills, and a field exercise. The training program also includes a day dedicated to DCMA contingency operations and procedures.[793] Here comes G.I. KO!

Environmental Contracting

Air Force Affirmative Procurement Program Audited

On 23 November 1999, the Air Force Audit Agency published its report on the Air Force's Affirmative Procurement Program.[794] The audit's objective was to answer two questions: first, had installation contracting officials implemented these required programs? second, were installations purchasing EPA guideline items?[795] The bottom line answer to both of these questions was "no."

The audit was performed at nine Air Force bases from December 1998 through March 1999.[796] The audit reviewed Program Awareness and Oversight and the International Merchant Purchase Authorization Card (IMPAC) program, two major aspects of the Air Force's Affirmative Procurement Program.

First, as to program awareness, the audit found that installation officials did not assign affirmative procurement program managers, program information was not provided, and mandatory program reviews were not accomplished.[797] Second, the audit agency researched the IMPAC or purchase card program, and determined the situation was just as bleak.[798] The audit found that IMPAC coordinators did not consistently provide affirmative procurement guidance and oversight.[799] Coordinators at a majority of locations did not include affirmative procurement in training courses or provide approving officials and cardholders information on EPA designated items.[800] Sixty-three percent of approving officials interviewed were unaware of the Affirmative Procurement Program requirements.[801]

The audit concluded the problems with the program were due to Air Force officials' failure to resolve program owner-

791. DCMA was formerly known as the Defense Contract Management Command, (DCMC). DCMC was a major subordinate command of the Defense Logistics Agency Effective 27 March 2000, DCMC was renamed DCMA and established as a separate defense agency. DCMA now reports directly to the Under Secretary of Defense (Acquisition, Technology and Logistics).

792. The training is based on Army Skill Level 1 Common Tasks. *See* U.S. DEP'T OF ARMY, SOLDIER TRAINING PUB. 21-1-SMCT, SOLDIER'S MANUAL OF COMMON TASKS, SKILL LEVEL 1 (1 Oct. 1994).

793. The training program is currently scheduled for ten, eight-hour days. DCMA intends to train fifty students per rotation, with rotations scheduled once per quarter. The training will take place at Fort McCoy, Wisconsin, and be executed by trainers from the USAR's 84th Division (Institutional Training).

794. Report of Audit, Affirmative Procurement Program, Air Force Audit Agency, Project 99052016, 23 Nov. 99 [hereinafter Air Force Audit]. The Affirmative Procurement Program is a compilation of the requirements that Executive Agencies purchase supplies and services that use recycled, recovered, and reclaimed materials. *Id. See also* 42 U.S.C. § 6962 (2000); FAR, *supra* note 49, at 23.403; Exec. Order 13,101, 63 Fed. Reg. 49,643 (Sept. 14, 1998). The Air Force Deputy Assistant Secretary for Environment, Safety and Occupational Health requested the audit. Air Force Audit, *supra* note 794, at 1.

795. *Id.* On 8 June 1999, the Environmental Protection Agency (EPA) published a final rule that designated nineteen new items, bringing the total number of guideline items to fifty-five. Guideline items are those products that are or can be made with recovered materials. For the entire list of these items and additional information about the program, go to the EPA website, http://www.epa.gov/epaoswer/non-hw/procure.htm.

Within one year after publication of the guideline items, each procuring agency must develop an affirmative procurement program that will assure that these items will be purchased to the maximum extent practicable. 42 U.S.C. § 6962(e) (2000) The use of the guideline items must not jeopardize the intended end use of the item. *Id.* § 6962(d)(2). The statutory requirement to purchase these items only applies to procurements over $10,000 or where the purchased quantity, or of functionally equivalent items, procured in the fiscal year exceeds $10,000. *Id.* Under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 (2000), exceptions to these requirements exist where the procuring contracting officer determines that the items meeting the statutory requirements are not reasonably available within a reasonable period of time, fail to meet the performance standards set forth in the specifications, or fail to meet the reasonable performance standards of the procuring agencies. The contracting officer also considers price, availability, and competition. Besides the guideline items, the EPA also publishes a list of recommended items that the government should purchase under each agency's affirmative procurement preference program. *Id.*

796. Air Force Audit, *supra* note 794, at 2, 11. The installations reviewed were Barksdale, Eglin, Grand Forks, Holloman, Keesler, March, McConnell, Travis, and Vandenberg Air Force Bases. These bases were selected to represent each of the Air Force's major commands. *Id.* at 2.

797. *Id.*

798. *Id.* at 3.

799. *Id.*

800. *Id.*

801. *Id.*

ship.[802] This created the lack of effective program implementation and prevented the Air Force from taking advantage of opportunities to purchase environmentally preferable products and services.[803]

Environmentally Preferable Products and Services: A Final Rule

On 6 June 2000, the FAR Council published[804] its final rule implementing the requirements of Executive Order 13,101.[805] The rule revises the FAR requirements based on previous executive orders. It also reorganizes and relocates language to make it easier to use and understand. The final rule also updates the requirements to purchase printing and writing paper,[806] increases the contracting officer's authority,[807] and makes these rules applicable to simplified acquisitions.

Fleet and Transportation Efficiency

On 21 April 2000, President Clinton signed Executive Order 13,149, entitled "Greening the Government through Federal Fleet and Transportation Efficiency."[808] The purpose of the order is to ensure the federal government exercises leadership in the reduction of petroleum consumption through improvements in fleet fuel efficiency and the use of alternative fuel vehicles and alternative fuels.[809] Each agency operating twenty or more motor vehicles within the United States shall reduce its entire vehicle fleet's annual petroleum consumption by at least twenty percent by the end of fiscal year 2005, compared with fiscal year 1999 petroleum consumption levels.[810]

Agencies have numerous options for developing strategies to meet the petroleum reduction levels.[811] The Executive Order lists several suggested strategies agencies may use to reduce petroleum product usage.[812] Each agency will need to utilize most of the suggested strategies, but is also free to develop strategies that fit its unique fleet configuration and mission requirements.[813] Where feasible, agencies should also consider procurement of innovative vehicles, such as hybrid electric vehicles, capable of large improvements in fuel economy.[814] The strategy should also attempt to minimize costs in achieving the objectives of the Executive Order.[815]

The Executive Order lists exemptions for military tactical, law enforcement, and emergency vehicles.[816] Agencies claiming vehicle exemptions must provide information on the number of each class or type of vehicle claimed as exempt as well as an estimate of total fuel consumption of exempt vehicles on an annual basis.[817] Agencies should examine options for increasing fuel efficiency in these vehicles or fleets.[818]

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802. *Id.*

803. *Id.*

804. Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) Federal Acquisition Regulation; Federal Acquisition Circular 97-18, Requirements Supporting Procurement of Recycled Products and Environmentally Preferable Services (FAR Case 1998-015)**,** 65 Fed. Reg. 36,012 (June 6, 2000).

805. Executive Order 13,101, Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition**,** 63 Fed. Reg. 49,643 (Sept 16. 1998).

806. *Id.* For high speed copier paper, offset paper, forms bond, computer printout paper, carbonless paper, file folders, white wove envelopes, writing and office paper, book paper, cotton fiber paper, and cover stock, the minimum content standard shall be no less than thirty percent postconsumer materials beginning 31 December 1998. If paper containing thirty percent postconsumer material is not reasonably available, does not meet reasonable performance requirements, or is only available at an unreasonable price, then the agency shall purchase paper containing no less than thirty percent postconsumer material. *Id.*

807. Contracting officers may include in solicitations additional information requirements when needed to determine if the offeror's product meets the requirements for recycled content or related standards. *Id.*

808. 65 Fed. Reg. 24,607 (April 26, 2000).

809. *Id.* § 101. Reduced petroleum use and the displacement of petroleum by alternative fuels will help promote markets for more alternative fuel and fuel efficient vehicles, encourage new technologies, enhance the United States' energy self-sufficiency and security, and ensure a healthier environment through the reduction of greenhouse gases and other pollutants in the atmosphere. *Id.*

810. *Id.* § 201. Government-owned, Contractor-operated vehicles also fall under the Executive Order. *Id.* § 505.

811. *Id.* § 202.

812. *Id.* These strategies include: (1) use of alternative fuels in light, medium, and heavy-duty vehicles; (2) the acquisition of vehicles with higher fuel economy, including hybrid vehicles; (3) the substitution of cars for light trucks; (4) an increase in vehicle load factors; (5) decrease in vehicle miles traveled; and (6) a decrease in fleet size. *Id.*

813. *Id.*

814. *Id.*

Leadership in Environmental Management[819]

On 22 April 2000, President Clinton signed Executive Order 13,148 entitled "Greening the Government through Leadership in Environmental Management."[820] The head of each federal agency is responsible for ensuring all necessary actions are taken to integrate environmental accountability into agency day-to-day decision-making and long-term planning processes across all agency missions, activities, and functions. Environmental management considerations must be a fundamental and integral component of federal government policies, operations, planning, and management.

The order establishes a number of environmental management goals for federal agencies.[821] In the area of release reductions—through innovative pollution prevention, effective facility management, and sound acquisition and procurement practices—each agency shall reduce its toxic chemicals release and off-site transfers for treatment and disposal by ten percent annually or by forty percent overall by 31 December 2006.[822]

The executive order also requires use reduction. By the identification of proven substitutes and established facility management practices, including pollution prevention, each agency shall reduce its use of toxic chemicals, hazardous substances, and pollutants or its generation of hazardous and radioactive waste types at its facilities by fifty percent by 31 December 2006.[823] Also, by evaluating present and future uses of ozone-depleting substances and maximizing the use of safe, cost effective, and environmentally preferable alternatives, each agency shall develop a plan to phase out the procurement of Class I ozone depleting substances by 31 December 2010.[824]

The executive order establishes acquisition and procurement guidance for the procurement of toxic chemicals, hazardous substances and other pollutants.[825] Agencies must implement training programs for procurement officials and program managers within twelve months from the date of the order.[826] Agencies must determine the feasibility of implementing centralized procurement and distribution programs at its facilities for tracking, distribution, and management of toxic or hazardous materials and, if appropriate, to implement those measures.[827]

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815. *Id.* In developing its strategy, each agency shall include alternative fuel vehicle acquisition, use of alternative fuels, and the acquisition of higher fuel economy vehicles. *Id.* Agencies shall increase the average EPA fuel economy rating of passenger cars and light trucks acquired by at least one mile per gallon by the end of FY 2002 and at least three miles per gallon by the end of FY 2005 compared with FY 1999 acquisitions. *Id.* § 202(b). In acquiring and maintaining motor vehicles, agencies shall acquire and use U.S. EPA designated Comprehensive Procurement Guideline items when such products are reasonably available and meet applicable performance standards. *Id.* § 403(a) and (b). *See* Executive Order 13,101, Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition, 63 Fed. Reg. 49,643 (Sept. 14, 1998) (no federal agency shall purchase, sell, or arrange for the purchase of virgin petroleum motor vehicle lubricating oils when re-refined motor vehicle lubricating oils are reasonably available and meet the vehicle manufacturer's recommended performance standards). Additionally, agencies shall consider acquiring other recycled content products. *Id.* § 403(a) and (b). Federal agencies are also encouraged to use bio-based motor vehicle products when such products are reasonably available and meet applicable performance standards. *Id.* § 403 (c).

816. *Id.* § 506.

817. *Id.*

818. *Id.*

819. Vice President Gore Highlights "Greening the Government" Achievements and Announces New Executive Order to Reduce Toxics at Federal Facilities, Office of the Vice President, Apr. 22, 2000. The Vice President emphasized that over the last seven years, executive agencies have made great strides in environmentally sustainable procurement and energy efficiency. The statement emphasizes several key accomplishments. These accomplishments include a sixty percent decrease in releases of toxic chemicals, a 20.5 percent decrease in energy consumption in government buildings (saving $2.2 billion in energy costs), and a dramatic increase in the purchase of environmentally sound products and services. *Id.*

820. 65 Fed. Reg. 24,595 (Apr. 26, 2000).

821. The first goal is environmental management, ensuring strategies are established to support environmental leadership programs, policies, and procedures. The second goal is environmental compliance. Agencies must comply with environmental regulations by implementing environmental compliance audit programs that emphasize pollution prevention as a means to both achieve and maintain environmental compliance. The third goal is to comply with Right-to-Know and Pollution Prevention requirements. *See generally* Emergency Planning and Community Right-to-Know (EPCRA) Act of 1986, 42 U.S.C. §§ 11001-11050 (2000); Pollution Prevention Act of 1990 (PPA), 42 U.S.C. §§ 13101-13109. Agencies shall inform workers and the public of possible sources of pollution. Additionally, agencies must strive to reduce or eliminate harm to human health and the environment from pollutant releases Agencies shall advance the national policy wherever feasible and cost effective, and should prevent or reduce pollution at the source. Greening the Government through Leadership in Environmental Management, 65 Fed. Reg. at 24,595, § 201-07.

822. *Id.* § 204.

823. *Id.* § 205.

824. *Id.* § 206.

825. *Id.* §§ 701-04.

826. *Id.* § 701(a).

Finally, agencies must review all their specifications and the GSA must review its schedules, to identify opportunities to eliminate or reduce the use of toxic chemicals and hazardous substances from the EPA listed items.[828]

In addition to the general exemptions of technically practicable and cost effective, the order includes one specific exemption. In the interest of national security, the head of any agency may request from the President an exemption to these requirements.[829] Exemptions are granted for a specific time period and may exceed one year.[830] Notice must be given to the OMB, the Center for Environmental Quality, and the National Security Council.[831] Exemptions may be granted due to a lack of appropriations to fund the requirements, if the agency head shows the necessary funds were requested but not placed in the President's budget or appropriated by Congress.[832]

The FAR Council is required to develop acquisition policies and procedures for contractors to supply agencies with all information necessary for compliance. Once published, these provisions must be included in all contracts.[833]

Violators Still Prohibited from Receiving Contracts but No Longer Need to Certify

On 27 December 1999, the FAR Council published[834] a final rule that amends the FAR to eliminate the burden on offerors to certify that they do not propose to use a facility for the performance of a contract that is ineligible for award.[835] A facility is ineligible if it is listed on the EPA's List of Violating Facilities.[836] Contracting officers are directed to use this list to guarantee that they do not award contracts to such violators.[837] This final rule represents no change to the long-standing policy that a contracting officer must not award a contract if performance of the contract would be at a facility that has not corrected the cause that gave rise to a criminal conviction under the Clean Air Act[838] or Clean Water Act.[839] The rule places the burden on the contracting officer to ensure a contractor does not use these facilities.[840]

GAO Says Environmental Statutes Must Be Followed in Solicitations

In 1993, Congress set forth a statutory preference for local contractors to receive environmental restoration and mitigation contracts when this work is associated with base realignment and closure (BRAC).[841] In *Ocuto Blacktop & Paving Company,*

827. *Id.* § 701(b). This requirement must be met within twenty-four months of the order. *Id.*

828. *Id.* § 701(c). Besides toxic chemicals and hazardous substances, the Executive Order specifically addresses environmentally benign pressure sensitive adhesives for paper products. Within twelve months after these adhesives become commercially available, each agency shall revise its specifications for paper products, including these adhesives in their specifications, and direct the purchase of paper products using those adhesives, whenever technically practicable and cost effective.

829. *Id.* § 801 (noting that the procedures set out in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9620(j)(1) (2000), are followed).

830. *Id.*

831. *Id.*

832. *Id.*

833. *Id.* § 305(c).

834. Federal Acquisition Regulation; Pollution Control and Clean Air and Water, 64 Fed. Reg. 72,415 (Dec. 29, 1999) (codified at 48 C.F.R. pts. 1, 12, 23, and 52). The rule became effective on 25 February 2000. *Id.*

835. *Id.*.

836. *Id.* The list is available at http://epls.arnet.gov/. *Id.*

837. *Id.*

838. 42 U.S.C. § 7606 (2000).

839. 33 U.S.C. § 1368 (2000).

840. Defense Federal Acquisition Regulation Supplement; Technical Amendments, 64 Fed. Reg. 72,415 (1999). On 31 August 2000, the Director of Defense Procurement published a final rule amending the DFARS, *supra* note 258, to revise and relocate policy on the level of approval required to except a contract from these restrictions. DFARS 223.1 no longer exists. The language of DFARS 223.1 was moved to the subpart on Debarment, Suspension, and Ineligibility. The language is now located in the revised DFARS 209.405(b). 65 Fed. Reg. 52,954 (2000).

841. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 2912(a) (1993) (codified at 10 U.S.C. § 2687).

Inc.,[842] the Army COE's policy of using a regional ID/IQ contract for all remediation work, including that necessary at BRAC bases, was successfully challenged.[843]

The COE attempted to use a regional ID/IQ contract at Griffis AFB, New York, an installation that had been realigned under a BRAC action.[844] In so doing, the COE planned to award a landfill capping contract to a firm located in Illinois.[845] After being notified by an official at the BRAC Commission, Ocuto filed a protest with the GAO which sustained the protest.[846]

In defending the protest the COE argued, among other things, that the statutory preference was a discretionary duty assigned to the Secretary of Defense.[847] The GAO agreed that exercising this preference was discretionary;[848] however, it also found "the statute does require that the COE give reasonable consideration to the practicability of the statutory preference."[849] The GAO also found that the statute directs the preference be given to the "greatest extent practicable."[850] If the agency cannot do that, it must provide a valid explanation.[851] The GAO found the COE had failed to meet its burden.[852]

The GAO recommended the COE reevaluate its approach and follow the requirements of DFARS Subpart 226.71 to provide the preference to qualified local businesses to the greatest extent possible.[853] If, after due consideration to alternative methods, the COE is not able to comply with the requirements of the preference, the COE must document that conclusion in a reasoned analysis.[854]

Ethics in Government Contracting

Proposed Blacklisting Rule Still Alive—But Not Yet Final

As we reported last year, the Clinton Administration proposed a controversial rule that would tie the award of federal contracts to a contractor's record of "satisfactory compliance" with a variety of federal labor, employment, and other non-procurement laws.[855] While all sides agree that the federal government should not do business with contractors that violate federal law, the debate rages over how to implement such a policy. The Office of Management and Budget has claimed the proposed rule is simply a clarification of the responsibility criteria at FAR Part 9. Contractors, on the other hand, have labeled the rule "blacklisting," and claim that the practical effect of the rules would debar contractors based on unsubstantiated allegations of wrongdoing.[856]

The initial proposal [857] drew strong criticism,[858] and a second proposal hit the streets on 30 June 2000 for further comment.[859]

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842. Ocuto Blacktop & Paving Co., B-284165, Mar. 1, 2000, 2000 CPD ¶ 32.

843. *Id.* at 2-3.

844. *Id.* at 2.

845. *Id.*

846. *Id.*

847. *Id.* at 7.

848. *Id.*

849. *Id.*

850. *Id.*

851. *Id.* Valid explanations included agency's budgeting and staffing constraints, the degree of local business interest and capability, and the number of projects subject to the statutory preference. *Id.*

852. *Id.*

853. *Id.* at 9.

854. *Id.* The GAO also recommended the Corps reimburse Ocuto the cost of filing and pursuing the protest and reasonable filing fees. *Id.*

855. *See 1999 Year in Review, supra* note 37, at 18.

856. *See Certification Clause Added to Controversial Contractor Responsibility Proposal,* 42 GOV'T CONTRACTOR, No. 26, at 9 (July 12, 2000).

857. The initial proposal would have amended the standard for evaluating a contractor's integrity and business ethics to include "persuasive evidence of the prospective contractor's lack of compliance with tax laws," as well as "substantial noncompliance with labor laws, employment laws, environmental laws, antitrust laws, or consumer protection laws." *See 1999 Year in Review, supra* note 37, at 18.

858. *See Certification Clause Added to Controversial Responsibility Proposal,* 42 GOV'T CONTRACTOR, No. 26, at 9 (July 12, 2000).

The new proposal differs from the original in three significant ways. First, the new proposed rule adds a contractor certification requirement: all offerors must certify that they have not been convicted of a felony or had any adverse civil or administrative judgments against them for violating tax, labor and employment, environmental, antitrust, or consumer protection laws within the preceding three years.[860] Second, the new proposal abandons a provision that would require the contracting officer to evaluate whether a contractor has the "necessary workplace practices" to ensure a skilled, stable and productive work force.[861] Finally, the proposals replace the phrases "persuasive evidence" and "substantial noncompliance" with a list of events that constitute "credible information" of a lack of business ethics.[862]

Industry opposition to the new responsibility rule spurred Congress to action, at least initially. Congressional threats to pass legislation defeating these rules, however, have yet to materialize.[863] The National Alliance Against Blacklisting (NAAB) has now made a new argument against the latest proposal, challenging the paperwork burden analysis prepared in support of the new rules as "improper and invalid."[864] It appears this newest industry objection and continued congressional interest will delay implementation of this proposed rule yet again.

Conflict of Interest in Contract Administration

In an appeal of a termination for default, the ASBCA found a contracting officer abused her discretion, when, *inter alia*, she relied upon the recommendations of individuals with conflicts of interest when determining whether to terminate a contract for default.[865]

The contract at issue was for a coal crushing plant at the Rheinau Coal Yard.[866] While preparing its bid, ABS Baumaschinenvertrieb GmbH (ABS) noted a discrepancy between the performance requirements and the design specifications, and designed a coal crushing plant that it believed satisfied the former. When ABS subsequently attempted to implement that design, the contracting officer informed it that the proposed plant was not in conformance with the specifications and was not acceptable. In making these determinations, the contracting officer relied on the Rheinau Coal Yard manager, who was less than forthright about his reliance upon another, competing contractor.[867] The contracting officer eventually terminated ABS for default for failing to meet the contract specifications, based

859. Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, 65 Fed. Reg. at 40,830 (June 30, 2000).

860. *Id.*

861. *Id.* The FAR Council believed that the general responsibility standards of FAR 9.104-1(e) adequately addressed this issue. That provision requires a contractor to "have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them" to be found responsible. FAR, *supra* note 49, at 9.104-1(e). *See Certification Clause Added to Controversial Contractor Responsibility Proposal*, 42 GOV'T CONTRACTOR, No. 26, at 10 (July 12, 2000).

862. The new proposal directs contracting officers to focus on formal adjudications of legal violations and to coordinate with legal counsel when nonresponsibility determinations are based on integrity or business ethics. 65 Fed. Reg. at 40,830.

863. *See* Deborah Billings, *Labor Standards: Opponents of Procurement Reform Effort Cite Lack of Support Within Administration*, BNA Federal Contracts Daily, Sept. 28, 2000; *see also Congressional Action to Block "Blacklisting" Regs Appears Doubtful*, 42 GOV'T CONTRACTOR, No. 34, at 5 (Sept. 13, 2000).

864. *See* Martha A. Matthews, *Labor Standards: Group Asks OMB to Pull "Blacklisting" Rule, Cites "Invalid" Analysis of Paperwork Burden*, BNA Federal Contracts Daily, Sept. 28, 2000. In a letter to the Office of Management and Budge and the FAR Council, NAAB challenges the FAR Council's estimations of the annual impact, citing two different, and widely varied estimates. NAAB claims both estimates underestimate the time necessary to complete the research needed to make the required certification. Further, the group argues the certification is unnecessary. *Id.*

865. ABS Baumaschinenvertreib GmbH, ASBCA No. 48207, 2000 ASBCA LEXIS 134 (Aug. 29, 2000).

866. Among many things that went wrong with this solicitation, the board suggested that a bidder violated FAR 9.505-2 by bidding on a solicitation after supplying the specifications. FAR 9.505-2 provides that a contractor who prepares and furnishes complete specifications for a nondevelopmental item is ineligible to compete as a prime or subcontractor in the subsequent procurement of such items. FAR, *supra* note 49, at 9.505-2(a). However, the board did not find the contract *void ab initio*, but rather, voidable. Ironically, the offending bidder was found non-responsive for failing to submit a procurement integrity certification. *ABS Baumaschinenvertreib GmbH*, 2000 ASBCA LEXIS 134 at *8.

867. Unbeknownst to the contracting officer, the coal yard manager continued to consult with a representative of the bidder who had designed the specifications, and who had been earlier rejected for failing to complete a procurement integrity certification. *Id.* at *18.

The board found the coal yard manager's "particularly egregious" conduct had tainted the decision process leading to the termination for default. While the opinion does not address whether the conduct of either the coal yard manager or the competing contractor specifically violated any FAR provision, the board did find that it led to an improper outcome.[868]

Foreign Military Sales

DSCA Issues New Guidance for Direct Commercial Contracts

In May 2000, the Defense Security Cooperation Agency (DCSA)[869] issued new guidelines for the processing and review of Direct Commercial Contracts.[870] The new guidelines, replacing a 1995 edition, changed the rules for U.S. content,[871] the procedures for calculating and disclosing U.S. content,[872] offsets,[873] commissions and contingent fees,[874] as well as a number of other provisions. Practitioners should be familiar with the new guidelines, particularly since all FMF-funded Direct Commercial Contracts are subject to DCAA audits.[875]

President Clinton Extends Certain Export Authorities

In August and September 2000, President Clinton moved to extend the export-related "national emergency"[876] and certain authorities under the Trading With the Enemy Act.[877] The President first declared a national emergency and issued Executive Order 12,924 on 19 August 1994. Executive Order 12,924 and the current declaration extend the provisions of the Export Administration Act (EAA).[878] The President stated that Congress's failure to renew the EAA constitutes a threat to United States security, foreign policy, and economic interests.[879] A few weeks later, President Clinton also extended the Foreign Assets,[880] Transaction,[881] and Cuban Assets Control Regulations.[882]

Where Have all the Stingers Gone?[883]

The DOD and Department of State must do a better job of ensuring end-use compliance by foreign military sales (FMS) customer countries, the GAO concluded recently.[884] The GAO conducted a compliance audit of sixty-eight overseas security

868. *Id.* at *39.

869. Formerly the Defense Security Assistance Agency. *See* Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, subject: Department of Defense Reform Initiative Directive #40: Redesignation of Defense Security Assistance Agency as the Defense Security Cooperation Agency (20 May 1998).

870. Direct Commercial Contracts (DCC) allow foreign governments to purchase defense articles and services directly from U.S. companies. DEFENSE SECURITY COOPERATION AGENCY, GUIDELINES FOR FOREIGN MILITARY FINANCING FOR DIRECT COMMERCIAL CONTRACTS (2000) [hereinafter GUIDELINES], *available at* http://www.deskbook.osd.mil/homepage.htm. The guidelines were effective on 6 June 2000. Memorandum for Record, Director, DSCA, subject: Revisions to the Defense Security Cooperation Agency's Guidelines for Foreign Military Financing of Direct Commercial Contracts (6 June 2000).

871. Guidelines, *supra* note 870, at para. 6. In order for a DCC to be approved for FMF funding, "the defense articles and services must be manufactured and assembled in the United States, purchased from U.S. manufacturers or suppliers, and composed of U.S.-origin material, components, goods, and services." *Id.*

872. *Id.*

873. *Id.* para. 14.

874. *Id.* para. 15.

875. *Id.* para. 20.

876. Continuation of Emergency Regarding Export Control Regulations, 65 Fed. Reg. 48,347 (Aug. 3, 2000).

877. Continuation of the Exercise of Certain Authorities under the Trading with the Enemy Act, 65 Fed, Reg. 55,883 (Sept. 14, 2000).

878. 50 U.S.C. app. § 2401 (2000).

879. Continuation of Emergency Regarding Export Control Regulations,65 Fed. Reg. at 48,347.

880. Foreign Assets Control Regulation, 31 C.F.R. pt. 500 (2000).

881. Transaction Control Regulation, 31 C.F.R. pt. 505.

882. Cuban Assets Control Regulation, 31 C.F.R. pt. 515.

883. The Stinger is a fire-and-forget missile system mounted on a variety of platforms used for short-range air defense. WEAPON SYSTEMS 2000, *supra* note 451, at 218-19.

884. GENERAL ACCOUNTING OFFICE, FOREIGN MILITARY SALES: CHANGES NEEDED TO CORRECT WEAKNESSES IN END-USE MONITORING PROGRAM, REPORT NO. GAO/NSIAD-00-208 (Aug. 2000).

assistance offices. The audit revealed significant failures in the End-Use Monitoring Program.[885] Field personnel failed to understand the requirements, and if they knew of the requirements, failed to carry out end-use checks. Of particular concern was the status of end-use checks for Stinger missiles[886] and Advanced Medium Range Air-to-Air Missiles. The GAO recommended that DOD expand its guidance to field personnel and begin reporting required information to Congress.

Progress Payments for FMS Contracts Applied in the same Manner as Other DOD Contracts

The Director of Defense Procurement amended the DFARS to clarify how DOD should apply progress payments to FMS contracts.[887] The new rule states specifically that contracts containing FMS requirements will now be entitled to the customary uniform progress payment rates that are applicable to all DOD contracts.[888]

DSCA Approval Not Required Before Award of Requirements Contract

In two protests associated with in the same procurement, GAO addressed the requirement for obtaining approval prior to award of a contract for FMS work that occurs outside the United States.[889] The Navy awarded a contract to Canadian Commercial Corporation for depot level maintenance services for various Navy and FMS customer helicopters.[890] The protesters argued that the Arms Export Control Act (AECA)[891] required the Navy to obtain approval prior to award of the contract. [892] The Navy argued that the AECA determination is only required prior to the issuance of task orders for FMS work. The DCSA General Counsel supported the Navy's position, stating that the proper time to obtain the required waiver is prior to the time funds are obligated pursuant to the issuance of individual task orders.[893] The GAO agreed with the Navy: in the case of a requirements or an ID/IQ contract, the waiver is not required prior to the award of the contract.[894]

The Contract Is in the Mail! FMS Contractor Learns a Hard Lesson on Pre-Award Costs Under a Long-Delayed Letter Contract[895]

In the late 1980s, the government of Kuwait purchased F-18 fighters from the U.S. Navy to enhance its air defense capabilities.[896] The Kuwaiti Air Force (KAF) required assistance with the maintenance and operation of these aircraft.[897] Due to its pressing security concerns, the KAF needed to expedite the award of the support contract to prepare for the arrival of its F-18s.[898] A contract was awarded to Integrated Logistics Support Systems International, Inc. (Integrated), on 16 May 1989 by the

885. *Id.* at 6. End-use checks are designed to provide reasonable assurances that the recipient is complying with U.S. government requirements on the use, transfer, and security of defense articles and services. Required End-Use checks were not made in most instances. *Id.*

886. *Id.* at 13. As late as December 1999, DCSA could not account for all Stinger missiles transferred under the FMS program. *Id.*

887. DFARS Case 2000-D009, 65 Fed. Reg. 39722 (June 27, 2000) (amending DFARS 232.501-1).

888. DFARS, *supra* note 258, at 232.501-1.

889. Sabreliner Corp., B-284240.2, B-284240.6, Mar. 22, 2000, 2000 CPD ¶ 68; PEMCO World Air Servs., B-284240.3 et al., Mar. 27, 2000, 2000 CPD ¶ 71. While both protests raised a number of issues, only the FMS issue is reviewed here.

890. *Sabreliner Corp.*, 2000 CPD ¶ 68, at 9; *PEMCO World Air Servs.*, 2000 CPD ¶ 71, at 16.

891. 22 U.S.C. § 2761 (2000).

892. *Sabreliner Corp.*, 2000 CPD ¶ 68, at 9; *PEMCO World Air Servs.*, 2000 CPD ¶ 71, at 16 (citing 22 U.S.C. § 2791(c)).

> Availability of funds for procurement outside United States. Funds made available under this Act may be used for procurement outside the United States only if the President determines that such procurement will not result in adverse effects upon the economy of the United States or the industrial mobilization base, with special reference to any areas of labor surplus or to the net position of the United States in its balance of payments with the rest of the world, which outweigh the economic or other advantages to the United States of less costly procurement outside the United States.

22 U.S.C. § 2791(c) (2000).

893. *Sabreliner Corp.*, 2000 CPD ¶ 68, at10; *PEMCO World Air Servs.*, 2000 CPD ¶ 71, at 17.

894. *Id.*

895. Integrated Logistics Support Sys. Int'l, Inc. v. United States, 47 Fed. Cl. 248 (2000).

896. *Id.* at 249.

897. *Id.*

American Embassy in Kuwait.[899] Integrated began performance and staged necessary materials, tools, and supplies in Baltimore, pending shipment to Kuwait.[900]

Integrated performed without problem until 2 August 1990.[901] Upon the invasion of Kuwait, contract performance was immediately suspended.[902] During the course of the war, the Ahmed Al-Jaber Base (AAJB), where the contract was to be perfomed, was completely destroyed, including the base electrical and water systems.[903] Soon after Kuwait's liberation, the KAF, over Integrated's protests, ordered the delivery of materials still staged in Baltimore. Upon arrival in Kuwait, the materials were incompetently unloaded, suffering significant damage.[904] Integrated incurred significant expense reorganizing and repairing the materials upon arrival in Kuwait.[905]

In the aftermath of the Gulf War, performance, as contemplated in the original contract was not possible. Integrated, the Navy and KAF, discussed the status of the project and agreed that a new contract was warranted.[906] The Navy and KAF advised Integrated that a new contract would be awarded quickly and that time was of the essence.[907] In April 1992, the Navy sent a request for quotation to Integrated. During a September 1992 meeting with the Navy, Integrated was informed that a letter contract would be issued shortly.[908] In late September 1992, Integrated visited the site for the first time since the Iraqi invasion, finding that the base where the maintenance was to be performed was effectively destroyed.[909]

Integrated was paid $3.6 million, the upper limit in the letter contract.[910] Integrated submitted claims for substantial pre-award costs.[911] The COFC denied Integrated's appeal. The court reviewed the history of the procurement and agreed with Integrated that the contracting authorities executed their responsibilities in a "clumsy" manner and without deliberate speed.[912] Unfortunately for Integrated, the shortcomings of the government's representatives were not sufficient. Citing the pre-contracting cost provision,[913] the court found that Integrated had failed to seek approval from the contracting officer, or at the very least, inform the contracting officer of the proposed work.[914] Integrated failed to show that it had so much as reached an agreement in principle with the contracting officer, yet alone secured the government's assent to the pre-contract expenditures.

Do Not Hide the Ball on FMS Sales

In *Defense Systems Company, Inc*.,[915] the ASBCA held that the government must inform prospective offerors of FMS and SDAF[916] quantities included in an acquisition.

898. *Id.* at 250. The contract was to be performed at Ahmed Al-Jaber Base in Kuwait. *Id.*

899. *Id.* at 250.

900. *Id.*

901. *Id.*

902. *Id.*

903. *Id.*

904. *Id.*

905. *Id.*

906. *Id.* at 251.

907. *Id.*

908. *Id.* The Navy Contracting Officer predicted the contract would issue around 15 October 1992.

909. *Id.* The base was littered with unexploded ordnance and almost no base facilities remained.

910. On 20 November 1993, Integrated notified the contracting officer that the project was complete.*Id.*

911. *Id.* In an attempt to expedite performance of the work, Integrated had incurred significant costs prior to the issuance of the letter contract. The contracting officer paid Integrated $622,000 as a result of the claims. *Id.* Integrated received a total of $4,222,000 prior to trial. Integrated appealed the denial of it's remaining claims. *Id.*

912. *Id.* at 257. The court also categorized the procurement as one suffering from "inordinate delays," "inattention," and "general incompetence." *Id.*

913. FAR *supra* note 49 at 31.205-32. This section allows contractors to recover costs "incurred before the effective date of the contract directly pursuant to the negotiation and in anticipation of the contract award when such incurrence is necessary to comply with the proposed contract delivery schedule." *Id.*

914. *Integrated Logistics Support Sys. Int'l, Inc.*, 47 Fed. Cl. at 256.

The case involved a production contract for HYDRA-70 Rockets.[917] Defense Systems Company (DSC) intentionally underbid the contract by $32 million below its estimated cost of performance in order to secure award. DSC then planned a very aggressive FMS and direct international sales campaign in order to make up contract losses. At the time of the contract, the DFARS required the government to identify known FMS requirements in the solicitation.[918] Although aware that a significant portion of the rockets bought under this contract would be for FMS and SDAF requirements,[919] the government failed to identify the exact quantities to prospective offerors.

In its appeal to the ASBCA, DSC alleged that the government breached the contract in bad faith, and caused the demise of the company. The board found the government had failed to properly identify the FMS requirements under the contract, [920] but that the government had not acted in bad faith. Accordingly, the board determined the proper remedy was an equitable adjustment and not breach damages.[921]

Freedom of Information Act

Unit Price Disclosures

Last year's decision by the United States Court of Appeals for the District of Columbia in *McDonnell Douglas v. NASA* sparked a firestorm of debate regarding the withholding of "unit prices" under the Freedom of Information Act's (FOIA) Exemption 4. [922] With *McDonnell Douglas* in hand, numerous contractors filed "reverse FOIA"[923] lawsuits to enjoin the government from releasing unit prices.[924] To clarify the Defense Department's policy on releasing unit prices in awarded contracts, the DOD Directorate for Freedom of Information and Security Review published a memorandum to guide contract attorneys.[925]

McDonnell Douglas stemmed from a proposed disclosure under the FOIA of a contract unit price. The contract at issue was solicited prior to the change to the FAR that required unit prices to be disclosed as part of the post-award debriefing.[926] The DOD memorandum highlights the *McDonnell Douglas* decision's reliance on specific facts, and accordingly does not establish new legal requirements limiting disclosure of unit prices.[927] Consequently, the DOD policy remains unchanged by this decision. For contracts solicited prior to 1 January 1998, contracting officers should continue to follow the submitter notice procedures that advise contractors of the agency's intent to release unit prices and allow them an opportunity to comment.[928] Release of unit prices in accordance with the FAR for contracts awarded on solicitations issued on or after 1 January 1998 do not require submitter notice.[929]

915. ASBCA No. 50918, 00-2 BCA ¶ 30,991. *See supra* notes 450-57 and notes 485-89 for discussions of the other aspects of this complex decision.

916. The Special Defense Acquisition Fund (SDAF) provides funds for the procurement of defense articles in anticipation of the sale or transfer to foreign governments. The SDAF provides a readily available source of selected material to meet urgent military requirements of FMS customers without diverting material earmarked or stockpiled for U.S. forces. *See* 22 U.S.C. § 2795 (a) (2000).

917. The HYDRA-70 rocket is the standard air-to-ground rocket for the U.S. military and much of the world. The rocket can carry a variety of anti-material and anti-personnel munitions, as well as suppression munitions, screening, illumination, and training warheads. WEAPON SYSTEMS 2000, *supra*, note 451, at 181.

918. *Def. Sys. Co., Inc*., 00-2 BCA ¶ 30,991, at 152, 960. The current provision is found at DFARS, *supra* note 258, at 225.7301(c). DFARS 225.7303(a) and DFARS 225.7303-2(c) are also relevant to this issue. *Id.*

919. *Id.* The ACBCA found that 48,793 out of 232,764 ordered (21%) were intended for FMS and SDAF purposes. *Id.* at 152,963.

920. *Id.* at 152,963 (applying U.S. DEP'T OF ARMY, ARMY REG. 12-8, SECURITY ASSISTANCE OPERATIONS AND PROCEDURES, paras. 11-4a(2), 11-4b (21 Dec. 1990)). *Id.* The board also found that SDAF purchases may be considered FMS purchases and contractors must be alerted for pricing reasons. *Id.*

921. *Id.* at 152,965.

922. McDonnell Douglas Corp. v. NASA, 180 F.3d 303 (D.C. Cir. 1999). *See 1999 Year in Review, supra* note 37, at 99.

923. A "reverse FOIA" suit arises when the submitter of information to a government agency (typically a business entity) seeks to prevent the agency from releasing it to a third party FOIA requester. U.S. DEPARTMENT OF JUSTICE OFFICE OF INFORMATION AND PRIVACY, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW 640-55 (May 2000) [hereinafter DOJ FOIA GUIDE], *available at* http://www.usdoj.gov/oip/reverse.htm.

924. Martha A. Matthews, *Contractors Ask District Court to Block GSA's Planned Release of Unit Prices*, 74 BNA FED. CONT. REP. 172 (2000) (discussing the pending "reverse FOIA" suits brought by federal telecommunications contractors to prevent the General Services Administration (GSA) from disclosing their unit prices to unsuccessful offerors in the post-award debriefings and in response to Freedom of Information Act requests).

925. Memorandum, Department of Defense (DOD) Directorate For Freedom of Information and Security Review, subject: DOD Policy Concerning Release of Unit Prices Under the FOIA (3 Mar. 2000) [hereinafter DOD Unit Price Memorandum], *available at* http://www.defenselink.mil/pubs/foi/unitprices.pdf.

926. *See* FAR, *supra* note 49, at 15.503 (b)(1)(iv), 15.506(d)(2). The effective date of the FAR change was 1 January 1998. The changes to Part 15 of the FAR provide that, for contracts solicited after 1 January 1998, the contracting officer will notify and provide unsuccessful offerors in the post-award debriefing the unit price of each award. This disclosure is independent of any FOIA disclosure. *Id.*

927. *Id.*

While the FAR and FOIA have been described as "co-extensive," they perform distinct legal functions.[930] The current FAR provides a separate express authority for the government to release unit prices.[931] Nothing in the FOIA affects the FAR's requirement to disclose the "unit price" for post-1 January 1998 solicited contracts. Similarly, concerns that disclosure of the unit price in accordance with the FAR violates the Trade Secrets Act are unfounded. The Trade Secrets Act does not apply to disclosures "authorized by law."[932] The FAR disclosure provisions satisfy that "authorized by law" requirement.[933] Accordingly, the challenge for contract attorneys is not deciding whether unit prices can be released (they can), but rather, what constitutes the "unit price."

A recent decision from the U.S. District Court of the District of Columbia, *Mallinckrodt Inc. v. West*,[934] provides some insight into the definition of unit price. Initially, the court framed the issue by reaffirming that "it is beyond dispute that unit price data is required to be submitted in order to compete for a government contract and would be disclosable."[935] However, the court went on to reject the Department of Veterans Affairs (VA) conclusion that incentives, rebates and discounts in an existing VA contract were part of the "unit price."[936]

Mallinckrodt involved a third-party FOIA request for the blanket purchase agreement (BPA) between the VA and Mallinckrodt.[937] The VA determined that information regarding rebates, incentives, and discounts was merely pricing information and part of the unit price of the BPA solicitation. The agency concluded that the information sought was a "required" submission that failed to overcome the *National Parks* "substantial competitive harm test" and was thus releasable.[938] The court, however, criticized the government's view that "all information submitted in an effort to win a government contract should be viewed as having been required by the solicitation."[939] Focusing on the language of the solicitation, the court concluded that the "unit price" did not include all submissions of price related information.

The original VA solicitation provided that offers "should" include any added value items (like rebates and incentives), and "must" include other specified items. The court held that most of the incentive or rebate programs would have "absolutely no effect on the unit price, but rather, they would only add some unspecified value to the contract."[940] Using the should-must distinction, the court concluded that the rebate and incentive information was not a "required" submission but rather a "voluntary" submission by the successful offeror. The court, applying the *Critical Mass* test for voluntarily submitted information, held that the rebates and incentives were not the kind of information customarily released to the public, and thus, FOIA Exemption 4 would prevent disclosure of the confidential information.[941]

"Review Costs" for Commercial Requesters

In *OSHA Data/CIH, Inc. v. U.S. Dep't of Labor*,[942] a case of first impression in the courts of appeal, the Third Circuit con-

928. DOD Unit Price Memorandum, *supra* note 925.

929. *Id.*

930. McDonnell Douglas Corp. v. Widnall, 57 F.3d 1162 (D.C. Cir. 1995).

931. DOJ FOIA Guide, *supra* note 923, at 228 (citing McDonnell Douglas Corp. v. Widnall, No. 94-0091, slip. op. at 13 (D.D.C. Apr. 11, 1994) (holding that FAR disclosure provisions serve as legal authority to release business information)).

932. Trade Secrets Act, 18 U.S.C. § 1905 (2000).

933. *McDonnell Douglas Corp.*, No. 94-0091, slip. op. at 13 (supporting the proposition that FAR disclosures that are "authorized by law" are not covered by the Trade Secrets Act).

934. Mallinckrodt Inc. v. West, 2000 U.S. Dist. LEXIS 11008 (D.D.C. June 22, 2000).

935. *Id*. at *11.

936. *Id.*

937. *Id.*

938. *Id.* (citing Nat'l Parks Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (establishing the "substantial competitive harm" test for determining when involuntarily submitted (required) information was confidential and consequently subject to FOIA Exemption 4 withholding)).

939. *Id.* at *13.

940. *Id.* at *11.

941. *Id.* at *14 (citing Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871 (D.C. Cir. 1992) (en banc) (establishing the "customarily not released" test for determining when voluntarily submitted information was confidential and thus subject to FOIA Exemption 4 withholding). The court found, *inter alia*, that the conclusions of the VA were based on an overly expansive interpretation of "required" price information for purposes of FOIA Exemption 4. *Id.*

sidered whether "review costs" charged to commercial FOIA requesters included the cost of the submitter notice process.[943] The case stemmed from FOIA requests by OSHA Data[944] for all the data collected by the DOL in its 1996 Data Collection Initiative and other specific work site inspection records. The DOL Data Collection Initiative included information on employee injury and illness rates collected from over 80,000 businesses in the manufacturing sector. The request specifically sought business names, addresses, and employee work data.

The DOL initially denied the requests and OSHA Data filed suit. During the pendency of the litigation, DOL asserted that because the requests sought records that may be confidential and exempt under the FOIA, the agency regulations required it to notify the 80,000 businesses that submitted information and evaluate their responses. The agency estimated the costs of the submitter notice process to total $1.7 million, including mailing and response review costs.[945] After OSHA Data informed the court that it was unable or unwilling to pay the estimated "review costs," the district court dismissed the counts of the suit seeking that information. OSHA Data appealed the dismissal on two grounds. It first asserted that DOL's submitter notice process was not the type of "review cost" contemplated by the FOIA. OSHA Data also contended that regardless of the scope of review costs, the submitter notice was unnecessary here because DOL had no reason to believe that disclosure of the requested information would cause the substantial competitive harm that triggers the notification process.

In affirming the district court, the Third Circuit reviewed the 1986 FOIA amendments that delineated the three types of costs that agencies could charge commercial requesters: search, duplication and review. While FOIA defines a "review cost" to include "only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed," it does not define "initial examination."[946] OSHA Data argued on appeal that the initial examination should be narrowly construed to the very first time agencies review documents.[947] The appeals court, however, concluded that such a narrow reading of "initial examination" would deprive the agency of any "meaningful" review of the documents.[948] The court held that "the statute suggests a broader reading of 'initial examination,' sufficiently broad to encompass the contested [submitter notice] steps in the predisclosure decision making process."[949]

The court similarly rejected OSHA Data's contention that the submitter notice process was unnecessary to determine whether the workplace data requested was confidential within the meaning of Exemption 4. The court recognized that the evidentiary threshold for the agency to initiate the submitter notice process was "much less onerous" than the level needed to ultimately withhold information under Exemption 4.[950] The court concluded that the evidentiary threshold did not require a showing that the disclosure "would" cause substantial competitive harm, but rather, sufficient evidence to give the agency reason to believe disclosure "could reasonably be expected" to cause substantial competitive harm.[951] Based on the totality of the evidence at the time the agency initiated the submitter notice process, the court concluded that DOL had met the submitter notification threshold.[952]

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942. OSHA DATA/CIH, Inc. v. U.S. Dep't of Labor, 220 F.3d 153 (3d Cir. 2000).

943. The "submitter notice process" includes notifying the commercial submitter (an actual or potential government contractor) that an agency has received a FOIA request for records that may include confidential business information provided by the submitter. The process allows the submitter an opportunity to inform the agency about the documents that it considers confidential and subject to withholding under FOIA Exemption 4. Executive Order 12,600 requires federal agencies to "provide predisclosure notification procedures under the Freedom of Information Act concerning confidential commercial information." Exec. Order No. 12,600, 52 Fed. Reg. 23,781 (1987). Each agency has promulgated submitter notice regulations that are triggered by a FOIA request for records that reasonably could be expected to be subject to FOIA Exemption 4. Specifically, DOL's regulations require notification when it "has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm." 29 C.F.R. § 70.26(d)(2) (2000).

944. OSHA Data, a private business entity, collects regulatory compliance information from federal government agencies and repackages the information in electronic databases for resale. *OSHA DATA/CIH, Inc.*, 220 F.3d at 156.

945. *Id.* at 159.

946. 5 U.S.C. § 552(a)(4)(A)(iv) (2000).

947. OSHA Data stated that "in order to assert the need to notify business submitters, [DOL] must have already conducted its 'initial examination' and thus cannot charge for any 'additional' review costs." 220 F.3d at 164. OSHA Data suggested that DOL conducted its " initial examination" when it first identified those documents that required submitter notice. It also urged the court to exclude any further document evaluation from the ambit of the "initial examination," and consequently, from subsequent "review costs." *Id.*

948. *Id.* at 165.

949. *Id.*

950. *Id.* at 167.

951. *Id.* at 168.

The Third Circuit ultimately concluded that the submitter notification process proposed by DOL was a necessary part of the "initial examination" to determine the applicability of FOIA Exemption 4. Consequently, the estimated $1.7 million submitter notification costs were "review costs" properly chargeable to OSHA Data in connection with its request. OSHA Data's refusal or inability to pay such costs warranted dismissal of the suit related to those requests.[953]

Government Furnished Property

Here Come the Auditors!

The Defense Department has announced that it will conduct an audit of its government-owned property, plants, and equipment held by private contractors.[954] The Defense Contract Audit Agency will conduct the review.[955] The review will encompass nearly $1 trillion worth of government property, held by thirty-one contractors.[956] The DOD has not established a date for completion of the property audit.

Requiring Interface with Government Furnished Equipment Does Not Unduly Restrict Competition

On 1 August 2000, the Comptroller General found that a solicitation requiring product interface with government furnished equipment did not unduly restrict competition. In *Northrop Grumman Corp.*,[957] Northrop protested an Air Force solicitation seeking radar air traffic control systems. The solicitation required that the radar system interface with a government furnished data system already in place and manufactured by Raytheon.[958] Northrop argued that this requirement unduly restricted competition because it gave Raytheon an automatic edge in the competition. The Comptroller General disagreed, stating that the safety concerns requiring the interoperability of the two systems overcame any competition concerns.[959] In addition, the Comptroller General stated that Raytheon had earned any competitive advantage through winning the initial radar contract.[960] Finally, the Comptroller General found that the requirement for Raytheon to share its system information with the new awardee mitigated any advantage it may have had.[961]

Information Technology

Navy-Marine Corps Awards $6.9 Billion Intranet Contract

The Navy and Marine Corps announced on 6 October 2000 an award of a $6.9 billion intranet contract to Electronic Data Systems of Plano, Texas.[962] The Navy-Marine Corps competitively awarded the five year $6,938,817,954[963] contract on a multi-year, firm-fixed-price basis.[964] The Navy-Marine Corps Intranet (NMCI) will provide secure communications throughout the sea services' business, scientific, research, computational, and war fighting activities.[965] It is designed to replace numerous shore-based command data networks.[966] It is also designed to transition the Navy-Marine Corps from a govern-

952. *Id.* at 165-167. The circuit court reviewed DOL's justifications for predisclosure submitter notification to include DOL's promises of confidentiality to submitters, and caselaw that suggested that similar workplace data was "competitively sensitive and therefore confidential within the meaning of Exemption 4." *Id.* (citing Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246, 1249 (E.D. Va. 1974); CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1141(D.C. Cir. 1987)).

953. *Id.* at 168.

954. *DOD Property Held by Contractors Focus of New Audit Initiative*, 42 GOV'T CONTRACTOR 23, ¶ 226 (June 14, 2000).

955. *Id*.

956. *Id*.

957. B-285386, Aug. 1, 2000, 2000 CPD ¶ 124.

958. If Raytheon did not win the award, the solicitation required the successful bidder to share information with Raytheon to ensure interoperability between the companies' two systems. *Id*.

959. *Id*. The safety concerns revolved around the necessity of controlling military and civilian flight patterns simultaneously. *Id.*

960. *Id*. In this sense, Raytheon was just like any other contractor who wins an initial contract and then competes for and wins a follow-on contract. *Id*.

961. *Id*.

962. Press Release, Defense Technical Information Center, Navy-Marine Corps Announce Intranet Contract Award (Oct. 6, 2000) (on file with author); Press Release, Defense Technical Information Center, Contracts for October 6, 2000 (Oct. 6, 2000) (on file with author) [hereinafter Intranet Press Releases].

963. *See* National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 814, 114 Stat. 1654 (2000).

964. Intranet Press Releases, *supra* note 962.

965. *Id.*

ment-owned data network to a privately-owned data network from which the government buys services.[967] This contract may well be a preview of things to come in terms of how the government will conduct its business in the age of information technology.

DOD "Smart Card" on the Way

The DOD announced on 6 October 2000 that it will introduce a new "smart card" to replace the current Uniform Services ID Card.[968] Rather than being a mere photo ID, the new card will provide computerized access to secure areas that the cardholder is entitled to enter.[969] The card will also enable employees to digitally sign documents, transactions, and orders.[970] If the Smart Card will enable employees to do these things, then perhaps it will someday pave the way for paperless contracting.

Document Your IT Choices!

Information technology (IT) acquisitions are increasingly complex; they require agencies to make careful selection decisions. On 20 March 2000, the GAO held that an agency could not award an IT support contract without an adequate level of documentation to support its decision. In *Future-Tec Management Systems, Inc.*,[971] two competitors challenged the Navy's award of an IT contract, arguing that the Navy should have assigned more weight to the protesters' IT experience. Although the procurement was for a complex and expensive project, the Navy's record of its technical evaluation was very minimal and conclusory.[972] Given the complexity of the project, the GAO determined that the Navy should have better documented its source selection. The GAO therefore recommended that the Navy withdraw the award and re-evaluate all proposals in light of some detailed selection criteria. This is an especially problematic area for IT acquisitions because many such acquisitions will be for complex and expensive projects. Given these complexities and costs, acquisition officials should be especially vigilant in documenting their IT choices.

Payment and Collection

The Ongoing Battle of Mr. Bianchi

Over the years Mr. Maurice Bianchi has battled with the DLA over various aspects of contracts for military clothing he entered into in 1979 and 1980. Some twenty years later, COFC heard the latest case arising from these contracts.[973] Due to a variety of disputes, DLA did not pay Mr. Bianchi an Equal Access to Justice Act (EAJA)[974] award of some $475,724.51 for eight years. When DLA did finally pay, it failed to pay any interest on the award. So, Mr. Bianchi sued (again), seeking interest on his EAJA award under the Federal Offset Statute.[975]

The COFC found no statutory authority to pay interest in this case. The court relied on the general rule that payment of interest is a waiver of sovereign immunity that must be strictly construed.[976] The court reasoned that the Federal Offset Statute did not apply in this case because the circumstances did not fit within the plain language of the statute.[977] In response to Mr. Bianchi's second argument, COFC found that the EAJA statute also did not provide for payment of interest under the circumstances of this case. The EAJA statute provides for payment of interest when the government loses a challenge to either the amount or the entitlement to an EAJA award. So, although Mr.

966. *Id.*

967. *Id.*

968. Press Release, Defense Technical Information Center, New Identification Card Uses "Smart" Technology (Oct. 6, 2000) (on file with author).

969. Department of Defense Access Card Office, *Welcome to the Common Access Card*, *at* http://www.dmdc.osd.mil/smartcard/ (last visited Nov. 22, 2000).

970. Press Briefing, Office of the Assistant Secretary of Defense (Public Affairs), Department of Defense Common Access Card (Oct. 10, 2000), *at* http://www.defenselink.mil/news/Oct2000/t10112000_t1010speca.html.

971. B-283793.5, Mar. 20, 2000, 2000 CPD ¶ 59.

972. *Id.* at 8. The agency's entire technical evaluation record consisted of only three documents: (1) an "extremely brief and conclusory" evaluation of initial proposals; (2) a revised technical evaluation, mostly unchanged from the initial evaluation; and (3) the contracting officer's source selection decision memo, generally adopting the initial findings and recommendations, "with little further explanation or amplification." *Id.*

973. Bianchi v. United States, 46 Fed. Cl. 363 (2000).

974. *See* 5 U.S.C. § 504 (2000). The Equal Access to Justice Act is designed to reimburse attorney's fees of small businesses that prevail in contract litigation, to enable small businesses to afford to pursue litigation when necessary. *Id.*

975. 31 U.S.C. § 3728(c) (2000). The statute provides, in relevant part, that: "if the Government loses a civil action to recover a debt or recovers less than the amount the Secretary of the Treasury withholds under this section, the Comptroller General shall pay the plaintiff the balance and interest of 6 percent for the time the money is withheld." *Id.*

976. *Bianchi*, 46 Fed. Cl. at 365.

Bianchi waited eight years for his EAJA award, he had no entitlement to interest.

Another Change to Payment Rules: "Just in Time" Is No More

Last year Congress changed when DOD made contract payments.[978] This year, Congress repealed the "just in time" payment rules.[979] Although DOD contended that contractors had no entitlement to be paid "early" (that is, before the due date), industry groups, such as the Aerospace Industries Association, the National Defense Industrial Association, and the Contract Services Association of America had complained that the "just in time" payment rules meant contractors would incur non-reimbursable interest costs.[980] The repeal of "just in time" takes us back to the rule that the government must make payments before the due date.

Federal Acquisition Circular (FAC) 97-16 Finalizes Progress Payment Rules

The efforts of the Director of Defense Procurement's Progress Payment Rewrite Team to review existing progress payment policies and procedures came to fruition this past year. The team's goal was to make progress payment rules easier to understand and less burdensome for contractors and contracting officers. Federal Acquisition Circular (FAC) 97-16, which amends FAR Part 32, does just that.[981] Significantly, the final rules ensured the consideration of performance-based payments as the preferred method of financing,[982] raised the dollar threshold for use of contract financing from $1 million to $2 million, and eliminated the "paid cost rule." Large businesses may now include subcontract costs incurred but not actually paid in payment requests, so long as the amounts will be paid "in accordance with the terms of the subcontract or invoice, and ordinarily prior to submission of the contractor's next payment request to the government."[983] Lastly, the new rule allows the use of performance-based payments in contracts for research and development and in contracts awarded through competitive negotiation procedures.[984]

Federal Agency Overpayments Strike a Nerve with Congress

The issue of huge overpayments by federal agencies continued to generate Congressional attention and ire. In September 2000, GAO issued a report highlighting agency non-compliance with the requirements of the Federal Financial Management Improvements Act of 1996.[985] A second GAO report showed improper agency payments totaling $20.7 billion in fiscal year 1999.[986] This news provoked legislative initiatives[987] requiring recovery audits[988] and reporting of overpayments. The House of Representatives passed the Government Waste

977. Specifically, since DLA, and not the Secretary of the Treasury, was obligated to pay the EAJA award from DLA appropriations, the Federal Offset Statute did not provide authority for interest payment. *Id.* at 367.

978. Department of Defense Appropriations Act for Fiscal Year 2000, Pub. L. No. 106-79, § 8175, 113 Stat. 1283 (1999). The provision required DOD to wait twenty-nine days after receipt of an invoice before making payment, to wait twelve days before making progress payments, and to wait nineteen days before making interim payments based on cost. *Id.*; *see also 1999 Year in Review*, *supra* note 37, at 128.

979. Emergency Supplemental Act, 2000, Pub. L. No. 106-246, § 125, 114 Stat. 534.

980. *See Contract Payments: House Passes Legislation to Repeal DOD 'Just-in-Time' Pay Rules*, BNA FED. CONT. DAILY, Apr. 19, 2000.

981. *See* Federal Acquisition Circular 97-16, 65 Fed. Reg. 16,274 (Mar. 27, 2000).

982. The final rules amend FAR 32.1001 to emphasize that performance-based payments should be considered and deemed impracticable by the contracting officer before a decision is made to provide customary progress payments. *Id.* Additionally, the rules require that each payment amount represent what the contractor could reasonably be expected to incur to reach the performance milestone, rather than a reward above and beyond what is required for successful completion of the contract. *Id.*

983. *Id.* This provision was further amended in September, to establish a standard time period of thirty days within which contractors must pay their subcontractors to take advantage of this new rule. *See* Federal Acquisition Regulation; Financing Policies, 65 Fed. Reg. 56,454 (Sept. 18, 2000).

984. Federal Acquisition Circular 97-16, 65 Fed. Reg. at 16,274.

985. *See* GENERAL ACCOUNTING OFFICE, FINANCIAL MANAGEMENT: FEDERAL FINANCIAL MANAGEMENT IMPROVEMENT ACT RESULTS FOR FISCAL YEAR 1999, REPORT NO. GAO/AIMD-00-307 (Sept. 2000).

986. *See* GENERAL ACCOUNTING OFFICE, FINANCIAL MANAGEMENT: IMPROPER PAYMENTS REPORTED IN FISCAL YEAR 1999 FINANCIAL STATEMENTS, REPORT NO. GAO/AIMD-00-261R (Sept. 2000).

987. H.R. 1827, 106th Cong. (2000).

988. A recovery audit is a financial management technique used to audit internal records to identify facial-discrepancy payment errors, including those that result from duplicate payments, invoice errors, failures to provide applicable discounts, rebates or other allowances, or any other facial-discrepancy errors resulting in inaccurate payments. A facial-discrepancy is an error that results from, is substantiated by, or is identified as a result of information contained on any invoice, delivery bill, or other documentation given to the government by the supplier in the usual and customary conduct of business, or as required by law or contract. *Id.* at § 3561.

Corrections Act of 2000,[989] which mandates recovery audits in agencies where payments to vendors and other non-governmental entities for property or services total $500 million or more.[990] The Senate version[991] added an additional requirement for OMB to issue guidance on implementation of the program, including recovery audit standards and reports for facial-discrepancies that result in underpayments to vendors.[992] OMB must also submit a report to the President and Congress highlighting the actions taken and assessing the benefits of recovery audits, including amounts recovered. Given the attention that overpayments garner, it is unlikely that efforts to impose these new requirements will just go away.[993] Look for new recovery audit requirements in the upcoming year.

Performance-Based Service Contracting

Performance-based service contracting (PBSC) continues to grab attention as the Office of Federal Procurement Policy (OFPP), the DOD, and Congress all search for ways to streamline acquisitions and save money. During 2000, each entity made strides to cement PBSC methods in the acquisition mindset throughout the federal government.

On 30 March 2000, the OFPP took a major step towards streamlining its PBSC policy guidance when it rescinded OFPP Policy Letter 91-2, Service Contracting.[994] For nearly a decade, Policy Letter 91-2 offered the most detailed guidance about how to implement PBSC methods.[995] Noting that the FAR has subsumed most of the policy, however, OFPP "cleaned house" to avoid duplicating guidance.[996]

Shortly after the OFPP axed Policy Letter 91-2, DOD kept pace with its push towards performance-based contracting. On 5 April 2000, Under Secretary of Defense for Acquisition, Technology, and Logistics, Jacques Gansler announced that DOD would use PBSC methods in at least fifty percent of all service acquisitions by 2005.[997] Putting teeth into this ambitious goal, Under Secretary Gansler required the military departments and the DLA to develop implementation plans describing how they would increase performance-based acquisition within their respective organizations. In addition, Under Secretary Gansler challenged the DOD components to train the acquisition and technology workforce in the nuances of performance-based acquisition, using both web-based and live, on-site methods.[998]

Of all the players, however, Congress made the biggest strides when it promoted PBSC in the National Defense Authorization Act for FY 2001.[999] On four occasions, Congress foot-stomped that it views PBSC as a key acquisition tool. First, Congress directed that the FAR be revised to establish a preference for performance-based contracts and task orders, with a corresponding order of precedence.[1000] Second, Congress directed that a performance-based service contract or task order could be treated as a contract for the purchase of commercial items if it satisfied certain criteria.[1001] Third, Congress directed the Service Secretaries to establish service contracting centers of excellence to serve as clearinghouses for best practices.[1002] Finally, Congress directed the Secretary of Defense to enhance training for personnel responsible for contracting for services.[1003]

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989. *Id.*

990. The bill also directs that at least fifty percent of amounts recovered as a result of such audits will be deposited into the U.S. Treasury. Funds recovered will also be available for recovery audit costs, and agency mandatory management improvement programs. *Id.* at § 3563.

991. S. 3030, 106th Cong. (2000).

992. The Senate version exempts contracts that provide for periodic audits, which were subject to cost accounting standards or for which cost and pricing data were required. *Id.*

993. The 106th Congress may adjourn without final action on either the House or Senate versions. However, these measures are likely to be reintroduced in the 107th Congress.

994. Rescission of Office of Federal Procurement Policy; Policy Letters, 65 Fed. Reg. 16,968 (Mar. 30, 2000) (rescinding 56 Fed. Reg. 15,112 (1991)).

995. 56 Fed. Reg. 15,112 (1991). For example, Policy Letter 91-2 outlined the federal government's policy of using performance-based methods to the maximum extent practicable when acquiring services. It further directed agencies to justify the use of other than performance-based methods. Policy Letter 91-2 also set forth the lynchpin of PBSC methods: the performance-based statement of work focused on the result ("what") rather than the method of performance ("how"). Moreover, it addressed other, familiar PBSC concepts, such as quality assurance, selection procedures, and contract type. *Id.*

996. Rescission of Office of Federal Procurement Policy; Policy Letters, 65 Fed. Reg. at 16,968. The OFPP also rescinded twenty other policy letters, leaving eleven intact. *Id.* With the demise of Policy Letter 91-2, the FAR contains the primary source of guidance for PBSC methods. FAR, *supra* note 49, at subpt. 37.6.

997. Memorandum, Under Secretary of Defense, Acquisition, Technology, and Logistics, to Secretaries of the Military Departments, subject: Performance-Based Services Acquisition (PBSA) (5 Apr. 2000), *available at* http://www.acq.osd.mil.

998. *Id.*; *see* U.S. DEP'T OF AIR FORCE, AIR FORCE PERFORMANCE-BASED SERVICES ACQUISITION IMPLEMENTATION PLAN (June 2000), *available at* http://www.safaq.hq.af.mil/contracting/toolkit/part37.

999. Pub. L. No. 106-398, § 821a, 114 Stat. 1654 (2000).

Procurement Fraud

Procurement Fraud: A Growing Cottage Industry

Procurement fraud continues to be a growth industry. In fiscal year 2000, the government collected a record $1.5 billion in civil fraud recoveries.[1004] This represented "an increase of almost fifty percent above the largest previous annual recovery in 1997."[1005] These fiscal year 2000 recoveries included $74 million from Anthem Blue Cross and Blue Shield, $53 million from Gambro Healthcare Patient Services, $35 million from Jacobs Engineering Group, $33.5 million from Toshiba, and $31 million from Community Health Systems.[1006] The recovery of $1.5 billion is a significant increase over the $200 million recovered ten years earlier in fiscal year 1990.[1007] Such hectic activity also resulted in many significant decisions of interest to the procurement fraud practitioner.[1008]

The Supremes Do Qui Tam

Although the United States Supreme Court does not decide many public contract cases, it settled a major *qui tam* question on 22 May 2000. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,[1009] a former employee of a state agency brought a *qui tam* action against that agency, alleging the submission of false claims to the federal government.[1010] The state agency moved to dismiss, claiming that the employee lacked standing to sue.[1011] The state also claimed that the Eleventh Amendment[1012] barred a *qui tam* action against a state entity, and that such a state entity was not a "person" subject to False Claims Act liability.[1013]

1000. *Id.* § 821a. In this subsection, Congress established the following order of precedence for the use of contracts to purchases services:

> (1) A performance-based contract or performance-based task order that contains firm fixed prices for the specific tasks to be performed.
> (2) Any other performance-based contract or performance-based task order.
> (3) Any contract or task order that is not a performance-based contract or a performance-based task order.

Id.

1001. *Id.* § 821b. The contract or task order must be valued at $5,000,000 or less and must set forth each task to be performed. Each task must also be defined in measurable, mission-related terms, identify the end product or output to be achieved, and contain a firm fixed price. Finally, the source of services must provide similar services contemporaneously to the general public under terms and conditions similar to those offered to the federal government. *Id.* § 821(b)(1)(A)-(C). The subsection further states that the special simplified procedures provided for pursuant to 10 U.S.C. 2304(g)(1)(B) shall not apply to a performance-based contract or task order treated as a contract for the purchase of commercial services under § 821(b)(1). *Id.* § 821(b)(2). Finally, Congress has directed the Comptroller General to submit a report to the congressional subcommittees on the implementation of this provision within two years of enactment. *Id.* § 821(b)(3).

1002. *Id.* § 821c. The Secretary of each military department must establish at least one center of excellence in contracting for services within 180 days of enactment. Each center of excellence "shall assist the acquisition community by identifying, and serving as a clearinghouse for, best practices in contracting for services in the public and private sectors." *Id.*

1003. *Id* § 821d. Among other items, Congress directed the Secretary of Defense to ensure that classes "focusing specifically on contracting for services are offered by the Defense Acquisition University and the Defense Systems Management College and are otherwise available to contracting personnel throughout the Department of Defense." *Id.*

1004. Press Release, Department of Justice, Justice Recovers Record $1.5 Billion in Fraud Payments–Highest Ever for One Year Period (Nov. 2, 2000), *available at* http://www.usdoj.gov/opa/pr/2000/November/641civ.htm.

1005. *Id.*

1006. *Id.*

1007. Memorandum from U.S. Department of Justice, Civil Division, to author (Nov. 9, 2000) (on file with author).

1008. *See, e.g.*, United States *ex rel.* Thorton v. Science Applications Int'l Corp., 207 F.3d 769 (5th Cir. 2000) (value of administrative claims released by a contractor pursuant to a False Claims Act settlement with the government are part of the settlement proceeds that the government must share with the relator); United States *ex rel.* Oliver v. Parsons Co., 195 F.3d 457 (9th Cir. 1999) (contractor's improper claim based on a reasonable interpretation of a Cost Accounting Standard did not constitute a false claim); United States *ex rel*. Rahman v. Oncology Assoc., 201 F.3d 277 (4th Cir. 1999) (government may not use False Claims Act suit against healthcare providers as a substitute for investigation into overpayments by those providers); United States v. Marovic, 69 F. Supp. 2d 1190 (N.D. Cal. 1999) (Contract Disputes Act divests court of jurisdiction over government claims unrelated to fraud in *qui tam* suit).

1009. 120 S. Ct. 1858 (2000).

1010. *Id.* at 1861.

1011. *Id.*

1012. U.S. CONST. amend. XI (prohibiting individuals from suing states in federal courts).

The Supreme Court began its analysis with the question of standing. The Court first noted that the relator in a *qui tam* action always has a pecuniary interest in the action's outcome, but that "the same might be said of someone who has placed a wager upon the outcome."[1014] The Court, therefore, found no standing based upon the relator's financial interest in the suit's outcome. The Court next turned to the history of *qui tam* actions. In so doing, the Court noted that a relator sues in the name of the sovereign, much as an assignee sues in the name of the assignor.[1015] Because a relator is assigned the rights of the United States, the Court ruled that a relator, therefore, has standing to bring a *qui tam* action.[1016]

The Court next addressed the issue of whether a relator may bring a suit against a state entity. Noting that the 11th Amendment issue is moot if the *qui tam* statute itself forbids suits against states, the Court focused on *qui tam* itself.[1017] The Court went through a detailed analysis of the *qui tam* provisions of the False Claims Act and finally found that a state entity could not be a "person" under the act.[1018] The Court summed up its ruling by stating that "a private individual has standing to bring suit in federal court on behalf of the United States under the False Claims Act . . . , but . . . the False Claims Act does not subject a State (or state agency) to liability in such actions."[1019]

But What About the "Take Care" Clause?

One significant issue not presented to the Supreme Court in *Stevens* was whether the "Take Care" clause[1020] renders *qui tam* actions unconstitutional. The Court may soon address the issue because the Fifth Circuit ruled on 15 November 1999 that *qui tam* lawsuits were unconstitutional for this very reason.

In *United States ex rel. Riley v. St. Luke's Episcopal Hospital*,[1021] a divided Fifth Circuit panel ruled that *qui tam* violates the Take Care provision when the government declines to join the relator's suit.[1022] The appeals court focused its reasoning on the proposition that the government, not an individual, has the sole right to remedy wrongs against the government. "[T]he FCA provisions permitting *qui tam* actions to proceed when the government has decided not to intervene do encroach on the Executive's authority to initiate litigation aimed solely at redressing the government's injuries."[1023] To date no other federal appeals courts have followed the Fifth Circuit's opinion in this regard. Still, the *St. Luke's* decision will become a ready defense for *qui tam* defendants when the government declines to join the relator's suit.

False Implied Certification: The Circuits Split

Qui tam relators will sometimes bring actions that involve contractor claims that are not, on their face, false. The relators will allege, nonetheless, that the mere filing of the claim certifies express or implied compliance with applicable laws and regulations. If the filing of the claim falsely implies contractor compliance with all laws and regulations, the claim then contains a "false implied certification." This past year has shown the lack of judicial consensus regarding such certifications.

On 18 May 2000, the Tenth Circuit ruled that a false implied certification supported liability under the False Claims Act. In *Shaw v. AAA Engineering & Drafting, Inc.*,[1024] the court held that work orders submitted by a contractor constituted false claims even though the contractor made false statements "recklessly" rather than intentionally.[1025] The work orders contained a false implied certification because their submittal implied that

1013. 120 S. Ct. at 1861.

1014. *Id.* at 1862.

1015. *Id.* at 1864-65.

1016. This was not a surprise decision, considering that if the Court had ruled that *qui tam* plaintiffs have no standing, then *qui tam* actions would disappear except for those instances when the government joins in the suit.

1017. 120 S. Ct. at 1866.

1018. *Id.* at 1866-71.

1019. *Id.* at 1871. The Court decided this case 7-2, with two concurrences. *Id.*

1020. U.S. CONST. art. II, § 3. Because this section of the Constitution requires the executive branch to "take care that the laws be faithfully executed," the argument is that *qui tam* is unconstitutional because it assigns an executive function to someone outside the executive branch, that is, the relator.

1021. 196 F.3d 514 (5th Cir. 1999).

1022. The Court found *qui tam* was unconstitutional because it inhibited the government's ability to control litigation. *Id.* at 526.

1023. *Id.*

1024. 213 F.3d 519 (10th Cir. 2000).

1025. *Id.* at 530.

the contractor had performed all the work when in fact it had performed only part of it. On 30 June 2000, the D.C. Circuit came to an opposite conclusion regarding false implied certifications. In *United States ex rel. Siewick v. Jamieson Science & Engineering, Inc.*,[1026] the contractor submitted a claim to the government, certifying that it was in compliance with a federal "revolving door" statute when in fact one of its sub-contractors was not.[1027] The court ruled that this certification could not be the basis of a *qui tam* false claim action because there was insufficient evidence that the contractor had knowingly falsified the certification.[1028] Unlike the *Shaw* court, the *Siewick* court appeared unwilling, in the absence of a knowing falsification, to pin liability on the defendant for a "reckless" implied certification.

Do Not Sue the Prisoners!

The D.C. Circuit addressed an interesting sovereign immunity question in *Galvan v. Federal Prison Industries*.[1029] In *Galvan*, a federal prisoner brought a *qui tam* action against his "employer", Federal Prison Industries (FPI), alleging that FPI had falsely certified compliance on certain items it supplied to DOD.[1030] The court dismissed the suit, however, holding that FPI is entitled to sovereign immunity because it is an entity that would have to pay any judgment from the public treasury.[1031]

I Want To Have My Cake and Eat It Too

31 U.S.C. § 3730(b)(1) permits a relator to settle a *qui tam* suit only if the Attorney General consents.[1032] What happens, though, when the government declines to intervene in a *qui tam* action and the relator conducting the suit alone wants to settle? That was the situation in *United States ex rel. Doyle v. United States*.[1033] In *Doyle*, the plaintiffs brought a *qui tam* action against their former employer for allegedly filing false Medicare claims with the government.[1034] The government declined to join the suit.[1035] When the plaintiffs later decided to settle the suit with the defendant, the government objected, arguing that the settlement did not adequately protect the government's interests.[1036] The issue then became whether the government could object to a relator's settlement even when the government had declined intervention in the *qui tam* suit.

The court came down on the side of the government, reasoning that the statute's plain language clearly requires government consent before a relator settles a *qui tam* action.[1037] The court specifically ruled that the government may reject a relator's settlement even after the government's sixty-day intervention period has expired.[1038] In reaching its conclusion, the Sixth Circuit sided with the Fifth Circuit on this issue and rejected the Ninth Circuit's view.[1039]

1026. 213 F.3d 1372 (D.C. Cir. 2000).

1027. *Id.* at 1374.

1028. *Id.* at 1378.

1029. 199 F.3d 461 (D.C. Cir. 1999).

1030. *Id.* at 462.

1031. *Id.* at 463.

1032. 31 U.S.C. § 3730(b)(1) (2000).

1033. 207 F.3d 335 (6th Cir. 2000).

1034. *Id.* at 337.

1035. *Id.*

1036. *Id.* at 338. The government did not receive any damages because the plaintiffs settled only for fees and injunctive relief. *Id.*

1037. *Id.* at 339.

1038. *Id. See* 31 U.S.C. § 3730 (b)(2) (2000).

1039. *See* Searcy v. Philips Elec. of N. Am. Corp., 117 F.3d 154 (5th Cir. 1997); United States *ex rel.* Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir. 1994) (holding the government may only stop a relator's settlement for "good cause").

Let's Not Get Carried Away With These Penalties

The civil penalty provisions of the Anti-Kickback Act provide that those liable to the government for kickbacks may be assessed penalties of twice the amount of each kickback plus $10,000 for each occurrence of prohibited conduct.[1040] The U.S. District Court for the Eastern District of Virginia has held, however, that the $10,000 per occurrence penalty may be applied in an unconstitutional manner. In *United States v. Kruse*,[1041] the defendant pled guilty to giving kickbacks to a government contractor.[1042] Although the court ordered recovery of $544,560 from the defendant, and allowed a penalty of double the amount of the kickbacks ($1,569,120), the court held that an additional $590,000 penalty ($10,000 per occurrence times fifty-nine occurrences) was unconstitutionally excessive.[1043] The court reasoned that in this case there was no rational relationship between the harm committed and the penalty sought.[1044]

Those Greedy Lawyers

To prevent plaintiffs from unfairly capitalizing upon someone else's hard work, the *qui tam* statute forbids actions regarding fraud for which there has already been public disclosure.[1045] In *United States ex rel. Grayson and Hoffman v. Advanced Management Technology, Inc.*,[1046] two lawyers represented a contractor in a bid protest.[1047] Through that representation, the lawyers learned of fraud by another contractor which formed the basis of their subsequent *qui tam* action.[1048] On appeal, the Fourth Circuit held this to be publicly disclosed information that prevented the lawyers from being an original source.[1049] The court thus upheld the dismissal of their *qui tam* lawsuit.[1050]

Randolph-Sheppard

A Dining Facility By Any Other Name is a Vending Facility?

The United States District Court for the Eastern District of Virginia ruled this past year that the Randolph-Sheppard Act's[1051] priority for blind vendors applies to all cafeterias on federal property, including military "mess halls."[1052] At the center of the controversy is the dining facility contract at Fort Lee, Virginia. Both the National Institute for the Severely Handicapped (NISH) and the Virginia Agency for the Blind expressed an interest in bidding on the food service contract. After seeking legal advice from the legal staffs at Fort Lee and the Army's Training and Doctrine Command, the contracting officer determined dining facilities were "cafeterias" that fell under the Randolph-Sheppard Act. The NISH subsequently filed suit, claiming such an interpretation violated federal procurement law.[1053]

The plaintiffs' main argument was that the Randolph-Sheppard Act was not an exemption to CICA. Although the court

1040. 41 U.S.C. § 55 (2000).

1041. 101 F. Supp. 2d 410 (E.D. Va. 2000).

1042. *Id.* at 411.

1043. *Id.* at 414.

1044. *Id.* at 415.

1045. 31 U.S.C. § 3730 (e) (4) (2000).

1046. 221 F.3d 580 (4th Cir. 2000).

1047. *Id.* at 581.

1048. *Id.* at 582. The other contractor had falsely claimed in its bid that it would secure the expertise of a particular subcontractor. It never did. *Id.* at 581. Specifically, the would-be relators learned of the suspected fraud through a bid protest filed by a competing contractor. *Id.* The attorneys learned of the fraud through publicly disclosed information contained in the competing contractor's administrative complaint. *Id.* at 583.

1049. *Id*.

1050. *Id.*

1051. The Randolph-Sheppard Act, 20 U.S.C. §§ 107-107(f) (2000), is a federal statute designed to ensure the maximum number of vending facilities located on federal property are operated by licensed, blind individuals. The Act is implemented at 34 C.F.R. § 395.30(a). The original Act was limited in scope and extended a priority to contracts in federal buildings for newsstands, snack bars, and the like. In 1974 the Act's coverage was extended and included "cafeterias" in the definition of vending facilities subject to the Act. *Id.*

1052. NISH and Goodwill Servs., Inc., v. Cohen, 95 F. Supp. 2d 497, 500 (E.D. Va. 2000).

1053. The court allowed seven groups representing blind vendors to intervene. The intervenors were: (1) Randolph-Sheppard Vendors of America; (2) American Council of the Blind; (3) National Educational and Legal Defense Services for the Blind; (4) Virginia Facilities Vendors Council; (5) National Federation of the Blind; (6) Texas Commission for the Blind; and (7) Oklahoma Department of Rehabilitation Services.

ultimately upheld the application of the Randolph-Sheppard Act to the Fort Lee dining facility contract,[1054] it failed to specifically address what made the Act a "procurement procedure otherwise expressly authorized by statute."[1055] What seems clear from the decision was the Court's heavy reliance upon the government's support for inclusion of military dining facilities under the Act.[1056] Without addressing the key question of the Act's status as a procurement statute, the district court held that including military dining facilities within the Act's definition of cafeteria solved the issue. The plaintiffs have appealed the decision to the Fourth Circuit, so stay tuned for more on this issue in the coming year.

Taxation

Telephone Charges

In the most recent case involving the propriety of paying telephone charges for 911 emergency service,[1057] the GAO found Utah's statute imposed a "vendee tax" which was not payable by the federal government.[1058] Under the pertinent provision of Utah state law, any public agency providing 911 emergency service may levy an emergency services telephone charge upon each access line.[1059] Finding that the 911 "charge" was in fact a tax,[1060] and then applying the constitutional principle that the United States and its instrumentalities are immune from direct taxation by state and local governments,[1061] the GAO concluded that the 911 charge was a vendee tax, the legal incidence of which fell directly on the federal government as a user of telephone services in the state.[1062] Consequently, the United States was constitutionally immune from paying that tax.

Hotel Room Tax

The applicability of state and local room taxes to federal employees traveling on official government business was addressed in *California Credit Union League v. City of Anaheim.*[1063] Here the Ninth Circuit held that federal credit union employees who were attending a credit union seminar were constituent parts of the United States, and thus, were exempt from paying that city's transient occupancy tax under a Federal Credit Union Act provision exempting credit unions from taxation.[1064]

The impetus of this case was a credit union seminar held in Anaheim, California, in November of 1993. Federal credit union employees who attended the seminar stayed at the Disneyland Hotel in Anaheim and were assessed a transient occupancy tax pursuant to the Anaheim Municipal Code. The

1054. *NISH and Goodwill Servs., Inc*., 95 F. Supp. 2d at 505.

1055. Defendants argued that Randolph-Sheppard was a procurement procedure otherwise expressly authorized by statute. *Id.* at 503. Agencies are not required to provide for full and open competition if a statute authorizes or requires the agency to procure the supplies or services from a specified source. 10 U.S.C. § 2304(c)(5) (2000); 41 U.S.C. § 253(c)(5) (2000).

1056. The court specifically cites a memorandum from the Department of Education's Commissioner of the Rehabilitative Services Administration and the Department of Defense General Counsel's memorandum to the General Counsels of the Military Departments. *See* Memorandum from Judith Miller, General Counsel of the Department of Defense, to General Counsels of the Military Departments, subject: Applicability of the Randolph-Sheppard Act to DOD Military Dining Facilities (2 Nov. 1998); *see also* Memorandum from U.S. Army Contracting Support Agency, subject: Military Dining Facility Solicitations and Contracts (22 Mar. 1999), *available at* http://acqnet.sarda.army.mil/library/policy399.html. Additionally, the court relied on the Comptroller General's opinion that military dining facilities are covered by the Act. *See* Department of the Air Force–Reconsideration, 72 Comp. Gen. 241 (1993).

1057. Telephone Charges–State of Utah, B-283464, Feb. 28, 2000 (unpublished).

1058. More than a dozen other states' statutes imposing 911 surcharges have been examined over the years, some of which are cited in the *Utah* opinion. Most have been found to be vendee taxes. *But cf.* 9-1-1 Tax, State of Arizona, B-238410, 1990 U.S. Comp. Gen. LEXIS 953 (Sept. 7, 1990) (finding the charge to be an indirect tax which the United States may pay).

1059. The local exchange telephone company is required to bill telephone customers for the charge and remit the amount collected to the public agency, where the money is deposited in a special emergency telephone service fund. The money in the fund is available only to pay the costs of establishing, installing, maintaining, and operating a 911 emergency telephone system. Telephone Charges–State of Utah, B-283464, Feb. 28, 2000 (unpublished).

1060. *Id.* (citing Matter of Emergency 9-1-1 Number Fee, 65 Comp. Gen. 879, 881 (1986) (identifying the following characteristics of telephone charges which make them taxes: a local government or quasi-governmental unit provides the telephone service; public funding of the service requires legal authority; and the service charge is actually based on a flat rate per telephone line and is unrelated to levels of service)).

1061. First enunciated in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

1062. Using the same analysis, the Comptroller General also found Utah's "hearing impaired surcharge" was a vendee tax. *Telephone Charges–State of Utah*, B-283464, at 3.

1063. 95 F.3d 30 (9th Cir. 1996), *vacated by* 520 U.S. 1261 (1997), *remanded to* 190 F. 3d 997 (9th Cir. 1999), *and cert. denied,* 120 S. Ct. 1159 (2000).

1064. 12 U.S.C. §1768 (2000) confers upon federal credit unions broad immunity from federal, state, and local taxation. Independent of §1768, courts have generally considered federal credit unions to be instrumentalities of the federal government, which share the government's sovereign immunity from state and local taxation.

California Credit Union League filed suit in federal district court against the City of Anaheim, alleging that the tax violated the Federal Credit Union Act. Anaheim argued that the incidence of the tax was on the occupants and that those occupants were not themselves exempt under the Act. The court granted the League's Motion for Summary Judgment. The Ninth Circuit affirmed upon appeal. Although the parties' arguments focused on whether the legal incidence of the room tax fell upon the credit union or the employees, the Ninth Circuit stated that even if the legal incidence fell on the individuals, the question remained whether those parties were independent entities of the United States. Applying the analysis of *United States v. New Mexico*,[1065] the Ninth Circuit held: "Because the federal credit unions' employees were attending to credit union business while staying at the Disneyland Hotel in Anaheim, they were 'constituent parts' of the credit union and immune from Anaheim's transient occupancy tax under section 1768."[1066]

Subsequently, the United States Supreme Court vacated the Ninth Circuit's decision and remanded it for reconsideration in light of *Arkansas v. Farm Credit Services of Central Arkansas*[1067] in which the court held that federal instrumentalities (without the United States as a co-plaintiff) are subject to the Tax Injunction Act[1068] bar to federal court jurisdiction. To cure the jurisdictional defect, the United States then joined the litigation as a co-plaintiff. In an opinion focusing largely on whether that joinder operated *nunc pro tunc* to cure the jurisdictional defect that existed before the district court, the Ninth Circuit held that it did. The appeals court then reaffirmed the district court's judgment in favor of the League for the reasons cited in its prior opinion. With the denial of certiorari by the United States Supreme Court, we are left with the Ninth Circuit holding quoted above.

The Ninth Circuit clearly departed from the traditional analysis given hotel occupancy taxes by the GAO,[1069] where the validity of the tax depends upon whom the legal incidence of the tax directly falls. Generally when a federal employee procures a room while traveling on official business, the legal incidence of the tax falls on the employee, not the federal government, and the employee pays the tax,[1070] unless the state or local jurisdiction provides its own exemption for federal travelers.[1071] By contrast, if the federal government procures the room through a direct contract, then the legal incidence falls on the federal government, which can assert its sovereign immunity from the tax.[1072] What *California Credit Union* bodes for the federal traveler is still uncertain; the Ninth Circuit decision is not yet reflected in federal travel policy.[1073]

Tax on Sales to the Post Exchange

In *Western Kentucky Coca-Cola Bottling Co. Inc. v. Revenue Cabinet, Commonwealth of Kentucky*,[1074] the Kentucky Board of Tax Appeals overturned an assessment of sales tax against the Bottling Co. for sales of canned soft drinks to the Army and Air Force Exchange Service. The Bottling Co. had a contract to sell soft drinks to the Fort Campbell Post Exchange (Exchange). Pursuant to that contract, title to the soft drinks and risk of loss passed to the Exchange when the Bottling Co.

1065. 455 U. S. 720 (1982).

1066. *Ca. Credit Union League*, 95 F. 3d at 31.

1067. 520 U. S. 821 (1997).

1068. 28 U.S.C. §1341 (2000). This Act provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." *Id.*

1069. *See, e.g.*, The Honorable E. Thomas Coleman, House of Representatives, B-217805, 1986 U.S. Comp. Gen. LEXIS 1248 (Apr. 11, 1986); Hotel-Motel Tax–Anchorage, Alaska, B-172621, July 16, 1976, 55 Comp. Gen. 1278.

1070. Federal travelers themselves no longer have a stake in the issue of whether the tax applies or not since the Federal Travel Regulations were changed in 1999 to exclude taxes from the per diem rates. In CONUS, lodging taxes are now reimbursable as a miscellaneous travel expense limited to the taxes on reimbursable travel costs. Federal Travel Regulation, 41 C.F.R. § 301-11.27, amend. 75 (1999).

1071. For help in identifying localities exempting federal employees from occupancy tax, see GSA's Web site at http://policyworks.gov/org/main/mt/homepage/mtt/mtthp.htm. The reimbursement of the employee by the federal government does not affect the legal incidence analysis. The rationale is that when the federal government pays a per diem or actual expense allowance, it is not paying the tax, but reimbursing the employee for the latter's expense.

1072. The rule was summarized by Deputy Attorney General Burns as follows:

> In summary, the rule is that, if the legal incidence of the tax falls on the employee, the employee is responsible for the payment of the tax. So long as the tax is not directly laid upon the Federal Government, it is nondiscriminatory, and there is not a jurisdictional exemption, until the Congress declares otherwise, the tax is valid and must be paid.

Letter from Deputy Attorney General Burns (Apr. 15, 1988) (on file with author).

1073. In view of Deputy Attorney General Burns' letter, *id.*, the Department of Justice, Office of Legal Counsel may be asked for an opinion.

1074. KBTA File No. K98-R-10, Order No. K-17862, 2000 Ky. Tax LEXIS 112 (Apr. 11, 2000).

placed the soft drinks in the vending machines. The Exchange paid for the initial stock and all soft drinks upon delivery. While the Bottling Co. collected the money when refilling the vending machines, the money remained the property of the Exchange. The contract specifically provided that the Bottling Co. was not the agent or representative of the Exchange.

The Revenue Board took a number of routes to arrive at its conclusion that the tax assessment was improper. First, it determined that under Kentucky tax regulations, a sales tax does not apply to receipts from sales made to "installations of the federal government." Noting that the United States Supreme Court has held that military posts or exchanges are instrumentalities of the federal government and may take advantage of its immunities,[1075] the board decided that sales to the Fort Campbell Exchange were immune from the imposition of Kentucky state sales tax.

Additionally, the board placed the incidence of the Kentucky sales tax on retailers; in this case, the Fort Campbell PX.[1076] The board expressly rejected the argument of the revenue authorities that the re-sales by the Exchange were not necessarily to government personnel with government funds for use in an official government function, finding that such a requirement has not been imposed by Kentucky courts.[1077]

FISCAL LAW

Purpose

The Quest for Free Food

There was a time, not so long ago, that everyone wanted to know why federal employees had to pay out-of-pocket for coffee and donuts at meetings and training events. Weren't these light refreshments an integral part of the event? Didn't they provide the participants with a means of exchanging information? After all, what better way is there for people to meet and greet if not over a café au lait and a flaky pastry? And, couldn't the agency better control the attendees' prompt return from breaks, and therefore ensure that meetings were run more efficiently, if donuts were in the vicinity of the conference room?

Well, believe it or not, a new era has begun. On 10 January 2000, the GSA amended the Federal Travel Regulation (FTR) to allow agencies to consider the cost of light refreshments in their planning of government-sponsored conferences.[1078] Following on the heels of the GSA's rule change, the DOD Per Diem, Travel and Transportation Allowance Committee (Per Diem Committee) amended both the Joint Federal Travel Regulation (JFTR) and the Joint Travel Regulation (JTR)[1079] According to these changes, DOD agencies should consider all direct and indirect costs associated with planning an agency-sponsored conference.[1080] Direct and indirect costs that may be considered include light refreshments, excluding alcoholic beverages.[1081] While the amended provisions are not a free ride to the buffet line, they do allow agencies some flexibility in plan-

1075. *Id.* (citing Standard Oil of Ca. v. Johnson, 315 U.S. 481 (1942); United States v. State Tax Comm'n of Miss., 421 U.S. 599 (1975)).

1076. The board stated that under the Buck Act, 4 U.S.C. §§105-110 (2000), the Kentucky revenue authorities may not tax the United States or any of its instrumentalities, and that the immunity provided for in the Buck Act applied to sales by the Exchanges. KBTA File No. K-98-R-10, 2000 Ky. Tax LEXIS 112 (Apr. 11, 2000).

1077. Western Kentucky Coca-Cola, 2000 Ky. Tax LEXIS 112 (citing cases involving alcohol sales by the Fort Knox Post Exchange (Falls City Brewing Co. v. Reeves, 40 F. Supp. 35 (W.D. Ky. 1941); Maynard & Child, Inc. v. Shearer, 290 S.W. 2d 790 (1955)).

1078. Conference Planning, 65 Fed. Reg. 1326, 1328 (Jan. 10, 2000) (to be codified at 41 C.F.R. pt. 301-74) (effective date Jan. 14, 2000). The text of the rule change reads in part: "Agencies sponsoring a conference may provide light refreshments to agency employees attending an official conference." *Id.* Prior to this rule change, federal agencies could not use agency funds to provide refreshments for federal employees or military members at government-sponsored meetings and similar functions. *See* Pension Benefit Guaranty Corp.–Provision of Food to Employees, B-270199, Aug. 6, 1996 (unpublished) (discussing that federal funds should not be used to reward employees for arriving punctually at their assigned duty location and performing to the best of their abilities as these are elements of job performance that are to be achieved without recourse to free food or other inducements). The General Services Administration, Office of Governmentwide Policy (OGP), is responsible for developing policy and guidance for travel and transportation costs for federal agencies. *See* OGP, *OGP Travel and Transportation Management Policy Division Homepage, at* http://policyworks.gov/org/main/mt/homepage/ mtt/mtthp/ (last visited Nov. 22, 2000).

1079. The Per Diem, Travel and Transportation Committee is chartered under the DOD. Its members are a Deputy Assistant Secretary for each of the DOD military departments and the Director of the National Oceanic and Atmospheric Administration Corps, the Commandant of the Coast Guard, and the Surgeon General of the Public Health Service. The Committee Chairman is the Deputy Assistant Secretary of Defense. *See* II Joint Fed. Travel Regs., forward (1 Apr. 2000) [hereinafter JFTR], *available at* http://www.dtic.mil/perdiem/jtr/intro.txt. The JFTR contains basic regulations concerning official travel and transportation of members of the active and reserve components of the uniformed services. *Id.* The Joint Travel Regulation pertains to civilian employees in DOD.

1080. JFTR, *supra* note 1079, pt: G, ¶ U2550 (31 Mar. 2000) (conference planning); I Joint Travel Regs., pt. S., ¶ C4950 (31 Mar. 2000).

1081. Other direct and indirect costs include travel and per diem expenses; rent of rooms for official business; usage of audiovisual and other equipment; computer and telephone access fees; printing; registration fees; ground transportation; and, attendee's travel and time cost. JFTR, *supra* note 1079, pt: G, ¶ U2550 (31 Mar. 2000) (conference planning); I Joint Travel Regs., pt. S., ¶ C4950 (31 Mar. 2000). Although the Per Diem Committee changes do not define "light refreshments," according to GSA's amendment to the FTR, light refreshments include, but are not limited to, coffee, tea, milk, juice, soft drinks, donuts, bagels, fruit, pretzels, cookies, chips, or muffins. Conference Planning, 65 Fed. Reg. at 1328.

ning conferences and considering refreshments for attendees in the overall cost to the agency. Let them eat cake, or in this case, muffins!

It Is All or Nothing!

Every year the issue of commanders' conferences resurfaces leaving many contract and fiscal law practitioners running for cover. Although there are many planning considerations for these, and other types of conferences, two have plagued the contracting community for years: (1) May a command contract for a facility and include meals in the contract? and (2) May a command spend appropriated funds on refreshments for the attendees? Finally, we have some assistance in answering both of these questions.

The GAO has determined that agencies can use appropriated funds to pay for meals in the cost of a facility rental fee, if the costs for the meals are non-negotiable and non-separable from the overall rental fee. In *Matter of Nuclear Regulatory Commission*,[1082] the Nuclear Regulatory Commission (NRC) requested an opinion of the GAO as to whether NRC used appropriated funds properly when it paid a facility rental fee that included, among other things, the cost of meals and refreshments.

The NRC sponsored a variety of internal agency workshops at a location outside of the agency.[1083] Officials of the NRC tasked on short notice an agency employee to obtain a facility close to the agency to host the workshops.[1084] The employee contacted a facility that NRC had rented previously and one other facility.[1085] The employee determined that the facility it had used previously offered NRC more than the other facility for a comparable, if not lower, price. Specifically, the previously used facility included in its rental fee the cost of a breakout room, refreshments, lunch, equipment, and appropriate supplies.[1086] The employee determined that NRC should contract with this facility once again.

The question raised by NRC officials was whether the agency acted properly by using appropriated funds for the rental of a facility that included meals and refreshments or should the agency personnel that attended the conference be required to reimburse NRC for these questionable expenses.[1087] The GAO determined that NRC acted properly. The GAO focused its analysis of the reasonableness of the expenditure on whether the facility fee was a necessary expense of the agency's operating funds. In finding that it was, the key issue for GAO appeared to be that the fee included meals and refreshments at no additional charge. In other words, the fee would have remained the same to the government whether or not NRC accepted and the employees ate the food.[1088] Because the facility fee was all-inclusive, the GAO determined the agency had expended its funds properly.

Transportation in Kind, To Be Kind

In an interesting request to the GAO, the U.S. Army Engineer District, Seattle, asked for the GAO's views on whether an annual payment to the Saint Martin de Porres Shelter for the costs of operating the shelter's bus was proper.[1089] The Seattle District has made the payment to the shelter for many years. In making such payments, the Seattle District relied on 10 U.S.C. § 2546, which authorizes the secretaries of the military departments to make military installations available for providing shelter for persons without adequate shelter.[1090] Furthermore this authority allows the secretaries to provide incidental services to the shelter, including transportation.[1091]

1082. B-281063, 1999 U.S. Comp. Gen. LEXIS 245 (Dec. 1, 1999).

1083. *Id.* at *1. The workshops were attended by NRC personnel exclusively. The personnel were not in a travel status. *Id.* The GAO decision did not discuss the NRC's reasons for requiring a facility outside the agency to host the workshops.

1084. *Id.* The short notice tasking applied to the first three workshops. *Id.* at *2. In addition to the facility's location, the officials required that the rental fees not exceed $2,500 and accommodate twenty to twenty-five individuals. *Id.*

1085. *Id.* The agency had used the William F. Bolger Center for Leadership Development (Bolger) in prior years. *Id.*

1086. *Id.* Bolger charged a flat fee of $45 per person. *Id.*

1087. The NRC raised this issue because of the general prohibition on expending appropriated funds for food for employees within their official duty station. This prohibition is meant to prevent the expenditure of government funds on personal items. *Id.* at *4.

1088. *Id.* at *6.

1089. B-284143, 2000 U.S. Comp. Gen. LEXIS 161 (Apr. 10, 2000). The shelter itself is located on the Seattle waterfront in a warehouse. The building was used by the Army as a point of debarkation, during both World War II and the Korean Conflict. The Army declared the building surplus and transferred ownership to the GSA, which used the building as a warehouse. Later, GSA dedicated part of the building for use by the City of Seattle as a shelter for up to 100 homeless persons. Seattle arranged for the shelter to be operated by Catholic Charities of King County. In 1985, GSA transferred the building to the Seattle District, which enlarged the capacity of the shelter to accommodate 200 people. *Id.* at *2-3.

1090. *Id.* at *3-4.

The Seattle District alleged that the statute in question allows only for the military departments to provide incidental services directly, not to reimburse the shelter for these costs.[1092] The GAO disagreed with the Seattle District and stated that the reimbursement for transportation services was legally sufficient.[1093] The GAO determined that the statutory authority was broad enough to allow the military departments to: provide the shelter with transportation using its own equipment and personnel; acquire transportation services by contract for the shelter; or, reimburse the shelter for the cost of acquiring the service.[1094]

Antideficiency Act

CAFC: You Can't Spend More than Congress Gives You!

In a case perhaps more remarkable for its background than for the actual holding,[1095] the CAFC overturned an Interior Board of Contract Appeals (IBCA) decision[1096] that had found the Bureau of Indian Affairs (BIA) liable to make payments exceeding the amount available in an appropriation earmark. The case involved a very complex statutory scheme under the Indian Self-Determination and Education Assistance Act (ISDA).[1097] Under the ISDA, the BIA was required to make payments to Indian tribes to offset the tribes' indirect costs associated with the administration of certain contracts. The BIA paid numerous tribes, including the Oglala Sioux (Oglala), only a fraction of these costs on the basis of a limited congressional appropriation for this purpose. Oglala filed a claim for the unpaid portion of its indirect costs. Following the contracting officer's denial of its claim, Oglala appealed to the IBCA. The board held in favor of Oglala, reasoning that, even if the BIA had exhausted the specific appropriation, it could reprogram funds from its general appropriation to make up the difference.

In overturning the board's decision, the CAFC noted that the ISDA (the authorizing statute in this case) contained a specific subject to the availability of funds provision that applied "[n]otwithstanding any other provision" of the ISDA.[1098] Noting that Congress had specifically earmarked funds for contract support costs in the applicable appropriation, the Court held that "in the face of Congressional under-funding, an agency can only spend as much money as has been appropriated for a particular program."[1099]

While the CAFC's holding should seem straightforward to readers of this article, it is interesting to note that the IBCA, in what appears to be an exhaustively-researched and well-reasoned opinion, failed to appreciate the importance of the subject to availability of funds language coupled with the appropriation earmark.

GAO: You Can't Spend What Congress Did Not Give You!

In a good primer on the rules regarding expenditure of funds received from outside the government, the GAO found a District of Columbia agency liable for a reportable Antideficiency Act (ADA) violation for spending interest it had earned on its appropriation.[1100] The Court Services and Offender Supervision Agency of the District of Columbia (CSOSA) received a $43 million appropriation from Congress for FY 1998. CSOSA invested these funds in an interest bearing account and spent

1091. *Id.* The Seattle District's concern arose out of the near future transfer of jurisdiction over the building from the Army to the Coast Guard, although the Coast Guard would then grant the Army a permit to continue administering the space occupied by the shelter. The Seattle District alleged that this transfer would affect its ability to rely on 10 U.S.C. § 2546. The GAO disagreed with the Seattle District's conclusion and stated that the Secretary of the Army's authority with respect to the space would be functionally no less than it was prior to the transfer, therefore 10 U.S.C. § 2546 would still apply. *Id.* at *12.

1092. *Id.* at *3. The GAO stated that the Seattle District's strict reading of the statute would require the military departments to provide utilities from their own generators; provide bedding from their own supplies; provide security with their own guards; and, renovate facilities only with their own personnel. The GAO stated that the word "incidental" as used in the statute means incidental to the operation of the shelter, not incidental to normal military operations. *Id.* at *7-8.

1093. *Id.* The GAO stated that while it did not have any legal objection to the reimbursement, according to the Assistant Chief of Staff for Installation Management, Army policy was that transportation and travel costs of shelter residents to and from the shelter outside the immediate shelter area are not eligible for reimbursement. *Id.* at *8 n.2.

1094. *Id.* at *10-11.

1095. Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't, 194 F.3d 1374 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 2196 (2000).

1096. Oglala Sioux Tribal Pub. Safety Dep't., IBCA No. 3680-97, 98-2 BCA ¶ 29,833. This is a brief decision granting summary judgment for Oglala. The board's detailed factual and legal analysis of the issues involved in this case may be found in a companion decision, Alamo Navajo Sch. Bd., Inc., and Miccosukee Corp., IBCA Nos. 3463-3466, 3560-3562, 98-2 BCA ¶ 29,831.

1097. 25 U.S.C. §§ 450-450n (2000).

1098. 25 U.S.C. § 450j-1(b).

1099. *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d at 1378. The court made specific reference to 31 U.S.C. § 1341(a)(1)(A), the "in excess" prong of the Antideficiency Act. *Id.*

1100. Unauthorized Use of Interest Earned on Appropriated Funds, B-283834, 2000 U.S. Comp. Gen. LEXIS 163 (Feb. 24, 2000).

$1.575 million of the interest it earned on agency operations in Fiscal Years 1998 and 1999.

The GAO first noted that the ADA "prohibits an officer or employee of the District of Columbia Government from making or authorizing an expenditure or obligation in excess of or in advance of an appropriation."[1101] Next, the GOA succinctly stated the general rule:

When an agency retains and expends funds received from outside sources, it augments its appropriation to the extent that such amount results in agency spending in excess of the level established by the appropriation act. An agency's authority to augment its appropriation is no greater than its authority to spend funds in the absence of an appropriation. Further, even when a law authorizes an officer or employee to receive funds from outside sources, the authority to spend the funds must be provided in law. The authority to spend may not be inferred from the absence of an express prohibition to spend in the law authorizing the collection.[1102]

Finally, GAO concluded that, "to the extent the interest spent in 1998 and 1999 exceed[ed] the unobligated balances of the appropriations made to CSOSA for those fiscal years, CSOSA committed a reportable violation of the Antideficiency Act."[1103]

Construction Funding

The Changing Concept of Construction Funding During Combat and Contingency Operations

On 22 February 2000, the Army Deputy General Counsel (Ethics and Fiscal) issued a revised opinion on construction funding during combat and contingency operations.[1104] According to the opinion, Operations and Maintenance (O&M) funds "are the appropriate funding source for acquisition of materials and/or cost of erection of structures during combat or contingency operations . . . that are clearly intended to meet a temporary operational requirement to facilitate combat or contingency operations."[1105] Such construction may be accomplished without regard to the project limitations imposed by 10 U.S.C. § 2805.[1106]

The new policy does not address nor modify the existing requirements for construction intended to meet a permanent need.[1107] The physical characteristics of the construction project do not dictate whether the project is permanent or temporary.[1108] Rather, the defining factor is the purpose for which the project is undertaken. No doubt the toughest issues facing good-faith application of this opinion are determining what is intended for temporary mission requirements and when a combat or contingency mission is no longer temporary in nature.[1109] In light of such unresolved matters, expect to see more guidance on contingency construction funding in the coming year.

1101. *Id.* at *3 (citing 31 U.S.C. § 1341 (1994)).

1102. *Id.* at *4.

1103. *Id.* at *6 (citing 31 USC § 1351 (1994) and OMB Cir. A-34, § 22.6 (November 1997)).

1104. Memorandum, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, Department of the Army, subject: Construction of Contingency Facility Requirements (22 Feb. 2000) [hereinafter Contingency Construction Opinion]. This memorandum modified a 21 January 1997 memorandum on the same subject, and added "or contingency" to the phrase "are clearly intended to meet a temporary operational requirement to facilitate combat or contingency operations." *Id. See generally* U.S. DEP'T OF ARMY, OFFICE OF GEN. COUNSEL, FISCAL LAW OUTLINE § P (July 9, 2000) (current issues), *available at* http://www.hqda.army.mil/ogc/eandfoutline-secp.htm.

1105. Contingency Construction Opinion, *supra* note 1104. For example, if reinforced concrete landing pads are necessary to support the weight of a unit's helicopters, then the unit may fund the entire cost of constructing such reinforced landing pads, regardless of total project cost, with its O&M appropriation if the landing pads are necessary to support the temporary need of the combat or contingency operation. When the purpose of the construction is to support a temporary operational need, then the fact that such landing pads will continue to exist after the mission has ended is immaterial. *See id.*

1106. *See* 10 U.S.C. § 2805 (2000).

1107. For construction projects undertaken to satisfy requirements of a permanent nature, the normal restrictions on the use of O&M funds for such construction apply. *See* 10 U.S.C. § 2805(c)(1)(A). The expanded authority also does not affect the funding of exercise-related construction. *See* 10 U.S.C. § 2805(a)(2), (c)(2); The Honorable Bill Alexander, B-213137, June 22, 1984 63 Comp. Gen. 422; The Honorable Casper Weinberger, B-213137, 1986 U.S. Comp. Gen. LEXIS 1342 (Mar. 25, 1986) (validating the rationale and conclusions of 63 Comp. Gen. 422).

1108. *See* U.S. DEP'T OF ARMY, REG. 415-32, ENGINEER TROOP CONSTRUCTION IN CONJUNCTION WITH TRAINING ACTIVITIES para. 3-5c (15 Apr. 1998) (to determine whether a facility is "temporary," focus on the duration and purpose of the facility's use rather than the materials used).

1109. The U.S. deployment to Bosnia is a prime example of the difficulties with this opinion; when the mission started in December 1995, the stated duration was one year.

Authorization Act Permits Construction as Payment-in-Kind

Section 2812 of the National Defense Authorization Act for Fiscal Year 2001[1110] now authorizes the secretaries of the military services to accept construction of new facilities as payment-in-kind for leased facilities. The new authority amends 10 U.S.C. § 2667, [1111] regarding the lease of non-excess military property. In cases above $500,000 at a single installation, the service secretaries may accept construction of new facilities as payment-in-kind after notifying the defense committees and waiting thirty days.[1112]

U.S. Army Forces Command Issues Funding Guidance on the Use of the Expanded Life, Health, or Safety Authority

If a contemplated construction project is "intended solely to correct a deficiency that is life-threatening, health-threatening, or safety-threatening," then the normal $500,000 threshold on use of O&M funds is instead $1 million per project.[1113] The statute leaves the phrase "life-threatening, health-threatening, or safety-threatening" undefined,[1114] and neither DOD nor the Army has issued regulatory guidance to explain what work falls under this special authority. Now, at least one Army major command has tackled this void.

On 6 March 2000, the U.S. Army Forces Command (FORSCOM)[1115] issued policy guidance on use of this special $1 million O&M threshold.[1116] The new policy requires installations to document the life, health or safety (LHS) deficiencies and, at a minimum, verbally discuss the project and the LHS justification with FORSCOM engineers before approving O&M funded projects under the expanded authority. Such a requirement is intended to ensure that any decision to use the LHS authority is well reasoned, supportable, and rational.

Liability of Accountable Officers

GAO Says: No Pecuniary Liability Absent Statutory Authority!

The GAO held that absent statutory authority, DOD could not impose pecuniary liability on government employees for erroneous payments resulting from information that they "negligently provided."[1117] The Chief, Fiscal Management Division and Administrative Support, Fort Sam Houston, requested an advance decision posing questions about extending pecuniary liability to employees who approved individual employees' time sheets.[1118]

In overruling previous decisions,[1119] the GAO ruled that an agency may impose statutory liability only with a statutory basis. The GAO focused on Supreme Court decisions holding that penalty matters for negligent federal employee conduct fell within congressional purview,[1120] and found that the administrative extension of personal pecuniary liability beyond the existing statutory parameters also fell within Congress's domain. Therefore, agency officials who merely support the payment process, but are not themselves certifying or disbursing officials, are not pecuniarily liable under 31 U.S.C. § 3528 for negligent payments.

1110. National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 2812, 114 Stat. 1654 (2000).

1111. 10 U.S.C. § 2667 (2000).

1112. National Defense Authorization Act for Fiscal Year 2001 § 2812.

1113. 10 U.S.C. § 2805(c)(1)(A) (2000); *see also* 10 U.S.C. § 2805(a)(1) (2000) (authorizing an increase in the Unspecified Minor Military Construction threshold from $1.5 million to $3 million based upon the same standard).

1114. *Id.* Section 2811(a)(1) of the FY 1996 National Defense Authorization Act, Pub. L. No. 104-106, amended 10 U.S.C. §2805(c)(1) and added (but did not define) the special threshold for unspecified minor construction projects "intended solely to correct a deficiency that is life-threatening, health-threatening, or safety-threatening."

1115. U.S. Army Forces Command, headquarters Fort McPherson, Georgia, has command over most operational active and reserve component Army forces based within the continental United States.

1116. Memorandum, Deputy Chief of Staff for Personnel and Installation Management, AFEN-ENO, subject: Funding and Approval Authority (6 Mar. 2000).

1117. Department of Defense–Authority to Impose Pecuniary Liability by Regulation, B-280784, May 4, 2000 (unpublished).

1118. By regulation, DOD imposed pecuniary responsibility on "accountable officials," defined as "DOD military and civilian personnel, who are designated in writing and not otherwise accountable under applicable law, who provide source information, data or service to a certifying or disbursing officer in support of the payment process." U.S. DEP'T OF DEFENSE, FINANCIAL MANAGEMENT REGULATION, DOD 7000.14-R, vol. 5, ch. 33, para. 331,001 (Aug. 1998) [hereinafter DOD FMR].

1119. The opinion finds that regardless of the 1992 decisions in *Matter of Ms. Hanna*, B-247708, Nov. 3, 1992, 72 Comp. Gen. 49, and *Matter of Ms. Hogue and MSgt Davidson*, B-241856.2, Sept. 23, 1992, 1992 U.S. Comp. Gen. LEXIS 1109, imposition of pecuniary liability must be statutory-, not regulatory-based. Dep't of Defense—Authority to Impose Pecuniary Liability by Regulation, B-280784, at 7.

1120. The GAO specifically cited *United States v. Gilman*, 347 U.S. 507 (1954), *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), and *Bush v. Lucas*, 462 U.S. 357 (1983). Dep't of Defense—Authority to Impose Pecuniary Liability by Regulation, B-280784, at 7.

Nonappropriated Funds

Uniform Resource Expanded Program (UREP)

The Uniform Resources Demonstration (URD) was a test program at six DOD installations that permitted the merging of nonappropriated funds (NAFs) and appropriated funds (APFs) for Morale, Welfare, and Recreation (MWR) programs authorized APF support.[1121] The Army Community & Family Support Center (CFSC) is now trying to make the test program permanent, and has sponsored legislation captioned the Uniform Resource Expanded Program (UREP).[1122] Even as a test program, URD successfully led to increased efficiency in procuring MWR property and services, and increased efficiency in managing MWR employees.[1123] Initial prospects for enactment of the UREP appear favorable.[1124]

Old Fort Campbell Had a Farm, Ee-I Ee-I Oh

On 16 August 2000, the Army Deputy General Counsel (Ethics & Fiscal) issued an opinion regarding Fort Campbell's commercial farm.[1125] Many years ago, Fort Campbell began growing hay on an on-post farm to supply the horses at its MWR stables.[1126] Fort Campbell deposited money from the sale of excess hay into the Installation MWR Fund (IMWRF).[1127] The operation expanded, however, and its primary purpose soon went from supplying hay for the stables to generating income for the IMWRF.[1128] Fort Campbell's success, however, came at the expense of local farmers. The Deputy General Counsel wrote that this endeavor violated the Miscellaneous Receipts statute[1129] because the operation had no statutory authority to use public lands to sell a commodity to the public and retain the proceeds.[1130] The opinion concluded by saying that the farm may deposit only "fees charged for feed and hay to authorized patrons" into the IMWRF.[1131]

No COFC Jurisdiction Over Self-Funding Government Agency

In a 26 April 2000 opinion, the COFC restated the rule that the court had no jurisdiction over a claim against a self-funding government agency. In *Furash & Co. v. United States*,[1132] the contractor sued the U.S. Finance Board, an independent government agency whose operating funds come from assessments on member banks rather than appropriations by Congress.[1133] The Finance Board moved to dismiss the case, arguing that the COFC had jurisdiction only over cases where judgments can be paid from appropriated funds.[1134] The court agreed, stating that it had no jurisdiction over agencies that operate without appropriated funds.[1135] This case has implications for military nonappropriated fund activities as well because it provides a ready defense for any suit brought in the COFC. Practitioners should be aware, however, that 28 U.S.C. § 1491(a)(1) establishes a separate basis for COFC jurisdiction over claims against the service exchanges.[1136]

1121. E-mails from Mr. Ronald Heuer, Deputy Counsel, U.S. Army Community & Family Support Center, Alexandria, Va., to author (Aug. 16 and Oct. 13, 2000) (on file with author) [hereinafter Heuer e-mails]. The installations provided MWR services under NAF rules and procedures. White Sands Missile Range and Fort Campbell were the two Army test sites. *Id*. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 335, 110 Stat. 186, 251. *See also*, Major David A. Wallace et al., *Contract Law Developments of 1997—The Year in Review,* ARMY LAW., Jan. 1998, at 100-02.

1122. Heuer e-mails, *supra* note 1121.

1123. Information Paper, Community & Family Support Center, subject: Uniform Resource Expanded Program (UREP) (21 July 2000).

1124. Heuer e-mails, *supra* note 1121.

1125. Memorandum, Deputy General Counsel (Ethics & Fiscal), Department of the Army, to Staff Judge Advocate, Army Forces Command, subject: Disposition of Proceeds from the Fort Campbell Farm Operation (16 Aug. 2000) [hereinafter Fort Campbell Memo].

1126. *Id*.

1127. *Id*.

1128. *Id*.

1129. 31 U.S.C. § 3302(b) (2000).

1130. Fort Campbell Memo, *supra* note 1125.

1131. *Id*.

1132. 46 Fed. Cl. 518 (2000).

1133. *Id*. at 520-21.

1134. *Id*. at 521.

1135. *Id*. at 522-23. This was true even though the Disputes clause included in the contract specifically gave plaintiff the contractual right to appeal an adverse final decision to the COFC. *Id*. at 525.

Operational and Contingency Funding

Congress Expands Reimbursables Under the OCOTF[1137]

As part of the Fiscal Year 2001 DOD Appropriations Act, Congress expanded the types of accounts that may be reimbursed from the Overseas Contingency Operations Transfer Fund (OCOTF).[1138] Previously, OCOTF funds were available for transfer only into O&M accounts, working capital funds, and the Defense Health Program account. Now, in addition to the aforementioned accounts, DOD may also transfer OCOTF funds to procurement accounts, RDT&E accounts, and military personnel accounts. Congress also added a limitation and a reporting requirement to the OCOTF mix.[1139] OCOTF funds may not be transferred or obligated for DOD expenses not directly related to the conduct of overseas contingencies. If SECDEF uses this authority, he must report such transfers to Congress on a quarterly basis.

GAO Recommends Changes in Contingency Operations Funding

In June 2000, the GAO issued a report on the status of Fiscal Year 2000 Contingency Operations Costs and Funding.[1140] The report highlighted a number of areas for improvements in accounting for contingency operations expenditures, which are discussed below.

As to flying hour calculations, the GAO found significant differences between the way the Air Force and the Navy's Atlantic Fleet and Pacific Fleet each calculated the incremental costs of aerial support to contingency operations.[1141] The pertinent regulation[1142] permitted each specific command involved in a contingency to develop its own methodology to separate funded flying hours from contingency flying hours.[1143] In Fiscal Year 2000, the Air Force decided to absorb the incremental costs of its contingency flying hours.[1144] The Navy used different methodologies for calculating contingency flying hours flown by the Atlantic Fleet[1145] or Pacific Fleet[1146] aircraft. The GAO recommended that the Secretary of Defense determine a common methodology of calculating incremental flying hour costs, or at a minimum, direct the Secretary of the Navy to

1136. 28 U.S.C. § 1491(a)(1) (2000).

1137. *See* DOD FMR, *supra* note 1118, vol. 12 (Special Accounts and Programs), ch. 23 (Contingency Operations) (Sep. 1996), vol. 2B (Budget Formulation and Presentation), ch. 17 (Contingency Operations) (June 2000).

1138. DOD Appropriations Act for FY 2001, Pub. L. No. 106-259, 114 Stat. 661 (2000). OCOTF funds are "no year" funds intended to reimburse DOD and the military departments for unprogramed contingency operations that occur during a given fiscal. For Fiscal Year 2001, Congress appropriated $3.94 billion of "no-year" funds "for expenditures directly relating to Overseas Contingency Operations by U.S. Military Forces." The Conference Report accompanying the Appropriations Act stated this amount covered the estimated costs of continuing operations in Bosnia, Kosovo, and Southwest Asia. H.R. REP. NO. 106-754 (2000).

1139. DOD Appropriations Act for FY 2001 § 8131.

> None of the funds appropriated in this Act under the heading [OCOTF] may be transferred or obligated for [DOD] expenses not directly related to the conduct of overseas contingencies: *Provided*, that the [SECDEF] shall submit a report no later than 30 days after the end of each fiscal quarter to the Committees on Appropriations of the Senate and House of Representatives that details any transfer of funds from the [OCOTF]: *Provided further*, That the report shall explain any transfer for the maintenance of real property, pay of civilian personnel, base operations support, and weapon, vehicle or equipment maintenance.

Id.

1140. GENERAL ACCOUNTING OFFICE, FISCAL YEAR 2000 CONTINGENCY OPERATIONS COSTS AND FUNDING, REPORT NO. GAO/NSIAD-00-168 (June 2000) [hereinafter GAO REPORT 00-168]. The review only looked at contingencies for which DOD utilized reimbursement from the OCOTF. *Id.* at 16. Total incremental costs from operations in Bosnia, Kosovo, and Southwest Asia since 1991 were estimated to be $21.3 billion. *Id.* at 1.

1141. *Id.* at 10. While there is some degree of overlap between the flying hour program and the contingency flying hours, reimbursement is only available for the incremental costs associated with a contingency operation over and above the normal flying hour program. *Id*.

1142. DOD FMR, *supra* note 1118, vol. 12 (Special Accounts and Programs), ch. 23 (Contingency Operations) (Sep. 1996).

1143. GAO REPORT 00-168, *supra* note 1140, at 10.

1144. *Id.* The Air Force has under-executed its base flying hour program each year from FY 1994 through FY 1998. *Id.* at 10. The Air Force will seek reimbursement for the reserve component contingency flying hours since those hours are executed strictly on an as needed basis. *Id.* at 11.

1145. *Id.* The Atlantic Fleet determines how much an aircraft would have flow if there had been no contingency, then requests reimbursement for any excess amount as the incremental cost of the contingency. *Id.* at 11.

1146. *Id.* The Pacific Fleet considers the training value of each flight. It considers all flights in the contingency as being contingency flights, but recognizes forty percent of the hours flown as training flights. The remaining sixty percent of hours flown are claimed as the incremental cost of the contingency. This methodology potentially results in a higher reimbursement for the Pacific Fleet. *Id.* at 11.

develop and apply a single methodology within the sea service.[1147]

Regarding mission rehearsal exercises (MREs), [1148] the GAO reviewed the use of MREs to prepare units to deploy to Bosnia or Kosovo.[1149] The GAO determined that the MRE program was highly valuable to the success of the Army's missions in the Balkans, and concluded that the incremental costs of the MREs were properly included as an incremental cost of the contingency operations.[1150]

Finally, as to infrastructure reconstitution, the Air Force had requested OCOTF funds to reimburse the cost of reconstituting infrastructure (for example, buildings and runways) used during the contingency operations in Kosovo.[1151] The GAO concluded that infrastructure costs may in fact be attributable to contingency operations, but recommended DOD clarify its guidance on when and how such costs should be considered for reimbursement.[1152]

Army Must Do More to Control Costs in the Balkans

A second GAO report issued this year criticized the Army for the cost of support contracts in the Balkans.[1153] While finding that the Army had taken steps to curb the costs of the support contract, the GAO also identified a number of areas for possible improvement of contract administration and cost control, including: performance standards; contracting officer or administrator knowledge and rotation; approval levels for new work and review of recurring work; and the personalizing of the basecamps.

Lack of performance standards for contractor work in the Balkans led to significant cost increases.[1154] Without designated performance standards, contractors executed task orders using their best business judgment.[1155]

As to the knowledge of contracting officers or administrators, the GAO identified significant deficiencies in technical knowledge.[1156] Administration personnel were particularly unsure of the parameters of the government's authority under a cost-reimbursement contract and the monitoring of cost contracts.[1157] The GAO also cited the frequent turnover of contracting personnel as hindering effective contract administration.[1158]

The GAO report also addressed approval levels for new work[1159] and review of recurring work.[1160] One effective mea-

1147. *Id.* at 15.

1148. *Id.* Mission rehearsal exercises are exercises conducted at the combat training centers to prepare units for deployment to Bosnia or Kosovo. *Id.* at 12-13.

1149. *Id.* MREs allow units to prepare for upcoming rotations and to train, validate, and rehearse the skills necessary to successfully execute their missions in the peacekeeping environment. *Id.*

1150. *Id.* at 12. The Army offsets the cost of the MRE by the amount that would have been spent on other training canceled or modified because of the deployment. *Id.* The Average cost for the Bonsia MREs is $9 to $11 million. The average cost for the Kosovo MREs is $14 to $15 million. *Id.* at 13.

1151. *Id.* at 11. The regulation does not specifically identify these costs as being eligible for reimbursement. *Id*; *see* DOD FMR, *supra* note 1118, vol. 12 (Special Accounts and Programs), ch. 23 (Contingency Operations) (Sep. 1996).

1152. GAO Report 00-168, *supra* note 1140, at 11-12. Note that Section 8131 now requires the reporting of any transfers from the OCOTF for the maintenance of real property. *See supra* note 1139. This new requirement will have an impact on the formulation of this guidance.

1153. General Accounting Office, Army Should Do More to Control Contract Cost in the Balkans, GAO Report No. GAO/NSIAD-00-225 (Sept. 2000). The GAO reviewed contract expenditures for Army operations in the Balkans from December 1995 through March 2000. *Id.* at 3. During that period, the Army spent over $2.2 billion for contractor support in the Balkans. *Id.* Originally, support was provided under the LOGCAP contract. The LOGCAP contract expired in 1997. Upon expiration, the Bosnian support requirements were removed from the LOGCAP SOW and placed under a new contract, the Bosnia Sustainment Contract. The outgoing LOGCAP contractor, Brown & Root Services, was awarded a sole-source contract for two years. In May 1999, the Army competitively awarded the Bosnian Sustainment Contract to Brown & Root Services. *Id.* at 5-6. The GAO identified defense contract management as a "high-risk area of government spending." *Id.* at 4.

1154. *Id.* The Army has directed that standards be developed, but as of July 2000 had not set a date for the completion of those standards. *Id.* The standards will describe the service to be performed, the necessary facilities and personnel, when and how the service is to be performed, and the level at which they are to be performed. *Id.* An example of one of the problem areas found by the GAO was the installation of 100 percent redundancy in power generation in all facilities in Kosovo. The actual requirement was to provided 100 percent redundancy only for critical installations (command centers, hospitals, and the like). *Id.* The additional redundant capability resulted in an unnecessary cost increase of significant proportions. Correcting this issue, the Army believes it will save approximately $90.1 million over the next five years. *Id.* at 15.

1155. *Id.* at 14.

1156. *Id.* at 4, 21-25. Many of the DOD personnel involved in contract administration had little previous experience with cost reimbursement contracts. *Id.* at 21. They were also unsure of their authority under cost reimbursement type contracts. *Id.* at 4.

1157. *Id.* at 22-23. The Army instituted a new training program in December 1999. During the MRE for the 49th Armored Division (Texas Army National Guard), division staff personnel were trained on the basics of the sustainment contract, unique issues faced in the Bosnia environment, and the contractor's responsibilities. While this additional training was well-received, the participants requested additional training on their authority and how to apply the contract in real-world situations. *Id.* at 23.

sure for cost containment is to have appropriate approval levels for new work, and to systematically review recurring work.[1161] While not diminishing the importance of approval level for new work, the GAO found cause for concern in the management of recurring work, which made up over seventy-seven percent of the total support contract cost.[1162] The GAO concluded that the Army must do a better job of periodically revalidating the level and necessity of recurring work.[1163]

Finally, the GAO report discussed personalized basecamps. During each of the ten major rotations by Army divisions into Bosnia since December 1995, incoming units have personalized their basecamps,[1164] largely by means of the support contract.[1165] While citing no specific dollar figure, the GAO reviewed hundreds of work orders for these types for actions during calendar year 2000.[1166] To address fiscal concerns raised during the GAO review, the Army has taken several steps to avoid such continuous personalizing of basecamps.[1167]

1158. *Id.* at 21, 24-25. The six-month rotation policy, coupled with lack of a staggered rotation system destroys continuity for ongoing projects builds-in an ongoing lack of historical knowledge regarding administration decisions *Id.* at 24-25.

1159. *Id.* at 7. "New work" is work that has not been previously authorized. *Id.*

1160. *Id.* "Recurring work" is a continuing service. The contractor will continue to execute recurring work, without further approval, unless the work is specifically modified or curtailed by the administrative contracting officer. *Id.*

1161. *Id.* at 10. U.S. Army Europe (USAREUR) approves all new work of $100,000 or more. *Id.* Army task force commanders approve all work up to $100,000. *Id.* A Joint Acquisition Review Board validates the need for all new work exceeding $2,500, and whether soldiers, Brown & Root, or other contractors should perform such work. *Id.* at 12. By setting these approval levels, Army officials hope to gain better control over the costs of support in the theater. *Id.*

1162. *Id.* at 17.

1163. *Id.* The rationales for why particular services are provided at their current level are lost due to the lack of institutional memory on the part of contract administration personnel. *Id.* at 18. The GAO found contracting officers could not explain the rationale for having Brown & Root personnel provide such services as: cleaning some offices four times a day, cleaning latrines three times a day, and conducting routine maintenance activities twenty-four hours a day. *Id.* at 19.

1164. *Id.* at 15.

1165. *Id.* Tasks have included putting up new signs with the unit's insignia and motto, renaming streets for the historical battles and heroes of a particular unit, and rearranging office space. *Id.*

1166. *Id.*

1167. The USAREUR officials took steps to develop common basecamp designs and unit-neutral signs. *Id.* at 16. Moreover, USAREUR directed that no new work be tasked to the contractor for camp changes as a result of the 3d Infantry Division's rotation beginning in September 2000. *Id.*

Appendix A

Department of Defense Legislation for Fiscal Year 2001

DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2001

President Clinton signed the Department of Defense Appropriations Act, 2001, on 9 August 2000.[1] The Act appropriated approximately $287.8 billion to the Department of Defense (DOD) for fiscal year (FY) 2001.[2] This amount is approximately $20 billion more than Congress appropriated for FY 2000, and approximately $3.3 billion more than President Clinton requested for FY 2000.[3]

Military Personnel[4]

Department of the Army

Congress appropriated approximately $22.2 billion for "Military Personnel, Army." This amount is sufficient to support an active force composed of 480,000 soldiers.[5]

Department of the Navy

Congress appropriated approximately $17.8 billion for "Military Personnel, Navy" and approximately $6.8 billion for "Military Personnel, Marine Corps." This amount is sufficient to support an active force composed of 372,642 sailors and 172,600 marines.[6]

Department of the Air Force

Congress appropriated approximately $18.2 billion for "Military Personnel, Air Force." This amount is sufficient to support an active force composed of 357,000 airmen.[7]

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1. Department of Defense Appropriations Act, 2001, Pub. L. No. 106-259, 114 Stat. 656 (2000). The joint conference report accompanying the Act requires the DOD to comply with the language and allocations set forth in the underlying House and Senate Reports unless they are contrary to the bill or joint conference report. H.R. CONF. REP. NO. 106-754, at 57 (2000). *See* H.R. REP. NO. 106-644 (2000); S. REP. NO. 106-298 (2000).

2. H.R. CONF. REP. NO. 106-754, at 297. The Act breaks down the appropriations as follows:

Military Personnel	$75,847,740,000
Operations and Maintenance	97,039,774,000
Procurement	59,232,846,000
Research, Development, Test, and Evaluation	41,359,605,000
Revolving and Management Tools	4,157,857,000
Other DOD Programs	14,114,424,000

Id. at 59, 90, 141, 218, 284, 285.

3. *Id.* at 297.

4. National Defense Appropriations Act, 2001, 114 Stat. at 656.

5. H.R. CONF. REP. NO. 106-754, at 62. *See* The Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, 114 Stat. 1654 (2000), § 401. Congress also appropriated approximately $2.47 billion for "Reserve Personnel, Army," and approximately $3.8 billion for "National Guard Personnel, Army. National Defense Appropriations Act, 2001, 114 Stat. at 657.

6. H.R. CONF. REP. NO. 106-754, at 62. *See* The Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 401, 114 Stat. 1654 (2000). Congress also appropriated approximately $1.6 billion for "Reserve Personnel, Navy" and approximately $449 million for "Reserve Personnel, Marine Corps." National Defense Appropriations Act, 2001, 114 Stat. at 657-58.

7. H.R. CONF. REP. NO. 106-754, at 62. *See* National Defense Authorization Act for Fiscal Year 2001 § 401, 114 Stat. 1654. Congress also appropriated approximately $971 million for "Reserve Personnel, Air Force," and $1.6 billion for "National Guard Personnel, Air Force." National Defense Appropriations Act, 2001, 114 Stat. at 658.

Emergency and Extraordinary Expenses and CINC Initiative Funds

Congress authorized the Secretary of Defense (SECDEF) and the Service Secretaries to use a portion of their Operation and Maintenance (O&M) appropriations for "emergencies and extraordinary expenses."[8] In addition, Congress gave the SECDEF the authority to make $25 million of the Defense-wide O&M appropriation available for the Commander-in-Chief (CINC) initiative fund account.[9]

Overseas Contingency Operations Transfer Fund

Congress appropriated nearly $4 billion for "expenses directly relating to Overseas Contingency Operations by U.S. military forces."[10] These funds remain available until expended; however, the SECDEF may transfer them to the military personnel accounts, O&M accounts, the Defense Health Program appropriation, procurement accounts, RDT&E accounts, and to working capital funds.[11] Transfer or obligation of these funds for purposes not directly related to the conduct of overseas contingencies is prohibited, and the SECDEF must submit a report each fiscal quarter detailing certain transfers to the congressional appropriations committees.[12]

Overseas Humanitarian, Disaster, and Civic Aid

Congress appropriated $55.9 million for the DOD's Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) program.[13] These funds are available until 30 September 2002.[14]

Quality of Life Enhancements

Congress appropriated over $160 million for expenses resulting from unfunded shortfalls in the repair and maintenance of real property in the Department of Defense.[15] The SECDEF must use the "Defense-Wide" portion of the appropriation to provide grants to repair and improve educational facilities to meet classroom size requirements for primary and secondary educational facilities located on DOD installations that are used primarily by DOD military and civilian dependents.[16]

Defense Health Program

Congress earmarked $10 million for HIV prevention educational activities undertaken in connection with U.S. military training, exercises, and humanitarian assistance activities conducted in Africa.[17]

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8. National Defense Appropriations Act, 2001, 114 Stat. at 659-60. Congress capped this authority at $10,616,000 for the Army, $5,146,000 for the Navy, $7,878,000 for the Air Force, and $30,000,000 for the DOD. *Id*. *See* 10 U.S.C.S. § 127 (West 2000) (authorizing the Secretary of Defense, the DOD Inspector General, and the Secretaries of the military departments to provide for "any emergency or extraordinary expense which cannot be anticipated or classified").

9. National Defense Appropriations Act, 2001, 114 Stat. at 660. *See* 10 U.S.C.S. § 166a (West 2000) (authorizing the Chairman of the Joint Chiefs of Staff to provide funds from the CINC Initiative Fund to combatant commanders for specified purposes).

10. National Defense Appropriations Act, 2001, 114 Stat. at 661.

11. *Id*. The authority to transfer these funds to the procurement accounts is new this year.

12. *Id*. § 8131, 114 Stat. at 703.

13. *Id*., 114 Stat. at 663. The DOD provides humanitarian, disaster, and civic aid to foreign governments pursuant to several statutes. *See, e.g.*, 10 U.S.C.A. §§ 401, 402, 404, 2547, 2551 (West 1999).

14. National Defense Appropriations Act, 2001, 114 Stat. at 663.

15. *Id*., 114 Stat. at 664. The amounts appropriated for quality of life enhancements are broken down as follows:

Army	$100,000,000
Navy	20,000,000
Marine Corps	10,000,000
Air Force	20,000,000
Defense-wide	10,500,000

These funds are available until 30 September 2002. *Id*.

16. *Id*. The Appropriations Act limits the cumulative amount of any grant or grants to a single local education authority to $1.5 million. *Id*.

17. *Id*., 114 Stat. at 672.

Drug Interdiction and Counter-Drug Activities

The Department of Defense received $869 million for drug interdiction and counter-drug activities.[18]

End-of-Year Spending Limited

Congress continued to limit the ability of the SECDEF and the Service Secretaries to obligate funds during the last two months of the fiscal year to twenty percent of the applicable appropriation.[19]

Multi-Year Procurement Authority

Congress specifically authorized the Service Secretaries to award multi-year contracts for the Javelin missile, the M2A3 Bradley fighting vehicle, the DDG-51 destroyer, and the UH-60/CH-60 aircraft.[20] Congress prohibited the Service Secretaries from awarding a multi-year contract that: (1) exceeds $20 million for any one year of the contract or provides for an unfunded contingent liability that exceeds $20 million;[21] or (2) is an advance procurement leading to a multi-year contract that employs economic order quantity procurement in excess of $20 million per year unless the Service Secretary notifies Congress at lease thirty days in advance of award.[22] Finally, Congress prohibited the Service Secretaries from awarding multi-year contracts in excess of $500 million unless Congress specifically provided for the procurement in the Appropriations Act.[23]

Military Installation Transfer Fund

Congress continued to authorize the SECDEF to enter into executive agreements that permit the DOD to deposit into a separate account the funds it receives from North Atlantic Treaty Organization (NATO) member nations for returning overseas military installations to them.[24] The DOD may use this money to build facilities which have been approved by an Act of Congress to support U.S. troops in those nations, or for real property maintenance and base operating costs that are currently paid through money transfers to host nations.[25]

Airhead for National Training Center

Again this year the Army must use the former George Air Force Base for personnel deploying by air to the National Training Center, as no funds are available for obligation or expenditure to transport personnel to Edwards Air Force Base.[26]

Limit on Transfer of Defense Articles and Services

Transfer of defense articles or services (other than intelligence services) during peacekeeping, peace-enforcement, or humanitarian assistance operations may not be transferred to another nation or international organization without advance congressional notification.[27]

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18. *Id*.

19. *Id*. § 8004, 114 Stat. at 674. This limitation does not apply to the active duty training of reservists, or the summer camp training of Reserve Officers' Training Corps (ROTC) cadets. *Id*.

20. *Id*. § 8008, 114 Stat. at 675-76.

21. *Id*. Congress also prohibited the DOD from awarding multi-year contracts unless it funds them to the limits of the government's liability. *Id*.

22. *Id*. Congress continued the requirement to provide 10-days advance notice before terminating a multi-year procurement contract. *Id*.

23. *Id*.

24. *Id*. § 8019, 114 Stat. at 678-79.

25. *Id*.

26. *Id*. § 8069, 114 Stat. at 689.

27. *Id*. § 8070, 114 Stat. at 689.

National Guard Distance Learning Project

The Chief of the National Guard Bureau has continued authority to permit use of its Distance Learning Project equipment on a space-available, reimbursable basis.[28] The amount of reimbursement may be determined on a case by case basis. Amounts collected under this authority shall be credited to the National Guard Distance Learning Project and are available, without fiscal year limitation, to defray the costs associated with the use of project equipment.[29]

Limitation on Training of Foreign Security Forces

Unless the Secretary of Defense determines that a waiver is required, no funds may be used to support training of a unit of the security forces of a foreign country where "credible information" exists that the unit has committed a gross violation of human rights.[30]

Required Actions of DOD Chief Information Officer

No Fiscal Year 2001 funds are available for a mission critical or mission essential information technology system until it is registered with the DOD Chief Information Officer (CIO).[31] Prior to Milestone I, II, or III approval for a major automated information system, the CIO must certify that the system is compliant with the Clinger-Cohen Act of 1996.[32]

Prompt Payment for Intragovernmental Transactions

The DOD is prohibited from providing support to a department or agency that is more than 90 days in arrears for payment for previously provided goods or services, unless the SECDEF determines that a waiver in the interest of national security is required.[33]

Report on Beryllium Exposure

The SECDEF is required to submit a report to Congress on work-related illnesses experienced by DOD employees, contractors, and vendors resulting from exposure to beryllium or beryllium alloy.[34]

Wernher von Braun Complex

The building planned to serve as the Army's Space and Missile Defense Command's consolidated operations center at Redstone Arsenal shall be known as the "Wernher von Braun Complex."[35]

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28. *Id.* § 8081(a), 114 Stat. at 692.

29. *Id.* § 8081(b), 114 Stat. at 692.

30. *Id.* § 8092, 114 Stat. at 694. This provision was included at § 8098 of the Fiscal Year 2000 Department of Defense Appropriations Act.

31. *Id.* § 8102(a), 114 Stat. at 696. Registration with the Chief Information Officer was required under § 8121(a) in last year's appropriation act.

32. *Id.* § 8102(b), 114 Stat. at 697.

33. *Id.* § 8103, 114 Stat. at 697. Section 8122 of the DOD Appropriations Act for Fiscal Year 2000 included this same prohibition.

34. *Id.* § 8120, 114 Stat. at 701.

35. *Id.* § 8151, 114 Stat. at 706.

FLOYD D. SPENCE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2001[36]

The President signed into law the National Defense Authorization Act for FY 2001 on 30 October 2000.

Procurement

The Act authorized $63.2 billion for procurement, which was $2.6 billion more than requested by the President in his budget.

National Missile Defense Program

Congress earmarked $74.5 million for the National Missile Defense program out of the amounts appropriated for Defense-wide procurement.[37]

Multi-Year Procurement Authority

Congress authorized the Army to enter into multi-year contracts for the M2A3 Bradley Fighting Vehicle and the UH-60 Blackhawk.[38]

The Army Transformation

The Army's transformation is moving forward with the recent contract award for the Interim Armored Vehicle to GM/GDLS (General Motors/General Dynamics Land Systems) Defense Group.[39] Congressional conferees earlier had expressed their strong support for the Army Chief of Staff's vision for a lighter, more survivable, and more lethal force to deal with the national security challenges of the 21st century.[40] However, pending the submission of certain plans and reports by the Secretary of Defense and Secretary of the Army that will include a comparative evaluation of the interim armored vehicle to those currently in the Army inventory, Congress placed certain limits on the obligation of funds for medium armored vehicles.[41]

Reports to Accompany FY 2002 Budget Submissions

The Navy is directed to analyze "alternative funding mechanisms" for procurement of various classes of vessels beginning in FY 2002,[42] and the Air Force is to submit a plan to modernize and upgrade Air National Guard units assigned F-16A aircraft so they can deploy as Air Expeditionary Forces.[43]

Joint Strike Fighter (JSF) Program

The Secretary of Defense must describe criteria and certify their accomplishment to move the JSF program from demonstration and validation to engineering and manufacturing development.[44] Prior to entering into the engineering and manufacturing development phase, the Secretary also must certify that the selected short take-off, vertical-landing aircraft variant has successfully flown at

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36. National Defense Authorization Act for Fiscal Year 2001, 114 Stat. 1654 (2000). Representative Spence currently chairs the House Armed Services Committee and has served in Congress since 1970.

37. *Id.* § 104(b).

38. *Id.* § 111.

39. DOD announced the award on November 16, 2000. *See* http//www.defenselink.mil/news/Nov2000/b11162000_bt700-00.html.

40. H.R. CONF. REP. NO. 106-945, at 643.

41. National Defense Authorization Act for Fiscal Year 2001 § 113. The House and Senate Authorization conferees, reflecting their desire for improved survivability and lethality of the Army's light forces, also directed the Army to evaluate the capabilities of the interim brigade combat team (IBCT) in a high intensity combat environment. H.R. CONF. REP. NO. 106-945, at 643.

42. National Defense Authorization Act for Fiscal Year 2001 § 127.

43. *Id.* § 132.

44. *Id.* § 212.

least 20 hours.[45] Following the contract award for engineering and manufacturing development of the Joint Strike Fighter, the Secretary of Defense is required to submit a report containing the results of a study of final assembly and checkout alternatives.[46] The report is to identify potential strategies, facilities, and costs of the final assembly and checkout.[47]

Research, Development, Test, and Evaluation

Joint Field Experiment

Elements of all services, to include special operations forces, will participate in a joint field experiment in fiscal year (FY) 2002.[48] The selected forces must exemplify the concepts for organization, equipment, and doctrine under Joint Vision 2010, Joint Vision 2020, and the current vision statements of the service chiefs. The Secretary of Defense must submit a report concerning the concept of the experiment, including participating forces, location, and funding.

Anthrax Vaccine

Congress placed limits on the obligation of funds for the anthrax vaccine.[49] The Secretary of Defense must identify strategies to procure the vaccine from the current manufacturer or other sources.

Biological Warfare Defense Programs

Concerned with the ability of the commercial sector to meet DOD's vaccine requirements, Congress requested a design and cost estimate for a government-owned, contractor-operated facility to produce biological warfare defense vaccines.[50]

Unmanned, Remote Control Technology

The services are to implement remote control technology such that one-third of the operational deep strike force aircraft fleet by 2010, and one-third of the ground combat vehicles by 2015, are unmanned.[51]

High Energy Laser Programs

Congress showed its support for high energy laser technology by providing funding[52] and directing the implementation of the management and organizational structure specified in the DOD High Energy Laser Master Plan.[53] The Secretary of Defense also is to consider modernizing the High Energy Laser Test Facility located at White Sands Missile Range.[54]

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45. *Id.*

46. *Id.* § 141.

47. *Id.*

48. *Id.* §213.

49. *Id.* §217. Noting that anthrax is but one of many biological agents against which military personnel must be protected, the conferees stated that the SECDEF needs to develop a plan for modernizing all vaccines. H.R. CONF. REP. NO. 106-945, at 719.

50. National Defense Authorization Act for Fiscal Year 2001 § 218.

51. *Id.* §220. Use of these unmanned vehicles is to "be focused initially on the highest risk mission areas," defined for aircraft as "early entry deep strike missions for suppression of enemy air defenses and other highest priority targets." H.R. CONF. REP. NO. 106-945, at 721. In a related matter, a DOD is required to initiate a concept demonstration involving a counter-drug surveillance scenario, using the Global Hawk High Altitude Endurance Unmanned Aerial Vehicle. *See* NDAA FY01 § 221.

52. National Defense Authorization Act for Fiscal Year 2001 § 241.

53. *Id.* § 242.

54. *Id.* § 245.

Defense Laboratory Partnerships with Educational Institutions

Directors of defense laboratories[55] are authorized to enter into partnership agreements with United States educational institutions[56] to encourage and enhance study in scientific disciplines. In support of these agreements, a director may provide to the educational institution any appropriate surplus computer or scientific equipment that is commonly used by educational institutions.[57]

Operation & Maintenance

Environmental Restoration Accounts

Congress established a new account to pay for all phases of environmental remediation at formerly used defense sites.[58] Additionally, the service Secretaries under certain circumstances may use Restoration Account funds to pay for facility relocation.[59] In an item of special interest, conferees directed the Secretaries of the Army and Air Force to assess the water quality problems, and develop a plan for their remediation and restoration, at approximately 36 locations on or near military installations in Kaiserslautern, Germany.[60]

Environmental Compliance Fines and Penalties

The Authorization Act contains no provision requiring congressional authorization prior to the payment of a fine or penalty of $1.5 million or more. However, the conferees have directed the SECDEF to submit a report to the congressional defense committees no later than March 1, 2002 that analyzes all fines and penalties assessed and imposed at military facilities during fiscal years 1995 through 2001.[61]

Environmental Impact of Low-Level Flight Training

Recognizing the importance of low-level flight training to national security and military readiness, Congress has determined that the military need not prepare a programmatic, nation-wide environmental impact statement as a precondition to conducting such training.[62]

Report on Morale, Welfare and Recreation (MWR) Slot Machines

The Secretary of Defense must submit to Congress a report evaluating the effect that MWR slot machines have on the morale and financial stability of those who use them.[63]

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55. Defined as "any laboratory, product center, test center, depot, training and educational organization, or operational command under the jurisdiction of the Department of Defense." *Id.* § 253(b).

56. Including local educational agencies as defined at 20 U.S.C. § 8801, colleges, universities, and any other nonprofit institutions that are dedicated to improving science, mathematics, and engineering information. See 10 U.S.C. § 2194(a).

57. National Defense Authorization Act for Fiscal Year 2001 § 253(a).

58. *Id.* § 311.

59. *Id.* § 312. Prior to using the funds, the Secretary concerned must: determine that the facility move is the most cost effective method of responding to a release or threatened release of hazardous substances, pollutants, or contaminants from the real property on which the facility is located; receive approval from the relevant regulatory agencies; obtain the support of the affected community; and submit notice to Congress of the determination. *Id.*

60. H.R. CONF. REP. NO. 106-945, at 758.

61. H.R. CONF. REP. NO. 106-945, at 760.

62. National Defense Authorization Act for Fiscal Year 2001 § 317. Congress exempted the military from preparing statements otherwise required under the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 et seq.), or its implementing regulations.

63. National Defense Authorization Act for Fiscal Year 2001 § 336. The report shall include information concerning the number of military personnel who, at least partially due to the use of slot machines, have sought financial services counseling, qualified for Government financial assistance, or had a personal check returned for insufficient funds or received any other non-payment notification from a creditor.

Armaments Industrial Base

In part to serve as a model for future defense conversion initiatives, the Secretary of the Army is authorized to carry out a program known as the "Armament Retooling and Manufacturing Support (ARMS) Initiative."[64] Another of the stated purposes of the Initiative is to encourage commercial firms to use eligible facilities[65] for commercial purposes.

Changes to the A-76 Program

Congress now requires inclusion of additional information in various reports to Congress when an agency is conducting an analysis of conversion to contractor performance.[66] Concurrent with the President's annual budget submission, the SECDEF must submit a Strategic Sourcing Plan of Action for the Department of Defense for the following year.[67] Congressional notice is required before consolidating, restructuring, or reengineering a DOD organization, function, or activity that would result in a manpower reduction of 50 or more DOD civilian or military personnel.[68] Congress also requires establishment of a cost monitoring system to compare the costs to perform a function before and after a workforce review, and to compare anticipated to actual savings resulting from conversion, reorganization, or reengineering actions.[69]

Army Budget Methodology

Future Army budget requests for operation and maintenance must include amounts to fund training necessary to execute national defense strategy missions at a low-to-moderate level of risk, and the costs of meeting infrastructure requirements.[70]

Expanded Use of Military Aircraft for Reserve Members

Reserve members, in conjunction with annual training duty or inactive-duty training, may travel in a "space-required" status to and from their home and place of duty.[71]

DOD Use of Civil Reserve Air Fleet

Congress has expanded the requirement that DOD contract with air carriers that either have aircraft in the civil reserve air fleet (CRAF) or offer to place aircraft in the fleet.[72] Contracts to move passengers or property from the United States to foreign locations, regardless of the length of the contract, must go to a CRAF carrier unless the SECDEF decides that no such carrier is capable and willing to provide the required service.[73] Contracts with CRAF carriers for transport between foreign locations shall be established when transportation by such a carrier is reasonably available.[74]

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64. *Id.* § 344.

65. An "eligible facility" is any Government-owned, contractor-operated ammunition manufacturing facility of the Department of the Army that is in an active, inactive, layaway, or caretaker status. *Id.*

66. *Id.* § 351 (including statement of potential economic effect of the change on the affected local community) and § 352 (description of the effect of outsourcing on overhead costs of Centers of Industrial and Technical Excellence and army Ammunition Plants).

67. *Id.* § 353, creating 10 U.S.C. § 2475.

68. *Id.* Implementation may not take place until thirty days elapse after notice has been submitted to the Armed Services Committees of the House and the Senate.

69. *Id.* § 354.

70. *Id.* § 375.

71. *Id.* § 384.

72. *Id.* § 385, amending 49 U.S.C. § 41106.

73. National Defense Authorization Act for Fiscal Year 2001 § 385 (adding new section 41006(b) at Title 49). The legislation applies to all contracts, not just to those of 31 days or more.

74. National Defense Authorization Act for Fiscal Year 2001 § 385 (adding 49 U.S.C. § 41106(c)).

Defense Joint Accounting System

Before the SECDEF can grant a Milestone III decision for the Defense Joint Accounting System, he must submit a report to Congress explaining the reasons for withdrawal of the Air Force and exclusion of the Navy from the system.[75]

Limitation on Performance of Depot-Level Maintenance

Rejecting a Senate bill that would have amended section 2466 of Title 10 of the United States Code, the conferees instead expressed concern that the Secretary of the Air Force has not taken all actions necessary to ensure compliance with that legislation.[76] The Senate version would have required the President, rather than the department secretary, to waive the 50 percent limit on non-Federal employee depot maintenance work.

Military Personnel Authorizations

Limitations on Personnel End Strengths

During times of war or national emergency, the SECDEF can suspend personnel strength limits of active duty senior enlisted members and reserve component field grade officers and senior enlisted members.[77] In addition, with certain exceptions reserve component members supporting combatant commands in an active duty status, for more than 180 days but less than 271 days, are excluded from active duty end strengths.[78]

Release of Promotion Lists

A promotion list for the grades of colonel and below now may be disseminated to the armed force concerned upon SECDEF transmittal of the report to the President.[79] The names of officers recommended for promotion to general officer and flag officer grades may be released upon Presidential approval.[80]

Grade Increase for General Officers of Reserve and National Guard Components

Congress has added a third star to the grade of the Chiefs of the Army, Naval, Marine Corps, and Air Force Reserves, and the Directors of the National Guard Bureau.[81]

Change to Separation Pay Entitlement Rules for Officers

Officers are not entitled to separation pay where, after a second non-selection for promotion, they decline selective continuation on active duty for a period that would qualify them for retirement.[82]

Limitation on Award of Bronze Star

A service member must be receiving imminent danger pay to be eligible for the award of the Bronze Star.[83]

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75. *Id.* § 391.

76. H.R. CONF. REP. NO. 106-945, at 776. Section 2466 provides that no more than 50 percent of funds available for depot-level maintenance and repair may be used for non-Federal employee performance, unless the secretary of the concerned department determines it is necessary for national security and provides notice to Congress.

77. National Defense Authorization Act for Fiscal Year 2001 § 421.

78. *Id.* § 422.

79. *Id.* § 503 (amending 10 U.S.C. § 618(e)).

80. *Id.*

81. *Id.* § 507.

82. *Id.* § 508. An officer declining selective continuation for a period that would not permit service until retirement eligibility would still be eligible for separation pay. H.R. CONF. REP. NO. 106-945, at 786-87.

Recognition by States of Military Testamentary Instruments

Congress has provided that a military will that meets certain execution requirements[84] has the same legal effect as a testamentary instrument prepared and executed in the State in which the military will is presented for probate.[85]

Military Justice Matters

The DOD must establish a process that allows a person, listed as a suspect in an official investigative report or in a central index used by law enforcement organizations, to review the designation.[86] The process must also provide for expungement of the designation if entry of the information was made contrary to DOD requirements.

For offenses committed under the Uniform Code of Military Justice after October 30, 2000, a Service Secretary may not grant clemency until a prisoner serves at least twenty years of a sentence of confinement for life without eligibility for parole.[87]

Civilian special agents of the services' criminal investigative commands now have the same authority as Defense Criminal Investigative Service special agents to execute warrants and make arrests.[88] Agents are to comply with guidelines prescribed by the service secretaries and approved by the SECDEF and the Attorney General.[89]

Army Recruiting Pilot Program

The Army is authorized to associate with motor sports competitions to help recruiters make contact with high school students for purposes of increasing enlistments and reducing Delayed Entry Program attrition.[90] Another pilot program requires the Secretary of the Army to replace Regular Army recruiters with contract recruiters in at least ten selected recruiting companies.[91] The contract recruiters will operate under the same rules and chain of command as other Army recruiting companies, and use the companies' offices, facilities, and equipment.[92]

Secondary Schools Access for Military Recruiting

If a local educational agency denies the same access to military recruiters as is provided to post-secondary educational institutions or to prospective employers, the SECDEF shall follow a sequential process for obtaining access.[93]

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83. National Defense Authorization Act for Fiscal Year 2001 § 541.

84. 10 U.S.C. § 1044d (c) provides that a testamentary instrument is valid only if executed by the testator, in the presence of a military legal assistance counsel and in the presence of at least two disinterested witnesses, and in accordance with additional requirements as may be provided in regulations prescribed under this section. *See* National Defense Authorization Act for Fiscal Year 2001 § 551.

85. *Id.* The term "State" includes D.C., Puerto Rico, the Northern Mariana Islands, and United States possessions.

86. National Defense Authorization Act for Fiscal Year 2001 § 552. The conferees directed the SECDEF to:

> review policies and procedures addressing the degree of evidence or information that must exist before titling and indexing occurs, to include the weight, if any, given to initial allegations; (2) review the sufficiency of training provided to individuals with access to the Defense Clearance and Investigative Index (DCII) regarding the significance of criminal investigative entries in the DCII; (3) review the use of criminal investigative data in the DCII to determine if it is being used properly and examine the adequacy of available sanctions for those who improperly use such information; and (4) provide other pertinent information discovered in the review process.

H.R. CONF. REP. NO. 106-945, at 792.

87. National Defense Authorization Act for Fiscal Year 2001 § 553.

88. *Id.* § 554.

89. *Id.*

90. *Id.* § 561.

91. *Id.*

92. *Id.*

Reimbursed Expenses for Canceled Leave Due to Contingency Operations

Travel and related expenses are reimbursable when a service member participating in a contingency operation is forced to cancel approved leave within 48 hours of the commencement of leave.[94]

Compensation and Other Personnel Benefits

Basic Pay Increases

Effective January 1, 2001, members of the uniformed services will receive a 3.7 percent increase to their monthly base pay.[95] Enlisted members in the grades of E-5 through E-7 will receive additional increases effective July 1, 2001.[96]

Supplemental Subsistence Allowance

To remove service members from the food stamp program, Service Secretaries are authorized to provide a supplemental subsistence allowance of up to $500 per month.[97]

Housing Allowances

The SECDEF will prescribe housing allowance rates based on the costs of adequate housing for an area.[98] To treat junior enlisted personnel more equitably, the SECDEF must establish a single rate for members in grades E-1 through E-4 with dependents.[99]

Senior Enlisted Personal Money Allowance

The senior noncommissioned officer (NCO) of each service is entitled to a $2,000 annual personal money allowance.[100]

Increased Officer Uniform Allowances

Officers are entitled to an initial uniform allowance of $400, and an additional allowance of $200.[101]

Travel and Transportation Allowances

Members are authorized reimbursement of mandatory pet quarantine expenses of up to $275 per permanent change of station move.[102] Service members may be entitled to a share of the savings resulting to the United States when the member's total household

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93. *Id.* § 563. The process includes designation of a military officer to meet with representatives of the local educational agency, notice to the Governor of the state concerned, and Congressional notification.

94. *Id*. § 579.

95. *Id.* § 601.

96. *Id.* § 602.

97. *Id*. § 604. The member's entitlement terminates upon payment of the allowance for twelve consecutive months, promotion to a higher grade, or transfer of the member in a permanent change of station.

98. *Id.* § 605. The SECDEF is authorized to eliminate by fiscal year 2005 the current requirement that service members pay fifteen percent of their housing expenses. H.R. CONF. REP. NO. 106-945, at 800-01.

99. National Defense Authorization Act for Fiscal Year 2001 § 607. The calculation is based on the average cost of a two-bedroom apartment in that military housing area, and one-half of the difference between the average cost of a two-bedroom townhouse in that area and the average cost of a two-bedroom apartment.

100. *Id.* § 609. The senior NCO includes the Sergeants Major of the Army and Marine Corps, the Master Chief Petty Officers of the Navy and the Coast Guard, and the Chief Master Sergeant of the Air Force.

101. *Id.* § 610.

102. *Id.* § 642.

good weight shipped or stored is less than the average of shipments made by members in the same grade and with the same dependent status.[103]

Thrift Savings Plan

Implementation of the federal government's Thrift Savings Plan for active and reserve service members will take place within 180 days of enactment of the Act, unless the SECDEF determines such implementation would prevent the Thrift Investment Board from providing timely and accurate services to investors, or would place an excessive administrative burden on the Board.[104]

Health Care Provisions

Chiropractic Services

The SECDEF is directed to complete a plan for the permanent provision of chiropractic health care services, to include care for neuro-musculoskeletal conditions typical among armed service members, to active duty members.[105]

Physical Exams for Minors

Dependents between the ages of 5 and 12 are authorized physical examinations required for school enrollment.[106]

Retiree Health Care

Medicare eligible military retirees are now eligible for the same pharmacy benefit as is available to beneficiaries under the TRICARE Extra and Standard programs.[107] Congress also extended eligibility for CHAMPUS and TRICARE to military retirees and their dependents upon attaining the age of 65,[108] and established the Department of Defense Medicare-Eligible Retiree Health Care Fund to handle the costs of the retiree health care programs.[109] Congress directed the SECDEF to submit a plan for universal, continuous enrollment of all eligible beneficiaries beginning in fiscal year 2002.[110]

Copay Eliminated

No copayment shall be charged for services rendered to a dependent of a TRICARE Prime participant.[111]

Privacy of DOD Medical Records

The SECDEF must submit to Congress a plan to improve the privacy of medical records, and issue interim regulations allowing for reasonable use of the medical records in certain circumstances.[112]

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103. *Id.* § 643. The SECDEF is to develop regulations for the program to ensure members of all services receive an equal benefit. H.R. CONF. REP. NO. 106-945, at 805.

104. National Defense Authorization Act for Fiscal Year 2001 § 661. The Thrift Savings Plan will allow active duty and reserve members to deposit up to five percent of their pre-tax basic pay in the plan now available to federal civil service employees. H.R. CONF. REP. NO. 106-945, at 808.

105. National Defense Authorization Act for Fiscal Year 2001 § 702.

106. *Id.* § 703. Only TRICARE Prime enrollees will require no copayment. H.R. CONF. REP. NO. 106-945, at 813.

107. National Defense Authorization Act for Fiscal Year 2001 § 711. *See* H.R. CONF. REP. NO. 106-945, at 814.

108. National Defense Authorization Act for Fiscal Year 2001 § 712.

109. *Id.* § 713.

110. H.R. CONF. REP. NO. 106-945, at 815.

111. National Defense Authorization Act for Fiscal Year 2001 § 752. However, it is not the intent of the conferees to eliminate copayments for pharmacy benefits under the mail order pharmacy program. H.R. CONF. REP. NO. 106-945, at 819-20.

112. National Defense Authorization Act for Fiscal Year 2001 § 756. The uses include national security, law enforcement, patient treatment, and payment for health care services.

Reimbursable Travel Expenses

When a primary care provider refers a TRICARE beneficiary to a specialty care provider located more than 100 miles from the location of the primary care provider, the beneficiary will be entitled to reimbursement for reasonable travel expenses.[113]

Acquisition Policy, Acquisition Management, and Related Matters

Multiyear Services Contracts

Congress created a new section under Title 10 to provide expanded guidance on the use of multi-year contracts for services.[114] Agencies may enter into contracts for not more than five years for services and supplies related to such services, when there will be a continuing need for the services, the furnishing of services will require the contractor to make a substantial initial investment or incur substantial contingent liabilities, and the use of a multiyear contract will encourage effective competition and promote economies in operation.[115] The agency shall consider including an option to renew the contract for up to three years. Contracts in excess of $500 million must be specifically authorized by law, and no unfunded contingent liability in excess of $20 million may be included in a contract without prior Congressional notice.[116]

DOD Guidelines for Use of "Other Transactions"

The authority to use transactions other than contracts, cooperative agreements, or grants to carry out prototype projects has been extended until September 30, 2004.[117] After referring to a GAO report[118] that identified weaknesses in DOD's use of Section 845[119] authority, the conferees directed the SECDEF to issue revised guidelines for use of this authority within 90 days of enactment of the Act.[120]

Stricter Education Qualifications for Contract Workforce

To receive an appointment or assignment (1) in the GS-1102 occupational specialty, or a similar occupational specialty if the position is filled by a military member, or (2) as a contracting officer authorized to award or administer contracts above the simplified acquisition threshold, a person now must have received a baccalaureate degree and have completed at least 24 semester credit hours in business disciplines.[121] The education requirement applies to appointments or assignments to contracting positions that are made on or after October 1, 2000.[122]

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113. *Id.* § 758.

114. Authority for multi-year service contracts existed at 10 U.S.C. § 2306(g). The newly created section 2306c provides more guidance than existed at § 2306(g). NDAA FY01 § 802.

115. National Defense Authorization Act for Fiscal Year 2001 § 802. The services covered under this legislation include: (1) Operation, maintenance, and support of facilities and installations; (2) maintenance or modification of aircraft, ships, vehicles and other highly complex military equipment; (3) specialized training necessitating high quality instructor skills (for example, pilot and air crew members or foreign language training); and (4) base services (for example, ground maintenance; in-plane refueling; bus transportation; refuse collection and disposal).

116. *Id.*

117. *Id.* § 803.

118. General Accounting Office, Acquisition Reform: DOD's Guidance on Using Section 845 Agreements Could be Improved, Report No. GAO/NSIAD-00-33 (April 7, 2000).

119. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 845.

120. H.R. Conf. Rep. No. 106-945, at 825.

121. National Defense Authorization Act for Fiscal Year 2001 § 808. *See also* H.R. Conf. Rep. No. 106-945, at 826. To serve as a contracting officer, the person also must have completed all contracting courses mandated for the person's grade level, and have at least two years of experience in a contracting position. See 10 U.S.C. § 1724(a)(1) and (2).

122. National Defense Authorization Act for Fiscal Year 2001 § 808. The new exception replaces the former exception at Title 10, Section 1724(c) of the United States Code, which had excepted employees holding ten years of acquisition experience, as of October 1, 1991, from the education requirements.

Electronic Notice of Solicitations

An agency need not use the Commerce Business Daily to publish a solicitation notice if the notice is electronically accessible through the single Government-wide point of entry designated in the Federal Acquisition Regulation in a "form that allows convenient and universal user access."[123]

Information Technology

The DOD is required to revise DOD Directive 5000.1 to prohibit award of any contract for the acquisition of a mission critical or a mission essential information technology system until the system has been registered with DOD's Chief Information Officer (CIO).[124] The CIO must determine that a major automated information system is being developed in accordance with the Clinger-Cohen Act of 1996 before the system can receive any Milestone approval.[125]

Congress has added an annual data collection and reporting requirement for DOD purchases of information technology products and services that are in excess of the simplified acquisition threshold.[126] Among the listed data required for collection are identity of the items purchased, pricing, extent of competition, and whether the purchase was made in compliance with the Clinger-Cohen Act planning requirements.[127]

Congress has directed amendment of the Federal Acquisition Regulation (FAR) to prohibit the setting of a minimum experience or educational requirement for proposed contractor personnel in solicitations for information technology services, unless a contracting officer determines a need for the requirement, or the agency requires use of non-performance-based contract.[128]

Following a GAO report that criticized the Navy's strategy and process for acquiring a Navy/Marine Corps Intranet,[129] Congress imposed several requirements affecting implementation. The legislation establishes certification requirements, provides for phased implementation of an Intranet contract, and requires the Secretary of the Navy to mitigate the adverse impact on Navy civilian employees performing functions included within the scope of the Intranet program.[130]

Preference for Performance-Based Service Contracting

The FAR will be revised to state a preference for a performance-based contract or performance-based task order that contains firm fixed prices for the specific tasks performed.[131] Such contracts or task orders, if valued at $5 million or less, may be treated as a commercial item procurement if the source of the services also provides similar services to the general public.[132]

Comptroller General Study of Military Construction Contract Bundling

Congress directed the Comptroller General to conduct a study on military construction contract bundling, and submit a report to the congressional Armed Services committees.[133]

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123. National Defense Authorization Act for Fiscal Year 2001 § 810 (amending 41 U.S.C. § 416).

124. *Id.* § 811.

125. *Id.*

126. *Id.* § 812. The reporting requirement applies whether the purchase is made in the form of a contract, task order, delivery order, military interdepartmental purchase request, or any other form of interagency agreement. *Id*. The reporting requirements will be met by incorporating the data elements into the Defense Contract Action Data System. H.R. CONF. REP. NO. 106-945, at 828.

127. National Defense Authorization Act for Fiscal Year 2001 § 812.

128. *Id.* § 813.

129. GENERAL ACCOUNTING OFFICE, DEFENSE ACQUISITIONS: OBSERVATIONS ON THE PROCUREMENT OF THE NAVY/MARINE CORPS INTRANET, GAO/T-NSIAD/AIMD-00-116 (Mar. 8, 2000)

130. National Defense Authorization Act for Fiscal Year 2001 § 814.

131. *Id.* § 821. The authority for this program will exist for three years after enactment of this Act.

132. *Id*. However, the agency may not use special simplified procedures authorized by 10 U.S.C. § 2304(g)(1)(B) and FAR 13.5 to acquire the services.

Department of Defense Organization and Management

Supervision of DOD Activities for Combating Terrorism

One of the Assistant Secretaries in the DOD, as designated by the SECDEF, will assume the responsibility to provide overall direction and supervision for policy, program planning and execution, and allocation and use of resources for combating terrorism.[134]

Name Change and Overhaul of U.S. Army School of the Americas

Congress has renamed the School of the Americas the "Western Hemisphere Institute for Security Cooperation."[135] Additionally, a board of visitors will be appointed to review instruction and curriculum, which will include at least eight hours of instruction on topics such as human rights, the rule of law, due process, civilian control of the military, and the role of the military in a democratic society.[136]

Name Change of Armed Forces Staff College

The Armed Forces Staff College is renamed the Joint Forces Staff College.[137]

Institute for Defense Computer Security and Information Protection

The SECDEF shall establish an Institute for Defense Computer Security and Information Protection to conduct research and technology development and facilitate the exchange of information regarding cyberthreats, technology, tools, and other relevant issues.[138]

Flexibility in Reduction of DOD Headquarters Personnel

The SECDEF may slow the five-year phased reduction of DOD headquarters and headquarters support activities personnel if he determines and certifies to Congress that the reduction of personnel would adversely affect national security.[139]

General Provisions

Obligation and Payment Requirements

Congress has placed even greater emphasis on timely payments to contractors with several new provisions. The SECDEF must submit a report to Congress for any month in which the Defense Finance and Accounting Service is delinquent on more than five percent of pending vouchers.[140] The SECDEF must present a plan to Congress for ensuring uniform recording of obligations not later than ten days after the date on which the obligation is incurred,[141] and require that any claim for payment be submitted to the DOD in electronic form.[142] Finally, contractors who receive late interim payments under a cost reimbursement contract will be due prompt payment interest.[143]

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133. National Defense Authorization Act for Fiscal Year 2001 § 833.

134. *Id.* § 901.

135. *Id.* § 911. The legislation has not quieted all critics of the school. One member of Congress stated that the changes "amount to little more than putting a perfume factory on top of a toxic waste dump." *See* Kim Burger, *Army Secretary, DOD Back 'Serious Reform at School of the Americas*, June 5, 2000, *available at* http://www.benning.army.mil/usarsa.main.html.

136. National Defense Authorization Act for Fiscal Year 2001 § 911. Board members will include members of Congress and six persons designated by the SECDEF, to include persons from academia and religious and human rights communities.

137. *Id.* § 913.

138. *Id.* § 921.

139. *Id.* § 941 (amending 10 U.S.C. § 130a).

140. *Id.* § 1006. A delinquent payment is one that has not been made within 30 days of receipt of the voucher.

141. *Id.* § 1007.

Counterterrorism and Domestic Preparedness

Congress has directed the SECDEF to establish five more Weapons of Mass Destruction Civil Support Teams,[144] and a loan guarantee program for qualified commercial firms to finance improved information security to counter cyberterrorism.[145]

Transit Pass Program

This year, both Congress and the Executive Branch demonstrated commitment to mass transit as a means to reduce air pollutants. Not later than May 1, 2001, the Authorization Act requires the SECDEF to implement a transit pass program, as authorized by 5 U.S.C. section 7905, for service members and DOD civilian officers and employees in poor air quality areas.[146] Pursuant to an executive order issued earlier this year,[147] and in support of the Authorization Act requirement, the DOD, in conjunction with the Department of Transportation, established a transportation benefit program for the National Capital Region, and directed establishment of a mass transit incentive program DOD-wide.[148]

Civilian Personnel Management

Pilot Program for Equal Employment Opportunity Complaint Process

Congress has directed the SECDEF to carry out a pilot program to improve the process for resolving the equal employment opportunity complaints of DOD civilian employees.[149] However, President Clinton expressed concern that Congress' waiver of the Equal Employment Opportunity Commission's (EEOC) procedures "could leave civilian employees without important means to ensure the protection of their civil rights."[150] As a result, the President has directed the SECDEF to approve no more than three pilot programs, ensure that each pilot program allow for a complaining party to opt out of the pilot procedures at any time, and submit an assessment of the pilots to the EEOC within 180 days of the completion of the three-year pilot program period. [151]

Matters Relating to Other Nations

Situation in the Balkans

Concerning Kosovo, Congress has directed the President to develop benchmarks that would allow for withdrawal of the United States military,[152] and to submit a semiannual report on the contributions of European nations and organizations to the peacekeeping effort.[153]

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142. *Id.* § 1008. The term "claim for payment" means an invoice or any other demand or request for payment.

143. *Id.* § 1010. The Director of the Office of Management and Budget shall prescribe regulations to implement this legislation.

144. *Id.* § 1032. The addition of five teams will result in a total of 32.

145. *Id.* § 1033. The maximum loan principal for all borrowers that may be guaranteed during a fiscal year may not exceed $10,000,000.

146. *Id.* § 1082. A "poor air quality area" is one that is deemed by the Administrator of the Environmental Protection Agency to be a non-attainment area with respect to national ambient air quality standards under the Clean Air Act (42 U.S.C. § 7409).

147. The President earlier this year directed federal agencies in the National Capital Region to implement a transit pass program for all qualified Federal employees. Exec. Order No. 13,150, 65 Fed. Reg. 24,613 (Apr. 26, 2000).

148. On October 13, Deputy Defense Secretary Rudy de Leon directed DOD installations and activities to establish mass transit programs for personnel in the 50 states, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Marian Islands. Costs to implement the program will be borne by the agency concerned. Deputy Secretary de Leon's directive authorizes all DOD employees, non-appropriated fund government employees, and reserve component members on active duty to receive direct subsidy of personal commuting costs up to the maximum allowed by the Internal Revenue Code. See press release at http://www/defemse;oml/,o;/news/Nov2000/n1109200_200011091.html.

149. National Defense Authorization Act for Fiscal Year 2001 § 1111.

150. Statement on Signing the National Defense Authorization Act, FY 2001, 36 WEEKLY COMP. PRES. DOC. 2690 (OCT. 30, 2000).

151. Memorandum on Implementation of Section 1111 of H.R. 4205, the "Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001," 36 WEEKLY COMP. PRES. DOC. 2700 (OCT. 30, 2000).

NATO Fair Burdensharing

For any future military operation of the North Atlantic Treaty Organization, the SECDEF must submit a report describing each NATO member nation's contributions to that operation and any pledged contributions to follow-on operations.[154] The report must be submitted within 90 days of the completion of an operation.

Congress Clarifies Authority to Use Acquisition and Cross Servicing Agreements (ACSA) for Airlift Support

Section 1222 of the Act[155] resolves a long-standing conflict between the statutory authority for Cooperative Military Airlift Agreements (CMAA)[156] and the statutory authority for ACSA.[157] As a result of this change, there now is clear statutory authority to provide airlift services to foreign governments, on a reimbursable basis, under either an ACSA or a CMAA.

Increased Health Care Authority for Humanitarian and Civic Assistance

Congress has expanded beyond rural areas the authority of United States military forces to provide medical, dental, and veterinary care in conjunction with a military operation to areas that "are rural or are underserved by medical, dental, and veterinary professionals."[158]

Navy Activities in Vieques

Congress has supported the holding of a binding referendum for the people of Vieques, Puerto Rico, to determine whether the Navy can continue live-fire training at the training sites on the island.[159] Should the people of Vieques approve the continuance of training, Congress has authorized the appropriation of $50 million to provide economic assistance to the island.[160]

Energy Employees Occupational Illness Compensation Program

Congress has agreed to creation of a program to provide compensation to employees of the Department of Energy (DOE) and its contractors and vendors who were injured from exposure to radiation, beryllium, or silica while working in DOE nuclear-weapons related programs.[161] Congress has requested a legislative proposal to implement the program,[162] and authorized $250 million for the Energy Employees Occupational Illness Compensation Fund.[163]

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152. National Defense Authorization Act for Fiscal Year 2001 § 1212.

153. *Id.* § 1213. The conferees expressed concern that U.S. troops "continue to perform a variety of non-military missions to compensate for remaining shortfalls in the civil implementation effort." Believing that the Europeans must fulfill their commitment to pay the "major share of the burden to secure the peace," the conferees stated their intent "to pursue legislative options in the future if those commitments are not fulfilled." H.R. CONF. REP. NO. 106-945, at 869.

154. National Defense Authorization Act for Fiscal Year 2001 § 1221.

155. *Id.* § 1222.

156. *See* 10 U.S.C.A. § 2350c(d) (West 2000), which is repealed by this provision.

157. *See* 10 U.S.C.A § 2350 (West 2000), defining "logistics support, supplies, and services" to include "transportation (including airlift)." *Id.*

158. National Defense Authorization Act for Fiscal Year 2001 § 1235, amending 10 U.S.C. § 401(e)(1). The increased authority is "to be used in conjunction with authorized U.S. military operations in furtherance of U.S. security interests and the expansion of the operational readiness skills of the armed forces, and shall be carried out at no additional cost to the Department of Defense." H.R. CONF. REP. NO. 106-945, at 872.

159. National Defense Authorization Act for Fiscal Year 2001 § 1503.

160. *Id.* § 1504.

161. National Defense Authorization Act for Fiscal Year 2001 §§ 3602, 3611. *See also* H.R. CONF. REP. NO. 106-945, at 980.

162. National Defense Authorization Act for Fiscal Year 2001 § 3613.

163. *Id.* § 3614.

MILITARY CONSTRUCTION APPROPRIATIONS ACT, 2001

President Clinton signed the Military Construction Appropriations Act, 2001, on 13 July 2000.[164] This Act appropriated $8.8 billion for military construction, family housing, and base closure activities.[165] This exceeds by nearly $460 million the amount appropriated for FY 2000, and is $800 million more than requested by the administration.[166]

Brooks Air Force Base Development Demonstration Project[167]

The Air Force has authority to conduct the Brooks Air Force Base Development Demonstration Project, also known as the "Base Efficiency Project."[168] The purpose of the project is to "improve mission effectiveness and reduce the cost of providing quality installation support."[169] The legislation grants authority to the Secretary of the Air Force to use leaseback provisions in leases, sales, or transfers of real property,[170] and creates a "Base Efficiency Project Fund" into which all proceeds will be deposited and available for use without fiscal year limitation.[171]

Inclusion of Contingency Funding in FY 2002 Budget

The conference committee membership (conferees) expressed concern about the lack of contingency funding in the DOD's FY 2001 budget request. Accordingly, the conferees directed the Department to include five percent contingency funding in next year's budget request to guard against unforeseen events such as environmental and regulatory requirements, unanticipated subsurface conditions, and changes in bid climate.[172]

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164. The Military Construction Appropriations Act, 2001, Pub. L. No. 106-246, 114 Stat. 511 (2000).

165. *Id.* The Military Construction Appropriations Act breaks the appropriations down as follows:

Military Construction, Army	$909,245,000
Military Construction, Navy	928,273,000
Military Construction, Air Force	870,208,000
Military Construction, Defense-wide	814,647,000
Military Construction, Army National Guard	281,717,000
Military Construction, Air National Guard	203,829,000
Military Construction, Army Reserve	108,738,000
Military Construction, Naval Reserve	64,473,000
Military Construction, Air Force Reserve	36,591,000
NATO Security Investment Program	172,000000
Family Housing, Army	1,187,749,000
Family Housing, Navy and Marine Corps	1,299,722,000
Family Housing, Air Force	1,072,861,000
Family Housing, Defense-wide	44,886,000
Base Realignment and Closure Account	1,024,369,000
Base Realignment and Closure Account	672,311,000

Id.

166. H.R. REP. NO. 106-710, at 130.

167. For additional information on this project see www.brooks.af.mil/HSW/CDB/default.htm.

168. The Military Construction Appropriations Act, 2001 § 136, 114 Stat. at 520.

169. *Id.*

170. *Id.* § 136(f), 114 Stat. at 521-22.

171. *Id.* § 136(h), 114 Stat. at 523.

172. H.R. CONF. REP. NO. 106-710, at 86.

Installation Commander Joint Use Certification

Stating that "[j]oint use facilities can optimize military construction and operation and maintenance funds while enhancing joint training and the total force concept," Congress will require installation commanders to certify that a proposed construction project has been considered and reviewed for joint use beginning with the FY 2003 budget submission.[173]

DOD Required to Submit Strategy for Management of Alkali Silica Reactivity

Alkali Silica Reactivity (ASR) is a major cause of deterioration of concrete structures and pavements.[174] Concerned with the effects of ASR on DOD concrete facilities, the conferees directed the Under Secretary of Defense for Acquisition, Technology and Logistics to submit a report to the congressional defense committees that addresses the Department's long-term strategy and recommendations to manage the issue.[175]

EMERGENCY SUPPLEMENTAL ACT, 2000[176]

In part to cover the unforeseen costs incurred in the Department's Kosovo operations, Congress appropriated additional funds for FY 2000.[177] Congress appropriated more than $2 billion to the Overseas Contingency Operations Transfer Fund, to be transferred to various accounts that have funded the Kosovo operations to date.[178] Due to increases in bulk fuel prices the DOD received $1.55 billion for the Defense-wide Working Capital Fund.[179]

The conferees expressed concern about violations of DOD financial regulations and possible violations of the Anti-Deficiency Act in the administration and execution of the TRICARE program, and directed the DOD IG to investigate the Defense Health Program.[180]

Congress required submission of several reports in conjunction with its appropriation of $154 million to aid the drug interdiction and counter-drug activities in Columbia.[181]

The Army received $5 million to carry out its role as the Executive Agent to lead, consolidate, and coordinate all DOD biometrics information assurance programs.[182]

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173. *Id.*

174. *See* http://leadstates.tamu.edu/asr/library/C315/index.stm, which contains a handbook developed by the Strategic Highway Research Program to help detect and mitigate the effects of ASR. As stated in the Foreward of the handbook, early identification of ASR is the first step to economical repair or rehabilitation.

175. H.R. CONF. REP. NO. 106-710, at 88. *See also* National Defense Authorization Act for 2001, § 388 (requiring assessment of ASR damage to aviation facilities, and evaluation of technologies to prevent, treat, or mitigate ASR).

176. Pub. L. No. 106-246, 114 Stat. 525 (2000).

177. Congress cited section 251(b)(2)(A) of the Balanced Budget and Emergency Deficit Control Act of 1985 as authority to designate the appropriations as an emergency requirement. None of the funds appropriated under this authority were available for obligation unless the President designated the amounts as emergency requirements. Pub. L. No. 106-246, 114 Stat. 523, Division B, § 126 (2000).

178. Pub. L. No. 106-246, 114 Stat. at 527.

179. *Id.* § 102, 114 Stat. at 523. *See also* H.R. CONF. REP. NO. 106-710, at 131.

180. H.R. CONF. REP. NO. 106-710, at 132.

181. Pub. L. No. 106-246, 114 Stat at 570. The SECDEF was required to submit a report on the proposed uses of the funds, and the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict is required to submit a monthly report containing specified information to the congressional defense committees. H.R. CONF. REP. NO. 106-710, at 165.

182. Pub. L. No. 106-246, § 112, 114 Stat. at 531.

THE SECURITY ASSISTANCE ACT OF 2000

On October 6, 2000, the President signed the Security Assistance Act of 2000 (the Act) into law.[183] The Act makes amendments to the Foreign Assistance Act and the Arms Export Control Act impacting the security assistance programs of the Departments of Defense and State.

Foreign Military Sales and Financing Authorities

Congress authorized $3.550 billion for FY 2001 and $3.627 billion for fiscal year 2002 for grant assistance under section 23 of the Arms Export Control Act (22 USC § 2763).[184]

The Act amends section 28 of the Arms Export Control Act (AECA)[185] to provide authority to exempt the export of defense articles and services to foreign countries from the AECA's licensing requirements.[186] The proposed export may be exempted from the licensing requirements if a binding bilateral agreement between the United States and the foreign country to receive the export is in place. The amendment contains detailed provisions concerning the content of these bilateral agreements, including end-use and retransfer control commitments.[187]

Other Assistance

The Act expands the special drawdown authority found at section 506(a)(2) of the Foreign Assistance Act (FAA) (22 U.S.C. § 2318(a)(2)(B)).[188] The amount of drawdown authority available is increased from $150 million to $200 million.[189] In addition, Congress added two new areas in which drawdown support under this authority may be provided – antiterrorism assistance and non-proliferation assistance.[190]

Under current law, excess defense articles (EDA) to be transferred to a country under the authority of section 516 of the FAA[191] may be transported to that country free of charge if the total weight of the EDA shipment is less than 25,000 pounds. Congress amended this section to increase the weight limit to 50,000 pounds.[192]

International Military Education and Training

Congress authorized $55 million for FY 2001 and $65 million for FY 2002 to fund the International Military Education and Training (IMET) program.[193]

In addition Congress added two new procedural requirements to the IMET program. First, the selection of foreign personnel for IMET training must be made in consultation with the Defense Attaché in the country concerned.[194] Second, the Secretary of Defense

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183. The Security Assistance Act of 2000, Pub. L. No. 106-280, 114 Stat. 845 (Oct. 6, 2000).

184. *Id.* § 101. These funds are used to provide assistance through grants and loan subsidies to designated countries. As in past years, the bulk of this assistance is to be provided to Israel and Egypt. *See id.* §§ 513-514. For designation of additional countries, see *id.* § 515.

185. 22 USC § 2778.

186. The Security Assistance Act of 2000 § 102, 114 Stat. 846.

187. *Id.*

188. *Id.* § 121.

189. *Id.* The limitation providing that not more than $75 million of this amount may be drawn down from DOD remains in place. *See* 22 U.S.C. § 2318(a)(2)(B)(i).

190. The Security Assistance Act of 2000, 114 Stat. at 850. These areas are in addition to the areas of international narcotics control assistance, international disaster assistance, and migration and refugee assistance currently included in the statute. *See* 22 U.S.C. § 2318(a)(2)(A)(I).

191. 22 U.S.C. § 2321j.

192. The Security Assistance Act of 2000 § 122, 114 Stat. 851.

193. *Id.* § 201.

194. *Id.* § 202.

must create a database containing detailed information regarding IMET students including training received and, to the extent practicable, the progression of the student's career since the student received the training.[195]

Nonproliferation and Export Control Assistance

The Act adds a new Chapter 9 to the FAA establishing new authority and requirements for assistance in the areas of nonproliferation and export controls.[196] The expressed purpose for this authority is to "halt the proliferation of nuclear, chemical, and biological weapons, and conventional weaponry . . . ."[197] The President is authorized to furnish, on such terms and conditions as he may determine, assistance necessary to carry out the purpose of this provision. This assistance may include "training services and the provision of funds, equipment, and other commodities related to the detection, deterrence, monitoring, interdiction, and prevention or countering of proliferation, the establishment of effective non-proliferation laws and regulations, and the apprehension of those individuals involved in acts of proliferation of such weapons."[198] Congress authorized $129 million for FY 2001 and $142 million for FY 2002 to fund this new program.[199] Of these amounts, $59 million for FY 2001 and $65 million for FY 2002 is specifically earmarked for "science and technology centers" in the states of the former Soviet Union.[200]

Integrated Security Assistance Planning

The Act directs the Secretary of State to draft and forward to the Congress a plan setting forth the National Security Assistance Strategy of the United States.[201] The plan, which must be coordinated with the Secretary of Defense and the Chairman of the Joint Chiefs of Staff, must be consistent with the National Security Strategy. Among other things, the plan must identify "overarching security assistance objectives", must identify a primary security assistance objective, as well as secondary objectives, for each country receiving security assistance, and must detail how specific types of assistance are coordinated with assistance provided by the DOD and other agencies.[202] Obviously, this report will be must reading for anyone involved in security assistance activities.

Congress authorized Foreign Military Financing (grant) funding[203] and IMET funding[204] for the Czech Republic, Hungary, and Poland to aid their integration into NATO.[205]

Miscellaneous Provisions

Congress amended the FAA to include "antiterrorism and nonproliferation" to the list of purposes for which defense articles and services could be transferred to a foreign country.[206]

The Act continues the prohibition on providing Stinger ground-to-air missiles to any country bordering the Persian Gulf.[207] As in the past, Stingers may be provided on a one-for-one exchange for missiles previously provided that are nearing the scheduled expiration of their shelf life.[208]

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195. *Id.*

196. *Id.* § 301.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* § 303.

201. *Id.* § 501.

202. *Id.*

203. $30 million for FY 2001 and $35 million for FY 2002.

204. $5.1 million for FY 2001 and $7 million for FY 2002.

205. The Security Assistance Act of 2000 § 511, 114 Stat.at 855.

206. *Id.* § 701.

207. *Id.* § 705.

MILITARY EXTRATERRITORIAL JURISDICTIONAL ACT OF 2000[209]

Closing a gap in United States criminal jurisdiction over its citizens, the Military Extraterritorial Jurisdictional Act allows for Department of Justice prosecution of offenses that under United States law are punishable by imprisonment for more than one year. The Act applies to offenses committed outside the United States by members of the Armed Forces, DOD civilian employees, DOD contractors and their employees (including a subcontractor at any tier), and dependents residing with them outside the United States.

The United States will not commence a prosecution if it recognizes the jurisdiction of a foreign government that has prosecuted or is prosecuting the person for the offense. Furthermore, application of the Act to a member of the Armed Forces will occur only if the member ceases to be subject to jurisdiction under the Uniform Code of Military Justice (UCMJ), or the member commits an offense with one or more other defendants, at least one of whom is not subject to the UCMJ.

After consulting with the Secretary of State and the Attorney General, the SECDEF shall prescribe uniform regulations concerning procedures for apprehension, detention, delivery, and removal of persons under this legislation. The Act provides for the appointment of qualified military counsel for initial proceedings held outside the United States

ADOPTION OF MILITARY WORKING DOGS[210]

The SECDEF may make a military working dog available for adoption at the end of the dog's useful working life or when the dog becomes excess to DOD's needs. Law enforcement agencies, former handlers of dogs, and other persons capable of humanely caring for the dogs, may obtain without charge dogs that are determined to be suitable for adoption by the commander of the last unit to which the dog was assigned.

208. *Id.*

209. Pub. L. 106-523, 114 Stat. 2488 (2000) (creating Title 18 Chapter 212, U.S.C).

210. Pub. L. 106-446 (adding section 2582 to title 10, United States Code).

Appendix B

CONTRACT & FISCAL LAW WEBSITES

CONTENT	ADDRESS

A

ABA LawLink Legal Research Jumpstation	http://www.abanet.org/lawlink/home.html
ABA Network	http://www.abanet.org/
ABA Public Contract Law Section (Agency Level Bid Protests)	http://www.abanet.org/contract/federal/bidpro/agen_bid.html
Acquisition and Cross Servicing Agreements (USAREUR)	http://www.odcsrm.hqusareur.army.mil/rmbud/acsahp1.htm
Acquisition Reform	http://tecnet0.jcte.jcs.mil:9000/htdocs/teinfo/acqreform.html
Acquisition Reform Network	http://www.arnet.gov
ACQWeb - Office of Undersecretary of Defense for Acquisition & Technology	http://www.acq.osd.mil
Agency for International Development	http://www.info.usaid.gov
Air Force Acquisition Reform	http://www.safaq.hq.af
Air Force Electronic Commerce Home Page	http://www.afca.scott.af.mil/ecommerce/index.htm
Air Force FAR Supplement	http://www.hq.af.mil/SAFAQ/contracting/far/affars/html
Air Force Home Page	http://www.af.mil
Air Force Materiel Command Web Page	http://www.afmc.wpafb.af.mil
Air Force Materiel Command SJA Web Page	http://www.afmc.mil.wpafb.af.mil/HQ-AFMC/JA/
Air Force Publications	http://afpubs.hq.af.mil/orgs.asp?type=pubs
Air Force Site, FAR, DFARS, Fed. Reg.	http://farsite.hill.af.mil
Armed Services Board of Contract Appeals	http://www.law.gwu.edu/ASBCA/default.htm
Army Acquisition Website	http://acqnet.sarda.army.mil/
Army Coprs of Engineers Home Page	http://www.usace.army.mil
Army Electronic Commerce Home Page	http://www.armyec.sra.com/
Army Home Page	http://www.dtic.mil/armylink
Army Financial Management Home Page	http://www.asafm.army.mil/homepg.htm
Army Materiel Command Web Page	http://www.amc.army.mil/
Army Portal	http://www.us.army.mil/
Army Single Face to Industry (ASFI) Acquisition Web Site	http://acquisition.army.mil/default.htm
Army STRICOM (Simulation, Training, and Instrumentation Command) Home Page	http://www.stricom.army.mil

C

CAGE Code Assignment (Also Search/Contractor Registration (CCR))	http://www.disc.dla.mil
CASCOM Home Page	http://www.cascom.army.mil/
CECOM	http://www.monmouth.army.mil/cecom/cecom.html
Code of Federal Regulations	http://www.access.gpo.gov/nara/cfr/cfr-table-search.html
Coast Guard Home Page	http://www.dot.gov/dotinfo/uscg
Central Contractor Registration (DOD)	http://www.ccr2000.com/index.cfm
Commerce Business Daily (CBD)	http://cbdnet.access.gpo.gov/index.html
Comptroller General Decisions	http://www.gao.gov/decisions/decision.htm
Congress on the Net-Legistive Info	http://thomas.loc.gov/
Contract Pricing Guides (address)	http://www.gsa.gov/staff/v/gudies/instructions.htm
Contract Pricing Reference Guides	http://www.gsa.gov/staff/v/guides/vlumes.htm
Commerce Business Daily (CBD)	http://cbdnet.access.gpo.gov/index.html
Cost Accounting Standards	http://www.fedmarket.com/cas/casindex.html

D

DCAA Web Page (Links to related sites)	http://www.dcaa.mil *Before you can access this site, must register at http://www.govcon.com
DCAA - Electronic Audit Reports	http://www.abm.rda.hq.navy.mil/branch11.html
DCAA (Defense Contract Management Agency)	http://www.dcmc.hq.dla.mil/
Debarred List	http://epls.arnet.gov
Defense Acquisition Deskbook	http://www.deskbook.osd.mil
Defense Acquisition University	http://www.acq.osd.mil/dau/
Defense Logistics Agency Electronic Commerce Home Page	http://www.supply.dla.mil/
Defense Technical Information Center Home Page (use jumper Defenselink and other sites)	http://www.dtic.mil
Department of Justice (jumpers to other federal agencies and criminal justice)	http://www.usdoj.gov
Department of Veterans Affairs Web Page	http://www.va.gov
DFARS Web Page (Searchable)	http://www.dtic.mil/dfars
DFAS	http://www.dfas.mil
DFAS Electronic Commerce Home Page	http://www.dfas.mil/ecedi/
DIOR Home Page - Procurement Coding Manual/FIPS/CIN	http://web1.whs.osd.mil/diorhome.htm
DOD Claimant Program Number (procurement Coding Manual)	http://web1.whs.osd.mil/diorhome.htm
DOD Contracting Regulations	http://www.defenselink.mil

DOD Home Page	http://www.dtic.mil/defenselink
DOD Instructions and Directives	http://web7.whs.osd.mil/corres.htm
DOD SOCO Web Page	http://www.defenselink.mil/dodgc/defense_ethics/
DOL Wage Determinations	http://www.ceals.usace.army.mil/netahtml/srvc. html

F

FAC (Federal Register Pages only)	http://www.gsa.gov:80/far/FAC/FACs.html
FAR (GSA)	http://www.arnet.gov/far/
Federal Acquisition Jumpstation	http://procure.msfc.nasa.gov/fedproc/home.html
Federal Acquisition Virtual Library (FAR/DFARS, CBD, Debarred list, SIC)	http://159.142.1.210/References/References.html
Federal Register	http://www.access.gpo.gov/su_docs/aces/aces140.html
Federal Web Locator	http://law.house.gov/7.htm
FFRDC - Federal Funded R&D Centers	http://web1.whs.osd.mil/diorhome.htm
Financial Management Regulations	http://www.dtic.mil/comptroller/fmr/
Financial Operations (Jumpsites)	http://www.asafm.army.mil

G

GAO Documents Online Order	http://gao.gov/cgi-bin/ortab.pl
GAO Home Page	http://www.gao.gov
GAO Comptroller General Decisions (Allows Westlaw/Lexis like searches)	http:/www.access.gpo.gov/su_docs/aces/aces170.shtml?desc017.html
GovBot Database of Government Web sites	http://www.business.gov
GovCon - Contract Glossary	http://www.govcon.com/information/gcterms.html
Govt't Information Locator Services Index U.S. Army publications	http://www-usappc.hoffman.army.mil/gils/gils.html
GSA Advantage	www.fss.gas.gov
GSA Legal Web Page	http://www.legal.gsa.gov

J

Joint Electronic Commerce Program Office	http://www.acq.osd.mil/ec/
Joint Publications	http://www.dtic.mil/doctrine
Joint Travel Regulations (JTR)	http://www.dtic.mil/perdiem/jtr.html
JWOD (Javits-Wagner-O'Day Act)	www.jwod.gov

L

Laws, Regulations, Executive Orders, & Policy	http://159.142.1.210/References/References.html#policy, etc
Library (jumpers to various contract law sites - FAR/FAC/ DFARS/AFARS)	http://acqnet.sarda.army.mil/library/default.htm
Library of Congress Web Page	http://lcweb.loc.gov

M

Marine Corps Home Page	http://www.usmc.mil
MWR (Army) Home Page	http://trol.redstone.army.mil/mwr/index.html

N

NAF Financial (MWR)	http://www.asafm.army.mil/fo/naf/naf.htm
National Performance Review Library	http://www.npr.gov/library/index.html
National Industries for the Blind	www.nib.org
NISH	www.nish.org
NAVSUP Home Page	http://www.navsup.navy.mil/javaindex.html
Navy Acquisition Reform	http://www.acq-ref.navy.mil
Navy Electronic Commerce On-line	http://ecic.abm.rda.hq.navymmil/
Navy Home Page	http://www.navy.mil

O

OGC Contract Law Division	http://www.ogc.doc.gov/OGC/CLD.HTML
OGE Ethics Advisory Opinions	http://fedbbs.access.gpo.gov/libs/oge_opin.html
OGE Web Page (Ethics training materials and opinions	http://www.access.gpo.gov/usoge
Office of Acquisition Policy	http://www.gsa.gov/staff/ap.htm
Office of Deputy ASA (Financial Ops) Information on ADA violations/NAF Links/Army Pubs/and Vari-ous other sites	http://www.asafm.army.mil/financial.htm
Office of Management and Budget (OMB)	http://www.access.gpo.gov/su_docs/budget/
Office of Management and Budge Circulars	http://www.whitehouse.gov/WH/EOP/omb
OFPP (Guidelines for Oral Presentations)	http://www.doe.gov/html/procure/oral.html
OFPP (Best Practices Guides)	http://www.access.gpo.gov/su-docs/budget/index/P/BestP.html

P

Policy Works - Per Diem Tables	http://www.policyworks.gov/org/main/mt/homepage/mtt/perdiem/perd97.htm
Produce Price Index	http://www.bis.gov/ppihome.htm
Purchase Card Program	http://purchasecard.dfas.mil

S

SBA Government Contracting Home Page	http://www.sbaonline.sba.gov/GC/
Service Contract Act Directory of Occupations	http://www.dol.gov//dol/esa/public/regs/compliance/whd/wage/main.htm
SIC	http://spider.osha.gov/oshstats/sicser.html

T

Taxes/Insurance	http://www.payroll-taxes.com
Training & Doctrine Command (TRADO) Acquisition Center	http://www.tac.eustis.army.mil

U

UNICOR (Federal Prison Industries, Inc.)	www.unicor.gov
U.S. Congress on the Net-Legislative Info	http://thomas.loc.gov/
U.S. Code	http://uscode.house.gov/usc.htm
USATRANSCOM	http://www.transcom.mil

W

White House	http://www.whitehouse.gov

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have 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, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School 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, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

2001

January 2001

2-5 January	2001 USAREUR Tax CLE (5F-F28E).
8-12 January	2001 PACOM Tax CLE (5F-F28P).
8-12 January	2001 USAREUR Contract & Fiscal Law CLE (5F-F15E).
8 January-27 February	4th Court Reporter Course (512-71DC5).
9 January-2 February	154th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
16-19 January	2001 Hawaii Tax CLE (5F-F28H).
17-19 January	7th RC General Officers Legal Orientation Course (5F-F3).
21 January-2 February	2001 JOAC (Phase II) (5F-F55).
29 January-2 February	164th Senior Officers Legal Orientation Course (5F-F1).

February 2001

2 February-6 April	154th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
5-9 February	75th Law of War Workshop (5F-F42).
12-16 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).
26 February-2 March	59th Fiscal Law Course (5F-F12).
26 February-9 March	35th Operational Law Seminar (5F-F47).

March 2001

5-9 March	60th Fiscal Law Course (5F-F12).
19-30 March	15th Criminal Law Advocacy Course (5F-F34).
26-30 March	3d Advanced Contract Law Course (5F-F103).
26-30 March	165th Senior Officers Legal Orientation Course (5F-F1).

April 2001

2-6 April	25th Admin Law for Military

	Installations Course (5F-F24).
9-13 April	3d Basics for Ethics Counselors Workshop (5F-F202).
16-20 April	12th Law for Legal NCOs Course (512-71D/20/30).
23-26 April	2001 Reserve Component Judge Advocate Workshop (5F-F56).
30 April-11 May	146th Contract Attorneys Course (5F-F10).

May 2001

7 - 25 May	44th Military Judge Course (5F-F33).
14-18 May	48th Legal Assistance Course (5F-F23).

June 2001

4-7 June	4th Intelligence Law Workshop (5F-F41).
4-8 June	166th Senior Officers Legal Orientation Course (5F-F1).
4 June-13 July	8th JA Warrant Officer Basic Course (7A-550A0).
4-15 June	6th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
5-29 June	155th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
6-8 June	Professional Recruiting Training Seminar
11-15 June	31st Staff Judge Advocate Course (5F-F52).
18-22 June	5th Chief Legal NCO Course (512-71D-CLNCO).
18-22 June	12th Senior Legal NCO Management Course (512-71D/40/50).
18-29 June	6th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
25-27 June	Career Services Directors Conference.
29 June-7 September	155th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2001

8-13 July	12th Legal Administrators Course (7A-550A1).
9-10 July	32d Methods of Instruction Course (Phase I) (5F-F70).
16-20 July	76th Law of War Workshop (5F-F42).
16 July-10 August	2d JA Warrant Officer Advanced Course (7A-550A2).
16 July-31 August	5th Court Reporter Course (512-71DC5).
30 July-10 August	147th Contract Attorneys Course (5F-F10).

August 2001

6-10 August	19th Federal Litigation Course (5F-F29).
13 August-23 May 02	50th Graduate Course (5-27-C22).
20-24 August	7th Military Justice Managers Course (5F-F31).
20-31 August	36th Operational Law Seminar (5F-F47).

September 2001

5-7 September	2d Court Reporting Symposium (512-71DC6).
5-7 September	2001 USAREUR Legal Assistance CLE (5F-F23E).
10-14 September	2001 USAREUR Administrative Law CLE (5F-F24E).
10-21 September	16th Criminal Law Advocacy Course (5F-F34).
17-21 September	49th Legal Assistance Course (5F-F23).
18 September-12 October	156th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
24-25 September	32d Methods of Instruction

Course (Phase II) (5F-F70).

October 2001

1-5 October	2001 JAG Annual CLE Workshop (5F-JAG).
1 October-20 November	6th Court Reporter Course (512-71DC5).
12 October-21 December	156th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
15-19 October	167th Senior Officers Legal Orientation Course (5F-F1).
29 October-2 November	61st Fiscal Law Course (5F-F12).

November 2001

12-16 November	25th Criminal Law New Developments Course (5F-F35).
26-30 November	55th Federal Labor Relations Course (5F-F22).
26-30 November	168th Senior Officers Legal Orientation Course (5F-F1).
26-30 November	2001 USAREUR Operational Law CLE (5F-F47E).

December 2001

3-7 December	2001 USAREUR Criminal Law Advocacy CLE (5F-F35E).
3-7 December	2001 Government Contract Law Symposium (5F-F11).
10-14 December	5th Tax Law for Attorneys Course (5F-F28).

2002

January 2002

2-5 January	2002 Hawaii Tax CLE (5F-F28H).
7-11 January	2002 PACOM Tax CLE (5F-F28P).
7-11 January	2002 USAREUR Contract & Fiscal Law CLE (5F-F15E).
7 January-26 February	7th Court Reporter Course (512-71DC5).
8 January-1 February	157th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
15-18 January	2002 USAREUR Tax CLE (5F-F28E).
16-18 January	8th RC General Officers Legal Orientation Course (5F-F3).
20 January-1 February	2002 JAOAC (Phase II) (5F-F55).
28 January-1 February	169th Senior Officers Legal Orientation Course (5F-F1).

February 2002

1 February-12 April	157th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
4-8 February	77th Law of War Workshop (5F-F42).
4-8 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).
25 February-1 March	62d Fiscal Law Course (5F-F12).
25 February-8 March	37th Operational Law Seminar (5F-F47).

March 2002

4-8 March	63d Fiscal Law Course (5F-F12).
18-29 March	17th Criminal Law Advocacy Course (5F-F34).
25-29 March	4th Contract Litigation Course (5F-F103).
25-29 March	170th Senior Officers Legal Orientation Course (5F-F1).

April 2002

1-5 April	26th Admin Law for Military Installations Course (5F-F24).
15-19 April	4th Basics for Ethics Counselors Workshop (5F-F202).
15-19 April	13th Law for Legal NCOs Course (512-71D/20/30).

22-25 April	2002 Reserve Component Judge Advocate Workshop (5F-F56).
29 April-10 May	148th Contract Attorneys Course (5F-F10).
29 April-17 May	45th Military Judge Course (5F-F33).

May 2002

13-17 May	50th Legal Assistance Course (5F-F23).

June 2002

3-7 June	171st Senior Officers Legal Orientation Course (5F-F1).
3-14 June	7th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
3 June-12 July	9th JA Warrant Officer Basic Course (7A-550A0).
4-28 June	158th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
10-14 June	32d Staff Judge Advocate Course (5F-F52).
17-21 June	13th Senior Legal NCO Management Course (512-71D/40/50).
17-22 June	6th Chief Legal NCO Course 512-71D-CLNCO).
17-28 June	7th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
24-26 June	Career Services Directors Conference.
28 June-6 September	158th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2002

8-9 July	33d Methods of Instruction Course (Phase I) (5F-F70).
8-12 July	13th Legal Administrators Course (7A-550A1).
15 July-9 August	3d JA Warrant Officer Advanced Course (7A-550A2).
15-19 July	78th Law of War Workshop (5F-F42).
15 July-30 August	8th Court Reporter Course (512-71DC5).
29 July-9 August	149th Contract Attorneys Course (5F-F10).

August 2002

5-9 August	20th Federal Litigation Course (5F-F29).
12 August-May 2003	51st Graduate Course (5-27-C22).
19-23 August	8th Military Justice Managers Course (5F-F31).
19-30 August	38th Operational Law Seminar (5F-F47).

September 2002

4-6 September	2002 USAREUR Legal Assistance CLE (5F-F23E).
9-13 September	2002 USAREUR Administrative Law CLE (5F-F24E).
9-20 September	18th Criminal Law Advocacy Course (5F-F34).
11-13 September	3d Court Reporting Symposium (512-71DC6).
16-20 September	51st Legal Assistance Course (5F-F23).
23-24 September	33d Methods of Instruction Course (Phase II) (5F-F70).

3. Civilian-Sponsored CLE Courses

18 January ICLE	Trial Advocacy Statewide Satellite Re-Broadcast
19 January ICLE	Jury Selection & Persuasion Statewide Satellite Re-Broadcast
9 February ICLE	Motion Practice Marriott Center Hotel Atlanta, Georgia
16 February ICLE	Advocacy & Evidence Sheraton Colony Square Hotel

	Atlanta, Georgia
22 February ICLE	Electronic Discovery (PM) Atlanta, Georgia

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 July annually
New Mexico	prior to 1 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	30 June annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed by last day of birth month each year
Utah	End of two-year compliance period
Vermont	15 July annually
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt
** Military Must Declare Exemption
For addresses and detailed information, see the March 2000 issue of *The Army Lawyer.*

5. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for first submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2000***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2001 (hereafter "2001 JAOAC"). This

requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

Any judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading with a postmark or electronic transmission date-time-group ***NLT 2400, 30 November 2000***. Examinations and writing exercises will be expeditiously returned to students to allow them to meet this suspense.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be allowed to attend the 2001 JAOAC. To provide clarity, all judge advocates who are authorized to attend the 2001 JAOAC will receive written notification. Conversely, judge advocates who fail to complete Phase I correspondence courses and writing exercises by the established suspenses will receive written notification of their ineligibility to attend the 2001 JAOAC.

If you have any further questions, contact LTC Karl Goetzke, (800) 552-3978, extension 352, or e-mail Karl.Goetzke@hqda.army.mil. LTC Goetzke.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2000-2001 Academic Year)

DATE	TRAINING SITE AND HOST UNIT	AC GO/RC GO	SUBJECT	ACTION OFFICER
6-7 Jan	Long Beach, CA 63rd RSC, 78th LSO	MG Altenburg COL(P) Pietsch	Criminal Law; International Law	POC: CPT Paul McBride (714) 229-3700 Sandiegolaw@worldnet.att.net
2-4 Feb	El Paso, TX 90th RSC, 5025th GSU	BG Romig COL(P) Walker	Civil/Military Operations; Administrative Law; Contract Law	POC: LTC(P) Harold Brown (210) 384-7320 harold.brown@usdoj.gov
2-4 Feb	Columbus, OH 9th LSO	MG Altenburg COl(P) Pietsch	Criminal Law; International Law	POC: MAJ James Schaefer (513) 946-3038 jschaefe@prosecutor.hamilton-co.org ALT: CW2 Lesa Crites (614) 898-0872 lesa@gowebway.com
10-11 Feb	Seattle, WA 70th RSC, 6th MSO	MG Huffman COL(P) Arnold	Administrative and Civil Law; Contract Law	POC: CPT Tom Molloy (206) 553-4140 thomas.p.molloy@usdoj.gov
24-25 Feb	Indianapolis, IN INARNG	BG Barnes COL(P) Arnold	Administrative and Civil Law; Domestic Operations Law; International Law	POC: LTC George Thompson (317) 247-3491 ThompsonGC@in-arng.ngb.army.mil
2-4 Mar	Colorado Springs, CO 96th RSC, NORD/USSPACECOM		Space Law; International Law; Contract Law	POC: COL Alan Sommerfeld (719) 567-9159 alan.sommerfeld@jntf.osd.mil
10-11 Mar	San Franscisco, CA 63rd RSC, 75th LSO	MG Huffman COL(P) Pietsch	RC JAG Readiness (SRP, SSCRA, Operations Law	POC: MAJ Adrian Driscoll (415) 543-4800 adriscoll@ropers.com
10-11 Mar	Washington, D.C. 10th LSO			POC: MAj Silas Deroma (202 305-0427
24-25 Mar	Charleston, SC 12th LSO	BG Barnes COL(P) Walker	Administrative and Civil Law; Domestic Operations; CLAMO; JRTC-Training; Ethics; 1-hour Professional Responsiblity	POC: COL Robert Johnson (704) 347-7800 ALT: COL David Brunjes (919) 267-2441
22-25 Apr	Charlottesville, VA OTJAG		RC Workshop	
28-29 Apr	Newport, RI 94th RSC	MG Huffman COL (P) Walker	Fiscal Law; Administrative Law	POC: MAJ Jerry Hunter (978) 796-2143 Jerry.Hunter@usarc-emh2.army.mil ALT: NCOIC-SGT Neoma Rothrock (978) 796-2143
5-6 May	Gulf Shores, AL	BG Marchand COL (P) Pietsch	Administrative and Civil Law; Environmental Law; Contract Law	POC: MAJ John Gavin (205) 795-1512 1-877-749-9063, ext. 1512 (toll-free) John.Gavin@se.usar.army.mil
18-20 May	St. Louis, MO 89th RSC, 6025th GSU 8th MSO	BG Romig COL (P) Pietsch	Legal Assistance; Military Justice	POC: LTC Bill Kumpe (314) 991-0412, ext. 1261

2. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of the TJAGSA Materials Available Through DTIC, see the September 2000 issue of *The Army Lawyer.*

3. Regulations and Pamphlets

For detailed information, see the September 2000 issue of *The Army Lawyer.*

4. Articles

The following information may be useful to judge advocates:

Robert D. Gifford, *Stepping onto the Battlefield: A Military Justice Primer for the Oklahoma Attorney,* 71 OKLA. B.J. 2479 (2000).

Eugene L. Shapiro, *Thinking the Unthinkable: Recasting the Presumption of* Edwards v. Arizona, 53 OKLA. L. REV. 11 (2000).

5. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new computers throughout the School. We are in the process of migrating to Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (804) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on the School's web page at http://www.jagcnet.arm.mil/tagjsa. Click on directory for the listings.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Legal Technology Management Office at (804) 972-6264. CW3 Tommy Worthey.

6. The Army Law Library Service

Per *Army Regulation 27-10*, paragraph 12-11, the Army Law Library Service (ALLS) Administrator, Ms. Nelda Lull, must be notified prior to 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.

Ms. Lull can be contacted at The Judge Advocate General's School, United States Army, ATTN: JAGS-CDD-ALLS, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, facsimile: (804) 972-6386, or e-mail: lullnc@hqda.army.mil.

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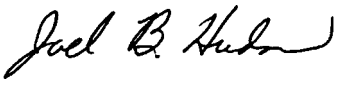

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