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# 1990 Contract Law Developments—The Year in Review

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Major John T. Jones, Jr.; Major Michael K. Cameron; Major Anthony M. Helm

## Foreword

We have endeavored to select the material in this year's review of recent developments in government contract law based upon its significance and general interest or because it will impact upon the contracting process and the practice of the contract attorney. Of necessity, this review cannot be an exhaustive analysis of every development or decision. We have chosen the statutes, regulations, decisions, and policies included in the review based on our assessment of the items that appear to be of the broadest interest to the government contract bar.

## Legislation

### *The 1991 National Defense Authorization Act*

#### *Introduction*

The Fiscal Year 1991/1992 National Defense Authorization Act<sup>1</sup> (Authorization Act), contains extensive changes to the acquisition system. Some of the changes were requested by the Department of Defense (DOD) as part of its legislative initiative resulting from the Defense Management Review. Other changes were the result of congressional initiatives and reforms. Some changes are self-implementing, many more direct DOD to promulgate regulations with specified contents. The resulting law is well over 250 pages for *Division A—Department of Defense Authorizations* alone. Every contract attorney should review the full text of the Authorization Act as soon as possible to assess the impact of this legislation on his or her agency.

#### *Award on Initial Proposals*

The most far-reaching reform included in this year's Authorization Act is a provision on competitive negotiation procedures that permits award on initial proposals to other than the low cost offeror.<sup>2</sup> The changes, effective for solicitations issued after March 5, 1991, are significant in several respects. First, the solicitation must identify and disclose the relative importance of all significant factors and *subfactors*.<sup>3</sup> While not a radical change, this provision should eliminate confusion as to the level of detail necessary in section M of a solicitation. Second, a

solicitation for competitive proposals must specifically indicate whether or not the agency intends to award on initial proposals without discussions. If the agency indicates it intends to award without discussions, the contracting officer<sup>4</sup> must explain why discussions are necessary before conducting discussions. No standards are provided to guide the contracting officer's decision regarding whether discussions are necessary. The distinction between discussions and minor clarifications is preserved. If the required notice is included in the RFP, then the agency may award without discussions to the successful offeror, considering only the factors and subfactors set forth in the solicitation. In a major departure from existing law, award may be made, without discussions, to other than the low offeror. The successful offeror need *not* be the lowest cost offeror. The intent of section 802 is to induce offerors to submit their lowest prices in initial proposals, by increasing the likelihood that there may not be a second chance in discussions to revise the offer. Awards made without discussions lessen the opportunity for auctions or improper communications that might affect the outcome of the solicitation.

#### *Cost or Pricing Data Threshold*

As requested by DOD and the defense industry, Congress raised the threshold for obtaining cost or pricing data to \$500,000.<sup>5</sup> DOD must also promulgate regulations regarding when a contracting officer may require cost or pricing data in procurements under \$500,000. The head of the agency (or his designee) must document the reasons for doing so in writing. The DOD Inspector General, who had opposed raising the threshold, is tasked to review the impact of raising the threshold and to report to Congress in 1995.<sup>6</sup>

#### *Stock Funds*

The Secretary of Defense may not incur obligations against stock funds in FY 1991 in excess of eighty percent of the stock fund sales in FY 1991.<sup>7</sup> Fuel and subsistence items are excluded, and the Secretary of Defense may waive this limitation if critical to national security. This limitation appears to be intended to reduce the inventory levels for stock funded activities in FY 1991.

<sup>1</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510 (1990).

<sup>2</sup>*Id.* § 802 (amending 10 U.S.C. § 2305).

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>*Id.* § 803.

<sup>6</sup>*Id.* § 803 (providing that "... not later than the date on which the President submits the budget to Congress ... for fiscal year 1996").

<sup>7</sup>*Id.* § 311.

### *Force Reductions at Commercial and Industrial Type Activities*

Congress restricted the Secretary of Defense's ability to reduce civilian employees at Commercial and Industrial Type Activities.<sup>8</sup> Congress directed the Secretary of Defense to establish guidelines for personnel reductions and directed agencies to develop a "Master Plan" for Commercial and Industrial Type Activities. The agency master plan must include demographic data and projected workload and manpower requirements. Agencies must notify Congress of proposed force reductions in its budget submission and may not involuntarily reduce or furlough employees until forty-five days after the agency reports the proposed action and the reasons therefore to Congress.

### *Duty-to-Domicile Transportation*

Congress has provided DOD statutory authority to transport government personnel and their dependents (family members) between duty station and home when public transportation is unsafe or not available.<sup>9</sup> This provision only applies outside the United States. Thus, the Secretary of Defense may deviate from the provisions of 31 U.S.C. section 1344 regarding personal use of government vehicles.

### *Environmental Provisions*

Reflecting an increased environmental awareness, Congress tasked DOD to prepare several reports regarding environmental compliance at home and abroad.<sup>10</sup> Congress also prohibited DOD from purchasing performance and payment bonds to guarantee an agency's performance of any direct function, to include environmental obligations.<sup>11</sup>

### *Municipal Service Contracts with Local Governments*

Congress ratified contracts awarded prior to November 5, 1990, to local governments for police, fire, and other municipal services, notwithstanding the prohibition against such contracts in 10 U.S.C. section 2465.<sup>12</sup> Con-

gress also directed a study of the problems relating to providing municipal services to military installations.<sup>13</sup>

### *Acquisition Law Reform Panel*

Congress has established yet another panel to study acquisition law reform. The panel's duties include drafting a new codification of procurement laws for DOD. The panel's report must be submitted to Congress by January 15, 1993.<sup>14</sup>

### *Competitive Alternative Sources*

Congress modified the requirement in major systems acquisitions for competitive alternative sources.<sup>15</sup> The previous requirement for so-called "dual sourcing" major systems acquisitions is replaced with a requirement that the acquisition strategy for a major system must provide an option for competitive alternative sources for programs and major subsystems. This option must be available throughout the period beginning with full scale development through the end of procurement whenever competitive alternative sources would be cheaper, less risky, quicker, more cost effective, or otherwise in the national interest.

### *Uniform Small Purchase Policy Thresholds*

Congress amended 41 U.S.C. section 403 to provide for a uniform small purchase threshold.<sup>16</sup> The current \$25,000 threshold will be adjusted for inflation every five years. Statutory provisions requiring publication of notices in the Commerce Business Daily<sup>17</sup> were amended to refer to the uniform threshold rather than a specific dollar threshold.

### *Multiyear Contracts*

Congress extended the use of multiyear contracts to construction, alteration, and repair of improvements to real property.<sup>18</sup> It also modified the findings required by 10 U.S.C. section 2306(h) to permit consideration of program cost savings other than contract cost savings in determining whether substantial costs savings are anticipated. Additional changes affecting multiyear contracts were made in the FY 1991 DOD Appropriations Act.<sup>19</sup>

<sup>8</sup>*Id.* § 322 (to be codified at 10 U.S.C. § 1597).

<sup>9</sup>*Id.* § 326 (to be codified at 10 U.S.C. § 2637).

<sup>10</sup>*Id.* §§ 341-345.

<sup>11</sup>*Id.* § 346.

<sup>12</sup>*Id.* § 353.

<sup>13</sup>*Id.* § 354.

<sup>14</sup>*Id.* § 800.

<sup>15</sup>*Id.* § 805 (amending 10 U.S.C. § 2438).

<sup>16</sup>*Id.* § 806.

<sup>17</sup>15 U.S.C. § 637(e)(1); 41 U.S.C. § 416(a)(1).

<sup>18</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 808 (1990) (amending 10 U.S.C. § 2306(h)).

<sup>19</sup>See *infra* notes 49-67 and accompanying text.

### *Employment by Subcontractors of Certain Convicted Felons*

Congress extended to first tier subcontractors the existing prohibitions against the employment and other activities of individuals convicted of defense-contract related felonies.<sup>20</sup>

#### *Subcontractor Disclosure of Debarment and Suspension*

Prime contractors must now require that subcontractors disclose to them whether they are debarred or suspended as of the time of award of a subcontract.<sup>21</sup> This disclosure requirement applies to all subcontracts exceeding the small purchase threshold.

#### *Payment Suspension on Substantial Evidence of Fraud*

Congress enacted statutory procedures for suspending progress, advance, and partial payments upon substantial evidence that the payment request is based on fraud.<sup>22</sup> The statute provides for elaborate procedures for requesting, suspending, and reinstating payments. It is unclear what, if any, impact the statute will have on common law remedies. The new statute applies to all contracts awarded after May 4, 1991.

#### *Whistleblowers*

Defense contractors are prohibited from discriminating against any employee who directly or indirectly discloses information to a government official that the employee reasonably believes evidences a violation of federal law or regulation relating to DOD procurement or the subject matter of a contract.<sup>23</sup> The statute adopts procedures similar to those protecting government employees. It applies to contracts over \$500,000 awarded between May 4, 1991, and November 5, 1994, except those based on established catalog or market prices of commercial items sold in substantial quantities to the general public.

#### *Independent Research and Development*

Congress significantly changed the rules on Independent Research & Development (IR&D) and Bid and Proposal (B&P) costs.<sup>24</sup> The new provision eliminates the

requirement that the work have a potential relationship to a military function or operation.<sup>25</sup> Instead, the work need only be of potential interest to the Department of Defense, and the statutory examples of what research should be encouraged are extremely broad, such as for enhancing industrial competitiveness. Requirements for advance agreements on IR&D and B&P costs are codified and the thresholds are subject to adjustment every three years beginning on October 1, 1994.

#### *Professional and Technical Services Contracts*

Congress directed DOD to issue regulations regarding professional and technical services contracts.<sup>26</sup> The regulations are supposed to reduce the use of such contracts, minimize the use of level of effort contracts, discourage uncompensated overtime, emphasize technical quality evaluation factors, and ensure that cost realism is considered in risk evaluations.

#### *CINC Initiative Fund*

A separate Operation & Maintenance (O&M) Budget Account was established in the O&M, Defense Agencies, authorization for the Chairman, Joint Chiefs of Staff.<sup>27</sup> Thirty-five million dollars is authorized for specific purposes, including purposes normally paid for out of other appropriations, such as humanitarian assistance, foreign military assistance, and procurement. These funds are in addition to other appropriations provided for these purposes.

#### *Contracting Out*

The authority provided to installation commanders to decide which commercial activities at the installation will be reviewed under the commercial activities procedures, and to decide when they would be reviewed, was extended until September 30, 1991.<sup>28</sup> Additional provisions on contracting out appear in the 1991 DOD Appropriations Act.<sup>29</sup>

#### *Defense Acquisition Workforce Improvement Act*

The Congress included a comprehensive system to organize, train, and manage the defense acquisition work

<sup>20</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 812 (1990) (amending 10 U.S.C. § 2408(a)).

<sup>21</sup>*Id.* § 813 (amending 10 U.S.C. § 2393).

<sup>22</sup>*Id.* § 836 (amending 10 U.S.C. § 2307).

<sup>23</sup>*Id.* § 837 (to be codified at 10 U.S.C. § 2409(a)).

<sup>24</sup>*Id.* § 824 (to be codified at 10 U.S.C. § 2372).

<sup>25</sup>*Id.* (repealing 10 U.S.C. § 2358).

<sup>26</sup>*Id.* § 834 (to be codified at 10 U.S.C. § 2331).

<sup>27</sup>*Id.* § 908.

<sup>28</sup>*Id.* § 921 (amending 10 U.S.C. § 2468(f)).

<sup>29</sup>Pub. L. No. 101-511 (1990).

force.<sup>30</sup> The Defense Acquisition Workforce Improvement Act provides for a separate personnel system, increased training opportunities, and higher pay. Contract attorneys are neither specifically included in nor excluded from this new system.<sup>31</sup> Legal education is listed as one of the disciplines that may be counted towards minimum educational requirements.<sup>32</sup>

#### *Acquisition Work Force Personnel Reductions*

Congress directed that acquisition personnel be reduced by twenty percent over five years.<sup>33</sup> No guidance is given on which categories of acquisition personnel should be reduced and how the reductions should be carried out. The reduction, however, applies to the very broad group of personnel described in Appendix A of "Defense Management"—a report by the Secretary of Defense to the President dated July 1989.

#### *M Accounts*

Congress completely revised the rules governing the closing of accounts and the management of expired appropriations, the so-called "M" Accounts. This action was taken in response to perceived abuses by executive branch agencies in funding changes on controversial programs without obtaining further congressional funding.<sup>34</sup> A more complete discussion of these changes appears in the section entitled Fiscal Law below.

#### *"Black" Programs*

The DOD Authorization Act and the DOD Appropriations Act specifically reference the Classified Annex to their Conference Reports<sup>35</sup> and state that the annexes will "have the force and effect of law as if enacted into law." The legal effect of this language may be debated. What is clear, however, is that Congress intends that DOD follow the directions given in the annexes. Attorneys working in this area should obtain a copy of the Classified Annexes and review their provisions. In two other provisions, Con-

gress amended 10 U.S.C. section 119 to: (1) require fourteen days advanced notice of any changes in the classification of a special access program;<sup>36</sup> and (2) thirty days advanced notice prior to initiating a special access program.<sup>37</sup>

#### *Use of Real Property Overseas*

Congress codified a recurring DOD Appropriations Act provision that authorized DOD to accept real property, or the use of real property, services, and supplies in connection with a mutual defense arrangement.<sup>38</sup> The codified provision requires accounting for use of real property, audit by GAO, and prohibits use of the authority contrary to congressional prohibition. This provision is an express authorization to acquire real property as required by 10 U.S.C. section 2676(a).

#### *Codification of Recurring Appropriations Act Provisions*

Congress codified a number of recurring provisions as permanent law, including authority to hire experts<sup>39</sup> and reprogramming procedures.<sup>40</sup> The other recurring provisions to be codified appear in sections 1481-1482 of the Authorization Act.

#### *Base Closure and Realignment*

Congress has completely revised base closure procedures and, in so doing, rejected earlier base closure decisions.<sup>41</sup> The new procedures provide for a commission, appointed by the President after consultation with congressional leaders, to review DOD recommendations for base closures and realignments. After public hearings on the DOD recommendations, the commission submits a report to the President stating its recommendations and provides a copy to the Congress. If the President approves all of the recommendations, he transmits them to Congress, which has forty-five days to disapprove the recommendations by joint resolution.<sup>42</sup> If not disapproved, DOD may implement the recommendations

<sup>30</sup>*Id.* title XII (to be codified at 10 U.S.C. §§ 1701-1764).

<sup>31</sup>10 U.S.C. § 1721.

<sup>32</sup>*Id.* § 1724.

<sup>33</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 905 (1990).

<sup>34</sup>*Id.* § 1405 (to be codified at 31 U.S.C. §§ 1551-1557).

<sup>35</sup>H. Rep. 101-923, 101st Cong., 2d Sess. (1990), reprinted in 136 Cong. Rec. H 11995; H. Rep. 101-938, 101st Cong., 2d Sess. (1990).

<sup>36</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 1461 (1990) (amending 10 U.S.C. § 119).

<sup>37</sup>*Id.* § 1482 (amending 10 U.S.C. § 119).

<sup>38</sup>*Id.* § 1451 (to be codified at 10 U.S.C. § 2350g).

<sup>39</sup>*Id.* § 1481 (to be codified at 10 U.S.C. § 129b).

<sup>40</sup>*Id.* § 1482 (to be codified as 10 U.S.C. § 2214).

<sup>41</sup>See generally *id.* title XXIX.

<sup>42</sup>If the President disapproves the Commission's recommendations, the report is returned to the Commission for its consideration of the President's reasons for disapproval, with a copy provided to Congress. Then the Commission transmits a revised report to the President that is forwarded to Congress with the President's reasons for any disapproval of the Commission's recommendations.

within the broad powers conferred by the act. If the President does not approve all of the commission's recommendations, he returns the report to the commission, with a copy provided to Congress, stating the reasons for disapproval. Then the commission transmits a revised report. Failure of the President to approve all of the commission's recommendations results in the process for selecting military installations for closure or realignment being terminated for that year.

Suits under the National Environmental Policy Act<sup>43</sup> have a sixty-day statute of limitations. The legislative history<sup>44</sup> states that this process is within the military affairs exception to the Administrative Procedure Act.<sup>45</sup> Section 2905(d)(1) purports to waive funding restrictions relating to base closures included in future appropriations acts. No funds shall be available to plan for domestic base closures other than in accordance with this act. DOD, however, may continue to carry out closures and realignments under previous base closure legislation.<sup>46</sup> The Defense Base Closure and Realignment Act of 1990 is an attempt to curb the ability of the Congress to change base closure decisions to satisfy special interest groups.

#### *Pilot Program Authorization for Depot Maintenance Workload Competition*

The Secretary of Defense is authorized to conduct a depot maintenance workload competition pilot program during fiscal year 1991<sup>47</sup> notwithstanding 10 U.S.C. section 2466.<sup>48</sup> The pilot program shall involve competition for a portion of the depot maintenance workload at one Army and one Air Force depot maintenance activity. Any competition shall be open to such maintenance activities of DOD as the Secretary of Defense may designate as well as private contractors.

#### *The 1991 Department of Defense Appropriations Act Introduction*

The Fiscal Year 1991 Department of Defense Appropriations Act<sup>49</sup> (DOD Appropriations Act) was signed into law on November 5, 1990. Not only does it make appropriations to the Department of Defense, it also

includes a number of provisions of widespread interest to the Department of Defense. Provisions recurring from previous year's acts will not be mentioned, except as necessary to explain new provisions.

#### *University Research Grants*

In previous years, Congress has battled over the practice of earmarking research grants for specific colleges and universities, rather than permitting universities to compete for the funds. 10 U.S.C. section 2361 was passed in 1988<sup>50</sup> and amended in 1989<sup>51</sup> to make what has been called "Pork Barrel Research" politically more difficult. Notwithstanding the prior legislation, in the rush to pass the DOD Appropriations Act, Congress earmarked a number of grants and enacted the statutory exceptions required by 10 U.S.C. sections 2361 and 2304.<sup>52</sup>

#### *Multiyear Contracts*

Just as the DOD Authorization Act modifies the requirements for multiyear contracts<sup>53</sup> the Appropriations Act also provides for a significant change.<sup>54</sup> Previous years' Acts had required the Secretary of Defense to certify a ten-percent cost savings over annual contracts for the use of multiyear contracts. This requirement has been dropped. The other restrictions on the award of multiyear contracts are retained.<sup>55</sup>

#### *Equipment Modifications*

The DOD Appropriations Act provides that FY 1991 Appropriations may not be used to modify an aircraft, weapon, ship, or other item of equipment, that the Military Department concerned plans to retire or otherwise dispose of within five years after completion of the modification.<sup>56</sup> An exception is provided for safety modifications.

#### *Consulting Services*

This year Congress reduced the total budget for contract advisory and assistance services (CAAS) by \$180

<sup>43</sup>42 U.S.C. §§ 4321-4374.

<sup>44</sup>H. Rep. 101-923, 101st Cong., 2d Sess. (1990), reprinted in 136 Cong. Rec. H 11935.

<sup>45</sup>5 U.S.C. §§ 551-559.

<sup>46</sup>Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, Title II, 102 Stat. 2623 (1988).

<sup>47</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510 § 922 (1990).

<sup>48</sup>This section prohibits DOD from requiring the Army or the Air Force to compete depot maintenance workloads between themselves or with private contractors.

<sup>49</sup>Pub. L. No. 101-511 (1990).

<sup>50</sup>National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 220(a), 102 Stat. 1940 (1988).

<sup>51</sup>National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 252, 103 Stat. 1404 (1989).

<sup>52</sup>*Id.* § 401.

<sup>53</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 808 (1990).

<sup>54</sup>Fiscal Year 1991 Department of Defense Appropriations Act, Pub. L. No. 101-511, § 8014 (1990).

<sup>55</sup>These restrictions include economic order quantities in excess of \$20M, contingent liabilities in excess of \$20M, and contracts in excess of \$500M.

<sup>56</sup>Fiscal Year 1991 Department of Defense Appropriations Act, Pub. L. No. 101-511, § 8035 (1990).

million and placed a statutory ceiling of \$1.3 billion on the amount of funds that may be obligated or expended for procurement of CAAS.<sup>57</sup> Requiring activities should be advised of these reductions and cautioned not to improperly classify services as other than CAAS or a funding violation could occur if the statutory ceiling is exceeded. The Reserve components are exempt from the restriction this year.

#### *Leases of Vessels, Aircraft, and Vehicles*

The annual restriction limiting leases and charters of vessels, aircraft, and vehicles to not more than eighteen months<sup>58</sup> was dropped from this year's DOD Appropriations Act. The permanent leasing restriction<sup>59</sup> that govern leases longer than three years is not affected by the elimination of this annual restriction.

#### *Brain Missile Wound Research on Cats*

Congress acted to stop a controversial research program involving the use of cats for brain trauma.<sup>60</sup> This restriction, and a separate provision<sup>61</sup> affecting a specific research program, highlights the sensitivity of using animals in research. Dogs and cats in particular engender special concerns.<sup>62</sup>

#### *Cost Studies of Commercial Activities*

The time allowed for the completion of cost comparison studies of commercial activities is now limited to forty-eight months for multifunction activities and to twenty-four months for single function activities.<sup>63</sup> No guidance is provided on how the time period should be calculated. The prohibition goes into effect on May 5, 1991, so funds may be applied to ongoing studies until then. This provision does not eliminate contracting out of commercial activities. It does, however, limit the time allowed to complete cost studies.

#### *Medical Treatment Facilities*

Congress included a new prohibition relating to medical treatment facilities (MTF).<sup>64</sup> DOD may not begin

closing a medical treatment facility until ninety days after the Secretary of Defense notifies Congress. There is no prohibition on closing facilities provided the notice is given and the waiting period observed. Additionally, the DOD Appropriations Act provides that MTF personnel, both civilian and military, may not be reduced below the levels authorized in FY 1990<sup>65</sup> except at installations scheduled for closure or realignment under the Defense Authorization Amendments and Base Closure and Realignment Act.<sup>66</sup>

#### *Computer Programming*

Effective June 1, 1991, all DOD computer programs must be written in the Ada™ programming language, when cost effective, unless a special exception is given by the Department of Defense.<sup>67</sup> The provision appears to apply to newly developed software as there is no indication that Congress intended DOD to rewrite existing software. Normally it should not be cost effective to write Ada programs when standard commercial software is available. As a minimum, acquisition plans and contracts should be reviewed for either a determination regarding cost effectiveness, or a valid waiver for use of non-Ada higher order languages.

#### *Chemical Weapons Demilitarization*

Two provisions in the Appropriations Act affect the Chemical Demilitarization Program. The first<sup>68</sup> prohibits the transportation of chemical munitions to Johnston Island, with two exceptions for European and World War II munitions. The second<sup>69</sup> prohibits planning for removal of such weapons from their storage sites in the United States. The combined impact of these two provisions is that domestically stored chemical munitions will be disposed of in place.

#### *The 1991 Military Construction Appropriations Act*

##### *General*

Military Construction Appropriations Act, 1991, (the MCA Act)<sup>70</sup> was signed on November 5, 1990. The MCA

<sup>57</sup>*Id.* § 8050.

<sup>58</sup>Department of Defense Appropriations Act, 1990, Pub. L. No. 101-165, § 9081, 103 Stat. 1147 (1989).

<sup>59</sup>10 U.S.C. § 2401.

<sup>60</sup>Fiscal Year 1991 Department of Defense Appropriations Act, Pub. L. No. 101-511, § 8078 (1990).

<sup>61</sup>*Id.* § 8079.

<sup>62</sup>*Id.* § 8019.

<sup>63</sup>*Id.* § 8087.

<sup>64</sup>*Id.* § 8088.

<sup>65</sup>*Id.* § 8098.

<sup>66</sup>Pub. L. No. 100-526, 102 Stat. 2623 (1988).

<sup>67</sup>Fiscal Year 1991 Department of Defense Appropriations Act, Pub. L. No. 101-511, § 8092 (1990).

<sup>68</sup>*Id.* § 8107.

<sup>69</sup>*Id.* § 8109.

<sup>70</sup>Pub. L. No. 101-519 (1990).

Act appropriates budgetary authority for specified (line item) military construction projects, unspecified minor military construction projects, and the military family housing program.

#### *Base Closure*

Congress appropriated \$998 million for the Base Realignment and Closure Account for Fiscal Year 1991. This is an increase of approximately \$500 million above the amount appropriated for last fiscal year. The appropriation includes a proviso that \$100 million shall be available solely for environmental restoration. The Conference Report<sup>71</sup> notes that these funds should not be considered the sole source of funding available for environmental restoration because authority exists to use receipts from funds deposited in the Base Closure Account from land sales. Congress believes that economic recovery in those areas impacted by base closures will be expedited by environmental restoration, which will improve opportunities for the reutilization of former DOD facilities and properties.

Congress reiterated its concern for controlling the cost associated with the base closures by directing that none of these funds be obligated for base realignments and closures activities that would cause the Department's \$2.4 billion cost estimate for military construction and family housing related to the Base Realignment and Closure Program to be exceeded.

#### *Cost-Plus-Fixed-Fee Contracts*

Funds appropriated by the MCA Act are again prohibited for any cost-plus-fixed-fee construction contract. This restriction applies to all contracts for work to be performed in the United States, except Alaska, in which the cost estimate exceeds \$25,000. The Secretary of Defense may waive this restriction.<sup>72</sup>

#### *Relocation of Activities*

Funds appropriated for minor construction may not be used to transfer or relocate any activity from one base or

installation to another, without prior notification to the Committee on Appropriations.<sup>73</sup>

#### *Exercise-Related Construction*

Congress has further directed that the Secretary give prior notice to Congress of the plans and scope of any proposed military exercises involving United States personnel if amounts expended for construction, either temporary or permanent, are anticipated to exceed \$100,000.

#### *Military Construction and Family Housing*

Funds appropriated for Military Construction and Family Housing are prohibited from being used for any costs associated with Operation Just Cause.<sup>74</sup>

#### *Use of Prior Funds for Current Construction*

The MCA Act permits the use of funds appropriated in prior years for construction projects authorized during the current session of Congress.<sup>75</sup>

#### *Military Construction Freeze Continues*

Again the Secretary of Defense has extended the moratorium on military construction,<sup>76</sup> including architectural and engineering design services. The current freeze, unless further extended, will expire April 15, 1991.<sup>77</sup>

#### *Military Construction Program Changes Under DOD Authorization Act, 1991*

##### *One-Year Extension of Military Housing Rental Guarantee Program*

The Authorization Act extends the military housing rental guarantee program for an additional year. The Act limits, however, the number of agreements that may be entered into during FY 91 to six.<sup>78</sup>

##### *Family Housing Improvements Threshold*

The threshold<sup>79</sup> for family housing improvements was increased from \$40,000 per single family housing unit to \$50,000 per unit. The Secretary concerned may waive the

<sup>71</sup>H.R. Conf. Rep. No. 888, 101st Cong., 2d Sess. 18 (1990).

<sup>72</sup>See Military Construction Appropriations Act, 1991, Pub. L. No. 101-519, § 101 (1990).

<sup>73</sup>*Id.* § 107.

<sup>74</sup>*Id.* § 124.

<sup>75</sup>*Id.* § 116.

<sup>76</sup>See 53 Fed. Cont. Rep. (BNA) 153 (Jan. 29, 1990).

<sup>77</sup>See 54 Fed. Cont. Rep. (BNA) 777 (Nov. 28, 1990).

<sup>78</sup>See National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 2811 (1990) (amending 10 U.S.C. § 2821).

<sup>79</sup>The threshold means the maximum amount of operations and maintenance funds that may be used for family housing improvements.

\$50,000 limitation if the service Secretary determines that, considering the useful life of the structure to be improved and the useful life of a newly constructed unit and the cost of construction and of operation and maintenance of each kind of unit over its useful life, the improvement will be cost effective. Congressional notification is required, however, prior to the waiver of the \$50,000 limitation.<sup>80</sup>

#### *Energy Savings at Military Installations*

The FY 91 Authorization Act amended title 10, United States Code, by adding section 2865, Energy Savings at Military Installations. The new statute requires the Secretary of Defense to designate an energy performance goal for DOD for the years 1991 through 2000. As part of any comprehensive plan to achieve an energy performance goal, military departments and defense agencies are encouraged to participate in programs conducted by any gas or electric utility for the management of electricity demand or for energy conservation, and to accept any financial incentive from such utility. At the end of each year during this ten-year period, the Secretary of Defense shall report to Congress action taken to achieve savings and the amount of such savings realized.<sup>81</sup>

#### *Procurement Integrity Law: On-Off and On Again*

With certain exceptions, the controversial 1989 Procurement Integrity Law<sup>82</sup> took effect December 1, 1990.<sup>83</sup> There were some congressional attempts to delay the implementation of the law for an additional six months to give lawmakers an opportunity to review the Bush administration's proposal,<sup>84</sup> which was sent to Congress on June 20, 1990. Congress did extend, however, the suspension of the post-employment restrictions for an additional six months.<sup>85</sup>

<sup>80</sup>*Id.* § 2812.

<sup>81</sup>*Id.* § 2851 (to be codified at 10 U.S.C. § 2865).

<sup>82</sup>In response to "Operation Ill Wind," Congress enacted the Procurement Integrity statute as part of the Office of Federal Procurement Policy (OFPP) Act Amendments of 1988. The statute is codified at 41 U.S.C. § 423, amended by National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 814, 103 Stat. 1495 (1989). The law regulates the transfer of procurement information from government officials to contractors by prohibiting the disclosure of procurement related information prior to contract award and restricting contractor employment of former government procurement personnel.

<sup>83</sup>On May 11, 1989, Federal Acquisition Circular (FAC) 84-47, implementing the Procurement Integrity provisions, was published. Subsequently, in November 1989, Congress, as part of the 1990/1991 DOD Authorization Act, amended the statute and then suspended its operation until November 30, 1990. See Pub. L. No. 101-189, 103 Stat. 1495 (1989); Ethics Reform Act of 1989, Pub. L. No. 101-194, § 507, 103 Stat. 1759 (1989).

<sup>84</sup>The administration's proposal, S 2775, is entitled "Procurement Ethics Reform Act." The proposal was introduced by Senator William Roth.

<sup>85</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510 § 815 (1990).

<sup>86</sup>Administrative Disputes Resolution Act, Pub. L. No. 101-552 (1990) (to be codified at 5 U.S.C. §§ 581-593).

<sup>87</sup>*Id.*

<sup>88</sup>*Id.* § 4(b).

<sup>89</sup>41 U.S.C. §§ 601-613 (1988).

<sup>90</sup>It is unclear from the text of the statute whether or not this so-called "sunset provision" applies only to the authority to enter into binding arbitration or whether it is intended to apply to all alternative means of dispute resolution. In the broadest sense, alternative dispute resolution techniques include, for example, an agency head's decision to settle a case that has been filed before the appropriate board of contract appeals. It is doubtful whether Congress intended the sunset provision to apply to this type of alternative dispute resolution.

<sup>91</sup>50 U.S.C. App. §§ 2061-2170.

#### *Administrative Dispute Resolution Act*

Congress passed legislation to encourage the voluntary use of alternative disputes resolution techniques by federal agencies, when appropriate.<sup>86</sup> The act requires that each agency promulgate policy, designate a senior official as the dispute resolution specialist, and train agency employees in dispute resolution techniques.

To facilitate use of alternative dispute resolution (ADR) techniques, the Administrative Dispute Resolution Act<sup>87</sup> authorizes for the first time the use of binding arbitration by federal agencies, employment of neutrals, and a limited privilege for communications made during ADR. Significantly, the head of the agency has sixty days after the issuance of an arbitration award to reject the decision. The agency's decision to enter into arbitration or not, and the decision to reject the arbitration award is committed to the discretion of the agency head by law and may not be judicially reviewed.<sup>88</sup>

The Administrative Dispute Resolution Act contains a conforming amendment to the Contract Disputes Act of 1978 (CDA).<sup>89</sup> The amendment specifically authorizes the use of alternative dispute resolution procedures for resolution of contract disputes and extends the CDA's requirement to certify claims in excess of \$50,000 that will be resolved using an alternative means of dispute resolution. The authority to use alternative dispute resolution techniques for CDA matters expires on October 1, 1995.<sup>90</sup>

#### *Defense Production Act Lapses*

The 101st Congress failed to extend the Defense Production Act<sup>91</sup> when it did not pass H.R. 486. The result is that the principal statutory authority for the Defense Priorities and Allocation System has expired.

## Regulatory Changes

### Defense FAR Supplement Changes

The major or most interesting policy and procedural changes made to the DFARS during 1990 are set forth below. See the three Defense Acquisition Circulars that were published during 1990 for details of all changes that were made.<sup>92</sup>

#### Part 202, Definitions of Words and Terms

Heads of contracting activities. The Director of the On-Site Inspection Agency<sup>93</sup> and the Commander in Chief, United States Special Operations Command<sup>94</sup> were designated as heads of a contracting activity.

#### Part 206, Competition Requirements

International agreement exception to J&A requirements. The Fiscal Year 1990 Defense Authorization Act, section 817, amended 10 U.S.C. section 2304(f) to permit certain exceptions to the statutory and FAR requirements for written justifications and approvals (J&As) for using other than full and open competitive procedures when an international agreement or treaty is the basis for limiting competition. The DFARS provision that was promulgated to implement this statute waives the J&A requirement in these circumstances only if two conditions are met. First, the head of the contracting activity must prepare a document that describes the terms of the agreement or treaty that have the effect of requiring the use of other than competitive procedures. Second, that document must then be approved by the contracting activity's competition advocate.<sup>95</sup>

Research and development or construction contracting by colleges or universities. Statutory authority to use other than full and open competition procedures when a statute expressly authorizes or requires that an acquisition be made through another agency or from a specified source<sup>96</sup> is limited as to awards to colleges or universities for the performance of research and development or for construction of any research facility.<sup>97</sup>

Specific implementation of these limitations was promulgated in the DFARS to clarify the statutory requirements for competition in award of such contracts by DOD.<sup>98</sup>

Amendment of J&A approval levels for contract actions exceeding \$10 million. Pursuant to section 818 of the Fiscal Year 1990 Defense Authorization Act, the J&A approval authority of senior Department of Defense procurement officials for contract actions between \$10 million and \$50 million may now be redelegated to certain flag rank or GS-16 level officials. No one having J&A approval authority for defense contract actions over \$50 million may delegate that authority, except the Under Secretary of Defense (Acquisition) when acting as the senior procurement executive of DOD.<sup>99</sup>

#### Part 209, Contractor Qualifications

Impact of on-site inspection under the INF Treaty. The Department of Defense revised policy provisions regarding firms that are subject to on-site inspection under the Intermediate-Range Nuclear Forces (INF) Treaty. The policy essentially requires that a potential contractor subject to on-site inspection shall not be denied consideration for a contract or subcontract award solely or partly because of the actual or potential presence of Soviet inspectors at the contractor's facility, unless such a decision is reviewed by the Senior Acquisition Executive of the department or agency and approved by the Under Secretary of Defense for Acquisition. The policy was made applicable to defense subcontractors as well as contractors. A decision not to consider a firm or to award a contract or subcontract to a firm that is subject to on-site inspection must be communicated to the firm in writing. Finally, a new clause was adopted to implement these requirements. The clause must be inserted into all solicitations and contracts in excess of the small purchase amount (currently \$25,000), except those for commercial or commercial-type products.<sup>100</sup>

#### Part 219, Small Business and Small Disadvantaged Business Concerns

Small disadvantaged business evaluation preference. Items purchased for commissary and exchange

<sup>92</sup>Defense Acquisition Circular 88-13 [hereinafter DAC], 54 Fed. Reg. 53,616 (1989) (effective Jan. 30, 1990); DAC 88-14, 55 Fed. Reg. 19,074 (1990) (effective Apr. 16, 1990); DAC 88-15, 55 Fed. Reg. 30,157 (1990) (effective July 16, 1990).

<sup>93</sup>DAC 88-13, 54 Fed. Reg. 53,616 (1989) (effective Jan. 30, 1990); Defense Fed. Acquisition Supp. 202.101 [hereinafter DFARS].

<sup>94</sup>DAC 88-14, 55 Fed. Reg. 19,074 (1990) (effective Apr. 16, 1990); DFARS 202.101.

<sup>95</sup>DAC 88-14, 55 Fed. Reg. 19,076 (1990) (effective Apr. 16, 1990); DFARS 206.302-4.

<sup>96</sup>10 U.S.C. § 2304(c)(5).

<sup>97</sup>*Id.* § 2361.

<sup>98</sup>DAC 88-15, 55 Fed. Reg. 30,157 (1990) (effective July 16, 1990); DFARS 206.302-5.

<sup>99</sup>DAC 88-14, 55 Fed. Reg. 19,076 (1990) (effective Apr. 16, 1990); DFARS 206.304.

<sup>100</sup>DAC 88-13; 54 Fed. Reg. 53,616 (1989) (effective Jan. 30, 1990); DFARS 209.103 (S-71).

resale were exempted from application of the small disadvantaged business ten percent evaluation preference.<sup>101</sup>

Small disadvantaged businesses (SDBs) and Historically Black Colleges and Universities and Minority Institutions (HBCU/MI). Several DFARS subparts were revised to enhance opportunities for SDBs and HBCU/MIs to participate in DOD acquisitions. These revisions will require consideration of SDBs in leader company contracting (subpart 217.4); make SDB or HBCU/MI status an evaluation factor in source selections (subpart 215.6); revise the incentive and provide for an award fee for contractors who exceed SDB/HBCU/MI subcontracting goals (subpart 219.7); establish a progress payment rate of ninety percent for SDBs and make progress payments available to SDBs on contracts of \$50,000 or more (subpart 232.5); establish a repetitive SDB set-aside procedure (subpart 219.5); and authorize prime contractors to restrict competition to SDBs in award of subcontracts (subpart 244.3).<sup>102</sup>

**Test program on small business subcontracting plans.** DOD has established a test program pursuant to statute<sup>103</sup> to determine whether plant, division, or company-wide small business subcontracting plans will increase opportunities for small and small disadvantaged business concerns under DOD contracts. The three-year test program commenced October 1, 1990. Under the test program, the military departments and defense agencies will designate contracting activities to select contractors for participation in the program. The designated agencies and selected contractors will then negotiate comprehensive plant, division, or company-wide subcontracting plans, which will be substituted for individual subcontracting plans in contracts with participating contractors.<sup>104</sup>

#### *Part 225, Foreign Acquisition*

**Strategic Defense Initiative RDT&E prohibitions.** Prior DFARS interim restrictions on the use of funds for contracts with foreign governments or foreign firms for research, development, test, and evaluation in connection

with the Strategic Defense Initiative were revised to implement the National Defense Authorization Act for fiscal years 1988 and 1989.<sup>105</sup> Defense funds may not be used for these contracts unless the Secretary of Defense certifies to Congress in writing that work under the contract cannot competently be performed by a United States firm at a price equal to or less than the price at which it would be performed by the foreign government or firm. This prohibition does not apply to contracts awarded to foreign governments or firms if: (1) the contract is to be performed within the United States; (2) the contract is for RDT&E in connection with antitactical ballistic missile systems; or (3) the foreign government or firm is willing to share a substantial portion of the total cost. This prohibition does not apply to subcontracts.<sup>106</sup>

#### *Part 233, Protests, Disputes, and Appeals*

**Certification of claims.** DFARS clause 252.233-7000, Certification of Requests for Adjustment or Relief Exceeding \$100,000 (Apr. 1990), was expanded to include certification that a claim for equitable adjustment under a completed or substantially completed contract does not include costs that already have been reimbursed or separately claimed and that the claim includes only its allocable share of indirect costs.<sup>107</sup>

#### *Part 237, Service Contracting*

**Obtaining certified cost and pricing data.** The requirement that the contracting officer obtain certified cost or pricing data for service contracts whenever he or she is unable to determine on the basis of price analysis that proposed prices are reasonable was modified specifically to prohibit requiring certified cost or pricing data on communication service contracts of \$25,000 or less.<sup>108</sup>

#### *Part 242, Contract Administration*

**Monitoring contractor costs.** DFARS contractor monitoring procedures were modified to require contracting and audit personnel to submit annual audit and oversight plans to the Cost Monitoring Coordinator, in

<sup>101</sup>DAC 88-13, 54 Fed. Reg. 53,616 (1989) (effective Jan. 30, 1990); DFARS 219.502-3.

<sup>102</sup>DAC 88-14, 55 Fed. Reg. 19,077-80 (1990) (effective Apr. 16, 1990).

<sup>103</sup>National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 834, 103 Stat. 1940 (1989).

<sup>104</sup>DAC 88-15, 55 Fed. Reg. 30,157 (1990) (effective July 16, 1990); DFARS Subpart 219.7.

<sup>105</sup>Pub. L. No. 100-180, § 222, 101 Stat. 1055 (1987).

<sup>106</sup>DAC 88-13, 54 Fed. Reg. 53,617 (1989) (effective Jan. 30, 1990); DFARS 225.7013.

<sup>107</sup>DAC 88-14, 55 Fed. Reg. 19,082 (1990) (effective Apr. 16, 1990); DFARS 233.7000.

<sup>108</sup>DAC 88-14, 55 Fed. Reg. 19,080 (1990) (effective Apr. 16, 1990); DFARS 237.7407(b).

implementation of 10 U.S.C. section 133(d)(1), as amended by the Defense Authorization Act for fiscal year 1989, which mandates coordination of annual audit and oversight plans among DOD components.<sup>109</sup>

#### *Part 244, Subcontracting Policies and Procedures*

**Contractors' purchasing systems reviews.** Responsibility for reviews of contractors' purchasing systems was assigned to Administrative Contracting Officers (ACO). Members of other activities, such as audit organizations or a Program Manager's Office, are not to conduct separate reviews of a contractor's purchasing system, but may participate in a review conducted under the authority of the ACO.<sup>110</sup>

#### *Part 245, Government Property*

**Nongovernment use of industrial plant equipment.** Authority to permit a contractor to use government-owned industrial plant equipment exceeding twenty-five percent of the equipment in use by the contractor may now be delegated to the head of a contracting activity.<sup>111</sup>

#### *Deletion of DFARS Appendices*

Appendix H, Military Standard Requisitioning and Issue Procedure (MILSTRIP) was deleted as being duplicative of MILSTRIP Manual, DOD 4000.25-1-M.<sup>112</sup>

Appendix L, DOD Freedom of Information Act Program, was deleted. Policies and procedures for DOD's FOIA program are contained in DOD Directive 5400.7 and in DOD Regulation 5400.7-7R, both entitled DOD Freedom of Information Act Program.<sup>113</sup>

Appendix P, Department of Defense Privacy Program, was also deleted. DOD policies and procedures for the conduct of this program are contained in DOD Directive 5400.11, Department of Defense Privacy Program.<sup>114</sup>

#### *Proposed Complete Revision of Defense FAR Supplement*

##### *Purpose and Scope of the Revision*

Three of four increments in the proposed total revision of the DFARS were issued during 1990.<sup>115</sup> The regula-

tions are being rewritten as a result of the Defense Management Review to accomplish three goals: (1) to eliminate text and clauses that are unnecessary, such as ones that duplicate provisions of the FAR or other directives or that have proven to be of no value; (2) to eliminate or modify thresholds, certifications, approval levels, and other burdens on contracting officers and contractors; and (3) to rephrase the remaining text and clauses in plain English.

The rewriting of the DFARS is focused on the needs of the contracting officer; accordingly, guidance directed to others in the acquisition process, such as program managers, requirements personnel, and small business specialists, is being removed. Some material is being moved to the FAR, and the DFARS text is being rearranged to more closely track the FAR text that DFARS material implements or supplements. Finally, the proposed revision of the DFARS does contain some policy and procedural changes, but generally the rewritten version is not intended to change current policy or procedure. The final rule implementing the revised DFARS is planned to be published in February 1991.

The more notable policy and procedural changes that have been proposed to be promulgated in the new DFARS are identified below. See the proposed rules published incrementally in the Federal Register for the complete changes and reorganization of the DFARS.<sup>116</sup> As of the publication date of this article, these changes are only proposals—they are not final rules.

#### *Part 205, Publicizing Contract Actions*

The requirement to include the size status of the contractor in the synopsis of a contract award will be deleted. The requirement that activities that prepare long-range acquisition estimates announce the availability of these estimates in the Commerce Business Daily also will be deleted. Finally, the level of approval for placing paid advertisements in newspapers to recruit civilian personnel will be lowered from the Secretary or designee to the HCA or delegee.<sup>117</sup>

#### *Part 207, Acquisition Planning*

The thresholds for requiring written acquisition plans will be increased for development acquisitions from \$2

<sup>109</sup>DAC 88-13, 54 Fed. Reg. 53,619 (1989) (effective Jan. 30, 1990); DFARS 242.7006(b).

<sup>110</sup>DAC 88-13, 54 Fed. Reg. 53,619 (1989) (effective Jan. 30, 1990); DFARS 244.301.

<sup>111</sup>DAC 88-13, 54 Fed. Reg. 53,620 (1989) (effective Jan. 30, 1990); DFARS 245.407.

<sup>112</sup>DAC 88-14, 55 Fed. Reg. 19,082 (1990) (effective Apr. 16, 1990).

<sup>113</sup>DAC 88-15, 55 Fed. Reg. 30,157 (1990) (effective July 16, 1990); DFARS 224.2.

<sup>114</sup>DAC 88-15, 55 Fed. Reg. 30,157 (1990) (effective July 16, 1990); DFARS 224.1.

<sup>115</sup>55 Fed. Reg. 33,218 (1990) (first increment, proposed rule with request for comments by October 15, 1990); 55 Fed. Reg. 39,788 (1990) (second increment, proposed rule with request for comments by November 27, 1990); 55 Fed. Reg. 45,904 (1990) (third increment, proposed rule with request for comments by December 31, 1990).

<sup>116</sup>See sources cited *supra* note 115.

<sup>117</sup>55 Fed. Reg. 39,788-91 (1990).

million to \$5 million, and for production and service acquisitions from \$15 million for all years or \$5 million for any fiscal year to \$30 million for all years or \$15 million for any fiscal year.<sup>118</sup>

#### *Part 209, Contractor Qualifications*

Coverage of debarment in overseas areas will be revised substantially to adopt use of FAR subpart 9.4 procedures. Overseas commanders will be required to list debarred and suspended offshore contractors on the list maintained by GSA.<sup>119</sup>

#### *Part 210, Specifications, Standards, and Other Purchase Descriptions*

A new clause is being added to permit offerors to submit alternative prices depending on two different preservation, packaging, and packing requirements—one based on the military standards and another based on commercial or industrial standards of equal or better protective value than the military standards.<sup>120</sup>

#### *Part 216, Types of Contracts*

The following three requirements are to be deleted from this part: (1) the restriction on the use of cost-plus-fixed-fee contracts for acquisitions categorized as either engineering development or operational system development for systems that have completed the validation phase; (2) the requirement that the contracting officer include a statement in the contract file describing his or her rationale for the contract type selected when awarding a research and development contract; and (3) the requirement that the chief of the contracting office approve price adjustments exceeding ten percent under fixed-price supply contracts with economic price adjustments for certain mill products and nonstandard steel items.<sup>121</sup>

#### *Part 219, Small Business and Small Disadvantaged Business Concerns*

This part is being substantively revised to clarify responsibilities, to eliminate conflicting guidance, to link

the small business specialist's responsibilities to specific functions, and to remove impediments to contracting with small business.<sup>122</sup> See the section below entitled Contract Performance and Administration for more details.

#### *Part 222, Application of Labor Laws to Government Acquisitions*

Approval levels will be lowered to the agency head for making the following major policy decisions: (1) labor relations determinations such as plant seizures or injunctive actions on potential or actual work stoppages; (2) removal of material from a contractor's facility during a labor dispute; and (3) exclusion of all or part of the equal employment opportunity requirements. A new clause to include in solicitations to inform offerors that a wage determination has been requested and will be incorporated in the solicitation by amendment has also been proposed.<sup>123</sup>

#### *Part 228, Bonds and Insurance*

The DFARS bid bond clause for construction contracts will be deleted, as will the requirement that the chief of the contracting office approve requiring performance and payment bonds in cost-reimbursement construction contracts.<sup>124</sup>

#### *Part 236, Construction and Architect-Engineering Contracts*

Ten clauses are to be deleted from this part, and the requirement that the head of the contracting activity approve the use of sealed bidding for construction overseas will be eliminated.<sup>125</sup>

#### *Part 246, Quality Assurance*

The definition of "essential performance requirements" will be changed to mean the operating capabilities and maintenance and reliability characteristics of a weapon system that the agency head determines to be necessary to fulfill the military requirement. This change will lower the level for determining these charac-

<sup>118</sup>*Id.* at 33,222-23.

<sup>119</sup>*Id.* at 39,788; 39,792-94.

<sup>120</sup>*Id.* at 39,788; 39,809.

<sup>121</sup>*Id.* at 45,904.

<sup>122</sup>*Id.* at 33,218; 33,223-28.

<sup>123</sup>*Id.* at 45,904.

<sup>124</sup>*Id.* at 39,788.

<sup>125</sup>*Id.* at 45,905.

teristics from the Secretary of Defense or delegee, as presently required, to the agency head.<sup>126</sup>

### *Part 248, Value Engineering*

The requirement for inclusion of a value engineering incentive clause in contracts of \$25,000 or more for spare parts and repair kits will be deleted.<sup>127</sup>

#### *Submission of Cost or Pricing Data Revised*

##### *Threshold for Submission of Cost or Pricing Data Revised*

On December 5, 1990, DOD issued a deviation that raised the threshold for the submission of cost or pricing data from \$100,000 to \$500,000.<sup>128</sup> The action was mandated by section 803 of the Authorization Act. The deviation authorizes the application of the new threshold in all regulatory guidance and clauses.

##### *Submission of Cost or Pricing Data Below Threshold*

DOD has issued guidance on the conditions under which contracting officers should consider the submission of cost or pricing data under the new threshold of \$500,000.<sup>129</sup> Data may be required if the offeror, contractor, or subcontractor: (1) recently has used fraudulent cost estimating or fraudulent cost accounting practices in performance of government contracts; (2) currently has significant deficiencies in such estimating systems; or (3) has been the subject of recent recurring and significant findings of defective pricing.

#### *GAO Proposes Bid Protest Rule Changes*

The General Accounting Office has proposed significant revisions to its bid protest rules.<sup>130</sup> The proposed revisions of the GAO's bid protest rules<sup>131</sup> represent the continuation of a trend toward more formal, judicial proceedings modeled upon the Federal Rules of Civil Procedure and the bid protest rules of the General Services Board of Contract Appeals.<sup>132</sup>

The GAO's stated objective in proposing the changes in its bid protest rules is to give each of the parties in a bid protest a full opportunity to present its case and to respond to the arguments of the other side. The following is a summary of the proposed changes to the GAO's bid protest rules.

#### *Hearing Procedures*

The current distinction between the "informal conference" and the "fact-finding hearing" is to be eliminated. There will be a single hearing procedure. Any interested party or the agency may request a hearing. Additionally, the proposed revision provides for prehearing conferences to entertain arguments from interested parties as to why a hearing is appropriate and to specify the factual issues that the party believes can be resolved only through oral testimony. In a significant departure from current practice, the proposed revisions authorize hearings to be held outside of the Washington, D.C., area. For purposes of determining participation in the hearing, only "interested parties," as defined at 4 C.F.R. section 21.0(b), will be permitted, as a matter of right, to participate in the hearing. The GAO may allow other participants in the procurement to attend the conference as observers. These parties may be allowed to participate in the proceedings, but their participation in the hearing will be determined on a case-by-case basis.

The degree of formality in the proposed hearing process will be determined by the GAO depending on the nature of the protest and the nature of the issues presented in the protest. The GAO's explanation of the proposed revision to its rules states that a full adversarial hearing with "oral testimony and cross examination may not be necessary in many cases."<sup>133</sup>

#### *Document Production and Protective Orders*

The agency's administrative report on a protest will contain all relevant material and under the revised rules, the report is presumptively releasable to all interested

<sup>126</sup>*Id.* at 39,788.

<sup>127</sup>*Id.* at 33,219.

<sup>128</sup>See 54 Fed. Cont. Rep. (BNA) 840 (Dec. 10, 1990).

<sup>129</sup>*Id.*

<sup>130</sup>55 Fed. Reg. 12,834 (1990) (to be codified at 4 C.F.R. § 21) (proposed Apr. 6, 1990).

<sup>131</sup>*Id.* (codified at 4 C.F.R. § 21).

<sup>132</sup>48 C.F.R. § 6101.1 (1985); 50 Fed. Reg. 1,756 (1985); *id.* at 26,764 (effective June 28, 1985); (correcting *id.* at 27,969, 29,231).

<sup>133</sup>55 Fed. Reg. 12,836 (1990).

parties. The GAO may, upon request from the agency, issue a protective order to restrict access to privileged information. To ensure appropriate access to all relevant documents, the GAO proposes to allow access to outside counsel for the protester and other interested parties under terms of a protective order. The GAO proposes sanctions for parties that do not comply with the terms of its protective orders.

#### *Costs and Attorneys' Fees*

The GAO also proposes to revise its rules concerning the award of bid protest costs, to include attorneys' fees. Under the current rule, if corrective action is taken by the agency prior to GAO decision on the protest, no costs or attorneys' fees are awarded to the protester.<sup>134</sup> Under the proposed rule, if voluntary corrective action is taken by the agency after the due date for the submission of the administrative report, the protester will be entitled to recover bid protest costs, to include attorneys' fees. Applications for costs and attorneys' fees must be made within sixty days after receipt of the GAO decision on the protest.

#### *GAO to Designate Witnesses*

To ensure that all parties to a protest are represented by individuals appropriately prepared to discuss the issues, the GAO may designate witnesses to appear for a party. Witnesses shall be subject to questioning by the other parties and by the GAO.

#### *Record of Proceedings*

Verbatim records will be made using either a stenographer or an audio tape. The record may or may not be reduced to writing. If a recording or transcript is made, any party may obtain a copy at its own expense. In addition, GAO hearing officials are to be empowered to make findings of fact, which will become a part of the protest record.<sup>135</sup>

#### *Effective Date*

August 15, 1990, was the deadline for public comment on the proposed revisions to the bid protest rules. The final rules are expected early in 1991.<sup>136</sup>

### *Simplified Competitive Procedure for Commercial Items*

On July 11, 1990, DOD issued proposed regulations<sup>137</sup> to establish a simplified uniform contract format to acquire commercial items.<sup>138</sup> Under the proposed simplified competitive procedures, commercial products are broadly defined as items regularly used for other than government purposes that, in the course of normal business operations, have been sold or traded to the general public, have been offered for sale to the general public at an established price but not yet sold, or will be available for commercial delivery in a reasonable period of time. Only firm fixed-price or firm fixed-price with economic price adjustments contracts are authorized. The new procedures prohibit the use of both specific designs, manufacturing processes or procedures, and Military Standards or Military Specifications that would restrict a potential contractor's ability to satisfy the government's needs.

Other significant characteristics of the simplified procedures include: (1) limited government inspection;<sup>139</sup> (2) acquisition of commercial items from sole source suppliers without requiring certification of cost or pricing data; (3) acquisition of commercial warranties customarily offered to the general public; and (4) prohibition of unilateral specification changes by the government. When using the simplified commercial procedures, contracting officers are required to authorize the submission of telegraphic or facsimile offers to the maximum extent practicable.

When the contracting officer anticipates that small businesses or labor surplus area concerns may respond to a solicitation for a commercial item, or the contracting officer determines that the procurement should be set aside for small businesses, the procedures set forth in FAR 19 and its supplements take precedence over the simplified commercial procedures. An interim rule is expected in February 1991.

#### *Threshold for Noncompetitive Quotes Is Raised*

In July, 1990, the FAR raised the dollar threshold for noncompetitive small purchase actions. Contracting officers now are required to obtain competitive quotations only if the acquisition is expected to exceed ten per-

<sup>134</sup>DHD, Inc.—Request for Reconsideration, B-237048.3, Feb. 27, 1990, 90-1 CPD ¶ 237.

<sup>135</sup>55 Fed. Reg. 12,834 (1990) (to be codified at 4 C.F.R. § 21) (proposed Apr. 6, 1990).

<sup>136</sup>Richardson, *Agencies Criticize GAO's Bid Protest Changes*, Fed. Computer Week, Sept. 3, 1990, at 24.

<sup>137</sup>55 Fed. Reg. 28,514 (1990).

<sup>138</sup>National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189 § 824, 103 Stat. 1352 (1989) (requiring DOD to develop new regulations implementing a simplified uniform contract format for the acquisition of commercial items).

<sup>139</sup>The government will rely on the contractor's commercial quality and inspection procedures.

cent of the small purchase limitation—that is, \$2500.<sup>140</sup> Before implementation of this change, the threshold was \$1000, although the Army had implemented a \$2500 limitation based on an earlier FAR deviation.<sup>141</sup>

#### ***Organizational Conflict of Interest Certificate— Marketing Consultants***

Federal Acquisition Circular 90-1,<sup>142</sup> which became effective October 22, 1990, requires all apparent successful offerors on any contract for advisory or assistance services over \$25,000 to certify whether similar services were rendered to the government or any other client over the past twelve months.<sup>143</sup> The interim rule also requires apparent offerors, on all advisory and assistance contracts over \$200,000 who employ marketing consultants, to certify whether similar services were rendered to the government or any other client over the past twelve months.<sup>144</sup> The interim rule exempts, however, the certification requirements for procurements using sealed bidding procedures.

#### ***Procurement Integrity Regulations Published***

On September 6, 1990, new implementing regulations were issued.<sup>145</sup> The new interim rule became effective December 1, 1990. The Procurement Integrity law prohibits certain activities by competing contractors and procurement officials "during the conduct of any Federal procurement of property or services." The interim rule attempts to clarify the point at which a violation of the law occurs by tying the commencement of a procurement to a specific action. Under the interim rule, the period begins on the earliest date upon which an identifiable, specific action is taken for the particular procurement and concludes upon award or modification of a contract or the cancellation of the procurement. The new interim rule provides a list of specific actions that may mark the beginning of a procurement.<sup>146</sup> These actions include: (1) drafting a specification or statement of work; (2) review and approval of a specification; (3) requirements computation at an inventory control point; (4) development of

a procurement or purchase request; (5) preparation or issuance of a solicitation; (6) evaluation of bids or proposals; (7) selection of sources; (8) conduct of negotiations; and (9) review and approval of a contract or modification. The start date, however, cannot be prior to a decision by an authorized official to satisfy the agency need through procurement. Procurement attorneys and ethics advisors should carefully review the interim rule because additional changes, beyond the scope of this article, have been made.

#### ***Interim Rule on Release of Acquisition-Related Information Published***

On July 12, 1990, DOD issued an interim rule<sup>147</sup> establishing the Department's policy concerning the release of acquisition-related information to the general public.<sup>148</sup> The general policy is to release to the public all unrestricted acquisition-related information. The interim rule lists seven bases to restrict access to acquisition related information. They are: (1) statutory restrictions; (2) classified information; (3) contractor bid or proposal information; (4) source selection information; (5) planning, programming, and budgetary information; (6) documents disclosing the government's negotiating position; and (7) drafts and working papers, the release of which would inhibit the development of the agency's position, jeopardize the free exchange of information that is part of the deliberative process, or compromise the decisionmaking process. The interim rule also lists seventeen major categories of planning, programming, and budgeting system (PPBS) documents and supporting data bases that are not releasable under the rule. Also not releasable are data associated with these seventeen categories. The rule does not define, however, "associated data."<sup>149</sup>

#### ***National Emergency Construction Authority***

On November 14, 1990, President Bush invoked emergency construction authority under 10 U.S.C. section 2808.<sup>150</sup> This statute provides that the Secretary of Defense and the Secretaries of the military departments may undertake construction projects, not otherwise

<sup>140</sup>Federal Acquisition Circular 84-58 [hereinafter FAC], 55 Fed. Reg. 25,522 (1990) (codified at 48 C.F.R. § 13.106(a)).

<sup>141</sup>Army Deviation 87-DEV-14, Acquisition Letter 89-12.

<sup>142</sup>55 Fed. Reg. 42,687 (1990) (to be codified at 48 C.F.R. § 52.209-7).

<sup>143</sup>The Head of the Contracting Activity (HCA) may increase the period up to 36 months.

<sup>144</sup>The HCA may increase the period up to 36 months.

<sup>145</sup>FAC 84-60, 55 Fed. Reg. 36,782 (1990).

<sup>146</sup>FAR 3.104-4, as amended by FAC 84-60, 55 Fed. Reg. 36,782 (1990).

<sup>147</sup>55 Fed. Reg. 28,614 (1990).

<sup>148</sup>National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 822, 103 Stat. 1503 (1990) (requiring DOD to prescribe a uniform regulation concerning the dissemination of, and access to, acquisition related information).

<sup>149</sup>The Under Secretary of Defense (Policy); Assistant Secretary of Defense (Program Analysis and Evaluation); and Comptroller, DOD, are responsible for adjudicating requests for access to PPBS information pertaining to their respective phases of the PPB system.

<sup>150</sup>Exec. Order No. 12734, 55 Fed. Reg. 48,099 (1990).

authorized by law, that are necessary to support the armed forces. These projects may be undertaken only with the total amount of funds that have been appropriated for military construction, including funds appropriated for family housing, that have not been obligated.

#### *Small and Small Disadvantaged Business Programs New Penalties for Status Misrepresentations*

Federal Acquisition Circular 84-56<sup>151</sup> amended the FAR to implement other provisions of the Reform Act. For example, the FAR now provides that if a firm misrepresents its status as a small or small disadvantaged business for the purpose of obtaining a contract or subcontract under a preference program, either the SBA or the contracting agency may "take action" against the firm.<sup>152</sup> "Action" means the initiation of administrative or judicial proceedings as appropriate and penalties include a maximum \$500,000 fine, ten years' imprisonment, or debarment. The DFARS also amended the SDB representation clause to reflect this change.<sup>153</sup>

#### *Termination Required upon Sale of Small Business*

Part 19 of the FAR is revised<sup>154</sup> to require contracting officers to terminate an 8(a) subcontract for convenience if the 8(a) subcontractor transfers ownership or control of the firm to another concern. Under the FAR, the SBA and subcontractor must notify the contracting officer of the intent to transfer ownership. The SBA may waive this requirement in certain instances, but only if the request for waiver is submitted before transfer of ownership. If the SBA does not intend to waive termination, and the contracting officer determines that termination would severely impair the agency's mission, the contracting officer must immediately notify the SBA that the agency is requesting a waiver. The agency head must confirm or withdraw the request within fifteen days. Absent an approved waiver, the contracting officer must terminate the contract on written notice from the SBA.<sup>155</sup>

#### *Waiver of Construction Bonds for Small Businesses*

Under the authority of the Reform Act, FAC 84-56 further amended FAR part 19 to provide that the SBA may

exempt its 8(a) subcontractors from the performance and payment bond requirement for construction contracts. The SBA is required, however, to solicit and "heavily weigh" the views of the contracting officer before exempting an 8(a) concern.<sup>156</sup>

#### *SBA's Proposed Implementation of the Breakout Procurement Center Representative Program*

The Small Business Act mandates the assignment of Breakout Procurement Center Representatives (BPCRs) to major procurement centers.<sup>157</sup> The BPCR's involvement begins during the acquisition planning stages, and its primary function is to ensure that activities "break-out" appropriate acquisition items for competition. Although the FAR incorporated the BPCR statutory requirements early on, the SBA has just recently amended its regulations to include BPCR provisions.<sup>158</sup> The new SBA regulations will, however, introduce a significant change to practice under the FAR. Under the FAR, the BPCR may ultimately appeal to the acquisition agency head if the *contracting officer* rejects its recommendation to compete an acquisition. The SBA amendment, in part, will allow the BPCR to appeal a *program or engineering manager's* rejection to the director or head of the program or engineering directorate. The BPCR may also request a suspension of the acquisition process at this time. Appeals during the planning stages of the acquisition will promote timely resolution of competition issues and possibly minimize interference with the acquisition lead-time at the more critical procurement phase. Note, however, that the regulation will still permit the BPCR to appeal contracting officer rejections.

#### *Mentor-Protege Pilot Program*

Congress has directed the Secretary of Defense to establish a "business assistance" program to further stimulate SDB participation in government contracting.<sup>159</sup> Under this three-year program, qualifying defense contractors (mentor firms) may provide management, technical, and financial assistance to SDBs (protege firms). Additionally, certain other entities that are socially and economically disadvantaged but not "small" may qualify as protege firms. As an incentive, mentor

<sup>151</sup> FAC 84-56, 55 Fed. Reg. 3,878 (1990).

<sup>152</sup> See FAR 19.301(d); 13 C.F.R. § 124.6 (1990).

<sup>153</sup> DAC 88-14, 55 Fed. Reg. 19,070 (1990) (codified at 48 C.F.R. § 252.219-7005).

<sup>154</sup> FAC 84-56, 55 Fed. Reg. 3,878 (1990).

<sup>155</sup> FAR 19.812(d).

<sup>156</sup> FAR 19.808-1(b).

<sup>157</sup> 15 U.S.C. § 644(l).

<sup>158</sup> 55 Fed. Reg. 19,633 (1990) (to be codified at 13 C.F.R. Part 125); see FAR 19.403.

<sup>159</sup> See National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510 (1990).

firms may obtain reimbursement from the government for management, technical, or other assistance rendered by mentor firm personnel. When reimbursement for assistance is not authorized, such as when financial assistance is provided, the mentor firm will receive credit toward its SDB subcontracting participation goals. The Secretary of Defense is required to prescribe regulations to implement this program, which will commence on October 1, 1991.

#### *Evaluation of Small Disadvantaged Business Utilization Required*

Defense Acquisition Circular 88-14<sup>160</sup> amended DFARS part 219 to require contracting officers to evaluate the extent to which offerors propose to use SDBs in the performance of a contract. This requirement applies only to major systems and other complex/sensitive acquisitions involving formal source selection procedures.<sup>161</sup>

#### *Repetitive SDB Set-Asides*

Defense Acquisition Circular 88-14 also provides that once an acquisition has been competed successfully as an SDB set-aside, the contracting officer must set-aside future acquisitions for the same product or service for SDBs.<sup>162</sup> As with an initial set-aside, a repetitive set-aside may be made only if the contracting officer reasonably expects offers from two or more SDBs and the contract award will be made at a price that does not exceed the market price by more than ten percent.

#### *SDB Progress Payment Threshold Lowered and Rate Increased*

SDBs may now obtain progress payments based on costs if progress payments are otherwise appropriate and the contract price equals or exceeds \$50,000.<sup>163</sup> Regular small businesses are not eligible for these progress payments unless the contract price is \$100,000 or more. The progress payment rate has been increased from eighty-five to ninety percent.<sup>164</sup>

#### *SDB Status Protest Rules Modified*

The procedures were clarified for protests concerning the disadvantaged status of an offeror.<sup>165</sup> Protests of dis-

advantaged status are premature if received by the contracting officer before bid opening or, for negotiated acquisitions, before the contracting officer notifies unsuccessful offerors of the proposed awardee's identity. A contracting officer may now protest the disadvantaged status of an offeror based on information furnished by third parties who are otherwise ineligible to protest status.

#### *Blanket Subcontracting Pilot Program*

Effective October 1, 1990, eligible prime contractors will negotiate one blanket subcontracting plan with designated contracting activities.<sup>166</sup> The plan is renegotiated annually for the three-year test period and may apply on a corporate, division, or plant-wide basis. As with individual subcontracting plans, the contracting officer may assess liquidated damages if the contractor fails to make a good-faith effort to comply with its comprehensive plan.

#### *Proposed Changes to DFARS Part 219*

The DFARS set-aside program order of precedence will be streamlined, reducing the types of set-asides from six to three, and will not include partial labor surplus area set-asides.<sup>167</sup> The DFARS change also deletes the combined small business-labor surplus area set-aside. Additionally, contracting officers will no longer be required to analyze offers received from SDBs on prior acquisitions to determine whether there are two SDBs eligible to compete for award of a new acquisition. Finally, if a contracting officer rejects a set-aside recommendation, the SBA may appeal to the Department Secretary. Under the DFARS as currently written, the contracting officer may proceed in the face of such an appeal only after finding that delay will be detrimental to the public interest and after obtaining approval from a higher level. The DFARS amendment maintains the public-interest-finding threshold but deletes the requirement to obtain higher level approval.

#### *Buy American Act Price Differential Simplified*

In the past, the DFARS prescribed a multi-step procedure for determining the low bidder in acquisitions subject to the Buy American Act (BAA). For price evaluation purposes, contracting officers increased the price of a

<sup>160</sup>55 Fed. Reg. 19,070 (1990).

<sup>161</sup>DFARS 219.705-2.

<sup>162</sup>DFARS 219.501(g).

<sup>163</sup>DFARS 232.502-1.

<sup>164</sup>DFARS 232.501-1(a).

<sup>165</sup>DFARS 219.302.

<sup>166</sup>DFARS 219.702; see also 55 Fed. Reg. 13,744 (1990).

<sup>167</sup>55 Fed. Reg. 33,218 (1990) (to be codified 48 C.F.R. at 219); DFARS Part 219.

nonqualifying country offer by certain percentages that varied depending on whether the low domestic offeror was a large or small business, whether a duty was added to a nonqualifying country offer, and whether the award would exceed \$100,000. Contracting officers will now apply a single fifty-percent factor against nonqualifying country offers (inclusive of duty) to which the Buy American Act applies.<sup>168</sup> The contracting officer will apply this factor only if an offer of a domestic end product is lower than a qualifying country offer. Using one fifty-percent multiplier will both simplify the evaluation process and allow a greater preference for small businesses.

### Authority to Contract

#### *Government Lacks Authority to Pay Claim Based on Doctrine of Equitable Estoppel*

In *Office of Personnel Management v. Richmond*<sup>169</sup> the Supreme Court held that the Appropriations Clause<sup>170</sup> of the United States Constitution bars a claim for money against the government based on the doctrine of equitable estoppel. Richmond, a retired Navy employee, received erroneous oral and written advice from government officials concerning the maximum amount of income he could receive without affecting his disability benefits income. The court held that payments of money from the Federal Treasury are limited to those authorized by statute; therefore, because Richmond had exceeded the statutory income limitations, the government lacked authority to pay his claim from the fund appropriated to disburse disability benefits. The Court noted that the judicial use of the equitable estoppel doctrine could not override the Appropriations Clause. Furthermore, the court stated that government officials may not authorize payments based on the equitable estoppel doctrine when no funds have been appropriated for that purpose because to do so could subject them to criminal liability under 31 U.S.C. sections 1341 and 1350.<sup>171</sup> Finally, the Court observed that it had reversed all cases concerning equitable estoppel

against the government, including several recent cases that it reversed summarily. Nevertheless, the Court refused to establish a blanket rule, as proposed by the government, that equitable estoppel could never be asserted against the government.

#### *Administrative Contracting Officer Had Authority to Bind Government to Price Reflected in Price Negotiation Memorandum*

*Texas Instruments, Inc. v. United States*<sup>172</sup> concerned the appeal of a board decision<sup>173</sup> holding that Texas Instruments, Inc., (TI) and the administrative contracting officer (ACO)<sup>174</sup> failed to reach a binding agreement on the price of a modification as reflected in a price negotiation memorandum (PNM).<sup>175</sup> The price had been negotiated by a representative of the ACO.<sup>176</sup> After the completion of the negotiations, the ACO's representative prepared the PNM, which also referred to TI's executed Certificate of Current Cost or Pricing Data.<sup>177</sup> The PNM stated that the agreed upon price of \$672,067.86 was considered fair and reasonable. The PNM was submitted to, and approved and signed by, the ACO. Unknown to TI, however, a DOD directive had established an internal audit review procedure for contract administration actions by Contract Management Boards of Review. This review was required before the execution of a formal contract action. Although not bound by the review board's recommendations, the ACO was required to give them due consideration.

Because of the review procedures, the board had held that the PNM did not constitute a final decision on price and that the ACO did not have the authority to bind the government before consideration of the review board's recommendations.

In reversing the board decision, the Federal Circuit concluded that the parties had executed a binding contractual agreement. Specifically, it found a contemporaneous signed document by each party—the PNM

<sup>168</sup>DFARS 225.

<sup>169</sup>110 S. Ct. 2465, 2471 (1990).

<sup>170</sup>U. S. Const. art. I, § 9, cl. 7 (providing that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law").

<sup>171</sup>This violation is commonly referred to as an Antideficiency Act violation.

<sup>172</sup>No. 90-1195 (Fed. Cir. Dec. 21, 1990).

<sup>173</sup>This decision concerned two board decisions, *Texas Instruments, Inc.*, ASBCA No. 27113, 90-1 BCA ¶ 22,537 (TI II) (appeal of decision determining the amount of \$628,069 to be a fair and reasonable price of Modification PK0005), and *Texas Instruments, Inc.*, ASBCA No. 27113, 87-1 BCA ¶ 19,394, *reh'g denied*, 87-2 BCA ¶ 19,767 (TI I) (non-final decision on parties cross-motions for summary judgment holding that parties had not reached a binding agreement on price for Modification PK0005).

<sup>174</sup>The ACO was the cognizant contracting officer for this contract.

<sup>175</sup>The PNM was an internal government document that reviewed the events leading to the negotiation of a price.

<sup>176</sup>This representative had negotiated several previous items; in each instance the ACO had issued the appropriate contract documents confirming the agreed upon price.

<sup>177</sup>Subsequent to the approval of the PNM, Texas Instruments was requested to execute a second certificate because the caption was incorrect on the first one.

reflected the government's approval of the price and TI had expressed its approval of the price in the Certificate of Current Cost or Pricing Data. The Federal Circuit held that the "non-public, internal directive" did limit the ACO's authority because the limitation it purported to add was not present in "a statute or validly-issued regulation." Because of the uncontested findings of fact upon which its decision was based, the Federal Circuit held that it was not necessary to send the matter back to the board and entered a judgment in favor of TI for \$672,027.86.

***Express and Implied-in-Fact Contracts and Equitable Estoppel Require Actual Authority of Agent***

*Essen Mall Properties v. United States*<sup>178</sup> contains a good overview of the authority of government employees to bind the government. The decision outlines the elements necessary to establish an express contract or a contract implied-in-fact with the government<sup>179</sup> and the elements by which the government may be equitably estopped. The government agent whose conduct is relied upon for the creation of an express contract or a contract implied-in-fact must have had the actual authority to bind the government to the contract. For the government to be equitably estopped, the conduct or representations relied upon must have been made by government officials acting within the scope of their authority.<sup>180</sup>

***Claim for Unauthorized Repairs to Dishwasher Won't Wash***

The Armed Services Board of Contract Appeals (ASBCA) held in *Mit-Con, Inc.*<sup>181</sup> that the contractor was not entitled to reimbursement for out-of-warranty repairs made to a dishwasher because the work was requested by unauthorized personnel. The ASBCA noted that although responding to unauthorized calls was practical, it was not proper procedure.

**Contract Types**

***Economic Price Adjustments***

In *Craft Machine Works, Inc.*<sup>182</sup> the ASBCA invalidated an economic price adjustment clause because it was

inconsistent with the DFARS. The DFARS states that economic price adjustment clauses should compensate the contractor during the performance period for fluctuations from price levels at the time of award. The locally drafted clause provided for moving base periods that protected the contractor from separate and distinct fluctuations in economic conditions but not for all the changes over the life of the contract.

***Indefinite Quantity, Indefinite Delivery***

***Reasonableness of Estimates***

*Crown Laundry & Dry Cleaners, Inc.*<sup>183</sup> highlights the difference between indefinite quantity, indefinite delivery (IQ/ID) contracts and requirements contracts. In using IQ/ID contracts, the reasonableness of the estimated quantity is not an issue. Under IQ/ID contracts, the government is obligated only to order the stated minimum quantity. Therefore, the contractor may not recover from the government for the failure to order negligently estimated higher quantities.

***Commercial Items or Services***

The GAO held in *Sletager, Inc.*<sup>184</sup> that indefinite quantity contracts are not limited to commercial items or services by the language at FAR 16.504(a)(3)(b). This FAR provision states that indefinite quantity contracts "should" only be used for commercial items or services. GAO stated that the word "should" indicates that there is no regulatory prohibition against the use of this contract type for noncommercial items or services.

***Contract Term***

*Ion Track Instruments, Inc.*<sup>185</sup> held that research and development contracts are not limited to five years. The five-year limitation at FAR 17.204(e) only applies to multiyear contracts. Research and development are governed by FAR part 35, which does not contain a corresponding limitation.

***Unit Price v. Lump Sum Price***

In *Bean Dredging Corporation*<sup>186</sup> the protester challenged an agency's decision to solicit certain work on a

<sup>178</sup> 21 Cl. Ct. 430, 9 FPD ¶ 130 (1990).

<sup>179</sup> See also *Webster Univ. v. United States*, 20 Cl. Ct. 429, 9 FPD ¶ 71 (1990) (discussing elements necessary to prove formation of express or implied-in-fact contract).

<sup>180</sup> This requirement is an additional element to a showing that: (1) the party to be estopped must know the facts; (2) the party must intend that its conduct shall be acted on or that party must so act that the party asserting the estoppel has a right to believe that it is so intended; (3) the party asserting must be ignorant of the true facts; and (4) the party asserting the estoppel must have relied, to its detriment, on the conduct of the party to be estopped. *Essen Mall Properties v. United States*, 21 Cl. Ct. 430, 446, 9 FPD ¶ 130 (1990).

<sup>181</sup> ASBCA No. 39377, 90-2 BCA ¶ 22,707.

<sup>182</sup> ASBCA No. 35167, 90-3 BCA ¶ 23,095.

<sup>183</sup> ASBCA No. 39982, 90-3 BCA ¶ 22,993.

<sup>184</sup> Comp. Gen. Dec. B-237676 (Mar. 15, 1990), 90-1 CPD ¶ 298.

<sup>185</sup> Comp. Gen. Dec. B-238893 (July 13, 1990), 90-2 CPD ¶ 31.

<sup>186</sup> Comp. Gen. Dec. B-239952 (Oct. 12, 1990), 90-2 CPD ¶ 286.

lump sum instead of a unit priced basis. The GAO found that the agency reasonably selected a lump sum pricing scheme because historical data and previous contracts demonstrated that the risks were low and fair, and that reasonable prices were possible.

### *Requirements Contracts*

In *Phil Brodeur*<sup>187</sup> the contractor had a requirements contract to perform repairs at a firm, fixed price per hour. The contract required the use of standard hours whenever those hours were available. In the absence of standard hours, agreed-upon estimated hours were to be used. The government avoided using standard hours by slightly rephrasing its description of repair work to distinguish it from repairs for which standard hours were available. The government's practice constituted a breach of the requirement to use standard hours, and it entitled the contractor to damages.

### *Option Contracts: Prices Under Firm Fixed-Price Options Are Not Renegotiable upon Exercise of Option*

In *Aviation Contractor Employees, Inc.*<sup>188</sup> the contractor sought to invalidate the methodology for the pricing of several options years by arguing that the option price must be completely renegotiated prior to exercise of each option. The ASBCA held that the contract and comments made during the prebid conference adequately placed the contractor on notice that the options were firm fixed-priced, and that only wage rate escalations and equitable adjustments for workload changes under the changes clause were allowed or required. To hold otherwise reduced the option to an agreement to agree that would be uncertain and, therefore, unenforceable.

### **Competition**

#### *Integrity of the Process Versus Integrity of the Contractor*

In *Compliance Corporation*<sup>189</sup> the Comptroller General clearly affirmed and explained a contracting officer's authority to disqualify a firm from participating in an acquisition to maintain the integrity of the competitive process. The contracting officer found that Compliance Corporation fell within the competitive range in a negotiated procurement, but disqualified the company because a

Naval Criminal Investigative Service investigation revealed that a Compliance Corporation employee may have obtained—and certainly attempted to obtain—proprietary information regarding the proposal of a competing contractor. Compliance Corporation asserted two arguments in its protest: (1) that the contracting officer lacked authority to disqualify it from the competition; and (2) that the contracting officer could not disqualify the firm from the competition without finding the company to be nonresponsible.

Citing FAR 1.602, which specifies contracting officers' responsibilities, and its decision in *NKF Engineering, Inc.*<sup>190</sup> the Comptroller General opined that contracting officers are not only authorized, but are required, to protect the integrity of the procurement system by disqualifying a firm from competition when it reasonably appears that the firm may have obtained an unfair competitive advantage. The Comptroller General also stated that contracting officers may impose a variety of restrictions—not all of which are specified in applicable regulations—to safeguard the competitive process, and that the GAO's standard of review of such decisions is to determine whether the contracting officer had a reasonable basis for the decision to impose the sanction. Finally, the Comptroller General emphasized that the contracting officer was not required to make a responsibility determination regarding Compliance Corporation before excluding it from the competition because the contracting officer's decision to disqualify Compliance Corporation was reasonably based on a need to protect the integrity of the competitive process rather than on the company's integrity to perform the contract.

#### *Restriction on Competition by Agency Action or Inaction*

#### *Sole-Source Justification May Be Limited to a Portion of the Work*

In *Tri-Ex Tower Corporation*<sup>191</sup> the Army proposed to issue a sole-source contract to the manufacturer of extendable antenna masts to modify and refurbish 149 of the masts under the statutory provision that permits use of other than full and open competition procedures when only one or a limited number of sources can do the work and no other goods or services will satisfy the agency's needs.<sup>192</sup> Only thirty of the masts were in use; the

<sup>187</sup>ASBCA No. 30967, 90-3 BCA ¶ 23,154.

<sup>188</sup>ASBCA No. 30154, 90-3 BCA ¶ 23,023.

<sup>189</sup>Comp. Gen. Dec. B-239252 (Aug. 15, 1990), 90-2 CPD ¶ 126, *aff'd on reconsideration*, B-239252.3, Nov. 28, 1990.

<sup>190</sup>65 Comp. Gen. 104 (1985), Comp. Gen. Dec. B-220007 (Dec. 9, 1985), 85-2 CPD ¶ 638; *see also* *NKF Eng'g, Inc. v. United States*, 805 F.2d 372, 5 FPD ¶ 107 (Fed. Cir. 1986) (judicially affirming the Comptroller General's resolution of the issues asserted in *NKF Engineering's* protest).

<sup>191</sup>Comp. Gen. Dec. B-239628 (Sept. 17, 1990), 90-2 CPD ¶ 221.

<sup>192</sup>10 U.S.C. § 2304(c)(1).

remaining 119 were spares kept in storage. The Comptroller General found adequate justification for modification of the first thirty masts because the work on that quantity was required within three months of award so that the thirty defective units in the field could be replaced and because it would take about six months for another contractor to reverse engineer the effort to enable it to compete. The GAO found no adequate justification for limiting competition on the remaining quantity, however, because none of that quantity was to be fielded and, therefore, there was no urgency in accomplishing the modifications. Consequently, the GAO concluded that the agency could not reasonably conclude that only one source would be able to meet the agency's needs within the required time for the remaining quantity of masts to be reworked because a contractor such as the protester could become capable of competing.

*Combining Similar Requirements May Be Unreasonable Restriction on Competition*

The Air Force combined two types of services—removal of rubber and paint from runways and repainting stripes on runways—into a single “total package” solicitation for each of four Air Force Logistic Command Center (AFLC) regions, which meant that each firm fixed-price regional contract would cover between sixteen and thirty-four airfields. Several small businesses protested, contending that the Air Force precluded effective competition, first by consolidating the two requirements and then by procuring the consolidated requirements in one large package for each AFLC region. The Comptroller General determined in *Airport Markings of America, Inc.*<sup>193</sup> that consolidation of the two types of services was justified for a number of practical reasons, but that combining the consolidated services into a few large regional contracts was not justified. The GAO opined that the Competition in Contracting Act of 1984 (CICA)<sup>194</sup> requires that any restriction or condition imposed upon competition for an acquisition must satisfy a legitimate need of the agency. The GAO found that the restriction to a single award for each AFLC region was primarily for the historical, administrative convenience of the Air Force. Accordingly, the restriction did not fulfill a legitimate agency need, because mere administrative convenience is not sufficient justification for restrictions that eliminate competition. The Comptroller General found no rational need for requiring all such work in each AFLC

region to be procured under a single contract. Consequently, the “total package” adopted to acquire these services was unduly restrictive of competition.

*Restrictions on Competition in Other than Full and Open Competition Circumstances*

*Urgency: Refusal to Submit Cost and Pricing Data Is Not a Basis for Exclusion from Limited Competition*

The Navy solicited offers for solid waste collection and disposal services for a four-month period from only two firms on the basis of unusual and compelling urgency, but did not solicit an offer from the incumbent contractor because that firm had refused to submit cost or pricing data on previous solicitations for the same services. The incumbent protested, and in *Bay Cities Services, Inc.*,<sup>195</sup> the Comptroller General determined that it was not reasonable for the Navy to exclude Bay Cities Services from the limited competition because the Navy could have waived the requirement for cost data if Bay Cities Services had been allowed to submit an offer and adequate price competition had consequently been obtained. In other words, because adequate price competition may have resulted if Bay Cities Services had been allowed to submit an offer and, therefore, because cost and pricing data may not have been required under the Truth in Negotiations Act,<sup>196</sup> the failure to solicit Bay Cities Services violated the requirement in the Competition in Contracting Act that agencies solicit offers from as many potential sources as possible, even when limited competition is justified.<sup>197</sup>

*Urgency: Authority to Limit Competition Does Not Automatically Justify a Sole-Source Award*

The Army awarded a sole-source contract for housing maintenance services at Fort Bragg to the incumbent contractor on grounds that an unusual and compelling urgency existed and that only the incumbent could provide continuing services immediately. A prior contractor for the same services protested the sole-source award, contending that no urgency existed and, alternatively, that even if there was an urgent requirement, the company improperly was excluded from the limited competition required by the Competition in Contracting Act (CICA). In *Earth Property Services, Inc.*<sup>198</sup> (EPS) the GAO found no basis to question the Army's determination that urgent circumstances justified limiting competition. The GAO

<sup>193</sup>Comp. Gen. Dec. B-238490 (June 8, 1990), 90-1 CPD ¶ 543.

<sup>194</sup>Pub. L. 98-369, title VII, § 2701, July 18, 1984, 98 Stat. 1175 (1984); see 10 U.S.C. § 2301(a).

<sup>195</sup>Comp. Gen. Dec. B-239880 (Oct. 4, 1990).

<sup>196</sup>10 U.S.C. § 2306a(a)(1)(B).

<sup>197</sup>*Id.* § 2304(e).

<sup>198</sup>Comp. Gen. Dec. B-237742 (Mar. 14, 1990), 90-1 CPD ¶ 273.

did find, however, that the failure to solicit an offer from EPS, which had held the contract prior to the incumbent, which had communicated with the agency regarding the urgent requirements, and which was known to the agency to be capable of commencing the urgent work on short notice, violated the CICA requirement that agencies request offers from as many potential sources as practicable under the circumstances.<sup>199</sup>

### *Restrictions on Competition to Maintain a Domestic Industrial Base*

#### *Generalized Justification Is Not Sufficient*

The United States District Court for the District of Columbia addressed the third statutory authorization for contracting with other than full and open competition<sup>200</sup> in *Scopus Optical Industry v. Stone*.<sup>201</sup> The court held that the Army improperly restricted competition on a contract for 60,000 M17 tank periscopes by limiting the procurement to United States and Canadian manufacturers. Although the Army issued a written J&A as required to support its decision to restrict competition under 10 U.S.C. section 2304(c)(3)(A), the J&A did no more than parrot the implementing language of the FAR, and thus it constituted no more than a generalized finding that a mobilization base has to be maintained for M17 periscopes. The Army did not establish that restriction on competition of this particular procurement was necessary to achieve the needed mobilization base; therefore, the restriction was improper.

#### *Limiting Competition to Designated Mobilization Base Producers Lacking Current Contract Is Reasonable*

The protester in *EMCO, Inc.*<sup>202</sup> contended that the Army improperly restricted competition on a contract for grenade metal parts to only two of the five active mobilization base producers. The Comptroller General found that the Army's J&A for use of other than full and open competition under 10 U.S.C. section 2304(c)(3)(A) adequately justified limiting competition to the two contractors who did not have current production contracts. The other three producers had ongoing contracts that would keep their production facilities in operation, whereas the two competing contractors were on the verge of going into inactive status, which would result in the loss of crit-

ical skills and inadequate production capacity in case of national emergency. The agency's J&A established the need for all five mobilization producers. Accordingly, the GAO found the restriction on competition to keep all producers in an active status to be reasonable.

#### *Limiting Competition to Mobilization Base Producers and Excluding Assemblers Is Reasonable*

The GAO determined in *DBA Systems, Inc.*<sup>203</sup> that a procurement for night vision intensifier tubes was reasonably limited to four industrial base producers. The protester argued that there was no reason to limit competition because it and other small businesses had manufactured night vision devices that met the requirements of the solicitation. The Comptroller General found that the prior competitive purchases were too small to sustain the mobilization base and that the Army had reasonably determined that there was a need to direct work to the four firms that could produce the tubes in large volumes. The opinion notes that in procurements made under the Competition in Contracting Act provisions regarding mobilization base producers,<sup>204</sup> the purpose is not to obtain competition but to maintain the industrial mobilization base. The GAO determined, therefore, that the Army had a reasonable basis for structuring the procurement as it had, and that the GAO would not question the agency's discretion in imposing such a restriction on competition in the absence of compelling evidence of abuse of that discretion.

### **Responsibility Determinations**

#### *Responsibility Determinations Based on Integrity*

#### *Nonresponsibility Determination on One Solicitation Does Not Trigger Right to Notice*

In *Frank Cain & Sons, Inc.—Request for Reconsideration*<sup>205</sup> the GAO held that when a contractor is deprived of an award in a single procurement, there is no basis for a finding of constructive or de facto debarment that would entitle the contractor to notice and an opportunity to be heard, unless there are specific facts justifying such a conclusion. The protester contended that the GAO had erred by disregarding *Cubic Corporation v. Cheney*,<sup>206</sup> which the protestor cited to support his assertion that "the contractor [is entitled] to due process where the

<sup>199</sup> 10 U.S.C. § 2304(e).

<sup>200</sup> *Id.* § 2304(c)(3)(A) (providing, in part, for limiting competition to maintain industrial mobilization base).

<sup>201</sup> No. 90-0484 (D.D.C. June 29, 1990), 36 CCF ¶ 75,890.

<sup>202</sup> Comp. Gen. Dec. B-240070.2 (Sept. 19, 1990), 90-2 CPD ¶ 235.

<sup>203</sup> Comp. Gen. Dec. B-237596 (Feb. 23, 1990), 90-1 CPD ¶ 214.

<sup>204</sup> 10 U.S.C. § 2304(c)(3).

<sup>205</sup> Comp. Gen. Dec. B-236893.2 (June 1, 1990), 90-1 CPD ¶ 516.

<sup>206</sup> No. 89-1617 (D.D.C. Aug. 8, 1989)(unpub.); see also *Old Dominion Dairy Prods., Inc. v. Secretary of Defense*, 631 F.2d 953 (D.C. Cir. 1980) (nonresponsibility determinations based on lack of business integrity deprive the contractor of liberty interest, thus creating due process right to notice and opportunity to be heard).

government deprives a contractor of a contract on the basis of a nonresponsibility determination relating to the contractor's perceived lack of integrity."<sup>207</sup> In denying the reconsideration request, the GAO stated, "A single nonresponsibility determination is administrative in nature, is largely dependent on the business judgment and discretion of the contracting officer, and provides minimal impingement on the contractor's interest since such determinations . . . vary from contract to contract."

*Two Contemporaneous Findings of Nonresponsibility Based on Current Information Is Not De Facto Debarment*

In *Garten-und Landschaftsbau GmbH*<sup>208</sup> the protester contended that the nonresponsibility determination on two "practically contemporaneous procurements" constituted a de facto debarment or suspension. The GAO recognized that it is improper for an agency, without following the procedures for suspension and debarment, to make repeated determinations of nonresponsibility or a single determination if it is part of a long-term disqualification attempt. The GAO upheld the contracting officer's determination because these determinations were practically contemporaneous—that is, they implied a single determination—and because they were based on current information.<sup>209</sup>

*Contracting Officer's Conduct Provides Basis for De Facto Debarment*

In *Leslie & Elliot Co., Inc v. Garrett*<sup>210</sup> the Navy issued two IFBs within a month of each other—one to construct a jogging path, the other to demolish a training tank. Leslie & Elliot, a small business, was the low bidder on both solicitations, but was not awarded the contracts because it was contemporaneously determined to be nonresponsible. The SBA refused to issue a Certificate of Competency (COC) and the Comptroller General denied the contractor's protest.

Leslie & Elliot sought to enjoin the awarding of the contracts, contending that the Navy's conduct amounted to a de facto debarment. The Navy argued that a de facto debarment had not occurred because the nonresponsibility determination was limited to the two contracts. The court stated, however, that there are a number of facts to con-

sider in determining whether a de facto debarment has occurred. The court found several facts supportive of Leslie & Elliot's argument that a de facto debarment had occurred. First, the court noted that one reason for finding Leslie & Elliot nonresponsible was its failure to comply with safety standards. The court noted that while this fact may have bearing on the demolition contract, it should not play an important factor in the construction contract. Next the court found that the contracting officer considered Leslie & Elliot to have consistently bid "jobs low and exploit[ed] obscure flaws in the plans and/or specifications to the detriment of the Navy and the taxpayer."<sup>211</sup> The court further found that the SBA understood that the Navy did not want the plaintiff to be working on the base. The court finally noted that Navy had assigned a full time inspector to Leslie & Elliot's last contract but could not explain why a full time inspector was needed. The court concluded that, while grounds for Leslie & Elliot's debarment may exist, such a debarment can only occur after the plaintiff has been provided notice and an opportunity to rebut the proposed debarment.

*No Comparative Evaluation of Responsibility Factors*

In *Stanley Machining & Tool Company, Inc.—Request for Reconsideration*<sup>212</sup> the protester alleged that the contracting officer was obligated to consider financial resources, past performance, ability to meet delivery schedules, and integrity—giving them weight equal to price—because they were specifically listed in the solicitation as factors that would be considered for award. According to the protester, the contracting officer should not have considered these factors in determining responsibility, but should have conducted a comparative "technical" evaluation of the offers. The GAO found that these factors were not to be used to make relative assessments of competing offers, but to determine the responsibility of each offeror. The GAO found support for this conclusion in the fact that the solicitation did not instruct the offerors to submit technical proposals addressing the enumerated factors.

*Unreasonably Low Bid by Responsible Firm May Not Be the Basis for Rejection*

A single instance of alleged below-cost bidding is not evidence of an intent to undercut the marketplace or to

<sup>207</sup>Comp. Gen. Dec. B-236893.2 (June 1, 1990), 90-1 CPD ¶ 516.

<sup>208</sup>Comp. Gen. Dec. B-237276, Comp. Gen. Dec. B-237277 (Feb. 13, 1990), 90-1 CPD ¶ 186.

<sup>209</sup>Cf. *ATL, Inc. v. United States*, 736 F.2d 677 (Fed. Cir. 1984).

<sup>210</sup>732 F. Supp. 191 (D.D.C. 1990).

<sup>211</sup>*Id.* at 197.

<sup>212</sup>Comp. Gen. Dec. B-239232.2 (June 25, 1990), 90-1 CPD ¶ 592.

obtain a monopoly for a particular item. In *Diemaster Tool, Inc.*<sup>213</sup> the protester argued that Textron was "buying-in" when its bid was two and a half times lower than Textron's bid on the same item submitted approximately four years earlier. The purpose of the "buy-in" bid, the protester argued, was to eliminate full and open competition. The GAO stated that whether a bidder can perform at the price offered is a matter of responsibility. An unreasonably low bid may not be rejected solely because of its lowness if the contracting officer determines that the bidder is otherwise responsible.

### Sealed Bidding—Recent Cases

#### *Bid Modified by Writing on Bid Envelope*

In *Qualicon Corporation*<sup>214</sup> the contractor submitted its bid in a sealed envelope and sought to modify that bid by annotating the bid envelope with the following notation: "Deduct-\$272,000 RCP." A contracting agency may consider a downward bid modification written on the bid envelope, the GAO determined, when the agency's procedures for inspecting bid documents are sufficiently thorough to ensure that the agency would have discovered the notation on the envelope and it is clear that the notation could not be renounced by the contractor.

The GAO distinguished its decision in *Central Mechanical Construction, Inc.*<sup>215</sup> in which it held that a bid modification on a bid envelope should not be considered when it is so inconspicuous in size and location on the envelope that the contracting officer could not reasonably be expected to have seen it. In *Qualicon* the GAO found that the agency procedures for inspecting bid documents were sufficiently thorough that a bidder would not have had the opportunity to renounce a bid modification by failing to bring it to the agency's attention. Moreover, the GAO found that because the bid modification was signed with the initials of the person who signed the bid, it was highly unlikely that the notation was intended to be anything but a bid modification.

#### *Reason to Cancel Unknown at Time of Decision*

In *Vanguard Security, Inc. v. United States*<sup>216</sup> the Claims Court held that a compelling reason to cancel a guard services solicitation will justify cancellation after bid opening even if raised for the first time during litigation. The agency initially canceled the solicitation on the

basis that a solicitation amendment resulted in an ambiguity concerning the contract type. During litigation the agency discovered that it had inadequately stated its needs by understating the number of guard posts and supervisory guard post assignments. The court ruled that to deny the agency's post hoc justification for cancellation, albeit untimely, would only undermine the integrity of the procurement process because the defects were substantial and integral to the contract.

#### *Requirement to Use Sealed Bidding Procedures*

In *Racal Filter Technologies, Inc.*<sup>217</sup> the GAO ruled that sealed bidding procedures must be used if the four conditions<sup>218</sup> enumerated in the Competition in Contracting Act exist. The Army sought to use competitive procedures for the procurement of gas mask canisters "to ensure offerors fully understand the government's requirements" and to discuss potential changes in quantities, delivery schedules and the "technical data package" (TDP). Award was to be based on price. The Army failed to explain how it intended to use the discussions to evaluate the offerors' understanding of the specifications because no technical proposal was required. Turning to the other basis for justifying the use of competitive procedures, the GAO pointed out that changes in quantity, delivery schedule, and the data package are "properly accomplished by an amendment, regardless of the procurement type."<sup>219</sup> Although the GAO noted that CICA abolished the statutory preference for sealed bidding, CICA does state that sealed bidding procedures *shall* be used if the four conditions are met.

#### *Inconsistent Bid Bond Is Nonresponsive*

In *Design for Health, Inc.*<sup>220</sup> the GAO held that when the legal entities shown on the bid form and the bid bond are different, the contracting officer must reject the bid as nonresponsive if it cannot be determined from the bid itself that the two entities are bidding as a joint venture.

In *W.R.M. Construction, Inc.*<sup>221</sup> the bidder, in lieu of submitting the standard government bid bond form, submitted a commercial form that limited the surety's obligation to the difference between the amount of the awardee's bid and the amount of a reprocurement contract. The IFB required that the bid bond cover "any

<sup>213</sup> Comp. Gen. Dec. B-238877.3, (Nov. 7, 1990).

<sup>214</sup> Comp. Gen. Dec. B-237288 (Feb. 7, 1990), 90-1 CPD ¶ 158.

<sup>215</sup> Comp. Gen. Dec. B-220594 (Dec. 31, 1985), 85-2 CPD ¶ 730.

<sup>216</sup> 20 Cl. Ct. 90, 9 FPD ¶ 50 (1990).

<sup>217</sup> Comp. Gen. Dec. B-240579 (Dec. 4, 1990).

<sup>218</sup> The four conditions are: (a) time permits the solicitation, submission, and evaluation of sealed bids; (b) award will be made on price and price related factors; (c) discussion with responding sources about their bids are unnecessary; and (d) more than one bid is expected.

<sup>219</sup> Comp. Gen. Dec. B-240579 (Dec. 4, 1990).

<sup>220</sup> Comp. Gen. Dec. B-239730 (Sept. 14, 1990), 90-2 CPD ¶ 213.

<sup>221</sup> Comp. Gen. Dec. B-239847 (Sept. 18, 1990), 90-2 CPD ¶ 227.

costs of acquiring the work that exceeds its bid." The GAO noted that this language permits the government to recover "administrative costs or the cost of performing the work in-house." The GAO found the submitted bid deficient and therefore nonresponsive.

#### ***Ambiguous Bid Is Nonresponsive***

In *Reid & Gary Strickland Company*<sup>222</sup> the Corps of Engineers issued an IFB for the construction of a nuclear weapons staging facility and weapons transfer station. Reid & Gary made a notation on its bid that it had "Allowed \$500,000 for them," with respect to several items for which it apparently had not received firm quotes from a supplier. The GAO held that the notation rendered the bid ambiguous and thus nonresponsive. Although the bid could be read as providing a firm fixed-price, with a mere informational notation, the notation could also be interpreted as limiting the bidder's liability to no more than \$500,000 for those items for which the bidder had not received firm quotes.

#### ***Failure to Submit Integrity Certification Is a Matter of Responsiveness***

In *Fry Communications, Inc.*<sup>223</sup> and *Atlas Roofing Co., Inc.*<sup>224</sup> the GAO held that the failure to submit the required Procurement Integrity Certificates rendered the bidders' bids nonresponsive and not nonresponsive.<sup>225</sup> The GAO found this to be a responsiveness issue because completion of the certificate bound the contractor to detect and report violations of the statute, thereby imposing a material legal requirement. The GAO also found it material that the certificate is required to be submitted with the bid, thereby indicating it was meant to be a responsiveness criteria.

#### ***Failure to Submit Lobbying Certification Is a Matter of Responsibility***

In *Tennier Industries, Inc.*<sup>226</sup> the GAO found that the failure to complete the certification requirement<sup>227</sup> regarding the statutory limitation on the use of appropriated funds for lobbying activities did not render a bid nonresponsive because the certification did not impose

additional material obligations upon the bidder beyond those imposed by the statute.<sup>228</sup> Additionally, the so-called Byrd Amendment permits submission anytime prior to award.<sup>229</sup> The GAO concluded that because the relevant time for submission of a certificate was at time of award, the submission of the lobbying certification was a matter of responsibility.

#### ***Mistake in Bids: Bid Susceptible to Two Interpretations***

In *Virginia Beach Air Conditioning Corporation*<sup>230</sup> the Coast Guard issued an IFB for the renovation and modification of heating and air conditioning systems. Bidders were asked to bid on five line items—one base item and four additive items, with prices in lump sum for each line item—as well as a grand total for all items. The apparent low bidder submitted the same figure of \$488,000 for the base item subtotal as well as for the grand total. The corrected arithmetical grand total of \$962,530 was approximately \$474,530 more than the next low bidder, Virginia Beach Air Conditioning. The agency permitted the bidder to verify its intended grand total bid of \$488,000 using its work papers. The work sheets did not definitively show the intended line item bids, but did show a price of \$488,000, which was consistent with the total on the bid. In reviewing the bid abstract, the GAO noted that the apparent low bidder's bid on the base item of \$488,000 and its corrected grand total of \$962,530 was within the range of other base item and grand total bids. The GAO held that the agency improperly permitted correction of the bid. When, as here, the bid was susceptible of being interpreted as offering either of two prices shown on its face, only one of which is low, the bid must be rejected because the request for correction should be considered as resulting in displacing a lower bid.

#### **Competitive Negotiations and Source Selections**

##### ***Proposal Format***

A common issue addressed by two protest forums last year was what should the contracting officer do when one or more proposers fails to follow the Instructions to Offerors contained in section L of the Request for Proposals. In *Infotec Development, Inc.*<sup>231</sup> the proposer failed to comply with page and line-per-page limitations

<sup>222</sup>Comp. Gen. Dec. B-239700 (Sept. 17, 1990), 90-2 CPD ¶ 222.

<sup>223</sup>Comp. Gen. Dec. B-237666 (Feb. 23, 1990), 90-1 CPD ¶ 215.

<sup>224</sup>Comp. Gen. Dec. B-237692 (Feb. 23, 1990), 90-1 CPD ¶ 216.

<sup>225</sup>GAO distinguished *Westmont Indus.*, Comp. Gen. Dec. B-237289 (Jan. 5, 1990), 90-1 CPD ¶ 26, in which the Navy treated the requirement as a matter of responsibility. At the time of the agency decision, the requirement to submit the certificate was suspended.

<sup>226</sup>Comp. Gen. Dec. B-239025 (July 11, 1990), 90-2 CPD ¶ 25.

<sup>227</sup>The GAO noted that this issue will not arise when the FAR version of the certificate is used. FAR 52.203-11 provides that the offeror by signing its offer certifies compliance with all provisions of the Byrd Amendment. See also FAC 84-55, 55 Fed. Reg. 3,190 (1990).

<sup>228</sup>Limitation on Use of Appropriated Funds, Pub. L. No. 101-121, § 319, 103 Stat. 701 (1989) (amending 31 U.S.C. § 1352).

<sup>229</sup>*Id.* § 319(b)(4).

<sup>230</sup>69 Comp. Gen. 132 (1990), Comp. Gen. Dec. B-237172 (Jan. 19, 1990).

<sup>231</sup>Comp. Gen. Dec. B-238980 (Jul. 20, 1990), 90-2 CPD ¶ 58.

contained in the Request for Proposals. The contracting officer simply refused to evaluate the additional forty-nine pages in the proposal. The proposal, as evaluated, contained numerous deficiencies and did not make the competitive range. The GAO held that this was permissible and that waiving the page limits for one offeror might prejudice the other offerors who had designed their proposals in such a manner as to comply with the page limitations.

In *United Computer Systems, Inc.*<sup>232</sup> the GSBICA considered a protester's argument that it was prejudiced by another offeror's violation of page limitations in the Request for Proposals. The RFP required offerors to comply with a provision entitled "instructions, conditions and notices to offerors," which contained the page limitations. This provision also stated that failure to comply with any of the instructions on proposal submission "may be cause for rejection of the proposal." The board held that rejection of a noncompliant proposal was discretionary, not mandatory, and that if the agency had intended to create a mandatory format for proposals, clearer language would be required. Accordingly, no prejudice to the protester was shown and the protest was denied.

### Evaluation of Proposals

#### Review of Source Selection Plans

The GAO indicated in *Frank E. Basil, Inc.*<sup>233</sup> that it will subject Source Selection Plans to closer scrutiny than it had in the past. In *Frank E. Basil* the GAO found an evaluation plan unreasonable because it assigned zero points for a personnel subfactor if a proposal had one unacceptable resume. This draconian scoring system was held to be inconsistent with the evaluation factors, which indicated a composite score based on the scores of all resumes submitted.

In *Modern Technologies Corporation*<sup>234</sup> the protester contended that the use of an arithmetic mean of scores to set pass-fail criteria violated the instructions of the source selection plan. While it considered the use of the mean questionable, the GAO found that the protester was not prejudiced and denied the protest. The GAO stated that the source selection plan does not, in itself, provide a basis for relief because evaluation plans are internal instructions that do not vest offerors with enforceable

rights. It is the evaluation factors in the solicitation that form the basis of review of the agency's evaluation by the GAO.

*Antenna Products Corporation*<sup>235</sup> stands for the proposition that failure to follow an evaluation plan is not necessarily error if the agency adheres to the evaluation scheme in the RFP. The GAO, however, will review evaluation plans for consistency with the RFP and for rationality.

#### Review of the Evaluation Process

The GAO and GSBICA also reviewed the actual evaluation to ensure that the evaluation is reasonable and consistent with the RFP. In *Secure Services Technology, Inc.*<sup>236</sup> the agency did not discuss its concerns about the user manual submitted by one offeror. Conversely, it did raise issues about the user manual of a competitor, who revised the manual and was given a higher evaluation as a result. The GAO found this inequitable treatment to be objectionable and sustained the protest.

In *Asbestos Management, Inc.*<sup>237</sup> the evaluation board lost part of an offeror's proposal. The agency evaluated the remaining portions of the proposal and eliminated the offeror for technical deficiencies contained in the portion of the proposal that was missing. The GAO held that the contracting officer should have requested another copy of the proposal before eliminating the offeror from the competition.

*Intertec Aviation*<sup>238</sup> is noteworthy for two reasons. First, the decision is notable because it evidences a heightened scrutiny of technical evaluations by the GAO. In this protest the GAO conducted *in camera* comparative reviews of the proposals submitted by the protester and another offeror. Second, the GAO—in conducting its review of the evaluation—determined that the agency appeared to apply an evaluation technique that allowed minor deficiencies in parts of the proposal to adversely affect the evaluation of disproportionately large parts of the proposal. Using this standard, the agency concluded that the proposal should be excluded from the competitive range, because it was technically unacceptable and not capable of being made acceptable without a major rewrite. When confronted with an allegation at the protest conference that the deficiencies were minor and easily correctable, the agency responded that the proposal had

<sup>232</sup> GSBICA No. 10303-P, 90-1 BCA ¶ 22,546, 1989 BPD ¶ 367.

<sup>233</sup> Comp. Gen. Dec. B-238354 (May 22, 1990), 90-1 CPD ¶ 492.

<sup>234</sup> Comp. Gen. Dec. B-236961.4, Comp. Gen. Dec. B-236961.5 (Mar. 19, 1990), 90-1 CPD ¶ 301.

<sup>235</sup> 69 Comp. Gen. 137 (1990), Comp. Gen. Dec. B-236933 (Jan. 22, 1990), 90-1 CPD ¶ 82.

<sup>236</sup> Comp. Gen. Dec. B-238059 (Apr. 25, 1990), 90-1 CPD ¶ 421.

<sup>237</sup> Comp. Gen. Dec. B-237841 (Mar. 23, 1990), 90-1 CPD ¶ 325.

<sup>238</sup> Comp. Gen. Dec. B-239672; Comp. Gen. Dec. B-239672.2 (Sept. 19, 1990), 90-2 CPD ¶ 232.

been scored in accordance with the evaluation factors. The GAO found the agency's conclusion that the deficiencies were so significant as to require a major revision of the proposal unsupported by the facts and sustained the protest.

#### *Use of Cost Data to Evaluate Technical Merit*

The GAO and GSBCA also examined agencies' use of cost proposals in the technical evaluation of proposals. In *American Contract Health, Inc.*<sup>239</sup> the government properly downgraded a proposal with low wage rates in light of the problem of attracting and retaining qualified dentists. A plan for selecting and retaining a competent work force was a specific evaluation criteria.

Similarly, in *Ferranti International Defense Systems, Inc.*,<sup>240</sup> an unexplained reduction of the price by twenty-six percent in Ferranti International's best and final offer (BAFO) justified an evaluation of substantial risk and downgrading of the technical score.

The GSBCA took a more aggressive position in *Sterling Federal Systems, Inc.*<sup>241</sup> by declaring a competitor ineligible for award. During evaluation of the cost proposal, the agency raised—but did not seriously question—the realism of the proposed salaries for key personnel. The board found that the low offeror, Computer Sciences Corporation (CSC), had materially misrepresented its estimated salaries for certain key managers on the cost-plus-award-fee contract. It found sua sponte that either the offeror was intending to pay its key personnel more—thereby misleading the government as to the true cost of this cost contract—or it was intending to substitute personnel other than those described in the proposal. The GSBCA was critical of the agency for its "stubborn refusal to acknowledge" the misrepresentations and to take appropriate action. Accordingly, the board disqualified CSC to protect the integrity of the procurement process.

#### *Consideration of Extrinsic Material*

In *Communications International, Inc.*<sup>242</sup> the GAO stated that agencies, in evaluating proposals, may consider evidence obtained from other sources as long as the use of extrinsic evidence is consistent with established

procurement practices. The agency disregarded the product literature submitted with the bid and considered information contained in a "change sheet" that it possessed prior to the closing date for receipt of proposals. The agency knew that there was a lag period before the updated information was incorporated into standard product literature. Accordingly, the agency's consideration of the change sheet's information in lieu of the information submitted by the offeror was appropriate.

The GAO held in *Ferranti International Defense Systems, Inc.*<sup>243</sup> that the contracting officer properly considered information contained in a preaward survey to determine technical acceptability.

In *SRS Technologies, Inc.*<sup>244</sup> the protester argued that the agency failed to conduct an adequate cost realism analysis. The contracting officer did not perform an independent assessment of the offeror's direct labor and overhead rates in arriving at the most probable cost. The contracting officer instead relied entirely on a DCAA audit of these rates. The GAO held that the agency could rely on a DCAA audit of labor rates and indirect cost rates. It was not necessary for the agency to prepare an independent analysis.

Finally, in *Paladin U.S.A., Inc.*<sup>245</sup> the GSA was preparing to enter into a long term lease for office space and had conducted several rounds of discussions when the 1988 San Francisco earthquake did substantial damage to the building of one of the offerors. The GAO permitted the agency to consider an independent damage assessment, prepared by a government engineer, after the receipt of best and final offers.

#### *Failure to Give Weight to Desirable Feature*

In *Cardkey Systems, Inc.*<sup>246</sup> the GAO found the agency evaluation scheme defective. The RFP stated that the compatibility of the proposed system with the existing computer system was desirable. The evaluation scheme, however, did not give any weight to compatibility. When a solicitation provides for a comparative evaluation of proposals and denotes a specific feature as desirable, the GAO stated, an offer to provide such a feature must receive some weight in the technical evaluation. To do otherwise, the GAO held, would materially mislead proposers who offered these features, perhaps at a higher price.

<sup>239</sup>Comp. Gen. Dec. B-236544.2 (Jan. 17, 1990), 90-1 CPD ¶ 59.

<sup>240</sup>Comp. Gen. Dec. B-237555 (Feb. 27, 1990), 90-1 CPD ¶ 239.

<sup>241</sup>GSBCA No. 10381-P, 90-2 BCA ¶ 22,802, 1990 BPD ¶ 70.

<sup>242</sup>Comp. Gen. Dec. B-238810, Comp. Gen. Dec. B-238810.2 (July 3, 1990), 90-2 CPD ¶ 3.

<sup>243</sup>Comp. Gen. Dec. B-237555 (Feb. 27, 1990), 90-1 CPD ¶ 239.

<sup>244</sup>Comp. Gen. Dec. B-238403 (May 17, 1990), 90-1 CPD ¶ 484.

<sup>245</sup>Comp. Gen. Dec. B-236619.3 (Mar. 13, 1990), 90-1 CPD ¶ 269.

<sup>246</sup>Comp. Gen. Dec. B-239433 (Aug. 27, 1990), 90-2 CPD ¶ 159.

### *Evaluation of Prior Experience of Others*

In *Barnes & Reinecke, Inc., and FMC Corporation*<sup>247</sup> the GAO considered an agency's technical evaluation of past performance that failed to consider the resources and performance available to a subsidiary from its parent corporation. It held that an agency need not automatically impute the resources and performance of the parent to the subsidiary to determine technical acceptability unless the resources of the parent are clearly committed to perform the contract.

In *Hardie-Tynes Manufacturing Company—Request for Reconsideration*,<sup>248</sup> however, the GAO distinguished the holding in *Barnes & Reinecke* by finding it permissible to consider the parent corporation's resources to determine whether the subsidiary was responsible. In this instance, the subsidiary included in its bid a clear statement that the manufacturing process required by the contract would be performed by its parent corporation. During the pre-award survey, the agency obtained detailed evidence of a firm commitment on the part of the parent corporation to perform the required manufacturing. The GAO analogized this situation to that of a prime contractor obtaining critical expertise from a subcontractor. The GAO noted that a firm commitment of the parent company's resources was not a prerequisite for using the parent company's experience to determine the subsidiary responsible, but in this instance, the agency's responsibility determination was reasonable.

In *York Systems Corporation*<sup>249</sup> the GAO held that an agency was not obligated to evaluate the corporate experience of a new business by reference to the past experience of its officers or parent company. Accordingly, it found no error in the agency's determination that the new business lacked any corporate experience. This decision also highlights the limited role that the Small Business Administration (SBA) has whenever past experience is used as technical evaluation criteria rather than as responsibility criteria. The GAO found that the protester's proposal was technically deficient—not that the protester was nonresponsible. Therefore, the agency did not need to refer this matter to the SBA for the issuance of a Certificate of Competency.

<sup>247</sup>Comp. Gen. Dec. B-236622, Comp. Gen. Dec. B-236622.2 (Dec. 20, 1989), 89-2 CPD ¶ 572.

<sup>248</sup>Comp. Gen. Dec. B-237938.2 (June 25, 1990), 90-1 CPD ¶ 587 (reconsidering Comp. Gen. Dec. B-237838 (Apr. 2, 1990), 90-1 CPD ¶ 347).

<sup>249</sup>Comp. Gen. Dec. B-237364 (Feb. 9, 1990), 90-1 CPD ¶ 172.

<sup>250</sup>GSBCA No. 10647-P, 90-3 BCA ¶ 23,180, 1990 BFD ¶ 195.

<sup>251</sup>Comp. Gen. Dec. B-239770 (Sept. 12, 1990), 90-2 CPD ¶ 203 (evaluation factors need not contain minimum standards because to set minimum standards when agency has no minimum needs would be wrong and violate CICA).

<sup>252</sup>Comp. Gen. Dec. B-237860 (Mar. 26, 1990), 90-1 CPD ¶ 330.

<sup>253</sup>See *DynCorp*, B-240980.2 (Oct. 17, 1990) (GAO decision discussing application of significant issue exception to the timely protest rule).

<sup>254</sup>Comp. Gen. Dec. B-240333 (Nov. 11, 1990).

### *Past Experience as Special Standard of Responsibility*

In *C3, Inc.*<sup>250</sup> the General Services Board of Contract Appeals concluded that a proposer could not satisfy minimum mandatory experience requirements by referencing its individual employees' experience gained while working for other contractors. This decision reflects the GSBCA's tendency to construe strictly these requirements.

### *Solicitation Not Defective for Failure to State Minimum Standards*

In *Monarch Enterprises, Inc.*<sup>251</sup> the protester contended that solicitation was defective because it did not inform offerors of the minimum standards necessary to comply with each of the stated evaluation factors and subfactors. The RFP was structured around performance requirements and clearly stated those factors and subfactors that would be evaluated. The GAO held that an agency is not required to formulate minimum standards when it has no need for a contractor to meet these objective standards and the agency has no intention of evaluating them.

### *Blue Ribbon Contracting Program*

Past performance also has been evaluated using various programs that reward contractors with good performance records. In *NASCO Aircraft Brake, Inc.*<sup>252</sup> the protester's challenge to the use of the Air Force's "Blue Ribbon Program" was denied because the contractor had been informed that the program would be used to evaluate past performance and the contractor failed to protest timely. Noteworthy is the GAO's refusal to waive the timeliness requirement.<sup>253</sup> It stated that there was nothing unique about the program because it formally implemented certain performance considerations that an agency could properly consider.

### *Award on Initial Proposals*

In *Raytheon Company*<sup>254</sup> the agency awarded a contract without discussions to the low priced, technically acceptable offeror. The solicitation was conducted on a

limited competition basis pursuant to a properly executed, urgency-based J&A. Three offers were received. One was clearly unacceptable. The protester's offer was qualified, but correctable. The protester argued that award without discussions was improper because the competition was not conducted on a full and open basis and there was no prior price history for the item.<sup>255</sup> Raytheon alleged that there was no rational basis for the agency to conclude that it had obtained the lowest cost to the government, especially when the government should have known that Raytheon would lower its price during discussions.<sup>256</sup> The GAO rule that the statutory authority to award without discussions applies only to full and open competition. When, as here, there is an urgency-based limited competition, award could be made on a sole source basis. When an agency can "award on a sole source basis under the urgency exception [it] can also dispense with discussions under this exception by awarding to the most advantageous offer on the basis of initial proposals whether or not the award represents the lowest overall cost to the government."<sup>257</sup>

### Discussions

#### No Discussions Appropriate

*Federal Data Corporation*<sup>258</sup> highlights the fact that no discussions are required when there are no deficiencies in the proposal. The GAO had directed a second round of best and final offers to correct an earlier error in the acquisition. The Air Force properly declined to discuss Federal Data Corporation's technical proposal because it contained no deficiencies.

#### Audit Is Not Discussion

*Data Management Services, Inc.*<sup>259</sup> held that an audit does not constitute discussions. The auditor persuaded an offeror that certain of its estimated costs were improperly allocated to the subject contract, and then requested and aided in the submission of a revised cost proposal to the contracting officer. The GAO held that the agency could still award on initial proposals because the procurement never advanced to the discussion stage; the audit was a means of gathering information—not discussions.

#### Addition of Mandatory Clauses Is Not Discussion

In *Planning Research Corporation*<sup>260</sup> the GAO held that the agency could add additional, mandatory clauses to the solicitation after the receipt of proposals and still make award on the basis of initial proposals, without conducting discussions. The case is also interesting because the evaluation factors were alleged to change based on whether or not discussions were conducted—that is, the basis for award would be low cost, technically acceptable offer if no discussions were conducted, or the basis for award would be best overall value if discussions were conducted.

#### Substitution of Personnel After Concluding Discussions

In *Booz, Allen & Hamilton, Inc.*<sup>261</sup> the proposer lost a proposed key employee after BAFOs. To avoid misleading the agency, it informed the agency and provided a replacement resume. The GAO held the replacement resume was not discussions because it did not concern a major key employee substitution. Material to the decision was the fact that under the evaluation plan, the substitution did not improve the technical acceptability of the proposal.

The opposite result was reached in *University of South Carolina*.<sup>262</sup> The agency proposed to make award on the basis of initial proposals without conducting discussions. The proposed contractor submitted two personnel changes after the proposals had been evaluated. The agency accepted the changes and did not rescore the proposals. In this instance, the GAO determined that allowing the substitution of personnel who were essential to the determination of the acceptability of the proposal, and whose credentials were the basis of a significant part of the evaluation, constituted discussions. Accordingly, the agency was required to allow both offerors the opportunity to revise their offers.

#### Award to a Noncompliant Proposal

The basic rule, that a proposal that fails to conform to material terms and conditions may not form the basis for an award, was restated in *Martin Marietta Corporation*.<sup>263</sup> In that case the agency awarded to a proposer that failed to meet a material requirement in the solicitation.

<sup>255</sup> 10 U.S.C. § 2305(b)(4)(A) (authorizing award without discussions based on lowest overall cost to government after full and open competition).

<sup>256</sup> See *supra* notes 2-4 and accompanying text. The changes that the Authorization Act makes to the rules on award based on initial proposals were designed to limit this proposal preparation strategy.

<sup>257</sup> Comp. Gen. Dec. B-240333 (Nov. 11, 1990).

<sup>258</sup> Comp. Gen. Dec. B-236265.4 (May 29, 1990), 90-1 CPD ¶ 504.

<sup>259</sup> Comp. Gen. Dec. B-237009 (Jan. 12, 1990), 69 Comp. Gen. 112, 90-1 CPD ¶ 51.

<sup>260</sup> Comp. Gen. Dec. B-237201, Comp. Gen. Dec. B-237201.3 (Jan. 30, 1990), 90-1 CPD ¶ 131.

<sup>261</sup> Comp. Gen. Dec. B-236476 (Dec. 4, 1989), 89-2 CPD ¶ 513.

<sup>262</sup> Comp. Gen. Dec. B-240208 (Sept. 21, 1990), 90-2 CPD ¶ 249.

<sup>263</sup> 69 Comp. Gen. 168 (1990), Comp. Gen. Dec. B-233742.4 (Jan. 31, 1990), 90-1 CPD ¶ 132.

The award was set-aside and the agency was directed to reopen discussions.

Conversely, the proposal need not be a mirror image of the solicitation; the agency may award if the deviations are minor and the other offerors are not prejudiced. In *Security Defense Systems Corporation*<sup>264</sup> the agency properly waived a one-inch deviation from size requirements. The noncompliance was held immaterial and minor.

Modifying a contract after award to make the original proposal compliant is improper. The Navy made the initial award in good faith in *Dresser-Rand Company*,<sup>265</sup> believing that the contractor's product exceeded the minimum solicitation requirements. After award the agency determined that only exact conformity with the specification would meet its needs. The agency proposed to modify the contract to allow the contractor to supply an alleged "alternate" item. The GAO found no evidence of the alternate bid. In *Federal Data Corporation*<sup>266</sup> the offeror was aware of a technical nonconformity prior to the submission of BAFOs, but did not identify the problem in the BAFO. The Air Force was unaware of the noncompliance until after award. The GAO held in both cases that providing the offeror with the opportunity to make its proposal acceptable after award constitutes the reopening of discussions. The agencies were directed to reopen discussions with all offerors in the competitive ranges.

#### Source Selection

##### *Supervisory Official Not Bound by Decision of Source Selection Authority*

In *Oklahoma Aerotronics, Inc.—Reconsideration*<sup>267</sup> the GAO held that no finality attaches to a decision of the source selection authority prior to award. The source selection authority had recommended award to the protester. The Assistant Commander for Contracts, pursuant to a delegation from the head of the contracting activity, reviewed the source selection authority's recommendation and directed award to another offeror. The GAO stated that the Assistant Commander could properly review source selection decisions, reverse or vacate those decisions, and make independent reasoned source selection decisions in accordance with the evaluation criteria.

It did not find any error in the Assistant Commander's decision to condition approval on the award to the high rated, higher priced proposal.

#### Agency Reevaluation Upheld on Reconsideration

*TRW, Inc.*<sup>268</sup> is a follow-on decision in a protest reported last year. The initial source selection decision was not adequately justified and appeared inconsistent with the evaluation factors set forth in the solicitation. The agency carefully reexamined its earlier decision and, in a well-documented decision, concluded that its initial decision was correct. The GAO denied the second protest, holding that the evaluation was reasonable and consistent with the criteria set forth in the solicitation. Of course, the protester recovered its costs for the first protest and the agency experienced a delay of nearly a year.

Another example of a well documented cost-technical tradeoff decision is *Pathology Associates, Inc.*<sup>269</sup>—an acquisition for animal colony management.

#### Small Purchase Procedures

##### *Losing Quotations Violates CICA Competition Mandate*

In *East West Research Inc.*<sup>270</sup> a DLA activity issued two separate RFQs and awarded purchase orders to vendors other than the protester. East West Research alleged that its quotes were low, that they had been mishandled, and that the competition should be reopened. The GAO found that the activity had lost the telefaxed quotes. It further opined that the contracting activity had not met the CICA small purchase standard of obtaining maximum practicable competition.<sup>271</sup> According to the GAO, maximum practicable competition means—among other things<sup>272</sup>—that contracting activities must establish a system to safeguard quotes once vendors submit them. The protester, however, was entitled only to quote preparation and protest costs because there was no evidence that the quotes subsequently provided by East West Research were identical to those lost by the activity.

##### *Award to Large Business Under Small Business-Small Purchase Set-Aside to Save Money Not Justified*

In *Vitronics, Inc.*<sup>273</sup> the Interstate Commerce Commission (ICC) canceled a small business-small purchase set-

<sup>264</sup> Comp. Gen. Dec. B-237826 (Feb. 26, 1990), 90-1 CPD ¶ 231.

<sup>265</sup> Comp. Gen. Dec. B-237342 (Feb. 12, 1990), 90-1 CPD ¶ 179.

<sup>266</sup> 69 Comp. Gen. 150 (1990), Comp. Gen. Dec. B-236265.2 (Jan. 25, 1990), 90-1 CPD ¶ 104.

<sup>267</sup> Comp. Gen. Dec. B-237705.2 (Mar. 28, 1990), 90-1 CPD ¶ 337. The original protest was denied for being untimely.

<sup>268</sup> Comp. Gen. Dec. B-234558.2 (Dec. 18, 1989), 89-2 CPD ¶ 560.

<sup>269</sup> Comp. Gen. Dec. B-237208.2 (Feb. 20, 1990), 90-1 CPD ¶ 292.

<sup>270</sup> Comp. Gen. Dec. B-239565, Comp. Gen. Dec. B-239566 (Aug. 21, 1990), 90-2 CPD ¶ 147.

<sup>271</sup> 10 U.S.C. § 2304(g)(4); 41 U.S.C. § 253(g)(4).

<sup>272</sup> FAR 13.106(b)(5) provides that the solicitation of three suppliers is considered to be adequate to promote competition to the maximum extent practicable.

<sup>273</sup> 69 Comp. Gen. 124 (1990), Comp. Gen. Dec. B-237249 (Jan. 16, 1990), 90-1 CPD ¶ 57.

aside and issued a purchase order to a large business that submitted a "courtesy quote" that was \$1200 lower than that submitted by Vitronics, a small business.<sup>274</sup> The GAO sustained Vitronics' protest because ICC provided no evidence that Vitronics' price was unreasonable.<sup>275</sup> Thereafter, ICC requested reconsideration and argued that award to Vitronics would have been "unconscionable" in light of its shrinking budget.<sup>276</sup> The GAO reiterated that ICC failed to meet its burden of showing that the small business price was unreasonable. A six-percent difference in price did not per se make the price unreasonable, nor did ICC's combined budget cuts and additional costs due to pay raises justify award to the lower priced, large business. The GAO reiterated that in light of the congressional view favoring the small business program, an agency may have to pay a premium price as long as that price does not exceed the fair market price.

### Commercial Activities Program

#### *Judicial Challenges to the Contracting Out Decision*

Office of Management and Budget (OMB) Circular A-76 requires federal agencies to institute administrative appeals procedures to address and resolve employee and bidder complaints concerning cost comparisons or the decision to contract out when no cost comparison is required.<sup>277</sup> In *Department of Treasury, IRS v. Federal Labor Relations Authority*<sup>278</sup> the Supreme Court was asked to decide whether the government is required to negotiate over a union proposal that seeks to designate the contractual agreement—that is, the collective bargaining agreement—grievance and arbitration provisions as the "internal appeals procedure" required by OMB Circular A-76. The Court held that under the negotiations and grievance provisions of title VII of the Civil Service Reform Act of 1978,<sup>279</sup> the IRS was not required to negotiate over the union proposal because that act gave management the right to designate the internal appeals procedure.

#### *Recompete to Return to In-House Performance*

In *CC Distributors, Inc. v. United States*<sup>280</sup> the court held that the Air Force could not return, partially or totally, a commercial activity to in-house performance

"unless a recompete does not result in reasonable prices, in-house performance is feasible, and the conversion is justified by a cost comparison study performed in accordance with OMB Circular A-76."<sup>281</sup>

### Disappointed Bidder's Remedies

#### *The Expanding Bid Protest Jurisdiction of the GAO*

Generally, the GAO dismisses protests concerning issues of contract administration. Nevertheless, the GAO has recently departed from this rule when the issue directly related to an agency's compliance with the Competition in Contracting Act.

#### *Exercise of Options*

To the extent that the exercise of an option raises issues of a sole source acquisition without appropriate justification, the GAO has exercised jurisdiction to review the propriety of the option exercise. In *Mine Safety Appliance Company*<sup>282</sup> the Navy had awarded parallel developments contracts to the two higher rated proposals. The procurement was structured to allow the Navy to choose, after conducting specified testing, the successful offeror through the mere exercise of an option in each contract. The GAO found the exercise of an option to be a limited competition and, therefore, subject to its review. The exercise of the option was held improper because the testing was not conducted in accordance with the test plan in the original solicitation.

#### *Modifications Outside the Scope of the Contract*

The GAO also considered a protest that alleged that a modification was outside the scope of the contract. In *Neil R. Gross & Company*<sup>283</sup> the GAO articulated five factors to evaluate whether a modification is within the general scope of the contract: (1) the materiality of the difference between the contract as awarded and the contract as modified; (2) the significance of the change in the nature of the work; (3) the change in the period of performance, if any; (4) the amount of the change in the price of the contract; and (5) whether the solicitation advised offerors of the potential for changes of the type described in the modification or whether the nature of the

<sup>274</sup>FAR 13.105(d)(3) authorizes the cancellation of a small business small purchase set-aside and competition on an unrestricted basis if one reasonable offer from a responsible small business is not received.

<sup>275</sup>ICC merely cited FAR 13.105(d)(3) as authority for its action without any explanation.

<sup>276</sup>Interstate Commerce Comm'n—Request for Reconsideration, Comp. Gen. Dec. B-237249.2 (Apr. 16, 1990), 90-1 CPD ¶ 391.

<sup>277</sup>OMB Circular A-76 (Supp. I-14, I-15 1983).

<sup>278</sup>110 S. Ct. 1623 (1990).

<sup>279</sup>Pub. L. No. 95-454, 92 Stat. 1111 (1978).

<sup>280</sup>54 Fed. Cont. R. (BNA) 377 (Sept. 10, 1990).

<sup>281</sup>*Id.* at 378.

<sup>282</sup>Comp. Gen. Dec. B-238597.2 (July 5, 1990), 90-2 CPD ¶ 11.

<sup>283</sup>69 Comp. Gen. 247 (1990), Comp. Gen. Dec. B-237434 (Feb. 23, 1990), 90-1 CPD ¶ 212.

modification is such that offerors could have reasonably foreseen the type of change described in the modification.

### *Modifications Outside the Scope II*

In two subsequent decisions, the GAO elaborated on its decision in *Neil R. Gross & Co. Inc.*<sup>284</sup> In *Ion Track Instruments, Inc.*<sup>285</sup> the GAO articulated the issue in terms of whether the modification so changes the contract that the field of competition for the original and modified contracts would be materially changed. In *Everpure, Inc.*<sup>286</sup> the fact that the contract in question was a research and development contract allowed the government greater latitude in making changes than would be permissible in a product contract. In both of these decisions, an essential element of the GAO's analysis was whether the modification changes the original purpose of the contract. Therefore, the GAO will in all likelihood consider protests based on allegations that a modification to a contract changes its original purpose.

### *Significant GAO Decisions*

#### *Significant Issue Exception to Late Protest Rule Limited*

In *DynCorp*<sup>287</sup> the GAO revised its position on the use of the significant issue exception to the late protest rules. Last year, in *Reliable Trash Service of Maryland, Inc.*<sup>288</sup> the GAO ruled that a clear violation of law justified invoking the significant issue exception to the late protest rule. In departing from the decision in *Reliable Trash Service*, the GAO ruled that it would no longer apply the significant issue exception based solely upon an allegation of a clear violation of a statute or regulation. *DynCorp*<sup>289</sup> establishes a strict standard for application of the significant issue exception. "In order to prevent the timeliness requirements from becoming meaningless, we will strictly construe and seldom use the significant issue exception, limiting it to protests that raise issues of widespread interest to the procurement community, ... and which have not been considered on the merits in a previous decision."<sup>290</sup> In the future, "in order to assure the perception that the timeliness rules are equitably enforced, the preferable approach is not to waive the

timeliness rules, but to notify the agency of a possible violation by separate letter so that the agency may address the issue as appropriate."<sup>291</sup>

#### *Security Clearance Requirements—Overly Restrictive?*

Two recent decisions—one by the GAO and one by the GSBICA—address the problems associated with obtaining competition when contract performance involves access to classified information. In *Pacific Architects and Engineers, Inc.*<sup>292</sup> the Navy refused to honor a State Department security clearance because the background investigation (BI) upon which it was based was not equivalent to the BI required for the Navy clearance. The GAO denied the protest stating that the determination of security clearance requirements should be left to the agency. An agency should not be required to accept either another agency's security clearance or a bidder's assertion of equivalence if there is an identifiable distinction between the requirements for the two clearances.

In *PacifiCorp Capital, Inc.*<sup>293</sup> a prime contractor, without the required security clearance, proposed to perform all of the work using a subcontractor that possessed the required clearances. The agency refused to allow this arrangement; it argued that the prime contractor was legally obligated to perform if the subcontractor defaulted and, therefore, the prime contractor must possess the required clearances. The GSBICA rejected the agency's rationale. Inasmuch as all of the performance was to take place in a government facility and no actual access to classified information was needed, either to prepare a bid or to actually perform the contract, the requirement that the prime possess all of the security clearances was an overly restrictive requirement.

#### *Constitutional Challenges Outside GAO Protest Jurisdiction*

The Health and Human Services Acquisition Regulation contains a clause that requires contractors to provide advance notice of the release of certain research findings.<sup>294</sup> This clause was included in a solicitation issued by the National Institutes of Health.<sup>295</sup> During negotia-

<sup>284</sup> 69 Comp. Gen. 247 (1990), Comp. Gen. Dec. B-237434 (Feb. 23, 1990), 90-1 CPD ¶ 212.

<sup>285</sup> Comp. Gen. Dec. B-238893 (July 13, 1990), 90-2 CPD ¶ 31.

<sup>286</sup> Comp. Gen. Dec. B-226395.4 (Oct. 10, 1990), 90-2 CPD ¶ 275.

<sup>287</sup> Comp. Gen. Dec. B-240980.2 (Oct. 17, 1990), 90-2 CPD ¶ 310.

<sup>288</sup> *Reliable Trash Serv. of Md., Inc.*, 68 Comp. Gen. 473 (1989), Comp. Gen. Dec. B-234367 (June 8, 1989), 89-1 CPD ¶ 535.

<sup>289</sup> Comp. Gen. Dec. B-240980.2 (Oct. 17, 1990).

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> Comp. Gen. Dec. B-240310 (Nov. 2, 1990).

<sup>293</sup> GSBICA No. 10711-P (Sept. 19, 1990), 1990 BPD ¶ 273.

<sup>294</sup> 48 C.F.R. § 352.224-70.

<sup>295</sup> *Stanford Univ.*, Comp. Gen. Dec. B-241125 (Sept. 20, 1990), 90-2 CPD ¶ 246.

tions, Stanford University refused to accept this clause, asserting that it "abrogate[d] its freedom of speech by allowing the government to decide what Stanford may or may not publish..."<sup>296</sup> In *Stanford University*<sup>297</sup> the GAO dismissed the protest because it was asserted after the date for the receipt of proposals and the basis for the protest was a problem apparent on the face of the solicitation. Moreover, the alleged constitutional violation of the right to free speech is outside of the GAO's statutory mandate under the Competition in Contracting Act<sup>298</sup> to decide protests based upon alleged violations of procurement regulations. Absent a clear, controlling judicial precedent, the GAO will defer constitutional challenges to the federal courts.

### *Significant Federal Court Disappointed Bidder Decisions*

#### *Submission of Bid Does Not Create Express Contract*

The contractor contended in *Essen Mall Properties v. United States*<sup>299</sup> that an *express* contract was created when it submitted its offer. The court rejected the contractor's argument that an IFB was an offer that could be accepted by the submission of an offer. The court noted that an invitation for bids constitutes a solicitation for an offer, and the bids received constitute offers. While there is an implied-in-fact contract to fairly evaluate bids received, there is no express contract until the government accepts the bid by executing the contract.

#### *Late Offer Does Not Create Implied-In-Fact Contract*

The Claims Court in *Howard v. United States*<sup>300</sup> dismissed a disappointed bidder action based on a late offer. The contracting officer refused to consider the late offer and Howard appealed the decision to the NASA Board of Contract Appeals, which dismissed the action for failure to show the existence of a contract or an implied-in-fact contract. Undaunted, Howard sought relief in the Claims Court under an implied-in-fact contract theory. The court held that a late bid is nonresponsive and cannot form the basis of an implied-in-fact contract. "A contract implied-in-fact requires the presence of all of the elements of an express contract, i.e., a proper offer to contract and an

acceptance."<sup>301</sup> Because Howard's proposal was untimely and, therefore, nonresponsive, it could not constitute an offer that the agency could accept.

### *Claims Court Lacks Jurisdiction over Due Process Claims*

The *Howard*<sup>302</sup> case also addresses an all too frequent problem in disappointed bidder litigation—the plaintiff without a legitimate legal position and an intractable belief that there must be a remedy for a perceived wrong. Howard also alleged an unconstitutional taking of unspecified property. In rejecting this argument, the court held that the plaintiff had failed to show that it was the owner of property taken by the United States for a public purpose.<sup>303</sup> "Not all economic interests are property rights. Only those economic advantages that 'have the law [in] back of them' are property rights, and only when they are recognized as such 'may courts compel [the government] to forebear from interfering with them or compensate for their invasion.'"<sup>304</sup>

The court wrestled with the plaintiff's claims, which the court characterized as being poorly drafted, repetitive, confusing, and "in a few instances, highly improbable."<sup>305</sup> The court construed the plaintiff's theory as falling under "an umbrella of invasion of privacy and tortious interference."<sup>306</sup> The court held that "[n]ot all rights granted by the Constitution or the laws of the United States are money mandating property rights that would support the jurisdiction of this court.... Due process claims are not actionable in this court because the right to due process is not money mandating."<sup>307</sup>

### *Is a GAO Protest an Administrative Remedy that Must Be Exhausted?*

In denying a request for a preliminary injunction in *Diverco, Inc. v. Cheney*,<sup>308</sup> the court held that Diverco had failed to demonstrate any irreparable harm. The government awarded a contract that required a domestically manufactured item. After award, Diverco learned that the contractor was supplying a foreign made product and protested to the GAO. Several days later, the government issued a stop-work order and announced plans to delete

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> 31 U.S.C. § 3552.

<sup>299</sup> 21 Cl. Ct. 430, 9 FPD ¶ 130 (1990).

<sup>300</sup> 21 Cl. Ct. 475, 9 FPD ¶ 134 (1990).

<sup>301</sup> *Id.* at 478 (citations omitted).

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 478.

<sup>304</sup> *Id.* (citations omitted).

<sup>305</sup> *Id.* at 476.

<sup>306</sup> *Id.* at 479.

<sup>307</sup> *Id.* (citations omitted).

<sup>308</sup> 745 F. Supp. 739 (D.C.C. 1990).

the domestic manufacture requirement and provide another round of negotiations.<sup>309</sup> Subsequently, Diverco filed its injunctive relief action in the district court seeking to enjoin performance under the contract as awarded. The court found that Diverco could fully challenge the original award decision in its pending GAO protest action. It also found that Diverco could prevent performance under the "resolicitation" action under the automatic stay provisions of the GAO's bid protest rules by filing another GAO protest prior to performance of the contract. Accordingly, the court concluded that the plaintiff could obtain the injunctive relief it seeks elsewhere, without any intervention of the court. While not clearly stating its holding as such, the court in *Diverco* appeared to establish a requirement that disappointed bidders seeking injunctive relief in district court must first exhaust their GAO bid protest remedies to invoke the automatic stay.

#### *Judicial Review of GAO Decision*

The litigation concerning trash collection services at Fort Polk, Louisiana, that began in *Reliable Trash Service*<sup>310</sup> continued in *Mark Dunning Industries, Inc. v. Cheney*.<sup>311</sup> The Army followed the Comptroller General's recommendation in *Reliable Trash Service* and terminated Mark Dunning's contract, awarding it to Reliable Trash Service. Because the Army made no separate determination or explanation of its award to Reliable Trash Service, the district court reviewed the award based on the rationale in the GAO's opinion. The district court reversed the GAO decision as lacking any rational basis because it found that the GAO had reevaluated the bids using a formula that was not in the solicitation.<sup>312</sup> The court held that if the GAO decides to direct the award of a contract, it must do so in accordance with the relevant statute.<sup>313</sup> By directing the award of the contract to Reliable Trash Service based upon an evaluation of bids that was not in the solicitation, the GAO violated the Armed Services Procurement Act.

#### *Protective Orders in GSBICA Bid Protest Litigation*

A rather extensive body of law has developed at the GSBICA regarding protective orders covering discovery

materials. In *Planning Research Corporation*<sup>314</sup> an in-house counsel to the protester was denied access to discovery materials because of the danger of inadvertent disclosure. The protected material was highly sensitive and the danger of inadvertent disclosure to the supervisor-president, despite the promise to protect, outweighed the need of the counsel. In *Kendrick & Company*<sup>315</sup> access was granted to an associate attorney in a small firm whose senior partner was the chief executive officer of the protester upon the condition that the material not be brought near the law office. Both of these cases apply the rule<sup>316</sup> that access to confidential commercial information will be denied to those attorneys who are actively involved in the competitive decisionmaking process of a business.

Material that is the subject of a GSBICA protective order may not be used for other purposes, such as for preparing a GAO protest. In *Sector Technology*<sup>317</sup> a contractor sought permission to use material received under a protective order as a basis for a protest to the GAO. The GSBICA denied the request, holding that permitting the use of materials available through its procedures would invite actions solely for discovery purposes. The contractor's protest, which was based on the protective material, was dismissed because the protester could not disclose the basis for its protest.<sup>318</sup> The GAO approved of the basis for the GSBICA's decision, agreeing that use of protective material obtained in one forum for an action in another forum could foster protests submitted for discovery purposes.

#### *Claims for Delay Asserted by Contractors Suspended by Bid Protest Automatic Suspensions of Performance*

##### *The Automatic Stay Is a Sovereign Act*

The government entered into a transportation agreement with Port Arthur Towing Company.<sup>319</sup> The award was protested to the GAO and performance was suspended pursuant to the automatic stay provisions of the Competition in Contracting Act.<sup>320</sup> Port Arthur Towing Company incurred costs during the suspension and filed a claim to recover them. In *Port Arthur Towing Com-*

<sup>309</sup>This procedure is not clearly described in the opinion. Apparently, very little work had been done on the contract.

<sup>310</sup>68 Comp. Gen. 473 (1989), Comp. Gen. Dec. B-234367 (June 8, 1989), 89-1 CPD ¶ 535.

<sup>311</sup>726 F. Supp. 810 (M.D. Ala. 1989).

<sup>312</sup>The court reviewed the GAO's decision under the Administrative Procedures Act, 5 U.S.C. §§ 702-706.

<sup>313</sup>31 U.S.C. § 3554(b)(1)(E).

<sup>314</sup>GSBICA No. 10694-P (Oct. 9, 1990), 1990 BPD ¶ 222.

<sup>315</sup>GSBICA No. 10547-P, 90-2 BCA ¶ 22,792, 1990 BPD ¶ 71.

<sup>316</sup>See *United States Steel v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984).

<sup>317</sup>GSBICA No. 10566-P, 90-2 BCA ¶ 22,927, 1990 BPD ¶ 99.

<sup>318</sup>Comp. Gen. Dec. B-239420 (June 7, 1990), 90-1 CPD ¶ 536.

<sup>319</sup>The transportation agreement in question was similar to a requirements contract, but was not governed by the FAR.

<sup>320</sup>31 U.S.C. § 3553(d); 4 C.F.R. § 21.4(e).

pany<sup>321</sup> the ASBCA held that the suspension of performance pursuant to the requirements of the Competition in Contracting Act is a sovereign action of the United States. The ASBCA noted that when the United States acts

in a general manner in promoting the general welfare of the country, such acts are sovereign acts and are not the responsibility of the government as a contracting party.... When costs are incurred on a contract as a result of Congressional action and not by the act of executive branch personnel in their contractual capacity, the Government is not liable for such increased costs.<sup>322</sup>

Accordingly, the government was not liable for the costs incurred as a result of the suspension of performance.

#### *Bid Protest Automatic Stay May Lead to Constructive Stop Work Order*

In *Hill Brothers Construction Company*<sup>323</sup> a third party filed a bid protest after award, but prior to the government's issuance of a Notice to Proceed to Hill Brothers. The contract contained a Protest after Award provision that authorized the contracting officer to issue a stop-work order in the event of a protest and that entitled the contractor to an equitable adjustment in the contract price upon the issuance of the stop-work order. The agency did not issue a stop-work order after the filing of the protest. The government argued that the automatic stay provisions of the GAO's Bid Protest Rules<sup>324</sup> obviated the need for a stop-work order because, as a matter of law, performance was stopped. The board rejected the government's arguments and held that the existence of a protest requires that the contracting officer do one of three things: (1) issue a stop-work order; (2) terminate the contract; or (3) seek authority to continue performance notwithstanding the protest. In the absence of a contracting officer's formal determination as to the course of action that the government desired to take, the board held that by failing to act, the contracting officer effected a constructive stop-work order.

<sup>321</sup> ASBCA No. 37516, 90-2 BCA ¶ 22,857.

<sup>322</sup> *Id.* at 114,822.

<sup>323</sup> ENG BCA No. 5686, 90-3 BCA ¶ 23,276.

<sup>324</sup> See 4 C.F.R. § 21.4.

<sup>325</sup> ASBCA No. 35703, 90-3 BCA ¶ 22,972.

<sup>326</sup> HUD BCA No. 89-4468-C8, 90-1 BCA ¶ 22,499.

<sup>327</sup> *Id.*

<sup>328</sup> ASBCA No. 32323, 90-1 BCA ¶ 22,602.

## Contract Performance and Administration

### *Contract Changes*

#### *Government's Insistence on a Specific Approval Constitutes a Constructive Change*

The government's insistence that each piece of equipment have electrical, electronic, and structural approval on Federal Aviation Administration (FAA) Forms 8110-3 constituted a constructive change in *BR Communications*.<sup>325</sup> It was impossible for the contractor to perform this requirement because approval of this equipment was not processed through use of FAA Form 8110-3.

#### *Government Suggestions Not "Orders"*

In *Watson, Rice & Company*<sup>326</sup> the board held that government suggestions that are not coercive are insufficient to constitute the "order" element of a constructive change. The board found persuasive that although the government had made multiple suggestions, it remained receptive to other means of meeting the performance requirements.

#### *Contracting Officer's Consideration Waives the Changes Clause Notice Requirement*

In *Watson, Rice & Company*<sup>327</sup> the board also addressed the issue of the contractor's late notice of its claim. It held that if the contracting officer considers the claim on its merits, the government is deemed to have waived the changes clause thirty-day notice requirement.

#### *FAR F.O.B. Destination Terms Not Changed by Custom or Usage*

In *Chevron U.S.A., Inc.*<sup>328</sup> the board held that because the term "F.O.B. Destination" was clear in the contract and defined by FAR 47.001, there was no need to resort to trade custom or usage. The contractor's expert testified that the term was unknown in non-governmental commercial shipping and was not in trade usage. The board was not impressed by the expert's testimony because this was a government contract and the expert admitted that he had never before seen a government contract.

### *Compliance with Environmental Laws Not a Change*

In *Eastern Chemical Waste Systems*<sup>329</sup> the board held that the government did not change the contract by requiring the contractor to comply with environmental laws when disposing of contaminated material. The contractor had intended to dispose of the material in a non-hazardous cell of a hazardous waste landfill. It was the landfill operator, rather than the government, that caused the additional costs by refusing to treat the contaminated material as nonhazardous.

### *Deviations From the Changes Clause*

The contract in *Southwest Marine, Inc.*<sup>330</sup> contained a special provision that required the contractor to schedule "Additional Requirements" without causing delay or disruption to other work. The board held that the special provision was a deviation from the changes clause because it provided that adjustments for "Additional Requirements" would not include any costs for delay or disruption of work. Therefore, the clause was not enforceable because the government had not obtained an "individual deviation" as required by regulation.

In *Engineered Air Systems, Inc.*<sup>331</sup> the GAO held that a clause, entitled the Preproduction Evaluation clause (PPE), was not a deviation from the changes clause. The PPE clause required the contractor to perform a detailed evaluation of the technical data product to identify and propose corrections of any discrepancy, error, omission, or other problem that might prevent the attainment of the required performance. The clause further required that any effort to correct problems identified by the PPE should be included in the proposed overall price. The PPE clause also listed several types of changes that the contractor was to accept without any increase in price or delay in delivery. The GAO held that it was clear from a reading of the solicitation as a whole that the PPE clause was intended to be read in conjunction with the changes clause. The contractor was not precluded from filing a claim under the changes clause if it disagreed with the contracting officer that a change came under the PPE clause.

### *Changes Clause Does Not Authorize Change in Warranty Provision*

The board held in *BMY—A Division of Harsco Corporation*<sup>332</sup> that the changes clause does not authorize a uni-

lateral change to the contract's warranty provision. The government's contention that a warranty was a "specification" was rejected because the warranty did not set forth any requirements with which the item must comply.<sup>333</sup>

### *Specifications: Defective, Ambiguous, and Impracticable*

#### *Concerns over Contract Administration Do Not Make Specifications Defective*

In *McDermott Shipyards Division, McDermott, Inc.*<sup>334</sup> the protester, who was the incumbent, contended that the specifications were defective because they did not adequately apprise offerors of the extent to which the procuring agency would review and approve design drawings. The GAO held that the protest concerned a contract administration issue because the specifications were not deficient or ambiguous. If additional costs arose because of the extended government review, they could be handled as disputes under the Contract Disputes Act.

### *Failure to Identify Sole Source Item as a New Product Not Superior Knowledge*

In *Alabama Dry Dock & Shipbuilding Corporation*<sup>335</sup> the board held that the government did not breach its duty to disclose superior knowledge because it failed to inform the contractor that a sole source component was a new product for the manufacturer. Both the agency and the contractor knew before award that the component was a sole source item. According to the board, the "newness" of the component was not vital information because the government did not represent, or warrant, that the manufacturer of the sole source item would either properly manufacture or timely deliver the item.

### *Buried Cars Not a Differing Site Condition*

In *Arctic Slope, Alaska General/SKW Eskimos, Inc., a Joint Venture*<sup>336</sup> the contract was for an arctic pipeline. During the short summer season, the tundra melted and the contractor encountered various subsurface metal debris, such as abandoned snowmobiles, caterpillar tractor treads, and aircraft landing mats. The board held that the metal debris did not constitute a Type II Differing Site Condition.<sup>337</sup> Although such debris might be unusual in other areas, the lack of neatness and the sense of

<sup>329</sup>ASBCA No. 39463, 90-3 BCA ¶ 22,951.

<sup>330</sup>ASBCA No. 34058 (Sept. 14, 1990).

<sup>331</sup>69 Comp. Gen. 127 (1990), Comp. Gen. Dec. B-236932 (Jan. 19, 1990), 90-1 CPD ¶ 75.

<sup>332</sup>ASBCA No. 36926 (Nov. 20, 1990).

<sup>333</sup>FAR 10.001 (definition of a specification).

<sup>334</sup>Comp. Gen. Dec. B-237049 (Jan. 29, 1990); 90-1 CPD ¶ 121.

<sup>335</sup>ASBCA No. 39215, 90-2 BCA ¶ 22,855.

<sup>336</sup>ENG BCA No. 5023, 90-2 BCA ¶ 22,850.

<sup>337</sup>Type II Differing Site Conditions are conditions of an unusual nature differing materially from what would be ordinarily encountered and generally recognized as occurring in the work called for by the contract.

clutter at the performance site placed the contractor on notice that it might encounter such debris. The board did hold, however, that the underground ice houses not shown on the contract drawings constituted a Type I Differing Site Condition.<sup>338</sup>

#### *Substantial Additional Costs Not Proof of Commercial Impracticability*

The contractor contended in *Chronometrics, Inc.*<sup>339</sup> that its expenditure of approximately \$169,000 above the final contract price of \$292,236 demonstrated that the contract was commercially impracticable to perform. The board found that the contractor did not use the design contained in its response to the solicitation. Moreover, the contractor rejected the government's suggested technologies and chose another method in an attempt to save money. The board ruled that both the government and the contractor shared responsibility for the increased costs and applied a jury verdict method to allocate liability for cost increases. The board stated that the appellant could not recover for those costs incurred as a result of its own inability to meet the contract requirements.

#### *High Reject Rates Render Contract Commercially Impracticable*

In *Numax Electronics, Inc.*<sup>340</sup> the board held that high reject rates of approximately fifty percent on a mass production item rendered the contract commercially impracticable to perform. In reaching its conclusion, the board considered the prior manufacturer's inability to mass produce the same item in accordance with the specifications. The board held that in allocating responsibility between the government and a contractor on a mass production item that cannot be produced without a significant research and development effort, the government bears the liability for the extreme difficulty of performance and the expense of attempting to perform. The board also considered it material that the contractor was a small business, which made it especially important that the government disclose the information it possessed concerning the difficulty in manufacturing this item.

#### *Disagreements Among Judges Do Not Prove the Existence of an Ambiguity*

In *Norflor Construction Corporation*<sup>341</sup> mere disagreements by individual judges over the reasonableness of an

interpretation did not establish that an ambiguity existed. In the original decision,<sup>342</sup> the five judges produced four separate opinions, with two dissenting opinions finding that the contractor's interpretation was the only reasonable one. On the motion for reconsideration, the panel's decision resulted in a tie vote because one of the judges who participated in the original decision had retired. One of the dissenting judges agreed with the majority that disagreements among judges do not prove ambiguities, but stated that he still believed the contractor's interpretation to be the only reasonable one.

In a similar case, *R.B. Wright Construction Company*,<sup>343</sup> four judges held that the contract unambiguously required three coats of paint on all surfaces, and one judge held that the contract unambiguously required two coats of paint on previously painted surfaces.

#### *Details of Subcontractor Performance Not Required*

The contractor in *R.A. Burch Construction Company*<sup>344</sup> argued that the sections of a contract should be drafted to be subcontractor specific. Certain wiring requirements were stated in the mechanical specifications and drawings but were not included in the electrical division of the plans. This organization, contended the contractor, was insufficient for its subcontractor to realize that the disputed wiring was required. Noting that it is the contractor's responsibility to subdivide the work, the board held that sections of a contract need not be subcontractor specific when a reading of the contract as a whole unambiguously apprises the contractor of the work required.

#### *Contract Interpretation*

##### *Contractor Must Show Reliance at Time of Bidding*

In *Fruin-Colnon Corporation v. United States*<sup>345</sup> the United States Court of Appeals for the Federal Circuit held that the contractor must show that it relied on its interpretation at the time of bidding to recover; contractor reliance during performance is not sufficient. In its oral argument, the contractor contended that its failure to offer evidence of the costs included in its bid was the result of the board's specific request that the evidence not be introduced at the hearing. The board hearing was limited to the question of whether the contractor was entitled to recover, and the bid cost information was relevant only to the question of the amount of the contractor's recovery. The court refused to consider this argument because the

<sup>338</sup> Type I Differing Site Conditions are conditions differing materially from those represented by the government in the contract specifications or drawings.

<sup>339</sup> NASA BCA No. 185-2, 90-3 BCA ¶ 22,992.

<sup>340</sup> ASBCA No. 29080, 90-1 BCA ¶ 22,280.

<sup>341</sup> ASBCA No. 31577, 90-1 BCA ¶ 22,277.

<sup>342</sup> Norflor Constr. Corp., ASBCA No. 31577, 89-1 BCA ¶ 21,265.

<sup>343</sup> ASBCA Nos 31967, 90-1 BCA ¶ 22,364.

<sup>344</sup> ASBCA No. 39017, 90-1 BCA ¶ 22,599.

<sup>345</sup> 912 F.2d 1426, 9 FPD ¶ 123 (Fed. Cir. 1990), affirming ASBCA No. 30702, 89-3 BCA ¶ 22,005.

contractor had failed to file an objection at the hearing to preserve this issue on appeal.

*Pre-Dispute Actions Cleaned Up Dispute over West Point Cadets' Laundry Mesh Bags*

In *Tri-States Service Company*<sup>346</sup> the board held that the parties' pre-dispute actions clearly showed that the mesh bags, into which West Point cadets placed their laundry, were not included within the billable laundry. The board also found it curious that the dispute did not arise until the contractor was required to make a payment of over \$100,000 for an erroneous invoice.

*Government's "Best Efforts" Sufficient Following Challenger Shuttle Destruction*

In *American Satellite Company v. United States*<sup>347</sup> the Claims Court held that the National Aeronautics and Space Administration (NASA) did not breach its contractually required duty to use its "best efforts" to launch the contractor's telecommunications satellites. Under the terms of their contract, NASA was obligated to use its best efforts to launch the contractor's satellites using the shuttle. Following the destruction of the Challenger shuttle, the President of the United States directed NASA to discontinue launching commercial satellites on the shuttle. The contractor contended that NASA did not use its "best efforts" because it should have launched the contractor's satellites using an expendable launch vehicle (ELV) that was available to NASA. Because the contract contained no provisions referring to ELVs or any other alternative launch vehicles, the court held that NASA had exerted its "best efforts."

*Government's Failure to Respond Binds It to Contractor's Interpretation*

The board held in *Plano Bridge & Culvert*<sup>348</sup> that the failure of the government to provide adequate written answers bound it to the contractor's reasonable interpretation of the government's requirements.

*Pricing of Equitable Adjustments*

*Actual Incurred Costs and Estimates Method*

*Fireman's Fund Insurance Company*<sup>349</sup> provides a good review and analysis of the pricing of equitable

adjustments. The contractor supported its claim by use of actual incurred costs and estimates. The board noted that in pricing change orders, actual costs—when reasonable and allocable—are preferred to estimates made prior to performance of the work. Citing *Bruce Construction Corporation v. United States*,<sup>350</sup> the board held that a presumption of reasonableness attached to actual costs incurred under the regulations then in effect.<sup>351</sup> No presumption of reasonableness attaches to estimates of the costs of changed work. With respect to certain costs, the government overcame the presumption of reasonableness that attaches to actual costs.

*Recovery of Cost of Preparing Unadopted Change Proposals*

In *Campos Construction Company, Inc.*<sup>352</sup> the contractor sought recovery of its costs incurred in preparing an unadopted change proposal. In denying the government's motion for summary judgment, the board held that recovery might be possible if the contractor could show: (1) the government requested the proposal for the purposes of its internal deliberations on how to accomplish the work; or (2) the government used the proposal to have another contractor perform the work.

*Contractor's Cost Savings Proper Measure Under Changes Clause*

In *Davis Constructors, Inc.*<sup>353</sup> the contractor failed to employ a full time on-site superintendent and the government sought a deductive change. The contractor contended that no deductive change was due because the government failed to show that it had suffered any damages. The board held, however, that the proper measure of recovery under an equitable adjustment is the amount of the contractor's savings, and not the amount of the government's damages for the failure to perform a contract requirement.

*Entitlement to Equitable Adjustment for Deleted Item Not Dependent on Demonstrable Cost Impact*

The government contended in *Condor Reliability Services, Inc.*<sup>354</sup> that the contractor was not entitled to an equitable adjustment for a deleted item because it failed to solicit firm quotations from suppliers or to determine the availability of parts prior to submitting its bid. The

<sup>346</sup>ASBCA No. 37058, 90-3 BCA ¶ 22,953.

<sup>347</sup>20 Cl. Cl. 710, 9 FPD ¶ 90 (1990).

<sup>348</sup>ASBCA No. 35497, 90-3 BCA ¶ 23,224.

<sup>349</sup>ASBCA No. 38284 (Sept. 28, 1990).

<sup>350</sup>163 Ct. Cl. 97, 324 F.2d 516 (1963).

<sup>351</sup>FAR 31.201-3 currently provides that there is no presumption that any incurred costs by a contractor are reasonable.

<sup>352</sup>VACAB No. 3019 90-3 BCA ¶ 23,108.

<sup>353</sup>ASBCA No. 40630 (Sept. 27, 1990).

<sup>354</sup>ASBCA No. 40538, 90-3 BCA ¶ 23,254.

government agreed to delete the item from the contract after the contractor was unable to fabricate it because parts were no longer available. The board stated that the reduction in contract requirements entitled the contractor to an equitable adjustment because a contractor's loss of profit position should not be changed after a contract change, notwithstanding the fact that the contractor was unable to show what it would have cost to perform the contract as originally awarded.

#### *New Delivery Date Bars Claim for Delays Prior to Agreement*

The ASBCA held in *Taylor Corporation*<sup>355</sup> that an agreement on a new delivery schedule eliminates from consideration the causes of delay occurring prior to such agreement. The contractor is obligated to perform by the new date unless it can show an excusable event occurring after the supplemental agreement.

#### *Inspection Clause as Basis for Recovery of Defective Performance*

In *Morton-Thiokol, Inc.*<sup>356</sup> the government's disallowance of costs associated with the installation of non-compliant railroad ties under a cost-plus-incentive-fee contract was reversed. The government argued that there were numerous problems in the contractor's purchasing system, and that it was not reasonable to reimburse costs for defective products that were acquired by the contractor's poor purchasing system. The government did not assert any remedies under the contract's inspection clause. The board ruled that absent a showing of gross misconduct by the contractor in conducting its purchasing operations, the government must allow the costs notwithstanding the fact that defective material was purchased. While the ASBCA expressed no opinion on the merits of asserting remedies under the inspection clause, it did make several references to the clause as being the "the most applicable remedy."

#### *Contractor Testing and Certification*

##### *Rejection of Contractor Proposed Additional Testing Shifts Risk*

In *Alonso & Carus Iron Works, Inc.*<sup>357</sup> the government's refusal to allow the contractor to perform a preliminary test was held to be a breach of its duty not to hinder the contractor's performance. The board held that

while the government was entitled to insist on the test specified in the contract, it did not possess an unlimited right to prohibit additional preliminary tests. The additional test proposed here was not prohibited by the contract and was a reasonable safety measure that might have prevented the damage caused by the contractually required test. Accordingly, the government assumed the risk for the damages resulting from the performance of the contractually required test.

#### *Additional Certification Requirement Unreasonable*

In *Hull-Hazard, Inc.*<sup>358</sup> the government required a contractor to obtain the manufacturer's certification of compliance with the specification when the contract contained no manufacturer's certification requirement. The board held that the government had the right to inspect and sample the windows delivered by the contractor under the inspection clause of the contract, but did not have the right to require the additional certification.

#### *Contractor Had Duty to Continue Performance Pending Resolution of Claim*

The contractor in *Dave's Excavation*<sup>359</sup> refused to continue with performance until the government resolved its claim. The board held that its refusal to proceed diligently with performance justified the termination for default of the contractor's contract.

#### *Value Engineering Change Does Not Require Change in Item*

In *ICSD Corporation*<sup>360</sup> the contractor submitted a value engineering change proposal (VECP) suggesting an adapter that permitted the use of alkaline, rather than mercury, batteries. The use of the new adapter did not require any physical change in the end item. The government contended that a VECP must involve a physical change in the product itself. The board held that it is sufficient if the proposal provides something different from what the government requires by contract. The *ICSD* decision also addresses the issue of sharing the collateral savings from a VECP when two contractors submit essentially the same VECP contemporaneously. The board held the government's allocation scheme reasonable. Finally, the board addressed the burden of proof in establishing the quantum of the VECP savings. There were two components of alleged savings that were unquantified after extensive discovery, a full trial, and a

<sup>355</sup> ASBCA No. 37139, 90-2 BCA ¶ 22,693.

<sup>356</sup> ASBCA No. 32629, 90-3 BCA ¶ 23,207.

<sup>357</sup> ASBCA No. 38312, 90-3 BCA ¶ 23,148.

<sup>358</sup> ASBCA No. 34645, 90-3 BCA ¶ 23,173.

<sup>359</sup> ASBCA No. 35533, 90-1 BCA ¶ 22,311.

<sup>360</sup> ASBCA No. 28028, 90-3 BCA ¶ 23,027.

post-trial briefing. The board held that neither the government nor the board were required to engage in speculation to quantify the savings. When the contractor is unable to prove quantum, it has no entitlement to that component of the VECP savings.

#### *Government Failed to Timely Exercise Option After Availability of Funds*

In *The Boeing Company*<sup>361</sup> the ASBCA found the exercise of an option untimely. The contract provided that the option period expired "sixty days after funds are made available from the Congress/President." The agency contended that the sixty-day period began on the date the contracting activity in fact received the funds for obligation. The contractor contended that sixty-day period commenced on the date the President signed the relevant appropriations act. The board found that the government had attached the same meaning to the sixty-day period as did the contractor at all times prior to this dispute. While the board declined to characterize the government's position as 'incredibl[e],' 'ridiculous' or 'irrational,' as contended by the contractor, it did find the government's interpretation "strained and unreasonable."<sup>362</sup> Accordingly, the board held that the government's unilateral exercise of the option was untimely and that the contractor was entitled to recover the costs associated with complying with the exercise of the option.

#### *Debt Collection Act*

##### *Common-Law Right of Offset and the Debt Collection Act*

In *Sam's Electric Company*<sup>363</sup> the GSA terminated a mechanical services contract for default, then reprocured and offset the excess reprocurement costs by withholding payment due on the same contract. The contractor asserted that the offset was improper because the GSA did not comply with the Debt Collection Act (DCA),<sup>364</sup> which permits agencies to collect debts through administrative offset only if the agency provides notice, an explanation of the debtor's rights under the statute, and an opportunity to enter into a written agreement to pay the debt. GSA regulations<sup>365</sup> specifically provide, however, that the agency will offset claims arising out of contracts that are subject to the Contract Disputes Act of

1978<sup>366</sup> pursuant to the government's common-law right of offset.

A prior ASBCA decision had concluded that the DCA superseded the government's common-law right of offset.<sup>367</sup> The GSBICA reached the opposite result in the present case for two reasons: (1) the GSA was authorized to assert the common-law right of offset; and (2) the offset constituted an adjustment of the contract price because the withholding from Sam's Electric Company came primarily from the same contract from which the debt had arisen. The GSBICA concluded that the GSA had authority to effect the price reduction by means of the government's common-law right of offset, rather than under the DCA.

##### *District Courts Lack Jurisdiction to Review Offset of Debts Against Other Contracts*

*U.S. Trading Corporation v. United States*<sup>368</sup> addressed jurisdiction of federal district courts over issues of application of the DCA to administrative offset of debts arising from contracts. The district court judge held that federal district courts have no jurisdiction to decide whether the government violated the DCA by collecting a contractor's alleged debt under one contract through offsets against the contractor's other contracts. The rationale of the decision is that district courts' jurisdiction is governed by the Tucker Act,<sup>369</sup> which precludes consideration of actions founded either on an express or implied-in-fact contract with the government that are subject to the Contract Disputes Act. Accordingly, district courts do not have jurisdiction over the underlying contracts or over administrative offsets made thereon. Therefore, the district courts lack jurisdiction to determine whether these offsets are subject to the DCA.

##### *Prompt Payment Discounts*

In *International Business Investments, Inc. v. United States*<sup>370</sup> the Navy, pursuant to a security guard services contract, made full payments to the contractor, less prompt payment discounts, but erroneously applied the discount rate to portions of the invoices representing increased wages. The contractor sought recovery of all prompt payment discounts taken by the Navy during a three-year period, arguing that the erroneous withholding

<sup>361</sup> ASBCA No. 37579, 90-3 BCA ¶ 23,202.

<sup>362</sup> *Id.* at 116,439.

<sup>363</sup> GSBICA No. 9359, 90-3 BCA ¶ 23,128; *see also* Information Consultants, Inc., GSBICA No. 8130-COM, 86-3 BCA ¶ 19,198.

<sup>364</sup> 31 U.S.C. § 3716.

<sup>365</sup> 41 C.F.R. § 105-55.007(d) (1990).

<sup>366</sup> 41 U.S.C. §§ 601-613.

<sup>367</sup> *DMJM/Norman Eng'g Co.*, ASBCA No. 28154, 84-1 BCA ¶ 17,226.

<sup>368</sup> No. 90-1779 (D.D.C. Sept. 10, 1990); 54 Fed. Cont. R. 589 (Oct. 22, 1990).

<sup>369</sup> 28 U.S.C. § 1346.

<sup>370</sup> 19 Cl. Ct. 715, 9 FPD ¶ 36 (1990); *vacated in part*, 21 Cl. Ct. 79, 9 FPD ¶ 110 (1990).

of discounts resulted in mere partial payments by the government and that, consequently, the government was not entitled to any prompt payment discounts. The Claims Court held that the Navy's good-faith erroneous application of the prompt payment discount did not transform the intended full and timely payments—which had been accepted by the contractor—into mere partial payments. The contractor's claim for recovery of all prompt payment discounts taken by the Navy was denied.

#### *Prompt Payment Act*

##### *Exercise of Option on Pre-Prompt Payment Act Contract Does Not Subject Contract to Act*

A second issue addressed by the Claims Court in *International Business Investments, Inc.*<sup>371</sup> was whether options exercised by the Navy to renew a contract after the effective date of the Prompt Payment Act (PPA)<sup>372</sup> are subject to the PPA's coverage when the underlying contract pre-dated the effective date of the PPA. The court originally ruled that the Navy's exercise of options to renew the contract created a new contract that was subject to the PPA; therefore, the contractor was entitled to recover PPA penalty interest on the over-discounted amounts withheld by the Navy.<sup>373</sup> Upon reconsideration, however, the court concluded that it had been in error because the exercise of an option really constitutes a continuation of the original contract unless the exclusive—or at least the primary—purpose of the contract was to obtain the option. Finding no such purpose under the contract in question, the court vacated the relevant portion of its earlier decision and held that the Navy's pre-PPA contract, as extended by the post-PPA options, was not subject to the PPA.<sup>374</sup>

##### *When Options Are Added to Pre-PPA Contract After PPA Effective Date, PPA Does Apply*

The Claims Court held in *Ocean Technology, Inc. v. United States*<sup>375</sup> that the government must pay interest to a contractor under the PPA for supplies that were ordered and accepted pursuant to an option on a pre-PPA contract when the option was created after the effective date of the PPA. The court noted that interest penalties under the PPA on late payments made by the government do not apply to payments made under contracts issued prior to the effective date of the PPA. In this case, however, the two signal data converters that were purchased under a

second option to the pre-PPA contract were not part of the original contractual undertaking; rather, the Navy contracted for the second option after the first option had lapsed and after the PPA had taken effect. The court concluded that creation of this option constituted an acquisition—that is, a contracting, delivery, receipt, and payment—to which the PPA applied. Consequently, the exercise of this option was not merely a continuation of the original pre-PPA contract because the contractual action by which the option was created occurred after the PPA's effective date.

##### *Government Demand for Resubmission of Invoice in Different Format*

The ASBCA determined that a contractor's progress payment invoices were in the proper format for purposes of the PPA when the government returned timely submitted invoices to be resubmitted in a different format than was previously required. Under two Department of Health and Human Services (HHS) contracts for renovation of several school buildings at two government installations, the government had a right to prescribe the format of the progress payment estimates under the payments clause of the contract, and the government was obligated to pay interest under the PPA only if it failed to make payment within a specified time period after receiving a proper invoice. In *Toombs & Co., Inc.*,<sup>376</sup> however, the board found that HHS did not exercise the right to prescribe the format of invoices until after the first estimates were submitted. Consequently, those estimates were proper within the meaning of the PPA, making the government responsible for interest on the delay in payment occasioned by its direction to reformat the invoices.

##### *Withholding Progress Payments from 8(a) Contractor*

In *Shelly's of Delaware, Inc.*<sup>377</sup> the ASBCA rejected a claim that the government breached a contract by refusing to make progress payments to an 8(a) painting contractor. The board found that the contractor had never submitted the required construction schedule that progress payments were to be based upon, nor had the contractor submitted required certified wage statements and corrected payrolls. Furthermore, the contractor objected to the quantity of paperwork required by the contracting agency and refused to return to the job site unless it received progress payments. The board held that termina-

<sup>371</sup> *Id.*

<sup>372</sup> 31 U.S.C. §§ 3901-06.

<sup>373</sup> 19 Cl. Ct. 715, 719-21, 9 FPD ¶ 36 (1990).

<sup>374</sup> 21 Cl. Ct. 79, 9 FPD ¶ 110 (1990).

<sup>375</sup> 19 Cl. Ct. 288, 9 FPD ¶ 6 (1990).

<sup>376</sup> ASBCA No. 34590 (Sept. 18, 1990).

<sup>377</sup> ASBCA No. 37404, 90-2 BCA ¶ 22,690.

tion of his contractor for default was proper because a party who contracts with the government must be prepared not only to perform the specified work but also to comply with all material administrative burdens imposed by the terms of the contract.

#### Costs and Cost Accounting

##### *Reestablished Cost Accounting Standards Board Meets for First Time*

The reconstituted Cost Accounting Standards Board (CASB) held its first meeting on July 25, 1990. The 1988 Defense Authorization Act reestablished the CASB.<sup>378</sup> It took almost two years for the new CASB to commence operations because of concerns over the application of ethics laws to industry board members. At its first meeting, the board agreed to use the old CASB regulations as a baseline for its own actions. The board also agreed to review DOD's interim changes to the CASB regulations to determine whether the changes should be adopted by the new board.<sup>379</sup>

##### *Cost Principles—Cost Reasonableness*

This year's case law, like many previous years' decisions, provides plenty of examples of what is a reasonable cost. Both the government and contractors had their share of successes and failures. The cases clarify that Boards of Contract Appeals, contractors, and the government do not share similar perceptions of reasonableness. All of these cases arose under contracts pre-dating the statutory and regulatory reversal of *Bruce Construction Company v. United States*.<sup>380</sup> *Bruce Construction Company* held that costs actually incurred by a contractor were presumed to be reasonable and that the burden was on the government to prove otherwise. Interestingly, the decisions of the civilian agency boards appeared to place the burden on the contractor.

##### *Energy Board Adopts a Flexible Burden of Proof*

In *Cotton & Company*<sup>381</sup> the Energy Board of Contract Appeals observed that business lunches and dinners are subject to abuse. The board therefore required the contractor to meet a higher burden of proof to show that the questioned expenses were reasonable. The board appeared to warn contractors that they should carefully document the reasons for expenses that appear to be per-

sonal in nature. Presumably, contractors will have a very low burden of proof to show that costs, such as wages, are reasonable.

##### *Costs Incurred in Disregard of Government Warning Unreasonable*

In *Ippoliti, Inc.*<sup>382</sup> the government proved that a back pay award to a terminated employee was an unreasonable cost. The contractor failed to follow government recommendations that, if followed, would have prevented the back pay award. If the government recommends that a cost reimbursement contractor adopt one method of performance to avoid costs, the contractor may ignore that recommendation only at its peril.

##### *Unreasonable Costs*

In *Lockheed-Georgia Company Division of Lockheed Corporation*<sup>383</sup> the government proved that air travel to the Greenbrier Resort in West Virginia for executive physicals was unreasonable because competent physicians were available in Atlanta, the executives' home city. In *Prosight Corporation*<sup>384</sup> the Agriculture Board placed a heavy burden on a contractor to demonstrate that contributions to a pension plan for two stockholder-employees were reasonable. The contractor failed to meet this burden.

##### *Negligence is Reasonable*

In *Morton-Thiokol, Inc.*<sup>385</sup> the government's theory was that a cost incurred in performing defective work was unreasonable and, therefore, unallowable. The government failed to prove that costs resulting from the negligence of nonmanagerial employees were unreasonable. The ASBCA observed that only if the costs resulted from a high degree of misconduct by appellant's management would the cost be unreasonable.<sup>386</sup>

##### *Specific Cost Principles*

##### *Research and Development Costs*

In *Denro, Inc. v. United States*<sup>387</sup> the Claims Court considered whether Research and Development (R&D) costs could be deferred and amortized over subsequent spare parts orders. Denro intentionally underbid a fixed

<sup>378</sup> Pub. L. No. 100-697, 102 Stat. 4069 (1988).

<sup>379</sup> 54 Fed. Cont. R. (BNA) 279, 295 (Aug. 20, 1990).

<sup>380</sup> 324 F.2d 416 (Cl. Ct. 97 1963).

<sup>381</sup> ENG BCA No. 426-6-89, 90-2 BCA ¶ 22,828.

<sup>382</sup> ASBCA No. 35236, 90-2 BCA ¶ 22,723.

<sup>383</sup> ASBCA No. 27660, 90-3 BCA ¶ 22,957.

<sup>384</sup> AQBCA No. 87-400-1, 90-1 BCA ¶ 22,557.

<sup>385</sup> ASBCA No. 32629, 90-3 BCA ¶ 23,207.

<sup>386</sup> See *infra* notes 404-06 and accompanying text.

<sup>387</sup> 19 Cl. Ct. 270, 9 FPD ¶ 4 (1990).

price contract and then tried to recover its loss on subsequent spare parts orders. Relying on both the cost principles then in effect and Financial Accounting Standard Number 2, the court held that the deferred development costs could not be allocated to the later spare parts orders.

In *Coflexip & Services, Inc. v. United States*<sup>388</sup> the contractor tried to characterize development costs as bid and proposal (B&P) costs that should be recoverable because it prevailed in a protest. The government moved for summary judgment based upon *AT&T Technologies, Inc. v. United States*.<sup>389</sup> The court held that if development of a prototype was required for final award of a contract, prototype development costs might be recoverable proposal costs. Therefore, summary judgment was not appropriate.

In another R&D cost case, *The Boeing Company*,<sup>390</sup> the contractor successfully recovered independent research and development (IR&D) and B&P costs in excess of the negotiated ceilings in its advance agreements with the government on IR&D and B&P rates. The ceilings were found inapplicable to NATO purchases. NATO was required to pay the full allocable costs, despite the standard advanced agreements.

#### Foreign Selling Costs

*General Electric Company, Aerospace Group v. United States*<sup>391</sup> discusses an unartfully worded cost principle on foreign selling costs. The cost principle used the term "not allocable" instead of "unallowable." The contractor argued that, as written, the cost principle was inconsistent with the Cost Accounting Standards (CAS) and, therefore, unenforceable. The Claims Court looked at the way the provision was applied and the subsequent regulatory changes that cleaned up the language to find that allowability was intended. Therefore, the court concluded that "not allocable" really meant "not allowable" and that the provision did not conflict with CAS.

#### Special Tooling

*Tubergen & Associates, Inc.*<sup>392</sup> held that a braiding machine was a special machine even though it did not appear to fit the definition of special tooling. The

ASBCA held that the braiding machine was purchased specifically to perform the contract and was not used by the contractor after termination. Therefore, the machine qualified as special machinery and the contractor could recover the loss of useful value.

#### Lack of a Cost Accounting System Not Impediment to Recovery of Costs

In an unusual cost accounting case, *CrystaComm, Inc.*,<sup>393</sup> the ASBCA allowed a contractor with no cost accounting system to recover costs on a cost type contract. The contracting officer failed to ensure that the contractor actually set up an adequate cost accounting system as promised during negotiations. When reviewing the claimed costs, the contracting officer recognized a relatively small amount using a cost of sales estimating method. The ASBCA agreed with the contractor that the contracting officer's cost of sales estimating method was inaccurate and adopted the contractor's estimate. The real lesson of *CrystaComm* is that the contracting officer should continuously monitor the contractor's cost accounting system to ensure that the contractor is accurately recording and allocating costs.

#### Pricing of Adjustments

#### Claims Preparation Costs

This year, as in most years, there were several cases in which the contractor attempted to recover claims preparation expenses.<sup>394</sup> *Coastal Drydock and Repair Corporation*<sup>395</sup> restates the general rule that a contractor may not recover the costs of preparing claims from the government. The Claims Court, however, departed from this general rule in *Levernier Corporation v. United States*.<sup>396</sup>

#### Double Recovery

This year also provided a classic example of how a contractor may try to double-count costs to enhance its recovery. In *Condor Reliability Services, Inc.*<sup>397</sup> the contractor reclassified costs related to subcontract administration out of overhead and included them as a direct cost in a claim. The contractor failed, however, to remove the same costs from overhead and, thus, double-counted.

<sup>388</sup>20 Ct. Cl. 412, 9 FPD ¶ 75 (1990).

<sup>389</sup>18 Ct. Cl. 315, 8 FPD ¶ 131 (1989).

<sup>390</sup>ASBCA No. 28510, 90-2 BCA ¶ 22,771.

<sup>391</sup>21 Ct. Cl. 72, 9 FPD ¶ 106 (1990).

<sup>392</sup>ASBCA No. 34106, 90-3 BCA ¶ 23,508.

<sup>393</sup>ASBCA No. 37177, 90-2 BCA ¶ 22,692.

<sup>394</sup>Allied Materials and Equip. Corp., ASBCA No. 17318, 75-2 BCA ¶ 11,150, is a limited exception to this general rule.

<sup>395</sup>ASBCA No. 36754 (Sept. 7, 1990); see also *Goetz Demolition Co.*, ASBCA No. 39129 (Aug. 13, 1990); *Condor Reliability Servs., Inc.*, ASBCA No. 40538 (Aug. 23, 1990).

<sup>396</sup>No. 531-87C (Ct. Cl. Oct. 30, 1990).

<sup>397</sup>ASBCA No. 40538 (Aug. 23, 1990).

### Equipment Costs

Several cases discussed when a contractor could recover equipment standby costs. *C. L. Fairly Construction Company*<sup>398</sup> states the general rule that a contractor may recover the costs of idle equipment during periods of government-caused delay. *Tom Shaw, Inc.*<sup>399</sup> highlights that a contractor may even recover for fully depreciated idle equipment because the contractor continues to incur costs, such as insurance and taxes. *Weaver-Bailey Contractors, Inc. v. United States*<sup>400</sup> considered whether the contractor and lessor were under common control so that idle equipment costs should be paid based on ownership rather than rental costs. The court considered the relationship between the contractor and the lessor when bidding the job, as well as the lack of any financial relationship between the two entities, to conclude they were not under common control.

### Total Cost Claims

The Claims Court, in *Servidone Construction Corporation v. United States*<sup>401</sup> found a modified total cost method appropriate when pricing a differing site condition claim. The differing site condition was material that was harder than expected to remove. Because the differing site condition was incremental and impossible to measure accurately, the total cost method was the only way of measuring the extra costs. The court adjusted the contractor's recovery to reflect an improvident bid by subtracting a reasonable bid from the total costs incurred.

### Audits and Access to Records

In *Newport News Shipbuilding and Drydock Company*<sup>402</sup> DCAA recommended that the costs of the contractor's internal audit department be suspended because the contractor denied DCAA access to the records of internal auditors. The contracting officer followed DCAA's advice and the contractor filed a claim. When the district court refused to enforce a DCAA subpoena for those records,<sup>403</sup> the agency paid the suspended costs, but no interest. The board followed its previous holding in *Martin Marietta Corporation*<sup>404</sup> and awarded interest on the suspended payments under the Contract Disputes

Act. Agencies should review similar recommendations from DCAA and others to avoid needless interest costs in the future.

### Terminations

#### Terminations for Default

##### Violation of the Buy American Act

In *H&R Machinists Company*<sup>405</sup> the government default terminated a contract for saddle block assemblies for which castings were made in China, and for which fasteners were made in the United States, because the product contained foreign components that comprised over ninety percent of the cost of all components in the product. The FAR and the applicable contract clauses required delivery of domestic end products, which required that the cost of components produced or manufactured in the United States had to exceed fifty percent of the cost of all components. Thus, the ASBCA determined that the contractor violated the Buy American Act and that the termination for default on that basis was proper.

##### Default Clause Read into Contract Under Christian Doctrine

In *H&R Machinists Company*<sup>406</sup> the ASBCA rejected the contractor's argument that the contract could not be terminated for default because the copy of the contract received by the contractor did not include the default clause. Noting that inclusion of the clause is required by the FAR, the board concluded that the clause was read into the contract by operation of law pursuant to the *Christian doctrine*.<sup>407</sup>

##### Contractor Must Show Reliance on Failure to Terminate for Summary Judgment

In *Hi-Shear Technology Corporation*<sup>408</sup> the ASBCA held that an eighty-six-day period between issuance of a show cause letter and termination for default was not sufficient to establish that the government had waived a contractor's default in the delivery of rocket motors for aircraft ejection seats. The contractor argued that it was

<sup>398</sup> ASBCA No. 32581, 90-2 BCA ¶ 22,665.

<sup>399</sup> DOT CAB No. 2106, 90-1 BCA ¶ 22,580; see also M.E. Brown, ASBCA No. 40043 (Aug. 28, 1990) (use fee for fully depreciated equipment allowed).

<sup>400</sup> 20 Cl. Ct. 158, 9 FPD ¶ 57 (1990).

<sup>401</sup> 19 Cl. Ct. 346, 9 FPD ¶ 12 (1990).

<sup>402</sup> ASBCA No. 32289, 90-2 BCA ¶ 22,859.

<sup>403</sup> *Newport News Shipbuilding and Dry Dock Co. v. Reed*, 655 F. Supp. 1408 (E.D. Va. 1987), *aff'd*, *United States v. Newport News Shipbuilding and Dry Dock Co.*, 837 F.2d 162 (4th Cir. 1988). The subpoena for internal audits was not enforced because it was overbroad and, therefore, beyond the statutory authority of DCAA to subpoena.

<sup>404</sup> ASBCA No. 31248, 87-2 BCA ¶ 19,875.

<sup>405</sup> ASBCA No. 38440 (Sept. 18, 1990).

<sup>406</sup> *Id.*

<sup>407</sup> *G. L. Christian & Assocs. v. United States*, 312 F.2d 418 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 954 (1963).

<sup>408</sup> ASBCA No. 36041, 90-2 BCA ¶ 22,643.

entitled to summary judgment under *DeVito v. United States*<sup>409</sup> if it could establish: (1) that the government failed to terminate within a reasonable period of time after the default by the contractor; and (2) that it relied on the government's failure to terminate by continuing performance under the contract with the government's knowledge and implied or express consent. The board found this statement of the second element of *DeVito* to be inaccurate, because the contractor must show both that it actually relied on the failure to terminate and that it continued performance as a result of that reliance. The majority of the board held that continued performance does not alone establish that such reliance occurred, but one administrative judge dissented from this conclusion. Finding that there were factual issues to be resolved as to whether the contractor had relied to its detriment on the government's failure to terminate, the board denied summary judgment.

#### *Simple Product—Grave Problems*

The Claims Court found in *Norwood Manufacturing, Inc. v. United States*<sup>410</sup> that the contracting officer had ample reason to conclude that the simple items manufactured by the contractor—pallets for transporting mail for the United States Postal Service—suffered grave problems when used for their intended function. The court held that the pallets did not meet specific and uncomplicated contract performance requirements. Therefore, the contractor had breached the warranty of supplies provisions of the contract, which constituted a proper basis for default termination of the contract.

#### *Claims Court Jurisdiction over Default Termination Claims Without Monetary Claims*

Both *Overall Roofing and Construction, Inc. v. United States*<sup>411</sup> and *Scott Aviation v. United States*<sup>412</sup> held that the Claims Court does not have jurisdiction over a claim that a default termination is improper. The court emphasized in the first case that the court's jurisdiction extends only to cases involving money damages presently due from the United States. In the second case, the court determined that a contracting officer's final decision on a default termination alone, in the absence of a final decision on an accompanying monetary claim, does not

invoke the court's jurisdiction.<sup>413</sup> These decisions reflect the split of authority on the Claims Court concerning jurisdiction over appeals from terminations for default in the absence of a monetary claim. There are several relatively recent decisions by other Claims Court judges articulating the opposite position.<sup>414</sup>

#### *Cure Notice Period Need Not Be Stated in Notice*

The one-year laundry contract held by *Red Sea Trading Associates, Inc.*<sup>415</sup> was terminated for default for the contractor's failure to perform several provisions of the contract. The contracting officer sent a letter that noted the contractor's continuing failures, stated that the government was withholding termination action to give the contractor an opportunity to take corrective action, and asserted that default termination would follow if the contractor's performance deteriorated in any way. The letter did not specify, however, the period of time to be afforded to the contractor to cure its deficient performance.

The contract was terminated for default sixteen days after the cure notice was issued. On appeal, the contractor argued that the contracting officer failed to satisfy an essential requirement of the contract's termination for default clause because no proper cure notice was issued. The contracting officer supported this argument by noting that the letter did not specify the period afforded to cure the deficiencies, which had to be a minimum of ten days under the default clause. The ASBCA held that the default clause does not require that a cure notice specify the cure period, so the omission of the length of the cure period from the notice does not affect its validity or effect, as long as at least ten days elapse between the issuance of the notice and termination of the contract.

#### *Anticipatory Cure Notice—Adequacy of Notice*

*Halifax Engineering, Inc. v. United States*<sup>416</sup> concerned a contract for security services at several Department of State buildings. The contract required issuance of a cure notice and a minimum of ten days to cure deficiencies before the government could terminate for default prior to the contract start date. Halifax Engineering was unable to establish an adequate radio network or hire sufficient guards by the original contract starting date, but the gov-

<sup>409</sup>188 Ct. Cl. 979 (1969).

<sup>410</sup>21 Cl. Ct. 300, 9 FPD ¶ 124 (1990).

<sup>411</sup>20 Cl. Ct. 181, 9 FPD ¶ 59 (1990).

<sup>412</sup>20 Cl. Ct. 780, 9 FPD ¶ 109 (1990).

<sup>413</sup>*Overall Roofing and Constr., Inc. v. United States*, 20 Cl. Ct. 181, 183, 9 FPD ¶ 109 (1990).

<sup>414</sup>See *Crippen & Graen Corp. v. United States*, 18 Cl. Ct. 237 (1989); *R.J. Crowley, Inc. v. United States*, Nos. 330-87C, 577-87C, 35-88C (Cl. Ct. 1989); *Moser Industrienmontage GmbH*, No. 254-88C (Cl. Ct. 1989); *Russell Corp. v. United States*, 15 Cl. Ct. 760 (1988).

<sup>415</sup>ASBCA No. 36360 (Nov. 5, 1990).

<sup>416</sup>915 F.2d 689 (Fed. Cir. 1990).

ernment extended the starting date by one month. The government informed the contractor of the extension by means of a letter which stated that failure to start performance, or to be adequately prepared to start performance, by a specified date would be grounds for immediate termination of the contract for default. The letter also stated that no other cure notice would be given. The government then terminated the contract for default five days prior to the extended start date.

The contractor argued that the letter was not a proper cure notice because it did not address termination prior to the contract start date, because it failed to specify a minimum ten-day cure period, and because it did not identify the defects that formed the basis of the default. The Federal Circuit held: (1) that, as a matter of contract interpretation, the GSBICA's conclusion that the wording of the letter constituted a cure notice was reasonable, whereas the contractor's contention was not; (2) that a cure notice need not specify the cure period, as long as a minimum of ten days to correct deficiencies is actually provided to the contractor; and (3) that the cure notice itself need not inform the contractor of deficiencies when the government had informed the contractor of the defects on numerous occasions.

#### *Terminations for Convenience*

##### *Constructive Termination for Convenience*

In *Systems Architects, Inc.*<sup>417</sup> (SAI) the Air Force placed no orders for computer hardware and computer related services under a contractor's requirements contract. During the life of the contract, however, the Air Force arranged to purchase the same equipment from the contractor's supplier at the same price that had been offered to the contractor. The appellant contractor sought recovery from the ASBCA for breach of contract. The board found that the Air Force actually did have requirements for which funds were available during the base year of the contract with SAI. Consequently, the board held that the Air Force's failure to place orders for its requirements with SAI constituted a constructive termination for convenience of the contract.

The board also considered whether the facts of this case constituted a wrongful termination for convenience for which SAI would be entitled to breach of contract damages, which would include recovery of anticipatory

profits. The board held that these circumstances fell within the *Reiner* rule,<sup>418</sup> under which a wrongful action by the government that prevents a contractor from performing its contract constitutes a termination for convenience unless the contracting officer abuses his discretion or acts in bad faith. Finding neither abuse of discretion nor bad faith, the board limited the contractor's recovery to that provided for by the contract's termination for convenience clause.

##### *Change in Circumstances I*

The *Torncello*<sup>419</sup> test, which provides that the termination for convenience clause may be utilized by the government only if there is a change in the circumstances of the bargain or in the expectations of the parties, was applied by the Claims Court in *Government Systems Advisors, Inc. v. United States*.<sup>420</sup> A seller of word processors under a lease to ownership plan brought an action against the government for breach of contract, in part because the Air Force terminated a delivery order for the convenience of the government. The court held that a congressional mandate to terminate delivery orders under lease to ownership plans as quickly as possible constituted a sufficient change in circumstances or expectations to justify termination of the delivery order for the government's convenience.

##### *Change in Circumstances II*

The Federal Circuit limited application of the *Torncello*<sup>421</sup> change in circumstances test in *Salsbury Industries v. United States*.<sup>422</sup> The contracting officer terminated for the convenience of the government a supplier's contract for aluminum post office lockboxes. The contracting officer took this action because a federal district court had ordered the Postal Service to suspend performance under the contract because an illegal de facto suspension had unlawfully prevented another bidder from receiving award.

Salsbury Industries first argued that the convenience termination was improper because the contracting officer did not make the required determination that termination was in the Postal Service's best interests. The contractor supported this argument by pointing out that the Postal Service contracting officer had testified to her belief that the government's best course of action was to appeal the judicial decision on which the termination was based.

<sup>417</sup>ASBCA No. 28861, 90-2 BCA ¶ 22,860.

<sup>418</sup>John Reiner & Co. v. United States (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964).

<sup>419</sup>Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982).

<sup>420</sup>21 Cl. Cl. 400, 9 FPD ¶ 128 (1990).

<sup>421</sup>Torncello, 681 F.2d at 756.

<sup>422</sup>905 F.2d 1518, 9 FPD ¶ 86 (Fed. Cir. 1990).

The Federal Circuit concluded that a convenience termination based on a judicial order is clearly in the government's best interests because failure to comply with the court order would have grave consequences for the agency. The court held that in the absence of bad faith or a clear abuse of discretion, a contracting officer's decision to terminate a contract is conclusive and will not be evaluated by courts to determine if termination was the best of all possible courses of action.

Citing *Torncello v. United States*,<sup>423</sup> Salsbury Industries next argued that the convenience termination was improper because the company was a foreseeable victim of the Postal Service's illegal conduct and, therefore, that there was no change in the circumstances of the parties to justify the termination. The majority decision severely restricts application of *Torncello* to circumstances in which the government contracts with a party "knowing full well" that it will not honor the contract. The majority opined that *Torncello* means that the government cannot obtain the benefits of its termination for convenience rights when to do so would permit the government to avoid its contractual obligations with impunity. Consequently, the court concluded that *Torncello* was not applicable in the present case because the agency clearly had every intent to abide by its contractual obligations toward Salsbury Industries and neither party anticipated at the time of award that an injunction and court order would interfere with their contractual relationship. Thus, the district court order to terminate Salsbury Industries' contract was an unanticipated change in circumstances that not only justified, but also compelled, convenience termination of the contract.

A strongly worded dissenting opinion insists that the *Torncello* test is useful and applicable in this instance. The dissent pointed out that the risk of judicial intervention in performance of Salsbury Industries' contract actually was foreseeable at the time of contract award because the agency had knowingly and improperly excluded a contractor from competing for award. The dissenting judge would have ruled that with no real change in circumstances after award—as required by *Torncello* for a convenience termination to be proper—the contractor's claim of breach of contract by the government, and its demand for award of anticipatory profits, should have been granted.

### *Change in Circumstances III*

The Claims Court also addressed the *Torncello* change in circumstances test in *SMS Data Products Group, Inc.*

*v. United States*.<sup>424</sup> In a contract for computer services, HHS discovered during performance that the original acceptance test would not adequately gauge whether the contractor's equipment satisfied mandatory requirements of the contract; accordingly, HHS changed the acceptance test. When the contractor could not meet the enhanced acceptance test, the agency default terminated the contract, but the default was converted to a termination for convenience by a prior Claims Court decision.<sup>425</sup> In the recent case, the contractor argued that it could recover lost profits and other consequential damages under *Torncello* because the agency could not properly justify its action as a termination for convenience.

The court held that the contractor's reading of *Torncello* unnecessarily limits the government's termination for convenience authority. The court found that both under the traditional rule that the government can invoke the clause only if it did not act in bad faith and did not clearly abuse its discretion, and under the *Torncello* test that the clause can be invoked only if there is a change in the circumstances or in the expectations of the parties, the agency in this case could properly terminate the contract for convenience. The agency could do so because there was no such bad faith or abuse of discretion and because the change in the acceptance tests and the contractor's inability to comply therewith constituted a change in the circumstances between the parties.

### *Unreasonable Delay in Correcting Termination Settlement Proposal*

The Army awarded a contract to Harris Corporation for ground mobile radio antennas; subsequently, however, the contract was partially terminated for the convenience of the government. The contractor submitted a termination settlement proposal in the twelfth month after the termination. The termination contracting officer (TCO) notified the contractor that the proposal was deficient because it was not properly certified and gave the company one month to correct the defective settlement proposal. Harris Corporation submitted a second termination proposal two months after the resubmission deadline—three months after the original submission deadline. Fifteen months after the partial termination, and shortly after receiving the resubmitted settlement proposal, the TCO issued a final decision that no amounts were due to the contractor by reason of the termination because the contractor had failed to submit its claim within the time provided by the contract, as extended. The contractor appealed to the ASBCA.

<sup>423</sup> *Torncello*, 681 F.2d at 756.

<sup>424</sup> 19 Cl. Ct. 612, 9 FPD ¶ 32 (1990).

<sup>425</sup> *SMS Data Prods. Group, Inc. v. United States*, 17 Cl. Ct. 1, 10, 8 FPD ¶ 60 (1989).

In *Harris Corporation*<sup>426</sup> the board first determined that the failure to submit a properly certified settlement proposal within the one-year period specified by the termination for convenience clause did not render the proposal a legal nullity. Second, the board held that the contractor delayed the correction of its defective proposal for an unreasonable period of time and, therefore, its corrected convenience termination settlement proposal was untimely.

#### *Characterization of Action as Convenience Termination Is Not Conclusive*

In *Goetz Demolition Company*<sup>427</sup> the Army awarded a construction contract for repair of a dam. After the contract was over ninety percent completed, the contracting officer issued a unilateral contract modification that deleted the balance of work under the contract. Both parties referred to the contract's termination for convenience clause in correspondence preceding the discontinuance of performance, and the contracting officer cited that clause in the final decision terminating the contractor's performance. On appeal of the contracting officer's reduction of the contract price, the ASBCA held that whether deletion of work constitutes a convenience termination or a contract change depends on the circumstances of each case. In addition, the board held that when the parties proceed in their relationship as though the work deletion falls under the changes clause, as had been the case here, the board will not treat the matter as a termination for convenience, regardless of how the issue is characterized in the contracting officer's final decision. Consequently, the contractor's claim for convenience termination settlement expenses was denied because the contract had not been terminated, but merely reduced in scope.

#### *Long-Form Services Termination for Convenience Clause Substituted for Short-Form Clause by Operation of Law*

DWS, Inc. entered into a contract to operate a training and audiovisual support center at Fort Bliss, Texas, under a fixed-price requirements type services contract. A portion of the contract was terminated for the convenience of the government before the start of contract performance. DWS, Inc. submitted a proposed settlement for the partial termination that claimed reimbursement for employee relocation and other expenses related to preparing to perform the terminated portion of the contract. The contractor also sought an equitable adjustment for reduced profitability of the unexpired portion of the contract. Because the contract contained the short-form services termination for convenience clause, which restricts the

government's liability to payment for services rendered prior to the effective date of the termination, the contracting officer denied the settlement proposal and equitable adjustment claims.

The ASBCA held in *DWS, Inc., Debtor-in-Possession*<sup>428</sup> that the contractor was entitled to reimbursement for the preparatory expenses and to an equitable adjustment for reduced profits, notwithstanding the fact that the contract contained the short-form convenience termination clause. The board reached this result by finding that the contract required the contractor to perform substantial preparatory work prior to commencement of performance, that the contracting officer should have realized that the contractor would submit a claim for these costs if the contract were terminated for default, and that there could not have been a reasonable basis for the contracting officer's decision to use the short-form clause. The board concluded, therefore, that the decision to include the short-form clause in the contract was an abuse of the contracting officer's discretion and that the long-form convenience termination clause must be read into the contract by operation of law.

#### *Deductive Change—Not Partial Termination for Convenience*

The Sacramento Air Logistics Center issued a modification to a contract with Aul Instruments, Inc. that made a relatively minor change in the contract's specifications. A few months later, the agency deleted the change and restored the previous specification by a second modification. The government characterized the second modification as a termination for convenience, and the contracting officer applied the time constraints for submission of settlement claims and appeals that are imposed by the convenience termination clause to the equitable adjustment submitted by the contractor.

On appeal to the ASBCA in *Lucas Aul, Inc.*<sup>429</sup> the board reached two conclusions. First, changes in specifications or in the scope of work that cause a decrease in the cost of, or time required for, performance are generally deductive changes—not partial terminations. The contractor's claim for equitable adjustment in this case related to a minor change in a contract specification that was just such a deductive change; therefore it was governed by the changes clause rather than by the termination for convenience clause. Secondly, the contracting officer inappropriately invoked the one-year settlement proposal limitation of the termination for convenience clause because the contractor's equitable adjustment claim clearly related to the changes ordered by the two

<sup>426</sup>ASBCA No. 37940, 90-3 BCA ¶ 23,257.

<sup>427</sup>ASBCA No. 39129, 90-3 BCA ¶ 23,241.

<sup>428</sup>ASBCA No. 29742, 90-2 BCA ¶ 22,696.

<sup>429</sup>ASBCA No. 37803, (Dec. 7, 1990).

modifications. Consequently, because the claim was asserted prior to final payment, it could and should have been considered under the contract's changes clause.

### Truth in Negotiations Act

#### *Defective Pricing—What is a Significant Amount?*

The ASBCA found in *Kaiser Aerospace & Electronics Corporation*<sup>430</sup> that the contractor had provided defective cost data concerning certain labor rates. The amount of the overpricing was two-tenths of one percent when compared to the total price. Citing *Conrac Corporation v. United States*,<sup>431</sup> the board held that the contractor had no right to retain any amount earned through supplying defective data. Accordingly, the government was entitled to a refund of \$5,527.82.

#### *Defective Pricing—What Data Must Be Disclosed?*

##### *Subcontractor's Computerized Labor Data Must Be Explained*

In *Grumman Aerospace Corporation*,<sup>432</sup> although the prime contractor was aware of the subcontractor's computerized reports containing actual labor data and had an opportunity to examine them, it failed to do so. The board held that because the prime contractor could not have understood the subcontractor's computer entries without further explanation, the subcontractor was obligated under these circumstances to physically deliver the records and explain their significance to the prime contractor. The subcontractor's failure to do so constituted the submission of defective pricing data and entitled the government to a refund for the amount of overpricing caused by this omission.

#### *Vendor Quotes v. Purchase History: Which Must Be Disclosed?*

*Grumman Aerospace Corporation*<sup>433</sup> also concerned the failure of the subcontractor to properly disclose its purchase history on certain vendor quotes. The prime contractor and the subcontractor negotiated a decrement

factor of four percent to reflect the expected reduction in prices for the materials for which the subcontractor had received vendor quotes.<sup>434</sup> The subcontractor's purchase history was recorded in two computerized reports, neither of which was disclosed to the prime contractor nor reviewed because the subcontractor felt that vendor quotes were more reliable than past prices, which could have been based on different requirements or affected by the passage of time.<sup>435</sup> This purchase history predicted a reduction of 13.25%. Accordingly, the purchase history was considered to be cost or pricing data that should have been disclosed.

#### *Decision to Modify Internal Financial Practice Has Sufficient Factual Content to Require Disclosure*

In *Millipore Corporation*<sup>436</sup> the GSBCEA held that a management decision to increase dealer discounts constituted cost or pricing data. During negotiations, the contractor represented that the highest dealer discount was thirty percent.<sup>437</sup> The contractor failed to disclose that, during the same time, the management had decided to increase its dealer discounts levels. The dealer discount was eventually increased to thirty-five percent. The applicable regulation defined cost or pricing data to include management decisions that might reasonably be expected to have a bearing on prices under the proposed contract.<sup>438</sup> The board held that the failure to disclose the pending revisions to the dealer discount program misled the government and violated the contractor's obligation to submit complete, current, and accurate data. The board further held that the defective data increased the prices by the full five percent of the higher discount level not disclosed.

#### *Government Collaterally Estopped from Contesting Prior Accounting and Disclosure of Data Practices*

In *Hughes Aircraft Company*<sup>439</sup> the ASBCA held that the government was collaterally estopped<sup>440</sup> from contesting certain practices by the appellant.<sup>441</sup> Specifically, the government was collaterally estopped from contesting the appellant's cost accounting and estimating practices

<sup>430</sup> ASBCA No. 32098, 90-1 BCA ¶ 22,489.

<sup>431</sup> 558 F.2d 994 (Cl. Cl. 1977) (overpricing of 0.01% was a significant amount). The Court of Claims noted that the amount of overpricing must be significant because the government was seeking a refund. *Id.*

<sup>432</sup> ASBCA No. 35188, 90-2 BCA ¶ 22,842.

<sup>433</sup> *Id.*

<sup>434</sup> The board also found that the subcontractor included, in its materials proposals, cost quotations from other divisions of its parent company that it knew contained unallowable interdivisional profits. The four-percent decrement factor was also meant to account for this unallowable cost. *Id.* at 114,697.

<sup>435</sup> The four-percent decrement factor was based on an average reduction of 4.6% through negotiations on the other materials in the subject bill of materials. *Id.*

<sup>436</sup> GSBCEA No. 9453 (Sept. 20, 1990).

<sup>437</sup> On this basis, the government accepted a flat 15% discount.

<sup>438</sup> Federal Procurement Regulation 1-3.807-3(h)(1). See FAR 15.801 (stating that cost or pricing data includes "information on management decision that could have a significant bearing on costs").

<sup>439</sup> ASBCA No. 30144, 90-2 BCA ¶ 22,847.

<sup>440</sup> "The doctrine of collateral estoppel, or issue preclusion, precludes the relitigation by the same parties of common issues of material fact that have been determined by valid and binding judgment." *Id.* at 114,759.

<sup>441</sup> The appellant for all practical purposes in these appeals is Texas Instruments, Inc., the subcontractor to Hughes Aircraft Company.

for firm fixed-priced contracts on a product line, rather than a single contract basis.<sup>442</sup> The government was also collaterally estopped from contesting the adequacy of disclosing data by microfiche format.<sup>443</sup> Finally, the government was collaterally estopped from contesting the appellant's use of a weighed average (MCS) estimating practice for materials from common stock.<sup>444</sup> The appellant's motion for summary judgment was granted for the issues governed by collateral estoppel.

**Contract Disputes Act Litigation**  
**Authority of Contracting Officers to Settle**  
**Cases in Litigation**  
**Federal Litigation**

The plaintiff in *Durable Metal Products, Inc. v. United States*<sup>445</sup> moved for partial summary judgment based upon a contracting officer's final decision issued after the filing of the complaint in the Claims Court. The complaint was based upon a "deemed denial" of a claim.<sup>446</sup> The subsequent final decision purported to determine entitlement, but not quantum, on one portion of the claims before the court. The Claims Court noted that the Attorney General represents the United States in all litigation in the courts;<sup>447</sup> this includes the power to make all decisions concerning the manner in which the case will be defended.<sup>448</sup> In a deemed denial case, if the contractor files suit in the Claims Court, the contracting officer is divested of all authority to determine the merits of the claim unless the court remands the matter to the contracting officer.<sup>449</sup>

This decision highlights the important distinction between federal court litigation and administrative proceedings. The Contract Disputes Act<sup>450</sup> creates alternative forums for appeals from a final decision. A contractor may appeal to either the cognizant Board of Contract Appeals<sup>451</sup> or the Claims Court.<sup>452</sup> The Army FAR Supplement provides that the contracting officer retains responsibility and authority to settle cases before

the Armed Services Board of Contract Appeals,<sup>453</sup> subject to the approval of the Chief Trial Attorney of the Army.<sup>454</sup> The holding in *Durable Metal Products*<sup>455</sup> requires that contracting officers be cognizant of the limitations on settlement authority in Contract Disputes Act appeals to the Claims Court.

**Board of Contract Appeals Litigation**

The appellant in *Hoboken Shipyards, Inc.*<sup>456</sup> moved for summary judgment to enforce a contracting officer's final decision granting it entitlement and quantum on a portion of its claims, the remainder of which were on appeal to the ASBCA. The board refused to enforce the contracting officer's decision on a piecemeal basis. The board rejected the appellant's argument that FAR 33.221(g), which concerns payment of sums determined by a contracting officer to be due to a contractor, supported a motion for summary judgment. When a contractor appeals a final decision to a board of contract appeals, the entire decision is placed in issue for de novo review by the board.<sup>457</sup> The appellant also argued that absent the appeal it would have been paid the amount determined to be due it by the contracting officer. Thus, it was being punished for pursuing its statutory right to appeal and due process considerations compelled the entry of summary judgment. The board found no merit in these arguments because the appellant's filing of the appeal placed the matter before the board.

**Certifying Claims in Excess of \$50,000—**  
**Who May Certify?**

**Senior Vice President**

The importance of who may certify a claim in excess of \$50,000 was highlighted by *United States v. Grumman Aerospace Corporation*,<sup>458</sup> in which the Federal Circuit held that a certification signed by a senior vice president and treasurer did not comply with FAR 33.207(c)(2) because the individual reported to a more senior corporate official. FAR 33.207(c)(2) provides that if a contrac-

<sup>442</sup> See *Texas Instruments, Inc.*, ASBCA No. 18621, 79-1 BCA ¶ 13,800.

<sup>443</sup> See *Texas Instruments, Inc.*, ASBCA No. 23678, 87-3 BCA ¶ 20,195.

<sup>444</sup> See *Texas Instruments, Inc.*, ASBCA No. 30836, 89-1 BCA ¶ 21,489.

<sup>445</sup> 21 Cl. Ct. 41, 9 FPD ¶ 101 (1990).

<sup>446</sup> 41 U.S.C. § 605(c)(5) provides that a contractor may choose to deem its claim denied and commence an appeal upon the failure of the contracting officer to issue a final decision within the required time periods.

<sup>447</sup> 28 U.S.C. § 516.

<sup>448</sup> See Exec. Order 6166 (1933).

<sup>449</sup> 21 Cl. Ct. 41, 46, 9 FPD ¶ 101 (1990).

<sup>450</sup> 41 U.S.C. §§ 601-613.

<sup>451</sup> *Id.* § 606.

<sup>452</sup> *Id.* § 609(a)(1).

<sup>453</sup> AFARS 33.212-90(a)(3).

<sup>454</sup> See AFARS 33.212-90(a)(2)(iii).

<sup>455</sup> 21 Cl. Ct. 41 (1990).

<sup>456</sup> ASBCA No. 38012, 90-3 BCA ¶ 23,150.

<sup>457</sup> *Id.* (citing *Tenaya Const.*, ASBCA No. 27799, 84-1 BCA ¶ 17,036).

<sup>458</sup> 9 FPD ¶ 136 (Fed. Cir. Oct. 1, 1990) *pet. for rehearing en banc filed*. This opinion is unpublished and may not be cited as precedent without permission of the court.

tor is not an individual, the certification shall be executed by: (1) a senior company official in charge at the contractor's plant or location involved; or (2) an officer or general partner having overall responsibility for the conduct of the contractor's affairs. Shipbuilders, whose claims must be filed within eighteen months of the cause of action,<sup>459</sup> are especially concerned with the impact of this decision. Shipbuilders claims for more than \$50,000 are not considered "claims" unless the contractor has provided the CDA certification and the supporting data for the claim.<sup>460</sup>

#### *Chief Financial Officer*

The Claims Court, in *Triax Company v. United States*,<sup>461</sup> held that the chief financial officer possessed the authority to certify a claim because both the president and the chief financial officer had "equal authority to direct any aspect of Triax's affairs."<sup>462</sup> In so holding, the Claims Court distinguished last year's major claim certification case, *Ball, Ball & Brosamer, Inc. v. United States*.<sup>463</sup> *Ball, Ball & Brosamer* rejected the certification of an individual with "overall supervision and administration of all cost and claim aspects of the performance of the contracts that this firm has at a given time."<sup>464</sup>

#### *Joint Ventures I*

Joint ventures have special problems when certifying claims, as was evident by the facts and decision of the ASBCA in *The Boeing Company*.<sup>465</sup> After one false start,<sup>466</sup> the president of one of the joint venturers, acting with a power of attorney from the president of the other joint venturer to certify the claim, properly certified a claim filed by the joint venture. The government's contention that the joint venture, acting as a team, should certify the claim was rejected.

#### *Joint Ventures II*

In *Al Johnson Construction Company v. United States*<sup>467</sup> a project manager who possessed the authority

to bind the joint venture only up to \$50,000 on changes certified a claim for more than \$50,000. Beyond this patent problem with the certification, the project manager was not a senior official in charge at the site of work. The un rebutted evidence was that other officials from the home office appeared whenever any matters of importance were discussed between the government and the joint venture. Given these facts, the court dismissed the case for lack of jurisdiction based upon the lack of a properly certified claim.

#### *Corporate Comptroller*

*BMV—Combat Systems of Harsco Corporation*<sup>468</sup> held that the corporate controller was neither a senior official in charge at the site, nor an officer with overall responsibility for management of the contractor's affairs as required by FAR 33.207(c)(2). That official's certification, therefore, was insufficient to vest the board with jurisdiction.

#### *Director of Marketing*

*Newport News Shipbuilding and Drydock Company*<sup>469</sup> held that a director of marketing may not certify a claim because he did not meet the requirements of FAR 33.207(c)(2)(ii), which requires an individual to be an officer of the corporation. The law of the state of incorporation defined "officer" as the president, the secretary, and other officers described in the by-laws or appointed by the corporation's board of directors. Appellant failed to show any corporate action designating the director of marketing as an officer.

#### *Official of Parent Corporation*

In *National Surety Corporation v. United States*<sup>470</sup> the contractor was a wholly owned subsidiary. The Claims Court held that an official of the parent corporation who was not an officer of the contractor could not certify the subsidiary's claim. The Claims Court also found that the certifying officer was not in charge at the site or location.

<sup>459</sup> See 10 U.S.C. § 2405.

<sup>460</sup> *Id.* § 2405(b).

<sup>461</sup> 20 Cl. Ct. 507, 9 FPD ¶ 76 (1990).

<sup>462</sup> *Id.* at 513.

<sup>463</sup> 878 F.2d 1426 (Fed. Cir. 1989).

<sup>464</sup> *Id.* at 1427.

<sup>465</sup> ASBCA No. 39314, 90-2 BCA ¶ 22,769.

<sup>466</sup> See *The Boeing Co.*, ASBCA No. 36612, 89-1 BCA ¶ 21,421.

<sup>467</sup> 19 Cl. Ct. 732, 9 FPD ¶ 43 (1990).

<sup>468</sup> ASBCA No. 39495, 90-3 BCA ¶ 23,089.

<sup>469</sup> ASBCA No. 32289, 90-2 BCA ¶ 22,859, *appeal docketed*, No. 90-1475 (Fed. Cir. Aug. 17, 1990).

<sup>470</sup> 20 Cl. Ct. 407, 9 FPD ¶ 70 (1990).

### Project Manager

Another recent case from the ASBCA interpreting the senior company official alternative for certifications under FAR 33.207 is *M.A. Mortensen Company*.<sup>471</sup> In *M.A. Mortensen Company* the construction project manager was held to be an appropriate official to certify a claim because he was a senior company official and in charge at the plant or location. Furthermore, considering the official's chain of command, contract authority, and responsibility for a significant part of the company's revenue, he was a senior official, albeit not an officer.

### "A" Senior Company Official

The ASBCA, perhaps in recognition of the general confusion surrounding the qualifications of a proper certifying official, addressed this issue again in *Emerson Electric Company*.<sup>472</sup> In that case the vice president of administration of one of Emerson's ninety-five first-tier subsidiaries certified the claim. The government argued that the board lacked jurisdiction based on the lack of a properly certified claim. The board ruled that "a" senior company official must certify the claim. This language, said the board, was intentionally broad to qualify "a class of individuals"<sup>473</sup> to certify claims. Similarly, the board read the requirement that the individual be "in charge" of the contractor's plant broadly. "It must only be shown that [the individual] is among those, perhaps numerous, individuals 'in charge at the contractor's plant or location involved.'"<sup>474</sup> Clearly, the ASBCA is striving to create a rule of reason in this area, which has become unnecessarily complex.

### Certifying Claims in Excess of \$50,000— Other Certification Issues

#### Submitting the Claim: A Jurisdictional Minefield

Two inconsistent lines of cases discussing to whom a claim may be submitted have emerged this year. The Claims Court in *West Coast General Corporation v. United States*,<sup>475</sup> *Lakeview Construction Company v.*

*United States*,<sup>476</sup> and *Robert Irsay Company v. United States Postal Service*<sup>477</sup> held that submission of a claim to a resident officer in charge of construction (ROICC) or other government official does not strictly comply with the Contract Disputes Act's requirement that a claim be submitted to the contracting officer. The fact that the contracting officer eventually received a copy of the claim and issued a final decision on the claim as submitted was not dispositive.<sup>478</sup>

The ASBCA declined to follow the Claims Court's analysis. It rejected the Claims Court's rationale in *Roy McGinnis & Company*,<sup>479</sup> in which the contractor submitted its claim to the contracting officer's legal office. One post-award letter signed by the contracting officer had invited replies to the legal office. The board considered the submission sufficient, expressly rejecting *West Coast General Corporation* by noting that decisions of the Claims Court were not binding on the board. The board sought "to avoid turning the Contract Disputes Act into a snare for the unwary by placing 'an unnecessarily complex and obscure burden upon a contractor.'"<sup>480</sup> What is required, the board held, is that a claim be submitted in a manner reasonably calculated to reach the contracting officer.<sup>481</sup>

### Certification of Multiple Claims

*Placeway Construction Corporation v. United States*<sup>482</sup> reviewed uncertified multiple claims, each less than \$50,000, to determine whether they were a single unitary claim over \$50,000. The test applied by the Federal Circuit was whether the claims arose from a common or related set of operative facts.

### Supporting Data

*Bay Area Crane-Hoist Company*<sup>483</sup> revisited the question of whether a claim must be accompanied by supporting data. In that case, the contractor provided no supporting data explaining either its basis for entitlement or how its liability was calculated. Without any data, the contracting officer could not make a reasoned final decision and the contractor could not appeal to the ASBCA.

<sup>471</sup> ASBCA No. 39978 (Nov. 5, 1990).

<sup>472</sup> ASBCA No. 37352 (Dec. 5, 1990).

<sup>473</sup> *Id.*

<sup>474</sup> *Id.*

<sup>475</sup> 19 Cl. Ct. 98, 9 FPD ¶ 24 (1989).

<sup>476</sup> 21 Cl. Ct. 269, 9 FPD ¶ 126 (1990).

<sup>477</sup> 21 Cl. Ct. 502 (1990).

<sup>478</sup> *Id.* at 101.

<sup>479</sup> ASBCA No. 40004 (Sept. 24, 1990).

<sup>480</sup> *Id.* (citing *Blake Const. Co.*, ASBCA No. 34480, 88-2 BCA ¶ 20,552).

<sup>481</sup> At the preconstruction conference, the contractor had been directed by the area-resident engineer to send all correspondence pertaining to the contract to the area engineer. Submission to this office, the board stated, would have also been proper.

<sup>482</sup> 910 F.2d 835 (Fed. Cir. 1990).

<sup>483</sup> ASBCA No. 35700, 90-1 BCA ¶ 22,356.

The ASBCA also discussed the requirement for data supporting a claim in *Holk Development, Inc.*<sup>484</sup> The board observed that the Federal Circuit requires a contractor to give the government adequate notice of the basis and amount of the claim,<sup>485</sup> which it interpreted as meaning that the claim must be sufficient to permit a meaningful review by the contracting officer. To this end, supporting data must show how the data supports the claim. Holk's claim did not provide adequate notice of the basis and amount of the claim because the contractor failed to explain how the data related to the claim; moreover, the relation between the claim and the date was not apparent from reviewing the two. Therefore, the appeal was dismissed.

Once the contractor has properly submitted a claim with supporting data and has properly certified it, however, the government may not delay its decision by continually seeking more information. In *Martin Marietta Information & Communications Systems*<sup>486</sup> the board found jurisdiction from a "deemed denial" final decision because the government had no reason to demand pricing information beyond the information provided.

*D.H. Blattner & Sons, Inc. v. United States*,<sup>487</sup> an unpublished decision from the Federal Circuit that is not citeable as precedent, emphasized that claim format is not controlling. A letter stating the basis for and amount of entitlement, properly certified, was found to be a claim despite the use of the term "proposal."

#### *Bonding Company May Not File Claim*

The Federal Circuit held in *Ranson v. United States*<sup>488</sup> that a surety has no privity of contract with the government by virtue of the requirement for the contractor to obtain bonding. Noting that only contractors may appeal, the court dismissed the action.<sup>489</sup>

#### *Final Decisions: Jurisdiction Not Affected by Final Decision Without Notice of Appellate Rights*

Another aspect of the Federal Circuit's decision in *Placeway Construction Corporation v. United States*<sup>490</sup> was that the government's assertion of set-off was an

appealable final decision. The government contended that the failure of the set-off notice to inform the contractor of its appeal rights barred an appeal of the government's action. The Federal Circuit held that there is no jurisdictional requirement that a final decision notify the contractor of its appeal rights. The time limits within which a contractor must file an appeal do not commence, however, until the contractor is correctly informed of those rights.

#### *Subject Matter Jurisdiction*

##### *Contract Disputes Act Applies to Leases of Government Owned Real Property*

In a case of first impression, *Arnold v. Hedberg, Tom Buffington*,<sup>491</sup> the ASBCA held that the Contract Disputes Act applies to leases of government owned real property. The board noted that government leases of privately owned real property are treated as acquisitions of personal property; therefore, it reasoned that leases of government real property must be disposals of personal property covered by 41 U.S.C. section 602(A)(4).

##### *Board's Unchallenged Findings of Fact Precludes Relitigation of Falsity of Evidence*

In *Ingalls Shipbuilding, Inc. v. United States*<sup>492</sup> the Claims Court held that a board's unchallenged findings of fact<sup>493</sup> collaterally estopped the government from contesting the truthfulness of the evidence supporting the contractor's claim. The contractor had filed suit seeking enforcement of the equitable adjustment granted by the board. The government filed a counterclaim, alleging that the claim was tainted by fraud. The issue framed by the court was not the preclusion of fraud, but the truthfulness of the documentary evidence submitted to the contracting officer. The Claims Court held that the government had a full and fair opportunity to litigate the falsity of the contractor's evidence under civil discovery devices and civil standards of proof. Recognizing that the board had no authority to entertain fraud claims, the Claims Court stated that the board had the authority to determine whether the evidence submitted in support of the claims was factually accurate. The Claims Court granted the

<sup>484</sup>ASBCA No. 40579, 90-3 BCA ¶ 23,086.

<sup>485</sup>Contract Cleaning Maint., Inc. v. United States, 811 F.2d 586, 592 (Fed. Cir. 1987).

<sup>486</sup>ASBCA No. 39615, 90-3 BCA ¶ 23,145.

<sup>487</sup>9 FPD ¶ 103 (Fed. Cir. July 16, 1990).

<sup>488</sup>900 F.2d 242 (Fed. Cir. 1990).

<sup>489</sup>See also National Roofing and Painting Corp., United States Fidelity & Guar. Co., ASBCA No. 36551, 90-2 BCA ¶ 22,936.

<sup>490</sup>910 F.2d 835 (Fed. Cir. 1990).

<sup>491</sup>ASBCA No. 31747, 90-1 BCA ¶ 22,577.

<sup>492</sup>21 Cl. Ct. 117, 9 FPD ¶ 113 (1990).

<sup>493</sup>See Ingalls Shipbldg. Div., Litton Sys., ASBCA No. 17717, 76-1 BCA ¶ 11,851. The government did not appeal the board decision.

contractor's motion for summary judgment and entered judgment in the sum of \$17,361,586.

#### *Receipt of Final Decision by Corporate Official Sufficient to Begin Appeal Periods*

*Borough of Alpine v. United States*<sup>494</sup> held that a final decision addressed to the borough's mayor, rather than the borough itself as the contracting party, began the time limits for filing an appeal. The decision is of note because, as the court observed, it was one of those rare occasions in which the Department of Justice asked for flexibility in interpreting the Contract Disputes Act. The government argued that the requirement that a final decision be received by the "contractor" should not be read mechanically.

#### *Liberation of Panama Did Not Excuse Late Filing of Appeal*

*Construiones Electromecanicas*<sup>495</sup> held that the military invasion of Panama did not excuse the late appeal to the board. The military action was not, as alleged, a constructive legal holiday.

#### *Claims Court Procedure*

##### *Sanctions*

Claims Court rules of procedure are generally more strictly enforced than those of Boards of Contract Appeals. In *Claude E. Atkins Enterprises v. United States*<sup>496</sup> the Federal Circuit upheld the Claims Court's sua sponte dismissal of the appellant's appeal for failure to timely file status reports.

##### *Jury Trials*

In *Seaboard Lumber Company v. United States*<sup>497</sup> the Federal Circuit considered a constitutional challenge to the Claims Court's jurisdiction over government counterclaims. The contractors alleged that they were deprived of their right to a jury trial by an article III court. The Federal Circuit held that the Contract Disputes Act was a limited waiver of sovereign immunity that is expressly conditioned on contractor claims and government counterclaims being heard by specialized forums using specialized procedures. When the contractors agreed to their contracts and filed their claims, they waived any right they may have had to a jury trial on the counterclaim.

<sup>494</sup> 19 Cl. Ct. 802, 9 FPD ¶ 46 (1990).

<sup>495</sup> ENG BCA No. PCC-65, 90-2 BCA ¶ 22,864.

<sup>496</sup> 899 F.2d 1180 (Fed. Cir. 1990).

<sup>497</sup> 903 F.2d 1560 (Fed. Cir. 1990).

<sup>498</sup> ASBCA No. 39596 (Aug. 28, 1990).

<sup>499</sup> ASBCA No. 36307, 90-2 BCA ¶ 22,889.

<sup>500</sup> ASBCA No. 37097, 90-3 BCA ¶ 23,245.

<sup>501</sup> ASBCA No. 32651, 90-2 BCA ¶ 22,937.

#### *Board of Contract Appeals Procedure*

##### *Appellant Required to File Special Pleadings*

In *Zinger Construction Company*<sup>498</sup> the ASBCA set forth special rules of procedure for Zinger relating to claims under one specific contract. The procedures required specific pleadings and relieved the government from either answering, or moving to dismiss, until the board was able to conclude that the claims were not barred by previous adverse decisions.

##### *Untimely Government Motion for Summary Judgment Denied*

In *Blake Construction Company*<sup>499</sup> the government filed a motion for summary judgment shortly before trial based upon facts known when the final decision was issued. The ASBCA held that the motion was not timely filed because it did not comply with the board rules requirement that motions be promptly filed.

##### *Late Claims: No Presumption of Prejudice*

In *Delco Systems Operations, Delco Electronics Corporation*<sup>500</sup> the ASBCA held that there is no presumption of prejudice resulting from late assertion of claims. The party asserting the defense of laches must show unreasonable or inexcusable delays and prejudice or injury to itself stemming from the delay. The contractor argued that the late filing of a defective pricing claim resulted in the unavailability of government pricing analysis documents and the memory loss of a government auditor. The board denied the contractor's summary judgment motion, finding that there were genuine issues whether the contractor was actually prejudiced by the late filing of the government claim.

##### *Interest*

In *Newport News Shipbuilding and Drydock Company*<sup>501</sup> the ASBCA awarded interest under the Contract Disputes Act for the Navy's temporary refusal to pay a contractor. The Defense Contract Audit Agency had requested suspension of payments because the contractor was refusing to provide certain documents. The board held that the contractor was entitled to interest from the date the claim was certified until the date the claim is paid. Thus, suspensions of payment, even though requested by another agency, may result in liability for interest.

## Discovery

### *Government Must Pay Cost of Appellant's Cross-Examination at Deposition*

*Duckels Construction, Inc.*<sup>502</sup> involved a government motion to force the appellant to share the costs of a deposition. The government deposed a third party and the appellant cross-examined the individual extensively. The cross-examination took approximately sixty percent of the total time of the deposition. The government sought to allocate the costs of the deposition, but the appellant refused. The board, looking to the federal rule<sup>503</sup> and ASBCA Rule 14(e), held that cross-examination is a right; therefore, the party taking a deposition must expect, and must pay for, appellant's cross-examination. The parties could have agreed to share the cost of the deposition, but did not. Absent such an agreement, the party taking the deposition bears the cost of it.

### *Government Sanctioned for Failure to Cooperate in Discovery*

In *Eagle Management, Inc.*<sup>504</sup> the Air Force failed to produce a witness voluntarily and subsequently failed to produce the witness in response to a board order. The board ruled that it is the representative of the Secretary of Defense and may order the attendance of military witnesses at board proceedings without issuing a subpoena. As a sanction for the nonappearance of the witness, the board found in favor of the contractor.

### *Videotape Depositions Not a Matter of Right at GSBICA*

In *Meredith Relocation Corporation*<sup>505</sup> the GSBICA refused to permit routine videotaped depositions. Instead, the appellant was required to individually request videotaped depositions and show a particularized need for a videotape, rather than a stenographic transcript.

### *Scope of Discovery Limited to Reasonably Viable Claims*

In *I-Net, Inc.*<sup>506</sup> the agency successfully resisted a protester's discovery request before the GSBICA. The board observed that a protester may obtain discovery on any

matter relevant to a claim it reasonably believes viable. Discovery, however, is not a fishing expedition; therefore, discovery will not be ordered for claims with no reasonable basis.

### *Appellant Cannot Obtain Subpoena Without Prior Violation of Board Discovery Order*

After the close of voluntary discovery, the government denied the appellant's request for documents as being untimely. The appellant requested that the board issue a subpoena for the documents and compel the attendance of a government employee as a witness for the appellant. In *Noslot Cleaning Services, Inc.*<sup>507</sup> the board rejected the application for a subpoena as being inappropriate and premature. The board noted that discovery sanctions, to include the issuance of a subpoena, were not imposed for failure to comply with voluntary discovery, but rather only for failure to comply with a board's order.

### *Reconsideration and Appeal of Board Decisions*

#### *No Jurisdiction over Maritime Claims*

*Southwest Marine of San Francisco, Inc. v. United States*<sup>508</sup> considered whether a contractor could appeal a board of contract appeals decision on a shipbuilding claim to the Federal Circuit. Despite the language of 28 U.S.C. section 1295(a)(10) and the CDA,<sup>509</sup> which appear to grant exclusive appellate jurisdiction from decisions of boards of contract appeals to the Federal Circuit, the court refused jurisdiction. It held that admiralty jurisdiction was exclusively vested in the district courts as provided by 28 U.S.C section 1333.

#### *Filing Deadline Excused Because of Appellant's Misfeasance*

*Tom Shaw, Inc.*<sup>510</sup> is a rare case waiving the thirty-day time limit on the filing of motions for reconsideration. The government was permitted to seek reconsideration because the appellant had provided an incomplete document as an exhibit that was central to the board's decision. The board found unusual and compelling circumstances because intentional misconduct was alleged, from which a wrongdoer should not profit.

<sup>502</sup>AGBCA No. 89-218-1, 90-3 BCA ¶ 22,955.

<sup>503</sup>Fed. R. Civ. P. 26(b)(4) and 30(c).

<sup>504</sup>ASBCA No. 35902, 90-1 BCA ¶ 22,513.

<sup>505</sup>GSBCA No. 8956, 90-2 BCA ¶ 22,747.

<sup>506</sup>GSBCA No. 10836-P (Oct. 5, 1990).

<sup>507</sup>IBCA No. 2552, 90-3 BCA ¶ 23,234.

<sup>508</sup>896 F.2d 532 (Fed. Cir. 1990).

<sup>509</sup>41 U.S.C. § 603.

<sup>510</sup>DOT CAB No. 2102, 90-2 BCA ¶ 22,903.

### *Finality of Board Decisions for Purposes of Appeal*

*Teledyne Continental Motors, General Products Division v. United States*<sup>511</sup> addressed the finality of agency board of contract appeals decisions that are based solely on entitlement. The parties stipulated to a trial only on entitlement. The Federal Circuit held that a decision on entitlement only, with a remand to the parties for negotiation of quantum, was not final. The court noted that it would be an inappropriate and inefficient use of appellate resources to render an opinion without understanding the full scope of the underlying decision. Accordingly, no appeal from an adverse decision on entitlement was permitted. The Federal Circuit also noted that permitting an appeal on the question of entitlement before quantum was determined would constitute an advisory opinion, which it is constitutionally prohibited from issuing. The *Teledyne* rationale was followed in *International Gunnery Range Services, Inc. v. United States*.<sup>512</sup>

### **Equal Access to Justice Act**

The Equal Access to Justice Act<sup>513</sup> (EAJA) permits a "prevailing party," who is otherwise qualified under EAJA, to recover attorney's fees and other expenses incurred in connection with the adjudication unless the position of the United States was substantially justified.

#### *Fees for Litigating Fees: May the Government Relitigate the Justification of Its Position?*

The Supreme Court, in *Commissioner v. Jean*,<sup>514</sup> addressed the issue of whether a prevailing party is eligible for fees for services rendered during a subsequent proceeding to litigate entitlement to EAJA fees. In other words, must a court or board make a second finding of no "substantial justification" before awarding any fees and expenses for the fee litigation?<sup>515</sup> The government's position was that unless its position in litigation EAJA fees was not substantially justified, fees for fee litigation should not be recoverable. The applicant argued that fee litigation was part of one integrated proceeding and that once the EAJA statutory prerequisites are met, the fee award presumptively includes fees for fee litigation.

"The reference to the position of the United States in the singular, ... [a]lthough it may encompass both the agency's prelitigation conduct and the Department of Justice's subsequent litigation positions, buttresses the conclusion that only one threshold determination for the entire civil action is required."<sup>516</sup> The Court concluded that requiring separate findings of substantial justification could "spawn a 'Kafkaesque judicial nightmare' of infinite litigation to recover fees for the last round of litigation over fees."<sup>517</sup> Accordingly, the Court held that a single finding that the government's position lacks substantial justification operates as a one-time determination for EAJA fee eligibility and that thereafter the government was precluded from litigating the justification of its position.

### *Recovery of Prelitigation Consultant Expenses Under EAJA*

In a significant departure from prior decisions,<sup>518</sup> the Claims Court awarded a prevailing party fees for its consultant, notwithstanding the fact that virtually all of the expenses for the consultant were incurred to present a claim to the contracting officer and were, at the time of incurrence, unrelated to any litigation. The plaintiff in *Levernier Construction, Inc. v. United States*<sup>519</sup> filed an extensive claim on a construction contract with the contracting officer. The claim was prepared in large part by the consultant. The litigation settled without extensive discovery or trial. The plaintiff then applied for recovery of the consultant's fees under the EAJA arguing that the material originally prepared for the claim to the contracting officer was also essential to its civil litigation. The court allowed recovery of the consultant's claim submission fees. The court reasoned that an "inflexible rule" that disallowed recovery of fees under these circumstances would discourage contractors from presenting "detailed and professional claims."<sup>520</sup> The court believed that this would be an unwise public policy that would discourage settlement at the administrative level. Accordingly, the court noted that

<sup>511</sup>906 F.2d 1579 (Fed. Cir. 1990).

<sup>512</sup>918 F.2d 186 (Fed. Cir. 1990).

<sup>513</sup>5 U.S.C. § 504.

<sup>514</sup>110 S. Ct. 2316 (1990).

<sup>515</sup>The Courts of Appeals have been evenly split on the issue. The Federal, First, Second, and Fifth Circuits have held that no additional finding of substantial justification is required; the Seventh, Eighth, and Ninth have required a second finding of substantial justification.

<sup>516</sup>*Jean*, 110 S. Ct. at 2319.

<sup>517</sup>*Id.* at 2321.

<sup>518</sup>*See Keyava Constr. Co. v. United States*, 15 Cl. Ct. 135, 7 FPD ¶ 88 (1988) (prevailing party not entitled to recover fees and expenses incurred to present claim to contracting officer); *Cox Constr. Co. v. United States*, 17 Cl. Ct. 29, 8 FPD ¶ 61 (1989).

<sup>519</sup>No. 531-87C (Cl. Ct. Oct. 30, 1990).

<sup>520</sup>*Id.* at 19.

we believe contractors should be encouraged to make their best case to the contracting officer. More importantly, ... the study prepared by the consultant was critical to the preparation of Levernier's civil case.... Undoubtedly, Levernier would not have achieved the successful settlement it did,<sup>521</sup> prior to the filing of dispositive motions or prior to trial, had it not convinced the government that its position was well-grounded in fact and law.<sup>522</sup>

While agreeing to allow entitlement to recovery of the consultant's expenses, the court found that the consultant's records lacked sufficient detail to allow the court to determine what services had been performed. Accordingly, the court denied actual payment of virtually all of the expenses.<sup>523</sup>

#### *Substantial Justification*

In *Ener-Tech Automated Control Systems, Inc.*<sup>524</sup> appellant sought attorneys' fees and expenses incurred after it prevailed in obtaining an order converting a default termination to a termination for convenience. The issue in the initial litigation turned on the reasonableness of the contracting officer's belief that the contractor could not perform on time. In sustaining the appeal, the board found as a matter of law that the contracting officer's belief was not reasonable. Notwithstanding this finding, the government defended the EAJA application with an argument that the contracting officer's belief was reasonable. The board held that the government could not relitigate the reasonableness of the contracting officer's belief in its opposition to the appellant's EAJA application.

In *ISC-Serco*<sup>525</sup> the board held that the government could not terminate a contract for default after formal acceptance. The appellant applied for attorneys' fees based on its prevailing in converting the termination for default into a termination for convenience. The board found that the government's actions in default terminating the contractor after acceptance for failing to complete a minor portion of the work was "illogical and unreasonable."<sup>526</sup> The termination was clearly contrary to control-

ling case law that holds that there can be no post-acceptance termination for default.<sup>527</sup> Because the government failed to use an available remedy for the alleged performance failure—that is, the inspection and acceptance clause—and terminated for default when it clearly had no right to do so, the board found that the government's position was not substantially justified and awarded attorneys' fees and expenses.

#### *No Award of Fees in Excess of Statutory Limit*

*ISC-Serco*<sup>528</sup> also directly addressed a common issue in EAJA applications: a request for attorneys' fees in excess of the statutory limit of seventy-five dollars per hour.<sup>529</sup> The board ruled that because DOD had not published a regulation setting forth circumstances that would justify an award of attorneys' fees in excess of the seventy-five-dollar-per-hour statutory limit; the applicant's petition for fees in excess of the limit was denied.

#### *Party Obtaining a Judgment for Less than Final Decision Is Not a Prevailing Party*

In *Tom Shaw, Inc.*<sup>530</sup> the contractor was dissatisfied with a final decision granting it \$1000 entitlement on a \$2,198.46 claim. Tom Shaw appealed the decision. After trial and a motion for reconsideration, the board found that appellant was entitled to a judgment in the amount of \$924.50, plus interest. Appellant then filed an Equal Access to Justice Act application for attorneys' fees. Notwithstanding the appellant's obtaining a judgment in its favor, the board rejected the application for attorneys' fees because appellant commenced the litigation to obtain more money than the contracting officer determined it was entitled to in the final decision. Appellant "not only failed in this quest, but came away with a lesser amount. The appellant would have obtained a greater recovery had it not commenced the litigation.... Under these circumstances it cannot be said that the appellant has prevailed."<sup>531</sup>

#### *Court Not Bound by Stipulation of Parties as to Amount of EAJA Fees*

In *Design and Production, Inc. v. United States*<sup>532</sup> the Claims Court awarded attorneys' fees under the EAJA.

<sup>521</sup>The complainant in this case sought \$839,998. The settlement amount was \$305,552. The attorneys' fees and expenses sought totaled \$114,346.85, of which \$43,170.86 was for the consultant. *Id.* at 2.

<sup>522</sup>*Id.*

<sup>523</sup>Of the original \$43,170.86 claimed, the court allowed recovery of \$786.25. The court found the consultant's billings to be "broad, vague, and general" and insufficient to allow the court to determine reasonableness. *Id.* at 22.

<sup>524</sup>ASBCA No. 31527, 90-3 BCA 23,096.

<sup>525</sup>ASBCA No. 36363, 90-1 BCA ¶ 22,262.

<sup>526</sup>ISC-Serco, ASBCA No. 36363, 90-3 BCA ¶ 23,094.

<sup>527</sup>See GAVCO Corp., ASBCA No. 29763, 88-3 BCA ¶ 21,095.

<sup>528</sup>ASBCA No. 36363, 90-3 BCA ¶ 23,093.

<sup>529</sup>5 U.S.C. § 504.

<sup>530</sup>DOT CAB No. 2105-E, 90-3 BCA ¶ 23,247.

<sup>531</sup>*Id.* at 116,640.

<sup>532</sup>20 Cl. Ct. 207, 9 FPD ¶ 60, *aff'd on reconsideration*, 21 Cl. Ct. 145 (1990).

The government moved for reconsideration of the fee award because it exceeded the amount contained in a stipulation for the entry of judgment the parties submitted to the court. In *Design and Production, Inc. I*<sup>533</sup> the Claims Court held that a stipulation of the parties as to the amount of attorneys' fees does not necessarily bind the court.<sup>534</sup> The original opinion is an excellent primer on analyzing EAJA applications. The opinion on reconsideration addresses the court's obligation to reject a stipulation if the court perceives the agreement to be "contrary to the best interests of justice."<sup>535</sup> Both opinions are valuable sources of applicable law on the award of attorneys' fees under the EAJA.

#### Automatic Data Processing Equipment Acquisitions Is the Standard for ADPE Acquisitions Zero Defects?

In a decision widely viewed as a major retreat from its strict compliance standards, the GSBICA in *Andersen Consulting*<sup>536</sup> held that minor errors in the solicitation process did not justify overturning the award. The awardee was the low cost, high technical proposer and the agency's errors would not have affected the ultimate source selection decision in this instance. The protester did, however, receive bid preparation costs and protest costs. Another decision, *ViON Corporation*<sup>537</sup> is more consistent with the GSBICA's previous decisions. In *ViON Corporation* the agency's failure to comply with guidelines in FIRMR Bulletin 27 was held a violation of law and regulation, and the GSBICA sustained the protest. Accordingly, this decision raises FIRMR Bulletins to the status of acquisition regulations. Construed together, *Andersen Consulting* and *ViON Corporation* indicate that strict compliance does apply in determining whether a violation occurred, but that prejudice is necessary for a directed award.

#### Brooks Act Coverage

##### Defining ADPE: An Expansive Interpretation

*The Electronic Genie, Inc.*<sup>538</sup> specifically held that a standard push button telephone was ADPE because a telephone transmits and receives information. This case

demonstrates that GSBICA interprets ADPE as encompassing a much broader range of products than may be intuitively obvious.

##### Defining ADPE: A Narrow Interpretation

In *Michigan Data Storage*<sup>539</sup> the GSBICA concluded that a computer tape archive contract was not ADPE even though the purpose of the contract was to store and retrieve tapes containing information. The board reasoned that the purpose of the contract was to store tapes—not the information on the tapes—and the incidental use of ADPE to inventory the tapes was not sufficient to bring the contract within the Brooks Act.

##### Significant Use

One of the major expansions of Brooks Act coverage in the Paperwork Reduction Reauthorization Act of 1986<sup>540</sup> was the inclusion of contracts making significant use of ADPE within the scope of the Brooks Act. This incorporation of contracts for automatic data processing equipment has resulted in considerable confusion over the issue of when a contract makes significant use of ADPE. This year has seen some contraction from earlier broad holdings.<sup>541</sup> As a result, the test the GSBICA applies to determine whether a contract makes significant use of ADPE is unclear. In *Vikonics, Inc.*<sup>542</sup> the GSBICA held that installation of a burglar alarm system in a government building under construction was ADPE. In *DRM & Associates, Inc.*<sup>543</sup> a solicitation for guard services did not make a significant use of ADPE because ADPE was not necessarily required to guard a building. *DRM & Associates, Inc.* cited *Sector Technology*,<sup>544</sup> which held that a guard services contract that required guards to interact with a computerized data base, did not make a significant use of ADPE. These decisions appear to retreat from the broad view evidenced just last year. In *Metaphor Computer Systems, Inc.*<sup>545</sup> the board held that sale of scanning data from a retail sales operation was: (1) an acquisition because government received copies of reports prepared by the contractor from the data; and (2) a contract making a significant use of ADPE because

<sup>533</sup> 21 Cl. Ct. 145 (1990).

<sup>534</sup> *Id.* at 145.

<sup>535</sup> *Id.* at 152.

<sup>536</sup> GSBICA No. 10833-P (Nov. 21, 1990).

<sup>537</sup> GSBICA No. 10218-P-REM, 1990 BPD ¶ 352 (Oct. 24, 1990).

<sup>538</sup> GSBICA No. 10571-P, 90-3 BCA ¶ 23,045, 1990 BPD ¶ 143.

<sup>539</sup> GSBICA No. 10954-P (Nov. 21, 1990).

<sup>540</sup> Pub. L. 99-500, 100 Stat. 3341-342 to 3341-344 (1986).

<sup>541</sup> See *National Biosys., Inc.*, GSBICA No. 10332-P, 90-1 BCA ¶ 22,459, 1989 BPD ¶ 354.

<sup>542</sup> GSBICA No. 10575-P, 1990 BPD ¶ 148 (June 8, 1990).

<sup>543</sup> GSBICA No. 10681-P, 1990 BPD ¶ 174 (July 6, 1990).

<sup>544</sup> GSBICA No. 10566-P, 90-2 BCA ¶ 22,908, 1990 BPD ¶ 95.

<sup>545</sup> GSBICA 10337-P, 90-1 BCA ¶ 22,542, 1989 BPD ¶ 393.

reports could be produced only using ADPE. Six months later, in *Norwood and Williamson, Inc.*,<sup>546</sup> the board held that acquisition of engineering drawings revision services that could only be produced using a computer system did not make a significant use of ADPE.

The divergent opinions of the GSBICA on significant use may be curtailed by FIRMR Amendment 19.<sup>547</sup> Amendment 19 implements the 1986 changes to the Brooks Act definition of ADPE. Specifically, the FIRMR now defines a significant use of ADPE to mean:

(A) The service or product of the contract could not reasonably be produced or performed without the use of Federal Information Processing resources; and

(B) The dollar value of Federal Information Processing resources expended by the contractor to perform the service or furnish the product is expected to exceed \$500,000 or 20 percent of the estimated cost of the contract, whichever is lower.<sup>548</sup>

#### *Warner Amendment Exemptions to Brooks Act*

In *Cryptek, Inc.*<sup>549</sup> fax machines for the war on drugs were held to involve intelligence activities and were exempt from the Brooks Act. The GSBICA held that intelligence activities include the transmission of information to civilian law enforcement authorities. This decision reflects the board's tendency to treat intelligence-related ADPE acquisitions more deferentially than other possible Warner exception acquisitions.

In *Information Systems & Networks Corporation*<sup>550</sup> the GSBICA found that an intrusion detection system was critical to the direct fulfillment of a military mission. The mission was safeguarding lives and property. The facts that the alarm systems were congressionally mandated, were for use on bases overseas, and responded to specific terrorist threats appeared to heavily influence the board's decision.

<sup>546</sup> GSBICA No. 10717-P, 1990 BPD ¶ 217 (Aug. 13, 1990).

<sup>547</sup> 55 Fed. Reg. 30,702 (1990).

<sup>548</sup> 40 C.F.R. § 201-2.001.

<sup>549</sup> GSBICA No. 10680-P, 1990 BPD ¶ 247 (Aug. 27, 1990).

<sup>550</sup> GSBICA No. 10775-P, 1990 BPD ¶ 296 (Oct. 1, 1990).

<sup>551</sup> GSBICA No. 10369-P, 90-1 BCA ¶ 22,582, 1989 BPD ¶ 374. This case is pending appeal before the Court of Appeals for the Federal Circuit. Practitioners should anticipate a definitive decision on subcontractor protests in the coming year.

<sup>552</sup> GSBICA No. 10450-P, 90-2 BCA ¶ 22,735, 1990 BPD ¶ 55.

<sup>553</sup> GSBICA No. 10450-P, 1990 BPD ¶ 12 (Jan. 10, 1990).

<sup>554</sup> GSBICA No. 10551-P, 90-3 BCA ¶ 22,960, 1990 BPD ¶ 130.

<sup>555</sup> FIRMR 30.009-3; 30.012(c)(1).

<sup>556</sup> FIRMR 30.007.

<sup>557</sup> GSBICA No. 10331-P, 90-2 BCA ¶ 22,883, 1989 BPD ¶ 385.

<sup>558</sup> GSBICA No. 10598-P, 90-3 BCA ¶ 23,062, 1990 BPD ¶ 157.

#### *Applicability of the Brooks Act to Subcontracts*

*International Technology Corporation*<sup>551</sup> is yet another case extending the Brooks Act to subcontracts. In this protest, a NASA technical services prime contractor was soliciting a subcontractor to supply computers for NASA. The GSBICA applied the Brooks Act to the subcontract and held that the delegation of procurement authority (DPA) for the prime contract did not cover the subcontract. NASA was directed to obtain a separate DPA.

#### *Change Orders*

In *MCI Telecommunications Corporation*<sup>552</sup> the board reviewed whether a change order was outside the general scope of the FTS 2000 contract. An earlier decision<sup>553</sup> held that the GSBICA would not review proposed modifications because the agency's action was not ripe for decision. On the merits, the board found the modification within the general scope of the contract relying heavily on the future requirements provisions of the contract.

#### *ADPE Specifications*

##### *Acquisition Planning*

In *Federal Systems Group, Inc.*<sup>554</sup> the failure of the government formally to justify a compatibility limited requirement and to perform a software conversion study required by the FIRMR<sup>555</sup> was excused because a requirements analysis<sup>556</sup> justified the compatibility limitation. There was no prejudice to offeror.

##### *Commercial Products*

A common solicitation requirement in ADPE acquisitions is that equipment and software be commercially available. In *C & P Telephone Company*<sup>557</sup> the GSBICA directed termination of a contract awarded to AT&T because the offered ADPE was not commercially available as defined in the RFP. In *AT&T Paradyne Corporation*<sup>558</sup> the GSBICA permitted the agency to waive a

commercial-off-the-shelf requirement and to award to AT&T's competitor. The difference in the two cases was that in the latter acquisition, the government reserved the right to approve noncommercial products. Any solicitation that requires commercial availability should have a similar waiver provision to avoid this type of protest.

#### *GSBCA Review of Agency Needs Determination*

The role of the General Services Board of Contract Appeals in reviewing agency needs determinations was limited in *Data General Products Corporation v. United States*.<sup>559</sup> The Federal Circuit observed that the Brooks Act specifically prohibits the GSBCA from substituting its own judgment for that of the agency in determining that agency's needs.<sup>560</sup> Because the GSBCA directed the agency to revise its solicitation to reflect the board's opinion of what the agency's needs really were, the board acted illegally. This decision substantially limits the scope of the board's review of agency specifications because the board traditionally reviews such decisions de novo and frequently has substituted its own judgment for that of the agency when it perceives that the requirements are not rationally supported.<sup>561</sup>

#### *GSBCA Establishes a Protester's Burden of Proof*

In a significant pre-*Data General Products*<sup>562</sup> requirements determination decision, the GSBCA declined to require an exhaustive statement of the agency's minimum needs. In *Rocky Mountain Trading Company—Systems Division*<sup>563</sup> the protester alleged that the agency did not perform an adequate requirements study to determine precisely its minimum needs for new technology. Instead, the agency defined its requirements based on the characteristics of commercially available equipment that could perform the required functions. The GSBCA held that the protester failed to carry its burden of proof that the agency overstated its minimum needs. Accordingly, the protest was denied. In light of the *Data General*<sup>564</sup> decision by the Federal Circuit, this protest may well be one of the last ones to question an agency's articulation of its requirements.

<sup>559</sup> 915 F.2d 1544 (Fed. Cir. 1990).

<sup>560</sup> 41 U.S.C. § 759(e).

<sup>561</sup> See *PacificCorp Capital, Inc.*, GSBCA No. 10711-P, 1990 BPD ¶ 273 (Sept. 19, 1990).

<sup>562</sup> *Data General Prods. Corp. v. United States*, 915 F.2d 1544 (Fed. Cir. 1990).

<sup>563</sup> GSBCA No. 10723-P, 1990 BPD ¶ 275 (Sept. 20, 1990).

<sup>564</sup> *Data Gen. Prods. Corp. v. United States*, 915 F.2d 1544 (Fed. Cir. 1990).

<sup>565</sup> 906 F.2d 1564 (Fed. Cir. 1990).

<sup>566</sup> *ViON Corp.*, GSBCA No. 10218-P, 90-1 BCA ¶ 22,287, 1989 BPD ¶ 284.

<sup>567</sup> *Id.* at 111,941.

<sup>568</sup> *ViON*, 906 F.2d at 1567.

<sup>569</sup> *Id.* at 1566.

<sup>570</sup> *Id.* at 1568, n. 5.

<sup>571</sup> Comp. Gen. Dec. B-237325 (Jan. 24, 1990), 90-1 CPD ¶ 101.

#### *Standards for Dismissing Protest as Frivolous*

In *ViON Corporation v. United States*<sup>565</sup> the GSBCA dismissed a bid protest because it found that ViON was not prosecuting the protest fairly and that its motives in initiating the protest were not "genuine."<sup>566</sup> In response to an earlier government motion to dismiss the protest as frivolous, the GSBCA had made a specific finding that there "was a genuine basis of protest which was factually supported by alleged facts and circumstances."<sup>567</sup> In subsequently dismissing the protest, the GSBCA found that ViON had not cooperated with the board's discovery order and was, thereby, obtaining an unfair advantage in the prosecution of the protest. Notwithstanding language in the board's dismissal order to the contrary, the Federal Circuit found the dismissal to be based, at least in part, on ViON's lack of cooperation in discovery.<sup>568</sup> Accordingly, the Federal Circuit reversed the GSBCA holding that if a protest has an arguable basis in law or fact, by definition it cannot be frivolous. If the protest has an appropriate basis, the protester's subjective motivation and conduct during discovery is irrelevant to a determination of frivolousness.<sup>569</sup> In a footnote, the court declined to comment on whether ViON could be sanctioned for prior discovery misconduct or whether dismissal might be an appropriate sanction for future discovery problems.<sup>570</sup>

#### *Socioeconomic Policies*

##### *Small Business Cases*

##### *Responsibility and Technical Unacceptability Distinguished*

In *Environmental Technologies Group, Inc.*<sup>571</sup> the Army issued a total small business set-aside request for proposals (RFP) for radiation detection kits. The RFP required offerors to comply with a standard quality control specification. The protester based its offer on a less stringent quality control system. The Army rejected the proposal as technically unacceptable and awarded to the next eligible low bidder. Environmental Technologies Group argued that its ability to meet quality control

standards was a traditional responsibility matter and that the contracting officer was required to refer the matter to the SBA for issuance of a certificate of competency (COC).<sup>572</sup> The GAO found that the proposal was rejected because it was technically unacceptable. In addition, the GAO distinguished this result from a situation in which the contracting officer finds the offeror nonresponsible because of a question concerning the offeror's ability to produce an acceptable product. Only in the latter case is referral to the SBA required.

#### *Evaluation of Past Performance*

In *Lock Corporation of America*<sup>573</sup> an agency attempted unsuccessfully to apply the rationale of *Environmental Technologies Group*. In November 1989, Federal Prison Industries, Inc. (FPI) terminated for default a contract performed by Lock Corporation of America to supply locks and keys. In January 1990, FPI issued a small business set-aside solicitation to reprocur these same items, and Lock Corporation of America submitted the low, responsive bid. The contracting officer determined that it was "not prudent" to award to Lock Corporation of America based on its previous poor performance. The contract, therefore, was awarded to the next low offeror, but without referring the matter to the SBA for issuance of a COC. Relying on *Environmental Technologies Group*, FPI argued that recent events made it clear that Lock Corporation of America was unable to meet the technical and delivery requirements of the contract. The GAO, however, distinguished *Environmental Technologies Group* by finding the rejection of an offer that does not propose to meet the quality assurance requirements of the RFP to be substantively different from the refusal to award a contract based upon a concern about the offeror's ability to perform. The GAO, consequently, sustained the protest.

#### *Evaluation of Financial Condition*

In *Flight International Group, Inc.*<sup>574</sup> the Navy rejected a small business's offer because the Source Selection Advisory Council found the protester's management proposal too risky. The protester proposed to sell its company to solidify its financial standing and also proposed to waive any "fee"—that is, any projected

profit. The GAO held that these concerns raised doubts as to the financial responsibility of the protester. Because the evaluation scheme did not advise offerors that their financial condition would be evaluated, however, financial condition could only be properly considered as a responsibility factor. Accordingly, the contracting officer should have forwarded such a finding to the SBA under the COC process before rejecting the proposal on this basis. The GAO recommended that if a COC was issued, the contract should be terminated for convenience of the government and award made to the protester.

#### *Management and Operating Contractor Not Required to Comply With Certificate of Competency Process*

In *Miklin Corporation—Request for Reconsideration*<sup>575</sup> the GAO opined that a management and operating (M&O) contractor was not required to comply with the COC process. In this case the Department of Energy's (DOE) M&O contractor, Rockwell Corporation, solicited small businesses to perform construction work at DOE's nuclear facility. Rockwell found Miklin Corporation nonresponsible because it had unsatisfactorily performed a previous construction subcontract for Rockwell. On the initial protest,<sup>576</sup> the GAO found no evidence to suggest that Rockwell's determination was unreasonable. Miklin Corporation requested reconsideration of the initial decision, arguing that Rockwell failed to submit the non-responsibility determination made by "the contracting officer" to the SBA.<sup>577</sup> The GAO found that the term "contracting officer," as set forth in the FAR and in the SBA regulations, refers to a "government" official, not the M&O contractor's personnel, who in this case actually issued the negative determination. The GAO further found that there was no privity of contract between the subcontractor and the government. Moreover, it pointed out that DOE regulations specifically state that M&O contractor purchases are not federal procurements, but are merely subject to the "federal norm" and other DOE-imposed contractual requirements. According to the GAO, "federal norm" relates only to the fundamental federal competition principles—it does not apply to all statutory and regulatory provisions applicable to prime contracts, such as the COC program. Additionally, the GAO found that there was no contractual provision included by DOE through which the COC requirement "flowed down" to the M&O contractor.

<sup>572</sup> 15 U.S.C. § 637(b)(7)(A); see FAR 19.602-1. The SBA ultimately reviews a contracting officer's negative responsibility determination and either issues a COC if it finds the concern responsible, or declines to do so if the offeror is nonresponsible. The COC is conclusive on all elements of responsibility.

<sup>573</sup> Comp. Gen. Dec. B-238886 (July 5, 1990), 90-2 CPD ¶ 12.

<sup>574</sup> Comp. Gen. Dec. B-238953.4 (Sept. 28, 1990), 90-2 CPD ¶ 257.

<sup>575</sup> Comp. Gen. Dec. B-236746.3 (June 8, 1990), 90-1 CPD ¶ 540.

<sup>576</sup> Miklin Corp., Comp. Gen. Dec. B-236746.2 (Jan. 19, 1990), 90-1 CPD ¶ 72.

<sup>577</sup> FAR 19.602-1.

*Certificate of Competency Required on Contract  
for Lease of Government Property*

In 1989, NASA proposed to sell satellite system "services" to the highest, responsible bidder. These "services" consisted of the exclusive right to control and use satellite transponders. Columbia Communications Corporation, a small business, out-bid its competitors by \$10 million. NASA, however, found Columbia nonresponsible and awarded the six-year contract to the next highest bidder. Columbia Communications sought injunctive relief, claiming that NASA should have referred the non-responsibility determination to the SBA. In *Columbia Communications Corporation v. Truly*<sup>578</sup> the court granted summary judgment for Columbia Communications. The court rejected NASA's arguments that the contract was for satellite "services" and not property. Based on a reading of the solicitation and other relevant authorities, the court concluded that the solicitation was for the use of property, rather than for the provision of services. The court also found that "disposal of property," which was the operative statutory term, included the sale, lease, or permit for use of government property. Accordingly, the court ordered NASA to submit its non-responsibility determination to the SBA.

*Post-Award Size Protests*

*United Power Corporation*<sup>579</sup> involved a post-award size protest. The RFP was issued as a total small business set-aside. The agency determined the competitive range to include the protester and EPE Technologies (EPE). A contract was awarded to EPE on the basis of initial proposals, without first notifying unsuccessful offerors as required by FAR 15.1001. The agency's action was prompted by an impending administrative "freeze" on the use of the funds contemplated for this contract. The contracting officer determined that award was urgent and decided to forego the notice requirement on this basis. After award, United Power filed its size protest and the SBA found that EPE was a large business. Despite the SBA's determination, the agency refused to terminate the EPE contract, and United Power protested.

On review, the GAO opined that if the contracting officer reasonably finds that award without notice is in the public interest, a size protest filed after award is untimely and does not affect the current procurement. The GAO, however, concluded that in this instance there

would have been sufficient time to process a size protest prior to award and that neither the funding freeze, nor the delay involved in seeking an exception to the freeze, would justify a finding of urgency that would allow award without notice. The GAO recommended that the agency terminate EPE's contract for convenience and award to United Power.

In a later case the GAO noted in dicta the difference between FAR and SBA size status protest timeliness rules. The FAR provides that size status protests filed with the contracting officer after award do not apply to the current procurement.<sup>580</sup> In *Eagle Design and Management, Inc.*<sup>581</sup> the GAO recognized, however, that under new SBA regulations on negotiated procurements,<sup>582</sup> if the contracting officer receives a protest within five days of the protester's receipt of a proposed awardee's identity, the protest will apply to the procurement in question even if award has already been made. If the post-award protest is timely under the new SBA regulations and the SBA determines that the awardee is a large business, the agency should consider terminating the contract for convenience despite the timeliness guidance set forth in the FAR.

*Joint Ventures and SDB Set-Asides*

*O.K. Joint Venture*<sup>583</sup> involved a construction contract set-aside for small disadvantaged businesses (SDBs). O.K. Joint Venture was a joint venture between O'Bryan Construction (an SDB concern) and Kurtz Construction (a non-SDB concern). Although it was the low bidder, the contracting officer rejected its bid after finding that it did not meet the SDB criteria set forth in the IFB. In pertinent part, the solicitation defined an SDB as a concern that is at least fifty-one-percent owned and controlled by a socially and economically disadvantaged individual and to which a majority of the earnings would directly accrue. The contracting officer determined that under the terms of the joint venture agreement, Kurtz Construction would provide the bonding and most of the equipment for the project. The contracting officer also concluded that O'Bryan Construction lacked the funds and experience necessary to control the day-to-day activities of the project and probably would not be able to perform at least fifteen percent of the work with its own labor force as required by the SBA regulations.<sup>584</sup> The GAO denied O.K. Joint Venture's protest, finding the contracting officer's determination to be reasonable considering all

<sup>578</sup>No. 89-2763 (D.D.C. Jan. 30, 1990).

<sup>579</sup>Comp. Gen. Dec. B-239330 (May 22, 1990), 90-1 CPD ¶ 494.

<sup>580</sup>FAR 19.302(j).

<sup>581</sup>Comp. Gen. Dec. B-239833, Comp. Gen. Dec. B-239833.2, Comp. Gen. Dec. B-239833.3 (Sept. 28, 1990), 90-2 CPD ¶ 259.

<sup>582</sup>13 C.F.R. § 121.1603 (1990).

<sup>583</sup>69 Comp. Gen. 200 (1990), Comp. Gen. Dec. B-237328 (Feb. 9, 1990), 90-1 CPD ¶ 170.

<sup>584</sup>13 C.F.R. § 124.314(a)(3) (1990).

cited factors. In particular, the GAO found it doubtful that a majority of the earnings would go to O'Bryan Construction because the joint venture agreement required O'Bryan Construction to use accrued profits from the project to repay Kurtz Construction for the working capital Kurtz Construction advanced to fund the project.

#### *No Ten-Percent SDB Evaluation Preference When There Are No Small Business Sources*

*Baszile Metals Service*<sup>585</sup> involved an unrestricted acquisition of aluminum sheet and plate. An SDB concern that is a regular dealer is entitled to a ten-percent evaluation preference if it provides a product manufactured by a small business concern.<sup>586</sup> The protester, an SDB, was not an aluminum manufacturer and could not certify that it would provide aluminum from an SDB because there actually were no small business manufacturers of aluminum. The contracting officer, therefore, did not apply the ten-percent SDB evaluation preference. The protester complained that the regulation improperly denied SDBs the evaluation preference when there were no small businesses available to provide the product. The GAO found that DOD had broad discretion to implement the congressionally-mandated goal of awarding contracts to socially and economically disadvantaged concerns. As a matter of policy, it is within DOD's discretion to determine that paying a premium price to SDBs that provide items from a large business does not promote the development of small businesses and SDB manufacturers. Accordingly, the decision not to apply the ten percent evaluation preference to an SDB's price when there are no SDB or small business manufacturers is reasonable.

#### *COC Procedures Apply Outside the United States*

In *Discount Machinery & Equipment, Inc.*<sup>587</sup> the Panama Canal Commission found the protester, a United States small business, nonresponsible and rejected its bid without referring the action to the SBA. Discount Machinery & Equipment protested, and the Panama Canal Commission argued that it was not subject to the COC procedures because FAR 19.000(b) provides that FAR part 19 applies only inside the United States, its territories and possessions, Puerto Rico, and the District

of Columbia. In a case of first impression, the GAO sustained Discount Machinery & Equipment's protest, finding that the Panama Canal Commission should have referred its determination to the SBA. The GAO emphasized that the Small Business Act is intended to protect small United States businesses and that the nationality of the small business is controlling—not the location of the agency.

#### *Claims Court Orders Agency to Apply SDB Evaluation Preference to All Line Items*

The Air Force issued an unrestricted RFP for natural gas that provided for award to the contractor offering the lowest overall price. The schedule included four line items, two that were fixed for all offerors (supply and transportation index prices) and two that required offerors to submit a numerical factor by which fluctuating index prices would be adjusted during performance to determine profit. The RFP also included the ten-percent SDB evaluation preference. During its evaluation, the agency applied the preference to the *adjustment* line items only, and Commercial Energies, Inc., protested to GAO arguing that the DFARS required application of the preference to the total contract cost—not only the adjustment factors. Relying on its decision in *Hudson Bay Natural Gas Corporation*,<sup>588</sup> the GAO denied the protest finding it reasonable to apply the preference only to portions of the contract that were priced by the offerors and not subject to fluctuation.<sup>589</sup> Commercial Energies then filed an action in the Claims Court, and in *Commercial Energies, Inc. v. United States*<sup>590</sup> the court found the GAO's *Commercial Energies* opinion erroneous and the agency's reliance on *Hudson Bay Natural Gas* unreasonable for two reasons. First, the DFARS requires application of the preference to *all* line items on which award will be based. Because the RFP provided that award would be made on the basis of *all* line items, the agency should have applied the preference to the adjustment factors. Second, the agency's scheme would negate the preference if a non-SDB proposed an adjustment factor of "zero" because applying the ten-percent factor to "zero" would not increase the non-SDB price. The court ordered the agency to apply the preference to all line items, but also provided that the agency could issue a new RFP with fewer line items.<sup>591</sup>

<sup>585</sup> Comp. Gen. Dec. B-237925, Comp. Gen. Dec. B-238769 (Apr. 10, 1990), 90-1 CPD ¶ 378. Although the protest was untimely, it was considered under the significant issue exception to the timeliness rules.

<sup>586</sup> DFARS 219.7001, 252.219-7007.

<sup>587</sup> Comp. Gen. Dec. B-240525 (Nov. 23, 1990).

<sup>588</sup> 69 Comp. Gen. 188 (1990), Comp. Gen. Dec. B-237264 (Feb. 5, 1990), 90-1 CPD ¶ 151 (when line items consisted solely of adjustment factors, agency reasonably limited application of evaluation preference to those factors).

<sup>589</sup> *Commercial Energies, Inc.*, Comp. Gen. Dec. B-237572 (Feb. 7, 1990), 90-1 CPD ¶ 160.

<sup>590</sup> 20 Cl. Ct. 140, 9 FPD ¶ 56 (1990).

<sup>591</sup> The Air Force revised its RFP by deleting the index price line items and providing that award would be based on the remaining adjustment factor line items. The Claims Court approved this method. *Commercial Energies, Inc. v. United States*, No. 90-300C, slip op. (Cl. Ct. June 29, 1990), cited in *SDS Petroleum Prods., Inc.*, Comp. Gen. Dec. B-239534 (Aug. 28, 1990), 90-1 CPD ¶ 164.

*Competitiveness Demonstration Program Is Not an Exemption from Requirement to Set-Aside for SDBs*

In *Kato Corporation*<sup>592</sup> the Air Force issued an unrestricted IFB for base housing maintenance (construction). This requirement had previously been procured by means of small business set-asides. Kato Corporation protested, arguing that the contracting officer should have set aside the acquisition for SDBs because the regulatory prerequisites were met.<sup>593</sup> The Competitiveness Demonstration Program (CDP)<sup>594</sup> provides that competition in certain industry groups, including construction, should not be considered for small business set-asides unless otherwise required. The Air Force contended that because the DFARS implementation of the CDP merely required contracting officers to continue to consider CDP exempt acquisitions for SDB set-asides, the contracting officer had discretion not to set this acquisition aside for SDBs.<sup>595</sup>

The GAO sustained Kato Corporation's protest, ruling that the CDP expressly provides that the CDP exemptions do not affect set-asides under DOD's SDB program. The GAO concluded that the DFARS language implementing the CDP does not alter the contracting officer's obligation under the SDB set-aside provisions of the DFARS to issue a solicitation as an SDB set-aside if the criteria are present. The GAO recognized that once an acquisition has been successfully competed as a regular small business set-aside, as was the case here, there is no requirement to resolicit the requirement as an SDB set-aside.<sup>596</sup> It found, however, that because the CDP eliminated the protection of regular small business in the construction industry, the agency could not invoke this exception to the general requirement to consider SDB set-asides.

*Award to Large Business Improper When No Small Business Offers Are Received*

*Ideal Services, Inc. and J. L. Associates, Inc.*<sup>597</sup> involved a succession of post-award size status protests in which the SBA found all offerors to be large businesses. As a result, the contracting officer withdrew the set-aside and "reinstated" the award to the original awardee, Crown Support Services, Inc. *Ideal Services*—one of the original bidders—protested, contending that

award to a large business was improper because the requirement originally had been solicited as a set-aside. The Army argued that the SBA size ruling only rendered the award to Crown Support Services as a small business voidable. The GAO disagreed and held that the solicitation should be cancelled and a new unrestricted solicitation issued, to allow large businesses that were excluded because of the set-aside solicitation to submit offers.

*Contract Void for Failure to Certify Affiliates Properly*

In *C&D Construction, Inc.*<sup>598</sup> the contractor appealed a final decision denying its claim for the costs associated with a differing site condition and compensable delay. The government argued, in part, that the appellant was not entitled to an adjustment because the contract was void for fraud. The government contended that the contractor intentionally failed to certify in its offer on a total set-aside that it was affiliated with another contractor and several other financial backers. The board found that the contracting officer was not aware of the undisclosed affiliations, that the contracting officer relied on the misrepresentation in awarding the contract, and that the misrepresentation did harm to the integrity of the contracting process. The board held that the contract was therefore void and it denied appellant's appeal without addressing the merits of the claims.

*Court Orders SBA to Accept Agency Requirement Under the 8(a) Program*

In *Woerner v. United States Small Business Administration*<sup>599</sup> the SBA failed to respond to an agency's offer of a requirement under the 8(a) program within the fifteen days permitted under SBA regulations.<sup>600</sup> The prospective 8(a) contractor sought injunctive relief, alleging that the SBA willfully violated its own regulation. The court agreed and stayed further SBA action on the matter. After a show cause hearing, the court declared that the SBA, by not responding to the agency's 8(a) offer, had waived its right to reject the proposal and ordered the SBA to accept the requirement under the 8(a) program. In a later action in the same case, the court refused to order the SBA to allow the contractor to participate in the 8(a) program past its October termination date.

<sup>592</sup>Comp. Gen. Dec. B-237965 (Apr. 3, 1990), 90-1 CPD ¶ 354.

<sup>593</sup>48 C.F.R. 219.502-70(a) provides that a procurement shall be set aside for SDBs if the contracting officer determines there is a reasonable expectation that: (1) offers will be obtained from at least two responsible SDB concerns; and (2) award will be made at a price not exceeding the fair market price by more than 10%.

<sup>594</sup>Small Business Competitiveness Demonstration Program, Pub. L. No. 100-656, 102 Stat. 3889, 3892 (1988).

<sup>595</sup>The Air Force had initially contended that the CDP exempted construction (base housing maintenance) from the SDB set-aside requirements.

<sup>596</sup>48 C.F.R. 219.502-72(b)(1).

<sup>597</sup>Comp. Gen. Dec. B-238927.2, Comp. Gen. Dec. B-238927.3, Comp. Gen. Dec. B-238927.4 (Oct. 26, 1990), 90-2 CPD ¶ 335.

<sup>598</sup>ASBCA No. 38661, 90-3 BCA ¶ 23,256.

<sup>599</sup>739 F. Supp. 641 (D.D.C. 1990).

<sup>600</sup>Under SBA regulations, if an agency offers a requirement for acquisition under the 8(a) program, the SBA has 15 days to accept, reject, or appeal the proposal. 13 C.F.R. 124.308(d).

## Labor Standards

### *Education Contract Not Subject to Service Contract Act*

In *J. L. Associates, Inc.*<sup>601</sup> NASA decided not to include Service Contract Act (SCA) clauses in its solicitation for an aerospace education services program. The solicitation called for twenty-nine "aerospace education specialists" to visit schools, workshops for elementary and secondary school teachers, museums, and planetaria. The staffing plan also required at least eight part-time "administrative assistants." J. L. Associates argued that the contracting officer attempted to avoid the SCA's requirements by improperly classifying the latter personnel, whom it believed should have been designated "secretaries," an employee classification subject to the SCA. The GAO initially found that J. L. Associates did not dispute NASA's classification of the "aerospace education specialists" as professionals, who are not subject to the SCA. Moreover, whether NASA labeled the other workers as secretaries or administrative assistants was irrelevant because the principal purpose of the contract was to obtain professional services through the use of educational specialists. Because the SCA only applies to contracts whose principal purpose is the provision of services through service employees, the GAO concluded that it was immaterial how NASA classified the non-professional employees.

### *Agency's Waiver of the SCA Wage Rates in Evaluating Awardee's Proposal Was Improper*

*Unified Industries, Inc.*<sup>602</sup> involved a Navy RFP for ADPE support. The RFP required offerors to submit hourly rates for employees subject to the SCA. After award, Unified Industries claimed, in part, that the awardee proposed labor costs below those set forth in the RFP's wage determination. The Navy defended on the ground that its cost realism analysis showed the offeror could reduce the wage shortfall by applying some of its fee to labor costs. The GAO concluded that the Navy should have adjusted the awardee's labor costs upward because, in failing to do so, it deprived Unified Industries of the opportunity to compete equally with the awardee.

### *Protest Sustained When Agency Disregards Department of Labor Ruling that SCA Applies*

The Government Printing Office (GPO) issued a solicitation to have the Federal Catalog System (FCS) trans-

ferred from microfiche to compact discs. Information Handling Services protested to the Department of Labor (DOL) when GPO amended the solicitation to delete SCA clauses, which are applicable to service contracts, and incorporate Walsh-Healey clauses, which are applicable to supply contracts. The DOL found that the SCA was applicable and requested that GPO abide by regulatory notice requirements.<sup>603</sup> The GPO did not respond to the DOL or incorporate SCA clauses. Information Handling Services protested to the GAO alleging that the GPO improperly disregarded the DOL's determination that the SCA applied. In *Information Handling Services, Inc.*<sup>604</sup> the GAO opined that an agency is not required to comport with DOL notice rules if the agency reasonably determines that the SCA does not apply. The GAO agreed with the protester in this instance, finding that the GPO acted arbitrarily and violated DOL regulations, because the GPO was not free to disregard the DOL's determination that the SCA applied. The GAO recommended that the agency either suspend action pending reconsideration by the DOL or issue a proper notice of intent to make a service contract.

### *Agency Clause Improper Because It Places Ceiling on Adjustment for Wage Rate Increase*

In *IBI Security Service, Inc.*<sup>605</sup> the GAO found that a GSA wage rate adjustment clause did not comply with the FAR policy underlying adjustments in contract price based on wage rate increases<sup>606</sup> primarily because the clause imposed a ten-percent cap on adjustments. The GSA clause was meant to force contractors to bargain aggressively with local unions to keep option-year labor costs reasonable. The GAO opined that the GSA scheme would likely prompt a contractor to overestimate future labor costs as a hedge against the GSA limitation, whether rates were negotiated or based on those prevailing in the area. The GAO concluded that GSA lacked authority to use this clause because it did not "accomplish the same purpose" as the FAR clause, and recommended resolicitation using a clause that comported with the FAR.

### *GSSBCA Denies Claim for Vacation Pay Price Adjustment*

As a general rule, a contractor is entitled to a price adjustment when it increases labor costs to comply with a

<sup>601</sup> Comp. Gen. Dec. B-236698.2 (Jan. 17, 1990), 90-1 CPD ¶ 60.

<sup>602</sup> Comp. Gen. Dec. B-237868 (Apr. 2, 1990), 90-1 CPD ¶ 346.

<sup>603</sup> 29 C.F.R. § 4.4 (1990); FAR 22.1007.

<sup>604</sup> Comp. Gen. Dec. B-240011 (Oct. 17, 1990), 90-2 CPD ¶ 306.

<sup>605</sup> Comp. Gen. Dec. B-239569 (Sept. 13, 1990), 90-2 CPD ¶ 205.

<sup>606</sup> FAR § 22.1006(c)(1) requires agencies to use the clause appearing at 52.222-43 or any clause that "accomplishes the same purpose" as this clause. FAR 52.222-43, mandatory for fixed-price service contracts, allows recovery of certain costs because of labor rate increases issued by DOL. The FAR clause is intended to ensure that contractors do not pad their offers to protect against escalating labor costs attributable to revised wage rate determinations.

new wage rate determination.<sup>607</sup> *Gricoski Detective Agency*<sup>608</sup> involved a one-year service contract with two option years. Appellant did not include vacation pay costs in its bid because in the first year of the contract its employees would not be entitled to paid vacations. In its request for an equitable adjustment for the first option year, the appellant included these costs, but the contracting officer disallowed them. On appeal, the GSBCA denied the claim, opining that because the solicitation allowed bidders to include option-year prices that varied from those of the base year, the appellant should have bid vacation costs for the option years knowing that its employees would be entitled to them after the first year of the contract. An adjustment might have been authorized if the new wage rate determination had increased the original entitlement to a one-week paid vacation, but the vacation benefit remained the same.

#### *Contractor Not Entitled to Adjustment for Increased Insurance Premiums*

The base operations support contract in *Morrison-Knudsen Services, Inc., & Harbert International, Inc.*<sup>609</sup> contained a clause that allowed a price adjustment for option-year SCA wage rate increases issued by the DOL. Workmen's compensation and health insurance premiums were also compensable if increased due to mandatory wage or fringe benefit increases. After the start of the first option year, appellant claimed the additional costs of general liability and employers' liability insurance premiums. The contracting officer denied the claim. On appeal, appellant argued these insurance premiums were compensable because they increased with the wage rate increases. Appellant also contended that employers' liability insurance fell within the definition of workmen's compensation. The ASBCA denied the appeal, finding that the clause allowed adjustments only for specific insurance premiums. It also found that the fact that the premiums were tied to wage rate increases was not controlling. In addition, the board found that the employers' liability insurance was significantly different than workmen's compensation insurance, and its premiums were not compensable under the terms of the contract.

#### *Court Dismissed Employee Suit for Wage Underpayment Brought Under the Racketeer Influenced and Corrupt Organizations Act (RICO)*

In *Danielsen v. Burnside-Ott Aviation Training Center*<sup>610</sup> the plaintiffs filed a RICO suit, claiming that the

defendants defrauded them of wages by knowingly using employee classifications that did not conform with those issued by the DOL. Plaintiffs also alleged that the defendants used the mails and altered documents to induce the requiring activity, DOL, and defendant's employees to believe that the defendants were properly paying the employees. The court found that the complaint was merely an attempt to obtain treble damages for violations of the Service Contract Act because of wage underpayments. In dismissing the action, the court concluded that the SCA did not create a private right of action and, with its comprehensive regulatory and enforcement scheme for resolving labor disputes, preempted the more general RICO statute relied on by the plaintiffs. The plaintiffs' only recourse at that point was to continue following the DOL's administrative procedures to recover the alleged wage underpayments or obtain sanctions against their employer.

#### *"Delivery Drivers" Covered by Davis-Bacon Act*

In *Building & Construction Trades Department, AFL-CIO v. Secretary of Labor*<sup>611</sup> the court held that drivers who work for construction contractors and deliver material to the worksite are employed "directly on the site" for purposes of Davis-Bacon Act (DBA) coverage. The contractor, who paid his delivery drivers less than the DBA rate, argued that "directly on the site" means physically on the site for the entire work day. The court, however, opined that by this language, Congress merely intended to withhold coverage from employees of manufacturers and materialmen, but intended to cover employees on a construction contractor's payroll who were working on the government contract. The court also concluded that the DBA does not define "directly on the site" and assuming the phrase is ambiguous, the DOL's interpretation is consistent with the intent of the statute.

#### *Court Dissolves Ban on Use of Helpers on Government Construction Projects*

In *Building and Construction Trades Department, AFL-CIO v. Dole*<sup>612</sup> the district court held that a revised DOL regulation<sup>613</sup> governing the use of helpers was consistent with the DBA. Earlier, the Court of Appeals for the District of Columbia<sup>614</sup> had struck down a DOL provision in a 1982 version of the Department of Labor's DBA regulations that allowed the use of helpers wherever employment of helpers was "identifiable" in the locale.

<sup>607</sup>United States v. Service Ventures, Inc., 899 F.2d 1 (Fed. Cir. 1990), *aff'g* Service Ventures, Inc., ASBCA No. 36726, 89-1 BCA ¶ 21,264, *aff'd on reconsideration*, 89-1 BCA ¶ 21,438.

<sup>608</sup>GSBCA No. 8901(7823), 90-3 BCA ¶ 23,131.

<sup>609</sup>ASBCA No. 39567, 90-2 BCA ¶ 22,853.

<sup>610</sup>746 F. Supp. 170 (D.D.C. 1990).

<sup>611</sup>747 F. Supp. 26 (D.D.C. 1990).

<sup>612</sup>No. 82-1631 (D.D.C. Sept. 24, 1990).

<sup>613</sup>52 Fed. Reg. 4,243 (1989) (to be codified at 29 C.F.R. § 1.7(d)).

<sup>614</sup>Building & Constr. Trades Dep't., AFL-CIO v. Donovan, 712 F.2d 611 (D.C. Cir. 1983).

The appeals court found that this interpretation failed to comport with the DBA because it would allow wage rates that did not correspond to those prevailing in the area.

Generally, under the revised provision,<sup>615</sup> use of helpers prevails if the prevailing journeyman wage rate is set by the majority rule and those contractors whose rates prevail employ helpers. The district court found that although the plaintiff argued that there were better methods for determining whether the use of helpers prevails, the plaintiff did not show that the DOL version was irrational or inconsistent with the DBA.

#### *New Walsh-Healey Public Contracts Act<sup>616</sup> Wage Rate Proposed*

The DOL has proposed a wage determination to cover persons employed under supply contracts subject to the Walsh-Healey Public Contracts Act (PCA).<sup>617</sup> The PCA wage rate was last adjusted in 1978. This proposed rule corrects a longstanding inconsistency between the PCA and the Fair Labor Standards Act (FLSA) wage rates. In practice, the FLSA wage rate was paid, notwithstanding the lower PCA rate. When this rule becomes final, the PCA rate will be \$3.80, with an increase to \$4.25 on April 1, 1991. This tracks the minimum wage set by a 1989 change to the FLSA. According to the DOL, this rate is "prevailing" because most employees working on supply contracts covered by the PCA would also be covered under the FLSA. The rationale is that these employees are normally engaged in commerce, engaged in the production of goods for commerce, or employed in FLSA-covered enterprises in such a manner that the FLSA is applicable.

#### *Walsh-Healey Act Does Not Apply to Rental of Personal Property*

*WestByrd, Inc.*<sup>618</sup> involved a solicitation for the rental and maintenance of washers and dryers. Initially, the contracting officer included PCA provisions in the contract but later deleted them after determining that the PCA did not apply. In protest, WestByrd, the second low, eligible

bidder, argued that the contracting officer's action was erroneous and that it was therefore entitled to award because the low bidder did not qualify for award under the PCA. The GAO distinguished an earlier case in which it held that a contracting officer did not act unreasonably by incorporating PCA clauses in lieu of SCA clauses.<sup>619</sup> It then denied the protest, concluding that providing property to an activity for a period of time does not constitute "furnishing" goods under the PCA.

#### *Walsh-Healey Act Applies to Sale of Natural Gas*

Defense Fuel Supply Center (DFSC) issued an RFP for the purchase of natural gas on a "direct supply" basis. The solicitation incorporated Walsh-Healey provisions and informed offerors that a supply contract was contemplated. One offeror protested that the DFSC should have deemed its requirement one for utility services to which the PCA does not apply.<sup>620</sup> In *Commercial Energies, Inc.*<sup>621</sup> the GAO found that DFSC's determination was reasonable because the solicitation contemplated furnishing a commodity to be "shipped" by pipeline to a distributor, and not a contract for the distribution of the gas. Once the gas was piped to a distributor, users would execute utility service contracts with local gas companies for pinpoint distribution.

#### *Buy American/Trade Agreements Act Cases*

##### *GSBICA Invalidates FAR Clause Implementing Buy American and Trade Agreements Acts*

In *International Business Machines Corporation*<sup>622</sup> the GSBICA invalidated a FAR clause that incorporates certain limitations of both the Buy American Act (BAA) and the Trade Agreements Act (TAA).<sup>623</sup> The clause is flawed, the GSBICA held, because it gives foreign "designated country" products an advantage over a specific class of products manufactured in the United States. Firms that offer products manufactured in the United States consisting of foreign components are not eligible to compete for acquisitions subject to the TAA<sup>624</sup> unless their products also are domestic end items under the

<sup>615</sup> 52 Fed. Reg. at 4,243 (1989) (to be codified at 29 C.F.R. § 1.7(d)).

<sup>616</sup> 41 U.S.C. §§ 35-45.

<sup>617</sup> 55 Fed. Reg. 41,555 (1990) (to be codified at 41 C.F.R. § 50.202.2).

<sup>618</sup> Comp. Gen. Dec. B-237515 (Feb. 7, 1990), 69 Comp. Gen. 194, 90-1 CPD ¶ 159.

<sup>619</sup> *Tenavision, Inc.*, Comp. Gen. Dec. B-231453 (Aug. 4, 1988), 88-2 CPD ¶ 114.

<sup>620</sup> 41 C.F.R. § 50.201.603(a) (1989).

<sup>621</sup> Comp. Gen. Dec. B-240148 (Oct. 19, 1990), 90-2 CPD ¶ 319.

<sup>622</sup> GSBICA No. 10532-P, 90-2 BCA ¶ 22,824, 1990 CPD ¶ 125.

<sup>623</sup> See FAR 52.225-9 (Buy American Act—Trade Agreements Act—Balance of Payments Program).

<sup>624</sup> The TAA, 19 U.S.C. §§ 2501-2582 (1982), which currently applies to acquisitions of \$172,000 or greater, prohibits the purchase of products from foreign countries other than those designated by the President. Under the TAA, a product is exempt from the BAA and cannot be excluded by the TAA if it is an eligible product from a designated country. Although an article may be composed of components from a nondesignated country, it is still an "eligible product" if it has been "substantially transformed" into a new and different article in a designated country. See *id.* § 2518(4).

BAA.<sup>625</sup> Conversely, the TAA permits a vendor to offer a product made entirely of foreign, noneligible components as long as the end product has been substantially transformed in a TAA designated country.<sup>626</sup> The board concluded that this anomalous situation lacks a rational basis and is unenforceable.

The board held that the TAA requires application of the substantial transformation test to products manufactured in the United States, as well as to those from designated countries because, by its terms, the TAA's test applies to "a country or instrumentality"—not a foreign or designated country. A product substantially transformed in the United States would then be a United States product under the TAA. Because the TAA only prohibits the acquisition of products from nonexempt foreign countries, the FAR clause violates the TAA because it precludes the purchase of such United States manufactured products.

For TAA acquisitions, the General Services Acquisition Regulation (GSAR) now requires GSA contracting officers to incorporate a FAR deviation that comports with the GSBICA ruling.<sup>627</sup> Under this new clause, United States-made end products comprised of foreign components are acceptable if they meet the substantial transformation test.<sup>628</sup>

#### *Packaging Is Not a Substantial Transformation*

In *Becton Dickinson AcuteCare*,<sup>629</sup> another TAA case, the protester offered a product comprised totally of United States components, but packaged for shipment in Mexico. Although the protester was the low bidder, the agency rejected its offer, finding that the product was not "domestic" under the terms of the BAA because the final manufacturing process was performed in Mexico. The GAO opined that the agency erred by employing the BAA's "domestic end product" definition because the procurement was subject to the TAA. It then applied the TAA substantial transformation test and found that the product was merely packaged in Mexico and was not substantially transformed such that it lost its domestic identity.

<sup>625</sup>The BAA, *id.* §§ 10(a)-(c), mandates a preference for domestic products but does not per se exclude foreign goods offered for use in the United States. In part, under the BAA, a product is domestic if it is manufactured in the United States and is comprised of United States components, the cost of which exceeds 50% of the product's total cost.

<sup>626</sup>The United States is not a designated country under the TAA or the clause.

<sup>627</sup>GSAR Acquisition Circular AC-90-2 (Nov. 1, 1990), 55 Fed. Reg. 46,068 (1990) (to be codified at GSAR 552.225-8 and 552.225-9).

<sup>628</sup>On December 20, 1990, OFPP recommended a similar amendment to FAR part 25. OFPP Policy Letter 90-438, 55 Fed. Reg. 52,232 (1990).

<sup>629</sup>Comp. Gen. Dec. B-238942 (July 20, 1990), 90-2 CPD ¶ 55.

<sup>630</sup>ASBCA No. 36551, 90-2 BCA ¶ 22,936.

<sup>631</sup>*Id.*

<sup>632</sup>Consolidated Marketing Network, Inc., ASBCA No. 37740, 90-3 ¶ 23,017.

<sup>633</sup>ASBCA No. 37740, 89-3 BCA ¶ 22,000.

<sup>634</sup>ASBCA No. 38661, 90-3 BCA ¶ 23,256.

## Procurement Fraud

### *Recent Cases*

#### *Government Reliance Required to Void Contract Ab Initio*

A contract tainted with fraud is void, the ASBCA held in *National Roofing & Painting Corporation*.<sup>630</sup> The contractor's president, office manager, and job foreman were found guilty of conspiracy to defraud the government and bribing government officials with respect to obtaining and performing the subject contract. The board ruled that the contract was void because it was tainted by fraud from its inception. Accordingly, the contractor was barred from recovering any interest on certain contract balances that the government had paid. To permit recovery would be an "affront to the integrity of the procurement process."<sup>631</sup>

Conversely, when the government did not rely on false statements made by the contractor concerning its affiliation with a large business, on a small business set-aside, the board held in *Consolidated Marketing II*,<sup>632</sup> that the contract was not void or voidable. Thus, the contractor was not precluded from obtaining an equitable adjustment notwithstanding its false statements. In *Consolidated Marketing I*,<sup>633</sup> a prior decision on the same dispute, the board held that Consolidated Marketing was entitled to an equitable adjustment. Consolidated Marketing was convicted of making false statements concerning its affiliation with a large business in connection with the contract award. The board noted that to avoid the contract and the equitable adjustment, the government must show that it relied on the false misrepresentations in making the award. The board held that because the affiliations were disclosed to the Small Business Administration, the government had knowledge of this information. Therefore, as a matter of law, the government could not have relied on any false information in making the award.

#### *Damage to Procurement Process Is Sufficient Detrimental Reliance*

In *C & D Construction, Inc.*<sup>634</sup> the contractor misrepresented its small business status—a false statement upon

which the contracting officer relied in awarding the small business set-aside contract to that firm. The board pointed out that under common law, a contract is void or voidable when a false representation is knowingly made, when it is made with the intent to induce reliance upon it, and when the injured party relies on that misrepresentation to its detriment. The board held that, although there was no evidence indicating a financial loss, the government is damaged by actions that taint the contract or compromise the integrity of the procurement process. Therefore, the contract was void.

#### ***Allegations of Fraud in Overseas Contract Does Not Deprive Board of Jurisdiction***

In *Meisel Rohrbau*<sup>635</sup> the government moved to dismiss an appeal before the ASBCA for lack of jurisdiction alleging that the contractor's appeal involved fraud and that the Contract Disputes Act<sup>636</sup> prohibited the board from deciding cases involving fraud. The government based its motion on a Criminal Investigative Command (CID) report that found probable cause to believe that the contractor made false statements and submitted false claims on the contract. The board found the report to be, at most, a "finding that there is sufficient evidence to warrant referring the matter for possible prosecution."<sup>637</sup> The board noted that mere allegations of fraud do not deprive the board of jurisdiction. The government argued that it does not have the full range of fraud remedies involving foreign contractors in foreign countries and that it is inequitable to make the government wait until a foreign prosecutor decides to prosecute. In response to the government's argument, the board held that its "jurisdiction is statutory not equitable."<sup>638</sup> The board also noted that the government had failed to assert its rights under a contract provision entitled "Willfully False Statement or Representation." Moreover, the government failed to allege that it had provided the German prosecutor with a copy of the CID report or that any civil or criminal court action had been initiated as a result of the alleged fraud. Accordingly, the board found that it had jurisdiction and denied the government's motion.

#### ***Treble Damages Amendments to False Claims Act Apply Retroactively***

In *SGW, Inc. v. United States*<sup>639</sup> the Claims Court held that the 1986 amendment to the False Claims Act,<sup>640</sup> providing for treble damages, may be applied retroac-

tively. The court ruled that in determining the retroactive application of laws it must use the rule cited by the Supreme Court in *Bradley v. School Board of Richmond, Virginia*,<sup>641</sup> and "apply the law in effect at the time it renders its decision." In *Bradley* the Court stated that in determining whether a statute is to be applied retroactively, courts must first examine whether the legislative history addresses the retroactivity of the amendment. If the legislative history is silent on the issue, courts then must determine whether retroactive application would result in a "manifest injustice."<sup>642</sup>

In deciding that the retroactive application of the amendment would not result in a "manifest injustice" the court found that the amendment merely corrected an outdated compensatory scheme and reflected the increase in litigation costs; that the amendments did not substantially affect the contractor's rights or obligations; and that retroactive application of the amendment would best serve public interest in combatting fraud and in maintaining public confidence in the government's ability to efficiently manage its programs.

#### ***Civil Fraud Remedies Not Double Jeopardy***

*SWG, Inc. v. United States*<sup>643</sup> also addresses the issue of the interrelationship between the False Claims Act<sup>644</sup> and the fifth amendment's prohibition against double jeopardy. SGW argued that the government's counterclaim under the False Claims Act (FCA) constituted double jeopardy because the penalties sought by the government actually would punish SGW after it previously had been criminally acquitted. The court stated that double jeopardy attaches only when the civil sanctions bear no relation to the actual damages suffered.<sup>645</sup> The court cited two reasons why damages allowable under FCA do not constitute punishment. First, the relationship between the government's alleged harm and recovery cannot be measured precisely. Second, the imposition of the civil penalty would not be so severe as to be penal in nature because the damages would do no more than afford the government complete indemnity for the injuries incurred.<sup>646</sup>

#### ***Corporation Held Vicariously Liable Despite Lack of Benefit***

The First Circuit held that a corporation is vicariously liable for its agent's fraud if the agent acts with apparent

<sup>635</sup> ASBCA No. 35566, 90-1 BCA ¶ 22424.

<sup>636</sup> 41 U.S.C. §§ 601-613.

<sup>637</sup> *Id.*

<sup>638</sup> *Id.*

<sup>639</sup> 20 Cl. Ct. 174, 9 FPD ¶ 58 (1990).

<sup>640</sup> 31 U.S.C. § 3729.

<sup>641</sup> 416 U.S. 711 (1974); see *SGW, Inc.*, 21 Cl. Ct. 174, 9 FPD ¶ 58 (1990).

<sup>642</sup> *Bradley*, 416 U.S. at 713-15.

<sup>643</sup> 21 Cl. Ct. 174, 9 FPD ¶ 58 (1990).

<sup>644</sup> 31 U.S.C. § 3729.

<sup>645</sup> *SGW, Inc.*, 21 Cl. Ct. at 179 (citing *United States v. Halper*, 490 U.S. 435 (1989)).

<sup>646</sup> *Id.* at 178.

authority, even if the agent acts for his sole benefit. In *United States v. O'Connell*<sup>647</sup> the court found that there is nothing in the language of the FCA proscribing vicarious liability. Moreover, the two-fold purposes of the FCA are to provide for restitution and to deter fraud. The court ruled that both goals are served by allowing for vicarious liability. The court rejected the precedent of the Fifth and Eleventh Circuits that requires the corporation to receive some benefit before being held vicariously liable for the fraud of an agent.

### Qui Tam Suits

#### *Time of Payment Triggers FCA Statute of Limitations Period*

In *United States, ex rel. Duvall v. Scott Aviation Division, Figgie International, Inc.*<sup>648</sup> a contractor employee (relator) alleged that its company and senior management officials had submitted or caused to be submitted false claims on a number of government contracts awarded to the company in 1974, 1981, and 1986. Specifically, the relator alleged that the company knew or had reason to know that the company-manufactured emergency breathing devices failed to provide adequate protection against harmful gases as required by the contract and that the accompanying test documents were false. The company filed a motion for summary judgment, asserting that the suit was barred by the False Claims Act's six-year statute of limitations.<sup>649</sup> The company argued that statute of limitations begins to run on the date the false claim is presented for payment. The relator maintained that the statute does not run until the time of payment or approval of payment by the government. The court held that "[i]t is the time of payment and not the request that triggers the limitations period."<sup>650</sup>

#### *Qui Tam Actions by Government Employees May Be Barred*

In *United States, ex rel. LeBlanc v. Raytheon Company*<sup>651</sup> LeBlanc filed a *qui tam* lawsuit under the False

Claims Act. He alleged that while employed as a quality assurance specialist with DCAS, he had observed fraud in the handling of government contracts by the defendant. The district court held that *qui tam* actions by government employees are excluded by section 3730(e)(4)<sup>652</sup> of the False Claims Act. Although agreeing that LeBlanc was excluded, the First Circuit disagreed with the district court's broad exclusion of all government employees. The Court of Appeals stated that the "public disclosure" provision does not bar government employees from bringing *qui tam* actions based on information acquired during the course of their employment but not as the result of a government hearing, investigation, or audit, or through the news media. The First Circuit did agree with the district court's finding that LeBlanc could not qualify as an "original source" because it was his job to uncover fraud and the "fruits of his effort belong to his employer—the government."<sup>653</sup> The court went on to state, however, that this does not mean that all government employees are excluded under the "original source" exception, but the court provided no guidance on how this concept is to be applied.

#### *Qui Tam Action by Former Government Employee Permitted*

In *United States v. CAC-Ramsey*<sup>654</sup> the court allowed a former government investigator to maintain a *qui tam* action based on information contained in an Inspector General audit report, noting that such information does not constitute public disclosure. The court further noted that the legislative history of the False Claims Act amendments<sup>655</sup> indicated that Congress intended individuals, whether government employees or not, to take corrective action against perpetrators of fraud on the government.

#### *Qui Tam Plaintiffs Must Be Original Source of Information*

In *United States, ex rel. Dick v. Long Island Lighting Company*<sup>656</sup> the Second Circuit held that if information

<sup>647</sup>36 CCF ¶ 75,763.

<sup>648</sup>733 F. Supp. 159 (W.D.N.Y. 1990).

<sup>649</sup>31 U.S.C. § 3731 states that a civil action may not be brought more than six years after the date on which the false claims violation is committed, or more than three years after the date when facts material to the right of action are known or reasonably should have been known, but in no event more than 10 years after the date on which the violation is committed.

<sup>650</sup>*Duvall v. Scott*, 723 F. Supp. 161 (W.D.N.Y. 1990).

<sup>651</sup>913 F.2d 17 (1st Cir. 1990).

<sup>652</sup>Section 3730(e)(4) states that courts shall not 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 GAO Report, hearing, audit, or investigation; or from the news media, unless the action is brought by the AG or the person bringing the action is an original source of the information. "Original source" is defined as one 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 that is based on the information.

<sup>653</sup>*LeBlanc v. Raytheon*, 913 F.2d 20 (1st Cir. 1990).

<sup>654</sup>744 F. Supp. 1158 (S.D. Fla. 1990).

<sup>655</sup>31 U.S.C. § 3230(c)(4); see also *Erickson ex rel. United States v. American Inst. of Biological Sciences*, 716 F. Supp. 908 (E.D. Va. 1989).

<sup>656</sup>36 CCF ¶ 84,397.

on which a *qui tam* suit is based is in the public domain and the *qui tam* plaintiff was not the original source of that information, then the suit is barred. Two former Long Island Lighting Company (LILCO) employees accused LILCO of making false claims against the United States. Approximately sixteen months earlier, however, Suffolk County, New York, had filed a similar complaint against LILCO based on information not obtained from either of these two employees. The court stated that an original source must not only

have direct and independent knowledge of the information on which the allegations are based and have provided that information to the government prior to filing suit, [but also] must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based.<sup>657</sup>

#### *Submission of False Certifications Justifies Default Terminations of All Contracts*

In *Leo Swanson*<sup>658</sup> the Postal Service awarded a contractor four service contracts for the transportation of mail between various locations. Each contract permitted a fuel adjustment to be made when the average price of fuel changed by three cents over the last approved cost statement. The contractor was to certify that the information submitted was accurate and reflected the actual cost of the total fuels used. A postal inspector initially determined that the contractor had altered fuel receipts and falsely certified fuel prices on three of the four contracts. The contracting officer terminated the contractor for default on all four contracts. The postal inspector subsequently determined that the contractor had also falsely certified its fuel prices on the fourth contract. The board held that the contractor's action demonstrated a lack of reliability, trustworthiness, and good character in the performance of all of the contracts that justified the termination of all of the contracts for default.

#### *No Right to Trial by Jury for Government Counterclaims Under the FCA*

In *Capital Engineering & Manufacturing Company v. United States*<sup>659</sup> the contractor filed suit seeking to recover an economic price adjustment for increased costs

under the contract. The United States counterclaimed for fraud. The contractor sought to dismiss the counterclaim on the grounds that the Seventh Amendment entitled the plaintiff-contractor to a jury trial. The court held that the fraud claim under the FCA is a "public right" that does not entitle plaintiff to a trial by jury. The court noted that the FCA grants the government the right to assert counterclaims against a plaintiff in the Claims Court, in which no jury is available.

#### *CEO's Debarment Justified Under "Reason to Know" Standard*

In *Novicki v. Cook*<sup>660</sup> the court upheld an agency's debarment of the president and chief executive officer (CEO). FAR 9.406-5(b) authorizes the debarment of executives who have "reason to know" of misconduct involving other employees of the company. The agency must prove by a preponderance of the evidence that the individual had reason to know of the misconduct.<sup>661</sup>

Novicki was president and CEO of a company that manufactured metal film resistors and electronic components for use in military weaponry and navigation systems. Under its contract, the company was required to inform the government whenever its customers reported resistor failure. During a four-year period, company executives "intentionally and systematically under-reported the number of instances in which the resistors failed."<sup>662</sup> The company made forty-two false statements by failing to report fifteen instances of resistor failure in quality control tests. The company also consciously failed to report, as required under the contract, some 1350 instances of resistor failure reported by customers.

The court found substantial evidence to conclude that the plaintiff had reason to know of the fraud his company was perpetrating on the government. The court found that this contract with the government was of paramount importance. The complaints received and failures noted were too numerous and not of "minor importance." As company president and CEO, plaintiff had a duty to "keep informed of corporate activities and to exercise reasonable control and supervision over his subordinate officers." In addition, plaintiff had a "duty to seek out and remedy violations wherever they might occur."<sup>663</sup> On the basis of these facts alone, the court concluded that

<sup>657</sup> *Id.* at 84,399.

<sup>658</sup> PSCA No. 2641 (Nov. 14, 1990).

<sup>659</sup> 19 Cl. Cl. 774, 9 FPD ¶ 39 (1990).

<sup>660</sup> 743 F. Supp. 11 (D.D.C. 1990).

<sup>661</sup> FAR 9.403.

<sup>662</sup> *Novicki*, 743 F. Supp. at 12.

<sup>663</sup> *Id.* at 14.

the agency's determination that the plaintiff had reason to know of the fraudulent activities was rational. The evidence also showed that the vice-president and three other executives participated in, knew of, or had reason to know of the scheme. These four executives were also debarred.

#### ***Debarring Official's Ex Parte Communications Must Be on the Record***

In *Joseph P. Corsini v. Department of Defense*<sup>664</sup> the United States District Court for the District of Columbia held that *ex parte* communications between the agency debarring official and the United States Attorney's Office are required to be on the record. The court stated that the possibility that an agency decisionmaker may be privy to information from which the party concerned and a reviewing court are excluded deeply offends the concepts of fundamental fairness that are implicit in due process. Therefore, a party seeking review of an agency action is entitled to appropriate discovery upon a demonstration that an administrative record may be incomplete.

#### ***Whether Debarment Is Warranted Is Determined by the Present Responsibility of Contractor***

In *Delta Rocky Mountain Petroleum, Inc. v. Department of Defense*<sup>665</sup> the plaintiff was convicted of crimes in connection with the performance of a government contract, which constituted cause for debarment under FAR 9.406.2(a). Plaintiff was debarred for the maximum period of three years. Plaintiff then sought a permanent injunction, alleging that the government disregarded evidence of plaintiff's present integrity and responsibility and that the debarment was arbitrary, capricious, and an abuse of discretion. The court noted that debarment is an administrative action designed to ensure the integrity of government contractors in the present and into the future.<sup>666</sup> The court noted that the criterion examined to test "whether debarment is warranted is the present responsibility of the contractor."<sup>667</sup> A contractor may meet the test by showing that it has taken steps to ensure the misconduct will not recur.<sup>668</sup> Although the plaintiff had taken a number of steps to demonstrate its present responsibility, the agency found that the corporate management remained unchanged since the time of the criminal misconduct. Therefore, the agency had little

confidence in the reforms alone, because they were "only as effective as the people responsible for carrying them out."<sup>669</sup> The court found that, although the agency did not explicitly articulate its consideration of each of the mitigating factors presented, the agency had considered and weighed the mitigating factors, and concluded that they were insufficient to protect the government's interests.

Finally, the plaintiff argued that the government was collaterally estopped from asserting the plaintiff's lack of present responsibility because it had not contested the issue at the criminal trial. The court recognized that unless the issue previously decided is identical to the one at issue in the present action, the doctrine of collateral estoppel is inapplicable. The court found that the issue of the plaintiff's present responsibility was not litigated at the criminal trial and thus found the doctrine inapplicable.<sup>670</sup>

#### ***Contractor Concedes Nonresponsibility Issue by Plea Agreement***

In *Thomas Breakey*<sup>671</sup> as part of a criminal plea agreement, the contractor agreed to an order debarring him from participating in any Farmers Home Administration program. Subsequently, the contractor contested the debarment action on the grounds that: (1) the Farmers Home Administration failed to comply with the notice and hearing requirements; (2) the debarment constituted punishment; and (3) the contractor was presently responsible because he served his six-month sentence, made restitution, cooperated with the government investigation, testified in criminal trial, and terminated all business relationships with individuals of questionable character. The court noted that, with the exception of the prison term, all of the above factors were known at the time of plea agreement, and that by signing the plea agreement the contractor conceded it was nonresponsible.

#### ***Wiretap Information Used in Nonresponsibility Determinations Subject to Collateral Attack***

In *Cubic Corporation v. Cheney*<sup>672</sup> the Court of Appeals for the District of Columbia Circuit held that when a court reviews an administrative decision that allegedly was based, in part, on unlawfully intercepted

<sup>664</sup>No. 90-0047 (D.D.C. June 18, 1990).

<sup>665</sup>36 CCF ¶ 75,888.

<sup>666</sup>*Delta Rocky Mountain Petroleum*, No. 90-0047, slip op. (citing *Caiola v. Carroll*, 851 F.2d 395, 397 (D.C. Cir. 1988)).

<sup>667</sup>36 CCF ¶ 75,888 at 84,151.

<sup>668</sup>*Delta Rocky Mountain Petroleum*, No. 90-0047, slip op. (citing *Robinson v. Cheney*, 876 F.2d 152, 160 (D.C. Cir. 1989)).

<sup>669</sup>36 CCF ¶ 75,888 at 84,151.

<sup>670</sup>*Id.* at 84,152-3.

<sup>671</sup>AGBCA 88-202-7.

<sup>672</sup>914 F.2d 1501, 1506 (1990).

wiretap information, the subject of the wiretap may move to suppress it. An Air Force contracting officer determined the contractor nonresponsible, allegedly based on unlawfully intercepted wiretap information. The court noted that the Air Force may consider the untested wiretap information in making a nonresponsibility determination without creating a right<sup>673</sup> for anyone to challenge the legality of the use of that information. A challenge of that nonresponsibility determination in a subsequent judicial proceeding, however, entitles the subject of the wiretap to move to suppress the information.

#### ***Board Lacks Jurisdiction to Consider Damages in Connection with Proposed Debarment***

The Armed Services Board of Contract Appeals held in *Ben M. White Company*<sup>674</sup> that the board lacks jurisdiction to consider appellant's claim for damages arising out of lost government contract opportunities that allegedly were incurred because of proposed debarment proceedings. The Air Force had awarded the appellant a construction contract. Subsequently, the appellant submitted a list of items that allegedly would involve extra costs, including an item involving a steel cost increase of \$5200. The contracting officer concluded that the request for \$5200 was a fraudulent claim and requested that the contractor be debarred. For approximately six months, until the Air Force terminated the proposed debarment, the contractor remained ineligible for contract award despite his submission of bids on various procurement actions. The contractor submitted a claim for loss of anticipated profits, legal services, equipment downtime, office expense, and punitive and reputation damages in the amount of \$585,905.74. The board found that it had no jurisdiction to consider appeals that relate only to bids or a proposed debarment and that do not arise from an expressed or implied-in-fact contract.

#### **Standards of Conduct**

##### ***Appearance of Conflict Justifies Contract Termination***

In *Naddaf International Trading Company (NITCO)*<sup>675</sup> the project manager, an active duty colonel, participated in a pre-award survey of NITCO. Shortly thereafter, the colonel sought to retire and recused himself from further participation in the procurement because he contemplated submitting a resume to NITCO. Subsequently, NITCO

hired the colonel. While on terminal leave and in the employment of NITCO, the colonel made numerous calls on behalf of NITCO to various levels of government officials in an apparent attempt to obtain award for NITCO. The Comptroller General upheld the Army's decision to terminate the contract to protect the integrity of the procurement process from the appearance of a conflict of interest.

#### ***Post-Employment Conflict Conviction Reversed***

The Eleventh Circuit in *United States v. Hedges*<sup>676</sup> reversed a lower court's conviction of an Air Force colonel who was convicted of taking government action while having a conflicting financial interest in violation of 18 U.S.C. section 208(a).<sup>677</sup> The appellate court based its reversal on the lower court's refusal to instruct the jury on the defense of entrapment by estoppel.<sup>678</sup>

Prior to his retirement, Colonel Hedges was responsible for the conduct and implementation of two computer system programs: Phase IV and the Inter-Service/Agency Automated Message Processing Exchange (I-S/AAMPE). He was also the I-S/AAMPE Source Selection Evaluation Board chairman. Sperry Corporation was the prime contractor on the Phase IV contract and was one of the potential bidders for award of the I-S/AAMPE contract. While on active duty and prior to the effective date of his terminal leave, Colonel Hedges took certain actions on each of the two computer system programs and had general discussions of employment with Sperry Corporation. In addition, prior to accepting employment with Sperry Corporation to work on the I-S/AAMPE program, Colonel Hedges requested that his standards of conduct counselor review and edit a consulting agreement that Sperry Corporation had provided to him. The counselor made several substantive changes to satisfy the conflict of interest concern. Colonel Hedges contended that the standards of conduct counselor was aware of his prior discussions with Sperry Corporation and that the counselor never informed him of any potential conflicts of interest violations. Colonel Hedges contended that he relied on the legal advice of his standards of conduct counselor concerning the proper course of action to be followed regarding his future employment plans.

The Eleventh Circuit found that while 18 U.S.C. section 208(a) is a strict liability offense statute, the facts presented by this case raise the defense of entrapment by

<sup>673</sup> 18 U.S.C. § 2518.

<sup>674</sup> ASBCA No. 39444, 90-3 BCA ¶ 23,115.

<sup>675</sup> Comp. Gen. Dec. B-238768.2 (Oct. 19, 1990), 90-2 CPD ¶ 316.

<sup>676</sup> 912 F.2d 1397 (11th Cir. 1990).

<sup>677</sup> 18 U.S.C. § 208(a) provides in pertinent part that any covered person who participates personally and substantially in a particular manner, in which to his knowledge, an organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest shall be guilty of a felony.

<sup>678</sup> Entrapment by estoppel applies when a government official informs a defendant that certain conduct is legal and the defendant relies on the representations of that official. See *Cox v. Louisiana*, 379 U.S. 559 (1965).

estoppel.<sup>679</sup> Accordingly, it determined that the failure of the lower court to instruct the jury on the requested defense constituted reversible error.

#### ***Employee Transfer Between Private Parties Is Not a Conflict of Interest***

In *Bildon, Inc.*<sup>680</sup> a bidder protested the award of a contract to its competitor on the basis of improper conduct. Specifically, Bildon alleged that its competitor was awarded the contract after a former Bildon employee, who was responsible for preparation of its proposal, left the firm and accepted employment with the competitor. The GAO held that this was essentially a dispute between private parties that was outside the scope of the GAO's bid protest function. Also outside the scope of the GAO's bid protest function was Bildon's allegation that its former employee's conduct amounted to collusion.

#### ***Joint Defense Privilege Prevents Waiver of Attorney-Client Privilege by Subsidiary***

In *In re Grand Jury Subpoenas 89-3 and 89-4*<sup>681</sup> the Army had awarded a contractor a service contract that was performed by the contractor's unincorporated division. After several years this division became a wholly-owned subsidiary. The contractor assigned the contract it had with the Army to the subsidiary; the Army, however, did not approve the assignment or enter into a novation agreement. Between 1985 and 1989, the contractor submitted a claim for increases in the cost of performance. The Army denied the claim and counterclaimed. In October 1989, the contractor sold a majority of the stock in the subsidiary and settled both the claim and counterclaim with the Army. Both parties walked away empty-handed. Subsequently, grand juries issued subpoenas for certain records in the possession of the subsidiary concerning the claim and counterclaim. The court held that these documents, which were created when the subsidiary was an unincorporated division of the contractor, were subject to the joint defense privilege against the grand jury subpoenas because the subsidiary and the contractor were engaged in the joint prosecution of the claim against the Army as well as the joint defense of the Army's counterclaim.

#### ***Government Counsel as Witness Is Basis for Possible Disqualification***

In *Integrated Systems Analysts, Inc.*<sup>682</sup> (ISA) the protester requested the General Services Board of Contract

Appeals to impose sanctions on a Navy attorney who appeared as a witness and as lead counsel. ISA initially protested the Navy's determination that its proposal was nonresponsive to a request for proposals for SNAP II systems, which support the functions that sailors must perform on board of ships. During a prehearing conference, Navy counsel stated that he had participated as a member of the Contract Award Review Panel (CARP). Counsel was asked whether he would be a witness in this protest, to which he responded negatively. At the hearing on responsiveness, Navy counsel appeared as lead counsel, and was twice cautioned by the board to refrain from testifying as a witness. Subsequently, ISA filed a motion for summary disposition or sanctions. On the motion for sanctions the board noted that Virginia Code of Professional Responsibility, Disciplinary Rule (DR) 5-101, prohibits a lawyer from accepting employment in contemplated or pending litigation if he knows, or it is obvious, that he ought to be called as a witness.<sup>683</sup> Furthermore, DR 5-102 mandates the withdrawal of a lawyer from the conduct of the trial if, after undertaking employment in contemplated or pending litigation, it becomes obvious that the lawyer ought to be called as a witness on behalf of his client. The board also noted that a lawyer may testify, while representing a client, if refusal would create a substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case. The Navy argued that no violation had occurred "because counsel's testimony related to a pre-trial, procedural matter ... and [because] withdrawal [is required] only when counsel 'ought to' testify." The board found that counsel had testified on a substantive matter, but withheld sanction and its decision on whether counsel should be disqualified until the board ascertained ISA's belief whether counsel "ought" to testify in future proceedings. Navy counsel subsequently withdrew from the case.

#### **Bankruptcy-Government Contract Law Interface**

##### ***Assumption or Rejection of Government Contracts***

##### ***Timely Objection to Proposed Assumption of Executory Contracts Is Essential***

The Fourth Circuit held in *United States v. Carolina Parachute Corporation*<sup>684</sup> that the government's failure to object to the proposed assumption of its executory contracts under the Bankruptcy Code<sup>685</sup> is binding on the government after confirmation of a reorganization plan.

<sup>679</sup> See *id.*

<sup>680</sup> Comp. Gen. Dec. B-241375 (Oct. 25, 1990), 90-2 CPD ¶ 332.

<sup>681</sup> 902 F.2d 244 (4th Cir. 1990).

<sup>682</sup> GSBCA No. 10750-P, 1990 BPD ¶ 242 (Aug. 23, 1990).

<sup>683</sup> The board applied the Virginia Code of Professional Responsibility because the Navy counsel was a member of the Virginia Bar.

<sup>684</sup> 907 F.2d 1469, (4th Cir. 1990).

<sup>685</sup> 11 U.S.C. §§ 101-1930.

In passing, the court noted that confirmation of the reorganization plan lifted the automatic stay<sup>686</sup> and allowed the government to again exercise all of its rights under the contract.<sup>687</sup> This decision vacates, in part, the district court's ruling in *In re Carolina Parachute Corporation*.<sup>688</sup> The district court held that the Anti-Assignment Act<sup>689</sup> precluded the assumption of executory government contracts under the Bankruptcy Code without the government's consent.<sup>690</sup> The Fourth Circuit held that principles of *res judicata*, based upon the government's failure to object to the proposed assumption of the contracts by the debtor in possession or to appeal the bankruptcy court's confirmation order, barred the government's contemporaneous attempts to invoke the Anti-Assignment Act.<sup>691</sup>

#### *Executory Government Contract May Be Assumed Without Consent*

*In re Hartec Enterprises, Inc.*<sup>692</sup> held that the Anti-Assignment Act<sup>693</sup> does not vest the government with the unilateral right to refuse assumption of performance by a debtor in possession. The Bankruptcy court in *Hartec Enterprises* distinguished *In re West Electronics*,<sup>694</sup> which holds to the contrary. The court in *Hartec Enterprises* focused on the purpose of the Anti-Assignment Act, which is to protect the government from having to deal with third parties. The court held that an "actual test" must be applied to determine whether a third party is assuming the contract. It concluded that the Anti-Assignment Act is not violated by permitting the debtor in possession the unilateral right to assume the contract because the debtor and the debtor in possession are not "entirely new entit[ies]."<sup>695</sup>

#### *Debtor's Speculation Is Not Adequate Assurance to Support Assumption*

The bankruptcy court in *In re Silent Partner, Inc.*<sup>696</sup> allowed a debtor to assume an executory contract that

was actually in default. On appeal, the district court reviewed the bankruptcy court's determination that the contract was not in default and determined that it was clearly erroneous. A debtor in possession may assume any executory contract subject to court approval.<sup>697</sup> A debtor in possession seeking to assume a contract that is in default "must meet certain stringent requirements in order to assume the contract."<sup>698</sup> The debtor in possession predicated its assumption on its resuming progress payments, and approval of its requested changes in the specifications. Moreover, it disputed the government's demand for a new first article. Under these circumstances, the court held that adequate assurances of future performance of the contract had not been provided. "While an absolute guarantee of performance is not required under 11 U.S.C. § 365(b)(1)(c), more than the debtor's speculative plans are needed."<sup>699</sup> Accordingly, the district court reversed the bankruptcy court's order allowing the assumption of the contract.

#### *Bankruptcy Courts Should Abstain in Contract Disputes Act Issues*

A debtor commenced an adversary proceeding under the Bankruptcy Code to attempt to force the government to exercise an option and to recover for an alleged breach of contract. The debtor also filed a claim for an equitable adjustment under the changes and termination clauses of its contract and received a final decision on these claims. The debtor sought to have all issues heard by the bankruptcy court. The government objected and moved the court to abstain from hearing this matter in light of the Congress's clear intent in the Contract Disputes Act<sup>700</sup> that all appeals from contracting officers' final decisions be taken to a board of contract appeals or the Claims Court. The bankruptcy court in *In re TS Infosystems, Inc.*<sup>701</sup> refrained from exercising jurisdiction. The court held that it had concurrent jurisdiction over the contract claims. The court ruled that it had

<sup>686</sup> 11 U.S.C. § 362.

<sup>687</sup> *Carolina Parachute Corp.*, 907 F.2d at 1474.

<sup>688</sup> 108 Bankr. 100 (M.D.N.C. 1989).

<sup>689</sup> 41 U.S.C. § 15.

<sup>690</sup> *In re Carolina Parachute Corp.*, 108 Bankr. 100 (M.D.N.C. 1989).

<sup>691</sup> Prior to the hearing on the reorganization plan, the government filed a motion to lift the automatic stay and asserted that the Anti-Assignment Act applied. The government, however, failed to object to the reorganization plan to assume the contracts and it failed to appear at the hearing on the reorganization plan. The clear message from this case is that contract law attorneys must be familiar with the bankruptcy court's procedural rules.

<sup>692</sup> 117 Bankr. 865 (W.D. Tx. 1990).

<sup>693</sup> 41 U.S.C. § 15.

<sup>694</sup> 852 F.2d 79 (3d Cir. 1988).

<sup>695</sup> *Hartec Enters.*, 117 Bankr. 865 (W.D. Tx. 1990).

<sup>696</sup> 119 Bankr. 95 (E.D. La. 1990).

<sup>697</sup> 11 U.S.C. § 365(a).

<sup>698</sup> *Silent Partner*, 119 Bankr. 95 (E.D. La. 1990).

<sup>699</sup> *Id.*

<sup>700</sup> 41 U.S.C. §§ 601-613.

<sup>701</sup> No. 89-4-0837 (Bankr. Md. July 3, 1990), 36 CCF ¶ 75,911.

jurisdiction in this matter by chance rather than design. On the whole, debtor's claims ought to go forward in the forum Congress specifically designed to hear such claims, particularly here where [the government] has made no claim against the debtor. To do otherwise could conceivably encourage others to file bankruptcy in order to pursue relief that would otherwise be unavailable before the boards of contract appeals or the Claims Court.<sup>702</sup>

#### *Automatic Stay Does Not Bar False Claims Act Litigation*

Shortly after the debtor sought protection under the Bankruptcy Code,<sup>703</sup> the government brought suit under the Civil False Claims Act<sup>704</sup> alleging a conspiracy to rig bids and the submission of false claims. The government asserted actual damages of \$778,000, and sought both treble damages and the maximum statutory penalty of \$10,000 per false claim. Both the bankruptcy court and the district court held that the automatic stay provisions of the Bankruptcy Code<sup>705</sup> barred the government from pursuing its false claims action.<sup>706</sup> In *United States v. Commonwealth Companies*<sup>707</sup> the Eight Circuit reversed the lower courts' decisions. The court rejected the lower courts' rationale that the False Claims Act is designed solely to recover money for the Treasury. Civil actions under the False Claims Act are designed "to inflict the 'sting of punishment' on wrongdoers and, more importantly, to deter fraud against the government, which Congress has recognized as a severe, pervasive, and expanding national problem."<sup>708</sup> The court held that a civil False Claims Act action that seeks the entry of a monetary judgment is not barred by the automatic stay because it is an action by the government to enforce its police and regulatory power.<sup>709</sup> Therefore, the action is statutorily exempt from the stay.<sup>710</sup>

#### *Contractor Is Proper Party in Board Proceeding, Notwithstanding Bankruptcy Proceeding*

The government moved to dismiss an appeal by a contractor to the Agriculture Board of Contract Appeals based upon lack of standing. The government argued that the contractor's bankruptcy petition divested the contrac-

tor of all authority it had under the Contract Disputes Act<sup>711</sup> to challenge a contracting officer's final decision. The government submitted that the only proper party to pursue an appeal was the bankruptcy trustee. In *Raymond S. Lyons, Jr.*<sup>712</sup> the Agriculture Board rejected these arguments and ruled that either the trustee or the contractor could pursue a CDA appeal before the board.

#### *Freedom of Information Act*

##### *Reverse FOIA Actions and Release of Confidential Business Information*

###### *Unit Prices and Wage Rates in Contract Releasable*

Pacific Architects and Engineers (PA&E) performed M&O services for the State Department in Moscow. Several of PA&E's competitors requested copies of the contract, which included hourly labor rates for thirteen job categories. PA&E objected to disclosure of the prices, asserting that release would cause it competitive harm. PA&E contended that one could calculate its profit margin by subtracting components of the unit price that were set either by statute or by standard industry practice. The State Department argued that profit was not determinable in this manner because the unit rates were comprised of fluctuating variables.

In *Pacific Architects and Engineers, Inc. v. Department of State*<sup>713</sup> the court of appeals agreed that unit prices were trade secrets or commercial and financial information under 5 U.S.C. section 552(b)(4), but affirmed the lower court ruling that denied the plaintiff, PA&E, permanent injunctive relief. The court held that the State Department's determination that the prices were not privileged or confidential was not arbitrary, capricious, or an abuse of discretion. The court also held that PA&E was not entitled to a trial de novo because the agency fact-finding procedures and administrative record were adequate.

###### *Option Prices Releasable*

*J.L. Associates, Inc.*<sup>714</sup> involved the disclosure of an incumbent's unit prices in a solicitation issued to determine whether exercise of an option would be advantageous. J.L. Associates protested that release allowed its

<sup>702</sup> *Id.* at 84,322.

<sup>703</sup> 11 U.S.C. §§ 101-1930.

<sup>704</sup> 31 U.S.C. §§ 3729-3733.

<sup>705</sup> 11 U.S.C. § 362.

<sup>706</sup> *Commonwealth Cos.*, 80 B.R. 162 (Bankr. D. Neb. 1987).

<sup>707</sup> 913 F.2d 518 (8th Cir. 1990).

<sup>708</sup> *Id.* at 526.

<sup>709</sup> *Id.*

<sup>710</sup> 11 U.S.C. § 362(b)(4).

<sup>711</sup> 41 U.S.C. §§ 601-613.

<sup>712</sup> AGBCA No. 90-136-3, 90-3 BCA ¶ 23,046.

<sup>713</sup> 906 F.2d 1345 (9th Cir. 1990).

<sup>714</sup> Comp. Gen. Dec. B-239790 (Oct. 1, 1990), 90-2 CPD ¶ 261.

competitors to discover its "pricing strategy and decision-making process" and as a remedy, the agency should cancel the solicitation and award it the option. The GAO cited *Pacific Architects & Engineers* and opined that disclosure of unit prices is not objectionable when the prices do not reveal confidential information. Because J. L. Associates did not argue that the prices revealed any cost elements, GAO denied its protest.

#### *Predecisional and Deliberative Process Exemption DCAA Audits*

In *Jowett, Inc. v. Department of the Navy*<sup>715</sup> the plaintiff filed a FOIA request for DCAA audits performed in connection with its request for an equitable adjustment. The Navy released segments of the reports but redacted some information arguing that it was exempt from release under 5 U.S.C. section 552(b)(5). The district court agreed, finding the data to be predecisional and deliberative process material. Of note, the court opined that the audits remained "pre-decisional" as long as the contracting officer did not incorporate them in a final decision. The court also concluded that even "factual" portions of the audit, such as numbers and calculations, were exempt because disclosure would reveal the government's deliberative process.

#### *Termination for Convenience Documents*

In *Thomas M. Durkin & Sons, Inc. v. Department of Transportation*<sup>716</sup> the Third Circuit held that the appellant was not entitled to disclosure of agency opinions and advice concerning a termination for convenience despite a state law that purportedly prohibited claiming a deliberative process privilege. The court found that the material was clearly predecisional and deliberative and that the FOIA—not state law—governed access to federal information.

#### **Government Contractor Defense**

##### *Failure to Warn Under State Law— a Separate Tort Theory*

The major government contractor defense issue of 1990 is whether, and the extent to which, *Boyle v. United*

*Technologies Corporation*<sup>717</sup> applies to state tort law failure to warn actions. The Second,<sup>718</sup> Ninth,<sup>719</sup> and Eleventh<sup>720</sup> Circuits have addressed the issue and have uniformly recognized the failure to warn claim as a separate and distinct tort theory. In addressing the application of the *Boyle* test<sup>721</sup> for application of the government contractor defense, each of the circuit courts of appeals stressed the need to specifically identify the nature of the conflict between the federal contract requirements and the state's duty to warn requirements. In each of the cited instances, the courts found that this determination turned on a careful examination of the contracts' packaging and marking requirements.

##### *Duty to Warn Government Is Distinct from Duty to Warn User*

In *In re Joint Eastern and Southern District New York Asbestos Litigation*<sup>722</sup> the Second Circuit rejected the defendant's argument that the *Boyle* requirement to warn the government of dangers in the use of the equipment known to the supplier but not the government implies a preemption of any state-imposed duty to warn third parties. The court held that the two duties to warn serve separate and distinct policy concerns. The duty to warn the government "is [designed] to ensure that the government makes its decision to contract for that particular equipment with the benefit of full knowledge of all hazards."<sup>723</sup> On the other hand, state tort law duties to warn "accomplish an entirely different objective of helping those who use or otherwise come into contact with a product to protect their own safety."<sup>724</sup> To establish the government contractor defense as a bar to a state law duty to warn action, the contractor must show that the applicable federal contract requires warnings, approved by the government, that "significantly conflicted" with those required by state law and that the required warnings prevented "the contractor from placing warnings on the product identifying the hazards which were inherent in the product."<sup>725</sup>

##### *Displacement of State Liability Law*

In *Nielsen v. George Diamond Vogel Paint Company*<sup>726</sup> the Ninth Circuit considered the preemption of state law in failure to warn actions. Nielsen, a civilian

<sup>715</sup> 729 F. Supp. 871 (D.D.C. 1989).

<sup>716</sup> 54 Fed. Cont. R. (BNA) 868 (Dec. 17, 1990).

<sup>717</sup> 487 U.S. 500 (1988).

<sup>718</sup> *In re Joint E. and S. Dist. N.Y. Asbestos Litig.*, 897 F.2d 626 (2d Cir. 1990) (recognizing a defense for military contractors in failure to warn cases involving state law causes of action).

<sup>719</sup> *Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450 (9th Cir. 1990) (holding that a government contract defense does not automatically preclude a cause of action grounded in state products liability law).

<sup>720</sup> *Dorse v. Eagle-Ficher Indus., Inc.*, 898 F.2d 1487 (11th Cir. 1990) (a state-imposed duty is contrary to a duty imposed by a government contract if it is "precisely contrary").

<sup>721</sup> *Boyle*, 487 U.S. at 512. To successfully assert the defense, the contractor must prove that: (1) the United States approved reasonably precise specifications; (2) the equipment conformed to the specifications; and (3) the manufacturer warned the United States about the dangers involved in the use of the item, of which it was aware, but the United States was not.

<sup>722</sup> 897 F.2d 626 (2d Cir. 1990).

<sup>723</sup> *In re Joint E. and S. Dist. N.Y. Asbestos Litig.*, 897 F.2d at 632.

<sup>724</sup> *Id.*

<sup>725</sup> *Id.*

<sup>726</sup> 892 F.2d 1450 (9th Cir. 1990).

employee with the Army Corps of Engineers, painted a dam using paint manufactured by the defendant. Nielsen brought suit against the manufacturer alleging that the toxic fumes of the paint caused permanent injury to his brain. The court noted that *Boyle* limited the government contractor defense to situations in which state tort law duty poses a significant conflict with the duties imposed under a federal contract.<sup>727</sup> The court found that *Nielsen* involved the use of a commercial product and that the application of state law to warn users of known hazards associated with the product would not create a "significant conflict" with the federal policy requiring displacement of state law.<sup>728</sup>

#### *Clear Conflict Between State and Federal Duties Required*

The holding in *Dorse v. Eagle-Picher Industries, Inc.*<sup>729</sup> clearly expresses the requirement that there be a clear and direct conflict between the requirements of the federal contract and the state's duty to warn. When the contractor could have complied with both its contractual obligations and the state-prescribed duty of care, the predicate for preemption is not present.<sup>730</sup> Therefore, the government contract defense is not applicable.

#### *Reasonably Precise Specifications*

The Fourth Circuit discussed the government contractor defense in *Kleemann v. McDonnell Douglas*.<sup>731</sup> Kleemann argued that an aircraft landing gear did not conform to the original procurement contract specifications because there had been numerous changes to it. Accordingly, he argued that the government contractor defense properly could not be invoked.<sup>732</sup> The *Kleemann* court rejected his assertion, holding that when the military procurement process involves continuous exchange between contractor and government, the ultimate design required by the government as a result of the totality of its negotiations with the military contractor constitutes the reasonably precise specifications to which the product must conform.<sup>733</sup>

#### *Application of National Security Interests to the Government Contractor Defense*

A wrongful death action against the manufacturer of the Phalanx weapon system, used aboard the ill-fated

U.S.S. *Stark*,<sup>734</sup> was dismissed when the government appropriately invoked the state secrets privilege. *Zuckerbraun v. General Dynamics Corporation*<sup>735</sup> was based on the theory that the manufacturer of the Phalanx negligently designed and tested it. The plaintiff also asserted that the manufacturer failed to warn the government of the known and potential defects in the system. The manufacturer and the government responded by asserting that disclosure of the specifics of the design and testing of the system would threaten national security and involve the disclosure of classified information. The government also asserted that the complaint involved broad foreign policy questions and was, therefore, nonjusticiable. The Secretary of the Navy appropriately invoked the state secrets privilege over information that the plaintiff would need to make a prima facie case. The state secrets privilege is absolute and even the most compelling necessity cannot overcome the privilege.<sup>736</sup> Accordingly, the district court dismissed the action.

#### *Environmental Law*

##### *Convictions of Federal Employees for Hazardous Waste Violations Upheld*

The Fourth Circuit held in *United States v. Dee*<sup>737</sup> that federal employees are not immune from criminal prosecution for violations of the Resource Conservation and Recovery Act (RCRA).<sup>738</sup> The defendants, three government engineers, were convicted of illegal storage, treatment, or disposal of hazardous waste at the Aberdeen Proving Ground in Maryland. The court stated that there is no general sovereign immunity from criminal prosecution for actions taken by government employees while serving in their offices.

##### *"Owner or Operator" Liability Under CERCLA Clarified*

##### *Parent Corporation Liability*

The First Circuit held in *United States v. Kayser-Roth Corporation*<sup>739</sup> that a parent corporation may be held liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>740</sup> as an

<sup>727</sup> *George Diamond Vogel Paint Co.*, 892 F.2d at 1454.

<sup>728</sup> *Id.*

<sup>729</sup> 898 F.2d 1487 (11th Cir. 1990).

<sup>730</sup> *Eagle-Picher Indus.*, 898 F.2d at 1489-90.

<sup>731</sup> 890 F.2d 698 (4th Cir. 1989).

<sup>732</sup> *Id.* at 700.

<sup>733</sup> *Id.* at 702.

<sup>734</sup> The U.S.S. *Stark* was fired upon by an Iraqi aircraft off the coast of Bahrain, on May 17, 1987. 37 sailors died in the incident.

<sup>735</sup> 54 Fed. Cont. Rep. (BNA) 836 (Dec. 5, 1990).

<sup>736</sup> See *Reynolds v. United States*, 345 U.S. 1 (1953).

<sup>737</sup> 912 F.2d 741 (4th Cir. 1990).

<sup>738</sup> 42 U.S.C. § 6961.

<sup>739</sup> 910 F.2d 24 (1990).

<sup>740</sup> 42 U.S.C. §§ 9601-9657.

"operator" for the actions of a subsidiary corporation. The nominal owner of the site was a wholly-owned subsidiary of the corporation prior to its dissolution. The government sought to recover from the parent corporation both as an operator under a direct liability theory, and as an owner under a theory of indirect liability by piercing the corporate veil. To be held an operator, the court stated, required more than mere corporate ownership and the concomitant authority that comes with ownership; rather, it requires, at a minimum, active involvement in the subsidiary's activities. The court found that the parent corporation exerted virtually total influence and control over the subsidiary and could be considered to be both its owner and its operator.

In *Joslyn Manufacturing Company v. T.L. James & Company*<sup>741</sup> the Fifth Circuit reached the opposite conclusion and held that CERCLA's definition of "owner" does not extend to a parent corporation whose subsidiary is found liable under the statute. The court stated that there was no direct liability on a parent corporation as an "owner," especially when the facts mitigate against piercing the corporate veil.

#### *Secured Creditor Liability*

In *United States v. Fleet Factors Corporation*<sup>742</sup> a secured creditor of an operator was held to be an "operator" under CERCLA because its participation in the financial management of the facility indicated a capacity to influence the operator's treatment of hazardous waste.

#### *Government Liability for Civil Penalties*

The issue of the liability of the United States for civil fines and penalties under the various environmental statutes is determined by analyzing the waiver of sovereign immunity, if any. In *Ohio v. Department of Energy*<sup>743</sup> the Sixth Circuit held that the United States waived sovereign immunity for federal civil penalties under the Clean Water Act<sup>744</sup> and under RCRA.<sup>745</sup> A different result was reached in *Mitzelfelt v. Department of the Air Force*,<sup>746</sup> in which the Tenth Circuit held that RCRA does not waive sovereign immunity for civil penalties imposed by the states.

<sup>741</sup> 893 F.2d 80 (5th Cir. 1990).

<sup>742</sup> 901 F.2d 1550 (11th Cir. 1990).

<sup>743</sup> 904 F.2d 1058 (6th Cir. 1990); see also *Sierra Club v. Lujan*, 728 F. Supp. 1513 (D. Colo. 1990).

<sup>744</sup> 33 U.S.C. §§ 1251-1386, amended by Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1323, 1323(a)(2)(c).

<sup>745</sup> 42 U.S.C. § 6961.

<sup>746</sup> 903 F.2d 1293.

<sup>747</sup> 895 F.2d 745 (Fed. Cir. 1990).

<sup>748</sup> Pub. L. No. 101-508 (1990).

<sup>749</sup> *Id.* § 13213(a).

<sup>750</sup> 31 U.S.C. § 1342.

<sup>751</sup> *Id.* § 13213(b).

<sup>752</sup> Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, title XIII (1990).

#### *Reformation Denied Based on Ignorance of Cost of Hazardous Waste Disposal*

The contractor in *Atlas Corporation v. United States*<sup>747</sup> argued that the contract should be reformed because the parties' lack of knowledge concerning the disposal costs of hazardous material constituted a mutual mistake. The contract involved the production of uranium or thorium, which produce radioactive residues called "tailings." The contractor contended that neither party knew the extent of, or the costs associated with, the disposal of this hazardous residue. The court held that reformation was not justified because if the existence of the hazard was beyond the parties' contemplation at time of award, the parties' could not have formed a mistaken belief concerning it.

#### *Fiscal Law*

##### *Statutory Changes to the Antideficiency Act Sequester Rules*

In the Omnibus Budget Reconciliation Act of 1990,<sup>748</sup> Congress amended 31 U.S.C. section 1341(a)(1) to prescribe the expenditure or obligation of funds required to be sequestered under the Balanced Budget and Emergency Deficit Control Act. The amendment also prohibits involving the government in a contract or obligation for the payment of money required to be sequestered under the latter act.<sup>749</sup>

##### *Emergency Exception to Voluntary Services Prohibition Narrowed*

Congress also made it clear that the "emergency" exception to the limitation on the acceptance of voluntary services<sup>750</sup> does not include "ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property."<sup>751</sup>

##### *Appropriations Process Modified*

Congress substantially changed the procedures it uses to translate the President's budget into appropriations as part of the Omnibus Budget Reconciliation Act of 1990.<sup>752</sup> The purpose of the change is to streamline the

Gramm-Rudman-Hollings process by allowing the timely passage of annual appropriations acts. To this end, the annual budget ceilings for 1992 thru 1995 are specified in the Budget Reconciliation Act. Appropriations in support of Desert Shield are exempt from the ceilings. The act includes an enforcement mechanism directed at congressional committees. It provides that any actions that decrease revenues or increase spending must be accompanied by offsetting reductions from the same broad area of the budget. The expected impact of this modification will be to avoid the need for a joint budget resolution on an annual basis.

#### *Bona Fide Need Rule and Multi-Year Appropriations*

The Comptroller General has modified the rules concerning the use of multi-year appropriations for level-of-effort contracts. In *Environmental Protection Agency*<sup>753</sup> the GAO ruled that level-of-effort contracts were, by definition, severable.<sup>754</sup> The GAO now states that a level-of-effort contract "represents a contracting arrangement dependent on the government's inability to define the needed work in advance. ... Severability, and the *bona fide* need rule, are appropriations concepts that concern the extent to which the needed work can be divided into independent components meeting separate needs."<sup>755</sup> Level-of-effort contracts may be structured in a variety of ways, some of which describe severable efforts and others that describe nonseverable efforts. Accordingly, "it is the nature of the work being performed, not the contract type, that must be taken into account in reaching a judgment on [the issue of severability and *bona fide* need]."<sup>756</sup>

#### *Use of Improper Funds Voids Option Exercise*

On remand from the Federal Circuit, the ASBCA has determined that an unpublished DOD directive<sup>757</sup> was intended to be binding on agency personnel. The directive therefore entitled a contractor to an equitable adjustment on option prices.<sup>758</sup> The original contract, with options, was awarded without a subject to the availability of funds (SAF) clause and was appropriately funded with "no-year" Air Force stock funds. The Air Force stock fund charter specifically authorized the stock funds for this type of contract. Some years later, administration of the contract was transferred to an activity of the Defense Logistics Agency (DLA). Neither the DOD directive nor the DLA stock fund charter authorized use of stock funds

for this contract. Accordingly, DLA was required to use annual appropriations for the contract. Recognizing that it could not add a SAF provision in the exercise of an option, the agency simply continued to cite DLA stock funds when the options were exercised. The contractor, by this time losing money on the contract, objected to the improper use of stock funds and sought an equitable adjustment.

In the original *New England Tank Industries of New Hampshire, Inc.*<sup>759</sup> opinion, the board found the unpublished DOD directive to be an internal regulation that would not support an equitable adjustment. The Federal Circuit vacated the board's decision and remanded the matter to it to determine whether the DOD directive was intended to be mandatory or binding.<sup>760</sup> The Federal Circuit directed judgment in favor of appellant, if the directive was intended by the DOD to be mandatory. The board found that the DOD directive was intended to be binding on all DOD personnel. Accordingly, judgment was entered for the appellant for the costs of performing under the lapsed contract.

#### *Agency Properly Limits Liability for Future Repairs*

In *Barrow Utilities & Electric Cooperative, Inc. v. United States*<sup>761</sup> the Bureau of Indian Affairs (BIA) contracted with Barrow Utilities for utility services. Under the contract, BIA would fund major repair projects to the utility, "subject to the availability of funds." BIA did this for a number of years, but at one point, when Barrow Utilities requested funds to repair several generator engines, BIA responded that funds were not available. Barrow Utilities made the repairs and filed a claim. The court granted summary judgment for the government, holding that the "subject to the availability of funds" term of the contract controlled. The court opined that it would have been a violation of the Antideficiency Act for BIA to have assumed an open-ended obligation to pay for all repairs contemplated by the utility.

#### *New "M" Account Rules*

In response to a growing perception that executive agencies were circumventing Congress's authority to control major systems by funding significant programmatic improvements or changes with expired appropriations, the Authorization Act completely revamps the rules for closing accounts and managing expired appropriations.<sup>762</sup>

<sup>753</sup> 65 Comp. Gen. 154 (1985), Comp. Gen. Dec. B-214597 (Dec. 24, 1985), 86-1 CPD ¶ 216.

<sup>754</sup> *Id.* at 156.

<sup>755</sup> Comp. Gen. Dec. B-235678 (July 30, 1990).

<sup>756</sup> *Id.*

<sup>757</sup> Dep't of Defense Directive 7420.1, Regulations Concerning Stock Fund Operations (Jan. 26, 1967).

<sup>758</sup> *New Eng. Tank Indus. of N.H., Inc.*, ASBCA No. 26474, 90-2 BCA ¶ 22,892.

<sup>759</sup> ASBCA No. 26474, 88-1 BCA ¶ 20,395.

<sup>760</sup> *New Eng. Tank Indus. of N.H., Inc. v. United States*, 861 F.2d 685 (Fed. Cir. 1988), *petition for modifications denied*, 865 F.2d 243 (Fed. Cir. 1989).

<sup>761</sup> 20 Cl. Cl. 113, 9 FPD ¶ 53 (1990).

<sup>762</sup> National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 1405 (1990) (to be codified at 31 U.S.C. §§ 1551-1558).

### *Existing Rules*

Under the old rules,<sup>763</sup> appropriations lost their fiscal year identity two years after expiration and were held indefinitely in either a Merged Surplus Account or an "M" Account. The consequence of this loss of fiscal year identification was a loss of audit control over the funds. The lack of an audit trail for expired funds and their indefinite availability created a potential for abuse that Congress decided to eliminate. The Merged Surplus Account was abolished as of 5 December 1990.<sup>764</sup> The "M" Account will be phased out over the next three years.<sup>765</sup>

### *New Rules*

Under the new structure, appropriations will retain their fiscal year identification for five years after expiration. During this five-year period, the appropriations will be available for liquidating or adjusting exiting obligations. If an adjustment exceeds the unobligated balance in the expired appropriation, current funds may be used. This authority, however, is limited to one percent of the current appropriation. At the end of the five-year period, the appropriation will be closed and will not be available for any purpose. After an account is closed, obligations and adjustments to obligations whose purpose and amount would have made them properly chargeable to that account before it was closed, and whose character would not make them otherwise chargeable to any current appropriation of the agency, may be charged to any current account of the agency available for the same general purpose. This authority to charge current accounts is limited to one percent of the total appropriations for that account or the original amount of the appropriation. The Authorization Act also imposes administrative controls on the use of expired appropriations to fund contract changes.<sup>766</sup>

### *Transition Rules for Existing Closed Accounts*

The Authorization Act also provides detailed, complex rules for the transition of existing balances in expired accounts to the new five-year structure.<sup>767</sup> The new rules will be phased in over the next three years and are keyed

to the status of currently expired funds on the day prior to the enactment of the Authorization Act—that is, November 4, 1990. Details concerning the transition rules will be implemented by the executive agencies.

### *Disposition of Monetary Recovery Under the False Claims Act*

In *Federal Emergency Management Agency—Disposition of Monetary Award Under False Claims Act*<sup>768</sup> the Comptroller General determined that a portion of sums recovered under a False Claims Act judgment or settlement may be retained by the agency. This is an exception to the general rule that sums received by an agency must be deposited in the Treasury as miscellaneous receipts.<sup>769</sup> To the extent that the funds represent a recovery of erroneous disbursements "that are directly related to, and reductions of, previously recorded payments from the accounts,"<sup>770</sup> the funds may be retained and need not be deposited in the Treasury. The Comptroller General ruled that any portion of the False Claims Act recovery that represents a refund of an erroneous overpayment may be retained by the agency. Additionally, because of the nature of the revolving fund in question, the agency was authorized to retain the interest on the principal amount of the false claim, and the administrative costs of the recovery effort. The agency, however, was not permitted to retain the False Claims Act treble damage award. The Comptroller General allowed the agency to recover its losses and "to be made whole."<sup>771</sup> The Comptroller General stressed that the nature of the appropriation and the characterization of the recovery determine the appropriate disposition of the funds.

### *Contingency Contracting and Related Issues*

#### *Secretary of Defense Invokes Forage Act*

On August 24, 1990, pursuant to 41 U.S.C. section 11, the Secretary of Defense authorized the military departments to incur obligations in excess of available appropriations if necessary to support Persian Gulf operations.<sup>772</sup> Congress enacted supplemental appropria-

<sup>763</sup> See GAO Principles of Federal Appropriations Law, pages 4-33 through 4-43 (1982).

<sup>764</sup> Unobligated balances of appropriations were transferred to the Merged Surplus Account two years after the expiration of the original period of availability for the appropriation.

<sup>765</sup> Obligated, but undisbursed, balances from appropriations were transferred to an "M" Account two years after the expiration of the period of availability of the original appropriation.

<sup>766</sup> For purposes of the notice requirements discussed in the preceding paragraphs, a "contract change" is defined as a change to a contract that requires the contractor to perform additional work. The definition specifically excludes adjustments necessary to pay claims or increases in contract price because of the operation of an escalation clause in the contract. Changes in excess of \$4 million require secretarial level approval. Changes greater than \$25 million require notice to Congress and a 30-day waiting period before the modification may be executed.

<sup>767</sup> National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 1405(b) (1990) (to be codified at 31 U.S.C. §§ 1551-1558).

<sup>768</sup> 69 Comp. Gen. 215 (1990), Comp. Gen. Dec. B-230250 (Feb. 16, 1990).

<sup>769</sup> 31 U.S.C. § 3302.

<sup>770</sup> FEMA, 69 Comp. Gen. at 217 (citing 7 GAO Policy and Procedures Manual for Guidance of Federal Agencies § 12.2).

<sup>771</sup> *Id.* at 218.

<sup>772</sup> Memorandum, Secretary of Defense, Aug. 24, 1990, subject: Obligations in Excess of Appropriations for Middle East Operations.

tions on October 1, 1990, to liquidate obligations incurred by DOD under this authority.<sup>773</sup>

#### *Defense Cooperation Account*

The Secretary of Defense may accept contributions of money or property for use by DOD. Congress also established the Defense Cooperation Account<sup>774</sup> into which the Secretary of Defense must deposit monetary contributions and the proceeds from the sale of donated property. Account funds may be used only as authorized by Congress. The new law also prescribes reporting requirements, authorizes investment of account funds, and mandates an annual GAO audit of all contributions. The current Defense Appropriation Act further requires the Secretary of Defense to report on contributions to the United States and the United Nations in support of Operation Desert Shield and the embargo against Iraq. The Secretary must also provide an accounting of oil revenues that accrue to Organization of Petroleum Exporting Countries (OPEC) nations.<sup>775</sup>

#### *Nonappropriated Fund Instrumentalities*

##### *GAO Approves Proposed Sole Source Award of Service Contract to AAFES*

The Army and Air Force Exchange Service (AAFES) provides food service for the DOD school system in Europe. The Army requested a decision on whether it could award a sole source contract for lunchroom monitoring services to AAFES. As justification, the Army asserted that only AAFES was capable of providing the service, the monitoring service was closely related to the food service, and introducing a new contractor on the premises would unduly complicate AAFES's administrative burdens with the program. The GAO opined that providing goods and services to appropriated fund activities is not a normal nonappropriated fund instrumentality (NAFI) function. Award of a contract to a NAFI would be proper if justified on a sole source basis. The GAO concluded that for the reasons proffered by the Army, a sole source award was appropriate.<sup>776</sup>

##### *GAO Review of Concessionaire Contract Protests*

In *Crystal Cruises*<sup>777</sup> the GAO reaffirmed the general rule that it will not consider protests relating to conces-

sion permit awards. The GAO's rationale is that these agreements do not involve the "procurement of goods and services" contemplated by CICA. *Crystal Cruises* involved a competition among cruise ships for permits to enter Glacier Bay National Park. The protester argued that permittees would provide a service by transporting passengers, including government employees, to the park. The GAO noted, however, that permittees bore all costs of the program, including payment of a concession fee. It concluded that the agreement was essentially one for access to federal property.

The GAO reached the opposite result in *Alpine Camping Services*.<sup>778</sup> *Alpine Camping Services* protested the issuance of a prospectus for campground concession operations and the Forest Service defended on jurisdictional grounds. The GAO found that, in addition to granting access to the property, the agreement required the concessionaire to enforce Forest Service rules and preserve the land, campsites, and structures. Because these services directly benefited the government, the GAO concluded that it had jurisdiction under CICA.

##### *Board Retains Jurisdiction over Dispute When Complaint Was Filed Six Months After Final Decision*

*Wolverine Supply, Inc.*<sup>779</sup> involved a NAFI construction contract during which a dispute arose over two equitable adjustments proposed by the contractor. The contracting officer rendered a final opinion that erroneously advised Wolverine of its right to appeal either to the ASBCA or the Claims Court. Accordingly, the contractor appealed to the Claims Court, but the court dismissed the action for lack of jurisdiction. After the dismissal, and six months after the contracting officer's final decision, Wolverine Supply filed an appeal with the ASBCA. The government moved to dismiss arguing, in part, that the appeal had not been timely filed. The board held that the contracting officer's defective advice on choice of forum did not trigger the appeal period and, therefore, Wolverine Supply's appeal before the board was timely. The board entered its holding even though the contract included, in full text, a clause that properly apprised the contractor of its only available appellate forum.

#### *Intellectual Property and Data Rights*

##### *Patent Law*

*Alcoa v. Reynolds Metals Company*<sup>780</sup> involved an interesting interplay between patent law and government

<sup>773</sup> Forage Act, Pub. L. No. 101-403, title II, § 201 (1990).

<sup>774</sup> *Id.* § 202 (to be codified at 10 U.S.C. § 2608).

<sup>775</sup> Fiscal Year 1991 Defense Appropriations Act, Pub. L. No. 101-511, § 8131 (1990).

<sup>776</sup> Departments of the Army and Air Force, Army and Air Force Exch. Serv., Comp. Gen. Dec. B-235742 (Apr. 24, 1990), 90-1 CPD ¶ 410.

<sup>777</sup> Comp. Gen. Dec. B-238347.2 (June 14, 1990), 90-1 CPD ¶ 560.

<sup>778</sup> Comp. Gen. Dec. B-238625.2 (June 22, 1990), 90-1 CPD ¶ 580.

<sup>779</sup> ASBCA No. 39250, 90-2 BCA ¶ 22,706.

<sup>780</sup> 14 U.S.P.Q.2d (BNA) 1170 (N.D. Ill. Dec. 21, 1989).

contracts. The inventor, a government contractor, submitted required contract progress reports to the government and thirty-three other persons with a legend limiting distribution to United States citizens only. The reports described the claimed invention. In a subsequent patent infringement suit, the infringer challenged the patent alleging that the distribution of the reports was a publication under 35 U.S.C. section 102(b) that barred the granting of the patent. The district court held that distributing the report with a legend that limited distribution to United States citizens was not a publication.

### *Technical Data, Software, and Trade Secrets*

#### *Trade Secrets as a Basis for Bid Protests*

In *Ingersoll-Rand Company*<sup>781</sup> the GAO reversed its previous decision<sup>782</sup> and agreed to consider protests alleging disclosure of trade secrets. Now a protester may allege that a solicitation unlawfully discloses technical data submitted to the government with limited rights. Because reverse engineering of a product is perfectly legal, however, the protester must show by clear and convincing evidence that disclosed data resulted from limited rights data.

#### *Reverse Engineering*

In *Bescast, Inc.*<sup>783</sup> the default termination of a reverse engineering contractor was upheld. The contractor had signed a nondisclosure agreement with the part vendor. The contractor refused to perform, citing mistake, when the vendor threatened action. The ASBCA held that the mistake was solely the contractor's and that the government had no knowledge or reason to know of the mistake. In *Secure Services Technology, Inc. v. Time and Space Processing, Inc.*<sup>784</sup> a government contractor tried to prevent a competitor from reverse engineering a machine it had sold to the government. The court held that machine and instructional material—sold without restriction to the government—could properly be used in reverse engineering of the device.

#### *Government Shop Rights*

In *Lariscey v. United States*<sup>785</sup> a prisoner working on an Army contract with Federal Prison Industries, Inc. (UNICOR) developed an improved method of manufac-

turing helmets. The process was adopted by UNICOR. The plaintiff tried to sell the process to a commercial competitor of UNICOR and was disciplined for "unauthorized use of the mails." He sought compensation alleging a fifth amendment taking of his trade secret and breach of an implied-in-fact contract. The court held that the inmate had not kept his process secret—discounting his argument that he was living in an open cell—and also found that UNICOR had a shop right in the process.

### *Security Clearance Litigation*

#### *Revocation of Security Clearance Does Not Give Rise to Due Process Claim*

In *Dorfmont v. Brown*<sup>786</sup> the court held that the revocation of a security clearance did not give rise to a due process claim. The plaintiff, who was employed by a defense contractor and who had been granted a security clearance, found herself in need of a computer programmer. She sent company data to a Bulgarian national who was serving a life sentence in federal prison for his part in an attempted airplane hijacking. She appealed the Defense Department's revocation of her security clearance for "conduct of a reckless nature indicating poor judgment, unreliability or untrustworthiness."<sup>787</sup> The court stated that the requirements of due process do not apply unless the person can show a cognizable liberty or property interest in her security clearance. The court found that there is no legitimate claim of entitlement to a security clearance.

#### *Gay and Lesbian Applicants May Be Subjected to More Stringent Security Clearance Investigations*

The Court of Appeals for the Ninth Circuit held in *High Tech Gays v. Industrial Security Clearance Office*<sup>788</sup> that the Defense Department may routinely subject gay and lesbian applicants to a more intensified background investigation based on their sexual orientation. The court found that the background checks were rationally related to national security concerns. The court stated that homosexuals do not constitute a suspect or quasi-suspect class. Accordingly, DOD was only required to show that the action was rationally related to a governmental interest.

<sup>781</sup>Comp. Gen. Dec. B-236391 (Dec. 5, 1989), 89-2 CPD 517.

<sup>782</sup>Ingersoll-Rand Co., Comp. Gen. Dec. B-237497 (Oct. 26, 1989), 89-2 CPD ¶ 384 (dismissing protest for failure to allege a valid basis).

<sup>783</sup>ASBCA No. 38149 (Aug. 10, 1990).

<sup>784</sup>722 F. Supp. 1354 (E.D. Va. 1989).

<sup>785</sup>20 Cl. Ct. 385, 9 FPD ¶ 68 (1990).

<sup>786</sup>913 F.2d 1399 (9th Cir. 1990).

<sup>787</sup>*Id.* at 1400.

<sup>788</sup>895 F.2d 563 (9th Cir. 1990).

## Memorandum of Law—Sniper Use of Open-Tip Ammunition

*The following memorandum addresses the Army's use of open-tip ammunition in combat. As a fundamental principle of the Law of War, nations may not employ weapons intended to cause unnecessary suffering. For almost a century, the United States and other nations have foresworn the use of expanding, or "dum-dum," bullets in compliance with this fundamental principle. Technology, however, continues to improve bullet design and performance. Accordingly, the military must review new weapons systems, weapons, and projectiles; compare their performance vis-a-vis existing, lawful weapons; and determine if these new weapons comply with the Law of War. New "open-tip" bullets offer vastly superior accuracy at long range for sniper use in combat. After noting the difference between a "dum-dum" bullet and the open-tip bullet, the memorandum compares the performance in the human body of the open-tip bullet with contemporary military small arms bullets. Signed on 12 October 1990, the opinion concludes that the open-tip bullet does not violate the Law of War obligations of the United States. A similar opinion was signed by The Judge Advocate General of the Navy on 17 December 1990, which covered Navy and Marine Corps use of this ammunition.*

DAJA-IA

12 October 1990

MEMORANDUM FOR COMMANDER, UNITED STATES ARMY SPECIAL OPERATIONS COMMAND

SUBJECT: Sniper Use of Open-Tip Ammunition

1. Summary. This memorandum considers whether United States Army snipers may employ match-grade, "open-tip" ammunition in combat or other special missions. It concludes that such ammunition does not violate the law of war obligations of the United States, and may be employed in peacetime or wartime missions of the Army.

2. Background. For more than a decade two bullets have been available for use by the United States Army Marksmanship Unit in match competition in its 7.62mm rifles. The M118 is a 173-grain match grade full metal jacket boat tail, ogival spitzer tip (closed tip) bullet,\* while the M852 is the Sierra MatchKing 168-grain match grade boat tail, ogival spitzer tip bullet with an open tip.\*\* Although the accuracy of the M118 has been reasonably good, though at times erratic, independent bullet comparisons by the Army, Marine Corps, and National Guard marksmanship training units have established unequivocally the superior accuracy of the M852. Army tests noted a thirty-six percent improvement in accuracy with the M852 at 300 meters, and a thirty-two percent improvement at 600 yards; Marine Corps figures were twenty-eight percent accuracy improvement at 300 meters, and twenty percent at 600 yards. The National Guard determined that the M852 provided better bullet groups at 200 and 600 yards under all conditions than did the M118. (Material Acquisition Decision Process Review of M118 Match Cartridge Engineering Study 1A-0-8355, 7 May 1980.)

The 168-grain MatchKing was designed in the late 1950's for 300-meter shooting in international rifle matches. In its competitive debut, it was used by the first-place winner at the 1959 Pan American Games. In the same caliber but in its various bullet weights, the MatchKing has set a number of international records. To a range of 600 meters, the superiority of the accuracy of the M852 cannot be matched, and led to the decision by United States military marksmanship training units to use the M852 in competition.

A 1980 opinion of this office concluded that use of the M852 in match competition would not violate law of war obligations of the United States (DAJA-IA 1980/6110, subject: Improved Accuracy 7.62mm Match Ammunition Program (11 Sept. 1980). Further tests and actual competition over the past decade have confirmed the superiority of the M852 over the M118 and other match grade bullets. For example, at the national matches held at Camp Perry, Ohio, in 1983, a new Wimbledon record of 200-15 X's was set using the 168-grain MatchKing. This level of performance lead to the question of whether the M852 could be used by military snipers in peacetime or wartime missions of the Army.

During the period in which this review was conducted, the 180-grain MatchKing bullet (for which there is no military designation) also was tested with a view to increased accuracy over the M852 at very long ranges. Because two bullet weights were under consideration, the term "MatchKing" will be used hereinafter to refer to the generic design rather than to a bullet of a particular weight. The fundamental question to be addressed by this review is whether an open-tip bullet of MatchKing design may be used in combat.

3. Legal Factors. The principal provision relating to the legality of weapons is contained in article 23e of the

\*The M118 bullet is loaded into a 7.62mm (caliber .308) cartridge. In its original loading in the earlier .30-06 cartridge, it was the M72.

\*\*While this review is written in the context of the M852 Sierra MatchKing 168-grain "open tip" bullet and a 180-grain version, the MatchKing bullet (and similar bullets of other manufacturers) is also produced in other bullet weights for 7.62mm rifles (.308, .30-06, or .300 Winchester Magnum).

Annex to Hague Convention IV Respecting the Laws and Customs of War on Land of 18 October 1907, which prohibits the employment of "arms, projectiles, or material of a nature to cause superfluous injury." In some law of war treatises, the term "unnecessary suffering" is used rather than "superfluous injury." The terms are regarded as synonymous. To emphasize this, article 35, paragraph 2 of the 1977 Protocol I Additional to the Geneva Conventions of August 12, 1949, states in part that "It is prohibited to employ weapons [and] projectiles ... of a nature to cause superfluous injury or unnecessary suffering." Although the United States has made the formal decision that for military, political, and humanitarian reasons it will not become a party to Protocol I, United States officials have taken the position that the language of article 35(2) of Protocol I as quoted is a codification of customary international law, and therefore binding upon all nations.

The terms "unnecessary suffering" and "superfluous injury" have not been formally defined within international law. In determining whether a weapon or projectile causes unnecessary suffering, a balancing test is applied between the force dictated by military necessity to achieve a legitimate objective vis-a-vis suffering that may be considered superfluous to achievement of that intended objective. The test is not easily applied. For this reason, the degree of "superfluous" injury must be clearly disproportionate to the intended objectives for development and employment of the weapon, that is, it must outweigh substantially the military necessity for the weapon system or projectile.

The fact that a weapon causes suffering does not lead to the conclusion that the weapon causes unnecessary suffering, or is illegal per se. Military necessity dictates that weapons of war lead to death, injury, and destruction; the act of combatants killing or wounding enemy combatants in combat is a legitimate act under the law of war. In this regard, there is an incongruity in the law of war in that while it is legally permissible to kill an enemy combatant, incapacitation must not result inevitably in unnecessary suffering. What is prohibited is the design (or modification) and employment of a weapon for the purpose of increasing or causing suffering beyond that required by military necessity. In conducting the balancing test necessary to determine a weapon's legality, the effects of a weapon cannot be viewed in isolation. They must be examined against comparable weapons in use on the modern battlefield, and the military necessity for the weapon or projectile under consideration.

In addition to the basic prohibition on unnecessary suffering contained in article 23e of the 1907 Hague IV, one other treaty is germane to this review. The Hague Declaration Concerning Expanding Bullets of 29 July 1899 prohibits the use in international armed conflict

... of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

The United States is not a party to this treaty, but United States officials over the years have taken the position that the armed forces of the United States will adhere to its terms to the extent that its application is consistent with the object and purpose of article 23e of the Annex to Hague Convention IV, quoted above.

It is within the context of these two treaties that questions regarding the legality of the employment of the MatchKing "open tip" bullet must be considered.

4. Bullet Description. As previously described, the MatchKing is a boat tail, ogival spitzer tip bullet with open tip. The "open tip" is a shallow aperture (approximately the diameter of the wire in a standard size straight pin or paper clip) in the nose of the bullet. While sometimes described as a "hollow point," this is a mischaracterization in law of war terms. Generally a "hollow point" bullet is thought of in terms of its ability to expand on impact with soft tissue. Physical examination of the MatchKing "open tip" bullet reveals that its opening is extremely small in comparison to the aperture in comparable hollow point hunting bullets; for example, the 165-grain GameKing is a true hollow point boat tail bullet with an aperture substantially greater than the MatchKing, and skiving (serrations cut into the jacket) to insure expansion. In the MatchKing, the open tip is closed as much as possible to provide better aerodynamics, and contains no skiving. The lead core of the MatchKing bullet is entirely covered by the bullet jacket. While the GameKing bullet is designed to bring the ballistic advantages of a match bullet to long range hunting, the manufacturer expressly recommends against the use of the MatchKing for hunting game of any size because it does not have the expansion characteristics of a hunting bullet.

The purpose of the small, shallow aperture in the MatchKing is to provide a bullet design offering maximum accuracy at very long ranges, rolling the jacket of the bullet around its core from base to tip; standard military bullets and other match bullets roll the jacket around its core from tip to base, leaving an exposed lead core at its base. Design purpose of the MatchKing was not to produce a bullet that would expand or flatten easily on impact with the human body, or otherwise cause wounds greater than those caused by standard military small arms ammunition.

5. MatchKing performance. Other than its superior long range marksmanship capabilities, the MatchKing was examined with regard to its performance on impact with the human body or in artificial material that approximates

human soft tissue. It was determined that the bullet will break up or fragment in some cases at some point following entry into soft tissue. Whether fragmentation occurs will depend upon a myriad of variables, to include range to the target, velocity at the time of impact, degree of yaw of the bullet at the point of impact, or the distance traveled point-first within the body before yaw is induced. The MatchKing has not been designed to yaw intentionally or to break up on impact. These characteristics are common to all military rifle bullets. There was little discernible difference in bullet fragmentation between the MatchKing and other military small arms bullets, with some military ball ammunition of foreign manufacture tending to fragment sooner in human tissue or to a greater degree, resulting in wounds that would be more severe than those caused by the MatchKing.\*\*\*

Because of concern over the potential mischaracterization of the M852 as a "hollow point" bullet that might violate the purpose and intent of the 1899 Hague Declaration Concerning Expanding Bullets, some M852 MatchKing bullets were modified to close the aperture. The "closed tip" MatchKing did not measure up to the accuracy of the "open tip" MatchKing.

Other match grade bullets were tested. While some could approach the accuracy standards of the MatchKing in some lots, quality control was uneven, leading to erratic results. No other match grade bullet consistently could meet the accuracy of the open-tip bullet.

**6. Law of War Application.** From both a legal and medical standpoint, the lethality or incapacitation effects of a particular small-caliber projectile must be measured against comparable projectiles in service. In the military small arms field, "small caliber" generally includes all rifle projectiles up to and including .60 caliber (15mm). For the purposes of this review, however, comparison will be limited to small-caliber ammunition in the range of 5.45mm to 7.62mm, that is, that currently in use in assault or sniper rifles by the military services of most nations.

Wound ballistic research over the past fifteen years has determined that the prohibition contained in the 1899 Hague Declaration is of minimal to no value, inasmuch as virtually all jacketed military bullets employed since 1899 with pointed ogival spitzer tip shape have a tendency to fragment on impact with soft tissue, harder organs, bone or the clothing and/or equipment worn by the individual soldier.

The pointed ogival spitzer tip, shared by all modern military bullets, reflects the balancing by nations of the

criteria of military necessity and unnecessary suffering: its streamlined shape decreases air drag, allowing the bullet to retain velocity better for improved long-range performance; a modern military 7.62mm bullet will lose only about one-third of its muzzle velocity over 500 yards, while the same weight bullet with a round-nose shape will lose more than one-half of its velocity over the same distance. Yet the pointed ogival spitzer tip shape also leads to greater bullet breakup, and potentially greater injury to the soldier by such a bullet *vis-a-vis* a round-nose full-metal jacketed bullet. (See Dr. M. L. Fackler, "Wounding Patterns for Military Rifle Bullets," *International Defense Review*, January 1989, pp. 56-64, at 63.)

Weighing the increased performance of the pointed ogival spitzer tip bullet against the increased injury its breakup may bring, the nations of the world—through almost a century of practice—have concluded that the need for the former outweighs concern for the latter, and does not result in unnecessary suffering as prohibited by the 1899 Hague Declaration Concerning Expanding Bullets or article 23e of the 1907 Hague Convention IV. The 1899 Hague Declaration Concerning Expanding Bullets remains valid for expression of the principle that a nation may not employ a bullet that expands easily on impact for the purpose of unnecessarily aggravating the wound inflicted upon an enemy soldier. Such a bullet also would be prohibited by article 23e of the 1907 Hague IV, however. Another concept fundamental to the law of war is the principle of *discrimination*, that is, utilization of means or methods that distinguish to the extent possible legitimate targets, such as enemy soldiers, from noncombatants, whether enemy wounded and sick, medical personnel, or innocent civilians. The highly trained military sniper with his special rifle and match grade ammunition epitomizes the principle of discrimination. In combat, most targets are covered or obscured, move unpredictably, and as a consequence are exposed to hostile fire for limited periods of time. When coupled with the level of marksmanship training provided the average soldier and the stress of combat, a soldier's aiming errors are large and hit probability is correspondingly low. While the M16A2 rifle currently used by the United States Army and Marine Corps is capable of acceptable accuracy out to six hundred meters, the probability of an average soldier hitting an enemy soldier at three hundred meters is ten percent.

Statistics from past wars suggest that this probability figure may be optimistic. In World War II, the United States and its allies expended 25,000 rounds of ammunition to kill a single enemy soldier. In the Korean War, the

\*\*\*For example, 7.62mm bullets manufactured to NATO military specifications and used by the Federal Republic of Germany have a substantially greater tendency to fragment in soft tissue than do the U.S. M80 7.62mm ammunition made to the same specifications, the M118, or the M852 MatchKing. None fragment as quickly or easily upon entry into soft tissue as the 5.56mm ammunition manufactured to NATO standards and issued to its forces by the Government of Sweden. Its early fragmentation leads to far more severe wounds than any bullet manufactured to military specifications and utilized by the U.S. military during the past quarter century (whether the M80 7.62mm, the M16A1, M193 or M16A2 5.56mm) or the open-tip MatchKing bullet under consideration.

ammunition expenditure had increased four-fold to 100,000 rounds per soldier; in the Vietnam War, that figure had doubled to 200,000 rounds of ammunition for the death of a single enemy soldier. The risk to noncombatants is apparent.

In contrast, United States Army and Marine Corps snipers in the Vietnam War expended 1.3 rounds of ammunition for each claimed and verified kill, at an average range of six hundred yards, or almost twice the three hundred meters cited above for combat engagements by the average soldier. Some verified kills were at ranges in excess of 1000 yards. This represents discrimination and military efficiency of the highest order, as well as minimization of risk to noncombatants. Utilization of a bullet that increases accuracy, such as the MatchKing, would further diminish the risk to noncombatants.

7. Conclusion. The purpose of the 7.62mm "open-tip" MatchKing bullet is to provide maximum accuracy at very long range. Like most 5.56mm and 7.62mm military ball bullets, it may fragment upon striking its target, although the probability of its fragmentation is not as great as some military ball bullets currently in use by some nations. Bullet fragmentation is not a design

characteristic, however, nor a purpose for use of the MatchKing by United States Army snipers. Wounds caused by MatchKing ammunition are similar to those caused by a fully jacketed military ball bullet, which is legal under the law of war, when compared at the same ranges and under the same conditions. The military necessity for its use—its ability to offer maximum accuracy at very long ranges—is complemented by the high degree of discriminate fire it offers in the hands of a trained sniper. It not only meets, but exceeds, the law of war obligations of the United States for use in combat.

This opinion has been coordinated with the Department of State, Army General Counsel, and the Offices of the Judge Advocates General of the Navy and Air Force, who concur with its contents and conclusions.

An opinion that reaches the same conclusion has been issued simultaneously for the Navy and Marine Corps by The Judge Advocate General of the Navy.

FOR THE JUDGE ADVOCATE GENERAL:

W. HAYS PARKS  
Chief, International Law Branch  
International Affairs Division

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## TJAGSA Practice Notes

*Instructors, The Judge Advocate General's School*

### Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally-published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; submissions should be sent to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

#### Reserve Component Judge Advocates' Authority to Provide Legal Assistance Services

President Bush's decision in November 1990 to add several hundred thousand service members to the Operation Desert Shield deployment has required intense efforts to prepare Reserve component soldiers for deploy-

ment. The role of Reserve component judge advocates, whether they serve on active duty or on Reserve status, has been critical to these deployment efforts. They have primary responsibility for ensuring that the legal concerns of deploying Reserve component soldiers have been met. Extensive involvement of these Reserve component judge advocates has led to general concerns about their proper role in this process and specific concerns about their liability for malpractice. This note is intended to address, in a question and answer format, some of these concerns and to allay some of the fears associated with possible malpractice allegations.

#### *What Are the Sources of the Army's Policy on Legal Assistance?*

The Judge Advocate General's Corps has two sources of policy concerning Reserve component involvement in legal assistance and premobilization legal preparation:

(1) Army Regulation (AR) 27-3;<sup>1</sup> and (2) The Judge Advocate General's Policy Memorandum 88-1.<sup>2</sup> Attorneys with questions regarding authority to perform legal assistance and premobilization legal preparation should consult both sources, because neither is a completely stand-alone document.

*What Is the Difference Between the Army's Legal Assistance Program and the Premobilization Legal Preparation Program?*

The legal assistance program and the premobilization legal preparation program must be distinguished. Premobilization legal preparation, although discussed in AR 27-3, is not part of the Army legal assistance program.<sup>3</sup> Legal assistance under the Army legal assistance program is available to active duty soldiers and their families, as well as to Reserve component soldiers and their families when the Reserve component soldiers are on active duty for thirty days or more or are on orders for overseas training.<sup>4</sup>

The premobilization legal preparation program, however, is intended exclusively for Reserve component soldiers.<sup>5</sup> Accordingly, premobilization legal preparation is more limited in the scope of authorized services. It has two basic components: (1) premobilization legal counseling (PLC); and (2) premobilization legal services (PLS). PLC consists primarily of advising Reserve component soldiers and their families of "the need to have their personal affairs in order before mobilization."<sup>6</sup> PLS consists of providing advice to individual Reserve component soldiers and their families. Preparation of "simple wills and powers of attorney" is authorized.<sup>7</sup> This limitation on scope of services is the most significant feature that distinguishes the premobilization legal preparation program from the Army legal assistance program.

*When May a Reserve Component Judge Advocate Provide Legal Assistance?*

Reserve component judge advocates provide legal assistance to authorized persons in three circumstances.<sup>8</sup> The first situation is when the Reserve component judge advocate has been called to active duty and is designated as a legal assistance attorney by the supervising staff

judge advocate. The second situation occurs when the Reserve component judge advocate is on annual training, active duty for training, or inactive duty for training status and has been designated as a legal assistance attorney by the supervising staff judge advocate. The third instance is when the Reserve component judge advocate has been designated as a special legal assistance attorney by The Judge Advocate General.

*When May a Reserve Component Judge Advocate Provide Assistance to Reserve Component Soldiers Who Are Not on Active Duty or Are Not on Orders for Overseas Training?*

Under the Army legal assistance program, a Reserve component judge advocate may provide legal assistance to active duty soldiers, Reserve component soldiers on active duty for thirty days or more, family members, and others listed in Army Regulation 27-3.<sup>9</sup> Ordinarily, Reserve component soldiers serving on active duty for less than thirty days are not eligible for legal assistance.<sup>10</sup> As mentioned above, with some exceptions, the legal assistance program is for active duty soldiers and their families. Although Reserve judge advocates may provide legal assistance to active soldiers even when the Reserve component judge advocates are not on active duty, these services are not extended to Reserve component soldiers in their Reserve component status.<sup>11</sup> The premobilization legal preparation program, however, does allow Reserve component judge advocates to provide these soldiers wills and powers of attorney, which usually are the most needed when contemplating a potential call-up and deployment. The following discussion clarifies this authority.

*Does the Status a Reserve Component Judge Advocate and Client Have When Acting Pursuant to the Premobilization Legal Preparation Program Make any Difference?*

The Judge Advocate General's Policy Memorandum 88-1 provides that Reserve component judge advocates

<sup>1</sup> Army Reg. 27-3, Legal Services: Legal Assistance, paras. 2-2, 2-4, 4-6 (10 Mar. 1989) [hereinafter AR 27-3].

<sup>2</sup> Policy Memorandum 88-1, Office of The Judge Advocate General, U.S. Army, subject: Reserve Component Premobilization Legal Preparation, 4 Apr. 1988 [hereinafter Policy Memorandum 88-1], reprinted in *The Army Lawyer*, May 1988, at 3.

<sup>3</sup> See AR 27-3, para. 4-6a.

<sup>4</sup> *Id.* para. 2-4a.

<sup>5</sup> *Id.* para. 4-6a.

<sup>6</sup> *Id.* para. 4-6b(1).

<sup>7</sup> *Id.* para. 4-6b(2).

<sup>8</sup> *Id.* para. 2-2a.

<sup>9</sup> See *id.* para. 2-4.

<sup>10</sup> An active Army staff judge advocate may authorize legal assistance to soldiers on active duty for 29 days or less when an emergency situation exists.

<sup>11</sup> This limitation exists, in part, from concern that training periods of less than 30 days duration are too limited to allow Reserve component soldiers to spend part of available training time resolving legal issues.

are authorized to provide premobilization legal counseling and premobilization legal services, "regardless of the training status of the [Reserve component judge advocate] or the [Reserve component] soldiers."<sup>12</sup> The policy memorandum further provides that Reserve component personnel acting within the scope of the policies set out in the memorandum "are encompassed by 10 USC 1054 with regard to legal malpractice suits."<sup>13</sup> Section 1054<sup>14</sup> is the judge advocate's malpractice insurance policy. It is intended to provide substitution of the United States as the defendant in any legal malpractice case arising from the actions of legal personnel<sup>15</sup> acting within the scope of their duties.

Because Policy Memorandum 88-1 explicitly authorizes provision of simple wills and powers of attorney regardless of the training status of the Reserve component client or counsel, section 1054 should provide broad coverage to Reserve component judge advocates in their premobilization efforts. Judge advocates acting in compliance with AR 27-3 and Policy Memorandum 88-1 have the legal malpractice protection they need to carry out their duties. In particular, Policy Memorandum 88-1 is intended to encourage active and dynamic premobilization legal preparation programs for Reserve component soldiers.<sup>16</sup> The emphasis on and consequences of rapid deployment of Reserve component personnel during Operation Desert Shield prove the wisdom of this policy letter. Major Pottorff.

#### Tax Note

##### *IRS Issues Guidance for Overseas and Desert Shield Taxpayers*

The Internal Revenue Service (IRS) issued answers to a number of questions raised by personnel being deployed to support Operation Desert Shield.<sup>17</sup> This guidance addresses the tax treatment of military pay, deferment of past-due taxes, signing tax forms with a nondeploying spouse, and relief from requirements for the foreign earned income exclusion for persons who had to leave areas of the Middle East unexpectedly.<sup>18</sup>

The IRS clarified that special pay, including hazardous duty pay received by soldiers supporting Operation Desert Shield, is fully subject to tax. The Internal Revenue Code contains a provision that allows enlisted soldiers receiving pay in combat zones to exclude monthly base pay from gross income.<sup>19</sup> Officers may exclude up to \$500 per month from gross income under this provision. This exclusion became available when the President declared the Persian Gulf area a combat zone.<sup>20</sup>

Some reservists being activated to support Operation Desert Shield may be eligible for deferment of collection of past due federal income taxes. According to the IRS, deferments are available to soldiers in their "initial period of service" and who demonstrate that their ability to repay has been "materially impaired."<sup>21</sup> The "initial period of service" is defined as the period of service following recall to active duty from an inactive Reserve or National Guard unit. For regular military personnel, the initial period of service is the period following induction or first enlistment or the first period of reenlistment for a person who has been out of the service for more than a year. Soldiers will meet the "material impairment" requirement by showing that income has dropped as a result of entering military service.

Soldiers desiring a deferment should file Form Letter 1175, "Request for Deferment of Collection of Income Tax," with the IRS office that issued the back-due tax notice. Alternatively, a soldier may mail a letter to the IRS listing his or her name, social security number, monthly income, military rank, date entered service, and date eligible for discharge. Soldiers should send a copy of orders with the request. If the IRS grants the request, payment of back taxes will be deferred for up to six months after the initial period of service.

Reservists who owe taxes to the IRS also may be eligible for a reduction in interest rate to six percent under the Soldiers' and Sailors' Civil Relief Act (SSCRA).<sup>22</sup> The amount of interest forgiven by the IRS and other lenders pursuant to the SSCRA is not taxable.

<sup>12</sup>Policy Memorandum 88-1, *supra* note 2, at 1 (emphasis added).

<sup>13</sup>*Id.* at 2.

<sup>14</sup>Pub. L. No. 99-661, div. A, Title XIII, 1356(a)(1), 100 Stat. 3996 (1986) (codified at 10 U.S.C. § 1054 (1988)).

<sup>15</sup>The statute provides protection to "an attorney, paralegal, and other member of a legal staff within the Department of Defense," including the National Guard while training under the authority of title 32, United States Code. *Id.* § 1054(a).

<sup>16</sup>For a brief discussion of premobilization legal issues, see Legal Assistance Note, *Premobilization Assistance*, The Army Lawyer, Sept. 1988, at 51.

<sup>17</sup>Now known as Operation Desert Storm.

<sup>18</sup>I.R.S. News Release IR-90-142 (Nov. 21, 1990).

<sup>19</sup>I.R.C. § 112 (West Supp. 1990).

<sup>20</sup>See also Treas. Reg. § 1.112-1(b) (1970).

<sup>21</sup>*Id.*

<sup>22</sup>50 U.S.C. § 526 (1982 and Supp. V 1987). See generally Administrative and Civil Law Division, The Judge Advocate General's School, JA 260, *Legal Assistance Guide: The Soldiers' and Sailors' Civil Relief Act* (Sept. 1990).

Married soldiers serving unaccompanied tours in the Middle East may find it difficult to file a joint return because one spouse may not sign a joint return on behalf of the other spouse. A special IRS Form 2848, "Power Of Attorney and Declaration of Representative," may be used to empower a spouse or some other person to sign an income tax return on behalf of a taxpayer who is unable to do so. In addition, the IRS announced that it will accept a properly completed general power of attorney that specifically authorizes another to prepare, sign, and file tax returns. The power of attorney must be attached to the return if one person relies on it to sign for another.

Taxpayers residing overseas on April 15th have an automatic two-month extension—until June 15th—to file an income tax return. Congress has broadened this automatic extension period beyond the June 15th deadline for individuals whose ability to file returns is affected by Operation Desert Storm.<sup>23</sup> This legislation will permit soldiers to defer their filing of federal income tax returns until six months after their redeployment. If a joint return is filed, only one spouse needs to be residing outside the United States or Puerto Rico on April 15th.

The automatic two-month extension to file, however, does not extend the time to pay taxes. Soldiers using the extension must pay interest on any unpaid tax from the original due date of the return until the date the tax is paid. The automatic filing extension also does not defer time to make an Individual Retirement Arrangement (IRA) contribution. Contributions to an IRA for tax year 1990 must be made on or before April 15th even by soldiers serving overseas who take advantage of the automatic filing extension.

In addition to the normal automatic filing extension and any additional automatic extension permitted because of the Persian Gulf situation, all soldiers serving overseas can request an additional two months' extension beyond the June 15th deadline to file by submitting an IRS Form 4868 on or before June 15th. Again, even though this permits a *filing* extension, it is not an extension of time to pay taxes; therefore, soldiers must estimate tax liability and pay any taxes due with Form 4868.

Several soldiers who sold homes prior to entry on active duty questioned the IRS on whether they are eligi-

ble for any extensions of time for buying a new home to postpone paying tax on capital gains realized on the sale of the home. The IRS clarified that soldiers serving on extended active duty for over ninety days or for an indefinite call-up are eligible for a two-year extension of time to replace a former residence. Thus, soldiers on extended active duty have up to four years after selling an old residence to buy and occupy a new home. The replacement period is suspended beyond this period for soldiers serving overseas for up to one year after the last day a taxpayer is stationed outside the United States. The total suspension period for service members with overseas service, however, may not exceed a total of eight years after sale of the old residence.<sup>24</sup>

The IRS announced that it also would give some accommodations to civilian taxpayers involved in the Middle East crisis. For example, the IRS indicated it would waive the bona fide residence test for purposes of determining eligibility for the foreign earned income exclusion for taxpayers living in Iraq, Kuwait, Libya, and Yemen.<sup>25</sup> Normally, to qualify for the foreign earned income exclusion, taxpayers must either have been a resident of a foreign country for an entire tax year or be physically present for at least 330 days during any period of twelve consecutive months.<sup>26</sup>

In addition, the IRS announced that it will waive the minimum length of employment requirement for purposes of claiming itemized moving expenses for civilians who were forced to terminate employment early because of the crisis in the Middle East. Civilian employees claiming moving expense deductions normally must be employed full time for thirty-nine weeks during the first twelve months after arriving in a new job location. Major Ingold.

### Veterans' Benefits Note

#### *Reservist's Dismissal Upheld*

The Veterans' Reemployment Rights Act<sup>27</sup> (Act) offers solid job protection to reservists who are required to leave civilian employment to perform military duties. A recent case illustrates, however, that the Act will not protect them when they fail to provide reasonable notice to their employers.

In what perhaps could become a leading case, *Ellermets v. Department of the Army*,<sup>28</sup> the Federal Cir-

<sup>23</sup> I.R.S. News Release IR-90-148.

<sup>24</sup> I.R.C. § 1034(h) (West Supp. 1990).

<sup>25</sup> Rev. Proc. 81-23, 1981-1 C.B. 693 (as supplemented by Rev. Proc. 86-39, 1986-2 C.B. 701).

<sup>26</sup> I.R.C. § 911(d)(1) (West Supp. 1990).

<sup>27</sup> 38 U.S.C. § 2024(d) (1982) provides that "[a]ny employee [who is a member of the Armed Forces of the United States] ... shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States."

<sup>28</sup> 916 F.2d 702 (Fed. Cir. 1990).

cuit Court of Appeals held that a Reservist must ask a civilian employer for a leave of absence prior to performing Reserve duties. The court upheld a Merit Systems Protection Board ruling that a federal agency did not act contrary to the Act when it dismissed a Reserve officer for being absent without leave and disobedience of orders.

In *Ellermets* an Army Reserve officer working for the Army as a civilian in Heidelberg, Germany, sought permission through Reserve channels to attend an Army conference in Washington, D.C. The weekend before the conference was to begin, the reservist, Ellermets, left a note with his supervisor requesting permission to perform Army Reserve duties by attending the conference. Ellermets did not have orders for Reserve duty and had not received prior permission for leave.

Upon returning to work after the weekend, Ellermets' supervisor found the note. He immediately arranged to have someone contact Ellermets at the airport and advise him to cancel his flight because his request for leave had been disapproved. Ellermets refused to change his travel plans or call his supervisor and flew to the United States where military authorities met him to advise Ellermets to return. Ellermets attended one day of the conference and returned to Heidelberg. Ellermets subsequently was removed for being absent without leave and for deliberately failing to follow orders.

Ellermets appealed his removal to the Merit Systems Protection Board, arguing that the Army improperly denied his request for leave under section 2024(d) of the Veterans' Reemployment Rights Act.<sup>29</sup> This section of the Act requires employers, upon request, to grant leave to employees to perform Reserve duties. The Federal Circuit ruled that the language in the Act that requires a request for leave can mean only that "barring an emergency or other special circumstances in which the country needs to call up its Reserves," an employee must ask for a leave of absence.<sup>30</sup>

The Federal Circuit agreed with Ellermets that courts should apply a rule of reason inquiry into determining whether a leave request is reasonable and should be granted. Under this inquiry, courts should examine not only the timing of the request, but also other factors, such as the burden on the employer.<sup>31</sup>

The court, however, upheld the Merit Systems Protection Board's finding that no reasonable request ever was

submitted. The court found as a "compelling factor" evidence showing that Ellermets received notice of the denial of his leave request and departed for the conference despite the denial. The court concluded that Ellermets failed to qualify for protection under the Act and upheld the agency removal action. Major Ingold.

### Estate Planning Note

#### *Courts Interpret Wills with No Residuary Clause*

One of the most egregious mistakes a will drafter can make is to omit inadvertently a residuary clause from a will. Two recent decisions indicate that this omission can lead to unintended results.

In *Knupp v. District of Columbia*<sup>32</sup> the testator signed a will in a hospital bed one month before he died. The will named an executor and directed him to pay debts and claims of the estate but did not include a residuary clause.

The attorney who prepared the will testified that the testator intended to give the bulk of his estate to the plaintiff. Actually, the testator's prior will specifically left a substantial gift to the plaintiff. The testator asked the attorney to prepare a new will making several specific bequests but passing the residuary to the plaintiff. The attorney prepared a new will including the specific bequests, but he mistakenly failed to include the residuary clause.

The trial court ruled that the extrinsic evidence offered by the attorney was not admissible. Even though the will was ambiguous, the court refused to consider the attorney's testimony regarding the name of the intended beneficiary. The court of appeals affirmed, holding that extrinsic evidence is admissible only to explain what is in a will, not to add to it. Because nothing in the will suggested that the testator intended to benefit the plaintiff, extrinsic evidence was inadmissible. The property escheated to the District of Columbia because the testator left no heirs.

In another recent case, *In re Estate of Jackson*,<sup>33</sup> a court reached a similar result. The will in *Jackson* contained a paragraph indicating that the testator was not making any gifts to his relatives because they were financially secure. Another clause disposing of personal property directed the executor to allow relatives to select the items they desired and thereafter to sell the remaining "said personal property" and distribute the proceeds to a church. The will had no residuary clause.

<sup>29</sup>38 U.S.C. § 2024 (1982).

<sup>30</sup>*Ellermets*, 916 F.2d at 705.

<sup>31</sup>The "reasonableness test" first was developed in *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981).

<sup>32</sup>455 N.W.2d 295 (Iowa Ct. App. 1990).

<sup>33</sup>793 S.W.2d 259 (Tenn. Ct. App. 1990).

The church argued that the personal property clause was in essence a residuary clause and entitled it to receive other assets owned by the testator, including a substantial certificate of deposit. The court determined that the word "said" referred to the personal property left over from the relatives' selection and did not include the certificate of deposit. Like the court in *Knupp*, the court refused to reconstruct the will to dispose of the residuary estate even though the testator clearly intended to disinherit his relatives.

Because courts generally will refuse to consider extrinsic evidence or to rely on inferences to reconstruct an incomplete will, the consequences of mistakenly omitting a residuary clause can be disastrous. The failure to include a residuary clause gives rise to the potential for a malpractice action because the error results from a careless review of the final instrument signed by the testator.

A negative consequence of computer-generated wills is that sometimes clauses, such as the residuary clause, inadvertently are omitted from the final product. Attorneys should review every will carefully before it is signed to ensure that provisions as important as the residuary clause properly have been included. Moreover, drafters should include a residuary clause in every will even if other bequests have disposed of the entire estate. Major Ingold.

#### Family Law Notes

##### *Divisibility of Non-Vested Military Pensions*

In the recent case of *In re Beckman*, the Colorado Court of Appeals held that a non-vested military pension is divisible marital property to the extent it was earned during the marriage.<sup>34</sup> The husband in *Beckman* was a National Guardsman who had approximately eighteen years of retirement-creditable service at the time of the divorce.

The court found that military retirement benefits are a form of deferred compensation for past services performed by an employee. Whether the pension is vested or not is not material to the issue of divisibility, according to the court. Noting that a "pension is not earned on the last day of the twentieth year of employment,"<sup>35</sup> the court held that a spouse's contribution to the earning of pension benefits can be recognized prior to the vesting of the pension itself.

<sup>34</sup>*In re Beckman*, 17 Fam. L. Rep. (BNA) 1063 (Colo. Ct. App. Oct. 25, 1990).

<sup>35</sup>*Id.* (quoting *Shill v. Shill*, 599 P.2d 1004 (Idaho 1979)).

<sup>36</sup>*Illies v. Illies*, 17 Fam. L. Rep. (BNA) 1058 (N.D. Nov. 13, 1990).

<sup>37</sup>See 32 C.F.R. part 146 (1989).

<sup>38</sup>DOD Dir. 5525.9 defines a felony as "[a] criminal offense that is punishable by incarceration for more than 1 year, regardless of the sentence that is imposed for commission of that offense." See *id.* § 146.3.

<sup>39</sup>*Id.* § 146.4.

Recognizing that Beckman's retirement benefits still might not vest, the court affirmed the trial court's decision to divide other marital property while retaining jurisdiction over the issue of distribution of retirement benefits. The court reasoned that this approach equally divided the risk that Beckman's military pension would fail to vest between the parties. Major Connor.

##### *North Dakota Child Support Guidelines Invalid*

On November 13, 1990, the North Dakota Supreme Court held that the state's child support guidelines were invalid.<sup>36</sup> The guidelines, issued in 1989, established a rebuttable presumption that the amount of support mandated by the guidelines constitutes the correct amount of support.

The court characterized the support guidelines as a rule subject to the North Dakota Administrative Procedure Act. As a result, the court held that interested parties should have been given an opportunity to provide oral and written comments on the guidelines prior to adoption.

Until new guidelines are issued, legal assistance attorneys should be aware that child support obligations in North Dakota will have to be determined subject to the proof presented by the parties on a case-by-case basis. Clients who were ordered to pay child support solely on the basis of the guidelines may have grounds to challenge those orders. Arrearages that have accumulated under orders issued pursuant to the invalid guidelines also might be susceptible to a successful challenge. Major Connor.

##### *Army Implementation of Department of Defense Directive 5525.9*

Department of Defense (DOD) Directive 5525.9 requires the Army to cooperate with courts and federal, state, and local officials in enforcing certain child custody court orders against soldiers, DOD civilian employees, and accompanying family members located overseas.<sup>37</sup> These orders include situations in which the subject of the order has "been charged with, or convicted of, a felony<sup>[38]</sup> in a court, have been held in contempt by a court for failure to obey the court's order, or have been ordered to show cause why they should not be held in contempt for failing to obey the court's order."<sup>39</sup>

When a request for assistance is received from a court of competent jurisdiction, the command first must attempt to resolve the situation to the satisfaction of the court concerned. In general, these actions may be anything short of sending the soldier back to the United States or taking any adverse actions against DOD civilian employees or accompanying family members. The action required to be taken by the command depends on the status of the subject of the request.<sup>40</sup>

Before any additional action is taken against the subject of a court's request for assistance, however, the subject must "be afforded the opportunity to provide evidence of legal efforts to resist the court order or otherwise show legitimate cause for non-compliance."<sup>41</sup> When these legal efforts or other legitimate cause warrants, a delay of further action against the subject of the request can be granted for up to ninety days.<sup>42</sup> However, if the request for assistance pertains to a felony or to a contemptuous or unlawful removal of a child from the jurisdiction of the court or from the custody of a person awarded custody by court order, additional actions must be taken against the subject after any period of delay has passed. Only the Assistant Secretary of Defense (Force Management and Personnel) can grant an exception to this requirement.<sup>43</sup>

On November 8, 1990, the Army issued a new policy implementing DOD Directive 5525.9.<sup>44</sup> This policy will be republished later as chapter 11 of the consolidated Army Regulation 614-XX.<sup>45</sup> The new policy specifies detailed procedures and strict time limits for seeking delays in compelling compliance with civilian court orders.<sup>46</sup> It establishes procedures and responsibilities for

determining whether civilian court orders should be enforced.<sup>47</sup> If it is determined that the court order must be honored, the policy specifies methods of compelling compliance.

A soldier subject to the order must be ordered to return to an appropriate port of entry at government expense.<sup>48</sup> An Army civilian or nonappropriated fund (NAF) employee who is the subject of the request must be strongly encouraged to comply with court order.<sup>49</sup> Failure to respond positively to the order can serve as the basis for termination of command sponsorship and removal from federal service.<sup>50</sup> A family member who is the subject of the request must be encouraged to comply with the court order. Subsequent failure to comply with the order may be the basis for withdrawing command sponsorship.<sup>51</sup>

The requesting party must provide travel expenses for Army civilian or NAF employees and accompanying family members. They also must provide travel expenses for military personnel from the port of entry to the requesting jurisdiction. Failure to provide travel expenses is grounds for recommending denial of the request.<sup>52</sup>

Commanders and supervisors have no authority to deny a request for assistance. That authority is reserved to the Secretary of the Army.<sup>53</sup> If local commanders or supervisors believe that non-compliance with a request for assistance is justified, they should forward their recommendation directly through the appropriate office to the Office of the Deputy Chief of Staff, Personnel.<sup>54</sup> Major Connor.

<sup>40</sup>See *id.* § 146.6(b)-(d).

<sup>41</sup>*Id.* § 146.6(a).

<sup>42</sup>55 Fed. Reg. 34555 (1990) (to be codified at 32 C.F.R. § 146.6(a)).

<sup>43</sup>32 C.F.R. § 146.6(a)(1) (1990).

<sup>44</sup>See 55 Fed. Reg. 47042 (1990) (to be codified at 32 C.F.R. part 589).

<sup>45</sup>AR 614-XX will prescribe policies pertaining to permanent change of station moves, overseas tour lengths, unit deployments, volunteers, deletions and deferment from overseas assignment instructions, curtailments, extensions, consecutive overseas tours, eligibility for overseas service, stabilization of tour lengths, and compliance with civilian court orders. This regulation will supersede AR 614-5, Stabilization of Tours; AR 614-6, Permanent Change of Station Policy; and AR 614-30, Overseas Service. See *id.*

<sup>46</sup>*Id.* at 47043 (to be codified at 32 C.F.R. 589.4(b)(3)).

<sup>47</sup>*Id.* (to be codified at 32 C.F.R. § 589.4(b)).

<sup>48</sup>*Id.* (to be codified at 32 C.F.R. § 589.4(c)).

<sup>49</sup>*Id.* (to be codified at 32 C.F.R. § 589.4(e)).

<sup>50</sup>*Id.*

<sup>51</sup>*Id.* (to be codified at 32 C.F.R. § 589.4(f)).

<sup>52</sup>*Id.* (to be codified at 32 C.F.R. § 589.4(g)).

<sup>53</sup>*Id.* (to be codified at 32 C.F.R. §§ 589.4(b)(4)&(5)).

<sup>54</sup>See *id.* (to be codified at 32 C.F.R. § 589.4(b)(3)-(5)) (DAPE-MP for military personnel and their family members; DAPE-CPL for Army civilian employees and their family members; CFSC-HR-P for NAF employees and their family members).

# Claims Report

United States Army Claims Service

## Correction to December 1990 Claims Policy Note

The Claims Report section of the December 1990 issue of *The Army Lawyer* contained erroneous information. The error appeared on page 61, in one of the tables published as part of the Claims Policy Note entitled **Field Claims Office Authority to Compromise, Waive, or Terminate Collection Action on Affirmative Claims**. The table incorrectly indicates that claims offices may waive property damage claims. The Editor of *The Army Lawyer* takes responsibility for this error and apologizes for any confusion it caused. The correct table appears below.

Table 2  
**LOCAL PROPERTY DAMAGE  
COMPROMISE/TERMINATION  
AUTHORITY**

	Amount of Assertion		
	Greater than \$20,000	Over \$10,000, up to \$20,000	No more than \$10,000
Area Claims Offices	No authority to terminate or compromise	May compromise up to \$10,000.	May compromise or terminate.
	Amount of Assertion		
	Greater than \$20,000	Over \$5,000, up to \$20,000	No more than \$5,000
Claims Processing Offices	No authority to terminate or compromise	May compromise up to \$5,000.	May compromise or terminate.

## Guard and Reserve Affairs Item

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

### Individual Mobilization Augmentee Position Vacancies

The Criminal Law Division of The Judge Advocate General's School, U.S. Army, has vacancies for Reserve officer Individual Mobilization Augmentees (IMA). These vacancies are for Reserve officers holding the rank of captain or major.

Criminal Law Division IMAs provide instruction to

judge advocates in substantive criminal law and trial advocacy. Applicants should have extensive experience in criminal law and criminal litigation.

Applications should be received no later than 30 April 1991. Interested Reserve officers should contact Mrs. Jeannie Brayshaw at The Judge Advocate General's School, ATTN: JAGS-GRA, Charlottesville, VA 22903-1781. Telephone: AV 274-7115 ext. 388 or commercial (804) 972-6388.

## CLE News

### 1. Rescheduling of the 9th Federal Litigation Course.

The 9th Federal Litigation Course, which was scheduled for the week of 15 April 1991, has been rescheduled for the fall. The new dates will be announced later; however, a late-September or October time frame is anticipated.

### 2. Resident Course Quotas

The Judge Advocate General's School restricts attendance at resident CLE courses to those who have received allocated quotas. If you have not received a welcome letter or packet, you do not have a quota. Personnel may obtain quota allocations from local training offices, which receive them from the MACOMs. Reservists obtain quotas through their unit or, if they are

nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7115, extension 307; commercial phone: (804) 972-6307).

### 3. TJAGSA CLE Course Schedule

1991

11-15 March: 15th Administrative Law for Military Installations (5F-F24).

18-22 March: 47th Law of War Workshop (5F-F42).

25-29 March: 28th Legal Assistance Course (5F-F23).

1-5 April: 2d Law for Legal NCO's Course (512-71D/E/20/30).

8-12 April: 9th Operational Law Seminar (5F-F47).

8-12 April: 106th Senior Officers Legal Orientation Course (5F-F1).

29 April-10 May: 124th Contract Attorneys Course (5F-F10).

8-10 May: 2d Center for Law and Military Operations Symposium (5F-F48).

13-17 May: 39th Federal Labor Relations Course (5F-F22).

20-24 May: 32d Fiscal Law Course (5F-F12).

20 May-7 June: 34th Military Judge Course (5F-F33).

3-7 June: 107th Senior Officers Legal Orientation Course (5F-F1).

10-14 June: 21st Staff Judge Advocate Course (5F-F52).

10-14 June: 7th SJA Spouses' Course.

17-28 June: JATT Team Training.

17-28 June: JAOAC (Phase VI).

8-10 July: 2d Legal Administrators Course (7A-550A1).

11-12 July: 2d Senior/Master CWO Technical Certification Course (7A-550A2).

22 July-2 August: 125th Contract Attorneys Course (5F-F10).

22 July-25 September: 125th Basic Course (5-27-C20).

29 July-15 May 1992: 40th Graduate Course (5-27-C22).

5-9 August: 48th Law of War Workshop (5F-F42).

12-16 August: 15th Criminal Law New Developments Course (5F-F35).

19-23 August: 2d Senior Legal NCO Management Course (512-71D/E/40/50).

26-30 August: Environmental Law Division Workshop.

9-13 September: 13th Legal Aspects of Terrorism Course (5F-F43).

23-27 September: 4th Installation Contracting Course (5F-F18).

#### 4. Other DOD Sponsored CLE Courses

13-17 May 1991: Air Force Environmental Law Course, Maxwell Air Force Base, Alabama. This intensive course covers the entire spectrum of environmental laws and regulations. Army attorneys should note that The Judge Advocate General's School currently does not offer a course on environmental law. Therefore, judge advocates desiring comprehensive environmental law training should seek a course allotment in the Air Force's program. Course allotments for the Army are managed by the OTJAG Environmental Law Division. For further information contact Major Gary Perolman at AV 226-1230 or (703) 696-1230.

#### 5. Civilian Sponsored CLE Courses

May 1991

1: CHBA, Incorporating a Business, Chicago, IL.

2-4: ALIABA, Chapter 11 Business Reorganizations, Dallas, TX.

3: NYSBA, Personal Injury Litigation Under New York Labor Law, New York, NY.

3: PBI, Trial Techniques, Pittsburgh, PA.

5-10: NJC, Probate Law, Reno, NV.

5-10: NJC, Administrative Law for Regulatory Agencies, New Orleans, LA.

5-10: NJC, Administrative Law: Workers' Compensation, New Orleans, LA.

5-10: NJC, Introduction to Personal Computers in the Courts, Reno, NV.

6-8: GWU, Patents, Technical Data and Computer Software, Washington, D.C.

7: CHBA, Law Office Management Advisory, Chicago, IL.

7-10: ESI, Competitive Proposals Contracting, Washington, D.C.

9-10: USCLC, 12th Annual Computer Law Institute, Los Angeles, CA.

10: NYSBA, Personal Injury Litigation Under New York Labor Law, Buffalo, NY.

10-11: ALIABA, Basics of Computer Law, Boston, MA.

12-16: NCDA, Prosecuting Drug Cases, New Orleans, LA.

12-17: NJC, Computer Uses for Judges, Reno, NV.

13: CHBA, The Art of Cross-Examination, Chicago, IL.

13: ALIABA, Professional Ethics and Responsibility: New Model Rules, San Francisco, CA.

14: CHBA, Aviation Law, Chicago, IL.

14-17: ESI, Contract Accounting and Financial Management, Los Angeles, CA.

14-17: ESI, ADP/Telecommunications Statements of Work, Washington, D.C.

17: NYSBA, The Role of the Attorney in Alternate Dispute Resolution, New York, NY.

19-22: LRP, Institute on Legal Problems of Educating the Handicapped, Phoenix, AZ.

19-23: NCDA, Trial Advocacy, San Diego, CA.

21-24: ESI, Negotiation Strategies and Techniques, Washington, D.C.

22: PBI, Trial Techniques, Philadelphia, PA.

23-25: JMLS, Globalization of the Computer Industry: Coping...., Chicago, IL.

30: CHBA, Contested Estates, Chicago, IL.

30-June 7: NCDA, Executive Prosecutors Course, Houston, TX.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed below.

AAJE: American Academy of Judicial Education, 2025 Eye Street, NW., Suite 824, Washington, D.C. 20006. (202) 755-0083.

ABA: American Bar Association, 750 North Lake Shore Drive, Chicago, IL 60611. (312) 988-6200.

ABICLE: Alabama Bar Institute for Continuing Legal Education, P.O. Box 870384, Tuscaloosa, AL 35487-0384. (205) 348-6230.

AICLE: Arkansas Institute for CLE, 400 West Markham, Little Rock, AR 72201. (501) 375-3957.

AKBA: Alaska Bar Association, P.O. Box 100279, Anchorage, AK 99510. (907) 272-7469.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104. (800) CLE-NEWS; (215) 243-1600.

ASLM: American Society of Law and Medicine, Boston University School of Law, 765 Commonwealth Avenue, Boston, MA 02215. (617) 262-4990.

BNA: The Bureau of National Affairs Inc., 1231 25th Street, NW., Washington, D.C. 20037. (800) 424-9890 (conferences); (202) 452-4420 (conferences); (800) 372-1033; (202) 258-9401.

CCEB: Continuing Education of the Bar, University of California Extension, 2300 Shattuck Avenue, Berkeley, CA 94704. (415) 642-0223; (213) 825-5301.

CHBA: Chicago Bar Association, CLE, 29 South LaSalle Street, Suite 1040, Chicago, IL 60603. (312) 782-7348.

CLEC: Continuing Legal Education in Colorado, Inc., 1900 Grant Street, Suite 900, Denver, CO 80203. (303) 860-0608.

CLESN: CLE Satellite Network, 920 Spring Street, Springfield, IL 62704. (217) 525-0744, (800) 521-8662.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53715. (608) 262-3588.

ESI: Educational Services Institute, 5201 Leesburg Pike, Suite 600, Falls Church, VA 22041-3203. (703) 379-2900.

FB: Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300. (904) 222-5286.

FBA: Federal Bar Association, 1815 H Street, NW., Washington, D.C. 20006-3604. (202) 638-0252.

GICLE: The Institute of Continuing Legal Education in Georgia, P.O. Box 1885, Athens, GA 30603. (404) 542-2522.

GII: Government Institutes, Inc., 966 Hungerford Drive, Suite 24, Rockville, MD 20850. (301) 251-9250.

GULC: Georgetown University Law Center, CLE Division, 777 N. Capitol Street, N.E., Suite 405, Washington, D.C. 20002. (202) 408-0990.

GWU: Government Contracts Program, The George Washington University, National Law Center, 2020 K Street, N.W., Room 2107, Washington, D.C. 20052. (202) 994-5272.

HICLE: Hawaii Institute for CLE, UH Richardson School of Law, 2515 Dole Street, Room 203, Honolulu, HI 96822-2369. (808) 948-6551.

ICLEF: Indiana CLE Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204. (317) 637-9102.

IICLE: Illinois Institute for CLE, 2395 W. Jefferson Street, Springfield, IL 62702. (217) 787-2080.

JMLS: John Marshall Law School, 315 South Plymouth Court, Chicago, IL 60604. (312) 427-2737, ext. 573.

**KBA:** Kansas Bar Association, 1200 Harrison Street, P.O. Box 1037, Topeka, KS 66601. (913) 234-5696.

**LEI:** Law Education Institute, 5555 N. Port Washington Road, Milwaukee, WI 53217. (414) 961-1955.

**LRP:** LRP Publications, 421 King Street, P.O. Box 1905, Alexandria, VA 22313-1905. (703) 684-0510; (800) 727-1227.

**LSBA:** Louisiana State Bar Association, 210 O'Keefe Avenue, Suite 600, New Orleans, LA 70112. (800) 421-5722; (504) 566-1600.

**LSU:** Louisiana State University, Center of Continuing Professional Development, Paul M. Herbert Law Center, Baton Rouge, LA 70803-1008. (504) 388-5837.

**MBC:** Missouri Bar Center, 326 Monroe St., P.O. Box 119, Jefferson City, MO 65102. (314) 635-4128.

**MCLE:** Massachusetts Continuing Legal Education, Inc., 20 West Street, Boston, MA 02111. (800) 632-8077; (617) 482-2205.

**MICLE:** Institute of Continuing Legal Education, 1020 Greene Street, Ann Arbor, MI 48109-1444. (313) 764-0533; (800) 922-6516.

**MILE:** Minnesota Institute of Legal Education, 25 South Fifth Street, Minneapolis, MN 55402. (612) 339-MILE.

**MLI:** Medi-Legal Institute, 15301 Ventura Boulevard, Suite 300, Sherman Oaks, CA 91403. (800) 443-0100.

**MICPEL:** Maryland Institute for Continuing Professional Education of Lawyers, Inc. 520 W. Fayette Street, Baltimore, MD 21201. (301) 238-6730.

**MSBA:** Maine State Bar Association, 124 State Street, P.O. Box 788, Augusta, ME 04332-0788. (207) 622-7523.

**NCBF:** North Carolina Bar Foundation, 1312 Annapolis Drive, P.O. Box 12806, Raleigh, NC 27605. (919) 828-0561.

**NCCLE:** National Center for Continuing Legal Education, Inc., 431 West Colfax Avenue, Suite 310, Denver, CO 80204.

**NCDA:** National College of District Attorneys, University of Houston Law Center, 4800 Calhoun Street, Houston, TX 77204-6380. (713) 747-NCDA.

**NCJFC:** National College of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8970, Reno, NV 89507. (702) 784-4836.

**NCLE:** Nebraska CLE, Inc., 635 South 14th Street, P.O. Box 81809, Lincoln, NB 68501. (402) 475-7091.

**NELI:** National Employment Law Institute, 444 Magnolia Avenue, Suite 200, Larkspur, CA 94939. (415) 924-3844.

**NHLA:** National Health Lawyers Association, 522 21st Street, N.W., Suite 120, Washington, DC 20006. (202) 833-1100.

**NIBL:** Norton Institutes on Bankruptcy Law, P.O. Box 2999, 380 Green Street, Gainesville, GA 30503. (404) 535-7722.

**NITA:** National Institute for Trial Advocacy, 1507 Energy Park Drive, St. Paul, MN 55108. (800) 225-6482; (612) 644-0323 in (MN and AK).

**NJC:** National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784-6747.

**NJCLE:** New Jersey Institute for CLE, One Constitution Square, New Brunswick, NJ 08901-1500. (201) 249-5100.

**NKU:** Northern Kentucky University, Chase College of Law, Office of Continuing Legal Education, Highland Hts., KY 41076. (606) 572-5380.

**NLADA:** National Legal Aid & Defender Association, 1625 K Street, N.W., Eighth Floor, Washington, D.C. 20006. (202) 452-0620.

**NMTLA:** New Mexico Trial Lawyers' Association, P.O. Box 301, Albuquerque, NM 87103. (505) 243-6003.

**NPI:** National Practice Institute, 330 Second Avenue South, Suite 770, Minneapolis, MN 55401. (612) 338-1977, (800) 328-4444.

**NWU:** Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611. (312) 908-8932.

**NYSBA:** New York State Bar Association, One Elk Street, Albany, NY 12207. (518) 463-3200; (800) 582-2452.

**NYUSCE:** New York University, School of Continuing Education, 11 West 42nd Street, New York, NY 10036. (212) 580-5200.

**NYUSL:** New York University, School of Law, Office of CLE, 715 Broadway, New York, NY 10003. (212) 598-2756.

**OLCI:** Ohio Legal Center Institute, P.O. Box 8220, Columbus, OH 43201-0220. (614) 421-2550.

**PBI:** Pennsylvania Bar Institute, 104 South Street, P.O. Box 1027, Harrisburg, PA 17108-1027. (800) 932-4637; (717) 233-5774.

**PLI:** Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. (212) 765-5700.

**SBA:** State Bar of Arizona, 363 North First Avenue, Phoenix, AZ 85003. (602) 252-4804.

SBMT: State Bar of Montana, P.O. Box 577, Helena, MT 59624-0577 (406) 442-7660.

SBT: State Bar of Texas, Professional Development Program, Capitol Station, P.O. Box 12487, Austin, TX 78711. (512) 463-1437.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 608, Columbia, SC 29202-0608. (803) 799-6653.

SLF: Southwestern Legal Foundation, P.O. Box 830707, Richardson, TX 75080-0707. (214) 690-2377.

STCL: South Texas College of Law, 1303 San Jacinto Street, Houston, TX 77002-7006. (713) 659-8040.

TBA: Tennessee Bar Association, 3622 West End Avenue, Nashville, TN 37205. (615) 383-7421.

UKCL: University of Kentucky, College of Law, Office of CLE, Suite 260, Law Building, Lexington, KY 40506-0048. (606) 257-2922.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124. (305) 284-4762.

USB: Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111-3834. (801) 531-9077.

USCLC: University of Southern California Law Center, University Park, Los Angeles, CA 90089-0071. (213) 743-2582.

USTA: United States Trademark Association, 6 East 45th Street, New York, NY 10017. (212) 986-5880.

UTSL: University of Texas School of Law, 727 East 26th Street, Austin, TX 78705. (512) 471-3663.

VACLE: Committee of Continuing Legal Education of the Virginia Law Foundation, School of Law, University of Virginia, Charlottesville, VA 22901. (804) 924-3416.

WSBA: Washington State Bar Association, Continuing Legal Education, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599. (206) 448-0433.

WTI: World Trade Institute, One World Trade Center, 55 West, New York, NY 10048. (212) 466-4044.

**6. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates**

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama	31 January annually
Arkansas	30 June annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year

<u>Jurisdiction</u>	<u>Reporting Month</u>
Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually
Montana	1 April annually
Nevada	15 January annually
New Jersey	12-month period commencing on first anniversary of bar exam
New Mexico	For members admitted prior to 1 January 1990 the initial reporting year shall be the year ending September 30, 1990. Every such member shall receive credit for carryover credit for 1988 and for approved programs attended in the period 1 January 1989 through 30 September 1990. For members admitted on or after 1 January 1990, the initial reporting year shall be the first full reporting year following the date of admission.
North Carolina	12 hours annually
North Dakota	1 February in three-year intervals
Ohio	24 hours every two years
Oklahoma	On or before 15 February annually
Oregon	Beginning 1 January 1988 in three-year intervals
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Utah	31 December of 2d year of admission
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually

<u>Jurisdiction</u>	<u>Reporting Month</u>
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For addresses and detailed information, see the January 1991 issue of *The Army Lawyer*.

### 7. Army Sponsored Continuing Legal Education Calendar (1 February 1991—30 September 1991)

The following is a schedule of Army Sponsored Continuing Legal Education, not conducted at TJAGSA. Those interested in the training should check with the

sponsoring agency for quotas and attendance requirements. NOT ALL training listed is open to all JAG officers. Dates and locations are subject to change; check before making plans to attend. Sponsoring agencies are: OTJAG Legal Assistance, (202) 697-3170; TJAGSA On-Site, Guard & Reserve Affairs Department, (804) 972-6380; Trial Judiciary, (703) 756-1795; Trial Counsel Assistance Program (TCAP), (703) 756-1804; U.S. Army Trial Defense Service (TDS), (703) 756-1390; U.S. Army Claims Service, (301) 677-7622; Office of the Judge Advocate, U.S. Army Europe & Seventh Army (POC: MAJ Gordon, Heidelberg Military 8459). This schedule will be updated in *The Army Lawyer* on a periodic basis. Coordinator: MAJ Cuculic, TJAGSA, (804) 972-6342.

### TRAINING

<u>TRAINING</u>	<u>LOCATION</u>	<u>DATES</u>
TJAGSA On-Site	Savannah, GA	9-10 Feb 91
USAREUR Administrative Law CLE	Lake Chiemsee, FRG	11-15 Feb 91
TCAP Training Seminar	Denver, CO	13-15 Feb 91
TJAGSA On-Site	St. Louis, MO	22-24 Feb 91
TJAGSA On-Site	Denver, CO	23 Feb 91
TJAGSA On-Site	Salt Lake City, UT	24 Feb 91
TJAGSA On-Site	Columbia, SC	2-3 Mar 91
Region II USATDS RDC Workshop	Hunter Army Airfield, GA	13-15 Mar 91
TJAGSA On-Site	Washington, DC	16-17 Mar 91
TJAGSA On-Site	San Francisco, CA	16-17 Mar 91
Trial Judiciary CLE	Ft Leavenworth, KS	17-20 Mar 91
TJAGSA On-Site	Wakefield, MA	23-24 Mar 91
TCAP Training Seminar	Atlanta, GA	3-5 Apr 91
TJAGSA On-Site	Chicago, IL	6-7 Apr 91
USAREUR Contract Law CLE	Heidelberg, FRG	8-12 Apr 91
TCAP Training Seminar	Washington, DC	10-12 Apr 91
TJAGSA On-Site	Louisville, KY	13-14 Apr 91
TCAP Training Seminar	Europe (Specific Locations to be Determined)	22 Apr-3 May 91
TJAGSA On-Site	San Juan, PR	30 Apr-12 May 91
TJAGSA On-Site	Fort McClellan, AL	4-5 May 91
TJAGSA On-Site	Columbus, OH	4-5 May 91
TJAGSA On-Site	Oklahoma City, OK	17-19 May 91
USAREUR Operational Law CLE	Heidelberg, FRG	21-24 May 91
USAREUR Staff Judge Advocates CLE	Heidelberg, FRG	30-31 May 91
USAREUR Legal Assistance CLE	Garmisch, FRG	3-6 Sep 91

## Current Material of Interest

### 1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. However, because outside distribution of these materials is not within the School's mission, TJAGSA does not have the resources to provide publications to individual requestors.

To provide another avenue of availability, the Defense Technical Information Center (DTIC) makes some of this material available to government users. An office may obtain this material in two ways. The first way is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. Practitioners may request the necessary information and forms to become registered as a user from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. DTIC will provide information concerning this procedure when a practitioner submits a request for user status.

DTIC provides users biweekly and cumulative indices. DTIC classifies these indices as a single confidential document, and mails them only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and *The Army Lawyer* will publish the relevant ordering information, such as DTIC numbers and titles. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC; users must cite them when ordering publications.

#### Contract Law

AD B100211 Contract Law Seminar Problems/JAGS-ADK-86-1 (65 pgs).

\*AD A229148 Government Contract Law Deskbook Vol 1/ADK-CAC-1-90-1 (194 pgs).

\*AD A229149 Government Contract Law Deskbook, Vol 2/ADK-CAC-1-90-2 (213 pgs).

AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

#### Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).

AD B116101 Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).

AD B136218 Legal Assistance Office Administration Guide/JAGS-ADA-89-1 (195 pgs).

AD B135453 Legal Assistance Real Property Guide/JAGS-ADA-89-2 (253 pgs).

AD B135492 Legal Assistance Consumer Law Guide/JAGS-ADA-89-3 (609 pgs).

AD A226160 Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-90 (85 pgs).

AD B141421 Legal Assistance Attorney's Federal Income Tax Guide/JA-266-90 (230 pgs).

AD B147096 Legal Assistance Guide: Office Directory/JA-267-90 (178 pgs).

AD A226159 Model Tax Assistance Program/JA-275-90 (101 pgs).

AD B147389 Legal Assistance Guide: Notarial/JA-268-90 (134 pgs).

AD B147390 Legal Assistance Guide: Real Property/JA-261-90 (294 pgs).

\*AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).

#### Administrative and Civil Law

AD B139524 Government Information Practices/JAGS-ADA-89-6 (416 pgs).

AD B139522 Defensive Federal Litigation/JAGS-ADA-89-7 (862 pgs).

AD B145359 Reports of Survey and Line of Duty Determinations/ACIL-ST-231-90 (79 pgs).

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

- AD B145360 Administrative and Civil Law Handbook/JA-296-90-1 (525 pgs).
- AD B145704 AR 15-6 Investigations: Programmed Instruction/JA-281-90 (48 pgs).
- Labor Law**
- AD B145934 The Law of Federal Labor-Management Relations/JA-211-90 (433 pgs).
- AD B145705 Law of Federal Employment/ACIL-ST-210-90 (458 pgs).

**Developments, Doctrine & Literature**

- AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

**Criminal Law**

- AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).
- AD B135506 Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).
- AD B135459 Senior Officers Legal Orientation/JAGS-ADC-89-2 (225 pgs).
- AD B137070 Criminal Law, Unauthorized Absences/JAGS-ADC-89-3 (87 pgs).
- AD B140529 Criminal Law, Nonjudicial Punishment/JAGS-ADC-89-4 (43 pgs).
- AD B140543 Trial Counsel & Defense Counsel Handbook/JAGS-ADC-90-6 (469 pgs).

**Reserve Affairs**

- AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

- AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

\*Indicates new publication or revised edition.

**2. Regulations & Pamphlets**

Listed below are new publications and changes to existing publications.

<u>Number</u>	<u>Title</u>	<u>Date</u>
CIR 611-90-2	Implementation of Changes to the Military Occupational Classification and Structure	19 Oct 90

<u>Number</u>	<u>Title</u>	<u>Date</u>
	DOD Entitlement Manual, Change 20	6 Jul 90
	Manual for Courts-Martial, U.S. 1984, Change 4	15 Nov 90
UPDATE 14	Officer Ranks Personnel	17 Sep 90
UPDATE 15	All Ranks Personnel	1 Oct 90
UPDATE 16	Enlisted Ranks Personnel	10 Oct 90

**3. OTJAG Bulletin Board System**

Numerous TJAGSA publications are available on the OTJAG Bulletin Board System (OTJAG BBS). Users can sign on the OTJAG BBS by dialing (703) 693-4143 with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and will then instruct them that they can use the OTJAG BBS after they receive membership confirmation, which takes approximately forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the OTJAG BBS.

**4. TJAGSA Information Management Items**

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) now has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to "crank(lee)" for PROFS.

b. Personnel desiring to reach someone at TJAGSA via AUTOVON should dial 274-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6-plus the three-digit extension you want to reach.

d. The Judge Advocate General's School has a new toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

**5. The Army Law Library System.**

The Army Law Library System (ALLS) acts as a central purchasing agent for over 260 Army law libraries world-

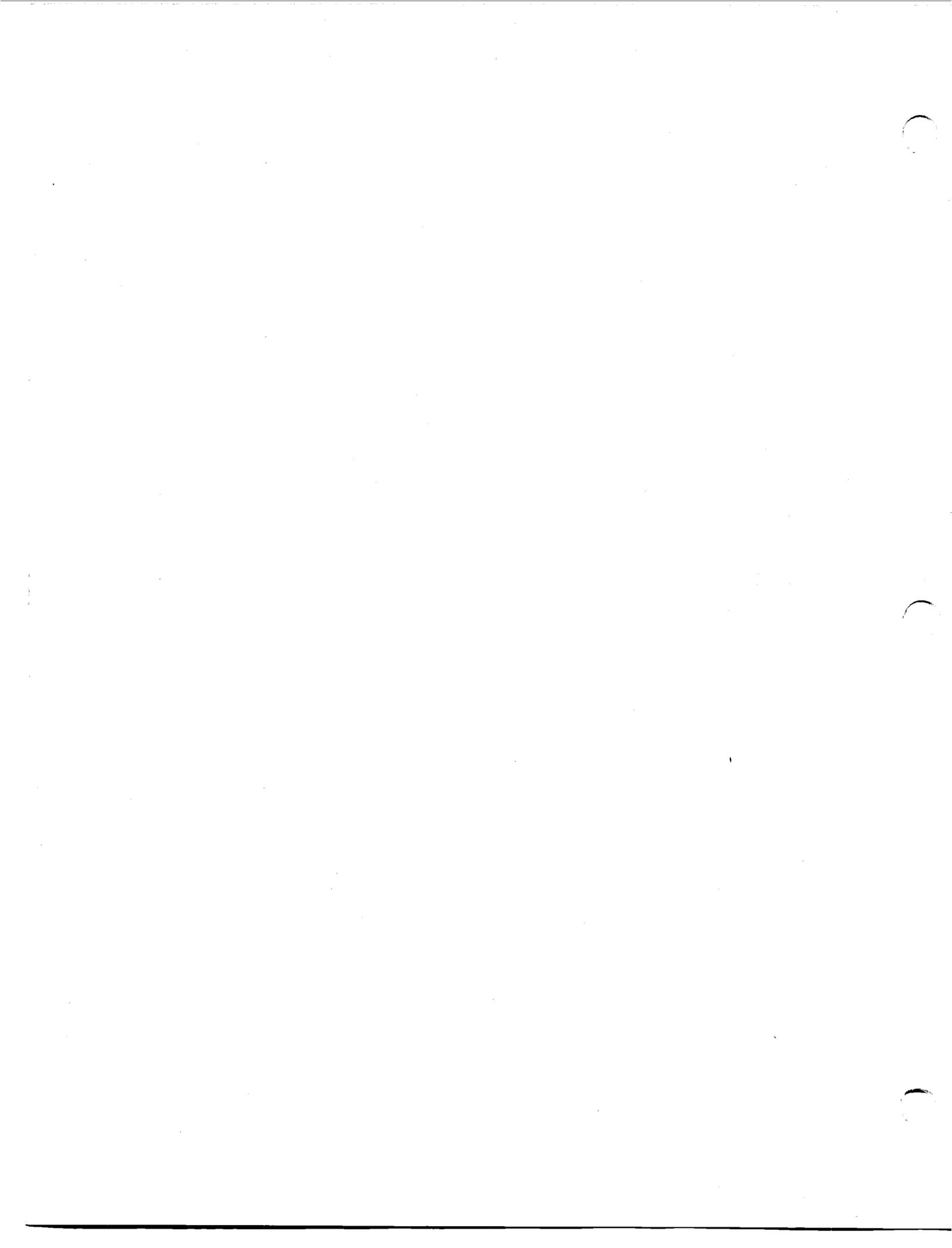
wide. These libraries contain the research materials that staff judge advocate offices need to perform their missions. Because most research materials are available through subscription services, ALLS's primary mission is to maintain these subscriptions so that the material in Army law libraries is current.

ALLS's current fiscal year budget is approximately two million dollars. Traditionally, ALLS has budgeted for its primary mission and has used remaining year-end funds to purchase new materials. It occasionally will have other funds available to acquire books and other research materials. Accordingly, when local funding is unavailable, librar-

ies may request ALLS assistance in acquiring library materials.

Most recently, with the closure and realignment of many Army installations, ALLS has become the point of contact for redistribution of materials 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 available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are Autovon 274-7115 ext. 394, or commercial (804) 972-6394.







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