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Contract and Fiscal Law Developments of 1998—The Year in Review

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CONTRACT AND FISCAL LAW DEVELOPMENTS OF 1998

THE YEAR IN REVIEW

FOREWORD

This past year was interesting and somewhat surprising. While Major League sluggers Mark and Sammy were eclipsing an unsung Yankee's single-season home run record, the U.S. Army Space and Missile Defense Command became the first "paperless" contracting activity within the Department of Defense (DOD). Likewise, as one venerable Oriole shortstop (former) sat down for the first time in over 2500 games, the Army announced plans to "stand up" its own "shortstop."[1] Just as the Nevada Athletic Commission breathed new life into Mr. Tyson's boxing career, Congress infused the DOD with an extra nine billion dollars to allay military officials' concerns that force modernization pools were being drained to accommodate increased operational demands.[2]

For those drawn more to the grassroots of life and government acquisition, there was plenty to go around in 1998. For example, as Reform Era momentum has increased, reliance on task orders, electronic commerce, privatization, outsourcing, oral presentations, and other creative means of obtaining goods and services has expanded considerably.[3] All the while, the Comptroller General, boards of contract appeals, and courts have endeavored to guide us astutely along the paths the believe Congress intended us to follow. Interestingly, in one case, the Chief Judge of the Court of Federal Claims rendered what may be viewed as the purest form of poetic justice ever witnessed in modern times.[4] In another, the contractor might have been hard pressed to find any rhyme or reason to the board's decision.[5]

This article addresses these matters and more.[6]

CONTRACT FORMATION

Authority

AT&T: Hanging By A Wire?[7]

Over the past several years, we have updated a decision regarding a Navy contract with American Telephone and Telegraph Company (AT&T).[8] The Navy awarded a fixed-price contract for a ship-towed, undersea surveillance system, called the Reduced Diameter Array (RDA). The RDA would replace existing, outdated sonar technology for tracking submarines. The contract contained two options—one to develop an engineering prototype and another to purchase three RDA subsystems. AT&T pleaded with the Navy not to exercise the options. Contrary to AT&T's pleas, the Navy exercised both options. AT&T delivered the work on time, but claimed it incurred nearly sixty million dollars in extra performance costs. The Navy denied AT&T's claim for these additional performance costs.

AT&T then sued in the Court of Federal Claims (COFC). It argued that the Navy lacked authority to enter into a fixed-price contract because the annual defense appropriations act required the Secretary of the Navy to approve a systems development contract that exceeds $10 million The trial court found the con-

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1. The Shortstop Electronic Protection System establishes an electronic "force field" over troops. The system actually triggers the proximity fuses of incoming artillery, mortar, or rocket rounds prematurely and well outside the intended target area. *See U. S. Army to deploy shortstop*, 13 DEFENSE NEWS 40, Oct. 5, 1998, at 10.

2. Interestingly, the missile defense program, while not a big hit operationally, obviously impressed Congress. Of the nine billion dollar increase, missile defense received one billion dollars.

3. Even this Department has undergone a bit of reform, adopting a new title—The Contract *and Fiscal Law* Department.

4. *See infra* pt. III, sec. H, pp. 125-26 (quoting in full Neal & Co., Inc. v. United States in which the entire "decision" comes to life in the form of a poem).

5. *See infra* pt. IV, sec. F, pp. 142 (discussing Schuepferling in which board denied recovery for work performed by contractor even though the government had ordered work knowing that earlier award had been tainted by fraud).

6. Special thanks to those from outside the Department who helped make this a comprehensive, timely, and relevant article: Colonel Jonathan Kosarin; Colonel Richard Huff; Lieutenant Colonel Steve Tomanelli (U.S.A.F.) ; Lieutenant Colonel Karl Ellcessor; Lieutenant Colonel John Moran; Major M. Warner Meadows (U.S.A.F.); and Major Rick Rousseau.

7. AT&T v. United States, 136 F.3d 793 (Fed. Cir. 1998).

8. *See* Major David A. Wallace, et al., *1997 Contract Law Developments—The Year in Review*, ARMY LAW., Jan. 1998, at 10 [hereinafter *1997 Year in Review*]; Major Timothy J. Pendolino, et al., *1995 Contract Law Developments—The Year in Review*, ARMY LAW., Jan. 1996, at 21. *See also* AT& T v. United States, 32 Fed. Cl. 672 (1995), *aff'd in part*, *rev'd in part*, *remanded*, 124 F.3d 1471 (Fed. Cir. 1997).

tract void and concluded AT&T could recover under an equitable remedy (quantum meruit). On appeal, the COFC affirmed the trial court's decision that the contract was void, but disagreed with the quantum meruit relief. The court observed that quantum meruit applied only to contracts that are implied-in-law. No contract existed between AT&T and the Navy, rendering the rubric of an implied-in-fact contract inappropriate.[9] In addition, this remedy exceeded the lower court's jurisdiction. The court remanded the case and ordered judgment for the Navy.

The Navy enjoyed a short-lived victory. AT&T later filed a petition for rehearing, including a petition for rehearing en banc, with the Federal Circuit. On 9 March 1998, the court denied the petition for rehearing, accepted the petition to rehear the appeal en banc, and vacated its earlier judgment and opinion. Pending oral arguments and a final decision, the status of this case remains unclear. As one commentator noted, this case may represent a major change on the murky issue of quasi-equitable claims.[10] We will have to wait and see.

To Write or Not To Write: When A Contract May Be Implied-In-Fact

In 1997, several subcontractors attempted to recover under an implied-in-fact[11] contract theory.[12] Throughout 1998, the courts continued to review when a contractor may show that a contract is implied-in-fact. Two interesting cases with different results are *PacOrd v. United States*[13] and *Kenney v. United States*.[14]In *PacOrd,* the Navy entered into several contracts for ship repair with A&E Industries (A&E). The Navy contracting officer was concerned that A&E might have trouble hiring subcontractors because it historically had not paid them. The Navy contracting officer contacted PacOrd and orally guaranteed payment if it agreed to work as a subcontractor on the A&E ship repair contract. Relying on this promise, PacOrd entered into a subcontract with A&E and completed its work on time. The Navy paid A&E, but A&E failed to pay PacOrd over $550,000 owed on the contract for its work.

PacOrd sued A&E and the government in federal district court. After A&E filed for bankruptcy, barring suit against it, the government then filed a motion for summary judgment, which the district court granted. The court concluded that the government is not bound by an oral or implied-in-fact contract because the Federal Acquisition Regulation (FAR) requires government contracts to be in writing.[15] PacOrd appealed this decision. Before the Ninth Circuit, PacOrd asserted that it entered into an oral, or implied-in-fact, contract with the Navy when the Navy agreed to guarantee payment from A&E. Conversely, the government argued that there was no exception to the FAR writing requirement.[16] A divided Ninth Circuit disagreed with the government.

The court tied its decision to prior case law. The court recognized that the FAR requires a contracting officer to meet all necessary requirements before entering into a contract, typically reduced to writing.[17] The court also observed that courts have enforced previous implied-in-fact contracts with the government despite the statutory or regulatory writing requirement. Relying on *Narva Harris Construction Corp. v. United States,*[18] the Ninth Circuit held that PacOrd should be allowed to establish at trial the existence of an implied-in-fact contract. If successful, PacOrd would be entitled to recover despite the FAR requirement that the contract must be in writing.[19] The court reversed and remanded the case to the district court.[20]

Conversely, the court in *Kenney v. United States* concluded the contractor failed to show a promise between the parties that established an implied-in-fact contract. Kenney developed and provided human resources training. In early 1992, a Navy employee from the Naval Weapons Station in Concord, California [hereinafter Concord Station] contacted Kenney to ask about the firm providing supervisory training for Navy employees. For several months, the parties negotiated over the Navy's requirements for the training. In September 1992, however, Concord Station underwent a change in command. The new command reevaluated the need for the supervisory training during the next summer. Even after the parties resumed negotiations, however, the Navy notified Kenney that it did not want

9. *AT&T,* 124 F.3d at 1479.

10. Brad Fagg, *AT&T v. United States: New Directions for Contract Illegality and Quasi-Equitable Claims?*, 32 THE PROCUREMENT LAW. 1, 33 (Winter 1997).

11. An implied in fact contract is a mutually binding agreement inferred from the conduct of the parties. It has the same elements as an express contract. RALPH C. NASH, JR. ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK 289 (2d ed. 1998).

12. *1997 Year in Review, supra* note 8, at 12-13.

13. 139 F.3d 1320 (9th Cir. 1998).

14. 41 Fed. Cl. 353 (1998).

15. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 2.101 (June 1997) [hereinafter FAR]. This section of the FAR defines "contracts" as including "all types of commitments that obligate the [g]overnment to an expenditure of appropriate funds and that, except as otherwise authorized, are in writing."

16. *PacOrd, Inc.*, 139 F.3d at 1322.

17. FAR, *supra* note 15, at 1.602-1(b).

the training sessions. The Navy later denied Kenney's claim for $26,000. Kenney sued in the COFC.

Kenney argued that its negotiations with the Navy created an implied-in-fact contract for training services, even though neither side signed a written document. In response, the government filed a motion for summary judgment. In granting the government's motion, the court ruled that Kenney failed to show any evidence of an implied-in-fact contract with the Navy. At most, the court found the parties negotiated over course content, dates, and price. Absent any promise from the government, the court concluded that the parties merely discussed the possibility of providing training.[21]

Contractor Jeopardy: Authority Has Limits!

In *Kenney*, the court also noted that the Navy negotiators lacked actual authority to bind the government in contract with Kenney.[22] The court analogized the facts to those in *Harbert/Lummus Agrifuels Project v. United States*.[23] Both cases caution that contractors must know the limits of a government employee's authority to contract.

In *Harbert/Lummus*, a construction contractor (Harbert/Lummus) worked for an energy company (Agrifuels) to build an ethanol plant. Agrifuels and the Department of Energy (DOE) had an agreement under a DOE loan guarantee program. Harbert/Lummus, however, had privity of contract only with Agrifuels under the plant construction contract. Both the loan agreement and construction contract called for a twenty-one month payment schedule. The construction contract rewarded Harbert/Lummus if it completed the work early.

During construction, Harbert/Lummus discovered that it was not receiving timely payments and asked for an accelerated payment schedule. At a meeting on this topic, a senior DOE official, who lacked contracting authority, told Harbert/Lummus that the DOE was "committed to funding the project to completion" and would pay when Harbert/Lummus completed the plant.[24] The contracting officer at the meeting, who had contracting authority, said nothing. As construction neared completion, Agrifuels suffered financial problems, and the DOE stopped funding the project. Because it did not get paid, Harbert/Lummus sued the government for breach of contract. The trial court ruled that the government entered into an oral contract with Harbert/Lummus to guarantee payment in exchange for its continued work on the plant.

18. 574 F.2d 508 (Ct. Cl. 1978). In *Narva Harris*, a government representative encouraged a contractor to submit a low bid to get a project started. The government representative assured the contractor that it would adjust the cost figures to reflect actual costs. Relying on these assurances, the contractor completed the work. The government, however, failed to adjust the figures, and the contractor sued. The government argued that no contract existed because it was not in writing. Although conceding that a statute may preempt enforcing an express oral contract, the *Narva Harris* court noted that courts have allowed recovery for implied-in-fact contracts. The court reasoned as follows:

> The failure, for whatever reason, of an attempt at an express contract be it written or oral, is not enough, in itself, to deprive a party of a recovery for breach where sufficient additional facts exist for the court to infer the "meeting of the minds" necessary to separate an implied-in-fact from a pure implied-in-law contract.

Id. at 511.

19. *PacOrd, Inc.*, 139 F.3d at 1323.

20. *Id*.

21. Kenney v. United States, 41 Fed. Cl. 353, 359 (1998).

22. *Id*. at 360.

23. 142 F.3d 429 (Fed. Cir. 1998).

24. *Id*. at 1431.

The Federal Circuit reversed on two grounds. First, the court held that the contracting officer had neither actual nor implied authority to enter into an oral contract to guarantee funding of the ethanol plant. Instead, the contracting officer's warrant required his written approval of all actions he entered into for the DOE.[25] Absent this evidence, the court concluded that the contracting officer could not bind the government.[26] Second, the court held that the contracting officer did not ratify the oral contract, even if he had the necessary authority. According to the court, the contractor established only that the contracting officer was present at the meeting when the DOE made the oral "offer" to the contractor. The contractor, however, failed to show that the contracting officer heard the "offer" and thus had actual or constructive knowledge. Absent knowledge and a "demonstrated acceptance" of the oral "offer," the court refused to find that the contracting officer ratified it through his silence.[27]

According to commentator Ralph C. Nash, this case suggests that contractors must aggressively find out the limits of the contracting officer's authority or risk damage to their "financial health."[28]

Competition

Army and Air Force Chastised for Violating the Competition in Contracting Act (CICA)[29]

In *Valenzuela Engineering, Inc.*,[30] the General Accounting Office (GAO) dismissed Valenzuela's protest as untimely. The GAO, however, took an unusual step. The GAO followed-up by sending letters to the Acting Secretaries of the Army and the Air Force to bring certain matters regarding Valenzuela's protest to their attention.

Valenzuela's protest involved an operation and maintenance (O&M) services contract at the Mike O'Callaghan Federal Hospital at Nellis Air Force Base (AFB), Nevada. In March 1996, the Air Force contracted with Valenzuela for these services pursuant to section 8(a) of the Small Business Act.[31]

The Valenzuela contract originally contemplated a base year and four option years. In May 1997, however, the Army Engineering and Support Center (CEHNC) in Huntsville, Alabama, awarded two broadly conceived indefinite-delivery/indefinite-quantity (ID/IQ) contracts to J&J Maintenance, Inc. and Syska & Hennessy.[32] These contracts did not identify specific facilities or locations. Instead, they required the contractor to perform various O&M-type services at "government facilities such as but not limited to medical, non-medical, training, administrative, plants, labs and storage facilities."[33] After the Army awarded these contracts, the Air Force decided to issue an Economy Act order[34] for the O&M services at Nellis AFB rather than exercise its option under the Valenzuela contract.[35]

The GAO sent letters to the Acting Secretaries of the Army and the Air Force to express certain concerns. In its letter to the

25. *Id*. at 1432. The contracting officer's warrant stated, in part:

> [The CO] is hereby delegated the authority . . . approve, execute, enter into, modify, administer, closeout, terminate and take any other necessary and appropriate action . . . behalf of the Department of Energy . . . . *However, a separate prior written approval of any such action must be given by or concurred in by [the CO] to accompany the action*.

Id. (emphasis added).

26. *Id*. at 1433. In its analysis, the court cited two established rules governing authority to contract. First, the government is not bound by the acts of its agents exceeding the scope of their actual authority. Second, contractors bear the burden of knowing the authority of those agents. *Id*. at 1432 (citing Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947)).

27. *Id*. at 1433-34 (citing EWG Assoc. Ltd. v. United States, 231 Ct. Cl. 1028 (1982)).

28. Ralph C. Nash & John Cibinic, *Contracting Authority of Government Employees: Handle With Care!*, 12 The Nash & Cibinic Rep. No. 50, 141 (Sept. 1998).

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

30. B-277979, Jan. 26, 1998, 98-1 CPD ¶ 51.

31. Section 8(a) of the Small Business Act permits the Small Business Administration (SBA) to contract with a federal agency, and then subcontract with a socially and economically disadvantaged small business. 15 U.S.C.A. § 637(a) (West 1998).

32. *Valenzuela Eng'g, Inc.*, 98-1 CPD ¶ 51 at 1. J&J Maintenance, Inc., and Syska & Hennessy are both large businesses. *Id*.

33. *Id.* The CEHNC originally limited the potential facilities covered by the solicitation to facilities within the continental United States, Hawaii, and Alaska; however, the CEHNC eventually expanded the solicitation to cover facilities world-wide. *Id*.

34. 31 U.S.C.A. § 1535 (West 1998).

35. *Valenzuela Eng'g, Inc.*, 98-1 CPD ¶ 51 at 2.

Army, the GAO indicated that the statement of work for the CEHNC contracts was "impermissibly broad" because it encompassed facilities throughout the world without limitation.[36] The GAO then concluded that this "all-encompassing work statement" failed to give potential offerors reasonable notice of the contract scope. Therefore, the GAO concluded that the CEHNC contracts violated the CICA.[37]

Similarly, in its letter to the Air Force, the GAO concluded that the Air Force had violated various statutory and regulatory provisions. Specifically, the GAO concluded that the Air Force had violated: (1) FAR 19.202-1(e)[38] by failing to advise the Small Business Administration (SBA) of its plan to remove the Nellis AFB acquisition from the small business program; (2) FAR 19.501(c)[39] and 19.502-2[40] by failing to consider setting the Nellis AFB acquisition aside for small business; and (3) the CICA by procuring the O&M services at Nellis AFB under one of the CEHNC contracts.[41]

Beware of Out-of-Scope Modifications

In 1998, the GAO and the COFC sustained an inordinately large number of protests that challenged out-of-scope modifications.[42] For example, in *Sprint Communications Co.*,[43] the GAO found that the Defense Information Systems Agency (DISA) violated the CICA by modifying a contract for bandwidth management and switching services to include asynchronous transfer mode (ATM)[44] services.

In August 1996, the DISA awarded MCI Telecommunications Corp. (MCI) the DISN Switched/Bandwidth Manager Services Continental United States (CONUS) (DS/BMS-C) contract.[45] This contract required MCI to provide various bandwidth management[46] and switching[47] services for the Defense Information System Network (DISN); however, it specifically, however, exempted MCI from the requirement to provide network access or backbone transmission[48] services, because the DISA planned to award another contract for these services.[49]

In May 1997, the DOD TRICARE Information Management Program asked the DISA to provide it with a high bandwidth telecommunications network. The DISA agreed to provide a network using ATM services; however, the DTS-C contractor could not install the required transmission backbone until June 1998.[50] As a result, the DISA decided to modify the DS/BMS-

36. *Id*. at 5.

37. *Id*.

38. FAR, *supra* note 15, at 19.202-1(e). FAR 19.202-1(e) requires the contracting officer to provide the SBA with a copy of the proposed acquisition package 30 days before the issuance of the solicitation under certain specified circumstances. *Id*.

39. *Id.* at 19.501(c). FAR 19.501(c) requires contracting officers to review acquisitions for possible set-aside to small businesses. *Id*.

40. *Id.* at 19.502-2. FAR 19.502-2 automatically reserves acquisitions greater than $2,500, but less than $100,000 for small businesses. It also requires the contracting officer to set aside acquisitions greater than $100,000 if the contracting officer reasonably expects to receive offers from at least two responsible small businesses and the contracting officer can award the contract based on fair market prices. *Id*.

41. The CICA prohibits an agency from obtaining goods or services from another agency unless the other agency fully complies with the CICA when it procures the goods or services required to fulfill the first agency's order. 10 U.S.C.A. § 2304(f)(5)(B) (West 1998).

42. *See, e.g.*, CCL, Inc. v. United States, 39 Fed. Cl. 780 (1997) (holding that a modification adding 10 Defense MegaCenters was outside the scope of a contract to consolidate 44 Air Force Logistics Command computer facilities into six information processing centers); Ervin & Assocs., B-278850, Mar. 23, 1998, 98-1 CPD ¶ 89 (holding that a task order to support the Housing and Urban Development's (HUD) Portfolio Reengineering/Mark-to-Market Demonstration Program was outside the scope of a contract for accounting support services); MCI Telecomm. Corp., B-276659.2, Sept. 29, 1997, 97-2 CPD ¶ 90 (holding that a modification permitting a contractor to design, operate, and maintain custom dedicated networks for government agencies was outside the scope of a contract for domestic inter-city telecommunications services).

43. B-278407.2, Feb. 13, 1998, 98-1 CPD ¶ 60.

44. *Id.* at 1. An ATM is a "high-speed, packet-like switching and multiplexing technique which simultaneously transfers voice, data, and video over the same circuits at far higher speeds than other existing technology." *Id.* at 3 n.5.

45. *Id*.

46. *Id*. "Bandwidth management" services involve linking transmission lines or facilities within a telecommunications network. *Id*. at 3 n.2.

47. *Id*. "Switching" services involves using a computer system to route telecommunications traffic to the desired location. *Id*. at 2 n.1.

48. *Id.* at 2. "Backbone transmission" is "the wideband network level transport that will connect the [bandwidth managers] provided under [the DS/BMS-C contract]." *Id.*

49. *Id*. The DS/BMS-C contract was one of three contracts DISA awarded for telecommunications services. The purpose of the DS/BMS-C contract was to provide "switched and bandwidth services in support of DISN CONUS"; the purpose of the DTS-C contract was to provide "access between DOD facilities and the DISN CONUS network"; and the purpose of the third contract was to provide video services. *Id*. at 2-3, 8 n.3.

C contract to allow MCI to provide the ATM services for TRICARE.

The modification allowed MCI to provide transmission services in addition to bandwidth management and switching services. The DISA argued that an "otherwise stipulated" clause in the DS/BMS-C contract allowed it to add these transmission services to the contract.[51] However, the GAO focused on the type of work the DS/BMS-C contract originally contemplated.[52] The DISA never intended the DS/BMS-C contractor to become the primary provider for transmission services.[53] Indeed, the DISA segregated these services intentionally, and awarded them to a different contractor under an entirely different contract. As a result, the GAO recommended that the DISA terminate the transmission services it added to the DS/BMS-C contract.[54]

Veterans Affairs' Restriction on Dosage Strength Creates Headache

In *Hoechst Marion Roussel, Inc.*,[55] the Department of Veterans Affairs (VA) issued a request for proposals (RFP) for Diltiazem.[56] Unfortunately, there were at least three problems with the solicitation. First, the solicitation stated that the VA would only evaluate 120, 180, and 240 milligram (mg.) dosage strengths, even though Diltiazem is also commercially available in 300 and 360 mg. dosage strengths and the VA had a known requirement for the higher strengths.[57] Second, the solicitation encouraged offerors to include the higher dosage strengths in their offers, stating that: "[a]ny additional strength may be added after award by mutual agreement through negotiation between the contractor and the government. Furthermore, any commercially offered packaging should be made available to the government after award."[58] Finally, the solicitation overstated the VA's need for the 180 mg. dosage strength by approximately 566,000 dosages.[59]

The GAO sustained Hoechst's protest.[60] The VA attempted to justify its actions by arguing that its approach would increase competition and decrease cost.[61] The GAO, however, found that the VA's decision to restrict the solicitation to the lower dosage strengths "lacked any basis in the agency's needs."[62] Additionally, the VA's approach might actually cost it more, because higher dosage strengths generally cost less than lower dosage strengths. Finally, the GAO found that the VA intended

50. *Id.* at 3. The DISA awarded the DTS-C contract to AT&T in January 1997. At that time, DISA expected AT&T to provide the transmission for the DISN, including the transmission for ATM services. *Id.*

51. *Id.* at 7. The disputed clause stated:

> This contract will not require the contractor to provide either access to the network or backbone transmission services. All access and backbone transmission services, including those that are need to connect with existing services during transition of full services between end-user [service delivery points], will be provided by the government under separate contract unless otherwise stipulated.

Id.

52. *Id.* at 7-8. The GAO also looked at the scope and potential cost of the modification, concluding that the broad scope of the modification could have a significant impact on the cost of the DS/BMS-C contract. *Id.* at 10-11.

53. *Id.* at 8. The DS/BMS-C contract did require MCI to provide some transmission services; however, they were minimal. *Id.* at 6-8.

54. *Id.* at 11.

55. B-279073, May 4, 1998, 98-1 CPD ¶ 127.

56. *Id.* at 1. Diltiazem is a calcium channel blocker used to treat hypertension. *Id.*

57. *Id.* at 1-2.

58. *Id.* at 2.

59. *Id.* at 3. The VA had a known requirement for approximately 1.7 million dosages of the 300 mg. dosage strength. Rather than include the 300 mg. dosage strength in the solicitation, however, the VA increased the 180 mg. dosage strength by 3.4 million dosages. This overstated the VA's need by 60 mg. per dosage, or 566,666 total dosages. *Id.* at 4 n.2.

60. *Id. See* Chadwick-Helmuth Co., Inc., B-279621.2, 1998 WL 482977 (Comp. Gen. Aug. 17, 1998) (holding that a requirement to procure a commercial off-the-shelf (COTS) automated test instrument capable of operating existing program-specific software is unduly restrictive). *Cf.* Caswell Int'l Corp., B-278103, Dec. 29, 1997, 98-1 CPD ¶ 6 (holding that a requirement to obtain interoperable equipment to ensure operational safety and military readiness is reasonably related to agency's needs).

61. *Hoeshst*, 98-1 CPD ¶ 127 at 2. The VA based its argument on the fact that three companies manufactured the lower dosage strengths, while only one company manufactured all five. *Id.*

62. *Id.* at 4. The GAO noted that the VA could increase competition by simply allowing offerors to propose either a single dosage or a combination of dosages to meet the higher dosage strength requirements. *Id.*

to modify the contract (to add higher dosage strengths) after award.[63]

Defense Logistics Agency (DLA) Permitted to Exercise Option at Lower Price Where Initial Contract Awarded on Sole-Source Basis

In 1996, the DLA awarded Teledyne Brown Engineering (TBE) a sole-source contract for tents.[64] In awarding this contract, the DLA relied on TBE's status as a mobilization base producer.[65]

The contract included both a base year and an option year. During the base year, the DLA issued two delivery orders at the unit price specified in the contract ($9700). Teledyne Brown Engineering, however, offered the DLA a reduced unit price in March 1997. As a result, the DLA was able to issue the first delivery order for the option year at a reduced price.[66] Approximately one year later, the DLA contacted TBE to determine whether it would offer the same reduced price for a new delivery order. This time, TBE quoted a price of $8900 for 305 tents. In response, the DLA issued the new delivery order in April 1998. Outdoor Venture Corp. (OVC) protested this decision.

Relying on *Magnavox Electronic Systems Co.*[67] and *Varian Associates, Inc.*,[68] OVC alleged that the DLA's discussions with TBE in April 1998 constituted improper post-award negotiations. In addition, OVC alleged that the DLA was required to compete the option quantity once it determined that a lower price was available.[69] The GAO responded by noting that a military agency's need to maintain a source of supply for industrial mobilization purposes outweighs the need to maximize competition.[70] The GAO then distinguished *Magnavox Electronic Systems Co.*[71] Unlike *Magnavox*, this was a sole-source procurement.[72] Therefore, as the sole-source justification was still valid when the DLA exercised the option, it did not have to compete the option quantity.[73]

The GAO Defines "Expert"; Rules Expert Exception Inapplicable

In November 1997, the Air Force awarded omnibus support contracts to SEMCOR, Inc. (SEMCOR), HJ Ford Associates, Inc. (HJ Ford), and three other companies.[74] These contracts were ID/IQ contracts for various support services, including litigation support. At the time it awarded these contracts, the Air Force planned to use them for litigation support in *Rockwell International Corp. v. United States*.[75]

Prior to 1997, Innovative Technologies Corp. (ITC) provided integrated engineering and technical management support services to the Contract Issues Resolution Team (CIRT)

63. *Id.* at 5. The GAO stated that "[a]n agency may not properly competitively award a contract with the intention of materially modifying it after award; such a modification would be tantamount to an improper sole-source award." *Id.*

64. Outdoor Venture Corp., B-279777, July 17, 1998, 98-2 ¶ 27.

65. 10 U.S.C.A. § 2304(c)(3) (West 1998). This statutory provision allows the government to use other than full and open competitive procedures "to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization." *Id.*

66. *Outdoor Venture Corp*., 98-2 CPD ¶ 27 at 1-2. The unit price for the option year quantity was originally $9600. *Id*.

67. B-231795, Nov. 2, 1988, 88-2 CPD ¶ 431. In *Magnavox Electronic Sys. Co.*, the GAO did not "necessarily" object to the Navy's attempts to negotiate a lower option price for sonobuoys. Instead, the GAO sustained the protest because the Navy probably could have gotten the additional quantity at an even lower price by competing the requirement.

68. B-208281, Feb. 16, 1983, 83-1 CPD ¶ 160, *aff'd*, Dep't of the Army – Recon., B-208281.2, July 12, 1983, 83-2 CPD ¶ 78. In *Varian Associates., Inc.*, the GAO sustained a protest after the Army negotiated a lower option price for Klystron Tubes. The GAO viewed the Army's actions as an unauthorized sole-source procurement, rather than the exercise of a legitimate option, because the Army varied the terms of the option by decreasing the option price.

69. *Outdoor Venture Corp*., 98-2 CPD ¶ 27 at 2. *See* FAR, *supra* note 15, at 17.207(c)(3) (noting that the contracting officer can only exercise an option after determining that "[t]he exercise of the option is the most advantageous method of fulfilling the government's need, price and other factors . . . considered").

70. *Outdoor Venture Corp*., 98-2 CPD ¶ 27 at 2. The need to maintain a source of supply for industrial mobilization purposes also justifies the payment of a price premium. *Id*.

71. *Id*. The GAO also indicated that *Varian Associates. Inc.*, was inapplicable in this case; however, the GAO did not specifically distinguish the facts of the case. *Id.*

72. *Id.* Like the procurement in *Outdoor Venture Corp.*, the procurement in *Magnavox Electronic Sys. Co.* was limited to industrial mobilization base producers. *Id.*

73. *Id*.

74. SEMCOR, Inc., B-279794, 1998 WL 482973 (Comp. Gen. July 23, 1998).

75. No. 95-425C (Fed. Cl. filed June 26, 1995). This case involves a $547.45 million claim against the Air Force on a 1987 contract to modify the C-130 transport aircraft to a gunship configuration. *Id*. at *1.

that was formed to analyze Rockwell's claim. Pursuant to this contract, the Air Force tasked ITC to:

> [I]dentify, collect, document, and file all program-related documents; perform in-depth technical analysis of the issues and a detailed cost/price analysis of the claimed damages; support the development and establishment of [court-ordered] database systems; and support Department of Justice (DOJ) attorneys in litigation activities such as depositions, interrogatories, interview, production of documents and pre-trial activities.[76]

In March 1998, ITC advised the Air Force that it planned to transfer certain key personnel to other ITC contracts if the Air Force used the omnibus support contracts for Rockwell.[77] In response, the Air Force awarded ITC a sole-source contract based on the "expert" exception to the full and open competition requirement.[78] The Air Force justified this award based on the "special and current knowledge of the claim" that ITC's personnel had acquired during the previous three years.[79] SEMCOR and HJ Ford protested this award.

The GAO began its analysis by focusing on the meaning of the term "expert." Noting that the CICA does not define the term, the GAO examined certain "common elements" of the definitions proffered by the parties.[80] The GAO then concluded that "[e]xperts may be individuals who possess special skill or knowledge of a particular subject, that may be combined with experience, which enables them to provide opinions, information, advice, or recommendations to those who call upon them."[81]

Based on this definition, the GAO determined that the Air Force's justification and approval (J&A) did not support finding that ITC's personnel were "experts."[82] Indeed, the GAO noted that most of ITC's personnel were performing tasks that any competent legal staff could accomplish.[83] The GAO nevertheless denied the protest. Noting that "the Air Force had a crit-

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76. *SEMCOR, Inc.*, 1998 WL 482973, at *2. The Air Force issued this task order in response to a court order that required the parties to image documents into various electronic databases. *Id.*

77. *Id.* Innovative Technologies Corp. sent this letter to the Air Force two days after the GAO denied its protest of the omnibus support contracts. *See* Modern Tech. Corp., B-278695, Mar. 4, 1998, 98-1 CPD ¶ 81. At this point, the government had approximately three months before ITC's contract was due to expire, nine months before the discovery period in the *Rockwell* case was due to end, and nineteen months before the trial was due to begin. *SEMCOR, Inc.*, 1998 WL 482973, at *2.

78. The CICA permits the government to use noncompetitive procedures when:

> [I]t is necessary to award the contract to a particular source or sources in order . . . to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the federal government, in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or to procure the services of an expert . . . for use in any part of an a lternative dispute resolution . . . process, whether or not the expert is expected to testify.

10 U.S.C.A. § 2304(c)(3)(C) (West 1998).

79. *SEMCOR, Inc.*, 1998 WL 482973, at *3. The Air Force's J&A stated, in part, that

> [ITC] personnel currently providing support to the CIRT have the corporate knowledge required to enable [the government] to continue the ongoing litigation effort for the upcoming trial . . . . They have in-depth knowledge of this highly complex claim . . . . No amount of training can replace this knowledge which gives [ITC] the unique ability to quickly and accurately retrieve information required to respond to discovery requests
>
> . . . .
>
> There is no guarantee that the critical personnel currently working for ITC on the CIRT will become available for the omnibus contractors to hire . . . . Even if the majority of the personnel were hired by the omnibus contractors, loss of even a few at this critical state of the discovery process would cause a major impact . . . . Any disruption at this point in discovery will present grave problems for the [DOJ] strategy, defense, and ability to respond to the Orders of the Court.

Id.

80. *Id.* at *6. SEMCOR asserted that an expert was "an individual possessing special skills or knowledge competent to offer opinion testimony in court;" HJ Ford asserted that an expert was "a witness qualified as an expert by knowledge, skill, experience, training, or education;" and the Air Force asserted that an expert was a person "possessing special, current knowledge or skill that may be combined with extensive operational experience [to enable] them to provide information, opinions, advice, or recommendations to enhance understanding of complex issues or to improve the quality and timeliness of policy development or decisionmaking." *Id.*

81. *Id.* at *7.

82. *Id.* at *8. The GAO stated that "the mere fact that one gains knowledge during one's employment does not make that knowledge 'special.'" *Id.* at *7.

83. *Id.* The GAO conceded that some of ITC's engineering and manufacturing personnel may possess the necessary knowledge and skills to qualify as experts; however, the GAO stated that the Air Force's J&A and post-protest submissions were not sufficient to support this conclusion. *Id.* at *8.

ical, time-sensitive requirement for litigation support due to an aggressive, court-imposed discovery schedule in a complex, high-dollar claim,"[84] the GAO concluded that 10 U.S.C.A. § 2304(c)(1)[85] covered the Air Force's actions. Therefore, the sole-source award to ITC was proper.[86]

National Guard Bureau Did Not Improperly Bundle Requirements

In *Malone Construction Co.*,[87] the GAO denied a protest challenging the National Guard Bureau's decision to "bundle" three construction projects at Scott AFB, Illinois, into a single contract.[88] The protester alleged that consolidating the projects would exclude small businesses. The National Guard Bureau defended its decision based on the need to perform multiple construction projects on a limited site during a short period of time.

In 1995, the Base Relocation and Closure Commission recommended that the National Guard Bureau relocate the 126th Air Refueling Wing from the O'Hare Air Reserve Station in Chicago, Illinois, to Scott AFB.[89] To accomplish this before the July 1999 deadline, the National Guard Bureau had to complete a total of seventeen construction projects in the same general location during approximately the same period of time.[90] As a result, the National Guard Bureau anticipated significant access and storage problems.[91]

In denying the protest, the GAO noted the "special conditions" that were present at the site. The GAO then stated: "[w]e think that given the limited storage area, the access difficulties, and the schedule constraints, the agency reasonably concluded that having only one contractor do all three projects is required to meet the agency's needs."[92] Accordingly, the GAO concluded that the National Guard Bureau's decision to "bundle" the three projects into a single contract was permissible.[93]

Excess Pages Equal Disparate Treatment

In *Electronic Design, Inc.*,[94] the Navy issued a RFP for integrated ship control systems upgrades for twenty-six CG 47 Ticonderoga class ships. The solicitation—which contemplated award to the offeror whose proposal was the most advantageous to the government—contained the following proposal preparation instructions: "The contractor shall submit a proposal that is no more than three binders. Technical and management shall not exceed one-sided 150 pages, no less than twelve-point font, and no fold out pages."[95]

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84. *Id*. at *9.

85. The CICA also permits the government to use noncompetitive procedures when "[T]he property or services needed by the agency are available from only one responsible source or only from a limited number of responsible sources and no other type of property or services will satisfy the needs of the agency." 10 U.S.C.A. § 2304(c)(1) (West 1998).

86. *SEMCOR, Inc.*, 1998 WL 482973, at *9. The GAO noted that an agency must normally publish a notice in the Commerce Business Daily (CBD) if it plans to use 10 U.S.C.A. § 2304(c)(1) to justify a sole-source award; however, the GAO determined that the Air Force's failure to do so in this case was excusable because the purpose of the mandatory notice was served. *Id*.

87. B-280021, 1998 WL 486881 (Comp. Gen. Aug. 18, 1998).

88. *Id*. at *1. The three projects were (1) alteration of an aircraft maintenance hangar, (2) construction of general purpose aircraft maintenance and engine inspection and repair shops, and (3) construction of a fuel cell/corrosion control hangar. *Id*.

89. *Id*.

90. *Id*. The sites for the three projects at issue in this case are within fifty feet of each other. *Id.*

91. *Id.* The contractor will have to pass through the work site to reach most of the available storage space. To compound this problem, utility and road work will periodically restrict access to the site altogether. *Id.*

92. *Id*. at *2.

93. *Id*. *See* National Airmotive Corp., B-280194, 1998 WL 637016 (Comp. Gen. Sept. 4, 1998) (holding that the bundling of the depot-level maintenance and repair of three aircraft engines into a single contract was reasonable given the degraded war readiness posture of the engines and the risk that awarding the contract to multiple contractors would further degrade this posture by increasing the inefficiencies and decreasing productivity); Aalco Forwarding, Inc., B-277241.12, Dec. 29, 1997, 97-2 CPD ¶ 175 (holding that a requirement that moving companies serve an entire traffic channel and provide both household goods and unaccompanied baggage transportation services was reasonable given the agency's need to reduce administrative burdens and improve reliability and quality of service). *But see* Pemco Aeroplex, Inc., B-280397, 1998 WL 667596 (Comp. Gen. Sept. 25, 1998) (holding that the Air Force improperly bundled the following work at the Sacramento Air Logistics Center at McClellan Air Force Base: (1) programmed depot maintenance for the KC-135 aircraft, (2) inspections and painting of the A-10 aircraft, and (3) overhaul and repair of hydraulic components, electrical accessories, and flight instruments and electronics).

94. B-279662.2, 1998 WL 600991 (Comp. Gen. Aug. 31, 1998).

95. *Id*. at *3.

The Navy received initial proposals from four offerors, including Electronic Design, Inc. (EDI) and Litton Integrated Systems Corp. (Litton). Electronic Design, Inc.'s initial proposal, including attachments, consisted of 136 pages. In contrast, Litton's initial proposal consisted of three binders and a CD-ROM with video. The first binder contained Litton's 149-page "Management/Technical Proposal." The second and third binders contained 1700 pages of attachments, including fifty-seven fold-out pages and a package of over-sized drawings.

By a letter dated 20 March 1998, the Navy provided written questions to the offerors and requested written responses.[96] In addition, the Navy advised offerors that they could present any information they wanted to at the discussions.[97] Litton responded by submitting a thirty-five page letter. This letter: (1) answered the Navy's questions, (2) requested the Navy to consider its entire initial proposal,[98] and (3) included two new attachments totaling eighty pages.

Following discussions and the submission of final proposals, the Navy decided to award the contract to Litton. Electronic Design Inc. protested. One of the issues EDI raised in its protest was the Navy's unequal treatment of the offerors' proposals.[99] Electronic Design, Inc,. alleged that the Navy improperly permitted Litton to submit materials in excess of the page limit specified in the solicitation.

In response, the GAO said that the problem was not that Litton submitted more than 150 material pages during discussions. Rather, the problem was that the Navy failed to tell the other offerors that it would consider what amounted to new initial proposals with no page limit. In doing so, "[t]he Navy allowed Litton to leave the starting gate well ahead of the other offerors and never gave the other offerors sufficient information or a comparable opportunity which might have allowed them to catch up and compete under the same conditions as Litton."[100] In other words, the Navy failed to level the playing field before the discussions and receipt of final proposals. As a result, the GAO sustained EDI's protest.[101]

Geographic Scope that Favors Incumbent Not Improper

In *Winstar Communications, Inc. v. United States,*[102] the General Services Administration (GSA) issued a RFP for local telecommunications services for federal agencies in and around New York City, New York.[103] The solicitation contemplated the award of a single ID/IQ contract for the five boroughs of New York and various suburban locations in New York and New Jersey. Because this covered such a large geographic area, the protester alleged that the solicitation favored the incumbent.[104] As a result, the protester alleged that the solicitation unduly restricted competition in violation of the CICA.[105]

The COFC noted that "an agency is not required to neutralize the competitive advantages some potential offerors enjoy simply because of their own particular circumstances."[106] The COFC then noted that the solicitation does not preclude anyone from competing since vendors without the facilities necessary to serve the entire area can provide some services indirectly

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96. *Id*. The Navy discovered significant deficiencies and weaknesses in all four initial proposals. *Id.*

97. *Id*. The Navy's letter to Litton also stated:

> [Y]our proposal contained pages beyond the page limit and a CD with video, which was beyond the allowed material in the initial proposal, against which the competitive range determination was made. If you wish that these now be considered as a part of the material you present for discussions, please state this in writing, or submit updated materials as you see fit.

Id.

98. *Id.* at *4. Litton had previously told the Navy to disregard the two binders of attachments in response to a letter advising it that its proposal exceeded the page limit specified in the solicitation. *Id*. at *3.

99. *Id*. at *5. Electronic Design, Inc. also challenged the Navy's failure to consider cost or price properly. *Id*.

100. *Id*. at *8.

101. *Id*. *Cf.* Candle Corp. v. United States, 40 Fed. Cl. 658 (1998) (finding that the government violated the CICA by relaxing the solicitation requirements without notifying all the offerors, but denying the protest because the protester was not prejudiced by the violation).

102. 41 Fed. Cl. 748 (1998).

103. *Id*. at 752-753. This solicitation is part of a nationwide program known as the Metropolitan Area Acquisition (MAA). The MAA program is the follow-on to the current Federal Telephone System (FTS) 2000 program. *Id*.

104. *Id*. The incumbent was the only offeror with the facilities necessary to serve the entire area. *Id.*

105. *Id.* at 763. In addition to challenging the geographic scope of the contract, the protester successfully challenged the GSA's decision to award a single ID/IQ contract. *Id.*

106. *Id*.

through resale from other vendors.[107] Therefore, the COFC concluded that the contract area, which was drawn to include as many potential federal agencies in the New York City metropolitan area as possible, did not violate the CICA.[108]

Contract Types

Options

Variable Option Periods do not Restrict Competition. In *Madison Services, Inc.*,[109] the Navy issued a solicitation for a fixed-price, ID/IQ contract to maintain family housing units in the Tidewater region of Virginia. The solicitation provided for a contract with a base year plus options to extend up to sixty months. The solicitation included an agency option clause that allowed the Navy to vary the length of the option period from one to twelve months.[110]

Madison protested, alleging that the Navy's standard agency option clause unduly restricted competition. Madison claimed that indefinite option periods would make small businesses noncompetitive with large businesses. [111]

The Navy responded that its variable option provision did not unduly restrict competition. It argued that it needed the flexibility to extend the contract by periods of one to twelve months to ensure that family housing developments were continuously maintained during changing circumstances and requirements.[112]

The GAO denied Madison's protest. It found that the FAR neither prohibited variable option periods nor required the option period to be longer than one month. The GAO found that the Navy's need for flexibility of the option period justified the use of variable options. The GAO concluded that the Navy did not exceed its needs or unduly restrict competition by including the variable option provision in the solicitation.[113]

Indefinite Delivery Contracts

Contractor Awarded Damages Where Agency Failed to Update Solicitation Work Estimate. In Fairfax Opportunities Unlimited, Inc.,[114] the Department of Agriculture (USDA) issued a solicitation for a requirements contract for a variety of services. In part, the contract required Fairfax to operate a copy center and fifteen additional satellite centers.

During a scheduled pre-solicitation conference, it was apparent that the potential offerors were not comfortable with the estimated quantity. Noting that the solicitation was issued on 13 April 1994, the offerors recognized that the estimated quantity did not take into account the additional fiscal year (FY) 1994 data. The offerors asked the USDA for its historical data on the acquisition. In response, the USDA issued an amendment that provided the historical data for the month of December 1993. The agency failed to provide additional data. Additionally, the historical data, labeled as "December 1993," actually contained the figures for November 1993. The significant difference between the actual quantity usage for the two months boosted Fairfax's confidence in the agency's estimate.

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107. *Id.* at 763-64

108. *Id*. *See* Instrument Specialists, Inc., B-279714, July 14, 1998, 98-2 CPD ¶ 1 (stating that "an agency is not required to construct its procurements in a manner that neutralizes the competitive advantage that some potential offerors may have over others by virtue of their own particular circumstances where the advantages did not result from unfair action on the part of the government").

109. B-278962, Apr. 17, 1998, 98-1 CPD ¶ 113.

110. *Id*. at 1-2. The agency clause provides, in part:

> [T]he [g]overnment may extend the term of this contract for a term of one (1) to twelve (12) months by written notice to the Contractor within the performance period specified in the Schedule; provided that the government shall give the Contractor a preliminary written notice of its intent to extend before the contract expires. The preliminary notice does not commit the [g]overnment to an extension.

Id.

111. *Id.* at 2. Madison argued that

> (1) without definite option periods, small businesses like Madison will have to load all indirect costs into the base year, hence making their prices noncompetitive with large businesses that perform numerous other government contracts and can spread their overhead costs over a greater pool of work; and (2) brief, unpredictable performance periods have a greater effect on small businesses, which are less likely to be able to hire and retain a dedicated workforce under conditions of continual job instability.

Id.

112. *Id*.

113. *Id*. In addressing Madison's concerns regarding the negative impact of variable option periods on small businesses, the GAO agreed that the variable option period holds some risk for the contractor. The GAO concluded, however, that existence of some risk does not equate to unduly restrictive competition. *Id*. at 2-3.

114. AGBCA No. 96-178-1, 98-1 BCA ¶ 29,556.

During contract performance Fairfax found that the estimated quantity of six million copies was twenty percent greater than the actual number ordered by the USDA. As a result, Fairfax claimed that the estimates were prepared negligently and requested an equitable adjustment. The contracting officer denied the request, and Fairfax appealed.[115] The appeal focused on the USDA's total estimated quantity of six million copies for the period of 1 October 1994 to 30 September 1995.[116] Contract Line Item Number 1003 required potential offerors to submit a per cost price based on the government's six million estimated copies.[117] On appeal, Fairfax alleged that the USDA failed to provide realistic or valid estimates of copy requirements; the board ultimately agreed.[118]

The board concluded that the government had a duty to provide offerors its most current and reliable data.[119] According to the board, while there are risks inherent in the performance of a requirements contract, the burden shifts to the government when its estimates are grossly inadequate or prepared negligently.[120]

Army's Failure to Include Significant Factors Leads to Negligent Estimate. In *Datalect Computer Services, Ltd. v. United States*,[121] the Army awarded a fixed-price requirements contract to Datalect for the maintenance and repair of computers in Germany and Italy in February 1993.

The solicitation included an estimate of the government's requirements for the computer maintenance and repair services. The Army based its estimate on historical workload information from FY 1991, which showed an average of sixty to sixty-five service calls per day. Datalect's actual rate, however, was forty-eight percent lower than the Army's estimate. The solicitation also contained language providing that Datalect would be the exclusive contractor for maintenance and repair requirements. The contract specified that the estimates were not actual purchases, and the contractor was not entitled to a price adjustment if the Army failed to order the maximum estimated quantity. The contract did specify, however, that the Army would purchase all its requirements from the contractor.[122]

Datalect submitted a claim for an equitable adjustment. It argued that its bid price was unrealistically low because the Army failed to consider all relevant facts that could affect the Army's estimate. Specifically, Datalect claimed that the Army failed to consider: (1) troop drawdowns in Europe since 1991, (2) the purchase of new computers with extended warranties, and (3) the turn-in of outdated computer equipment. In addition, Datalect identified in-house maintenance as a factor contributing to the reduction of service calls.[123] The Army denied the claim. On appeal, Datalect alleged that the Army breached its duty to consider relevant information when it compiled the workload estimates.[124]

The Army argued that the estimate was not prepared negligently, because it based the estimates on the most recent historical data that was reasonably available at the time it issued the solicitation.[125] The Army also claimed that the contract specified (and Datalect knew) that the estimate was not a guarantee that the Army would purchase the entire quantity stated in the estimate.[126] The court ruled for Datalect, concluding that the

115. *Id*. at 146,521.

116. *Id*. at 146,516. The USDA cautioned the potential offerors that the six million copies was merely an estimate and was not a guaranteed amount. *Id*.

117. *Id*.

118. *Id*. at 146,516. On appeal, the USDA agreed that it used the historical data from FY 1993 (the most recent full fiscal year historical data it had on hand) to determine the contract's estimated quantity. *Id*.

119. *Id*. at 146,524. The board stopped short of ruling that the government's actions constituted bad faith and concluded that the government did not paint a fair picture by limiting the historical data on hand. The board ruled that the government acted negligently when it provided only one month of historical data when it actually had five months of data. *Id*.

120. *Id*. at 146,523. The board stated that the government may be liable if its estimates were prepared negligently in bad faith, or grossly inadequate when the estimate was made. *Id*.

121. 40 Fed. Cl. 28 (1997).

122. *Id*. at 30-31.

123. During oral arguments the Army stated:

> Did the government know of factors that could impact the call rate? The answer is taken as a whole, yes, the government knew there was going to be a troop drawdown. The government knew that the government was going to purchase new computers. The government knew that [Information Management Officers] were being trained to troubleshoot computers. The Army did not dispute the fact that it knew of several factors.

Id. at 36.

124. *Id*. at 36. Additionally, Datalect argued that the Army failed to order all of its actual needs by using in-house assets and by using warranties from new computer purchases to fulfill the maintenance and repair work. *Id.*

Army knew of the additional factors and that it did not consider them when determining the contract estimates.[127]

GAO Recommends Cancellation Where Solicitation Failed to Provide Realistic Quantity Estimates. In *Beldon Roofing & Remodeling Co.*,[128] the Army issued an invitation for bids (IFB) to replace roofing on buildings at Forts McPherson and Gillem. The solicitation called for a fixed-price requirements contract with one base year and two one-year options.

Although Beldon was the apparent low bidder, the Army rejected the bid as mathematically and materially unbalanced.[129] Following an award to another offeror, Beldon protested and argued that its bid was balanced. Beldon challenged the Army's methods for determining that its bid was materially unbalanced. It argued that the Army did not base the solicitation estimates on the best information available.[130]

Initially, the GAO agreed with the Army. It concluded ultimately, however, that there were substantial discrepancies between the historical information and the anticipated orders and estimates in the IFB. The GAO found that the Army could not document the development of these estimates, rendering them unrealistic and not meeting the standard under FAR 16.503(a)(1).[131] The GAO recommended that the Army cancel the solicitation because these estimates did not inform bidders of the Army's actual anticipated needs. The lack of information made it impossible for the Army to determine which bid represented the lowest cost of performance.[132]

Task Order Contracting.

Task Order Exceeded Contract Limitation. In *Comdisco, Inc.*,[133] the GAO decided that the task orders issued by the Department of Transportation (DOT) exceeded the scope of the Information Technology Omnibus Procurement (ITOP) contract. The ITOP contract was for a variety of information system security support services.

In May 1996, the DOT awarded the ITOP contract to Troy Systems. The ITOP contract contained a mandatory ceiling for the acquisition of hardware, software, and related supplies. The contract provision stated specifically that the value of hardware, software, and related supplies "shall not exceed twenty-five percent of the value of the task order."[134] The DOT subsequently awarded three task orders to Troy Systems. The task orders required Troy to provide specified replacement computer equipment and related services if an agency declared a "disaster."[135]

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125. *Id.* at 36.

126. *Id.* at 37. The requirements clause provides that

> The estimated quantities are not the total requirements of the government activity specified in the Schedule, but are estimates of requirements in excess of the quantities that the activity may itself furnish within its own capabilities. Except as this contract otherwise provides, the government shall order from the contractor all of the activity's requirements for supplies and services specified in the Schedule that exceed the quantities that the activity may itself furnish within its own capabilities.

Id. at 40.

127. *Id.* at 36. Additionally, the court found that the Army did not breach the contract by performing in-house maintenance and by using warranted services from the purchase of new computers. The court found that the in-house maintenance and the warranties did not fall within the terms of the requirements clause in the contract. It is interesting to note that the COFC denied Datalect's recovery because Datalect failed to quantify its entitlement. Specifically, the court found that Datalect could not provide adequate evidence supporting its original bid prices, the effect of government's negligent estimate on its bid, and its claimed costs. Datalect Computer Servs., Ltd. v. United States, 41 Fed. Cl. 720 (1998).

128. B-277651, Nov. 7, 1998, CPD 97-2 ¶ 131.

129. *Id. See* FAR, *supra* note 15, at 15.814(b), 52.214-19. An "unbalanced bid is a bid that states nominal or low prices for some work and enhanced prices for other work. For the bid to be deemed nonresponsive, it must be both mathematically unbalanced and materially unbalanced." NASH, *supra* note 11, at 527.

130. *Beldon*, 97-2 CPD ¶ 131 at 1-2.

131. The estimates in a requirements contract must be made in good faith and based on the best information reasonably available to ensure realistic estimates.

132. *Beldon*, 97-2 CPD ¶ 131 at 7.

133. Comdisco, Inc., B-277340, Oct. 1, 1997, 97-2 CPD ¶ 105. *See* Ervin & Assocs., Inc., B-278850, Apr. 30, 1998, 98-1 CPD ¶ 89 at 9 (holding that a task order contract may contemplate a "broad range" of services but is not totally open-ended). *See also* Valenzuela Eng'g, Inc., B-277979, Jan. 26, 1997, 98-1 CPD ¶ 51. In *Valenzuela*, the GAO denied the contractor's protest as untimely but felt strongly about the underlying substantive issue and sent letters to the Air Force and the Army secretaries. In the letter, the GAO cited a violation of the CICA of 1984, 10 U.S.C. § 2304(f)(5)(B). The Army had an ID/IQ services contract similar to the services sought by the Air Force. Rather than exercising its option with the incumbent, the Air Force decided not to exercise the option and instead acquired the services under the Army's ID/IQ contract. *Valenzuela*, 98-1 CPD ¶ 51 at 2-4. The GAO held that the extent of the work in the Army's ID/IQ contract for hospital operation and maintenance services "world-wide" was so broad that it did not reasonably describe the extent of the work needed. Thus, it did not provide potential offerors notice of the work that would be within the scope of the resulting contract. The Honorable Robert M. Walker, B-277979, Jan. 26, 1998, 98-1 CPD ¶ 51 at 3.

Comdisco protested the award of these three task orders and claimed that the task orders exceeded the twenty-five percent limitation expressed in the ITOP contract.[136] In response, the DOT argued that the task orders did not involve acquisition of hardware or software. The DOT claimed that the task orders were contingency plans or an insurance policy and not the acquisition of supplies. The GAO disagreed. It decided that the task orders involved the leasing of hardware and software and that the DOT exceeded the twenty-five percent cap stated in the contract.[137]

Guaranteed Minimum Quantity of One Does Not Equal Nominal. In *Sea-Land Service, Inc.*,[138] the Army issued a solicitation for ocean and intermodal[139] services on a worldwide basis under an ID/IQ contract. Sea-Land protested, citing numerous defects in the solicitation. Among the defects, Sea-Land noted that the solicitation stated a minimum guaranteed quantity of one container to each of the awardees under the multiple award scheme. Sea-Land argued that the amount promised was nominal; therefore, the contract lacked adequate consideration to bind the parties.[140]

The GAO disagreed with Sea-Land and held that a minimum quantity of one container per carrier is adequate consideration to bind the parties. In its decision, the GAO concluded that due to the multiple award scheme, the Army would not know which carrier (offeror) would provide the best value under an individual order until the need arose. Therefore, it was impossible for the Army to predetermine the minimum quantity it would award a carrier under the contract. The GAO reconciled its decision with the FAR requirement that a minimum quantity be more than nominal by emphasizing that a minimum quantity of one is a quantity the government was certain to order.[141]

Cost Contracts

Federal Circuit Reverses Board—Contractor Entitled to Award Fee Upon Convenience Termination. In July 1987, the National Aeronautics and Space Administration (NASA) awarded a cost-plus-fixed-fee contract to Northrop Grumman Corporation for program management, integration, and support to NASA's space station program.[142] In 1992, the parties modified the contract bilaterally to establish a separate award fee pool aside from the basic award fee.[143] In November 1993, NASA terminated the contract for the convenience of the government. After the termination, Northrop submitted a claim for unpaid award fees that remained in the separate award fee pool.[144]

In March 1997, the Armed Services Board of Contract Appeals (ASBCA) denied Northrop's claim for the payment of funds allocated to a separate award fee pool. The board concluded that payment was allowed for the award fee only to the extent that work had been performed by Northrop.[145] In February 1998, the Federal Circuit reversed and held that Northrop was entitled to funds allocated to a separate award fee pool when NASA terminated the contract for convenience.[146]

The National Aeronautical and Space Administration contended that Northrop was not entitled to the unpaid award fees because it failed to meet the milestones stated in the contract.[147]

134. *Comdisco, Inc*., 97-2 CPD ¶ 105 at 2. The solicitation contained this limitation because the ITOP contracts were intended to be primarily contracts for services, not contracts for supplies such as hardware or software. The Director of ITOP Acquisitions also testified that there were numerous other government contracts to purchase hardware. *Id*.

135. *Id*. at 3-4. In the context of this contract, "disaster" meant any unplanned event or condition that rendered the agency unable to use a location for its intended computer processing and related purposes. *Id*. at 3.

136. *Id*. at 10.

137. *Id*. at 10-11.

138. B-278404.2, Feb. 9, 1998, 98-1 CPD ¶ 47.

139. Intermodal transportation is a combination of ocean and motor/rail/inland water transportation. *Id*. at 3.

140. *Id*. at 11. *See* FAR, *supra* note 15, at 16.504(a)(2) ("To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity, but it should not exceed the amount that the government is fairly certain to order.").

141. *Id*. at 12.

142. Northrop Grumman Corp. v. Goldin, 136 F.3d 1479 (Fed. Cir. 1998). *See* Grumman Space Station Integration Div., ASBCA No. 48719, 97-1 BCA ¶ 28,843. *See also 1997 Year in Review*, *supra* note 8, at 20.

143. In *Grumman Space Station Integration*, the award fee was divided into basic fee and a separate fee pool for award fee.

144. *Northrop Grumman*, 136 F.3d at 1482.

145. *Id*.

146. *Id*. at 1485.

The Federal Circuit stated that "[u]nder the contract, NASA effectively held back the funds in the separate pool beyond the period for which they accrued so that the funds could be used as an incentive for work yet to be performed."[148] The Federal Circuit held that "[u]nder NASA's theory, it could have kept a large percentage of the funds in the separate pool by refusing to set milestones and then terminating the contract early, even if only one day early."[149] The Federal Circuit concluded that Northrop earned the fee for work it performed before NASA terminated the contract.[150] According to the court, to find otherwise would be inconsistent with the terms of the contract that allowed Northrop an award fee of up to eight and one half percent of the estimated cost based on its contract performance.[151]

Award Fee Contracts Expressly Limited to Fee Schedule. In 1984, the Air Force awarded Textron Defense Systems a research and development cost-plus-award-fee (CPAF) contract for a portion of the Star Wars anti-ballistic missile defense system.[152] The contract specified a base fee of zero[153] and an award fee divided into seven performance periods.[154]

In September 1989, the Air Force ordered Textron to stop work and a year later terminated the contract for convenience due to the lack of funding. In its settlement proposal, Textron requested an additional award fee of ten million dollars. The Air Force partially denied Textron's claim, paying only $2.25 million. Textron's subsequent appeal to the board was denied.[155]

Before the Federal Circuit, Textron asserted that it was entitled to a 77.4 percent share of the award fee that was proportionate to the percentage of the contract completed.[156] The Federal Circuit disagreed with Textron and held that a strict reading of the award fee provision in the contract expressly limited the amount of the award fee that Textron could recover. It found that award fee payments were not subject to the termination for convenience clause contained in the contract.[157] The Federal Circuit also concluded that Textron's reliance on cost-plus-fixed-fee (CPFF) and cost-plus-incentive-fee (CPIF) contracts was misplaced. The Federal Circuit ruled that a contractor with either a CPFF or CPIF contract reasonably expects to receive at least a portion of the fee.[158] Conversely, according to the court, under a CPAF contract, a contractor receives an award fee only as a result of a discretionary act by a fee determination official. This official may reasonably conclude that a contractor is not entitled to receive a fee based on its performance.

147. *Id*. at 1481. Under the bilateral modification, the award fees in the separate award fee pool were not distributed at the end of each evaluation period. Rather, the award fees were left to accumulate until Northrop reached certain milestones designated by NASA. Therefore, NASA would evaluate Northrop's performance and distribute the fee from the separate award fee pool, only after Northrop reached a milestone. *Id*.

148. *Id*. at 1483.

149. *Id*.

150. *Id*. The Federal Circuit held that "[t]he funds in both the basic and separate pool accumulated in direct proportion to work already performed prior to the termination for convenience." *Id*.

151. *Id*.

152. Textron Defense Sys. v. Widnall, 143 F.3d 1465 (Fed. Cir. 1998).

153. A base fee in a CPAF contract is a fixed fee the government must pay regardless of the contractor's performance.

154. *Id*. at 1466. Textron and the government agreed to end-load the award fee in a bilateral modification.

Period	Maximum Award Fee
1	$1,000,000
2	$1,100,000
3	$1,200,000
4	$2,000,000
5	$4,000,000
6	$6,484,656
7	$1,000,000

155. *See* Textron Defense Sys., ASBCA Nos., 47352, 47950, 96-2 BCA ¶ 28,332.

156. *Textron*, 143 F.3d at 1467.

157. *Id*. at 1468. The award fee clause stated, in part, that "[p]ayment of any award fee to the contractor hereunder, as determined by the fee determining official, will not be subject to the clauses of this contract entitled allowable cost, fixed fee, and payment and termination." *Id*.

158. *Id*.

Monetary Limitation Clause in Delivery Order Trumps Limitation of Cost Clause (LOCC) Terms in Contract. The LOCC requires contractors to provide the contracting officer advance notice of potential cost overruns.[159] The contractor may not recover its costs above the LOCC ceiling unless the contracting officer authorizes the contractor to exceed the cost ceiling after it receives notice of a potential cost overrun.[160] The contractor may recover its cost overruns, however, if the overrun was unforeseeable[161] or the doctrine of estoppel[162] applies to the government.

In *SMS Agoura System, Inc.*,[163] the Navy awarded SMS a cost reimbursement level-of-effort contract to provide engineering support services at one of its installations for a one-year base period and two options. The Navy issued delivery orders for the engineering support services. The contract contained the standard LOCC that required SMS to notify the Navy when its costs would exceed seventy-five percent of the contract's estimated cost. The LOCC also provided that the Navy was not obligated to pay SMS any cost overrun unless the contracting officer expressly approved the cost increase.[164] In addition to the LOCC, each delivery order contained a Monetary Limitation clause that required SMS to notify the Navy if its costs reached eighty-five percent of either the estimated cost or estimated level of effort stated in the delivery order.[165]

In 1992, a Defense Contract Audit Agency audit revealed an increase in SMS's indirect rates for 1989.[166] In 1995, SMS submitted claims for additional funds for two delivery orders it performed in 1989. The amounts that SMS claimed were approximately $37,000 and $800 (respectively for each delivery order) above the "Not-To-Exceed" amount specified in the Monetary Limitation clause.[167] The Navy paid SMS additional costs up to the amounts specified in the Monetary Limitation clause but denied the rest. The contracting officer stated that SMS had failed to provide notice of the cost overruns. Additionally, the contracting officer stated that SMS failed to prove that the overruns were unforeseeable. SMS appealed the contracting officer's final decision.[168]

The ASBCA agreed with the Navy. The board concluded that SMS failed to comply with the LOCC's notice requirements. In its defense, SMS claimed that the cost overruns were unforeseeable. The board rejected this argument, and ruled that SMS failed to meet its burden of proof on the unforeseeability issue. The board emphasized that the Monetary Limitation clause clearly limited the Navy's payment obligation to a "not-to-exceed" amount that was specified in the order unless that amount was increased by formal modification. Significantly, the Monetary Limitation clause was not subject to exceptions to the LOCC clause such as unforeseeability.[169]

Federal Circuit Reinforces the LOCC General Rule: No Notification—No Recovery. In *Titan Corporation v. West*,[170] the Federal Circuit affirmed the ASBCA decision involving a CPFF contract.[171] The board had denied Titan's request for reimbursement of a cost overrun associated with indirect costs.[172] The DCAA discovered the cost overrun during a post-performance audit that revealed that Titan's subcontractor incurred indirect costs exceeding those it had estimated. Titan argued that it was entitled to the excess costs because the cost overrun was unforeseeable.[173]

159. *See* FAR, *supra* note 15, at 52.232-20.

160. *See, e.g.*, RMI, Inc. v. United States, 800 F.2d 246 (Fed. Cir. 1986); Advanced Materials, Inc., ASBCA No. 47014, 96-1 BCA ¶ 28,002; Ragsdale, Belas, Hooper & Seigler v. Dep't of the Treasury, GSBCA No. 13142-TD, 96-1 BCA ¶ 27,930.

161. *See, e.g.*, General Elec. Co. v. United States, 440 F.2d 420 (1971).

162. *See, e.g.*, American Elec. Labs, Inc. v. United States, 774 F.2d 1110 (Fed. Cir. 1985). Estoppel is "a legal doctrine preventing a party from asserting a right to the detriment of the other party, when the first party has acted or made statements contrary to the right asserted and the other party has reasonably relied on such conduct." NASH, *supra* note 11, at 217.

163. ASBCA No. 50451, 97-2 BCA ¶ 29,203.

164. *Id.*

165. *Id.* at 145,302.

166. *Id.* at 145,303.

167. *Id.*

168. *Id.*

169. *Id.* at 145,304, 145,305.

170. 129 F.3d 1479 (Fed. Cir. 1997).

171. *See* Titan Corp., ASBCA No. 49865, 97-1 BCA ¶ 28,679.

172. *Id.* at 143,266.

The Federal Circuit disagreed because Titan failed to notify the government of its potential cost overrun pursuant to the LOCC. The court concluded that Titan's subcontractor failed to prove that the cost overrun was unforeseeable. The court noted that the final indirect cost rate was the same rate used by the subcontractor during contract performance. Therefore, the subcontractor knew or should have known that the actual indirect costs it incurred during performance exceeded the provisional rate in the contract.[174]

Continuing Saga of the A-12 Fighter. In 1988, the Navy awarded a contract to McDonnell Douglas to develop a carrier-based, low observable (Stealth) attack aircraft known as the A-12. The A-12 was to replace the aging A-6 aircraft. McDonnell Douglas ran behind schedule and experienced cost overruns during its performance. In 1991, the Navy terminated the contract for default. Later, the termination for default was converted into a termination for convenience, because the court found that the Navy had abused its discretion in terminating the contract for default.[175]

In *McDonnell Douglas Corp. v. United States*,[176] the COFC limited McDonnell Douglas' recovery to the target price of $3.5 billion due to the court's interpretation of the incremental funding clause.[177] In December 1997, McDonnell Douglas filed another claim seeking to exceed the $3.5 billion target price by an additional $135 million.[178] It asserted that the $135 million was an adjustment made to the contract under the Economic Price Adjustment (EPA) clause[179] and the Incentive Price Revision (IPR) clause.[180] Contingent liabilities are not included in the target price calculations under the incremental funding clause. Accordingly, they are separate from the target price set by the incremental funding scheme of the contract. McDonnell Douglas claimed that payments for contingent liabilities are paid from funds that are specifically reserved and separate from the incremental funds. Incremental funds, by contrast, are provided to fund the fixed portion of the contract.[181]

The court held that the EPA and IPR clauses were designed to reimburse contractors for costs incurred above the original target price up to the ceiling price. The court concluded, therefore, that McDonnell Douglas was entitled to prove an additional $135 million in incurred costs.[182]

Sealed Bidding

Late Bids

In 1998, the GAO continued its age-old tradition of pronouncing that "late is late"[183] to bidders who failed to adhere to the general rule that the agency must receive bids prior to the established time for bid opening.[184]

The Postman Always Rings Twice!! In *Denny's Rock & Driveway*,[185] the Fish and Wildlife Service issued an IFB for dike

173. *Titan*, 129 F.3d at 1481.

174. *Id.* at 1482.

175. McDonnell Douglas Corp. v. United States, 35 Fed. Cl. 358 (1996). The contract was a fixed-price incentive contract.

176. 37 Fed. Cl. 295 (1997). McDonnell Douglas claimed total incurred costs of four billion dollars.

177. *See 1997 Year in Review*, *supra* note 8, at 98. The incremental funding clause stated that "[t]he government's total obligation for payment (including termination settlement expenses) under this contract shall not exceed the total amount obligated at the time of termination." *McDonnell Douglas*, 37 Fed. Cl. at 298.

178. McDonnell Douglas Corp. v. United States, 39 Fed. Cl. 665 (1997).

179. An EPA clause provides an upward or downward revision of the stated contract price for specified contingencies. The EPA clause was established to adjust the target cost, target price, and ceiling price of the contract based on Bureau of Labor Statistics indexes. These indices measure materials and labor cost fluctuations in the aircraft industry. *Id.* at 666-67.

180. An IPR clause attempts to keep the contractor's allowable costs to a minimum. This clause allows the government and the contractor to share in the underruns and the overruns of incurred costs below the ceiling price of the contract. As the contractor's costs increase, its profits decrease; similarly, as contractor's costs decrease, its profits increase.

181. *McDonnell Douglas*, 39 Fed. Cl. at 666-67. FAR 16.203-2 provides that the "contracting officer shall ensure that contingency allowances are not duplicated by inclusion in both the base price and the adjustment requested by the contractor under economic price adjustment clause." FAR, *supra* note 15, at 16.203-2. Normally, the government obligates the target price upon award and certifies (commits) that additional funds in the amount of the estimated contingent liability are available for contingencies. When contingencies occur, the government obligates previously committed funds. *See* U.S. DEP'T OF DEFENSE REG. 7000.14-R, FINANCIAL MANAGEMENT REG., paras. 080202A, 080401 (Dec. 31, 1996).

182. *McDonnell Douglas*, 39 Fed. Cl. at 673.

183. The phrase "late is late," while used repeatedly in the classroom during discussions of late bids, does not appear routinely in the Comptroller General's decisions. A search of the phrase "late is late" produced only one decision – Radar Devices, Inc., B-249118, Oct. 27, 1992, 92-2 CPD ¶ 287.

184. FAR, *supra* note 15, at 14.304-1. Generally, bids received after the exact time set for bid opening are late and shall not be considered for award. *Id.*

repairs. The protester mailed its bid via United States Postal Service Express Mail on 14 October 1997, the day before bid opening. The transmitting post office accepted the package for guaranteed delivery prior to twelve p.m. the next day. The receiving post office accepted the express mail package for delivery on 15 October 1997. A postal clerk attempted to deliver the bid to the installation's mailroom twice on 15 October, at 11:30 a.m. and again at 4:30 p.m. Bid opening was set for 2 p.m. The postal clerk, however, could not complete delivery because the mailroom's door was locked. The postal clerk did not attempt to deliver the bid to any other office or person.[186] The agency held bid opening at the scheduled time. The agency recorded the four bids it had received. The agency received the protester's bid on 16 October 1997 and rejected it as late.[187]

The protester filed its protest before the GAO. The protester argued that the agency impeded delivery because it "wrongfully closed [its] office during business hours."[188] The protester alleged that this was tantamount to government mishandling.

The agency agreed with the protester that the mailroom door was locked when the postal clerk attempted delivery at 11:30 a.m., the mailroom's regularly scheduled lunch hour. The contracting office, however, informed the mailroom personnel and the main entrance security guards of the day's bid opening, including its time and location. Additionally, contracting personnel periodically checked the mailroom on and before the bid opening date.

The GAO denied the protest, holding that neither the two-day exception nor the government mishandling exception applied to this case.[189] The GAO reiterated the general rule that the bidder is responsible for ensuring that the agency timely receives its bid. To consider the late bid under the government mishandling exception,[190] the protester must demonstrate that a government impropriety occurred after the agency received the bid and it was the sole or paramount reason for the late receipt.[191] The GAO held that the protester's actions caused the late delivery because the protester waited until the day before bid opening to mail its bid to the agency.[192] Furthermore, the GAO stated that the protester erroneously claimed that the installation was "wrongfully closed." While the mailroom may have been closed for the lunch hour, the GAO remarked that the installation itself was open when the postal clerk attempted to deliver the bid. The postal clerk's decision not to deliver the bid to the security personnel at the main entrance did not constitute government mishandling.

Agency's Misrouting of Bid Not Paramount Cause of Late Receipt. In *Boines Construction & Equipment Co., Inc.*,[193] Boines protested the award of a contract for demolition and related work to Pierce Foundations, Inc. Boines claimed that the Department of Housing and Urban Development (HUD) improperly accepted Pierce's late bid.

The Department of Housing and Urban Development issued an Invitation to Bids (IFB) for the demolition of vacant buildings. The IFB contained FAR 52.214-5. This clause instructs bidders to submit their bids in a sealed envelope or package: (1) addressed to the office specified in the IFB; and (2) labeled to show the time and date of bid opening, the solicitation number, and the bidder's name and address.[194]

Agency personnel recorded six bids at the time and date set for bid opening. Boines' bid was the lowest bid.[195] After the bid opening, Pierce telephoned the contracting personnel and discovered that the agency had not recorded its bid.[196] The con-

185. B-278597, Jan. 23, 1998, 98-1 CPD ¶ 30.

186. The postal clerk did not attempt to deliver the bid package to the security guards located at the installation's main entrance. Apparently, he knew from prior experience that the guards would not sign for an express mail package or allow him to wander through the building looking for someone to sign for the package.

187. The IFB contained FAR 52.214-7(a). This clause defines the exceptions to the late bid rule, including the exception for bids sent by "U.S. Postal Service Express Mail Next Day Service." FAR, *supra* note 15, at 52.214-7(a).

188. *Denny's Rock & Driveway*, 98-1 CPD ¶ 30 at 2.

189. FAR 52.214-7(a)(3) is known as the "two-day" exception. This provision allows an agency to consider a late bid if it was sent by "U.S. Postal Service Express Mail Next Day Service-Post Office To Addressee," not later than 5:00 p.m. at the place of mailing two working days prior to the date specified for receipt of bids. See FAR, *supra* note 15, at 52.214-7(a)(3). The GAO held that this exception did not apply because the protester mailed its bid only one working day prior to the bid opening date. 98-1 CPD ¶ 30 at 2.

190. FAR, *supra* note 15, at 14-304-1(a)(2).

191. *Denny's Rock & Driveway*, 98-1 CPD ¶ 30 at 2.

192. *Id*.

193. B-279575, June 29, 1998, 98-1 CPD ¶ 175.

194. *Id*.

195. Shortly before bid opening, the contracting office staff contacted the mailroom and was told that no other bids had been received. *Id*. at 2.

tracting officer discovered that Federal Express had delivered Pierce's bid to the mailroom at 9:40 a.m. that morning. A mailroom clerk misrouted the bid to an office within HUD that processes bids for the sale of houses.

Pierce's bid package was inside a Federal Express envelope. The envelope was not marked with the solicitation number, the bid opening date and time, or other identifying information. The only marking on the envelope was HUD's address. Pierce did not include the department name, floor number, or room number on the envelope. The mailing label, however, did include the language "bid enclosed" and the telephone number for the contract specialist listed on the IFB.[197]

Pierce mailed its bid on the Friday before bid opening, with guaranteed delivery for the day of bid opening. The agency's mailroom received the bid at 9:40 a.m. on bid opening day. The contracting officer determined that the bid was late due to government mishandling after receipt at the government installation.[198] Because Pierce's bid was lowest, HUD accepted Pierce's bid and considered it for award.[199] The Department of Housing and Urban Development ultimately awarded the contract to Pierce.[200]

After HUD denied its protest, Boines filed before the GAO. Boines alleged that HUD improperly considered Pierce's late bid for award. In sustaining the protest, the GAO concluded that although the agency may consider a late bid if the government mishandled the bid, the agency cannot accept a late bid if the bidder contributed significantly to the late receipt.[201] Here, the bidder failed to record required information regarding the solicitation number, the date and time of bid opening, and the designated office for receipt of bids on the outside of the Federal Express envelope. The GAO opined that Pierce's failure to mark the envelope with the identifying information was the paramount reason for the mailroom misrouting the envelope.

First You Don't See It, Now You Do? The Case of the Suddenly Appearing Bid. Pacific Tank Cleaning Services, Inc.,[202] presented the classic case of "now you see it, now you don't" in reverse! In this case, the Navy issued an IFB for hazardous waste pumping and transportation services. The IFB specified the date and time for bid opening and the location for the receipt of hand-carried bids. At the exact time set for bid opening, a procurement technician announced that bid opening time had arrived and opened the locked bid box. She removed all of the loose bids from the box and left a package marked "old bids" in the box. This package was bound by a rubber band. After she sorted the loose bids, the procurement technician set aside the five bids marked for the procurement. The technician again checked the remaining loose bids for other bids for this bid opening. Finding none, she then returned the loose bids that were not for the bid opening to the box and relocked it. At bid opening, the contracting specialist opened and recorded five bids. Pacific Tank Cleaning Services (Pac Tank) was the low bid.

California Marine Cleaning, Inc. (Cal Marine) was concerned about Pac Tank being listed on the "bid board" as the apparent low bid when Cal Marine's bid was lower. After the contract specialist spoke to Cal Marine, she opened the bid box and discovered Cal Marine's bid inside the locked box under three loose bids. Cal Marine's bid was date-stamped with the date of bid opening and time-stamped at approximately one and one-half hours before the time set for bid opening. The specialist opened the envelope and found that Cal Marine's bid was $300,000 less than Pac Tank's.

Pac Tank filed an agency-level protest and a protest before the GAO. It maintained that the Navy should have rejected Cal Marine's bid because there was no evidence that the agency timely received the bid. In addition, the bid was under the agency's control until it was discovered by a contract specialist. The Navy responded that the time and date stamp showed that it received the bid on time, and asserted that the procurement technician probably overlooked the bid when she sorted through the bids at bid opening.[203]

The GAO stated that an agency may consider a late misplaced bid for award only where the evidence demonstrates that (1) the installation received the bid prior to bid opening, (2) the

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196. Boines' bid price was $1,196,620.00 while Pierce's was $1,120,921.16. *Id*.

197. *Id.*

198. *Id*. at 4. In its report, the agency contended that the mailroom mishandled the package by misrouting it to the wrong office instead of calling the telephone number written on the envelope. Additionally, the agency argued that a "priority" package that sat in the mailroom for almost five hours was in and of itself government mishandling. *Id*.

199. *Id*. at 2.

200. *Id*. at 3. Although the protester filed its protest in time to trigger a CICA stay of award, the agency executed an override of the contract performance suspension on 30 March 1998. *Id. See* 31 U.S.C.A. § 3553 (d)(3)(A)(i) (West 1998) (requiring an agency to suspend performance of contract award if the protester files its protest before the GAO within 10 days of contract award); 31 U.S.C.A. § 3553 (d)(3)(C)(II) (permitting an agency to override a contract performance suspension upon a determination of urgent and compelling circumstances).

201. *Boines Constr.*, 98-1 CPD ¶ 175 at 4. A bidder contributes significantly when it does not act reasonably to ensure timely delivery of its bid to the designated place.

202. B-279111.2, July, 1, 1998, 98-2 CPD ¶ 1.

bid remained under the agency's control until it was discovered, and (3) the agency discovered the bid prior to award.[204] Acceptable forms of evidence to establish the time and date of receipt include the installation's time/date stamp on the envelope or wrapper, other evidence of receipt maintained by the installation, or statements or testimony by government employees.[205] The GAO further stated that a bidder's own records cannot serve to establish the time and date of delivery on their own. Although Cal Marine's representative testified that he personally stamped the date and time on the bid and placed it into the box prior to bid opening, that testimony did not establish the time of delivery because this offer of proof was outside the agency's control.[206]

The Navy did not support its assertion that the bid was in the bid box prior to bid opening. The procurement technician who opened the bid box stated that although it was possible that she missed Cal Marine's bid, given the small number of bids in the box, it appeared unlikely.[207] Additionally, the GAO held that the protester's theory that Cal Marine's representative could have stamped the time and date on the bid the day of bid opening, but deposited the bid in the bid box at any time prior to when the box was rechecked, was as plausible as Cal Marine's assertion that the bid was placed in the box prior to bid opening. The GAO held that there was insufficient evidence to establish that Cal Marine's bid was received at the installation prior to bid opening. The protest was sustained by the GAO.[208]

Cal Marine then filed suit in the COFC.[209] In a thirty-four page ruling, the COFC overturned the GAO's decision. The COFC held that the GAO misapplied the late bid rule.[210] The COFC stated that whether a bid is timely depends upon when the agency received the bid, not when the agency discovered the bid.[211] A bid does not become late merely because the agency overlooked the bid in the bid box.[212] The COFC found that the GAO erred in not considering relevant evidence in the record[213] that "reveals that a clear preponderance of the evidence supports [Cal Marine's] assertion that its bid was timely submitted."[214] The COFC directed the Navy to consider Cal Marine's bid.[215]

I Hear You Knocking But You Can't Come In! Sometimes a case comes along with a set of facts that makes for great fiction. *Caddell Construction Co., Inc.*,[216] is just such a case. In *Caddell*, the Army Corps of Engineers (COE) issued a RFP for the construction of a barracks complex. The RFP provided the date, time, and location for receipt of proposals. The solicita-

203. *Id*. at 3.

204. *Id*. at 3 (citing Pershield, Inc., B-256827, July 27, 1994, 94-2 CPD ¶ 40 at 3).

205. FAR, *supra* note 15, at 14.304-1(c).

206. *Id*. at 3-4. The Navy conceded that its personnel do not continuously monitor the time/date stamp machine in the lobby and bidders may operate the machine without agency employee supervision. There was no assurance that a bidder immediately placed its bid in the bid box once the bidder stamped it. *Id.*

207. *Id*. at 4.

208. *Id*. at 5.

209. California Marine Cleaning, Inc. v. United States, No. 98-636C, 1998 U.S. Claims LEXIS 250, (Fed. Cl. Oct. 22, 1998). Cal Marine's original filing sought to enjoin the Navy from awarding the contract to Pac Tank. When the Navy learned of Cal Marine's suit, it decided to cancel the solicitation and resolicit. Cal Marine then amended its complaint adding its challenge to the cancellation. Pac Tank then intervened and requested that the COFC issue an injunction directing the Navy to reinstate the solicitation and award the contract to Pac Tank. *Id*. at *3.

210. *Id*. at *50. The COFC found that the GAO misapplied the late bid rule because the evidence clearly showed that Cal Marine's bid was timely submitted. The court found that the GAO began its analysis of Cal Marine's bid by applying the late bid rule to determine if the bid was timely, assuming that the bid was, in fact, late. The COFC stated that the GAO should have addressed the timeliness of the bid first, then applied the late bid rule if it determined that the bid was late. *Id*. at *58. The court concluded that for the GAO to determine the bid's timeliness, it must consider all relevant evidence in the record, *i.e*., the date/time stamp, statements from all relevant parties, etc. The COFC stated that the GAO failed to consider this probative evidence. *Id*.

211. *Id*. at *52.

212. *Id*.

213. *Id*. at *59.

214. *Id*. at *65. The court discussed that the GAO failed to consider pertinent evidence including statements of a Cal Marine employee regarding when he time/date stamped the bid and deposited it in the bid box; the time/date stamp itself; the agency's visitor log showing the date and time of Cal Marine's representative's visit; and the agency's contracting specialist that acknowledged she may have overlooked the bid at bid opening and that she has overlooked bids in the past. *Id*. at *60. The COFC held that the GAO's decision was irrational. *Id*. at *59.

215. *Id*. at *66. The court also enjoined the Navy from canceling the solicitation holding that its decision to do so was arbitrary and capricious. *Id.*

216. B-280405, 1998 WL 536393 (Comp. Gen. Aug. 24, 1998).

tion also included FAR 52.215-1(c)(3) regarding late proposals.[217]

The issue before the GAO was whether Caddell's employees arrived at the location for receipt of proposals prior to, or contemporaneously with, the time set for receipt. Approximately one and a half hours before the time for receipt, two Caddell employees arrived at the office where they were to submit their proposals (Room 821). The two employees introduced themselves to the contract specialist designated to receive the proposals. The protester's employees asked to see the "official bid opening clock." The contract specialist responded that there was no "official clock," but she had just telephoned for the time and synchronized the clock located near her computer. Additionally, the contract specialist told the employees the time and stated that she would lock the door at 4:30 p.m., the time set for receipt. Apparently, one of the protester's employees set his watch to the time the contract specialist gave them.

The protester's employees asked to use a room to finish preparing their proposal. The contract specialist escorted them to a room about twenty feet down the hall from Room 821. While finishing the proposal, one employee used his cellular telephone to call the company's president for certain subcontractors' names. Telephone records indicated that the employee completed this call at 4:25 p.m. Meanwhile, in Room 821, the contract specialist observed her clock change to 4:29 p.m. She and the other agency employees became concerned about whether Caddell's employees would submit their proposal before the time for receipt. The contract specialist then went to the hallway and called out "[i]t's 4:29 p.m. Are there any other proposals?"[218] In addition, the contract specialist walked down the hallway and told Caddell's employees that it was 4:29 p.m.[219]

While the contract specialist was out of the room, the time/date stamp clock and the clock on the contract specialist's desk changed to 4:30 p.m. At that time, the agency's employees in Room 821 locked the door. The contract specialist returned to the room, and the other agency employees unlocked the door to admit her into the room. Agency personnel then witnessed Caddell's employees approach the door and attempt to get inside the room. The contract specialist told Caddell's employees through the locked (glass) door that they were late. The employees tried to push the door open, but were unable to open it. The contract specialist notified the chief of contracting who met with Caddell's employees. The employees insisted that the chief of contracting accept the proposal. He did, but stated that he would treat it as a late proposal.

The GAO denied the protest finding no improper government action. Based upon two clocks that were located in the office designated in the RFP as the location for receipt of proposals, agency personnel determined that the closing time for receipt had arrived. Furthermore, the protester's argument that the agency failed to provide offerors with an "official clock" in plain view fell upon unsympathetic ears. The GAO held that there is no requirement for an "official clock." Rather, it is the agency's reasonable declaration that a procurement is closed that is determinative.[220] Simply because the protester's employee's watch did not register the exact time as the clock in Room 821 did not prove that the employees reached the room prior to the time set for closing.

Mistakes in Bids

A look at the winners and losers in the mistakes in bid area confirms that the quality of the evidence the protester uses to prove its mistake (and the intended bid) determines the outcome of the case. If a bidder has well-documented worksheets and other written documentation that leads the agency to a reasonable decision that a mistake was made (and the intended bid), the GAO will not disturb that decision. Likewise, if the quality of the evidence leaves the agency wondering about the validity of the documentation or guessing about the intended bid, the GAO will not question the agency's decision to deny the contractor's request to correct its bid. Three cases that illustrate the differences in the quality of documentation submitted by bidders to prove a mistake in bid are *Pueblo Enterprises, Inc.*,[221] *H.A. Sack Co., Inc*.,[222] and *Asbestos Control Management, Inc*.[223]

Pueblo Enterprises, Inc. In *Pueblo*, the agency denied the protester an opportunity to correct its bid. The protester was the apparent low bidder in a procurement for furnishing and installing replacement doors and windows on housing units. The

217. FAR 52.215-1(c)(3) provides that "[a]ny proposal received at the office designated in the solicitation after the exact time specified for receipt of offers will not be considered unless . . . " one of the exceptions apply. FAR, *supra* note 15, at 52.215-1.

218. *Caddell*, 1998 WL 536393, at *3.

219. *Id*. at *4. The protester's employees contended that the contract specialist did not come into the room to alert them; however, they did agree that they heard someone call out from the hallway that the time was 4:29 p.m. *Id*.

220. *Id*. at *6 (citing Pat Mathis Constr. Co., Inc., B-248979, Oct. 9, 1992, 92-1 CPD ¶ 236 at 3).

221. B-278279, 1998 WL 10228 (Comp. Gen. Jan. 14, 1998).

222. B-278359, Jan. 20, 1998, 98-1 CPD ¶ 27.

223. B-279521, June 23, 1998, 98-1 CPD ¶ 169.

agency requested that Pueblo verify its bid as it was significantly below the government estimate and the other bids. Pueblo complied, but claimed certain mistakes when the agency requested a detailed written breakdown of its costs.

To prove its mistake and its intended bid, Pueblo offered original hand-written undated worksheets. After reviewing the worksheets the agency conceded that Pueblo made a mathematical error in calculating part of its costs. The agency did not, however, allow Pueblo to correct its asserted mistakes. The agency determined that the work papers were undated, contained various, sometimes unexplained, calculations and were not in good order.[224] More importantly, the agency noted that the "total" on the revised bid worksheet showed a base bid that was different from the base bid that Pueblo actually submitted. Therefore, the agency determined that there was no clear and convincing evidence of Pueblo's intended bid.[225]

The protester attempted to file its comments to the agency's report worksheets that explained the differences in the prices that concerned the agency. This was "too little, too late" for the GAO.[226] The GAO agreed with the agency and denied the protest. Specifically, the GAO found that the protester did not explain the change in prices between the initial base bid worksheet and the revised base bid worksheet. Although the protester attempted to establish its intended bid with its comments, it failed to demonstrate that the agency acted unreasonably when it disallowed the correction. Because the protester failed to provide a critical piece of evidence at the pertinent time, the agency reasonably decided to disallow the correction.

Asbestos Control Management, Inc. In *Asbestos Control*, the agency conducted a procurement for the installation of a new heating and air-conditioning system. Asbestos Control submitted the lowest of the ten bids the agency received. Two days after bid opening, the agency asked that the protester provide a breakdown of its bid. The following day, the agency requested that the protester verify its bid and again asked for a breakdown of the bid. The protester confirmed its bid and provided the agency with the requested breakdown. One month later, the agency asked the protester to review its bid for the possibility of a mistake. The agency based its request on the disparity between the protester's bid, the government estimate, and the other bids. A week later, the protester retracted its confirmation and claimed a mistake in its bid. Asbestos Control asserted that it omitted certain costs from its final bid price because of a computer error.[227] Asbestos requested a correction that would make its bid approximately four percent lower than the next low bid.

In support of its claim, Asbestos Control submitted worksheets and other data[228] it used to prepare its bid. Asbestos Control also included a letter from its computer supplier confirming that software compatibility problems can cause problems in spreadsheet applications. The bid Asbestos Control actually submitted did not appear on any of the presented documents.[229]

After reviewing Asbestos Control's evidence, the agency determined that the protester had not submitted clear and convincing evidence of its intended bid. Furthermore, the agency found discrepancies between the evidence Asbestos Control now presented and the information it provided for the bid breakdown. The agency stated that certain costs, listed in the evidence presented by the protester to prove a mistake in bid, were significantly higher than in the documents submitted for the bid breakdown. More importantly, the quotations that the protester asserted were omitted by the computer program were not the same costs that concerned the agency. The agency rejected the protester's request to correct its bid because: (1) the protester delayed reporting the mistake, (2) there was an undated critical bid preparation sheet, (3) the agency was unable to ascertain the protester's intended bid with reasonable certainty.

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224. *Pueblo Entrprs.*, 1998 WL 10228, at *2.

225. *Id*. The protester's worksheets did not demonstrate clearly the amounts of certain items, specifically those dealing with "infills." The protester explained these calculations in an affidavit it submitted with the protester's claim of mistake; however, the calculations were not ascertainable from the worksheets themselves. *Id*.

226. *Id*. at *3. Apparently, the protester did not believe that the additional worksheets were relevant to the issue of the intended bid until after it received and read the agency's report. The Comptroller General disagreed with the protester's assessment of what was "relevant." *Id*.

227. *Asbestos Control*, 98-1 CPD ¶ 169 at 1.

228. *Id*. The other data Asbestos Control submitted included its computer-generated estimates and spreadsheet printouts, its in-house costs, and its subcontractors' quotation sheets. *Id*. at 2.

229. *Id*. The protester asserted that the computer program that calculated its original bid excluded seven quotations. Five of the seven quotations that Asbestos Control submitted were subcontractor quotations dated prior to bid opening. They clearly reflected the subcontractors' prices. The agency questioned the authenticity of the other two quotations. One quotation was Asbestos Control's for certain asbestos work, dated almost two months after bid opening. The other quotation had no supporting documentation. The protester explained that it prepared a "bid prep" sheet using a computerized spreadsheet for subcontractor costs, and then prepared a total bid using its estimating software. It prepared the total bid by adding the results from the bid prep spreadsheet to the numbers in the estimating software program. The estimating software program combines the numbers with the protester's in-house costs. The protester offered the agency an undated spreadsheet as its original worksheet. This worksheet indicated that the seven items in question were not carried over from the base cost to the total cost column.

The only document that included the protester's actual submitted bid was an affidavit from the company's vice president in which he explained the error and the company's intended bid. *Id*. at 4.

The GAO agreed with the agency and denied the protest. The GAO found that the protester had not proved that it had mistakenly omitted the costs for the seven items from its base bid. Asbestos Control did not provide sufficient evidence to prove its intended bid. The GAO found that the protester's evidence contained various ambiguities and inconsistencies that raised a question about the documents. First, the GAO observed that the critical worksheets that would have proved the mistake, and possibly the intended bid, were not dated. Second, the protester dated its in-house costs well after bid opening.[230] Third, the GAO noted that none of the documents submitted by the protester indicated the protester's original bid. Fourth, the amount that the protester offered as the "amount of the mistake" did not equal its intended bid when added to other numbers the protester supplied as "corrected amounts." The protester never offered an explanation for this discrepancy.[231]

H. A. Sack Co. While *Pueblo* and *Asbestos Control* illustrate the pitfalls of presenting inadequate evidence, or evidence that raises credibility concerns, *H.A. Sack* enlightens protesters about the quality of evidence an agency will allow to correct a mistake in a bid. In *H.A. Sack*, the agency issued an IFB for the replacement of a water distribution system. The agency received seven timely bids, including one from the protester and one from MMT. MMT submitted the lowest bid, while the protester submitted the next lowest bid. The agency requested that MMT and H.A. Sack verify their bids. Both bidders verified their respective prices; however, MMT notified the agency one week later it had discovered a mistake in its bid.

MMT noticed that the Lotus electronic spreadsheet it used to develop the job estimate and to calculate its bid contained a formula error. MMT discovered that a number of cost elements, which were included on the spreadsheet, were not included in the total column that the job estimate spreadsheet calculated. MMT provided the agency with a computer diskette that contained a spreadsheet file dated 18 September 1997 (the bid opening date), a printout of the spreadsheet, and a statement that it used these documents to prepare its bid. MMT also provided a new diskette and a printout of a revised spreadsheet dated 25 September 1997 that reflected MMT's requested correction. The agency determined that MMT's evidence clearly and convincingly showed the mistake and MMT's intended bid. Therefore, the agency allowed the correction.

H.A. Sack protested to the GAO. It claimed that MMT did not submit clear and convincing evidence because the amount of the corrected bid did not match the amount on the corrected spreadsheet.[232] H.A. Sack argued that the spreadsheets MMT produced to show the additional calculations needed for the job estimate did not exist at the time of bid opening; therefore, MMT could not use them to show its intended bid.

The GAO disagreed with H.A. Sack. The GAO stated that the worksheets that MMT used to calculate its job estimate listed the various materials and tasks required to perform the work for the base bid and each option. MMT's worksheets clearly listed each item, followed by a line of figures and the unit of measure MMT used to calculate the subtotal for each item. The worksheets proved the formula used by the Lotus spreadsheet omitted certain items listed on the worksheets.

Likewise, the GAO rejected H.A. Sacks's argument that the agency improperly considered the worksheets used by MMT to prove its intended bid. The GAO found that the worksheets that MMT used were merely for explanatory purposes. When MMT's proposed rationale for using the end sheets was applied to the original worksheet and the revised worksheet, the bid prices were clear. MMT asserted, and its worksheets proved, that it calculated its bid price using 98.65 percent of the job estimate figures computed on the spreadsheets, rounded upward to the nearest thousand.[233]

Cancellation of the Solicitation

The GAO continues to hear numerous cases regarding cancellation of a solicitation after bid opening. In these cases, the GAO focuses on whether the agency had a compelling reason to cancel the solicitation. If so, the GAO will not overturn the agency's decision to cancel.

Agencies cited various "compelling" reasons for canceling a solicitation. In *Constructive Solutions, Inc.*,[234] an ambiguity in the solicitation caused the agency to cancel the solicitation after

230. *Id.* at 4. The protester argued that the February date on the in-house quotation appeared on the submitted documentation because the protester had to reprint the document. The Comptroller General did not find this argument compelling. The GAO held that a self-serving statement by the protester as the only offer of proof that the document was not created in February was insufficient to prove that the protester prepared the quotation prior to bid opening. *Id.*

231. Based upon these inconsistencies, the GAO held that the protester did not meet its burden of proof regarding either its mistake or its intended bid. In addition, the GAO found that the "tardy production of a crucial work sheet document [the spreadsheet the protester attempted to use to support its intended bid] is reasonably viewed as raising credibility concerns and doubts about the good order of the work papers." *Id.* at 5.

232. *Id.* at 2. The protester argued also that MMT's initial verification of its bid contravened MMT's subsequent claim of a mistake. The GAO held that there was no authority to support that allegation, and the GAO knew of no prohibition against asserting a mistake once a bidder has verified its bid as requested by an agency. *Id.*

233. *Id.* at 3. In the agency report, the contracting officer confirmed that it is a common practice in the construction industry to bid prices that are reduced from the actual estimate an offeror calculates. Similarly, MMT's proposed corrected price could be ascertained by calculating 98.65 percent of the price arrived at by manually adding all the items listed on the original worksheet (to include the ones that the electronic spreadsheet omitted), and rounding up to the nearest thousand. *Id.*

234. B-278227, Jan. 9, 1998, 98-1 CPD ¶ 9.

bids were opened. The ambiguity concerned misleading language in the IFB. After bid opening, the agency discovered that the IFB's language caused several bidders, including the protester, to include the price for only one of the two alternatives discussed in one of the line items. The agency, however, needed prices on both alternatives to determine which one best met its needs. The GAO denied the protest because an award based upon the bids submitted would not serve the government's actual needs.

The GAO denied another protest in which the agency canceled the solicitation after opening bids because it discovered that the solicitation did not meet its actual needs. In *Mobile Dredging & Pumping Co.*,[235] the agency solicited bids for dredging a reservoir in the District of Columbia. The agency received and opened five bids. Mobile submitted the lowest bid. One of the bidders filed an agency-level protest. As a result of the protest, the agency discovered that Mobile's interpretation of one of the paragraphs in the specifications was inconsistent with the agency's intent. The agency maintained that the provision neither guaranteed compliance with the National Sanitation Foundation (NSF) standards nor ensured that treated water would contain acceptable levels of polymers. Mobile disagreed with the agency and filed a protest before the GAO. Mobile stated that the paragraph was unambiguous and reflected the agency's needs. The GAO dismissed Mobile's argument because it ignored the requirements to impose the NSF standard for polymers in drinking water on the contractor. The record supported the agency's position that the solicitation provision, as written, did not ensure that the drinking water would meet the required standard. The GAO found that the agency had a compelling reason to cancel and revise the IFB to meet its actual needs.

Negotiated Acquisitions

New DOD Scheme for Collecting and Evaluating Past Performance Information

On 20 November 1997, Dr. Jacques Gansler, Under Secretary of Defense for Acquisition and Technology, issued a memorandum announcing that acquisition officials across the DOD will use a common multi-factor rating system to assess contractor past performance information (PPI).[236] The DOD subsequently published a draft guide on the new policy.[237]

The new policy divides industry into eight business sectors. These eight sectors fall into one of two groups—key or unique.[238] The new policy also establishes common assessment elements and ratings to standardize the methods used to rate contractor performance under DOD contracts. Each business sector has a separate threshold for the mandatory collection of PPI.[239] For example, the threshold for the systems sector is five million dollars, while the threshold for the construction and architect-engineering sector is $25,000. The new policy also establishes mandatory assessment elements and ratings for each business sector.[240] The identified elements and sub-elements include traditional evaluation factors such as technical, management, and cost control. The common assessment rating system has five ratings: exceptional, very good, satisfactory, marginal, and unsatisfactory.[241]

Evaluation Factors

Price as an "Eligibility Factor" Inadequate. In *Electronic Design*,[242] the Navy awarded a fixed-price contract for integrated ship control system upgrades on twenty-six CG47 Ticonderoga class ships. The protester asserted that the Navy conducted the competition on an unequal basis. In addition, the protester claimed that price was not properly evaluated as a significant evaluation factor.[243] The GAO sustained the protest on both grounds.

In this acquisition, the Navy considered only price to determine whether a given proposal was eligible for award (that the price did not exceed the Navy's available budget). The pro-

235. B-278725, Mar. 6, 1998, 98-1 CPD ¶ 72.

236. Memorandum, The Under Secretary of Defense, to Secretaries of the Military Departments, subject: Collection of Past Performance Information in the Department of Defense (20 Nov. 1997) availabe at <http://www.acq.osd.mil/ar/doc/0798past.pdf> (visited 5 Oct. 1998) [hereinafter Gansler Memorandum].

237. Draft DOD Guide to Collection and Use of Past Performance Information, July 1998 available at <http://www.acq.osd.mil/ar/doc/collect.pdf> (visited 5 Oct. 1998). The DOD requested comments on the draft guide by 1 September 1998.

238. *Id.* at app. B. The key business sectors are systems, services, information technology, and operations support. The four unique business sectors are construction and architect-engineering, health care, fuels, and science and technology.

239. *Id.* at app. C.

240. *Id.* at app. D. The elements and ratings established previously for construction/architect-engineering and health care still apply.

241. *See* Gansler Memorandum, at attachment.

242. B-279662, Aug. 31, 1998, 98-2 CPD ¶ 69.

243. The CICA requires contracting agencies to include cost or price as a significant evaluation factor that must be considered in proposal evaluations. *See* 10 U.S.C.A. § 2305(a) (West 1998).

tester alleged that this was inadequate to meet the CICA mandate. The GAO agreed, finding the consideration of price nominal.[244]

Past Performance Evaluations. Past performance is a major consideration in government procurements and a source of endless litigation.[245] Government attorneys are exerting a lot of time and effort defending past performance cases at every imaginable dollar level. Often, past performance is the most critical evaluation criterion. The GAO examines an agency's evaluation only to ensure that it was reasonable and consistent with stated evaluation criteria and applicable statutes and regulations.

Relevancy of Experience: A Few Aerobics Classes Does Not a Gym Make. In *Hard Bodies, Inc.* (HBI),[246] the Navy issued a RFP for the operation of a fitness center. The RFP made past performance the most important evaluation criteria. The RFP asked offerors to submit past performance information on similar contracts and subcontracts, particularly those of similar scope, magnitude, and complexity to the RFP's requirements. The Navy, however, stated that it would not consider the past performance of key personnel.[247]

After the initial round of proposals, the Navy rated HBI and another offeror as unacceptable, but capable of being made acceptable. Hard Bodies had no past performance rating because it had not supplied enough relevant information. It later supplied ten references with its best and final offer, and was given an "acceptable" rating by the Navy evaluators. The other offeror received an "outstanding" past performance rating and was awarded the contract.[248] Hard Bodies complained that it should have received an "outstanding" past performance rating because it received outstanding ratings on its questionnaires. The Navy argued that it rated HBI "acceptable" because the past performance information did not indicate experience in operating and managing a fitness facility of the size and scope contemplated in the RFP.[249]

The GAO denied the protest.[250] Eight of HBI's listed references concerned only teaching aerobics and fitness classes. Hard Bodies acknowledged that it lacked the required management experience but relied on one of its key personnel to provide the necessary management experience. The GAO found the Navy had warned offerors that it would not consider key personnel experience in evaluating past performance. [251] The GAO decided that although an agency may consider the experience of key personnel in evaluating new businesses, it is not required to attribute personal experience to a contractor as if it was a long-established entity.[252]

Here's a Whole Book of Referrals: We'll Let You Know When You're Tired! In *Black & Veatch Special Projects Corp.* (B&V),[253] the COE issued a RFP for the design and construction of a building at Tinker AFB, Oklahoma. The RFP required offerors to include a list of relevant design and building projects. Black & Veatch submitted fifteen projects with specific named references.[254]

The COE investigated only two projects and did not speak to any of the named references. Black & Veatch complained about its past performance score. Black & Veatch claimed that if the agency had contacted all named references and investigated all fifteen projects, it would have received a higher evaluation. The GAO disagreed, concluding there is no legal requirement for an agency to contact and check all references listed in a proposal.[255] The GAO noted that the COE talked to the project engineer on the two B&V projects that resembled the RFP's requirements. This engineer had unfavorable comments on B&V's timeliness, personnel, supervision of employ-

244. *Electronic Design*, 98-2 CPD ¶ 69 at 2.

245. *See 1997 Year in Review, supra* note 8, at 27.

246. B-279543, June 23, 1998, 98-1 CPD ¶ 172.

247. *Id.* at 2.

248. *Id.* The awardee's price was higher than HBI's price. However, the RFP permitted award to a higher priced offeror provided such award represented the best value to the Navy. *Id.*

249. *Id.* at 4.

250. *Id.* at 5. Hard Bodies also claimed the contracting officer was biased against it based on a verbal altercation it had with the contracting officer. Hard Bodies alleged the contracting officer was irate and disrespectful because she felt HBI's frequent calls concerning the status of the procurement were an inconvenience. The GAO found no evidence of bias and no basis to question the motives of the contracting officer. *Id.*

251. *Id.* The Navy did evaluate key personnel under the technical evaluation factor. *Id.*

252. *Id. See* Atlantic Coat Contracting, B-270491, B-270590, Mar. 13, 1996, 96-1 CPD ¶ 147.

253. B-279492.2, June 26, 1998, 98-1 CPD ¶ 173.

254. *Id.* at 6.

ees, and experience in design-to-build projects. Black & Veatch objected because the project engineer was not the person listed as a reference in its proposal. The GAO had no problem with the COE's action. The GAO found the project engineer's comments accurate, relevant, and unrebutted by B&V.[256] In addition, the GAO found that B&V was not prejudiced by the COE's failure to allow a rebuttal opportunity to this adverse information.[257] The GAO concluded that a perfect score in the relevant subfactor would not have changed the outcome.[258]

GAO Still Emphasizing Importance of Personal Knowledge in Evaluations. In *Team Support Services, Inc.*,[259] (TSS) the RFP stated that the Environmental Protection Agency (EPA) would evaluate offerors on their demonstrated success in performing similar work within the past three years. Team Support Service's proposal highlighted that it was the incumbent EPA contractor and listed the EPA project officer on that contract as the contact point. The EPA project officer was also the sole past performance evaluator assigned to the evaluation team. Team Support Services received a low past performance rating. After evaluating the eight proposals it received, the EPA eliminated TSS from the competitive range.[260]

Team Support Services alleged that the project officer unfairly used his personal knowledge and opinion of TSS's performance as the incumbent to downgrade the past performance score. It argued that the project officer was biased because of two cost allowability disputes that arose under the incumbent contract. Team Support Services also claimed the project officer improperly solicited a past performance questionnaire improperly from a NASA official and used that information to downgrade TSS's past performance score. Team Support Services asserted that the project officer's action was the "work of a malicious saboteur manipulating what should be an impartial process to get his way."[261]

The GAO found that the project officer's low opinion of TSS's working relationship and cooperation in resolving disputes was relevant to an evaluation of TSS's past performance. The questionnaire responses praised TSS's incumbent contract for excellent on-site support, response to performance problems, and timeliness; however, they downgraded TSS's ability to work through contract dispute problems.[262] The GAO found that the project officer's comments were critical of TSS's corporate management rather than bias against the firm itself. There was nothing wrong with the project officer evaluating TSS based on his experience with the current EPA contract and incorporating his opinion of TSS's performance into the evaluation.[263]

Likewise, the GAO had no difficulty with the project officer sending the questionnaire to NASA. Agencies may consider evidence from sources that are not listed in the proposal.[264] The project officer was aware of the NASA contract through his conversations with TSS's management. The project officer contacted NASA because he had only been able to contact one of TSS's references concerning a small, non-EPA contract. The NASA contract, however, was closer in size, complexity, and dollar amount to the RFP than most of the contracts that TSS submitted as references. The NASA information was negative and echoed the problems it had experienced with TSS's corporate management. The GAO stated that although the NASA contract's technical aspects were different from this RFP, the issue of TSS management's effectiveness and ability to maintain a working relationship with the government was relevant to any type of contract. In addition, the GAO refused to attribute improper motives to the project officer simply because the NASA information was unfavorable.[265]

Collecting Past Performance Data Not a Continuing Duty. Once an agency receives requested PPI, must it go beyond that material to update the offeror's submission? In *PCT Services, Inc.* (PCT),[266] the Air Force issued a RFP for hospital aseptic management system services. The RFP required offerors to

255. *Id.* at 8.

256. *Id.* at 9.

257. *See* FAR, *supra* note 15, at 15.610(c)(6).

258. *Black & Veatch*, 98-1 CPD ¶ 173 at 9.

259. B-279379.2, June 22, 1998, 98-1 CPD ¶ 167.

260. *Id.* at 2.

261. *Id.* at 3.

262. *Id.* at 5.

263. *Id.* at 4.

264. *Id.* at 6.

265. *Id.*

submit PPI for relevant contracts within the past two years. In assessing past performance, evaluators would review information required by the RFP, seek present and past performance information through the use of simplified questionnaires, and use data independently obtained from both government and commercial sources. The lowest evaluated price, technically acceptable offeror would receive the award if it also received a low performance risk rating. If the low-priced offeror received other than a low-risk rating, the RFP stated that the award could go to another offeror.[267]

PCT submitted past performance references and received a number of marginal and unsatisfactory ratings, including a low rating in management performance. Additionally, one contracting office reported problems in negotiating changes with PCT because it failed to submit timely and complete change proposals.[268] During discussions, the Air Force advised PCT that it received a moderate risk rating based on reported past performance deficiencies. The Air Force gave PCT an opportunity to respond. PCT questioned some of the ratings and provided some additional information regarding its past performance.[269]

The Air Force found that PCT's submissions provided no basis to disregard most of the adverse ratings. Therefore, it did not change the moderate risk rating.[270] PCT complained that the Air Force failed to request updated information concerning its performance after the closing date for receipt of proposals. According to PCT, if the Air Force had received that information, including the positive aspects of PCT's present performance, it would have assigned PCT a low risk rating and the contract award.[271]

The GAO found that the Air Force, consistent with the RFP's requirements, relied on performance information within the last two years to evaluate PCT's past performance. That information was provided in response to the questionnaires. The GAO noted that the Air Force's use of this data was consistent with the RFP's stated evaluation scheme, and was reasonable. The RFP did not require the Air Force to conduct a new survey rather than relying on the PPI it already had.[272] The GAO noted that even though PCT was informed of the past performance problems during discussions, PCT did not rebut the accuracy of the past performance information.

266. B-279168, May 12, 1998, 98-1 CPD ¶ 152.

267. *Id.* at 2.

268. *Id.* at 2-3.

269. *Id.* at 3.

270. *Id.*

271. *Id.* at 4.

272. *Id.* The GAO stated "[w]hile the protester argues that updated performance information would show that PCT's performance has improved, we do not think the agency's reliance on the . . . questionnaire responses – the most current information available at the time of evaluation – was unreasonable." *Id.*

The Recalcitrant Referral: What Do You Do When No One Will Respond?

What does an agency do if an offeror's references will not provide PPI? The DOE confronted this issue in *Advanced Data Concepts* (ADC).[273] The RFP required offerors to identify past contracts for review. For each contract that was identified, the offeror provided the name of the contracting activity, the contract number and type, the contract value, a description of the statement of work, and point of contact telephone numbers. The RFP advised offerors that if an offeror's references were unwilling to provide the government with requested information, that reference would receive a neutral rating.[274] Because none of ADC's references responded, the DOE assigned them each neutral ratings. All of the awardee's references responded to the request for references.[275]

Advanced Data Concepts complained that the neutral ratings it received were unfair, since the actual ratings on its referenced contracts would have exceeded the neutral ratings given by DOE. The GAO reminded ADC that there is no legal requirement that all past performance references be included in a valid review of past performance.[276] The record showed that the DOE contacted all of ADC's references and made at least an initial attempt to get the information. The GAO found that the DOE properly followed the RFP procedures in assigning the neutral ratings. The record demonstrated that the DOE translated the neutral rating to a favorable numerical score of eight out of ten available points. The GAO held that ADC was not harmed in any significant way by the DOE's action.[277]

Urgent Call for "Roach Motels" Can Strike Competitor With Neutral Rating Dead

Who would think that a case that involves the purchase of "roach motels" would give excellent guidance on the issue of "neutral" past performance ratings? In *Phillips Industries, Inc.*,[278] the Defense Supply Center Richmond (DSCR) required a large supply of "roach motels."[279] The RFP stated that the DSCR would assess the offeror's prices and past quality and delivery performance in making its award decision. Past performance and price were the primary evaluation factors, and the solicitation also advised offerors that the award could be made to other than the low-priced, technically acceptable offeror. The DSCR would provide offerors with a past performance score based on a combination of their delivery and performance scores. The RFP further advised offerors that a lack of a performance history would not disqualify an offeror, but it could cause the offeror to "be considered less favorably than an offeror with favorable performance history."[280]

Because "roach motels" were a high-demand item and often back-ordered, timely delivery was very important. Phillips had no performance history, and its past performance rating was considered "unscored." Amjay Chemicals, another offeror, received a high past performance score, but its price was three percent higher than Phillips'. The contracting officer considered the scores and prices and determined that Amjay, even though higher priced, represented the best value to the DSCR. In her award decision memorandum, the contracting officer noted that an award to an offeror without a performance history would be a "great risk" to the DSCR.[281]

Phillips protested, arguing that it was penalized for its lack of performance history. It asserted that the contracting officer unreasonably believed there would be considerable risk if she awarded the contract to a contractor without a performance history. The GAO, however, concluded that the DSCR's actions were reasonable and consistent with the RFP.[282] The RFP clearly advised offerors that while lack of a performance history would not disqualify them, they might be considered less favorably than an offeror with a good performance history. Also, offerors were aware that the DSCR could trade-off price and past performance to pay a higher price for less performance risk (better past performance). Given the immediate need for "roach motels," the contracting officer believed that paying a premium price to ensure timely delivery represented the best value to the government. Thus, the DSCR did not penalize Phillips by assigning it a neutral rating.[283]

273. B-277801.4, June 1, 1998, 98-1 CPD ¶ 145.

274. *Id.* at 7.

275. *Id.* at 8.

276. *Id.* at 10.

277. *Id.*

278. B-280645, 1998 WL 639099 (Comp. Gen. Sept. 17, 1998).

279. The industry term is "bait station." *Id.* at *1.

280. *Id.* at *2. The RFP stated that offerors without a performance history would receive more favorable scores than offerors with poor performance histories. *Id.*

281. *Id.* at *3.

282. *Id.* at *4.

Although the GAO denied the protest, it appeared concerned with the DSCR's use of the terms "performance risk" or "great risk" in the source selection memorandum concerning offerors with no performance histories. This language raises the issue of whether an agency is unfairly penalizing offerors with no past performance histories.

Scoring Past Performance With "Same or Similar Items"—Art or Science?

How do evaluators score proposals when a RFP contains the language "same or similar item," and one offeror provides references of the "same item" while another provides references of a "similar item"? In *Chant Engineering Co., Inc.*,[284] the Marine Corps sought a supplier for two aircraft fuel nozzle test stands. The RFP asked offerors to describe their past experience in producing the same or similar item within the last three years.[285] The awardee (Bauer) received a higher past performance score than Chant because Bauer had manufactured the same test stands as required by the RFP. As both Chant and Bauer had the same scores in other technical areas, the past performance scoring made a critical difference in the award decision.[286]

Chant protested the award, alleging that the RFP did not state that the Marine Corps would give a preference to offerors with the "same" manufacturing experience as this RFP. Chant argued the Marine Corps should have given it a score equal to Bauer's because it met all the RFP's requirements and demonstrated "similar" experience manufacturing the test stands.[287] The GAO disagreed, finding that agencies may properly make qualitative distinctions between competing proposals. According to the GAO, an agency may rate a firm that has previously supplied the same type of item higher than a firm with more general experience.[288]

Discussions

Sure the Discussions on Cost Were Misleading and Inequitable, But Can You Prove They Were Prejudicial? In *Richards International Inc. T-A INFOTEQ*,[289] the Department of Health and Human Services (HHS) solicited scientific research support services. The HHS awarded a five-year, cost-reimbursement, level-of-effort contract to B.L. Seamon & Associates (Seamon). INFOTEQ alleged that HHS misled it about the government's concerns with its cost proposal.[290] The record showed that HHS directed INFOTEQ to use current rate agreement indirect cost rates instead of the lower rates proposed in its initial proposal. INFOTEQ established that the agency's actual concern was about the protester's lack of support for the lower rates.[291] The record also revealed that Seamon had proposed rates that were substantially lower than its most recent rate agreement. Unlike the protester, Seamon was merely asked to provide additional support for its indirect cost rates.[292]

The GAO found that the discussions were both misleading and unequal. Nonetheless, the GAO held that the record did not show "a reasonable possibility" that INFOTEQ was prejudiced by the agency's improper discussions about indirect cost rates.[293] In a post-protest analysis, HHS showed that Seamon's technically superior proposal still would have been less expensive than the protester's proposal. INFOTEQ countered that it would have lowered its fixed fee if its lower indirect rates were approved.[294] The GAO viewed this position as speculative and unsupported. With the higher indirect cost rates, INFOTEQ

283. The GAO stated:

> [T]he use of a neutral rating approach, to avoid penalizing a vendor without prior experience and thereby enhance competition, does not preclude, in a best value procurement, a determination to award to a higher-priced offeror with a good performance record over a lower-cost vendor with a neutral past performance rating. Indeed such a concept is inherent in the concept of best value.

Id. at *4.

284. B-280250, 1998 WL 461076 (Comp. Gen. Aug. 7, 1998).

285. *Id.* at *2.

286. *Id.*

287. *Id.*

288. *Id.* at *3.

289. B-277808, Nov. 21, 1997, 98-1 CPD ¶ 2.

290. *Id.* at 1.

291. *Id.* at 6.

292. *Id.* at 7.

293. *Id.*

had a strong incentive to lower its fee as much as possible to improve its competitive standing.[295]

GAO Little Help in Determining How to Avoid Conducting Discussions During Oral Presentations. In *BE; PAI Corp.*,[296] the DOE sought a contractor to provide technical support services for the DOE's nuclear weapons activities. The contract was an ID/IQ task order contract with a base year and four option years.[297] The DOE received ten written initial proposals by the closing date. Following subsequent oral presentations, the DOE awarded the contract to Systematic Management Services, Inc. (SMS).

After the award, two firms protested. BE protested the cost/technical trade-off and the evaluation of SMS's cost proposal. The GAO, however, found the source selection decision reasonable.[298] PAI challenged how the DOE conducted the awardee's oral presentation. PAI alleged that two of DOE's questions elicited answers that affected the scoring of the awardee's proposal, and therefore constituted discussions. The questions identified and sought additional details to PPI that was already presented in SMS's proposal.[299]

Without discussing the limits of clarifications in oral presentations, the GAO concluded that SMS provided insufficient information. The GAO found that the solicited information "in no way can be said to have been necessary to establish the acceptability of SMS's proposal."[300] Perhaps another time?

Information Received During a Site Visit to Verify Past Performance Data Does Not Create Discussions. In *UNICCO Government Services*,[301] the Social Security Administration (SSA) awarded a contract for consolidated facility management services at the Harold Washington Social Security Center in Chicago, Illinois.[302] The fixed-price, requirements contract included equipment maintenance, custodial services, security, and utilities. The RFP called for a "best value" award, with price less important than the agency's "evaluated confidence" (experience and past performance combined). The RFP instructed offerors to demonstrate that the reference contracts were similar in size, scope, and complexity to the solicitation's statement of work.[303]

Given the importance of past performance in this evaluation scheme, the evaluation team conducted site visits at some of the facilities managed by the offerors.[304] In addition to an unsuccessful challenge of the awardee's ratings, the protester complained that the evaluation team's visit to an awardee managed facility, the Peachtree Summit Federal Building, constituted discussions with the awardee.[305]

The GAO determined that, during the initial site visit, the evaluation team did not obtain any information essential to determining the acceptability of the awardee's proposal or modifying the initial proposal. The GAO found that the team primarily inspected the building's operations and spoke with government personnel on site. The head of the evaluation team testified that the only conversations with the awardee's people involved requests to be shown certain pieces of equipment and to review maintenance records.[306] According to the GAO, this interaction merely served to confirm the existing ratings.[307] The GAO did not address what would have happened if it had found

294. *Id.*

295. *Id.* at 8. The GAO did not analyze the problem in terms of the offeror's cost risk, although it appears that the contractor was trying, at least indirectly, to compare the speculative nature of the proposed rates to the more tangible effects of a fee reduction. For an instance where misleading discussions were found prejudicial, *See* Hughes STX Corp., B-278466, Feb. 2, 1998, 98-1 CPD ¶ 52 (holding that a "mechanical comparison" of proposed labor rates to undisclosed historical labor rates without considering each offeror's proposed technical approach or other information constituted a flawed cost realism approach in evaluations; because of the flawed cost evaluation, discussions consistent with this approach were not meaningful).

296. B-277978.2, Dec. 16, 1997, 98-1 CPD ¶ 80.

297. *Id.* at 1.

298. *Id.* at 3-4.

299. *Id.* at 5. Regarding a referenced contract, the DOE asked SMS to described the supported organization. The DOE also asked a very narrow technical question regarding one of several contract tasks on the same referenced contract. *Id.*

300. *Id.* The GAO stated that the FAR considers information on the relevance of past performance data to be in the same category as minor or clerical errors. *Id.* at n.3. *See* FAR, *supra* note 15, at 15.306(a)(2).

301. B-277658, Nov. 7, 1997, 97-2 CPD ¶ 134.

302. *Id.* at 1.

303. *Id.* at 2.

304. *Id.* at 4.

305. *Id.* at 10. The evaluation team did not visit any of the buildings that the protester identified because the team was already familiar with the protester's operations. UNICCO was the incumbent contractor at the Chicago facility. *Id.* at 4.

the results to be inconsistent with the awardee's past performance history.[308]

Conversations Regarding Cost & Pricing Data Information Not Discussions. In *WECO Cleaning Specialists*,[309] the SSA awarded a contract for janitorial services on the basis of initial proposals. The evaluation factors were: (1) promised value—an offeror's acceptability, (2) level of confidence in an offeror's performance, and (3) price.[310] The protester alleged that the SSA had impermissible discussions with the awardee, Beautify Professional Cleaning Service.[311] The protester argued that the agency should have conducted discussions with all offerors, because the SSA requested and reviewed Beautify's cost and pricing data prior to award.[312] The GAO found that the SSA's questions related only to Beautify's responsibility. Its technical and price proposals, which were the basis for award, remained unchanged. Therefore, the GAO found that there were no impermissible discussions.

Debriefings—Can You Be Too Brief?

In *Thermolten Tech.*,[313] the Army requested proposals for multiple negotiated task order contracts to identify and demonstrate alternative disposal methods for destroying chemical weapons.[314] The solicitation stated that the Army would award "initial $50,000 firm fixed price task orders" for the preparation of demonstration work plans to all responsive offerors meeting six stated threshold criteria.[315] After finding that the protester's proposal failed to meet five of these six criteria, the Army did not consider it further.[316] At its request, Thermolten Tech. received a debriefing.

One of the protester's issues concerned the adequacy of the debriefing. Thermolten Tech. complained of the absence of government experts who could hear its proposal and, possibly, reverse the determination of the evaluation team. Without experts present, Thermolten Tech. characterized the debriefing process as "a wild goose chase."[317]

The GAO had little difficulty denying the protest. While the debriefing may not have been all the protester desired, the absence of technical experts was not a regulatory violation.[318] The GAO noted that the purpose of a debriefing is not to give offerors the opportunity to cure deficiencies, but to furnish the basis of the source selection decision.[319]

306. *Id.* at 10.

307. *Id.* at 11.

308. *Id.* The protester's additional allegation of unfair competitive advantage, dismissed "out of hand" by the GAO, may have played a more prominent role in that instance.

309. B-279305, June 3, 1998, 98-1 CPD ¶ 154.

310. *Id.* at 1.

311. In the flawed evaluation allegation, the protester alleged unsuccessfully that the SSA considered information that was not required by the solicitation. The GAO pointed to language that encouraged supporting documentation on the similarities between a given offeror's past experience and the present requirement. *Id.* at 3.

312. *Id.* at 4.

313. B-278408, Jan. 26, 1998, 98-1 CPD ¶ 35.

314. *Id.* at 3. The Army's preferred method, incineration, had created concerns about potentially toxic by-products that could be released into the air. *Id.* at 2.

315. *Id.* The proposals had to (1) provide a total solution, (2) be a meaningful alternative to baseline incineration, (3) use processes that can be developed in time to meet the existing schedule, (4) use proven agent properties, (5) use proven energetics processes, and (6) use legally licensed technology. *Id.*

316. *Id.* at 4.

317. *Id.* at 5.

318. *See* FAR, *supra* note 15, at 15.506.

319. *Thermolten*, 98-1 CPD ¶ 35 at 5. *See* NASH, *supra* note 11, at 159-60.

Setting Competitive Ranges: The New Rule Looks a Whole Lot Like the Old Rule!

In *SDS Petroleum Products*,[320] the GAO reviewed the new FAR Part 15 rewrite[321] standard for setting competitive ranges. The protester challenged its exclusion from the competitive range of a VA 8(a) set-aside procurement for the supply and delivery of natural gas. Despite serious flaws in the technical portion of SDS's initial proposal, the VA kept SDS in the competitive range.[322] After discussions, SDS submitted additional information. Nonetheless, the VA subsequently eliminated SDS from the competitive range as having the highest price and the lowest technical score. During the debriefing, SDS discovered that the competitive range was reduced to one. SDS protested this decision.

Besides asserting that its final proposal revisions included adequate evidence, SDS argued that reducing the competitive range to one violated FAR Part 15. Specifically, SDS argued that the VA violated FAR 15.306 that required it to include "all of the most highly rated proposals." The GAO disagreed, holding that the FAR Part 15 rewrite final rules did not intend for agencies to retain proposals with no reasonable prospect of award to avoid a competitive range of one.[323] The GAO's use of the old competitive range standard confirms that little has changed in making these determinations.

Simplified Acquisitions

One Day Insufficient Notice Period for Award of Sole-Source Procurement

In *Jack Faucett Associates*,[324] the National Institute of Health (NIH) awarded a simplified acquisition, sole-source contract via the Federal Acquisition Computer Network (FACNET).[325] The purchase order involved administrative services in support of NIH meetings of the American Medical Students Association. The NIH issued the purchase order for these services one day after it met the publication requirement through FACNET. In addition to arguing that the sole-source justification was inadequate, the protester argued that the NIH failed to allow interested vendors a reasonable opportunity to provide a quote.[326]

The GAO noted that the contracting officer is required to provide potential offerors notice and a reasonable opportunity to respond, even if simplified acquisitions using FACNET are exempt from the CBD publication requirement.[327] The FACNET is merely the alternate method to satisfy these requirements.[328] The NIH argued that a one-day response time was sufficient because it believed that no other offeror could meet its needs. In sustaining the protest, GAO responded that NIH's beliefs did not eliminate the requirement to provide a reasonable time.[329]

320. B-280430, 1998 WL 637020 (Comp. Gen. Sept. 1, 1998).

321. FAR, *supra* note 15, at 15.306(c)(1). *See 1997 Year in Review, supra* note 8, at 25-27(providing additional information on the FAR Part 15 rewrite).

322. *SDS Petroleum*, 1998 WL 637020, at *2. The protester was never able to establish its ability to obtain natural gas below a certain index price, the second most important evaluation factor. *Id.*

323. *Id.* at *4.

324. B-279437, June 3, 1998, 98-1 CPD ¶ 155.

325. *Id.* at 1 n.1. The FACNET is a government-wide electronic network that was designed to exchange procurement information readily between the government and the private sector. 41 U.S.C.A. § 426 (West 1998). Although intended to ultimately become the primary means for posting solicitations and receiving responses (i.e., paperless contracting), its unpopularity with industry led to the official sanctioning of other electronic commerce systems. *See* National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 850, 111 Stat. 1629 (1997).

326. *Jack Faucett*, 98-1 CPD ¶ 155 at 2. *See* FAR, *supra* note 15, at 13.003.

327. 41 U.S.C.A. § 416(c)(1)(A) (West 1998); FAR, *supra* note 15, at 5.202(a)(13),(14).

328. 41 U.S.C.A. § 426(c) (West 1998); FAR, *supra* note 15, at 5.202(b), 13.003(i)(2).

329. *Jack Faucett*, 98-1 CPD ¶ 155 at 3. The requirement to provide a reasonable response time also applies to the pilot program for commercial item procurements in excess of the simplified acquisition threshold (up to five million dollars). FAR, *supra* note 15, at 13.500.

Joining the 90s: Agency Can Require Submission of Electronic Quotes

In *Commonwealth Industrial Specialties*,[330] the DLA sought quotations for pressure gauges. The request for quotations (RFQ) was available only through the DLA electronic bulletin board (EBB). Likewise, quotations had to be submitted in an electronic format via the EBB.[331]

The protester argued that the DLA's method violated the statutory mandate that simplified acquisition procedures "promote competition to the maximum extent practicable."[332] The GAO acknowledged the necessity of having access to a personal computer, certain telecommunications software, and a modem to obtain EBB access. These items, however, are readily available in the commercial marketplace.[333] In addition, the DLA provided evidence that the use of EBB quotations actually increased competition.[334] The GAO noted that the DLA's experience with new information technologies was generally consistent with the experience of other agencies.[335]

Federal Acquisition Regulation Council Issues Final Rule on FAR Part 13 Reorganization

On 9 December 1997, the Federal Register published Federal Acquisition Circular (FAC) 97-03. Item IV of the FAC was FAR Case 94-772: Reorganization of FAR Part 13, Simplified Acquisition Procedures.[336] The final rule reorganizes Part 13 for clarity and emphasizes the use of electronic commerce in government contracting (including the ability to allow agency clauses to be incorporated by reference where the full text can be accessed electronically by prospective contractors).[337] The final rule also adds a new clause to provide offerors reference-only citations of the most commonly used clauses in simplified acquisitions.[338]

DFARS Proposed Rule Would Severely Restrict Non-Credit Card Micropurchases

On 8 May 1998, the Director of Defense Procurement issued a proposed rule to conform DFARS Part 213 to the revisions made in FAR Part 13 by Federal Acquisition Circular 97-03.[339] In addition, the proposed rule would prohibit commercial item purchases using purchase orders or other contracts, at or below $2500, absent a written justification by a senior executive service, flag, or general officer.[340]

Commercial Items

Was that Box of Household Goods Clearly Marked "Commercial Items"?

In *Aalco Forwarding, Inc.*,[341] the GAO determined that household goods moving services for military personnel can

330. B-277833, Nov. 25, 1997, 97-2 CPD ¶ 151.

331. *Id.* at 2. *See* 10 U.S.C.A. § 2304(g)(1) (West 1998); 41 U.S.C. § 253(a)(1)(A), 259(c) (1994).

332. 10 U.S.C.A. § 2304(g)(3) (West 1998).

333. *Commonwealth*, 97-2 CPD ¶ 151 at 3.

334. *Id.* The DLA showed that there was a twenty-seven percent increase in the number of participating vendors and a sixty-five percent increase in the number of quotes received. *Id.*

335. *See* NuWestern USA Contractors, B-275514, Feb. 27, 1997, 97-1 CPD ¶ 90 (holding that the issuance of solicitation only in CD-ROM format was not unduly restrictive of competition).

336. 62 Fed. Reg. 64,916 (1997).

337. The proposed rule was published on 13 September 1996. 61 Fed. Reg. 48,532 (1996).

338. FAR, *supra* note 15, at 52.213-4.

339. 63 Fed. Reg. 25,438 (1998).

340. *Id.* at 25,439. The written determination must find that:

(1) The source or sources available for the supply or service do not accept the government-wide commercial purchase card; and

(2) The contracting activity is seeking a source that accepts the card; or,

(3) The nature of the purchase necessitates the use of a purchase order or other contract so that terms and conditions can be specified.

The regulation also allows for delegation of approval authority to the level of the senior local commander or director where necessary to prevent mission delays. *Id.*

341. B-277241.8, Oct. 21, 1997, 97-2 CPD ¶ 110.

constitute a commercial item buy under FAR Part 12. The services involved an Army Military Traffic Management Command (MTMC) solicitation for fifty percent of all military and Coast Guard personal property shipments from North Carolina, South Carolina, and Florida to destinations in the Continental United States and Europe. The solicitation included all personnel, equipment, materials, supervision, and other items necessary to provide transportation.[342] The solicitation implemented a pilot program to "reengineer" the DOD personal property shipping and storage program.[343]

The protesters, 119 moving companies, contended that the MTMC was acquiring the services improperly under FAR Part 12.[344] They argued that moving military household goods, particularly the international shipments, was unlike moving civilian personnel household goods. The protesters asserted that there were no established catalog or market prices on international shipments. Additionally, the entire program involved unique requirements tailored to meet the MTMC's special needs that have no counterpart in the commercial marketplace.[345]

The GAO found the MTMC's extensive market research for this pilot program persuasive, noting that the contracting officer generally has the discretion to determine whether the product or service is a commercial item. The GAO found that the protesters had not convincingly explained why the services for commercial contractors[346] were significantly different, since the same trucks, warehouses, ocean and air carriers, crews, packing materials, and other equipment are used. While there were a few government-unique requirements, they did not change the fundamental nature of the types of services sought.[347]

In rejecting the protester's assertion that international shipments did not involve established catalog or market prices, the GAO found that a "through" rate[348] met the definition of "market prices" under the Federal Acquisition Streamlining Act of 1994 (FASA).[349] The GAO determined that the absence of lump-sum rates did not remove "through" rates from the statutory definition of market prices, for the end rate is merely a compilation of established market prices for specific tasks.[350]

Subcontractor Clause Flow-down Slowdown

The proposed rules for the flow-down of mandatory clauses for commercial items and commercial components subcontracts were issued on 23 September 1997.[351] The comment period ended 24 November 1997. The FAR Council, however, has yet to issue final rules. Contractors are naturally concerned about how many clauses must be carried down from the prime.

Exempting Commercial Item Buys from the Cost Accounting Standards

Item V of FAC 97-04[352] addresses FAR Case 97-020—Applicability of Cost Accounting Standards (CAS) Coverage. The final rule amends FAR Parts 12 and 52 to exempt contracts and subcontracts for commercial item buys from any CAS requirements when a firm-fixed-price or fixed-price with economic price adjustment contract is involved.[353]

Bid Protests

This past year was eventful in the bid protest area, especially the COFC. While the number of protests filed before the GAO

342. *Id.* at 2.

343. *Id.* at 5.

344. *Id.* at 11. The contractors also argued unsuccessfully that the RFPs included requirements that violated the Anti-Kickback Act of 1986, Pub. L. No. 104-106, 110 Stat. 186.

345. *Id.*

346. Household goods shipments for the DOD account for approximately fifteen percent of the U.S. moving industry's annual volume in the United States. *Id.* at 3.

347. *Id.* at 12.

348. *Id.* A "through" rate is the sum of the separately priced components for each uniquely individual shipment. *Id.*

349. 41 U.S.C.A. § 403(12)(F) (West 1998), *amended by* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4204, 110 Stat. 186. Domestic shipments, in contrast, involve a standard tariff from origin to destination.

350. *Aalco*, 97-2 CPD ¶ 110 at 12.

351. 62 Fed. Reg. 49,903 (1997) (amending FAR 52.244-6, Subcontracts for Commercial Items and Commercial Components, to clarify that contractors are required to include, in subcontracts at any tier for commercial items or commercial components, the FAR clauses and provisions listed in that clause (as well as any other clauses and provisions that might be later added by addenda)).

352. 63 Fed. Reg. 9048 (1998).

353. *Id. See also* FAR, *supra* note 15, at 12.214.

continued its downward trend,[354] the number of protests filed before the COFC continued to increase.[355]

The COFC's General Order 38

On 8 May 1998, the COFC announced its long-awaited order describing its standard practices for bid protests.[356] In General Order No. 38, the court order adopted the recommendations of the task force that was implemented under the COFC's Advisory Council.[357] The major provisions of the order include the pre-filing notice, the initial status conference, the protective order, and the administrative record.

At least twenty-four hours prior to filing the protest, counsel for the protester must provide notice of its filing to: (1) the Department of Justice, (2) the clerk of court, (3) the procuring agency, and (4) the apparent successful offeror.[358] While the task force agreed that a pre-filing notice would assist with the efficient processing of a protest case, there was internal dissent about whether to make the notice a requirement or a strong suggestion.[359] The task force resolved the disagreement by requiring the notice, but declined to provide a sanction for a protester that fails to meet the requirement (other than delaying the initial proceedings).[360]

Members of the task force agreed unanimously that an initial status conference was a critical management tool for resolving routine procedural matters without the filing of additional motions and court papers. Section D of General Order 38 discusses the conference requirement. The court will schedule the conference "as soon as practicable after the filing of the complaint."[361] At this time, the parties will be able to discuss requests for temporary or preliminary injunctions and the content of any requested protective order.

Another key provision of General Order 38 discusses the protective order requirement. Section F of the order defines the procedures that parties must follow to gain access to proprietary or source-selection information. Attached to the General Order is a sample of a protective order and an application for access to materials under a protective order. The COFC fashioned its protective order and application forms around the protective order used by the GAO; however, the judge or the parties may tailor the order to meet the needs of the particular case.

The court was very clear in the General Order that it expects the government to produce the "core" documents of the case promptly. The order states in Section G, paragraph 17 "[t]hat the early production of relevant core documents may expedite final resolution of the case." The COFC provides a list of twenty-one types of documents that the government may include in the core record.[362] These "core" documents include the agency's statement of requirements, the agency's source selection plan, the solicitation, the protester's and the awardee's proposals, and the agency's evaluations of the proposals.

The COFC will implement General Order 38 for a twelve-month trial period. At the end of the trial period, it will consider input from the bar and the general public, as well as its own experience, to determine if it needs to modify the order.

Bid Protest Decisions

GAO. In January 1998, the Comptroller General heard a case that presented a new twist to what everyone may have considered a worn-out issue. *Electro-Voice, Inc.*,[363] presented the GAO with the question of whether its protest authority allows it to consider allegations concerning "downselection."[364]

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354. The total number of protests published in the Federal Publications' *Comptroller General's Procurement Decisions* for 1997 included a total of 410 decisions. This is down significantly from the 537 decisions published in 1996. 12 THE NASH & CIBINIC REP., No. 5, 66 (May 1998).

355. The number of postaward protests filed before the COFC as of July 1997 was 11. As of July 1998, the COFC had received 14 postaward protests. Robert M. Cowen, *Court of Federal Claims Likely to Top 1997 Postaward Protest Record*, 70 Fed. Cont. Rep. (BNA) 4 (1998).

356. General Order 38, United States Court of Federal Claims, *General Orders and Other Announcements*, <http://ogc.doc.gov/fedcl/docs/orders.html> [hereinafter G.O. 38]. More information about G.O. 38, or a full-text copy of the order, may be found at the COFC's website <http://www.law.gwu.edu/fedcl> or <http://www.ogc.doc.gov/fedcl>.

357. Martha A. Matthews, *Court of Federal Claims Adopts Standard Practices for Bid Protest Cases*, 69 Fed. Cont. Rep. (BNA) 532 (1998) (quoting Thomas Madden, of Venable, Baetjer, Howard & Civiletti, Washington, D.C., who co-chaired the task force). The task force reviewed the COFC's rules and procedures and recommended changes in light of its expanded bid protest jurisdiction. The task force's annotations addressing the issues it considered accompanies the text of the order and serves as a useful tool for the reader. According to the task force, the general order will allow for efficient processing of bid protest cases, and will allow the parties to focus on the protest's substantive issues. *Id.*

358. G.O. 38, *supra* note 356, ¶ B.2.

359. *Id.* (task force annotation).

360. *Id.*

361. *Id.* ¶ D. 8.

362. *Id.* ¶ G. 17.

Electro-Voice

In *Electro-Voice*, the protester and another contractor, Specialty Plastic, received awards of ID/IQ quantity contracts for the production of Advanced Combat Vehicle Crewman helmets with communications systems. Both firms delivered four product demonstration models for testing in the downselection process. In RFP, the agency indicated that they would base the award on best value, considering certain specified factors including cost and technical performance.[365] While the source selection evaluation board (SSEB) determined that Electro-Voice's product offered some marginal advantage over Specialty Plastic's product, this advantage was not worth the additional thirty-three percent price premium of Electro-Voice's offered price.[366] The SSEB recommended that the agency select Specialty Plastic as the production contractor. The Source Selection Authority (SSA) accepted the recommendation, and the agency issued a delivery order to Specialty Plastic for 10,015 helmets. Electro-Voice filed its protest after it received its debrief from the agency.

Specialty Plastic, as an intervenor, questioned the GAO's jurisdiction. Specialty Plastic argued that 10 U.S.C.A. § 2304c(d) precludes a protest "in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued."[367] The GAO disagreed strongly with the intervenor's argument and denied the protest.

The GAO reasoned that while the cited statute precluded it from considering certain protests, Congress did not mean to include downselect decisions. Nothing on the face of the statute, or in the legislative history, indicates that the statute prohibits downselect protests. The FASA[368] implemented the provision that the intervenor cited. The GAO stated that the legislative history of FASA's provisions regarding task and delivery order contracts shows that Congress encouraged agencies to use multiple award order contracts. Such contracts promote an ongoing competitive environment where an agency would fairly consider each awardee for each issued order.[369]

The GAO also concluded that once the agency makes the downselection decision, 10 U.S.C.A. § 2304c(d) does not apply because competition for orders among the multiple awardees ceases. The GAO found that the agency placed the initial delivery order only as a means to implement the downselection. Because the agency used the terms of the existing contract to conduct a competition that would eliminate other contractors as sources for its requirements for the contracts' duration, the GAO determined that it had the authority to consider the protest that relates to competition and selection decision.[370]

The Intrados Group

The Intrados Group[371] involved an allegation of downselection, but the GAO held that the facts of the case did not meet the definition of downselect. In *The Intrados Group*, the agency issued a task order to Finance Markets International under an ID/IQ multiple award contract. In its protest, Intrados alleged that the agency did not follow the stated evaluation criteria and scoring scheme and misevaluated its technical proposal. The United States Agency for International Development (USAID) issued the original RFP for technical assistance services to support a privatization and economic restructuring program for Europe and the new independent states of the former Soviet Union. The RFP divided the privatization services into five

363. B-278319, B-278319.2, Jan. 15, 1998, 98-1 CPD ¶ 23.

364. Downselection occurs when an agency selects one of multiple contractors for continued performance of a delivery order contract. Contractors are generally barred from protesting orders under a delivery order contract. 10 U.S.C.A. § 2304c(d) (West 1998). The GAO was now confronted with deciding whether this same prohibition applied to the downselection process where a contractor would be precluded from receiving any other task orders under the contract.

365. The agency issued a purchase description that detailed the technical requirements for the helmets and the headsets. These requirements were incorporated into the RFP. *Id.* at 2.

366. *Id.* at 4.

367. *Id.*

368. Pub. L. No. 103-355, § 1004, 108 Stat. 3243, 3252-53.

369. *Electro-Voice*, B-278319, B-278319-2, 98-1 CPD ¶ 23, at 5.

370. *Id*. at 5. The GAO went on to consider Electro-Voice's allegations that (1) the agency's method of evaluating sound attenuation was not consistent with the requirement description and was unreasonable; (2) the agency unreasonably evaluated Specialty Plastic's subcontractor's experience; and (3) the agency placed too much significance on price. The GAO first examined the record to determine whether the agency acted fairly, reasonably, and consistently with the stated evaluation factors. The GAO agreed with the protester that the agency's actual methodology of assigning the sound attenuation ratings was unreasonable; however, it held that there was enough other evidence in the evaluation record to demonstrate that Specialty Plastic's product was superior to Electro-Voice's product. The GAO finally found that (1) the record reasonably supported the agency's determination that the awardee's subcontractor's experience deserved a higher rating than Electro-Voice's, and (2) the agency properly conducted a cost/technical trade-off with equal weight given to the technical and cost/price factors. *Id.* at 5, 8.

371. B-280130, Jun. 22, 1998, 98-1 CPD ¶ 168.

functional activities: (1) transactions, (2) financial sector restructuring and privatization, (3) privatization advisory and training services and support, (4) capital and financial markets to support privatization, and (5) public information. The agency awarded contracts to Intrados and eight other firms in the functional area of capital and financial markets to support privatization. Since 1995, USAID had invited Intrados and the other firms to compete for twenty-two task orders.[372] At the time of the protest, USAID had issued six task orders to Intrados.

Intrados recognized that 41 U.S.C.A. § 253j(d) prohibits protests concerning the issuance or proposed issuance of a task or delivery order except where the order increases the scope, period, or maximum value of the contract under which the order is issued. Intrados, however, argued that the GAO could hear its protest as a result of its decision in *Electro-Voice*. Intrados maintained that the task order consolidated into a final task order work in Romania that Intrados and other firms had performed under previously awarded task orders.[373]

Intrados argued that "the inevitable consequence of [AID's] task order competition is to 'downselect,' as that term was used in *Electro-Voice*, one [AID] contractor working in Romania and exclude all others from all remaining Romania work."[374] While this was a unique argument, it was not a successful one. The GAO found persuasive the agency's contention that this was not a downselect but rather a routine issuance of a task order, and that Intrados was still in a position to compete for other work under the contract.[375]

Premature Protest. A protester jumped the gun, filing a protest before the GAO regarding the agency's decision in an agency-level protest to reconsider an award. In *Universal Technical Source Services, Inc.*,[376] the protester was the awardee of a contract against which another offeror filed an agency-level protest. The agency found flaws in the procurement and decided to take corrective action. Upon notice that the agency was going to take some form of corrective action, Universal filed its protest before the GAO. The GAO dismissed the protest as premature.

In its decision, the GAO stated that the agency was still in the process of deciding the appropriate corrective action, the protester was continuing to perform the awarded contract, and Universal was merely speculating that it may lose the contract.

Court of Federal Claims. As practitioners in the bid protest area know, the United States Postal Service (USPS) considered itself safe, from a jurisdictional standpoint, from protests filed in federal district courts[377] and the GAO.[378] A new day has dawned in the bid protest world, and the COFC has "fired its warning shot at the USPS!"

Hewlett-Packard Co. v. United States[379] provided a question of first impression for the COFC. The issue presented was whether the COFC had jurisdiction to hear a post-award protest against a procurement conducted by the USPS. The COFC decided that question in the affirmative.

In April 1998, Hewlett-Packard Company (HP) filed a post-award bid protest before the COFC. Hewlett-Packard protested the USPS's award of a contract for computer equipment to Sun Microsystems Federal, Inc. (Sun). Hewlett-Packard alleged that the USPS violated the terms of the solicitation and failed to follow its agency procurement manual. Sun filed a motion to

372. The twenty-two task orders included two orders placed after the task order that was the subject of the protest in the instant case. *Id*. at 2.

373. *Id*.

374. *Id*.

375. The GAO easily distinguished *Electro-Voice*. In that case, there was no on-going competition for future work among the multiple awardees once the agency issued the task order. By contrast, the agency's actions in this case did not foreclose Intrados from competing for future task orders. The GAO held that while Intrados may be precluded from doing any further work in Romania, it is not eliminated from future work under the contract. In short, Intrados could still compete for and be awarded future orders under the contract. Based upon this analysis, the Comptroller General determined that the facts of the case did not present a downselection, and Intrados' protest allegations fell within the prohibition set forth in 41 U.S.C.A. § 253j(d).

376. B-280659, Aug. 24, 1998 (unpublished) *see Bid Protests: Contractor's Challenge to Agency-Level Protest Decision is Premature, GAO Rules*, Fed. Cont. Daily (BNA), Sept. 23, 1998, *available in* Lexis 23 Sept. 98.

377. Prior to December 1996, the federal district courts reviewed agency procurement decisions under the Administrative Procedures Act (APA) 5 U.S.C.A. § 702 (West 1998). The USPS is specifically exempted from the APA. 39 U.S.C.A. § 410(a) (West 1998). The district courts' authority to hear protests was known also as the "Scanwell Doctrine." *See* Scanwell Lab., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970). On 31 December 1996, Congress provided concurrent jurisdiction to the federal district courts and the COFC Claims to hear pre-award and post-award protests through the Administrative Disputes Resolution Act (ADRA) of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (adding 28 U.S.C.A. § 1491(b)(1) – 1491 (b)(4) and repealing (a)(3)).

378. The CICA of 1984, 31 U.S.C.A. §§ 3551-56, provides the GAO with its authority to render decisions on protests of federal agencies procurements. 4 C.F.R. § 21.5(g) (1996) specifies that the GAO will not hear protests conducted by agencies (that are not defined as a "federal agency" by section 3 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. A. § 472). The USPS is not considered a federal agency for purposes of the GAO's jurisdiction.

379. 41 Fed. Cl. 99 (1998).

dismiss for failure to state a claim upon which the court could grant relief because the Tucker Act does not allow the COFC to provide a remedy in protests against the USPS. Alternatively, Sun claimed that the COFC lacked subject matter jurisdiction over protests against the USPS because it is not a federal agency within the meaning of the Tucker Act.[380]

The COFC denied Sun's motion, holding that the Tucker Act provides the COFC with the authority to hear protests concerning USPS procurements.[381] The COFC held that the plain meaning of the Tucker Act and its definition of the term "agency" clearly include the USPS.[382] Sun argued that the court does not have jurisdiction to hear bid protests concerning the USPS in the same way that the GAO and the General Services Board of Contract Appeals (GSBCA) have found that they do not have jurisdiction over the USPS. The COFC disagreed with Sun. The COFC agreed that the GAO and the GSBCA lacked jurisdiction because the USPS was exempt from federal procurement laws such as the CICA and the Brooks Act. The court, however, distinguished itself because it did not derive its protest jurisdiction from a federal procurement law.[383]

Sun finally argued that the COFC's post-award jurisdiction does not apply to the USPS because the ADRA invokes the APA and the USPS is specifically exempted from the APA.[384] Sun's argument did not persuade the court. While the Tucker Act incorporates the APA standard of review set out in 5 U.S.C.A. § 706, the COFC held that it does not apply the APA as a whole.[385] The court reiterated that it derives it jurisdiction from the Tucker Act, not federal procurement law or the APA. The court found no evidence to indicate that Congress intended 39 U.S.C.A. § 410(a) to exempt the USPS from the COFC's jurisdiction.[386]

The COFC concluded that it could review protests against the USPS and denied Sun's motion to dismiss, thereby, allowing the protest to proceed on its merits. After the COFC decided this case of first impression, HP withdrew its protest. Hewlett-Packard cited its reason for withdrawing the case as a "business decision."[387] Since HP withdrew its protest, it will be interesting to see what impact, if any, this has for the USPS, as well as the COFC and the federal district courts.

Alternative Dispute Resolution

In *Hopkins Heating & Cooling, Inc.*,[388] the VA contracted with Hopkins for construction work at the VA Medical Center in San Francisco. The contract was contentious and relations between the parties became worse as the performance progressed. The VA eventually terminated Hopkins for its failure to complete work on time. Hopkins appealed the termination.

During the appeal, Hopkins and the VA agreed to use alternative dispute resolution. The parties eventually settled the dispute. As part of the settlement, the VA withdrew the termination for default and paid Hopkins $40,000 to complete the remaining work under the contract. After the settlement, Hopkins sought its attorney's fees under the Equal Access to Justice Act (EAJA).[389]

The Veterans Administration Board of Contract Appeals (VABCA) decided that Hopkins was not entitled to attorney's fees because the VA was "substantially justified" in terminating the contract. The VABCA stated that the contractor was long overdue in completing the contract and it seemed unwilling or unable to finish the work satisfactorily. Hopkins' unsupported assertions of delays and biases on the part of VA personnel were

380. *Id*. at 102.

381. *Id*. at 105-106.

382. *Id* at 103. According to 28 U.S.C.A. § 451, the term "agency" includes "any department, independent establishment, commission, administration, authority, board or bureau of the United States, or any corporation in which the United States has a proprietary interest . . . ." The USPS was created as an "independent establishment" of the United States. *See* 39 U.S.C.A. § 201 (West 1998).

383. *Hewlatt-Packard*, 41 Fed. Cl. at 104. The court stated that "[t]he Tucker Act is not a Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets or funds." Id. (citing 39 U.S.C.A. § 410(a)).

384. *Id*. at 104 -105.

385. *Id*.

386. *Id*.

387. *Id*. Hewlett-Packard, as well as the government's representatives and Sun, signed a stipulation agreeing to dismiss the protest voluntarily. The COFC subsequently closed the case. *Id*.

388. VABCA Nos. 4905E, 4906E, 98-1 BCA ¶ 29,449.

389. 5 U.S.C.A. § 504 (West 1998). In order for a contractor to receive payment for attorneys' fees under the EAJA, it must establish that it meets the EAJA size and net worth requirements and that it is a prevailing party. If the contractor is able to establish the above criteria, the burden shifts to the government to establish that its position was substantially justified. *Id.*

insufficient to rebut the VA's showing of substantial justification.

The case is significant since the VABCA opined that although the contractor obtained favorable results through a settlement agreement, it was not prevented from being a "prevailing party" under the EAJA. According to the VABCA, "[s]o long as there is a causal connection between the relief sought, the relief obtained, and the settlement of the litigation, attorney fees and expenses are not precluded when the parties agree to settle a matter instead of litigate."[390]

Small Business

Pilot Program for Very Small Businesses

On 2 September 1998, the SBA issued final rules that implement a pilot program for very small businesses.[391] The Small Business Reauthorization Act of 1994 mandated the creation of a pilot program to aid very small businesses in obtaining government contracts. The authority for the pilot program is limited to two years.

A "very small business" is a firm with fifteen or fewer employees and average annual receipts of not more than one million dollars. The SBA's regulations specify that contracts between $2500 and $50,000 must be set-aside for very small businesses if: (1) the contract will be performed in one of ten specified geographical areas,[392] and (2) there is a reasonable expectation of obtaining competitive bids from two or more responsible very small businesses.

According to SBA Administrator Aida Alvarez, "[t]oday's announcement strengthens the SBA's commitment to help the nation's smallest businesses get a foot in the doorway of the $200 billion federal market place for goods and services . . . ."[393]

The DOD Issues Interim Rule on Subcontracting to Conform with Adarand

On 5 August 1998, the DOD issued an interim rule on subcontracting with small disadvantaged businesses.[394] The purpose of the interim rule is to comply with the strict scrutiny standard that was announced by the United States Supreme Court in its 1995 landmark decision, *Adarand Constructors, Inc. v. Pena*.[395] Under the interim rule, small disadvantaged businesses in industries that show the ongoing effects of discrimination will be eligible for a price evaluation factor of up to ten percent.

Women-Owned Businesses Get Increased Opportunities in 1998

The SBA announced a number of initiatives designed to assist women-owned businesses.[396] Among the initiatives, the SBA intends to (1) request that each cabinet secretary commit to strategies to increase the percentage of women-owned businesses contracting with their respective agency, (2) mandate that agencies consider women-owned businesses in a new, streamlined acquisition process, (3) aggressively recruit more women-owned firms to register in the SBA's PRO-Net database,[397] and (4) have the SBA appoint a manager to work on increasing the number of women-owned firms doing business with the government. According to Aida Alvarez: "[w]omen now own forty percent of all small businesses in the United States but they only get a tiny share of federal contracting dollars. We have made some progress. Contracting dollars to women entrepreneurs have risen by fifty percent under this administration."[398]

Tenth Circuit Says Subcontractor Cannot Challenge DBE Set-Aside

390. *Hopkins Heating & Cooling*, 98-1 BCA ¶ 29,449 at 146,193.

391. 63 Fed. Reg. 46,640 (1998).

392. *Id*. § 125.7. The pilot program includes the following geographical areas: Albuquerque, Los Angeles, Boston, Louisville, Columbus, New Orleans, Detroit, Philadelphia, El Paso, and Santa Ana. *Id.*

393. *Small Business Administration: SBA Issues Regulations Implementing Pilot Set-Aside Program for Very Small Businesses*, Fed. Cont. Daily (BNA), (Sept. 3, 1998), *available in* WESTLAW, Legal News, BNA-FCD, Sept. 3, 1998 FCD, d2.

394. 63 Fed. Reg. 41,972 (1998).

395. 515 U.S. 200 (1995) (declaring that all racial classifications, whether benign or pernicious, must be analyzed by a reviewing court using a strict scrutiny standard; accordingly, only those affirmative action programs that are narrowly tailored to achieve a compelling government interest will pass constitutional muster).

396. *Small Business: SBA Plans to Increase Contract Opportunities for Women-Owned Businesses*, Fed. Cont. Daily (BNA), (July 2, 1998), *available in* WESTLAW Legal News, BNA-FCD, July 2, 1998 FCD, d2. In 1992, women-owned businesses received less than two percent of all federal contracts. With the new initiatives, the SBA wants to increase the share to five percent. *See id*.

397. *Id*. PRO-Net is a "one-stop" website for small businesses seeking federal, state, and private contacts. It is intended to assist contracting officers award contracts and to help small firms market their capabilities to agencies. PRO-Net replaced PASS (Procurement Automated Source System). The PRO-Net website is at <http://pro-net.sba.gov>.

In another post-*Adarand* case, the Tenth Circuit held that a subcontractor lacked standing to challenge the constitutionality of the DOT's Disadvantaged Business Enterprise (DBE) program.[399]

In 1995, the Utah Department of Transportation (UDOT) solicited bids on two highway projects. The federal government partially funded the projects. Cache Valley Electric Company (CVE) submitted the lowest bids to the prime contractor on each of the two projects. Cache Valley is not a business that is owned by members of groups presumed to be disadvantaged.[400] Additionally, CVE did not qualify as a DBE because its gross revenues exceed the regulatory limit. In both instances, the prime contractor selected the next low bidder as its subcontractor to satisfy the DBE percentage goal.[401]

Cache Valley Electric challenged the constitutionality of the DBE program. It argued that the DBE program, on its face and as applied, violates the Fifth and Fourteenth Amendments to the Constitution. The district court held that CVE did not have standing to pursue the case.[402] The Tenth Circuit agreed, concluding that the contractor failed to establish that its alleged injury (its inability to compete on an equal footing) was traceable to the disputed conduct of the UDOT. The court found that *Adarand* was not controlling. Specifically, *Adarand* did not address the traceability and redressability criteria required for standing.

According to the court, "it would be pure speculation to conclude that invalidating the allegedly unconstitutional preferences would ameliorate plaintiff's ability to compete in any way."[403] The court gave two reasons for its conclusion. First, the DBE preferences are severable from the remainder of the program. Therefore, the DBE program would remain intact even in the absence of the preferences. Second, the contractor offered no proof that eliminating racial preferences would reduce the number of qualifying DBEs.[404]

Language in Solicitation Does Not Shackle Government

In *McNeil Technologies, Inc.*,[405] the contractor protested the DOE's failure to award it a contract for technical services for the Energy Information Administration. McNeil argued that its proposal was the highest-ranking one submitted by a small disadvantaged business.

The DOE issued a RFP that envisioned combining a number of support service contracts into one omnibus acquisition. The RFP provided for multiple indefinite quantity awards. The RFP stated, "[t]he government contemplates individual awards for at least one small business, at least one small/disadvantaged business, and at least one large business under each functional area . . . ." The DOE made similar comments in the cover letter to the solicitations and in answers to pre-award questions.

McNeil and five other offerors submitted proposals. The DOE awarded the contract to one large business and one small business. McNeil argued that the language of the RFP, the cover letter, and the answers to the questions required the DOE

398. *Id.*

399. Cache Valley Elec. Co. v. Utah Dept of Transp., 149 F.3d 1119 (10th Cir. 1998).

400. *Id.* at 1121. To qualify as a DBE, a firm must be owned and controlled by individuals who are socially and economically disadvantaged. Under section 8(d) of the Small Business Act, 15 U.S.C.A. § 637 (West 1998), "socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C.A. § 637(a)(5) (West 1998). Economically disadvantaged individuals are "socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* § 637(a)(6)(A). Finally, the statutory scheme establishes a presumption that "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities are socially and economically disadvantaged." *Id.* § 637(d)(3)(C).

401. *Cache Valley*, 149 F.3d at 1121. Under the DBE program, it has been the policy of the DOT to expend "not less than ten percent of the amounts authorized to be appropriated" for specific federal highway programs with small business owned and operated by socially and economically disadvantaged individuals. Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1003(b)(1), 105 Stat. 1914, 1919.

402. *Cache Valley*, 149 F.3d at 1122. In order to establish standing, a party must show:

> (1) an injury in fact, meaning the invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct, meaning that the injury fairly can be traced to the challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and (3) likelihood that the injury will be redressed by a favorable decision, meaning that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative.

Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 663-64 (1993).

403. *Cache Valley*, 149 F.3d at 1123.

404. *Id.*

405. B-278904.2, Apr. 2, 1998, 98-1 CPD ¶ 96.

to award a contract to at least one small disadvantaged business. The DOE argued that the language did not obligate it to award to a small disadvantaged business.

The GAO agreed with the DOE. It concluded that the award decision represented the best value. According to the GAO, "[n]othing in this language commits or requires the agency to award contracts to these three types of firms, particularly in view of the fact that the RFP otherwise indicates that full and open competition is anticipated and does not provide for any sort of set-aside." [406]

Small Disadvantaged Business Must Be Judged by Same Standards as Large Firms

Recently, the Federal Circuit stated that contracting officers must treat contractors the same during contract performance regardless of their status as small disadvantaged businesses.[407] The Army contracted with H.B. Mac. Inc., a certified small disadvantaged business, to construct a motor vehicle maintenance facility in Hawaii. During performance, Mac encountered a Type 1 differing site condition that related to the excavation of the soil. Mac submitted a certified equitable adjustment claim. After the contracting officer failed to respond to the claim, Mac treated it as denied. Mac then sought relief at the COFC.

The court held that Mac encountered conditions that were materially different than those indicated in the contract. Accordingly, Mac was entitled to an equitable adjustment as a Type 1 differing site condition. On appeal, the Federal Circuit noted that the COFC considered Mac's status as a small disadvantaged business with no experience and limited financial resources. The Federal Circuit stated:

> "[a]s a preliminary matter, it thus appears that the court viewed the contract indications in this case and Mac's pre-bid investigation, not from the standpoint of what a reasonable and prudent contractor would have done, but rather from the standpoint of what a reasonable and prudent small disadvantaged business would have done."[408]

In essence, the lower court had articulated one standard for small disadvantaged businesses and one for regular contractors. The Federal Circuit concluded this was an error.[409]

Commentators have noted that there are circumstances when the government does not treat contractors differently depending on their status.[410] For example, when the government has waived a delivery date, it must establish a new delivery date if it wants to terminate the contract for default. The new delivery date must be reasonable in light of the particular contractor's capabilities. Additionally, boards treat *pro se* contractors differently in litigation by relaxing procedural rules.[411]

More Rules and Regulations in 1998

This past year, a flurry of rules affected small business. A brief synopsis of the rules is outlined below.

HUBZone Empowerment Contracting.[412] The SBA issued its final rules on 11 June 1998. The rules implement the Historically Underutilized Business Zone (HUBZone) Empowerment Contracting Program, which is Title VI of the Small Business Reauthorization Act of 1997. The SBA designed the rules to provide a competitive advantage to firms located in economically distressed and rural areas.

Under the new rules, a small business qualifies for participation if its principal office is in a designated HUBZone and at least thirty-five percent of its employees live in the HUBZone.[413] Agencies can award contracts for HUBZone firms

406. *Id.*

407. H.B. Mac, Inc. v. United States, 1153 F.3d 1338 (Fed. Cir. 1998).

408. *Id.* at 1345.

409. *Id*. The Federal Circuit stated:

> The fact that a contract is a set-aside for small disadvantaged businesses does not change in any way the standard that a court applies in analyzing the contractor's pre-bid conduct. The program of having certain contracts set aside for small, disadvantaged businesses is meant to achieve certain public policy goals . . . . The program is not relevant in assessing a contractor's pre-bid conduct or its interpretation of contract documents. In that regard, as a government contractor, an SDB has its conduct judged under the same standard as that of any other contractor. That standard is whether, without qualification, the contractor acted reasonably and prudently.

Id.

410. *Small Disadvantaged Business Judged By Same Conduct Standards As Large Firms – Contrary COFC Decision Reversed*, 40 THE GOV'T CONTRACTOR 35, Sept. 16, 1998.

411. *See*, *e.g*., Green's Multi-Services, Inc., EBCA C-9312162, 95-1 BCA ¶ 27,431; Modoc Foresters, Inc., AGBCA 96-120-1, 96-1 BCA ¶ 28,174.

412. 63 Fed. Reg. 31,896 (1998).

through fenced competitions or on a sole-source basis. Contracting agencies may also provide a price preference in full and open competitions. The HUBZone rules apply only to specific agencies until 30 September 2000.[414] After that date, the rules will apply to all agencies that have contracting officers.

Small Disadvantaged Business Procurement Rules.[415] On 24 June 1998, the Clinton Administration announced rules that overhaul its approach to assisting small disadvantaged businesses. The rules permit eligible small disadvantaged businesses to receive a price adjustment in federal procurements. The DOC will determine the price adjustment available for use in federal procurement programs. The DOC also will specify the price adjustments by Standard Industrial Classification major groups and regions.

Under the new rules, the DOC is responsible for: (1) developing methods to calculate benchmark limitations, (2) developing methods to calculate the size of the price evaluation adjustment employed in a given industry, and (3) determining the applicable adjustment.

Only small disadvantaged businesses in industries that show the ongoing effects of discrimination are eligible for up to a ten percent price evaluation adjustment in bidding for government contracts. The DOC identified specific industries (or segments of the industries) that are eligible for price evaluation adjustments.[416] The DOC is not limited to the price evaluation adjustment for small disadvantaged businesses where it has found substantial and persuasive evidence of: (1) a persistent and significant under use of minority firms in a particular industry due to past or present discrimination, and (2) a demonstrated incapacity to alleviate the problem by using those mechanisms.

Finally, the new rules end self-certification. Previously, federal agencies relied upon businesses to self-certify because they were small disadvantaged businesses. Under the new rules, however, the SBA must ensure that firms certify they are small disadvantaged businesses. To be eligible to receive a benefit as a prime contractor based on disadvantaged status, a business concern must either be certified as a small disadvantaged business, or have a completed small disadvantaged business application at the SBA, or be a private certifier at the time of its offer.[417]

Tweaking the 8(a) Rules. The SBA issued final rules that modify the SBA's 8(a) Business Development Program.[418] The new rules contain four essential objectives: (1) to foster a mentor-protégé program that encourages private sector relationships,[419] (2) to enhance the ability of 8(a) contractors to receive large prime contracts and overcome the effects of contract bundling by allowing small business to affiliate into joint ventures, (3) to revise the standard for social disadvantage to comply with *Adarand*,[420] and (4) to provide for a fairer distribution of 8(a) contracts by putting caps on sole source awards and other non-competitive arrangements.

On 21 September 1998, the SBA announced a new certification process for 8(a) contractors. Under the new process, the SBA will categorize a firm as "disadvantaged" only if the firm is owned and controlled by someone who is socially and economically disadvantaged. The SBA will not require firms already in the 8(a) program to undergo a second review. According to the SBA, the new system will reduce cost, prevent fraud, and ensure fairness.[421]

SBA Appeals GSA's Decision to Consolidate Information Technology Schedules

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413. Practitioners can find information on specific HUBZones at <http://www.sba.gov/hubzone>.

414. The rules apply to acquisitions by the Departments of Agriculture, Defense, Energy, Health and Human Services, Housing and Urban Development, Transportation, Veterans Affairs, GSA, and NASA.

415. 63 Fed. Reg. 35,714 (1998).

416. *Id.* The industries include: agriculture, forestry, fishing, mining, construction, manufacturing, transportation, communications, wholesale and retail trade, finance, insurance, and real estate among others.

417. FAR, *supra* note 15, at 19.304.

418. 15 U.S.C. A. § 637(a) (West 1998); FAR, *supra* note 15, at subpt 19.8. The SBA's 8(a) program is the primary program in the federal government designed to assist small disadvantaged businesses. The program derives its name from Section 8(a) of the Small Business Act. Section 8(a) authorizes the SBA to contract with federal agencies. The SBA then subcontracts with eligible small businesses. 15 U.S.C.A. § 637(a). By Memorandum of Understanding dated 6 May 1998, between the DOD and the SBA, the SBA delegated its authority to the DOD to enter 8(a) prime contracts with 8(a) contractors. 63 Fed. Reg. 33,587 (1998).

419. 13 C.F.R. § 124.520 (1998). The SBA designed the Mentor/Protégé Program to encourage approved mentors to provide various forms of assistance to eligible 8(a) contractors. A mentor benefits from the relationship in that it may: (1) joint venture with a small business, (2) own an equity interest in the protégé firm up to 40 percent, and (3) qualify for other assistance from the SBA.

420. 13 C.F.R. § 124.103(c) (1998). Individuals who are not members of designated socially disadvantaged groups must establish individual social disadvantage by a preponderance of the evidence. Previously, individuals had to establish their disadvantage by clear and convincing evidence.

421. *SBA Ends Self-Certification, Lowers 8(a) Eligibility Standard*, 70 Fed. Cont. Rep. (BNA) 11 (1998).

In a letter dated 25 February 1998, the SBA appealed the GSA's decision to consolidate five of its information technology products and services schedules into a single schedule.[422] Aida Alvarez complained that the proposal would not lead to equitable opportunities for small businesses.

The SBA's concern is that small businesses will lose opportunities because agencies are bundling requirements. According to Aida Alvarez, "[b]undling threatens the historical participation of small, small disadvantaged, and women-owned small business concerns in repetitive, previously unconsolidated requirements such as the proposed merged IT schedule."[423] The SBA appealed under Section 15 of the Small Business Act after it made other administrative attempts to resolve the issue.

On 23 March 1998, the SBA issued its information technology schedule overruling the GSA's objections.[424] The new schedule places a number of additional requirements on vendors. For example, it requires vendors to accept credit card orders below $2500. It requires that all IT products be available on GSA's online catalog. It requires quarterly reports from vendors on their sales through the internet. Finally, it allows for a continuous open season during which offers can be submitted at any time.[425]

Contracting Arrangement for 8(a) Contracts Changes in 1998

The SBA signed agreements with twenty-five agencies that would allow these agencies to contract directly with 8(a) contractors. The SBA called the agreements "delegations of authority." Before the change, the federal agencies awarded the prime contract to the SBA. The SBA then awarded subcontracts to eligible 8(a) contractors. In making the announcement, the SBA emphasized that it did not delegate authority to decide whether to accept or reject firms for the 8(a) program. Rather, the SBA was eliminating its role as a middleman in the contracting process.[426]

Labor Standards

The Service Contract Act (SCA)[427]

The SCA Applies to Travel Service Contracts. In *Ober United Travel Agency, Inc. v. Department of Labor*,[428] the District of Columbia Circuit Court of Appeals upheld a Department of Labor (DOL) determination that SCA provisions and clauses were included properly in a solicitation for a travel management contract. In holding that the SCA applies to these contracts, the court dismissed Ober United's[429] arguments aimed at the linchpin language of the statute.[430]

Ober United argued initially that a travel management contract is not principally for the furnishing of services. It contended that the government executes these contracts mainly to generate revenue.[431] The court rejected this position, however, and found that the government awarded such contracts to obtain reservation and ticketing services. The court considered revenue a mere ancillary benefit.

The court also discounted Ober United's claim that the SCA was inapplicable because a concession agreement[432] is a no-cost contract and cannot be valued "in excess of $2500." In dismissing this argument, the court noted that a DOL provision adopting contractor receipts under a concession contract was the proper unit of measure.[433]

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422. *Small Business: SBA Appeals GSA's Decision To Consolidate IT Schedules*, Fed. Cont. Daily (BNA), (March 3, 1998), *available in* WESTLAW, Legal News, BNA-FCD, March 3, 1998 FCD, d2.

423. *Id.*

424. *GSA Issues IT Schedule Overruling SBA Objections*, 40 THE GOV'T CONTRACTOR 12, March 25, 1998.

425. The new solicitation is available on the Federal Supply Schedule at <http://pub.fss.gsa.gov/fcoc/sced.htm>.

426. *SBA Gives up Middleman Role for 8(a) Contracts*, 40 THE GOV'T CONTRACTOR 12, May 13, 1998.

427. 41 U.S.C.A. §§ 351-358 (West 1998).

428. 135 F.3d 822 (D.C. Cir. 1998).

429. In view of the apparent import of this issue to travel agencies, Ober United was joined in the litigation by the Society of Travel Agents in Government.

430. Generally, the SCA applies only to contracts "in excess of $2,500, except as provided in section 356 of [Title 41] . . . the principal purpose of which is to furnish services . . . ." 41 U.S.C.A. § 351(a).

431. Under most travel management contracts, a travel agency pays the government for the exclusive right to serve government employees. The travel agency receives commissions from common carriers, car rental companies, hotels, and other travel industry activities. *Ober United Travel Agency*, 135 F.3d at 823.

432. Under a concession contract, the government authorizes a vendor to sell goods or services to authorized patrons on a military installation.. In exchange, the government receives a fee from the vendor based on a percentage of gross sales. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 215-4, NONAPPROPRIATED FUND CONTRACTING, para. 5-17 (10 Sept. 1990).

Finally, Ober United asserted that travel management contracts are contracts for common carrier services, therefore, they are exempt from SCA coverage.[434] The court agreed with the DOL, however, that the carrier exemption was inapplicable because travel agents provide reservation and ticketing services, not in-kind transportation.[435]

Contractor Denied Recovery of Excise Taxes Occasioned by Wage Rate Increase. After the DOL increased wage rates, a contractor sought an adjustment of its firm-fixed-price contract for all associated costs. The contracting officer approved the adjustment generally, but issued a final decision that excluded $34,000 attributable to a four percent excise tax imposed by the State of Hawaii on the contractor's total gross revenues. The ASBCA denied the contractor's subsequent appeal.[436] The ASBCA held that excise taxes are not included as reimbursable costs under the clause that allows price adjustments for wage rate increases.[437]

In view of the plain language of the contract, the board was unmoved by the claim that the same contracting activity had paid a predecessor contractor for such taxes under similar circumstances. Likewise, the contractor could not recover merely because other government contracting activities reimbursed contractors regularly for excise taxes that stemmed from the DOL-mandated rate increases. Finally, the board dismissed the contractor's argument that it should prevail because excise taxes generally are allowable costs under the changes clause[438] and FAR Part 31.[439] The board noted that price adjustments for wage rate increases are not "equitable adjustments" compensable under the changes clause. Additionally, the board concluded that allowability depended on the specific terms of the price adjustment clause, which did not permit recovery of excise taxes.[440]

No Recovery for Increases Under Collective Bargaining Agreement (CBA) Executed During First Option Year. In *Classico Cleaning Contractors, Inc.*,[441] the Coast Guard exercised the first twelve-month option on a fixed-price janitorial services contract in October 1992. During this option period, Classico and the Service Employees International Union executed a CBA effective 1 January through 31 December 1993. The DOL then issued a commensurate wage determination that increased Classico's labor costs $40,000 between 1 January and 30 September 1993. The contracting officer denied Classico's request for an adjustment in this amount. On appeal, the board granted the government's motion for summary judgment. The board held that Classico was not entitled to recover because the contractor assumed the risk of labor cost increases when it negotiated a mid-option year CBA. Under the SCA and implementing FAR clauses,[442] Classico's price adjustment was limited to increases stemming from a CBA/wage determination effective at the beginning of an option period.[443]

Mutual Mistake Concerning Employee Classification Shifts Price Adjustment Burden to Government. Normally, contractors are responsible for classifying their employees properly and paying them appropriate wages.[444] In *Richlin Security Service Co.*,[445] however, the board opened the door for Richlin to

433. *See* 29 C.F.R. § 4.141(a) (1998) (providing that concession contracts are considered "in excess of $2,500" if the contractor's gross receipts are expected to exceed $2500).

434. *See* 41 U.S.C.A. § 356(3) (West 1998).

435. *Ober United Travel Agency*, 135 F.3d at 825.

436. All Star/SAB Pacific, J.V., ASBCA No. 50856, 92-2 BCA ¶ 29,958.

437. *See* FAR, *supra* note 15, at 52.222-43. This clause limits adjustments to increases or decreases in wages and fringe benefits; social security and unemployment taxes, and workers' compensation insurance. Additionally, it excludes amounts for general and administrative costs, overhead, and profit. The contract also incorporated in full text another clause containing similar language. *See All Star/SAB Pacific*, 98-2 BCA ¶ 29,958 at 148,233.

438. *See, e.g.*, FAR, *supra note* 15, at 52.243-1.

439. *See* FAR, *supra* note 15, at 31.205-41. In fact, appellant had recovered under the Changes clause for excise taxes associated with performance of extra work ordered by the contracting officer. *All Star/SAB Pacific*, 98-2 BCA ¶ 29,958 at 148,235.

440. *All Star/SAB Pacific*, 98-2 BCA ¶ 29,958 at 148,235.

441. DOTBCA No. 2786, 98-1 BCA ¶ 29,648.

442. FAR, *supra* note 15, at 52.222-41, 52.222-43.

443. *See also* Ameriko, Inc., d/b/a Ameriko Maint. Co., ASBCA No. 50356, 98-1 BCA ¶ 29,505 (holding that a contractor was not entitled to a price adjustment for an increase in base year wages where the increase was due to a CBA executed after the contract award).

444. *See* Emerald Maintenance, Inc. v. United States, 925 F.2d 1425 (Fed. Cir. 1991).

445. DOTBCA Nos. 3034, 3035, 98-1 BCA ¶ 29,651.

recover the costs of DOL-assessed back wages, even though the contractor failed to pay its employees correctly for several years.

Richlin Security involved a contract for guard services at an international airport.[446] The solicitation included a standard clause[447] that identified the class of service employee expected to perform under the contract as "Guard I."[448] The contract also incorporated a DOL wage determination listing both "Guard I" and "Guard II" classifications. Under this determination, the minimum wage for a Guard I employee was $6.36, and $11.63 for a Guard II employee. Fringe benefits applied to both categories.[449]

After performing for four years, Richlin questioned the Guard I classification. The DOL concluded that some Richlin employees had, in fact, been performing Guard II duties, and should have been paid the higher rate. As a result, Richlin filed a $1.5 million claim difference between the Guard I wages it paid and those it should have paid for a Guard II employee over the term of the contract. The contracting officer denied the claim. The contracting officer reasoned that *Collins International Service Co. v. United States*[450] required Richlin to bear full responsibility for misclassifying its guards.

On appeal, the board distinguished *Collins International* and found that Richlin was entitled to equitable relief.[451] The board concluded that: (1) the government believed, and led Richlin to believe, that only Guard I employees would be required; and (2) the government would have been willing to contract with Richlin for the services of Guard II employees at the higher price. Thus, the board held that Richlin was entitled to reformation of the contract on a mutual mistake of fact theory.[452]

The Davis-Bacon Act (DBA)

Contractor-DOL Settlement Agreement Did Not Vitiate Basis for Termination. In *Herman B. Taylor Construction Co. v. General Services Administration*,[453] the board denied a construction contractor's appeal of a default termination. The board concluded that detailed findings issued by the DOL concerning labor standards violations[454] were sufficient to support the contracting officer's action. The board held this even though the contractor agreed with the DOL to pay back wages to affected employees. While the contractor argued that the "consent decree" should have eliminated the labor violations as grounds for default, the board pointed out that the agreement unambiguously stated that the DOL had found violations.[455] Thus, while the decree may have shielded the contractor from further liability for the violations, the government was not barred from asserting an appropriate contractual remedy.

Summary Judgment Denied Absent Proof that Government Had Notified Contractor of Violations. In *Richard Lobato Remodeling, LLC*, [456] the contracting officer terminated Lobato for default in April 1996 for failure to pay wages to two employees, and the contractor appealed. In its motion for summary judg-

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446. Guards were responsible for taking custody of, securing, and transporting aliens detained at Los Angeles International Airport. *Id.* at 146,902.

447. FAR, *supra* note 15, at 52.222-42.

448. *Richlin Security*, 98-1 BCA ¶ 29,651 at 146,903-04. The agency's request for a wage determination, i.e., Standard Form (SF) 98, filed with the DOL listed only the "Guard I" classification. The FAR requires contracting officers to include on the SF 98 all classes of employees the government anticipates will be employed on the contract. *See* FAR, *supra* note 15, at 22.1008-2(a).

449. These obviously disparate rates caught the board's attention. It noted that Richlin bid its guards at $10.86 per hour (with annual escalators), which is well below the Guard II rate when fringes are added to the latter. The board also pointed out that the government must have believed the Guard I classification was proper because it did not question the Richlin unit prices. *Richlin Security*, 98-1 BCA ¶ 29,651 at 146,904.

450. 744 F.2d 812 (Fed. Cir. 1984).

451. Specifically, the board noted that in *Collins International*, the contractor did not recover because the classification it adopted was neither listed in the DOL wage determination nor reasonably related to a classification set forth in the determination. Here, however, Richlin merely adopted the classification the government itself had deemed proper. *Richlin Security*, 98-1 BCA ¶ 29,651 at 146,907.

452. While the board decided reformation was a proper remedy, it was unwilling to establish specific terms because the DOL had not yet directed the contractor to pay back wages. *Id.* at 146,908-09.

453. GSBA No. 12961, 98-2 BCA ¶ 28,836.

454. The DOL found that the contractor failed to pay proper wages, fringe benefits, and overtime. Additionally, the DOL determined that the contractor had misclassified it laborers and had failed to maintain satisfactory payroll records. 98-2 BCA ¶ 29,836 at 147,712.

455. *Id.* at 147,715*10. Appellant relied unsuccessfully on language in the same paragraph of the agreement that provided that "neither this agreement to release back wages nor execution of this agreement shall constitute or be construed as liability or an admission on the part of the Contractor of any violation of [specified labor standards]. . . . " *Id.* at 147,712. Presumably, whether or not the contractor was "liable" for violations was irrelevant to the board. Key to the board's decision was that the DOL determined ultimately that the violations had occurred.

456. ASBCA No. 49968, 98-1 BCA ¶ 29,587.

ment, the government argued that a May 1997 letter from the DOL declaring that Lobato had committed labor violations "conclusively prove[d] the propriety of default termination."[457] The ASBCA denied the motion, finding that the government failed to show that either the DOL or the contracting officer had afforded Lobato an opportunity to respond to specific allegations.[458] According to the board, there was no evidence that the contracting officer had notified Lobato and forwarded the contractor's comments to the DOL.[459] Likewise, the DOL findings issued to the contracting officer suggested that DOL officials had communicated only with the aggrieved employees, not Lobato. Thus, a question of fact remained as to whether the DOL had made the contractually required determination.

Bonds and Sureties

Stay Tuned for Changes to Payment Bond Requirements

On 11 September 1998, the new Administrator for the Office of Federal Procurement Policy, Deidre A. Lee, testified before two House panels regarding proposed changes to the Miller Act.[460] Ms. Lee told a joint hearing of the House Judiciary Subcommittee on Commercial and Administrative Law, and the House Government Reform and Oversight Subcommittee on Government Management, Information, and Technology, that the OFPP opposes the proposed legislation.[461] Ms. Lee testified that the Miller Act already allows contracting officers to require additional payment bond protections for subcontractors.[462] Nevertheless, Ms. Lee indicated that the Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council would begin drafting "updated regulatory guidance" on payment bond protections for subcontractors.[463] The first draft of this "guidance" should be available for comment sometime soon.[464]

Only Notice by Actual Surety Triggers Government's Duty to Withhold Contract Funds

In *Hartford Fire Insurance Co. v. United States*,[465] an 8(a) subcontractor, K&K Construction Company, entered into a subcontract with Rau Construction Company. This agreement required Rau to perform various administrative tasks for K&K,[466] to include obtaining a surety for its COE construction contract at Fort Leonard Wood, Missouri.[467] To fulfill this obligation, Rau contacted the Hartford Fire Insurance Co. Hartford, however, would not issue the necessary bonds for the COE contract until Rau agreed to indemnify it.

In June 1995, Rau notified the SBA's contracting officer that K&K was making unauthorized withdrawals from project funds and placing progress payments in unauthorized bank accounts.[468] Rau also notified the contracting officer that K&K did not have enough money to pay its subcontractors, and asked the contracting officer to make sure that K&K used future

457. *Id.* at 146,667.

458. The FAR requires contracting officers to "refer [Davis-Bacon labor disputes], including the views of interested parties" to the DOL. *See* FAR, *supra* note 15, at 52.222-5. Additionally, the DOL must notify contractors of its findings by registered or certified mail. *See* 29 C.F.R. § 5.11(b)(1) (1998).

459. Apparently, the contractor received only a cure notice listing "failure to pay employees" as a condition endangering performance. The contractor merely responded that "all employees have been paid." *See Lobato Remodeling*, 98-1 BCA ¶ 29,587 at 146,666-67.

460. *OFPP Chief Opposes Miller Act Changes, Will Tighten Rules to Protect Subcontractors*, Fed. Cont. Daily (BNA), June 15, 1998 [hereinafter *OFPP Chief*], *available in* WESTLAW, Legal News, BNA-FCD, June 15, 1998 FCD, at d4. The Miller Act generally requires contractors to submit performance and payment bonds before the award of a construction contract. 40 U.S.C.A. § 270a(a) (West 1998).

461. *OFPP Chief, supra* note 461, at d4. The proposed legislation, currently entitled the "Construction Subcontractors Payment Protection Enhancement Act of 1998," would (1) make the amount of the payment bond equal to the amount of the performance bond, and (2) permit subcontractors to sue the United States if the contracting officer fails to obtain the payment bond and ensure that it remains in effect during the contract period. H.R. 3032, 105th Cong. (1997).

462. *OFPP Chief, supra* note 461, at d4. The Miller Act specifically states that "[n]othing in this section shall be construed to limit the authority of any contracting officer to require a performance bond *or other security* in addition to those . . . specified in subsection (a) of this section." 40 U.S.C.A. § 270a(c) (emphasis added).

463. *OFPP Chief, supra* note 461, at d4. For construction contracts, the government determines the penal amount of the bond based on a percentage of the contract price. FAR 28.102-2(b) appears to cap this amount at $2.5 million; however, it also contains the following provision: "The government shall secure additional protection by directing the contractor to increase the penal sum of the existing bond or to obtain an additional bond, or to furnish additional alternative payment protection." FAR 28.102-2(b), *supra* note 15. This language is extremely vague in contrast to FAR 28.103-3, which provides: "[w]hen a contract price [for non-construction contracts] is increased, the government may require additional bond protection in an amount adequate to protect suppliers of labor and materials." FAR, *supra* note 15, at 28.103-3. Therefore, this may be the provision for which the OFPP intends to provide updated guidance.

464. *OFPP Chief, supra* note 461, at d4.

465. 40 Fed. Cl. 520 (1998).

466. *Id.* at 521. Rau's subcontract agreement with K&K gave Rau the right to: (1) perform the contract if K&K defaulted, and (2) resolve any claims against K&K's bonds as the surety's representative. *Id.*

467. *Id.* The contract required K&K to construct a Criminal Investigation Division Field Office. *Id.*

progress payments to pay them.[469] Unfortunately, the contracting officer did not withdraw payment authority from the COE immediately. As a result, on 14 July 1995, the COE made a final progress payment to K&K which totaled $208,109.[470]

Two years later, Hartford sued the government to recover the $208,109 progress payment, but the COFC was singularly unsympathetic. After noting that the government owes no duty to a surety until the surety notifies the government that the contractor is in danger of defaulting on its bonds,[471] the COFC rejected Hartford's argument that Rau was acting as its representative in June 1995. The COFC did so for two reasons. First, the COE had not yet decided to terminate Rau for default. Second, nobody had filed any claims against K&K's bonds before 14 July 1995. The COFC then rejected the Hartford's argument that Rau's notice was sufficient because Hartford and Rau had the same interest in ensuring that K&K paid its subcontractors. Relying on *Fireman's Fund Insurance Co. v. United States*,[472] the COFC held that only notice by the actual surety triggers the government's duty to the surety.[473] Since Hartford did not personally notify the government that K&K was in danger of defaulting on its bonds, the government's duty to Hartford never arose.[474]

Notice Not Required if Contract Requires Government to Withhold Funds

International Fidelity Insurance Co. v. United States[475] involved a contract to clean up a petroleum tank farm at the former Greenville AFB in Mississippi. Approximately one year after the COE issued the notice to proceed, the contractor asked the COE to make future payments jointly to the contractor and its surety, Met-Pro Corporation (Met-Pro).[476] The COE responded by executing a unilateral contract modification that implemented the contractor's request on 6 July 1993.[477] Unfortunately, less than three weeks later, the COE sent the contractor a $67,054.52 check payable solely to the contractor.

After the project was completed, Met-Pro made payments totaling $89,087.93 to the subcontractors and suppliers under the payment bond. Met-Pro then sued the COE to recover $67,054.52 it improperly paid the contractor.

In its defense, the COE initially argued that the COFC lacked jurisdiction over the surety's complaint because the surety was not a contractor within the meaning of the CDA.[478] The court quickly dismissed this argument, noting that the doctrine of equitable subrogation[479] gives it jurisdiction to determine the validity of a surety's claim that the government disbursed contract funds improperly.[480]

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468. *Id*. The SBA initially delegated administration and payment authority to the COE. The SBA, however, wanted to monitor the contractor's performance with its own assets. As a result, the SBA appointed its own contracting officer. *Id*.

469. *Id*. Rau made this request twice. Rau made the first request during a 5 June 1995 meeting with the contracting officer. Rau then made a second request in a 3 July 1995 letter from its attorney. *Id*.

470. *Id*. at 522. The surety did not notify the COE of the unpaid claims on K&K's payment bond until 9 August 1995. *Id*.

471. *Id*. at 522-23.

472. 909 F.2d 495 (Fed. Cir. 1990). In *Fireman's Fund*, the Federal Circuit stated that because "some subcontractors and suppliers had informed the government of [the contractor's] payment deficiencies prior to the release of the retainage does not substitute for notice by the surety and does not trigger the government's equitable duty to act with reasoned discretion toward it." *Id*. at 499. The court then stated:

> We see no reason to impose on the government a duty toward the surety whenever a subcontractor or supplier complains of late or nonpayment by the contractor. Only the contract should limit the government's flexibility in resolving payment disputes so minor, and perhaps so inevitable, that the surety itself doesn't consider the contractor's role in them a potential default under the bond.

Id.

473. *Hartford Fire Ins. Co.*, 40 Fed. Cl. at 523-24.

474. *Id*.

475. 41 Fed. Cl. 706 (1998).

476. *Id*. at 708. At this point, the contractor's subcontractors and suppliers were already complaining about nonpayment, and the contractor was in danger of being terminated for default. On 19 April 1993, the contracting officer's representative sent the contractor a letter stating that "[s]uppliers have advised me that they have not received payment in a timely manner." *Id*.

477. *Id*. at 707. The contract modification stated that "all payment should be payable and remitted" to the contractor and its surety. *Id*.

478. The CDA defines a "contractor" as "a party to a government contract other than the government," and permits only a contractor to file a claim and sue the government. 41 U.S.C.A. §§ 601, 605, 609 (West 1998).

Next, the COE argued that Met-Pro failed to state a claim upon which the COFC could grant relief. Specifically, the COE argued that it had no duty to Met-Pro because it failed to notify the COE of the contractor's potential default under the payment bond. Relying on *Balboa Insurance Co. v. United States*[481] and *Fireman's Fund Insurance Co.*,[482] the COE argued that constructive notice is not enough. The surety must expressly advise the government of the subcontractors' and suppliers' unpaid claims. The COFC, however, distinguished these two cases.[483] The COFC relied on *National Surety v. United States*[484] and *Transamerica Premier Insurance Co. v. United States*,[485] stating that "[l]ogically and equitably, [the surety] should not have been required to take further action, given the contractual reflection of the government's stakeholder's duty."[486] Therefore, the COFC granted Met-Pro's motion for summary judgment.[487]

Commercial Activities and Service Contracting

Commercial Activities

Defense Reform Initiative Report. On the eve of 1998, the DOD continued downsizing. On 10 November 1997, Secretary of Defense William Cohen unveiled the Defense Reform Initiative (DRI)[488] report, portraying it as a sweeping program aimed at reforming the "business" of the DOD. Designed to enhance the DOD's warfighting capability, the DRI expanded upon the Quadrennial Defense Review (QDR).[489] The DRI proposed four ways for the DOD to reform: (1) reengineer its business practices, (2) consolidate and reorganize its headquarters, (3) actively use OMB Circular (OMB Cir.) A-76,[490] and (4) eliminate unneeded infrastructure.[491]

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479. *Black's Law Dictionary* defines subrogation as "[t]he substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities." BLACK'S LAW DICTIONARY 1279 (5th ed. 1979). It then points out that "[i]nsurance companies, guarantors and bonding companies generally have the right to step into the shoes of the party whom they compensate and sue any party whom the compensated party could have sued." *Id.* In the public contracts arena, the COFC has explained the doctrine of equitable subrogation as follows:

> [T]he surety was entitled to the benefit of all the rights of the laborers and materialmen whose claims it paid and those of the contractor whose debts it paid. The surety then is subrogated to the rights of the contractor who could sue the government since it was in privity of contract with the United States. The surety is likewise subrogated to the rights of the laborers and materialmen who might have superior equitable rights to the retainage but no right to sue the [United States].

United States Fidelity & Guar. Co. v. United States, 475 F.2d 1377, 1382 (Ct. Cl. 1973). *See* Prairie State Bank v. United States, 164 U.S. 227, 231 (1896) (stating the right of a surety to assert the doctrine of equitable subrogation is elemental).

480. *International Fidelity Ins. Co.*, 41 Fed. Cl. at 710. *See Hartford Fire Ins. Co*., 40 Fed. Cl. at 522-23.

481. 775 F.2d 1158 (Fed. Cir. 1985). In *Balboa*, the Federal Circuit stated: "[U]pon notification by the surety of the unsatisfied claims of the materialmen, the government became a stakeholder with respect to the amount not yet expended under the contract . . . ." *Id*. at 1161-62.

482. 909 F.2d at 495. *See supra* note and accompanying text.

483. *International Fidelity Ins. Co.*, 41 Fed. Cl. at 711-12. The court distinguished *Balboa* because "a contract modification establishing joint payment procedures had not been issued and was not before that court." Similarly, the court distinguished *Fireman's Fund* because the surety in that case did not ask the government to withhold payments until almost five months after the government released the funds the surety was claiming. *Id*.

484. 118 F.3d 1542 (Fed. Cir. 1997). In *National Surety*, the government failed to comply with a contract provision that expressly required it to retain ten percent of all progress payments until it approved the contractor's performance schedule. *Id*. at 1543. As a result, the Federal Circuit held the government liable, even though the surety had not provided the government with notice of the contractor's default. *Id*. at 1546-47.

485. 32 Fed. Cl. 308 (1994). In *Transamerican Premier*, the government sent a check for final payment to the contractor even though: (1) the surety sent the government two letters notifying the government of the subcontractors' and suppliers' unpaid claims, and (2) the government had previously modified the contract to change the mailing address for the remaining contract payments to the surety's address. *Id*. at 310-11. Therefore, the COFC held the government liable. *Id*. at 317.

486. *International Fidelity Ins. Co.*, 41 Fed. Cl. at 716.

487. *Id*. at 719. In response to the COE's attempts to show that it exercised reasonable discretion, the court stated that

> [F]ar from being a reasoned exercise in judgment and discretion, [the government's] own recital of why the contract's payment provisions were violated appears to be one of inefficient payment procedures at best resulting in error when cutting the final check. In the government's explanations, there is no reflection of a reasoned exercise of judgment and discretion on the part of the Corps of Engineers.

Id.

488. WILLIAM S. COHEN, DEFENSE REFORM INITIATIVE REPORT (Nov. 1997), *available at* <http://www.defenselink.mil/pubs/DODreform/>.

489. WILLIAM S. COHEN, REPORT ON THE QUADRENNIAL DEFENSE REVIEW (May 1997), *available at* <http://www.defenselink.mil/pubs/qdr/>. In 1997, Congress directed the DOD to study defense programs comprehensively "with a view towards determining and expressing the defense strategy of the United States" through the year 2005. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, §§ 921-926, 110 Stat. 2422, 2623-2628 (1996). The DOD prepared the QDR, which concluded that the DOD must cut support functions to maintain combat readiness. QDR, *supra*, § 8, at 6.

To implement its reform proposals, the DOD has issued Defense Reform Initiative Directives (DRIDs).[492] One of the more interesting DRIDs addresses establishing a uniform definition of the term "inherently governmental function" for the DOD[493] Responding to congressional concerns, the DOD issued "DRID 20," that required all of the DOD components to classify their functions as either inherently governmental or as commercial activities, using uniform guidelines, by October 1998.[494] Upon completing this inventory, DRID 20 directed the services and other DOD offices to complete a joint review by 30 November 1998. This review will identify uniformly within DOD the functions that are either inherently governmental or commercial. As a result of this comprehensive and joint effort, DOD components should avoid the disjointed approach to defining functions as inherently governmental. In light of the current outsourcing push, this is a step in the right direction.

GAO Reviews Outsourcing Savings Goals, Leadership. In 1998, the GAO reviewed the DOD's projected savings from its outsourcing efforts. In one report, the GAO questioned whether the DOD could achieve its stated goals from the QDR.[495] The QDR directed personnel cuts to identify savings the DOD could then use to increase modernization funding. In response, the services proposed initiatives to eliminate about 175,000 personnel and save about $3.7 billion by FY 2003. The GAO, however, observed that the DOD may not achieve all the personnel cuts and associated savings. It called the services' plans for the cuts "incomplete," stating they depend on "undefined" and "optimistic" outsourcing goals. Additionally, each service used a different method to figure personnel cuts and outsourcing goals, further skewing projected dollar savings. The GAO recommended that the DOD monitor closely the services' progress in achieving the personnel cuts and savings.[496]

In another report, the GAO observed that the DOD faces a difficult task in implementing the DRI.[497] Although supporting the DRI, the GAO stated that the DOD needed to embrace other opportunities to save money and meet mission needs. The GAO focused on four key points from the DRI. First, the GAO expressed concern that the DOD will reduce future budgets based only on expected savings from OMB Cir. A-76 competitions and base closings. The GAO noted that these tools produced savings, but not as much or as quickly as the DOD initially estimated. Consequently, the GAO viewed the DOD's approach as a "readiness risk." Second, the GAO concluded that the DOD failed to think broadly about how to implement its business reengineering reforms. Although the GAO noted that the DOD expected these initiatives to save money and provide quality service, it cautioned that the DOD failed to consider how to implement them in a timely, efficient, and effective manner. Third, the GAO found that the DOD needed to capitalize fully on the savings potential from initiatives to consolidate, restructure, and regionalize functions. Finally, the GAO criticized the DOD for not addressing systemic management problems that hamper change. It focused on such hurdles as service parochialism, lack of incentive to change, lack of goals to achieve change, and lack of data to measure change.[498] To avoid "expecting too much too soon," the GAO cautioned the DOD to track carefully its reform initiatives to forestall adverse impacts on readiness and support activities.[499]

Finally, the GAO reviewed the extent to which executive agencies have used OMB Cir. A-76 as a cost-savings tool.[500]

490. Federal Office of Management and Budget (OMB) Cir. A-76, Performance of Commercial Activities (Aug. 4, 1983) [hereinafter OMB Cir. A-76].

491. The DRI devotes a chapter to each proposed reform. Chapter one highlights some "best business practices" the DOD plans to adopt, such as paperless contracting. Chapter two focuses on reorganizing and reducing DOD headquarters elements, such as the Office of Secretary of Defense staff, Defense Agencies, DOD Field Activities, Defense Support Activities, and the Joint Staff. Chapter three identifies outsourcing opportunities for DOD under OMB Cir. A-76, such as payroll, personnel services, surplus property disposal, and drug testing laboratories. Chapter four identifies ways that the DOD may eliminate unneeded infrastructure, such as additional base closures.

492. The DOD has issued 45 DRIDs. *See Defense Reform Initiative Directives* (visited Oct. 1, 1998) <http://ca.dtic.mil/dri/drids/>.

493. An "inherently governmental function" is one "intimately related to the exercise of the public interest as to mandate performance by [f]ederal employees." OMB Cir. A-76, *supra* note 491, ¶ 6.e.

494. *See* Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, subject: Department of Defense Reform Initiative Directive 20: Review of Inherently Governmental Functions (19 Jan. 1998).

495. General Accounting Office, Quadrennial Defense Review: Some Personnel Cuts and Associated Savings May Not Be Achieved, Report No. GAO/NSIAD-98-100 (Apr. 30, 1998).

496. *Id.* at 13. *See* General Accounting Office, Quadrennial Defense Review: Opportunities to Improve the Next Review, Report No. GAO/NSIAD-98-155 (June 25, 1998) (recommending the DOD improve the next QDR by changing the process, preparing the QDR earlier, and improving its analytical tools).

497. General Accounting Office, Defense Management: Challenges Facing DOD in Implementing Defense Reform Initiatives, Report No. GAO/T-NSIAD-98-122 (Mar. 13, 1998) [hereinafter GAO Defense Management].

498. *Id.* at 2-4. *See also* General Accounting Office, Defense Infrastructure: Challenges Facing DOD in Implementing Reform Initiatives, Report No. GAO/T-NSIAD-98-115 (Mar. 18, 1998).

499. GAO Defense Management, *supra* note 498, at 23.

Noting that OMB Cir. A-76 has a proven track record for saving scarce funds, the GAO found that agencies seldom use it. Thus, the GAO criticized the OMB for not consistently sending strong messages to agencies that OMB Cir. A-76 is a "priority management initiative."[501] The GAO challenged the OMB to exercise "consistent and forceful leadership" to create incentives for other agencies to also use A-76. [502] Additionally, the GAO recommended that agencies integrate OMB Cir. A-76 into their annual performance plans submitted to Congress.[503] These plans reflect an agency's goals for delivering quality products and services. The GAO concluded that these plans offer a ready-made vehicle for Congress to assess if an agency is using the most cost-effective strategies to achieve its goals.[504]

The GAO issued its comments shortly after the OMB directed all executive departments and agencies to prepare a list of duties that the government could outsource to the private sector. For the first OMB inventory since 1996, agencies must review their support activities to determine which are inherently governmental and must be performed in-house, and which are commercial for which the private sector may compete.[505] The OMB required agencies to submit their lists by 31 October 1998.

Congress Passes New Legislation. In 1998, Congress passed legislation addressing the outsourcing process. Known as the Federal Activities Inventory Reform Act of 1998,[506] the new legislation requires federal agencies to prepare an annual list of noninherently governmental functions performed by federal employees, submit the list to OMB for review, and make the list publicly available. The bill establishes an appeal process within each agency to challenge the contents of the list. It also creates a statutory definition—identical to OMB Cir. A-76—of "inherently governmental function." Finally, the bill requires "fair and reasonable cost comparisons." On 30 July 1998, the Senate passed this bill and referred it back to the committee on Government Reform and Oversight. The House Committee included identical language as an amendment to an unrelated measure, the Federal Procurement System Performance Measurement and Acquisition Workforce Training Act.[507] On 5 October 1998, however, the House accepted the Senate's version in light of President Clinton's opposition to the broader House bill.[508]

It Ain't Fair! GAO Upholds Air Force Cost Comparison. During 1998, the GAO opined on the fairness of OMB Cir. A-76 studies. One case depicted how easily an agency may gain access to and use a private offeror's cost estimate in an OMB Cir. A-76 competition. In *Madison Services, Inc.*,[509] the Air Force solicited offers for a base operating services contract. The solicitation stated that the Air Force would evaluate the offers on technical factors and price. The Air Force selected Madison's proposal as the best value offer. After performing the cost comparison, however, the Air Force decided that it would cost less to perform the services in-house. Madison filed an agency appeal. In response, the Air Force increased the in-house cost estimate during the review process but denied Madison's appeal. Madison protested to the GAO.

Madison alleged that base personnel "gamed" the procurement by deliberately omitting some costs from the initial in-

500. GENERAL ACCOUNTING OFFICE, OMB CIRCULAR A-76: OVERSIGHT AND IMPLEMENTATION ISSUES, REPORT NO. GAO/T-GGD-98-146 (June 4, 1998) [hereinafter GAO OMB CIR. A-76].

501. *Id.* at 11.

502. *Id*. at 8. The GAO praised the DOD for using A-76 to generate savings and to fund its modernization efforts. GAO also pointed out that for FY 1997, the DOD was the only federal agency that reported to the OMB any completed A-76 studies. *Id.* at 4.

503. Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285.

504. GAO OMB CIR. A-76, *supra* note 501, at 7.

505. *OMB Tells Agencies to List Commercial Activities for Public/Private Competition*, 69 Fed. Cont. Rep. (BNA) 637 (1998).

506. S. 314, 105th Cong. (1998). Recently, Senate and House members have introduced varying versions of a bill codifying the outsourcing process. Initially known as the Freedom from Government Competition Act, this bill would have prohibited agencies from providing or obtaining goods or services from other agencies unless the goods or services are inherently governmental, dictated by national security, or the federal government is the best value for the goods or services. Regarding best value, the initial bill would have required the OMB to write regulations considering cost, qualifications, past performance, technical capability, and other relevant non-cost factors for both the public and private sector. *See* H.R. 716, 105th Cong. (1997); S. 314, 105th Cong. (1997).

507. H.R. 4244 105th Cong. (1998).

508. *House Passes Contracting Out Bill; Industry Gratified, Clinton Expected to Sign*, Fed. Cont. Daily (BNA) Oct. 7, 1998, *available in* WESTLAW, Legal News, BNA-FCD, Oct. 7, 1998 FCD, d2. *See* <http://www.loc.gov> to review this legislation (last visited Oct. 14, 1998). *See* GENERAL ACCOUNTING OFFICE, PRIVATIZATION AND COMPETITION: COMMENTS ON H.R. 716, THE FREEDOM FROM GOVERNMENT COMPETITION ACT, REPORT NO. GAO/T-GGD-97-185 (Sept. 29, 1997); GENERAL ACCOUNTING OFFICE, PRIVATIZATION AND COMPETITION: COMMENTS ON S. 314, THE FREEDOM FROM GOVERNMENT COMPETITION ACT, REPORT NO. GAO/T-GGD-97-134 (June 18, 1997) (providing a general summary and history of the legislation and its pros and cons).

509. B-277614, Nov. 3, 1997, 97-2 CPD ¶ 136. In *Madison*, the Air Force used best value contracting procedures. It evaluated technical and price factors to determine which offer or combination of offers gave the Air Force the "best value." *Id.*

house estimate. According to Madison, base personnel omitted these costs so they could review its proposed costs before recalculating the in-house estimate during the appeal process.[510] Madison also alleged that the appeal process favored the government's "most efficient organization." According to Madison, the appeal review team discussed the omitted costs with the base employees who had prepared the in-house cost estimate initially.[511]

The GAO ruled that the Air Force did not "game" the OMB Cir. A-76 cost comparison. The GAO found that Madison failed to show bad faith and excused the base personnel for mistakenly omitting certain costs from the in-house estimate. The GAO noted that the confusing language in the cost comparison and solicitation made it difficult for the base personnel to accurately calculate the in-house cost estimate.[512] In addition, the GAO ruled that the appeal review team properly consulted with the base personnel who prepared the in-house estimate when they resolved Madison's appeal. Only those personnel could logically identify the omitted costs and then properly recalculate the in-house cost estimate.[513] Finally, the GAO observed that the base officials for the Air Force increased the in-house cost estimate significantly after they reviewed Madison's costs, an act inconsistent with agency bias.[514]

In light of the DOD's current emphasis on outsourcing, *Madison* offers a couple of key lessons. First, the GAO reaffirmed that it will review cost comparisons to determine if they were faulty or misleading. Otherwise, the GAO will not review an agency's initial decision to conduct an A-76 study. Second, the GAO emphasized that agency officials presumptively act in good faith unless the protester shows a "specific, malicious intent" to cause harm.

Bring It On Home! GAO Allows AF To Bring Work In-House. In *Pemco Aeroplex Inc.*,[515] the GAO upheld the Air Force's decision to cancel a RFP for depot maintenance and bring the work in-house. Significantly, the GAO reasoned that the Air Force did not violate a statutory requirement to permit private companies to provide goods and services unless the government can provide them at a lower cost.[516]

This protest has a tortuous history. In July 1996, the Air Force issued a solicitation for depot maintenance for C-130 aircraft. It awarded the contract to Aero in April 1997; Pemco protested. In response, the Air Force admitted that it failed to evaluate the offerors' past performance properly, and agreed to revise the RFP. The GAO dismissed Pemco's protest in May 1997.[517] The Air Force, however, concluded that it could not complete the corrective action until October 1997. As a result, it terminated Aero's contract and decided that Warner Robins AFB would temporarily perform the depot work. In June 1997, the Air Force advised offerors that it was reevaluating the depot work to "determine the best approach to ensure readiness and sustainability of the C-130 weapon system." Finally, on 3 March 1998, the Air Force announced that it was canceling the RFP, concluding that keeping the work in-house was the "most cost effective means" of performing the work.[518] Both Pemco and Aero protested. They cited two bases: (1) the Air Force canceled the RFP improperly, and (2) the Air Force violated 10 U.S.C.A. § 2462, which requires a "reasonable and fair cost comparison" before acquiring goods or services from the private sector.[519]

The GAO agreed with the Air Force and denied the protest. Initially, the GAO agreed with the protesters that 10 U.S.C.A. § 2462 applied when the Air Force decided to bring work in-house. The GAO, however, found the "except as otherwise provided by law" proviso of 10 U.S.C.A. § 2462 triggered 10

510. *Id.* at 3-4.

511. *Id.* at 4.

512. *Id.* at 3.

513. *Id.* at 4.

514. *Id.*

515. B-275587.10, B-275587.11, B-275587.12, June 29, 1998, 98-2 CPD ¶ 1.

516. 10 U.S.C.A. § 2462 (West 1998). This statute states, in part:

> Except as otherwise provided by law, the Secretary of Defense shall procure each supply or service necessary for or beneficial to the accomplishment of the authorized functions of the Department of Defense . . . from a source in the private sector if such a source can provide such supply or service to the Department at a cost that is lower . . . than the cost at which the Department can provide the same supply or service.

Id.

517. Pemco filed for reconsideration, which the GAO denied. Pemco Aeroplex, Inc.—Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102.

518. *Pemco Aeroplex, Inc.*, 98-2 CPD ¶ 1 at 2.

519. *Id.*

U.S.C.A. § 2466(a), which prohibits the Air Force from contracting out more than fifty percent of depot maintenance.[520] Thus, the GAO concluded that the Air Force canceled the solicitation properly to comply with this statutory cap. The GAO agreed with the Air Force that it teetered on the brink of exceeding the fifty percent cap despite the C-130 solicitation. Thus, the GAO concluded that the Air Force exercised its discretion properly when it canceled the solicitation to stay within the statutory cap.[521]

The GAO also agreed with the three specific reasons the Air Force offered to explain why 10 U.S.C.A. § 2466(a) required it to cancel the RFP. First, the Air Force noted that the statute requires agencies to carefully balance the funds used for depot maintenance workloads, whether performed in-house or contracted out to the private sector. According to the Air Force, shifting funds from public depot maintenance to private contractors could cause it to exceed the statutory cap. Second, the Air Force stated that agencies lose valuable "headroom" or available funds for contracting out depot maintenance every time they make that decision. Thus, the Air Force loses some financial flexibility for future, and perhaps more appropriate, decisions to contract out depot maintenance. Finally, the Air Force observed that Congress amended 10 U.S.C.A. § 2466(a) to define "depot-level maintenance and repair" as including "interim contractor support or contractor logistics support." The private sector has traditionally performed the latter work, which altered the workload balance for purposes of 10 U.S.C.A. § 2466(a).[522]

Practitioners should find *Pemco* interesting, especially as DOD agencies struggle with outsourcing in general and depot maintenance in particular.

Service Contracting

Performance-Based Service Contracting Pilot Project. In May 1998, the OFPP issued the results of a government-wide pilot project on performance-based service contracting (PBSC) methods.[523] The report caps a four-year study of whether PBSC methods delivered savings and stimulated competition. Fifteen agencies voluntarily agreed to designate non-PBSC contracts totaling $585 million and resolicit them using PBSC methods.[524] The OFPP report showed PBSC decreased contract prices by an average of fifteen percent.[525] In addition to saving money, the report stated that the pilot project revealed other PBSC successes. For example, PBSC improved contractor performance in terms of quality, quantity, and timeliness. Moreover, agencies' customer satisfaction ratings improved by eighteen percent.[526] In addition, PBSC stimulated competition, shown by the number of offers received. Finally, PBSC reduced contract audits by ninety-three percent.

By contrast, the report noted that PBSC increased contract lead-time by sixteen percent, from 237 to 275 days. The report attributed the increased lead-time to the need of agencies to develop new statements of work, performance standards, and quality assurance plans.[527]

Environmental Cleanup: It's a Dirty Job, but PBSC Can Do It! The EPA implemented its own pilot project for PBSC. Using superfund sites, the EPA has identified three areas to test PBSC to cleanup lead-contaminated soils. The EPA picked soil cleanup for its pilot project because the work is repetitive and not complex. The EPA also developed a performance work statement totaling only thirteen pages, which simplified the contractor's work. From its pilot project, the EPA expects to compile a baseline to assess future PBSC work.[528]

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520. *Id.* at 6.

521. *Id.* at 9.

522. *Id.* at 8. The *Pemco* case touches, albeit briefly, on the tension between the "low cost" language of 10 U.S.C.A. § 2462 and the current trend of using "best value" or non-cost factors in cost comparisons.

523. Franklin D. Raines, A Report on the Performance-Based Service Contracting Pilot Project (May 1998) *available at* <http://www.arnet.gov/References/Policy_Letters/>.

524. *Id.* at 6. Executive officials from the participating agencies signed a pledge committing them to use PBSC for the volunteered contracts. Agencies selected contracts about to expire and resolicited them using PBSC. The project measured the following variables before and after contract award: contract price; agency satisfaction with contractor performance; type of work performed; contract type; competition; procurement lead-time; and audit workload. *Id.* at 7.

525. *Id.* at 8.

526. *Id.* at 13. The report noted that PBSC generated higher customer satisfaction ratings when cost reimbursement requirements were converted to fixed-price contracts. According to the OFPP, these results validated the "strong preference" for fixed price contracts emphasized in various OFPP checklists for PBSC. *Id.*

527. *Id.* at 16. The report noted that PBSC did not increase lead-time for non-technical services, but increased lead-time significantly for professional and technical services.

528. *Use of Performance-Based Contracting Making Headway at Hazardous Waste Sites*, 69 Fed. Cont. Rep. (BNA) 702 (1998).

Privatization

The GAO Reviews the DOD's Housing Privatization. In July 1998, the GAO issued a report criticizing the DOD's sluggish efforts to implement housing privatization pursuant to temporary legislation passed in FY 1996.[529] This legislation allows the DOD to offer incentives, such as loan guarantees, to encourage the private sector to use its investment capital to build or renovate military housing. Because the legislation represents a new approach for improving military housing, the GAO reviewed it to measure its progress, assess key issues, and see if the DOD is integrating the legislation into other parts of its housing program. The GAO concluded that the housing privatization is off to a slow start and the DOD could better integrate it into its overall housing program.

The GAO cited several reasons for the slow start to housing privatization. First, officials from both the government and the private sector had to overcome a learning curve because the legislation offers a unique way of doing business.[530] After resolving legal and financial issues on early projects, both sides then proceeded carefully while developing initial agreements, hoping to avoid mistakes. Officials from both private and public sectors assured the GAO that later deals should proceed faster. The GAO also noted that the DOD will save less from proposed housing projects than originally estimated.[531] Citing incomplete cost analyses, the GAO concluded that the overall cost savings to the government would be as much as ten percent less than originally estimated on one project.

Finally, the GAO identified problems with the long-term privatization agreements, many of a fifty-year length. The GAO singled out three concerns. First, the long-term agreements require the DOD to know with a "high degree of certainty" an installation's future housing needs.[532] Thus, the military must forecast whether it will need the installation in the future, and then predict its mission, population, and local community housing costs. The GAO noted that making these forecasts is difficult but necessary to assure that the private sector participates. Second, the GAO identified another concern—overall contractor performance. Over the life of an agreement, the contractor may lose incentive to maintain housing, hire unqualified managers, and use inferior supplies. According to the GAO, service members suffer because their quality of life erodes.[533] Finally, the GAO recognized that the long-term agreements allow civilians to rent vacant units if military families choose not to rent them. If more military families decide to live off base, more civilian families could choose to rent the housing. As a result, commanders may have to wrestle with the prospect of non-military civilians living on base.[534]

Although the housing legislation offers the DOD a "powerful new option" for addressing its housing problems, the GAO reminded the DOD that it is only one of several tools.[535] The GAO recommended that the DOD use a housing strategy integrating three elements. First, the DOD must accurately determine its housing needs and the ability of the local communities to absorb some of those needs. Second, the DOD must maximize its use of private sector housing to contain housing construction costs. Finally, the DOD must make unified decisions on housing allowances and housing construction. The GAO noted that changes in housing allowances affect the amount of local housing military families can afford. These changes also affect the privatization agreements that tie rental rates to the housing allowance. If the DOD uses these other tools, the GAO predicted it could "maximize advantages from the initiative and minimize total housing costs."[536]

CONTRACT PERFORMANCE

Contract Interpretation

Federal Circuit Finds Army Contract Contained Patent Ambiguity

In December 1997, the Federal Circuit affirmed the ASBCA's decision in *Triax Pacific, Inc., v. West*.[537] Ruling in

529. General Accounting Office, Military Housing: Privatization Off to a Slow Start and Continued Management Needed, Report No. GAO/NSIAD-98-178 (July 17, 1998) [hereinafter Military Housing Report]. The legislation temporarily authorizing housing privatization is at 10 U.S.C.A. §§ 2871-2885 (West 1998). It expires in FY 2001.

530. Military Housing Report, *supra* note 530, at 22.

531. *Id*. at 23-25. The GAO noted that privatization shifts funding from military housing construction and operations and maintenance accounts to military personnel accounts to pay for additional housing allowances created through privatization.

532. *Id*. at 26.

533. *Id*. at 27. The GAO stated that enforcing long-term agreements could be difficult, timely, and costly. The GAO also observed that the financial incentive for the contractor erodes during the last twenty years of the agreement. As a result, the contractor has little need to keep up the property. The GAO painted a bleak picture, reasoning that if military families do not rent the units, civilians will, attracted by lower rents which could create an "on-base slum." *Id*.

534. *Id*. at 28. The GAO noted that renting on-base housing base housing to civilians could raise installation security concerns significantly and complicate law enforcement responsibilities.

535. *Id*. at 7.

536. *Id*. at 32. The GAO also recommended that the DOD direct the services to prepare detailed plans describing how they will determine their housing needs, showing how they will rely on local community housing, and outlining ways to improve housing referral services. *Id*. at 37.

favor of the Army, the Federal Circuit determined that a patent ambiguity[538] existed regarding the painting of lanais.[539]

In 1990, the Army awarded a contract for the renovation of military housing units at Fort Shafter, Hawaii. The contract required Triax to build lanais and perform other minor renovation projects. The central issue in this case involved whether the contract required Triax to paint the lanais after its construction. The parties were unable to resolve the issue, and Triax chose to paint the lanais and seek an equitable adjustment for what it considered additional work. The contracting officer denied the claim.

On appeal, Triax argued that the contract drawings did not require it to paint the lanais. The Army responded that while the drawings did not mention painting, a specification containing the "painting" schedule required Triax to paint the lanais.[540] Triax argued that the painting schedule was only a list that contained general instructions about when to paint if the contract drawings or other provisions specified painting the lanais. Additionally, Triax claimed that the painting schedule for the lanais contained a thirty-day curing period that would make timely performance impossible.[541] The Army claimed that any inconsistency with the curing period and the contract deadline was illusory because it was willing to waive the curing period.[542]

The board ruled against Triax. The board concluded that the drawings and the specification that contained the painting schedule, when read together, clearly required Triax to paint the lanais. Triax appealed the board's decision to the Federal Circuit. The Federal Circuit also denied the appeal, but for different reasons. The Federal Circuit found that the contract was patently ambiguous. The patent ambiguity was the conflict between the thirty-day curing period and the performance schedule. The Federal Circuit held for the Army and concluded that Triax should have recognized the ambiguity and sought clarification before submitting its bid.[543]

Get This, Take That – And Don't Come Back!

Teague Brothers Transfer & Storage Co., Inc.[544] involved a COE contract for document storage services. Under the contract, Teague received orders from the COE either to pick up records and put them in storage or retrieve them from storage and deliver them to the COE.[545] When Teague picked up or retrieved the records, it charged the COE five dollars for each request, and the COE paid five dollars for each invoice submitted by Teague. This practice went on for three years until the contract expired.[546]

After the contract expired, the COE sent a letter to Teague claiming that it had overcharged the COE. The COE argued that the contract allowed only a five dollar charge per box for all activities involved in delivery and pick up. The COE claimed that Teague improperly billed ten dollars for the retrieval, delivery, and refile service. This resulted in over-payment of $3070 for 614 boxes at five dollars per box.[547]

The COE and Teague interpreted differently line item 0003[548] of the contract, entitled "Annual Requests for Retrieval, Delivery, and Refile Service."[549] Teague's bid for this item was five dollars. The COE claimed that line item 0003 requested a price for a round-trip service, not a separate charge for each element of the service. The COE argued that the key word was "service" as opposed to "services." "Service" implied a single payment of five dollars per round-trip.[550]

537. 130 F.3d 1469 (Fed. Cir. 1997).

538. *Id.* at 1475.

539. A lanai is a roofed patio commonly built in Hawaii. WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 675 (1984).

540. *Triax Pacific*, 130 F.3d at 1471-73. The painting schedule listed seven different surfaces Triax had to paint. Three of the listed surfaces pertained to painting the lanais. *Id.* at 1472.

541. *Id.* at 1472.

542. *Id.* at 1473.

543. *Id.* at 1475.

544. ASBCA Nos. 6312, 6313, 98-1 BCA ¶ 29,333.

545. *Id.* at 145,837.

546. *Id.*

547. *Id.* at 145,838.

548. *Id.* at 145,837. There were ten line items listed on the contract. Each line item required various services including initial inventory. Item 0003 provided an estimated quantity of 960 units that required retrieval, delivery, and refile services. *Id.*

549. *Id.* at 145,838.

The COE's interpretation of the ambiguous provision did not persuade the board. The board held for Teague based on the reasonableness of Teague's interpretation of the latent ambiguity and the parties' consistent prior course of conduct.[551] Rather than concentrating on whether the COE's interpretation was reasonable, the board found Teague's interpretation of the latent ambiguity to be reasonable. The board applied the general rule of *contra proferentem*[552] and construed the ambiguous provision against the COE. Additionally, the board noted that the parties' consistent prior course of conduct was binding on the COE. Here, Teague consistently billed, and the COE paid, five dollars for each request.

Contract Changes

Agency Clause Supplementing the Standard Changes Clause is not a Deviation

In September 1989, the Air Force awarded a hospital cleaning services contract to Kentucky Building Maintenance, Inc.[553] The contract required Kentucky Building to provide cleaning services for the medical treatment facility at Wright-Patterson AFB, Ohio.

The cleaning contract contained the standard changes clause for fixed-price contracts.[554] In addition to this clause, the Air Force included its own "Hospital Aseptic Management Services" (HAMS) clause. The HAMS clause provided that the Air Force would compute the additions and deletions of square footage of various areas to be cleaned using a specified formula.[555]

The Air Force modified the contract several times during contract performance. Some modifications added square feet, while others deleted square feet from the contract. Applying the HAMS formula to the changes resulted in a decrease in the total contract price.[556]

Kentucky Building appealed to the ASBCA claiming that the HAMS clause was illegal. It contended that the clause was inconsistent with the standard changes clause and the Air Force should have obtained approval for its use before incorporating it in the contract.[557] Kentucky Building cited *Southwest Marine, Inc.*,[558] where the board held that a deviation from the FAR without proper authorization was illegal.

The board disagreed and held for the Air Force. The board concluded that the HAMS clause did not contradict the standard changes clause, but merely supplemented it by outlining a specific formula for equitable adjustments between the parties.[559]

550. *Id.* at 145,839.

551. *Id.* at 145,839.

552. *Contra Proferentem* is a rule of contract interpretation that construes the meaning of the ambiguous language against the drafter.

553. Kentucky Bldg. Maint., Inc., No. 50,535, 98-2 BCA ¶ 29,846, 1998 WL 338243 (ASBCA Jun. 24, 1998).

554. FAR, *supra* note 15, at 52.243-1.

555. *Kentucky Building*, 1998 WL 338243, at *2. The HAMS clause provided, in part:

> Additions and deletions of square footage of PRS #3 and PRS #7. Either as a permanent change or a change of short duration will be completed using the following methodology:
>
> > PRS #3 will be figured by adding the percentages in the contract of PRS #3 and PRS #4 and an allocation as shown below of PRS items #8 and #9.
> >
> > PRS #7 will be figured by adding the percentages in the contract of PRS #3 and PRS #4 as shown below of PRS #8 and #9.

Id.

PRS is Performance Requirements Summary, which defines the different categories of cleaning services for hospital rooms based on the function.

556. *Id.* The modifications resulted in a total reduction of $8,585.83 to the contractor's overall price.

557. *Id. See also* FAR, *supra* note 15, at 1.401(a), which defines a deviation as:

> (a) The issuance or use of a policy, procedure, solicitation provision . . . , contract clause . . . , method, or practice of conducting acquisition actions of any kind at any stage of the acquisition process that is inconsistent with the FAR.

Id.

558. *Kentucky Building*, 1998 WL 338243, at *2 (citing Southwest Marine, Inc., ASBCA Nos. 34058, et. al., 91-1 BCA ¶ 23,323).

559. *Id.* at *3.

Oral Modifications are Unenforceable

In *Staff, Inc.*,[560] the Forest Service awarded a tree thinning services contract to Staff. Before contract performance began, the contracting officer informed Staff orally that the Forest Service planned to modify the contract by deleting 212 acres from the contract and adding another 210 acres from another location in the forest. The contracting officer gave Staff two options: (1) accept the substitution at no additional cost to the government, or (2) accept termination of the 212 acres without the additional substituted acreage.[561]

The contracting officer restated the Forest Service's position during a subsequent meeting with Staff. Shortly after the meeting, Staff faxed a letter stating that it would perform the substituted (option 1) work at an increased cost of eighty dollars per acre. The contracting officer countered that Staff could perform the substitution only if it agreed to a no-cost modification. Alternatively, the contracting officer was prepared to terminate the contract for the convenience of the government. According to the contracting officer, Staff had agreed orally to perform the work, as modified, at no cost to the government. Mr. Galan, president of Staff, testified that he had not agreed to the no-cost substitution.[562]

In any event, the contracting officer orally directed Staff to begin work on the substituted acreage. The contracting officer believed Staff would perform the work under the oral agreement that specified no additional cost to the Forest Service.[563]

One month after directing Staff to perform, the contracting officer issued a written contract modification that memorialized the earlier oral agreement. The substituted work was about thirty percent completed at the time. Staff refused to sign the modification because it did not provide for the eighty dollar increase per acre. The contracting officer then issued a unilateral modification directing Staff to perform at no additional cost. Staff completed thinning out the 210 acres pursuant to the unilateral modification.[564]

Before the Agriculture Board of Contract Appeals, the Forest Service argued that Staff was not entitled to additional money because the oral agreement bound the contractor to its terms. Staff, on the other hand, argued that the oral agreement was not enforceable.[565]

The board concluded that oral agreements are generally unenforceable.[566] Any modification must be in writing in order to bind the parties. In this case, the board found that the parties did not reduce the oral agreement to writing. Additionally, it found that the oral agreement lacked mutuality of intent because the facts were unclear whether the parties actually agreed to perform the substitution under a no-cost modification. The board instead concluded that the Forest Service directed Staff to perform different work (a change in place of performance) than required under the original contract at no additional cost. The board also found that the Forest Service intended to close the agreement with a written modification, but did not. The board concluded that to bind Staff to the terms of the oral agreement, the Forest Service should have issued a written modification.

Unilateral Increase in Contractor's Pro Rata Share of Agency's Requirements is a Cardinal Change

In *Valley Forge Flag Co., Inc.*,[567] the VA awarded a partial requirements contract to Valley Forge for approximately sixty percent of its total requirements. Subsequently, the VA awarded the other forty percent to two small disadvantaged businesses as sole-source procurements under Section 8(a) of the Small Business Act.[568]

After Valley Forge completed its obligations under the requirements contract, it discovered that the VA actually had ordered eighty-five percent of its total requirements from Valley Forge rather than the sixty percent pro rata share. Valley Forge requested an equitable adjustment of the contract price because it incurred a higher materials cost due to the VA's unilateral reallocation of the pro rata share of its total require-

560. AGBCA Nos. 96-112-1, 96-159-1, 97-2 BCA ¶ 29,285.

561. *Id.* at 145,703-04.

562. *Id.* at 145,705.

563. *Id.*

564. *Id.* at 145,706.

565. *Id.* at 145,708-09.

566. Oral modifications are generally unenforceable. *See* Mil Spec Contractors, Inc. v. United States, 885 F.2d 865 (Fed. Cir. 1987).

567. VABCA Nos. 4667, 5103, 97-2 BCA ¶ 29,246.

568. 15 U.S.C.A. § 637(a) (West 1998); 13 C.F.R. pt. 124; *see* FAR, *supra* note 15, at subpt. 19.8. This is the primary federal government program designed to assist small disadvantaged businesses. Section 8(a) authorizes the SBA to enter into contracts with other federal agencies. The SBA then subcontracts with eligible small disadvantaged businesses. *See supra* note and accompanying text.

ments. The contracting officer denied the appeal. The VA claimed that the total number of flags stated in the contract was merely an estimate and the VA was within its rights when its order exceeded the estimated quantity. Additionally, the contracting officer claimed that Valley Forge failed to assert its right to entitlement within thirty days from the receipt of the order(s) changing the terms of the contract.[569] Basically, the VA disregarded the pro rata share of the total estimated quantity allotted to each contractor and ordered its requirements unilaterally from Valley Forge without prior notification.

The VABCA held for Valley Forge, concluding that the VA could not ignore the pro rata share on which it based the award. The board found that the VA breached its partial requirements contract by ordering in excess of the sixty percent pro rata share awarded to Valley Forge. The board stated that the VA's actions constituted a cardinal change. Without defining "significantly," the board ruled that the VA's orders could not vary "significantly" from the pro rata share awarded to Valley Forge.[570]

Value Engineering Change Proposals (VECP)[571]

The Times, They Are a Changin'!

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations (DAR) Council proposed a change to the sharing periods and rates that contracting officers may establish for individual VECPs. This proposed rule would amend the VECP guidance in FAR Parts 48 and 52[572] in three areas. It would allow contracting officers to: (1) increase the sharing period from thirty-six to sixty months, (2) increase the contractors share of incentive and concurrent savings to seventy-five percent, and (3) increase the contractors share of collateral savings to 100 percent on a case-by-case basis for each VECP.[573]

The councils are seeking the proposed amendment to entice contractors to submit more VECPs. By providing contracting officers the opportunity to increase both the share percentage and the sharing period, the councils are seeking to motivate contractors to submit VECPs by providing adequate compensation for their preparation and negotiation efforts. With these additional incentives, the councils anticipate that contractors will find it more feasible to submit VECPs.

Contractors Take a "Time-Out" from the VECP Process

The DOD Inspector General (IG) issued a report last fall that found that DOD activities were not using value engineering fully or effectively. The IG also found that contractors were reluctant to submit VECPs.[574] The report summarized the findings of a joint audit conducted by the IG and the Army and Air Force Audit Agencies.

According to the report, contractors cited DOD program officials' lack of interest in the value engineering program, and the low priority the contracting officers give VECPs as the reasons for their lack of VECP submissions. Long delays and processing times in evaluating the VECPs discouraged contractors from submitting change proposals. According to the IG, these concerns exist even though the DOD had taken positive steps to increase the use of value engineering. These steps included: (1) approving a value engineering strategic plan that required agencies to establish value engineering savings goals, and (2) establishing a value engineering processing action team to identify means of overcoming obstructions to the use of value engineering techniques.[575] The report indicated that although the DOD reported significant savings as a result of its use of value engineering, the savings accounted for less than one percent of its total obligation authority during the two FYs that were the focus of the report.[576]

No-Cost VECP

On 22 June 1998, the Civilian Agency Acquisition Council and the DAR Council agreed on an interim rule that would

569. *Valley Forge*, 97-2 BCA ¶ 29,246 at 145,484-85.

570. *Id*. at 145,487. The board ruled that while the pro-rata percentage share may not vary significantly, the total quantity may increase as long as it was proportional to the pro-rata percentage share specified in the contract.

571. Value engineering is a procurement technique by which contractors either: (1) voluntarily develop, prepare, and submit suggested performance methods, and then share in any savings that may result to the government; or (2) the contractor is required to establish a program to identify methods for performing more economically and submit these methods to the government. The VECP is the mechanism contractors use for such submissions. JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 412-13 (3d ed. 1995).

572. The specific FAR provisions affected by the proposal include §§ 48.001, 48.102, 48.103, 48.104-1, and 52.248-1.

573. 63 Fed. Reg. 43,236 (1998).

574. *DOD: DOD Agencies Report Value Engineering Savings; IG Urges Expanded, More Effective Use of VE*, Fed. Cont. Daily (BNA), Nov. 17, 1997, *available in* WESTLAW, Legal News, BNA-FCD, Nov. 17, 1997 FCD, d3.

575. *Id.*

576. *Id.* The auditors examined the value engineering program and savings for FYs 1994 and 1995. The savings for the two years were $855 million and $734 million, respectively.

amend the FAR and clarify the issue of no-cost VECPs.[577] According to the interim rule, no-cost VECPs may be used when, in the contracting officer's judgment: (1) it would not be more cost-effective to rely on other value engineering approaches, and (2) the no-cost settlement would provide adequate consideration to the government.[578]

The interim rule[579] seeks to clarify the guidance provided at FAR 48.104-3.[580] This provision authorizes no-cost settlements. Contracting officers may use no-cost settlements when they have: (1) considered and balanced the administrative costs of negotiating a settlement with the anticipated savings, (2) determined that reliance on other value engineering approaches would probably not be more cost-effective, and (3) determined that the settlement would provide the government with adequate compensation.[581]

Pricing of Adjustments

Federal Circuit "Clarifies" Eichleay Again in 1998

Showing its propensity to tinker, the Federal Circuit clarified the *Eichleay*[582] formula again this past year in *West v. All State Boiler*.[583] The VA Medical Center in Northampton, Massachusetts, awarded All State a construction contract to upgrade the boiler system at the medical center. The contract required All State to demolish and remove three existing boilers and install new boilers and plumbing.[584] The VA gave All State the notice to proceed on 13 January 1994. The VA set the original completion date for 5 January 1995. The parties subsequently changed the completion date to 7 February 1995, for reasons unrelated to the appeal.

All State discovered asbestos in the casing of one of the boilers. The contract, however, contained no provisions for dealing with asbestos. Accordingly, the VA suspended work on All State's contract for two months and hired another contractor to abate the asbestos.[585] On 28 May 1994, performance resumed on the contract. All State completed its work under the contract on 1 March 1995, twenty-two days after the amended completion date.

All State submitted a claim for $55,739.74 for its increased costs associated with the suspension of work. Upon further consideration, All State reduced its claim to $39,962. The contracting officer obtained an audit of the claim. In his final decision, the contracting officer found that All State was only entitled to its operational rental costs which amounted to $522. The contracting officer denied the remainder of the claim, including portions that related to unabsorbed overhead costs.

All State did not take the contracting officer's final decision with the spirit that was intended and appealed to the board.[586] The board considered only whether All State was entitled to receive unabsorbed overhead expenses. The board held that All State established that it was required to "standby" during the government-caused suspension period. The board then concluded that it was "impractical" for the contractor to take on other work during that period.[587]

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577. 63 Fed. Reg. 34,078 (1998).

578. *Id*.

579. This interim rule was promulgated without providing the public with a prior opportunity to comment. The Secretary of the DOD, the Administrator of the GSA, and the Administrator of the NASA determined that urgent and compelling reasons existed that did not allow for the additional time required for public comment. The urgent and compelling reasons cited were the necessity to preclude misinterpretation and misuse of the existing guidance and resulting settlements. The amended language provides contracting officials with the appropriate standard to determine whether a no-cost VECP would best benefit the government. *Id*.

580. FAR, *supra* note 15, at 48.104-3.

581. *Id*. If the contracting officer anticipates significant cost savings on a contract, the contracting officer should not use a no-cost VECP.

582. *See* Eichleay Corp., ASBCA No. 5183, 60-2 BCA ¶ 2688, *aff'd on reconsideration*, 61 BCA ¶ 2894.

583. 146 F.3d 1368 (Fed. Cir. 1998).

584. *Id*. at 1370. The contract specified that All State was to do the work in eight phases. The parties established a completion date for each individual phase. *Id*.

585. *Id.* All State offered to continue work on the contract (albeit out-of-sequence work) during the suspension. *Id*.

586. *Id*. While the appeal was pending at the board, All State and the VA agreed that All State was entitled to an additional $9628 in direct field costs and salaries accrued during the 58-day suspension.

587. *Id*. at 1371(citing VABCA No. 4537 at 7). The board made the following specific findings regarding All State's ability to take on additional work:

> During the suspension of work, [All State] had approximately $5 million of additional bonding capacity and continued to actively bid for new work. [All State], as a matter of its deliberate business practice, maintained its work-on-hand volume at approximately half of its bonding capacity. Although [All State] bid several jobs smaller than those for which it would typically compete during the suspension period in an effort to generate revenue, it was impractical for [All State] to bid, obtain contracts, and work on new projects in the 58 day period of suspension. In general, however, [All State] was not prevented from bidding on new projects by reason of the suspension of work.

Id.

The VA argued that it must be "impossible" for the contractor to take on additional work, not just "impractical." The board disagreed, stating that such an "[e]xpression of the second prerequisite . . . is contrary to the [Federal Circuit's] holdings and would impermissably [sic] restrict the ability of federal construction contractors to recover the costs of unabsorbed overhead expenses to which they are entitled to under Federal contract law."[588]

The Federal Circuit affirmed the board's decision. The court held: (1) establishing that All State was unable to undertake other work to absorb overhead expenses required only showing that other work was "impractical," not that it was impossible; (2) the period of delay for which unabsorbed overhead may be recovered is not the suspension period alone, but additional time beyond the original deadline necessary to finish the contract; (3) the burden of proof is on the VA to establish that it was not impractical for All State to take on replacement work; and (4) All State was entitled to recover unabsorbed overhead for the additional time period that was needed to complete performance of the contract due to the VA's suspension.[589]

The appeal clearly favored government contractors. In writing for the majority, Judge Paul R. Michel noted, "[i]t would be inconsistent with the purpose behind *Eichleay* recovery to require a contractor to cease all normal, on-going operations during a government-caused suspension on one contract in order to guarantee its recovery of unabsorbed overhead costs . . . ."[590]

Some commentators hailed *All State* as important because it removed uncertainty in the law created by prior Federal Circuit opinions.[591] Others believe that *All State* resurrected the *Eichleay* formula after the Federal Circuit sounded the "death knell" for *Eichleay* in *Satellite Electric Co. v. Dalton*.[592] In either case, *All State* is the Federal Circuit's latest effort to clarify the *Eichleay* formula.[593]

Jury Verdict Method Tested in 1998

In 1998, boards of contract appeals "weighed-in" on the jury verdict method for calculating damages. In *Cryus Contracting, Inc.*,[594] the Interior Board of Contract Appeals (IBCA) used the jury verdict method[595] for calculating damages in a contract for stabilizing and reclaiming a landslide. Specifically, the jury verdict technique was used to calculate standby damages for equipment because the contractor's evidence of its actual costs was imprecise. The IBCA held that if it rigidly followed the Army's standby cost rate schedule, the contractor would only receive fifteen to twenty percent of its claimed costs.[596]

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588. *Id.* (citing VABCA No. 4537 at 16).

589. *Id.* at 1368.

590. *Id.* at 1376.

591. Martha A. Matthews, *Construction Contracts: Federal Circuit Rejects Higher Standard for Recovery of Unabsorbed Overhead* , Fed. Cont. Daily (BNA), July 13, 1998, *available in* WESTLAW Legal News, BNA-FCD, July 13, 1998 FCD, d4.

592. 105 F.3d 1418 (Fed. Cir. 1997). In this case, the Navy awarded Satellite a contract to set up a power supply system. The Navy required the contractor to stop performance twice during the contract because it failed to provide government furnished property. In holding for the Navy, the court noted:

> Requiring the government to prove the actual acquisition of additional work would be inconsistent with the assumption on which the *Eichleay* formula rests: that where the government delays performance and requires the contractor to stand by indefinitely, the contractor is unable to develop other work against which the unabsorbed home office overhead otherwise chargeable against the suspended contract may be charged. If the government shows that the contractor was able to handle other work—whether or not it actually did so, which may have depended on circumstances other than the delay—it refutes the underlying fact on which Eichleay damages are based.

593.*d.* at 1422-23.

> Boards of contract appeals decided a couple of other noteworthy cases in this area this past year. In Keno & Sons Const.Co., ENG BCA No. 5837-Q, 97-2 BCA ¶ 29,336, the board concluded that Keno could not recover its unabsorbed overhead costs under *Eichleay* where it had already received compensation for the impact of the government's constructive change. In essence, the board said that the award of *Eichleay* damages would result in double recovery for the contractor. In M.A. Mortenson Co., ASBCA No. 40750, 98-1 BCA ¶ 29,658, the ASBCA held, in part, that the contractor was not entitled to recover its job site overhead because it used two different bases for allocating the overhead to changes, i.e. a per diem basis and a percentage markup basis. According to the board, FAR 31.203 requires a single distribution base.

594. IBCA Nos. 3232, 3233, 3895-98, 3897-98, 98-2 BCA ¶ 29,755.

595. CIBINIC & NASH, *supra* note 572, at 716. Courts and boards use the jury verdict method to resolve conflicting evidence regarding damages, or to arrive at an appropriate amount of compensation when there is incomplete evidence. The appropriate conditions for the use of the jury verdict methods were outlined in WRB Corp. v. United States, 183 Ct. Cl. 409, 425 (1968):

> 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 of computing damages; and (3) that the evidence is sufficient for a court to make a fair and reasonable approximation of the damages.

In *Landscaping by Femia Associates, Inc.*,[597] the VABCA also addressed the jury verdict method. Unlike the *Cryus Contracting* appeal, the contractor did not recover under the jury verdict method. In *Femia*, the contract involved mowing grass at a cemetery. The VABCA held that Femia was not entitled to payment for allegedly mowing 91.25 acres.[598] The VABCA reasoned that Femia's only proof was an undated and unsigned paper that referred to the mowing by simply stating "72 acres left." The VABCA stated: "In cases in which there is entitlement but the contractor's cost presentation is erroneous or incomplete, boards will generally calculate a jury verdict if there is sufficient data to calculate the costs with some reasonable precision."[599] In *Femia*, the VABCA found that Femia's evidence was so lacking that there was no basis to calculate the amount owed the contractor.[600]

Inspection, Acceptance, and Warranties

Warranty Disclaimer Not Proof Against Every Incompetence

Congress charged the Federal Railroad Administration (FRA)[601] with improving passenger rail stations and service between Washington, D.C. and Boston, Massachusetts.[602] *Massachusetts Bay Transportation Authority. v. United States* [603] involved one of these stations-the Boston South Station House. In the design agreement executed with the responsible local transit authority, the Massachusetts Bay Transportation Authority (MBTA) and the FRA agreed to procure and supply designs for the renovation of the station house as well as the construction of additions and platforms.[604] The subsequent construction agreement provided that the MBTA could not deviate from the design without prior FRA approval. In addition, the construction agreement contained several provisions regarding potential liability issues. One provision indicated that the FRA made no warranties, express or implied, concerning the design documents.[605]

During construction, the contractor informed the MBTA that the design plans contained several serious defects. After settling with the construction contractor for the increased costs,[606] the MBTA sought reimbursement from the FRA in the COFC.[607] The COFC found that the contractual disclaimer of warranties, express or implied, precluded any action by the MBTA for defective specifications.[608]

The Federal Circuit found the FRA's interpretation of the warranty disclaimer overly broad. The Federal Circuit noted that it is a fundamental rule of contract interpretation that a contract's "provisions are viewed in the way that gives meaning to all parts of the contract, and that avoids conflict, redundancy, and surplusage among the contract provisions."[609] The court

596. *Id.* at 147,451 (noting that neither the contract nor the FAR require the use of the schedule).

597. VABCA No. 5099, 98-1 BCA ¶ 29,718.

598. *Id.* at 147,361.

599. *Id.* at 147,360.

600. *Id.*

601. The Federal Railroad Administration, a part of the DOT, is responsible for ensuring railroad safety throughout the nation. For more information via the internet, *see* <http://www.fra.dot.gov> (visited Nov. 1, 1998).

602. *See* Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 45 U.S.C.A. § 801-855 (West 1998).

603. 129 F.3d 1226 (Fed. Cir. 1997).

604. *Id.* at 1229.

605. *Id.* Section 222(a) read as follows:

> Title to the Project Design Documents shall pass to MBTA upon acceptance by MBTA. MBTA acknowledges that Project Design Documents are being prepared by an A-E acting as a contractor to FRA, not as FRA's agent. FRA makes no warranties, express or implied, concerning the Project Design Documents. No FRA or MBTA approval given under this Agreement shall be construed as a warranty of any kind.

Id.

606. The construction contractor submitted a claim for increased costs to the MBTA for $23,680,228. The MBTA filed a declaratory relief action against the construction contractor in state court. The subsequent settlement yielded the contractor $3,810,000. The FRA encouraged the settlement, and for this purpose entered into releases with the architect-engineers. The Claims Court stayed MBTA's suit against the FRA pending the outcome of the state court litigation.

607. 21 Cl. Ct. 252 (1990).

608. *Id.* at 263-64.

609. *Massachusetts Bay Transp. Auth.*, 129 F.3d at 1231 (quoting United Int'l Investigative Servs., 109 F.3d 734, 737 (Fed. Cir. 1996)).

then found that the FRA's interpretation contravened other standard contractual provisions regarding liability. For example, another subsection in the same provision as the disclaimer called for the FRA to provide the MBTA insurance protection from claims due to design errors, omissions, or negligence on the part of the architect-engineers.[610] In another section, the FRA agreed to pursue with its architect-engineers all contractual rights concerning errors and omissions.[611] The Federal Circuit reversed and remanded, holding that the lower court's ruling could not stand in light of the "disharmony" that the provisions created.[612]

The Bane of Every Latent Defect Allegation: the Defective Specification

In *M.A. Mortenson v. United States,*[613] the contractor brought an action before the COFC to recover costs incurred in repairing pipe in a ground-based aircraft refueling system for the B-1B bomber. The system was installed at Ellsworth AFB, South Dakota, and operated for over a year without incident. Ultimately, however, the welds in the piping proved to be fused inadequately, creating leaks.[614] In denying Mortenson's claim, the COE alleged that the fueling system was latently defective. The contractor, however, argued that the government's pipe specifications were defective due to cyclic pressure use beyond the capabilities of the selected piping. Thus, the two contentions were inevitably intertwined on the causation issue. Ultimately, after a long technical battle, including expert testimony, the contractor prevailed on its defective specification allegation.[615]

The court noted that the government specified one-hundred percent radiographic (x-ray) testing of joints, instead of the five to ten percent that is customary for similar systems.[616] The court believed that this naturally raised questions, especially in light of the contractor's expert testimony regarding the government's inadequate choice of industry specifications.[617] If the inside welds on the piping were critical, then the government should have tested them radiographically. The court noted that the government did not inspect a single interior weld during contract performance. In addition, the government should have discovered any significant failures with just a visual inspection. Therefore, the government failed to conduct an adequate inspection.[618]

The court also received considerable testimony about the actual operating conditions at Ellsworth AFB.[619] Assuming a latent defect existed, the court found that the weld failured due to severe cyclic loading conditions (large pressure variances) prevented the COE from distinguishing its damages in the case.[620]

Termination for Default

Anticipatory Repudiation

GSA Pulls Trigger (a Little Too Fast). The GSBCA held that the GSA acted too fast in terminating a contractor for default

610. *Id.* Section 222(c) stated:

> FRA shall secure from each of its consultant architect-engineers ("A/E's") an endorsement to the benefit of the MBTA on the pro fessional liability insurance policy or policies carried by such A/E's with respect to any A/E errors, omissions, or acts of negligence in the design of the Facility. FRA shall furnish the MBTA evidence of such endorsements.

Id. at 1229.

611. *Id.* Section 220(c) stated: "FRA shall pursue with its design-phase A-E all contractual rights concerning correction of errors, omissions, and deficiencies." *Id.*

Id.

612. *Id.* at 1231.

613. 40 Fed. Cl. 389 (1998).

614. *Id.* at 404-414. Referred to repeatedly in the decision as lack of fusions, or LOF. *Id.*

615. *Id.* at 423.

616. *Id.* at 428.

617. *Id.* American Society for Testing and Materials (ASTM) specification A312 was intended for high-temperature and corrosive service. *Id.* at 392. Seamed A312 piping, however, was not intended for high-pressure cyclic use. *Id.* at 393.

618. *Id.* at 428-429.

619. *Id.* at 412, 421, 430. The court noted that military personnel even "experimented" with and improperly operated the hydrant fueling so severely as to damage gauges and components, and that the government failed to maintain the pressure recording gauges, which denied an opportunity to view precisely the type of loading that the Ellsworth fueling system was forced to withstand. *Id.* at 430-31.

620. *Id.* at 430.

after the contractor hinted that it planned to discontinue operations.[621]

The facts of the case are straightforward. In January 1997, the GSA awarded HBS a contract for janitorial services at the Federal Center Complex in St. Louis. The contract had a base period of one year, with four one-year option periods. In June 1997, HBS sent the GSA a copy of a draft letter that it intended to send to its employees. The letter notified the employees that HBS anticipated discontinuing performance of the contract within sixty to ninety days; consequently, the employees would lose their jobs with the company.[622] Two days later, HBS's corporate counsel sent a letter to the GSA stating that HBS would be asking the GSA for a "no-cost termination" of the contract. The letter specifically stated that HBS would not leave the GSA without services or supplies.

The contracting officer never contacted HBS regarding the apparent contradictions in the letters. On 27 June 1997, the contracting officer terminated the contract for default based upon anticipatory repudiation. HBS appealed the termination to the board.

The board held for HBS. The board noted initially that anticipatory repudiation is a breach of contract.[623] In clarifying precisely what constitutes anticipatory repudiation, the United States Supreme Court, in *Dingley v. Oler*, specifically noted: "[A] mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made . . . ."[624]

The board concluded that the GSA failed to establish anticipatory repudiation on the part of HBS. According to the board, HBS's plans were ambiguous. In its letters to the GSA, HBS never stated that it was incapable of performing the contract or that it would stop performing on a specific date. In fact, in its 18 June letter, HBS specifically promised that GSA would not be left without services or supplies. Accordingly, the board concluded that HBS did not repudiate its contract with the GSA.

ASBCA Tackles Anticipatory Repudiation on Navy Contract. In *AEC Corp.*,[625] the ASBCA also addressed the issue of anticipatory repudiation. In this case, the board held that the Navy terminated AEC improperly for anticipatory repudiation based upon its financial difficulties. The board concluded that there were signs that AEC could overcome its financial problems and that it expressed a willingness to continue performance under the contract.

In May 1989, pursuant to Section 8(a) of the Small Business Act, the SBA contracted with the Navy for the construction of a reserve training center. The SBA subcontracted performance of the contract to AEC. AEC Corporation experienced numerous performance difficulties during the course of contract performance, and the Navy eventually terminated the contract.[626]

During the twelve day hearing, the Navy raised other possible grounds for the termination, including anticipatory repudiation.[627] Specifically, it pointed to a letter that AEC had sent to the Navy stating that AEC had been forced to substantially cut its work force. In addition, AEC stated that it could not continue to incur costs on the contract due to its financial circum-

621. HBS Nat'l Corp. v. General Serv. Admin., No. 14302, 1998 WL 445293 (GSBCA July 31, 1998).

622. *Id*. at 1. The letter stated:

> On Monday, June 16, 1997, the owners and managers of HBS National Corporation (HBS) made the decision to enter a request for termination of our contract with the GSA. The current contract with the GSA runs through February 1998, however, for various reasons HBS has decided to terminate prematurely. Whether this request is granted or not, HBS will be forced to permanently discontinue its activities and all employment at the GSA Federal Complex, St. Louis, MO. HBS anticipates that this will occur within 60-90 days. In compliance with the Federal Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. Part [sic] 2101 et seq., this is to advise you that your employment with HBS will be terminated on or after August 15, 1997.

Id.

623. *Id.* at 4. In setting the standard for anticipatory breaches, the Supreme Court stated: "When one party to [a] . . . contract absolutely refuses to perform his contract, communicates that refusal to the other party, that other party can, if he chooses, treat that refusal as a breach and commence an action at once therefore." Dingley v. Oler, 117 U.S. 490 (1886).

624. *Oler*, 117 U.S. at 503.

625. No. 42920, 1998 WL 525796 (ASBCA Aug. 14, 1998).

626. *Id*. at 33. FAR 52.249-10 provides, in part, as follows:

> If the [c]ontractor refuses or fails to prosecute the work or any separable part, with the diligence that will ensure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the [g]overnment may, by written notice to the [c]ontractor, terminate the right to proceed with the work (or any separable part of the work) that has been delayed.

Id.

stances. In another letter, AEC advised the Navy that it could not predict when it could complete the contract. Finally, the Navy claimed that AEC's removal of some equipment and files from the construction site was further evidence of anticipatory repudiation.

In its opinion, the board initially discussed the well-settled law on anticipatory repudiation.[628] The board then noted that there is no repudiation where the contractor's professed inability to perform can be overcome and the contractor expresses a willingness to continue performance.[629] By contrast, the board was not persuaded by the Navy's position on anticipatory repudiation. The board concluded that AEC's statements were far from an unequivocal expression of an unwillingness or inability to perform. Next, as to the reduction in its work force, the board found that AEC had personnel at the construction site until the date the contract was terminated for default. Finally, regarding the removal of the equipment and files, AEC returned most of what it had removed and explained why it removed these items.

Excessive Interference by NASA Results in Improper Termination

In *SIPCO Services & Marine Inc. v. United States*,[630] the COFC concluded in a detailed, forty-seven page opinion that NASA improperly terminated SIPCO's contract for default. Accordingly, the court converted the default termination to a termination for convenience.

The contract was for the removal of coatings containing lead and the replacement of the coatings on portions of the exterior of a wind tunnel at the Ames Research Center at Moffet Field, California. Among other criticisms of NASA's contract administration, Senior Judge Wilkes C. Robinson noted that NASA required SIPCO to perform work in excess of contract requirements and then terminated SIPCO for default before the out-of-scope work reasonably could have been completed. As to the specific basis for the default, Judge Robinson noted, "The propriety of SIPCO's termination for default is brought into serious question by the acceleration of NASA's supervisory activities, its unilateral setting of a new completion date, and the time of Kono's [the Contracting Officer's Technical Representative for the contract] discovery of the air monitoring guidelines."[631]

This case is noteworthy because of its harsh criticism of the government and its employees[632] and the court's stern admonishment regarding the government's role in awarding and administering contracts.[633]

627. *AEC Corp*., 1998 WL 525796, at *34. A termination for default may be upheld where it is justified by circumstances at the time of the termination, even if unknown at that time, regardless of whether the contract was actually terminated for another reason. Joseph Morton Co. Inc., v. United States, 757 F.2d 1273 (Fed. Cir. 1985).

628. AEC Corp., 1998 WL 525796, at *34. Anticipatory repudiation requires a "definite and unequivocal manifestation of intention on the part of the repudiator that he will not render the promised performance when the time fixed for it in the contract arrives." CORBIN ON CONTRACTS, § 973. The repudiation must reflect a clear refusal to perform or be an unequivocal expression of an inability to perform. Beeston, Inc., ASBCA No. 38969, 91-3 BCA ¶ 24,241.

629. *Id.* (citing Fairfield Scientific Corp., ASBCA No. 21151, 78-1 BCA ¶ 13,082, *reconsideration denied*, 78-2 BCA ¶ 13,429, *aff'd*, 655 F.2d 1062 (Ct. Cl. 1981).

630. 41 Fed. Cl. 196 (1998).

631. *Id.* at 221.

632. *Id.* at 228. Commenting on the government's witnesses, the court stated:

> During the trial the court looked all witnesses in the eyes, viewed their demeanors, and on occasion directed questions to witnesses to better understand their testimony and judge their credibility. In general, based upon this approach and the entire record, the court determined that SIPCO's witnesses offered highly credible and persuasive testimony. On the other hand, defendant's witnesses were evasive and far less credible.

Id.

633. *Id*. In stating what the court believes are the government's obligations in dealing with its citizens, the court, in quoting from Chief Judge Loren Smith, stated:

> It is the obligation of the United States to do right. Every free government can be judged by the degree to which it respects the life, liberty, and property of its citizens. The United States stands tall among the Nations because it is a just Nation. In the instant case, the United States has not acted in a manner worthy of the great just Nation it is. Because the dollars appear to be so large, the government has raised legal and factual arguments that have little or no basis in law, fact, or logic. While the court can appreciate the concerns of the government's attorneys to protect the public treasury, and are honorable people, it must severely criticize the tactics and approach of the government.

Id. (quoting California Federal Bank v. United States, 39 Fed. Cl. 753, 754 (1997)).

Board Converts T4D Motivated, in Part, by Contracting Out Plan

The Government Printing Office (GPO) Board of Contract Appeals converted a contract for the supply of forms for military pay statements from a termination for default to a termination for convenience. The board decided to convert the termination, in part, because the GPO no longer had a requirement for the forms and, thus, defaulted the contractor.[634]

In December 1993, the GPO awarded the contractor a contract to produce and deliver three million perforated forms for military pay statements. The Defense Finance and Accounting Service (DFAS), the end user of the forms, experienced paper jamming problems on its printers with the forms that the contractor delivered. Consequently, the GPO terminated the contractor because it failed to deliver a satisfactory product.

The contractor appealed the default termination. Among its arguments, it contended that GPO's decision to terminate the contract was partially motivated by its decision to contract with commercial sources for the military pay statements. In support of this contention, the contractor highlighted language in the GPO's termination notice that stated the contract was being terminated "because the forms did not run satisfactorily . . . and the government no longer has a requirement for the . . . forms."[635] The GPO explained that the language that was used in the second part of the quoted language above simply meant that there would be no reprocurement.

634. The Standard Register Co., Inc., No. 25-94, 1998 WL 350448 (GPOBCA Mar. 23, 1998).

635. *Id.* at *13.

The board was not persuaded by the GPO's position. It stated:

> Nonetheless, it is difficult to escape the conclusion that if the need for the Z-fold forms had remained, DFAS and the contracting officer would not have been so quick to give up on appellant's forms
>
> . . . .
>
> [I]f DFAS had continued with in-house production, there would have been a need for the forms, and the Respondent, instead of terminating the Appellant's contract for default, might have provided the Appellant with the opportunity to determine the cause of the jamming and to fix it, which might or might not have involved redoing the forms.[636]

In sum, the board noted that the contracting officer allowed the DFAS's unhappiness with the contractor's forms, together with the DFAS's new contracting out plan, to motivate the GPO simply to get rid of the contractor. The board observed that the Federal Circuit takes a very dim view of such motivation in termination for default cases.

Defaulted Contractor May Be Excluded Automatically from Reprocurement

The GAO departed from prior precedent by overruling *PRB Uniforms, Inc*.[637] that decided that an agency may not exclude a defaulted contractor from a reprocurement automatically.[638] In 1996, the Navy awarded Montage an ID/IQ construction contract. The Navy issued Montage a delivery order to replace a HVAC system. Approximately seven months later, the Navy terminated the delivery order for default for failure to make progress and for failure to perform substantially.

The Navy subsequently offered the HVAC requirement to Capital Contractors, Inc., as a sole-source award pursuant to the SBA's 8(a) program. Montage protested the sole-source award. Consequently, the Navy canceled the award and obtained competition by soliciting three contractors. The three contractors did not include Montage.

Montage argued that the Navy improperly excluded it from the reprocurement. In addressing Montage's position, the GAO reviewed the current state of the law related to soliciting defaulted contractors on reprocurement contracts. The GAO initially stated that the federal procurement statutes and regulations do not apply strictly to reprocurements of contracts terminated for default.[639]

The GAO has long held that a defaulted contractor may not be excluded automatically from a competition for the defaulted requirement.[640] The GAO noted that it has not sustained a protest for failure to solicit a defaulted contractor. In other more recent opinions, the GAO's thinking on the matter has evolved. It has found that contracting officers have wide latitude to decide whether to solicit a defaulted contractor. Specifically, the decision on whether to solicit a defaulted contractor depends on the circumstances of a particular case.[641]

The GAO has come "full circle" since *PRB Uniforms*. It concluded that the Navy properly excluded Montage from the reprocurement. It also stated that agencies are not to follow *PRB Uniforms* and its progeny.

Dealing with a T4C Before the T4D is Decided

In an appeal with convoluted facts, the ASBCA declined to exercise jurisdiction over an appeal of a termination for convenience when a termination for default was pending in the same case.[642]

In May 1994, the Navy entered into a contract for the design, manufacture, testing, and installation of stainless steel cabinets for Trident missile guidance system parts. In January 1995, the contracting officer terminated the contract for default. The contractor appealed to the board. Shortly thereafter, the contracting officer demanded excess reprocurement costs from the contrac-

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636. *Id.*

637. 56 Comp. Gen. 976, 978 (1977), 77-2 CPD ¶ 213.

638. *See* Montage, Inc., B-277923.2, Dec. 29, 1997, 97-2 CPD ¶ 176.

639. *Id*. at 2. The GAO noted that agencies may use any terms and acquisition methods that are appropriate for a reprocurement. Contracting officers must, however, repurchase at as reasonable a price as practicable. Finally, contracting officers must compete contracts to the maximum extent practicable. FAR, *supra* note 15, at 49.402-6.

640. *Id.* (citing PRB Uniforms, Inc., 56 Comp. Gen. 976, 978 (1977), 77-2 CPD ¶ 213 at 3).

641. *Id.* (citing E. Huttenbauer & Son, Inc., B-239142, Aug. 17, 1990, 90-2 CPD ¶ 140 at 2). In this case, the GAO upheld a contracting officer's decision not to solicit the defaulted contractor where the defaulted contractor declined to perform the contract requirements. Therefore, the contracting officer could conclude that the defaulted contractor could not and would not perform the contract.

642. Poly Design, Inc., ASBCA No. 50862, 98-1 BCA ¶ 29,458.

tor. On 9 May 1996, the contractor filed another appeal regarding the excess reprocurement.

On 11 February 1997, the contractor submitted a termination for convenience settlement proposal. The contractor argued that the Navy should convert the termination for default into a termination for convenience. On 9 April 1997, the contracting officer issued a final decision denying the contractor's termination for convenience settlement claim because the termination for default was proper and appropriate. On 7 July 1997, the contractor filed a third appeal with the board.

The Navy filed a motion to dismiss the contractor's appeal of the denial of the termination for convenience settlement claim. The Navy argued that, until the underlying termination for default is decided, the board lacks jurisdiction to consider the termination for convenience claim.[643] The contractor contended that the board can only dismiss these appeals as premature when a contractor appeals from a contracting officer's failure to issue a written decision on a termination for convenience claim, while the merits of a prior default termination are in litigation.

The board concluded that the contractor's underlying premise was wrong. The board cited specific authority in which an appeal from a contracting officer's written decision denying a termination for convenience settlement claim was dismissed as being premature.[644] Consequently, the board held that "while we have jurisdiction over the subject appeal, judicial economy would not be served"[645] by allowing the contractor's termination for convenience appeal to be litigated concurrently with its other two appeals. Accordingly, it dismissed the contractor's termination for convenience appeal.

Water Tank Contract Termination for Default Found to Be Improper by Interior Board

The National Park Service entered into a contract with Piedmont Painting Contractors to paint the interior and exterior of a 50,000-gallon steel water reservoir.[646] Shortly after the National Park Service issued a notice to proceed, Piedmont encountered difficulties with the water tank. When the water was drained, the contractor discovered the tank was in poor condition. There were crevices on the tank where the steel was not welded together properly. Piedmont had difficulty sandblasting the water tank because the crevices caught and retained the sand.

On 13 September 1995, the National Park Service issued a cure notice to Piedmont. The cure notice specified deficiencies with the work. Piedmont, however, refused to correct the alleged defects. It contended that it had done an excellent job and demanded payment. The National Park Service paid Piedmont for its work on the exterior of the tank but not for work on the interior of the tank.

After a lot of hand wringing and letter writing, the National Park Service terminated the contract for default on 9 March 1997.[647] As part of its termination notice, the National Park Service asserted its right to excess reprocurement costs after the replacement contractor finished the work.

The board decided to convert the termination for default into a termination for convenience. In concluding that the National Park Service had improperly terminated the contract, the board specifically found that the government: (1) had superior knowledge of defects in the water tank, (2) had not issued a timely notice to proceed, (3) failed to cooperate with the contractor in the performance of the contract, and (4) failed to give Piedmont an adequate opportunity to correct its alleged deficiencies.

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643. *Id.* at 146,228 (citing Peter Gross GmbH & Co. KG, ASBCA No. 49,437, 96-2 BCA ¶ 28,290); Aerosonic Corp., ASBCA No. 42,696, 91-3 BCA ¶ 24,214.

644. *Id*. at 146,229 (citing Information Sys. & Network Corp., ASBCA Nos. 41,514, 42,659, 92-1 BCA ¶ 24,607). In *Information Systems*, the contractor appealed on the propriety of a termination for default. During the litigation on the termination for default, the contractor appealed the government's failure to decide a termination for convenience claim the contractor filed. Subsequently, the contracting officer issued a written final decision denying the termination for convenience claim. The board, notwithstanding the written final decision, dismissed the termination for convenience claim as premature. Likewise, in *Bogue Electric Manufacturing Co*., the government terminated a contract for default in 1980, and the contractor appealed. In 1984, the contracting officer issued a final decision denying Bogue's termination for convenience settlement claim. The contractor then appealed that decision. Again, the board dismissed the termination for convenience appeal as premature. *See* Bogue Elec. Mfg. Co., ASBCA Nos. 25184, 29606, 86-2 BCA ¶ 18,925.

645. *Poly Design, Inc.*, 98-1 BCA ¶ 29,458 at 146,229.

646. Piedmont Painting Contractors, IBCA No. 3772, 98-1 BCA ¶ 29,168. In the first paragraph, the board gives the reader some flavor for the appeal. The board noted:

> As the statement of facts indicates, the gathering of evidence in this appeal was a highly unsatisfactory experience. The diametrically contradictory testimony at the hearing, coupled with the [g]overnment's inadequate appeal file, made it virtually impossible for the board to get a clear picture of either the chronology or importance of events as they transpired. Nor can either party be commended on their halfhearted attempts to settle this dispute. Thus, we are left to rely on inferences based on the record as a whole.

Id. at 146,774.

647. The facts of the case do not make clear the precise basis of the termination for default.

Significantly, the board highlighted the National Park Service's failure to mention the condition of the water tank in its solicitation. The board found that the Park Service should have made welding and rehabilitating the water tank a significant portion of the contract (a separate line item). Instead, according to the board, the National Park Service "tucked" the welding requirement in the back of the solicitation, disguising it as surface preparation work.

Termination for Convenience

Decision to T4C Results in Breach

In *Travel Centre v. General Services Administrative*,[648] the GSBCA concluded that the General Services Administration (GSA) terminated a travel services contract for convenience in bad faith, resulting in a breach of the contract. The GSA sought reconsideration of this decision. In rejecting the GSA's reconsideration motion, the GSBCA noted that people dealing with the government expect government officials to act in good faith. The GSBCA held that when a government official possesses information that is material to a pending procurement but fails to provide it to offerors, the official has not acted in good faith.[649]

The solicitation required offerors to establish and operate a travel management center for federal agencies located in New England. It specified that the successful offeror would serve as the preferred source for federal agencies that needed airline tickets, lodging, rental vehicles, and other travel services.[650]

The solicitation specified an ID/IQ contract with a minimum guaranteed revenue of one hundred dollars. Before the award, the incumbent contractor notified the GSA that its largest customer had awarded its own travel services contract to another contractor.[651] According to the GSBCA:

> GSA never informed offerors of this important information—information that directly contradicted the estimates of expected business contained in the solicitation upon which offerors had based their proposals. GSA simply awarded a contract to Travel Centre for the states of Maine and New Hampshire. When expected business failed to materialize, Travel Centre was forced to close its business. GSA then terminated the contract for default, changing the termination to one for the convenience of the government in April 1997.[652]

In its underlying opinion, the GSBCA commented that tribunals struggle with the distinction between a government breach of contract and the legitimate use of a termination for convenience clause. Prior to *Torncello v. United States*,[653] courts consistently held that terminations for convenience would only be considered a breach when government officials acted in bad faith or abused their discretion.[654]

In the plurality opinion in *Torncello*, the court further limited the government's power to terminate a contract for convenience by adopting a "change in circumstances" test. Specifically, when the circumstances of a contract have not changed after award, the government cannot rely on the termination for convenience clause to avoid a breach.[655] Subsequent case law eroded *Torncello*, culminating with *Krygoski Construction Co. v. United States*.[656] *Krygoski* returned the law to its pre-1982 status. According to the GSBCA, "[g]iven the current state of the law . . . we must determine whether GSA's termination for convenience of Travel Centre's contract as a result of a severely deficient estimate was in bad faith or constituted an abuse of discretion."[657]

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648. GSBCA No. 14057, 98-1 BCA ¶ 29,541.

649. *Id.*

650. *Id.* The winning contractor would receive commissions from the services provided.

651. *Id.* The DOD business was more than half of the business from Maine.

652. *Id.*

653. 681 F.2d 756 (Ct. Cl. 1982). *Torncello* stands for the proposition that when the government enters into a contract knowing that it will not honor the contract, it cannot avoid a breach claim by using the termination for convenience clause. In *Torncello*, the government entered into an exclusive requirements contract knowing that it could get the same services much cheaper from another contractor. When the contractor complained that the government was breaching the contract by satisfying its requirement from a cheaper source and ordering nothing from it, the government claimed its action amounted to a constructive termination for convenience. The court held specifically that the government could not avoid the consequences of breach by hiding behind the termination for convenience clause. *Id*. at 72.

654. *See, e.g.*, Kalvar Corp. v. United States, 543 F.2d 1298 (Ct. Cl. 1976).

655. *Torncello*, 681 F.2d at 772.

656. 94 F.3d 1537 (Fed. Cir. 1996).

657. *Travel Centre*, 98-1 BCA ¶ 29, 422.

The GSBCA held that the government's actions breached the contract. Specifically, it stated that "[w]hatever risks a contractor takes should not include the risk that the contract will be based on an irrationally contrived estimate."[658] The GSBCA concluded that the GSA's irrationally-arrived-at-estimate was not a normal mistake. According to the GSBCA, the GSA awarded the contract to Travel Centre knowing that its estimate was vastly overstated and knowing that Travel Centre had based its offer on the erroneous information.

Navy Justified in Terminating a Contract for Convenience due to Faulty Estimates

In *T&M Distributors, Inc., v. United States*,[659] the Navy entered into a fixed-price requirements contract with T&M Distributors. The contract required T&M to supply vehicle parts and special purpose equipment on Guam. It also required T&M to operate and maintain a parts store. The contract specified a one-year base period and four one-year option periods. The Navy's combined estimate for the base and option periods was approximately one million dollars.

After award, T&M's president went to Guam to prepare a comprehensive inventory list. He observed that the Navy had a large number of existing inventory of parts and that it had blanket purchase agreements with local firms. The president reported his observations to the contracting officer. The contracting officer investigated the report. He discovered that the estimated amount in the contract was grossly understated. A more accurate estimate was $4.5 million.

The contracting officer terminated the contract for convenience and resolicited the requirement. Although T&M competed for the subsequent contract, the Navy awarded it to another offeror. T&M appealed the Navy's decision. Relying on *Travel Centre*,[660] it argued that the Navy's failure to understand its requirement constituted "bad faith." The court disagreed and distinguished *Travel Centre*, in which the government withheld vital information from the contractor. Specifically, the government awarded the contract with no intention of fulfilling its contractual obligations. By contrast, in *T&M Distributors*, the Navy did not intend to terminate T&M when it entered into the contract. Instead, the Navy terminated the contract only after learning that the estimates were vastly understated. It took this action to promote full and open competition. According to the court, terminating the contract for this reason did not constitute bad faith.

Contractor Loses Rights After Untimely Settlement Proposal

In *Industrial Data Link Corp.*,[661] the Defense Contract Management Command (DCMC) awarded a contract for test stations with Industrial Data. Approximately three months after award, the DCMC terminated the contract for convenience. Industrial Data waited twenty-nine months from the date of its termination to submit its termination settlement proposal. In granting the government's motion for summary judgment, the board reiterated the long-standing rule that if a contractor fails to submit a termination settlement proposal within one year of the termination, it is barred from appealing the contracting officer's determination of the amount due under the termination for convenience clause.[662]

Writing for a three-judge panel, Administrative Judge Alexander Younger analogized the instant appeal to *Rivera Technical Products*.[663] Judge Younger stated: "[h]aving failed to comply with the contract, appellant has no basis to object to the consequences attached to that failure that were also spelled out in the contract—a government unilateral determination of the amounts owing under the termination for convenience clause, without right of appeal."[664]

ABA Section Seeks to Change FAR Termination Language in 1998

The ABA Public Contract Law Section (Section) proposed that the FAR Secretariat amend FAR 49.101.[665] The Section

658. *Id.* at 76,710.

659. No. 97-148C, 1998 WL 118077 (Fed. Cl. Mar. 17, 1998).

660. *Travel Centre*, 98-1 BCA ¶ 29,422.

661. ASBCA No. 49348, 98-1 BCA ¶ 29,639.

662. *Id.* at 146,847.

> "Paragraph (i) of the termination for convenience clause gives appellant the right of appeal from a settlement determination 'except that if the [c]ontractor failed to submit the termination settlement proposal within the [one year] time period provided [in the clause], and failed to request a time extension, there is no right of appeal.'" FAR, *supra* note 15, at 52.249-2.

663. ASBCA Nos. 48,171, 49,564, 96-2 BCA ¶ 28,564.

664. *Id.* at 146,847.

665. FAR 49.101 provides that "[t]he contracting officer shall terminate contracts, whether for default or convenience, only when it is in the [g]overnment's interest." FAR, *supra* note 15, at 49.101.

argued that the Secretariat should change the regulation to reflect the principle that when "the United States exercises its termination authority, it should be held to the same duties as other parties in the market."[666] The Section's action was motivated, in part, by *Krygoski Construction Co. v. United States*.[667] In *Krygoski*, the Federal Circuit severely limited challenges to termination for convenience decisions. The court held that contracting officers abuse their discretion only when the agency enters a contract with no intention of fulfilling their promises, or they otherwise act in bad faith.

According to the Section, if federal agencies are free to terminate contracts for any or no reason, the contracts are illusory and lack mutuality of obligation. In addition, the Section argued that the government pays a real price for its unlimited right to terminate contracts for convenience. Specifically, contractors bid higher prices because of the uncertainty and risk created by the government's broad idscretion.

To solve this problem, the Section recommended including the following language in FAR 49.101: "An assertion by the contractor that the government when terminating for convenience or default has acted in bad faith shall be assessed objectively based upon standards applicable to private parties in commercial contracts." The Section believes that the proposed language adopts the common law view that a party must exercise its discretion consistent with the justified expectations of the parties at the time of contract award.

Contract Disputes Act (CDA)[668] Litigation

When Does a Claim Submission Become a Claim?

The CDA requires a contractor to submit a written claim to the contracting officer for a decision.[669] In *D.L. Braughler Co., Inc. v. West*,[670] the contractor submitted two "claims," two years apart, on a contract for remedial work at the R.D. Bailey Dam on the Guyandot River in West Virginia.

The contractor's first "claim"[671] was entitled "Claim for Delay Caused by Untimely Approval of the Existing Stilling Basin Cofferdam." It sought $137,648.04 "in compensable delay costs." It included supporting data, and was properly certified.[672] On the surface, this appeared to be a valid claim. Unfortunately, the contractor made several mistakes. First, the contractor submitted its "claim" to the resident engineer rather than the contracting officer.[673] Second, the contractor failed to request a contracting officer's final decision. Finally, the contractor failed to ask the resident engineer to forward its "claim" to the contracting officer. Instead, the contractor continued to deal exclusively with the resident engineer until the resident engineer "denied" its claim in March 1990.[674] As a result, the Federal Circuit concluded that the contractor's first submission was not a valid claim because it did not meet the "submit" requirement of the CDA.[675]

The contractor's second "claim" was almost identical to its first. This time, however, the contractor submitted its claim to the contracting officer and specifically requested a contracting officer's final decision. What the contractor failed to submit was a new claim certification. As a result, the contractor argued

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666. *ABA Section Targets FAR Termination Language*, 40 THE GOV'T CONTRACTOR. 25, June 24, 1998.

667. 94 F.3d 1537 (Fed. Cir. 1996).

668. Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (codified as amended at 41 U.S.C.A. §§ 601-613 (West 1998)).

669. 41 U.S.C.A. § 605(a) (West 1998). *See also* FAR, *supra* note 15, at 33.201 (defining a "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract").

670. 127 F.3d 1476 (Fed. Cir. 1997). This case is somewhat unique because the contractor is arguing against the validity of its own claim. If either one of the contractor's first two submissions was a valid claim, the contractor's appeal was untimely because the contractor did not appeal until 38 months after the contracting officer issued the final decision denying the contractor's second submission. *Id.* at 1479.

671. *Id.* at 1479. The contractor submitted its first "claim" by letter dated 10 February 1988. *Id*.

672. *Id.* The certification read:

> I, David L. Braughler, certify that the claim submitted by our letter dated 10 February 1988 and its attachments for the Delay Caused by Untimely approval of the Existing Stilling Basin Cofferdam in the amount of $137,648.04 is made in good faith, that the supporting data are accurate and complete to the best of my knowledge and belief, and the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

Id.

673. *Id*. The resident engineer was the contracting officer's authorized representative; however, he did not have the authority to modify the contract. *Id.*

674. *Id.* By letter dated 14 March 1990, the resident engineer stated: "I find that your claim is not justifiable. The provisions for obtaining a Contracting Officer's Decision are contained in General Provision 6, 'Disputes' of the contract." *Id.*

that the contracting officer's 16 November 1990 final decision was a nullity.[676] The Federal Circuit disagreed.

Distinguishing *Santa Fe Engineers v. Garrett*,[677] the Federal Circuit found that the contractor in this case did not alter its claim between its first and second submissions. Instead, the contractor submitted an identical claim with identical supporting data. The Federal Circuit consequently held that the contractor did not have to submit a new certification "under these circumstances."[678]

Government Must Pay to Depose Contractor's Expert

In *Copy Data Systems, Inc.*,[679] the ASBCA held that the government is responsible for paying reasonable expert witness fees when it deposes a contractor's expert during the discovery phase of an appeal.[680] In so doing, the board relied on the Federal Rules of Civil Procedure[681] after concluding that its own discovery rules[682] did not address the issue fully.[683] According to the board, "[i]t is a matter of basic fairness."[684] The board noted that the expert was not testifying for the contractor, but was testifying at a government-noticed deposition aimed at preparing the government to cross-examine the expert. The board held that "it is only fair" that the government should pay the expert's reasonable fees and expenses.[685]

Tick-Tock, Tick-Tock, Attempted Delivery Starts the Clock

In *CWI Consultants & Services*,[686] the GSA default terminated a contract to provide janitorial services at the Office of Personnel Management Services in Macon, Georgia. On 28 June 1996, a GSA building inspector personally tried to deliver the termination notice to the contractor. The GSA claimed that the contractor's president opened and read the termination notice, but refused to acknowledge its receipt in writing.[687] Conversely, the contractor claimed that its president did not

675. 41 U.S.C.A. § 605(a). The Federal Circuit noted, in *dicta*, that the contractor's first submission would have met the "submit" requirement of 41 U.S.C.A. § 605(a) if the resident engineer had forwarded it to the contracting officer for a final decision at the contractor's request. *See D.L. Braughler Co., Inc.*, 127 F.3d at 1481; *see also* Neal & Co., Inc. v. United States, 945 F.2d 385, 388-89 (Fed. Cir. 1991) (holding that a contractor can meet the "submit" requirement of 41 U.S.C.A. § 605(a) if: (1) the contractor sends a proper claim to its primary contact, (2) the claim requests a contracting officer's final decision, (3) the contractor has a reasonable expectation that the contracting officer will honor its request, and (4) the contractor's primary contact actually delivers the claim to the contracting officer in a timely manner).

676. *D.L. Braugher*, 127 F.3d at 1479. The contractor failed to appeal the contracting officer's 16 November 1990 final decision in a timely manner. Instead, the contractor waited until the government tried to close out the contract to raise its "claim" again. By letter dated 30 November 1992, the contractor alleged that the contracting officer's 16 November 1990 final decision was invalid because the contractor's 10 February 1988 submittal was not a valid claim. The contractor then submitted a new claim certificate and asked the contracting officer to issue a new final decision. When the contracting office r failed to do so, the contractor appealed the "deemed denial" of its claim to the Corps of Engineers Board of Contract Appeals. *Id*.

677. 991 F.2d 1579 (Fed. Cir. 1993). In *Santa Fe Engineers*, the Federal Circuit held that the contractor's first submission was not a valid claim because there was not a pre-existing dispute between the parties when the contractor submitted its claim. The court then held that the contractor's second submission was not a valid claim because the contractor submitted additional supporting data between its first and second submissions that it did not certify. *Id*. at 1582-83.

678. *D.L. Braughler*, 127 F.3d at 1483.

679. ASBCA No. 44058, 98-1 BCA ¶ 29,390, *motion for reconsideration denied*, 98-1 BCA ¶ 29,661.

680. *Id*. at 146,072. After the deposition, the contractor's expert submitted an invoice to the contractor's attorney for $2732.75. The invoice included $480 for preparation, $2,052 for traveling to and participating in the deposition, $194 for travel expenses, and $6.75 for telephone/fax expenses. *Id*. at 146,071.

681. Federal Rule of Civil Procedure 26(b)(4)(A) states that "[a] party may depose any person who has been identified as an expert whose opinions may be presented at trial," and Federal Rule of Civil Procedure 26(b)(4)(C) states that "[u]nless manifest injustice would result, . . . the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision." FED. R. CIV. P. 26(b)(4).

682. Rule 14(e) of the Rules for the ASBCA states that "[e]ach party will bear its own expenses associated with the taking of any deposition." U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. app. A (Dec. 31, 1991) [hereinafter DFARS].

683. *Copy Data Sys., Inc.*, 98-1 BCA ¶ 29,390 at 146,072. The board noted that "[w]e . . . follow our own rules insofar as they address particular situations. When they do not, we look to the . . . Federal Rules of Civil Procedure for guidance." *Id*. (quoting Carolina Maint. Co., ASBCA No. 25891, 88-1 BCA ¶ 20,388 at 103,076).

684. *Id*.

685. *Id*. The board specifically held that "[t]he government is responsible for paying Mr. Bolte an expert witness fee to the extent that it is reasonable and does not exceed any limitation which may be provided by Federal law . . . ." With respect to Mr. Bolte's preparation time, the board held that "unless factors rendering award of such time unjust, such as demonstration that the preparation is a substitute for pretrial preparation to be accomplished in any event, reasonable preparation time should be allowed." *Id*.

686. GSBCA No. 13889, 98-2 BCA ¶ 29,343.

687. *Id*. at 145,893. The government also tried to deliver the default termination notice by faxing it to the contractor on 28 June 1996. *Id*. at 145,894.

even open the letter because he thought it contained a termination notice.

The GSBCA received the contractor's notice of appeal via Federal Express on 27 September 1996.[688] This was ninety-one days after the GSA attempted to deliver the termination notice to the contractor.[689] Consequently, the GSA moved to dismiss for lack of jurisdiction.

In response to the GSA's motion, the board concluded that it did not matter whether the contractor's president actually opened the letter containing the termination notice. According to the board, "[a] person cannot avoid the legal consequences of receiving a document by refusing to accept delivery."[690] The contractor's "appeals clock" began to run on the date it "received" the default termination notice "in the legal sense."[691] As a result, the board dismissed the contractor's appeal as untimely.[692]

Parties Cannot Deprive Board of Jurisdiction by Agreement

Imagine the following scenario: (1) the government gives Contractor *A* drawings that contain technical data that Contractor *B* considers proprietary, (2) the government orders Contractor *A* to perform its contracts despite Contractor *B's* complaints, (3) Contractor *B* sues the government and Contractor *A* for misappropriating its trade secrets, (4) the parties enter into a settlement agreement, (5) Contractor *A* submits a certified claim to recover the attorney fees and costs it incurred to defend itself, and (6) the government denies Contractor *A's* claim. Based on these facts, the government's actions appear patently unjust. Unfortunately, this scenario basically describes the Navy's actions in the case of *D&R Machine Co.*[693]

The Navy alleged that D&R waived its right to recover its attorneys' fees and costs by signing the settlement agreement.[694] In addition, the Navy alleged that the ASBCA lacked jurisdiction to entertain D&R's appeal because the federal magistrate retained jurisdiction to enforce the terms of the settlement agreement.[695] The board disagreed. First, the board noted that it has jurisdiction to decide any appeal that is "relative to" a contract.[696] Next, the board found that D&R's appeal was "relative to" its Navy contracts because it resulted from the Navy's order to continue performance. The board consequently concluded that it had jurisdiction over D&R's appeal.[697]

The board then rejected the Navy's claim that the terms of the parties' settlement agreement deprived it of jurisdiction. The board noted that D&R had a statutory right to appeal the contracting officer's final decision to the board and held that the parties' settlement agreement was unenforceable to the extent it deprived the board of jurisdiction to hear D&R's appeal. The board stated that "[t]he law is clear that the parties cannot, by agreement, override the plain dictates of Congress."[698]

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688. *Id*. at 145,894. The relevant date for determining the timeliness of the contractor's appeal was 27 September 1996 because the contractor sent its notice of appeal by Federal Express. *See* North Coast Remfg, Inc., ASBCA No. 38599, 89-3 ¶ 22,232 (holding that the board will consider the date of receipt as the filing date unless the contractor delivers the notice of appeal through the U.S. Postal Service); *see also* Elaine Dunn Realty, HUDBCA No. 98-C-101-C1, 98-1 BCA ¶ 29,581 (holding that a notice of appeal delivered by Federal Express is not "furnished" until the board actually receives it).

689. *CWI Consultants & Servs*., 98-1 BCA ¶ 29,343 at 145,894. The CDA requires a contractor to appeal to an agency board of contract appeals within 90 days of the date it received the contracting officer's final decision. 41 U.S.C.A. § 606 (West 1998).

690. *CWI Consultants & Servs*., 98-1 BCA ¶ 29,343 at 145,894. (citing Conquest Constr., Inc., PSBCA No. 2637, 90-2 BCA ¶ 22,682).

691. *Id*.

692. *Id*.

693. ASBCA No. 50730, 98-1 BCA ¶ 29,462.

694. *Id*. at 146,235. Paragraph 17 of the settlement agreement stated that "[e]ach party shall bear its own attorneys' fees and costs." However, paragraph 9 of the same settlement agreement stated that "[n]othing in this Settlement Agreement shall be construed to effect or waive the contractual rights and obligations of D&R and the Navy with respect to Contract No. N00383-92-C-8884 or Contract No. N00383-94-D-046P-0001. . . ." Moreover, the contractor's attorney allegedly told the federal magistrate that the contractor "intended to pursue a Contract Disputes Act claim for [the additional costs it expended with respect to the Federal Litigation] at the conclusion of the litigation." *Id*. at 146,234.

695. *Id.* at 146,235. Paragraph 15 of the settlement agreement stated that "[f]or purpose of enforcing this Settlement Agreement . . . the parties hereby consent to United States Magistrate Judge Thomas J. Rueter exercising continuing jurisdiction over this case pursuant to 28 U.S.C. § 636 . . . ." *Id*. at 146,234.

696. *Id*. at 146,235. *See* 41 U.S.C.A. § 607(d) (West 1998).

697. *Id*. at 146,236.

698. *Id*. (citing J.S. Alberici Constr. Co., Inc. & Martin K. Eby Constr. Co., Inc. (Joint Venture)), ENG BCA No. 6179, 97-1 BCA ¶ 28,639, *motion for reconsideration denied*, 97-1 BCA ¶ 28,919; OSHCO-PAE-SOMC v. United States, 16 Cl. Ct. 614, 619 (1989)). *See also* John E. Gallno, AGBCA No. 97-146-1, 98-1 BCA ¶ 20,616 (noting that parties' agreements can neither vest nor divest a board of jurisdiction).

ASBCA Permits Telephonic Testimony

In 1985, the board upheld the government's default termination of a contract to paint military family housing units at Homestead AFB, Florida.[699] Ten months later, the contracting officer issued a final decision demanding $132,715.69 in excess reprocurement costs and $15,840 in liquidated damages, and the contractor appealed. The contractor successfully argued that the board should reduce the government's claim because the reprocurement contract required the new contractor to perform additional work. The board, however, could not determine how much of the government's claim was attributable to the additional work. As a result, the board remanded that portion of the appeal to the parties to resolve.[700] Unfortunately, the parties were unable to agree, and the board reinstated the contractor's appeal.[701] In 1996, the board held four days of additional hearings, two in February and two in August.[702]

During the August 1996 hearings, the presiding judge permitted the contractor's cost estimating expert to testify under oath by telephone over the government's objection.[703] Later, in reviewing the decision to permit the telephonic testimony, the board noted that the expert's absence from the hearing room did not prejudice either: (1) the government's ability to present its case, or (2) the board's ability to weigh and consider the expert's credibility. The board implied that the expert's inability to testify in person was the government's fault. The contractor's expert had been present during the February 1996 hearings; however, the presiding judge continued the hearing because the government failed to submit its supplemental Rule 4 file[704] in a timely manner.[705] As a result, the board affirmed the presiding judge's decision to permit the contractor's expert to testify by telephone.[706]

Generic Reference Sufficient for Jurisdictional Purposes

On 25 February 1998, the ASBCA found Martin Marietta Corp. liable for defective cost and pricing data submitted by its subcontractor, Aydin Computer Systems.[707] The board overruled Martin Marietta's objection[708] to the government's introduction of evidence regarding the "cost of facilities" element of its claim.[709] Martin Marietta challenged the board's jurisdiction to consider this element because the contracting officer did not "expressly include" the phrase "cost of facilities," or its equivalent, in the final decision.[710] The board, however, concluded that the contracting officer's generic reference to Aydin's G&A rate, which included Aydin's unallowable "Facility Capital Allocation" charge, gave the board jurisdiction to consider the "cost of facilities" element of the government's claim.[711]

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699. Dave's Aluminum Siding, Inc., ASBCA No. 29397, 86-1 BCA ¶ 18,623.

700. Dave's Aluminum Siding, Inc., No. 34092, 1989 WL 250119 (ASBCA Sept. 26, 1989), *motion for reconsideration denied*, 90-2 BCA ¶ 22,646.

701. Dave's Aluminum Siding, Inc., ASBCA No. 47350, 98-1 BCA ¶ 29,470.

702. *Id.* at 146,270. The presiding judge continued the February 1996 hearings because the government failed to submit its supplemental Rule 4 file in a timely manner, and the judge wanted to mitigate any prejudice to the contractor. *Id*.

703. *Id.* at 146,279. The contractor's expert was not present during the 13-14 August 1996 hearing because of "financial constraints." *Id*.

704. Rule 4 of the Rules of the ASBCA requires the contracting officer to prepare an appeal file consisting of all documents pertinent to the appeal. The parties often supplement this file before the hearing. DFARS, *supra* note 683, at app. A.

705. *Dave's Aluminum Siding, Inc.*, 98-1 BCA ¶ 29,470 at 146,279.

706. *Id. Cf.* Ryan-Walsh, Inc. v. United States, 39 Fed. Cl. 305, 306 (1997) (stating that cost and trial efficiency do not justify submitting deposition testimony in lieu of live testimony at trial).

707. Martin Marietta Corp., ASBCA No. 48223, 98-1 BCA ¶ 29,592.

708. *Id*. at 146,712. Martin Marietta voiced its objection at the hearing; however, the presiding judge reserved ruling because he needed the concurrence of the other board members responsible for deciding the case. *Id*.

709. *Id*. at 146,711-12. The phrase "cost of facilities" refers to an unallowable "Facility Capital Allocation" charge that Martin Marietta's subcontractor included in its General and Administrative (G&A) expenses. *Id*.

710. *Id*. "Cost of facilities capital," "corporate cost of capital," and "facilities capital charge" are equivalent phrases. *Id*.

711. Martin Marietta subsequently submitted a timely motion for reconsideration. Martin Marietta Corp., ASBCA No. 48,223, 98-2 BCA ¶ 29,741. This time, Martin Marietta alleged that the government failed to give it notice of the "cost of facilities" element of its claim by failing to "expressly mention" this element in either the DCAA defective pricing audit reports, or the contracting officer's final decision. The board was not persuaded. First, the board found that Martin Marietta knew that the DCAA questioned Aydin's "cost of facilities" charge. Second, the board found that Martin Marietta knew that Aydin's "cost of facilities" charge had been the subject of discovery during the litigation process. Finally, the board found that Aydin shared the contracting officer's understanding that the government's defective pricing claim included its unallowable "cost of facilities" charge. The board consequently concluded that the generic references to Aydin's G&A rate in the audit reports and the contracting officer's final decision provided Martin Marietta with sufficient notice of the "cost of facilities" element of the government's claim. *Id*. at 147,480.

EAJA Clock Starts When Parties Sign Settlement Agreement

The issue in *Reid Associates, Inc.*,[712] was the timeliness of the contractor's application for attorney's fees under the Equal Accessto Justice Act (EAJA).[713] The parties signed a contract modification to settle the quantum portion of the contractor's claim on 27 June 1997;[714] however, the contractor did not file its EAJA application until 16 August 1997.[715] The Navy argued that Reid's application was untimely because final disposition of the appeal occurred on the date the parties signed the modification.[716]

In deciding this case, the board relied on a Sixth Circuit case, *Buck v. Secretary of Health and Human Services*,[717] which distinguished two of its own prior decisions, *Coleman Newland Construction*[718] and *Southern Dredging Co., Inc.*[719] The board indicated that it had two options for handling an EAJA application if there was nothing pending before the board when the parties settled their dispute.[720] It could either determine that the contractor's time to file an EAJA application never expires, or it could find that the parties triggered the thirty-day EAJA clock on the date they finally settled their dispute. The board chose the second alternative. Agreeing with the Navy, the board held that final disposition[721] of the appeal occurred on the date the parties signed the modification and dismissed Reid's EAJA application as untimely.[722]

GSBCA Cannot Force a Hamilton Stipulation[723]

In *Lockheed Martin Tactical Defense Systems v. Department of Commerce*,[724] Lockheed Martin submitted a request for equi-

712. ASBCA No. 98-1 BCA ¶ 29,657.

713. Pub. L. No. 96-481, § 203(a)(1), 94 Stat. 2325 (1980) (codified as amended at 5 U.S.C.A. § 504). The EAJA states that "[a] party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application . . . ." U.S.C.A. § 504 (West 1998).

714. *Reid Assocs., Inc.*, 98-1 BCA ¶ 29,657 at 146,940. The Navy agreed to pay Reid a fixed sum of money, which it paid on 1 August 1997, in exchange for a mutual release of all claims except Reid's EAJA claim. *Id*. at 146,940-41.

715. *Id*. at 146,941.

716. *See* Old Dominion Sec., ASBCA No. 40063, 94-2 BCA ¶ 26,761.

717. 923 F.2d 1200 (6th Cir. 1991). In *Buck*, the court concluded that the final decision of the Secretary of Health and Human Services was a "final judgment" for EAJA purposes because (1) neither party could appeal it, and (2) the district court that had initially remanded the case to the Secretary of Health and Human Services did not retain jurisdiction to monitor the remand. *Id*. at 1207.

718. ASBCA No. 32241, 89-1 BCA ¶ 21,434. The board distinguished *Coleman* because the settlement agreement in that case depended on the government's immediate payment of the settlement amount, while the settlement agreement in this case was unconditional. *Reid Assocs., Inc.*, 98-1 BCA ¶ 29,657 at 146,941.

719. ENG BCA No. 6236-F, 97-2 BCA ¶ 29,014. The board distinguished *Southern Dredging* because the contractor in that case was not on notice of the final disposition until it received the board's dismissal letter, while the contractor in this case was on notice of the final disposition as soon as the parties signed the settlement agreement. *Reid Assocs., Inc.*, 98-1 BCA at 146,941.

720. *Reid Assocs., Inc.*, 98-1 BCA ¶ 29,657 at 146,941. The board removed, but did not dismiss, the contractor's appeal from its docket after it sustained the appeal on the issue of entitlement. Therefore, there was nothing pending before the board when the parties entered into the settlement agreement. *Id*.

721. *Id*. at 146,941. The board stated that "[f]inal disposition occurs when the dispute is settled and no further discretionary action is required by the board." *Id*.

722. *Id*. The board specifically stated:

> The settlement of quantum in this case resolved all outstanding issues on the merits between the parties. The dispute was finally disposed of by the settlement. Notice and signing were simultaneous. An action to reinstate and then to dismiss the appeal after it had been settled would have been nothing more than a ministerial act by the board.

Id.

723. Hamilton Enters. v. United States, 711 F.2d 1038, 1043 (Fed. Cir. 1983). A *Hamilton* stipulation requires:

> (1) The contractor to submit a certified claim that encompasses the same facts and legal arguments as the uncertified claim,
>
> (2) The contracting officer to determined that he or she would deny the certified claim for the same reasons he or she denied the uncertified claim, and
>
> (3) Both parties to assert that their positions and evidentiary presentations would remain the same.

Id. See Carothers & Carothers Co., ENG BCA No. 4739, 88-3 BCA ¶ 21,161.

724. GSBCA No. 14450-COM, 98-1 BCA ¶ 29,717.

table adjustment (REA) for $864,221.[725] The REA included its subcontractors' claims and provided a "claim certificate" from one of its subcontractors that recited the appropriate CDA certification language. Lockheed Martin, however, never submitted its own claim certificate. Lockheed Martin's Manager of Contracts merely stated that "[Lockheed Martin] has reviewed TASC's certified claim and, based on our analysis of the data presented, we consider it to qualify for certification under FAR 52.233-1."[726]

In response to the government's motion to dismiss, the board noted that Lockheed Martin was the party responsible for certifying the claim because it was the prime contractor. The board then distinguished this case from those cases in which a contractor submits a deficient or defective certification.[727] In this case, Lockheed Martin did not certify its claim at all.[728] As a result, the board lacked jurisdiction to consider Lockheed Martin's claim.[729]

Interestingly, Lockheed Martin refused to concede defeat. Instead, it asked the board to use a *Hamilton* stipulation[730] to retain jurisdiction based upon its properly certified post-appeal claim.[731] The government, however, refused to enter into a *Hamilton* stipulation, alleging that Lockheed Martin's revised claim contained new supporting documentation and materials.[732] Therefore, the board dismissed Lockheed Martin's appeal, noting that it could not force the government to enter into a *Hamilton* stipulation.[733]

Has the Department of Transportation Contract Appeals Board Opened the Door to Claims for Pre-Award Expenses?

The Coast Guard awarded Automated Power Systems, Inc. (APS)[734] a contract to manufacture lampchangers for buoy lamps[735] on 30 December 1986. Automated Power Systems completed the contract on 30 September 1987 and received final payment on 14 October 1987.[736] More than seven years later,[737] APS submitted a claim for the pre-award expenses it allegedly incurred to get on the Coast Guard's Qualified Product List (QPL).[738]

Predictably, the board granted the Coast Guard's motion for summary judgment for two reasons. First, APS should have included its pre-award expenses in its bid.[739] Second, final payment barred APS's claim.[740] Before doing so, however, the Coast Guard addressed the issue of whether APS submitted a valid CDA claim.[741] The board noted that to file a valid CDA claim, the purported claimant must seek relief arising under or relating to the contract.[742] With a disappointed bidder, there is not a contract under which a purported claim can arise, or to

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725. *Id*. at 147,356. Lockheed Martin submitted the REA on behalf of itself and two subcontractors, TASC, Inc. and Lowe-North Construction, Inc. (Lowe-North). *Id*. at 147,357.

726. *Id.*; FAR, *supra* note 15, at 52.233-1. FAR 52.233-1 requires contractors to certify claims in excess of $100,000. *Id*. *See* 41 U.S.C.A. § 605(c)(1) (West 1998).

727. *Lockheed Martin*, 98-1 BCA ¶ 29,717 at 147,358. A defect in a claims certification no longer deprives a court or board of jurisdiction over the claim. The contractor simply has to correct the defect before the entry of final judgment. 41 U.S.C.A. § 605(c)(6) (West 1998).

728. *Lockheed Martin*, 98-1 BCA ¶ 29,717 at 147,358. The board specifically noted that "Lockheed's statement that TASC's claim qualified for certification is not itself a certification." *Id.*

729. *Id. Cf.* Keydata Sys., Inc. v. Department of the Treasury, GSBCA No. 14281-TD, 97-2 BCA ¶ 29,330 (dismissing an appeal based on the contractor's negligent disregard of substantial defects in its claim certification).

730. *See* Hamilton Enters. v. United States, 711 F.2d 1038, 1043 (Fed. Cir. 1983).

731. *Lockheed Martin*, 98-1 BCA ¶ 29,717 at 147,358. Lockheed Martin submitted its revised claim on 18 February 1998. *Id*.

732. *Id*. at 147,359. The government could not stipulate that the contracting officer would deny the revised claim for the same reasons that he denied the uncertified claim. *Id*.

733. *Id*.

734. Automated Power Sys., Inc., DOTBCA Nos. 2922, 2924, 98-1 BCA ¶ 29,583.

735. *Id*. at 146,650. Lampchangers are devices that replace burned out lamps in buoys automatically. *Id*.

736. *Id.* Automated Power Systems accepted full and final payment on the contract without submitting or reserving any claims under the contract. *Id.*

737. *Id*. Automated Power Systems submitted its claim on 27 February 1995. *Id.*

738. *Id*. Automated Power Systems had to get on the Coast Guard's QPL before it could bid on solicitations for lampchangers. To get on this list, APS had to: (1) conduct research; (2) design, develop, and produce ten samples; and (3) submit the samples to an independent testing firm for compliance testing. *Id.*

739. *Id.* at 146,652 (citing Wheatly Assocs., d/b/a Eagle Contractors, ASBCA No. 24846, 83-2 BCA ¶ 16,604), *aff'g on reconsideration*, 83-1 BCA ¶ 16,306).

740. *Id*. (citing Mingus Constructors, Inc. v. United States, 10 Cl. Ct. 173, *aff'd*, 812 F.2d 1387, 1391-92 (Fed. Cir. 1987)).

which a purported claim can relate. As a result, a disappointed bidder cannot file a valid CDA claim. In this case, however, the Coast Guard subsequently awarded a contract to APS. As a result, the board found that: (1) the relief APS sought clearly related to its contract, and (2) APS's post-award submission of a claim for pre-award expenses constituted a valid CDA claim.[743]

How Long Can the Contracting Officer Take to Decide a Claim?

Dillingham/ABB-SUSA, A Joint Venture[744] concerns appeals from the deemed denial of two claims. The contractor submitted its first claim on 17 May 1997,[745] and its second claim on 3 June 1997.[746] In July 1997, a "substitute" contracting officer advised the contractor that he would issue a final decision on the first claim by 11 September 1998,[747] and the second claim by 7 August 1998. Unwilling to wait, the contractor appealed both claims on 5 December 1997.

The government moved to dismiss the contractor's appeals. The government argued that the contracting officer had complied with the CDA by timely notifying the contractor of the dates that he would issue the final decisions.[748] The board disagreed with the government. Distinguishing *Defense Systems Co., Inc.*,[749] the board held that the fourteen to sixteen month time periods the contracting officer established were unreasonable. Therefore, the board denied the government's motion.[750]

Poetic Justice

In *Neal & Company, Inc. v. United States*,[751] Chief Judge Loren A. Smith of the COFC wrote his entire opinion as a poem. The entire opinion follows:

> There are strange things done in the midnight sun,
> By the men who rock do crush,
> The Arctic trails have their contractor tales,
> That would make your aggregate blush,
> The Northern Lights have seen queer fights,
> But the queerest they ever did see,
> Was the suit on the marge of the Aleutian's barge,
> When Neal opposed the Navy.
>
> A bunch of the contractor boys were whooping it up in a quarry by Clam Lagoon,
> The kid that handles the big jaw crusher was hitting a jag-time tune,
> Back of the bench, in a plaintiff's brief filed in the new Claims Court,
> Sat Dangerous Tony Neal, who was in it for more than the sport,
> And watchin' his luck was a promisee,
> The Lady we call the U.S. Navy,
> Out lookin' for a friendly port,
> When out of the night, which was fifty below, and into the court with a glare,
> There stumbled a contracting offer, dog-dirty and loaded for bear,

741. *Id*. The contracting officer in this case refused to issue a final decision because the contracting officer did not believe that the contractor's submission constituted a claim arising under or related to the contract. The Coast Guard then filed a motion to dismiss based on the contractor's failure to state a valid CDA claim. *Id*.

742. *Id*. *See* FAR, *supra* note 15, at 33.201 (defining a claim as a "written demand or written assertion . . . seeking . . . the payment of money in a sum certain, the adjustment or interpretation of contract of terms, *or other relief arising under or relating to the contract*") (emphasis added).

743. *Automated Power Sys., Inc.*, 98-1 BCA ¶ 29,583 at 146,652. The board's findings on this issue are strictly gratuitous since they are not crucial to the board's holding. However, they may "open the door" for similar post-award claims for pre-award expenses in the future. *Id*.

744. ASBCA Nos. 51195, 51197, 98-2 BCA ¶ 29,778.

745. *Id*. at 147,556. The contractor's first claim stemmed from a government request for an impact cost proposal. In response to this request, the contractor submitted cost proposals totaling $11,460,660 and $11,758,130, respectively, in December 1995 and December 1996. However, after "extensive analysis," the government advised the contractor on 24 March 1996 that "[N]one of [your] claimed costs has merit and you will not receive a modification for the proposed claim." *Id.*

746. *Id*. at 147,557. The contractor's second claim stemmed from the government's unilateral modification of the contract. *Id*.

747. *Id*. at 147,556. Three months after he advised the contractor that he would issue a final decision on the first claim by 11 September 1998, the contracting officer asked the contractor to provide additional supporting data. The contractor responded promptly, but the contracting officer found the additional supporting data inadequate. *Id*.

748. *Id*. at 147,557. *See* 41 U.S.C.A. § 605(c)(2) (West 1998) (providing that for claims greater than $100,000, the contracting officer must take one of the following actions within 60 days of the date the contracting officer received the claim: (1) issue a final decision, or (2) notify the contractor when the contracting officer will issue a final decision).

749. ASBCA No. 50534, 97-2 BCA ¶ 28,981 (holding that nine months is a reasonable period to evaluate a $71 million claim consisting of a 162-page claim and 49 promptly exhibits in two volumes).

750. *Dillingham/ABB-SUSA*, 98-2 BCA ¶ 29,778 at 147,557.

751. 41 Fed. Cl. 584 (1998).

He tilted a poke of dust on the bench, and called for a long deposition,
Number four fine, it seemed to play, though that wasn't the plaintiff's position.

Now a settled case is a friendly face,
In a land of hard rock and men,
But positions are harder than # 4 rock, in the times of now and then,
And settlement fell through the grizzly bars, again, and again, and again,
While the Navy's hard sword never turned to a soft feathered pen.

The thought came back of an ancient wrong, and it stung like a frozen lash,
And the lust awoke in the plaintiff's heart to sue and sue for the cash,
Then all of a sudden the talking stopped, it stopped with a thunderous crash,
A crash and a crush, and much aggregate mush were stilled in a courtroom's hush,
With the air full of memos and dust and mail,
And a ROICC and an EIC, and down the pike the case was ready to sail.

Number four coarse, in a voice so hoarse, you could barely hear it rail,
No its fine, on the dotted line, replied the Navy's clearest wail,
From Muckluch Bay on Adak Isle to a surety's icy heart,
The shooting began, with never a man, to settle a claim from the start.

Now a deed undone is a debt begun,
And a trial has its own stern code,
So I ducked my head to avoid the lead,
The lights went out, with a bitter shout,
And both lawyers blazed in the dark,
Then a paralegal cited, and the lights alighted,
But both counsel lay stiff and stark.

Now this sad tale of memos and mail,
Needn't have ever occurred,
But a typo seen, and a word between,
Would have all this deterred.[752]

SPECIAL TOPICS

Bankruptcy

Pay Us Now, or Pay Us Later, Just Pay Us!

A ship repair contractor's discharge in bankruptcy did not preclude the Navy from recovering two million dollars in overpayments from the company that acquired the contractor.[753] The district court ruled that the overpayments were related to voluntary debt concessions that the subcontractors made to the contractor after it petitioned for bankruptcy. Therefore, the Navy could seek reimbursement for these overpayments.[754]

The Navy awarded a fixed-price incentive contract to Northwest Marine Ironworks, Inc. to repair and overhaul the U.S.S. Duluth. Northwest performed the work from August 1985 until June 1986, accepting progress payments from the Navy without paying the subcontractors for their costs. Northwest filed for bankruptcy in October 1986 under the provisions of Chapter 11 of the Bankruptcy Code.[755] In February 1989, Southwest Marine, Inc., agreed to purchase Northwest contingent upon Northwest obtaining debt concessions from its creditors. The Navy was unaware of this arrangement.[756]

The DCAA conducted audits of Northwest's contract performance and discovered that it had received three million dollars in debt concessions. As a result, DCAA concluded that the Navy overpaid Northwest two million dollars. The contracting officer issued a final decision finding that the Navy overpaid Northwest two million dollars and demanding that the contractor refund the money. Southwest, as the acquiring company, appealed to the ASBCA.[757]

The ASBCA ruled against the Navy and granted summary judgment for Southwest, holding that the subcontractors' debt concessions were related to Northwest's pre-petition debts.[758]

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752. *Id.*

753. Martha A. Matthews, *Bankruptcy: Acquiring Contractor Owes Navy $2M Refund After Predecessor Went Bankrupt*, Fed. Cont. Daily (BNA) Sept. 24, 1998, *available in* WESTLAW, Legal News, BNA-FCD, Sept. 24, 1998 FCD, d6.

754. Dalton v. Southwest Marine, Inc., S.D. Calif., No. 97-1488, Aug. 20, 1998; *see* Matthews, *supra* note 753.

755. 11 U.S.C.A. §§ 1101-1174 (West 1998).

756. Matthews, *supra* note 754. In March 1987, the court confirmed a reorganization plan. The plan provided for unsecured creditors, which included Northwest's subcontractors, to receive new debt obligations from the company. In April 1987, Northwest informed the Navy that it had incurred $25 million in contract costs. The Navy agreed to an increased contract price of $2.8 million. In April 1989, Northwest sent the Navy an invoice for $2.8 million, certifying that it was entitled to that amount. Later that same month, the court issued a report discussing Northwest's successful attempt to obtain concessions from its creditors. The Navy told Northwest the next day that it would seek to recover the fees it paid. *Id.*

757. Southwest Marine, Inc., ASBCA No. 47621, 96-1 BCA ¶ 28,601.

Because the court discharged these debts, the board held that the subcontractors could not recover them.[759]

The Navy appealed the board's decision to the Federal Circuit.[760] The Navy then successfully moved to have the appeal transferred to the district court.[761] The district court ruled that the board erred when it determined that bankruptcy laws precluded the Navy from recovering from Southwest. Although the court agreed with the board's analysis that the post-petition debts replaced the pre-petition debts, it found that once the petitioner's creditors agreed to compromise their claims, the Navy was entitled to share in the reduced cost to the petitioner. The court ruled that a bankruptcy discharge did not prevent the Navy from recovering the overpayment because the overpayment related to the concessions given by the creditors. The court concluded that the Navy was entitled to reimbursement pursuant to two contract clauses—the Credit Provision clause[762] and the Incentive Price Revision clause.[763]

Government Furnished Property (GFP)

FAR Part 45, Where Are You?

On 30 January 1998, the draft rewrite of Part 45 was released by the interagency team tasked to incorporate comments received since the 2 June 1997 release of the proposed rule.[764] The draft makes many changes to the proposed rule, as detailed below.

Definitions (45.001). The draft completely revises the definition of "equipment." It defines it in terms of useful life (over one year) and function (general purpose), instead of function alone. The draft adds the definition of "expendable property," which is property with a useful life of less than one year that is consumed during the production process. Expendable property is a subcategory of "material." A significant change was made to the definition of "low value property" by defining it as property with an acquisition cost of less than $5000, instead of $1000 as stated in the proposed rule. This change should greatly reduce the administrative recordkeeping burden associated with low dollar value GFP. The definition of "special test equipment" was also modified to clarify that general purpose test equipment that is combined will not meet the definition of "special test equipment" unless the combined property is a new functional entity that cannot be used for general purpose testing.

Policy (45.101). The draft rule emphasizes the government's policy that it will not provide commercially available items to contractors as GFP. This policy addresses the concerns expressed in numerous studies over the last twenty years that contracting officers increase the government's contract risks unnecessarily when they provide commercial items as GFP.

*Contractor Acquired or Fabricated Property (45.103)***.** New language was added to the proposed rule to clarify that contractors cannot charge as a direct cost property that they acquire or fabricate to perform a specific contract unless the property qualifies as a direct charge under FAR 31.202. Thus, if a contractor purchases general purpose capital equipment, it generally will be required to amortize the purchase price and make an indirect allocation of the costs.

Liability for Loss, Theft, Destruction, or Damage (45.104). In both the proposed rule and the draft, the contractor's liability under various contract types is contained in the same subsection. This can cause confusion since this subsection ends with the statement that "the government assumes such liability during any period in which the contractor maintains an approved system." One could misinterpret this ending phrase of the subsection as inconsistent with the first sentence of that subsection. The latter states that the "contractor is liable for loss, theft, or destruction of, or damage to" GFP provided under specified

758. *Id.* at 142,788.

759. *Id*. The board reasoned that if the Navy could recover overpayments that represented paid subcontractors' costs, the Navy would be receiving the subcontractors' supplies and services without cost because the subcontractors could not collect the costs from Northwest. The board also held that the Navy could not compare the subcontractors' post confirmation activities with overpayment on the Duluth contract. *Id.* at 142,789.

760. Dalton v. Southwest Marine, Inc., 120 F.3d 1249 (Fed Cir 1997).

761. *Id.* at 1252. The Navy argued that the Federal Circuit did not have jurisdiction to hear the case because the contract was wholly maritime. *Id.* at 1250. Southwest opposed the transfer arguing that there is no established mechanism to transfer a case from the Federal Circuit to the district court. Additionally, Southwest maintained that the appeal should not be transferred because the government's case would have been untimely if filed in the district court. The Federal Circuit did not find Southwest's argument persuasive. *Id.* at 1252.

762. Matthews, *supra* note 753. FAR 31.201-5 states that any credit relating to a contract cost that a contractor receives must be credited to the government. *See* FAR, *supra* note 15, at 31.201-5.

763. FAR, *supra* note 15, at 52.216-16. FAR 52.216-16(g)(2) provides that when the government overpays a contractor, the contractor must refund or credit the government the amount of the excess immediately. *Id*.

764. 62 Fed. Reg. 30,185 (1998). Information about the rewrite can also be obtained on the internet at <http://www.acq.osd.mil/dp/mpi/home.html>.

contract types. This potential ambiguity could be eliminated if the different standards of liability were addressed in different subsections.

Furnishing Property for Performance of a Government Contract (45.201). The draft states that government property may only be provided to contractors if certain restrictions, criteria, and document requirements are satisfied. The draft differs from the proposed rule. It discusses separately the various types of government property and explains which criteria must be satisfied before the contracting officer can provide each type of property to a contractor. The criteria are listed at 45.201-2 of the draft rule. The draft also adds the criterion that the "property will be incorporated into or attached to a deliverable end item." Because this condition is a part of the definition of "material," any property meeting this aspect of the definition of material could always be furnished to contractors since it will satisfy one of the listed criteria automatically.

The draft rule also would authorize the government to furnish property to contractors if the property is "needed for the retention or operation of an essential, government-owned capability." For example, this authority could be used to provide property at DOD depots and arsenals.

Solicitation and Contract Requirements (45.201-5). This section states that the cost of transporting GFP provided on an "as is" basis "shall not increase the fee or price of any government contract." The current regulation (45.205(a)) is less strict and states that contractors "ordinarily" will bear such costs. Either rule is difficult to enforce under firm-fixed price contracts for two reasons. First, the contracting officer will not have insight into the cost elements of the bid price. Second, some bidders may attempt to pass the transportation costs through to the government. Neither the current rule (which states that when the contractor bears these costs, "no additional evaluation factors related to these costs shall be used" (45.202-3)) nor the draft rule addresses this problem. Alternative approaches would be either to allow contracting officers to add a "transportation factor" to the bid prices of contractors receiving GFP or allow contractors to pass through transportation costs and rely on competition to control prices.

Repair or Replacement of Government Furnished Property (45.201-7). Although the draft rule authorizes the contracting officer to elect to repair, replace, or dispose of GFP (by the contractor or the government) in appropriate circumstances, it also limits the contracting officer's authority to repair or replace commercial GFP and property furnished "as is."

Property Control System Review and Approvals. For many years, property management control systems have been criticized as both ineffective and overly burdensome. The proposed rule and the current draft attempt to streamline this process, while ensuring accountability. For example, if a contractor's property management system includes the processes identified in FAR 52.245-3(c), the draft rule states that the system "should be approved and corrections not required if the property administrator considers the processes sufficient to assure compliance with contract requirements." Similarly, draft rule 45.302 states that "[p]roperty administrators shall not require a contractor to modify its record keeping and reporting practices if those practices generate the [information] required." The administrative record-keeping burden is reduced by new language in the draft rule that exempts incidental amounts of GFP remaining after contract completion from various disposal requirements (45.304).

Disposal Priorities (45.304-2). The draft rule changes the priority schedule from "government" to "re-use within the agency." Re-use within the government is the third priority after transfer to schools, non-profit organizations, and reporting to the GSA. It would seem that reporting to the GSA would accomplish the goal of reuse within the government, since the GSA is responsible for identifying government-wide needs for excess or surplus government property.[765]

Screening (45.304-5). Under the draft rule, at contract close-out, property would be exempted from both the standard screening requirements (45.304-6) and the special screening requirements (45.304-7) if it is properly included on a scrap list or is identified on an inventory disposal schedule, with limited exceptions. This process should simplify the plant closeout procedure and reduce administrative burdens on both contractors and government plant clearance officers.

Finally, the draft rule improves upon the proposed rule released in June 1997 by reorganizing several sections, clarifying some ambiguities, and making several substantive changes.

GFP Decisions on Prior Contract Do Not Establish Bias

In *Rockhill Industries, Inc.*,[766] the protester alleged that its proposal was not fairly evaluated because agency officials were biased against it. In its attempt to establish bias, the protester referenced the agency's refusal to provide government laser filters as GFP under a prior contract. The GAO rejected this argument stating, "there is no basis in the record . . . to conclude that the agency actions complained of were the result of anything but the reasonable exercise of the agency's discretion to make decisions."[767] Significant to GAO's decision was the agency's

765. *See* 40 U.S.C.A. §§ 472-493 (West 1998).

766. B-278797, Mar. 16, 1998, 98-1 CPD ¶ 79.

767. *Id.* at 3.

failure to consider the prior contract in its assessment of past performance. Given the intent of the proposed FAR Part 45 rewrite to restrict the availability of GFP, this decision could support an agency's defense against allegations of bias in the source selection process.

Unauthorized Disposition of GFP Bars Recovery

As part of contract closeout, a standard FAR clause[768] requires contractors to provide to the contracting officer an inventory of GFP it possesses under the contract and await disposition instructions. In *LaBelle Industries, Inc.*,[769] the contractor did not furnish the required inventory and disposed of government furnished ammunition without direction from the contracting officer. The contractor submitted a claim for its disposition costs. The contracting officer denied this claim. In denying the contractor's appeal, the ASBCA concluded "[t]here is no evidence that the disposal costs claimed were incurred in accordance with [the] provisions of the contract. Government responsibility for these costs is not proven."[770] Although there was no question that the contractor actually incurred the costs it claimed, the ASBCA denied recovery because the contractor failed to comply with the procedural requirement of the GFP clause.

Failure to Provide Timely Notice of GFP Shortage Can Affect Recovery

In *J.S. Alberici Constuction Co. & Martin K. Eby Construction Co. (Joint Venture)*,[771] the government agreed to provide a contractor with 351,200 linear feet of metal plates to be used for dam construction. The government delivered the GFP on schedule, but the contractor's project engineer was concerned that there was a shortage because the plates were not each at least eighty feet long (although the total number of linear feet exceeded 351,200). The contractor did not notify the government of this concern and attempted to alter the construction method to use the shorter sheets.

The board listed the following prerequisites to government liability: (1) the contract obligates the government to provide GFP, (2) the government breached its duty by late delivery of the GFP or by furnishing insufficient or unsuitable GFP, and (3) the contractor incurred additional costs as a result of the government's breach of duty. The board denied recovery because the contractor failed to notify the government of the shortage. The board reasoned that "the very purpose of the notice requirement is to afford to the government the opportunity to eliminate or minimize the effect of the predicament encountered by the contractor."[772] Because the contractor failed to provide timely notice of the shortage, it could not establish that its additional costs were incurred as a result of the late delivery, as opposed to its failure to provide the required notice.

Payment and Collection

Proposed Revisions to OMB Circular 125

On 17 June 1998, the OMB proposed revisions to OMB Cir. 125, "Prompt Payment."[773] The current circular prescribes policies for executive agencies and departments in paying for goods and services pursuant to the Prompt Payment Act.[774] The proposed changes to OMB Cir. 125 reflect the increasing preference for prompt electronic payments mandated by the Debt Collection Improvement Act of 1996.[775] Additionally, the suggested changes promote the use of government credit cards and accelerated payment methods; clarify and simplify current language; and announce a toll free number and internet website for accessing prompt payment information.[776]

Among its changes, the revised circular adds options for making payments before thirty days if doing so promotes electronic payments and is in the best interest of the government. For example, a new section entitled "Accelerated Payment Methods" allows agencies to make payments under $2500 after matching invoice, receipt, and acceptance documents. It also allows for early payment to small disadvantaged businesses, and payments for emergency disasters and military deployments. Another section entitled "Fast Payments" requires the

768. FAR, *supra* note 15, at 52.245-4(d).

769. ASBCA No. 49307, 98-2 BCA ¶ 29,774.

770. 98-2 BCA ¶ 29,774, at 147,543.

771. ENG BCA No. 6178, 1998 Eng. BCA LEXIS 13 (July 9, 1998).

772. *Id.* at 96.

773. 63 Fed. Reg. 33,000 (1998).

774. 31 U.S.C. § 3901 (1994). Congress enacted the PPA in 1982 to require agencies to pay their bills on time, pay interest for late payments, and take discounts only when making payment by the discount date. In 1982, the OMB issued Circular 125 to implement the PPA. 47 Fed. Reg. 37,321 (1982). After Congress amended the PPA in 1988, the OMB revised Circular 125 in 1989. 54 Fed. Reg. 52,700 (1989).

775. Pub. L. No. 104-134, 110 Stat. 1321 (1996).

776. The toll free number is 1-800-266-9667. The internet website is < http://www.fms.treas.gov/prompt/>.

agency to pay a vendor within fifteen days after receiving a proper invoice, even without evidence of receiving goods or services. The proposed circular also adds a provision on rebates instructing agencies to determine credit card payment dates after completing a cost-benefit analysis for the government. Finally, the revised circular would allow agencies to pay credit card invoices under $2500 without matching documents.

New Proposed FAR Rule on Electronic Funds Transfer

On 6 July 1998, the FAR Council proposed a rule amending the FAR to address the use of electronic funds transfers (EFT) for federal contract payments.[777] The proposed rule differs from the interim rule issued in August 1996 that implements the Debt Collection Improvement Act.[778] In particular, the proposed rule provides for a different location where the government will receive a contractor's EFT information. Although the interim rule requires the contractor to submit the information directly to the payment office, the proposed rule requires contractors to submit their EFT data to the Central Contractor Registration (CCR)[779] database when the payment office uses the CCR as its main source of EFT information.[780] When the government does not use the CCR as its main source, the contractor must submit its EFT information to the office designated in the contract. The payment office is the "default" recipient if the contract fails to designate another office. The proposed rule also recognizes that agencies may use different administrative approaches to collect, track, and store EFT data.

Significantly, the proposed rule requires payment by EFT except: (1) when contractors do not have an account with a domestic U.S. financial institution and do not have a paying agent,[781] and (2) when the government is incapable of making payments via EFT. The latter exception allows agencies to use non-EFT systems when: (1) receiving payment outside the United States, (2) receiving payment in non-U.S. currency, (3) using classified contracts, or (4) awarding contracts during military or emergency operations.[782] In these situations, the contract must provide for payment by non-EFT when such a mechanism is not possible or it would not support the objectives of the operation.

Finally, the proposed rule contains three new implementing clauses.[783] The agency will use one clause when designating an office other than the payment office to receive the contractor's EFT data. Another clause governs third-party payments for the agency, such as through the government credit card. A third clause applies when the contract provides for using delivery orders and multiple payment arrangements.

The DOD Issues New Rules on Contract Financing

On 9 March 1998, the DAR Council issued thirty-one interim and final rules amending the DOD Federal Acquisition Regulation Supplement (DFARS).[784] The final rules on contract financing augment the FAR rules published in September 1995[785] and add new provisions on financing commercial item purchases and performance-based contracting. The rules set prompt payment periods of thirty days for commercial advance payments, fourteen days for commercial interim payments and performance-based payments, and seven days for cost-based payments.[786]

The DAR Council defended the rationale behind the additional payment periods. The fourteen day period for performance-based payments allows for the extra time needed to verify a contractor's performance; the same period for commercial interim payments allows for the "wide diversity anticipated for commercial payment terms."[787] For these reasons, the final rule allows more time for payment than the seven-day period

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777. 63 Fed. Reg. 36,522 (1988).

778. 61 Fed. Reg. 45,770 (1996).

779. The CCR allows federal contractors to provide basic business information, capabilities, and financial data to the government on a one-time basis. Contractors update the information annually and as the data changes, rather than providing it for every solicitation. *See* Memorandum, Director of Defense Procurement, to Directors of Defense Agencies, subject: Central Contractor Registration (Feb. 10, 1997).

780. Effective 1 June 1998, the DOD amended the DFARS to address CCR and EFT. *See* DFARS, *supra* note 683 , at 252.204-7004 (requiring contractors to register in the DOD CCR database prior to receiving a contract award); DFARS, *supra* note 683, at 252.232-7009 (outlining the DOD policies and procedures for using EFT to pay contractors when the paying office uses the CCR as its source of EFT information).

781. 63 Fed. Reg. at 36,524.

782. *Id.* The proposed rule defines "military operation" as including contingency operations. It also defines "emergency operations" as including responses to natural disasters or national or civil emergencies. *Id.*

783. 63 Fed. Reg. at 36,525.

784. 63 Fed. Reg. 11,522 (1998).

785. 60 Fed. Reg. 48,272 (1995); 60 Fed. Reg. 49,707 (1995).

786. 63 Fed. Reg. at 11,537.

for cost-based progress payments. Because most requests for advance commercial payments occur at the beginning of the contract, the thirty day period allows the payment office time to receive the contract, enter it into the computer system, and process the contractor's request for payment.[788] According to the DAR Council, the prompt payment periods adopted in the final rules also benefit small businesses because they are shorter than the prompt payment periods in the FAR.[789] The final rules apply to both large and small businesses whose DOD contracts include performance-based or commercial type financing.

New Guidance from the DOD on Progress Payment Distribution for Some Contracts

On 12 August 1998, the Director of Defense Procurement, Eleanor Spector, issued guidance altering how the DOD distributes progress payments. Beginning 31 August 1998, contracting officers who are responsible for administering progress payments must provide distribution instructions to the contract paying office on new, non-firm-fixed-price contracts.[790] The new guidance applies to any fixed-price contract funded with multiple appropriations that is other than a firm-fixed-price contract.

The new guidance minimizes burdens on contractors, while requiring more direction from contracting officers. The guidance relieves contractors from providing additional data to support progress payment distribution. For example, the guidance notes that fixed-price incentive contracts (to which the guidance applies) typically require a contractor to submit quarterly contract fund status reports (CFSR) that show funds usage by appropriation. Contracting officers, in turn, use the CFSR to provide progress payment guidance to contract paying offices. According to the new guidance, the contracting officer should use other available information to show the appropriations usage, absent a CFSR, but should not find it "necessary to require contractors to provide any additional information" to support this requirement.[791]

In addition, the Progress Payment Memorandum requires contracting officers to provide progress payment instructions to contract paying offices. According to the guidance, contracting officers must give the paying offices enough information to allow them to distribute progress payments from each appropriation funding the contract in proportion to the work performed. In addition, the contracting officer also must distribute payment amounts by accounting classification reference number (ACRN) because paying offices maintain contract payment records using the ACRN.[792]

The new DOD guidance is its latest attempt to tighten its policy on progress payments. The DOD never implemented its initial proposed rule,[793] scheduled to go into effect on 1 October 1997. Rather, Congress urged the DOD to weigh the cost and benefits of the proposed procedures, arguing the new system would create payment delays.[794] The DOD's second proposed rule also languished,[795] after the Defense Contract Management Command (DCMC) complained it would affect its operations and not accurately align progress payments with their appropriations.[796] The Progress Payment Memorandum may not be the DOD's last word on this topic.

The GAO Reviews the DOD's Technology Initiatives for

787. *Id.* at 11,523.

788. *Id.*

789. FAR, *supra* note 15, at 32.906.

790. Memorandum, Director, Defense Procurement, to Directors of Defense Agencies, subject: Progress Payment Distribution (Aug. 12, 1998) [hereinafter Progress Payment Memorandum]. The Progress Payment Memorandum states, in part:

> This requirement applies to any fixed-price contract funded with multiple appropriations that is other than a firm-fixed price contract. Contracts that are not firm-fixed price, e.g., fixed-price incentive contracts, typically require adjustments to obligated funds during contract performance. Most of our contracts with progress payments are firm-fixed price and do not need distribution instructions, since they do not entail this kind of adjustment.

Id.

791. *Id.*

792. *Id.*

793. 62 Fed. Reg. 30,829 (1997).

794. *DOD: Change in Progress Payment Distribution Postponed After Senators Appeal to Cohen*, Fed. Cont. Daily, (BNA) Oct. 14, 1997, *available in* WESTLAW, Legal News, BNA-FCD, Oct. 14, 1997 FCD, d3.

795. 62 Fed. Reg. 63,047 (1997).

796. *Progress Payments: DCMC Calls Proposed Rule Burdensome, Offers Alternative to Achieve Goal,* Fed. Cont. Daily (BNA), Feb. 12, 1998, *available in* WESTLAW, Legal News, BNA-FCD, Feb. 12, 1998 FCD, d2.

Contract Financing

On 30 January 1998, the GAO issued a report reviewing some DOD initiatives intended to improve its contract payment methods.[797] Three of the initiatives focus on electronic document management and access, and electronic data interchange.[798] The DOD plans to spend nearly eighty million dollars on these short term initiatives through FY 1999.[799] The other initiatives, which are long term, attempt to move the DOD's payment process to an integrated system using standard data with records available to all users.[800] At an estimated cost of $409 million, the DOD plans to implement these long-term initiatives by 15 April 2002.[801]

According to the GAO, the DOD's initiatives may be insufficient to allow it to reach its goal of paperless contracting by 1 January 2000. The GAO criticized the DOD for not performing an in-depth analysis to identify the underlying causes of its disbursement and accounting problems and choosing effective solutions. According to the GAO, even in a paperless environment, the DOD can make proper payments only with accurate and complete data. It found "unclear," however, the overall impact the seven initiatives would have on DOD's long-standing contract payment problems.[802] Although the GAO criticized the DOD's initiatives, it did not address specific issues or problems, or recommend solutions.

Defective Pricing. Truth in Negotiations Act (TINA)

Contractor Precluded from Offsetting Intentional Understatements

Twelve years ago, the Federal Circuit permitted a contractor to offset intentional understatements that were known to the government at the time of negotiations.[803] The Federal Circuit, however, did not address whether a contractor could offset intentional understatements that were unknown to the government.[804] This year, the ASBCA finally addressed this issue.

In *United Technologies Corp./Pratt & Whitney*,[805] the Pratt & Whitney Division of United Technologies Corp. intentionally failed to disclose "sweep" data[806] that it obtained from the Hamilton Standard Division[807] before it certified its cost or pricing data for three F-100 aircraft engine contracts. This "sweep" data revealed both overstatements and understatements of the contractor's cost or pricing data.[808] To resolve the overstatements, Pratt & Whitney agreed to a downward price adjustment for each of its three F-100 aircraft engine contracts.[809] Pratt & Whitney, however, subsequently submitted a claim to offset these downward price adjustments based on the understatements. The contracting officer denied the contractor's claim on 19 July 1991.

In analyzing the contractor's claim, the board began by concluding that the contractor's three F-100 aircraft engine contracts were governed by the law in effect before 1986.[810]

The board then concluded that the disputed "sweep" data was cost or pricing data.[811] Nevertheless, the board concluded that the contractor could not offset the understatements because its failure to disclose the "sweep" data disadvantaged the gov-

797. General Accounting Office, Financial Management: Seven DOD Initiatives That Affect the Contract Payment Process, Report No. GAO/AIMD-98-40 (Jan. 30, 1998).

798. *Id*. at 9-20. The three short-term initiatives are intended to move DOD's contract payment process toward a paperless environment and reduce its dependence on manual data entry. *Id*. at 9-10.

799. *Id*. at 20.

800. *Id.* at 20-27. The four long-term initiatives are the Standard Procurement System, Defense Procurement Payment System, Shared Data Warehouse, and Defense Finance and Accounting Service Corporate Database.

801. *Id*. at 27.

802. *Id*. at 2.

803. United States v. Rogerson Aircraft Controls, 785 F.2d 296, 299 (Fed. Cir. 1986).

804. *Id*.

805. ASBCA No. 43645, 98-1 BCA ¶ 29,577.

806. *Id*. at 146,630. A "sweep" is a formal method of ensuring that all departments and divisions within a corporation disclose all relevant cost and pricing data to the government up to the date of agreement on price. *Id*.

807. *Id*. at 146,629-32. Like Pratt & Whitney, Hamilton Standard is an unincorporated division of United Technologies Corp. As a result, Pratt & Whitney and Hamilton Standard cannot contractually bind each other. Instead, Pratt & Whitney uses interdivisional work authorizations to obtain the parts it needs from Hamilton Standard. *Id*. at 146,629-30.

808. *Id*. at 146,629-32. Pratt & Whitney claimed that it did not disclose the "sweep" data because the net effect might have been a price increase. *Id*. at 146,630-31.

809. *Id*. at 146,632. The contractor agreed to the downward price adjustments as part of a global agreement that settled defective pricing claims on nine contracts. The contractor, however, specifically excluded the offset amounts on its three F-100 aircraft engine contracts from the agreement. *Id*.

ernment and frustrated the statutory purpose of the TINA.[812] Specifically, the contractor's failure to disclose the "sweep" data placed the government in an unequal bargaining position. Unlike the government personnel in *Rogerson*, the government employees in this case did not know about the contractor's understatement. Therefore, they could not substitute the true figures for the incorrect understatements.[813]

Cost And Cost Accounting Standards (CAS)

Update: Cost Accounting Standards Board Review Panel

Last year, Congress directed the GAO to review and analyze the mission of the Cost Accounting Standards Board (CASB)[814] in light of acquisition reforms.[815] Accordingly, the GAO convened a panel comprised of members from government, industry, and the accounting profession to study and assess the CASB's current role.[816] The panel will address the scope of the CASB, its size and staffing, and its organizational framework.

This step reflects growing discontent about the proper function of the CASB. In a 3 March 1998 letter to the CASB Review Panel, the Council on Defense, and the Space Industry Association (CODSIA) suggested "retooling" the CASB to make it more effective.[817] Among its suggestions, the CODSIA recommended changing the board's philosophy, composition, and length of service. Regarding philosophy, the CODSIA noted that the CASB or its successor needs to alter its "more is better" approach to align with the streamlining goals of acquisition reform.[818] In addition, the CODSIA urged increasing the current CASB membership from five to seven members, adding one member from industry and one from either academia or public accounting. This move would restore the balance among government, industry, public accounting, and academia.[819] Finally, the CODSIA agreed with the current four-year term for CASB members, but suggested a two-term limit to encourage new ideas and insight on accounting issues.

The OMB is crafting a plan to alter how the CASB works.[820] First, the OMB plan calls for term limits on the five-member board. Second, the CASB would hold more public meetings to gather industry input. Finally, the CASB would establish task groups to work on specific issues. The CASB Review Board is expected to release its report to Congress in January 1999.

CAS Board Grants Waiver Authority

On 15 July 1998, the CASB issued a two-year waiver of the CAS for certain firm-fixed-price contracts to spur interest in contracting with the DOD.[821] The waiver applies in two situa-

810. *Id*. at 146,633. In 1986, Congress amended the Truth in Negotiations Act (TINA) to disallow offsets for intentional understatements. Pub. L. No. 99-661, § 952(d), 100 Stat. 3949 (1986). Prior to that time, courts and boards generally permitted offsets up to the amount of the overstatement. *United Technology Corp./Pratt & Whitney*, 98-1 BCA ¶ 29,577 at 146,633. *See* Cutler-Hammer, Inc. v. United States, 416 F.2d 1306, 1309-13 (Ct. Cl. 1969).

811. *United Technology Corp./Pratt & Whitney*, 98-1 BCA ¶ 29,577 at 146,633. A contractor is not entitled to an offset unless the unsubmitted data is cost or pricing data. *See* Norris Industries, Inc., ASBCA No. 15442, 74-1 BCA ¶ 10,482. In this case, the board concluded that the "sweep" data was cost or pricing data because it was verifiable data that prudent buyers and sellers would expect to have a significant effect on negotiations. *United Technology Corp./Pratt & Whitney*, 98-1 BCA at ¶ 29,577 at 146,632.

812. *United Technology Corp./Pratt & Whitney*, 98-1 BCA ¶ 29,577 at 146,632. The board noted that the statutory purpose of the TINA was to require full disclosure. *Id.* (quoting Lockheed Aircraft Corp. v. United States, 432 F.2d 801, 805 (Ct. Cl. 1971)).

813. *Id.*

814. The CASB is a government entity with exclusive authority over CAS, which are a series of standards designed to achieve uniformity when measuring, assigning, and allocating costs to government contracts. The CASB is an independent board within the OFPP; the Administrator of OFPP chairs the CASB. *See generally* NASH, *supra* note 5, at 137-39.

815. *1997 Year in Review, supra* note 8, at 109.

816. *GAO Announces 10 CAS Board Review Panel Members*, 69 Fed. Cont. Rep. (BNA) 218 (1998). Information about the Cost Accounting Standards Board Review Panel is available at <http://www.gao.gov>.

817. *Defense Industry Sees Need for CAS Function, But Suggests Changes to Role, Structure*, 69 Fed. Cont. Rep. (BNA) 245 (1998).

818. *Id*. at 245-46. The CODSIA commented that the CAS mission to achieve uniformity and consistency in the measurement, assignment, and allocation of costs has remained constant for 25 years. However, the acquisition world has dramatically changed, with greater reliance on commercial acquisition and simplified procedures. *Id*.

819. According to the CODSIA, the CAS functions extend to all federal agencies. As a result, the current five member board with only one DOD member is inadequate. *Id*. at 246.

820. *CAS Board: Administration to Limit Terms of Members, Staff of Cost Accounting Standards Board*, Fed. Cont. Daily, (BNA) Sept. 22, 1998, *available in* WESTLAW, Legal News, BNA-FCD, Sept. 22, 1998 FCD, d4.

821. *CAS Board Grants DOD Limited CAS Waiver Authority*, 40 THE GOV'T CONTRACTOR No. 27, at 5 (July 15, 1998).

tions: (1) where the government obtains cost data that is not certified by the contractor as being accurate, complete, and current prior to contract award; and (2) where the contract does not provide for progress payments based on contract costs incurred. In addition, a company to whom the waiver applies must have no previous CAS-covered contracts. The Under Secretary of Defense for Acquisition and Technology will approve decisions not to use the CAS contract clause in individual contracts.[822]

Industry critics complained that the waiver is limited for two reasons.[823] First, when considering if it had a previous CAS-covered contract, the waiver focuses on the *entire* company, rather than a *segment* of a company. Additionally, critics note that the waiver forces companies to choose between progress payments or the CASB waiver. What impact the waiver will have on the DOD contracting for the next two years remains to be seen.

Current Use of Land Crucial for Calculating Costs

On 27 January 1998, the ASBCA clarified when a contractor may include the value of land in facilities capital cost of money (FCCOM) calculations under CAS 414.[824] In *McDonnell Douglas Helicopter Co.*,[825] a contractor bought undeveloped land to use in a planned expansion, but later used the land for other purposes. The board ruled that McDonnell Douglas' initial purpose in purchasing the land did not control when determining if it could continue to include the value of the land in FCCOM calculations under CAS 414. Noting that the contractor voluntarily adopted a new use for the land, the board refused to grant summary judgment for McDonnell Douglas.[826]

Consultant Costs Unallowable[827]

In 1987, the government contracted with Plano Builders to demolish and reconstruct an aircraft facility at Malmstrom AFB, Montana. The contract included asbestos removal. During performance, Plano and its subcontractor encountered more asbestos work than anticipated and submitted four claims in 1987 and 1988. Plano hired a consultant to help clarify the claims after the contracting officer criticized them as difficult to analyze. The consultant's work covered both the claims and other work that the subcontractor believed were covered under the contract. Based, in part, on the consultant's work, Plano and the subcontractor submitted four new claims in 1990 for the additional work and for the fees paid to the consultant.

The COFC held that the consultant fees were incurred "in connection" with the prosecution of a claim against the government, as stated in the FAR.[828] Relying on a dictionary definition of "connection," the court interpreted the phrase "in connection with" broadly "to encompass consulting fees that are merely associated with or related to the prosecution of a CDA claim."[829]

The court then analyzed the claims by when Plano actually incurred the costs. Regarding the 1987 and 1988 claims, the court found the consultant fees unallowable:

> Because plaintiff [contractor] incurred these costs in an effort to convince the contracting officer to award the compensation sought in its previously submitted CDA claims, it follows that these fees must be characterized as associated with or related to the submission of CDA claims and therefore were incurred "in connection with . . . the prosecution of [CDA] claims" and are not recoverable under FAR 31.205-47(f).[830]

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822. The Under Secretary of Defense may delegate this authority no lower than a Deputy Under Secretary or the director of defense procurement. *Defense: Defense Firms Say New Conditions Cripple Two-Year Cost-Accounting Waiver*, Fed. Cont. Daily (BNA), July 17, 1998, available in WESTLAW, Legal News, BNA-FCD, July 17, 1998 FCD, d3.

823. *Id.*

824. CAS 9904.414—Cost Accounting Standard—Cost of Money as an Element of the Cost of Facilities Capital, *available at* <http://www.fedmarket.com/cas/cas-index.html>.

825. ASBCA No. 50,756, 98-1 BCA ¶ 29,546.

826. In rejecting McDonnell Douglas' appeal, the board clarified its earlier decision in *Raytheon Co. See* Raytheon Co., ASBCA No. 32419, 88-3 BCA ¶ 20,899. In *Raytheon*, a contractor purchased land for expansion purposes. However, the contractor was frustrated in its attempts to use the land for its original purpose and continued to include the value of the land in its FCCOM calculations. *Id*. The board upheld the calculations, relying on the contractor's continued intent and efforts to use the land for its initial expansion purposes. *Id*.

827. Plano Builders Corp. v. United States, 40 Fed. Cl. 635 (1998).

828. FAR, *supra* note 15, at 31.205-47(f). This provision disallows costs if incurred in connection with the "prosecution of claims or appeals against the [f]ederal [g]overnment." *Id*.

829. *Plano Builders Corp.*, 40 Fed. Cl. at 638.

830. *Id.*

Likewise, the court disallowed the costs tied to the 1990 claims. The court reasoned that the subcontractor incurred these costs when preparing its later claim. Focusing on the consultant's "function," the court reasoned that

> [T]he plain meaning of FAR 31.205-47(f) brings within its scope consulting fees merely associated with or related to the submission of that claim. Therefore, in applying FAR 31.205-47(f), the crucial issue is not the timing of the consulting work but rather the function for which the consulting work was performed.[831]

The court distinguished *Plano* from *Bill Strong Enterprises, Inc. v. Shannon.*[832] In *Bill Strong*, the Federal Circuit allowed the contractor to recover the consultant fees because the contractor incurred them as part of contract administration, not in connection with the prosecution of a claim.[833] The COFC concluded, however, that Plano could not recover under *Bill Strong* because the Federal Circuit overruled that case in *Reflectone Inc. v. Dalton*.[834] In *Reflectone*, the court ruled that a dispute is not a prerequisite to the existence of a CDA claim. Rather, the court pointed to the FAR, which established the only requirements for a claim: a written demand seeking, as a matter of right, the payment of a sum certain.[835] After *Reflectone*, the 1990 claims formed actual CDA claims. Thus, Plano and its subcontractor incurred the costs "in connection with . . . the prosecution" of a claim, making the costs unrecoverable.[836]

The *Plano* case is not the last word on this subject. In analyzing the *Bill Strong* "legacy," one commentator observed that distinguishing between allowable contract administration costs and unallowable costs of prosecuting claims "continues to be a source of controversy."[837] The controversy likely will continue for the time being.

Fraud

Board Voids Contract Tainted by Fraud

In 1998, the ASBCA held that a contract obtained through bribery was void.[838] In addition, the board concluded that the Army did not have to pay the contractor for the work it performed under the contract.

On 19 February 1990, the Army awarded a requirements contract to Schuepferling for interior and exterior painting of troop buildings in Germany. The Army issued a number of delivery orders under the contract. The Army did not contend that the contractor's performance under the delivery orders was deficient. During the performance of the contract, the German police learned that the contractor bribed the contract specialist who was responsible for awarding the contract. The contract specialist admitted that the owner of the company gave her a substantial bribe to award the contract to his firm. When questioned by German authorities, the owner explained that he might have paid the contract specialist for the contract.

On 28 February 1991, the Army suspended Schuepferling from contracting with the government. On 11 March 1991, the contracting officer ordered the Department of Engineering and Housing to stop issuing delivery orders and to stop processing all invoices under the instant contract. On or about 23 April 1991, the Army resumed issuing delivery orders under the contract. The reason was that Army troops were returning from Desert Storm and the Army did not have any place to house them other than in the buildings that needed painting.

The contractor completed work under the contract in May 1991 and submitted several invoices. The contracting officer notified the contractor, in writing, with each invoice that the government was withholding payment due to preliminary findings that it paid substantial bribes. A German court subsequently found the contract specialist guilty of accepting a bribe. The contractor filed a certified claim for the unpaid invoices totaling DM 98,414.27. On 12 January 1993, the contractor appealed the contracting officer's "constructive"[839] denial of the claim to the ASBCA.

831. *Id.* at 639. The court went on to note that the "sole pertinent function" of the consultant's work for the 1990 claim was to form the basis for the 1990 claim. Thus, the court stated that the consultant's work "reasonably must be classified as associated with or related to the prosecution of those claims." *Id.*

832. 49 F.3d 1541 (Fed. Cir. 1995).

833. *Id.* at 1551. The court also noted that the Federal Circuit issued the *Bill Strong* case in light of precedent requiring an existing dispute between the parties. Because the contractor in that case incurred the costs before a dispute arose, the court allowed the costs.

834. 60 F.3d 1572 (Fed. Cir. 1995). In *Reflectone*, the Federal Circuit overturned Dawco Constr. Inc. v. United States, 930 F.2d 972 (Fed. Cir. 1992). In *Dawco*, the Federal Circuit ruled that a contractor's submission of a document entitled "claim" did not constitute a valid claim unless a dispute already existed between the parties about the contractor's entitlement.

835. FAR, *supra* note 15, at 33.201.

836. *Plano Builders Corp.*, 40 Fed. Cl. at 641.

837. *Unallowable Claims Costs vs. Allowable Contract Administration Costs: The Bill Strong Legacy*, 12 NASH & CIBINIC REPORT NO. 6, 93 (June 1998).

838. Schuepferling GmbH & Co., KG, ASBCA No. 45564, 98-1 BCA ¶ 29,659.

The Army filed a motion to dismiss the contractor's claim based on a lack of jurisdiction. The Army argued that the contractor's bribes tainted the entire process; therefore, the contract was void *ab initio*. The board concluded that the contractor paid the contract specialist a bribe to manipulate the competitive bidding process. In exchange for the bribe, the contract specialist gave Schuepferling the source list and failed to post the solicitation on the bulletin board. Under these rather straightforward facts, the board found that the contractor's fraud tainted the contract from the outset. Relying on *Godley v. United States*,[840] and *J.E.T.S., Inc. v. United States*[841] Administrative Judge J. Stuart Gruggel found that the contract was void *ab initio*.

The most interesting portion of the case is that the Army issued delivery orders after it knew about the fraud. Judge Gruggel specifically rejected an unjust enrichment argument by the contractor, comparing the subject case to *United States v. Amdahl Corp*.[842] In *Amdahl*, the Federal Circuit found a contract void *ab initio* because its terms and conditions were contrary to a statute. Judge Gruggel noted that in *Amdahl* the contractor did not engage in any fraud, unlike the subject case. He stated:

> It is well established that the absence of a criminal conviction of Mr. Schuepferling for bribery and assuming, arguendo, even the absence of a specific showing that the wrongdoing adversely affected the contract does not preclude our holding that the contract is void ab initio and cannot be ratified.
>
> . . .
>
> This is due to the primacy of the public interest in preserving the integrity of the federal procurement process as well as the overriding concern for insulating the public from corruption. [843]

Circuit Court Tackles Issues of First Impression with Major Fraud Act

In *United States v. Sain*,[844] the Third Circuit addressed two issues of first impression regarding the Major Fraud Act.[845] The fraud arose on a seven million dollar contract between the Army and Advanced Environmental Consultants, Inc. (AEC). Samir Sain was the sole shareholder and president of AEC. The case involved only one contract, which required AEC to build, own, and operate a wastewater treatment plant at the Tooele Army Depot.

Sain told the Army that the wastewater plant required virgin carbon[846] to produce pure water. This statement was false. Based on Sain's lies, the Army reimbursed AEC for the added cost of using virgin carbon. Unbeknownst to the Army, Sain used less expensive, reactivated carbon,[847] and kept the difference between the amount he charged and his actual costs. Sain submitted numerous claims for payments under the tainted contract. In the district court, the government convicted Sain of forty six counts of fraud for violating the Major Fraud Act.[848] Sain appealed the conviction.

The Third Circuit noted that the case raised two issues of first impression: (1) whether the government could charge Sain with a separate violation of the Major Fraud Act for each claim that was submitted under a single fraudulent scheme; and (2) whether modifications of the original contract, each of which

839. It was a "constructive" denial of the claim because the contracting officer never issued a final decision.

840. 5 F.3d 1473 (Fed. Cir. 1991).

841. 838 F.2d 1196, 1200 (Fed. Cir. 1988), *cert. denied*., 486 U.S. 1057 (1988).

842. 786 F.2d 387, 393-95 (Fed. Cir. 1986).

843. *Schuepferling*, 98-1 BCA ¶ 29,659 at 146,953.

844. 141 F.3d 463 (Fed. Cir. 1998).

845. 18 U.S.C.A. § 1031(a) (West 1998). The statute provides:

> Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent (1) to defraud the United States, or (2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises, in any procurement of property or services as a prime contractor with the United States or a subcontractor or supplier on a contract with the United States, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is $1,000,000 or more, shall, subject to the applicability of subsection (c), be fined not more than $100,000, or imprisoned not more than 10 years or both.

Id.

846. *Sain*, 141 F.3d at 468. Virgin carbon has never been used for water purification.

847. *Id.* Reactivated carbon has been previously used to filter water. It has been heated to extremely high temperatures in order rid the carbon of the impurities.

848. *Id.* at 463. Sain was sentenced to 37 months imprisonment and three years supervised release. In addition, the court ordered AEC to pay $597,124 in restitution, with any amount not paid by AEC to be paid by Sain personally.

have a value under one million dollars, are within the jurisdictional scope of the Major Fraud Act, when the underlying contract has a value greater than one million dollars.

Regarding the first issue, Sain contended that the government should have charged him only with a single count under the Major Fraud Act for the overall fraudulent scheme. The court disagreed and noted that the Major Fraud Act criminalizes each knowing execution of a fraudulent scheme rather than simply devising the fraudulent scheme. The court stated, however, that not every act furthering the scheme separately executes the scheme. The court held, "[i]n determining whether an action is a separate execution of a fraudulent scheme, courts look to whether the actions are substantively and chronologically independent from the overall scheme."[849] In this case, the court had no difficulty concluding that each of the forty-six false claims submitted by Sain constituted a separate execution of the scheme.

As to the second issue, Sain contended that the court should follow the Second Circuit decision in *United States v. Nadi*.[850] In *Nadi*, the Second Circuit held that jurisdiction under the Major Fraud Act is determined by the specific contract that is tainted by fraud. Sain essentially argued that each modification under the original contract was a separate contract, distinct from the main contract. Therefore, since each modification was valued at less than one million dollars, Sain's fraud with each modification did not trigger jurisdiction under the Major Fraud Act.

The court disagreed with this argument and stated:

> We need not decide whether to follow *Brooks*[851] or *Nadi,* because we conclude that there was only one contract in this case. The contract modifications pointed to by Sain were simply that—modifications of the approximately $4.5 million which ultimately increased in value to $7 million. As modifications, they were not separate contracts and did not stand on their own; they merely changed some of the terms of the original contract.[852]

Ninth Circuit Reverses Twenty-Six Million Dollar Award against DCAA

A three-judge panel of the Ninth Circuit reversed a 1996 district court decision holding that General Dynamics was entitled to approximately twenty-six million dollars in damages that resulted from auditing malpractice by the DCAA.[853]

General Dynamics brought a Federal Tort Claims Act (FTCA)[854] action against the United States alleging that DCAA committed professional negligence in performing audit work in connection with the Army's Divisional Air Defense Gun System (DIVAD). The Army designed DIVAD as a tank-like weapon intended to engage enemy helicopters and fixed-wing aircraft. The DCAA's audit report alleged that General Dynamics fraudulently mischarged approximately $8.4 million. The Army referred the case to the DOJ for action related to the alleged fraud. Incredibly, the DCAA incorrectly assumed that the DIVAD contract was a firm fixed-price contract. The contract, however, was a firm fixed-price (best efforts) type contract.[855] The district court concluded that the DCAA was negligent in auditing the contract; therefore, General Dynamics was entitled to recovery under the FTCA.[856]

On appeal, the DOJ contended that the FTCA's discretionary function exception barred General Dynamic's action. Under the FTCA, the United States may be liable "for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee . . . under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[857] The FTCA is a specific waiver of sovereign immunity. There are, however, a number of exceptions to FTCA liability, including the discretionary function exception.[858]

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849. *Id.* at 473.

850. 996 F.2d 548 (2d Cir. 1993).

851. United States v. Brooks, 111 F.3d 365 (4th Cir. 1997). The Fourth Circuit held that the one million dollar jurisdictional threshold of the Major Fraud Act is met when the value of a prime contract is one million dollars or more, regardless of the value of the tainted subcontract. *Id.*

852. *Sain*, 141 F.3d at 472.

853. General Dynamics Corporation v. United States, 139 F.3d 1280 (9th Cir. 1998).

854. 28 U.S.C.A. § 1346 (West 1998).

855. The language of the contract provided that the contractor will "provide his best efforts, manpower, resources, and facilities, to design, develop and deliver the DIVAD Gun System . . . ." General Dynamics Corp. v. United States, 644 F. Supp. 1497, 1501 (C.D. Cal. 1996).

856. *Id.* at 1497.

857. *General Dynamics*, 139 F.3d at 1283 (citing 28 U.S.C.A. § 1346(b) (West 1998)).

In reversing the lower court, the Ninth Circuit agreed with the DOJ that the FTCA's discretionary function exception insulates the government from liability. The court noted that although the DCAA auditors committed professional negligence in auditing the DIVAD contract, the real source of General Dynamics' damages was the prosecution of the case by the DOJ. The court stated that prosecuting a case is a "discretionary function." Succinctly put, "[t]he decision whether or not to prosecute a given individual is a discretionary function for which the United States is immune from liability."[859]

Judge Fernandez summarized the court's sentiments about the entire case by stating, in part:

> The actions taken against General Dynamics and its employees will not be recorded as the Department of Justice's finest hour, nor, considering the ultimate candid request for dismissal, was it the Department's darkest one. A mistake was made, but, because prosecutors do not have ichor in their veins, mistakes can be expected from time to time. Mistakes, however, do not necessarily equal governmental liability.[860]

Thus, whether or not the DCAA auditors were negligent, the Ninth Circuit concluded that General Dynamics' difficulties flowed from the federal prosecutors' exercise of discretion in handling the case. Because the prosecution was a discretionary act, the government was immune from suit under the FTCA. Any effort by General Dynamics to do an "end run" was barred because the United States was immune from legal action under the discretionary function exception of the FTCA.

Ninth Circuit Holds that a Contracting Officer Lacks Standing to Pursue Qui Tam Action

Federal appellate courts addressed several *qui tam*[861] issues in 1998. One of the most interesting cases is *United States, ex. rel. Biddle v. Board of Trustees of Leland Stanford, Jr. University.*[862] In that case, the Office of Naval Research (ONR) entered an agreement with Stanford University to perform scientific research.

The ONR assigned Paul Biddle as an administrative contracting officer at Stanford University. Biddle alleged that Stanford overcharged the ONR for indirect costs. Biddle informed his supervisor to no avail. Biddle then raised his concerns with a congressional subcommittee. Consequently, the GAO and the DCAA started investigating Stanford. In September 1990, news media reports covered Biddle's accusations. Various newspapers and magazines, including the ABC news program "20/20," interviewed Biddle. In 1991, Stanford reduced its indirect rates by over twenty percent.

In September 1991, Biddle filed a *qui tam* suit. Following a two-year investigation, the DOJ declined to intervene. Biddle continued with the action. The district court dismissed Biddle's *qui tam* suit on jurisdictional grounds, because: (1) it was based upon "public disclosures," [863] and (2) Biddle did not qualify as an "original source"[864] of the information he provided the government.

In affirming the district court's decision, the Ninth Circuit addressed three issues. The first issue was whether the disclosures of Stanford's alleged fraud were "public disclosures" under the False Claims Act. The court held that the media reports of the alleged fraud were "public disclosures" within the meaning of the False Claims Act,[865] because the information

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858. *Id.* If one of the exceptions applies, sovereign immunity is not waived, and no subject matter jurisdiction exists.

859. *Id.* The court highlighted the tactics employed by General Dynamics. That is, General Dynamics pursued its case against DCAA as opposed to the DOJ so they could circumvent the jurisdictional impediment.

860. *Id.* at 1286.

861. 31 U.S.C.A. § 3730(b) (West 1998). Under the *qui tam* provisions of the False Claims Act, a private individual, known as a "relator," is authorized to bring a claim on behalf of the United States against anyone who knowingly presents a false or fraudulent claim to the United States in violation of 31 U.S.C.A. § 3729. If a relator wins his case, he will receive a percentage of the recovery, with the contractor paying the balance to the United States.

862. 147 F.3d 821 (9th Cir. 1998).

863. *Id*. at 824. Congress has limited the jurisdiction over *qui tam* actions. Specifically, 31 U.S.C. A. § 3730(e)(4)(A) provides:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless . . . the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A).

864. *Biddle*, 147 F.3d at 824. An "original source" is defined as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information. 31 U.S.C.A. § 3730(e)(4)(B) (West 1998).

was released to the news media before the suit was filed in district court.

The second issue was whether the public disclosure resulted in the suit. The case details several of the recent decisions that have wrestled with the "based upon" language. Ultimately, the court concluded that Biddle brought his *qui tam* action after he disclosed the allegations of fraud publicly.

The final inquiry was whether Biddle was the original source of the information—specifically, whether Biddle had direct and independent knowledge of the alleged fraud and whether he provided the information voluntarily. The inquiry turns on whether Biddle provided the information voluntarily or whether Biddle was under a duty to provide the information. The Ninth Circuit concluded that Biddle did not reveal the evidence of fraud voluntarily. The court considered Biddle's duties as the contracting officer. The court found that the government charges contracting officers with protecting the government's interest and, like auditors[866] contracting officers were barred from bringing *qui tam* actions. It distinguished the instant case from *Fine* and *Hagood v. Sonoma County Water Agency*.[867] In *Hagood*, the court concluded that the plaintiff voluntarily provided the information because his job did not require him to expose fraud. Rather, his job involved drafting contracts and performing other legal services.

Some commentators have found the Ninth Circuit's decision in the *Biddle* significant, because the court drew a bright line in determining when an action has been disclosed publicly.[868]

Taxation

Burden of Investigating Tax Ramifications Is on the Contractor

In *Centric-Jones Constructors*,[869] the contractor contended that the government's solicitation implied that the construction project was located only within rural Pima County, Arizona. The county did not have a tax, and the contractor did not know that any of the project was located in the town of Marana. The solicitation did not specify that the project was located in the town of Marana, and the contractor was not aware that the project extended into the taxing jurisdiction of the town until immediately before completion. The contract contained a standard fixed-price contract clause specifying that the price included all applicable federal, state, and local taxes and duties. The contractor demanded reimbursement for $157,495 in "gross receipts" taxes it had to pay the town of Marana. The IBCA held that a contractor is liable for any municipal taxes imposed if it fails to discover the applicability of taxes or fails to include them in its bid.[870] Although the government's solicitation only referred to the county and not the city, where the project was located, it was the contractor's error in not ascertaining and including the applicable municipal taxes in its bid. The IFB in this case required that each contractor determine the applicable state taxes on its own before submitting its bid. The contractor must determine its cost, including all tax consequences, when setting its price.

Material Government Misrepresentation Leads to Reimbursement of Gross Receipts Tax

In a negotiated procurement, *Jim Sena Construction Co*.[871] initially included New Mexico's "gross receipts tax" in its offer for a construction contract. Despite Sena's assertion to the contracting officer that the state gross receipts tax was applicable to the project, the contracting officer insisted that the federal government was exempt from the tax. Sena agreed not to include the tax in its proposal because of the Bureau of Land Management's (BLM) assurances that it would either obtain a tax exemption or reimburse the contractor for any tax exacted. Nevertheless, the contract still contained the usual clause making the contractor liable for all taxes. The BLM did not get an exemption, and the contracting officer denied a claim for reimbursement. The IBCA held that Sena was entitled to have the contract reformed to recover $47,131.59 of the New Mexico

865. *Biddle*, 147 F.3d at 825. The court analogized the case to United States *ex. rel*. Devlin v. California, 84 F.3d 358 (9th Cir. 1998), *cert. denied*, 117 S. Ct. 361 (1996). In *Devlin*, a government employee told the plaintiffs of alleged fraud in which he participated (falsified records). One of the plaintiffs proceeded to tell a newspaper reporter about the fraud. The newspaper reported the fraud. Within a week after the newspaper account, the plaintiffs filed a *qui tam* action. The Ninth Circuit held that because the action was filed after the newspaper disclosed the fraud publicly, the district court lacked jurisdiction unless the plaintiffs were an "original source" of the information. Biddle, 147 F.3d at 825.

866. *Biddle*, 147 F.3d at at 829 (citing United States *ex. rel.* Fine. v. Chevron Corp., 72 F.3d 740 (9th Cir. 1995)). In *Fine*, the relator was a supervisory auditor for the DOE's Office of Inspector General. The Ninth Circuit held, in part, that he was a salaried government employee, compelled to disclose fraud by the very terms of employment. *Fine*, 72 F.3d at 743.

867. 81 F.3d 1465 (9th Cir. 1996).

868. Robert M. Cowen, *Qui Tam Litigation: Ninth Circuit Rules Contracting Officer Cannot File Qui Tam Case Against Stanford*, Fed. Cont. Daily (BNA), June 1, 1998, *available in* WESTLAW, Legal News, BNA-FCD, June 1, 1998 FCD, d2.

869. Centric-Jones Constructors, No. 3899-98, 1998 WL 596779 (IBCA Sept. 2, 1998).

870. *Id*.

871. Jim Sena Constr. Co., No. 3761-3765, 1998 WL 401633 (IBCA July 16, 1998).

gross receipts tax paid, plus interest, for the misrepresentation relied upon by the contractor to its detriment.

Special Assessment or Tax: What is the Plain Language of the Agreement?

In *Wright Runstad Properties Ltd. Partnership*,[872] the GSA entered into a lease for office space that contained a "tax adjustment" provision. This clause obligated the government to "pay additional rent for its share of increases in real estate taxes" levied on the building. During the lease term, Seattle built a bus tunnel near the leased office building. To help defray the cost of the tunnel, Seattle levied a special assessment on commercial properties located nearby. The city levied a special assessment against Wright Runstad. Wright Runstad then "charged" a pro rata share to the GSA. The COFC held that the "tax adjustment" provision in the lease did not obligate the GSA to cover any portion of the special tunnel assessment. Instead of focusing upon governmental tax immunity issues,[873] the court viewed the government's obligations under "common law rules of contract interpretation."[874]

The court unequivocally stated that "tax adjustment" clauses can obligate the government to pay additional rent for its pro rata share of increases in real estate taxes levied on a lessor's property. A lease that obligates the government to pay real estate taxes, however, does not bind the government to indemnify the lessor for special assessments.[875] The government can be held responsible for special assessments that are true substitutes for general real estate taxes pursuant to "tax adjustment" clauses.[876] The court was not persuaded that the tunnel assessment was a "real estate tax in disguise." The court identified the tunnel assessment as an example of "the very definition of a special assessment." Finally, the plain meaning of the "tax adjustment" clause was dispositive. The "tax adjustment" clause was unambiguous in requiring the GSA to pay only its portion of the increases in "real estate taxes," not special assessments.

Freedom of Information Act (FOIA)[877]

In *Gilmore v. United States Department of Energy*,[878] U.S. District Court Judge William H. Orrick ruled that computer software developed by a government contractor was not an "agency record" because the agency lacked controls over it, and it illustrated nothing about the agency's decision-making process. Alternatively, Judge Orrick ruled that even if the software was an "agency record," FOIA Exemption Four[879] would protect it from release because disclosure would result in substantial competitive harm to the contractor.

Sandia Corporation developed the software while performing a management and operations contract for the DOE. By the terms of the contract, the software was initially the property of the government. The DOE, however, transferred the software to Sandia based upon Sandia's promise to commercialize the software. While transferring title to Sandia, the agency reserved a nonexclusive license to use the software on behalf of the United States. Judge Orrick held that this limited interest did not provide the agency with the unrestricted use required to give it control over the record for FOIA purposes.[880] In addition, Judge Orrick ruled that the software was not an agency record because it did "not illuminate the structure, operation, or decision-making structure of DOE."[881]

Judge Orrick found that the software was exempt from mandatory disclosure as "commercial or financial information obtained from a person and privileged or confidential."[882] Noting that the contractor had already licensed the software to another company for over $200,000, Judge Orrick declared that

872. 40 Fed. Cl. 820 (1998).

873. Under the intergovernmental tax immunity doctrine, the federal government is immune from state taxation. *Id*. at 823. Here, the court concluded that this doctrine was not applicable because the federal governmental was not taxed. *See* McCulloch v. Maryland, 17 U.S. 316 (1819).

874. *Wright Runstad*, 40 Fed. Cl. at 824.

875. *Id.* (citing McDaniel Bros. Constr. Co., GSBCA Nos. 6973, 7283, 84-2 BCA ¶ 17,497, *aff'd on reconsideration*, GSBCA No. 7283-R, 84-3 BCA ¶ 17,683).

876. *Id.* at 825.

877. 5 U.S.C.A. § 552 (West 1998).

878. 4 F. Supp.2d 912 (N.D. Cal. 1998).

879. Exemption Four allows withholding records that are trade secrets and commercial or financial information obtained from a person that are privileged or confidential. Trade secret is defined as "secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." 5 U.S.C.A. § 552 (West 1998).

880. *Id.* at 918 (citing Tax Analysts v. United States Department of Justice, 913 F. Supp. 599 (D. D.C. 1996), *aff'd*, 107 F.3d 923 (D.C. Cir.) (unpublished table decision), *cert. denied*, 118 S. Ct. 336 (1997)).

881. *Id.* at 920 (citing SDC Dev. Corp. v. Mathews, 542 F.2d 1116 (9th Cir. 1976); Baizer v. United States Dep't of the Air Force, 887 F. Supp. 225 (N.D. 1995)).

"[i]f the technology is freely available on the internet [where the requester had promised to put it], the value of Sandia's copyright effectively will have been reduced to zero."[883] Judge Orrick then concluded that there "can be no doubt that corporations will be less likely to enter into joint ventures with the government to develop technology if that technology can be distributed freely through the FOIA, irrespective of any intellectual property rights retained by the corporations."[884]

Environmental Contracting

Comprehensive Guidelines for Buying Products Containing Recovered Materials

On 26 August 1998, the EPA published a proposed rule that designated nineteen new items that are or can be made with recovered materials.[885] The guidelines set forth specific procedures. Within one year after publishing the guideline items, each agency must develop an affirmative procurement program ensuring that that it will purchase these items to the maximum extent practicable.[886] Also, while using the guideline items, agencies must not jeopardize the intended end use of the item.[887] The statutory requirement to purchase these items applies only to procurements over $10,000. It also applies when the purchased quantity of functionally equivalent items procured in the fiscal year exceeds $10,000.[888]

Protection of Stratospheric Ozone and Halon Manufacture: A Final Rule

On 5 March 1998, the EPA issued a final rule governing the manufacture of halon blends.[889] The final rule bans the manufacture of halon blends. It also prohibits the intentional release of halons during technician training. The intentional release of halons is also prohibited during testing, repair, and disposal of halon-containing equipment. The rule also requires appropriate training of technicians concerning emissions reduction and the proper disposal of halons and halon-containing equipment.

In the final rule, the EPA lists specific U.S. military installations that are affected by the ban.[890] Other affected organizations are those that manufacture halon blends, owners of halon-containing equipment, and persons who test, repair, or dispose of total flooding systems or hand-held fire extinguishers. It also includes those who employ technicians to service such equipment. From this rule, government agencies are likely responsible for their contractors performing government contracts within these categories.

Federal Compliance With Right-To-Know Laws

On 23 February 1998, the FAR Council adopted a final rule on Federal Compliance with Right-To-Know Laws and Pollution Prevention Requirements.[891] The final rule adopts the interim rule with changes.[892] The final rule also amends FAR Part 23 and Part 52, and implements Executive Order (EO) 12856.[893] This executive order requires federal facilities to

882. 5 U.S.C.A. § 552(b)(4) (West 1998).

883. 4 F. Supp. 2d at 923.

884. *Id*.

885. 63 Fed. Reg. 45,558 (1998). These items include nylon carpet with backing containing recovered materials, carpet cushions, flowable fill, railroad grade crossing surfaces, park and recreational furniture, playground equipment, food waste compost, and plastic lumber landscaping timbers and posts. The new items also include solid plastic binders, plastic clipboards, plastic file folders, plastic clip portfolios, plastic presentation folders, absorbents and adsorbents, awards and plaques, industrial drums, mats, signage, and manual-grade strapping. The proposed rule adds to the EPA's previous list of items made with recovered materials. These include floor tiles, structural fiberboard, laminated paperboard, tires, oil, cement and concrete containing fly ash, paper products, building insulation, engine coolants, patio blocks, traffic cones, traffic barricades, playground surfaces, running tracks, hydraulic mulch, yard trimmings compost, office recycling containers, office waste receptacles, plastic desktop accessories, toner cartridges, binders, and plastic trash bags. 61 Fed. Reg. 57,748 (1996).

886. 42 U.S.C.A. § 6962(e) (West 1998).

887. *Id.* § 6962(d)(2).

888. *Id.* The Resource Conservation and Recovery Act (RCRA) offers some exceptions to these requirements. These exceptions are if 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. Moreover, the contracting officer also considers price, availability, and competition.

889. 63 Fed. Reg. 11,084 (1998).

890. *Id.*

891. 63 Fed. Reg. 9051 (1998).

892. 62 Fed. Reg. 12,690 (1997).

comply with the planning and reporting requirements of the Pollution Prevention Act of 1990 (PPA)[894] and the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA).[895] Considering the public comments in response to the interim rule, the FAR was revised in an effort to clarify the obligations of federal facilities to comply with the reporting and emergency planning requirements of the applicable statutes.[896]

The rule applies to all contractors (including small businesses) that use toxic or hazardous substances in the performance of contracts on federal facilities.[897] Affected contractors must provide all necessary information to assist the federal facility in meeting its reporting requirements under the PPA, EO 12856, and the EPCRA.[898]

The GAO Reviews the DOD's Use of Single Contracts for Multiple Support Services

On 27 February 1998, the GAO released a report reviewing the DOD's use of a single contract for multiple base operations functions.[899] The report is based on the use of single contracts for multiple base operations support services at ten CONUS military installations. In this report, the GAO discusses how installations used these types of contracts for environmental cleanup and other environmental services. The report offers a good review for any agency deciding whether to use a multiple support service contract. It covers the characteristics of these contracts, the services used, their costs and efficiencies, and lessons learned.

The GAO Upholds Solicitations Requiring Compliance with Local Environmental Requirements

In *Red River Service Corp.*,[900] the GAO ruled that a solicitation for solid waste collection and disposal services properly included a provision requiring contractors to comply with local ordinances. The GAO upheld this provision although it had previously ruled that major federal facilities were exempt from local ordinances.

The Navy issued a solicitation for solid waste collection and disposal for Camp Pendleton, in San Diego County, California. The IFB envisioned a fixed-price, indefinite quantity contract. The IFB listed the requirements of San Diego County Ordinance Number 8790 as a prerequisite for contract award. This ordinance required the awardee to have a non-exclusive solid waste management agreement with the county. Red River argued that this requirement unduly restricted competition. It also argued that this was unnecessary because Camp Pendleton was a major federal facility and not required to comply with local environmental requirements.[901]

The GAO disagreed with Red River. First, the GAO stated that the procuring agency is required to specify its needs and then solicit bids in a manner that achieves full and open competition.[902] In preparing its solicitation, the agency believed that it must comply with the requirements of the RCRA.[903] Second, the GAO discussed its previous decisions in this area[904] and found that government facilities were not exempt from the general requirement that they comply with local rules that address

893. Exec. Order No. 12,856, 3 C.F.R. 616 (1994).

894. 42 U.S.C.A. §§ 13,101-13,109 (West 1998).

895. *Id.* §§ 11,001-11,050.

896. 63 Fed. Reg. 46,596 (1998).

897. *Id.*

898. To meet these requirements, FAR 52.223-5 was revised to read:

> (b) The Contractor shall provide all information needed by the Federal facility to comply with the emergency planning reporting requirements of Section 302 of EPCRA; the emergency notice requirements of Section 304 of EPCRA; the list of Material Safety Data Sheets required by Section 311 of EPCRA; the emergency and hazardous chemical inventoryf orms of Section 312 of EPCRA; the toxic chemical release inventory of Section 313 of EPCRA, which includes the reduction and recycling information required by Section 6607 of PPA; and the toxic chemical reduction goals requirements of Section (c) 3-3-2 of Executive Order 12856.

Id.

899. GENERAL ACCOUNTING OFFICE, BASE OPERATIONS—DOD'S USE OF SINGLE CONTRACTS FOR MULTIPLE SUPPORT SERVICES, REPORT NO. GAO/NSIAD-98-82 (Feb. 27, 1998).

900. B-279250, May 26, 1998, 98-1 CPD ¶ 142.

901. Monterey City Disposal Serv., Inc., B-218624, Sept. 3, 1985, 85-2 CPD ¶ 261; Solano Garbage Co., B-225398, Feb. 5, 1987, 87-1 CPD ¶ 125; Oakland Scavenger Co., B-236685, Dec. 19, 1989, 89-2 CPD ¶ 565; Waste Management of N. Am., Inc., B-241067, Jan. 18, 1991, 91-1 CPD ¶ 59.

902. 10 U.S.C.A § 2305(A)(1)(a)(I) (West 1998).

903. RCRA states that each Federal agency engaged in the disposal or management of solid or hazardous waste must comply with all federal, state, interstate, and local requirements concerning the control of these wastes as any other entity would be required. 42 U.S.C. A. § 6961(a) (West 1998).

solid and hazardous waste collection and disposal. In making this decision, the GAO deferred to the EPA's opinion.[905] The GAO pointedly stated that it would no longer follow its previous decisions in this area.

New Executive Order on Recycling

On 14 September 1998, President Clinton signed Executive Order 13101.[906] Entitled "Greening the Government through Waste Prevention, Recycling, and Federal Acquisition," the new executive order revokes Executive Order 12873.[907] Like its predecessor, however, Executive Order 13101 also states, "[c]onsistent with the demands of efficiency and cost effectiveness, the head of each executive agency shall incorporate waste prevention and recycling in the agency's daily operations and work to increase and expand markets for recovered materials through greater federal government preference and demand for such products."[908] It also states that "agencies shall comply with executive branch policies for the acquisition and use of environmentally preferable products and services and implement cost-effective procurement preference programs favoring the purchase of these products and services."[909]

The executive order provides a number of definitions. It defines "environmentally preferable" as "products or services that have a lesser or reduced effect on human health and the environment when compared with competing products or services that serve the same purpose."[910] It also defines "life cycle assessment" as "the comprehensive examination of a product's environmental and economic aspects and potential impacts throughout its lifetime, including raw material extraction, transportation, manufacturing, use, and disposal."[911]

The executive order creates a steering committee, a federal environmental executive, a task force, and agency environmental executive positions within each agency. The federal environmental executive is required to develop a government-wide waste prevention and recycling strategic plan within 180 days. The plan must: (1) include initiatives for the acquisition of environmentally preferable products, (2) devise ways to develop affirmative procurement programs,[912] (3) review and revise standards and specifications, and (4) aid in the development of new technologies for the creation and use of these products.

The executive order further discusses specific types of environmentally preferable products. First, it increases the minimum content standard for printing and writing paper to no less than thirty percent postconsumer material. If this paper is not reasonably available, does not meet performance requirements, or is cost prohibitive, the agency must purchase paper containing no less than twenty percent post consumer material. Thus, the executive order suggests that agencies can no longer use virgin paper. This requirement is effective 1 January 1999.

Finally, the executive order requires agencies to establish goals for solid waste prevention and recycling by 1 January 2000. Contractors working at government-owned, contractor-operated facilities, or providing work on government contracts, must also comply with this executive order.

Ethics in Government Contracting

OGE Proposes Changes to Standards of Ethical Conduct

The Office of Government Ethics (OGE) has proposed amending the standards of conduct rules governing Executive branch employees.[913] Of interest to procurement practitioners are the OGE's proposed changes to the gift rules[914] and the financial conflict of interest rules that implement 18 U.S.C.A. § 208.[915]

904. *See supra* note 902.

905. The GAO is required to defer to the EPA's reasonable interpretation of its regulations. Israel Aircraft Indus., Ltd., B-258229, July 26, 1995, 95-2 CPD ¶ 46.

906. Exec. Order 13,101, 63 Fed. Reg. 49,643 (1998).

907. Exec. Order 12,873, 58 Fed. Reg. 54,911 (1993).

908. *Id*.

909. *Id*.

910. *Id*.

911. *Id*.

912. 42 U.S.C.A. § 6002 (West 1998).

913. Standards of Conduct for the Executive Branch, 5 C.F.R. pt. 2635 (1998).

914. 63 Fed. Reg. 41,476 (1998).

915. *See* 18 U.S.C.A. § 208 (West 1998); 63 Fed. Reg. 45,415 (1998).

Gifts. The OGE proposes two changes to the gift rules. First, the OGE proposes to clarify the meaning of gifts given "because of the employee's official position."[916] Currently, the OGE's regulations define these gifts as those that would not have been "solicited, offered, or given had the employee not held his position as a Federal employee."[917] In the OGE's view, agencies have interpreted this definition too broadly. For example, the OGE notes that some agencies interpret the rule to encompass gifts based on the "mere happenstance" that the recipient was a government employee. Thus, the OGE proposes to change the rule to cover situations where the employee's "status, authority, or duties" associated with the employee's federal position motivate the gifts.[918] Under this definition, employees may accept a gift if the gift is motivated by circumstances unrelated to the employee's official status, authority, or duties.[919] Employees, however, still may not accept gifts from "prohibited sources," meaning employees cannot accept gifts from those who currently do business or seek to do business with the employee's agency.[920]

Second, the OGE intends to clarify the exception for gifts totaling twenty dollars or less per occasion. Currently, the regulation allows an employee to accept unsolicited gifts having an aggregate market value of twenty dollars or less per occasion. The aggregate market value of individual gifts, however, received from any one person must not exceed fifty dollars in a calendar year.[921] The OGE has noted that some ethics officials and employees are confused about whether to aggregate all gifts from a particular occasion or to aggregate only gifts from each source.[922] The OGE proposes amending the rule to state that the de minimus exception allows gifts aggregating at twenty dollars "per source per occasion."[923] According to the OGE, this amendment would allow employees to accept gifts from any source per occasion if the aggregate amount per source stays under the twenty-dollar exception.[924]

Financial Conflicts of Interest. The OGE also proposes to align its regulatory language with that of 18 U.S.C.A. § 208. The amendments[925] propose to codify the OGE's long-standing advice that 18 U.S.C.A. § 208 controls subpart F of its standards of conduct regulations.[926] When it first issued the standards of conduct regulations in 1992, the OGE combined in subpart F the restrictions from 18 U.S.C.A. § 208 relating to negotiating for employment with those from Executive Order 12674[927] on seeking employment.

As a result, subpart F contained discrepancies among various sections. Some sections adopt the "seeking employment" language of the executive order, a term that encompasses both negotiating and other lesser contacts. The language also covers situations where the employee's "performance or nonperformance of official duties" will affect the financial interests of a prospective employer.[928] By contrast, other sections mirror 18 U.S.C.A. § 208 and extend the coverage only to a "particular matter that has a direct and predictable effect" on those finan-

916. 5 C.F.R. § 2635.203(e) (1998).

917. *Id.*

918. 63 Fed. Reg. at 41,476.

919. The OGE proposes a new example to illustrate the new definition. *Id.* at 41,477.

920. 5 C.F.R. § 2635.203(d) defines "prohibited source" as any person who seeks official action by the agency, does business or seeks to do business with the agency, conducts activities regulated by the agency, has interests affected by the employee's performance or nonperformance of official duties, or is an organization a majority of whose members fall within the preceding groups.

921. 5 C.F.R. § 2635.204(a) (1998).

922. 63 Fed. Reg. at 41,477.

923. *Id.*

924. OGE also proposes a new example to illustrate this change:

> During off-duty time, an employee of the Department of Defense (DOD) attends a trade show involving companies that are DOD contractors. He is offered a $15 computer program disk at X Company's booth, a $12 appointments calendar at Y Company's booth, and a deli lunch worth $8 from Z Company. The employee may accept all three of these items because they do not exceed $20 per source, even though they total more than $20 at this single occasion.

Id.

925. 63 Fed. Reg. at 45,415.

926. 5 C.F.R. §§ 2635.601-606 (1998).

927. Exec. Order No. 12,674, 3 C.F.R. 215 (1990).

928. *See* 5 C.F.R. §§ 2635.601-602 (1998).

cial interests.[929] To close this gap, the OGE proposes amending subpart F to conform to 18 U.S.C.A. § 208. Each section in subpart F will state that it restricts only those employees "participating personally and substantially" in a particular matter. By erasing this "unintended" discrepancy, the OGE hopes to eliminate confusion and provide a clear meaning to the regulatory language.[930]

DOD Issues Guidance on Procurement Integrity Rules

On 28 August 1998, the Director of the DOD Standards of Conduct Office (SOCO) issued new guidance for the DOD agencies to use when confronted with Procurement Integrity Act (PIA) issues.[931] The product of the Procurement Integrity Tiger Team (PITT),[932] the SOCO Memorandum attempts to interpret the 1997 changes to the PIA.[933]

The SOCO Memorandum addresses several areas that troubled ethics counselors previously. For example, it recommends that agencies stop using the obsolete term "procurement official," and substitute a person's position, such as Program Manager and Source Selection Authority.[934] The SOCO memorandum also clarifies that the PIA's one-year post-employment ban, which applies to persons holding certain procurement-related positions, extends only to the prime contractor.[935] It discusses when employees must report employment contacts, including whether an employee must report as a contact a "right of first refusal" under an OMB Circular A-76 procurement.[936] Additionally, the SOCO Memorandum permits DOD agencies, in certain cases, to discipline employees whom the agency has ordered to perform procurement duties but become disqualified when they seek employment with a contractor.[937]

Small Talk Not Enough to Show Agency Bias[938]

In *Oceanometrics, Inc*., the Navy issued a RFP for an anti-submarine warfare development program. In a subsequent protest, Oceanometrics claimed that a Navy employee working on the contract socialized with a competitor and leaked procurement-sensitive information.[939] The GAO dismissed the case, finding no nexus between the social contacts and Oceanometrics' claim that the government employee divulged contract-sensitive data. Rather, the GAO highlighted key facts that deflected any agency bias. The Navy and the contractor personnel met in a public place with groups of other professionals. Additionally, the GAO noted that Oceanometrics personnel were also present at this Navy-sponsored locale. Finally, the two targeted employees denied having a personal friendship. Relying on these facts, and finding no contrary evidence, the GAO observed that "socializing between an individual participating in a competitive procurement and a government contracting official does not, in and of itself, warrant a conclusion that bias or preferential treatment occurred."[940]

929. *See* 5 C.F.R. § 2635.604(a), § 605(a), § 2635.606(a) (1998).

930. 63 Fed. Reg. at 5,415.

931. Memorandum, Director, DOD Standards of Conduct Office, to Members of the DOD Ethics Community, subject: Guidance on Application of the Procurement Integrity Law and Regulation (28 Aug. 1998) [hereinafter SOCO Memorandum], *available at* <http://www.defenselink.mil/dodgc/defense_ethics/>.

932. The DOD formed the PITT to propose guidance for the DOD agencies when applying and interpreting the PIA. Members of the PITT included the DOD Standards of Conduct Office, the individual services, the DLA, and the National Security Agency (NSA). *Id*.

933. 41 U.S.C.A. § 423 (West 1998).

934. SOCO Memorandum, *supra* note 932, para. 1.

935. *Id*. para. 2. The SOCO Memorandum, however, allows ethics counselors to find inappropriate compensation from "sham" subcontracts.

936. *Id*. para. 6. The FAR requires a clause in OMB Circular A-76 procurements giving government employees adversely affected by the contract award a right of first refusal for employment under the contract. FAR, *supra* note 15, at 7.305(c).

937. SOCO Memorandum, *supra* note 932, para. 10. The SOCO Memorandum states, in part:

> If a civilian employee or military service member is ordered to perform duties consistent with his or her position, such as perform the duties of Source Selection Authority, and that individual takes actions that require disqualification from those duties, that individual may be subject to administrative action. Actions taken by an employee that result in disqualification may be construed as a refusal to perform assigned duties.

Id.

938. Oceanometrics, Inc., B-278647.2, June 9, 1998, 98-1 CPD ¶ 159.

939. Oceanometrics also raised other issues. It alleged that amendments to the RFP set overly restrictive requirements for key personnel and created unfair cost realism factors; that the Navy weighted certain experience improperly when evaluating key personnel; and that the contracting officer extended the incumbent's contract improperly to favor that firm's competitive stance during the procurement process. *Id*. at 2.

940. *Id*. at 5.

Organizational Conflicts of Interest

Contracting agencies must review potential organizational conflicts of interest and, if possible, reduce or avoid, those conflicts prior to contract award.[941] Two interesting but unsuccessful attempts to argue the presence of organizational conflicts of interest are *Professional Gunsmithing Inc*.[942] and *Battelle Memorial Institute*.[943]

GAO Shoots Down Conflict of Interest Charges. In *Professional Gunsmithing Inc*., the FBI issued a solicitation for .45 caliber pistols. The FBI hired a gun consultant as a technical advisor on the weapon. Eight offerors submitted proposals, including Professional Gunsmithing and Springfield Armory. Following testing and evaluation, the FBI awarded the contract to Springfield Armory. Professional Gunsmithing protested the award.

Professional Gunsmithing argued that the FBI tainted its award to Springfield because a conflict of interest existed between the gun consultant and the awardee. Specifically, Professional Gunsmithing claimed that the consultant had sued Springfield over a gun design to which the consultant holds a trademark. As part of the settlement, Professional Gunsmithing claimed that Springfield could use the consultant's design in future guns if it paid royalties to the FBI's consultant.[944]

Labeling the claimed conflict of interest as "remote and speculative," the GAO denied the protest.[945] The GAO found no evidence that Springfield used the consultant's gun design for the FBI procurement. The GAO, however, found overwhelming evidence that the consultant did not influence the procurement either for Springfield or against Professional Gunsmithing. The GAO concluded that speculative conflicts of interest do not violate the FAR, which requires agencies to avoid or mitigate significant conflicts of interest.[946]

A Shot in the Arm: The GAO Finds no Conflict of Interest. Likewise, the GAO found no evidence to support conflict of interest charges in a vaccine contract.[947] Unlike most organizational conflict of interest cases, the GAO focused on the extent to which government involvement pre-and post-contract created an organizational conflict of interest.

In *Battelle Memorial Institute*, the Army Joint Program Office for Biological Defense awarded a contract to DynPort for biological defense vaccines. In its proposal, DynPort proposed using testing facilities at the U.S. Army Medical Research Institute of Infectious Diseases (USAMRIID). Two USAMRIID employees served on the SSEB. Battelle claimed that DynPort's proposal created an organizational conflict of interest. The Army, however, interpreted DynPort's proposal differently, finding that a DynPort subcontractor would be responsible for meeting the testing requirements at either its facility, with USAMRIID, or with another Army facility. From these facts, the GAO agreed with the contracting officer that no conflict of interest existed, finding USAMRIID's potential involvement "limited."[948]

In this case, the GAO addressed an issue one commentator predicts will arise with increasing frequency in light of the government's push towards outsourcing and privatization.[949] The GAO framed the issue as follows:

> [W]here a potential contractor proposes to meet a solicitation's requirements by offering performance by a government facility, and personnel employed by that facility are involved in evaluating the competing offerors' proposals, it is incumbent on the contracting officer, in complying with the requirements of FAR § 3.101, to consider whether similar situations involving contractor organizations would require avoidance, neutralization or mitigation and, if so, to take remedial action.[950]

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941. FAR, *supra* note16 , at 9.504(a).

942. B-279048.2, 1998 WL 526375 (Comp. Gen. Aug. 24, 1998).

943. B-278673, Feb. 27, 1998, 98-1 CPD ¶ 107.

944. *Professional Gunsmithing Inc*., 1998 WL 526375, at *2-3.

945. *Id*. at *3.

946. *Id*. at *4. Professional Gunsmithing argued that any hammer resembling the consultant's trademarked hammer is, in fact, one of the consultant's hammers, the sale of which benefited the consultant. The GAO disagreed. The record showed that Springfield's proposal stated it would use a hammer design from another manufacturer. Moreover, the pistols Springfield submitted for testing did not use the consultant's hammer. Thus, the GAO found no basis to conclude that Springfield would use the consultant's design for the FBI contract. *Id*.

947. Battelle Memorial Inst., B-278673, Feb. 27, 1998, 98-1 CPD ¶ 107.

948. *Id*. at 8.

949. *Limited Agency Role in Performing Contract Doesn't Create Significant Conflict, GAO Says*, Fed. Cont. Daily, (BNA), May 1, 1998, *available in* WESTLAW, Legal News, BNA-FCD, May 1, 1998 FCD, d7.

Noting that FAR subpart 3.1 does not provide guidance for these situations, the GAO stated that section advised government employees to "avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships."[951] According to the GAO, the organizational conflict of interest provisions in FAR subpart 9.5 addressed analogous situations involving contractor organizations. Specifically, FAR subpart 9.5 requires the contracting officer to analyze situations on a case-by-case basis to see if the agency must avoid, neutralize, or minimize an organizational conflict of interest. The GAO concluded that the contracting officer met the dual requirements of FAR subpart 3.1 and FAR subpart 9.5. It agreed that USAMRIID played a "limited" role in performing DynPort's contract, and any significant conflict of interest was dispelled when USAMRIID personnel evaluated DynPort's proposal.

Don't Shoot! The GAO Tells Army to "Execute" Conflict of Interest Clause in Contract. By contrast, the GAO sustained an organizational conflict of interest protest in *J&E Associates, Inc*.[952] In that case, the Army issued a RFP for educational support services at Fort Rucker, Alabama. The solicitation did not contain an organizational conflict of interest clause prohibiting prospective offerors currently offering courses at Fort Rucker from submitting proposals.[953] J&E Associates Inc. protested, asserting that the solicitation failed to address the conflicts of interest of an institution which, if awarded the contract, could advise Army personnel to enroll in its courses. It alleged that the solicitation should contain a clause preventing those educational institutions from competing for the contract. The Army argued that no organizational conflict of interest would arise because the solicitation required the contractor to act in the best interest of the service member and the government.

The GAO sustained the protest, finding that the Army's argument "misses the point" of the organizational conflict of interest regulations[954] requiring the Army to address the conflict of interest issues. The GAO did not, however, require the Army to eliminate from the competition educational institutions already providing courses at Fort Rucker. Instead, it recommended that Army avoid or reduce the conflict through "appropriate restraints" on contract performance. It suggested a contract clause precluding an educational institution awarded the contract from advising service members to enroll in its courses. The GAO recommended the Army amend the solicitation to address the conflict issue and then resolicit.

Construction Contracting

Knowledge Not Superior if Reasonably Available

In May 1994, the USPS issued a solicitation for a new post office.[955] Among other things, the solicitation contained a project manual and a construction rider. The project manual contained the project specifications, the preliminary soils testing report,[956] and a health department permit for the septic system. It did not, however, contain the full soils testing report.[957] Instead, the project manual indicated that the USPS would make the full report available upon request. The construction rider required offerors to examine the site and held the lessor responsible for all surface and subsurface site conditions.[958]

Thomas J. Young, Jr. visited the site and reviewed the project manual before he submitted his offer, but he did not request the full soils testing report. As a result, Mr. Young did not know that the full report indicated that a house previously had occupied the site. Similarly, Mr. Young did not know that

950. *Id.* at 5.

951. FAR, *supra* note 15, at 3.101, states:

> Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in [g]overnment-contractor relationships.

952. B-278771, Mar. 12, 1998, 98-1 CPD ¶ 77.

953. The draft solicitation included a clause prohibiting such institutions from competing. However, the contracting officer recommended deleting this clause, finding that these institutions could offer "objective advice and assistance to service members," and that any potential bias in assisting in a service member's selection of courses would be mitigated by the Army's direct oversight of the contract. *Id*. at 2.

954. *Id.* at 3. The GAO observed that an organizational conflict of interest could arise from a contractor's relationship with other entities, regardless of its good faith and adherence to the contract terms.

955. Thomas J. Young, Jr., PSBCA No. 3885, 98-2 BCA ¶ 29,772. The solicitation required the successful offeror to purchase the site, construct a post office based on the USPS's plans and specifications, and lease the post office back to the USPS for a basic term of twenty years. *Id.* at 147,527.

956. *Id.* at 147,528. Among other things, the preliminary soils report contained a two-page cover letter, a one-page Perk Test Summary, a one-page soil boring plot plan, and boring logs showing the results of two soil borings and two percolation borings. *Id.* at 147,527.

957. *Id.* at 147,528. Neither the architect who prepared the plans and specifications for the post office, nor the USPS project manager read the full report. *Id.* at 147,527.

the full report indicated that the contractor might encounter old footings, septic tanks, or other hidden features during grading operations.[959]

On 22 August 1994, the USPS accepted Mr. Young's offer and executed the lease agreement. Several months later, Mr. Young's subcontractor found and removed the remains of a house that was buried at the site. Mr. Young then submitted a claim for his increased costs.

The central issue was whether the USPS was liable for Mr. Young's increased costs because it failed to disclosed "superior knowledge" regarding the site. Mr. Young argued that the USPS had a duty to tell prospective offerors that a house had once occupied the site, and debris may still be beneath the surface. In addition, Mr. Young argued that the information in the project manual was misleading because it did not show any subsurface debris. The board disagreed with Mr. Young. The board found that the information in the project manual was accurate and made no representations about subsurface conditions at locations other than the boring site locations.[960] The board then found that the information in the full soils testing report was reasonably available to Mr. Young. Therefore, the board denied Mr. Young's "superior knowledge" claim.[961]

NAF Contracting

Claim Filed with Board Seven Years After Termination Not Barred by Statute of Limitations

In 1987, the Composite Recreational Fund at the U.S. Naval Station, Panama Canal, awarded a five-year video rental concessionaire contract to Home Entertainment International, S.A. (HEISA). In August 1989, the naval station commander barred all members of the company from the base for criminal activity related to their business operations. Home Entertainment International S.A. filed a "formal protest" with the commander in September 1987, claiming that the Navy's action was a breach of contract.[962] The contractor also advised it would sue in the "United States Court of Claims" for damages and lost profits.[963] Apparently, the Navy took no action in response to HEISA's "claim."

In February 1997, HEISA filed a certified claim with the naval station commander demanding $500,000 for lost profits and the value of property "confiscated" by the Navy. Again, the Navy did not respond, and the contractor appealed to the ASBCA. The Navy moved to dismiss the case for lack of jurisdiction, arguing that the six-year statute of limitations[964] applicable to civil actions barred the appeal. The board disagreed, however, and noted that the bar applies only to civil actions filed in a judicial court. The board concluded further that a "cause of action" had not accrued for purposes of filing a complaint under the statute because the mandatory administrative forum had not rendered a decision.[965]

Information Technology

Regulatory Changes

ITMRA Implemented. On 9 December 1997, the DAR Council and the Civilian Agency Acquisition Council issued a final rule amending the FAR[966] to implement the Information Technology Management Reform Act (ITMRA) of 1996.[967] The final rule

958. *Id*. at 147,528. The construction rider stated, in part, that: "Offerors must examine the site and be thoroughly acquainted with the conditions thereon. The Lessor will be responsible for site conditions including but not limited to subsurface or latent physical conditions or unknown physical conditions of an unusual nature differing materially from those ordinarily encountered." *Id.* This language is unique because it relieves the USPS of liability for differing site conditions. *See* FAR, *supra* note 16, at 52.236-2.

959. *Thomas J. Young, Jr.*, 98-2 BCA ¶ 29,727 at 147,527. The project manual stated, in part:

> [S]pecial attention should be directed to locating and removing any buried pipelines, septic tanks, drain fields or basement walls. Because this area was previously occupied by a house, there is the potential for grading operations to uncover old footings, septic tanks, or other hidden features in the subsurface. Generally, such features will require removal; however, details regarding their treatment must be determined on a case-by-case basis.

Id.

960. *Id*. at 147,530. The board distinguished *United States v. Atlantic Dredging Co.* because the government in that case misrepresented the actual site conditions. *See* United States v. Atlantic Dredging Co. 253 U.S. 1, 11 (1920).

961. *Thomas J. Young Jr.*, 98-2 BCA ¶ 29,772 at 147,530. Mr. Young ultimately prevailed on part of a second claim for delay damages. *Id*.

962. *See* Home Entertainment Int'l, S.A., GSBCA No. 50920, 98-2 BCA ¶ 29,959 at 148,237.

963. *Id.* HEISA did not claim a sum certain, include a contract number, or request a contracting officer's final decision.

964. *See* 28 U.S.C.A. § 2401(a) (West 1998) (barring civil actions against the United States where complaint is filed more than six years after the right of action accrues).

965. *Home Entertainment*, 98-2 BCA ¶ 29,959 at 148,238. The board also rejected the Navy's position that a similar statute of limitations barred HEISA's appeal. *Id. See* 28 U.S.C.A. § 2501 (West 1998) (providing that claims within the jurisdiction of the COFC are barred unless they are filed no later than six years after claim accrues).

adopts the 1996 proposed rules[968] with one change that clarifies the definition of "information technology."[969] The final rule addresses imbedded information technology that was missing from the proposed regulation. FAR Part 39 implements the final rule.

Modular Contracting. On 23 February 1998, the DAR Council and the Civilian Agency Acquisition Council issued a final rule[970] on modular contracting implementing section 5202 of the ITMRA.[971] The final rule amends FAR Part 39 and is set out in FAR 39.103. The final rule creates modular contracting techniques for acquiring information technology.[972] Modular contracting provides for the delivering, implementing, and testing of a workable system or solution in discrete increments or modules.[973] Modular contracting may be achieved by a single procurement or multiple procurements, but is intended to ensure that the government is not obligated to purchase more than one module at a time.

Year 2000 Compliance

On 18 December 1997, Mr. Anthony M. Valletta, the Acting DOD Chief Information Officer, issued a memorandum that requires DOD information technology procurements to comply with Year 2000 (Y2K) requirements.[974] This requirement applies to all DOD purchases by any acquisition method, including orders placed under contracts or schedules issued by other agencies."[975]

So, How Does the Year 2000 Problem Affect Procurements?[976]

FAR Part 39 requires agencies to acquire information technology that is Y2K compliant.[977] FAR Part 39 does not apply to embedded information technology, such as that used in heating systems or medical devices.[978] Contracting officers and contract attorneys, however, should ensure that new contracts for information technology comply with FAR Part 39. Although the definition of information technology does not include any equipment with imbedded IT, contracting personnel should also draft similar compliance language. Since the terms of warranty clauses may not last until January 2000, contracting officers should conduct Y2K compliance testing as part of their acceptance testing. Agencies also should consider modifying existing contracts to achieve Y2K compliance by requiring

966. 62 Fed. Reg. 64,914 (1997).

967. Pub. L. No. 104-106, Division E, § 5101, 110 Stat. 680. *See* Major Kathryn R. Sommerkamp et al., *Contract Law Developments of 1996—The Year in Review*, ARMY LAW., Jan. 1997, at 103-05.

968. *See* 61 Fed. Reg. 41,467 (1996).

969. FAR 2.101(c) provides:

> (c) The term "information technology" does not include—
>
> (1) Any equipment that is acquired by a contractor incidental to a contract; or
>
> (2) any equipment that contains imbedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. For example, HVAC (heating, ventilation, and air conditioning) equipment such as thermostats or temperature control devices, and medical equipment where information technology is integral to its operation, are not information technology.

FAR, *supra* note 15, at 2.101(c).

970. 63 Fed. Reg. 9068 (1998).

971. ITMRA, § 5113, 110 Stat. At 681-83.

972. *See generally 1997 Year in Review*, *supra* note 2, at 88.

973. Under modular contracting, agencies divide the purchase of an IT system into smaller "stand-alone" modules. Several modules or purchases are required to complete a system. In other words, the goal of modular contracting is to purchase smaller units that will function independently, yet allow for the creation of integrated systems through the execution of additional modules. *Id*. A typical example of modular contracting may be found in any office that is networked so that several computer stations share in the use of common drives.

974. Memorandum, DOD Chief Information Officer, subject: Acquisition of Year 2000 (Y2K) compliant Information Technology (IT) and Bringing Existing IT into Compliance (Dec. 18, 1997) [hereinafter Y2K Compliance Memorandum]. FAR 39.002 defines Year 2000 compliance as:

> That the information technology accurately processes date/time data (including, but not limited to, calculating, comparing, and sequencing) from, into, and between the twentieth and twenty-first centuries, and the years 1999 and 2000 and leap year calculations, to the extent that other information technology, used in combination with the information technology being acquired, properly exchanges date/time data with it.

FAR, *supra* note 15, at 39.002.

contractors to repair or replace systems that are not in compliance.[979]

Multiple Award Schedules and ID/IQ Contracts

Navy Goes Against Grain of Competition in Contracting Act in Schedule Furniture Buy

In *Marvin J. Perry & Associates*,[980] the Navy was buying 563 sets of red oak sleeping room furniture for its Naval Training Center at Great Lakes, Illinois. After obtaining several prices, the Navy acquired the furniture through the Federal Supply Schedules (FSS).[981] The FSS vendor's wood supplier, however, mistakenly provided ash rather than red oak.[982] Consequently, the Navy agreed to modify the delivery order at no-cost to permit substitution of the ash wood. The ash furniture was subsequently delivered.

The protester asserted that ash is materially different than red oak in terms of cost and quality.[983] The Navy did not dispute the inferiority and lower price of the substituted wood. Rather, it argued that the material savings would not have translated into significantly lower furniture costs, asserting that its post-protest research showed that ash normally is not as readily available as red oak in the quantities needed to fill large orders. The GAO was not convinced, especially in light of Perry's supporting documentation regarding lumber prices.[984] In addition, the GAO found that the change was one that reasonably could not have been anticipated by Perry or the other FSS vendors that supplied quotes for the red oak.[985]

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975. *See* Y2K Compliance Memorandum, *supra* note 975. *See also* FAR, *supra* note 15, at 39.106, which provides:

> When acquiring information technology that will be required to perform date/time processing involving dates subsequent to December 31, 1999, agencies shall ensure that solicitations and contracts—
>
> (a)(1) Require the information technology to be Year 2000 compliant; or
> (2) Require that non-compliant information technology be upgraded to be Year 2000 compliant prior to the earlier of
> (i) the earliest date on which the information technology may be required to perform date/time processing involving dates later that December 31, 1999; or
> (ii) December 31, 1999; and
> (b) As appropriate, describe existing information technology that will be used with the information technology to be acquired and identify whether the existing information technology is Year 2000 compliant.

Id.

976. On 1 January 2000, many of these systems may malfunction or shut down completely. The systems that could fail include operational and strategic military systems, telecommunications, pay and finance, personnel systems, security systems, weapons systems, and a myriad of other functions dependent on computers. This would completely disrupt military operations for days or even weeks. The problem goes far beyond computers. Many electronic devices contain processors or timing devices, known as "embedded information technology," that also may fail or malfunction on 1 January 2000. The failure of these embedded chips could also disrupt normal operations for days, shutting down, for example, traffic lights, elevators, heating and air-conditioning systems, medical devices, security locks, fire alarms, and sprinkler systems. *See*, General Accounting Office, Defense Computers: Year 2000 Computer Problems Threaten DOD Operations, Report No. GAO/AIMD-98-72 (April 30, 1998) [hereinafter GAO, Year 2000 Computer Problems].

977. *See* FAR, *supra* note 15, at 39.106. The GAO concluded that the DOD's Y2K compliance efforts fall woefully short of one hundred percent compliance. According to current estimates, of the 2915 mission-critical systems within the DOD, only 530 or 18.3 percent are Y2K compliant. *See* GAO, Year 2000 Computer Problems, *supra* note 977, at 10. The GAO also found shortages with the Army's program as well. The GAO reported in May 1998 that 160 of 376 mission-critical systems within the Army are compliant (42.6%); 6699 of 19,731 (33.9%) non-mission critical Army systems. The GAO also criticized the Army's Year 2000 program, indicating it is at risk of failure. *See* General Accounting Office, Defense Computers: Army Needs to Greatly Strengthen Its Year 2000 Program, Report No. GAO/AIMD-98-53 (May 29, 1998) at 8.

978. *See* FAR, *supra* note 15, at 2.101(c).

979. The only problem with such modifications is whether they are within the scope of the original contract.

980. B-277684, Nov. 4, 1997, 97-2 CPD ¶ 128.

981. *See generally* FAR, *supra* note 15, at subpt. 8.4. The GSA awards and administers this program pursuant to the Federal Property and Administrative Services Act of 1949, Pub. L. No. 152-288, 63 Stat. 377. The Schedules provide federal agencies with a simplified process for obtaining commonly used commercial supplies and services at prices associated with volume buying.

982. *Marvin J. Perry*, 97-2 CPD ¶ 128 at 2.

983. *Id.* at 3.

984. The protester presented a copy of the Weekly Hardwood Review. This periodical showed that red oak was over sixty percent more expensive per one-thousand board feet. *Id.* at n.4.

985. *Id.* at 4.

The Navy also argued that, unlike a traditional bid or offer, a delivery order need not conform, in every detail, to the request for quotations. The decision, however, notes that the Navy elected to hold a competition by seeking several vendor quotes in order to obtain a good price. Having so elected, the Navy had an obligation to ensure that the competition was conducted fairly.[986]

The Limits of Discretion in Evaluating Schedule Quotes

In *COMARK Federal Systems*,[987] the Health Care Financing Administration (HCFA), Department of Health and Human Services, competitively issued blanket purchase agreements[988] with three FSS vendors for contractor-configured groupings of computer systems and related hardware and services.[989] A couple of weeks later, the HCFA issued a RFQ to the three FSS vendors for 1950 computer workstations. The RFQ specifically referred to the BPA, that stated that it was issued pursuant to the FSS.[990] The BPA contained a number of specifications, including a requirement that all computers delivered contain a minimum of a two gigabyte hard drive.

The evaluators assigned numerical scores to quotes. The evaluated categories included system design, features, performance, and price.[991] The HCFA conducted a cost-technical trade-off, ultimately choosing a higher-priced system that included a hard drive with memory capacity in excess of the minimum hard drive requirement stated in the BPA.[992]

The protester argued that the RFQ did not specify what evaluation criteria would be used; therefore the agency improperly engaged in a "best value" procurement rather than selecting the lowest-priced, technically acceptable offer. The agency responded that best value determinations are permitted under the FSS.[993] The GAO agreed with the agency's statement, but found that once an agency shifts responsibility to the vendor to select items on which to quote, it must provide some guidance about the evaluation criteria to have a meaningful competition.[994] The GAO conceded that an agency need not identify detailed evaluation criteria in a RFQ, but must, at a minimum, state whether it is willing to consider paying a higher price for greater features or performance.[995]

Buy American Act

The DOD issued a new rule applying the Buy American Act[996] to the acquisition of information technology.[997] The rule provides that it is not in the public interest[998] to apply the Buy American Act's restrictions to American-made information technology products in acquisitions subject to the Trade Agreements Act.[999]

Agency's should evaluate offers of American-made information technology products that are subject to the Trade Agreements Act in FSS Groups 70 and 74[1000] without considering whether the product meets the standards of a domestic product.

986. *Id.*

987. B-278343, Jan. 20, 1998, 98-1 CPD ¶ 34.

988. The FAR authorizes the creation of blanket purchase agreements (BPAs) under the FSS. "if not inconsistent with the terms of the applicable schedule contract." FAR, *supra* note 15, at 13.210(c)(3). The use of BPAs in FSSs has exploded in recent years, turning the schedules into an extensively used source for repetitive purchases of small dollar items. With the new price reductions clause and the elimination of maximum order limitations, they are a powerful purchasing tool, affording considerable discretion and bargaining power.

989. The GAO approved this shifting of responsibility for selecting items from schedule offerings, particularly in the area of information technology where "the large number of possible combinations might make it difficult for agency personnel unfamiliar with the particular equipment or related technical issues." *Id.* at 4.

990. *Id.* at 3.

991. *Id.* at 2.

992. *Id.* at 3.

993. *See* FAR, *supra* note 15, at 8.404(b)(2).

994. COMARK, 98-1 CPD ¶ 34, at 4.

995. *Id.* at 5.

996. 41 U.S.C.A. §§ 10a-d (West 1998). Generally, the Buy American Act establishes a preference for the acquisition of domestic "articles, materials, and supplies" when they are being purchased for use in the United States. The Buy American Act was a depression-era statute designed to protect American capital and jobs.

997. 63 Fed. Reg. 21,876 (1998) (amending DFARS Part 225).

998. 41 U.S.C.A. § 10a (West 1998). The Buy American Act permits the head of a procuring agency to waive application of the Act if its application would be inconsistent with the public interest.

999. 19 U.S.C.A. § 2501 (West 1998).

The new rule applies in acquisitions that are greater than $190,000. The DOD's rationale for the new rule is as follows:

The different rules of origin under the Buy American Act and the Trade Agreements Act result in disproportionately burdensome recordkeeping requirements on firms offering information technology products, because eligible offers under the Trade Agreements Act are exempt from the Buy American Act, but offers of U.S.-made products are not exempt. This rule will relieve U.S. manufacturers of information technology products from the burden of researching and documenting the origin of components for information technology products, because the Buy American Act component test no longer applies. This rule will also simplify the evaluation of offers because, for acquisitions subject to the determination, there is only one class of U.S. made products, and no preference for domestic products.[1001]

FISCAL LAW

Purpose

The Business Card Saga Continues

In the 1997 Year In Review,[1002] we discussed a DOJ[1003] opinion regarding the use of appropriated funds to purchase business cards for agency employees. As last year's article discussed, the DOJ disagreed with the numerous GAO opinions that decided it was improper to use appropriated funds for business cards. The DOJ stated that it was hard to reconcile the GAO's purpose test with its opinions prohibiting the use of appropriated funds for business cards.

Since the DOJ's August 1997 opinion, other agencies, including the DOD, have decided it is proper to use appropriated funds for business cards.[1004] In a memorandum dated 28 August 1998, the DOD modified its policy. The DOD now permits the printing of business cards, using existing software and agency-purchased card stock.[1005] It authorized the use of agency-printed business cards for an employee's official activities when "the exchange of cards would facilitate mission-related business communications."[1006] The memorandum distinguished mission-related business communications from those of a social or business courtesy.[1007] The DOD authorized agencies, including the military departments, to permit the printing of business cards for organizations or employees in positions that require business cards to perform their official functions.[1008]

A Governmental Agency Can Fund Expanded Transition Assistance for Civilian Employees

In *National Aeronautics and Space Administration (NASA)—Use of Appropriations to Fund Expansion of "Career Transition Assistance Program,"*[1009] NASA asked the GAO whether it could use appropriated funds to expand its Career Transition Assistance Program (CTAP).[1010] The NASA wanted

1000. FSS Group 70 includes information technology equipment. Group 74 includes office machines. Additional information is available on the internet at <http://www.pub.fss.gsa.gov>.

1001. *DOD: New DOD Rules Issued on Contract Financing, Buy American Act* Fed. Cont. Daily (BNA), (Mar. 12, 1998), *available in* WESTLAW, Legal News, BNA-FCD, Mar. 12, 1998 FCD, d3.

1002. *1997 Year In Review*, *supra* note 8, at 98.

1003. Memorandum from Richard L. Shiffrin, Deputy Assistant Attorney General, to Emily C. Hewitt, General Counsel, General Services Administration, subject: Use of Appropriations to Purchase Employee Business Cards (Aug. 11, 1997) (on file with Contract and Fiscal Law Department).

1004. *See* Memorandum from John Berry, Assistant Secretary, Policy, Management and Budget, U.S. Department of Interior, to Deputy Secretary, et. al., subject: Procurement of Business Cards (Apr. 13, 1998) (on file with Contract and Fiscal Law Department)

1005. Memorandum, Office of the Secretary of Defense, Washington, D.C., for Secretaries of the Military Departments, subject: Printing of Business Cards (28 Aug. 98) (on file with Contract and Fiscal Law Department).

1006. *Id*.

1007. *Id*.

1008. On 1 October 1998, the Department of Army issued a memorandum modifying its business card policy. The Department of Army's policy now follows that of the Department of Defense. *See* Memorandum from Joel H. Hudson, Administrative Assistant to the Secretary, to Principal Officials of Headquarters, Department of the Army, subject: Printing of Business Cards (1 October 1998) (on file with Contract and Fiscal Law Department). At this time, the Department of the Air Force has not changed its policy that Air Force personnel should not use official funds and resources to produce business cards until Air Force officials determine whether to change its prohibition and amend appropriate Air Force instructions. Request for Guidance - Business Cards, Op, JAG, Air Force, No. 1998/12, (4 Feb. 98). In an astounding turn of events, on November 5, 1998, the GAO issued a response to a request for informal advice stating that its long history of business cards decisions had been "grounded on a narrow, if not incorrect, understanding of the function and use of business cards." [Letter], B-280759, 1998 WL 807760 (Comp. Gen. Nov. 5, 1998). The GAO agreed with the DOJ's application of the GAO's "necessary expense" analysis and opined that analyzing the purchase of business cards from a "necessary expense" perspective results in a more logical and legally defensible conclusion. *Id.*

1009. B-272040, Oct. 29, 1997, 97-2 CPD ¶ 122.

a contractor who performed job searches and arranged interviews for departing NASA employees. The NASA also wanted to offer the contractor bonuses if it identified jobs that NASA's employees accepted.[1011]

The GAO concluded that outplacement assistance is a legitimate matter of agency personnel administration; therefore, NASA may use appropriated funds as long as it benefits the agency.[1012] The GAO also stated that the type of assistance does not control whether the agency may use appropriated funds. Instead, the agency must determine whether funding the assistance "is necessary to accomplish the purpose of the appropriation to be charged."[1013] The agency should consider what benefits it expects to receive from the program, and evaluate those benefits against the cost of the program to ensure that the cost is reasonable.[1014]

The GAO addressed the propriety of funding incentives. It cautioned NASA that it could only do so if it is paying for a received benefit. If the agency pays a contractor to assist an employee who was separated involuntarily and received separation pay, the agency would not be receiving a benefit from the placement assistance. Therefore, the funding would be improper.

The Army May Use One Appropriation to Supplement Another

In *Funding for Army Repair Projects*,[1015] the Army's Deputy Chief of Staff for Resource and Management requested an advance decision from the Comptroller General regarding the legality of using money from one appropriation to supplement another appropriation.

Congress appropriated about $500 million for the two-year Real Property Maintenance, Defense (RPM,D)[1016] account for FY 1993 to fund maintenance and repair projects. Additionally, Congress appropriated about $13 billion for the one-year operations and maintenance, Army (O&M) account for FY 1993. The problem arose when, at the end of FY 1994, the Army discovered it still had additional unfunded maintenance and repair projects even though it had exhausted most of the $500 million RPM,D account.[1017]

The Army recovered (deobligated) $20.4 million from its portion of the FY 1993-94 RPM,D appropriation and obligated this amount against its expired FY 1993 O&M appropriation. The Army then used the released RPM,D funds to finance new real property maintenance and repair projects.[1018]

The DOD IG took exception to the Army manipulating taxpayer's dollars. Relying on longstanding GAO precedent, the IG claimed that when two appropriations are available for the same purpose (O&M and RPM,D), the Army must select only one appropriation. Once the Army makes the election, it may not use the second appropriation (O&M) even if the Army depletes the amount available in the first account.

Additionally, the IG argued that the Army acted improperly by substituting O&M funds for RPM,D funds after the end of the fiscal year.[1019] The IG claimed that, under 31 U.S.C § 1553(a), the expired FY 1993 O&M funds were only "available for recording, adjusting, and liquidating obligations" properly charged to the O&M account.[1020] The IG claimed that the Army's adjustment to the O&M account was improper because the Army could make adjustments only if it had recorded inaccurate data during the account's period of availability.[1021]

1010. The CTAP offers employees various outplacement services such as group seminars, employment workshops, and individual career counseling. *Id*.

1011. *Id*.

1012. *Id*. at 2.

1013. *Id*.

1014. *Id*. at 3.

1015. B-272191, Nov. 4, 1997, 97-2 CPD ¶ 141.

1016. The Department of Defense Appropriations Act for FY 1992 established the RPM,D account. *Id*. at 2.

1017. *Id*. at 3.

1018. *Id*. at 3.

1019. *Id*. at 5.

1020. 31 U.S.C.A. § 1553(a) states:

> After the end of the period of availability for obligation of a fixed appropriation account and before the closing of that account . . . the account shall retain its fiscal-year identity and remain available for recording, adjusting, and liquidating obligations properly chargeable to that account.

Id.

The GAO examined both of the IG's arguments. First, the GAO held that the Army did not have to elect between the O&M and the RPM,D appropriations.[1022] Second, it ruled that the Army's O&M adjustment was proper. It rejected the IG's interpretation of 31 U.S.C.A. § 1553(a), because section 301 of Public Law No. 103-35 allowed the Army to obligate both O&M and RPM,D funds for the same purpose. The GAO opined that the original obligations met the purpose, time, and amount controls imposed on the FY 1993 O&M appropriation. Therefore, the Army took advantage of the flexibility afforded by section 301 of Public Law No. 103-35 and properly adjusted the accounts.[1023]

Time

The Time Rule: Funds Available when Appropriated.[1024]

In 1983, the Navy awarded a multi-year contract for flight training services for a base period of up to five years. The Navy had an option to extend the contract for an additional three years. The contract permitted the contracting officer to exercise the option by giving written notice to the contractor, Cessna Aircraft Company (Cessna), and issuing a modification "not later than 1 October 1988." The contracting officer exercised the option by sending a facsimile transmission to Cessna on 1 October 1988, after receiving notice that the President had signed the appropriation act. Cessna asserted that the modification was invalid because the OMB had not apportioned the funds to the agency. Cessna continued to perform, assuming that the Navy would record its services in a definitive contract. Similar to the first option year, the Navy exercised the second and third option years by transmitting the modifications to Cessna on 1 October 1989 and 1990. In 1991, Cessna filed a $25.7 million claim for the services it provided during the three-year option period. The contracting officer neither issued a final decision nor informed Cessna when it would issue a decision within the sixty-day time limit. Cessna appealed this "deemed denial" to the ASBCA, and the ASBCA denied Cessna's appeal.[1025]

Before the Federal Circuit, Cessna argued that several statutes and regulations prohibit agencies from obligating funds before they are appropriated by Congress and apportioned by the OMB. In rejecting Cessna's arguments, the court addressed the timetables for obligating funds. First, the court agreed that the Antideficiency Act[1026] prohibits the government from spending money or incurring obligations before Congress appropriates funds. The court, however, noted that other key statutes[1027] are silent on whether agencies may incur obligations before carrying out the apportionment process. The court held that these statutes do not prevent government officials from incurring obligations before completing the apportionment.[1028] Consequently, the court concluded that the contracting officer exercised the 1988 option properly when the President signed the appropriation act.[1029]

Although the Federal Circuit "zeroed-in" on the Antideficiency Act, its decision affects the "time" prong of fiscal law. According to statute, agencies must obligate an appropriation during its period of availability, or the authority to obligate expires.[1030] After *Cessna Aircraft*, however, funds are available and the "time" clock may now start when the President signs the appropriation act.

Liability of Accountable Officers

The DOD Finalizes the Rules Governing the Liability of Certifying Officers and Accountable Officials

In a 1997 memorandum, the Under Secretary of Defense (Comptroller) noted that while disbursing officers are strictly liable for erroneous payments, they rely almost exclusively on

1021. *Army Repair Project*, 97-2 CPD ¶ 141 at 4.

1022. *Id.* at 4-5. The Comptroller General based its holding on Public Law No. 103-35, § 301, 107 Stat. 97, 103 (1995), which permitted the Army to use its O&M account to supplement the RPM,D account. *Id.*

1023. *Id.* at 7-8.

1024. Cessna Aircraft Co. v. Dalton, 126 F.3d 1442 (Fed. Cir. 1997).

1025. Cessna Aircraft Co., ASBCA No. 43196, 93-3 BCA ¶ 25,912 (Cessna I); 96-1 BCA ¶ 27,966 (Cessna II).

1026. 31 U.S.C.A. § 1341(a) (West 1998).

1027. *See*, *e.g.*, 31 U.S.C.A. §§ 1511-1519 (West 1998) (addressing the apportionment process); 31 U.S.C.A. § 1512 (West 1998) (requiring appropriations to be apportioned to prevent obligations at rates that could result in a deficiency or supplemental appropriation); 31 U.S.C.A. § 1513 (West 1998) (providing timelines for apportioning funds); 31 U.S.C.A. § 1517 (West 1998) (prohibiting government officials from authorizing obligations that exceed apportionments). The *Cessna* court noted that neither 31 U.S.C. § 1513 nor 31 U.S.C. § 1517 addresses whether the apportionment process must be completed before government officials may incur obligations. *Cessna Aircraft Co.*, 126 F.2d at 1451.

1028. *Cessna Aircraft Co*., 126 F.3d at 1451-52.

1029. *Id*. at 1452.

1030. 31 U.S.C.A. § 1552.

information from others before authorizing disbursements.[1031] Indeed, the Under Secretary estimated that eighty percent of supporting data originated with persons outside financial management channels who would not be liable for improper payments.[1032] As a result, disbursing officers were overburdened with duplicating and confirming the work of others to ensure that the information was accurate. According to the Under Secretary, this practice reduced the efficiency of the financial management system.

The DOD "fix" was to add a chapter to the Financial Management Regulation in August 1998.[1033] The new chapter specifies the responsibilities and liabilities of certifying and disbursing officers and adds "accountable officials" to the list of those who may be liable for erroneous payments. Of particular interest is the extension of responsibility to accountable officials.[1034] For example, contracting officers, receiving officials, resource managers, temporary duty authorizing officials, information system managers, purchase card program coordinators, and others now may be pecuniarily liable if their negligence causes an erroneous payment.

Liability for accountable officials, however, does not attach automatically as it does with certifying and disbursing officers. Likewise, negligence is not presumed for accountable officials when a fiscal irregularity surfaces. If an irregularity is discovered, investigators must determine whether: (1) an accountable official was negligent, (2) the negligence caused the loss, and (3) the certifying and disbursing officers were faultless.[1035]

Interestingly, the regulation drew substantial criticism when staffed for comment. For example, the Navy objected to the breadth of the accountable official definition, asserting that it would encompass "all individuals who are directly or indirectly associated with the obtaining of goods and services . . . ." The Navy feared many covered employees would be unaware of their potential liability and that substantial, recurring training for those within the definition would be required.[1036] Likewise, while the Army applauded the regulation's concept, it disagreed with the application of a negligence presumption to a certifying officer's actions. In the Army's view, "[s]tandardization of the adjudication process for assessing pecuniary liability should [have been] set at the Departmental level."[1037] Nevertheless, the DOD issued the regulation without modifying those portions deemed objectionable by these two departments.

Nonappropriated Funds and Official Representation Funds

Conserving Water is not a Valid Reason to Irrigate those Golf Courses!

As contract attorneys at installations with a golf course know, 10 U.S.C.A. § 2246(a) prohibits the use of appropriated funds to equip, operate or maintain a golf course at any DOD facility or installation.[1038] The question that arose this year was whether Congress, by implication, modified or repealed this statutory prohibition by enacting two other provisions. The two provisions are the congressional mandate that requires federal agencies to cooperate with states in their attempts to resolve water resource issues in concert with conservation of endangered species,[1039] and the law that allows and encourages DOD instrumentalities to participate in water conservation efforts.[1040] The GAO answered with a resounding, "No!"[1041]

1031. Memorandum, Under Secretary of Defense (Comptroller), subject: Certifying Officer and Accountable Official Policy Within the Department (25 Apr. 1997).

1032. *Id.*

1033. *See* DOD REG. 7000.14-R, vol. 5 (Disbursing Policy and Procedures), ch. 33.

1034. "Accountable official" is not a new term within the DOD financial management system. *See id.*, ch. 1, p. xxxv (defining "accountable official" as one to whom public funds are entrusted, for example, a disbursing officer or disbursing officer deputy or agent). In the new chapter to volume 5, the definition is quite different:

> Accountable Officials. For the purposes of this chapter, DoD military members and civilian personnel, who are designated in writing and are not otherwise accountable under applicable law, who provide source information, data, or service (such as receiving official, cardholder, and an automated information system administrator) to a certifying or disbursing officer in support of the payment process . . . .

Id. ch. 33, para. 331001.

1035. *Id*. ch. 33, para. 3309.

1036. *See* Memorandum, Assistant Secretary of the Navy (Financial Management), subject: Certifying Officer and Accountable Official Policy Within the Department (30 June 1997). The Navy also believed that "[r]eferences to personal pecuniary liability [were] frightening to the point of being counterproductive." *Id*.

1037. *See* Memorandum, Assistant Secretary of the Army (Financial Management and Comptroller), subject: Response to Proposed Certifying and Approving Officer Policy (19 June 1997).

1038. 10 U.S.C.A.§ 2246 (West 1998). Subsection (b) makes an exception for facilities and installations outside of the United States or those facilities and installations inside the United States at a location designated by the Secretary of Defense as a remote and isolated location. *See* 10 U.S.C.A. § 2246(b).

1039. 16 U.S.C.A. § 1531(c)(2) (West 1998).

The U.S. Army Garrison, Fort Sam Houston, Texas, requested the GAO's guidance about whether it could use appropriated funds to install and maintain pipelines to water the installation's golf course according to local conservation regulations. San Antonio implemented water use reduction efforts that included the use of "greywater."[1042] Fort Sam Houston would be able to participate in the conservation measures and use greywater to irrigate the installation's land, a portion of which includes the golf course, if it installed the necessary pipelines.

The GAO ruled that the more general statutes authorizing the use of appropriated funds for water conservation efforts cannot overcome the specific prohibition discussed in 10 U.S.C.A § 2246. While the GAO found that the agency's proposed action was a valuable conservation effort, it stated that watering a golf course is an essential activity in "maintaining" the golf course, no matter if the agency used aquifer water or greywater for conservation reasons.[1043] Ultimately, the GAO concluded that if Congress specifically intended to allow for the use of appropriated funds to conserve water at military golf courses, it would have done so with specific language. Because Congress chose to enact a statute with broad language prohibiting the use of appropriated funds to maintain and operate golf courses, the agency's proposed action would be improper.

Revolving Funds

The Government Printing Office May Keep Its Prompt Payment Discount

The GPO's authorizing statutes permit it to contract with commercial printers for services it cannot perform in-house.[1044] Under the terms of these contracts, the GPO sometimes receives prompt payment discounts.[1045] When this happens, the GPO normally passes the discount on to the customer if the discount exceeds five percent. Otherwise, it uses the discount to offset its indirect costs.[1046]

In *Government Printing Office—Treatment of Prompt Payment Discounts*, the IRS asked the GAO to opine on the legality of the GPO's prompt payment discount policy.[1047] The IRS contended that the GPO's policy: (1) violates its authorizing statutes, and (2) improperly augments the GPO's revolving fund and other ordering agencies' appropriations.[1048]

The GAO initially analyzed two of the GPO's authorizing statutes, 44 U.S.C.A. §§ 309-310. The GAO noted that neither statute explicitly requires the GPO to base its charges on its actual costs.[1049] Section 309(b) requires the GPO to recover its costs.[1050] According to the GAO, the GPO's policy satisfies this requirement.[1051] As a result, the GAO concluded that the GPO's policy complies with its authorizing statutes.[1052]

1040. 10 U.S.C.A. § 2866.

1041. Prohibition on Use of Appropriated Funds for Defense Golf Courses, B-277905, Mar. 17, 1998, 98-1 CPD ¶ 135.

1042. Greywater is partially purified recycled waste water. Greywater is used in lieu of aquifer water for irrigation purposes. *Id*. at 2.

1043. *Id*. at 4.

1044. *See, e.g*., 44 U.S.C.A. § 502 (West 1998).

1045. Government Printing Office—Treatment of Prompt Payment Discounts, B-276509, 1998 WL 555434 (Comp. Gen. Aug. 28, 1998).

1046. *Id*. at *1. The GPO normally charges its customers a six percent surcharge in addition to the commercial printer's full invoice price. The purpose of the six percent surcharge is to cover the GPO's indirect costs. Therefore, the GPO effectively reduces this surcharge every time it uses a prompt payment discount to offset its indirect costs. *Id*.

1047. *Id*. at *2. The IRS is the GPO's second largest customer. As such, the IRS estimates that it loses over one million dollars each year because of the GPO's current policy. *Id*.

1048. Congress established the GPO revolving fund on 1 July 1953 to finance the GPO's operations. 44 U.S.C.A. § 309 (West 1998).

1049. *Id*. The IRS alleged that the following language in 44 U.S.C. § 310 required the GPO to base its charges for each order on the actual costs of that order when read in conjunction with 44 U.S.C. § 309: "Adjustments on the basis of the actual cost of delivered work paid for in advance shall be made monthly or quarterly and as may be agreed by the Public Printer and the department or establishment concerned." *Id*. (quoting 44 U.S.C. § 310).

1050. The statute specifically requires customers to reimburse the GPO revolving fund "for the cost of all services and supplies furnished, including those furnished other appropriations of the Government Printing Office, at rates which include charges for overhead and related expenses, depreciation of plant and building appurtenances, except building structures and land, and equipment, and accrued leave." 44 U.S.C.A. § 309(b).

1051. *Government Printing Office*, 1998 WL 555434, at *2.

1052. *Id*.

The GAO then concluded that the GPO's policy complies with the general prohibition against augmenting appropriations.[1053] Focusing on the GPO's entire cost recovery method,[1054] the GAO stated that "we would not view GPO's approach as significantly augmenting one agency's approach at the expense of another."[1055] Therefore, the GAO ruled that the GPO could continue to use the prompt payment discounts it received from commercial printers to offset its indirect costs.

Judgment Fund

Court Upholds Jurisdiction Based on Availability of Judgment Fund[1056]

In April 1989, the spouse of a Family Child Care (FCC)[1057] provider injured Megan Han Lee by submerging her in hot bath water.[1058] In April 1990, the Lees filed suit against the FCC provider and her spouse in federal district court. The government denied the FCC provider's request for coverage and representation under the U.S. Army Nonappropriated Fund Risk Management Program (RIMP),[1059] and the court ultimately issued a default judgment against the FCC provider and her spouse for more than $700,000. Shortly thereafter, the FCC provider assigned her rights against the government for breach of contract to the Lees. The Lees then filed suit in the COFC seeking to recover damages under the RIMP.

In *Lee v. United States*, the government challenged the COFC's jurisdiction to entertain the Lees' complaint. The government argued that the COFC lacked jurisdiction because the Tucker Act[1060] limits the COFC's jurisdiction to cases that involve appropriated fund activities.[1061] The Federal Circuit, however, upheld the lower court's jurisdiction because: (1) the DOD uses both appropriated and nonappropriated funds to support FCC programs[1062] such as the RIMP, (2) the DOD can use the Judgment Fund to pay a final judgment for contract damages,[1063] and (3) the DOD must reimburse the Judgment Fund from its current appropriations.[1064] Therefore, "any judgment against the United States on a contract claim arising out of the FCC could ultimately be paid from current appropriated funds of the Department of Defense."[1065]

Unsatisfied with the Federal Circuit's ruling on the jurisdictional issue,[1066] the government petitioned for a rehearing.[1067] The government now argued that the COFC lacked jurisdiction to entertain the Lees' complaint because the pertinent RIMP contract took effect before the DOD had the authority to use

1053. According to the GAO, "an agency may not augment its appropriations from outside sources without specific statutory authority." Office of the General Counsel, United States General Accounting Office, Principles of Federal Appropriations, ch. 6, para. 6-103 (2d ed. 1992).

1054. *Government Printing Office*, 1998 WL 555434, at *3. The GAO was quick to point out that the GPO's cost recovery method benefits large volume customers more because the GPO caps its surcharge at $15,000. *Id.*

1055. *Id*.

1056. 31 U.S.C.A. § 1304 (West 1998).

1057. The FCC program is part of the Army's Child Development Services (CDS). U.S. Dep't of Army, Reg. 215-1, Nonappropriated Fund Instrumentalities and Morale, Welfare, and Recreation Activities, para. 8.9 (29 Sept. 1995).

1058. *Lee v. United States*, 124 F.3d 1291 (Fed. Cir. 1997).

1059. *Id*. The RIMP is an insurance program that insures FCC providers "for any individual claim arising out of the death or injury of any child under [the FCC provider's] care which occurs as a result of a negligent act or omission on [the FCC provider's] part, or on the part of any member of [the FCC provider's] household;" however, it specifically excludes "any injury or death . . . arising out of any criminal act or omission . . . on [the FCC provider's] part or the part of a member of [the FCC provider's] household . . . ." *Id*.

1060. 28 U.S.C.A. § 1491 (West 1998).

1061. *Lee*, 124 F.3d at 1294. *See* L'Enfant Plaza Properties, Inc. v. United States, 668 F.2d 1211, 1212 (Ct. Cl. 1982) (holding that the COFC lacks jurisdiction over disputes arising from contracts entered into by federal instrumentalities if "Congress intended that the activity resulting in the claim was not to receive or be funded from appropriated funds").

1062. *Lee*, 124 F.3d at 1294. The Military Child Care Act of 1989 authorized the DOD to use appropriated funds "for operating expenses for military child care development centers . . . for child care and child-related services of the Department . . . [and] to provide assistance to family home day care providers so that family home day care services can be provided to members of the Armed Forces at a cost comparable to the cost of services provided by military child development centers." *Id.* (quoting Pub. L. No. 101-198, 103 Stat. 1352, 1595 (1989)). Based on this and subsequent legislation, the DOD authorized the Army to use appropriated funds to pay RIMP fees and FCC claims. *Id*.

1063. *See* 41 U.S.C.A. § 612(a) (West 1998) ("[A]ny judgment against the United States on a claim under [the Contract Disputes Act] shall be paid promptly in accordance with the procedures provided by section 1304 of Title 31.").

1064. *See* 41 U.S.C.A. § 612(c) ("[P]ayments made pursuant to subsection (a) . . . of this section shall be reimbursed to the fund provided by section 1304 of Title 31 by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes.").

1065. *Lee*, 124 F.3d at 1295.

appropriated funds to pay RIMP claims.[1068] As a result, the government argued that the DOD could not have used appropriated funds to pay any judgment the Lees might have obtained against it. In response, the Federal Circuit noted that "[t]he legal effect of the Military Child Care Act was . . . to waive sovereign immunity for actions based on contracts with RIMP, regardless of whether the contracts were entered into before or after fiscal year 1990."[1069] The Federal Circuit then noted that the judgment fund is available to pay the COFC judgments for which no other provision has been made.[1070] Consequently, the Federal Circuit again held that the COFC had jurisdiction to entertain the Lees' complaint.[1071]

The Department of Justice Prohibited from Using Judgment Fund for Teamsters Election

By letter dated 22 April 1998, the Chairman of the House Subcommittee on Oversight and Investigations, Committee on Education and the Workforce, asked the GAO two questions regarding the use of the Judgment Fund.[1072] First, the Chairman asked the GAO whether the DOJ could use the Judgment Fund to pay the costs of supervising the rerun of the International Brotherhood of Teamsters' 1996 election if the government chose to have it supervised.[1073] Second, the Chairman asked the GAO whether the DOJ could use the Judgment Fund to pay the costs of supervising the rerun election if the United States District Court for the Southern District of New York (the District Court) ordered the government to pay these costs.[1074]

In response, the GAO determined that the DOJ could not use the Judgment Fund to pay the costs of supervising the rerun election under either scenario. The Judgment Fund is only available to pay specific monetary damage awards—it is not available to pay the costs of complying with injunctive orders.[1075] Similarly, the Judgment Fund is not available to pay the costs of judgments that are "injunctive in nature."[1076] Therefore, the Judgment Fund would not be available to pay the costs of supervising the rerun election "even if the court were to award a specific sum equivalent to the actual or anticipated costs of supervising the rerun [election]."[1077]

1066. *Id*. at 1297. The government ultimately prevailed on the issue of liability based on the fact that Megan Han Lee's injuries arose out of a criminal act. *Id*.

1067. Lee v. United States, 129 F.3d 1482 (Fed. Cir. 1997).

1068. *Id*. at 1483. The Military Child Care Act of 1989 took effect in fiscal year 1990. *Id.* However, the RIMP contract at issue in this case was effective sometime prior to 12 April 1989. *Lee*, 124 F.3d at 1293.

1069. *Lee*, 129 F.3d at 1483-84.

1070. *Id*. *See* 31 U.S.C.A. § 1304 (West 1998).

1071. *Lee*, 129 F.3d at 1484. Interestingly, the Federal Circuit left a door open to the government in future cases, stating that "[t]he government has not pointed us to any authority holding that the judgment fund could not be used to pay a judgment arising from a contract that the RIMP entered into before appropriated funds became available to support it." *Id*.

1072. The Honorable Peter Hoekstra, 1998 WL 229292 (Comp. Gen. Apr. 28, 1998).

1073. On 14 March 1989, the District Court entered a consent order that (1) required the International Brotherhood of Teamsters to provide an election officer to supervise its 1991 election, and (2) permitted the government to have an election officer supervise the Union's 1996 election at the government's expense. Unfortunately, the election officer refused to certify the 1996 election results and ordered a rerun election. Thereafter, the Justice Department negotiated a tentative agreement to share the costs of supervising the rerun election; however, Congress subsequently prohibited the Justice Department from using any funds appropriated pursuant to the 1998 Justice and Labor Appropriations Act to pay the costs of supervising the rerun election. *Id*. at *3.

1074. In December 1997, the District Court held that the Union would have to pay the costs of supervising the rerun election. United States v. International Bhd. of Teamsters, 989 F. Supp. 468 (S.D.N.Y. 1997). The United States Court of Appeals for the Second Circuit, however, subsequently reversed the District Court's decision. United States v. International Bhd of Teamsters, 141 F.3d 405 (1998).

1075. *See* Judgment Fund and Law Enforcement Seizure Claims, B-259065, 1995 WL 756243 (Comp. Gen. Dec. 21, 1995); Availability of Expired Funds for Non-Monetary Judicial Awards, 70 Comp. Gen. 225 (Dec. 21, 1991).

1076. *The Honorable Peter Hoekstra*, 1998 WL 229292, at *8. According to the GAO, a judgment is "injunctive in nature" if it directs the government to either perform or refrain from performing a particular action. *Id*.

1077. *Id*.

Appendix A

DEPARTMENT OF DEFENSE LEGISLATION FOR FISCAL YEAR 1999

"If we choose to focus solely on the symptoms of degraded readiness today and put our money into operations and maintenance accounts, I am afraid that we will merely scrape off the skin cancer of short-term readiness and allow our long-term readiness cancer to metastasize."

General Charles Krulak
Marine Corps Commandant

"Readiness is declining in the Air Force and has been for some years . . . If we do not reverse these trends through substantial and sustained funding of our forces, our concern . . . will rapidly turn into a readiness crisis."

General Michael E. Ryan
Air Force Chief of Staff

"We are paying for today's readiness with our future. With readiness a top priority and a flat 'top line,' the Navy bill payers have been modernization, infrastructure and procurement."

Admiral Jay L. Johnson
Chief of Naval Operations

"I have been in a hollow Army. I have done that, got the T-shirt, and I don't want to go back. It is not a pleasant scene . . . I must tell you . . . that if we don't do something, we run the risk of returning to the hollow Army or . . . run the risk of not being able to execute the National Military Strategy."

General Dennis J. Reimer
Army Chief of Staff[1]

"As a matter of national security, we must solemnly commit that the dangerous decline in military readiness that followed the conclusion of the Vietnam War will not be repeated as we continue to draw down our Cold War-era forces. Credible warnings that we are approaching the 'hollow force' levels of the 1970s can no longer be ignored. Let us act now to avoid this calamity."

Senator John McCain, AZ-R[2]

1. Jim Garamone, *Service Chiefs Detail Readiness Concerns*, AM. FORCES PRESS SERV., Oct. 6, 1998 (summarizing testimony from the service chiefs on readiness issues before the Senate Armed Services Committee).

2. 144 CONG. REC. S11,142 (daily ed. Sept. 30, 1998).

DEPARMENT OF DEFENSE APPROPRIATIONS ACT

Following five separate continuing resolutions, President Clinton signed into law the Fiscal Year 1999 Department of Defense (DOD) Appropriations Act on 17 October 1998.[3] The Act appropriates to the DOD $250.5 billion, approximately $2.8 billion more than appropriated for Fiscal Year (FY) 1998.[4] The President's defense budget request sought $250.99 billion.[5]

Forces to Be Supported

Department of the Army.

The FY 1999 budget is structured to support ten active duty Army divisions,[6] three armored cavalry regiments, eight Army reserve divisions and three reserve brigades, and fifteen enhanced National Guard brigades. In all, this force structure arrangement represents a personnel end strength of only 480,000 soldiers–down from 488,000 in fiscal year 1998 and 495,000 in FY 1997.[7]

Department of the Navy.

The 1999 DOD Appropriations Act is designed to support an active duty naval force of 315 ships, a decrease of eighteen ships from fiscal year 1998.[8] The American naval battle force for fiscal year 1999 consists of eighteen strategic submarines, eleven aircraft carriers, 245 other battle force ships, 324 reserve force ships, and assorted aircraft. The Appropriations Act supports 372,696 sailors and 172,200 marines–down from 386,894 sailors and 172,987 marines in FY 1998.[9]

Department of the Air Force.

The Appropriations Act is structured to support a total active duty Air Force of fifty fighter and attack squadrons, six Air National Guard air defense interceptor squadrons, nine bomber squadrons, and 700 ICBM launchers.[10] The Appropriations Act allows for 370,882 airmen–down from 371,577 in FY 1998.[11]

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3. Pub. L. No. 105-262, 112 Stat. 2279 (1998). The joint conference report accompanying the Appropriations Act directs that the language and allocations contained in the underlying House and Senate reports will be complied with unless otherwise addressed by the 1999 DOD Appropriations Act and its conference report. H.R. CONF. REP. NO. 105-746, at 69 (1998).

4. The Act breaks out these appropriations among the following major accounts:

Military Personnel:	$70.607 billion
Operation and Maintenance (O&M):	$84.193 billion
Procurement:	$48.590 billion
RDT&E:	$36.757 billion
Revolving/Management:	$798 million
Other: $11.8 billion	

H.R. CONF. REP. NO. 105-746, at 70, 83, 110, 127, 158, 159 (1998).

5. As signed into law, the Act represents the fourteenth year in a row that defense appropriations have failed to keep pace with inflation. H.R. REP. NO. 105-591, at 2 (1998).

6. Although the overall number of active Army divisions supported is constant with that for FYs 1997 and 1998, the character of these divisions was altered. Instead of supporting two full Light Infantry Divisions, the 1998 DOD Appropriations Act supports one fully rounded Light Infantry Division and one Light Infantry Division (minus). *Id.* at 17.

7. *Id.*

8. As recently as FY 1996, the Naval battle force was 365 ships. H.R. REP. NO. 105-206, at 21-22 (1997).

9. H.R. REP. NO. 105-591, at 18 (1998). Additionally, the underlying House Report "urges" against further downsizing of the Navy Reserve. According to the Report, the Navy Reserve force structure has shrunk by "well over 30 percent since 1990" and "has already downsized more and faster than any active or Reserve component." *Id.* at 81.

10. The Act will support 700 active launchers for the Minuteman and Peacekeeper Intercontinental Ballistic Missile (ICBM) forces. *Id.*

11. *Id.*

Emergency and Extraordinary Expenses

The Appropriations Act provides each Service Secretary with funds for emergency and extraordinary expenses.[12] Additionally, the Act appropriates $25 million for the Commander-in-Chief (CINC) initiative fund.[13]

Overseas Contingency Operations

The Appropriations Act appropriates $439.4 million for "expenses directly relating to Overseas Contingency Operations by United States military forces."[14] Congress views this amount as sufficient to finance DOD's continuing operations in Southwest Asia.[15] These funds remain available until they are spent and may be transferred to defense Operation and Maintenance (O&M) accounts or working capital funds.[16]

Overseas Humanitarian, Disaster, and Civic Aid

As allowed by statute, the Appropriations Act provides $50 million for overseas humanitarian, disaster, and civic aid (sometimes referred to as OHDACA). This unique type of O&M money remains available for two fiscal years (until 30 September 2000).[17]

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12. *See* 10 U.S.C.A. § 127 (West 1998). Broken down by Service component, the Act appropriates funds for emergencies and extraordinary expenses as follows:

Army:	$11.437 million
Navy:	$ 5.36 million
Air Force:	$7.968 million
Defense-Wide:	$29 million

Pub. L. No. 105-262, at 4-5, 112 Stat. 2279, 2281-2283 (1998).

13. *Id. See also* 10 U.S.C.A. § 166a.

14. Pub. L. No. 105-262, at 6-7, 112 Stat. 2279, 2284 (1998). This is far below the $746.9 million allowed by the Strom Thurmond National Defense Authorization Act for FY 1999. Pub. L. No. 105-261, § 301(24), 112 Stat. 1920, 1961 (1998).

15. H.R. CONF. REP. NO. 105-746, at 107 (1998). By comparison, the Strom Thurmond National Defense Authorization Act allows $227.38 million out of the Army's O&M account for contributions to the North Atlantic Treaty Organization's (NATO) common funded military budget. Pub. L. No. 105-261, at § 314, 112 Stat. 1920, 1962 (1998). In addition, the repeated deployments to Iraq do not come cheap. It is estimated that since 1991, the costs to the United States of deployments to Southwest Asia are approximately $6.9 billion. *See* Ernest Biazar, *$6.9 Billion Yo-Yo*, WASH. TIMES, Nov. 13, 1998, at A5 (explaining that the winter 1998 deployment alone cost $2 billion).

16. Pub. L. No. 105-262, at 6-7, 112 Stat. 2279, 2284 (1998).

17. These appropriations are to be used in support of activities performed pursuant to 10 U.S.C.A. §§ 401, 402, 404, 2547, 2551. *Id.* at 8-9. In addition, Congress allows the use of generic O&M funds for humanitarian and civic assistance costs *incidental* to activities authorized under 10 U.S.C.A. § 401 (West 1998). Note, however, that the DOD must inform Congress of any such use of O&M appropriations. *Id.* § 8009.

Quality of Life Enhancements

Congress appropriated $455 million to address what it characterized as "unfunded shortfalls" with minor military construction work and the repair and maintenance of real property, to include military housing and barracks. These funds are available for two fiscal years.[18]

End of Year Spending Limited

As in previous years, Congress limited the rate of obligation activity at the end of the fiscal year. No more than twenty percent of the appropriations may be obligated during the last two months of the fiscal year. Excepted from this restriction are obligations associated with active duty training for reserves and summer camp training for the Reserve Officers' Training Corps.[19]

Multiyear Procurement Authority

Absent a thirty day notice to Congress, the Appropriations Act prohibits multiyear contracts that: (1) incorporate advanced economic order procurements in excess of $20 million in any one year of the contract, or (2) allow for an unfunded contingent liability in excess of $20 million. Additionally, no procurement in excess of $500 million may be initiated absent specific congressional approval. Further, agencies may not terminate any authorized multiyear procurement absent a ten-day notice to Congress. The Act specifically provides multiyear authority for the following programs: Medium Tactical Vehicle Replacement, E-2C aircraft, and the Longbow Hellfire missile.[20]

A-76: Forging Ahead for FY 1999

In the race to execute the mandate established by the National Performance Review and the Defense Reform Initiative to cut costs and to streamline operations, the DOD has aggressively pursued the OMB Circular A-76 contracting-out process.[21] The FY 1999 Authorization Act increases the threshold for notice and study requirements when considering a function for possible contractor performance from twenty to fifty employees. The Authorization Act also requires the DOD to certify that the planned change to contractor performance is not the result of a decision to limit the number of government employees.[22] Meanwhile, the Appropriations Act continues to require DOD agencies to conduct a cost study when considering whether to contract out a function performed by more than ten DOD civilians.[23]

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18. Pub. L. No. 105-262 at 9. Of this amount, the funds were broken out among the military departments as follows:

Army:	$137 million
Navy:	$121 million
Marine Corps:	$27 million
Air Force:	$108 million
Reserves/National Guard:	$62 million.

19. *Id.* § 8004. The 1999 DOD Military Construction Appropriations Act has a similar limiting provision. *See* Pub. L. No. 105-237, § 114, 112 Stat. 1553, 1558 (1998). *See also* General Accounting Office, Year-End Spending: Reforms Underway But Better Reporting and Oversight Needed, GAO/AIMD-98-185 (July 31, 1998).

20. Pub. L. No. 105-262 § 8008, 112 Stat. 2279, 2298 (1998). *See also* 10 U.S.C.A. § 2306b (West 1998).

21. *See, e.g.*, Bradley Graham, *Retired Admiral Pushes Pentagon to Run a Tighter Ship*, Wash. Post, Nov. 6, 1998, at A19 (providing an overview of the challenges facing the DOD Director of Defense Reform). *See also* Tanya Eiserer, *StratCom to Privatize 350 Jobs*, Omaha World-Herald, at 19, Oct. 28, 1998 (noting that the Strategic Command at Offutt AFB, Nebraska contracts out $77 million contract for computer/information technology work). *But see* General Accounting Office, Outsourcing DOD Logistics: Savings Achievable But Defense Science Board's Projections Are Overstated, GAO/NSIAD-98-48 (Dec. 8, 1997).

22. Pub. L. No. 105-261, 112 Stat. 1920 (1998) (amending 10 U.S.C.A. § 2461 (West 1998)). The Authorization Act further provides that "*any* individual or entity at a facility" being considered for possible change to contractor performance can object to the command's actions for failure to properly provide Congressional notice and reports, to include the new certification. Such an objection must be made within 90 days of when the "individual or entity" knew or should of known that the function was under study for possible change to private sector performance. *Id.* (emphasis added).

This guidance has led Dr. John Hamre, Deputy, Secretary of Defense to comment: "One half of the authorization bill beats us up for not moving fast enough. The other half makes us do extra paperwork every time we want to contract out fifteen more jobs."[24]

Funds Associated with the Transfer of Overseas Military Installations

The Appropriations Act allows the Secretary of Defense (SECDEF) to enter into executive agreements to allow the retention of residual funds resulting from the conveyance of U.S. installations in NATO countries back to the host country. These funds can be used only for the construction of facilities for American troops located in that same host country, or for the payment of real property maintenance and base operations costs that are otherwise due to that nation. Additionally, Congress must first approve any construction projects using these funds. Finally, reflecting a high level of congressional interest in the amount and use of these funds, the Act mandates various reporting requirements regarding these monies.[25]

Unsolicited Proposals: Restrictions on Contracts for Studies, Analysis, or Consulting Services

The Appropriations Act includes a provision that addresses the level of competition for consultant contracts and studies programs generated by unsolicited proposals.[26] Any such contracts must be the subject of competition unless the head of the activity, relying on guidance contained in the Act, determines otherwise.[27] This restriction does not apply to contracts that are less than $25,000; contracts associated with improvements to equipment that is already in development or production; or contracts deemed to be in "the best interests of the national defense."[28]

Assistance to North Korea Prohibited

The Appropriations Act continues to prohibit any use of funds for assistance to the Democratic People's Republic of North Korea, unless Congress has appropriated monies specifically for that purpose.[29]

Limitation on the Transfer of Defense Articles or Services

Congress remains vigilant over the transfer of defense articles or services in support of international peacekeeping or peace-enforcement operations conducted under United Nations authority or for any other similar international operation, to include humanitarian assistance operations.[30] Consequently, the Appropriations Act requires that Congress be notified at least fifteen days before any such transfer.[31]

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23. Pub. L. No. 105-262, § 8014, 112 Stat. 2279, 2299 (1998). *See* 10 U.S.C.A. § 2461 (1998). The Appropriations Act also retains a provision carried in past years of requiring completion of A-76 cost studies within 24 months for single function activities or 48 months for multifunction activities. Pub. L. No. 105-262, § 8026, 112 Stat. 2279, 2303 (1998). For an overview on the implementation of A-76 within the federal government, *see* General Accounting Office, OMB Circular A-76: Oversight and Implementation Issues, GAO/T-GGD-98-146 (Jun. 4, 1998).

24. Jim Garamone, *Hamre Says DOD Building Agile Support Organization*, Am. Forces Press Serv., Oct. 8, 1998.

25. Specifically, Congress directs DOD, in its FY 2000 budget submission, to identify the amount and use of any such funds. Additionally, Congress requires DOD to notify various Congressional defense and foreign relations committees at least 30 days prior to executing any executive agreement with a NATO host nation relying on this authority. Pub. L. No. 105-262, § 8019, 112 Stat. 2279, 2301 (1998).

26. *Id.* § 8054.

27. The activity head must conclude that: (1) as a result of "a thorough technical evaluation," only one fully qualified source exists; or (2) the unsolicited proposal offers the unique possibility of significant scientific or technological advancement; or (3) the proposed contract will take advantage of a unique and significant industrial accomplishment or a new product or idea. *Id.*

28. "[A] civilian official of the Department of Defense, who has been confirmed by the Senate," must make this national security determination. *Id.*

29. *Id.* § 8060.

30. This provision specifically addresses international peacekeeping or peace-enforcement operations conducted under the authority of Chapter VI or Chapter VII of the United Nations Charter. *Id.* § 8074.

Failure to Notify Congress of New Starts Will Result in Forfeiture of Pay

For the third consecutive year, Congress has expressed its frustration with the failure of the DOD agencies to notify Congress properly of "new start programs."[32] Congress identified the failure of the Navy, Air Force, and the Defense Advanced Research Projects Agency (DARPA) to notify it prior to initiating new programs. Additionally, Congress found "particularly disturbing" new starts in classified, "special access" programs.[33] Thus, "[s]ince the existing DOD financial management policies governing the new start notification process have failed," no funds appropriated under the Act will be used to compensate any employee who improperly initiates a "new start program."[34]

Power of the Purse and Foreign Policy: Funding the Deployment of Troops

Prior to deploying any additional troops to Yugoslavia, Albania, and Macedonia, the Appropriations Act requires the President to consult with Congress.[35] Additionally, the Act requires the President to certify to Congress that the deployment "is necessary to the national security interests of the United States." In addition, the President must identify the mission and objectives of the troops, the impact on military readiness, the timetable for accomplishing these objectives, the costs and funding sources for supporting the deployment, and the President's exit strategy.[36]

Funding for Costs Associated with Aircraft Accident

Congress has earmarked $20 million in O&M funds for emergency and extraordinary expenses that arise out of the accident involving a Marine Corps aircraft at a ski resort near Cavalese, Italy.[37] These funds are available until they are spent and will be used for payment of property damage claims. In a move that is sure to warm the hearts of many, however, Congress prohibits the use of these funds to pay any attorneys' fees accompanying the property damage claim.[38]

Year 2000 (Y2K) Compliance

Both the Appropriations and Authorization Acts reflect Congress's deep concern regarding the extent to which DOD information technology assets and national security systems can properly function in the year 2000 (Y2K Compliance).[39] Additionally, Congress is troubled by the state of security within the DOD information technology infrastructure.[40] To address these concerns, the Appropriations Act provides only funds for information technology systems and equipment that are Y2K compliant.[41] Additionally, both Acts

31. To the extent that the transfer involves equipment or supplies, the notice must contain a statement of whether inventory requirements for all elements of the Armed Forces have been met and whether any of the items transferred will be replaced. To the extent replacement will occur, the notice must inform Congress how such action will be funded. *Id.*

32. According to the underlying House Report, "new starts pertain to specific appropriation line-items and include any new programs, projects, subprojects, or modifications that were not disclosed to Congress in the justification material. A new start occurs even when such activities may be funded in another appropriation belonging to the same or different military department or defense agency." H.R. Rep. No. 105-591, 14-15 (1998).

33. *Id.* at 14.

34. H.R. Conf. Rep. No. 105-746, § 8111 (1998). Congress further stated it "believes that DOD's acquisition and comptroller organizations, especially at the levels most directly responsible for approval of the obligation of funds," will institute controls to ensure that existing notification requirements are followed. H.R. Rep. No. 105-591, at 14-15 (1998).

35. Specifically, the Appropriations Act directs the President to consult with the Speaker of the House, the Senate Majority and Minority Leaders, and the House Minority Leader. Pub. L. No. 105-262, § 8115, 112 Stat. 2279, 2327 (1998).

36. *Id.*

37. *Id.* § 8114. The tragic accident involving two Marine Corps A-6 radar-jamming aircraft occurred on 3 Feb. 1998 in the Italian Alps. The aircraft cut a ski lift cable on which was a gondola carrying twenty skiers and vacationers – killing all in the gondola. *See* Matthew L. Wald, *Problems Beset Marines in Ski Crash*, N. Y. Times, Nov. 11, 1998.

38. Pub. L. No. 105-262, § 8114, 112 Stat. 2279, 2326 (1998).

39. *Id*. §§ 8116-17, 112 Stat. 2279, 2328-2331 (1998); Pub. L. No. 105-261, §§ 333-335, 112 Stat. 1969-1972 (1998). An excellent reference source for the scope of this issue, as perceived by Congress, is the General Accounting Office's (GAO's) website titled, "Year 2000 Computing Crisis." More than 60 different GAO reports on this matter are catalogued and electronically retrievable. Included among the references are assessment and testing guides. *See* <http://www.gao.gov/y2kr.htm>.

require the DOD to report to Congress on the status of its Y2K efforts.[42] Furthermore, Congress directed the DOD to have in place a "capability contingency plan" by 30 December 1998 to assure the continuity of operations of critical systems.[43]

The Appropriations Act further requires the DOD to conduct at least twenty-five "year 2000 simulation exercises," with each unified and specified combatant command performing at least two such exercises. All military departments will conduct these Y2K exercises from 1 January to 30 September 1999. For those tests or simulations that pose unique risks or difficulties, Congress requires that the DOD conduct Y2K testing at a major range and test facility base.[44] Finally, the GAO will review the DOD's plans to comply with this mandate by 30 January 1999.[45]

Don't Contract with China-Owned Companies

The Appropriations Act prohibits the DOD from using any procurement or RDT&E funds to enter or renew a contract with a company owned, or partially owned, by the People's Republic of China or the People's Liberation Army of the People's Republic of China.[46]

Training with Foreign Forces Restricted

Congress prohibits the DOD from using funds for training programs involving a unit of a foreign security force, where a member of that unit has committed "a gross violation of human rights." Within ninety days of enactment, the Appropriations Act requires the DOD to consult with the Department of State to consider all credible information related to human rights violations.[47]

Along similar lines, the DOD Authorization Act highlights congressional concern regarding the training of foreign security forces by U.S. military personnel. Congress now requires SECDEF approval for the training of American Special Forces with any friendly forces.[48] More specifically, the Authorization Act emphasizes that any training involving foreign security forces rather than armed forces "should be a rare exception."[49]

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40. *See* H.R. Rep. No. 105-591 at 265 (1998).

41. This limitation does not apply to obligations aimed at bringing systems into compliance by the year 2000, or otherwise certified by the SECDEF. H.R. Conf. Rep. No. 105-746, § 8116 (1998).

42. *See* Pub. L. No. 105-262, § 8116, 112 Stat. 2279, 2328 (1998); Pub. L. No. 105-261, § 333, 112 Stat. 1920, 1969 (1998).

43. *Id.*

44. Pub. L. No. 105-262, § 8117, 112 Stat. 2279, 2329 (1998); Pub. L. No. 105-261, § 334, 112 Stat. 1920, 1970 (1998). Indeed, there is one DOD range and test facility uniquely positioned to support such Y2K testing, White Sands Missile Range, New Mexico – otherwise known as "America's Range." As DOD's largest land-based major range and test facility, White Sands Missile Range has executed a series of complex and highly technical Y2K tests. Among the systems studied for Y2K compliance include major weapons systems (e.g., ATACMS and HIMARS), jet aircraft (Phantom F-4), radar and telemetry tracking systems, flight safety systems, and a wide array of crucial installation infrastructure systems (e.g., telecommunications switches and public utility systems). *See* Public Affairs Office, *New Century Computer Testing*, Missile Ranger, June 26, 1998, at 1; Public Affairs Office, *Y2K Test a Success*, Missile Ranger, July 10, 1998, at 1; Public Affairs Office, *Successful Flight from the HIMARS Is Y2K Compliant*, Missile Ranger, Oct. 2, 1998, at 1; Public Affairs Office, *Y2K Infrastructure Test Successful*, Missile Ranger, Oct. 23, 1998, at 1. *See also* General Accounting Office, Year 2000 Computing Crisis: Avoiding Major Disruptions Will Require Strong Leadership and Effective Partnerships, GAO/T-AIMD-98-267 (Aug. 19, 1998).

45. Pub. L. No. 105-262, § 8117, 112 Stat. 2279, 2129 (1998).

46. *Id.* § 8120.

47. *Id.* § 8130.

48. Pub. L. No. 105-261, § 1062, 112 Stat. 1920 at 2129 (1998) (amending 10 U.S.C.A. § 2011(West 1998)). Additionally, in the Authorization Act's conference report, Congress stated its expectation that the SECDEF not delegate this authority below an Assistant Secretary of Defense. H.R. Conf. Rep. No. 105-736, at 715-16.

49. Additionally, Congress indicated that the primary purpose of any interaction with foreign security or armed forces, as authorized by this authority, must be the training of U.S. special operations forces. H.R. Conf. Rep. No. 105-736, at 716.

Congress to Study Military Readiness

As FY 1999 opened, the state of America's military achieved national visibility. The overused refrain of "doing more with less" is now viewed as one of the root causes for declining readiness and the "hollowing out" of the armed forces.[50] Following up on congressional hearings with the military's chiefs, the Appropriations Act directs the SECDEF to report to Congress on military readiness by 1 June 1999. Among the areas the report will assess, are the overall ability of the military to execute the National Security Strategy and the impact of the Bosnian deployment on readiness. Additionally, Congress requests "a complete assessment" of recent readiness trends, to include a discussion of manning shortfalls, the loss of trained aviators, and the overall state of training for our troops.[51]

DOD Outsourcing and Privatization Initiatives Under Review

In the underlying conference report accompanying the Appropriations Act, Congress expresses "significant concerns about DOD's outsourcing and privatization strategy."[52] Specifically, the scarcity of reliable information validating projected savings and efficiencies causes Congress to wonder whether the fervor surrounding DOD privatization efforts are "building unrealistic savings estimates" into DOD's budget requests.[53] Consequently, the Appropriations Act directs the SECDEF to report to Congress on the scope of the DOD privatization efforts, the criteria employed, and also a detailed accounting of the net savings associated with this effort.[54]

Missile Defense Systems

Concerned with the rapidly growing threat of theater ballistic missiles and recent missile launch activity out of North Korea, Congress has focused on improving this nation's theater missile defense systems to protect U.S. interests and America's forward-deployed forces.[55] Reflecting this heightened concern, the Appropriations Act appropriates $445.25 million to continue the problem-plagued Theater High-Altitude Area Defense System (THAAD),[56] $338.45 million to the Navy Theater Wide program, and an additional $950.47 million for the development of a national missile defense system.

MILITARY CONSTRUCTION APPROPRIATIONS ACT

On 20 September 1998, President Clinton signed into law a $8.5 billion dollar military construction (MILCON) appropriations act.[57] This was the first of thirteen appropriations bills offered by the Congress for FY 1999 funding. Congress directs the DOD to use these appropriations for military construction, family housing, and base realignment and closure functions.[58]

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50. *See, e.g.*, Rowan Scarborough, *General: Army Declining, Readiness Suffering*, WASH. TIMES, Sept. 10, 1998, at 1 (memo by General David Bramlett, Commander, U.S. Army Forces Command, states that America's armed forces "can no longer train and sustain the force" under current levels of defense spending).

51. H.R. CONF. REP. NO. 105-746, at 83-84 (1998).

52. *Id.* at 85-86.

53. Congress acknowledges that the DOD is attempting to outsource and privatize many of its support and infrastructure functions to free up funding and resources for readiness and modernization. Indeed, according to the conference report, the Defense Reform Initiative argues that the DOD will save almost $6 billion over the next five years through outsourcing. Given the steady decline in military readiness as noted above, however, there is a growing concern over whether the outsourcing/privatization mantra is achieving the overall goal of "a Lean Green Fighting Machine." *Id.*

54. *Id.* at 85-86.

55. In particular, the joint conference report accompanying the Act identifies the national missile defense system as a "national priority." H.R. CONF. REP. NO. 105-746 at 155-56 (1998).

56. *See*, *e.g.*, Jane McHugh, *Despite Failures, Army Officials Remain Confident in THAAD*, DEF. NEWS, Sept. 7-13, 1998, at 36 reporting that (the next THAAD test shot is scheduled for the first calendar quarter of 1999 at White Sands Missile Range, New Mexico). Described as "the latest in hit-to-kill technology," the air defense community describes the concept behind the THAAD as similar to "hitting a bullet with a bullet." *Id.*

57. Pub. L. No. 105-237, 112 Stat. 1553 (1998). Specifically, the Military Construction Appropriations Act appropriates $8,449,742,000. This amount is approximately $666 million more than that requested by the Clinton Administration; but is $759 million less than that appropriated last year. H.R. REP. NO. 105-647, 41 (1998). Additionally, the Senate Committee on Appropriations points out that approximately 22 percent of the military construction budget is dedicated to base realignment and closure accounts. S. REP. NO. 105-213, 8 (1998).

Restriction on Use of Cost-Plus-Fixed Fee Construction (CPFF) Contracts

As it has for the past several years, Congress again affirmed its reluctance to allow the use of CPFF construction contracts. Consequently, absent SECDEF approval, CPFF contracts for construction are limited to work that is estimated to cost no more than $25,000. This restriction applies to construction contracts performed in the United States, except Alaska.[59]

Restrictions Regarding Construction of New Bases

Congress also prohibits the use of MILCON funds to begin construction of new bases unless it has otherwise provided specific appropriations. This restriction applies to new base construction within the continental United States (CONUS).[60] Regarding overseas locations, Congress requires prior notification to the appropriations committees before "initiating" new installations.[61]

Relocation of Base Activities Prohibited

Congress further prohibits the services from using minor construction funds to relocate or transfer "any activity" from one base or installation to another without first notifying the congressional appropriations committees.[62]

American Steel Requirement

Contract attorneys should keep in mind Congress's interest in the use of American steel products when engaging in construction contracting using MILCON funds. Specifically, Congress requires that the DOD ensure American steel manufacturers, producers, and fabricators have the opportunity to compete as the supplier of steel products used in construction efforts.[63]

Prohibition Regarding the Payment of Real Property Taxes

Congress prohibits the use of MILCON or family housing funds to pay real property taxes in any foreign country.[64]

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58. Additionally, the Army's military construction account allows it to use a limited amount of funds for host nation support – flexibility not provided to the other military departments within this appropriation. *See* H.R. 4059; Pub. L. No. 105-237, at 1, 112 Stat. 1553 (1998). Provided below is a breakout, by military department, of the construction appropriations; these amounts remain available for five fiscal years, or until September 30, 2003.

> Army: Military Construction $868,726,000 / Family Housing $1,229,987,000
> Navy: Military Construction $604,593,000 / Family Housing $1,207,883,000
> Air Force: Military Construction $615,809,000 / Family Housing $1,064,169,000
> DOD: Military Construction $553,114,000 / Family Housing $37,244,00

Pub. L. No. 105-237, at 1-4, 112 Stat. 1553-1554 (1998). The Act is also the source for the U.S. share of the NATO Security Investment Program. S. REP. NO. 105-213, at 3 (1998).

59. Pub. L. No. 105-237, § 101, 112 Stat. 1553, 1557 (1998).

60. *Id.* § 104.

61. *Id.* § 110.

62. *Id.* § 107.

63. *Id.* § 108.

64. *Id.* § 109. Family Housing funds may otherwise be used for acquisition, replacement, addition, expansion, extension and alteration, *and* for operation and maintenance, including debt payment, leasing, minor construction, principal and interest charges, and insurance premiums, as authorized by law. Indeed, Congress generally breaks out Family Housing appropriations into three categories: construction; operation and maintenance; and debt payment. *See, e.g.*, Pub. L. No. 105-237, at 3, 112 Stat. 1553, 1555 (1998).

Requirement to Notify Congress: Military Exercises

The SECDEF must notify Congress of the plans and scope of any military exercise that involves U.S. personnel where construction activity, either permanent or temporary, will exceed $100,000. The SECDEF will notify the appropriations committees at least thirty days before the exercise occurs.[65]

Fiscal Flexibility for Expired Funds

Agencies may use project funds that have otherwise expired or lapsed to pay the costs of supervision, inspection, overhead, engineering and design on those projects, *and on subsequent claims* associated with the underlying project. This authority applies to military construction or family housing projects funded by the MILCON Appropriations Act.[66]

Transfer of Expired Funds to Foreign Currency Fluctuations Account

After determining that the MILCON funding will not be used to adjust or liquidate amounts that are due under pre-existing obligations, DOD agencies may transfer any unobligated balances into the Foreign Currency Fluctuations, Construction, Defense appropriation. This authority applies to MILCON and family housing funds (to include O&M).[67]

Conferees Adopt More Expansive Definition of Maintenance and Repair

In the joint conference report accompanying the Appropriations Act, Congress adopted the more expansive definition of maintenance and repair, similar to that recently announced by the DOD.[68] Specifically, Congress allows components of a facility to be repaired by replacement. Any replacement work can upgrade existing systems to bring them up to current standards or code. Further, interior arrangements and restoration work may be included as repair. Additions, new facilities, and functional conversions, however, are still viewed as construction work. Finally, the service secretary must notify Congress at least twenty-one days before beginning any repair project estimated to exceed $10 million.

Buy American Act

Congress mandates that any expenditure of funds appropriated under the MILCON Appropriations Act comply with the Buy American Act.[69]

Support to Non-NATO Countries Restricted

Congress prohibits the use of any appropriations provided by the MILCON Appropriations Act for Partnership for Peace Programs or to support non-NATO countries.[70]

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65. *Id.* § 113.

66. *Id.* § 116. Given the language of the Act, it appears that expired MILCON funds may be used to pay claims for both in-scope *and out-of-scope* changes to work. *See* 31 U.S.C.A. § 1502(a), which generally limits the use of expired funds to in-scope changes. 31 U.S.C.A. § 1502(a). *See generally Funding of Replacement Contracts*, B-198074, 60 Comp. Gen. 591 (1981). Again, note that this discretionary fiscal authority applies not only to military construction projects but also to family housing projects.

67. Note that any such funds will be merged with and will be available for the same time period and purposes of the Foreign Currency Fluctuations appropriation. Pub. L. No. 105-237, § 118, 112 Stat. 1553 at 1559 (1998).

68. Memorandum, Office of the Secretary of Defense, Comptroller, subject: Definition of Repair and Maintenance (2 July 1997). *See also* Major M. Warner Meadows, *Has DOD "Repaired" a Component of the Construction Funding Analysis?*, ARMY LAW., Mar. 1998, at 15.

69. *Id.* § 121. *See* 41 U.S.C.A. §§ 10a-10c (West 1998) (Buy American Act). The FY 1999 DOD Appropriations Act carries a similar provision requiring adherence to the Buy American Act. Pub. L. No. 105-262, § 8053, 112 Stat. 2279, 2308 (1998). *See also* Tony Capaccio, *Report: Pentagon Buys Prohibited Chinese Footware*, DEF. WEEK, at 3, Nov. 2, 1998 (reporting that DODIG report discovered violations of the Buy American Act in 16 contracts valued at $1.4 million).

Privatization of Military Housing Under Scrutiny

Often, it seems that "privatization" is viewed as the *sine qua non* for all the fiscal challenges confronting the government. Although many within Congress applaud the DOD's efforts to privatize everything within sight, others may not share the same enthusiasm.[71] Perhaps reflective of this difference of opinion, Congress now requires various notice requirements regarding military housing privatization initiatives.[72] Congress wants to be notified of any guarantee of payments made to a private party in the event of: (1) base closure or realignment, (2) reduction in troop strength, or (3) extended deployments of units. In particular, Congress requires that the notice specify the nature of the guarantee and the extent and likelihood of any liability assumed by the government.[73]

Congress further expressed its concern regarding the DOD's housing privatization initiatives by providing the Defense Family Housing Improvement Fund only a fraction of the monies that were initially earmarked in earlier conference reports.[74] Highlighting the lack of progress in this area, Congress reminded the DOD that housing privatization authority expires in February 2001. Congress also observed that it never intended the housing privatization initiatives "to become a substitute for the traditional housing construction program." As a consequence, Congress has directed that the DOD review its housing privatization plans and "narrow the scope to a reasonable number of projects."[75]

Additionally, Congress expressed its concern "that privatization shifts funding from military family housing construction, operations, and maintenance accounts to military personnel accounts to pay for increased housing allowances, which are used to pay rent to developers of privatized housing." Consequently, the SECDEF will report to Congress "an integrated family housing strategy" that focuses on maximizing existing civilian housing, housing referral services, and the appropriate use of privatization. Further, Congress tasked the GAO to monitor the DOD's implementation of its housing privatization initiatives.[76]

Comply with the Guidance Contained in House and Senate Reports

In the joint conference report accompanying the MILCON Appropriations Act, Congress instructed the DOD to comply with the underlying committee reports from both the House and the Senate "unless specifically addressed to the contrary."[77] Additionally, where either house has directed the submission of a report, the report will be provided to both the House and the Senate.[78]

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70. Pub. L. No. 105-237, § 124, 112 Stat. 1553, 1560 (1998). The Senate Committee on Appropriations expressed its view that MILCON appropriations, specifically the NATO Security Investment Program funds, must be used only to finance "critical infrastructure requirements within NATO alliance." S. Rep. No. 105-213, 23-24 (1998).

71. *See, e.g.*, General Accounting Office, Military Housing: Privatization Off to a Slow Start and Continued Management Attention Needed, GAO/NSIAD-98-178 (July 1998) (noting that not only is the DOD privatization effort lagging behind virtually all initial timetables, but predicted savings are vastly overstated). For example, savings for privatization efforts at Fort Carson and Lackland AFB were projected to be 24 percent and 29 percent less, respectively, than identical costs financed with MILCON appropriations. The GAO, however, concluded that, at most, the savings would be no more than seven percent at Fort Carson and 10 percent at Lackland AFB. *Id.* at 24-25. *See also* General Accounting Office, Defense Infrastructure: Challenges Facing DOD in Implementing Reform Initiatives, GAO/T-NSIAD-98-115 (Mar. 18, 1998) (concluding that initiatives to reduce the DOD infrastructure take longer than expected and anticipated savings fall short of projections).

72. Pub. L. No. 105-237, §126, 112 Stat. 1553, 1560 (1998). Additionally, in its report, the Senate Committee on Appropriations expressed its concern on the impact of housing privatization on school districts supporting military installations. Specifically, the Committee noted that housing privatization could well lead to the loss of federal funding critical to maintaining quality programs at local school districts. S. Rep. No. 105-213, 18. *See* Captain Joseph D. Lipchitz, *Note from the Field: Avoiding the Specter of Patriot Village: The Military Housing Privatization Initiative's Effect on Federal Funding of Education*, Army Law. , Feb. 1998, at 41.

73. Congress specifically identified the guarantee of any payments associated with military housing and private parties, to include mortgage and rental payments. Additionally, the Service Secretary must provide such notice at least 60 days before issuing a contract solicitation. *Id.*

74. Pub. L. No. 105-237, at 4, 112 Stat. 1553, 1560 (1998). Specifically, the House initially proposed the $242.4 million, and the Senate proposed $7 million. According to the joint conference report, Congress funded construction efforts fully in the "traditional family housing accounts." H.R. Conf. Rep. No. 105-647, at 17 (1998).

75. *Id.* at 18.

76. *Id.* at 18-19. *See, e.g.*, the DOD Housing Revitalization Support Office's website on this subject at: <http://www.acq.osd.mil/iai/hrso>. Additional insight on Army efforts in this area can be obtained via the Army Corps of Engineers Residential Communities Initiatives website at: <http://www.govcon.com/>. This website has the latest generic request for qualifications (RFQ) boilerplate for Army housing privatization initiatives. The Air Force has also put together an interesting website titled "Housing Privatization Tool Kit." *See* <http://www.afcee.brooks.af.mil/dc/dch/private/private.htm>.

77. H.R. Conf. Rep. No. 105-647, at 11 (1998).

78. *Id.*

Confronting a Crumbling Infrastructure

In its report, the Senate Committee on Appropriations, noted that the DOD's performance plan for FY 1999 failed to adequately explain how the military intends "to modernize, renovate, and improve . . . [an] aging defense infrastructure."[79] Consequently, the committee "encourages" the DOD to establish specific performance milestones regarding military infrastructure, to include: (1) reduction of the real property maintenance backlog, (2) improvement of family housing, (3) modernization of unaccompanied personnel housing, and (4) efforts aimed at responding to "critical shortfalls of quality of life facilities."[80]

Environmental Remediation Costs and Project Ceilings

To control repair costs on military housing, Congress requires prior notice whenever such work is projected to exceed $20,000 for non-flag officer quarters and $25,000 for general officer quarters.[81] Often, after work begins, unexpected environmental hazards are discovered that lead to costly remediation work. The remediation work typically includes: asbestos removal or abatement, radon abatement, lead-based paint removal or abatement, and other hazards associated with government housing that is frequently forty years or more old. To the extent that environmental remediation causes these thresholds to be exceeded, Congress will allow "after-the-fact" notification, which will be made on a semi-annual basis. This authority extends to projects funded by both current year and prior fiscal year appropriations.[82]

"Single Soldier" Housing Concept Attacked

In its committee report, the Senate disagreed with the concept of providing single enlisted soldiers with their own private barracks/dorm room. Not only did it question the wisdom of such an approach in this day and age of funding shortfalls, but the committee contended that "putting an 18-year-old man or woman in a room alone detracts from promoting unit cohesiveness and team building."[83] Consequently, the committee directed the SECDEF to report on the reasons supporting this "one-plus-one" policy, the costs, and the timetable.[84]

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79. S. Rep. No. 105-213, 9 (1998).

80. Among the "quality of life facilities" identified by the Senate Committee include child care centers, barracks, dining facilities, family housing projects, physical fitness and recreation centers, health clinics, and family support centers. *Id.*

81. According to the House Committee on Appropriations, this policy began in 1984. Congress initiated this notice requirement to assure "orderly planning and programming" for the repair and maintenance of military housing. H.R. Rep. No. 105-578, 24 (1998).

82. *Id.* The Senate Conference Report affords DOD similar flexibility regarding the application of the construction reprogramming criteria. Specifically, the Senate Report provides that "the costs associated with environmental hazard remediation such as asbestos removal, radon abatement, lead-based paint removal or abatement, and any other legislated environmental hazard remediation may be excluded." Sen. Rep. No. 105-213, at 11 (1998). *See* General Accounting Office, Environmental Compliance: Reporting on DOD Military Construction and Repair Projects Can Be Improved, GAO/NSIAD-98-3 (Dec. 8, 1997) (providing an overview of how the DOD funds construction and repair environmental compliance projects).

83. The Senate committee further noted that it "strongly supports" such a policy for junior noncommissioned officers. *Id.* at 12.

84. *Id.*

STROM THURMOND NATIONAL DEFENSE AUTHORIZATION ACT

Congress honored the senior senator from South Carolina by naming this year's National Defense Authorization Act (Authorization Act) after him, in recognition of his service for the United States of America. As a member of the Senate Armed Services Committee, Senator Thurmond has worked on forty annual defense authorization bills. His service to this country dates back to 1924, when he was commissioned as an Army reserve infantry officer. Among his many accomplishments as a soldier and an officer, Senator Thurmond participated in the D-Day Invasion at Normandy, where he was part of the 82d "All American" Airborne Division. Senator Thurmond retired from the Army Reserves, at the rank of Major General, in January 1965. Senator Strom Thurmond's dedication to and love for his country assured that America's Armed Forces remained ready to defend the United States and its interests.[85]

On 17 October 1998, President Clinton signed into law the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999.[86] What follows is an overview of its key provisions, with an emphasis on the Act's impact on fiscal, procurement, and operational activities within the DOD.

Missile Defense Systems

In light of the increased number of nations participating in missile and rocket launches, particularly by nations such as North Korea,[87] Congress has given greater attention to the DOD's work on missile defense technologies. Recognizing a heightened sensitivity to this growing threat, the Authorization Act contains "sense of Congress" language relating to national missile defense coverage. This provision conveys Congress's concern that any national defense missile system must protect America against "limited, accidental, or unauthorized ballistic missile attack."[88] In a separate "sense of Congress" provision, Congress encourages American and NATO cooperation with Russia to establish a system for providing "early warning of ballistic missile launches."[89]

Congress Restructures Ballistic Missile Defense Organization Program Elements

The Authorization Act mandates program elements for budget submissions by the Ballistic Missile Defense Organization (BMDO).[90] Specifically, the Act requires that all funding for National Missile Defense and Theater Missile Defense systems will be included in BMDO program elements.[91]

Among the programs identified by Congress were the THAAD system which reflects many of the challenges associated with current missile defense systems. After suffering five test fire failures, Congress has not yet lost faith in the THAAD concept, but it is not happy with the contractor's performance—a view shared by the DOD.[92] Consequently, the Authorization Act directs the SECDEF to implement a technical and price competition for the development and production of the THAAD interceptor missile. Further, the Authorization Act directs the SECDEF to establish a cost-sharing arrangement with the prime contractor to absorb costs associated with test failures, beginning with the ninth test flight. Last, Congress prohibits the DOD from initiating the engineering and manufacturing development phase for this program until three successful missile tests have occurred.[93]

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85. Pub. L. No. 105-261, § 1, 112 Stat. 1920 (1998).

86. *Id.* (also referred to as the 1999 DOD Authorization Act).

87. *See*, *e.g.*, Willis Witter, *Japan Makes Missile-Defense Plan High Priority*, WASH. TIMES, Nov. 6, 1998, at A12 (the 30 August 1998 rocket launch by North Korea demonstrates "for the first time" that it has a missile capable of striking at all of Japan, Hawaii, and parts of Alaska). *See also* Bill Gertz, *China Prepared to Test ICBM with Enough Range to Hit U.S.*, WASH. TIMES, Nov. 12, 1998, at A1.

88. Pub. L. No. 105-261, § 231, 112 Stat. 1920, 1952 (1998). *See also* General Accounting Office, *National Missile Defense: Even with Increased Funding Technical and Schedule Risks Are High*, Report No. GAO/NSIAD-98-153 (Jun. 23, 1998).

89. *Id.* § 234.

90. *Id.* § 235. The Act makes this funding structure a permanent part of 10 U.S.C. (inserting 10 U.S.C.A. § 223 (West 1998), and repealing Pub. L. No. 104-106, § 251 (1996 DOD Authorization Act)). Among the program elements mandated by Congress include: the Patriot system; the Navy system; the Theater High-Altitude Area Defense (THAAD) system; and the Medium Extended Air Defense System.

91. *Id.*

92. *Id.* § 236. In the underlying conference report, Congress refers to the THAAD program "as a matter of highest priority." H.R. CONF. REP. NO. 105-736 at 564-65. The report also notes that the DOD "is considering establishment of a second source for the THAAD," a proposal that Congress "tentatively support[s]." *Id.* at 590.

Landmine Alternatives

The Authorization Act authorizes $19.2 million for research and development of alternatives to anti-personnel and anti-tank mine systems. Additionally, the SECDEF will report to Congress on the DOD's progress in developing alternative landmine technologies and concepts.[94] The Authorization Act repeals that part of the 1996 Foreign Operations Appropriations Act that imposed a one-year moratorium on the use of anti-personnel landmines by U.S. armed forces.[95]

New Notice Requirements for Depot Maintenance Work

Congress requires the DOD to maintain a government-owned/government-operated core logistics capability for the repair and maintenance of weapons systems and certain military equipment. Commercial items, however, are specifically excluded from coverage by this provision. Congress requires a report on core depot maintenance capabilities and a "detailed justification" for any item that is, for the first time, determined to fall within this commercial item exception.[96]

Additionally, the Authorization Act requires the DOD first to notify Congress before it enters into a prime vendor contract for depot-level maintenance and repair work. In this notice, the DOD must outline the competitive procedures used to award a contract and provide a cost-benefit analysis that details expected savings.[97]

Acquisition Workforce Reductions

Demonstrating an increased sensitivity to the impact of downsizing within the acquisition community, Congress has directed the GAO to review the effect of personnel cuts on operations and readiness on the Army Materiel Command.[98] Additionally, the Appropriations Act requires congressional notice before allowing reductions in civilian personnel at Major Range and Test Facility Bases below that number cited in the FY 1999 budget submission.[99]

On the other hand, Congress has once again directed the DOD to reduce its acquisition workforce.[100] The Authorization Act requires the SECDEF to cut defense acquisition and support personnel strength by 25,000. Importantly, however, the Authorization Act allows the SECDEF to limit such cuts to 12,500 personnel if the SECDEF certifies to Congress that any further reduction in the defense procurement community would be inconsistent with the overall goal of promoting best value acquisitions and enhanced operational readiness.[101]

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93. Pub. L. No. 105-261, § 236, 112 Stat. 1920, 1953 (1998). The House Report notes that the THAAD failures were not the result of "design flaws but were failures due to quality control." H.R. REP. NO. 105-591, at 238-39. In light of this, Lieutenant General Lyles, BMDO director, issued a cure notice to the prime contractor, Lockheed Martin Corp. Upon receipt of LTG Lyles' notice, Lockheed Martin initiated a series of organizational and quality assurance measures aimed at eliminating test failures. Among its actions, Lockheed Martin has recruited Raytheon Corporation for assistance in analyzing test data. Jim Garamone, *Lyles Announces THAAD Program Changes*, AM. FORCES PRESS SERV., July 20, 1998.

94. Pub. L. No. 105-261, § 248, 112 Stat. 1920, 1957 (1998).

95. The moratorium mandated by the Foreign Operations Appropriations Act was set to begin on 12 February 1999. *Id.* § 1236 (repealing Pub. L. No. 104-107, § 580; 110 Stat. 751 (1996)).

96. *Id.* § 343 (amending 10 U.S.C.A. § 2464).

97. *Id.* § 346.

98. *Id.* § 348. *See also* GENERAL ACCOUNTING OFFICE, QUADRENNIAL DEFENSE REVIEW: SOME PERSONNEL CUTS AND ASSOCIATED SAVINGS MAY NOT BE ACHIEVED, GAO/NSIAD-98-100 (Apr. 30, 1998).

99. Pub. L. No. 105-262, § 8112, 112 Stat. 2279, 2326 (1998) (requiring a 30-day advance notice to Congress).

100. According to the GAO, the size of the acquisition workforce is shrinking only "slightly faster" than the rest of DOD. From fiscal year 1993 through 1997, the DOD workforce decreased by 17.5 percent. On the other hand, the civilian defense acquisition workforce decreased by 24 percent, and the number of military acquisition personnel fell by 28 percent. GENERAL ACCOUNTING OFFICE, ACQUISITION MANAGEMENT: WORKFORCE REDUCTIONS AND CONTRACTOR OVERSIGHT, GAO/NSIAD-98-127 (July 1998), at 1-3.

101. Pub. L. No. 105-261, § 931, 112 Stat. 1920, 2105 (1998). The initial provision by the House National Security Committee called for cuts of up to 70,000 personnel from the defense acquisition workforce. H.R. Rep. No. 105-736, at 699-700 (1998). In FY 1998, the SECDEF informed Congress that he had cut the acquisition workforce by 20,096 positions. *Acquisition Workforce: Cohen Compromises with Congress, Will Cut 20,096 from Workforce This Year*, Fed. Cont. Rep., (BNA), at 44 (July 13, 1998).

Keep Your Hands Off My Libraries!

The House National Security Committee has identified libraries on military installations as "essential category A morale, welfare, and recreation activities."[102] Consequently, with the exception of BRAC-affected installations, the House directed the SECDEF to suspend any further library closures and to report on those that have been closed since 1996 or that are open for less than four days a week. In addition to justifying the closure of the libraries or curtailment of hours, the report must detail DOD plans to re-open libraries on installations that have no library service.[103]

Commissary Allowed to Keep Bad Check Fees

It is well established that, absent specific statutory authority, the Miscellaneous Receipts Rule prevents agencies from retaining funds received outside of the appropriations process.[104] The Authorization Act now allows commissaries to charge dishonored check fees that are consistent with commercial industry practice and credit any collected fees to the commissary trust revolving fund. Furthermore, the commissaries may use appropriated funds to pay for costs associated with "making good" on these bad checks.[105]

Congress Provides Commanders Greater R&R Authority

With the personnel assigned to Operation Joint Guard specifically in mind, Congress has "clarified" an existing statute to allow service secretaries the ability to provide transportation for rest and recuperation (R&R) travel, using either government or commercial carriers.[106] Congress believes that this additional authority will enhance the overall cost effectiveness of the Operation Joint Guard R&R program.

Army National Guard Work Now Subject to the Competitive Process

The Secretary of the Army may provide financial assistance to support service, maintenance, repair, and construction work performed by the National Guard. The Authorization Act will allow assistance only after the Guard is selected following a competitive process that allows for consideration of proposals submitted by private and public sector entities.[107]

Price Preference for Small Disadvantaged Businesses (SDB) Limited

The Authorization Act relaxes the mandate to give SDBs a ten percent contract price preference. Previously, Congress gave the DOD a goal to award at least five percent of its total contract dollars to SDBs. The DOD could achieve this goal, in part, by setting aside and awarding contracts to SDBs if the contract price did not exceed the fair market price by more than ten percent. This price preference will apply only when the DOD fails to achieve its five-percent goal during the previous fiscal year.[108]

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102. H.R. Rep. No. 105-532, at 264-65.

103. *Id.*

104. 31 U.S.C.A. § 3302(b) (West 1998). *See, e.g., Bureau of Alcohol, Tobacco, and Firearms—Augmentation of Appropriations – Replacement of Autos by Negligent Third Parties*, B-226004, 67 Comp. Gen. 510 (1988) (ruling that the miscellaneous receipts rule applies to monies received, not to other property or services).

105. Pub. L. No. 105-261, § 364, 112 Stat. 1920 at 1985 (1998) (amending 10 U.S.C.A. § 2486 (West 1998)).

106. *Id.* § 633 (amending 37 U.S.C.A § 411c (West 1998)). Author's Note: On Thanksgiving Eve, 1997, Lieutenant Colonel Steve Salata, the 1st Armored Division Staff Judge Advocate, staffed this issue and assisted the Commander, 1st Armored Division, bringing it to the attention of congressional officials visiting the troops in Bosnia-Herzegovina. For additional information on how the Judge Advocate can tackle statutory impediments, *see* Information Paper, Subject: Legislative Procedures to Obtain Relief from Statutory Impediments or Obtain New Statutory Authority for Commanders (15 Aug. 1998) (distributed during the 1998 WWCLE). A copy of this information paper may be obtained from JAGCNET at <http: www.jagcnet.army.mil>.

107. *Id.* § 375 (amending 32 U.S.C.A. § 113(b) (West 1998).

108. *Id.* § 801.

Concern Over Sole Source Repair Parts Contracts Produce FAR Changes

Concerned over the possible abuse associated with sole-source purchases of commercial item spare parts, Congress has directed that the FAR be revised to assure price reasonableness for these procurements. The FAR changes will include specific guidance to ensure that prices are reasonable. It will also require the DOD to implement procedures that ensure, as appropriate, that item managers or primary contracting officers will procure spare parts. Congress directs the DOD to maximize its leverage associated with large quantity purchases for corporate discounts and other favorable contractual terms.[109]

Multiple Award Contracting Procedures Scrutinized

Concerned that government agencies are using multiple award task order and delivery order contracts to avoid the requirements of full and open competition, Congress has directed the DOD to revise its regulations covering these procurements.[110] Specifically, Congress is concerned about the practice of government agencies ordering from other agencies' multiple award contracts. In addition to concerns regarding competition, Congress questioned the fees charged for interagency purchases.[111] Consequently, Congress now expects the DOD to establish rules that will allow it access to interagency multiple award contracts "only when there is a legitimate reason to do so."[112]

Permanent Authority for Commercial Use of Major Range and Test Facilities Bases

Congress made permanent the authority allowing commercial entities to conduct test and evaluation activities at DOD Major Range and Test Facility Bases (MRTFBs).[113] This authority not only allows MRTFBs to charge commercial users direct and indirect costs associated with using DOD range and test facilities, but also permits the ranges to retain any funds generated under this authority.[114]

Domestic Terrorist Threats

The Authorization Act also contains the "Defense Against Weapons of Mass Destruction Act of 1998."[115] This series of provisions focuses on the importance of enhancing the effectiveness of federal, state, and local government agency interaction. Consequently, Congress requires a number of reports and studies that evaluate the DOD's efforts to confront this growing threat. Concerned about the level of federal interagency coordination and between each level of government, the Authorization Act directs the President to report on actions being taken to enhance government integration to prevent and to respond to terrorist incidents.[116] Additionally, the Authorization Act requires the Attorney General to develop and test methods that assess the threat posed against cities and other local areas by terrorist weapons of mass destruction.[117] Additionally, the SECDEF must contract with a federally funded research and development center to assess domestic response capabilities to terrorist use of weapons of mass destruction.[118] Finally, the Authori-

109. *Id.* § 803. Two DODIG reports recently concluded that DOD was paying more for commercial items than previously—anywhere from 1,430 percent to 13,163 percent more. *See Senate Panel Seeks Clearer Commercial Item Pricing Guidance*, CP&A REPORT, May 1998, at 12-13.

110. *Id.* § 814.

111. SEN. REP. NO. 105-189, at 318 (1998). The underlying impetus for this provision was a GAO report highlighting the multiple award contracting practices of six different agencies. In its report, the GAO cites the practice of one organization charging a $125 fee for orders placed by activities within the parent agency and up to $99,000 for an order placed by another agency. *See* GENERAL ACCOUNTING OFFICE, ACQUISITION REFORM – MULTIPLE-AWARD CONTRACTING AT SIX FEDERAL ORGANIZATIONS, GAO/NSIAD-98-215 (Sept. 1998), at 3.

112. SEN. REP. NO. 105-189, 318 (1998).

113. H.R. CONF. REP. NO. 105-736, § 820 (amending 10 U.S.C.A. § 2681 (West 1998)).

114. *Id.* The ability of commercial entities to use the DOD range and test facilities generates much needed funding so that these installations may upgrade and improve vital test and evaluation equipment and support systems.

115. Pub. L. No. 105-261, at Title XIV, §§ 1401-1405, 172 Stat. 1929, 2167 (1998).

116. *Id.* § 1402. Congress views this report as fleshing out the intent of Presidential Decision Directive 62, which is to create a new and more systematic approach to countering terrorist use of weapons of mass destruction. H.R. CONF. REP. NO. 105-736, at 629.

117. Pub. L. No. 105-261, § 1404, 112 Stat. 1920, 2168 (1998).

zation Act authorizes the President to employ and activate reserve forces to respond to the use or threatened use of a weapon of mass destruction.[119]

FY 1999 MILITARY CONSTRUCTION AUTHORIZATION ACT

On 17 October 1998, President Clinton signed the Military Construction Authorization Act (MILCON Authorization Act) for FY 1999. The Act authorizes $8.443 billion in budgetary authority for specified military construction projects, unspecified minor military construction projects, military family housing, and base realignment and closure activities.[120]

Architectural and Engineering Threshold Increased.

The MILCON Authorization Act increases the threshold at which DOD must notify Congress regarding the costs for architectural and engineering services and construction design from $300,000 to $500,000.[121] Additionally, the Act "clarifies" congressional intent that design funding not be used for "planning" and "study" efforts associated with military construction projects.[122]

An "Outside of the Box" Thought: Leasing Non-Excess Property to Lower Installation Infrastructure Costs.

Congress is apparently interested in the DOD's initiatives to reduce installation infrastructure costs. The DOD already has statutory authority to lease non-excess property under terms that will "promote the national defense or be in the public interest."[123] Congress has learned of plans by the Air Force and Navy to use this authority to reduce infrastructure costs.[124] The Act directs the SECDEF to report to Congress the number and purpose of any leases executed under this authority and "the positive and negative aspects" that leasing real property and surplus capacity on military installations will have on force protection and the military functions on the installation. Additionally, Congress wants the DOD to provide proposed or actual legislative authority for these ventures.[125]

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118. *Id.* § 1405.

119. This provision also allows the employment of full-time reserve personnel to support emergency preparedness programs aimed at preventing and responding to emergencies involving weapons of mass destruction. *Id.* § 511. The Act authorizes $99.1 million for countering paramilitary and terrorist WMD threats and $49.2 million for employment of the Army Reserves to support these programs. H.R. CONF. REP. NO. 105-736, at 628-29.

120. Pub. L. No. 105-261, Division B, 112 Stat. 1920, 1931 (1998). The DOD budget request sought only $7.777 billion in construction funding. If enacted, this request would have constituted a 30 percent decrement in construction funding compared to the funding authorization for fiscal year 1996.

121. *Id.* § 2801, 112 Stat. 1920 at 1932 (amending 10 U.S.C.A. § 2807 (West 1998)).

122. H.R. REP. NO. 105-532, at 774-75.

123. *See* 10 U.S.C.A. § 2667.

124. Specifically, the conference report accompanying the Act cites initiatives at Brooks Air Force Base, Texas and the development of Ford Island as part of the Naval Complex, Pearl Harbor, Hawaii. H.R. CONF. REP. NO. 105-736, at 777.

125. Pub. L. No. 105-261, § 2814, 112 Stat. 1920, 1932 (1998).

1999 OMNIBUS CONSOLIDATED AND EMERGENCY SUPPLEMENTAL APPROPRIATIONS ACT

On 21 October 1998, in a unique finale to America's "annual appropriations waltz," President Clinton signed the 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act (Omnibus Appropriations Act). The Omnibus Appropriations Act constitutes annual funding for eight separate appropriations measures.[126] Additionally, the Omnibus Appropriations Act provided the DOD with $7.73 billion in "emergency supplemental appropriations." When the music finally ended, the Omnibus Appropriations Act appropriated approximately $520 billion throughout the federal government. Below is a brief overview of how the DOD fared.

Bosnia Troop Effort Receives 11th Hour Relief

The 1999 DOD Appropriations Act did not specifically include funding to cover the costs of maintaining U.S. troops in Bosnia. The Omnibus Appropriations Act appropriates to the DOD $1.86 billion in emergency supplemental funding for overseas contingency operations, such as Bosnia.[127]

Readiness Enhancements Funded

The Omnibus Appropriations Act provides $1.301 billion to fund urgent personnel and readiness-related programs. The appropriations target the following activities: military recruiting and retention initiatives ($113.5 million), personnel tempo relief initiatives ($25.5 million), morale and recreation support of forces involved in deployments to Bosnia and Southwest Asia[128] ($50 million), defense health care ($200 million), flying hour and aviation spare parts increases ($239 million), depot maintenance ($302 million), operating forces support ($347.2 million), and individual combat equipment ($24 million).

Ballistic Missile Defense Programs Get a Boost

Underscoring its concern regarding the growing number of countries with intercontinental ballistic missile capabilities, Congress appropriated an additional $1 billion for ballistic missile defense programs. Interestingly, these funds are not earmarked for any specific program. Instead, the SECDEF has the discretionary authority to use these funds for "programs and infrastructure activities which accelerate this nation's efforts to field theater and national ballistic missile defense capability."[129] The Omnibus Appropriations Act also requires the SECDEF to provide Congress thirty days advance notice prior to allocating any of these funds to a specific missile defense program.[130]

Y2K Compliance Efforts Receive Extra Funding

The Omnibus Appropriations Act also provides $1.1 billion to the DOD for its Y2K compliance efforts. Additionally, these funds may be used to cover expenses related to computer security and information assurance programs. The SECDEF, however, must first provide Congress the proposed allocation and plan for achieving Y2K compliance before transferring these funds to any other account.[131]

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126. The eight appropriations bills consolidated into this Act were: Agriculture, Commerce, Justice, State, Judiciary, District of Columbia, Foreign Operations, Interior, Labor and HHS, Transportation, Treasury, and Postal. *Id.*

127. Of the $1.86 billion, $342 million is for military personnel and $1.52 billion is for the overseas contingency operations transfer fund. 144 CONG. REC. H11,521 (Oct. 19, 1998).

128. *Id.* at H11,195.

129. *Id.* at H11,522.

130. *Id.*

131. Specifically, the SECDEF must provide 15 days notice to the House and Senate Appropriations Committees, the Senate Special Committee on the Year 2000 Technology Problem, the House Committee on Science, and the House Committee on Government Reform and Oversight. *Id.* at H11,199.

Anti-Terrorism, Domestic Defense Programs, and Counter-Drug Programs

The Omnibus Appropriations Act also reflects Congress's keen interest in assuring that Americans are protected, no matter where they may be. The Omnibus Appropriations Act appropriates $478 million to defense anti-terrorism and diplomatic security programs. Congress also included an additional $50 million for DOD programs for domestic defense against weapons of mass destruction. Specifically, Congress identified the National Guard as "the logical entity" to coordinate domestic defense activities and programs between the DOD and state and local governments.[132] Finally, the Act provides $42 million for specified "high-priority" drug interdiction efforts.[133]

Storm Damage and Natural Disasters

Congress appropriated $469 million to the DOD to perform repair and construction work caused by storms and natural disasters at defense facilities around the world. Among the disasters noted include the recent severe flooding in Korea[134] and Hurricanes Bonnie, Earl, and George.[135]

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132. *Id.* at H11,523.

133. Congress specifically identified National Guard general support activities, interdiction efforts in the Caribbean and eastern Pacific, and funding for Operation CAPER FOCUS. *Id.* at H11,521.

134. For the flood damage alone, the Omnibus Act appropriated $253 million as follows:

O&M, Army	$134.0 million
O&M, Air Force	$ 1.7 million
MILCON, Army	$118.0 million

Id.

135. *Id.*

Appendix B

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 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
ADR (Alternate Disputes Resolution)	http://www.adr.af.mil/
	http://www.ogc.doc.gov/ogc/cld.html
Agency for International Development	http://www.info.usaid.gov
Air Force Contracting	http://www.safaq.hq.af.mil/contracting
Air Force Contingency Contracting Center	http://www.acclog.af.mil/lgc/contingency/contin1.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 Publications	http://afpubs.hq.af.mil
Air Force Site, FAR, DFARS, Fed. Reg.	http://farsite.hill.af.mil
AMC Command Counsel News Letter	http://www.amc.army.mil/amc/command_counsel/
AMC Command Counsel News Letter (Text Only)	http://www.amc.army.mil/amc/command_counsel_text
AMC –HQ Home Page	http://www.amc.army.mil
Army Acquisition Website	http://acqnet.sarda.army.mil/
Army Contingency Site	http://acqnet.sarda.army.mil/acqinfo/zpcntcrt.htm
Army Home Page	http://www.dtic.mil/armylink
Army Financial Management Home Page	http://www.asafm.army.mil/homepg.htm
Army Regulations/AFARS	http://www.sarda.army.mil/librarymain.htm
ASBCA Home Page	http://www.law.gwu.edu/burns

C

CAGE Code Assignment Also Search/Contractor Registration (CCR)	http://www.disc.dla.mil
Chief Information Officers Council (IT)	http://www.cio.fed.gov
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
Commerce Business Daily (CBD)	http://cbdnet.access.gpo.gov/index.html
Competitive Sourcing (Outsourcing)	http://www.afmc.wpafb.af.mil/organizations/HQ-AFMC/PK/pko/outsorce.htm
	http://www.hqda.army.mil/acsim/ca/ca1.htm
	http://www.afcesa.af.mil
	http://www.afcqmi.randolph.af.mil/op/index.htm
Comptroller General Decisions	http://www.gao.gov/decisions/decision.htm
Congress on the Net-Legislative Info	Http://thomas.loc.gov/
Congressional Record via GPO Access	http://www.access.gpo.gov/su_docs/aces/aces150.html
Contingency Contracting	http://www.afmc.wpafb.af.mil/organizations/HQ-AFMC/PK/pko/gotowar.htm
Contract Pricing Guides (address)	http://www.gsa.gov/staff/v/guides/instructions.htm
Contract Pricing Reference Guides	http://www.gsa.gov/staff/v/guides/volumes.htm
Cost Accounting Standards	http://www.fedmarket.com/cas/casindex.html

D

DCAA Web Page (Links to related sites)	http://www.dtic.mil/dcaa *Before you can access this site, must register at http://www.govcon.com
Debarred List	http://www.arnet.gov/epls/
Defense Acquisition Deskbook	http://www.deskbook.osd.mil
Defense Acquisition University	http://www.acq.osd.mil/dau/
Defense Contracting Regulations	http://www.dtic.mil/contracts
Defense Procurement	http://www.acq.osd.mil/dp/
Defense Tech. Info. Ctr. 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.acq.osd.mil/dp/dars/dfars.html
DFAS	http://www.dfas.mil/
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.acq.osd.mil/dp/dars
DOD Home Page	http://www.dtic.mil/defenselink
DOD Instructions and Directives	http://web7.whs.osd.mil/corres.htm
DOD Publications	http://books.hoffman.army.mil/cgi-bin/bookmgr/Shelves
DOD SOCO Web Page	http://www.dtic.mil/defenselink/dodgc/defense_ethics
DOL Wage Determinations	http://www.ceals.usace.army.mil/netahtml/srvc.html

E

Electronic Earlybird	http://ebird.dtic.mil/
Executive Orders	http://www.pub.whitehouse.gov/search/executive-orders.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 Jump-station	http://nais.nasa.gov/fedproc/home.html
Federal Acquisition Virtual Library (FAR/DFARS, CBD, Debarred list, SIC)	http://159.142.1.210/References/References.html
Federal Employees	http://www.fedweek.com
Federal Register	http://law.house.gov/7.htm
Federal Web Locator	http://www.law.vill.edu/Fed-Agency/fedwebloc.html
FFRDC - Federally 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
FMS Website	http://www.fms.treas.gov/finman.html

G

GAO Documents Online Order	http://gao.gov/cgi-bin/ordtab.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.sht-ml?desc017.html
General Services Administration	http://gsa.gov
GovBot Database of Government Web Sites	http://www.business.gov
GovCon - Contract Glossary	http://www.govcon.com/information/gcterms.html
Govt't Contracts Practice Group (Fried, Frank, Harris, Shriv-er, and Jacobson)	http://www.ffhsj.com/govtcon/govtcon.htm
Gov't. Information Locator Services Index U.S. Army Publi-cations	http://www-usappc.hoffman.army.mil/gils/gils.html
GSA Legal Web Page	http://www.legal.gsa.gov

I

Information Technology Homepage	http://www.afmc.wpafb.af.mil/organizations/HQ-AFMC/PK/pks/index.htm
Information Technology Policy	http://www.itpolicy.gsa.gov

J

Joint Publications	http://www.dtic.mil/doctrine
Joint Travel Regulations (JTR)	http://www.dtic.mil/perdiem/jtr.html
Justice Department	http://www.usdoj.gov

L

Lawguru (Legal Research Jumpsite)	http://www.lawguru.com/
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

N

NAF Contracting Regulation – AR 215-4 MWR Websites	http://trol.redstone.army.mil/mwr/naf_contracting/ne-wreg.pdf
	http://www.mwr.navy.mil
	http://www-r.afsv.af.mil
	http://www.usmc-mwr.com
NAF Financial (MWR)	http://www.asafm.army.mil/fo/naf/naf.htm
National Performance Review Library	http://www.npr.gov/library/index.html
NAVSUP Home Page	http://www.navsup.navy.mil/javaindex.html
Navy Acquisition Reform	http://www.acq-ref.navy.mil/
Navy Acquisition & Business Management	http://www.abm.rda.hq.navy.mil/
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.usoge.gov
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 Various Other Sites	http://www.asafm.army.mil/financial.htm
Office of General Counsel – U.S. Department of Commerce	http://www.ogc.doc.gov/OGC/CLD.HTML
Office of Management and Budget (OMB)	http://www.access.gpo.gov/su_docs/budget/index/html
Office of Management and Budget 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.arnet.gov/BestP/BestP.html
Operational Contracting Home Page	http://www.afmc.wpafb.af.mil/organizations/HQ-AFMC/PK/pko/index.htm

P

Policy Works - Per Diem Tables	http://www.policyworks.gov/org/main/mt/homepage/mtt/per-diem/perd97.htm

Privatization – Housing	http://www.acq.osd.mil/iai/hrso/

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
Taxpayers Against Fraud – False Claims Act Legal Center	http://www.taf.org

U

U.S. Agency for International Development	http://www.info.usaid.gov/
U.S. Court of Appeals for the Federal Circuit	http://www.fedcir.gov
U.S. Court of Federal Claims	http://www.ogc.doc.gov/fedcl/
U.S. Congress on the Net-Legislative Info	Http://thomas.loc.gov/
U.S. Code	http://law.house.gov/usc.htm

W

White House	http://www.whitehouse.gov

Y

Year 2000 Website	http://www.asafm.army.mil/fo/y2k/index.htm

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division
Office of The Judge Advocate General, U.S. Army

GRA On-Line!

You may contact any member of the GRA team on the Internet at the addresses below.

COL Tom Tromey,...........................trometn@hqda.army.mil
Director

COL Keith Hamack,.......................hamackh@hqda.army.mil
USAR Advisor

Dr. Mark Foley,................................foleyms@hqda.army.mil
Personnel Actions

MAJ Juan Rivera,................................riverjj@hqda.army.mil
Unit Liaison & Training

Mrs. Debra Parker,...........................parkeda@hqda.army.mil
Automation Assistant

Ms. Sandra Foster, ...fostesl@hqda.army.mil
IMA Assistant

The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Program

The following is the current schedule of The Judge Advocate General's Reserve Component (on-site) Continuing Legal Education Program. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units to attend on-site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend on-site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any on-site training session.

1998-1999 Academic Year On-Site CLE Training

On-site instruction provides updates in various topics of concern to military practitioners as well as an excellent opportunity to obtain CLE credit. In addition to receiving instruction provided by two professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to obtain career information from the Guard and Reserve Affairs Division, Forces Command, and the United States Army Reserve Command. Legal automation instruction provided by personnel from the Legal Automation Army-Wide System Office and enlisted training provided by qualified instructors from Fort Jackson will also be available during the on-sites. Most on-site locations supplement these offerings with excellent local instructors or other individuals from within the Department of the Army.

Additional information concerning attending instructors, GRA representatives, general officers, and updates to the schedule will be provided as soon as it becomes available.

If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Juan J. Rivera, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380 or (800) 552-3978, ext. 380. You may also contact Major Rivera on the Internet at riverjj@hqda.army.mil. Major Rivera.

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE 1998-1999 ACADEMIC YEAR

DATE	CITY, HOST UNIT, AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*		ACTION OFFICER
9-10 Jan 99	Long Beach, CA 78th MSO Renaissance Long Beach Hotel Long Beach, CA 90802 1-800-228-9898	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	BG Michael J. Marchand BG Thomas W. Eres MAJ Stephanie Stephens MAJ M. B. Harney COL Keith Hamack	MAJ Christopher Kneib 5129 Vail Creek Court San Diego, CA 92130 (work) (619) 553-6045 (unit) (714) 229-7300 akneib1@san.rr.com
30-31 Jan	Seattle, WA 6th MSO University of Washington School of Law Condon Hall 1100 NE Campus Parkway Seattle, WA 22903 (206) 543-4550	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MG John D. Altenburg BG Thomas W. Eres MAJ Harrold McCracken LTC Tony Helm COL Thomas Tromey	LTC Frederick S. Feller 7023, 95th Avenue, SW Tacoma, WA 98498 (work) (360) 753-6824 (home) (253-582-6486 (fax) (360) 664-9444 feller@biia.wa.gov
6-7 Feb	Columbus, OH 9th MSO/OH ARNG Clarion Hotel 7007 North High Street Columbus, OH 43085 (614) 436-5318	AC GO RC GO Criminal Law Ad & Civ Law GRA Rep	BG Thomas J. Romig BG Richard M. O'Meara MAJ Victor Hansen LTC Karl Goetzke COL Keith Hamack	LTC Tim Donnelly 1832 Milan Road Sandusky, OH 44870 (419) 625-8373 e-mail: Tdonne2947@aol.com
20-21 Feb	Denver, CO 87th MSO Embassy Suites Denver Tech Center Costila Avenue 10250 Englewood, CO 80112 1-800-654-4810	AC GO RC GO Contract Law Int'l - Ops Law GRA Rep	BG Joseph R. Barnes BG Thomas W. Eres MAJ Jody Hehr MAJ Michael Smidt COL Thomas N. Tromey	MAJ Paul Crane DCMC Denver Office of Counsel Orchard Place 2, Suite 200 5975 Greenwood Plaza Blvd. Englewood, CO 80111 (303) 843-4300 (108) e-mail:pcrane@ogc.dla.mil
27-28 Feb	Indianapolis, IN IN ARNG Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	BG Michael J. Marchand BG John F. DePue LTC Jackie R. Little MAJ Michael Newton MAJ Juan J. Rivera	LTC George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449 thompsongc@in-arng,ngb.ar
6-7 Mar	Washington, DC 10th MSO National Defense University Fort Lesley J. McNair Washington, DC 20319	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Joseph R. Barnes BG Richard M. O'Meara MAJ Herb Ford MAJ Walter Hudson COL Thomas N. Tromey	CPT Patrick J. LaMoure 6233 Sutton Court Elkridge, MD 21227 (301) 394-0558 e-mail: lampat@mail.va.gov

13-14 Mar	Charleston, SC 12th LSO Charleston Hilton 4770 Goer Drive North Charleston, SC 29406 (800) 415-8007	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	BG Joseph R. Barnes BG John F. DePue MAJ Mike Berrigan MAJ Dave Freeman COL Keith Hamack	COL Robert P. Johnston Office of the SJA, 12th LSO Building 13000 Fort Jackson, SC 29207-6070 (803) 751-1223
13-14 Mar	San Francisco, CA 75th LSO	AC GO RC GO Int'l - Ops Law Criminal Law GRA Rep	BG Michael J. Marchand BG Thomas W. Eres LTC Manuel Supervielle MAJ Edye Moran Dr. Mark Foley	MAJ Douglas T. Gneiser Hancock, Rothert & Bunshoft Four Embarcadero Center Suite 1000 San Francisco, CA 94111 (415) 981-5550 dgneiser@hrblaw.com
20-21 Mar	Chicago, IL 91st LSO Rolling Meadows Holiday Inn 3405 Algonquin Road Rolling Meadows, IL 60008 (708) 259-5000	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Thomas J. Romig BG John F. DePue LTC Paul Conrad MAJ Norm Allen Dr. Mark Foley	CPT Ted Gauza 2636 Chapel Hill Dr. Arlington Heights, IL 60004 (312) 443-1600 (312) 443-1600
10-11 Apr	Gatlinburg, TN 213th MSO Days Inn-Glenstone Lodge 504 Airport Road Gatlinburg, TN 37738 (423) 436-9361	AC GO RC GO Criminal Law Int'l - Ops Law GRA Rep	BG Michael J. Marchand BG Thomas W. Eres MAJ Marty Sitler LTC Richard Barfield Dr. Mark Foley	LTC Barbara Koll Office of the Commander 213th LSO 1650 Corey Boulevard Decatur, GA 30032-4864 (404) 286-6330/6364 work (404) 730-4658 bjkoll@aol.com
23-25 Apr	Little Rock, AR 90th RSC/1st LSO	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MG John D. Altenburg BG Thomas W. Eres MAJ Rick Rousseau MAJ Tom Hong Dr. Mark Foley	MAJ Tim Corrigan 90th RSC 8000 Camp Robinson Road North Little Rock, AK 72118-2208 (501) 771-7901/8935 e-mail: corrigant@usarc-emh2.army.mil
24-25 Apr	Newport, RI 94th RSC Naval Justice School at Naval Education & Training Center 360 Elliott Street Newport, RI 02841	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	BG Joseph R. Barnes BG Richard M. O'Meara MAJ Moe Lescault MAJ Geoffrey Corn COL Thomas N. Tromey	MAJ Lisa Windsor/Jerry Hunter OSJA, 94th RSC 50 Sherman Avenue Devens, MA 01433 (978) 796-2140-2143 or SSG Jent, e-mail: jentd@usarc-emh2.army.mil
1-2 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Boulevard Gulf Shores, AL 36547 (334) 948-4853 (800) 544-4853	AC GO RC GO Int'l - Ops Law Contract Law GRA Rep	BG Michael J. Marchand BG Richard M. O'Meara LCDR Brian Bill MAJ Beth Berrigan COL Keith Hamack	1LT Chris Brown OSJA, 81st RSC ATTN: AFRC-CAL-JA 255 West Oxmoor Road Birmingham, AL 35209-6383 (205) 940-9303/9304 e-mail: browncr@usarc-emh2.army.mil

14-16 May	Kansas City, MO 8th LSO/89th RSC Embassy Suites (KC Airport) 7640 NW Tiffany Springs Parkway Kansas City, MO 64153-2304 (816) 891-7788 (800) 362-2779	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Thomas J. Romig BG John f. DePue MAJ Janet Fenton MAJ Michael Hargis Dr. Mark Foley	MAJ James Tobin 8th LSO 11101 Independence Avenue Independence, MO 64054-1511 (816) 737-1556 jtobin996@aol.com

*Topics and attendees listed are subject to change without notice.
Please notify MAJ Rivera if any changes are required, telephone (804) 972-6383.

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 which require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, 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

1999

January 1999

4-15 January	1999 JAOAC (Phase II) (5F-F55).
5-8 January	1999 USAREUR Tax CLE (5F-F28E).
11-15 January	1999 PACOM Tax CLE (5F-F28P).
11-15 January	1999 USAREUR Contract and Fiscal Law CLE (5F-F15E).
11-22 January	148th Basic Course (Phase I-Fort Lee) (5-27-C20).
20-22 January	5th RC General Officers Legal Orientation Course (5F-F3).
22 January-	148th Basic Course (Phase II-2 April TJAGSA) (5-27-C20).
25-29 January	152nd Senior Officers Legal Orientation Course (5F-F1).

February 1999

8-12 February	70th Law of War Workshop (5F-F42).
8-12 February	1999 Maxwell AFB Fiscal Law Course (5F-F13A).
8-12 February	23rd Administrative Law for Military Installations Course (5F-F24).

March 1999

1-12 March	31st Operational Law Seminar (5F-F47).
1-12 March	142nd Contract Attorneys Course (5F-F10).
15-19 March	44th Legal Assistance Course (5F-F23).
22-26 March	2d Advanced Contract Law Course (5F-F103).
22 March-2 April	11th Criminal Law Advocacy Course (5F-F34).
29 March-2 April	153rd Senior Officers Legal Orientation Course (5F-F1).

April 1999

12-16 April	1st Basics for Ethics Counselors Workshop (5F-F202).
14-16 April	1st Advanced Ethics Counselors Workshop (5F-F203).

19-22 April	1999 Reserve Component Judge Advocate Workshop (5F-F56).
26-30 April	10th Law for Legal NCOs Course (512-71D/20/30).
26-30 April	53rd Fiscal Law Course (5F-F12).

May 1999

3-7 May	54th Fiscal Law Course (5F-F12).
3-21 May	42nd Military Judge Course (5F-F33).
10-12 May	1st Joint Service High Profile Case Management Course (5F-F302).
17-21 May	2nd Advanced Trial Advocacy Course (5F-F301).

June 1999

7-18 June	4th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
7 June- 16 July	6th JA Warrant Officer Basic Course (7A-550A0).
7-11 June	2nd National Security Crime and Intelligence Law Workshop (5F-F401).
7-11 June	154th Senior Officers Legal Orientation Course (5F-F1).
14-18 June	3rd Chief Legal NCO Course (512-71D-CLNCO).
14-18 June	29th Staff Judge Advocate Course (5F-F52).
21 June-2 July	4th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
21-25 June	10th Senior Legal NCO Management Course (512-71D/40/50).
23-25 June	Career Services Directors Conference

July 1999

5-16 July	149th Basic Course (Phase I-Fort Lee) (5-27-C20).
6-9 July	30th Methods of Instruction Course (5F-F70).
7-9 July	Professional Recruiting Seminar
12-16 July	10th Legal Administrators Course (7A-550A1).
16 July- 24 September	149th Basic Course (Phase II-TJAGSA) (5-27-C20).

August 1999

2-6 August	71st Law of War Workshop (5F-F42).
2-13 August	143rd Contract Attorneys Course (5F-F10).
9-13 August	17th Federal Litigation Course (5F-F29).
16-20 August	155th Senior Officers Legal Orientation Course (5F-F1).
16 August 1999- 26 May 2000	48th Graduate Course (5-27-C22).
23-27 August	5th Military Justice Mangers Course (5F-F31).
23 August- 3 September	32nd Operational Law Seminar (5F-F47).

September 1999

8-10 September	1999 USAREUR Legal Assistance CLE (5F-F23E).
13-17 September	1999 USAREUR Administrative Law CLE (5F-F24E).
13-24 September	12th Criminal Law Advocacy Course (5F-F34).

October 1999

4-8 October	1999 JAG Annual CLE Workshop (5F-JAG).
4-15 October	150th Basic Course (Phase I-Fort Lee) (5-27-C20).
15 October- 22 December	150th Basic Course (Phase II-TJAGSA) (5-27-C20).

12-15 October	72nd Law of War Workshop (5F-F42).
18-22 October	45th Legal Assistance Course (5F-F23).
25-29 October	55th Fiscal Law Course (5F-F12).

November 1999

1-5 November	156th Senior Officers Legal Orientation Course (5F-F1).
15-19 November	23rd Criminal Law New Developments Course (5F-F35).
15-19 November	53rd Federal Labor Relations Course (5F-F22).
29 November 3 December	157th Senior Officers Legal Orientation Course (5F-F1).
29 November 3 December	1999 USAREUR Operational Law CLE (5F-F47E).

December 1999

6-10 December	1999 USAREUR Criminal Law Advocacy CLE (5F-F35E).
6-10 December	1999 Government Contract Law Symposium (5F-F11).
13-15 December	3rd Tax Law for Attorneys Course (5F-F28).

2000

January 2000

4-7 January	2000 USAREUR Tax CLE (5F-F28E).
10-14 January	2000 USAREUR Contract and Fiscal Law CLE (5F-F15E).
10-21 January	2000 JAOAC (Phase II) (5F-F55).
17-28 January	151st Basic Course (Phase I-Fort Lee) (5-27-C20).
18-21 January	2000 PACOM Tax CLE (5F-F28P).
26-28 January	6th RC General Officers Legal Orientation Course (5F-F3).
28 January- 7 April	151st Basic Course (Phase II- TJAGSA) (5-27-C20).
31 January- 4 February	158th Senior Officers Legal Orientation Course (5F-F1).

February 2000

7-11 February	73rd Law of War Workshop (5F-F42).
7-11 February	2000 Maxwell AFB Fiscal Law Course (5F-F13A).
14-18 February	24th Administrative Law for Military Installations Course (5F-F24).
28 February- 10 March	33rd Operational Law Seminar (5F-F47).
28 February- 10 March	144th Contract Attorneys Course (5F-F10).

March 2000

13-17 March	46th Legal Assistance Course (5F-F23).
20-24 March	3rd Contract Litigation Course (5F-F102).
20-31 March	13th Criminal Law Advocacy Course (5F-F34).
27-31 March	159th Senior Officers Legal Orientation Course (5F-F1).

April 2000

10-14 April	2nd Basics for Ethics Counselors Workshop (5F-F202).
10-14 April	11th Law for Legal NCOs Course (512-71D/20/30).
12-14 April	2nd Advanced Ethics Counselors Workshop (5F-F203).
17-20 April	2000 Reserve Component Judge Advocate Workshop (5F-F56).

May 2000

1-5 May	56th Fiscal Law Course (5F-F12).
1-19 May	43rd Military Judge Course (5F-F33).
8-12 May	57th Fiscal Law Course (5F-F12).

June 2000

5-9 June	3rd National Security Crime and Intelligence Law Workshop (5F-F401).
5-9 June	160th Senior Officers Legal Orientation Course (5F-F1).
5-14 June	7th JA Warrant Officer Basic Course (7A-550A0).
5-16 June	5th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
12-16 June	4th Senior Legal NCO Course (512-71D-CLNCO).
12-16 June	30th Staff Judge Advocate Course (5F-F52).
19-23 June	11th Senior Legal NCO Management Course (512-71D/40/50).
19-30 June	5th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
26-28 June	Professional Recruiting Training Seminar

3. Civilian-Sponsored CLE Courses

1999

January

21 January ICLE	Mastering the Craft of Modern Trial Advocacy Swissotel Atlanta, Georgia
21 January ICLE	Constitutional Tort Case Seminar Swissotel Atlanta, Georgia

February

19 February ICLE	Motion Practice Atlanta, Georgia

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

For detailed information on mandatory continuing legal eduction jurisdiction and reporting dates for other states, see the September 1998 issue of *The Army Lawyer*.

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

Legal Assistance

*AD A350513 The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Volume I, June 1998, 219 pages

*AD A350514 The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Volume II, June 1998, 223 pages

Labor Law

*AD A350510 The Law of Federal Employment, JA 210, July 1998, 226 pages

* Indicates a new publication or revised edition.

For a complete listing of the TJAGSA Materials Available through the DTIC, see the September 1998 issue of *The Army Lawyer.*

2. Regulations and Pamphlets

For detailed information, see the September 1998 issue of *The Army Lawyer.*

3. The Legal Automation Army-Wide System Bulletin Board Service

For detailed information, see the September 1998 issue of *The Army Lawyer.*

4. TJAGSA Publications Available Through the LAAWS BBS

For detailed information, see the September 1998 issue of *The Army Lawyer.*

5. Article

The following information may be useful to judge advocates:

Robert P. Burns, *The Purpose of Legal Ethics and the Primacy of Practice*, 39 WM. & MARY L. REV. 327 (1998).

6. TJAGSA Information Management Items

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new projectors in the primary classrooms and pentiums in the computer learning center. We have also completed the transition to Win95 and Lotus Notes. We are now preparing to upgrade to Microsoft Office 97 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 Information Management Office.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or 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 Information Management Office at extension 378. Mr. Al Costa.

7. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library Service (ALLS) has become the point of contact for redistribution of materials purchased by ALLS which are contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

Law librarians having resources purchased by ALLS which are available for redistribution should contact Ms. Nelda Lull, JAGS-DDS, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.