2013

CONTRACT ATTORNEYS DESKBOOK

Volume II

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THE JUDGE ADVOCATE GENERAL'S SCHOOL
CONTRACT AND FISCAL LAW DEPARTMENT

BIOGRAPHIES OF PROFESSORS

LIEUTENANT COLONEL CHARLES T. KIRCHMAIER, United States Army. Presently assigned as the Department Chair and Professor, Contract and Fiscal Law Department, The Judge Advocate General's Legal Center and School. LL.M., Government Procurement Law, The George Washington University School of Law, 2010; LL.M., Military Law, The Judge Advocate General's Legal Center and School, 2005; J.D., Temple University James E. Beasley School of Law, 1997; B.A., History, The University of Florida, 1989; Career Highlights: Chief, Contract and Fiscal Law Division, OJA, U.S. Army Europe, 2010-2012; Chief, Military Justice, Multi-National Corps Iraq and XVIII Airborne Corps, 2008-2009; Operational Law Trainer, U.S. Army Battle Command Training Program, 2006-2007; Operational Law Fellow, Center for Law and Military Operations, The Judge Advocate General's Legal Center and School, 2005-2006; Command Judge Advocate, 75th Ranger Regiment, 2003-2004; International Law Attorney, DoD Office of General Counsel, 2002-2003; Trial Attorney, U.S. Army Legal Services Agency, Contract Appeals Division, 2000-2002; Brigade Trial Counsel, Legal Assistance Attorney, 82d Airborne Division, 1998-2000.

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Air Base, Okinawa, Japan, 2006-2008. Member of Bar of Montana; admitted to practice before the U.S. Court of Appeals for the Armed Force and the U.S. Supreme Court.

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MAJOR JESSICA M. FARRELL, JA, Professor, Contract and Fiscal Law Department. B.A., Boston College, 1998; J.D., University of Connecticut School of Law, 2003; Judge Advocate Officer Basic Course, 2004; LL.M Military Law, The Judge Advocate General's School, 2013. Career Highlights: Chief, Military Justice, USARAF/SETAF, Vicenza, Italy 2010-2012; Chief, Administrative Law, USARAF/SETAF, Vicenza, Italy 2009-2010; Trial Counsel, 7th Sustainment Brigade, Fort Eustis, Virginia and Tallil, Iraq 2007-2009; Chief, Legal Assistance, Fort Eustis, Virginia 2006-2007; Claims Judge Advocate, Fort Eustis, Virginia 2005-2006. Member of the Bar of Connecticut.

MAJOR RYAN A. HOWARD, JA, Professor, Contract and Fiscal Law Department. B.A., Wheaton College, 2001; J.D., Northern Illinois University College of Law, 2005; Judge Advocate Officer Basic Course, 2005; LL.M Military Law (Contract Specialty), The Judge Advocate General's School, 2013. Career Highlights: Knowledge Management Attorney, International and Operational Law Division, OTJAG, Pentagon, 2011; Senior Trial Counsel, 21st Theater Sustainment Command, Kaiserslautern, Germany, 2009; Chief, Operational Law, 21st Theater Sustainment Command, Kaiserslautern, Germany, 2008; Brigade Judge Advocate, 159th Combat Aviation Brigade, 2007; Civil and Administrative Law Attorney, 101st Airborne Division (Air Assault), COB Speicher, Iraq, 2006. Lean Six Sigma Green Belt, 2010. Member of the Bar of Illinois; admitted to practice before the U.S. Supreme Court.

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Intelligence Battalion, Bagram, Afghanistan, 2002-2003, Fort Bragg, North Carolina, 2002. Member of the Bar of North Carolina.

MAJOR DALE C. McFEATTERS, JA, Professor, Contract and Fiscal Law Department. B.A., Wittenberg University, 2000; J.D. Duquesne University School of Law, 2004; Judge Advocate Officer Basic Course, 2005; LL.M Military Law, The Judge Advocate General's School, 2013. Career Highlights: Defense Counsel, Trial Defense Service, Schofield Barracks, Hawaii 2009-2012; Administrative Law Attorney, 1st Armored Division, Wiesbaden, Germany, 2008-2009; Trial Counsel, 2nd Brigade Combat Team, 1st Infantry Division, Baghdad, Iraq, 2006-2007; Administrative Law Attorney, 1st Infantry Division, Schweinfurt, Germany, 2006; Chief, Legal Assistance, Schweinfurt Law Center, 1st Infantry Division, Schweinfurt, Germany, 2005-2006. Member of the Bar of Pennsylvania.

MAJOR DARREN W. POHLMANN, JA, Professor, Contract and Fiscal Law Department. B.A., Washington and Lee University, 1999; J.D., American University-Washington College of Law, 2002; Judge Advocate Officer Basic Course, 2003; LL.M Military Law, The Judge Advocate General's School, 2011. Career Highlights: Battalion Judge Advocate, 1st Battalion, 7th Special Forces Group (Airborne), Fort Bragg, North Carolina, and Kandahar, Afghanistan, 2008-2010; Acquisition Attorney, US Army Space and Missile Defense Command/Army Forces Strategic Command, Redstone Arsenal, Alabama, 2006-2008; Trial Counsel, 4th Brigade Combat Team, 3d Infantry Division, Fort Stewart, Georgia and Baghdad, Iraq, 2005-2006; Administrative Law and Contract Law Attorney, 3d Infantry Division, Fort Stewart, Georgia, and Baghdad, Iraq, 2003-2005; Legal Assistance Attorney, 3d Infantry Division, 2003. Member of the Bar of the Commonwealth of Virginia; admitted to practice before the U.S. Court of Appeals for the Armed Forces.

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MAJOR GREG A. MARCHAND, JA, Professor, Contract and Fiscal Law Department, U.S. Army Reserve. B.A., University of Pittsburgh (summa cum laude), 1996; J.D., Harvard Law School (cum laude), 1999; Judge Advocate Officer Basic Course (Commandant’s List), 2000; Judge Advocate Officer Advanced Course (Honor Graduate), 2006. Career Highlights: Deputy Assistant General Counsel, Government Accountability Office, 2005-present; Counsel, U.S.

House of Representatives, Committee on Armed Services, Subcommittee on Oversight & Investigations, 2007-2008; 151st Legal Support Organization (General Officer Support Team, 2009-2010; OTJAG Criminal Law Division Team, 2006-2009; S-1, 2005-2006); Administrative and Operational Law Attorney, Multi-National Force – Iraq, 2004-2005; Law Clerk to the Honorable Judge Andrew Effron, U.S. Court of Appeals for the Armed Forces, 2003-2004; Assistant Counsel for Legislative, Fiscal, and General Law, Office of the Chief Counsel, Headquarters, U.S. Army Corps of Engineers (Honors Program), 2000-2003; Attorney, Wiley, Rein & Fielding LLP, 1999. Member of the Bar of Pennsylvania; admitted to practice before the U.S. Supreme Court, U.S. Court of Appeals for the Federal Circuit, and U.S. Court of Appeals for the Armed Forces.

MAJOR SEAN T. NGUYEN, JA, Professor, Contract and Fiscal Law Department, United States Army Reserve, DIMA. B.A., Santa Clara University, 1995; J.D., University of the Pacific, McGeorge School of Law, 2003; Judge Advocate Officer Basic Course, 2004; LL.M. Government Procurement Law, The George Washington University, exp. 2012. Career Highlights: Contract and Administrative Law Attorney, 151st Legal Support Organization, Alexandria, VA, 2011; Contract Law/Protest Litigation Attorney, Army Materiel Command, Fort Belvoir, VA, 2008-2010; Legal Advisor to the Commander, Responsible Reset Task Force (R2TF), Army Materiel Command, Camp Arifjan, Kuwait, 2009; Chief, Administrative and Civil Law, Army Sustainment Command, Rock Island Arsenal, IL, 2007-2008; Command Judge Advocate, 555th Combat Support Brigade (Maneuver Enhancement), Fort Lewis, WA and COB Speicher, Iraq, 2005-2007; Operational Law Judge Advocate, I Corps and Fort Lewis, Fort Lewis, WA, 2005; Legal Assistance Attorney, I Corps and Fort Lewis, Fort Lewis, WA, 2004. Member of the District of Columbia Bar and the State Bar of California.

MAJOR CHARLENE T. STORINO, JA, U.S. Army Reserve. B.A., Asian Studies (summa cum laude and All College Honors), Carthage College, 2000; J.D., University of Wisconsin Law School, 2003; Judge Advocate Basic Course, 2003. Career Highlights: Attorney, National Capital Region Contracting Center, Alexandria, Virginia, 2009-Present; Legal Counsel, Mission and Installation Contracting Center – Fort Eustis, Fort Eustis, Virginia, 2006-2009; Administrative and Operational Law Attorney, Office of the Staff Judge Advocate, Fort Huachuca, Arizona, 2005-2006; Legal Assistance Attorney, Office of the Staff Judge Advocate, Fort Huachuca, Arizona, 2003-2005. Member of the Bar of Wisconsin.

MAJOR ROBERT T. WU, JA, Professor, Contract and Fiscal Law Department, U.S. Army Reserves. B.S., Tufts University, 1999; J.D., University of San Francisco School of Law, 2002, cum laude; LL.M. Candidate, Government Procurement Law, George Washington University Law School. Career Highlights: Senior Attorney, Procurement Law Division, Office of the General Counsel, U.S. Government Accountability Office, 2013-present; Trial Attorney, Civilian, U.S. Army Legal Services Agency, Contract and Fiscal Law Division, 2009-2013; Assistant District Counsel, Afghanistan Engineer District - North, U.S. Army Corps of Engineers, 2011-2012; Trial Attorney, U.S. Army Legal Services Agency, Contract and Fiscal Law Division, 2007-2009; Trial Counsel, U.S. Army Medical Research and Materiel Command, Fort Detrick, Maryland, 2006-2007; Attorney, Task Force 134, Camp Victory, Iraq, 2005; Trial Counsel, U.S. Army Communications-Electronics Command, Fort Monmouth, New Jersey,

2004-2006; Chief of Client Services, Area III Legal Center, Camp Humphreys, Korea, 2003-2004. Member of the New York State Bar.

MAJOR THOMAS J. WARREN, JA, Professor, Contract and Fiscal Law Department, U.S. Army Reserve, DIMA. B.A., Political Science, Furman University, 2002; J.D., University of Oregon School of Law, 2005; Judge Advocate Officer Basic Course (Commandant's List), 2006. Career Highlights: Assistant Counsel for Procurement Law and Contract Disputes, Office of the Chief Counsel, Headquarters, United States Army Corps of Engineers (Military Honors Program), Washington, DC, 2006-2010; Associate Attorney, Government Contracts and Litigation practice groups, Wiley Rein, LLP, Washington, DC, 2010-2012; Senior Regional Counsel for Procurement Law, United States Army Corps of Engineers, Northwestern and Pacific Ocean Divisions, Portland, OR, 2012-present.
Member of the Bars of the State of Oregon and the District of Columbia. Admitted to practice in the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit.

CAPTAIN KATHYRN E. WITWER, JA, Professor, Contract and Fiscal Law Department, United States Army Reserve, DIMA. B.S., Wheaton College (*summa cum laude*), 2003; J.D., University of Arizona, 2006; Judge Advocate Officer Basis Course (Honor Graduate), 2007; Basic Officer Leader's Course (Honor Graduate), 2007; U.S. Army Airborne School (2007). Career Highlights: Trial Attorney, Commercial Litigation Branch, Department of Justice, 2010-present; Trial Attorney, Contract and Fiscal Law Division, U.S. Army Legal Services Agency, 2009-2010; Contract and Fiscal Law Attorney, Multi-National Division-Baghdad, Camp Liberty, Iraq, 2007-2009; Administrative Law Attorney, 4th Infantry Division, Fort Hood, Texas, 2007; Recruitment Officer, University of Arizona, Cadet Command, Tucson, Arizona, 2006-2007; Department of the Army Office of the General Counsel Honors Program, 2005; Legal Fellow, U.S. Senate Subcommittee on Terrorism, Technology & Homeland Security, 2004; Department of Defense Office of the General Counsel (International Affairs) Honors Program, 2004. Member of the Arizona bar; admitted to practice in the Supreme Court of Arizona, the U.S. Court of Federal Claims, the U.S. Court of Appeals for the Federal Circuit, and the U.S. Supreme Court.

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Chapter 19
Inspection, Acceptance and Warranty

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CHAPTER 19

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CHAPTER 19

INSPECTION, ACCEPTANCE, AND WARRANTY

I. INTRODUCTION.

A. A fundamental goal of the acquisition process is to obtain quality goods and services. In furtherance of this goal, the government inspects tendered supplies or services to insure that they conform with contract requirements.

B. While the right to inspect and test is very broad, it is not without limits. Frequently, government inspectors perform unreasonable inspections, rendering the government liable to the contractor for additional costs. Proper inspections are critical, because once the government accepts a product or service, it cannot revoke its acceptance except in narrowly defined circumstances.

C. Attorneys can contribute to the success of the government procurement process by working with government inspectors and contracting officers to insure that each of these individuals understands the government's rights and obligations regarding inspection, acceptance, and warranty under government contracts.

II. FUNDAMENTAL CONCEPTS OF INSPECTION AND TESTING.

A. General.

1. The inspection clauses, which are remedy granting clauses, vest the government with significant rights and remedies. FAR 52.246-2 thru 52.246-12.

2. In any dispute, the parties must identify the correct theory of recovery and applicable contractual provisions. The theory of recovery normally flows from a contractual provision. See Morton-Thiokol, Inc., ASBCA No. 32629, 90-3 BCA ¶ 23,207 (government denial of cost reimbursement rejected-board noted government's failure to cite Inspection clause).

B. Origin of the Government's Right to Inspect.

1. The government has the right to inspect to ensure that it receives conforming goods and services. FAR Part 46. The particular inspection clauses contained in a contract, if any, determine the government's right to inspect a contractor's performance.

2. Contract inspections fall into three general categories, depending on the extent of quality assurance needed by the government for the acquisition involved. These include:

   a. Government reliance on inspection by the contractor (FAR 46.202-2);

   b. Standard inspection requirements (FAR 46.202-3); and

   c. Higher-level contract quality requirements (FAR 46.202-4).

3. The FAR contains several different inspection clauses. In determining which clause to use, consider:

   a. The contract type (e.g., fixed-price, cost-reimbursement, time-and-materials, and labor-hour); and

   b. The nature of the item procured (e.g., supply, service, construction, transportation, or research and development).

4. Depending upon the specific clauses in the contract, the government has the right to inspect and test supplies, services, materials furnished, work required by the contract, facilities, and equipment at all places and times, and, in any event, before acceptance. See, e.g., FAR 52.246-2 (supplies-fixed-price), 52.246-4 (services-fixed-price), 52.246-5 (services-cost-reimbursement), 52.246-6 (time-and-materials and labor-hour), 52.246-8 (R&D-cost-reimbursement), 52.246-9 (R&D), and 52.246-12 (construction).

C. Operation of the Inspection Clauses.

1. Definitions.

   a. "Government contract quality assurance" is "the various functions, including inspection, performed by the Government to determine whether a contractor has fulfilled the contract obligations pertaining to quality and quantity." FAR 46.101.

   b. "Testing" is "that element of inspection that determines the properties or elements, including functional operation of supplies or their components, by the application of established scientific principles and procedures." FAR 46.101.

2. The government may require a contractor to maintain an inspection system that is adequate to ensure delivery of supplies and services that conform to the requirements of the contract. David B. Lilly Co., ASBCA No. 34678,

92-2 BCA ¶ 24,973 (government ordered contractor to submit new inspection plan to eliminate systemic shortcomings in the inspection process).

3. Inspection and testing must *reasonably relate* to the determination of whether performance is in compliance with contractual requirements.

   a. Contractually-specified inspections or tests are presumed reasonable unless they conflict with other contract requirements. General Time Corp., ASBCA No. 22306, 80-1 BCA ¶ 14,393.

   b. If the contract specifies a test, the government may not require a higher level of performance than measured by the method specified. United Technologies Corp., Sikorsky Aircraft Div. v. United States, 27 Fed. Cl. 393 (1992).

   c. The government may use tests other than those specified in the contract provided the tests do not impose a more stringent standard of performance. Donald C. Hubbs, Inc., DOT BCA No. 2012, 90-1 BCA ¶ 22,379 (use of rolling straightedge permitted after initial inspection determined that road was substantially nonconforming); Puroflow Corp., ASBCA No. 36058, 93-3 BCA ¶ 26,191 (upholding government's rejection of First Article Test Report for contractor's failure to perform an unspecified test).

   d. Absent contractually specified tests, the government may use any tests that do not impose different or more stringent standards than those required by the contract. Space Craft, Inc., ASBCA No. 47997, 98-1 BCA ¶ 29,341 (government reasonably measured welds on clamp assemblies); Davey Compressor Co., ASBCA No. 38671, 94-1 BCA ¶ 26,433; Al Johnson Constr. Co., ENG BCA No. 4170, 87-2 BCA ¶ 19,952.

   e. If the contract specifies no particular tests, consider the following factors in selecting a test or inspection technique:

      (1) Consider the intended use of the product or service. A-Nam Cong Ty, ASBCA No. 14200, 70-1 BCA ¶ 8,106 (unreasonable to test coastal water barges on the high seas while fully loaded).

      (2) Measure compliance with contractual requirements, and inform the contractor of the standards it must meet. Service Eng'g Co., ASBCA No. 40275, 94-1 BCA ¶ 26,382 (board refused to impose a military standard on contract for ship repair, where contract simply required

workmanship in accordance with "best commercial marine practice"); Tester Corp., ASBCA No. 21312, 78-2 BCA ¶ 13,373, mot. for recon. denied, 79-1 BCA ¶ 13,725.

(3) Use standard industry tests, if available. DiCecco, Inc., ASBCA No. 11944, 69-2 BCA ¶ 7,821 (use of USDA mushroom standards upheld). But see Chelan Packing Co., ASBCA No. 14419, 72-1 BCA ¶ 9,290 (government inspector failed to apply industry standard properly).

(4) The government must inspect and test correctly. Baifield Indus., Div. of A-T-O, Inc., ASBCA No. 13418, 77-1 BCA ¶ 12,308 (cartridge cases/rounds fired at excessive pressure).

(5) Generally, the government is not required to perform inspections. Cannon Structures, Inc., AGBCA No. 90-207-1, 93-3 BCA ¶ 26,059.

(a) The government's failure to discover defects during inspection does not relieve the contractor of the requirement to tender conforming supplies. FAR 52.246-2(j); George Ledford Constr., Inc., ENGBCA No. 6218, 97-2 BCA ¶ 29,172.

(b) However, the government may not unreasonably deny a contractor's request to perform preliminary or additional testing. Alonso & Carus Iron Works, Inc., ASBCA No. 38312, 90-3 BCA ¶ 23,148 (no liability for defective fuel tank because government refused to allow a preliminary water test not prohibited by the contract); Praoil, S.R.L., ASBCA No. 41499, 94-2 BCA ¶ 26,840 (government unreasonably refused contractor's request, per industry practice, to perform retest of fuel; termination for default overturned).

(6) Requiring a contractor to perform tests not specified in the contract may entitle the contractor to an equitable adjustment of the contract price. CBI NA-CON, Inc., ASBCA No. 42268, 93-3 BCA ¶ 26,187.

4. Costs

a. The burden of paying for testing depends on the clause used in the contract

(1) For supplies, generally the contractor pays for all reasonable facilities and assistance for the safe and convenient performance of Government inspectors. FAR 52.246-2(d).

(a) The Government pays for all expenses for inspections or tests at other than the contractor or subcontractor's premises. FAR 52.246-2(d).

(b) If supplies are not ready for tests or inspections, the contractor may be charged for the additional costs of re-inspection or tests. FAR 52.246-2(e)(1).

(c) The contractor may also be charged for additional costs of inspection following a prior rejection. FAR 52.246-2(e)(2).

(2) For services, the contractor and subcontractors are required to furnish, at no additional costs, reasonable facilities and assistance for the safe and convenient performance of tests or inspections on the premises of the contractor or subcontractor. FAR 52.246-4(d).

(3) For construction, the contractor shall furnish, at no increase in contract price, all facilities, labor, and material reasonably needed for performing safe and convenient inspection and tests as may be required.

(a) If the work is not ready for tests or inspections or following a prior rejection, the contractor may be charged for the additional costs of re-inspection or tests. FAR 52.246-12(e).

(b) The Government is required to perform tests and inspections in a manner that will not unnecessarily delay the work. FAR 52.246-12(e).

(c) The Government may engage in destructive testing, i.e. examining already completed work by removing it or tearing it out. The contractor must promptly furnish all necessary facilities, labor, or material.

(i) If the work is defective, the contractor must defray the expenses of the examination and satisfactory reconstruction.

(ii) If the work meets contract requirements, the contractor will receive an equitable adjustment for the additional services involved in the test and reconstruction, to include an extension of time if completion of the work was delayed by the test.

b. If a test is found to be unreasonable, courts and boards may find that the government assumed the risk of loss resulting from an unreasonable test. See Alonso & Carus Iron Works, Inc., ASBCA No. 38312, 90-3 BCA ¶ 23,148.

III. GOVERNMENT REMEDIES UNDER THE INSPECTION CLAUSE.

A. Introduction.

1. The inspection clauses give the government significant remedies. FAR 46.407; FAR 52.246; DFARS 246.407

2. The government's remedies under the inspection clauses operate in two phases. Initially, the government may demand correction of deficiencies. If this proves to be unsuccessful, the government may obtain corrective action from other sources.

3. Under the inspection clauses, the government's remedies depend upon when the contractor delivers nonconforming goods or services.

B. Defective Performance **BEFORE** the Required Delivery Date.

1. If the contractor delivers defective goods or services before the required delivery date, the government may:

a. Reject the tendered product or performance. Andrews, Large & Whidden, Inc. and Farmville Mfg. Corp., ASBCA No. 30060, 88-2 BCA ¶ 20,542 (government demand for replacement of non-conforming windows sustained); But see Centric/Jones Constr., IBCA No. 3139, 94-1 BCA ¶ 26,404 (government failed to prove that rejected work was noncompliant with specifications; contractor entitled to equitable adjustment for performing additional tests to secure government acceptance);

b. Require the contractor to correct the nonconforming goods or service, giving the contractor a reasonable opportunity to do so. Premiere Bldg. Servs., Inc., B-255858, Apr. 12, 1994, 94-1 CPD ¶ 252 (government may charge reinspection costs to contractor); or,

c. Accept the nonconforming goods or services at a reduced price. Federal Boiler Co., ASBCA No. 40314, 94-1 BCA ¶ 26,381 (change in cost of performance to the contractor, not the damages to the government, is the basis for adjustment); Blount Bros. Corp., ASBCA No. 29862, 88-2 BCA ¶ 20,644 (government entitled to a credit totaling the amount saved by contractor for using nonconforming concrete). See also Valley Asphalt Corp., ASBCA No. 17595, 74-2 BCA ¶ 10,680 (although runway built to wrong elevation, only nominal price reduction allowed because no loss in value to the government).

2. The government may not terminate the contract for default based on the tender of nonconforming goods or services before the required delivery date.

C. Defective Performance **ON** the Required Delivery Date.

1. If the contractor delivers nonconforming goods or services on the required delivery date, the government may:

a. Reject or require correction of the nonconforming goods or services;

b. Reduce the contract price and accept the nonconforming product; or

c. Terminate for default if performance is not in substantial compliance with the contract requirements. See FAR 52.249-6 to 52.249-10. When the government terminates a contract for default, it acquires rights and remedies under the Termination Clause, including the right to reprocure supplies or services similar to those terminated and charge the contractor the additional costs. See FAR 52.249-8(b).

2. If the contractor has complied substantially with the requirements of the contract, the government must give the contractor notice and the opportunity to correct minor defects before terminating the contract for default. Radiation Tech., Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966).

D. Defective Performance **AFTER** the Required Delivery Date.

1. Reject and require correction of the late nonconforming goods or services;

2. Accept the late nonconforming goods or services at a reduced price; or

3. Terminate the contract for default. However, if the contractor has complied substantially with the requirements of the contract, albeit after the required delivery date, the government should give the contractor notice of the defects and an opportunity to correct them. See Franklin E. Penny Co. v. United States, 524 F.2d 668 (Ct. Cl. 1975) (late nonconforming goods may substantially comply with contract requirements). Note: Penny arguably expanded the concept of substantial compliance to include late delivery of nonconforming goods. While the courts and boards have not widely followed Penny, they have also not overruled it.

E. Remedies if the Contractor Fails to Correct Defective Performance.

If the contractor fails to correct defective performance after receiving notice and a reasonable opportunity to correct the work, the government may:

1. Contract with a commercial source to correct or replace the defective goods or services (obtaining funding is often difficult and may make this remedy impracticable), George Bernadot Co., ASBCA No. 42943, 94-3 BCA ¶ 27,242; Zimcon Professionals, ASBCA Nos. 49346, 51123, 00-1 BCA ¶ 30,839 (Government may contract with a commercial source to correct or replace the defective goods or services and may charge cost of correction to original contractor);

2. Correct or replace the defective goods or services itself;

3. Accept the nonconforming goods or services at a reduced price, or;

4. Terminate the contract for default. FAR 52.246-4(f); Firma Tiefbau Meier, ASBCA No. 46951, 95-1 BCA ¶ 27,593.

F. Special Rules for Service Contracts.

1. The inspection clause for fixed-price service contracts, FAR 52.246-4, is different than FAR 52.246-2, which pertains to fixed-price supply contracts.

2. The government's remedies depend on whether it is possible for the contractor to perform the services correctly.

a. Normally, the government should permit the contractor to re-perform the services and correct the deficiencies, if possible, for no additional fee. Pearl Properties, HUD BCA No. 95-C-118-C4, 96-1 BCA ¶ 28,219 (government's failure to give contractor notice

and an opportunity to correct deficient performance waived right to reduce payment).

b. Otherwise, the government may:

(1) Require the contractor to take adequate steps to ensure future compliance with the contract requirements; and

(2) Reduce the contract price to reflect the reduced value of services received. Teltara, Inc., ASBCA No. 42256, 94-1 BCA ¶ 26,485 (government properly used random sampling inspections to calculate contract price reductions); Orlando Williams, ASBCA No. 26099, 84-1 BCA ¶ 16,983 (although default termination of janitorial contract was sustained, the government acted unreasonably by withholding maximum payments when some work had been performed satisfactorily). Even if it reduces the contract price, the government may also recover consequential damages. Hamilton Securities Advisory Servs., Inc. v. United States, 46 Fed. Cl. 164 (2000).

c. Authorities disagree about whether the same failure in contract performance can support both a reduction in contract price and a termination for default. Compare W.M. Grace, Inc., ASBCA No. 23076, 80-1 BCA ¶ 14,256 (monthly deductions due to poor performance waived right to T4D during those months) and Wainwright Transfer Co., ASBCA No. 23311, 80-1 BCA ¶ 14,313 (deduction for HHG shipments precluded termination) with Cervetto Bldg. Maint. Co. v. United States, 2 Cl. Ct. 299 (1983) (reduction in contract price and termination are cumulative remedies).

IV. STRICT COMPLIANCE VS. SUBSTANTIAL COMPLIANCE.

A. Strict Compliance.

1. As a general rule, the government is entitled to strict compliance with its specifications. Blake Constr. Co. v. United States, 28 Fed. Cl. 672 (1993); De Narde Construction Co., ASBCA No. 50288, 00-2 BCA ¶ 30,929 (government entitled to type of rebar it ordered, even if contrary to trade practice). See also Cascade Pac. Int'l v. United States, 773 F.2d 287 (Fed. Cir. 1985); Ace Precision Indus., ASBCA No. 40307, 93-2 BCA ¶ 25,629 (government rejection of line block final assemblies that failed to meet contract specifications was proper). But see Zeller Zentralheizungsbau GmbH, ASBCA No. 43109, 94-2 BCA ¶ 26,657 (government improperly

rejected contractor's use of "equal" equipment where contract failed to list salient characteristics of brand name equipment).

2. Contractors must comply with specifications even if they vary from standard commercial practice. R.B. Wright Constr. Co. v. United States, 919 F.2d 1569 (Fed. Cir. 1990) (contract required three coats over painted surface although commercial practice was to apply only two); Graham Constr., Inc., ASBCA No. 37641, 91-2 BCA ¶ 23,721 (specification requiring redundant performance sustained).

3. Slight defects are still defects. Mech-Con Corp., GSBCA No. 8415, 88-3 BCA ¶ 20,889 (installation of 2" pipe insulation did not satisfy 1½" requirement).

B. Substantial Compliance.

1. "Substantial compliance" is a judicially created concept to avoid the harsh result of termination for default based upon a minor breach, and to avoid economic waste. The concept originated in construction contracts and has been extended to other types of contracts. See Radiation Tech., Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966).

2. Substantial compliance gives the contractor the right to attempt to cure defective performance, even if that requires an extension of time beyond the original delivery date. The elements of substantial compliance are:

a. Timely delivery;

b. Contractor's good faith belief that it has complied with the contract's requirements, See Louisiana Lamps & Shades, ASBCA No. 45294, 95-1 BCA ¶ 27,577 (no substantial compliance because contractor had attempted unsuccessfully to persuade government to permit substitution of American-made sockets for specified German-made sockets);

c. Minor defects;

d. The defects can be corrected within a reasonable time; and

e. Time is not of the essence, i.e., the government does not require strict compliance with the delivery schedule.

3. Generally, the doctrine of substantial compliance does not require the government to accept defective performance by the contractor. Cosmos Eng'rs, Inc., ASBCA No. 19780, 77-2 BCA ¶ 12,713.

4. Except in those rare situations involving economic waste (discussed below), the doctrine of substantial compliance affects only when, not whether, the government may terminate for default. While substantial compliance requires the government to give the contractor a reasonable amount of time to correct the defects, including, if necessary, an extension beyond the original required delivery date, it does not preclude the government from terminating the contract for default if the contractor fails to correct the defects with a reasonable period of time. Firma Tiefbau Meier, ASBCA No. 46951, 95-1 BCA ¶ 27,593 (termination for default justified by contractor's repeated refusal to correct defective roof panels).

C. Economic Waste.

1. The doctrine of economic waste requires the government to accept noncompliant **construction** if the work, as completed, is suitable for its intended purpose and the cost of correction would far exceed the gain that would be realized. Granite Constr. Co. v. United States, 962 F.2d 998 (Fed. Cir. 1992), cert. denied, 113 S. Ct. 965 (1993); A.D. Roe Co., Inc., ASBCA No. 48782, 99-2 BCA ¶ 30,398 (economic waste is exception to general rule that government can insist on strict compliance with contract).

2. To be "suitable for its intended purpose," the work must substantially comply with the contract. Amtech Reliable Elevator Co. v. General Servs. Admin., GSBCA No. 13184, 95-2 BCA ¶ 27,821 (no economic waste where contractor used conduits for fire alarm wiring which were not as sturdy as required by specifications and lacked sufficient structural integrity); Triple M Contractors, ASBCA No. 42945, 94-3 BCA ¶ 27,003 (no economic waste where placement of reinforcing materials in drainage gutters reduced useful life from 25 to 20 years); Shirley Constr. Corp., ASBCA No. 41908, 93-3 BCA ¶ 26,245 (concrete slab not in substantial compliance even though it could support the design load; without substantial compliance, doctrine of economic waste inapplicable); Valenzuela Engineering, Inc., ASBCA No. 53608, 53936, 04-1 BCA ¶ 32,517 (absent expert testimony, government can demand strict performance for structure designed to contain explosions).

V. PROBLEM AREAS IN TESTING AND INSPECTION.

A. Claims Resulting from Unreasonable Inspections.

1. Government inspections may give rise to equitable adjustment claims if they delay the contractor's performance or cause additional work. The government:

a. Must perform reasonable inspections. FAR 52.246-2. Donald C. Hubbs, Inc., DOT BCA No. 2012, 90-1 BCA ¶ 22,379 (more sophisticated test than specified, rolling straightedge, was reasonable).

b. Must avoid overzealous inspections. The government may not inspect to a level beyond that authorized by the contract. Overzealous inspection may impact adversely upon the government's ability to reject the contractor's performance, to assess liquidated damages, or to otherwise assert its rights under the contract. See The Libertatia Associates, Inc., 46 Fed. Cl. 702 (2000) (COR told contractor's employees that he was Jesus Christ and that CO was God); Gary Aircraft Corp., ASBCA No. 21731, 91-3 BCA ¶ 24,122 ("overnight change" in inspection standards was unreasonable); Donohoe Constr. Co., ASBCA No. 47310, 98-2 BCA ¶ 30,076, motion for reconsideration granted in part on other grounds, ASBCA No. 47310, 99-1 BCA ¶ 30,387 (government quality control manager unreasonably rejected proposed schedules, ignored contractor submissions for weeks, and told contractor he would "get even" with him); Lan-Cay, Inc., ASBCA 56140, 2012-1 BCA ¶ 34,935 (contractor affidavits consisting of personal attacks, argument, hearsay and conjecture lack credibility and are insufficient to show overzealous inspection).

c. Must resolve ambiguities involving inspection requirements in a timely manner. P & M Indus., ASBCA No. 38759, 93-1 BCA ¶ 25,471.

d. Must exercise reasonable care when performing tests and inspections prior to acceptance of products or services, and may not rely solely on destructive testing of products after acceptance to discover a deficiency it could have discovered before acceptance. Ahern Painting Contractors, Inc., GSBCA No. 7912, 90-1 BCA ¶ 22,291.

2. Improper inspections:

a. May excuse a contractor's delay, thereby delaying or preventing termination for default. Puma Chem. Co., GSBCA No. 5254, 81-1 BCA ¶ 14,844 (contractor justified in refusing to proceed when government test procedures subjected contractor to unreasonable risk of rejection).

b. May justify claims for increased costs of performance under the delay of work or changes clauses in the contract. See, e.g., Hull-Hazard, Inc., ASBCA No. 34645, 90-3 BCA ¶ 23,173 (contract specified joint inspection, however, government conducted multiple inspections and bombarded contractor with "punch lists"); H.G. Reynolds Co., ASBCA No. 42351, 93-2 BCA ¶ 25,797; Harris Sys. Int'l, Inc., ASBCA No. 33280, 88-2 BCA ¶ 20,641 (10% "spot mopping" specified, government demanded 100% for "uniform appearance"). But see Trans Western Polymers, Inc. v. Gen. Servs. Admin., GSBCA No. 12440, 95-1 BCA ¶ 27,381 (government properly performed lot by lot inspection after contractor failed to maintain quality control system); Space Dynamics Corp., ASBCA No. 19118, 78-1 BCA ¶ 12,885 (defects in aircraft carrier catapult assemblies justified increased government inspection).

c. May give rise to a claim of government breach of contract. Adams v. United States, 358 F.2d 986 (Ct. Cl. 1966) (government breached contract when inspector disregarded inspection plan, doubled inspection points, complicated construction, delayed work, increased standards, and demanded a higher quality tent pin than specified); Electro-Chem Etch Metal Markings, Inc., GSBCA No. 11785, 93-3 BCA ¶ 26,148. But see Southland Constr. Co., VABCA No. 2217, 89-1 BCA ¶ 21,548 (government engineer's "harsh and vulgar" language, when appellant contributed to the tense atmosphere, did not justify refusal to continue work) Olympia Reinigung GmbH, ASBCA Nos. 50913, 51225, 51258, 02-2 BCA ¶ 32,050 (allegation of aggressive government inspections did not render termination for default arbitrary or capricious).

3. It is a constructive change to test a standard commercial item to a higher level of performance than is required in commercial practice. Max Blau & Sons, Inc., GSBCA No. 9827, 91-1 BCA ¶ 23,626 (insistence on extensive deburring and additional paint on a commercial cabinet was a constructive change).

4. Government breach of its duty to cooperate with the contractor may shift the cost of damages caused by testing to the government. See Alonso & Carus Iron Works, Inc., ASBCA No. 38312, 90-3 BCA ¶ 23,148 (government refusal to permit reasonable, preliminary test proposed by contractor shifted the risk of loss to the government).

B. Waiver, Prior Course of Dealing, and Other Acts Affecting Testing and Inspection.

1. By his actions, an authorized government official may waive contractual requirements if the contractor reasonably believes that a required specification has been suspended or waived. Gresham & Co. v. United States, 470 F.2d 542, 554 (Ct. Cl. 1972), Perkin-Elmer's Corp. v. United States, 47 Fed. Cl. 672 (2000).

2. The government may also be estopped from enforcing a contract requirement. The elements of equitable estoppel are:

   a. Authorized government official;

   b. Knowledge by government official of true facts;

   c. Ignorance by contractor of true facts; and

   d. Detrimental reliance by the contractor. Longmire Coal Corp., ASBCA No. 31569, 86-3 BCA ¶ 19,110.

3. Normally, previous government acceptance of similar nonconforming performance is insufficient to demonstrate waiver of specifications.

   a. Government acceptance of nonconforming performance by other contractors normally does not waive contractual requirements. Moore Elec. Co., ASBCA No. 33828, 87-3 BCA ¶ 20,039 (government's allowing deviation to another contractor on prior contract for light pole installation did not constitute waiver, even where both contractors used the same subcontractor).

   b. Government acceptance of nonconforming performance by the same contractor normally does not waive contractual requirements. Basic Marine, Inc., ENG BCA No. 5299, 87-1 BCA ¶ 19,426.

4. However, numerous government acceptances of similar nonconforming performance by the same contractor may waive the requirements of that particular specification. Gresham & Co. v. United States, 470 F.2d 542 (Ct. Cl. 1972) (acceptance of dishwashers without detergent dispensers eventually waived requirement to equip with dispensers); Astro Dynamics, Inc., ASBCA No. 28381, 88-3 BCA ¶ 20,832 (acceptance of seven shipments of rocket tubes with improper dimensions precluded termination for default for same reason on the eighth shipment). But see Kvass Constr. Co., ASBCA No. 45965, 94-1 BCA ¶ 26,513 (Navy's acceptance on four prior construction contracts of "expansion compensation devices" for a heat distribution system did not waive contract requirement for "expansion loops").

5. Generally, an inspector's failure to require correction of defects is insufficient to waive the right to demand correction. Hoboken Shipyards, Inc., DOT BCA No. 1920, 90-2 BCA ¶ 22,752 (government not bound by an inspector's unauthorized agreement to accept improper type of paint if a second coat was applied).

VI. ACCEPTANCE.

A. Acceptance.

Acceptance is the "act of an authorized representative of the Government by which the Government, for itself or as agent of another, assumes ownership of existing identified supplies tendered or approves specific services rendered as partial or complete performance of the contract." FAR 46.101.

B. General Principles of Acceptance.

1. Acceptance is conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided for in the contract, e.g., warranties. FAR 52.246-2(k); Hogan Constr., Inc., ASBCA No. 39014, 95-1 BCA ¶ 27,398 (government improperly terminated contract for default after acceptance).

2. Acceptance entitles the contractor to payment and is the event that marks the passage of title from the contractor to the government.

3. The government generally uses a DD Form 250 to expressly accept tendered goods or services.

4. The government may impliedly accept goods or services by:

a. Making final payment. Norwood Precision Prods., ASBCA No. 24083, 80-1 BCA ¶ 14,405. See also Farruggio Constr. Co., DOT CAB No. 75-2-75-2E, 77-2 BCA ¶ 12,760 (progress payments on wharf sheeting contract did not shift ownership and risk of loss to the government). Note, however, that payment, even if no more monies are due under a contract, does not necessarily constitute final acceptance. Spectrum Leasing Corp., GSBCA No. 7347, 90-3 BCA ¶ 22,984 (no acceptance because contract provided that final testing and acceptance would occur after the last payment). See also Ortech, Inc., ASBCA No. 52228, 00-1 BCA ¶ 30,764 (contractor's acceptance of final payment from the government may preclude a later claim by the contractor).

b. Unreasonably delaying acceptance. See, e.g., Cudahy Packing Co. v. United States, 75 F. Supp. 239 (Ct. Cl. 1948) (government took two months to reject eggs); Mann Chem. Labs, Inc. v. United States, 182 F. Supp. 40 (D. Mass. 1960).

c. Using or changing a product. Ateron Corp., ASBCA No. 46,867, 96-1 BCA ¶ 28,165 (government use of products inconsistent with contractor's ownership); The Interlake Cos. v. General Servs. Admin., GSBCA No. 11876, 93-2 BCA ¶ 25,813 (government improperly rejected material handling system after government changes rendered computer's preprogrammed logic useless).

5. Unconditional acceptance of partial deliveries may waive the right to demand that the final product perform satisfactorily. See Infotec Dev., Inc., ASBCA No. 31809, 91-2 BCA ¶ 23,909 (multi-year contract for Minuteman Missile software).

6. As a general rule, contractors bear the risk of loss or damage to the contract work prior to acceptance. See FAR 52.246-16, Responsibility for Supplies (supply); FAR 52.236-7, Permits and Responsibilities (construction). See also Meisel Rohrbau GmbH, ASBCA No. 40012, 92-1 BCA ¶ 24,716 (damage caused by children); DeRalco Corp., ASBCA No. 41306, 91-1 BCA ¶ 23,576 (structure destroyed by 180 MPH hurricane winds although construction was 97% complete and only required to withstand 100 MPH winds); G&C Enterprises, Inc. v. United States, 55 Fed. Cl. 424 (2003) (no formal acceptance where structure destroyed by windstorm after project 99% complete and Army had begun partial occupation) .

a. If the contract specifies f.o.b. destination, the contractor bears the risk of loss during shipment even if the government accepted the supplies prior to shipment. FAR 52.246-16; KAL M.E.I. Mfg. & Trade Ltd., ASBCA No. 44367, 94-1 BCA ¶ 26,582 (contractor liable for full purchase price of cover assemblies lost in transit, even though cover assemblies had only scrap value).

b. In construction contracts, the government may use and possess the building prior to completion. FAR 52.236-11, Use and Possession Prior to Completion. The contractor is relieved of responsibility for loss of or damage to work resulting from the government's possession or use. See Fraser Eng'g Co., VABCA No. 3265, 91-3 BCA ¶ 24,223 (government responsible for damaged cooling tower when damage occurred while tower was in its sole possession and control).

C. Exceptions to the Finality of Acceptance.

1. Latent defects may enable the government to avoid the finality of acceptance. To be latent, a defect must have been:

   a. Unknown to the government. See Gavco Corp., ASBCA No. 29763, 88-3 BCA ¶ 21,095;

   b. In existence at the time of acceptance. See Santa Barbara Research Ctr., ASBCA No. 27831, 88-3 BCA ¶ 21,098; mot. for recon. denied, 89-3 BCA ¶ 22,020 (failure to prove crystalline growths were in laser diodes at the time of acceptance and not reasonably discoverable); and

   c. Not discoverable by a reasonable inspection. Munson Hammerhead Boats, ASBCA No. 51377, 00-2 BCA ¶ 31,143 (defects in boat surface, under paint and deck covering, not reasonably discoverable by government until four months later); Stewart & Stevenson Services, Inc., ASBCA No. 52140, 00-2 BCA ¶ 31,041 (government could revoke acceptance even though products passed all tests specified in contract); Wickham Contracting Co., ASBCA No. 32392, 88-2 BCA ¶ 20,559 (failed spliced telephone and power cables were latent defects and not discoverable); Dale Ingram, Inc., ASBCA No. 12152, 74-1 BCA ¶ 10,436 (mahogany plywood was not a latent defect because a visual examination would have disclosed); But see Perkin-Elmer Corp. v. United States., 47 Fed. Cl. 672 (2000) (six years was too long to wait before revoking acceptance based on latent defect).

2. Contractor fraud allows the government to avoid the finality of acceptance. See D&H Constr. Co., ASBCA No. 37482, 89-3 BCA ¶ 22,070 (contractors' use of counterfeited National Sanitation Foundation and Underwriters' Laboratories labels constituted fraud). To establish fraud, the government must prove that:

   a. The contractor intended to deceive the government;

   b. The contractor misrepresented a material fact; and

   c. The government relied on the misrepresentation to its detriment. BMY – Combat Sys. Div. Of Harsco Corp., 38 Fed.Cl. 109 (1997) (contractor's knowing misrepresentation of adequate testing was fraud); United States v. Aerodex, Inc., 469 F.2d 1003 (5th Cir. 1972).

3. A gross mistake amounting to fraud may avoid the finality of acceptance. The elements of a gross mistake amounting to fraud are:

   a. A major error causing the government to accept nonconforming performance;

   b. The contractor's misrepresentation of a fact, Bender GmbH, ASBCA No. 52266, 04-1 BCA ¶ 32,474 (repeated false invoices in "wonton disregard of the facts" allowed government to revoke final acceptance); and

   c. Detrimental government reliance on the misrepresentation. Z.A.N. Co., ASBCA No. 25488, 86-1 BCA ¶ 18,612 (gross mistake amounting to fraud established where the government relied on Z.A.N. to verify watch caliber and Z.A.N. accepted watches from subcontractor without proof that the caliber was correct);

4. Warranties. Warranties operate to revoke acceptance if the nonconformity is covered by the warranty.

5. Revocation of Acceptance.

   a. Once the government revokes acceptance, its normal rights under the inspection, disputes, and default clauses of the contract are revived. FAR 52.246-2(l) (Inspection-Supply clause expressly revives rights); Spandome Corp. v. United States, 32 Fed. Cl. 626 (1995) (government revoked acceptance, requested contractor to repair structure, and demanded return of purchase price when contractor refused); Jo-Bar Mfg. Corp., ASBCA No. 17774, 73-2 BCA ¶ 10,311 (contractor's failure to heat treat aircraft bolts entitled government to recover purchase price paid). Cf. FAR 52.246-12 (Inspection-Construction clause is silent on reviving rights).

   b. Failure to timely exercise revocation rights may waive the government's contractual right to revoke acceptance. Perkin-Elmer's Corp. v. United States, 47 Fed. Cl. 672 (2000) (Air Force attempted to revoke acceptance of "portable wear metal analyzer" six years after acceptance; Court of Federal Claims held the six-year delay in revoking acceptance was unreasonable, thus prohibiting government recovery on the claim).

VII. WARRANTY.

A. General Principles.

1. Warranties may extend the period for conclusive government acceptance. FAR 46.7; DFARS 246.7; AR 700-139, ARMY WARRANTY PROGRAM (7 Oct 05).

2. Warranties may be express or implied. Fru-Con Constr. Corp., 42 Fed. Cl. 94 (1998) (design specifications result in an implied warranty; no implied warranty with performance specifications because of the broader discretion afforded the contractor in their implementation).

3. Normally, warranties are defined by the time and scope of coverage.

4. The use of warranties is not mandatory. FAR 46.703. In determining whether a warranty is appropriate for a specific acquisition, consider:

a. Nature and use of the supplies or services;

b. Cost;

c. Administration and enforcement;

d. Trade practice; and

e. Reduced quality assurance requirements, if any.

B. Asserting Warranty Claims.

1. When asserting a warranty claim, the government must prove:

a. That there was a defect when the contractor completed performance. Vistacon Inc. v. General Servs. Admin., GSBCA No. 12580, 94-2 BCA ¶ 26,887;

b. That the warranted defect was the most probable cause of the failure. Hogan Constr., Inc., ASBCA No. 38801, 95-1 BCA ¶ 27,396; A.S. McGaughan Co., PSBCA No. 2750, 90-3 BCA ¶ 23,229; R.B. Hazard, Inc., ASBCA No. 41061, 91-2 BCA ¶ 23,709 (government denied recovery under warranty theory because it failed to prove that pump failure was not the result of government misuse and that defective material or workmanship was the most probable cause of the damage);

c. That the defect was within the scope of the warranty;

d. That the defect arose during the warranty period;

e. That the contractor received notice of the defect and its breach of the warranty, Land O'Frost, ASBCA Nos. 55012, 55241, 2003 B.C.A. (CCH) ¶ 32,395 (Army's warranty claim failed to provide specific notice of a defect covered by the warranty); and

f. The cost to repair the defect, if not corrected by the contractor. See Hoboken Shipyards, Inc., DOT BCA No. 1920, 90-2 BCA ¶ 22,752; Globe Corp., ASBCA No. 45131, 93-3 BCA ¶ 25,968 (reducing government's claim against the contractor because the government inconsistently allocated the cost of repairing defects).

2. The government may invalidate a warranty through improper maintenance, operation, or alteration.

3. A difficult problem in administering warranties on government contracts is identifying and reporting defects covered by the warranty.

4. Warranty clauses survive acceptance. Shelby's Gourmet Foods, ASBCA No. 49883, 01-1 BCA ¶ 31,200 (government entitled to reject defective "quick-cooking rolled oats" under warranty even after initial acceptance).

C. Remedies for Breach of Warranty.

1. The FAR provides the basic outline for governmental remedies. See FAR 52.246-17 and 52.246-18. If the contractor breaches a warranty clause, the government may—

a. Order the contractor to repair or replace the defective product; or

b. Retain the defective product at a reduced price;

2. If the contractor fails to repair or replace the supplies within the time established, or fails to accept return of the nonconforming supplies or fails to make progress in correcting or replacing them, the government may

a. Correct the defect in-house or by contract and charge the cost to the contractor; or

b. Requirean equitable adjustment in the contract price. However, the adjustment cannot reduce the price below the scrap value of the product.

D. Mitigation of Damages.

1. The government must attempt to mitigate its damages.

2. The government may recover consequential damages. Norfolk Shipbldg. and Drydock Corp., ASBCA No. 21560, 80-2 BCA ¶ 14,613 (government entitled to cost of repairs caused by ruptured fuel tank).

VIII. CONCLUSION

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Chapter 20
Contract Payment

2013 Contract Attorneys Deskbook

CHAPTER 20

CONTRACT PAYMENT

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CHAPTER 20

CONTRACT PAYMENT

I. INTRODUCTION.

A. Objectives. Following this block of instruction, students should understand these concepts:

1. The various methods used by the Government to pay contractors.

2. The methods, and order of preference, for financing Government contracts.

3. The application of "The Prompt Payment Act."

4. The Government's policies and procedures for identifying and collecting contract debts.

B. Perspective. "The Department [of Defense] continues to experience an unacceptable number of contract payment problems. These problems are caused by a number of factors including systems deficiencies and contract structure."[1]

II. REFERENCES.

A. 10 U.S.C. § 2307, Contract Financing.

B. 31 U.S.C. § 3901, Prompt Payment.

C. 31 U.S.C. § 3701, Claims.

D. 31 U.S.C. § 3727 and 41 U.S.C. § 6305, Assignment of Claims Act of 1940.

E. 41 U.S.C. § 4503, Advance or other payments.

F. Federal Acquisition Regulation, Part 32, Contract Financing.

G. DoD Financial Management Regulation (FMR) (DoD 7000.14-R), vol. 10, Contract Payment Policy and Procedures.

H. 5 CFR Part 1315, "Prompt Payment."

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1. Memorandum, The Under Secretary of Defense, Acquisition and Technology, to Assistant Secretaries of the Military Departments, subject: Reducing Contract Fund Citations (30 Apr. 1999).

III. POLICIES AND PROCEDURES.

A. FAR Part 32. This Part prescribes policies and procedures for contract financing and other payment matters.

B. Disbursing Authority.

1. The Financial Management Service (FMS), a bureau of the U.S. Department of the Treasury, is the principle disbursing agent of the Federal government, accounting for approximately 85% of all Federal payments. The FMS website is at: http://www.fms.treas.gov/.

2. The Department of Defense, the United States Marshal's Office, and the Department of Homeland Security (with respect to public money available for the Coast Guard's expenditure when it is not operating as a service in the Navy) have statutory authority to disburse public money. 31 U.S.C. § 3321. The Defense Finance and Accounting Service (DFAS) website is at: http://www.dfas.mil/.

C. Contract Payments. All solicitations and contracts shall specify the payment procedures, payment due dates, and interest penalties for late invoice payment. FAR 32.903(a). There are two major types of government contract payments:

1. Payment of the contract price for completed work.

2. Payment in advance of work performance.

D. Advances. An advance of public money may be made only if authorized by Congress or the President. 31 U.S.C. § 3324(b). Chapter 4 of Volume 10, DoD FMR covers all aspects of the various types of advance payments for DoD.

E. Invoice Payments vs. Financing Payments. FAR Subpart 32.9.

1. Invoice payments are payments made upon delivery of goods or performance of services and acceptance by the government. Invoice payments include: See Ch. 7, Vol. 10 of DoD FMR.

a. Final payments of the contract price, costs, or fee in accordance with the contract or as settled by the government and the contractor.

b. Payments for partial deliveries or partial performance under fixed-price contracts.

c. Progress payments:

(1) Construction contracts.

(2) Architect/Engineer contracts.

2. Financing payments are made to a contractor before acceptance of goods or services by the government. Such payments include: See ¶ 100401, Ch. 10, Vol. 10 of DoD FMR.

a. Advance payments.

b. Performance-Based Payments.

c. Commercial advance and interim payments.

d. Progress payments based on costs.

e. Progress payments based on a percentage or stage of completion under FAR 52.232-5 or 52.232-10.

f. Interim payments on cost-type contracts. But see FAR 32.908(c)(3) (allowing interim payments for cost-type service contracts).

3. Financing payments DO NOT include invoice payments, payments for partial deliveries or lease and rental payments.

F. Order of Preference.

FAR 32.106 provides the following order of preference when a contractor requests contract financing, unless an exception would be in the Government's interest in a specific case:

1. Private financing without Government guarantee (note, however, that the intent is not to require private financing at unreasonable terms or from other agencies);

2. Customary contract financing (see FAR 32.113);

3. Loan guarantees;

4. Unusual contract financing (see FAR 32.114); and

5. Advance payments (see exceptions at FAR 32.402(b)).

G. Payment Requirements. Payments are based on receipt of a proper invoice or contract financing request, and satisfactory contract performance. FAR 32.905(a).

H. Invoice Payment Due Date. The due date for making an invoice payment is prescribed in FAR 32.906. Government acceptance of supplies or services or

receipt by the designated billing office of a proper invoice, whichever is later, triggers the time period for calculation of prompt payment. Failure of the Government to pay the contractor by the due date results in payment of interest.

I. Financing Payment Due Date. The due date for making a contract financing payment is prescribed in FAR part 32.9. Generally, the due date for contract financing payments is 30 days from date of receipt by the designated billing office of a proper payment request. Failure of the Government to make a contract financing payment by the due date does not normally entitle the contractor to interest.[2] However, late payment can be a defense to a default termination. But see Jones Oil Company, ASBCA No. 42651, 98-1 BCA ¶ 29,691 (contractor will succeed in appealing a default termination of a contract only if the late payment rendered appellant financially incapable of continuing performance, was the primary or controlling cause of the default, or was a material rather than insubstantial or immaterial breach).

IV. CONTRACT PAYMENT METHODS.

41 U.S.C. § 4502; 10 U.S.C. § 2307; FAR Part 32. FAR Part 32 draws a distinction between contract payments for commercial items and noncommercial items.

A. Definitions.

1. Commercial items are defined at FAR 2.101. For example, a computer qualifies as a commercial item because it is sold to the general public.

2. A non-commercial item is a supply or service that is not available for sale to the public, such as a major weapon system.

B. Non-Commercial Contract Payments. Payment methods for non-commercial item supplies or services include partial payments, advance payments, progress payments, loan guarantees, provisional delivery payments, and performance-based payments.

1. Partial Payments.

a. Partial payments are payments made under fixed-price contracts for supplies or services that are accepted by the government but are only part of the contract requirements. FAR 32.102(d).

b. Although partial payments are generally treated as a method of payment and not as a method of contract financing, using partial payments can help contractors participate in government contracts without, or with minimal, contract financing. When appropriate,

2. FAR 32.904(e) establishes a due date for interim payments on cost-reimbursement contracts for services 30 days after the date of receipt of a proper invoice.

contract work statements and pricing agreements must permit acceptance and payment of discrete portions of work, as soon as accepted. FAR 32.102(d).

c. FAR 52.232-1 provides that unless otherwise specified in the contract, the government must make payment under fixed-price contracts when it accepts partial deliveries if:

(1) The amount due on the deliveries warrants it; or

(2) The contractor requests payment and the amount due on partial deliveries is at least $1,000 or 50% of the total contract price.

2. Advance Payments. FAR Subpart 32.4; FAR 52.232-12, Advance Payments.

a. Advance payments are advances of money by the government to a prime contractor before, in anticipation of, and for the purpose of complete performance under one or more contracts. They are expected to be liquidated from payments due to the contractor incident to performance of the contract. Advance payments may be made to a prime contractor for the purpose of making advances to subcontractors.

b. This is the least preferred method of contract financing.

c. Requirements. FAR 32.402(c).

(1) The contractor must give adequate security.

(2) Advance payments cannot exceed the unpaid contract price.

(3) The agency head or designee must determine that advance payment is in the public interest or facilitates the national defense.

d. According to FAR 32.402(c)(2), the agency head or designee[3] must make written findings that:

(1) Advance payment will not exceed the contractor's interim cash needs.

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3. For the Army, the designee is the Assistant Secretary of the Army (Financial Management), see AFARS 5132.402. The Air Force designee is the Assistant for Accounting and Banking, Office of the Assistant Secretary of the Air Force (Financial Management and Comptroller) (SAF/FMPB), see AFFARS 5332.409.

(2) Advance payment is necessary to supplement other funds or credit available to a contractor.

(3) The recipient is otherwise qualified as a responsible contractor.

(4) The government will benefit.

(5) The case fits one or more of the categories described in FAR 32.403.

e. Advance payments can be authorized in addition to progress or partial payments on the same contract. (FAR 32.402(d)).

f. Advance payments may be appropriate for the following (FAR 32.403):

(1) Contracts for experimental, research or development projects with nonprofit education or research institutions.

(2) Contracts solely for management and operation of Government-owned plants.

(3) Contracts of such highly classified nature that assignment of claim is undesirable for national security reasons.

(4) Contracts with financially weak contractors with essential technical ability. In such a case, contractor performance shall be closely monitored to reduce Government's financial risk.

(5) Contracts for which a loan by a private financial institution is not practicable.

(6) Contracts with small business concerns.

(7) Contracts where exceptional circumstances make advance payments the most advantageous contract financing method for both the contractor and the Government.

3. Progress Payments. There are two types of progress payments: those based on costs incurred and those based on the stage of completion of the contracted work.

a. Costs Incurred. Progress payments can be made on the basis of costs incurred by the contractor as work progresses under the contract. FAR Subpart 32.5; FAR 52.232-16, Progress Payments.

(1) Unless otherwise provided for in agency regulations, the contracting officer shall not provide for progress payments to a large business if the contract amount is less than $2.5 million or to a small business if the contract amount is less than the simplified acquisition threshold (currently $150,000). FAR 32.104(d)(2)-(3).

(2) Subject to the dollar thresholds, a contracting officer may provide for progress payments if the contractor must expend money during the predelivery period that will have a "significant impact" on its working capital, and there is a substantial time from contract inception to delivery (six months for a large business and four months for a small business). FAR 32.104(d)(1).

(3) As part of a request for progress payments, a contractor may include the full amount of payments due to subcontractors as progress payments under the contract and subcontracts. FAR 32.504(b).

(4) Progress payments made under indefinite-delivery contracts should be administered under each individual order as if the order constituted a separate contract, unless agency procedures provide otherwise. FAR 32.503-5(c) (as amended by FAC 97-16). But see Aydin Corp. v. Widnall, 61 F.3d 1571 (Fed. Cir. 1995) (contractor entitled to administrative and production costs incurred to implement cost segregation requirements imposed by the contracting officer, where DFARS clause provided for progress payments based on cumulative total costs of the contract).

4. Progress payments can be added to the contract after award by contract modification, but the contractor must provide adequate consideration. FAR 32.005.

5. Customary progress payments. FAR 32.501-1 and FAR 32.502-1.

a. The FAR provides that the customary amount is 80% for large businesses and 85% for small businesses. FAR 32.501-1(a).

b. DFARS provides for a customary uniform progress payment rate of 80% for large business, 90% for small business, and 95% for small, disadvantaged businesses. DFARS 232.501-1(a)(i).

(1) Unusual progress payments. Unusual contract financing is financing with additional approval requirements. FAR 32.001.

(a) Contracting officer may provide unusual progress payments only if (FAR 32.501-2):

(i) Contract necessitates predelivery expenditures that are large in relation to the contractor's working capital and credit;

(ii) Contractor fully documents an actual need to supplement private financing available;

(iii) Contractor's request is approved by the head of the contracting activity or designee.

(b) DoD requires advance approval of the Director of Defense Procurement & Acquisition Policy (OUSD(AT&L)DPAP) for any "unusual" progress payment requests. DFARS 232.501-2.

c. Percentage or Stage of Contract Completion. Progress payments also can be based on a percentage or stage of contract completion, if authorized by agency procedures. Use of this type of progress payment is subject to the following restrictions:

(1) DFARS 232.102 provides that these types of progress payments are only authorized for construction contracts, shipbuilding, and ship conversion, alteration or repair.

(2) The agency must ensure that payments are commensurate with the work accomplished. Greenhut Constr. Co., ASBCA No. 41777, 93-1 BCA ¶ 25,374 (after hurricane damaged previously completed construction work, Navy was entitled to review the work and pay only the amount representing satisfactorily completed work).

(3) Under undefinitized contract actions, such payments cannot exceed 80% of the eligible costs of work accomplished.

6. Loan Guarantees.

a. FAR Subpart 32.3 prescribes policies and procedures for designated agencies' guarantees of loans made by private financial institutions to borrowers performing contracts related to national defense.

b. The use of guaranteed loans requires the availability of certain congressional authority. DoD has not requested authority in recent years, and none is now available. DFARS 232.302.

7. Provisional Delivery Payments. DFARS 232.102-70.

a. The contracting officer may establish provisional delivery payments to pay contractors for the costs of supplies and services delivered to and accepted by the government under the following contract actions, if undefinitized:

(1) Letter contracts contemplating a fixed-price contract,

(2) Orders under basic ordering agreements,

(3) Unpriced equitable adjustments on fixed-price contracts, and

(4) Orders under indefinite delivery contracts.

b. Provisional delivery payments shall be used sparingly, priced conservatively, and reduced by liquidating previous progress payments in accordance with the Progress Payments Clause.

c. Provisional delivery payments shall not include profit, exceed funds obligated for the undefinitized contract action, or influence the definitized contract price.

8. Performance-Based Payments.[4] Performance-based payments are the preferred financing method when the contracting officer finds its use practical and the contractor agrees to its use. FAR 32.1001(a). However, in a recent report the DoD IG reported that DoD failed to adequately administer performance-based payments on 43 of 67 reviewed contracts. Additionally, the DoD IG found that "$4.1 billion of the $5.5 billion in performance-based payments lacked adequate documentation to ensure the payments were for demonstrated performance."[5]

a. Performance-based payments may be made either on a whole contract or on a deliverable item basis, unless otherwise prescribed by agency regulations. FAR 32.1004.

(1) Financing payments made on a whole contract basis apply to the entire contract.

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4. The Defense Contract Management Agency website at http://guidebook.dcma.mil/7/index.cfm provides guidance on the use and administration of performance-based payments (PBPs).

5. OFFICE OF THE INSPECTOR GENERAL OF THE DEP'T OF DEFENSE, REP. NO. D-2003-106, *Administration of Performance-Based Payments Made to Defense Contractors* (June 2003).

(2) Financing payments made on a deliverable item basis apply to a specific deliverable item.

b. Performance-based payments may not exceed 90 percent of the contract price if on a whole contract basis, or 90 percent of the delivery item price if on a delivery item basis. FAR 32.1004(b)(2).

c. The payments may be made on any of the following bases (FAR 32.1002):

(1) Performance measured by objective, quantifiable methods;

(2) Accomplishment of defined events; or

(3) Other quantifiable measures of results.

d. The contracting officer may use performance-based payments only when the contracting officer and the offeror agree on the performance-based payment terms, the contract is a definitized fixed-price type contract, and the contract does not provide for progress payments. FAR 32.1003.

e. FAR 32.1001(e) provides that performance-based payments are not used in the following instances:

(1) Payments under cost-reimbursement contracts.

(2) Contracts for architect-engineer services or construction, or for shipbuilding or ship conversion, alteration, or repair, when the contracts provide for progress payments based on a percentage or stage of completion.

(3) Contracts awarded through sealed bid procedures.

C. Commercial Item Purchase Payments. 10 U.S.C.§ 2307(f); 41 U.S.C.§ 4505; FAR 32.2.

1. General Rule. Although financing of the contract is normally the contractor's responsibility, in some markets, the provision of financing by the buyer is a commercial practice. The contracting officer may include appropriate financing terms in contracts for commercial purchases when it is in the best interests of the government.

2. Types of Payments. FAR 32.202-2:

a. Commercial advance payment.

(1) Payments made before any performance of work.

(2) Limited to 15% of contract price.

(3) Not subject to Prompt Payment Act interest.

(4) Payment is made on contract specified date, or 30 days after receipt by the designated billing office of a proper request for payment, whichever is later. DFARS 232.206(f)(i).

b. Commercial interim payment. FAR 32.001 (Similar to Progress Payments)

(1) Not commercial advance payment or delivery payment.

(2) Payments made after some work has been done.

(3) Late payment is not subject to Prompt Payment Act interest penalty.

(4) Payment is made on entitlement date specified in the contract, or 14 days from the receipt by the designated billing office of a proper request for payment, whichever is later. DFARS 232.206(f)(ii).

c. Delivery payment. FAR 32.001

(1) Payment for accepted supplies or services.

(2) Includes partial deliveries.

(3) Considered an invoice payment subject to Prompt Payment Act interest.

(4) The prompt payment standards for commercial delivery payments are the same as specified in FAR Subpart 32.9.

d. Installment payment financing for commercial items shall not be used for defense contracts unless market research has established that this form of contract financing is both appropriate and customary in the marketplace. DFARS 232.206(g).

3. Prerequisites. FAR 32.202-1. Commercial item purchase financing, consisting of either interim payments or advance payments, may be made under the following circumstances:

a. The item financed is a commercial supply or service.

b. The contract price exceeds the simplified acquisition threshold.

c. The contracting officer determines that it is appropriate/customary in the commercial marketplace to make financing payments for the item.

d. This form of contract financing is in the best interest of the government. To help make this determination, the FAR authorizes agencies to establish standards, such as type of procurement, type of item, or dollar level. FAR 32.202-1(e).

e. Adequate security is obtained from the contractor. FAR 32.202-4.

(1) Subject to agency regulations, the contracting officer may determine the offeror's financial condition to be adequate security provided the offeror agrees to provide additional security should that financial condition become inadequate as security. DFARS 232.202-4 states that an offeror's financial condition may be sufficient to make the contractor responsible for award purposes, but not be adequate security for commercial contract financing.

(2) Types of Security.

(a) Paramount lien.

(b) Irrevocable letters of credit.

(c) Surety bond.

(d) Guarantee of repayment from a person or corporation of demonstrated liquid net worth connected by significant ownership to the contractor.

(e) Title to identified contractor assets of adequate worth.

(3) The value of the security must be at least equal to the maximum unliquidated amount of contract financing payments to be made to the contractor. The value of security may be adjusted during contract performance as long as it is always equal to or greater than the amount of unliquidated financing. FAR 32.202-4(a)(3).

D. Progress Payments on Construction Contracts. FAR 32.103; FAR 52.232-5, Payments Under Fixed-Price Construction Contracts.

1. When a construction contract provides for progress payments and the contractor fails to achieve satisfactory performance for a period for which a progress payment is to be paid, the government may retain a percentage of the progress payment. The retainage shall not exceed 10 percent of the progress payment.

2. Entitlement to progress payments requires compliance with the contract and relevant regulations. The Davis Group, Inc., ASBCA No. 48431, 95-2 BCA ¶ 27,702.

V. THE PROMPT PAYMENT ACT. 31 U.S.C. § 3901-3907; 5 C.F.R. 1315;[6] FAR SUBPART 32.9.

A. Applicability of the Prompt Payment Act (PPA).

1. Background.

a. Prior to enactment of the Prompt Payment Act of 1982 (Pub. Law No. 97-177), the Federal government did not have uniform criteria for establishing due dates for payments to contractors.

b. Many invoices were paid too early or too late. The General Accounting Office (GAO) estimated that contractors were losing at least $150 million annually due to late payments, and the Federal Government could save at least $900 million annually if payments that had been paid early had instead been paid when due.[7]

c. To address these concerns, the PPA and implementing guidance and regulations issued by the Office of Management and Budget (OMB) provided for payment due dates and interest penalties for late payments.

d. The PPA provides that interest begins when the government fails to make timely payments to the contractor after receipt of a proper invoice from the contractor.

2. Coverage.

a. The PPA applies to all government contracts except for contracts where payment terms and late payment penalties have been established by other governmental authority (e.g., tariffs). FAR

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6. OMB Circular A-125 was rescinded in 1999 and replaced by the Prompt Payment regulations at 5 CFR Part 1315.

7. Actions to Improve Timeliness of Bill Paying by the Federal Government Could Save Hundreds of Millions of Dollars, (AFMD-82-1, Oct. 1, 1981).

32.901. See Prompt Payment Act Interest on Utility Bills, B-214479, Sept. 22, 1986, 1986 U.S. Comp. Gen. LEXIS 497. See also National Park Service—Late Payment Charges for Utility Services, B-222944, Oct. 23, 1987, 1987 U.S. Comp. Gen. LEXIS 316 (holding that elements of implied contract governed payment terms with private, unregulated utility company)

b. The PPA applies to all government agencies.

c. There are no geographical limitations to applicability of the PPA's procedural requirements. FAR 32.901. Ingenieurgesellschaft Fuer Technische Dienste, ASBCA No. 42029, 42030, 94-1 BCA ¶ 26,569.

3. In analyzing whether the contractor is entitled to PPA interest, the government must determine that:

a. PPA applies to the payment,

b. Invoice is proper,

c. Government has accepted the supplies or services, and

d. Government has paid the invoice late.

4. Applicability to Types of Payments. The PPA applies to invoice payments i.e., payments made for supplies or services accepted by the government. For purposes of applying the PPA, invoice payments include (FAR 32.901(a)):

a. Payment for supplies or services accepted by the Government.

b. Payments for partial deliveries accepted by the Government under fixed-price contracts.

c. Final cost or fee payments where the Government and the contractor have settled the amounts owed.

d. Progress payments under fixed-price architect-engineer contracts.

e. Progress payments under fixed-price construction contracts.

f. Interim payments on cost-reimbursement service contracts.[8]

8. FAR 32.907 imposes an interest penalty on interim payments on cost-reimbursement contracts for services, when such payment is made more than 30 days after the designated billing office receives a proper invoice. 66 Fed. Reg.

5. The PPA does not apply to contract financing payments made prior to acceptance of supplies or services. FAR 32.901(b). For purposes of applying the PPA, contract financing payments include (FAR 32.001):

   a. Advance payments.

   b. Progress payments based on cost.

   c. Progress payments based on percentage or stage of completion (except for those made under the fixed-price construction and fixed-price architect-engineer payments clauses noted above).

6. The PPA does not require payment of interest when payment is not made because of a dispute over the amount of payment due or compliance with the contract. Active Fire Sprinkler Corp. v General Servs. Admin., 2001 GSBCA LEXIS 172 (July 11, 2001). GSBCA No. 15318.

B. Invoice Payment Procedures.

1. Proper invoice required. The contractor must submit a proper invoice to trigger the PPA. FAR 32.904(b)(1)(i). Invoice means a contractor's bill or written request for payment under the contract for supplies delivered or services performed. FAR 2.101.

   a. Under FAR 32.905(b), a proper invoice must include:

      (1) Name and address of contractor.

      (2) Invoice date and invoice number.

      (3) Contract number or other authorization.

      (4) Description, quantity, unit of measure, and cost of supplies delivered or services performed.

      (5) Shipping and payment terms.

      (6) Name and address of contractor official to whom payment is to be sent.

      (7) Name, telephone number, and mailing address of person to notify if the invoice is defective.

65,359 (Dec. 18. 2001). Section 1007 of the National Defense Appropriations Act for FY 02 also requires payment of Prompt Payment Act interest for these late payments.

(8) Taxpayer Identification Number (if required by agency procedures).

(9) EFT Information (if required).

(10) Any other information or documentation required by the contract, such as evidence of shipment.

b. Notice of defective invoice. The government must notify the contractor of any defective invoice within 7 days (3 days for meat, meat food products, and fish; 5 days for perishable agricultural commodities, dairy, and edible fats or oils) after receipt of the invoice at the designated payment office. The notice should include a statement identifying the defect in the invoice. FAR 32.905(b)(3).

(1) If such notice is not timely, an adjusted due date for purposes of determining an interest penalty will be established in accordance with FAR 32.905(b)(3).

(2) FAR 52.232-25(a)(3) provides that the due date on the corrected invoice will be adjusted by subtracting from it the number of days taken beyond the prescribed notification of defects period.

(3) The contractor will not be entitled to PPA interest for late payment, despite the agency's failure to notify the contractor of a defective invoice, if the contractor knew that its invoice was defective. Masco, Inc., HUDBCA No. 95-G-147-C16, 96-2 BCA ¶ 28364 (contractor knew that invoiced work had not yet been completed).

c. Supporting documentation is required for authorization of payment. FAR 32.905(c).

(1) A receiving report or some other government document authorizing payment must support all invoice payments. A receiving report is evidence that the government accepted the supplies delivered or services performed by the contractor.

(2) The agency receiving official must forward supporting documentation by the 5th working day after government acceptance or approval, unless the parties have made other arrangements. This period of time does not extend the payment due date.

2. Payment due date. FAR 32.904(a) provides the payment due date for invoice payments, not including architect-engineer, construction, or food and specified item contracts, is the later of:

   a. The 30th day after the designated billing office receives a proper invoice; or

   b. The 30th day after government acceptance of supplies delivered or services performed by the contractor.

      (1) On a final invoice where the payment amount is subject to contract settlement actions, acceptance occurs on the effective date of the settlement.

      (2) For the sole purpose of computing an interest penalty, government acceptance occurs constructively on the seventh day after the contractor has delivered the supplies or performed the services, unless there is a disagreement over quantity, quality, or contractor compliance with a contract requirement.

      (3) Except for commercial items as defined in FAR 2.101, the contracting officer may specify a longer period for constructive acceptance. This is normally to afford the government a reasonable opportunity to inspect and test the supplies furnished or to evaluate the services performed, but cannot be used as a routine agency practice. The contract file must indicate the justification for extending the constructive acceptance period beyond 7 days.

   c. Special payment periods. The payment due date on contracts for perishable agricultural commodities is shorter. (meat, 7 days; fish, 7 days; perishable agricultural commodities, 10 days; dairy, 10 days; etc.) FAR 32.904(f).

   d. It is DOD policy to assist small disadvantaged businesses by paying them as quickly as possible after receipt of a proper invoice, and before normal payment due dates in the contract. This policy does not alter the payment due date for purposes of the Prompt Payment Act. DFARS 232.903.

3. Interest penalty for late payment. The government incurs an interest penalty for late invoice payment, including late payment of progress payments under fixed-price architect-engineering contracts and fixed-price construction contracts, and interim cost-reimbursement for services, FAR 32.907(a). Accrual. The interest penalty accrues when the government pays the contractor after the contract payment due date. Interest penalties

will not accrue for more than one year. See FAR 32.907 and 5 CFR §1315.10(a)(3).

a. Automatic payment. The interest penalty accrues automatically and must be paid by the government without request by the contractor. The government must pay any interest penalty of $1 or more.[9] FAR 32.907.

b. The interest penalty is not excused by temporary unavailability of funds. FAR 32.907(f).

c. Late payment penalty upon interest penalty.

(1) The contractor is entitled to a penalty payment if the contractor is owed an interest penalty of $1 or more, the agency fails to make a required interest penalty payment within 10 days after the date the invoice amount is paid, and the contractor makes a written demand for the penalty within 40 days after the payment. FAR 32.907(c).

(2) The penalty upon penalty amount is 100% of the interest penalty owed the contractor, not to exceed $5,000, nor be less than $25. 5 CFR §1315.11(b)&(c).

4. Contract Disputes Act Interest Distinguished from Prompt Payment Act Interest.

a. Under the CDA, the government pays interest on amounts found to be due to a contractor on claims submitted to the contracting officer. Such CDA interest accrues from the date the contracting officer receives a proper claim until payment of the amount due on the claim. FAR 33.208. 41 U.S.C.§ 7109. See Paragon Energy Corp., ENG BCA No. 5302, 91-3 BCA ¶ 24,349 (payment of CDA claim presumed to include interest).

b. PPA and CDA interest is based on the rate established by the Secretary of the Treasury and published in the Federal Register. 31 U.S.C. § 3902 and 41 U.S.C.§ 7109.[10] Under the CDA, the

[9] The Defense Finance and Accounting Service (DFAS) has expressed concern that the costs of making such small payments may not justify the payments. In FY 1996, DFAS Columbus made 10,789 interest payments—about one quarter of all interest payments--totaling $28,701. DFAS regulations require documentation of the reason for the late payment, and in one case a $1.05 payment was supported with nine pages of documentation. Financial Management: The Prompt Payment Act and DoD Problem Disbursements (GAO/AIMD-97-71, May 23, 1997).

[10] Information concerning the interest rate can be obtained through the Federal Register or from the Department of the Treasury, Financial Management Service (FMS), Washington, DC 20227 (202) 874-6995. The rate applicable from 1 January 2013 to 30 June 2013 is 1.375%. This rate is published semi-annually in the Federal Register. *See*

government pays simple interest and adjusts the rate every six months in accordance with the current Treasury rate. In contrast, PPA interest is compounded and is not adjusted during the one year accrual period.

c. If a contractor files a claim under the CDA for PPA interest, interest will run under the PPA until government receipt of the claim, after which CDA interest will apply. Technocratica, ASBCA No. 44444, 94-1 BCA ¶ 26,584.

C. Fixed-Price Construction Contracts.

1. The government must pay interest on approved construction contract progress payments that remain unpaid for more than 14 days after the designated billing office receives a proper payment request. FAR 32.904(d).

2. Similarly, the contractor must pay interest on unearned progress payments, e.g., when the contractor's performance for which progress payments are made does not conform to contract terms. FAR 32.904(d)(4)(i). FAR 52.232-5(d), Payments under Fixed-Price Construction Contracts. The government must demand payment of the underlying debt in a sum certain. Electronic & Space Corp., ASBCA No. 47539, 95-2 BCA ¶ 27,768 (the government's letter which simply stated "it appears" progress payments were overpaid was ruled to be an improper demand letter).

3. The government must pay interest on any retained amount that is approved for release if the government does not pay the retained amount to the contractor by the 30th day (unless specified otherwise in contract) after release. FAR 32.904(d)(1)(ii).

4. Interest penalties are not required on payment delays due to disagreement between the parties over the payment amount or other issues involving contract compliance. Claims involving disputes and any interest thereon will be resolved in accordance with the Disputes clause. FAR 52.232-27 (a)(4)(ii). FAR 32.907(d).

D. Fixed-Price Architect-Engineer Contracts. The government must pay interest penalties on approved contract progress payments that remain unpaid for more than 30 days after government approval of contractor estimates of work or services accomplished. FAR 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts; FAR 52.232-26, Prompt Payment for Fixed-Price Architect-

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76 Fed. Reg. 82350 (Dec. 30, 2011). The FMS website is <www.fms.treas.gov>. The current and prior PPA interest rates are at http://www.fms.treas.gov/prompt/rates.html.

Engineer Contracts. FAR 32.904(c).

E. Prompt Payment Discounts.

1. Discount for prompt payment means an invoice payment reduction voluntarily offered by the contractor, in conjunction with the clause at FAR 52.232-8, Discounts for Prompt Payment, if payment is made by the government prior to the due date. The due date is calculated from the date of the contractor's invoice. If the contractor has not placed a date on the invoice, the due date is calculated from the date the designated billing office receives a proper invoice, provided the agency annotates such invoice with the date of receipt at the time of receipt. When the discount date falls on a Saturday, Sunday, or legal holiday when federal government offices are closed and government business is not expected to be conducted, payment may be made on the following business day and a discount may be taken. FAR 32.906(e).

2. The government may take prompt payment discounts offered by a contractor only when it makes payment within the specified discount period.[11]

3. The PPA imposes an interest penalty on improperly taken discounts, and the agency must pay the penalty without request by the contractor. FAR 32.907(b).

4. The government policy provisions at FAR 32.906(a) state that the government shall not make invoice and contract financing payments earlier than 7 days prior to the dates specified in the contract unless the agency head, or designee, determines to make earlier payment on a case-by-case basis.

F. Waiver. A contractor may waive an interest penalty payment issued to it under the PPA either by an express written statement or by acts and conduct which indicate an intent to waive. Central Intelligence Agency - Waiver of Interest Under Prompt Payment Act, 62 Comp. Gen. 673 (1983) (contractor refused to accept interest check prepared by agency).

[11] For a discussion on the propriety of taking a prompt payment discount for progress payments made in the normal course of contract administration, See Prompt Payment Discounts Based on Progress Payments, ARMY LAW., Aug. 1994, at 54.

VI. ELECTRONIC FUNDS TRANSFERS (EFT). FAR SUBPART 32.11.

A. Mandatory Use. Payment by EFT is the mandatory method of contract payment[12] in normal contracting situations except for the following situations listed in FAR 32.1103:

1. The office making payment under a contract requiring EFT loses the ability to release payment by EFT. In such a case, the paying office shall make all the necessary payments by check or some other mutually acceptable method of payment. FAR 32.1103(a).

2. The payment will be received by or on behalf of a contractor outside the United States and Puerto Rico. FAR 32.1103(b). However the agency head may authorize EFT for a non-domestic transaction if the political, financial, and communications infrastructure in the foreign country supports EFT payment. FAR 32.1106(b)(1).

3. The payment will be paid in other than US currency. FAR 32.1103(c). However, the agency head may authorize EFT if such a transaction may be made safely. FAR 32.1106(b)(2).

4. Classified contracts, where EFT payments could compromise the safeguarding of classified information or national security, or where arrangements for appropriate EFT payments would be impractical due to security considerations. FAR 32.1103(d).

5. Contracts executed by deployed contracting officers in the course of military operations, including but not limited to, contingency operations as defined in 10 U.S.C. § 101(a)(13), or a contract awarded during emergency operations, such as natural disasters or national or civil emergencies. FAR 32.1103(e).

6. The agency does not expect to make more than one payment to the same recipient within a one year period. FAR 32.1103(f).

7. The agency's need for supplies and services is of such unusual and compelling urgency that the government would be seriously injured unless payment is by a method other than EFT. FAR 32.1103(g).

8. There is only one source for supplies and services and the government would be seriously injured unless payment is by a method other than EFT. FAR 32.1103(h).

[12] 31 USC §3332 requires use of EFT in all situations except when recipients certify in writing that they do not have an account with a financial institution.

9. Payment by a method other than EFT is otherwise authorized by the Department of Treasury Regulations at 31 CFR 208. FAR 32.1103(i).

B. Specified Payment Date. FAR 32.902. See also FAR 52.232-33 & 34.

1. The date on which the funds are to be transferred to the contractor's account by the financial agent according to agency's EFT payment transaction instruction given to the Federal Reserve System.

2. If no date has been specified in the instruction, the specified payment date is 3 business days after the payment office releases the EFT payment transaction instruction.

C. Assignment of Claims. Using EFT payment methods is not a substitute for a properly executed assignment of claims. EFT information showing the ultimate recipient of the transfer to be other than the contractor, in the absence of a proper assignment of claims, is considered to be incorrect EFT information. FAR 32.1105.

D. Central Contractor Registration (CCR). FAR Subpart 4.11. FAR 52.204-7.

1. Contractors provide EFT data to DOD by registering in the CCR. Registration is mandatory prior to award of a contract, basic agreement, basic ordering agreement, or blanket purchase agreement. The contractor identifies itself through a Data Universal Numbering System number or DUNS assigned by Dun and Bradstreet Information Services. See FAR 52.204-6.

2. Exceptions to this policy: FAR 4.1102.

a. Purchases made with the Government-wide commercial purchase card or other micro-purchase methods,

b. Awards made to foreign vendors for work performed outside the United States,

c. Classified contracts or purchases,

d. Contracts executed by deployed contracting officers in the course of military operations, including but not limited to, contingency operations as defined in 10 U.S.C. § 101(a)(13), or a contract awarded during emergency operations, such as natural disasters or national or civil emergencies.

e. Contracts to support unusual or compelling needs.

E. Incorrect EFT Information. If the contractor's EFT information is incorrect, the Government need not make payment until the contractor supplies the correct information. Any invoice submitted under the contract is deemed not to be a proper invoice for purposes of prompt payment. FAR 52.232-33(d); FAR 52.232-34(d); FAR 32.905(b)(ix)(B).

F. Payment by Government Purchase Card.[13] The financial institution that issued the government credit card may make immediate payment to the contractor. The government will reimburse the financial institution. FAR 32.1108.[14]

G. FAR Clauses: Unless payment will be made exclusively through the government purchase card, other third party arrangement, or pursuant to an exception in FAR 32.1103, the contracting officer shall insert the clause at FAR 52.232-33, Payment by Electronic Funds Transfer-Central Contractor Registration, in all solicitations where the paying office uses the Central Contractor Registration database as its source of EFT information. The contracting officer will insert the clause at FAR 52.232-34, Payment by Electronic Funds Transfer-Other than Central Contractor Information, when FAR 52.204-7, Central Contractor Registration, or a similar agency clause requiring a contractor to be registered in the CCR database, is not included.

H. Liability for Erroneous Transfer

1. If an uncompleted or erroneous transfer occurs because the government failed to use the contractor provided EFT information in the correct manner, the government remains responsible for making a correct payment, paying any prompt penalty due, and recovering any erroneously directed funds. FAR 52.232-33(e)(1).

2. If an uncompleted or erroneous transfer occurs because the contractor provided incorrect EFT information, and if the funds are no longer in the control of the payment office, the government is deemed to have made payment and the contractor is solely responsible for recovery of any of the erroneously directed funds. If the funds remain under the control of the payment office, the government shall not make payment until the corrected ETC information is entered. FAR 52.232-33(e)(2).

3. Prompt Payment Act. A payment shall be deemed to have been made in a timely manner if the EFT payment transaction instructions given to the

[13] DoD requires use of the purchase card as payment for any purchase at or below the micro-purchase threshold ($3,000). A written determination by a Senior Executive Service member, Flag Officer, or General Officer is required in certain instances where the card is not used. DFARS 213.270.

[14] Written contracts to be paid by purchase card should include the clause at 52.232-36, Payment by Third Party, as prescribed by FAR 32.1110(d). However, payment by a purchase card also may be made under a contract that does not contain the clause if the contractor agrees to accept the card as a method of payment. FAR 32.1108(b)(1).

Federal Reserve System specifies the date for settlement of the payment on or before the prompt payment due date, whether or not the Federal Reserve System actually makes the payment by that date. FAR 52.232-33(f) & -34(f).

I. Wide Area Work Flow (WAWF).

1. WAWF is the mandated method for using EFT for payments for DoD contracts. DFARS 232.7003. WAWF combines, in a secure web-based system, electronic invoicing, receipt, and acceptance. WAWF website is at https://wawf.eb.mil/.

2. From March 2002 through May 2003, the Defense Contract Management Agency (DCMA) conducted a pilot program using WAWF. The program involved about 31,000 transactions valued at about $1.5 billion dollars. Comparable paper-based transactions would result in an average of about $315,000 dollars in PPA interest payments. In the pilot program, 99.9% of WAWF payments were processed on time, incurring only $54 dollars in PPA interest.

VII. ASSIGNMENT OF CLAIMS.

A. General Rule. A contractor may assign its right to be paid by the government for contract performance. FAR 32.802.

1. Under the Assignment of Claims Act (31 U.S.C. § 3727) and Assignment of Contracts Act (41 U.S.C. § 6305), a contractor may assign monies due or to become due under a contract if all of the following conditions are met:

a. The contract specifies payments aggregating $1,000 or more.

b. The contractor makes the assignment to a bank, trust company, or other financing institution, including any federal lending agency.

c. The contract does not prohibit the assignment.

d. Unless the contract expressly permits otherwise, the assignment:

(1) Covers all unpaid amounts payable under the contract;

(2) Is made only to one party; except that any assignment may be made to one party as agent or trustee for two or more parties participating in the financing of the contract; and

(3) Is not subject to further assignment.

e. The assignee sends a written notice of assignment together with a true copy of the assignment instrument to the:

(1) Contracting officer or agency head,

(2) Surety on any bond applicable to the contract; and

(3) Disbursing officer designated in the contract to make payment.

2. The provisions of the Assignment of Claims Act are construed strictly. See Summerfield Housing Limited Partnership v. United States, 42 Fed. Cl. 160 (1998).

B. Protection for the Assignee. 41 U.S.C. § 6305; FAR 32.804.

1. Once the assignee notifies the government of the assignment, the government must pay the assignee. Payment to the contractor will not discharge the government's obligation to pay the assignee. Tuftco Corp. v. United States, 222 Ct. Cl. 277 (1980).

2. The government cannot recover payments made to the assignee based on the contractor's liability to the government. FAR 32.804.

3. DOD may include a "no-setoff" provision in its contracts upon a determination of need by the President published in the Federal Register. 41 U.S.C. § 6305. Formerly, agencies could only use a "no-setoff" provision upon a Presidential proclamation of war or national emergency. This authority has been delegated to the Head of the Agency after such determination has been published in the Federal Register. Use of the "no-setoff" provision may be appropriate to facilitate the national defense, in the event of a national emergency or natural disaster, or when the use of a "no-setoff" provision may facilitate private financing of contract performance. If the offeror is significantly indebted to the Government, this information should be used in the determination. FAR 32.803(d).

4. If the contract contains a no-setoff commitment clause (FAR 52.232-23, Alt I), the assignee will receive contract payments free of reduction or setoff for:

a. Any liability of the contractor arising independent of the contract. FAR 32.804(b)(1). See Bank of Amer. Nat. Trust and Sav. Ass'n v. United States, 23 F.3d 380 (Fed. Cir. 1994) (SBA loans to fund contract performance are "independent" of the contract and not subject to set-off). See also Applied Companies v. United States, 37 Fed. Cl. 749 (1997) (discussing use of no-setoff provision by assignor).

b. Certain liabilities arising under the same contract, such as fines, penalties, and withheld taxes (FAR 32.804(b)(2)).

VIII. DEBT DETERMINATION AND COLLECTION PROCEDURES.

A. Debts Covered by Contract Collection Procedures. FAR 32.601.

1. Damages or excess costs arising from a contractor's default in performance.

2. Breaches of contract obligations by the contractor concerning progress payments, advance payments, or government-furnished property or material.

3. Expenses incurred by the government in correcting defects.

4. Government overpayment to contractors due to billing errors, such as stating an incorrect quantity, or deficiencies in quality or erroneous payments made through EFT.[15]

5. Retroactive price reductions resulting from contract terms for price redetermination or for determination of prices under incentive-type contracts.

6. Delinquency in contractor payments due to the government under agreements for deferral or postponement of collections.

7. Reimbursement of costs as provided in FAR 33.102(b) and 33.104(h)(1), paid by the Government where a postaward protest is sustained as a result of an awardee's misstatement, misrepresentation, or mis-certification.

B. Determination of Contractor Debt.

1. Overpayment problem. Contractor reconciliation of its billings to government accounting and payment data is a key procedure for identifying government overpayments.[16] In 2002, Congress enacted the

[15] The General Accounting Office (GAO) has issued numerous reports highlighting DoD's problems concerning overpayments to contractors. In fiscal years 1994 through 1998, defense contractors returned $4.6 billion to the Defense Finance and Accounting Center in Columbus, Ohio, due to overpayments resulting from contract administration actions and payment processing errors. See DoD Procurement: Funds Returned by Defense Contractors (GAO/NSIAD-98-46R, Oct. 28, 1997), and DoD Procurement: Millions in Overpayments Returned by DoD Contractors (GAO/NSIAD-94-106, Mar. 14, 1994). For FY 01, DFAS Columbus records revealed that DoD made approximately $488 million in overpayments. *See* GEN. ACCT. OFF. REP. NO. GAO-02-635, *DoD Contract Management: Overpayments Continue and Management and Accounting Issues Remain* (May 30, 2002).

[16] See DoD Contract Management: Greater Attention Needed to Identify and Recover Overpayments (GAO/NSIAD-99-131, July 19, 1997). In the FY 02 National Defense Authorization Act, section 831 amended Title 31 of the U.S. Code to require that the head of each executive agency establish a cost effective program for

Improper Payments Information Act of 2002 that requires agencies to annually identify programs and activities susceptible to significant improper payments and report an annual estimate of improper payments to Congress.[17]

2. Cooperation among government officials. The FAR requires contracting officers, contract financing offices, disbursing officials, and auditors to cooperate fully with each other to properly identify and promptly collect contract debts. FAR 32.602.

3. Responsibility.

   a. Normally, the contracting officer has primary responsibility for determining the amount of a debt and for collecting it. FAR 32.602(a).

   b. For DOD agencies, the disbursing officer is responsible for determining the amount and collecting contract debts whenever the government makes overpayment or erroneous payments. DFARS 232.605(b).

4. Procedures.

   a. The responsible official determines the substantive basis for the government's entitlement. FAR 32.606.

      (1) Contractual. Identify the specific contract provision(s) upon which the government's claim is based. Common bases include:

         (a) Defective Pricing. See FAR 15.407-1, Defective Cost or Pricing Data.

         (b) Excess Costs of Reprocurement. See FAR 49.402-6, Repurchase Against Contractor's Account.

         (c) Recovery of Unliquidated Progress Payments. See FAR 52.232-16(h).

         (d) Recovery of Unliquidated Advance Payments. See FAR 52.232-12; Do-Well Machine Shop Inc., ASBCA Nos. 34565, 40895, 99-1 BCA ¶ 30,320

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identifying payment errors and for the recovery of overpayments. Pub. L. No. 107-107, §831, 115 Stat. 1012, 1186 (2001).

[17]. Pub. L. No. 107-300, 116 Stat. 2350 (2002).

(SBA entitled to unliquidated advance payment following default termination of 8(a) contractor); Johnson Mgmt. Group CFC Inc., HUDBCA Nos. 96-C-132-C15, 97-C-109-C2, 1999 HUD BCA LEXIS 7 (HUD had paramount lien on start-up equipment purchased with advance payments).

(2) Other bases for government entitlement include common law (e.g., breach of contract, consequential damages) and debts from other contracts.

b. The responsible official must issue a demand letter notifying the contractor of the debt as soon as the responsible official has computed the amount of refund due. FAR 32.604.

C. Enforcing Government Claims-Collecting the Debt.

1. Collection methods.

a. Voluntary Payment by the Contractor. After receiving the demand letter, the contractor may pay, arrange to defer payment, or arrange to make installment payments.

b. Administrative Set-Off. If the disbursing officer is responsible for collection of a contract debt or is notified of the debt by the responsible official, and if the disbursing officer has contractor invoices on hand for payment by the government, the disbursing official shall make an appropriate set-off in the payment to the contractor. DoD FMR, vol. 10. 180501B and 180502.

c. Withholding. If the contractor fails to make payment within 30 days of a demand, and has failed to request deferment, the government shall immediately initiate withholding of principal and interest. FAR 32.606.

d. Tax Refund Offsets. 31 U.S.C. § 3720A authorizes the Internal Revenue Service (IRS) to collect certain past due and legally enforceable debts by offset against tax refunds. This is done through the Department of Treasury Offset Program administered by the Financial Management Service's Debt Management Services. DOD FMR, vol. 10, para. 180403 and 180501.

2. Deferment of Collection. FAR 32.607-2.

a. If the contractor is not appealing the debt, the government and the contractor may agree to a debt deferment or installment payments if the contractor is unable to pay in full at once or if the

contractor's operations under national defense contracts would be seriously impaired. FAR 32.607(b)(1)

b. If the contractor is appealing the debt, suspension or delay of the collection action is not required. However, the responsible official shall consider whether deferment of the debt is advisable to avoid possible overcollection. FAR 32.607-2(d).

c. Deferment pending disposition of appeal may be granted when the contractor is a small business concern or is financially weak. FAR 32.607-2(e).

d. The government grants deferments pursuant to a written agreement. FAR 32.607-2(g) specifies the necessary terms. According to FAR 32.607-2(h), if the contractor's appeal of the debt determination is pending when it requests deferment, any deferment/installment agreement must provide that the contractor will:

(1) prosecute the appeal diligently; and

(2) pay the debt in full when the appeal is decided or the parties agree on the debt amount.

e. The filing of an action under the contract's Disputes clause shall not suspend or delay collection of government claims. To obtain deferment of a debt determination that has been appealed under the Disputes clause, the contractor must present a bond or other collateral in the amount of the claim to the government. FAR 32.607-2.

D. Compromise Actions. DoD FMR, Vol. 10, Ch. 18

1. For debts under $100,000 (excluding interest), if further collection is not practicable or would cost more than the amount of the recovery, the agency may compromise the debt or terminate or suspend further collection action. FAR 32.610.

2. For debts over $100,000, DFAS must forward the debt to the Department of Justice (DOJ) for further action when the debt is not serviced by Department of Treasury. If DOJ determines that the debt is uncollectible, it must notify DFAS that the debt should be written off. DoD FMR, vol. 10, 180703.

E. Funds Received from the Contractor.

1. Miscellaneous Receipts Statute (MRS). 31 U.S.C. § 3302(b). Most funds received from a source outside the appropriations process must be deposited in the general fund of the United States Treasury.

2. Exceptions. Exceptions to the MRS are scattered throughout the United States Code and public law.

3. For more on the MRS and its exceptions, see General Accounting Office, Principles of Federal Appropriations Law, vol. II, ch. 6, § E (2d Ed. 1992); Major Timothy D. Matheny, Go On, Take the Money and Run: Understanding the Miscellaneous Receipts Statute and Its Exceptions, Army Lawyer, Sep. 1997, at 31.

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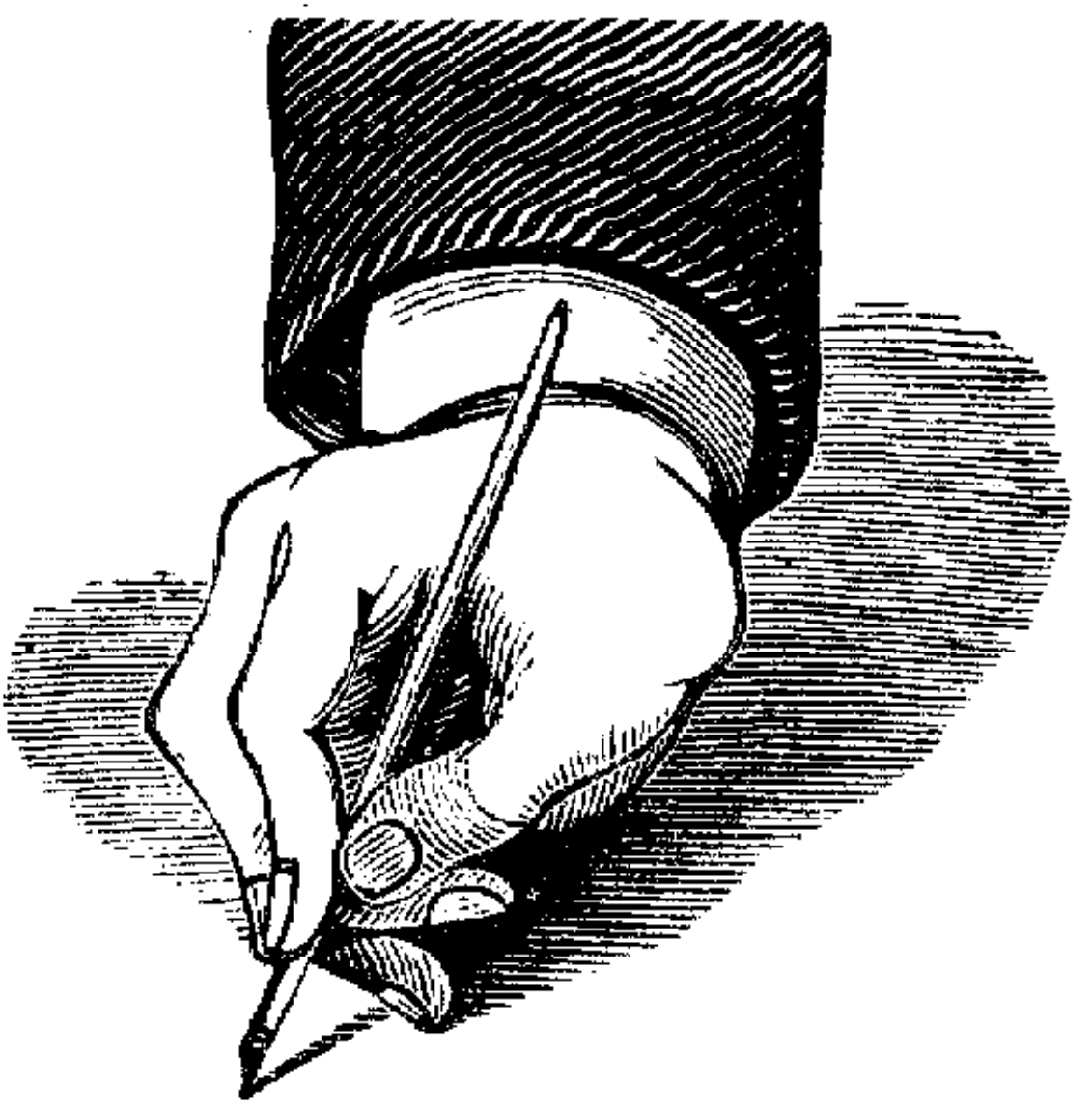
Chapter 21
Contract Changes



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CHAPTER 21

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CHAPTER 21

CONTRACT CHANGES

I. INTRODUCTION

A. Generally. Government Contracts are not perfect when awarded. During performance, many changes may be required in order to fix inaccurate or defective specifications, react to newly encountered circumstances, or modify the work to ensure the contract meets government requirements. Any changes made to a government contract may force a contractor to perform more work, or to perform in an often more costly fashion, and may require additional funding. Unfortunately, the parties do not always agree on the scope, value, or even the existence of a contract change. Contract changes account for a significant portion of contract litigation.

B. References.

1. Federal Acquisition Regulation (FAR) part 43, 50.1, 52.243-1 to 7, 52.233-1.

2. John Cibinic, Ralph Nash and James Nagle, Administration of Government Contracts, Ch. 4, Changes (4th Ed., 2006).

3. Ralph C. Nash, Jr. & Steven W. Feldman, Government Contract Changes (3d ed. 2007).

C. Definitions.

1. **Contract Change** – Any addition, subtraction, or modification of the work required under a contract made during contract performance. This is distinguished from an "amendment" which usually denotes a change to a solicitation.

2. **Formal Contract Modification** – Any written change in the terms of a contract. (FAR 2.101)

3. **Change Order** – A unilateral, written order, signed by the contracting officer, directing the contractor to make a change that a Changes Clause authorizes. FAR 2.101. This is an order for a change in the contract, with or without the contractor's consent. This is a right to make a unilateral change vested in the Government, not the contractor. FAR 43.201. (FAR 2.101)

4. **Informal (Constructive) Contract Change** – Any contract change effected through other than formal means (verbally, etc.). (FAR 43.104)

5. **Unilateral Contract Change** – A contract modification executed only by the contracting officer. (FAR 43.103(b))

6. **Bilateral Contract Change** – A contract modification executed by both the contracting officer and the contractor after negotiations (also called a supplemental agreement). (FAR 43.103(a))

7. **Administrative Change** – A contract modification (in writing) that does not affect the substantive rights of the parties. (FAR 43.101)

8. **Substantive Change** – A contract change that affects the substantive rights of the parties with regard to contract performance or compensation.

9. **Changes Clause** – A contract clause that allows the contracting officer to make unilateral, substantive changes to a contract, as long as the changes are within the general scope of the contract. (FAR 43.201)

10. **In-Scope Change** – A contract change that is within the general scope of the original contract in terms of type and amount of work, period of performance, and manner of performance.

11. **Out-of-Scope ("Cardinal") Change** – A contract change that is not within the general scope of the original contract in terms of type and amount of work, period of performance, and manner of performance.

12. **Equitable Adjustment** – A contract modification, usually to contract price, that enables a contractor to receive compensation for additional costs of performance including a reasonable profit, caused by an in-scope contract change.

13. **Request for Equitable Adjustment (REA)** – A contractor request (not a demand – see "claim" below) that the contracting officer adjust the contract price to provide an equitable (i.e. "fair and reasonable") increase in contract price based on a change to contract requirements. REAs are handled under the contract's Changes Clause.

14. **Claim** – a written demand, as a matter of right, to the payment of a sum certain or other relief. Claims are handled under the Contract Disputes Act (CDA). (FAR 2. 101)

15. **Intrinsic Evidence** – evidence of the intent of the contracting parties found within the words of the contract (and supporting documentation).

16. **Extrinsic Evidence** –evidence external to, or not contained in, the body of a contract, but which is available from other sources such as statements by

the parties and other circumstances surrounding the transaction. Black's Law Dictionary, 1999.

17. **Latent Ambiguity** – An ambiguity that does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed. Black's Law Dictionary, 1999.

18. **Patent Ambiguity** – An ambiguity that clearly appears on the face of a document, arising from the language, itself. Black's Law Dictionary, 1999.

II. AUTHORITY TO CHANGE A CONTRACT

A. In whom the authority vests. Only the contracting officer, acting within his or her authority, can issue a contract change.[1] (FAR 43.102(a)) This rule prohibits other government personnel from:

1. Executing a contract change;

2. Acting in such a manner as to cause the contractor to believe they have authority to bind the government; or

3. Directing or encouraging the contractor to perform work that should be the subject of a contract modification.

B. Delegation. Some government officials, in executing their duties as delegated by the contracting officer, may direct contractor actions while still not improperly issuing contract changes. See J.F. Allen Co. v. United States, 25 Cl. Ct. 312 (1992) (directions issued by expert engineer were not contract changes because the contract specifically stated the work would be "as directed" by the government).

C. Unauthorized Changes. Any contract change not made by the contracting officer is unauthorized. The contractor bears the responsibility of immediately notifying the contracting officer of the alleged change to confirm whether the government is officially ordering the change. (FAR 43.104)

III. FORMAL CONTRACT MODIFICATIONS

A. General. Any change executed in writing and made part of the contract file is a formal contract modification.

B. Categories.

[1] FAR 43.202 contains a limited authority for Contract Administration Offices to issue "Change Orders," unilateral contract changes pursuant to the contract's "changes clause." However, they may only do so upon proper delegation.

1. Administrative. These unilateral changes are made in writing by the contracting officer, and do not affect the substantive rights of the parties. FAR 43.101. These include:

   a. Changes to appropriations data (to update for new fiscal years, etc.);

   b. Changing points of contact or telephone numbers.

2. Substantive. These changes alter the terms and conditions of the contract in ways that affect the substantive rights of the parties by adding, deleting, or changing the work required and/or compensation authorized under the contract. These may be made unilaterally (for changes authorized by a changes clause) or bilaterally (with agreement between the two parties).

C. Methods.

1. Unilateral. The contracting officer may make certain changes to the contract without contractor agreement or negotiation prior to the change. These changes include those of an administrative nature or those authorized by the changes clause in that contract, and are executed using a **change order**.

   a. **Changes Clauses** provide the contracting officer with authority to make certain unilateral contract changes. (FAR 43.201) Some main changes clauses include:

      (1) **Fixed-Price Supply Contracts** – FAR 52.243-1. This clause authorizes changes to:

         (a) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.

         (b) Method of shipment or packing.

         (c) Place of delivery.

      (2) **Services** – FAR 52.243-1 ALTERNATE 1. This clause authorizes changes in:

         (a) Description of services to be performed.

         (b) Time of performance (i.e., hours of the day, days of the week, etc.).

         (c) Place of performance of the services.

(3) **Construction** – FAR 52.244-4. This clause authorizes changes:

(a) In the specifications (including drawings and designs);

(b) In the method or manner of performance of the work;

(c) In the Government-furnished property or services; or

(d) Directing acceleration in the performance of the work.

b. Other Clauses Authorizing Unilateral Changes.

(1) **Suspension of Work**. The contracting officer may unilaterally suspend work for the convenience of the government. However, if the delay is unreasonable, the contractor is entitled to an adjustment of the contract price, through a contract modification, to account for added expense. Note that suspensions of work may entitle the contractor to recover additional costs, but not profit (since the work has not changed). (FAR 52.242-14)

(2) **Property Clause**. This clause gives the contracting officer broad power to unilaterally increase, decrease, substitute, or even withdraw government-furnished property. (FAR 52.245-1)

(3) **Options Clause**. These clauses give the contracting officer the ability to unilaterally extend the contract, or order additional supplies/services. (FAR 52.217-4 thru FAR 52.217-9)

(4) **Terminations**. The contracting officer can unilaterally terminate a contract for convenience or default (FAR 49.5)

2. Bilateral. As with any contract, the parties may agree to change the terms and conditions of the original contract. In such cases, the parties have actually created a supplemental agreement.[2] In government contracting, the parties can only agree to make changes within the scope of the original contract.

[2] Per FAR 43.102, there is a general government preference for bilateral modifications rather than unilateral modifications.

a. Differing Site Conditions. Contractors must "promptly notify the Contracting Officer, in writing, of subsurface or latent physical conditions differing materially from those indicated in this contract or unknown unusual physical conditions at the site before proceeding with the work." The contracting officer must then pay an equitable adjustment to account for the conditions, though only when the contractor properly proposes the equitable adjustment. (FAR 52.236-2; 52.243-5)

b. Other In-Scope Changes. The parties may agree to a change that falls within the scope of the original contract.

3. Form and Procedure.

a. Required Form. The FAR prescribes the use of Standard Form (SF) 30, "Amendment of Solicitation/Modification of Contract," for all contract modifications, both unilateral and bilateral. (FAR 43.301)

b. Timing. Changes may be made at any time prior to final payment on the contract. **Final Payment** is the last payment due under the contract, and the contractor must take the payment with the understanding that no more payments are due. See Design & Prod., Inc. v. United States, 18 Cl. Ct. 168 (1989); Gulf & Western Indus., Inc. v. United States, 6 Cl. Ct. 742 (1984).

c. Definitization. Any contract change likely requires an increase in the cost of performance. This amount must either be negotiated ahead of time, or a maximum allowable cost identified, unless impractical. (FAR 43.102(b)).

d. Fiscal Considerations. Proper appropriated funds must be available to fund any contract modification. Otherwise, availability of funds or price limitation clauses must be included. (FAR 43.105(a)).

e. Government Benefit. There must be some benefit to the government in order to justify a contract change. Northrop Grumman Computing Systems, Inc., GSBCA No. 16367, 2006-2 BCA ¶ 33,324.

IV. CONSTRUCTIVE CONTRACT CHANGES - GENERALLY.

A. Background. Constructive changes exist whenever the government, through action or inaction, and whether intentionally or unintentionally, imposes a change to the terms and conditions of contract performance - but fails to do so formally (in writing or otherwise). Administration of Gov't Contracts, Cibinic, Nash &

Nagle (2006, p. 427). In such cases, the contractor often argues the change entitles it to additional compensation or extension of performance period.[3] Upon receiving notice of the alleged constructive change, a contracting officer may respond in one of three ways:

1. Adopt the Change. The contracting officer may ratify the government's action/inaction and formally establish a contract modification. If so, the contracting officer must negotiate an equitable adjustment to account for any additional work. FAR 43.104(a)(1).

2. Reject the Change. The contracting officer can simply disclaim unauthorized government conduct and absolve the contractor of following the unauthorized directions. FAR 43.104(a)(2).

3. Adopt the Conduct, but Deny a Change Exists. In many cases the government's action/inaction may affect contractor performance, but the contracting officer may conclude that the original contract requires the performance at issue and that no change has occurred. These cases include the majority of contract changes litigation. FAR 43.104(a)(3)

B. Three Basic Elements of Constructive Changes. Note that these three elements are generally applicable to all constructive change claims. Nevertheless, there are additional elements that the contractor must prove depending upon the "type" of constructive change alleged (See below). The Sherman R. Smoot Corp., ASBCA Nos. 52173, 53049, 01-1 BCA ¶ 31,252 (appeal later sustained on other aspects of the case); Green's Multi-Services, Inc., EBCA No. C-9611207, 97-1 BCA ¶ 28,649; Dan G. Trawick III, ASBCA No. 36260, 90-3 BCA ¶ 23,222.

1. A change occurred either as the result of government action or inaction. Kos Kam, Inc., ASBCA No. 34682, 92-1 BCA ¶ 24,546;

2. The contractor did not perform voluntarily. Jowett, Inc., ASBCA No. 47364, 94-3 BCA ¶ 27,110; and

3. The change resulted in an increase (or a decrease) in the cost or the time of performance. Advanced Mech. Servs., Inc., ASBCA No. 38832, 94-3 BCA ¶ 26,964.

V. TYPES OF CONSTRUCTIVE CHANGES.

A. Five Types. There are five general types of constructive changes that comprise the majority of litigation on the subject, each of which will be dealt with in depth below:

1. Contract Interpretation (or Misinterpretation);

[3] NOTE: Contractors are required to immediately notify the contracting officer when they believe a constructive change has occurred. See FAR 43.104

2. Defective Specifications;

3. Governmental Interference and Failure to Cooperate;

4. Failure to Disclose Vital Information (Superior Knowledge); and

5. Constructive Acceleration.

B. Contract Interpretation. This type of constructive change occurs when the contractor and the government disagree on how to interpret the terms of the contract. Often, the government insists that the contract terms require the work to be performed in a certain (usually more expensive) manner than the contractor's interpretation requires. See Ralph C. Nash, Jr. & Steven W. Feldman, Government Contract Changes 340 (3d ed. 2007). The contractor argues that the government misinterpreted the contract's requirements, resulting in additional work or costs that would not otherwise be reimbursed to the contractor.

1. Initial Concerns.

a. Before deciding how to properly interpret a contract term, the following preliminary issues must be examined:

(1) Did the government's disputed interpretation originate from an employee with authority to interpret the contract terms? See J.F. Allen Co. & Wiley W. Jackson Co., a Joint Venture v. United States, 25 Cl. Ct. 312 (1992). If not, there may be no genuine dispute over interpretation unless the contracting officer later adopts the unauthorized individuals' interpretation.

(2) Did the contractor perform any work that the contract did not require? If not, there may be no issue to resolve.

(3) Did the contractor timely notify the government of the impact of the government's interpretation? Ralph C. Nash, Jr., Government Contract Changes, 11-2 (2d ed. 1989).

b. Contractors must continue to perform all required work until disputes are resolved if those disputes arise "under the contract." FAR 52.233-1(i). Contractors bear the initial risk of non-performance pending the outcome. Therefore, contractors usually perform according to the requirements of a constructive change and file a claim for equitable adjustment or breach damages. Administration of Government Contracts, 431 - 5. See also Aero Prods. Co., ASBCA No. 44030, 93-2 BCA ¶ 25,868.

c. Contract Interpretation Generally.

(1) Contract interpretation is an effort to discern the intent of the contracting parties by examining the language of the agreement they signed and their conduct before and after entering into the agreement. Once that intent is ascertained, the parties will generally be held to that intent. See Firestone Tire & Rubber Co. v. United States, 444 F.2d 547 (Ct. Cl. 1971).

(2) Process. The first place to seek the intent of the parties is the **intrinsic evidence** - i.e. the four corners of the contract itself. If the contract terms are ambiguous (admitting of two or more reasonable meanings), the **extrinsic evidence** surrounding contract formation and administration may be examined. Also, some common-law doctrines of contract interpretation, including **contra proferentem** and the **duty to seek clarification** apply.

2. Intrinsic Evidence and Contract Interpretation.

a. The first step to interpreting contract terms is to identify the **plain meaning** of a given term, as this is considered strong evidence of the intent of the parties. See Ahrens. v. United States, 62 Fed. Cl. 664 (2004).

b. "When interpreting the language of a contract, a court must give reasonable meaning to all parts of the contract, and not render portions of the contract meaningless." Big Chief Drilling Co. v. United States, 26 Cl. Ct. 1276, 1298 (1992).

c. Defining Terms.

(1) Give ordinary terms their ordinary definitions. See Elden v. United States, 617 F.2d 254 (Ct. Cl. 1980);

(2) If the contract defines a term, use the definition contained in the contract itself. See Sears Petroleum & Transp. Corp., ASBCA No. 41401, 94-1 BCA ¶ 26,414.

(3) Give technical, scientific, or engineering terms their recognized technical meanings unless defined otherwise in the contract. See Western States Constr. Co. v. United States, 26 Cl. Ct. 818 (1992); Tri-Cor, Inc. v. United States, 458 F.2d 112 (Ct. Cl. 1972).

d. Lists of Items. Lists of items are presumed to be exhaustive unless otherwise specified. Non-exhaustive lists are presumed to include only similar unspecified items.

e. Orders of Precedence of Contract Terms. Contracts often contain "order of precedence" clauses to establish an order of priority between sections of the contract.

f. Drawings v. Specifications

(1) Non-Construction Contracts – **drawings** trump **specifications**. (FAR 52.215-8)

(2) Construction Contracts – (FAR 52.236-21)

(a) Anything in drawings and not specifications, or vice-versa, is given the same effect as if it were present in both;

(b) **Specifications** trump **drawings** if there is a difference between them;

(c) Any discrepancies can only be resolved by the contracting officer who must resolve the matter "promptly."

g. **Patent ambiguities** in construction contracts may be resolved by applying the order of preference clauses in the contract. See Manuel Bros., Inc. v. U.S., 55 Fed. Cl. 8 (2002).

h. In construction contracts, the DFARS states that the contractor shall perform **omitted details** of work that are necessary to carry out the intent of the drawings and specifications or that are performed customarily. (DFARS 252.236-7001)

3. Extrinsic Evidence. Courts will only examine extrinsic evidence only if the intent of the parties cannot be ascertained from the contract's terms. See Coast Federal Bank, FSB v. United States, 323 F.3d 1035 (Fed. Cir. 2003).

a. Courts generally examine four main types, which will be discussed below:

(1) Pre-award communications;

(2) Actions during contract performance;

(3) Prior course of dealing;

(4) Custom, trade, or industry standard.

b. Pre-Award Communications. During the solicitation period, an offeror may request clarification of the solicitation's terms, drawings, or specifications. Under the "Explanation to Prospective Bidders" clause, the government will respond in writing (oral explanations are not binding on the government) to all offerors. (FAR 52.214-6)

(1) Oral clarifications of ambiguous solicitation terms during pre-award communications are not generally binding on the government. However, if the government official making the clarification is vested with proper authority to make minor modifications to the solicitation, those clarifications may be binding. See Max Drill, Inc. v. United States, 192 Ct. Cl. 608, 427 F.2d 1233 (1970).

(2) Other statements made at pre-bid conferences may bind the government. See Cessna Aircraft Co., ASBCA No. 48118, 95-2 BCA ¶ 27,560, reversed, in part, by Dalton v. Cessna Aircraft Co., 98 F.3d 1298 (Fed. Cir. 1996) (finding that the Navy's statements at a pre-bid conference did not resolve a patent contractual ambiguity, so the contractor had a duty to clarify).

(3) Pre-award acceptance of a contractor's cost-cutting suggestion may also bind the government. See Pioneer Enters., Inc., ASBCA No. 43739, 93-1 BCA ¶ 25,395.

c. Actions During Contract Performance. The parties to a contract often act in ways that illuminate their understanding of contract requirements. This may aid courts in discerning the understood meanings of ambiguous contract terms.

(1) Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight. Restatement, Second, Contracts § 202(4)(1981).

(2) To quote one judge, "in this inquiry, the greatest help comes, not from the bare text of the original contract, but from external indications of the parties' joint understanding, contemporaneously and later, of what the contract imported. [H]ow the parties act under the arrangement, before the advent of controversy is often more revealing than the dry language of the written agreement by itself." Macke Co. v. U.S., 467 F.2d 1323 (Ct. Cl. 1972).

(3) Persistent acquiescence or non-objection may indicate that a contractor originally believed the disputed performance was actually part of the original contract, thus requiring no additional compensation. See Drytech, Inc., ASBCA No. 41152, 92-2 BCA 24,809; Tri-States Serv. Co., ASBCA No. 37058, 90-3 BCA ¶22,953.

d. Prior Course of Dealing.

(1) If a contractor demonstrates a specific understanding of contract terms through its **history of dealing** with the government on the present or past contracts, that understanding may be binding. See Superstaff, Inc., ASBCA No. 46112, 94-1 BCA ¶ 26,574; Metric Constructors v. NASA, 169 F.3d 747 (Fed. Cir. 1999)

(2) In some instances, **government waiver** of a contract term may demonstrate the intent of the parties not to follow that term. However, there must be many instances of waiver to establish this prior course of dealing. Thirty-six instances of waiver has been held to be sufficient. See LP Consulting Group v. U.S., 66 Fed. Cl. 238 (2005). However, six is not enough when the agency actively seeks to enforce the contract term in the present contract. See Gen. Sec. Servs. Corp. v. Gen. Servs. Admin., GSBCA No. 11381, 92-2 BCA ¶ 24,897.

e. Custom, Trade, or Industry Standard. Ambiguous contract terms may be interpreted through the lens of customary practice within that trade or industry. The following rules apply:

(1) Parties may not use the extrinsic evidence of custom and trade usage to contradict unambiguous terms. See McAbee Const. Inc. v. U.S., 97 F.3d 1431, 1435 (Fed. Cir. 1996). See also All Star / SAB Pacific, J.V., ASBCA No. 50856, 99-1 BCA ¶ 30,214;

(2) However, evidence of custom, trade, or industry standard may be used to demonstrate that an ambiguity exists in a contract term, if a party "reasonably relied on a competing interpretation . . ." of a contract term. Metric Constructors v. NASA, 169 F.3d 747, 752 (Fed. Cir. 1999);

(3) The party asserting the industry standard or trade usage bears the burden of proving the existence of the standard or usage. Roxco, Ltd., ENG BCA No. 6435, 00-1 BCA ¶

30,687; DWS, Inc., Debtor in Possession, ASBCA No. 29743, 93-1 BCA ¶ 25,404.

4. Common-Law Doctrines.

a. Contra-Proferentem. Latin for "against the offeror," this common law doctrine of contract interpretation considers the drafting party (the offeror) to be in the best position to put what it truly means into the words of the contract. Thus, any ambiguities in the language that party drafted should be interpreted against them. See Keeter Trading Co., Inc. v. U.S., 79 Fed. Cl. 243 (2007); Rotech Healthcare v. U.S., 71 Fed. Cl. 393 (2006); Emerald Maint., Inc., ASBCA No. 33153, 87-2 BCA ¶ 19,907. Four requirements before applying contra proferentem:

(1) The non-drafter's interpretation must be **reasonable**. The interpretation's reasonableness must be established with more than mere allegations of reasonableness. See Wilhelm Constr. Co., CBCA 719, Aug. 13, 2009.

(2) The **opposing party** must be the drafter (i.e. not a third party). See Canadian Commercial Corp. v. United States, 202 Ct. Cl. 65 (1973).

(3) The non-drafting party must have **detrimentally relied** on its interpretation in submitting its bid. The requirement for prebid reliance underscores the contractor's obligation to establish actual damage as a prerequisite to recovery. See American Transport Line, Ltd., ASBCA No. 44510, 93-3 BCA ¶ 26,156 (1993) (finding no evidence to support the genuineness of a contractor's self-serving statement of prebid reliance on a contract interpretation).

(4) The ambiguity **cannot be patent** – otherwise, the contractor has the duty to clarify (see below).

b. Duty to Seek Clarification.

(1) The law establishes the duty of clarification in order to ensure that the government will have the opportunity to clarify its requirements and thereby provide a level playing field to all competitors for the contract before contract award, and to avoid litigation after contract award. A contractor proceeds at its own risk if it relies upon its own interpretation of contract terms that it believes to be ambiguous instead of asking the government for a clarification. Wilhelm Constr. Co. v. Dep't of Veterans Affairs, CBCA 719, 09-2 BCA ¶ 34228; Community

Heating & Plumbing Co. v. Kelso, 987 F.2d 1575 (Fed. Cir. 1993); Nielsen-Dillingham Builders, J.V. v. United States, 43 Fed. Cl. 5 (1999).

(2) Do not apply contra proferentem if an ambiguity is patent and the contractor failed to seek clarification. See Triax Pacific, Inc. v. West, 130 F.3d 1469 (Fed. Cir. 1997).

(3) Latent v. Patent Ambiguities.

(a) Latent Ambiguity. An ambiguity that does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed. Black's Law Dictionary, 1999. See Foothill Eng'g., IBCA No. 3119-A, 94-2 BCA ¶ 26,732 (the misplacement of a comma in a figure was a latent ambiguity and did not trigger a duty to inquire, because it was not obvious and apparent in the context of a reasonable, but busy, bidder).

(b) Patent Ambiguity. An ambiguity that clearly appears on the face of a document, arising from the language, itself. Black's Law Dictionary, 1999.

(i) An ambiguity is patent if it would have been apparent to a reasonable person in the claimant's position or if the provisions conflict on their face. Patent ambiguities are "obvious, gross, (or) glaring." Grumman Data Systems Corp. v. Dalton, 88 F.3d 990 (1996); H&M Moving, Inc. v. United States, 499 F.2d 660, 671 (Ct. Cl. 1974). See White v. Edsall Constr. Co., Inc., 296 F.3d 1081 (2002) (holding that a note disclaiming the government's warranty on one of several dozen design drawings was patent ambiguity). "A patent ambiguity is one which is so clearly evident, obvious or glaring that a reasonable man would be impelled by his own good sense, if not his conscience, to ask a question." American Transport Line, Ltd., ASBCA No. 44510, 93-3 BCA ¶ 26,156 (1993).

(ii) A determination of what constitutes a patent ambiguity is made on a case-by-case basis

given the facts in each contractual situation. Whether an ambiguity it patent or latent is a question of law. Wilhelm Constr. Co., CBCA 719, Aug. 13, 2009; Interstate General Gov't Contractors, Inc. v. Stone, 980 F.2d 1433 (Fed. Cir. 1992); H.B. Zachry Co. v. United States, 28 Fed. Cl. 77 (1993), aff'd, 17 F.3d1443 (Fed. Cir. 1994)(table). See Hensel Phelps Constr. Co., ASBCA No. 49716, 00-2 BCA ¶ 30,925 (holding thatan objective standard applied to the latent/patent ambiguity determination).

C. Defective Specifications.

1. Based on an analysis of acceptable risk and government requirements, government contracts may include four types of specifications:

a. **DESIGN SPECIFICATIONS** set forth precise measurements, tolerances, materials, tests, quality control, inspection requirements, and other specific information. See Apollo Sheet Metal, Inc., v. United States, 44 Fed. Cl. 210 (1999); Q.R. Sys. North, Inc., ASBCA No. 39618, 92-2 BCA ¶ 24,793 (specified roofing material inadequate for roof type)

(1) The key issue is whether the government required the contractor to use detailed specifications. Geo-Con, Inc., ENG BCA No. 5749, 94-1 BCA ¶ 26,359. Nonconformity to design specifications result in a contract price reduction. Donat Gerg Haustechnick, ASBCA Nos. 41197, 42001, 42821, 47456, 97-2 BCA ¶ 29,272.

(2) The government is responsible for design and related omissions, errors, and deficiencies in the specifications and drawings. White v. Edsall Constr. Co., Inc., 296 F.3d 1081 (2002); Apollo Sheet Metal, Inc., v. United States, 44 Fed. Cl. 210 (1999); Neal & Co. v. United States, 19 Cl. Ct. 463 (1990) (defective design specifications found to cause bowing in wall); International Foods Retort Co., ASBCA No. 34954, 92-2 BCA ¶ 24,994 (bland chicken ala king). But see Hawaiian Bitumuls & Paving v. United States, 26 Cl. Ct. 1234 (1992) (contractor may vitiate warranty by participating in drafting and developing specifications).

(3) The constructive change theory of defective specifications only applies to "design" specifications (or to the "design" portion of "composite specifications").

b. **PERFORMANCE SPECIFICATIONS** set forth the operational characteristics desired for the item. In such specifications, design, measurements, and other specific details are neither stated nor considered important as long as the performance requirement is met. See Apollo Sheet Metal, Inc., v. United States, 44 Fed. Cl. 210 (1999); Interwest Constr. v. Brown, 29 F.3d 611 (Fed. Cir. 1994).

(1) If the government uses a performance specification, the contractor accepts general responsibility for the design, engineering, and achievement of the performance requirements. Apollo Sheet Metal, Inc., v. United States, 44 Fed. Cl. 210 (1999); Blake Constr. Co. v. United States, 987 F.2d 743 (Fed. Cir. 1993); Technical Sys. Assoc., Inc., GSBCA Nos. 13277-COM, 14538-COM, 00-1 BCA ¶ 30,684.

(2) The contractor has discretion as to the details of the work, but the work is subject to the government's right of final inspection and approval or rejection. Kos Kam, Inc., ASBCA No. 34682, 92-1 BCA ¶ 24,546.

c. **PURCHASE DESCRIPTIONS** are specifications that designate a particular manufacturer's model, part number, or product. The phrase "or equal" may accompany a purchase description. M.A. Mortenson Co., ASBCA Nos. 50716, 51241, 51257, 99-1 BCA ¶ 30,270; Monitor Plastics Co., ASBCA No. 14447, 72-2 BCA ¶ 9626.

(1) If the contractor furnishes or uses in fabrication a specified brand name or an acceptable and approved substitute brand-name product, the responsibility for proper performance generally falls upon the government.

(2) The government's liability is conditioned upon the contractor's correct use of the product.

(3) If the contractor elects to manufacture an equal product, it must ensure that the product is equal to the brand name product.

d. **COMPOSITE SPECIFICATIONS** are specifications that are comprised of two or more different specification types. See Defense Sys. Co., Inc., ASBCA No. 50918, 00-2 BCA ¶ 30,991; Transtechnology, Corp., Space Ordnance Sys. Div. v. United States, 22 Cl. Ct. 349 (1990).

(1) If the government uses a composite specification, the parties must examine each portion of the specification to determine which specification type caused the problem. This determination establishes the scope of the government's liability. Aleutian Constr. v. United States, 24 Cl. Ct. 372 (1991); Penguin Indus. v. United States, 530 F.2d 934 (Ct. Cl. 1976). *Cf.* Hardwick Bros. Co., v. United States, 36 Fed. Cl. 347 (Fed. Cl. 1996) (since mixed specifications were primarily performance-based, there is no warranty covering the specifications).

(2) The contractor must isolate the defective element of the design portion or demonstrate affirmatively that its performance did not cause the problem. Defense Sys. Co., Inc., ASBCA No. 50918, 00-2 BCA ¶ 30,991 (finding that contractor failed to demonstrate deficient fuses were due to deficient Government design rather than production problems).

2. Scope of Government Liability for Defective Specifications. The government's liability varies based on the type of specification included in the contract as follows:

Type of Specification	Description	Risk Allocation
Design Specification	If the Gov't provides and requires use of design specifications, the Gov't gives an implied warranty that specifications are free of defects.	Gov't assumes the risk of defective design specifications
Performance Specifications	Gov't only specifies performance objectives	Contractor bears responsibility for design and success of that design
Purchase Specifications	Gov't provides specifications necessary to identify required product/item to be purchased or used by contractor during performance	If gov't specifies and Ktr uses properly, gov't bears the risk; if Ktr uses improperly, Ktr may be liable if incorrect use caused failure.
Composite Specifications	Identify the type of specification	See above…

3. Defective Specifications - Theory of Recovery - Implied Warranty of Design.

a. Basis.

(1) This "warranty" is based on an implied promise by the government that a contractor can follow the contract drawings and specifications and perform without undue expense. This promise has been called a warranty; however, recovery is based on a breach of the duty to provide drawings and specifications reasonably free from defects. White v. Edsall Constr. Co., Inc., 296 F.3d 1081 (2002); Fru-Con Constr. Corp. v. United States, 42 Fed. Cl. 94 (1998) (reconsidered on other grounds); United States v. Spearin, 248 U.S. 132 (1918); Luria Bros. & Co. v. United States, 177 Ct. Cl. 676, 369 F.2d 701 (1966).

(2) Defective (**design**) specifications may result in a constructive change. See, e.g., Hol-Gar Mfg. Corp. v. United States, 175 Ct. Cl. 518, 360 F.2d 634 (1964). In some cases, judges have relied on a breach of contract theory. See, e.g., Big Chief Drilling Co. v. United States, 26 Cl. Ct. 1276 (1992).

b. Recovery. See Transtechnology, Corp., Space Ordnance Sys. Div. v. United States, 22 Cl. Ct. 349 (1990).

(1) To recover under the implied warranty of specifications, the contractor must prove that:

(a) It reasonably relied upon the defective (design) specifications and complied fully with them. Phoenix Control Sys., Inc. v. Babbitt, Secy. of the Interior, 1997 U.S. App. LEXIS 8085 (Fed. Cir. 1997); Fruin-Colnon Corp. v. U.S., 912 F.2d 1426 (Fed. Cir 1990) (reasonably relied on its interpretation in submitting its bid on proposal); Al Johnson Constr. Co. v. United States, 854 F.2d 467 (Fed. Cir. 1988); Gulf & Western Precision Eng'g Co. v. United States, 543 F.2d 125 (Ct. Cl. 1976); Mega Constr. Co., 29 Fed. Cl. 396 (1993); Bart Assocs., Inc., EBCA No. C-9211144, 96-2 BCA ¶ 28,479; and

(b) That the defective (design) specifications caused increased costs. McElroy Mach. & Mfg. Co., Inc., ASBCA No. 46477, 99-1 BCA ¶ 30,185; Pioneer Enters., Inc., ASBCA No. 43739, 93-1 BCA ¶ 25,395 (contractor failed to demonstrate that defective specification caused its delay); Chaparral

Indus., Inc., ASBCA No. 34396, 91-2 BCA ¶ 23,813, aff'd, 975 F.2d 870 (Fed. Cir. 1992).

(2) The contractor cannot recover if it has actual or constructive knowledge of the defects prior to award. M.A. Mortenson Co., ASBCA Nos. 50716, 51241, 51257, 99-1 BCA ¶ 30,270; Centennial Contractors, Inc., ASBCA No. 46820, 94-1 BCA ¶ 26,511; L.W. Foster Sportswear Co. v. United States, 405 F.2d 1285 (Ct. Cl. 1969) (contractor had actual knowledge from prior contract). Generally, constructive knowledge is limited to patent errors because a contractor has no duty to conduct an independent investigation to determine whether the specifications are adequate. Jordan & Nobles Constr. Co., GSBCA No. 8349, 91-1 BCA ¶ 23,659. *Cf.* Spiros Vasilatos Painting, ASBCA No. 35065, 88-2 BCA ¶ 20,558 (appealed, modified on other grounds).

(3) A contractor may not recover if it decides unilaterally to perform work knowing that the specifications were defective. Ordnance Research, Inc. v. United States, 221 Ct. Cl. 641, 609 F.2d 462 (1979).

(4) A contractor may not recover if it fails to give timely notice that it was experiencing problems without assistance of the government. McElroy Mach. & Mfg. Co., Inc., ASBCA No. 46477, 99-1 BCA ¶ 30,185; JGB Enters., Inc., ASBCA No. 49493, 96-2 BCA ¶ 28,498.

(5) The government may disclaim this warranty. *See, e.g.*, Serv. Eng'g Co., ASBCA No. 40272, 92-3 BCA ¶ 25,106 (reconsideration motion granted; decision modified, in part, on other grounds); Bethlehem Steel Corp., ASBCA No. 13341, 72-1 BCA ¶ 9186. The disclaimer must be obvious and unequivocal, however, in order to shift the risk to the contractor. White v. Edsall Constr. Co., Inc., 296 F.3d 1081 (2002) (holding that a small note disclaiming the government's warranty found on one of several dozen design drawings was hidden and not obvious).

4. Defective Specifications - Theory of Recovery – Impracticability/ Impossibility of Performance.

a. **Three Elements.** American Mechanical, Inc., ASBCA No. 52033, 03-1 BCA ¶ 32,134; Oak Adec, Inc. v. United States, 24 Cl. Ct. 502 (1991); Reflectone, Inc., ASBCA No. 42363, 98-2 BCA ¶

28,869; Gulf & Western Indus., Inc., ASBCA No. 21090, 87-2 BCA ¶ 19,881.

(1) An Unforeseen or Unexpected occurrence.

(a) A significant increase in work usually caused by unforeseen technological problems. Examine the following factors to determine whether a problem was unforeseen or unexpected:

(i) The nature of the contract and specifications, i.e., whether they require performance beyond the state of the art;

(ii) The extent of the contractor's effort; and

(iii) The ability of other contractors to meet the specification requirements.

(b) In some cases, a contractor must show that an extensive research and development effort was necessary to meet the specifications or that no competent contractor can meet the performance requirements. Hol-Gar Mfg. Corp. v. United States, 360 F.2d 634 (Ct. Cl. 1964); Reflectone, Inc., ASBCA No. 42363, 98-2 BCA ¶ 29,869 (contractor must show specifications "required performance beyond the state of the art" to demonstrate impossibility); Defense Sys. Corp. & Hi-Shear Tech. Corp., ASBCA No. 42939, 95-2 BCA ¶ 27,721.

(2) The contractor did not assume the risk of the unforeseen occurrence by agreement or custom. RNJ Interstate Corp. v. United States, 181 F.3d 1329 (Fed. Cir. 1999) (holding that doctrine of impossibility did not apply to a worksite fire since the contract placed the risk of loss on the contractor until acceptance by the government); Southern Dredging Co., ENG BCA No 5843, 92-2 BCA ¶ 24,886; Fulton Hauling Corp., PSBCA No. 2778, 92-2 BCA ¶ 24,858.

(a) A contractor may assume the risk of the unforeseen effort by using its own specifications. Short Bros., PLC v. U.S., 65 Fed. Cl. 695 (2005); Costal Indus. v. United States, 32 Fed. Cl. 368 (1994) (use of specification drafted, in part, by contractor's supplier held to be assumption of risk); Technical

Sys. Assoc. Inc., GSBCA Nos. 13277-COM, 14538-COM, 00-1 BCA ¶ 30,684.

(b) By proposing to extend the state of the art, a contractor may assume the risk of impossible performance. See J.A. Maurer, Inc. v. United States, 485 F.2d 588 (Ct. Cl. 1973).

(3) Performance is commercially impracticable or impossible.

(a) The contractor must show that the increased cost of performance is so much greater than anticipated that performance is commercially senseless. *See* Fulton Hauling Corp., PSBCA No. 2778, 92-2 BCA ¶ 24,858; Technical Sys. Assoc. Inc., GSBCA Nos. 13277-COM, 14538-COM, 00-1 BCA ¶ 30,684; McElroy Mach. & Mfg. Co., Inc., ASBCA No. 46477, 99-1 BCA ¶ 30,185. But see SMC Info. Sys., Inc. v. Gen. Servs. Admin., GSBCA No. 9371, 93-1 BCA ¶ 25,485 (the increased difficulty cannot be the result of poor workmanship).

(b) There is no universal standard for determining "commercial senselessness."

(i) Courts and boards sometimes use a "willing buyer" test to determine whether the increased costs render performance commercially senseless. A showing of economic hardship on the contractor is insufficient to demonstrate "commercial senselessness." The contractor must show that there are no buyers willing to pay the increased cost of production plus a reasonable profit. Ralph C. Nash, Jr., Government Contract Changes, 13-37 to 13-39 (2d ed. 1989).

(ii) Some decisions have stated that it must be "positively unjust" to hold the contractor liable for the increased costs. Raytheon Co., ASBCA Nos. 50166, 50987, 01-1 BCA ¶ 31,245 (57% increase insufficient) *appealed, vacated, in part, on other grounds at* 305 F.3d 1354 (Fed. Cir. 2002); Weststates Transp. Inc., PSBCA No. 3764, 97-1 BCA ¶ 28,633; Gulf & Western Indus., Inc.,

ASBCA No. 21090, 87-2 BCA ¶ 19,881 (70% increase insufficient); HLI Lordship Indus., VABCA No. 1785, 86-3 BCA ¶ 19,182 (200% increase in gold prices insufficient). But see Xplo Corp., DOT BCA No. 1289, 86-3 BCA ¶ 19,125 (50% increase in costs was sufficient).

D. Interference and Failure to Cooperate.

1. General Theory of Recovery.

a. Contracting activities have an implied obligation to cooperate with their contractors and not to administer the contract in a manner that hinders, delays, or increases the cost of performance.

Cases: Precision Pine & Timber, Inc. v. United States, 50 Fed. Cl. 35, 65-70 (2001) (holding that the Forest Service breached a timber sale contract by suspending the contractor's logging operations when the Mexican spotted owl was listed as an endangered species instead of consulting with the Fish and Wildlife Service and developing a management plan as was required by the ESA) (case later reconsidered, modified judgment entered on other grounds); Coastal Gov't Serv., Inc., ASBCA No. 50283, 01-1 BCA ¶ 31,353; R&B Bewachungsgesell-schaft GmbH, ASBCA No. 42213, 91-3 BCA ¶ 24,310 (cost and fees proceeding on remand); C.M. Lowther, Jr., ASBCA No. 38407, 91-3 BCA ¶ 24,296. *See also* Restatement (Second) of Contracts, § 205 (1981) (description of bad faith practices during administration of the contract).

b. Generally a contractor may not recover for "interference" that results from a sovereign act.

Cases: See Hills Materials Co., ASBCA No. 42410, 92-1 BCA ¶ 24,636, rev'd sub nom., Hills Materials Co. v. Rice, 982 F.2d 514 (Fed. Cir. 1992); Orlando Helicopter Airways, Inc. v. Widnall, 51 F.3d 258 (Fed. Cir. 1995) (holding that a criminal investigation of the contractor was a noncompensable sovereign act); Henderson, Inc., DOT BCA No. 2423, 94-2 BCA ¶ 26,728 (limitation on dredging period created implied warranty); R&B Bewachungsgesellschaft GmbH, 91-3 BCA ¶ 24,310 (criminal investigators took action in government's contractual capacity, not sovereign capacity) (cost and fees proceeding on remand). See also Hughes Communications Galaxy, Inc. v. United States, 998 F.2d 953 (Fed. Cir. 1993) (holding that the government may waive sovereign act defense); Oman-Fischbach Int'l, a Joint Venture,

ASBCA No. 44195, 00-2 BCA ¶ 31,022 (actions of a separate sovereign were not compensable constructive changes).

2. Bases for Interference Claims.

a. Overzealous inspection of the contractor's work. Neal & Co., Inc. v. United States, 36 Fed. Cl. 600 (1996) ("nit-picking punch list" held to be overzealous inspection); WRB Corp. v. United States, 183 Ct. Cl. 409 (1968); Adams v. United States, 175 Ct. Cl. 288, 358 F.2d 986 (1966).

b. Incompetence of government personnel. Harvey C. Jones, Inc., IBCA No. 2070, 90-2 BCA ¶ 22,762.

c. Water seepage or flow caused by the government. See C.M. Lowther, Jr., ASBCA No. 38407, 91-3 BCA ¶ 24,296 (water from malfunctioning sump pump was interference); Caesar Constr., Inc., ASBCA No. 41059, 91-1 BCA ¶ 23,639 (government's failure to remove snow piles which resulted in water seepage constituted a breach of its implied duty not to impede the contractor's performance).

d. Disruptive criminal investigations conducted in the government's contractual capacity. R&B Bewachungsgesellschaft GmbH, 91-3 BCA ¶ 24,310.

3. Bases for Failure to Cooperate Claims. The government must cooperate with a contractor. See, e.g., Whittaker Elecs. Sys. v. Dalton, Secy. of the Navy, 124 F.3d 1443 (Fed. Cir. 1997); James Lowe, Inc., ASBCA No. 42026, 92-2 BCA ¶ 24,835; Mit-Con, Inc., ASBCA No. 42916, 92-1 CPD ¶ 24,539. Bases for claims include:

a. Failure to provide assistance necessary for efficient contractor performance. Chris Berg, Inc. v. United States, 197 Ct. Cl. 503, 455 F.2d 1037 (1972) (implied requirement); Durocher Dock & Dredge, Inc., ENG BCA No. 5768, 91-3 BCA ¶ 24,145 (failure to contest sheriff's stop work order was not failure to cooperate); Hudson Contracting, Inc., ASBCA No. 41023, 94-1 BCA ¶ 26,466; Packard Constr. Corp., ASBCA No. 46082, 94-1 BCA ¶ 26,577.

b. Failure to prevent interference by another contractor. Examine closely the good faith effort of the government to administer the other contract to reduce interference. Northrup Grumman Corp. v. United States, 47 Fed. Cl. 20 (2000); Stephenson Assocs., Inc., GSBCA No. 6573, 86-3 BCA ¶ 19,071.

c. Failure to provide access to the work site. Summit Contractors, Inc. v. United States, 23 Cl. Ct. 333 (1991) (absent specific warranty, site unavailability must be due to government's fault); Atherton Constr., Inc., ASBCA No. 48527, 00-2 BCA ¶ 30,968; R.W. Jones, IBCA No. 3656-96, 99-1 BCA ¶ 30,268; Old Dominion Sec., ASBCA No. 40062, 91-3 BCA ¶ 24,173, *recons. denied*, 92-1 BCA ¶ 24,374 (failure to grant security clearances); M.A. Santander Constr., Inc., ASBCA No. 35907, 91-3 BCA ¶ 24,050 (interference excused default); Reliance Enter., ASBCA No. 20808, 76-1 BCA ¶ 11,831.

d. Abuse of discretion in the approval process. When the contract makes the precise manner of performance subject to approval by the contracting officer, the duty of cooperation requires that the government approve the contractor's methods unless approval is detrimental to the government's interest. Ralph C. Nash, Jr., Government Contract Changes 12-7 (2d ed. 1989). Common bases for claims are:

(1) Failure to approve substitute items or components that are equal in quality and performance to the contract requirements. Page Constr. Co., AGBCA No. 92-191-1, 93-3 BCA ¶ 26,060; Bruce-Anderson Co., ASBCA No. 29411, 88-3 BCA ¶ 21,135 (contracting officer gave no explanation for refusal).

(2) Unjustified disapproval of shop drawings or failure to approve within a reasonable time. Orlosky, Inc. v. U.S., 68 Fed. Cl. 296 (2005); Vogt Bros. Mfg. Co. v. United States, 160 Ct. Cl. 687 (1963).

(3) Improper failure to approve the substitution or use of a particular subcontractor. Lockheed Martin Tactical Aircraft Sys., ASBCA Nos. 49530, 50057, 00-1 BCA ¶ 30,852, *recon. denied*, 00-2 BCA ¶ 30,930; Manning Elec. & Repair Co. v. United States, 22 Cl. Ct. 240 (1991); Hoel-Steffen Constr. Co. v. United States, 231 Ct. Cl. 128, 684 F.2d 843 (1982); Liles Constr. Co. v. United States, 197 Ct. Cl. 164, 455 F.2d 527 (1972); Richerson Constr., Inc. v. Gen. Servs. Admin., GSBCA No. 11161, 93-1 BCA ¶ 25,239. *Cf.* FAR 52.236-5, Material and Workmanship.

E. Constructive Acceleration.

1. General. If a contractor encounters an excusable delay, it is entitled to an extension of the contract schedule. Constructive acceleration occurs when

the contracting officer refuses to recognize a new contract schedule and demands that the contractor complete performance within the original contract period.

2. Elements of Constructive Acceleration. Fru-Con Constr. Corp. v. United States, 43 Fed. Cl. 306 (1999); Atlantic Dry Dock Corp., ASBCA Nos. 42609, 42610, 42611, 42612, 42613, 42679, 42685, 42686, 44472, 98-2 BCA ¶ 30,025; Trepte Constr. Co., ASBCA No. 28555, 90-1 BCA ¶ 22,595.

   a. The existence of one or more excusable delays;

   b. Notice by the contractor to the government of such delay, and a request for an extension of time;

   c. Failure or refusal by the government to grant the extension request;

   d. An express or implied order by the government to accelerate; and

   e. An actual acceleration resulting in increased costs.

3. Excusable Delays. FAR 52.249-8, -9, -10, 14; FAR 52.212-4(f). See also Outline on Terminations for Default.

   a. An excusable delay is a delay which is beyond the control, fault or negligence of both the contractor and the subcontractor. The focus of the determination of "excusable delay" turns on the issue of foreseeability. General Injectables & Vaccines, Inc. v. Secretary of Defense, CAFC No 2007-1119, June 3, 2008, pg. 4.

   b. Examples: Embargoes, fires, floods, strikes, sovereign acts, and unusually severe weather.

   c. Subcontractors. The general rule is a delay in a subcontract does not excuse a prime contractor from performing on time unless the subcontractor's difficulty itself resulted from a delay that would be excusable under the contract. The rationale for this rule is that the prime contractor should not be placed in a better position, risk or liability wise, if the prime subcontracts the work rather than performing the work itself. General Injectables & Vaccines, Inc. v. Secretary of Defense, CAFC No. 2007-1119, June 3, 2008 (holding that a prime contractor was not excused under the sovereign act exception when the FDA refused to allow its subcontractor's to ship vaccine into the country because it was contaminated with bacteria); Johnson Mgmt. Group CFC, Inc. v. Martinez, 308 F.3d 1245, 1252 (Fed. Cir. 2002)("A contractor is responsible for the unexcused performance failures of its subcontractors").

d. Common Carriers. Generally, a delay of a common carrier is among the conditions that constitute a valid excusable delay because a common carrier delay is considered beyond the reasonable control of the contractor. A common carrier is not considered a sub-contractor. FAR 52.212-4(f). H.B. Nelson Construction Co. v. United States, 87 Ct. Cl. 375 (1938); Malan Construction Corp., VABCA No. 262, 1960 WL 151 (June 17, 1960); General Injectables & Vaccines, Inc. v. Secretary of Defense, CAFC No. 2007-1119, June 3, 2008.

4. Examples of Constructive Acceleration.

a. The government threatens to terminate when the contractor encounters an excusable delay. Intersea Research Corp., IBCA No. 1675, 85-2 BCA ¶ 18,058;

b. The government threatens to assess liquidated damages and refuses to grant a time extension. Fraser Constr. Co. v. U.S., 384 F.3d 1354 (Fed. Cir. 2004); Norair Eng'g Corp. v. United States, 666 F.2d 546 (Ct. Cl. 1981); Unarco Material Handling, PSBCA No. 4100, 00-1 BCA ¶ 30,682; or

c. The government delays approval of a request for a time extension. Fraser Constr. Co. v. U.S., 384 F.3d 1354 (Fed. Cir. 2004); Fishbach & Moore Int'l Corp., ASBCA No. 18146, 77-1 BCA ¶ 12,300, aff'd, 617 F.2d 223 (Ct. Cl. 1980). *But see* Franklin Pavlov Constr. Co., HUD BCA No. 93-C-13, 94-3 BCA ¶ 27,078 (mere denial of delay request due to lack of information not tantamount to government order to accelerate).

d. Note: The contractor's acceleration efforts need not be successful; a reasonable attempt to meet a completion date is sufficient. Unarco Material Handling, PSBCA No. 4100, 00-1 BCA ¶ 30,682; Fermont Div., Dynamics Corp., ASBCA No. 15806, 75-1 BCA ¶ 11,139.

5. Measure of Damages.

a. The measure of recovery will be the difference between:

(1) The reasonable costs attributable to acceleration or attempting to accelerate; and

(2) The lesser costs the contractor reasonably would have incurred absent its acceleration efforts; plus

(3) A reasonable profit on the above-described difference.

b. Common acceleration costs.

(1) Increased labor costs;

(2) Increased material cost due to expedited delivery; and

(3) Loss of efficiency or productivity. A method to compute this cost is to compare the work accomplished per labor hour or dollar during an acceleration period with the work accomplished per labor hour or dollar during a normal period. See Ralph C. Nash, Jr., Government Contract Changes, 18-16 and 18-17 (2d ed. 1989).

VI. DETERMINING THE SCOPE OF A CHANGE.

A. Generally. All modifications must be within the overall scope of the contract. Also, unilateral modifications must be authorized by the applicable changes clause as discussed in Section III above.

B. Two Perspectives. The scope analysis asks different questions when looked at from the two major forums available to litigate contract modifications:

1. Bid Protest Forum. When a 3rd party competitor protests to GAO that the government made an out-of-scope contract modification, the main question asked is whether the modification changed the "scope of competition."

2. Contract Dispute Forum. When an incumbent contractor alleges that the government made an out-of-scope contract modification, the main question is whether the new work was reasonably within the contemplation of the parties when they entered into the original contract – and consequently, whether the field of competition would have been different had the original contract included the new work.

C. Scope Determinations in **Bid Protests**.

1. The Government Accountability Office (GAO) has jurisdiction over bid protests, but will only review contract modifications if the protestor alleges the modification is out-of-scope.

a. Once a contract is awarded, GAO will generally not review modifications to that contract, because such matters are related to contract administration. They are beyond the scope of GAO's bid protest function. *See* Bid Protest Regulations, 4 C.F.R. § 21.5(a) (2011).

b. An exception exists to GAO's restriction on reviewing contract administration matters if the protestor alleges that the modification

is out-of-scope of the original contract because, absent a valid sole-source determination (see FAR 6.302), the work covered by the modification would be subject to the statutory requirements for competition. Engineering & Prof'l Servs., Inc., B-289331, Jan. 28, 2002, 2002 CPD ¶ 24 at 3.

2. The basis for a contract modification bid protest is the Competition in Contracting Act (CICA). 41 U.S.C. § 3306(a)(1)(A) (2011). The CICA, as implemented in Part 6 of the FAR, requires agencies to compete contract requirements to the greatest extent practical. Any modification made to a contract that exceeds the scope of the original contract represents a new requirement that should be competed. Any out-of-scope modification is essentially an improper sole-source contract award.

3. Scope of Competition Test. The GAO applies the following test to determine whether a change is within the general scope of the contract:

   a. Did the modification so materially alter the contract that the *field of competition* for the contract, as modified, would be significantly different from that obtained for the original contract, as awarded? Krykowski Const. Co., Inc. v. U.S., 94 Fed.3d 1537 (Fed. Cir. 1996); H.G. Properties A. LP v. U.S., 68 Fed. Appx. 192 (Fed. Cir. 2003).

   b. Restated: Should offerors (prior to award) have reasonably anticipated this type of Contract Change based upon what was in the solicitation? A modification falls within the scope of the original procurement if potential offerors would have reasonably anticipated such a change prior to initial award. AT&T Communications, Inc. v. Wiltel, Inc.,1 F.3d 1201, 1205 (Fed. Cir. 1993) (stating a modification generally falls within the scope of the original procurement if potential bidders would have expected it to fall within the contract's changes clause).

   c. A modification falls within the scope of the original contract if the solicitation for the original contract adequately advised offerors of the potential for the type of change found in the modification. DOR Biodefense, Inc.; Emergent BioSolutions, B-296358.3; B-298358.4, Jan. 31, 2006, 2006 CPD ¶ 35 at 6.

   d. To determine whether a modification triggers the competition requirements in CICA, GAO looks to whether there is a material difference between the modified contract and the contract that was originally awarded. MCI Telecomms. Corp., B-276659.2, Sept. 29, 1997, 97-2 CPD ¶ 90 at 7.

e. Evidence of a material difference between the modification and the original contract is found by examining any changes in the following:

f. The type of work;

(1) The performance period;

(2) The costs between the contract as awarded and as modified; and

(3) Whether the agency had historically procured services under a separate contract. Atlantic Coast Contracting, Inc., B-2889693.4, June 21, 2002, 2002 CPD ¶ 104 at 4; Hughes Space and Communications Co., B-276040, 97-1 CPD ¶ 158.

4. Result. If GAO finds a contract modification is outside the scope of the contract, GAO may recommend that the government terminate the modification and then issue a solicitation for a separate contract for this work.

D. Scope Determinations in **Contract Disputes**.

1. The Boards of Contract Appeals (BCAs) have jurisdiction to review contract modifications through the Contract Disputes Act if the dispute "arises under" the contract per the Disputes Clause contained in the contract. (FAR 33.215 and 52.233-1; 41 U.S.C. §§ 7101-7108)

2. Contemplation of the Parties Test. Should the contract, as modified, "be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into?"

a. See Freund v. United States, 260 U.S. 60 (1922); Shank-Artukovich v. U.S., 13 Cl. Ct. 346 (1986); Air-A-Plane Corp. v. United States, 408 F.2d 1030 (Ct. Cl. 1969); GAP Instrument Corp., ASBCA No. 51658, 01-1 BCA ¶ 31,358; Gassman Corp., ASBCA Nos. 44975, 44976, 00-1 BCA ¶ 30,720.

b. Restated: Is the contract, as modified, for essentially the same work as the parties originally bargained for?

3. Result. If the court or board finds a contract modification to be outside the scope of the contract (i.e. a "cardinal change"), then:

a. The contractor is not required to perform the work, and

b. The contractor may be entitled to **breach damages**.

(1) NOTE: If the contractor performs the out-of-scope work, the contractor is limited to an equitable adjustment pursuant to the changes clause. The contractor who performs the work is not entitled to breach damages.

c. See Cities Service Helix v. U.S., 211 Ct. Cl. 222 (1976) (stating that if the government contract modification results in a material breach, then the contractor may elect to either perform or not to perform). *See Also* Dow Chemical Co. v. U.S., 226 F.3d 1334 (Fed. Cir. 2000). E. L. Hamm & Assocs., Inc., ASBCA No. 43792, 94-2 BCA ¶ 26,724 (holding that that because the Navy's modification of a lease contract –which transformed the contract into a purchase contract—was beyond the scope of the contract, the contractor could be entitled to "breach damages"). *See also*, Amertex Enter., Ltd. v. United States, 1997 U.S. App. LEXIS 3301 (Fed. Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998). Nevertheless, if the contractor elects to perform a contract modification, the contractor cannot later prevail on a contract claim for material breach of contract. Amertex Enter., Ltd. Once the contractor chooses to perform a modification, the contractor has, in fact, waived its material breach claim. Id.

E. **Common Scope Factors** (applied to all scope determinations). The following four factors are used to evaluate both bid protests and contract disputes that allege the existence of an out-of-scope contract modification. These factors must be weighed individually and in conjunction with each other to determine if a modification is out-of-scope.

1. Changes in the Function of the Item or the Type of Work.

a. In determining the materiality of a change, the most important factor to consider is the extent to which a product or service, as changed, differs from the requirements of the original contract.

See E. L. Hamm & Assocs., Inc., ASBCA No. 43792, 94-2 BCA ¶ 26,724 (change from lease to lease/purchase was out-of-scope); Matter of: Makro Janitorial Servs., Inc., B-282690, Aug. 18, 1999, 99-2 CPD ¶ 39 (task order for housekeeping outside scope of an IDIQ contract for preventive maintenance); Hughes Space and Communications Co., B- 276040, May 2, 1997, 97-1 CPD ¶ 158; Aragona Constr. Co. v. United States, 165 Ct. Cl. 382 (1964); 30 Comp Gen. 34 (B-95069)(1950)(stating that in a construction contract to build a hospital, modifying the contract to add another building to serve as living quarters for hospital employees was outside the scope of the contract).

b. Substantial changes in the work may be in-scope if the parties entered into a broadly conceived contract. AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201 (Fed. Cir. 1993) (more latitude allowed where the activity requires a state-of-the-art product); Engineering & Professional Svcs., Inc., B-289331, 2002 U.S. Comp. Gen. LEXIS 11, 2002 Comp. Gen. Proc. Dec. ¶ 24 (provision of technologically advanced, ruggedized, handheld computers was not beyond the scope of the original contract that called for a wide array of hardware and software and RFP indicated the engineering change proposal process would be utilized to implement technological advances); Paragon Sys., Inc., B-284694.2, 2000 CPD ¶ 114 (contract awarded for broad range of services given wide latitude when issuing a task order); Gen. Dynamics Corp. v. United States, 585 F.2d 457 (Ct. Cl. 1978).

c. An agency's pre-award statements that certain work was outside the scope of the contract can bind the agency if it later attempts to modify the contract to include the work. Octel Communications Corp. v. Gen. Servs. Admin., GSBCA No. 12975-P, 95-1 BCA ¶ 27,315 (appeal of decision granted on different grounds).

2. Changes in Quantity.

a. Generally, the Changes clause permits increases and decreases in the quantity of minor items or portions of the work unless the variation alters the entire bargain.

See Connor Bros. Const. Co. v. U.S., 65 Fed. Cl. 657 (2005) (modification of ductwork in Army hospital was not an out-of-scope change). *Cf.* Lucas Aul, Inc., ASBCA No. 37803, 91-1 BCA ¶ 23,609. See also Kentucky Bldg. Maint., Inc., ASBCA No. 50535, 98-2 BCA ¶ 29,846 (holding that agency clause that supplements the standard Changes Clause (a Hospital Aseptic Management Services clause) was not illegal).

b. Increases and decreases in the quantity of major items or portions of the work are generally considered to be outside the scope of a contract.

See, e.g., Valley Forge Flag Co., Inc., VABCA Nos. 4667, 5103, 97-2 BCA ¶ 29,246 (stating that in a requirements contract, a major increase in the total quantity of flags ordered (over 109,000) was outside the scope of the contract); Liebert Corp., B-232234.5, Apr. 29, 1991, 91-1 CPD ¶ 413, 70 Comp. Gen. 448 (order in excess of maximum quantity was a material change). *But see* Master Security, Inc., B-274990, Jan. 14, 1997, 97-1 CPD ¶ 21 (tripling the number of work sites not out-of-scope change);

Caltech Serv. Corp., B-240726.6, Jan. 22, 1992, 92-1 CPD ¶ 94, 1992 U.S. Comp. Gen. LEXIS 102 (increase in cargo tonnage on containerization requirements contract was within scope).

c. Generally, increases are new procurements, and decreases are partial terminations for convenience (TforC). *Cf.* Lucas Aul, Inc., ASBCA No. 37803, 91-1 BCA ¶ 23,609 (order was deductive change, not partial termination).

3. Number and Cost of Changes.

a. Neither the number nor the cost of changes alone dictates whether modifications are beyond the scope of a contract. PCL Constr. Serv., Inc. v. United States, 47 Fed. Cl. 745 (2000) (series of contract modifications did not constitute cardinal change); Triax Co. v. United States, 28 Fed. Cl. 733 (1993); Reliance Ins. Co. v. United States, 20 Cl. Ct. 715 (1990), *aff'd*, 931 F.2d 863 (Fed. Cir. 1991) (over 200 changes still held to be within scope); Coates Indus. Piping, Inc., VABCA No. 5412, 99-2 BCA ¶ 30,479; Combined Arms Training Sys., Inc., ASBCA Nos. 44822, 47454, 96-2 BCA ¶ 28,617; Bruce-Andersen Co., ASBCA No. 35791, 89-2 BCA ¶ 21,871.

b. However, the cumulative effect of a large number of changes may be controlling. Air-A-Plane Corp. v. United States, 408 F.2d 1030 (Ct. Cl. 1969) (dispute involving over 1,000 changes sent back for trial on merits). See Caltech Serv. Corp., B-240726.6, Jan. 22, 1992, 92-1 CPD ¶ 94 at 5 (finding a 30 percent increase in workload volume is not beyond the scope of the original contract).

4. Changes in Time of Performance.

a. The Supply Changes Clause does not provide for unilateral acceleration of performance. FAR 52.243-1.

b. Under the Services Changes Clause, the contracting officer unilaterally may change "when" a contractor is to perform but not the overall performance period. FAR 52.243-1, Alternate I.

c. The Construction Changes Clause authorizes unilateral acceleration of performance. FAR 52.243-4(a)(4).

d. Granting a contractor additional time to perform will normally be considered within scope. Saratoga Indus., Inc., B-247141, 92-1 CPD ¶ 397.

5. Acceptance of a Change.

a. If a contractor performs under a change order, it may not subsequently argue that the change constituted a breach of contract. Amertex Enter., Ltd. v. United States, 1997 U.S. App. LEXIS 3301 (Fed. Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998); Silberblatt & Lasker, Inc. v. United States, 101 Ct. Cl. 54 (1944); C.E. Lowther & Son, ASBCA No. 26760, 85-2 BCA ¶ 18,149. Similarly, once the contractor waives the breach and performs, the Government is obligated to pay for the out-of-scope work. Mac-Well Co., ASBCA No. 23097, 79-2 BCA ¶ 13,895.

b. Agreeing to a change does not convert an out-of-scope change into one that is within the scope of the contract for competition purposes; it simply means that the parties have agreed to process the change under the Changes clause. The contracting officer may not use modifications to avoid the statutory mandate for competition. Corbin Superior Composites, Inc., B-235019, July 20, 1989, 89-2 CPD ¶ 67, 1989 U.S. Comp. Gen. LEXIS 793.

c. Reducing Work. A bi-lateral modification for a reduced scope and repricing of work operates as an accord and satisfaction as to the subject matter of the modification. It bars any claim of breach or equitable adjustment arising from the modification. Corners and Edges, Inc. , CBCA nos. 693, 762, 23 Sept 2008. Trataros Construction, Inc. v. General Services Administration, GSBCA 15344, 03-1 BCA ¶ 32,251, at 159,459; Cygnus Corp. v. United States, 63 Fed. Cl. 150, 156 (2004), aff'd, 177 Fed Appx. 186 (Fed.Cir. 2006)(finding no government liability arising from bi-lateral modification eliminating database from option year of contract and repricing option year work.).

F. Scope Determinations and the Duty to Continue Performance.

1. In-Scope Changes: The contractor has a duty to continue performance pending the resolution of a dispute over an in-scope change.

a. *See* FAR 52.233-1(i), Disputes (stating that the "Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action *arising under the contract*, and comply with any decision of the Contracting Officer."). See Appendix A. The term "arising under the contract" refers only to in-scope changes." *See also* FAR 52.243-1(e), Changes – Fixed Price, and 33.213

b. Exceptions to the duty to proceed.

(1) The contractor may not have to proceed if the government improperly withholds progress payments. *See* Sterling

Millwrights v. United States, 26 Cl. Ct. 49 (1992). *But see* D.W. Sandau Dredging, ENG BCA No. 5812, 96-1 BCA ¶ 28,064 (holding two late payments of 12 days and 19 days did not discharge the contractor from its duty to continue performance where contractor did not demonstrate the late payments had impacted its ability to perform).

(2) The contractor may not have to proceed if doing so is impractical. *See* United States v. Spearin, 248 U.S. 132 (1918)(government refused to provide safe working conditions); Xplo Corp., DOT BCA No. 1289, 86-3 BCA ¶ 19,125.

(3) The contractor may be justified in suspending performance if the government fails to provide clear direction. *See* James W. Sprayberry Constr., IBCA No. 2130, 87-1 BCA ¶ 19,645 (contractor justified to await clarification of defective specifications). *Cf*. Starghill Alternative Energy Corp., ASBCA Nos. 49612, 49732, 98-1 BCA ¶ 29,708 (a one-month government delay in executing modification did not excuse contractor from proceeding).

2. Out-of-Scope Changes: A contractor has **no duty to proceed** pending resolution of any dispute concerning a change that is outside the scope of the original contract (i.e. a "cardinal change").

a. See FAR 52.233-1(i). Alliant Techsys., Inc. v United States, 178 F.3d 1260 (Fed. Cir. 1999); CTA Inc., ASBCA No. 47062, 00-2 BCA ¶ 30,947; Airprep Tech., Inc. v. United States, 30 Fed. Cl. 488 (1994). Cities Service Helix v. U.S., 211 Ct. Cl. 222 (1976) (stating that if the government issues a modification that is outside the scope of the contract, then the contractor may elect not to perform the work covered by that modification).

b. Cardinal Change: An out-of-scope change is also called a "**cardinal change.**" It is a change to the contract that is so profound that it is not redressable under the contract and thus renders the Government in breach. Thomson and Pratt Insurance Assoc., Inc., GSBCA No. 15979-ST, 2005-1 BCA ¶ 32,944.

3. Uncertainty. Contractors may believe a given modification is out-of-scope. However, until that issue is adjudicated, they run the risk that non-performance could render them in breach should the modification be found to be in-scope. *See* FAR 52.233-1, Alternate I; DFARS 233.215 (mandating the use of this clause under some circumstances).

G. Fiscal Implications of Scope Determinations.

1. General. If a contract change is determined to be in-scope, it is considered a modification of the original *bona fide need* for the contract and may be funded as part of the original contract. *See* Fiscal Law Deskbook Chapter 3, Availability of Appropriations as to Time. If a change is determined to be out-of-scope, however, it is a new *bona fide* need that must be funded with current-year funds.

2. Antecedent Liability Rule:

   a. When a contract modification does not represent a new requirement or liability, but only adjusts an earlier liability, the amount of that modification is said to "relate back" to the pre-existing, or **antecedent**, liability.

   b. If the modification is within the scope of the original contract (*see* discussion in Part VI above), changes are funded with the same appropriation as the original contract, even if that appropriation has expired.

   c. Examples.

      (1) Equitable Adjustments. When a contract price is made contingent upon certain performance costs that fluctuate unpredictably, the contract may include a clause allowing for equitable adjustment of the contract price. These clauses allow the government to increase (or decrease) contract price based on changes in the price of certain performance factors.

      (2) Changes Pursuant to Changes Clause. If a contract modification is made pursuant to the contract's changes clause, it is considered within the scope of the contract, as it was authorized by the contract itself. In such cases, original funds may be used to pay for any cost increases.

3. Funding in-scope modifications.

   a. As discussed above, if a contract modification is in-scope, it relates back to the original contract for funding purposes. If the original appropriation is still available for new obligations (i.e. has not expired at the end of the fiscal year), it may be committed and obligated following standard procedures.

   b. If the original appropriation used for the contract has expired, but not yet closed, the contracting officer may choose to seek expired funds for the modification. However, this requires increasingly higher levels of approval.

(1) Changes in excess of $4 million must be approved by the Under Secretary of Defense (Comptroller) (USD(C)). DOD FMR, Vol. 3, Ch. 10, para. 100204.

(2) Changes in excess of $25 million requires notice be given to the Congressional Armed Services and Appropriations Committees for both the House and Senate, and a 30-day waiting period. DOD FMR, Vol. 3, Ch. 10, para. 100205.

c. If the original appropriation is closed, or if no funds remain in otherwise available expired appropriations accounts, the contracting officer should use current-year funds to fund the contract modification.

VII. CONTRACTOR NOTIFICATION REQUIREMENTS.

A. Formal Changes. The standard Changes clauses each state that "the Contractor must assert its right to an adjustment . . . within 30 days after receipt of a written [change] order." Courts and boards, however, do not strictly construe this requirement unless the untimely notice is prejudicial to the government. Watson, Rice & Co., HUD BCA No. 89-4468-C8, 90-1 BCA ¶ 22,499; SOSA Y Barbera Constrs., S.A., ENG BCA No. PCC-57, 89-2 BCA ¶ 21,754; E.W. Jerdon, Inc., ASBCA No. 32957, 88-2 BCA ¶ 20,729.

B. Constructive Changes.

1. Supply / Service Contracts. The standard supply and service contract Changes clauses do not prescribe specific periods within which a contractor must seek an adjustment for a constructive change.

2. Construction Contracts. Under the Changes clause for construction contracts, a contractor must assert its right to an adjustment within 30 days of notifying the government that it considers a government action to be a constructive change. FAR 52.243-4(b) and (e). Furthermore, unless the contractor bases its adjustment on defective specifications, it may not recover costs incurred more than 20 days before notifying the government of a constructive change. FAR 52.243-4(d). *But see* Martin J. Simko Constr., Inc. v. United States, 11 Cl. Ct. 257 (1986) (government must show late notice was prejudicial), *vacated in part, on other grounds, by* 852 F.2d 540 (Fed. Cir. 1988).

3. Content of Notice. A contractor must assert a positive, present intent to seek recovery as a matter of legal right. Written notice is not required, and there is no formal method for asserting an intent to recover. The notice, however, must be more than an ambiguous letter that evidences a differing opinion. Likewise, merely advising the contracting officer of problems is

not sufficient notice. CTA Inc., ASBCA No. 47062, 00-2 BCA ¶ 30,947; McLamb Upholstery, Inc., ASBCA No. 42112, 91-3 BCA ¶ 24,081.

C. Requests for Equitable Adjustment.

1. A contractor may first file an **intent to submit** a request for equitable adjustment, and then file an actual request for an adjustment to the contract price or other delivery terms at a later time. The above requirement for the contractor to assert its rights to an adjustment places the government on notice that there has been an actual or constructive change to the contract, thus permitting the government to possibly adjust its action/inaction.

2. For contracts awarded before October 1, 1995, the contractor's request for an equitable adjustment must be made within a **reasonable time** unless the contract specifies otherwise. Generally, this will require the contractor to act while the facts supporting the claim are readily available. See LaForge and Budd Construction Co. v. United States 48 Fed. Cl. 566 (2001) (finding *laches* did not bar a contractor's claim submitted seven years after its accrual because the government did not demonstrate it was prejudiced).

3. Effect of Final Payment.

   a. Requests for equitable adjustments raised for the first time after final payment are untimely. Design & Prod., Inc. v. United States, 18 Cl. Ct. 168 (1989) (final payment rule predicated on express contractual provisions); Navales Enter., Inc., ASBCA No. 52202, 99-2 BCA ¶ 30,528; Electro-Technology Corp., ASBCA No. 42495, 93-2 BCA ¶ 25,750.

   b. Final payment does not bar claims for equitable adjustments that were pending or of which the government had constructive knowledge at the time of final payment. Mingus Constructors, Inc. v. U.S., 812 F.2d 1387 (Fed. Cir. 1987); Miller Elevator Co. v. U.S., 30 Fed. Cl. 662 (1994); Gulf & Western Indus., Inc. v. United States, 6 Cl. Ct. 742 (1984); Navales Enter., Inc., ASBCA No. 52202, 99-2 BCA ¶ 30,528; David Grimaldi Co., ASBCA No. 36043, 89-1 BCA ¶ 21,341 (contractor must specifically assert a claim as a matter of right; letter merely presented arguments).

4. Government Requests for a Downward Equitable Adjustment.

   a. The Changes clauses do not specify the time within which the government must claim a downward equitable adjustment. They also do not require the government to notify the contractor that it intends to subsequently assert its right to an adjustment.

b. For contracts awarded subsequent to October 1, 1995, the government must assert any claims it has against a contractor within six years from the accrual of the claim, except claims based upon fraud. See 41 U.S.C § 605 and FAR 33.206(b).

c. For contracts awarded both before and after October 1, 1995, the government's request for an equitable adjustment must be made within a reasonable time unless the contract specifies otherwise. Generally, this will require the government to act while the facts supporting the claim are readily available and before the contractor's position is prejudiced by final settlement with its subcontractors, suppliers, and other creditors. See Aero Union Corp. v. United States, 47 Fed. Cl. 677 (2000) (denying motion for summary judgment where there were issues of fact concerning whether the government had delayed so long the plaintiff was prejudiced by the delay).

VIII. CONCLUSION.

A. Contract changes are often required during contract performance. They are either formal (written and intentional) or informal (unintentional, constructive). Formal contract changes may be unilateral, issued by the contracting officer pursuant to changes clauses in the contract. They may also be bilateral, constituting a supplemental agreement between the parties. Informal contract changes are not issued in writing and often result from government conduct, unforeseen impediments to performance, or other factors. They may be adopted formally, rejected and the contractor absolved of performance, or disputed as not truly being contract changes.

B. Changes must be within the scope of the original contract. Scope determinations require an evaluation of quantity, type of work, and other factors to determine whether the contract, as changed, represents substantially the same contract as originally awarded. This is evaluated through the lens of incumbent contractors who may not want the additional responsibility of performing new work, or from the perspective of potential bidders who would have competed for the contract as changed, but did not compete for the contract as originally advertised.

C. In all cases, contract changes that require additional funding may be funded from the appropriation that originally funded the contract if the change is within the scope of the original. Otherwise, or if no money remains from the original appropriation, the change must be funded with current appropriations.

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Chapter 22
Contract Disputes Act (CDA) Claims

2013 Contract Attorneys Deskbook

CHAPTER 22

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CHAPTER 22

CONTRACT DISPUTES ACT

I. INTRODUCTION. As a result of this instruction, the student will understand:

A. The claims submission and dispute resolution processes provided by the Contract Disputes Act (CDA) (41 U.S.C. §§ 7101-7109).

B. The jurisdiction of the Armed Services Board of Contract Appeals (ASBCA) and the U.S. Court of Federal Claims (COFC) to decide appeals from contracting officer final decisions.

C. The role of the contract attorney in addressing contractor claims, defending against contractor appeals, and prosecuting government claims.

II. OVERVIEW.

A. Historical Development.

1. Pre-Civil War Developments. Before 1855, government contractors had no forum in which to sue the United States. In 1855, the Congress created the Court of Claims as an Article I (legislative) court to consider claims against the United States and recommend private bills to Congress. Act of February 24, 1855, 10 Stat. 612. The service secretaries, however, continued to resolve most contract claims. As early as 1861, the Secretary of War appointed a board of three officers to consider and decide specific contract claims. See Adams v. United States, 74 U.S. 463 (1868). Upon receipt of an adverse board decision, a contractor's only recourse was to request a private bill from Congress.

2. Civil War Reforms. In 1863, Congress expanded the power of the Court of Claims by authorizing it to enter judgments against the United States. Act of March 3, 1863, 12 Stat. 765. In 1887, Congress passed the Tucker Act to expand and clarify the jurisdiction of the Court of Claims. Act of March 3, 1887, 24 Stat. 505, codified at 28 U.S.C. § 1491. In that Act, Congress granted the Court of Claims authority to consider monetary claims based on: (1) the Constitution; (2) an act of Congress; (3) an executive regulation; or (4) an express or implied-in-fact contract.[1] As a result, a government contractor could now sue the United States as a matter of right.

[1] The Tucker Act did not give the Court of Claims authority to consider claims based on implied-in-law contracts.

3. Disputes Clauses. Agencies responded to the Court of Claim's increased oversight by adding clauses to government contracts that appointed specific agency officials (e.g., the contracting officer or the service secretary) as the final decision-maker for questions of fact. The Supreme Court upheld the finality of these officials' decisions in Kihlberg v. United States, 97 U.S. 398 (1878). The tension between the agencies' desire to decide contract disputes without outside interference, and the contractors' desire to resolve disputes in the Court of Claims, continued until 1978. This tension resulted in considerable litigation and a substantial body of case law.

4. Boards of Contract Appeals (BCAs). During World War I (WWI), the War and Navy Departments established full-time BCAs to hear claims involving wartime contracts. The War Department abolished its board in 1922, but the Navy board continued in name (if not fact) until World War II (WWII). Between the wars, an interagency group developed a standard disputes clause. This clause made contracting officers' decisions final as to all questions of fact. WWII again showed that boards of contract appeals were needed to resolve the massive number of wartime contract disputes. See Penker Constr. Co. v. United States, 96 Ct. Cl. 1 (1942). Thus, the War Department created a board of contract appeals, and the Navy revived its board. In 1949, the Department of Defense (DOD) merged the two boards to form the current ASBCA.

5. Post-WWII Developments. In a series of cases culminating in Wunderlich v. United States, 342 U.S. 98 (1951), the Supreme Court upheld the finality (absent fraud) of factual decisions issued under the disputes clause by a department head or his duly authorized representative. Congress reacted by passing the Wunderlich Act, 41 U.S.C. §§ 321-322, which reaffirmed that the Court of Claims could review factual and legal decisions by agency BCAs. At about the same time, Congress changed the Court of Claims from an Article I (legislative) to an Article III (judicial) court. Pub. L. No. 83-158, 67 Stat. 226 (1953). Later, the Supreme Court clarified the relationship between the Court of Claims and the agency BCAs by limiting the jurisdiction of the boards to cases "arising under" remedy granting clauses in the contract. See Utah Mining and Constr. Co. v. United States, 384 U.S. 394 (1966).

6. The Contract Disputes Act (CDA) of 1978, 41 U.S.C. §§ 7101-7109. Congress replaced the previous disputes resolution system with a comprehensive statutory scheme. Congress intended that the CDA:

   a. Help induce resolution of more disputes by negotiation prior to litigation;

   b. Equalize the bargaining power of the parties when a dispute exists;

c. Provide alternate forums suitable to handle the different types of disputes; and

d. Insure fair and equitable treatment to contractors and Government agencies. S. REP. NO. 95-1118, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235.

7. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. Congress overhauled the Court of Claims and created a new Article I court (i.e., the Claims Court) from the old Trial Division of the Court of Claims. Congress also merged the Court of Claims and the Court of Customs and Patent Appeals to create the Court of Appeals for the Federal Circuit (CAFC).[2]

8. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 3921. Congress changed the name of the Claims Court to the United States Court of Federal Claims (COFC), and expanded the jurisdiction of the court to include the adjudication of nonmonetary claims.

9. Federal Acquisition Streamlining Act (FASA) of 1994, Pub. L. No. 103-355, 108 Stat. 3243. Congress increased the monetary thresholds for requiring CDA certifications and requesting expedited and accelerated appeals.[3]

B. The Disputes Process.

1. The CDA establishes procedures and requirements for asserting and resolving claims subject to the Act.

2. Distinguishing bid protests from disputes.

a. In bid protests, disappointed bidders or offerors seek relief from actions that occur **before** contract award. See generally FAR Subpart 33.1.

b. In contract disputes, contractors seek relief from actions and events that occur **after** contract award (ie., contract administration). See generally FAR Subpart 33.2.

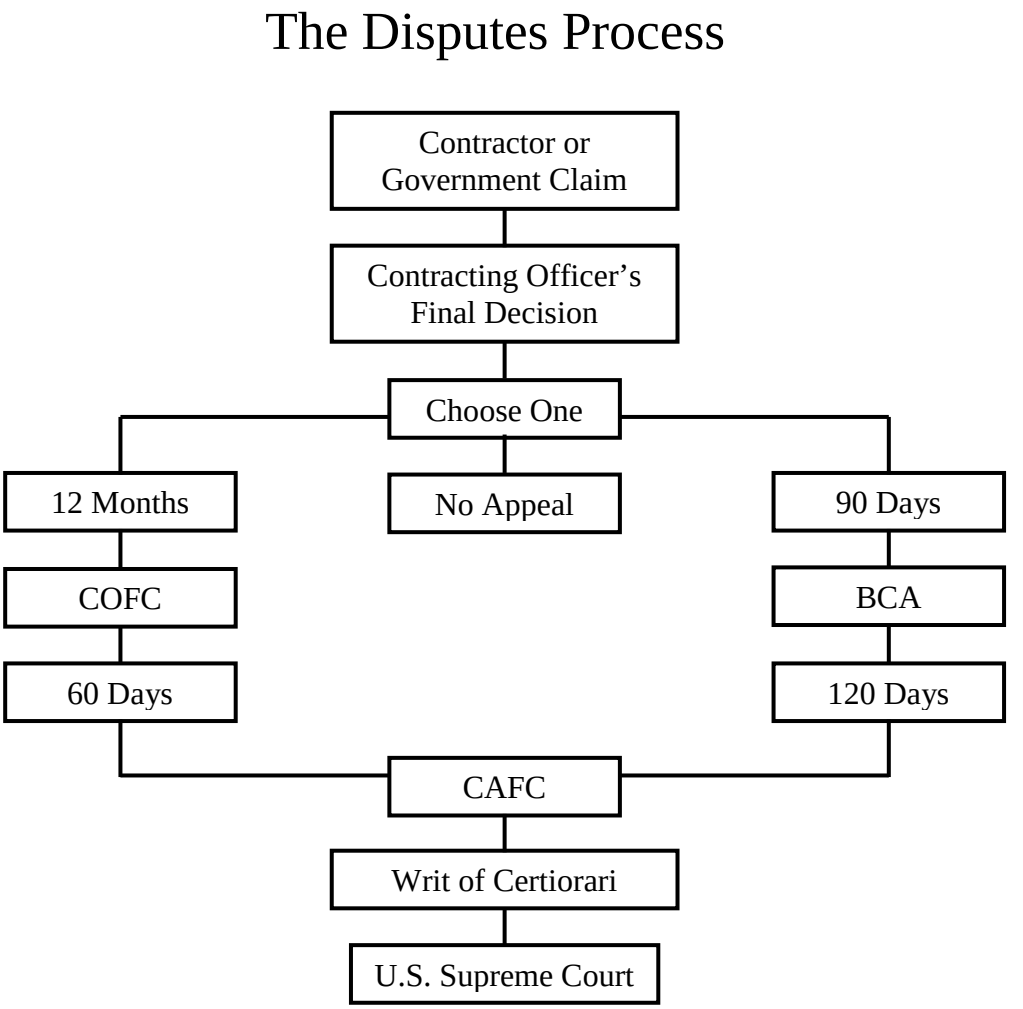
c. The Boards of Contract Appeals lack jurisdiction over bid protest actions. See United States v. John C. Grimberg, Inc., 702 F.2d 1362 (Fed. Cir. 1983) (stating that "the [CDA] deals with contractors, not with disappointed bidders); Ammon Circuits Research, ASBCA No. 50885, 97-2 BCA ¶ 29,318 (dismissing an

[2] The Act revised the jurisdiction of the new courts substantially.

[3] This Act represented Congress's first major effort to reform the federal procurement process since it passed the CDA.

appeal based on the contracting officer's written refusal to award the contractor a research contract); RC 27th Ave. Corp., ASBCA No. 49176, 97-1 BCA ¶ 28,658 (dismissing an appeal for lost profits arising from the contracting officer's failure to award the contractor a grounds maintenance services contract).

3. The disputes process flowchart.[4]



4. The Election Doctrine. The CDA provides alternative forums for challenging a contracting officer's final decision. Once a contractor files

[4] Note that for maritime contract actions, the CDA recognizes jurisdiction of district courts to hear appeals of ASBCA decisions, or to entertain suits filed following a contracting officer's final decision. See 41 U.S.C. § 7102(d); See also Marine Logistics, Inc. v. Secretary of the Navy, 265 F.3d 1322 (Fed. Cir. 2001) . *See* also L-3 Services, Inc., Aerospace Electronics Division v. United States, No. 11-255C (Filed: Mar. 16, 2012) holding that the exclusive jurisdiction of the Court of Federal Claims over bid protest matters involving maritime contracts has since been clarified and codified by the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 and cannot be extended to provide jurisdiction over plaintiff's claims, which do not arise under the court's exclusive bid protest jurisdiction but instead involve the performance of a maritime contract.

its appeal in a particular forum, this election is normally binding and the contractor can no longer pursue its claim in the other forum. The "election doctrine," however, does not apply if the forum originally selected lacked subject matter jurisdiction over the appeal. 41 U.S.C. §§7104 (a) - (b).. See Bonneville Assocs. v. United States, 43 F.3d 649 (Fed. Cir. 1994) (dismissing the contractor's suit because the contractor originally elected to proceed before the GSBCA); see also Bonneville Assocs. v. General Servs. Admin., GSBCA No. 13134, 96-1 BCA ¶ 28,122 (refusing to reinstate the contractor's appeal), aff'd, Bonneville Assoc. v. United States, 165 F.3d 1360 (Fed. Cir. 1999).

III. APPLICABILITY OF THE DISPUTES CLAUSE.

A. Appropriated Fund Contracts.

1. The CDA applies to most express and implied-in-fact[5] contracts.[6] 41 U.S.C. § 7102(a); FAR 33.203.

2. The Federal Acquisition Regulation (FAR) implements the CDA by requiring the contracting officer to include a Disputes clause in solicitations and contracts.[7] FAR 33.215.

   a. FAR 52.233-1, Disputes, requires the contractor to continue to perform pending resolution of disputes "arising under"[8] the contract. See Attachment A.

   b. FAR 52.233-1, Alternate I, Disputes, requires the contractor to continue to perform pending resolution of disputes "arising under or relating to"[9] the contract.[10] See Attachment A.

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[5] An "implied-in-fact" contract is similar to an "express" contract. It requires: (1) "a meeting of the minds" between the parties; (2) consideration; (3) an absence of ambiguity surrounding the offer and the acceptance; and (4) an agency official with actual authority to bind the government. James L. Lewis v. United States, 70 F.3d 597 (Fed. Cir. 1995).

[6] The CDA normally applies to contracts for: (1) the procurement of property; (2) the procurement of services; (3) the procurement of construction, maintenance, and repair work; and (4) the disposal of personal property. 41 U.S.C. § 7102(a). Cf. G.E. Boggs & Assocs., Inc., ASBCA Nos. 34841, 34842, 91-1 BCA ¶ 23,515 (holding that the CDA did not apply because the parties did not enter into a contract for the procurement of property, but retaining jurisdiction pursuant to the disputes clause in the contract).

[7] The CDA—and hence the Disputes clause—does not apply to: (1) tort claims that do not arise under or relate to an express or an implied-in-fact contract; (2) claims for penalties or forfeitures prescribed by statute or regulation that another federal agency is specifically authorized to administer, settle or determine; (3) claims involving fraud; and (4) bid protests. 41 U.S.C. §§ 7102 - 7103; FAR 33.203; FAR 33.209; FAR 33.210.

[8] "Arising under the contract" is defined as falling within the scope of a contract clause and therefore providing a remedy for some event occurring during contract performance. RALPH C. NASH ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK, at 8 (2d ed. 1998).

B. Nonappropriated Fund (NAF) Contracts.

1. Exchange Service contracts. The CDA applies to contracts with the Army and Air Force, Navy, Marine Corps, Coast Guard, and NASA Exchanges. See 41 U.S.C. § 7102(a), 28 U.S.C. §§ 1346, 1491. The CDA does **not** apply to other nonappropriated fund contracts.[11] See e.g. Furash & Co. v. United States, 46 Fed. Cl. 518 (2000) (dismissing suit concerning contract with Federal Housing Finance Board).

2. In the past, the government often included a disputes clause in non-exchange NAF contracts, thereby giving a contractor the right to appeal a dispute to a BCA. See AR 215-4, Chapter 6, para.6-11c.(3); Charitable Bingo Assoc. Inc., ASBCA No. 53249, 01-2 BCA ¶ 31,478 (holding that the board had jurisdiction over a dispute with a NAF based on the inclusion of the disputes clause). Further, an agency directive granting NAF contractors a right of appeal has served as the basis for board jurisdiction, even when the contract contained no disputes clause. See DoDD 5515.6; Recreational Enters., ASBCA No. 32176, 87-1 BCA ¶ 19,675 (board had jurisdiction over NAF contract dispute because DOD directives required contract clause granting a right of appeal).

3. However, See Pacrim Pizza v. Secretary of the Navy, 304 F.3d 1291 (Fed. Cir. 2002) (CAFC refused to grant jurisdiction over non-exchange NAFI contract dispute; even though the contract included the standard disputes clause, the court held that only Congress can waive sovereign immunity, and the parties may not by contract bestow jurisdiction on a court). See also Sodexho Marriott Management, Inc., f/k/a Marriott Mgmt. Servs. V. United States, 61 Fed. Cl. 229 (2004) (holding that the non-appropriated funds doctrine barred the COFC from having jurisdiction over a NAF food service contract with the Marine Corps Recruit Morale, Welfare, and Recreation Center), Core Concepts of Florida, Inc. v. United States, 327 F.3d 1331 (Fed. Cir. 2003) (CAFC upheld a COFC decision that it lacked jurisdiction over a Federal Prison Industry (FPI) contract under the Tucker Act because FPI was a self-sufficient NAFI.

IV. CONTRACTOR CLAIMS.

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[9] "Relating to the contract" means having a connection to the contract. The term encompasses claims that cannot be resolved through a contract clause, such as for breach of contract or correction of mistakes. Prior to passage of the CDA, contractors pursued relief for mutual mistake (rescission or reformation) under the terms of Pub. L. No. 85-804 (see FAR 33.205; FAR Part 50, Extraordinary Contractual Actions). RALPH C. NASH ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK, at 438 (2d ed. 1998).

[10] The Department of Defense (DOD) typically uses this clause for mission critical contracts, such as purchases of aircraft, naval vessels, and missile systems. DFARS 233.215.

[11] In addition, the CDA does not normally apply to: (1) Tennessee Valley Authority contracts; (2) contracts for the sale of real property; or (3) contracts with foreign governments or agencies. 41 U.S.C. § 7102 (b)-(c); FAR 33.203.

A. Proper Claimants.

1. Only the parties to the contract (i.e., the prime contractor and the government) may normally submit a claim. 41 U.S.C. § 7103.

2. Subcontractors.

a. A subcontractor cannot file a claim directly with the contracting officer. United States v. Johnson Controls, 713 F.2d 1541 (Fed. Cir. 1983) (dismissing subcontractor claim); see also Detroit Broach Cutting Tools, Inc., ASBCA No. 49277, 96-2 BCA 28,493 (holding that the subcontractor's direct communication with the government did not establish privity); Southwest Marine, Inc., ASBCA No. 49617, 96-2 BCA ¶ 28,347 (rejecting the subcontractor's assertion that the Suits in Admiralty Act gave it the right to appeal directly); cf. Department of the Army v. Blue Fox, 119 S. Ct. 687 (1999) (holding that a subcontractor may not sue the government directly by asserting an equitable lien on funds held by the government). But see Choe-Kelly, ASBCA No. 43481, 92-2 BCA ¶ 24,910 (holding that the board had jurisdiction to consider the subcontractor's unsponsored claim alleging an implied-in-fact contract).

b. A prime contractor, however, can sponsor claims (also called "pass-through claims") on behalf of its subcontractors. Erickson Air Crane Co. of Washington, Inc. v. United States, 731 F.2d 810 (Fed. Cir. 1984); McPherson Contractors, Inc., ASBCA No. 50830, 98-1 BCA ¶ 29,349 (appeal dismissed where prime stated it did not wish to pursue the appeal).

3. Sureties. Absent privity of contract, sureties may not file claims. Admiralty Constr., Inc. v. Dalton, 156 F.3d 1217 (Fed. Cir. 1998) (surety must finance contract completion or take over performance to invoke doctrine of equitable subrogation); William A. Ransom and Robert D. Nesen v. United States, 900 F.2d 242 (Fed. Cir. 1990) (discussing doctrine of equitable subrogation). However, see also Fireman's Fund Insurance Co. v. England, 313 F.3d 1344 (Fed Cir. 2002) (although the doctrine of equitable subrogation is recognized by the COFC under the Tucker Act, the CDA only covers "claims by a contractor against the government relating to a contract," thus a surety is not a "contactor" under the CDA.

4. Dissolved/Suspended Corporations. A corporate contractor must possess valid corporate status, as determined by applicable state law, to assert a CDA appeal. See Micro Tool Eng'g, Inc., ASBCA No. 31136, 86-1 BCA ¶ 18,680 (holding that a dissolved corporation could not sue under New York law). But cf. Fre'nce Mfg. Co., ASBCA No. 46233, 95-2 BCA ¶ 27,802 (allowing a "resurrected" contractor to prosecute the appeal). Allied Prod. Management, Inc., and Richard E. Rowan, J.V., DOT CAB

No. 2466, 92-1 BCA ¶ 24,585 (allowing a contractor to appeal despite its suspended corporate status). In determining what powers survive dissolution, courts and boards look to the laws of the state of incorporation. See AEI Pacific, Inc., ASBCA No. 53806, 05-1 BCA ¶ 32,859 (holding that a dissolved Alaska corporation could initiate proceedings before the ASBCA as part of its "winding up its affairs" as allowed by the Alaskan Statute concerning the dissolution Alaskan Corporations.)

B. Definition of a Claim.

1. Contract Disputes Act. The CDA does not define the term "claim." As a result, courts and boards look to the FAR for a definition. See Essex Electro Eng'rs, Inc. v. United States, 960 F.2d 1576 (Fed. Cir. 1992) (holding that the executive branch has authority to issue regulations implementing the CDA, to include defining the term "claim," and that the FAR definition is consistent with the CDA).

2. FAR. The FAR defines a "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to a contract." FAR 2.101; FAR 52.233-1.

a. Claims arising under or relating to the contract include those supported by remedy granting clauses, breach of contract claims, and mistakes alleged after award.

b. A written demand (or written assertion) seeking the payment of money in excess of $100,000 is not a valid CDA claim until the contractor properly certifies it. FAR 2.101.

c. A request for an equitable adjustment (REA) is not a "routine request for payment" and satisfies the FAR definition of "claim." Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995).

d. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a valid CDA claim. FAR 2.101; 52.233-1. A contractor may convert such a submission into a valid CDA claim if:

(1) The contractor complies with the submission and certification requirements of the Disputes clause; and

(2) The contracting officer:

(a) Disputes the submission as to either liability or amount; or

(b) Fails to act in a reasonable time. FAR 33.201; FAR 52.233-1. See S-TRON, ASBCA No. 45890, 94-3 BCA ¶ 26,957 (contracting officer's failure to respond for 6 months to contractor's "relatively simple" engineering change proposal (ECP) and REA was unreasonable).

C. Elements of a Claim.

1. The demand or assertion must be in writing. 41 U.S.C. § 7103(a)(2); FAR 33.201. See Honig Indus. Diamond Wheel, Inc., ASBCA No. 46711, 94-2 BCA ¶ 26,955 (granting the government's motion to strike monetary claims that the contractor had not previously submitted to the contracting officer); Clearwater Constructors, Inc. v. United States, 56 Fed. Cl. 303 (2003) (a subcontractor's letter detailing its dissatisfaction with a contracting officer's contract interpretation, attached to a contractor's cover-letter requesting a formal review and decision, constituted a non-monetary claim under the CDA).

2. Seeking as a matter of right,[12] one of the following:

a. Payment of money in a sum certain;

b. Adjustment or interpretation of contract terms. TRW, Inc., ASBCA Nos. 51172 and 51530, 99-2 BCA ¶ 30,047 (seeking decision on allowability and allocability of certain costs). Compare William D. Euille & Assocs., Inc. v. General Services Administration, GSBCA No. 15,261, 2000 GSBCA LEXIS 105 (May 3, 2000) (dispute concerning directive to remove and replace building materials proper contract interpretation claim), with Rockhill Industries, Inc., ASBCA No. 51541, 00-1 BCA ¶ 30,693 (money claim "masquerading as claim for contract interpretation"); or

c. Other relief arising under or relating to the contract. See General Electric Co.; Bayport Constr. Co., ASBCA Nos. 36005, 38152, 39696, 91-2 BCA ¶ 23,958 (demand for contractor to replace or correct latent defects under Inspection clause).

(1) Reformation or Rescission. See McClure Electrical Constructors, Inc. v. United States, 132 F.3d 709 (Fed. Cir. 1997); LaBarge Products, Inc. v. West, 46 F.3d 1547 (Fed. Cir. 1995) (ASBCA had jurisdiction to entertain reformation claim).

[12] Some submissions, such as cost proposals for work the government later decides it would like performed, would not be considered submissions seeking payment "as a matter of right." Reflectone v. Dalton, 60 F.3d 1572, n.7 (Fed. Cir. 1995).

(2) Specific performance is not an available remedy. Western Aviation Maintenance, Inc. v. General Services Administration, GSBCA No. 14165, 98-2 BCA ¶ 29,816.

3. Submitted to the contracting officer for a decision. 41 U.S.C. § 7103(a).

a. The Federal Circuit has interpreted the CDA's submission language as requiring the contractor to "commit" the claim to the contracting officer and "yield" to his authority to make a final decision. Dawco Constr., Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991).

b. The claim need not be sent only to the contracting officer, or directly to the contracting officer. If the contractor submits the claim to its primary government contact with a request for a contracting officer's final decision, and the primary contact delivers the claim to the contracting officer, the submission requirement can be met. Neal & Co. v. United States, 945 F.2d 385 (Fed. Cir. 1991) (claim requesting contracting officer's decision addressed to Resident Officer in Charge of Construction). See also D.L. Braughler Co., Inc. v. West, 127 F.3d 1476 (Fed. Cir. 1997) (submission to resident engineer not seeking contracting officer decision not a claim); J&E Salvage Co., 37 Fed. Cl. 256 (1997) (letter submitted to the Department of Justice rather than the Defense Reutilization and Marketing Office was not a claim).

c. Only receipt by the contracting officer triggers the time limits and interest provisions set forth in the CDA. See 41 U.S.C. § 7103(a), § 7109.

d. A claim should implicitly or explicitly request a contracting officer's final decision. See Ellett Constr. Co., Inc. v. United States, 93 F.3d 1537 (Fed. Cir. 1996) (holding that submission to the contracting officer is required, but the request for a final decision may be implied); Heyl & Patterson, Inc. v. O'Keefe, 986 F.2d 480, 483 (Fed. Cir. 1993) (stating that "a request for a final decision can be implied from the context of the submission"); Transamerica Ins. Corp. v. United States, 973 F.2d 1572, 1576 (Fed. Cir. 1992) (stating that no "magic words" are required "as long as what the contractor desires by its submissions is a final decision").

e. A contracting officer cannot issue a valid final decision if the contractor explicitly states that it is not seeking a final decision. Fisherman's Boat Shop, Inc. ASBCA No. 50324, 97-2 BCA ¶ 29,257 (holding that the contracting officer's final decision was a

nullity because the contractor did not intend for its letter submission to be treated as a claim).

4. Certification. A contractor must certify any claim that exceeds $100,000. 41 U.S.C. § 7103(b); FAR 33.207. CDA certification serves to create the deterrent of potential liability for fraud and thereby discourage contractors from submitting unwarranted or inflated claims. See Fischbach & Moore Int'l Corp. v. Christopher, 987 F.2d 759 (Fed. Cir. 1993).

a. Determining the Claim Amount.

(1) A contractor must consider the aggregate effect of increased and decreased costs to determine whether the claim exceeds the dollar threshold for certification.[13] FAR 33.207(d).

(2) Claims that are based on a "common or related set of operative facts" constitute one claim. Placeway Constr. Corp., 920 F.2d 903 (Fed. Cir. 1990).

(3) A contractor may not split a single claim that exceeds $100,000 into multiple claims to avoid the certification requirement. See, e.g., Walsky Constr. Co v. United States, 3 Ct. Cl. 615 (1983); Warchol Constr. Co. v. United States, 2 Cl. Ct. 384 (1983); D&K Painting Co., Inc., DOTCAB No. 4014, 98-2 BCA ¶ 30,064; Columbia Constr. Co., ASBCA No. 48536, 96-1 BCA ¶ 27,970; Jay Dee Militarywear, Inc., ASBCA No. 46539, 94-2 BCA ¶ 26,720.

(4) Separate claims that total less than $100,000 each require no certification, even if their combined total exceeds $100,000. See Engineered Demolition, Inc. v. United States, 60 Fed.Cl. 822 (2004) (holding that appellants claim of $69,047 and $38,940 sponsored on behalf of appellant's sub-contractor were separate, having arose out of different factual predicates, each under $100,000.), Phillips Constr. Co., ASBCA No. 27055, 83-2 BCA ¶ 16,618; B. D. Click Co., ASBCA No. 25609, 81-2 BCA ¶ 15,394.

(5) The contracting officer cannot consolidate separate claims to create a single claim that exceeds $100,000. See B. D. Click Co., Inc., ASBCA No. 25609, 81-2 BCA ¶ 15,395. Courts and boards, however, can consolidate separate claims for hearing to promote judicial economy.

[13] The contractor need not include the amount of any government claims in its calculations. J. Slotnik Co., VABCA No. 3468, 92-1 BCA ¶ 24,645.

(6) A contractor need not certify a claim that grows to exceed $100,000 after the contractor submits it to the contracting officer if:

(a) The increase was based on information that was not reasonably available at the time of the initial submission; or

(b) The claim grew as the result of a regularly accruing charge and the passage of time. See Tecom, Inc. v. United States, 732 F.2d 935 (Fed. Cir. 1984) (concluding that the contractor need not certify a $11,000 claim that grew to $72,000 after the government exercised certain options); AAI Corp. v. United States, 22 Cl. Ct. 541 (1991) (refusing to dismiss a claim that was $0 when submitted, but increased to $500,000 by the time the suit came before the court); Mulunesh Berhe, ASBCA No. 49681, 96-2 BCA ¶ 28,339.

b. Certification Language Requirement. FAR 33.207(c). When required to do so, a contractor must certify that:

(1) The claim is made in good faith;

(2) The supporting data are accurate and complete to the best of the contractor's knowledge and belief;

(3) The amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable; and

(4) The person submitting the claim is duly authorized to certify the claim on the contractor's behalf.[14]

c. Proper Certifying Official. A contractor may certify its claim through "any person duly authorized to bind the contractor with respect to the claim." 41 U.S.C. § 7103(b)(2); FAR 33.207(e). See Metric Constructors, Inc., ASBCA No. 50843, 98-2 BCA ¶

[14] Absent extraordinary circumstances, courts and boards will not question the accuracy of the statements in a contractor's certification. D.E.W., Inc., ASBCA No. 37332, 94-3 BCA ¶ 27,004. A prime contractor need not agree with all aspects or elements of a subcontractor's claim. In addition, a prime contractor need not be certain of the government's liability, or the amount recoverable. The prime contractor need only believe that the subcontractor has good grounds to support its claim. See Oconto Elec., Inc., ASBCA No. 45856, 94-3 BCA ¶ 26,958 (holding that the prime contractor properly certified its subcontractor's claim, even though the official certifying the claim lacked personal knowledge of the amount claimed); see also Arnold M. Diamond, Inc. v. Dalton, 25 F.3d 1006 (Fed. Cir. 1994) (upholding the contractor's submission of a subcontractor's claim pursuant to a court order).

30,088 (concluding that senior project manager was proper certifying official).

d. No claim vs. Defective Certification. Tribunals treat cases where an attempted certification is "substantially" compliant differently from those where the certification is either entirely absent or the language is intentionally or negligently defective.

(1) No claim.

(a) Absence of Certification. No valid claim exists. See FAR 33.201 ("Failure to certify shall not be deemed to be a defective certification."); Hamza v. United States, 31 Fed. Cl. 315 (1994) (complete lack of an attempted certification); Eurostyle Inc., ASBCA No. 45934, 94-1 BCA ¶ 26,458 ("complete absence of any certification is not a mere defect which may be corrected").

(b) Certifications made with intentional, reckless, or negligent disregard of CDA certification requirements are not correctable. See Walashek Industrial & Marine, Inc., ASBCA No. 52166, 00-1 BCA ¶ 30,728 (two prongs of certificate omitted or not fairly compliant); Keydata Sys, Inc. v. Department of the Treasury, GSBCA No. 14281-TD, 97-2 BCA ¶ 29,330 (denying the contractor's petition for a final decision because it failed to correct substantial certification defects).

(2) Claim with "Defective" Certification. 41 U.S.C. § 7103(b)(3); FAR 33.201 defines a defective certification as one "which alters or otherwise deviates from the language in 33.207(c) or which is not executed by a person duly authorized to bind the contractor with respect to the claim."

(a) Exact recitation of the language of 41 U.S.C. § 7103(b)(1) and FAR 33.207(c) is not required—"substantial compliance" suffices. See Fischbach & Moore Int'l Corp. v. Christopher, 987 F.2d 759 (Fed. Cir. 1993) (substituting the word "understanding" for "knowledge" did not render certificate defective). However, See URS Energy & Construction, Inc. v. Department of Energy, CBCA No. 2589 (Filed: May 30, 2012), where the court found the purported certification to be defective and not curable because the first and fourth prong of the CDA certification language were absent.

(b) Technical defects are correctable. Examples include missing certifications when two or more claims are deemed to be a larger claim requiring certification, and certification by the wrong representative of the contractor. See H.R. Rep. No. 102-1006, 102d Cong., 2d Sess. 28, reprinted in 1992 U.S.C.C.A. at 3921, 3937.

(c) Certifications used for other purposes may be acceptable even though they do not include the language required by the CDA. See James M. Ellett Const. Co., Inc. v. United States, 93 F.3d 1537 (Fed. Cir. 1996) (SF 1436 termination proposal not substantially deficient as a CDA certificate); Metric Constructors, Inc., ASBCA No. 50843, 98-2 BCA ¶ 30,088. Compare SAE/Americon - Mid-Atlantic, Inc., GSBCA No. 12294, 94-2 BCA ¶ 26,890 (holding that the contractor's "certificate of current cost or pricing data" on SF 1411 was susceptible of correction, even though it did not include the first and third statements required for a proper CDA certification), with Scan-Tech Security, L.P. v. United States, 46 Fed. Cl. 326 (2000) (suit dismissed after court equated use of SF 1411 with no certification).

(d) The CO need not render a final decision if he notifies the contractor in writing of the defect within 60 days after receipt of the claim. 41 U.S.C. § 7103(b)(3).

(e) Interest on a claim with a defective certification shall be paid from the date the contracting officer initially received the claim. FAR 33.208(c).

(f) A defect will not deprive a court or board of jurisdiction, but it must be corrected before entry of a court's final judgment or a board's decision. 41 U.S.C. § 7103(b)(3).

D. Demand for a Sum Certain.

1. Where the essence of a dispute is the increased cost of performance, the contractor must demand a sum certain as a matter of right. Compare Essex Electro Eng'rs, Inc. v. United States, 22 Cl. Ct. 757, aff'd, 960 F.2d 1576 (Fed. Cir. 1992) (holding that a cost proposal for possible future work did not seek a sum certain as a matter of right); with J.S. Alberici Constr. Co., ENG BCA No. 6179, 97-1 BCA ¶ 28,639, recon. denied,

ENG BCA No. 6179-R, 97-1 BCA ¶ 28,919 (holding that a request for costs associated with ongoing work, but not yet incurred, was a sum certain); McDonnell Douglas Corp., ASBCA No. 46582, 96-2 BCA ¶ 28,377 (holding that a sum certain can exist even if the contractor has not yet incurred any costs); Fairchild Indus., ASBCA No. 46197, 95-1 BCA ¶ 27,594 (holding that a request based on estimated future costs was a sum certain).

2. A claim states a sum certain if:

a. The government can determine the amount of the claim using a simple mathematical formula. Metric Constr. Co. v. United States, 1 Cl. Ct. 383 (1983); Mulunesh Berhe, ASBCA No. 49681, 96-2 BCA ¶ 28,339 (simple multiplication of requested monthly rate for lease); Jepco Petroleum, ASBCA No. 40480, 91-2 BCA ¶ 24,038 (claim requesting additional $3 per linear foot of excavation, when multiplied by total of 10,000 feet, produced sum certain).

b. Enlarged claim doctrine. Under this doctrine, a BCA or the COFC may exercise jurisdiction over a dispute that involves a sum in excess of that presented to the contracting officer for a final decision if:

(1) The increase in the amount of the claim is based on the same set of operative facts previously presented to the contracting officer; and

(2) The contractor neither knew nor reasonably should have known, at the time when the claim was presented to the contracting officer, of the factors justifying an increase in the amount of the claim. Johnson Controls World Services, Inc. v. United States, 43 Fed. Cl. 589 (1999). See also Stencel Aero Engineering Corp., ASBCA No. 28654, 84-1 BCA ¶ 16,951 (finding essential character or elements of the certified claim had not been changed).

E. Supporting Data. Invoices, detailed cost breakdowns, and other supporting financial documentation need not accompany a CDA claim as a jurisdictional prerequisite. H.L. Smith v. Dalton, 49 F.3d 1563 (Fed. Cir. 1995) (contractor's failure to provide CO with additional information "simply delayed action on its claims"); John T. Jones Constr. Co., ASBCA No. 48303, 96-1 BCA ¶ 27,997 (stating that the contracting officer's desire for more information did not invalidate the contractor's claim submission).

F. Settlement.

1. Agencies should attempt to resolve claims by mutual agreement, if possible. FAR 33.204; FAR 33.210. See Pathman Constr. Co., Inc. v.

United States, 817 F.2d 1573 (Fed. Cir. 1987) (stating that a "major purpose" of the CDA is to "induce resolution of contract disputes with the government by negotiation rather than litigation").

2. Only contracting officers or their authorized representatives may normally settle contract claims. See FAR 33.210; see also J.H. Strain & Sons, Inc., ASBCA No. 34432, 88-3 BCA ¶ 20,909 (refusing to enforce a settlement agreement that the agency's attorney entered into without authority). The Department of Justice (DOJ), however, has plenary authority to settle cases pending before the COFC. See Executive Business Media v. Department of Defense, 3 F.3d 759 (4th Cir. 1993).

3. Contracting officers are authorized, within the limits of their warrants, to decide or resolve all claims arising under or relating to the contract except for:

   a. A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or

   b. The settlement, compromise, payment or adjustment of any claim involving fraud.[15] FAR 33.210.

G. Interest.

1. Interest on CDA claims is calculated every six months based on a rate established by the Secretary of the Treasury pursuant to Pub. L. No. 92-41, 85 Stat. 97. 41 U.S.C. § 7109; FAR 33.208.

2. Established interest rates can be found at www.treasurydirect.gov.

3. Interest may begin to accrue on costs before the contractor incurs them. See Servidone Constr. Corp. v. United States, 931 F.2d 860 (Fed. Cir. 1991) (stating that 41 U.S.C. § 611 (recodified as 41 U.S.C. § 7109) "sets a single, red-letter date for the interest of all amounts found due by a court without regard to when the contractor incurred the costs"); see also Caldera v. J.S. Alberici Constr. Co., 153 F.3d 1381 (Fed Cir. 1998) (holding that 41 U.S.C. § 611 "trumps" conflicting regulations that prohibit claims for future costs).

H. Termination for Convenience (T4C) Settlement Proposals. FAR 49.206.

[15] When a claim is suspected to be fraudulent, the contracting officer shall refer the matter to the agency official responsible for investigating fraud. FAR 33.209. To justify a stay in a Board proceeding, the movant has the burden to show there are substantially similar issues, facts and witnesses in civil and criminal proceedings, and there is a need to protect the criminal litigation which overrides any injury to the parties by staying the civil litigation. Afro-Lecon, Inc. v. United States, 820 F.2d 1198 (Fed. Cir. 1987); T. Iida Contracting, Ltd., ASBCA No. 51865, 00-1 BCA ¶ 30,626.

1. A contractor may submit a settlement proposal for costs associated with the termination of a contract for the convenience of the government. FAR 49.206-1; FAR 49.602-1. See Standard Form (SF) 1435, Settlement Proposal (Inventory Basis); SF 1436, Settlement Proposal (Total Cost Basis); SF 1437, Settlement Proposal for Cost-Reimbursement Type Contracts; SF 1438, Settlement Proposal (Short Form).

2. Courts and boards consider T4C settlement proposals to be "nonroutine" submissions under the CDA. See Ellett, 93 F.3d at 1542 (stating that "it is difficult to conceive of a less routine demand for payment than one which is submitted when the government terminates a contract for its convenience").

   a. Courts and boards, however, do not consider T4C settlement proposals to be CDA claims when submitted because contractors normally do not submit them for a contracting officer's final decision—they submit them to facilitate negotiations. See Ellett Constr. Co., Inc. v. United States, 93 F.3d 1537 (Fed. Cir. 1996) (T4C settlement proposal was not a claim because the contractor did not submit it to the contracting officer for a final decision); see also Walsky Constr. Co. v. United States, 173 F.3d 1312 (Fed. Cir. 1999) (T4C settlement proposal was not a claim because it had not yet been the subject of negotiations with the government); cf. Medina Constr., Ltd. v. United States, 43 Fed. Cl. 537, 551 (1999) (parties may reach an impasse without entering into negotiations if allegations of fraud prevent the contracting officer from entering into negotiations).

   b. A T4C settlement proposal may "ripen" into a CDA claim once settlement negotiations reach an impasse. See Ellett, 93 F.3d at 1544 (holding that the contractor's request for a final decision following ten months of "fruitless negotiations" converted its T4C settlement proposal into a claim); Metric Constructors, Inc., ASBCA No. 50843, 98-2 BCA ¶ 30,088 (holding that a contractor's T4C settlement proposal ripened into a claim when the contracting officer issued a unilateral contract modification following the parties' unsuccessful negotiations); cf. FAR 49.109-7(f) (stating that a contractor may appeal a "settlement by determination" under the Disputes clause unless the contractor failed to submit its T4C settlement proposal in a timely manner).

3. Certification. If a CDA certification is required, the contractor may rely on the standard certification in whichever SF the FAR requires it to submit. See Ellett, 93 F.3d at 1545 (rejecting the government's argument that proper certification of a T4C settlement proposal is a jurisdictional prerequisite); see also Metric Constructors, Inc., supra. (concluding that the contractor could "correct" the SF 1436 certification to comply with the CDA certification requirements).

4. Interest. The FAR precludes the government from paying interest under a settlement agreement or determination; however, the FAR permits the government to pay interest on a contractor's successful appeal. FAR 49.112-2(d). Therefore, the government cannot pay interest on a T4C settlement proposal unless it "ripens" into a CDA claim and the contractor successfully appeals to the ASBCA or the COFC. See Ellett, 93 F.3d at 1545 (recognizing the fact that T4C settlement proposals are treated disparately for interest purposes); see also Central Envtl, Inc., ASBCA 51086, 98-2 BCA ¶ 29,912 (concluding that interest did not begin to run until after the parties' reached an impasse and the contractor requested a contracting officer's final decision).

I. Statute of Limitations.

1. In 1987, the Federal Circuit concluded that the six-year statute of limitations in the Tucker Act does not apply to CDA appeals. Pathman Constr. Co. v. United States, 817 F.2d 1573 (Fed. Cir. 1987).

2. In 1994, Congress revised the CDA to impose a six-year statute of limitations. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified at 40 U.S.C. § 605). See FAR 33.206; see also Motorola, Inc. v. West, 125 F.3d 1470 (Fed. Cir. 1997).

a. For contracts awarded on or after 1 October 1995, a contractor must submit its claim within six years of the date the claim accrues.

b. This statute of limitations provision does not apply to government claims based on contractor claims involving fraud.

V. GOVERNMENT CLAIMS.

A. Requirement for Final Decision. 41 U.S.C. § 7103(a)(3); FAR 52.233-1(d)(1).

1. The government may assert a claim against a contractor; however, the claim must be the subject of a contracting officer's final decision.

2. Some government actions are immediately appealable.

a. Termination for Default. A contracting officer's decision to terminate a contract for default is an immediately appealable government claim. Independent Mfg. & Serv. Cos. of Am., Inc., ASBCA No. 47636, 94-3 BCA ¶ 27,223. See Malone v. United States, 849 F.2d 1441, 1443 (Fed. Cir. 1988); cf. Educators Assoc., Inc. v. United States, 41 Fed. Cl. 811 (1998) (dismissing the contractor's suit as untimely because the contractor failed to appeal within 12 months of the date it received the final termination decision).

b. Withholding Monies. A contracting officer's decision to withhold monies otherwise due the contractor is an immediately appealable government claim. Placeway Constr. Corp. United States, 920 F.2d 903, 906 (Fed. Cir. 1990); Sprint Communications Co., L.P. v. General Servs. Admin., GSBCA No. 14263, 97-2 BCA ¶ 29,249.

c. Cost Accounting Standards (CAS) Determination. A contracting officer's decision regarding the allowability of costs under the CAS is often an immediately appealable government claim. See Newport News Shipbuilding and Dry Dock Co. v. United States, 44 Fed. Cl. 613 (1999) (government's demand that the contractor change its accounting for all of its CAS-covered contracts was an appealable final decision); Litton Sys., Inc., ASBCA No. 45400, 94-2 BCA ¶ 26,895 (holding that the government's determination was an appealable government claim because the government was "seeking, as a matter of right, the adjustment or interpretation of contract terms"); cf. Aydin Corp., ASBCA No. 50301, 97-2 BCA ¶ 29,259 (holding that the contracting officer's failure to present a claim arising under CAS was a nonjurisdictional error).

d. Miscellaneous Demands. See Bean Horizon-Weeks (JV), ENG BCA No. 6398, 99-1 BCA ¶ 30,134 (holding that a post-appeal letter demanding repayment for improper work was an appealable final decision); Outdoor Venture Corp., ASBCA No. 49756, 96-2 BCA ¶ 28,490 (holding that the government's demand for warranty work was a claim that the contractor could immediately appeal); Sprint Communications Co. v. General Servs. Admin., GSBCA No. 13182, 96-1 BCA ¶ 28,068. But see Boeing Co., 25 Cl. Ct. 441 (1992) (holding that a post-termination letter demanding the return of unliquidated progress payments was not appealable); Iowa-Illinois Cleaning Co. v. General Servs. Admin., GSBCA No. 12595, 95-2 BCA ¶ 27,628 (holding that government deductions for deficient performance are not appealable absent a contracting officer's final decision).

3. As a general rule, the government may not assert a counterclaim that has not been the subject of a contracting officer's final decision.

B. Contractor Notice. Assertion of a government claim is usually a two-step process. A demand letter gives the contractor notice of the potential claim and an opportunity to respond. If warranted, the final decision follows. See FAR 33.211(a) ("When a claim by or against a contractor cannot be satisfied or settled by mutual agreement and a decision on the claim is necessary"); Instruments & Controls Serv. Co., ASBCA No. 38332, 89-3 BCA ¶ 22,237 (dismissing appeal because final decision not preceded by demand); see also Bean Horizon-Weeks (JV), ENG BCA No. 6398, 99-1 BCA ¶ 30,134; B.L.I. Constr. Co., ASBCA No. 40857, 92-2 BCA ¶ 24,963 (stating that "[w]hen the Government is considering

action, the contractor should be given an opportunity to state its position, express its views, or explain, argue against, or contest the proposed action").

C. Certification. Neither party is required to certify a government claim. 41 U.S.C. §§ 7103(b). See Placeway Constr. Corp., 920 F.2d at 906; Charles W. Ware, GSBCA No. 10126, 90-2 BCA ¶ 22,871. A contractor, however, must certify its request for interest on monies deducted or withheld by the government. General Motors Corp., ASBCA No. 35634, 92-3 BCA ¶ 25,149.

D. Interest. Interest on a government claim begins to run when the contractor receives the government's initial written demand for payment. FAR 52.232-17.

E. Finality. Once the contracting officer's decision becomes final (i.e., once the appeal period has passed), the contractor cannot challenge the merits of that decision judicially. 41 U.S.C. § 7103(g). See Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1562 (Fed. Cir. 1990); L.A. Constr., Inc., 95-1 BCA¶ 27,291 (holding that the contractor's failure to appeal the final decision in a timely manner deprived the board of jurisdiction, even though both parties testified on the merits during the hearing).

VI. FINAL DECISIONS.

A. General. The contracting officer must issue a written final decision on all claims. 41 U.S.C. § 7103(d); FAR 33.206; FAR 33.211(a). See Tyger Constr. Co., ASBCA No. 36100, 88-3 BCA ¶ 21,149. But cf. McDonnell Douglas Corp., ASBCA No. 44637, 93-2 BCA ¶ 25,700 (dismissing the contractor's appeal from a government claim for noncompliance with CAS because the procuring contracting officer issued the final decision instead of the cognizant administrative contracting officer as required by the FAR and DFARS).

B. Time Limits. A contracting officer must issue a final decision on a contractor's claim within certain statutory time limits. 41 U.S.C. § 7103(f); FAR 33.211.

1. Claims of $100,000 or less. The contracting officer must issue a final decision within 60 days.

2. Certified Claims Exceeding $100,000. The contracting officer must take one of the following actions within 60 days:

a. Issue a final decision; or

b. Notify the contractor of a firm date by which the contracting officer will issue a final decision.[16] See Boeing Co. v. United

[16] The contracting officer must issue the final decision within a reasonable period. What constitutes a "reasonable" period depends on the size and complexity of the claim, the adequacy of the contractor's supporting data, and other relevant factors. 41 U.S.C. § 7103(f)(3); FAR 33.211(d). See Defense Sys. Co., ASBCA No. 50534, 97-2 BCA ¶ 28,981 (holding that nine months to review a $72 million claim was reasonable).

States, 26 Cl. Ct. 257 (1992); Aerojet Gen. Corp., ASBCA No. 48136, 95-1 BCA ¶ 27,470 (concluding that the contracting officer failed to provide a firm date where the contracting officer made the timely issuance of a final decision contingent on the contractor's cooperation in providing additional information); Inter-Con Security Sys., Inc., ASBCA No. 45749, 93-3 BCA ¶ 26,062 (concluding that the contracting officer failed to provide a firm date where the contracting officer merely promised to render a final decision within 60 days of receiving the audit).

3. Uncertified and Defectively Certified Claims Exceeding $100,000.

a. FAR 33.211(e) The contracting officer has no obligation to issue a final decision on a claim that exceeds $100,000 if the claim is:

(1) Uncertified; or

(2) Defectively certified.

b. If the claim is defectively certified, the contracting officer must notify the contractor, in writing, within 60 days of the date the contracting officer received the claim of the reason(s) why any attempted certification was defective.

4. Failure to Issue a Final Decision. FAR 33.211(g)

a. If the contracting officer fails to issue a final decision within a reasonable period of time, the contractor can:

(1) Request the tribunal concerned to direct the contracting officer to issue a final decision. 41 U.S.C. § 7103(f)(4); FAR 33.211(f). See American Industries, ASBCA No. 26930-15, 82-1 BCA ¶ 15,753.

(2) Treat the contracting officer's failure to issue a final decision as an appealable final decision (i.e., a "deemed denial"). 41 U.S.C. § 7103(f)(5); FAR 33.211(g). See Aerojet Gen. Corp., ASBCA No. 48136, 95-1 BCA ¶ 27,470.

b. A BCA, however, cannot direct the contracting officer to issue a more detailed final decision than the contracting officer has already issued. A.D. Roe Co., ASBCA No. 26078, 81-2 BCA ¶ 15,231.

C. Format. 41 U.S.C. § 7103(e); FAR 33.211(a)(4).

1. The final decision must be written. Tyger Constr. Co., ASBCA No. 36100, 88-3 BCA ¶ 21,149.

2. In addition, the final decision must:

   a. Describe the claim or dispute;

   b. Refer to the pertinent or disputed contract terms;

   c. State the disputed and undisputed facts;

   d. State the decision and explain the contracting officer's rationale;

   e. Advise the contractor of its appeal rights; and

   f. Demand the repayment of any indebtedness to the government.

3. Rights Advisement.

   a. FAR 33.211(a)(4)(v) specifies that the final decision should include a paragraph substantially as follows:

> This is a final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board's small claim procedure for claims of $50,000 or less or its accelerated procedure for claims of $100,000 or less. Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision.

   b. Failure to properly advise the contractor of its appeal rights <u>may</u> prevent the "appeals clock" from starting. If the contracting officer's rights advisory is deficient, the contractor must demonstrate that, but for its detrimental reliance upon the faulty advice, its appeal would have been timely. <u>Decker & Co. v. West</u>, 76 F.3d 1573 (Fed. Cir. 1996).

4. Specific findings of fact are <u>not</u> required and, if made, are <u>not</u> binding on the government in any subsequent proceedings. <u>See</u> <u>Wilner v. United</u>

States, 24 F.3d 1397 (Fed. Cir. 1994) (concluding that admissions favorable to the contractor do not constitute evidence of government liability).

D. Delivery. 41 U.S.C. § 7103(d); FAR 33.211(b).

1. The contracting officer must mail (or otherwise furnish) a copy of the final decision to the contractor. See Images II, Inc., ASBCA No. 47943, 94-3 BCA ¶ 27,277 (holding that receipt by the contractor's employee constituted proper notice).

2. The contracting officer should use certified mail, return receipt requested, or by any other method that provides evidence of receipt.

3. The contracting officer should preserve all evidence of the date the contractor received the contracting officer's final decision. See Omni Abstract, Inc., ENG BCA No. 6254, 96-2 BCA ¶ 28,367 (relying on a government attorney's affidavit to determine when the 90-day appeals period started). See Trygve Dale Westergard v. Services Administration, CBCA No. 2522, Sept. 15, 2011 (Board denied the government request to dismiss the appeal as untimely because the contracting officer submitted the final decision to the contractor via e-mail and could not provide any proof of a return receipt).

a. When hand delivering the final decision, the contracting officer should require the contractor to sign for the document.

b. When using a FAX transmission, the contracting officer should confirm receipt and memorialize the confirmation in a written memorandum. See Mid-Eastern Indus., Inc., ASBCA No. 51287, 98-2 BCA ¶ 29,907 (concluding that the government established a prima facie case by presenting evidence to show that it successfully transmitted the final decision to the contractor's FAX number); see also Public Service Cellular, Inc., ASBCA No. 52489, 00-1 BCA ¶ 30,832 (transmission report not sufficient evidence of receipt); Riley & Ephriam Constr. Co., Inc. v. United States, 408 F.3d 1369 (May 18, 2005)(fax machine printout of all faxes sent which showed appellant's attorney's office received a fax, and contracting officer's statement at trial that she faxed the final decision on the day and time shown on fax print out were not "objective indicia of receipt" as required by the CDA).

E. Independent Act of a Contracting Officer.

1. The final decision must be the contracting officer's personal, independent act. Compare PLB Grain Storage Corp. v. Glickman, 113 F.3d 1257 (Fed. Cir. 1997) (unpub.) (holding that a termination was proper even though a committee of officials directed it); Charitable Bingo Associates d/b/a Mr.

Bingo, Inc., ASBCA Nos. 53249, 53470, 05-01 BCA 32,863 (finding the Contracting Officer utilized independent judgment in terminating appellant's contract after the Assistant Secretary of the Army (MR&A) issued a policy memorandum prohibiting contractor-operated bingo programs within the Army MWR programs) with Climatic Rainwear Co. v. United States, 88 F. Supp. 415 (Ct. Cl. 1950) (holding that a termination was improper because the contracting officer's attorney prepared the termination findings without the contracting officer's participation).

2. The contracting officer should seek assistance from engineers, attorneys, auditors, and other advisors. See FAR 1.602-2 (requiring the contracting officer to request and consider the advice of "specialists," as appropriate); FAR 33.211(a)(2) (requiring the contracting officer to seek assistance from "legal and other advisors"); see also Pacific Architects & Eng'rs, Inc. v. United States, 203 Ct. Cl. 499, 517 (1974) (opining that it is unreasonable to preclude the contracting officer from seeking legal advice); Prism Constr. Co., ASBCA No. 44682, 97-1 BCA ¶ 28,909 (indicating that the contracting officer is not required to independently investigate the facts of a claim before issuing final decision); Environmental Devices, Inc., ASBCA No. 37430, 93-3 BCA ¶ 26,138 (approving the contracting officer's communications with the user agency prior to terminating the contract for default); cf. AR 27-1, para. 15-5a (noting the "particular importance" of the contracts attorney's role in advising the contracting officer on the drafting of a final decision).

F. Finality. 41 U.S.C. § 7103(g).

1. A final decision is binding and conclusive unless timely appealed.

2. Reconsideration.

a. A contracting officer may reconsider, withdraw, or rescind a final decision before the expiration of the appeals period. General Dynamics Corp., ASBCA No. 39866, 91-2 BCA ¶ 24,017. Cf. Daniels & Shanklin Constr. Co., ASBCA No. 37102, 89-3 BCA ¶ 22,060 (rejecting the contractor's assertion that the contracting officer could not withdraw a final decision granting its claim, and indicating that the contracting officer has an obligation to do so if the final decision is erroneous).

b. The contracting officer's rescission of a final decision, however, will not necessarily deprive a BCA of jurisdiction because jurisdiction vests as soon as the contractor files its appeal. See Security Servs., Inc., GSBCA No. 11052, 92-1 BCA ¶ 24,704; cf. McDonnell Douglas Astronautics Co., ASBCA No. 36770, 89-3 BCA ¶ 22,253 (indicating that the board would sustain a contractor's appeal if the contracting officer withdrew the final decision after the contractor filed its appeal).

c. A contracting officer may vacate his or her final decision unintentionally by agreeing to meet with the contractor to discuss the matters in dispute. See Sach Sinha and Assocs., ASBCA No. 46916, 95-1 BCA ¶ 27,499 (finding that the contracting officer "reconsidered" her final decision after she met with the contractor as a matter of "business courtesy" and requested the contractor to submit its proposed settlement alternatives in writing); Royal Int'l Builders Co., ASBCA No. 42637, 92-1 BCA ¶ 24,684 (holding that the contracting officer "destroyed the finality of his initial decision" by agreeing to meet with the contractor, even though the meeting was cancelled and the contracting officer subsequently sent the contractor a letter stating his intent to stand by his original decision).

d. To restart the appeal period after reconsidering a final decision, the contracting officer must issue a new final decision. Information Sys. & Networks Corp. v. United States, 17 Cl. Ct. 527 (1989); Sach Sinha and Assocs., ASBCA No. 46916, 95-1 BCA ¶ 27,499; Birken Mfg. Co., ASBCA No. 36587, 89-2 BCA ¶ 21,581.

3. The Fulford Doctrine. A contractor may dispute an underlying default termination as part of a timely appeal from a government demand for excess reprocurement costs, even though the contractor failed to appeal the underlying default termination in a timely manner. Fulford Mfg. Co., ASBCA No. 2143, 6 CCF ¶ 61,815 (May 20, 1955); Deep Joint Venture, GSBCA No. 14511, 02-2 BCA ¶ 31,914 (GSBCA confirms validity of the Fulford doctrine for post-CDA terminations).

VII. APPEALS TO THE ARMED SERVICES BOARD OF CONTRACT APPEALS (ASBCA).

A. The Right to Appeal. 41 U.S.C. § 7104(a). A contractor may appeal a contracting officer's final decision to an agency BCA.

B. The Armed Services Board of Contract Appeals (ASBCA).

1. The ASBCA consists of 25-30 administrative judges who dispose of approximately 800-900 appeals per year.

2. ASBCA judges specialize in contract disputes and come from both the government and private sectors. Each judge has at least five years of experience working in the field of government contract law.

3. The Rules of the Armed Services Board of Contract Appeals appear in Appendix A of the DFARS.

C. Jurisdiction. 41 U.S.C. § 7105(e)(1)(A). The ASBCA has jurisdiction to decide appeals regarding contracts made by:

1. The Department of Defense; or

2. An agency that has designated the ASBCA to decide the appeal.

D. Standard of Review. The ASBCA will review the appeal de novo. See 41 U.S.C. § 7103(e) (indicating that the contracting officer's specific findings of fact are not binding in any subsequently proceedings); see also Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994) (en banc); Precision Specialties, Inc., ASBCA No. 48717, 96-1 BCA ¶ 28,054 (final decision retains no presumptive evidentiary weight nor is it binding on the Board).

E. Perfecting an Appeal.

1. Requirement. A contractor's notice of appeal (NOA) shall be mailed or otherwise furnished to the Board within 90 days from date of receipt of the final decision. A copy shall be furnished to the contracting officer. 41 U.S.C. § 7104(a); ASBCA Rule 1(a). See Cosmic Constr. Co. v. United States, 697 F.2d 1389 (Fed. Cir. 1982) (90 day filing requirement is statutory and cannot be waived by the Board); Rex Sys, Inc., ASBCA No. 50456, 98-2 BCA ¶ 29,956 (refusing to dismiss a contractor's appeal simply because the contractor failed to send a copy of the NOA to the contracting officer).

2. Filing an appeal with the contracting officer can satisfy the Board's notice requirement. See Hellenic Express, ASBCA No. 47129, 94-3 BCA ¶ 27,189 (citing Yankee Telecomm. Lab., ASBCA No. 25240, 82-2 BCA ¶ 15,515, for the proposition that "filing an appeal with the contracting officer is tantamount to filing with the Board"); cf. Brunner Bau GmbH, ASBCA No. 35678, 89-1 BCA ¶ 21,315 (holding that notice to the government counsel was a filing).

3. Methods of filing.

a. Mail. The written NOA can be sent to the ASBCA or to the contracting officer via the U.S. Postal Service. See Thompson Aerospace, Inc., ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232 (NOA mailed to KO timely filed).

b. Otherwise furnishing, such as through commercial courier service. North Coast Remfg., Inc., ASBCA No. 38599, 89-3 BCA ¶ 22,232 (NOA delivered by Federal Express courier service not accorded same status as U.S. mail service and was therefore untimely).

4. Contents. An adequate notice of appeal must:

a. Be in writing. See Lows Enter., ASBCA No. 51585, 00-1 BCA ¶ 30,622 (holding that verbal notice is insufficient).

b. Express dissatisfaction with the contracting officer's decision;

c. Manifest an intent to appeal the decision to a higher authority, see e.g., McNamara-Lunz Vans & Warehouse, Inc., ASBCA No. 38057, 89-2 BCA ¶ 21,636 (concluding that a letter stating that "we will appeal your decision through the various avenues open to us" adequately expressed the contractor's intent to appeal); cf. Stewart-Thomas Indus., Inc., ASBCA No. 38773, 90-1 BCA ¶ 22,481 (stating that the intent to appeal to the board must be unequivocal); Birken Mfg. Co., ASBCA No. 37064, 89-1 BCA ¶ 21,248 (concluding that an electronic message to the termination contracting officer did not express a clear intent to appeal); and

d. Be timely. 41 U.S.C. § 7104; ASBCA Rule 1(a); Thompson Aerospace, Inc., ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232.

(1) A contractor must file an appeal with a BCA within 90 days of the date it received the contracting officer's final decision. 41 U.S.C. § 7104.

(2) In computing the time taken to appeal (See ASBCA Rule 33(b)):

(a) Exclude the day the contractor received the contracting officer's final decision; and

(b) Count the day the contractor mailed (evidenced by postmark by U.S. Postal Service) the NOA or that the Board received the NOA.

(c) If the 90th day is a Saturday, Sunday, or legal holiday, the appeals period shall run to the end of the next business day.

e. The NOA should also:

(1) Identify the contract, the department or agency involved in the dispute, the decision from which the contractor is appealing, and the amount in dispute; and

(2) Be signed by the contractor taking the appeal or the contractor's duly authorized representative or attorney.

5. The Board liberally construes appeal notices. See Thompson Aerospace, Inc., ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232 (Board jurisdiction where timely mailing of NOA to KO, despite Board rejecting its NOA mailing).

F. Regular Appeals.

1. Docketing. ASBCA Rule 3. The Recorder assigns a docket number and notifies the parties in writing.

2. Rule 4 (R4) File. ASBCA Rule 4.

   a. The contracting officer must assemble and transmit an appeal file to the ASBCA and the appellant within 30 days of the date the government receives the docketing notice.

   b. The R4 file should contain the relevant documents (e.g., the final decision, the contract, and the pertinent correspondence).

   c. The appellant may supplement the R4 file within 30 days of the date it receives its copy.[17]

3. Complaint. ASBCA Rule 6(a).

   a. The appellant must file a complaint within 30 days of the date it receives the docketing notice. But cf. Northrop Grumman Corp., DOT BCA No. 4041, 99-1 BCA ¶ 30,191 (requiring the government to file the complaint on a government claim).

   b. The board does not require a particular format; however, the complaint should set forth:

      (1) Simple, concise, and direct statements of the appellant's claims;

      (2) The basis of each claim; and

      (3) The amount of each claim, if known.

   c. If sufficiently detailed, the board may treat the NOA as the complaint.

4. Answer. ASBCA Rule 6(b).

   a. The government must answer the complaint within 30 days of the date it receives the complaint.

   b. The answer should set forth simple, concise, and direct statements of the government's defenses to each of the appellant's claims, including any affirmative defenses.

   c. The board will enter a general denial on the government's behalf if the government fails to file its answer in a timely manner.

[17] As a practical matter, the ASBCA generally allows either party to supplement the R4 file up to the date of the hearing.

5. Discovery. ASBCA Rules 14-15.

   a. The parties may begin discovery as soon as the appellant files the complaint.

   b. The board encourages the parties to engage in voluntary discovery.

   c. Discovery may include depositions, interrogatories, requests for the production of documents, and requests for admission.

6. Pre-Hearing Conferences. ASBCA Rule 10. The board may hold telephonic pre-hearing conferences to discuss matters that will facilitate the processing and disposition of the appeal.

7. Motions. ASBCA Rule 5.

   a. Parties must file jurisdictional motions promptly; however, the board may defer its ruling until the hearing.

   b. Parties may also file appropriate non-jurisdictional motions.

8. Record Submissions. ASBCA Rule 11.

   a. Either party may waive its right to a hearing and submit its case on the written record.

   b. The parties may supplement the record with affidavits, depositions, admissions, and stipulations when they choose to submit their case on the written record. See Solar Foam Insulation, ASBCA No. 46921, 94-2 BCA ¶ 26,901.

9. Hearings. ASBCA Rules 17-25.

   a. The board will schedule the hearing and choose the location.

   b. Hearings are relatively informal; however, the board generally adheres to the Federal Rules of Evidence.

   c. Both parties may offer evidence in the form of testimony and exhibits.

   d. Witnesses generally testify under oath and are subject to cross-examination.

   e. The board may subpoena witnesses and documents.

   f. A court reporter will prepare a verbatim transcript of the proceedings.

10. Briefs. ASBCA Rule 23. The parties may file post-hearing briefs after they receive the transcript and/or the record is closed.

11. Decisions. ASBCA Rule 28.

    a. The ASBCA issues written decisions.

    b. The presiding judge normally drafts the decision; however, three judges decide the case.

12. Motions for Reconsideration. ASBCA Rule 29.

    a. Either party may file a motion for reconsideration within 30 days of the date it receives the board's decision.

    b. Motions filed after 30 days are untimely. Bio-temp Scientific, Inc., ASBCA No. 41388, 95-2 BCA ¶ 86,242; Arctic Corner, Inc., ASBCA No. 33347, 92-2 BCA ¶ 24,874.

    c. Absent unusual circumstances, a party may not use a motion for reconsideration to correct errors in its initial presentation. Metric Constructors, Inc., ASBCA No. 46279, 94-2 BCA ¶ 26,827.

13. Appeals.41 U.S.C. § 7107. Either party may appeal to the Court of Appeals for the Federal Circuit (CAFC) within 120 days of the date it receives the board's decision; however, the government needs the consent of the U.S. Attorney General. 41 U.S.C. § 7107(a)(1)(B).

G. Accelerated Appeals. 41 U.S.C. § 7106; ASBCA Rule 12.3.

1. If the amount in dispute is $100,000 or less, the contractor may choose to proceed under the board's accelerated procedures.

2. The board renders its decision, whenever possible, within 180 days from the date it receives the contractor's election; therefore, the board encourages the parties to limit (or waive) pleadings, discovery, and briefs.

3. The presiding judge normally issues the decision with the concurrence of a vice chairman. If these two individuals disagree, the chairman will cast the deciding vote.

    a. Written decisions normally contain only summary findings of fact and conclusions.

    b. If the parties agree, the presiding judge may issue an oral decision at the hearing and follow-up with a memorandum to formalize the decision.

4. Either party may appeal to the CAFC within 120 days of the date it receives the decision.

H. Expedited Appeals. 41 U.S.C. § 7106; ASBCA Rule 12.

1. If the amount in dispute is $50,000 or less or where the business (as defined in the Small Business Act and regulations under that Act), $150,000 or less, the contractor may choose to proceed under the board's expedited procedures.

2. The board renders its decision, whenever possible, within 120 days from the date it receives the contractor's election; therefore, the board uses very streamlined procedures (e.g., accelerated pleadings, extremely limited discovery, etc.).

3. The presiding judge decides the appeal.

a. Written decisions contain only summary finds of fact and conclusions.

b. The presiding judge may issue an oral decision from the bench and follow-up with a memorandum to formalize the decision.

4. Neither party may appeal the decision, and the decision has no precedential value. See Palmer v. Barram, 184 F.3d 1373 (Fed. Cir. 1999) (holding that a small claims decision is only appealable for fraud in the proceedings).

I. Remedies.

1. The board may grant any relief available to a litigant asserting a contract claim in the COFC. 41 U.S.C. § 7105(e)(2).

a. Money damages is the principal remedy sought.

b. The board may issue a declaratory judgment. See Malone v. United States, 849 F.2d 1441 (Fed. Cir. 1988) (validity of T4D).

c. The board may award attorney's fees pursuant to the Equal Access to Justice Act (EAJA). 5 U.S.C. § 504. See Hughes Moving & Storage, Inc., ASBCA No. 45346, 00-1 BCA ¶ 30,776 (award decision in T4D case); Oneida Constr., Inc., ASBCA No. 44194, 95-2 BCA ¶ 27,893 (holding that the contractor's rejection of the agency settlement offer, which was more than the amount the board subsequently awarded, did not preclude recovery under the EAJA); cf. Cape Tool & Die, Inc., ASBCA No. 46433, 95-1 BCA ¶ 27,465 (finding rates in excess of the $75 per hour guideline rate reasonable for attorneys in the Washington D.C. area with government contracts expertise). Q.R. Sys. North, Inc., ASBCA

No. 39618, 96-1 BCA ¶ 27,943 (rejecting the contractor's attempt to transfer corporate assets so as to fall within the EAJA ceiling).

2. The board need not find a remedy-granting clause to grant relief. See S&W Tire Serv., Inc., GSBCA No. 6376, 82-2 BCA ¶ 16,048 (awarding anticipatory profits).

3. The board may not grant specific performance or injunctive relief. General Elec. Automated Sys. Div., ASBCA No. 36214, 89-1 BCA ¶ 21,195. See Western Aviation Maint., Inc. v. General Services Admin, GSBCA No. 14165, 98-2 BCA ¶ 29,816 (holding that the 1992 Tucker Act amendments did not waive the government's immunity from specific performance suits).

J. Payment of Judgments. 41 U.S.C. § 7108.

1. An agency may access the "Judgment Fund" to pay "[a]ny judgment against the United States on a [CDA] claim." 41 U.S.C. § 7108(a). See 31 U.S.C. § 1304; cf. 28 U.S.C. § 2517.

a. The Judgment Fund is only available to pay judgments and monetary awards—it is not available to pay informal settlement agreements. See 41 U.S.C. § 7108; see also 31 U.S.C. § 1304.

b. If an agency lacks sufficient funds to cover an informal settlement agreement, it can "consent" to the entry of a judgment against it. See Bath Irons Works Corp. v. United States, 20 F.3d 1567, 1583 (Fed. Cir. 1994); Casson Constr. Co., GSBCA No. 7276, 84-1 BCA ¶ 17,010 (1983). As a matter of policy, however, it behooves the buying activity to coordinate with its higher headquarters regarding the use of consent decrees since the agency must reimburse the Judgment Fund with current funds.

2. Prior to payment, both parties must certify that the judgment is "final" (i.e., that the parties will pursue no further review). 31 U.S.C. § 1304(a). See Inland Servs. Corp., B-199470, 60 Comp. Gen. 573 (1981).

3. An agency must repay the Judgment Fund from appropriations current at the time of the award or judgment. 41 U.S.C. § 7108(c). Bureau of Land Management, B-211229, 63 Comp. Gen. 308 (1984).

K. Appealing an Adverse Decision. 41 U.S.C. § 7107. Board decisions are final unless one of the parties appeals to the CAFC within 120 days after the date the party receives the board's decision. See Placeway Constr. Corp. v. United States, 713 F.2d 726 (Fed. Cir. 1983).

VIII. ACTIONS BEFORE THE COURT OF FEDERAL CLAIMS (COFC).

A. The right to file suit. Subsequent to receipt of a contracting officer's final decision, a contractor may bring an action directly on the claim in the COFC. 41 U.S.C. § 7104(b).

B. The Court of Federal Claims (COFC).

1. Over a third of the court's workload concerns contract claims.

2. The President appoints COFC judges for a 15-year term with the advice and consent of the Senate.

3. The President can reappoint a judge after the initial 15-year term expires.

4. The Federal Circuit can remove a judge for incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability.

5. The Rules of the United States Court of Federal Claims (RCFC) appear in an appendix to Title 28 of the United States Code.

C. Jurisdiction.

1. The Tucker Act. 28 U.S.C. § 1491(a)(1). The COFC has jurisdiction to decide claims against the United States based on:

a. The Constitution;

b. An act of Congress;

c. An executive regulation; or

d. An express or implied-in-fact contract.

2. The Contract Disputes Act (CDA) of 1978. 41 U.S.C. § 7104(b). The Court has jurisdiction to decide appeals from contracting officers' final decisions.

3. The Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (codified at 28 U.S.C. § 1491(a)(2)). The COFC has jurisdiction to decide nonmonetary claims (e.g., disputes regarding contract terminations, rights in tangible or intangible property, and compliance with cost accounting standards) that arise under section 10(a)(1) of the CDA.

D. Standard of Review. 41 U.S.C. § 7104(b)(4). The COFC will review the case de novo. The COFC will <u>not</u> presume that the contracting officer's findings of fact and conclusions of law are valid. Instead, the COFC will treat the contracting

officer's final decision as one more piece of documentary evidence and weigh it with all of the other evidence in the record. Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994) (en banc) (overruling previous case law that a contracting officer's final decision constitutes a "strong presumption or an evidentiary admission" of the government's liability).

E. Perfecting an Appeal.

1. Timeliness. 41 U.S.C. § 7104(b)(3); RCFCs 3 and 6.

a. A contractor must file its complaint within 12 months of the date it received the contracting officer's final decision. See Janicki Logging Co. v. United States, 124 F.3d 226 (Fed. Cir. 1997) (unpub.); K&S Constr. v. United States, 35 Fed. Cl. 270 (1996); see also White Buffalo Constr., Inc. v. United States, 28 Fed. Cl. 145 (1992) (filing one day after the expiration of the 12 month period rendered it untimely).

b. In computing the appeals period, exclude:

(1) The day the contractor received the contracting officer's decision; and

(2) The last day of the appeals period if that day is:

(a) A Saturday, Sunday, or federal holiday; or

(b) A day on which weather or other conditions made the Clerk of Court's office inaccessible.

c. The COFC may deem a late complaint timely if:

(1) The plaintiff sent the properly addressed complaint by registered or certified mail, return receipt requested;

(2) The plaintiff deposited the complaint in the mail sufficiently in advance of the due date to permit its timely receipt in the ordinary course of the mail; and

(3) The plaintiff exercised no control over the complaint from the time of mailing to the time of delivery.

See B. D. Click Co. v. United States, 1 Cl. Ct. 239 (1982) (concluding that the contractor failed to demonstrate the applicability of the exception to the timeliness rules).

d. The Fulford Doctrine. See para. VI.F.3, above.

2. Filing Method. RCFC 3. The contractor must deliver its complaint to the Clerk of Court.

3. Contents. RCFC 8(a); RCFC 9(h).

a. If the complaint sets forth a claim for relief, the complaint must contain:

(1) A "short and plain" statement regarding the COFC's jurisdiction;

(2) A "short and plain" statement showing that the plaintiff is entitled to relief; and

(3) A demand for a judgment.

b. In addition, the complaint must contain, inter alia:

(1) A statement regarding any action taken on the claim by Congress, a department or agency of the United States, or another tribunal;

(2) A clear citation to any statute, regulation, or executive order upon which the claim is founded; and

(3) A description of any contract upon which the claim is founded.

4. The Election Doctrine. See para. II.B.3, above.

F. Procedures.

1. Process. RCFC 4. The Clerk of Court serves 5 copies of the complaint on the Attorney General (or the Attorney General's designated agent).

2. "Call Letter." 28 U.S.C. § 520.

a. The Attorney General must send a copy of the complaint to the responsible military department.

b. In response, the responsible military department must provide the Attorney General with a "written statement of all facts, information, and proofs."

3. Answer. RCFCs 8, 12, and 13. The government must answer the complaint within 60 days of the date it receives the complaint.

4. The court rules regulate discovery and pretrial procedures extensively, and the court may impose monetary sanctions for noncompliance with its

discovery orders. See M. A. Mortenson Co. v. United States, 996 F.2d 1177 (Fed. Cir. 1993).

5. Decisions may result from either a motion or a trial. Procedures generally mirror those of trials without juries before federal district courts. The judges make written findings of fact and state conclusions of law.

G. Remedies.

1. The COFC has jurisdiction "to afford complete relief on any contract claim brought before the contract is awarded including declaratory judgments, and such equitable and extraordinary relief as it deems proper." Federal Courts Improvements Act of 1982, Pub. L. No. 97-164, 96 Stat. 40 (codified at 28 U.S.C. § 1491(a)(3)). See Sharman Co., Inc. v. United States, 2 F.3d 1564 (Fed. Cir. 1993).

2. The COFC has no authority to issue injunctive relief or specific performance, except for reformation in aid of a monetary judgment, or rescission instead of monetary damages. See John C. Grimberg Co. v. United States, 702 F.2d 1362 (Fed. Cir. 1983); Rig Masters, Inc. v. United States, 42 Fed. Cl. 369 (1998); Paragon Energy Corp. v. United States, 645 F.2d 966 (Ct. Cl. 1981).

3. The COFC may award EAJA attorneys' fees. 28 U.S.C. § 2412.

H. Payment of Judgments. See para. VII.J., above.

I. Appealing an Adverse Decision.

1. Unless timely appealed, a final judgment bars any further claim, suit, or demand against the United States arising out of the matters involved in the case or controversy. 28 U.S.C. § 2519.

2. A party must appeal a final judgment to the CAFC within 60 days of the date the party receives the adverse decision. 28 U.S.C. § 2522. See RCFC 72.

IX. APPEALS TO THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT (CAFC).

A. National Jurisdiction.

1. The Federal Circuit has national jurisdiction. Dewey Elec. Corp. v. United States, 803 F.2d 650 (Fed. Cir. 1986); Teller Envtl. Sys., Inc. v. United States, 802 F.2d 1385 (Fed. Cir. 1986).

2. The Federal Circuit also exclusive jurisdiction over appeals from an agency BCA and the COFC pursuant to section 8(g)(1) of the CDA. 28 U.S.C. § 1295(a)(3) and (10).

B. Standard of Review. 41 U.S.C. § 7104(b)(4).

1. Jurisdiction. The court views jurisdictional challenges as "pure issues of law," which it reviews de novo. See Transamerica Ins. Corp. v. United States, 973 F.2d 1572, 1576 (Fed. Cir. 1992).

2. Findings of Fact. Findings of fact are final and conclusive unless they are fraudulent, arbitrary, capricious, made in bad faith, or not supported by substantial evidence. 49 U.S.C. § 609(b). See United States v. General Elec. Corp., 727 F.2d 1567, 1572 (Fed. Cir. 1984) (holding that the court will affirm a board's decision if there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"); Tecom, Inc. v. United States, 732 F.2d 935, 938 n.4 (Fed. Cir. 1995) (finding that the trier of fact's credibility determinations are virtually unreviewable).

C. Frivolous Appeals. The court will assess damages against parties filing frivolous appeals. See Dungaree Realty, Inc. v. United States, 30 F.3d 122 (Fed. Cir. 1994); Wright v. United States, 728 F.2d 1459 (Fed. Cir. 1984).

D. Supreme Court Review. The U.S. Supreme Court reviews decisions of the Federal Circuit by writ of certiorari.

X. CONTRACT ATTORNEY RESPONSIBILITIES IN THE DISPUTES PROCESS.

A. Actions upon Receipt of a Claim.

1. Review the claim and check the agency's facts and theories.

2. Verify that the contractor has properly certified all claims exceeding $100,000.

3. Advise the contracting officer to consider business judgment factors, as well as legal issues.

B. Contracting Officer's Final Decision.

1. Prior to reviewing the final decision, determine whether the claim should be certified. If the claim exceeds $100,000, ensure that a person authorized to bind the contractor properly certified the claim.

2. Ensure that the subject of the final decision is a nonroutine request for payment, rather than a contractor's invoice or preliminary request for adjustment.

3. Review the final decision for sufficiency of factual and legal reasoning.

4. Ensure that the decision letter properly sets forth the contractor's appeal rights.

C. R4 File.

1. Oversee the preparation of the Rule 4 file. If possible, coordinate with the trial counsel assigned to the appeal as to what documents to include/omit from the Rule 4 file.

2. Put privileged documents in a separate litigation file for transmission to the trial attorney.

D. Discovery.

1. Assist the trial attorney in formulating a discovery plan.

2. Identify knowledgeable government and contractor personnel and conduct preliminary interviews of government witnesses.

3. Draft interrogatories, requests for documents, requests for admissions, and other discovery requests. Prepare draft responses to any discovery requests propounded by the appellant.

4. Assist the trial counsel during depositions (e.g., by identifying key contractor personnel and pertinent documents related to the dispute). Coordinate with the trial counsel regarding the feasibility of conducting one or more depositions.

E. Hearings.

1. Through the trial attorney, coordinate with the Chief Trial Attorney concerning appearing as counsel of record.

2. To the extent practicable, assist in witness and evidence preparation.

3. Assist in the preparation and/or review of post-hearing briefs.

F. Client Expectations. Assist the trial attorney in providing the contracting officer and other interested parties regular status updates regarding the appeal.

G. Settlement. Work with the contracting officer and the trial attorney regarding the costs and benefits of litigating the claim. Strive for a position that reflects sound business judgment and protects the interests of the government.

XI. CONCLUSION.

ATTACHMENT A

52.233-1 Disputes.

As prescribed in 33.215, insert the following clause:

Disputes (July 2002)

(a) This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

(c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding $100,000 is not a claim under the Act until certified. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d)(1) A claim by the Contractor shall be made in writing and, unless otherwise stated in this contract, submitted within 6 years after accrual of the claim to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.

(2)(i) The Contractor shall provide the certification specified in paragraph (d)(2)(iii) of this clause when submitting any claim exceeding $100,000.

(ii) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.

(iii) The certification shall state as follows: "I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the Contractor."

(3) The certification may be executed by any person duly authorized to bind the Contractor with respect to the claim.

(e) For Contractor claims of $100,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-

certified claims over $100,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

(f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.

(g) If the claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent, may agree to use alternative dispute resolution (ADR). If the Contractor refuses an offer for ADR, the Contractor shall inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the offer.

(h) The Government shall pay interest on the amount found due and unpaid from (1) the date that the Contracting Officer receives the claim (certified, if required); or (2) the date that payment otherwise would be due, if that date is later, until the date of payment. With regard to claims having defective certifications, as defined in FAR 33.201, interest shall be paid from the date that the Contracting Officer initially receives the claim. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim.

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

(End of clause)

Alternate I (Dec 1991). As prescribed in 33.215, substitute the following paragraph (i) for paragraph (i) of the basic clause:

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under or relating to the contract, and comply with any decision of the Contracting Officer.

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Chapter 22B
The Litigation Process

2013 Contract Attorneys Deskbook

CHAPTER 22B

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CHAPTER 18C

THE LITIGATION PROCESS

I. INITIATING SUIT.

A. Action Commenced With A Complaint.

1. A "short and plain" statement showing jurisdiction and entitlement to relief, and demanding judgment for the relief sought. RCFC 8(a).

2. In addition, the complaint must contain:

a. A statement regarding any action taken on the claim by Congress, a department or agency of the United States, or another tribunal, RCFC 9(o);

b. A citation to any statute, regulation, or Executive order upon which the claim is founded, RCFC 9(j); and

c. Identification of any contract on which the claim is founded, as well as a description or attached copy of the contract. RCFC 9(k).

3. Compare: At BCAs, action commenced with notice of appeal.

B. Statute of Limitations.

1. Contract claims. Generally, six years. 28 U.S.C. § 2501.

2. The COFC generally considers the Clerk of Court's record of receipt to be final and conclusive evidence of the date of filing. But the Court will deem a late complaint timely if the plaintiff:

a. Sent the complaint to the proper address by registered or certified mail, return receipt requested;

b. Deposited the complaint in the mail far enough in advance of the due date to allow delivery by the due date in the ordinary course of the mail; and

c. Exercised no control over the complaint from the date of mailing to the date of delivery. See B.D. Click Co. v. United States, 1 Cl. Ct. 239 (1982) (holding that the contractor failed to demonstrate the applicability of exceptions to timeliness rules).

C. The "Call Letter."

1. 28 U.S.C. § 520.

2. The Attorney General must send a copy of the complaint to the responsible military department, along with a request for all of the facts, circumstances, and evidence concerning the claim that are within the military department's possession or knowledge.

3. The responsible military department must then provide the Attorney General with a "written statement of all facts, information, and proofs."

4. "Do not destroy" reminder.

5. Don't wait for the call letter before contacting us. DOJ is usually the last to know when a complaint is filed.

II. RESPONDING TO THE COMPLAINT.

A. The Answer.

1. RCFC 8, 12, and 13.

2. The Government must either respond with a motion under RCFC 12 or file its answer within 60 days of the date it receives the complaint.

3. If the Government submits an answer, the Government must admit or deny each averment in the complaint.

4. If the Government lacks sufficient knowledge or information to admit or deny a particular averment, the Government must say so.

5. If the Government only intends to oppose part of an averment, the Government must specify which part of the averment is true and deny the rest.

6. Generally, DOJ files bare bones admissions and denials. Compare with ASBCA practice. However, each such statement must be supportable. See discussion of Rule 11, below.

B. Defenses.

1. RCFC Nos. 8 and 12.

2. If an answer is required, the Government must plead every factual and legal defense to a claim for relief.

3. Where appropriate, the Government asserts the following defenses by motion:

   a. Lack of subject-matter jurisdiction;

   b. Lack of personal jurisdiction;

   c. Insufficiency of process; and

   d. Failure to state a claim upon which the Court may grant relief.

4. If an answer is required, the Government must plead the following affirmative defenses:

   a. "accord and satisfaction,

   b. arbitration and award,

   c. discharge in bankruptcy,

   d. duress,

   e. estoppel,

   f. failure of consideration,

   g. fraud, illegality,

   h. laches,

   i. license,

   j. payment,

   k. release,

   l. res judicata,

   m. statute of frauds,

   n. statute of limitations,

   o. waiver, and

   p. any other matter constituting an avoidance or affirmative defense." RCFC 8(c).

C. Counterclaims.

1. RCFC 13.

2. To preserve its right to judicial enforcement of a claim, the Government must state any claim it has against the plaintiff as a counterclaim if:

   a. The claim arises out of the same transaction or occurrence as the plaintiff's claim; and

   b. The claim does not require the presence of third parties for its adjudication.

3. The Government may state any claims not arising out of the same transaction or occurrence as the plaintiff's claim as counterclaims.

D. Signing Pleadings, Motions, and Other Papers.

1. RCFC 11.

2. The attorney of record must sign every pleading, motion, and other paper. The attorney's signature constitutes a certification that the attorney has read the pleading, motion, or other paper; that to the best of the attorney's knowledge, information, and belief formed after reasonably inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

3. The COFC will strike a pleading, motion, or other paper if the attorney does not promptly sign it after the omission of the attorney's signature is brought to the attorney's attention.

4. The COFC will impose appropriate sanctions against the attorney and/or the represented party if the attorney signs a pleading, motion, or other paper in violation of this rule.

E. Early Meeting of Counsel.

1. RCFC, App. A, Pt. II.

2. The parties must meet after the Government files its answer to:

   a. Identify each party's factual and legal contentions;

   b. Discuss each party's discovery needs and discovery schedule; and

c. Discuss settlement.

d. As a practical matter, DOJ orchestrates this.

F. Joint Preliminary Status Report (JPSR).

1. RCFC, App. A, Pt. III.

2. The parties must file a JPSR no later than 49 days after the Government answers or plaintiff files its reply to a Government counter-claim.

3. The JPSR must set forth answers to the following questions:

a. Does the Court have jurisdiction?

b. Should the case be consolidated with any other action?

c. Should trial of liability and damages be bifurcated?

d. Should further proceedings be deferred pending consideration of another case? Consider 28 U.S.C. § 1500; UNR Indus., Inc. v. United States, 962 F.2d 1013 (1992), cert. granted, 113 S. Ct. 373(1992); Keene Corn. v. United States, 113 S. Ct. 2035 (1993). Subsequent interpretations of 28 U.S.C. § 1500 include: Wilson v. United States, 32 Fed. Cl. 794 (1995) (same recovery in both actions); McDermott. Inc. v. United States, 30 Fed. Cl. 332 (1994) (constitutional claims and challenges to Federal statutes pending in a district court action not the same as the contract actions before the COFC); Marshall Assoc. Contractors Inc. v. United States, 31 Fed. Cl. 809 (1994) (surety's suit against the United States pending in another Federal court not a jurisdictional bar to contractor's suit before the COFC).

e. Will a remand or suspension be sought?

f. Will additional parties be joined?

g. Does either party intend to file a motion to dismiss for lack of jurisdiction, failure to state a claim, or summary judgment? If so, a schedule.

h. What are the relevant issues?

i. What is likelihood of settlement?

j. Do the parties anticipate proceeding to trial? If so, does any party want to request expedited trial scheduling?

k. Is there any other information of which the court should be made aware?

l. What do the parties propose for a discovery plan and deadlines?

III. BASIS FOR RESPONSE - THE LITIGATION REPORT.

A. The agency is required, by statute, to file a litigation report. 28 U.S.C. § 520(b).

B. Army Regulation 27-40, paragraph 3-9 requires the SJA or legal advisor to prepare the litigation report when directed by Litigation Division. Not a Rule 4 File. Neither the CFC nor the plaintiff sees the report. Err on the side of inclusion, not exclusion. Stamp "Attorney Work Product."

C. AR 27-40, "Litigation." Chapter 3.9, "Litigation Reports."

1. Statement of Facts. A complete statement of the facts on which the action and any possible Government defenses are based. Where possible, support facts by reference to documents or witness statements. Include details of previous administrative actions, such as the filing and results of an administrative claim.

2. Setoff or Counterclaim. Identify with supporting facts.

3. Responses to Pleadings. Prepare a draft answer or other appropriate response to the pleadings. (See fig 3-1, Sample Answer). Discuss whether allegations of fact are well-founded. Refer to evidence that refutes factual allegations.

4. Memorandum of Law.

a. "Include a brief statement of the applicable law with citations to legal authority. Discussions of local law, if applicable, should cover relevant issues such as measure of damages . . . . Do not unduly delay submission of a litigation report to prepare a comprehensive memorandum of law."

b. Identify jurisdictional defects and affirmative defenses.

c. Assess litigation risk. Do not hesitate to form (and support) a legal opinion. Give a candid assessment of the potential for settlement.

5. Potential witness information. List each person having information relevant to the case and provide an office address and telephone number. If there is no objection, provide the individual's social security account number, home address, and telephone number. This is "core information"

required by Executive Order No. 12778 (Civil Justice Reform). Finally, summarize the information or potential testimony that each person listed could provide." NB: DOJ usually does not require SSNs, but it really needs to know witnesses' expected availability (retiring? PCS'ing to Greenland?).

6. Exhibits – "Attach a copy of all relevant documents . . . . Copies of relevant reports of claims officers, investigating officers, boards, or similar data should be attached, although such reports will not obviate the requirement for preparation of a complete litigation report . . . Where a relevant document has been released pursuant to a Freedom of Information Act (FOIA) request, provide a copy of the response, or otherwise identify the requestor and the records released.

7. Draft an answer.

8. Identify documents and information targets for discovery. Think about things you know exist or must exist that will help the agency position as well as things that might exist that might undermine the agency's position.

9. Consider drafting a motion to dismiss for lack of jurisdiction, RCFC 12(b)(1), or for failure to state a claim, RCFC 12(b)(6).

10. Consider drafting motion for summary judgment, RCFC 56. NB: RCFC 56(d) requires that the moving party file a separate document entitled Proposed Findings of Uncontroverted Fact, and that the responding party file a "Statement of Genuine Issues," and permits the responding party to file proposed findings of uncontroverted facts.

D. Analyze the Client.

1. If the plaintiff's position is unbelievable, there is some chance the agency has simply misunderstood it (perhaps because the position was poorly presented). Identify the questions that will assure the Government understands the contractor's point so we can target discovery, properly respond, and be assured the Government will not be blind-sided at trial.

2. Identify any agency concerns, uncertainty, hard or soft spots (the contracting officer will fight to the death vs. the contracting officer was surprised the contractor never called to negotiate), witness problems or biases, and anything else you would like to know if you were trying the case.

IV. AGENCY ROLE THROUGHOUT DISCOVERY.

A. Discovery scope.

RCFC 26, Appendix A, Pt. V, ¶¶ 9-10.

B. Methods of Discovery.

1. RCFC 26(a).

2. The parties may obtain discovery by depositions upon oral examination or written questions, written interrogatories, requests for the production of documents, and requests for admission.

3. The Court may limit discovery if:

a. The discovery sought is unreasonably cumulative or duplicative;

b. The party seeking the discovery may obtain it from a more convenient, less burdensome, or less expensive source;

c. The party seeking the discovery has had ample opportunity to obtain the information sought; or

d. The burden or expense of the proposed discovery outweighs its likely benefit.

e. Remember, defendant is the United States – thus discovery requests could include more than one Federal agency.

C. Protective Orders.

a. RCFC 26(c) and Form 8.

b. The court may make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

D. Depositions.

1. RCFC 30.

2. Purpose –

a. Lock in testimony, pure exploration, testing a theory/confirming a negative.

b. Need relevant documents to refresh witness's testimony and keep questioning specific.

3. Subpoenas may be served at any place within 100 miles of deposition, hearing or trial. Upon a showing of good cause, a subpoena may be served at any other place. RCFC 45(b)(2).

4. Expenses. RCFC 30(g).

   a. The party taking the deposition must pay the cost of recording the deposition.

   b. Tell DOJ what you will need: disk; condensed (with word index); full. Making copies may or may not be permitted.

5. Defending Subpoenas.

   a. Agency counsel should coordinate service.

   b. If the party that gave notice of the deposition failed to attend (or failed to subpoena a witness who failed to attend), the court may order that party to pay the other party's reasonable expenses, including reasonable attorney's fees.

   c. DOJ should take lead in preparing witnesses, including how much and how to prepare.

   d. Agency may be asked to identify relevant documents and likely questions.

   e. All contact with witness must be coordinated with DOJ.

6. Submission of Transcript to Witness.

   a. RCFC 30(e).

   b. The deponent must examine and read the transcript unless the witness and the parties waive the requirement.

   c. The deponent may make changes; however, the deponent must sign a statement that details the deponent's reasons for making them.

   d. Agency counsel should coordinate this for agency witnesses.

E. Interrogatories.

1. RCFC 33.

2. The Government may serve interrogatories on the plaintiff after the plaintiff files the complaint, and the plaintiff may serve interrogatories on the Government after the Government receives the complaint.

3. The party upon whom the interrogatories have been served (i.e., the answering party) must normally answer or object to the interrogatories within 30 days of service.

4. The answering party may answer an interrogatory by producing business records if:

   a. The business records contain the information sought; and

   b. The burden of deriving or ascertaining the answer sought is substantially the same for both parties.

   c. The responding party must be specific about where the information can be located. Otherwise, the burden is not the same.

5. The answering party must sign a verification attesting to the truth of the answers. The answering party's attorney must sign the objections.

F. Requests for the Production of Documents.

1. RCFC 34.

2. The rules are similar to the rules for interrogatories.

3. The party producing the records for inspection/copying may either:

   a. Produce them as they are kept in the usual course of business; or

   b. Organize and label them to correspond to the production request.

4. Exercise caution in privilege review: once they've got it, assume we can't take it back. Prepare a draft privilege list of documents withheld, providing sufficient detail to assure recipient can analyze applicability of privilege (usually, to, from, subject, and identify of sender/recipient's office (e.g., "Counsel").

G. Requests for Admission.

1. RCFC 36.

2. The answering party must:

   a. Specifically deny each matter; or

b. State why the answering party cannot truthfully admit or deny the matter.

3. The answering party may not allege lack of information or knowledge unless the answering party has made a reasonable inquiry into the matter.

4. If the answering party fails to answer or object to a matter in a timely manner, the matter is admitted.

5. Admissions are conclusive unless the court permits the answering party to withdraw or amend its answer.

6. Great tool for narrowing the facts in dispute.

H. Agency Counsel Role in Responding to Interrogatories, Requests for Production and Admissions.

1. Identify who should answer.

2. Inform all potential witnesses and affected activities that a lawsuit has been filed; that, as a normal part of discovery, plaintiff is entitled to inspect and copy all related documents; that "documents" includes electronic documents, such as email and "personal" notes kept in performing official duties, such as field notebooks; that witnesses are not to dispose of any such documents; that they should begin to collect and identify all files related to the lawsuit – including those at home.

3. Current employees also should be told they are represented by DOJ and the contractor is represented by counsel, and they should not talk to the contractor or its attorneys about the lawsuit.

I. Discovery Planning Conference.

1. Agency counsel and answering witnesses should discuss with DOJ a strategy for responding, to include:

a. Objections in lieu of responses (what we won't tell them);

b. Objections with limited responses (what we will tell them), e.g., requests for "all documents" or "all information related to."

c. In which cases will DOJ will produce documents instead of responding to an interrogatory in accordance with RCFC 33(c).

d. How documents will be organized and stamped, including adoption of a stamping protocol (e.g.. "HQDA0001 . . . ,"

"AMC0001 . . . .") to identify source of produced documents and to identify them as having been subject to discovery effort.

e. How copying and inspection will be handled – security concerns? Cost concerns?

2. Preparation of a privilege log. All relevant documents not produced and not covered by an objection must be listed on a privilege log furnished to the other side. Typically, they list to, from, date, subject, and privilege claimed. They should be sufficiently detailed so that the basis for the privilege is evident but does not disclose the privileged matter. E.g., "Ltr. From MAJ Jones, AMC Counsel, to Smith, CO re: claim."

J. Failure to Cooperate in Discovery.

1. Motion to Compel Discovery. RCFC 37(a)(3). If a party or a deponent fails to cooperate in discovery, the party seeking the discovery may move for an order compelling discovery.

2. Expenses. RCFC 37(a)(5). The court may order the losing party or deponent to pay the winning party's reasonable expenses, including attorney fees.

3. Sanctions. RCFC 37(b).

a. If a deponent fails to answer a question after being directed to do so by the court, the court may hold the deponent in contempt of court.

b. If a party fails to provide or permit discovery after being directed to do so, the court may take one or more of the following actions:

(a) Order that designated facts be taken as established for purposes of the action;

(b) Refuse to allow the disobedient party to support or oppose designated claims or defenses;

(c) Refuse to allow the disobedient party to introduce designated facts into evidence;

(d) Strike pleadings in whole or in part;

(e) Stay further proceedings until the order is obeyed;

(f) Dismiss the action in whole or in part;

(g) Enter a default judgment against the disobedient party;

(h) Hold the disobedient party in contempt of court; and

(i) Order the disobedient party—and/or the attorney advising that party—to pay the other party's reasonable expenses, including attorney's fees.

c. In Mortenson Co. v. United States, 996 F.2d 1177 (Fed. Cir. 1993), the CAFC affirmed a $22 million award of attorney fees and costs against the United States as a Rule 37(a)(4) sanction for the VA's failure to comply with certain discovery orders.

V. TRIAL.

A. Meeting of counsel.

1. No later than 60 days before the pretrial conference, counsel for the parties shall:

a. Exchange all exhibits (except impeachment) to be used at trial.

b. Exchange a final list of names and addresses of witnesses.

c. To disclose to opposing counsel the intention to file a motion.

d. Resolve, if possible, any objections to the admission of oral or documentary evidence.

e. Disclose to opposing counsel all contentions as to applicable facts and law, unless previously disclosed.

f. Engage in good-faith, diligent efforts to stipulate and agree to facts about which the parties know, or have reason to know, there can be no dispute for the purpose of simplifying the issues at trial.

g. Exhaust all possibilities of settlement.

h. Ordinarily, the parties must file:

i. A memorandum of contentions of fact and law;

j. A joint statement setting forth the factual and legal issues that the court must resolve NLT 21 days before the pretrial conference;

k. A witness list;

l. An exhibit list.

2. Failure to identify an exhibit or a witness may cause the Court to exclude the exhibit or witness. Appendix A ¶¶ 13(a), 13(b), 15.

3. The attorneys who will try the case must attend the pretrial conference.

B. Pre-Trial Preparation.

1. Contacting all witnesses -- ensuring none will be gone during trial and that former Government employees have signed representation agreements if they wish to.

2. Outlining Witness Testimony.

3. Preparing Witnesses.

4. Preparing FRE 1006 summaries.

5. Copying and organizing documents.

C. Offers of Judgment.

1. RCFC 68.

2. The Government may make an offer of judgment at any time more than 10 days before the trial begins.

3. If the offeree fails to accept the offer and the judgment the offeree finally obtains is not more favorable than the offer, the offeree must pay any costs the Government incurred after it made the offer.

VI. SETTLEMENT.

A. Authority

1. Attorney General has authority to settle matters in litigation, 28 U.S.C. § 516, and has delegated that authority depending upon dollar value of settlement. 28 C.F.R. § 0.160, et seq., e.g., AAG, Civil Division may settle a defensive claim when the principal amount of the proposed settlement does not exceed $2 million.

2. The AAG has redelegated office heads and U.S. Attorneys, but redelegation subject to exceptions, including case where agency opposes settlement.

3. Whether matter is "in litigation," is not always clear. The Sharman Co., Inc. v. United States, 2 F.3d 1564 (1993); Boeing Co. v. United States, Cl. Ct. No. 92-14C (June 3, 1992), reversed 92-5129, 92-5131 (Fed. Cir., March 19, 1992) (unpublished); Durable Metal Products v. United States, 21 Cl. Ct. 41, 45 (1990); but see Hughes Aircraft Co. v. United States, 209 Cl. Ct. 446, 465, 534 F.2d 889, 901 (1976). The body of law on this issue continues to develop. See, e.g. Alaska Pulp Corporation v. United States, 34 Fed. Cl. 100 (1995) (default terminations); Volmar Construction, Inc. v. United States, 32 Fed. Cl. 746 (1995) (claims and setoffs); Cincinnati Electronics Corp. v. United States, 32 Fed. Cl. 496 (1994) (default terminations).

4. When in doubt, assume matter is in litigation and all discussions should be made through DOJ.

B. Assume a Discussion About Settlement Is Coming.

1. The agency has little influence on the process when the agency counsel is not sufficiently familiar with case developments to offer a persuasive opinion.

2. Explain to your clients that ADR and, if warranted, settlement are more arrows in the quiver for resolving the dispute.

3. Explain that settlement should be used when it avoids injustice, when the defense is unprovable, when a decision can be expected to create an unfavorable precedent; and when settlement provides a better outcome (including the fact it might include consideration that a court judgment will not) than could be expected from a trial. The availability of expiring contract funds might also be considered.

4. In that regard, help client understand difference between their believing a fact, and it being legally significant and provable.

5. Identify early on who within the agency has authority to recommend settlement, and who within the agency has the natural interest or "pull" to affect that recommendation, such that they should be continually updated on the litigation.

C. Settlement Procedure.

1. Agencies must be consulted regarding "any significant proposed action if it is a party, if it has asked to be consulted with respect to any such proposed action, or if such proposed action in a case would adversely affect any of its policies." U.S. Attorney's Manual, para.4-3.140C (available at www.usdoj.gov).

2. Litigation attorney coordinates with installation attorney and contracting officer to determine whether settlement is appropriate.

3. If settlement deemed appropriate, the litigation attorney prepares a settlement memorandum. Next the litigation attorney, submits the memorandum through the Branch Chief to the Chief, Litigation Division. The Chief, Litigation Division must approve all settlement agreements. He has authority to act on behalf of TJAG and the Secretary of the Army on litigation issues, including the authority to settle or compromise cases. See AR 27-40, paragraph 1-4d(2).

4. Finally, the recommendation of the Chief, Litigation Division is forwarded to the DOJ. Then DOJ goes through a similar process to get approval of a settlement.

VII. ALTERNATIVE DISPUTE RESOLUTION (ADR).

A. The COFC pilot program

1. The COFC pilot program requires that designated cases be automatically referred to an ADR judge; however, the parties may opt out.

2. Each party presents an abbreviated version of its case to a neutral advisor, who then assists the parties to negotiate a settlement. Suggested procedures are set forth in the General Order.

B. ADR Methods

1. The court offers ADR methods for use in appropriate cases.

a. Use of a settlement judge.

b. Mini-trial.

2. Both ADR methods are designed to be voluntary and flexible.

3. If the parties want to employ one of the ADR methods, they should notify the presiding judge as soon as possible.

a. If the presiding judge determines that ADR is appropriate, the presiding judge will refer the case to the Office of the Clerk for the assignment of an ADR judge.

b. The ADR judge will exercise ultimate authority over the form and function of each ADR method.

c. If the parties fail to reach a settlement, the Office of the Clerk will return the case to the presiding judge's docket.

VIII. POST JUDGMENT.

A. Final Judgment Rule.

Unless timely appealed, a final judgment of the court bars any further claim, suit, or demand against the United States arising out of the matters involved in the case or controversy. 28 U.S.C. § 2519.

B. New Trials.

1. 28 U.S.C. § 2515; RCFC 59.

2. The COFC may grant a new trial or rehearing or reconsideration based on common law or equity.

3. The COFC may grant the Government a new trial—and stay the payment of any judgment—if it produces satisfactory evidence that a fraud, wrong, or injustice has been done to it:

a. While the action is pending in the COFC;

b. After the Government has instituted proceedings for review; or

c. Within 2 years after final disposition of the action.

C. Appeals.

1. See generally, Jennifer A. Tegfeldt, A Few Practical Considerations in Appeals Before the Federal Circuit, 3 FED. CIR. BAR. J. 237 (1993).

2. A party may appeal an adverse decision to the CAFC within 60 days of the date the party received the decision. 28 U.S.C. § 2522. See RCFC 72.

3. Solicitor General approves/disapproves appeals by the United States.

D. Paying plaintiff attorney fees.

A different attorney fee statute. The Court of Federal Claims grants Equal Access To Justice Act (EAJA) relief pursuant to 28 U.S.C. § 2412, unlike the BCAs, which grant EAJA relief pursuant to 5 U.S.C. § 504. See also, Form 5 in Appendix of the RCFC (application form for EAJA fees).

E. Payment of Judgments.

1. An agency may access the "Judgment Fund" to pay "[a]ny judgment against the United States on a [CDA] claim." 41 U.S.C. § 612(a). See 31 U.S.C. § 1304; cf. 28 U.S.C. § 2517.

2. The Judgment Fund also pays compromises under the Attorney General's authority.

3. If an agency lacks sufficient funds to cover an informal settlement agreement, it may "consent" to the entry of a judgment against it. Bath Irons Works Corp. v. United States, 20 F.3d 1567, 1583 (Fed. Cir. 1994).

4. An agency that accesses the Judgment Fund to pay a judgment must repay the Fund from appropriations that were current at the time the judgment was rendered against it. 41 U.S.C. § 612(c).

Chapter 23

Pricing of Contract Adjustments

2013 Contract Attorneys Deskbook

CHAPTER 23

PRICING OF CONTRACT ADJUSTMENTS

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CHAPTER 23

PRICING OF CONTRACT ADJUSTMENTS

I. INTRODUCTION. Following this block of instruction, students will understand:

A. The circumstances that entitle a contractor to a contract price adjustment.

B. The measurement of a price adjustment.

C. The methods and burden of proving a price adjustment.

D. The various special items that often comprise a price adjustment.

E. Quantum Case Planning.

II. REFERENCES

A. 41 U.S.C. §§ 1501-1506.

B. Pricing of Adjustments, Chapter 8, Administration of Government Contracts, 4th Edition, Cibinic, Nash & Nagle, 2006.

C. Federal Acquisition Regulation (FAR) 30, Cost Accounting Standards Administration; FAR 31, Contract Cost Principles and Procedures; FAR 43.2 Change Orders; FAR 52.243-1 to 52.243-7; 48 CFR 9903.202-1to 5 (FAR Appendix); DFARS 243.205-70.

D. DFARS 243.205-70 and 252.243-7001 Pricing of Contract Modifications, (Dec 1991); DFARS 243.205-71 and 252.243-7002 Requests for Equitable Adjustment (Mar 1998).

E. Accounting Guide, Defense Contract Audit Agency Pamphlet No. 7641.90, Information for Contractors, http://www.dcaa.mil; OMB Circular A-122; OMB Circular No. A-21 Cost Principles for Education Institutions; OMB Circular No. A-87, Cost Principles for State and Local Governments.

III. OVERVIEW

A. Entitlement to More Money. There are three circumstances that entitle contractors to more than the original contract price:

1. Equitable adjustment. An equitable adjustment entitles the contractor to receive certain additional costs of performance **plus a reasonable profit** on those costs. Equitable adjustments are based on contract clauses granting that remedy, including:

   a. FAR 52.243-1 thru -7, Changes.

   b. FAR 52.245-1, -2, Government Furnished Property.

   c. FAR 52.248-1 thru -3, Value Engineering.

   d. FAR 52.242-15, Stop Work Order.

   e. FAR 52.236-2, Differing Site Conditions.

2. Adjustments. An adjustment entitles the contractor to recover certain additional performance costs, but not profit. The rationale for lack of profit is that there is no change in work and/or risk—only the period in which performance occurs. There are two types of adjustments:

   a. Work stoppage adjustments. These adjustments allow the contractor to recover certain direct and indirect performance costs. Contract clauses providing for such adjustments are:

      (1) FAR 52.242-14, Suspension of Work. See Thomas J. Papathomas, ASBCA No. 51352, 99-1 BCA ¶ 30,349;[No specific references to FAR, Part 52.242-14, just full text clause with substantially the same language. Negative treatment of the case has to do with an EAJA issue.] *see also* GASA, Inc. v. U.S., 79 Fed. Cl. 325, 347 (2007) Tom Shaw, Inc., ASBCA No. 28596, 95-1 BCA ¶ 27457 [Decision adhered to on reconsideration.].

      (2) FAR 52.242-17, Government Delay of Work.

   b. Labor standards adjustments. Adjustments under labor standards clauses include only the increased costs of direct labor (and do not include profit). See FAR 52.222-43, Fair Labor Standards Act and Service Contract Act – Price Adjustments (Multiple Year and

Option Contracts); FAR 52.222-44, Fair Labor Standards Act and Service Contract Act – Price Adjustments; All Star/SAB Pacific, J.V., ASBCA No. 50856, 98-2 BCA ¶ 29,958; U.S. Contracting, Inc., ASBCA No. 49713, 97-2 BCA ¶ 29,232. But see BellSouth Communications Sys., Inc., ASBCA No. 45955, 94-3 BCA ¶ 27,231 (holding that a price adjustment under FAR 52.222-6, Davis-Bacon Act, did not preclude profit).

3. Damages. The contractor can recover common law breach of contract damages in certain very narrow situations.

a. A contractor may not assert a claim for breach of contract damages when there is a remedy-granting contract clause. Information Sys. & Network Corp., ASBCA No. 42659, 99-1 BCA ¶ 30,665 (holding that claim for breach of damages barred by convenience termination clause); Hill Constr. Corp., ASBCA No. 49820, 99-1 BCA ¶ 30,327 (denying a breach claim for lost profits where the underlying changes were within the ambit of the Changes clause).

b. Situations where breach damages may be recovered include:

(1) Breach of a requirements contract. Bryan D. Highfill, HUDBCA No. 96-C-118-C7, 99-1 BCA ¶ 30,316.

(2) Bad faith termination for convenience. Praecomm, Inc. v. U.S., 78 Fed.Cl. 5, 12 (2007); Torncello v. United States, 231 Ct. Cl. 20, 681 F.2d 756 (1982); *but see* Custom Printing v. U.S., 51 Fed.Cl. 729, 734 (2002) (Questioned the level for standard of review for termination for convenience.).

(3) Government's failure to disclose material information. Shawn K. Christensen, dba Island Wide Contracting, AGBCA No. 95-188-R, 95-2 BCA ¶ 27,724.

c. Damages are measured under common law principles (see Section V.E., infra), although cost principles may apply. Chevron, USA, Inc. v. U.S., 71 Fed. Cl. 236 (2006); AT&T Tech., Inc. v. United States, 18 Cl. Ct. 315 (1989) (Decision later criticized on other, more specific grounds); Shawn K. Christensen, dba Island Wide Contracting, AGBCA No. 95-188-R, 95-2 BCA ¶ 27,724.

(1) Consequential Damages. The general rule is that consequential damages are not recoverable unless they are foreseeable and caused directly by the government's breach. Prudential Ins. Co. of Am. v. United States, 801 F.2d 1295 (Fed. Cir. 1986); Land Movers Inc. and O.S. Johnson - Dirt Contractor (JV), ENG BCA No. 5656, 91-1 BCA ¶ 23,317 (no recovery of lost profits based on loss of bonding capacity; also no recovery related to bankruptcy, emotional distress, loss of business, etc.).

(2) Compensatory Damages. A contractor whose contract was breached by the government is entitled to be placed in as good a position as it would have been if it had completed performance. U.S. v. Delta Constr. Int'l, Inc., No. 01-1253, 2002 U.S. App. LEXIS ____ (Fed. Cir., Mar. 13, 2002); PHP Healthcare Corp., ASBCA No. 39207, 91-1 BCA ¶ 23,647 (the measure of damages for failure to order the minimum quantity is not the contract price; the contractor must prove actual damages). Compensatory damages include a reliance component (costs incurred as a consequence of the breach), and an expectancy component (lost profits). Keith L. Williams, ASBCA No. 46068, 94-3 BCA ¶ 27,196.

B. Pricing Formula.

1. General Rule.

a. The basic adjustment formula is the difference between the reasonable cost to perform the work as originally required, and the reasonable cost to perform the work as changed. See B.R. Servs., Inc., ASBCA Nos. 47673, 48249, 99-2 BCA ¶ 30,397 (holding that the contractor must quantify the cost difference—not merely set forth the costs associated with the changed work); Buck Indus., Inc., ASBCA No. 45321, 94-3 BCA ¶ 27,061.

b. Pricing adjustments should not alter the basic profit or loss position of the contractor before the change occurred. "An equitable adjustment may not properly be used as an occasion for reducing or increasing the contractor's profit or loss . . . for reasons unrelated to a change." U.S. ex rel Bettis v. Odebrecht, 393 F.3d 1321 (D.C. Cir. 2005); Pacific Architects and Eng'rs, Inc. v. United States, 203 Ct. Cl. 499, 508 491 F.2d 734, 739 (1974). See also Stewart & Stevenson Servs., Inc., ASBCA No. 43631, 97-2 BCA ¶ 29,252

modified by 98-1 BCA ¶ 29,653 (holding that a contractor is entitled to profit on additional work ordered by the Army even though the original work was bid at a loss); Westphal Gmph & Co., ASBCA No. 39401, 96-1 BCA ¶ 28194 (Reversed, remanded, based on factual issue, not legal premises).

2. Pricing Additional Work. Agencies price additional work based on the reasonable costs actually incurred in performing the new work. CEMS, Inc. v. U.S., 59 Fed. Cl. 168 (2003); Delco Elecs. Corp. v. United States, 17 Cl. Ct. 302 (1989), aff'd, 909 F.2d 1495 (Fed. Cir. 1990); The contractor should segregate and accumulate these costs.

3. Pricing Deleted Work.

   a. Agencies price deleted work based on the difference between the estimated costs of the original work and the actual costs of performing the work after the change. Knights' Piping, Inc., ASBCA No. 46985, 94-3 BCA ¶ 27,026; Anderson/Donald, Inc., ASBCA No. 31213, 86-3 BCA ¶ 19,036. But see Condor Reliability Servs, Inc., ASBCA No. 40538, 90-3 BCA ¶ 23,254.

   b. When the government partially terminates a contract for convenience, a contractor is generally entitled to an equitable adjustment on the continuing work for the increased costs borne by that work as a result of a termination. Deval Corp., ASBCA Nos. 47132, 47133, 99-1 BCA ¶ 30,182; Cal-Tron Sys., Inc., ASBCA Nos. 49279, 50371 97-1 BCA ¶ 28,986; Wheeler Bros., Inc., ASBCA No. 20465, 79-1 BCA ¶ 13,642.

      (1) Convenience Termination Settlements. A contractor is not entitled to profit as part of a termination for convenience settlement proposal if the contractor would have incurred a loss had the entire contract been completed. FAR 49.203. The government has the burden of proving that the contractor would have incurred a loss at contract completion. R&B Bewachungs, GmbH, ASBCA No. 42214, 92-3 BCA ¶ 25,105. A contractor is not entitled to anticipatory profits as part of a convenience termination settlement proposal. Dairy Sales Corp. v. United States, 593 F.2d 1002 (Ct. Cl. 1979).

4. Responsibility. Where the parties share the fault, they share liability for the added costs. See Essex Electro Eng'rs, Inc., v. Danzig, 224 F.3d 1283

(Fed. Cir. 2000); Dickman Builders, Inc., ASBCA No. 32612, 91-2 BCA ¶ 23,989.

C. Recoverable Costs. The cost principles of FAR Part 31 apply to the pricing of contracts, subcontracts, and modifications whenever cost analysis is performed and when the determination, negotiation or allowance of costs is required by a contract clause. FAR 31.000. DoD requires the cost principles to be applied to all fixed price contracts when pricing any adjustment, such as a modification, under the contract. DFARS 243.205-70.

1. Allowability: When FAR Part 31 applies, contractors may claim only certain costs for adjustment purposes. The concept of allowability is ultimately a question of whether a particular item of cost should be recoverable as a matter of public policy. Boeing North American, Inc. v. Roche, 298 F.3d 1274, 1281 C.A. Fed. (2002).

a. A cost is allowable only when the cost complies with **all** the following requirements:

(1) Reasonableness. See discussion below.

(2) Allocability. See discussion below.

(3) Standards promulgated by the CAS Board, if applicable, **or** generally accepted accounting principles (GAAP) and practices appropriate to the circumstances.

(4) Terms of the contract. See discussion below on advance agreements.

(5) Any limitations set forth in FAR part 31. See discussion below. FAR 31.201-2(a).

2. Reasonable. To be allowable, a cost must be reasonable. A cost is reasonable if, in its nature and amount, it does not exceed that which a prudent person would incur in the conduct of a competitive business. FAR 31.201-3.

a. Cost held unreasonable in amount. TRC Mariah Assocs., Inc., ASBCA No. 51811, 99-1 BCA ¶ 30,386; Kelly Martinez d/b/a Kelly Martinez Constr. Servs., IBCA Nos. 3140, 3144-3174, 97-2 BCA ¶ 29,243, 1997 IBCA LEXIS 12. But see Raytheon STX Corp., GSBCA No. 14296-COM, 00-1 BCA ¶ 30,632, 1999

GSBCA LEXIS 252 (holding that salaries paid key employees during a shutdown were reasonable in amount).

b. Nature of cost held unreasonable. Lockheed-Georgia Co., Div. of Lockheed Corp., ASBCA No. 27660, 90-3 BCA ¶ 22,957 (air travel to the Greenbrier resort for executive physicals unreasonable because competent physicians were available in Atlanta).

c. No presumption of reasonableness is attached to contractor costs. If an initial review of the facts causes the Contracting Officer to challenge a specific cost, the Contractor bears the burden of showing the cost is reasonable. FAR 31.201-3. Reasonablenss depends on a variety of considerations and circumstances, including:

(1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance;

(2) Generally accepted sound business practices, arm's length bargaining, and Federal and State laws and regulations;

(3) The contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and

(4) Any significant deviations from the contractor's established practices. FAR 31.201-3(b).

d. Profit. In determining the reasonableness of profit as part of an equitable adjustment, profit is calculated as:

(1) The rate earned on the unchanged work;

(2) A lower rate based on the reduced risk of equitable adjustments; or

(3) The rate calculated using weighted guidelines. See Doyle Constr. Co., ASBCA No. 44883, 94-2 BCA ¶ 26,832.

3. Allocable. To be allowable, a cost must be allocable to the contract.

a. A cost is allocable if:

(1) Incurred specifically for the contract (direct cost); **or**

(2) The cost benefits both the contract and other work, and is distributed to them in reasonable proportion to the benefits received; **or**

(3) Is necessary for the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown. FAR 31.201-4.

b. Generally, allocability is a subset of allowability. A cost is not allowable if the cost cannot be allocated to a government contract. However, a cost may be allocable to a contract, but be unallowable because it failed another element of allowability – such as reasonableness. Boeing North American, Inc. v. Roche, 298 F.3d 1274, 1280, C.A. Fed. (2002).

(1) The concept of allocability is addressed to the question of whether a sufficient "nexus" exists between the cost and a government contract. Lockheed Aircraft Corp. v. U.S., 179 Ct. Cl. 545, 375 F.2d 786, 794 (1967); Boeing North American, Inc. v. Roche, 298 F.3d 1274, 1280, C.A. Fed. (2002).

(2) "Allocability is an accounting concept involving the relationship between incurred costs and the activities or cost objectives (e.g., contracts) to which those costs are charged. Proper allocation of costs by a contractor is important because it may be necessary for the contractor to allocate costs among several government contracts or between government and non-government activities." Boeing North American, Inc. v. Roche, 298 F.3d 1274, 1280, C.A. Fed. (2002).

(3) **Benefit to the government**. For a period of time, under the Caldera case, the courts held that a cost is not allocable to a government contract if there is no reasonable benefit to the government. That principle is no longer good law.

(a) Currently, "the word "benefit" is used in the allocability provisions to describe the nexus required for accounting purposed between the cost and the contract to which it is allocated."

(b) The term is not designed to send the government into an "amorphous inquiry into whether a

particular cost sufficiently 'benefits' the government so that the cost should be recoverable by the government. The question whether a cost should be recoverable as a matter of policy is to be undertaken by applying the specific allowability regulations, which embody the government's view, as a matter of 'policy,' as to whether the contractor may permissibly change particular costs to the government (if they are otherwise allocable.)" Boeing North American, Inc. v. Roche, 298 F.3d 1274, 1284, C.A. Fed. (2002)(holding that the CAS does not require that a cost directly benefit the government's interests for the cost to be allocable). Caldera v. Northrop Worldwide Aircraft Servs., Inc., 192 F.3d 962 (Fed. Cir. 1999) (holding that attorneys fees incurred unsuccessfully defending wrongful termination actions resulted in no benefit to the contract and were not allocable).

(c) The contractor does not, however, have to demonstrate that the incurrence of the cost benefits the government in order for the cost to be allocable. Rumsfeld v. United Techs Corp., 315 F.3d 1361 (Fed. Cir. 2003) (holding that the concept of "benefit" within the provisions dealing with allocability merely require a nexus for accounting purposes between the cost and the contract to which it is allocated); Info. Sys. & Network Corp., ASBCA No. 42659, 00-1 BCA ¶ 30,665; P.J. Dick, Inc., GSBCA No. 12415, 96-2 BCA ¶ 28,307 (finding that accounting fees were costs benefiting the contract);

c. In certain instances (i.e., impact on other work), the contract appeals boards may ignore the principle of allocability. See Clark Concrete Contractors, Inc. v. Gen. Servs. Admin., GSBCA No. 14340, 99-1 BCA ¶ 30,280 (holding that costs incurred on an unrelated project were recoverable because they were "equitable and attributable" by-products of agency design changes).

4. Accounting Standards. Costs must be measured in accordance with standards promulgated by the Cost Accounting Standards Board (CASB), if applicable. Otherwise, Contractors can determine costs by using any

generally accepted cost accounting principles and practices appropriate to the circumstances. FAR 31.201-2.

a. Introduction to Cost Accounting Standards (CAS). CAS are administrative cost rules promulgated by the Cost Accounting Standards Board (CASB), which is an office within the Office of Federal Procurement Policy (OFPP). The regulations are codified at 48 CFR, Chapter 99.

(1) The CASB is an independent statutorily-established board consisting of five members. 41 U.S.C. § 1502 (2011). The Board has exclusive authority to make, promulgate, and amend coast accounting standards and interpretations. The CASB's goal is to achieve uniformity and consistency in the cost accounting practices governing the measurement, assignment, and allocation of costs to contracts with the United States. See http://www.whitehouse.gov/omb/procurement_casb/ (last visited June 26, 2013).

(2) CAS grew out of criticism of accounting and pricing practices of the defense industry in the 1960s. In turn, Congress called for and GAO confirmed, the feasibility of applying uniform cost accounting standards to all negotiated prime contract and subcontract defense procurements of $100,000 or more. In 1988, a more permanent and independent CASB was established within the OFPP. See Pub.L.No. 100-679, 102 Stat. 4055 (1988); Boeing North American, Inc. v. Roche, 298 F.3d 1274, 1282-83, C.A.Fed. (2002)(detailing some of the history of the CASB).

b. If there is any conflict between the CAS and the FAR as to an issue of allocability, the CAS governs. United States v. Boeing Co., 802 F.2d 1390, 1395 (Fed.Cir. 1986); Rice v. Martin Marietta Corp., 13 F.3d 1563, 1565 n.2 (Fed.Cir. 1993).

c. CAS does not apply to sealed bid contracts or to any contract with a small business concern. 48 CFR 9903.201-1(b)(FAR Appendix) and FAR 30.000.

d. CAS is mandatory for contractors and subcontractors in estimating, accumulating, and reporting costs in connection with pricing and administration of, and settlement of disputes concerning, all

negotiated prime contract and subcontract procurements with the United States in excess $700,000[1], **except:**

(1) Contracts or subcontracts for the acquisition of commercial items.

(2) Contracts or subcontracts where the price negotiated is based on prices set by law or regulation.

(3) Firm, fixed-price contracts or subcontracts awarded on the basis of adequate price competition without submission of certified cost or pricing data.

(4) A contract or subcontract with a value of less than $ 7,500,000 if, at the time the contract or subcontract is entered into, the segment of the contractor or subcontractor that will perform the work has not been awarded at least one contract or subcontract with a value of more than $ 7,500,000 that is covered by the cost accounting standards.

(5) The term "subcontract" includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor. 41 U.S.C. §1502(b)(1).

(6) Waiver Authority. In certain situations, when CAS is required, it can be waived. 41 U.S.C. §1502(b)(2); FAR 30.201-5; DFARS 230.201-5:

(a) The head of an executive agency may waive CAS in writing for contracts less than $ 15,000,000 where the contractor primarily sells commercial items and would not otherwise be subject to CAS.

(b) The head of an executive agency may waive CAS under exceptional circumstances when necessary to meet the needs of the agency. A written J&A will address certain questions listed in the FAR & DFARS.

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1 The statute refers to 10 U.S.C. § 2306a, the Truth in Negotiations Act (TINA) threshold. This threshold adjusts for inflation every five years. See also, Contract Pricing for threshold information.

(c) The head of an executive agency may not delegate the authority under subparagraph (A) or (B) to any official in the executive agency below the senior policymaking level in the executive agency.

(d) A list of all waivers is forwarded to the CASB on an annual basis. 41 USC §1502(b)(3)(E).

5. Terms of the Contract. **Advance Agreements**.

a. The reasonableness, allocability, and allowability of certain costs may be difficult to determine. Contracting officers and contractors should seek advance agreement on the treatment of special or unusual costs. Advance agreements are not required but may be negotiated before or during a contract as long as the costs involved have not been incurred.

b. A contracting officer may not agree to a treatment of costs inconsistent with FAR Part 31. FAR 31.109.

c. Advance agreements may be particularly important for:

(1) Compensation of personal services;

(2) Fully depreciated assets;

(3) Precontract costs;

(4) Independent research and development and bid and proposal costs;

(5) Royalties and costs for use of patents;

(6) Costs of idle facilities and idle capacity

(7) See FAR 31.109(h) for more examples.

6. **Limitations set forth in FAR 31.205 – Limited allowable costs and unallowable costs.** The government does not pay certain costs, even if they are actually incurred, reasonable, allocable, and properly accounted for. FAR Part 31 sets forth specific costs that are disallowed. Similarly, the parties may specify in the contract that certain costs will not be allowable.

a. The following list of potential **disallowed costs** is non-exclusive:

(1) Bad debts. FAR 31.205-3.

(2) Costs related to contingencies are generally unallowable, but some categories are allowable. FAR 31.205-7.

(3) Contributions or Donations, including cash, property and services, regardless of recipient. FAR 31.205-8.

(4) Depreciation costs that significantly reduce the book value of a tangible capital asset below its residual value. FAR 31.205-11(b).

(5) Entertainment costs, including amusement, diversions, social activities, gratuities and tickets to sports events. FAR 31.205-14.

(6) Specific Lobbying and Political Activities. FAR 31.205-22.

(7) Excess of costs over income under any other contract. FAR 31.205-23.

(8) Costs of Alcoholic Beverages. FAR 31.205-51

(9) Excessive Pass-Through charges by contractors from sub-contractors, that add no or negligible value, are unallowable. If a contractor sub-contracts at least 70 percent of the work, the contracting officer must make a determination that pass-through charges at the time of award are not excessive and add value. FAR 15.408(n)(2) and FAR 52.215-23.

b. What if a cost is not expressly listed in FAR 31.205?

(1) FAR 31.205 does not cover every element of cost. Failure to include any item of cost does not imply that it is either allowable or unallowable. In that case, the determination of allowability shall be based on the principles and standards in FAR 31 and the treatment <u>of similar or related selected items</u>. FAR 31.204(d).

(2) There are several cases analyzing allowability based on whether a particular cost is <u>similar or related to selected items</u> in FAR 31.

(a) Boeing North American, Inc. v. Roche, 298 F.3d 1274, 1285-86, C.A. Fed. (2002). This case involved a claim for the cost of settling a private shareholder lawsuit against 14 directors of a company (later bought by Boeing). The shareholder suit sought damages for the failure of the company directors to establish internal controls that would have prevented the company from committing fraud against the government. The fraud led to subsequent convictions, fines and penalties against the company. The court first held that costs of shareholder suits are not "similar" to costs incurred in connection with criminal convictions or any other disallowed cost in the FAR. Then the court held that such costs were "related" to the convictions with a sufficiently direct relationship to the disallowed costs of the criminal convictions to disallow the cost of defending against the adverse judgment in the shareholder suit.

(b) Southwest Marine, Inc. v. United States, 535 F.3d 1012 (9th Cir. 2008). The court held that legal costs associated with citizen suits against Southwest Marine under the Clean Water Act were not allowable costs because they were "similar" to costs disallowed in the FAR in False Claims Act proceedings.

(c) Geren v. Tecom, Inc. ("Tecom II"), 566 F.3d 1037, (Fed. Cir. 2009). The court stated that when the cost of an adverse judgment on an underlying suit would be unallowable (and thus in breach of the contract), the settlement of such a private suit is "similar" to the FAR provisions concerning private suits under the False Claims Act. Thus, attorneys' fees defending against the lawsuit would not be an allowable cost. The court held that the settlement costs may still be allowable if the contracting officer determines that there was 'very little likelihood that the third party plaintiffs would have been successful on the merits.'"

(3) A cost is unallowable if it is associated with the contractor breaching the government contract. See cases below.

(a) Geren v. Tecom, Inc. ("Tecom II"), 566 F.3d 1037 (Fed. Cir.2009). This case examined the allowability of legal costs associated with Title VII violations. Rather than conduct a "similar or related" analysis (see discussion above), the court held that if an adverse judgment would cause the contractor to breach its contract with the government, the cost is unallowable. In this case, the contract contained a clause stating the contractor would not discriminate based on sex, among other factors. The court found that an adverse judgment in a Title VII suit would breach the contract clause, thus any defense costs and judgment costs would be unallowable. See also NAACP v. Federal Power Commission, 425 U.S. 662, 668, 96 S.Ct. 1806, 48 L.Ed.2d 284 (1976)(holding that the Federal Power Commission had authority to disallow the costs of unlawful discriminatory employment practices as the costs were unreasonable and contrary to public policy).

(b) Dade Brothers, Inc., v. United States, 163 Ct. Cl. 485, 325 F.2d 239, 240 (1963). This case holds that costs resulting from a breach of a contractual obligation are not allowable costs under the contract. The case dealt with allowability of the legal cost of defending a union suit and the subsequent cost of satisfying the adverse judgment. Specifically, 54 employees sued the contractor for denying them seniority rights. The court found all the costs unallowable because the contract specifically stated the contractor would abide by the union agreement.

D. Certification Requirements. The Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. 103-355, § 2301, 108 Stat. 3243 (1994) amended 10 U.S.C. § 2410, Requests for Equitable Adjustment or Other Relief: Certification.

1. In DOD, a request for equitable adjustment that exceeds the simplified acquisition threshold (currently, $150,000) may not be paid unless a

person authorized to certify the request on behalf of the contractor certifies, at the time that the request is submitted, that:

a. The request is made in good faith, and

b. The supporting data is accurate and complete to the best of that person's knowledge. 10 U.S.C. § 2410.

IV. MEASUREMENT OF THE ADJUSTMENT

A. Costs. "Costs" for adjustment formula purposes are the sum of allowable direct and indirect costs, incurred or to be incurred, less any allowable credits, plus cost of money. FAR 31.201-1. If it is an equitable adjustment, one must also calculate the profit on the allowable costs.

1. Direct Costs.

a. A direct cost is any cost that is identified specifically with a particular contract. Direct costs are not limited to items that are incorporated into the end product as material or labor. All costs identified specifically with a claim are direct costs of that claim. FAR 31.202.

b. Direct costs generally include direct labor, direct material, subcontracts, and other direct costs.

2. Indirect Costs.

a. Indirect costs are any costs not directly identified with a single final cost objective, but identified with two or more final cost objectives, or with at least one intermediate cost objective. FAR 31.203. There are two types of indirect costs:

(1) Overhead. Allocable to a cost objective based on benefit conferred. Typical overhead costs include the costs of personnel administration, depreciation of plant and equipment, utilities, and management.

(2) General and administrative (G&A). Not allocable based on benefit, but necessary for overall operation of the business.

FAR 31.201-4(c).

b. Calculating indirect cost rates. The total indirect costs divided by the total direct costs equals the indirect cost rate. For example, if a contractor has total indirect costs of $100,000 in an accounting period, and total direct costs of $1,000,000 in the same period, the indirect cost rate is 10%.

c. Some agencies limit the recoverable overhead through contract clauses. Reliance Ins. Co. v. United States, 931 F.2d 863 (Fed. Cir. 1991) (court upheld clause which limited recoverable overhead for change orders).

B. Profit and Loss. An equitable adjustment includes a reasonable and customary allowance for profit. United States v. Callahan Walker Constr. Co., 317 U.S. 56 (1942); Rumsfeld v. Applied Companies, Inc., 325 F.3d 1328 (Fed. Cir. 2003). Adjustments under FAR 52.242-14, Suspension of Work and FAR 52.242-17, Government Delay of Work, expressly do not include profit. Profit is calculated as:

1. The rate earned on the unchanged work;

2. A lower rate based on the reduced risk of equitable adjustments; or

3. The rate calculated using weighted guidelines. See Doyle Constr. Co., ASBCA No. 44883, 94-2 BCA ¶ 26,832.

V. PROVING THE AMOUNT OF THE ADJUSTMENT

A. Burden of Proof.

1. The burden is on the party claiming the benefit of the adjustment. Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994); Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 767 (Fed. Cir. 1987) (moving party "bears the burden of proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation"); B&W Forest Prod., AGBCA Nos. 96-180, 96-198-1, 98-1 BCA ¶ 29,354.

2. What must the party prove?

a. Entitlement (Liability)—the government did something that changed the contractor's costs, for which the government is legally liable. T.L. James & Co., ENG BCA No. 5328, 89-2 BCA ¶ 21,643.

b. Causation—there must be a causal nexus between the basis for liability and the claimed increase (or decrease) in cost. Hensel Phelps Constr. Co., ASBCA No. 49270, 99-2 BCA ¶ 30,531; Stewart & Stevenson Servs., Inc., ASBCA No. 43631, 98-1 BCA ¶ 29,653, modifying 97-2 BCA ¶ 29,252; Oak Adec, Inc. v. United States, 24 Cl. Ct. 502 (1991).

c. Resultant Injury—that there is an actual injury or increased cost to the moving party. Servidone Constr. Corp. v. United States, 931 F.2d 860 (Fed. Cir. 1991); Cascade Gen., Inc., ASBCA No. 47754, 00-2 BCA ¶ 31,093, 2000 ASBCA LEXIS 138 (holding that a contractor claim was deficient when it failed to substantiate what specific work and/or delays resulted from the defective government specifications).

B. Methods of Proof.

1. Actual Cost Method. The actual cost method is the preferred method for proving costs. North Star Alaska Hous. Corp. v. U.S., 76 Fed. Cl. 158 (2007).

a. A contractor must prove its costs using the best evidence available under the circumstances. The preferred method is actual cost data. Cen-Vi-Ro of Texas, Inc. v. United States, 210 Ct. Cl. 684, (1976); Deval Corp., ASBCA Nos. 47132, 47133, 99-1 BCA ¶ 30,182.

b. The contracting officer may also include FAR 52.243-6, Change Order Accounting, in a contract. This clause permits the contracting officer to order the accumulation of actual costs. A contractor must indicate in its proposal, which proposed costs are actual and which are estimates.

c. Failure to accumulate actual cost data may result in either a substantial reduction or total disallowance of the claimed costs. Delco Elecs. Corp. v. United States, 17 Cl. Ct. 302 (1989), aff'd, 909 F.2d 1495 (Fed. Cir. 1990) (recovery reduced for unexcused failure to segregate); Togaroli Corp., ASBCA No. 32995, 89-2 BCA ¶ 21,864 (costs not segregated despite the auditor's repeated recommendation to do so; no recovery beyond final decision); Assurance Co., ASBCA No. 30116, 86-1 BCA ¶ 18,737 (lack of cost data prevented reasonable approximation of damages for jury verdict, therefore, the appellant recovered less than the amount allowed in the final decision).

2. Estimated Cost Method.

a. Good faith estimates are preferred when actual costs are not available. Lorentz Bruun Co., GSBCA No. 8505, 88-2 BCA ¶ 20,719 (estimates of labor hours and rates admissible). Estimates are generally required when negotiating the cost of a change in advance of performing the work. Estimates are an acceptable method of proving costs where they are supported by detailed substantiating data or are reasonably based on verifiable cost experience. J.M.T. Mach. Co., ASBCA No. 23928, 85-1 BCA ¶ 17,820 (1984), aff'd on other grounds, 826 F.2d 1042 (Fed. Cir. 1987).

b. If the contractor uses detailed estimates based on analyses of qualified personnel, the government will not be able to allege successfully that the contractor used the disfavored total cost method of adjustment pricing. Illinois Constructors Corp., ENG BCA No. 5827, 94-1 BCA ¶ 26,470.

c. Estimates based on Mean's Guide must be disregarded where actual costs are known. Anderson/Donald, Inc., ASBCA No. 31213, 86-3 BCA ¶ 19,036.

3. Total Cost Method.

a. The total cost method is not preferred because it assumes the entire overrun is solely the government's fault. The total cost method calculates the difference between the bid price on the original contract and the actual total cost of performing the contract as changed. Servidone v. United States, 931 F.2d 860 (Fed. Cir. 1991); Raytheon Co. v. White, 305 F.3d 1354 (Fed. Cir. 2002); Stewart & Stevenson Servs., Inc., ASBCA No. 43631, 98-1 BCA ¶ 29,653, modifying 97-2 BCA ¶ 29,252; Santa Fe Eng'rs, Inc., ASBCA No. 36682, 96-2 BCA ¶ 28,281; Concrete Placing Inc. v. United States, 1992 U.S. Ct. Cl. LEXIS 58, 25 Cl. Ct. 369 (1992).

b. To use the total cost method, the contractor must establish four factors:

(1) The nature of the particular cost is impossible or highly impracticable to determine with a reasonable degree of certainty;

(2) The contractor's bid was realistic;

(3) The contractor's actual incurred costs were reasonable; and

(4) The contractor was not responsible for any of the added costs. Raytheon Co. v. U.S., 305 F.3d 1354 (Fed. Cir. 2002), WRB Corp. v. United States, 183 Ct. Cl. 409 (1968).

4. Modified total cost method. The court or board of contract appeals allows the contractor to adjust the total cost method to account for other factors, usually because the bid was not realistic or because there were other causes for the extra costs. Olsen v. Espy, 1994 U.S. App. LEXIS 11840, 26 F.3d 141 (Fed. Cir. 1994); River/Road Constr. Inc., ENG BCA No. 6256, 98-1 BCA ¶ 29,334; Hardrives, Inc., IBCA No. 2319, 94-1 BCA ¶ 26,267; Servidone Constr. Corp., ENG BCA No. 4736, 88-1 BCA ¶ 20,390; Teledyne McCormick-Selph v. United States, 218 Ct. Cl. 513 (1978).

C. Jury Verdicts.

1. Jury verdicts are not a method of proof, but a means of resolving disputed facts. Northrop Grumman Corp. v. United States, 47 Fed. Cl. 20 (2000); Delco Elecs. Corp. v. United States, 17 Cl. Ct. 302 (1989), aff'd, 909 F.2d 1495 (Fed. Cir. 1990); River/Road Constr. Inc., ENG BCA No. 6256, 98-1 BCA ¶ 29,334; Cyrus Contracting Inc., IBCA Nos. 3232, 3233, 3895-98, 3897-98, 98-2 BCA ¶ 29,755; Paragon Energy Corp., ENG BCA No. 5302, 88-3 BCA ¶ 20,959. Before adopting a jury verdict approach, a court must first determine three things:

a. That clear proof of injury exists;

b. That there is no more reliable method for computing damages. See Azure v. U.S., U.S. App. LEXIS 29365 (Fed. Cir. 1997) (actual costs are preferred; where contractor offers no evidence of justifiable inability to provide actual costs, then it is not entitled to a jury verdict); Service Eng'g Co., ASBCA No. 40274, 93-2 BCA ¶ 25,885; and

c. That the evidence is sufficient for a fair and reasonable approximation of the damages. Northrop Grumman Corp. v. United States, 47 Fed. Cl. 20 (2000).

VI. SPECIAL ITEMS

A. Unabsorbed Overhead.

1. Generally. A type of cost associated with certain types of claims is "unabsorbed overhead." Unabsorbed overhead has been allowed to compensate a contractor for work stoppages, idle facilities, inability to use available manpower, etc., due to government fault. In such delay situations, fixed overhead costs, e.g., depreciation, plant maintenance, cost of heat, light, etc., continue to be incurred at the usual rate, but there is less than the usual direct cost base over which to allocate them. Therm-Air Mfg. Co., ASBCA No. 15842, 74-2 BCA ¶ 10,818.

2. Contracts Types. Most unabsorbed overhead cases deal with recovery of additional overhead costs on construction and manufacturing contracts. The qualitative formula adopted in Eichleay Corp., ASBCA No. 5183, 60-2 BCA ¶ 2688, aff'd on recons., 61-1 BCA ¶ 2894, is the exclusive method of calculating unabsorbed overhead for both construction contracts (Wickham Contracting Co. v. Fischer, 12 F.3d 1574 (Fed. Cir. 1994)) and manufacturing contracts (West v. All State Boiler, Inc., 146 F.3d 1368 (Fed. Cir. 1998); Genisco Tech. Corp., ASBCA No. 49664, 99-1 BCA ¶ 30,145, mot. for recons. den., 99-1 BCA ¶ 30,324; Libby Corp., ASBCA No. 40765, 96-1 BCA ¶ 28,255).

   a. Under this method, calculate the daily overhead rate during the contract period, then multiply the daily rate by the number of days of delay.

   b. To be entitled to unabsorbed overhead recovery under the Eichleay formula, the following three elements must be established:

      (1) A government-caused or government-imposed delay;

      (2) The contractor was required to be on "standby" during the delay; and

      (3) While "standing by," the contractor was unable to take on additional work. Melka Marine, Inc. v. United States, 187 F.3d 1370 (Fed. Cir. 1999); West v. All State Boiler, 146 F.3d 1368 (Fed. Cir. 1998); Satellite Elec. Co. v. Dalton, 105 F.3d 1418 (Fed. Cir. 1997); Altmayer v. Johnson, 79 F.3d 1129 (Fed. Cir. 1995).

   c. If work on the contract continues uninterrupted, albeit in a different order than originally planned, the contractor is not on standby. Further, a definitive delay precludes recovery "because 'standby' requires an uncertain delay period where the government can require the contractor to resume full-scale work at any time."

Melka Marine, Inc. v. United States, 187 F.3d 1370 (Fed. Cir. 1999); American Renovation & Constr. Co., Inc. v. United States, 45 Fed. Cl. 44 (1999).

d. A contractor's ability to take on additional work focuses upon the contractor's ability to take on replacement work during the indefinite standby period. Replacement work must be similar in size and length to the delayed government project and must occur during the same period. Melka Marine, Inc. v. United States, 187 F.3d 1370 (Fed. Cir. 1999); West v. All-State Boiler, 146 F.3d 1368, 1377 n.2 (Fed. Cir. 1998).

3. Proof Requirements.

a. Recovery of unabsorbed overhead is not automatic. The contractor should offer credible proof of increased costs resulting from the government-imposed delay. Beaty Elec. Co., EBCA No. 403-3-88, 91-2 BCA ¶ 23,687. But see Sippial Elec. & Constr. Co. v. Widnall, 69 F.3d 555 (Fed. Cir. 1995) (allowing Eichleay recovery with proof of actual damages).

b. A contractor must prove only the first two elements of the Eichleay formula. Once the contractor has established that the Government caused the delay and that it had to remain on "standby," it has made a prima facie case that it is entitled to Eichleay damages. The burden of proof then shifts to the government to show that the contractor did not suffer or should not have suffered any loss because it was able to either reduce its overhead or take on other work during the delay. Satellite Elec. Co. v. Dalton, 105 F.3d 1418 (Fed. Cir. 1997); Mech-Con Corp. v. West, 61 F.3d 883 (Fed Cir. 1995).

c. When added work causes a delay in project completion, the additional overhead is absorbed by the additional costs and Eichleay does not apply. Community Heating & Plumbing Co. v. Kelso, 987 F.2d 1575 (Fed. Cir. 1993) (Eichleay recovery denied because overhead was "extended" as opposed to "unabsorbed"); accord C.B.C. Enters., Inc. v. United States, 978 F.2d 669 (Fed. Cir. 1992).

4. Subcontractor Unabsorbed Overhead. Timely completion by a prime contractor does not preclude a subcontractor's pass-through claim for unabsorbed overhead. E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369 (Fed. Cir. 1999).

5. Multiple Recovery. A contractor may not recover unabsorbed overhead costs under the Eichleay formula where it has already been compensated for the impact of the government's constructive change on performance time and an award under Eichleay would lead to double recovery of overhead. Keno & Sons Constr. Co., ENG BCA No. 5837-Q, 98-1 BCA ¶ 29,336.

6. Profit. A contractor is not entitled to profit on an unabsorbed overhead claim. ECC Int'l Corp., ASBCA Nos. 45041, 44769, 39044, 94-2 BCA ¶ 26,639; Tom Shaw, Inc., ASBCA No. 28596, 95-1 BCA ¶ 27,457; FAR 52.242-14, Suspension of Work; FAR 52.242-17, Government Delay of Work.

B. Subcontractor Claims.

1. The government consents generally to be sued only by parties with which it has privity of contract. Erickson Air Crane Co. of Wash. v. United States, 731 F.2d 810, 813 (Fed. Cir. 1984); E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369 (Fed. Cir. 1999).

2. A prime contractor may sue the government on a subcontractor's behalf, in the nature of a pass-through suit, for the extra costs incurred by the subcontractor only if the prime contractor is liable to the subcontractor for such costs. When a prime contractor is permitted to sue on behalf of a subcontractor, the subcontractor's claim merges into that of the prime, because the prime contractor is liable to the subcontractor for the harm caused by the government. Absent proof of prime contractor liability, the government retains its sovereign immunity from pass-through suits. Severin v. United States, 99 Ct. Cl. 435 (1943), cert. denied, 322 U.S. 733 (1944)); E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369 (Fed. Cir. 1999).

3. The government may use the Severin doctrine as a defense only when it raises and proves the issue at trial. If the government fails to raise its immunity defense at trial, then the subcontractor claim is treated as if it were the prime's claim and any further concern about the absence of subcontractor privity with the government is extinguished. Severin v. United States, 99 Ct. Cl. 435 (1943), cert. denied, 322 U.S. 733 (1944)); E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369 (Fed. Cir. 1999).

C. Loss of Efficiency. The disruption caused by government changes and/or delays may cause a loss of efficiency to the contractor.

1. Burden of Proof. A contractor may recover for loss of efficiency if it can establish both that a loss of efficiency has resulted in increased costs and that the loss was caused by factors for which the Government was responsible. Luria Bros. & Co. v. United States, 177 Ct. Cl. 676, 369 F.2d 701 (1966). See generally Thomas E. Shea, Proving Productivity Losses in Government Contracts, 18 Pub. Cont. L. J. 414 (March 1989).

2. Applicable Situations. Loss of efficiency has been recognized as resulting from various conditions causing lower than normal or expected productivity. Situations include: disruption of the contractor's work sequence (Youngdale & Sons Constr. Co. v. United States, 27 Fed. Cl. 516 1993)); working under less favorable weather conditions (Charles G. Williams Constr., Inc., ASBCA No. 42592, 92-1 BCA ¶ 24,635); the necessity of hiring untrained or less qualified workers (Algernon-Blair, Inc., GSBCA No. 4072, 76-2 BCA ¶ 12,073); and reductions in quantity produced.

D. Impact on Other Work.

1. General Rule. A contractor is generally prohibited from recovering costs under the contract in which a Government change, suspension, or breach occurred, when the impact costs are incurred on other contracts. Courts and boards usually consider such damages too remote or speculative, and subject to the rule that consequential damages are not recoverable under Government contracts. See General Dynamics Corp. v. United States, 218 Ct. Cl. 40, 585 F.2d 457 (1978); Defense Sys. Co., ASBCA No. 50918, 2000 ASBCA LEXIS 100, 00-2 BCA ¶ 30,991 (holding the loss of sales on other contracts was too remote and speculative to be recoverable); Sermor, Inc., ASBCA No. 30576, 94-1 BCA ¶ 26,302; Ferguson Mgmt. Co., AGBCA No. 83-207-3, 83-2 BCA ¶ 16,819.

2. Exceptions. In only exceptional circumstances, especially when the impact costs are definitive in both causation and amount, have contractors recovered for additional expenses incurred in unrelated contracts. See Clark Concrete Contractors, Inc. v. Gen. Servs. Admin., GSBCA No. 14340, 99-1 BCA ¶ 30,280 (allowing recovery of additional costs incurred on an unrelated project as a result of government delays and changes).

E. Attorneys' Fees.

1. Legal Expenses are addressed by two FAR provisions, listed below. Such expenses are commonly an indirect expense in a contractor's G&A expense pool. However, in some situations, legal expenses are specifically

incurred for a particular contract and counted as a direct cost. Government Contract Costs & Pricing, Karen Manos, 2nd Edition, 2009.

a. FAR 31.205-33 covers professional and consultant service costs.

b. FAR 31.205-47 discusses costs related to legal and other proceedings. It defines costs as including, but are not limited to, administrative and clerical expenses; the costs of legal services, whether performed by inhouse or private counsel; the costs of the services of accountants, consultants, or others retained by the contractor to assist it; cost of employees, officers, and directors; and any similar costs incurred before, during, and after commencement of a judicial or administrative proceeding which bears a direct relationship to the proceeding. FAR 31.205-47.

2. Costs incurred in connection with any proceeding brought by a Federal, State, local, or foreign government for violation of, or a failure to comply with, law or regulation by the contractor are unallowable if the result is an adverse judgment. This includes costs involved in a final decision to (a) debar or suspend the contractor, (b) rescind or void the contract, or (c) terminate a contract for default for violation or failure to comply with the law. FAR 31.205-47(b).

a. Costs incurred in connection with any Qui Tam proceeding brought against the contractor are unallowable if the result is an adverse judgment. FAR 31.205-47(b); See False Claims Act, 31 USC 3730.

3. Costs related to prosecuting and defending claims and appeals against the federal government are unallowable. FAR 31.205-47(f)(1). See Stewart & Stevenson Servs., Inc., ASBCA No. 43631, 97-2 BCA ¶ 29,252 modified by 98-1 BCA ¶ 29,653(finding that claimed legal expenses related to counsel's preparation of a certified claim and so are disallowed); Marine Hydraulics Int'l, Inc., ASBCA No. 46116, 94-3 BCA ¶ 27,057(finding that legal costs to prepare a REA were unallowable costs to prepare a claim because the parties were not working together, the contract work had already been performed, and the issues had been in dispute for months); P&M Indus., Inc., ASBCA No. 38759, 93-1 BCA ¶ 25,471(finding that consultant fees for post termination administration costs was an unallowable cost to prepare a claim). This is consistent with the general rule that attorneys' fees are not allowed in suits against the United States absent an express statutory provision allowing recovery. Piggly Wiggly Corp. v. United States, 112 Ct. Cl. 391, 81 F. Supp. 819 (1949).

4. The Equal Access to Justice Act, 5 U.S.C. § 504, authorizes courts and boards to award attorneys fees to qualifying prevailing parties unless the government can show that its position was "substantially justified." See, e.g., Midwest Holding Corp., ASBCA No. 45222, 94-3 BCA ¶ 27,138.

5. Costs incurred incident to contract administration, or in furtherance of the negotiation of the parties' disputes, are allowable. FAR 31.205-33 (consultant and professional costs may be allowable if incurred to prepare a demand for payment that does not meet the CDA definition of a "claim").

   a. "There must be a 'beneficial nexus' between effort for which the cost is incurred and performance or administration of the contract." Appeal of Marine Hydraulics Intern., Inc., 94-3 BCA ¶ 27057 (1994). "Contract administration normally involves 'the parties . . . working together.'" *Id*.

   b. Example: SAB Constr., Inc. v. U.S., 66 Fed. Cl. 77 (Fed. Dist. 2005) (holding that when the genuine purpose of incurred legal expenses is that of materially furthering a negotiation process, such cost should normally be allowable);

   c. Example: Submittal of a proposal in aid of determining how a specification could be met. Prairie Wood Products, AGBCA No. 91-197-1, 94-1 BCA ¶ 26,424.

6. Legal fees unrelated to presenting or defending claims against the government are generally allowable. But See the earlier discussion entitled "What if a cost is not expressly listed in FAR 31.205?" for cases where legal costs to defend 3rd party suits have been found to be unallowable.

   a. Boeing North Am., Inc. v. United States,298 F.3d 1274 (Fed. Cir. 2002); Information Sys. & Networks Corp., ASBCA No. 42659, 00-1 BCA ¶ 30,665 (holding that legal expenses incurred in lawsuits against third-party vendors were allowable as part of convenience termination settlement); Bos'n Towing and Salvage Co., ASBCA No. 41357, 92-2 BCA ¶ 24,864 (holding that costs of professional services, including legal fees, are generally allowable, except where specifically disallowed).

   b. 3rd Party Settlement Agreements. When a third party has sued a government contractor and the contractor has settled the lawsuit,

the question becomes whether the legal costs associated with the settlement agreement are allowable. The courts and boards conduct a two-step inquiry to determine the allowability of costs associated with such a settlement.

(1) The two-step test is:

(a) If an adverse judgement were reached, would the damages, costs, and attorney's fees be allowable? (See earlier discussion under the heading 'What if costs are expressly discussed in FAR 31?')

(b) If yes, the cost of the settlement is allowable.

(c) If no, then the cost of the settlement is disallowed unless the contractor can prove that the private suit has very little likelihood of success on the merits. Geren v. Tecom, Inc., 566 F.3d 1037, 1046 (Fed. Cir. 2009); rehearing and rehearing en banc denied Oct.2, 2009.

(d) The rationale behind the "very little likelihood of success" test is two-fold. The court noted that the FAR's policy was to disallow the cost of settling suits that were likely to have been meritorious and therefore disallowed if not settled. The reason is a policy judgment that assumes that suits brought by government entities are in most situations "likely to be meritorious." However, the same bright line assumption is not appropriate for suits brought by a private party. Geren v. Tecom, Inc., 566 F.3d 1037, 1046 (C.A. Fed., 2009); rehearing and rehearing en banc denied Oct.2, 2009.

F. Interest.

1. Pre-Claim Interest.

a. Generally. Contractors are not entitled to interest on borrowings, however represented, as part of an equitable adjustment. FAR 31.205-20; Servidone Constr. Corp. v. United States, 931 F.2d 860 (Fed. Cir. 1991); D.E.W. & D.E. Wurzbach, A Joint Venture, ASBCA No. 50796, 98-1 BCA ¶ 29,385; Superstaff, Inc., ASBCA Nos. 48062, et al., 97-1 BCA ¶ 28,845; Tomahawk

Constr. Co., ASBCA No. 45071, 94-1 BCA ¶ 26,312. This is consistent with the general rule that the United States is immune from interest liability absent an express statutory provision allowing recovery. Library of Congress v. Shaw, 478 U.S. 310 (1986).

b. Lost Opportunity Costs. The damages for the "opportunity cost of money" are unrecoverable as a matter of law. Adventure Group, Inc., ASBCA No. 50188, 97-2 BCA ¶ 29,081; Environmental Tectonics Corp., ASBCA No. 42540, 92-2 BCA ¶ 24,902 (not only interest on actual borrowings, but also the economic equivalent thereof, are unallowable); Dravo Corp. v. United States, 219 Ct. Cl. 416, 594 F.2d 842 (1979).

c. Cost of Money. Contractors may recover facilities capital cost of money (FCCM) (the cost of capital committed to facilities) as part of an equitable adjustment. FAR 31.205-10. Among the various allowability criteria, a contractor must specifically identify FCCM in its bid or proposal relating to the contract under which the FCCM cost is then claimed. FAR 31.205-10(a)(2). See also McDonnell Douglas Helicopter Co. d/b/a McDonnell Douglas Helicopter Sys., ASBCA No. 50756, 98-1 BCA ¶ 29,546.

2. Prompt Payment Act Interest. Under the Prompt Payment Act (31 U.S.C. §§ 3901-3907), the contractor is entitled to interest if the contractor submits a proper voucher and the government fails to make payment within 30 days.

3. Contract Disputes Act Interest.

a. Generally. A contractor is entitled to interest on its claim based upon the rate established by the Secretary of the Treasury, as provided by the Contract Disputes Act, 41 U.S.C. §§ 7101-7109.

b. Timing. Interest begins to run when the contracting officer receives a properly certified claim. Raytheorn Co. v. White, 305 F.3d 1354 (Fed. Cir. 2002), or upon submission of a defectively certified claim that is subsequently certified. Federal Courts Administration Act of 1992, Title IX, Pub. L. No. 102-572, 106 Stat. 4506, 4518. Interest runs regardless of whether the claimed costs have actually been incurred at the date of submission of a claim. Servidone Constr. Co. v. United States, 931 F.2d 860 (Fed. Cir. 1991).

c. Convenience Termination Settlements. A termination for convenience settlement proposal (FAR 49.206) is not initially considered a CDA claim, as it is generally submitted for purposes of negotiation. James M. Ellett Constr. Co. v. United States, 93 F.3d 1537 (Fed. Cir. 1996). Accordingly, a contractor is not entitled to interest on the amount due under a settlement agreement or determination. FAR 49.112-2(d); James M. Ellett Constr. Co. v. United States, 93 F.3d 1537 (Fed. Cir. 1996). If a termination settlement proposal matures into a CDA claim (once settlement negotiations reach an impasse), then a contractor is entitled to interest.

4. Payment of Interest. When the contracting officer pays a claim, the payment is applied first to accrued interest. Then the payment is applied to the principal amount due. Any unpaid principal continues to accrue interest. Paragon Energy Corp., ENG BCA No. 5302, 91-3 BCA ¶ 24,349.

VII. QUANTUM CASE PLANNING

A. The Philosophy.

1. It is necessary to approach pricing of adjustments with a guiding philosophy. To do otherwise renders your litigation efforts half-hearted. The elements of quantum litigation planning are two-fold:

a. The fact that a contractor prevails on entitlement is meaningless in your quantum case.

b. Your game plan for the contractor's claim is a simple one: First you are going to cut it up, and then you are going to defeat it.

B. The Prerequisites.

1. There exist two essential prerequisites to your efforts.

a. You must have a thorough understanding of the law on pricing adjustments.

b. Facts are king, and getting all the facts will take hard work.

C. The Methodology: DAMS.

1. Divide the contractor's claim into component parts.

2. Apply Cost/Cost Accounting Standards (CAS) principles.

3. Make the contractor prove the amount claimed.

4. See what really happened.

VIII. APPLYING THE DAMS METHODOLOGY

A. Divide the Contractor's Claim into Component Parts.

1. A contractor claim is really a series of smaller claims all added together. Each piece must stand on its own, in terms of being both legally permitted and factually supported.

2. Quantum case litigation requires analyzing each section of the contractor's claim separately. This leads to a more thorough examination and prevents overpayment regardless if the case is settled or litigated.

B. Apply Cost/CAS Principles. Generally. The government does not pay all the costs actually incurred and/or claimed by a contractor. Applying Cost/CAS principles entails analyzing each part of the total claim for allowability, allocability, reasonableness, and CAS compliance.

C. Make the contractor prove the amount claimed.

D. See What Really Happened (Seize the Offensive).

1. A contractor's cost data will tell you what really happened. Accordingly, you must seize the initiative/go on the offensive. This allows you to develop the "real story" of how the contractor incurred extra costs.

2. Determine the true root causes of the contractor's extra costs.

a. Was the job as a whole underbid?

b. Did the contractor change planned facilities?

c. Did the contractor purchase cheap and unworkable component parts?

d. Did the contractor select subcontractors that were unable to perform?

e. Was there reliance upon less competent vendors?

f. Were there increases in material costs?

g. Did the contractor change components for cost reasons? Did this in turn result in engineering problems? Did prior design work become worthless? Did this in turn cause the need for redesign work, with more time and effort?

h. Was there an overall lack of efficient organization?

i. Did the contractor waste time recompeting components and vendors?

j. What expenses were unrelated to the claimed causation?

k. Did the contractor order surplus material (for potential options and possible commercial jobs)?

3. Important Documents. There are many important contractor documents that will assist you in determining what really happened.

a. As-Bid Bill of Materials (BOM), and Final BOM.

b. Production Schedules

c. As-Bid Bid Rates (Overhead Rates).

d. Actual Overhead Rates.

e. Expected and Actual Direct Costs—for the specific contract and plant-wide.

f. Expected and Actual Labor Amounts—for the specific contract and plant-wide.

g. Material Invoices for Major Component Parts.

h. CAS Disclosure Statement.

4. The Quantum Case Litigation Team. It is necessary to enlist the support of many individuals in both your defensive and offensive quantum case litigation efforts. These individuals will help you decipher the contractor's accounting documentation, as well as explain relevance in relation to contract performance.

a. DCAA Auditor.

b. Contracting Officer.

c. Program Manager/End User.

d. Contracting Officer's Representative (COR).

e. Project Managers, Site Inspectors, Project Engineers, Quality Assurance Representatives.

IX. CONCLUSION

A. The various circumstances that entitle a contractor to a contract price adjustment (equitable adjustments, adjustments, damages) result in different types/amounts of recovery.

B. The basic measurement of a price adjustment is the difference between the reasonable costs of the original and changed work.

C. The burden of proving a price adjustment is on the moving party, and the method of proving a price adjustment is to use the best evidence available.

D. The various special items that often comprise a price adjustment demand special attention.

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Chapter 24

Contract Terminations for Convenience

2013 Contract Attorneys Deskbook

CHAPTER 24

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CHAPTER 24

CONTRACT TERMINATIONS FOR CONVENIENCE

I. INTRODUCTION

A. References and Definition

1. FAR Part 49

2. Clauses: FAR 52.249-1 through 52.249-7

3. Definition: "'Termination for convenience' means the exercise of the Government's right to completely or partially terminate performance of work under a contract when it is in the Government's interest." FAR 2.101.

B. Historical Development

See Krygoski Constr. Co., Inc. v. United States, 94 F.3d 1537 (Fed. Cir. 1996) (court traces history of government's right to terminate contracts for convenience).

1. Inherent Authority. The government has always possessed the inherent authority to suspend contracts. United States v. Corliss Steam Engine Co., 91 U.S. 321 (1875) (finding the Navy Department had authority to suspend work under a contract and enter into a breach settlement for partial performance); Krygoski, 94 F.3d at 1540-41.

2. Terminations for the government's convenience "developed as a tool to avoid enormous procurements upon completion of a war effort." Krygoski, 94 F.3d at 1540. Because public policy counseled against continuing wartime contracts after the end of hostilities, the government, under certain circumstances, terminated contracts and settled with the contractor for partial performance. Id.

3. Following WWI, large numbers of contracts were terminated by the government. The Dent Act provided new statutory authority for the settlement of claims from those terminations. See Dent Act, 40 Stat. 1272 (1919). Further statutory and regulatory provisions were provided at the onset of WWII. See Contract Settlement Act of 1944, 58 Stat. 649.

4. Historically, a contractor could recover breach of contract damages, which include anticipatory (lost) profits, as a result of a termination based on inherent authority. United States v. Speed, 75 U.S. 77 (1868). Currently,

convenience termination clauses preclude the contractor from recovering anticipatory or lost profits when the government, in good faith, terminates the contract for its convenience.

5. In 1964, the first edition of the Federal Procurement Regulation (FPR) included optional termination for convenience clauses. FPR 1-8.700-2. However, by 1967, the FPR required termination for convenience clauses in most contracts. 32 Fed. Reg. 9683 (1967). Accordingly, termination for convenience evolved into a principle of government contracting and the exigencies of war no longer limit the government's ability to terminate. Krygoski, 94 F.3d at 1541.

II. THE RIGHT TO TERMINATE FOR CONVENIENCE

A. Termination is for the convenience of the government.

When a contractor is performing at a loss, termination may be beneficial to the contractor, but the government has no duty to the contractor to exercise the government's right to terminate for the contractor's benefit. Contact Int'l Corp., ASBCA No. 44636, 95-2 BCA ¶ 27,887; Rotair Indus., ASBCA No. 27571, 84-2 BCA ¶ 17,417; John Massman Contracting Co. v. United States, 23 Cl. Ct. 24 (1991) (no duty to terminate when it would be in the contractor's best interest).

B. Termination for Convenience Clauses

1. The FAR provides various termination for convenience clauses. See FAR 52.249-1 through 52.249-7. The proper clause for a specific contract is dependent upon the type and dollar amount of the contract. See FAR Subpart 49.5.

a. Contracts for commercial items and simplified acquisitions for other than commercial items include unique convenience termination provisions that, for the most part, are not covered by Subpart 49.5. See 52.212-4 and 52.213-4.

b. "Short form" clauses govern fixed-price contracts not to exceed the Simplified Acquisition Threshold (SAT)(generally $150,000). Settlement is governed by FAR Part 49. See Arrow, Inc., ASBCA No. 41330, 94-1 BCA ¶ 26,353 (board denied claim for useful value of special machinery and equipment because service contract properly contained short form termination clause, which limited settlement charges to services provided prior to termination).

c. "Long form" clauses govern fixed-price contracts exceeding the SAT. These clauses specify contractor obligations and termination settlement provisions. See FAR 52.249-2.

d. Cost reimbursement contract clauses. These clauses cover both convenience and default terminations, and specify detailed termination settlement provisions. See FAR 52.249-6.

2. The clauses give the government a right to terminate a contract, in whole or in part, when in the government's interest.

3. The clauses also provide the contractor with a monetary remedy.

a. The contractor is entitled to:

(1) the contract price for completed supplies or services accepted by the government;

(2) reasonable costs incurred in the performance of the work terminated,

(3) a fair and reasonable profit (**UNLESS** the contractor would have sustained a loss on the contract if the entire contract had been completed); and

(4) reasonable costs of settlement of the work terminated. See FAR 52.249-2(g).

b. Exclusive of settlement costs, the contractor's recovery may NOT exceed the total contract price.

c. The contractor cannot recover anticipated (lost) profits or consequential damages, which would be recoverable under common law breach of contract principles. FAR 49.202(a).

d. The cost principles of FAR Part 31 in effect on the date of the contract shall govern the claimed costs.

C. The "Christian Doctrine"

1. **Rule:** A mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy is considered to be included in a contract by operation of law. G.L. Christian & Assoc. v. United States, 312 F.2d 418 (Ct. Cl. 1963) (termination for convenience clause read into the contract by operation of law).

2. The Christian doctrine does not turn "on whether clause was intentionally or inadvertently omitted, but on whether procurement policies are being 'avoided or evaded (deliberately or negligently) by lesser officials.'" S.J. Amoroso Constr. Co. v. United States, 12 F.3d 1072, 1075 (Fed. Cir. 1993) (Buy American Act (BAA) clause for construction contract read into contract after it had been stricken and erroneously replaced by the BAA supply clause).

3. The doctrine, however, does not permit the automatic incorporation of every required contract clause. General Engineering & Mach. Works v. O'Keefe, 991 F.2d 775, 779 (Fed. Cir. 1993). Rather, it must be determined whether there is any significant or deeply ingrained public procurement policy supporting incorporation of the clause. Lambrecht & Sons, Inc., ASBCA No. 49515, 97-2 BCA ¶ 20,105.

4. The Christian doctrine applies only to mandatory clauses reflecting significant public procurement policies. Michael Grinberg, DOT BCA No. 1543, 87-1 BCA ¶ 19,573 (board refused to incorporate by operation of law a discretionary T4C clause).

5. It has also been applied to incorporate less fundamental or significant mandatory clauses if they were not written to benefit or protect the party seeking the incorporation. General Engineering & Mach. Works v. O'Keefe, 991 F.2d 775, 780 (Fed. Cir. 1993) (citing Chris Berg, Inc. v. United States, 426 F.2d 314, 317 (Ct. Cl. 1970)).

6. The Christian doctrine does not apply when the contract includes an authorized deviation from the standard termination for convenience clause. Montana Refining Co., ASBCA No. 44250, 94-2 BCA ¶ 26,656 (ID/IQ contract with a stated minimum quantity included deviation in T4C clause that agency would not be liable for unordered quantities of fuel "unless otherwise stated in the contract").

7. When a contract lacks a termination clause, an agency can't limit termination settlement costs by arguing that the Short Form termination clause applies. Empres de Viacao Terceirense, ASBCA No. 49827, 00-1 BCA ¶ 30,796 (ASBCA noted that use of the Short Form clause was predicated on a contracting officer's determination and exercise of discretion, which was lacking in this case).

8. Impact of other termination clauses: Existence of "Termination on Notice" clause in contract modification, did not render T4C clause meaningless. Dart Advantage Warehousing, Inc. v. United States, 52 Fed. Cl. 694 (2002) (clause with such ancient lineage, reflecting deeply ingrained public procurement policy, and applied to contracts with the

force and effect of law even when omitted, should not be materially modified or summarily rendered meaningless without good cause).

D. Convenience Terminations Imposed by Law

1. Termination by Conversion

a. The termination for default clauses provide that an erroneous default termination converts to a termination for convenience. FAR 52.249-8(g); FAR 52.249-10(c); ALKAI Consultants, LLC, ASBCA 56792, 10-2 BCA ¶ 34,493 (converted T4D to T4C based on unanticipated conditions and government failure to cooperate).

b. However, if the government acted in bad faith while terminating a contract for default, courts and boards will award common law breach damages rather than the usual termination for convenience costs. See Apex Int'l Mgmt. Servs., Inc., ASBCA No. 38087, 94-2 BCA ¶ 26,842 (finding 20 breaches, ASBCA holds Navy liable for breach damages); Sigal Constr. Corp., CBCA No. 508, 10-1 BCA ¶ 34,442 (finding T4C to be in bad faith where GSA deleted work from a construction contract to have that work performed by another contractor at a lower price).

2. Constructive Termination for Convenience

a. A government directive to end performance of work will not be considered a breach but rather a convenience termination if the action could lawfully fall under that clause, even if the government mistakenly thinks a contract invalid, erroneously thinks the contract can be terminated on other grounds, or wrongly calls a directive to stop work a "cancellation." G.C. Casebolt Co. v. United States, 421 F.2d 710 (Ct. Cl. 1970); John Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963).

b. The constructive termination for convenience doctrine is based on the concept that a contracting party who is sued for breach may ordinarily defend on the ground that there existed at the time of the breach a legal excuse for nonperformance, although that party was then ignorant of the fact. College Point Boat Corp. v. United States, 267 U.S. 12 (1925).

c. However, the government cannot use the constructive termination for convenience theory to retroactively terminate a fully performed contract in an effort to limit its liability for failing to order the contract's minimum amount of goods or services. Ace-Federal Reporting, Inc., v. Barram, 226 F.3d 1329 (Fed. Cir. 2000);

Maxima Corp. v. United States, 847 F.2d 1549 (Fed. Cir. 1988); PHP Healthcare Corp., ASBCA No. 39207, 91-1 BCA ¶ 23,647.

d. Further, the government may not require bidders to agree in advance that the government's failure to order the contract's minimum quantity will be treated as a termination for convenience. Southwest Lab. of Okla., Inc., B-251778, May 5, 1993, 93-1 CPD ¶ 368.

3. Deductive Change v. Partial Termination for Convenience

a. The contracting officer must determine whether deleted work is a deductive change **or** a partial termination for convenience.

b. This distinction is important because it determines whether the measure of the contractor's recovery is under the contract's changes clause or the termination for convenience clause.

c. Generally, the courts and boards will not overturn the contracting officer's determination that the deleted work is a deductive change if the parties consistently treated the deletion as such. Dollar Roofing, ASBCA No. 36461, 92-1 BCA ¶ 24,695. But see Griffin Servs., Inc., GSBCA No. 11022, 92-3 BCA ¶ 25,181 (board characterized deleted work as a partial termination for convenience, but ordered recovery based on the changes clause).

d. If the contractor disputes the contracting officer's treatment of the deletion, courts and boards will examine the relative significance of the deleted work.

(1) If MAJOR portions of the work are deleted and no additional work is substituted in its place, the termination for convenience clause must be used. Nager Elec. Co. v. United States, 442 F.2d 936 (Ct. Cl. 1971).

(2) Courts and boards will treat the deletion of relatively MINOR and segregable items of work as a deductive change. Lionsgate Corp., ENG BCA No. 5425, 90-2 BCA ¶ 22,730.

III. THE DECISION TO TERMINATE FOR CONVENIENCE

A. Regulatory Guidance

1. The FAR clauses give the government the right to terminate a contract in whole, or in part, if the contracting officer determines that termination is

in the government's interest. See John Massman Contracting Co. v. United States, 23 Cl. Ct. 24 (1991) (no duty to terminate when it would be in the contractor's best interest).

2. The FAR provides **no guidance** on factors that the contracting officer should consider when determining whether termination is "in the government's interest." FAR 49.101(b) and the convenience termination clauses merely provide that contracting officers shall terminate contracts only when it is in the government's interest to do so.

   a. The right to terminate "comprehends termination in a host of variable and unspecified situations" and is not limited to situations where there is a "decrease in the need for the item purchased." John Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964).

   b. A "cardinal change" in the government's requirements is not a prerequisite to a termination for convenience. T&M Distributors, Inc. v. United States, 185 F.3d 1279 (Fed. Cir. 1999).

3. The FAR does provide guidance concerning circumstances in which contracting officers normally **cannot or should not** use a convenience termination.

   a. A negotiated **no-cost settlement** is appropriate instead of a termination for convenience or default when: (1) the contractor will accept it; (2) government property was not furnished; and (3) there are no outstanding payments due to the contractor, debts due by the contractor to the government, or other contractor obligations. FAR 49.101(b).

   b. The government normally should not terminate a contract, but should allow it to run to completion, when the price of the undelivered balance of the **contract is less than $5,000**. FAR 49.101(c).

   c. **CAUTION**—Termination simply to get the item at a **lower price** may amount to **bad faith**. Sigal Constr. Co., CBCA No. 508, 10-1 BCA ¶ 34,442 (quoting Krygoski Constr. Co., 94 F.3d 1537 (Fed. Cir. 1996) ("A contracting officer may not terminate for convenience in bad faith, for example, simply to acquire a better bargain from another source.")

4. There is no requirement to give the contractor a hearing before the termination decision. Melvin R. Kessler, PSBCA No. 2820, 92-2 BCA ¶ 24,857.

5. Notice of termination

a. When terminating a contract for convenience, the contracting officer **must provide notice** to the contractor, the contract administration office, and any known assignee, guarantor, or surety of the contractor. Notice shall be made by certified mail or hand delivery. FAR 49.102. After the contracting officer issues the notice of termination, a termination contracting officer (TCO) is responsible for negotiating any settlement with the contractor. FAR 49.101(d). In practice, the administering contracting officer (ACO) and the TCO are one and the same.

b. For DoD components, **congressional notification** is required for any termination involving a reduction in employment of 100 or more contractor employees. DFARS 249.7001. The agency liaison offices will coordinate timing of the congressional notification and public release of the information with release of the termination notice to the contractor. DFARS PGI 249.7001. Similar reports are required by some DOD agencies for terminations with high-level agency interest or litigation potential. See e.g., AFFARS MP5349.

6. Contractor duties after receipt of notice of termination. FAR 49.104. The contractor is required generally to:

a. Stop work immediately and stop placing subcontracts;

b. Terminate all subcontracts;

c. Immediately advise the TCO of any special circumstances precluding work stoppage;

d. Perform any continued portion of the contract and submit promptly any request for equitable adjustment to the price;

e. Protect and preserve property in the contractor's possession, and dispose of termination inventory as directed or authorized by TCO.

f. Notify TCO in writing concerning any legal proceedings growing out of any subcontract or other commitment related to the terminated portion of the contract;

g. Settle subcontract proposals;

h. Promptly submit own termination settlement proposal; and

i. Dispose of termination inventory as authorized by TCO.

7. Duties of TCO after notice of termination. FAR 49.105.

a. Direct the action required of the prime contractor;

b. Examine the contractor's settlement proposal (and when appropriate, the settlement proposals of subcontractors); and

c. Promptly negotiate settlement agreement (or settle by determination for the elements that cannot be agreed upon, if unable to negotiate a complete settlement).

B. Standard of Review

1. The courts and boards recognize the government's broad right to terminate a contract for convenience. It is not the province of the courts to decide de novo whether termination of the contract was the best course of action. Salsbury Indus. v. United States, 905 F.2d 1518 (Fed. Cir. 1990).

2. The "Kalvar" test. To find that a termination for convenience in legal effect is a breach of contract, a contractor must prove **bad faith** or **clear abuse of discretion**. This is sometimes referred to as the "Kalvar" test. Kalvar Corp., Inc., v. United States, 543 F.2d 1298 (Ct. Cl. 1976); Salsbury Indus. v. United States, 905 F.2d 1518 (Fed. Cir. 1990).

a. Bad Faith

(1) Proof of bad faith requires proof tantamount to some **specific intent to injure** the plaintiff, malice, or "designedly oppressive conduct." Kalvar Corp., Inc., v. United States, 543 F.2d 1298, 1302 (Ct. Cl. 1976).

(2) Courts and boards presume that contracting officers act conscientiously in the discharge of their duties. Krygoski Constr. Co., Inc. v. United States, 94 F.3d 1537, 1541 (Fed. Cir. 1996).

(3) Overcoming this strong presumption requires "clear and convincing evidence." Am-Pro Protective Services, Inc. v. United States, 281 F.3d 1234, 1241 (Fed. Cir. 2002). This "clear and convincing evidence" standard is an articulation of a long-standing precedent holding that to overcome the presumption of good faith, contractors alleging bad faith on

the part of the government needed "well-nigh irrefragable proof."[1]

(4) TLT Constr. Corp., ASBCA No. 40501, 93-3 BCA ¶ 25,978 (inept government actions do not constitute bad faith).

(5) McHugh v. DLT Solutions, Inc., 618 F.3d 1375 (Fed. Cir. 2010) (government may T4C even where it contemplated at time of award that it might T4C the contract in the future); Caldwell & Santmyer, Inc., v. Glickman, 55 F.3d 1578, 1582 (Fed. Cir, 1995) (refusing to disallow a termination for convenience in a "situation in which the government contracts in good faith but, at the same time, has knowledge of facts supposedly putting it on notice that, at some future date, it may be appropriate to terminate the contract for convenience").

(6) Oregon Woods, Inc. v. United States, 355 Fed. Appx. 403 (Fed. Cir. 2009) (unpublished) (no bad faith where government terminated due to inadequate specifications even though government engineers modified the specs twice before contract award).

(7) BioFuction, LLC v. United States, 92 Fed. Cl. 167 (2010) (no bad faith where government terminated the contract for convenience after inducing contractor to perform on a related unfunded pilot program because government employee did not have authority to enter into contract).

(8) Evidence that government acted with malice or with specific intent to injure is not necessary to establish breach of the duty of good faith and fair dealing. Teresa A. McVicker, P.C., ASBCA 57487, 57653, 2012-2 BCA ¶ 35,127 (bad faith found in "bait and switch" situation where government contracts for PA services specifying contractor must hire two current contract employees; at

[1] The United States Court of Appeals for the Federal Circuit held in Am-Pro Protective Agency, Inc., v. United States, "In fact, for almost 50 years this court and its predecessor have repeated that we are 'loath to find to the contrary [of good faith], and it takes, and should take, well-nigh irrefragable proof to induce us to do so.'" 281 F.3d 1234, 1239 (quoting Schaefer v. United States, 224 Ct. Cl. 541, 633 F.2d 945, 948-49 (Ct. Cl. 1980)) (also citing Grover v. United States, 200 Ct. Cl. 337, 344 (1973); Kalvar Corp. Inc., v. United States, 543 F.2d 1298, 1302, 211 Ct. Cl. 192 (1976); Torncello v. United States, 231 Ct. Cl. 20, 681 F.2d 756, 770 (Ct. Cl. 1982); T&M Distribs., Inc. v. United States, 185 F.3d 1279, 1285 (Fed. Cir. 1999)).

same time government works to hire same individuals as federal employees).

b. Abuse of Discretion

(1) A contracting officer's decision to terminate for convenience cannot be arbitrary or capricious.

(2) The Court of Claims (predecessor to the Court of Appeals for the Federal Circuit) cited four factors to apply in determining whether a contracting officer's discretionary decision is arbitrary or capricious. Keco Indus. v. United States, 492 F.2d 1200, 1203-04 (Ct. Cl. 1974). These factors are:

(a) Evidence of subjective bad faith on the part of the government official;

(b) Lack of a reasonable basis for the decision;

(c) The degree of proof to recover is related to the amount of discretion given to the government official; i.e., the greater the discretion granted, the more difficult it is to prove that the decision was arbitrary and capricious; and,

(d) A proven violation of an applicable statute or regulation (this factor alone may be enough to show that the conduct was arbitrary and capricious).

3. The Torncello "change in circumstances" test

a. Background.

(1) In 1982, a plurality of the Court of Claims (predecessor to the Federal Circuit) articulated a different test for the sufficiency of a convenience termination.

(2) The test was known as the "change in circumstances" test. Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982) (T4C clause could not be used to avoid paying anticipated profits unless there was some change in circumstances between time of award and termination).

(3) Critics of the "change in circumstances" test charged that the court should have applied the "Kalvar" test. See e.g.,

Krygoski Constr. Co., Inc. v. United States, 94 F.3d 1537, 1543-1544 (Fed. Cir. 1996).

(4) The Court of Appeals for the Federal Circuit subsequently characterized Torncello as a "bad faith" case. Salsbury Indus. v. United States, 905 F.2d. 1518 (Fed. Cir. 1990) (The Torncello decision "stands for the unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by adverting to the convenience termination clause.") This rationale had been applied by the ASBCA prior to the Federal Circuit's decision. See Dr. Richard L. Simmons, ASBCA No. 34049, 87-3 BCA ¶ 19,984; Tamp Corp., ASBCA No. 25692, 84-2 BCA ¶ 17,460.

b. Today.

(1) Contractors occasionally still argue the change in circumstances test, though unsuccessfully. See T&M Distributors, Inc. v. United States, 185 F.3d 1279 (Fed. Cir. 1999); Charles Mullens, ASBCA No. 56927, 12-2 BCA ¶ 35163.

(2) The court has since refused to extend Torncello to situations in which the government contracts in good faith while having knowledge of facts putting it on notice that termination may be appropriate in the future. See Krygoski Construction Company, Inc. v. United States, 94 F.3d 1537 (Fed. Cir. 1996).

4. Effect of Improper Termination

a. The general rule is to place the injured party in as good a position as the one he would have been in had the breaching party fully performed.

b. By terminating in bad faith or arbitrarily and capriciously, the government breaches the contract, permitting the contractor to recover **breach of contract damages**, including anticipatory (lost) profits. See Operational Serv. Corp., ASBCA No. 37059, 93-3 BCA ¶ 26,190 (government breached contract by exercising option year of contract while knowing that it would T4C the current contract once it had awarded a commercial activities contract or decided to perform the work in house).

c. Remote and consequential damages are not recoverable. San Carlos Irr. & Drainage Dist. v. United States, 111 F.3d 1557, 1563 (Fed. Cir. 1997). But see Energy Capital Corp. v. United States, 47 Fed. Cl. 382 (2000) (awarding $8.78 million in lost profits to new venture).

C. Revocation of a Termination for Convenience

1. Reinstatement of the contract. FAR 49.102(d).

a. A terminated portion of a contract may be reinstated in whole, or in part, if the contracting officer determines in writing that there is a requirement for the terminated items and that the reinstatement is advantageous to the government. To the Administrator, Gen. Servs. Admin., 34 Comp. Gen. 343 (1955).

b. The contracting officer may not reinstate a contract unilaterally. The written consent of the contractor is required. B3h Corp., GSBCA No. 12813-P-REM, 96-2 BCA ¶ 28360 (May 3, 1996).

2. A termination for default cannot be substituted for a termination for convenience. Roged, Inc., ASBCA No. 20702, 76-2 BCA ¶ 12,018; but see Amwest Surety Ins. Co., ENG BCA No. 6036, 94-2 BCA ¶ 26,648 (substitution allowed where government issued "conditional" termination for convenience while negotiating following a termination for default).

IV. CONVENIENCE TERMINATION SETTLEMENTS

A. Procedures. FAR Part 49.

1. After termination for convenience, the parties must:

a. Stop the work;

b. Dispose of termination inventory; and

c. Adjust the contract price.

2. Timing of the Termination Settlement Proposal

a. The contractor must submit its termination proposal within **one year** of notice of the termination for convenience. FAR 49.206-1; Do-Well Mach. Shop, Inc. v. United States, 870 F.2d 637 (Fed. Cir. 1989) ("we cannot hold that Congress wanted to prevent parties from agreeing to terms that would further expedite the claim resolution process.").

b. Timely submittal is defined as mailing the proposal within one year after receipt of the termination notice. Voices R Us, Inc., ASBCA No. 51565, 99-1 BCA ¶ 30,213 (denying government's summary judgment motion for failure to provide evidence that fax notice of termination was sent to and received by contractor); Jo-Bar Mfg. Corp., ASBCA No. 39572, 93-2 BCA ¶ 25,756 (finding timely mailing despite lack of government receipt).

c. If a contractor fails to submit its termination settlement proposal within the required time period, or any extension granted by the contracting officer, the contracting officer may then unilaterally determine the amount due the contractor. FAR 49.109-7. Industrial Data Link Corp., ASBCA No. 49348, 98-1 BCA ¶ 29,634, aff'd 194 F.3d 1337 (Fed. Cir., 1999) (granting summary judgment in favor of government because termination settlement proposal was untimely submitted); Harris Corp, ASBCA No. 37940, 90-3 BCA ¶ 23,257 (termination settlement proposal found untimely where contractor notified of defects in proposal and fails to correct within extension granted by TCO).

d. A contracting officer's refusal to grant an extension of time to submit a settlement proposal is a decision that can be appealed but requires the contractor to submit a proposal for jurisdiction under the Contract Disputes Act. Cedar Constr., ASBCA No. 42178, 92-2 BCA ¶ 24,896. But, failure of the contracting officer to act on a timely request for an extension cannot deny the contractor the right to appeal. The Swanson Group, ASBCA No. 52109, 01-1 BCA ¶ 31,164.

B. Methods and Basis for Settlement

1. Methods of settlement. FAR 49.103.

a. Bilateral negotiations between the contractor and the government.

b. Unilateral determination of the government. FAR 49.109-7. This method is appropriate only when the contractor fails to submit a proposal or a settlement cannot be reached by agreement.

2. Bases of settlement. The two basis for settlement proposals are the inventory basis (the preferred method), and the total cost basis. FAR 49.206-2.

a. Inventory basis. FAR 49.206-2(a).

(1) This is the preferred method. Propellex Corp. v. Brownlee, 342 F.3d 1335, 1338 (Fed. Cir. 2003) (the preferred way for a contractor to prove increased costs is by submitting actual cost data).

(2) Settlement proposal must itemize separately:

(a) Metals, raw materials, purchased parts, work in process, finished parts, components, dies, jigs, fixtures, and tooling, at purchase or manufacturing cost;

(b) Charges such as engineering costs, initial costs, and general administrative costs;

(c) Costs of settlements with subcontractors;

(d) Settlement expenses; and

(e) Other proper charges;

(f) An allowance for profit or adjustment for loss must be made to complete the gross settlement proposal. All unliquidated advance and progress payments and all disposal and other credits known when the proposal is submitted are then deducted.

b. Total cost basis. FAR 49.206-2(b).

(1) This approach to calculating damages is disfavored. Tecom, Inc. v. United States, 86 Fed. Cl. 437, 455 (2009) (citing Serrvidone Constr. Corp. v. United States, 931 F.2d 860, 861-62 (Fed. Cir. 1991) (describing method as "a last result" that may be used "in those extraordinary circumstances where no other way to compute damages was feasible"); WRB Corp. v. United States, 183 Ct. Cl. 409, 426 (1968) (explaining this method "has been tolerated only when no other mode was available")).

(2) Used only when approved in advance by the TCO and when use of inventory basis is impracticable or will unduly delay settlement, as when production has not commenced and accumulated costs represent planning and preproduction expenses. FAR 49.206-2(b)(1)

(3) ALKAI Consultants, LLC, ASBCA 56792, 10-2 BCA ¶ 34,493 (where costs of additional work could not readily be separated from the cost of the basic contract work, a cost-based approach would be an appropriate measure of the percentage of work performed).

C. Amount of Settlement.

1. Convenience termination settlements are based on:

a. Costs incurred in the performance of terminated work, plus

b. A fair and reasonable profit on the incurred costs, plus

c. Settlement expenses.

d. See FAR 31.205-42; Teems, Inc. v. General Services Administration, GSBCA No. 14090, 98-1 BCA ¶ 29,357.

2. The contractor has the burden of establishing its proposed settlement amount. FAR 49.109-7(c); American Geometrics Constr. Co., ASBCA No. 37734, 92-1 BCA ¶ 24,545.

3. As a general rule, a termination for convenience converts the terminated portion of a fixed-price contract to a cost-reimbursement type of contract, so costs on the settlement proposal are determined under FAR Part 31 Cost Principles and Procedures. See FAR 31.205-42 – Termination Costs (these principles to be used in conjunction with other cost principles in Subpart 31.2), which lists the following categories of costs:

a. Common items;

b. Costs continuing after termination;

c. Initial costs;

d. Loss of useful value of special tooling and machinery;

e. Rental under unexpired leases;

f. Alteration of leased property;

g. Settlement expenses; and

h. Subcontractor claims.

4. The cost principles must be applied subject to the fairness principle set forth at FAR 49.201(a), which states:

   a. A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit. See Ralcon, Inc., ASBCA No. 43176, 94-2 BCA ¶ 26,935; Red River Holdings, LLC v. United States, 802 F.Supp.2d 648 (D. Md., 2011) (rejecting narrow interpretation of fairness principles).

   b. Fair compensation is a matter of judgment and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation.

   c. The use of business judgment, as distinguished from strict accounting principles, is the heart of a settlement. See Codex Corp. v. United States, 226 Ct. Cl. 693 (1981) (board decision disallowing pre-contract costs based on strict application of cost principles was remanded for further consideration by the board based on the court's determination that cost principles must be applied "subject to" the fairness concept in FAR 49.201); see also J.W. Cook & Sons, ASBCA No. 39691, 92-3 BCA ¶ 25,053 (board definition of "fairness").

5. Cost of Termination Inventory. Except for normal spoilage and except to the extent that the government assumed the risk of loss, the contracting officer shall exclude from the amounts due the contractor the fair value of property that is destroyed, lost, stolen, or damaged so as to become undeliverable to the government. FAR 52.249-2(h); see Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987) (contractor cannot recover "simply by pleading ignorance" of fate of materials); Industrial Tectonics Bearings Corp. v. United States, 44 Fed. Cl. 115 (1999) ("fair value" means "fair market value" and not the amount sought by the contractor).

6. Common Items

   a. FAR 31.205-42(a) provides that "[t]he costs of items reasonably usable on the contractor's other work shall not be allowable unless the contractor submits evidence that the items could not be retained at cost without sustaining a loss."

   b. Courts and boards have applied this provision to more than just materiel costs. Dairy Sales Corp. v. United States, 593 F.2d 1002 (Ct. Cl. 1979) (cost of butter wrapping machine not allowed in a

partial termination of a butter packing contract); Hugo Auchter GmbH, ASBCA No. 39642, 91-1 BCA ¶ 23,645 (only depreciation, not costs for general purpose off-the-shelf computer equipment allowed).

7. Subcontract Settlements. FAR 49.108.

a. Upon termination of a prime contract, the prime and each subcontractor are responsible for prompt settlement of the settlement proposals of their immediate subcontractors. FAR 49.108-1.

b. Such subcontractor recovery amounts are allowable as part of the prime's termination for convenience settlement with the government. FAR 31.205-42(h); see Fluor Intercontinental, Inc. v. IAO Worldwide Serv., Inc., 2010 WL 3610449 (N.D. Fla. Sept. 13, 2010) (prime contractor liable to subcontractor for breach although prime contractor's government contract was T4C'd).

c. The TCO shall examine each subcontract settlement to determine that it was arrived at in good faith, is reasonable in amount, and is allocable to the terminated portion of the contract. FAR 49.108-3(c). A contractor's settlement with a subcontractor must be done at "arm's-length", or it may be disallowed. Bos'n Towing & Salvage Co., ASBCA No. 41357, 92-2 BCA ¶ 24,864 (denying claim for costs of terminating charter of tug boats).

d. The contractor has a duty to determine the allowability and reiumbursability of the costs submitted by the subcontractor as part of the settlement. Parsons Global Serv. Inc., ASBCA 56731, 11-1 BCA ¶ 34,643 (dismissing contractor claims for reiumbursement of sub's costs as premature when prime had not evaluated costs).

D. Settlement Expenses. FAR 31.205-42(g).

1. Accounting, legal, clerical, and similar costs reasonably necessary for: (a) the preparation and presentation, including supporting data, of settlement claims to the contracting officer; and (b) the termination and settlement of subcontracts.

2. Reasonable costs for the storage, transportation, protection, and disposition of property acquired or produced for the contract.

3. Indirect costs related to salary and wages incurred as settlement expenses in 1. and 2. above; normally limited to payroll taxes, fringe benefits, occupancy costs, and immediate supervision costs.

E. Limitations on Termination for Convenience Settlements

1. A contractor is not entitled to anticipatory profits or consequential damages. FAR 49.202; Dairy Sales Corp. v. United States, 593 F.2d 1002 (Ct. Cl. 1979); Centennial Leasing Corp., ASBCA No. 49217, 96-2 BCA ¶ 28,571

2. **Loss Contracts**

   a. A contracting officer may **not allow profit** in settling a termination claim if it appears that the contractor would have incurred a loss had the entire contract been completed. FAR 49.203.

   b. If the contractor would have suffered a loss on the contract in the absence of the termination, the contractor may recover only the same **percentage of costs** incurred as would have been recovered had the contract gone to completion. The rate of loss is applied to costs incurred to determine the cost recovery. FAR 49.203.

   c. The government has the burden of proving that the contractor would have incurred a loss at contract completion. Balimoy Mfg. Co. of Venice, ASBCA Nos. 47140 and 48165, 98-2 BCA ¶ 30,017, aff'd, 2000 U.S. App. LEXIS 26702 (Fed. Cir. 2000).

   d. The target price of the fixed items, rather than the ceiling price, is used to compute the loss adjustment ratio for a convenience termination of a contract with both firm fixed price items and fixed price incentive fee line items. Boeing Defense & Space Group, ASBCA No. 51773, 98-2 BCA ¶ 30,069.

3. Overall contract price for fixed-price contracts:

   a. The total settlement **may not exceed the contract price** (less payments made or to be made under the contract) - plus the amount of the settlement expenses. FAR 49.207. See also, Tom Shaw, Inc., ENG BCA No. 5540, 93-2 BCA ¶ 25,742; Alta Constr. Co., PSBCA No. 1463, 92-2 BCA ¶ 24,824.

   b. Compare Okaw Indus., ASBCA No. 17863, 77-2 BCA ¶12,793 (the contract price of items terminated on an indefinite quantity contract is the price of the ordered quantity, not of the estimated quantity, where the government has ordered the minimum quantity) with Aviation Specialists, Inc., DOT BCA No. 1967, 91-1 BCA ¶ 23,534 (the only reasonable measure of the maximum recovery under a requirements contract is the government estimate).

4. Pending claims. Add the cost of valid pending claims for government delay, defective specifications, etc., to the original contract price to establish the "ceiling" of convenience termination recovery. See, e.g., Wolfe Constr. Co., ENG BCA No. 5309, 88-3 BCA ¶ 21,122.

F. Special Considerations

1. Offsets. The government may withhold a portion of the termination settlement as an offset against other claims. See Applied Companies v. United States, 37 Fed. Cl. 749 (1997) (Army properly withheld $1.9 million from termination settlement due to overpayments on another contract).

2. Merger. Claims against the government arising out of contract performance are generally merged with the termination for convenience settlement proposal; therefore, it is not necessary to distinguish equitable adjustment costs from normal performance costs unless the contract is in a loss status. Worsham Constr. Co., ASBCA No. 25907, 85-2 BCA ¶ 18,016; Symbion Ozdil Joint Venture, ASBCA 56713, 10-1 BCA ¶ 34,367.

3. Equitable adjustments. In cases of partial terminations a contractor may request an equitable adjustment for the continued portion of the contract. See FAR 52.249-2(l) (requiring proposal to be submitted within 90 days of effective date of termination unless extended in writing by KO); Varo Inc., ASBCA Nos. 47945, 47946, 98-1 BCA ¶ 29,484 (affirmative defense of untimeliness waived where not raised until third day of hearing).

4. Mutual fault. If both the government and the contractor are responsible for the causes resulting in termination of a contract, contractors have been denied full recovery of termination costs.

a. In Dynalectron Corp. v. United States, 518 F.2d 594 (Ct. Cl. 1975), the court allowed the contractor only one-half of the allowable termination for convenience costs because the contractor was at fault in continuing to incur costs while trying to meet impossible government specifications without notifying the government of its efforts.

b. In Insul-Glass, Inc., GSBCA No. 8223, 89-1 BCA ¶ 21,361, the board denied termination for convenience recovery because of the contractor's deficient administration of the contract. The board noted that under the default clause, if the default is determined to be improper, "'the rights and obligations of the parties shall be the same as if a notice of termination for convenience of the

government had been issued.' . . . We may exercise our equitable powers, however, to fashion, in circumstances where both parties share in the blame for the predicament which engenders an appeal, a remedy which apportions costs fairly."

G. Commercial Items – Termination for Convenience

1. Background. The Federal Acquisition Streamlining Act of 1994, P.L. 103-355, 108 Stat. 3243 (Oct. 13, 1994), established special requirements for the acquisition of commercial items. Congress intended government acquisitions to more closely resemble those customarily used in the commercial market place. FAR 12.201.

2. FAR 12.403(a) states that the termination for convenience concepts for commercial items differ from those in FAR Part 49 for non-commercial items, and that the Part 49 principles do not apply to terminations for convenience of a commercial item, except as guidance to the extent they do not conflict with FAR 52.212-4.

3. Policy. The contracting officer should exercise the government's right to terminate a contract for a commercial item only when such a termination would be in the best interests of the government. FAR 12.403(b).

4. When the contracting officer terminates for convenience a commercial item contract, the contractor shall be paid:

   a. The percentage of the contract price reflecting the percentage of the work performed prior to the notice of the termination, and

   b. Any charges the contractor can demonstrate directly resulted from the termination. FAR 12.403(d)(1).

5. The contractor may demonstrate such charges using its standard record keeping system and is not required to comply with the cost accounting standards or the contract cost principles in Part 31. The Government does not have any right to audit the contractor's records solely because of the termination for convenience. FAR 12.403(d)(1)(ii).

6. Generally, the parties should mutually agree upon the requirements of the termination proposal. The parties must balance the Government's need to obtain sufficient documentation to support payment to the contractor against the goal of having a simple and expeditious settlement. FAR 12.403(d)(2).

7. Recovery on commercial item contracts.

a. In Red River Holdings, LLC, ASBCA 56316, 09-2 BCA ¶ 34,304, a charter of a vessel to the government included the commercial item termination for convenience clause. The contractor was not entitled to recover for a termination for convenience under FAR Part 49 cost principles. The phrase in the termination for convenience clause "reasonable charges the Contractor can demonstrate . . . have resulted from the termination" is read to mean settlement expenses, and not items such as preparatory costs.

b. For a good analysis of Red River and how the commercial item principles have been applied in other cases, see Seidman, Termination for Convenience of FAR Par 12 Commercial Contracts, Nash & Cibinic Report August 2010 at 117.

V. DISPUTES REGARDING TERMINATION SETTLEMENTS

A. When does a T4C proposal become a claim? Once the parties reach an "impasse" in settlement negotiations, a request that the contracting officer render a final decision is implicit in the contractor's settlement proposal.

B. Once the parties reach an impasse, the proposal becomes a claim under the Contract Disputes Act. James M. Ellet Constr. Co. v. United States, 93 F.3d 1537 (Fed. Cir. 1996); Rex Systems, Inc. v. Cohen, 224 F.3d 1367 (Fed. Cir. 2000) (no impasse entitling contractor to interest despite taking 2 ½ years to settle the termination); Mediax Interactive Technologies, Inc., ASBCA No. 43961, 99-2 BCA ¶ 30,318.

C. If an Agency fails to respond to a contractor's settlement proposal, the contractor can file an appeal with the appropriate Board. ePlus Tech., Inc. v. FCC., CBCA 2573, 2012-2 BCA ¶ 25,114 (Board found jurisdiction over appeal when Agency failed to respond for six months to termination settlement proposal that was certified as a claim).

D. A claim based upon the termination of a contract is typically pursued under the Contract Disputes Act, 41 U.S.C. §§ 7101-09. OAO Corp. v. Johnson, 49 F.3d 721, 724-25 (Fed. Cir. 1995); Data Monitor Sys., Inc. v. United States, 74 Fed. Cl. 66, 71 (2006). Be aware, however, the Court of Federal Claims has reviewed some terminations for convenience pursuant to its bid protest jurisdiction when the termination is in conjunction with corrective action. Wildflower Int'l, Inc. v. United States, 105 Fed. Cl. 362 (2012).

VI. FISCAL CONSIDERATIONS

A. An agency must analyze each contract that it plans to terminate for convenience to determine whether termination for convenience or completion of the contract is less costly or otherwise in the best interests of the government.

B. An agency must determine whether the convenience termination settlement would be governed by standard FAR convenience termination clause provisions, or by contract specific terms, such as termination ceilings, multi-year contract termination costs, or other specific contractual terms.

C. **General Rule:** A prior year's funding obligation is extinguished upon termination of a contract, and those funds will **not remain available** to fund a **replacement contract** in a subsequent year where a contracting officer terminates a contract for the convenience of the government. The contracting officer must deobligate all funds in excess of the estimated termination settlement costs. FAR 49.101(f); DOD Financial Management Regulation 7000.14-R, vol. 3, ch. 8, para. 080512.

D. **Two Exceptions**:

1. In response to judicial order.

a. Funds originally obligated in one fiscal year for a contract that is later terminated for convenience in response to a **court order** or to a determination by the Government Accountability Office or other competent authority that the award was improper, can remain available in a subsequent fiscal year to fund a replacement contract. Funding of Replacement Contracts, B-232616, 68 Comp. Gen. 158 (1988).

b. Funds available for obligation for a contract at the time of a GAO protest, agency protest, or court action filed in connection with a solicitation for, proposed award of, or award of such contract, remain available for obligation for 100 days after the date on which the final ruling is made on the protest or other action. A ruling is considered "final" on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such an appeal or request, whichever is later. 31 U.S.C. § 1558; DFAS-IN 37-1, para. 080606. See also OFFICE OF THE GENERAL COUNSEL, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, Principles of Federal Appropriations Law, Vol I, 5-89 (3d ed. 2004).

2. Clearly erroneous award. Funds originally obligated in one FY for a contract that is later terminated for convenience as a result of the contracting officer's determination that award was clearly erroneous, can remain available in a subsequent FY to fund a replacement contract. Navy, Replacement Contract, B-238548, 70 Comp. Gen. 230 (1991).

3. The two exceptions above apply subject to the following conditions:

   a. The original award was made in good faith;

   b. The agency has a continuing bona fide need for the goods or services involved;

   c. The replacement contract is of the same size and scope as the original contract;

   d. The replacement contract is executed without undue delay after the original contract is terminated for convenience; and

   e. If the termination for convenience is issued by the contracting officer, the contracting officer's determination that the award was improper is supported by findings of fact and law. Funding of Replacement Contracts, B-232616, 68 Comp. Gen. 158 (1988); Navy, Replacement Contract, B-238548, 70 Comp. Gen. 230 (1991).

VII. CONCLUSION

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Chapter 25
Contract Terminations for Default

2013 Contract Attorneys Deskbook

CHAPTER 25

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CHAPTER 25

CONTRACT TERMINATIONS FOR DEFAULT

I. INTRODUCTION

A. Definition. A contractor's unexcused present or prospective failure to perform in accordance with the contract's terms, specifications, or delivery schedule constitutes contractual default under government contracts. See FAR 49.401.

B. Effect of Default Terminations

1. Judges often describe terminations for default as a "contractual death sentence." ENGBCA No. 5959, No. 6005, 94-2 BCA ¶ 26,649.

2. A termination for default continues to have an on-going negative effect on a contractor beyond the specific contract which was terminated. This is true even when the contractor has appealed and even prevails in challenging the termination.

a. Colonial Press Int'l, Inc., B-403632, 2010 CPD ¶ 247 (GAO upheld the exclusion of the defaulted contractor from the competition for the reprocurement contract even though the termination was on appeal).

b. Commissioning Solutions Global, LLC, B-403542, 2010 CPD ¶ 272 (GAO went out of its way to find that, in evaluating offers for a contract for dry dock repairs, the Coast Guard properly could have considered the T4D of a prior similar contract in assessing past performance even though the record established that the evaluators did not consider the earlier contract; GAO found that the prior T4D could properly be considered even though it was on appeal and a few weeks later the Coast Guard agreed to convert the T4D to a T4C).

c. M. Erdal Kamisli Co. Ltd. (ERKA Co. Ltd.), B-403909.2, B-403909.4, 2011 CPD ¶ 63, at *5 (2011) (holding that the agency could properly consider a prior T4D in rating past performance as an evaluation factor in a new procurement even though the T4D was on appeal; the Army could "properly rely upon its reasonable perception of a contractor's inadequate performance even where the contractor disputes the agency's position").

C. Review of Default Terminations by the Courts and Boards

1. Courts and boards hold the government to a high standard when terminating a contract for default because of the adverse impact such an action has on a contractor. Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987) ("[A] termination for default is a drastic sanction [citation omitted] that should be imposed upon a contractor only for good cause and in the presence of solid evidence."); Mega Constr. Co. v. United States, 25 Cl. Ct. 735 (1992).

2. Unfortunately, government officials frequently fail to follow prescribed procedures, rendering default terminations subject to reversal on appeal. Prior to issuing a default termination notice, contracting officers must have a valid basis for the termination, must issue proper notices, must account for the contractor's excusable delay, must act with due diligence, and must make a reasonable determination while exercising independent judgment.

3. Attorneys play a critical role in this process, ensuring that all legal requirements are met and the termination decision receives the care and attention it deserves.

4. Burden of Proof

a. It is the government's burden to prove, by a preponderance of the evidence, that the termination for default was proper. Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987); Walsky Constr. Co., ASBCA No. 41541, 94-1 BCA ¶ 26,264.

b. A contractor's technical default is not determinative of its propriety. The Government must exercise its discretion reasonably to terminate a contract for default. Darwin Constr. Co. v. United States, 811 F.2d 593 (Fed. Cir. 1987).

c. Once the government has met its burden of demonstrating the appropriateness of the default, the contractor has the burden of proof that its failure to perform was the result of causes beyond its control and without fault on its part. International Elec. Corp. v. United States, 646 F.2d 496 (Ct. Cl. 1981); Composite Int'l, Inc., ASBCA No. 43359, 93-2 BCA ¶ 25,747.

II. THE RIGHT TO TERMINATE FOR DEFAULT

A. Contractual Rights. FAR Subpart 49.4

1. The FAR contains various default clauses for use in government contracts that identify the conditions that permit the government to terminate a contract for default. See e.g., FAR 52.249-8 and FAR 52.249-9.

2. The clauses contain different bases for termination and different notice requirements. For example, the Fixed-Price Supply and Service clause (FAR 52.249-8) is different from the Fixed-Price Construction clause (FAR 52.249-10).

B. Common-Law Doctrine

1. The standard FAR default clauses provide: "The rights and remedies of the government in this clause are in addition to any other rights and remedies provided by law or under this contract." See FAR 52.249-8(h) and FAR 52.249-10(d).

2. Courts commonly cite the above-quoted provision to support termination based on common-law doctrines, such as anticipatory repudiation. Cascade Pac. Int'l v. United States, 773 F.2d 287 (Fed. Cir. 1985); All-State Constr., Inc., ASBCA No. 50586, 06-2 BCA ¶ 33,344 (contractor's failure to diligently perform pending resolution of a dispute, as required by the Disputes clause, is a material breach for which termination is proper under the government's common law rights reserved in 52.249-10(d)).

III. GROUNDS FOR TERMINATION

A. Failure to Deliver or Perform on Time

1. This ground is sometimes referred to as an "(a)(1)(i)" termination because of the FAR provision setting forth this ground. FAR 52.249-8(a)(1)(i); 52.249-10(a).

2. Generally, time is of the essence in all government contracts containing fixed dates for delivery or performance. DeVito v. United States, 413 F.2d 1147 (Ct. Cl. 1969); Kit Pack Co., ASBCA No. 33135, 89-3 BCA ¶ 22,151; Matrix Res., Inc., ASBCA No. 56430, 11-2 BCA ¶ 34,789 (upholding T4D where after 2 ½ years of extension the contractor demanded another 126 day extension in order to finish); Selpa Constr. & Rental Equip. Corp., PSBCA No. 5039, 11-1 BCA ¶ 34,635.

3. When a contract does not specify delivery dates (or those dates have been waived), actual delivery could constitute the "delivery date" for purposes of the T4D clause. Aerometals, Inc., ASBCA No. 53688, 03-2 BCA ¶ 32,295.

4. Compliance with specifications

a. The government is entitled to strict compliance with its specifications. M. Maropakis Carpentry, Inc. v. United States, 84 Fed. Cl. 182, 188 (Fed. Cl. 2008) aff'd, 609 F.3d 1323 (Fed. Cir. 2010); Kurz-Kasch, Inc., ASBCA No. 32486, 88-3 BCA ¶ 21,053.

b. Exceptions:

(1) The courts and boards recognize the common-law principles of **substantial compliance** (supply) and **substantial completion** (construction) to protect the contractor where timely performance departs in minor respects from that required by the contract.

(2) **Rule:** If the contractor substantially complies with the contract, the government must give the contractor additional time to correct the defects prior to terminating for default. Radiation Technology, Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966); Al Khudhairy Grp., ASBCA No. 56131, 10-2 BCA ¶ 34,530 (even though 95% complete, the board held that because the termination affected only the uncompleted 5% of the work, the doctrine of substantial completion did not apply); FD Constr. Co., ASBCA No. 41441, 91-2 BCA ¶ 23,983 (contractor not protected under doctrine of substantial completion because it abandoned the work and refused to complete administrative items); Selpa Constr. & Rental Equip. Corp., PSBCA No. 5039, 11-1 BCA ¶ 34,635 (rejecting defense of substantial completion where contract was not complete after extensions totalling 563 days and building was not available for intended use).

B. Failure to Make Progress so as to Endanger Performance

1. Supply and Service. The default clauses for (i) fixed-price supply and service contracts and (ii) cost-reimbursement contracts provide for termination when the contractor fails to make progress so as to endanger performance. This is sometimes referred to as an "(a)(1)(ii)" termination. FAR 52.249-8(a)(1)(ii); FAR 52.249-6(a).

2. Construction. The default clause for fixed-price construction contracts provides for termination when the contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in the contract. FAR 52.249-10(a).

3. Proof

a. The government is not required to show that it was impossible for the contractor to complete performance. California Dredging Co., ENGBCA No. 5532, 92-1 BCA ¶ 24,475.

b. Rather, the contracting officer must have a **reasonable belief** that there is no reasonable likelihood that the contractor can perform the entire contract effort within the time remaining for contract performance. Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987) (upholding the lower court's conversion of the T4D to a T4C where government did not determine whether contractor could complete work within the required time, or determine how long it would take a follow-on contractor to do the work); Edge Constr. Co., Inc. v. United States, 95 Fed. Cl. 407 (2010) (government must demonstrate that the contracting officer included any extensions granted due to unusually severe weather when determining if the contractor could perform within the time remaining); Pipe Tech, Inc., ENGBCA No. 5959, No. 6005, 94-2 BCA ¶ 26,649 (termination improper where 92% of contract performance time remained and reprocurement contractor fully performed within the time allowed in defaulted contract); Advance Constr. Servs., Inc., ASBCA No. 55232, 11-2 BCA ¶ 34,776 (government not required to wait the full 45 days of the cure notice when it became clear earlier that contractor could not achieve necessary average daily production).

c. Prior to termination, the contracting officer should analyze progress problems against a specified completion date, adjusted to account for any government-caused delays. Technocratica, ASBCA No. 45077, et al, 94-2 BCA ¶ 26,606 (T4D improper based on "poor progress," not inability to complete contract on time); Environmental Safety Consultants, Inc., ASBCA No. 51722, 11-2 BCA ¶ 34,848 (attempt to terminate for failure to make progress was rejected in absence of effective delivery date).

d. Factors to consider include, but are not limited to:

(1) A comparison of the percentage of work completed and the time remaining before completion is due;

(2) The contractor's failure to meet progress milestones;

(3) Problems with subcontractors and suppliers;

(4) The contractor's financial situation; and

(5) The contractor's past performance.

(6) See McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1016-1017 (Fed. Cir. 2003); Advance Constr. Servs., Inc., ASBCA No. 55232, 11-2 BCA ¶ 34,776 (measuring progress against the average contractor conceded was required to complete project).

C. Failure to Perform Any Other Provision of the Contract

1. Supply and Service. The default clause in fixed-price supply and service contracts specifically provides this ground for termination. It is sometimes referred to as an "(a)(1)(iii)" termination. FAR 52.249-8(a)(1)(iii).

2. Construction.

a. This basis does **not exist** under the construction clauses. See FAR 52.249-10.

b. BUT . . . the courts and boards may sustain default terminations of construction contracts on this ground by reasoning that the failure to perform the "other provision" renders the contractor unable to perform the work with the diligence required to insure timely completion (see previous ground for termination at FAR 52.249-10(a)). Engineering Technology Consultants, S.A., ASBCA No. 43454, 94-1 BCA ¶ 26,586 ("The Government, reasonably we conclude, had no alternative but to stop performance based on ETC's failure to maintain the proper amount of insurance coverage. Under the circumstances ETC was unable to perform and/or prosecute the work with the diligence required to insure completion within the performance period.").

3. Courts and boards will not sustain a default termination unless that "other provision" of the contract is a "material" or "significant" requirement. Precision Prods., ASBCA No. 25280, 82-2 BCA ¶ 15,981 (noncompliance with first article manufacture requirements not deemed material under facts); Yonir Technologies, Inc., ASBCA No. 56736, 10-1 BCA ¶ 34,417 (noncompliance with first article manufacture requirements deemed material when First Article clause specifies that CO disapproval equals contractor failure to make delivery under Default clause of contract); 5860 Chicago Ridge, LLC v. United States, 104 Fed. Cl. 740 (2012) (the government must prove that the breach is material when relying on its general right to terminate under the standard default clause for violation of any other provision).

4. Examples of "material" or "significant" requirements:

a. Failure to deliver an agreement with Cisco permitting contractor to perform required maintenance services on Cisco SMARTnet equipment within 5 days as specified in the contract. ZIOS Corp., ASBCA No. 56626, 10-1 BCA ¶ 24,244 (here, the contracting officer offered ZIOS the opportunity to withdraw from the contract when he became concerned about its ability to perform; ZIOS turned down the offer because it wanted the money).

b. Failure to employ drivers with valid licenses. Maywood Cab Service, Inc., VABCA No. 1210, 77-2 BCA ¶ 12,751.

c. Failure to obtain (or provide proof of) liability insurance. A-Greater New Jersey Movers, Inc., ASBCA No. 54745, 06-1 BCA ¶ 33,179; UMM, Inc., ENGBCA No. 5330, 87-2 BCA ¶ 19,893 (mowing services contract).

d. Violation of the Buy American Act. HR Machinists Co., ASBCA No. 38440, 91-1 BCA ¶ 23,373.

e. Failure to comply with statement of work. 4-D and Chizoma, Inc., ASBCA Nos. 49550, 49598, 00-1 BCA ¶ 30,782 (failure to properly videotape inspection of sewer line).

f. Failure to retain records under Payrolls and Basic Records Clause justified default under the Davis-Bacon Act. Kirk Bros. Mech. Contractors, Inc. v. Kelso, 16 F.3d 1173 (Fed. Cir. 1994).

g. Failure to provide a quality control plan. A-Greater New Jersey Movers, Inc., ASBCA No. 54745, 06-1 BCA ¶ 33,179

D. Other Contract Clauses Providing Independent Basis to Terminate for Default

1. Gratuities clause. FAR 52.203-3.

2. Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters. FAR 52.209-5; see Spread Information Sciences, Inc., ASBCA No. 48438, 96-1 BCA¶ 27,996.

3. Equal Opportunity clause. FAR 52.222-26.

4. Bid Guarantee clause. FAR 52.228-1.

5. Inspection clause. FAR 52.246-2.

E. Common Law Ground – Anticipatory Repudiation

1. Each party to a contract has the common-law right to terminate a contract upon actual or anticipatory repudiation of the contract by the other party. Restatement (Second) of Contracts § 250; Uniform Commercial Code § 2-610; Dingley v. Oler, 117 U.S. 490 (1886); see also, Franconia Associates, et al., v. United States, 536 U.S. 129 (2002) (discussing the difference between an immediate breach and repudiation in the context of a federal housing loan program).

2. This common-law basis for default applies to all government contracts because contract clauses generally do not address or supersede this principle. Cascade Pac. Int'l v. United States, 773 F.2d 287 (Fed. Cir. 1985).

3. **Requirements** for anticipatory repudiation**:**

   a. Anticipatory repudiation must be **express**. United States v. DeKonty Corp., 922 F.2d 826 (Fed. Cir. 1991) (must be absolute refusal, distinctly and unequivocally communicated); Marine Constr. Dredging, Inc., ASBCA No. 38412, 95-1 BCA ¶ 27,286 (no repudiation where contractor did not continue performance due to government's failure to issue appropriate instructions).

   b. Anticipatory repudiation must be **unequivocal** and manifest either a clear intention not to perform or an inability to perform the contract. Ateron Corp., ASBCA No. 46352, 94-3 BCA ¶ 27,229 (contractor's statement that continued contract performance is impossible constituted repudiation). Compare Swiss Prods., Inc., ASBCA No. 40031, 93-3 BCA ¶ 26,163 (contractor's refusal to perform until government provided advance payments constitutes repudiation), with Engineering Professional Servs., Inc., ASBCA No. 39164, 94-2 BCA ¶ 26,762 (no repudiation where contractor's statement that "government financing must be provided to assure contract completion" was not precondition to resumed performance).

4. Abandonment is **actual** repudiation. Compare Ortec Sys., Inc., ASBCA No. 43467, 92-2 BCA ¶ 24,859 (termination proper when work force left site and contractor failed to respond to phone calls), with Western States Mgmt. Servs., Inc., ASBCA No. 40212, 92-1 BCA ¶ 24,714 (no abandonment when contractor was unable to perform by unreasonable start date established after disestablishment of original start date); see Brock v. United States, 2012 WL 2057036 (Fed. Cl. June 7, 2012) (unsuccessfully arguing that agency abandoned the contract at the same time that contractor refused to continue performance).

5. Examples of anticipatory repudiation.

a. D&M Grading, Inc. v. Dep't of Agriculture, CBCA No. 2625, 12-2 BCA ¶35,021 (contractor's refusal to continue performance of the contract because of disagreement with agency's reasonable interpretation of the scope of the contract was anticipatory repudiation).

b. Emiabata v. United States, 102 Fed. Cl. 787 (2012) (despite repeated opportunities, mail transportation contractor failed to provide certificates for the necessary liability insurance).

c. Brock v. United States, 2012 WL 2057036 (Fed. Cl. June 7, 2012) (anticipatory repudiation where contractor refused to continue performance under new delivery schedule, promised litigation, and adopted a "no surrender" position).

d. Global Constr. Inc. v. Dept. of Veterans Affairs, CBCA 1198, 10-1 BCA ¶ 34,363 (contractor's failure to provide revised schedules and adequate assurances in response to cure notice meant that the contracting officer reasonably believed there was no reasonable possibility that the contractor could complete the work in the time remaining).

e. Montage, Inc., GAOCAB 2006-2, 10-2 BCA ¶ 34,490 (board held that the contractor for installation of generator anticipatorily repudiated the contract by: (i) refusing to provide contractually required staging plan, (ii) refused to proceed with performance even though the contract contained a contract disputes clause, and (iii) relying on Danzig v. AEC Corp., 224 F.3d 1333 (Fed. Cir. 2000), contractor did not provide adequate assurances in response to justified cure notice).

f. Free & Ben, Inc., ASBCA No. 56129, 12-1 BCA ¶ 34,966 (contractor anticipatorily repudiated where they could not perform on contract to supply cargo trucks in Iraq due to refusal of government to provide End Use Certificate to Japanese supplier as precondition to export trucks.); Tzell Airtrak Travel Group Corp., ASBCA No. 57313, 11-2 BCA ¶ 34,845 (contractor's repudiation excused where government made material misrepresentation regarding volume of work during contract formation).

F. Common Law Ground – Demand for Assurance

1. Failure by one party to give adequate assurances that it would complete a contract is a valid basis for a default termination under common-law. Restatement (Second) of Contracts § 251; Uniform Commercial Code § 2-609; Global Constr. Inc. v. Dept. of Veterans Affairs, CBCA No. 1198,

10-1 BCA ¶ 34,363 (contractor's failure to provide revised schedules and adequate assurances in response to cure notice meant that the contracting officer reasonably believed there was no reasonable possibility that the contractor could complete the work in the time remaining).

2. This basis for termination applies to government contracts. Danzig v. AEC Corp., 224 F.3d 1333 (Fed. Cir. 2000) (AEC's letter responses and conduct following the Navy's cure notice supported T4D); Eng'r Professional Servs., Inc., ASBCA No. 39164, 94-2 BCA ¶ 26,762; National Union Fire Ins. Co., ASBCA No. 34744, 90-1 BCA ¶ 22,266. But see Ranco Constr., Inc. v. Gen. Servs. Admin., GSBCA No. 11923, 94-2 BCA ¶ 26,678 (board questions whether demand for assurance under UCC § 2-609 applies to construction contracts).

3. The government's "cure notice" may be the equivalent of a demand for assurance. Hannon Elec. Co. v. United States, 31 Fed. Cl. 135 (1994) (contractor's failure to provide adequate assurance in response to cure notice justified default termination); Fairfield Scientific Corp., ASBCA No. 21151, 78-1 BCA ¶ 13082.

G. Grounds Unknown at Time of Termination

1. When a contractor appeals a final decision terminating a contract for default, the government is not bound by the contracting officer's reasons for the termination as stated in the termination notice.

2. If a proper ground for the default termination existed at the time of the termination, regardless of whether the contracting officer relied on or was even aware of that basis, the termination is proper. See Glazer Construction Co. v. United States, 52 Fed. Cl. 513 (2002) (COFC upheld a termination for default based on Davis-Bacon Act violations committed before, but discovered after, the government issued the default termination notice); Kirk Bros. Mech. Contractors, Inc. v. Kelso, 16 F.3d 1173 (Fed. Cir. 1994) (violations of Davis-Bacon Act); Joseph Morton Co. v. United States, 757 F.2d 1273 (Fed. Cir. 1985) (fraud); Quality Granite Constr. Co., ASBCA No. 43846, 93-3 BCA ¶ 26,073 (government not required to give notice to contractor when unaware of basis for termination).

IV. NOTICE REQUIREMENTS

A. Cure Notice

1. Definition.

a. Notice issued by the government to inform the contractor that the government considers the contractor's failure a condition that is endangering performance of the contract.

b. The cure notice specifies a period (typically 10 days) for the contractor to remedy the condition.

c. If the condition is not corrected within this period, the cure notice states that the contractor *may* face termination of its contract for default (less definite than a show cause notice – see below).

d. Mandatory in some situations.

2. A proper cure notice must inform the contractor in writing:

a. That the government intends to terminate the contract for default;

b. Of the reasons for the termination; and

c. That the contractor has a right to cure the specified deficiencies within the cure period (10 days). FAR 49.607(a).

3. To support a default decision, the cure notice must clearly identify the nature and extent of the performance failure. Lanzen Fabricating, Inc, ASBCA No. 40328, 93-3 BCA ¶ 26,079 (show cause notice did not serve as cure notice for purposes of (a)(1)(ii) termination because it didn't specify failures to be cured); Insul-Glass, Inc., GSBCA No. 8223, 89-1 BCA ¶ 21,361 (notice directed contractor to provide acceptable drawings without specifying what the contractor had to do to make the drawings acceptable); but see Genome Communications, ASBCA Nos. 57267, 57285, 11-1 BCA ¶ 34,699 (contractor did not have to comply with directions in a cure notice that attempted to impose obligations beyond the contract requirements).

4. The government must give the contractor a minimum of ten days to cure the deficiency. Red Sea Trading Assoc., ASBCA No. 36360, 91-1 BCA ¶ 23,567 (the ten day period need not be specifically stated in the notice if a minimum of ten days was actually afforded the contractor); NCLN20., Inc. v. United States, 99 Fed. Cl. 734 (2011) (overturning T4D that took place on the second day of the required 10 day cure period); but see Advance Constr. Servs., Inc., ASBCA No. 55232, 11-2 BCA ¶ 34,776 (government not required to wait the full 45 days of the cure notice when it because clear earlier that contractor could not achieve necessary average daily production).

5. Is a cure notice required?

a. Failure to perform on time. FAR 52.249-8(a)(1)(i).

(1) **NO**.

(2) Sazie Wilson, PSBCA No. 5247, 12-1 BCA ¶34,906 (cure notice not required when T4D is for failure to meet a delivery date as opposed to a T4D for failure to make progress toward meeting a delivery date that has not yet arrived).

(3) Delta Indus., DOTCAB No. 2602, 94-1 BCA ¶ 26,318 (government rejected desks that did not meet contract specifications; cure notice not issued by KO)

b. Failure to make progress. FAR 52.249-8(a)(1)(ii).

(1) **YES except construction**.

(2) Fixed-price supply or service contracts (FAR 52.249-8); fixed-price research and development contracts (FAR 52.249-9); cost-reimbursement contracts (FAR 52.249-6).

(3) Construction. FAR 52.249-10(a). May terminate upon written notice. No cure notice required.

c. Failure to perform any other provision of the contract. FAR 52.249-8(a)(1)(iii)

(1) **YES except construction**.

(2) Fixed-price supply or service contracts (FAR 52.249-8); fixed-price research and development contracts (FAR 52.249-9); cost-reimbursement contracts (FAR 52.249-6).

(3) Remember – This is not a ground for T4D in construction contracts.

d. Other Contract Clauses Providing Independent Basis to T4D

(1) **DEPENDS** on the clause.

(2) See "K" Servs., ASBCA No. 41791, 92-1 BCA ¶ 24,568 (default under FAR 52.209-5 for false certification regarding debarment status of contractor's principal; no cure notice required because false certification cannot be cured)

e. Anticipatory repudiation.

(1) **NO**.

(2) Beeston, Inc., ASBCA No. 38969, 91-3 BCA ¶ 24,241; Scott Aviation, ASBCA No. 40776, 91-3 BCA ¶ 24,123.

f. Failure to give adequate assurances.

(1) **SORT OF**.

(2) Generally, do not have to give a "cure notice," but government does have to provide a "demand for assurances." A cure notice suffices as a demand for assurances.

g. Grounds unknown at time of termination

(1) **NO**.

(2) Quality Granite Constr. Co., ASBCA No. 43846, 93-3 BCA ¶ 26,073 (government not required to give notice to contractor when unaware of basis for termination)

h. Fraud – **NO.**

i. Construction. FAR 52.249-10.

(1) **NO**.

(2) Professional Services Supplier, Inc. v. United States, 45 Fed. Cl. 808, 810 (2000) (no cure notice required before a fixed price construction contract may be terminated for default).

(3) Although not required, the government frequently provides the contractor a cure notice prior to terminating these contracts. See Hillebrand Constr. of the Midwest, Inc., ASBCA No. 45853, 95-1 BCA ¶ 27,464 (failure to provide submittals); Engineering Technology Consultants, S.A., ASBCA No. 43454, 94-1 BCA ¶ 26,586 (concerning contractor's failure to provide proof of insurance).

B. Show Cause Notice

1. Definition.

a. Notice issued by government to inform the contractor that the government intends to terminate for default unless the contractor "shows cause" why the contract should not be terminated. FAR 49.607.

b. **Not required**. The default clauses do not require the use of a show cause notice. See FAR 52.249-8 (Supply and Service); FAR 52.249-9 (Research and Development); FAR 52.249-10 (Construction); Alberts Assocs., ASBCA No. 45329, 95-1 BCA ¶ 27,480; Sach Sinha and Associates, Inc., ASBCA No. 46916, 96-2 BCA ¶ 28,346.

c. **BUT . . .** if a termination for default appears appropriate, the government **should, if practicable**, notify the contractor in writing of the possibility of the termination. FAR 49.402-3(e)(1). The courts and boards may require a "show cause" notice if its use was practicable. Udis v. United States, 7 Cl. Ct. 379 (1985); Enginetics Corp., ASBCA No. 48034, 92-2 BCA ¶ 24,965 (denying government's motion for summary judgment while noting government's failure to issue show cause notice).

d. If the government issues a show cause notice, it need not give the contractor ten days to respond. Nisei Constr. Co., Inc., ASBCA Nos. 51464, 51466, 51646, 99-2 BCA ¶ 30,448 (six days was sufficient in construction default case).

2. The show cause notice should:

a. Call the contractor's attention to its contractual liabilities if the contract will be terminated for default.

b. Request the contractor to show cause why the contract should not be terminated for default.

c. State that the failure of the contractor to present an explanation may be taken as an admission that no valid explanation exists.

d. The contracting officer is not required to include every subsequently advanced reason for the termination in the show cause notice because the government is under no obligation to issue the notice. Sach Sinha and Associates, Inc., ASBCA No. 46916, 96-2 BCA ¶ 28,346.

3. Why use a show cause notice?

a. Courts and boards like to see them

b. They shock contractor into compliance

c. They inform us of contractor's defenses

d. Can help us avoid waiver (see discussion below)

V. CONTRACTOR DEFENSES TO A TERMINATION FOR DEFAULT

A. Excusable Delay

1. The contractor has the burden to prove that its failure to perform was excusable. Lan-Cay, Inc., ASBCA No. 56140, 12-1 BCA ¶ 34,935.

2. A contractor's failure to deliver or to perform is excused if:

   a. The failure is beyond the control and without the fault or negligence of the contractor. FAR 52.249-8(c).

   b. Timely performance was actually prevented by the claimed excuse. Sonora Mfg., ASBCA No. 31587, 91-1 BCA ¶ 23,444; Beekman Indus., ASBCA No. 30280, 87-3 BCA ¶ 20,118.

   c. The specific period of delay caused by the event. Conquest Constr., Inc., PSBCA No. 2350, 90-1 BCA ¶ 22,605.

   d. Construction only: The delay arises from unforeseeable causes beyond the control and without the fault or negligence of the contractor. FAR 52.249-10(b)(1); Local Contractors, Inc., ASBCA No. 37108, 1991 WL 517213 (Oct. 11, 1991); Charles H. Siever, ASBCA No. 24814, 83-1 BCA ¶ 16,242.

   e. Construction only: The contractor, within 10 days from the beginning of any delay (unless extended by the contracting officer), notifies the contracting officer in writing of the causes of delay. FAR 52.249-10(b)(2).

3. The default clauses specifically identify some causes of excusable delay. These include:

   a. Acts of God (AKA "force majeure") or of the public enemy. See Nogler Tree Farm, AGBCA No. 81-104-1, 81-2 BCA ¶ 15,315 (eruption of Mount St. Helens volcano); Centennial Leasing v. Gen. Servs. Admin., GSBCA No. 12037, 94-1 BCA ¶ 26,398 (death of chief operating officer not an act of God); C-Shore International, Inc. v. Dept. of Agriculture, CBCA 1696, 10-1 BCA ¶ 34, 379 (sought to excuse non-performance on hurricanes Katrina and Rita; board agreed that hurricanes are acts of God but the hurricanes occurred *before* the contracts were awarded and contractor had obligation to take into account the effect of the hurricanes before accepting the contractual commitment).

b. Acts of the government in either its sovereign or contractual capacity.

(1) Sovereign capacity refers to public acts of the government not directed to the contract. Home Entertainment, Inc., ASBCA No. 50791, 99-2 BCA ¶ 30,550 (analysis of "sovereign act" relating to expulsion orders in Panama); Woo Lim Constr. Co., ASBCA No. 13887, 70-2 BCA ¶ 8451 (imposition of security restrictions in a hostile area).

(2) Acts of the government in its contractual capacity are most common and include delays caused by such things as defective specifications, unreasonable government inspections and late delivery of government furnished property. See Marine Constr. Dredging, Inc., ASBCA No. 38412, 95-1 BCA ¶ 27,286 (government failed to respond to contractor's request for directions); John Glenn, ASBCA No. 31260, 91-3 BCA ¶ 24,054 (government issued faulty performance directions); Jean E. Smith, PSBCA No. 5360, 10-2 BCA ¶ 34,546 (contractor refused to wear her badge or leave post office; arrested for criminal trespass but later acquitted; board upheld T4D based on contractor's inability to perform the contract after being banned from the postal facilities following arrest because contractor precipitated her own arrest by her own conduct).

c. Fires. Hawk Mfg. Co., GSBCA No. 4025, 74-2 BCA ¶ 10,764 (lack of facilities rather than a plant fire caused contractor's failure to timely deliver).

d. Floods. Wayne Constr., ENGBCA No. 4942, 91-1 BCA ¶ 23,535 (storm damage to a dike entitled contractor to time extension).

e. Epidemics and quarantine restrictions. Ace Elecs. Assoc., ASBCA No. 11496, 67-2 BCA ¶ 6456 (denying relief based on allegation that flu epidemic caused a 30% to 40% rate of absenteeism, without showing that it contributed to delay).

f. Strikes, freight embargoes, and similar work stoppages. Woodington Corp., ASBCA No. 37885, 91-1 BCA ¶ 23,579 (delay not excused where steel strike at U.S. Steel had been ongoing for two months prior to contractor's bid, subcontractor ordered steel after strike ended, and other steel manufacturers were not on strike); but see NTC Group, Inc., ASBCA Nos. 53720, 53721, 53722, 04-2 BCA 32,706 (labor conspiracy, akin to a strike was a valid defense to default termination).

g. Unusually severe weather. Only unusually severe weather, as compared to the past weather in the area for that season, excuses performance. See Aulson Roofing, Inc., ASBCA No. 37677, 91-2 BCA ¶ 23,720 (contractor not entitled to day for day delay because some rain delay was to be expected); TCH Indus., AGBCA No. 88-224-1, 91-3 BCA ¶ 24,364 (eight inches of snow in northern Idaho in November is neither unusual nor unforeseeable).

h. Acts of another contractor in performance of a contract for the government (construction contracts). FAR 52.249-10(b)(1)(iii); Modern Home Mfg. Corp., ASBCA No. 6523, 66-1 BCA ¶ 5367 (housing contractor entitled to extension because site not prepared in accordance with contract specifications).

i. Defaults or delays by subcontractors or suppliers:

(1) Generally, problems with subcontractors are not a basis for excusable delay for the prime. Matrix Res. Inc., ASBCA Nos. 56430, 56431, 11-2 BCA ¶ 34,789 (contractor responsible for lack of progress in delivery of product caused by actions of subcontractors); New Era Contract Sales, Inc., ASBCA No. 56661, 11-1 BCA ¶ 34,738 (subcontractor's unwillingness to abide by its quoted price does not excuse contractor from fulfilling its contract to delivery); Ryll Int'l, LLC v. Dep't of Transp., CBCA No. 1143, 11-2 BCA ¶ 34,809 (critical subcontractor's abandonment of work not excusable delay).

(2) Construction. If the delay of a subcontractor or supplier at any tier arises from unforeseeable causes beyond the control and without the fault or negligence of both the contractor and the subcontractor or supplier, and the contractor notifies the contracting officer within ten days from the beginning of the delay, it may be excusable. FAR 52.249-10(b).

(3) Supply and Services contracts, and cost-reimbursement contracts. FAR 52.249-6(b); FAR 52.249-8(d); FAR 52.249-14(b). The general rule is that if a failure to perform is caused by the default of a subcontractor or supplier at any tier, the default is excusable if:

(a) The cause of the default was beyond the control and without the fault or negligence of either the contractor or the subcontractor, See General Injectables & Vaccines, Inc., ASBCA No. 54930,

06-2 BCA ¶ 33,401 (contractor not excused from failure to provide flu vaccine despite worldwide vaccine unavailability because the contractor's supplier—the vaccine manufacturer—caused the unavailability of the vaccine); and

(b) The subcontracted supplies or services were not obtainable from other sources in time for the contractor to meet the required delivery schedule. Progressive Tool Corp., ASBCA No. 42809, 94-1 BCA ¶ 26,413 (contractor failed to show it made all reasonable attempts to locate an alternate supplier); CM Mach. Prods. Inc., ASBCA No. 43348, 93-2 BCA ¶ 25,748 (default upheld where plating could have been provided by another subcontractor but prime refused to pay higher price).

4. Additional excuses commonly asserted by contractors include:

a. Material breach of contract by the government. Todd-Grace, Inc., ASBCA No. 34469, 92-1 BCA ¶ 24,742 (breach of implied duty to not interfere with contractor); Bogue Elec. Mfg. Co., ASBCA No. 25184, 86-2 BCA ¶ 18,925 (defective government-furnished equipment); Lan-Cay, Inc., ASBCA No. 56140, 12-1 BCA ¶34,935 (contractor unsuccessful in demonstrating overzealous inspection by the government that allegedly led to delay).

b. Lack of financial capability. Contractors are responsible for having sufficient financial resources to perform a contract.

(1) Generally, this is not an excuse. Local Contractors, Inc., ASBCA No. 37108, 1991 WL 517213 (Oct. 11, 1991) (contractor had deteriorating financial base unconnected to the contract); Selpa Constr. & Rental Equip. Corp., PSBCA 5039, 11-1 BCA ¶ 34,635 (financing difficulties did not excuse its delayed performance and contractor could not establish that government contributed to its problems).

(2) If the financial difficulties are caused by wrongful acts of the government, however, the delay may be excused. Nexus Constr. Co. Inc., ASBCA No. 31070, 91-3 BCA ¶ 24,303 (default converted because government's refusal to release progress payments constituted material breach of contract); see Lan-Cay, Inc., ASBCA No. 56140, 12-1 BCA ¶34,935 (failure of agency to make progress payments was not excusable delay because progress

payments were not required where the contractor had failed to install the required system); Red Sea Eng'rs & Constr., ASBCA No. 57448, 11-2 BCA ¶34,880 (contractor defeated motion for summary judgment in part because of questions as to whether the government had fulfilled its obligations to pay contractor during performance).

c. Bankruptcy. Although filing a petition of bankruptcy is not an excuse, it precludes termination. Communications Technology Applications, Inc., ASBCA No. 41573, 92-3 BCA ¶ 25,211 (government's right to terminate stayed when bankruptcy filed, not when government notified); See also, Carter Industries, DOTCAB No. 4108, 02-1 BCA 31,738.

d. Small business. A-Greater New Jersey Movers, Inc., ASBCA No. 54745, 06-1 BCA ¶ 33,179 ("The Board does not accord special treatment in determining whether the burden of proof has been met to a contractor because of its status as a small business"); Kit Pack Co. Inc., ASBCA No. 33135, 89-3 BCA ¶ 22,151 (no excuse for failure to meet delivery date).

e. Impossibility or Commercial impracticability. To establish commercial impracticability, the contractor must show it can perform only at excessive and unreasonable cost – simple economic hardship is not sufficient. Singelton Enterprises v. Dep't of Agriculture, CBCA No. 2136, 12-1 BCA ¶35,005 (rejecting excuse that government specifications were impossible to perform in light of ability of the reprocurement contractor to complete the work); Montage, Inc., GAOCAB 2006-2, 10-2 BCA ¶34,490 (board held that contractor did not meet the very tough standard for practical impossibility because contractor failed to establish that increased cost made the work commercially senseless); CleanServ Executive Services, Inc., ASBCA No. 47781, 96-1 BCA ¶ 28,027; compare Soletanche Rodio Nicholson (JV), ENG BCA Nos. 5796, 5891, 94-1 BCA ¶ 26,472 (performance that might take 17 years and cost $400 million, rather than 2 years and $16.9 million found to be commercial impractical), with CM Mach. Prods., ASBCA No. 43348, 93-2 BCA ¶ 25,748 (no commercial impracticability where costs increased 105%).

5. **Consequence of excusable delay.** If a delay is found to be excusable, the contractor is entitled to additional time and/or money. Batteast Constr. Co. Inc., ASBCA No. 35818, 92-1 BCA ¶ 24,697. **NOTE:** Constructive acceleration of the delivery date often occurs when the contracting officer, using a threat of termination, directs compliance with the contract delivery

or performance date without an extension for the time period attributable to an excusable delay.

B. Waiver

1. Waiver of the right to terminate for default occurs if:

a. The government fails to terminate a contract within a reasonable period of time after the default under circumstances indicating forbearance, and

b. Detrimental reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the government's knowledge and implied or express consent.

c. See DeVito v. United States, 413 F.2d 1147 (Ct. Cl. 1969) (government's delay in terminating fixed-price supply contract and continued acceptance of deliveries after default constituted waiver); S.T. Research Corp., ASBCA No. 39600, 92-2 BCA ¶ 24,838 (KO's encouragement that contractor propose new delivery schedule and continue performance constituted waiver); Motorola Computer Sys., Inc., ASBCA No. 26794, 87-3 BCA ¶ 20,032 (government waived original performance schedule when there were no firm delivery dates or schedule for progress of work; new performance or delivery schedule had to be established to T4D under default clause).

2. Waiver generally does **NOT** apply to **construction** contracts.

a. Absent government manifestation that a performance date is no longer enforceable, the waiver doctrine generally does not apply to construction contracts. Nisei Constr. Co., Inc., ASBCA Nos. 51464, 51466, 51646, 99-2 BCA ¶ 30,448.

b. Construction contracts typically include a payment clause entitling the contractor to payment for work performed subsequent to the specified completion date.

c. Construction contracts also typically include a liquidated damage clause that entitles the government to money for late completion.

d. As a consequence, detrimental reliance usually cannot be found merely from government forbearance and continued contractor performance. Brent L. Sellick, ASBCA No. 21869, 78-2 BCA ¶ 13,510. But see, B.V. Construction, Inc., ASBCA Nos. 47766, 49337, 50553, 04-1 BCA 32,604 (the lack of a liquidated damages clause coupled with the government's apparent complete lack of

concern over the completion date, caused the ASBCA to find the government elected to waive the right to terminate the contract).

e. In 2010, in AmeriscoSolutions, Inc., ASBCA No. 56811, 10-2 BCA ¶ 34,606, the board reaffirmed the rule that, barring unusual circumstances, the government cannot waive the delivery date in a construction contract. It distinguished several construction cases in recent years that found waivers. Those cases involved very long delays between the passing of the delivery date and the termination during which the government gave no indication that the date would be enforced. In Amerisco, the Corps of Engineers frequently reminded the contractor that it was in default even while permitting it to work to a new proposed schedule before terminating the contract 84 days after the stated delivery date passed. Board was not troubled by the absence of a liquidated damages provisions.

3. Acceptance of late delivery of an installment does NOT waive timely delivery of future installments.

a. If a contract requires multiple deliveries, each successive increment represents a severable obligation to deliver on the contract delivery date.

b. Thus, the government may accept late delivery of one or more installments without waiving the delivery date for future installments. Electro-Methods, Inc., ASBCA No. 50215, 99-1 BCA ¶ 30,230; Allstate Leisure Prods., Inc., ASBCA No. 40532, 94-3 BCA ¶ 26,992.

4. Forbearance = Reasonable Time Period

a. Definition. Period of time during which the Government investigates the reasons for the contractor's failure to meet the contract requirements.

b. General Rule. The government may "forbear" for a reasonable period after the default occurs before taking some action. Reasonableness depends on the specific facts of each case. American AquaSource, Inc., ASBCA 56677, 10-2 BCA ¶ 34,557 (although government waited 49 days after delivery to terminate, board found the time for terminating is extended when the contractor has abandoned performance or where its situation is such as to render performance unlikely); Progressive Tool Corp., ASBCA No. 42809, 94-1 BCA ¶ 26,413 (although forbearance for 42 days after show cause notice was "somewhat long," T4D

sustained because government did not encourage contractor to continue working and contractor did not perform substantial work during that period); but see DODS, Inc., ASBCA No. 57667, 12-2 BCA ¶35,078 (agency waived delivery date when it did not terminate for 21 months after contractor failed first article test).

c. Government actions inconsistent with forbearance may waive a delivery date. Applied Cos., ASBCA No. 43210, 94-2 BCA ¶ 26,837 (government waived delivery date for First Article Test Report by seeking information, making progress payments, directing the contractor to rerun tests, and incorporating engineering change proposals into the contract after the delivery date); Kitco, Inc., ASBCA No. 38184, 91-3 BCA ¶ 24,190 (no clear delivery schedule established after partial termination for convenience resulted in waiver of right to terminate for default based on untimely deliveries); Beta Engineering, Inc., ASBCA Nos. 53570, 53571, 02-2 BCA ¶ 31,879 (after contractor missed a First Article Test delivery deadline, the government left itself without an enforceable schedule by failing to terminate, encouraging continued performance, and leaving contractor "in limbo" about a new delivery schedule); but see Tawazuh Commercial & Const. Co., Ltd., ASBCA 55656, 11-2 BCA ¶ 34,781 (Army in Afghanistan did not waive its right to reject clearly defective work merely because it was delayed in performing inspections for several months).Contracting officers should use show cause notices to avoid waiver arguments. Show cause notice is inconsistent with waiver. See Charles H. Siever Co., ASBCA No. 24814, 83-1 BCA ¶ 16,242 (using timely show cause notice preserved right to terminate despite four month forbearance period).

5. Detrimental Reliance

a. The contractor must show detrimental reliance on the government's inaction before the government will be deemed to have waived the delivery schedule. Ordnance Parts Eng'g Co., ASBCA No. 44327, 93-2 BCA ¶ 25,690 (no detrimental reliance where contractor repudiated contract).

b. Where the contractor customarily continued performance after a missed delivery date, a board has found no inducement by the government. Electro-Methods, Inc., ASBCA No. 50215, 99-1 BCA ¶ 30,230.

c. American AquaSource, Inc., ASBCA No. 56677, 10-2 BCA ¶ 34,557 (nominal surveying fees that the contractor incurred

between the delivery date and the termination were not sufficient to show substantial reliance by the contractor on the government's 49-day delay in terminating).

6. Reestablishing the Delivery Schedule

a. If government waived, what do we do? The government should reestablish a delivery schedule if it believes it waived the original schedule. FAR 49.402-3(c). Proper reestablishment of a delivery schedule also reestablishes the government's right to terminate for default.

b. A delivery schedule can be reestablished either bilaterally or unilaterally. Sermor, Inc., ASBCA No. 30576, 94-1 BCA ¶ 26,302 (formal modification not required, but new delivery date must be reasonable and specific).

(1) **Bilateral**. A new delivery date established bilaterally is presumed to be reasonable. Trans World Optics, Inc., ASBCA No. 35976, 89-3 BCA ¶ 21,895; Sermor, Inc., ASBCA No. 30576, 94-1 BCA ¶ 26,302 (by agreeing to new delivery schedule, contractor waives excusable delay); Tampa Brass Aluminum Corp., ASBCA No. 41314, 92-2 BCA ¶ 24,865 (termination proper because unreasonable schedule was proposed by the contractor); but see S.T. Research Corp., ASBCA No. 39600, 92-2 BCA ¶ 24,838 (contracting officer requiring proposed schedule within 24 hours from contractor, having technical problems, was not reasonable).

(2) **Unilateral.** A new delivery date the government unilaterally establishes must in fact be reasonable in light of the contractor's abilities in order to be enforceable. Rowe, Inc., GSBCA No. 14211, 01-2 BCA 31,630 (The board made an "objective determination" from "the standpoint of the performance capabilities of the contractor at the time the notice [was] given" and found the new delivery date was reasonable); McDonnell Douglas Corp. v. United States, 50 Fed. Cl. 311 (2001) (reestablished schedule was reasonable); Oklahoma Aerotronics, Inc., ASBCA No. 25605, 87-2 BCA ¶ 19,917 (unilateral date for first article delivery unreasonable); Ensil Int'l Corp., ASBCA Nos. 57297, 57445, 12-1 BCA ¶34,942 (although agency may have waived original delivery date, when contractor actually delivered the goods, it effectively established a new enforceable delivery date and was

obligated to provide conforming supplies as of the actual delivery date).

c. A cure notice, by itself, does not reestablish a waived delivery schedule. Lanzen Fabricating, ASBCA No. 40328, 93-3 BCA ¶ 26,079.

VI. THE DECISION TO TERMINATE FOR DEFAULT

A. Discretionary Act

1. The standard FAR clauses generally grant the government the authority to terminate, which shall be exercised only after review by contracting and technical personnel, and by counsel, to ensure propriety of the proposed action. FAR 49.402-3 (a).

2. Contracting officers must exercise discretion. The default clauses do not **compel** termination; rather, they **permit** termination for default if such action is appropriate in the business judgment of the responsible government officials. Schlesinger v. United States, 182 Ct. Cl. 571, 390 F.2d 702 (1968) (Navy improperly terminated a contract because of pressure from a Congressional committee, rather than its own assessment of the government's and contractor's interests).

B. Burden of Proof

1. The Government has the burden of establishing the propriety of a default termination. Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987).

2. A finding of technical default is not determinative on the issue of the propriety of a default termination. Walsky Constr. Co., ASBCA No. 41541, 94-2 BCA ¶ 26,698.

3. Courts and boards review the KO's actions according to the circumstances as they existed at the time of the default. Local Contractors, Inc., ASBCA No. 37108, 1991 WL 517213 (Oct. 11, 1991).

4. Once the Government establishes that the contractor was in default, the contractor bears the burden of proving that the termination was an abuse of discretion or done in bad faith.

5. Contractors may challenge the default termination decision on the basis that the terminating official abused his discretion or acted in bad faith. Marshall Associated Contractors, Inc., & Columbia Excavating, Inc., (J.V.), IBCA Nos. 1091, 3433, 3435, 01-1 BCA ¶ 31248 (abuse of discretion to terminate for default a contract with defective specifications,

when the reprocurement contractor received relaxed treatment); Darwin Constr. Co. v. United States, 811 F.2d 593 (Fed. Cir. 1987) (T4D found to be arbitrary and capricious where technical default used as a pretext to get rid of contractor).

a. Abuse of Discretion.

(1) Abuse of discretion (also referred to as "arbitrary and capricious" conduct) may be ascertained by looking at the following factors:

(a) Subjective bad faith on the part of the Government;

(b) No reasonable basis for the decision;

(c) The degree of discretion entrusted to the deciding official; and

(d) Violation of an applicable statute or regulation. United States Fidelity & Guaranty Co. v. U.S., 676 F.2d 622 (Ct. Cl. 1982); Quality Environment Systems, Inc., ASBCA No. 22178, 87-3 BCA ¶ 20,060.

(2) The contractor bears the burden of showing an abuse of discretion. Walsky Constr. Co., ASBCA No. 41541, 94-1 BCA ¶ 26,264, aff'd on recon., 94-2 BCA ¶ 26,698 (lieutenant colonel's directive to the contracting officer "tainted the termination"); see also Libertatia Assoc., Inc. v. United States, 46 Fed. Cl. 702 (2000) (once default is established, burden shifts to contractor to show its failure to perform is excusable).

(3) Recent examples of abuse of discretion: Teresa A. McVicker, P.C., ASBCA No. 57487, 57653, 12-2 BCA 35,127; Ryste & Ricas, Inc., ASBCA No. 51841, 02-2 BCA ¶ 31,883 and Bison Trucking and Equipment Company, ASBCA No. 53390, 01-2 BCA ¶31,654.

b. Bad Faith.

(1) There is a strong presumption that government officials act conscientiously in the discharge of their duties. Krygoski Constr. Co., Inc. v. United States, 94 F.3d 1537 (Fed. Cir. 1996).

(2) Contractors asserting that government officials acted in "bad faith" must meet a higher standard of proof. The courts and boards require "clear and convincing evidence"[1] of "malice" or "designedly oppressive conduct" tantamount to some specific intent to injure the plaintiff, to overcome the presumption that public officials act in good faith in the exercise of their powers and responsibilities. See Am-Pro Protective Agency, Inc., v. United States, 281 F.3d 1234 (Fed. Cir. 2002); Kalvar Corp. v. United States, 543 F.2d 1298 (Ct. Cl. 1976); White Buffalo Constr. Inc. v. United States, 101 Fed. Cl. 1 (2011); Apex Int'l Mgmt. Servs., Inc., ASBCA No. 38087, 94-2 BCA ¶ 26,842, aff'd on recon., 94-2 BCA ¶ 26,852 (Navy officials acted in bad faith by "declaring war" against the contractor; contractor entitled to breach damages); Marine Constr. Dredging, Inc., ASBCA No. 38412, 95-1 BCA ¶ 27,286 (although government's administration of the contract was "seriously flawed," no bad faith).

C. Regulatory Guidance

The FAR provides detailed procedures which the contracting officer should follow to terminate a contract.

1. Contracting officers should consider **alternatives** to termination. FAR 49.402-4. The following, among others, are available in lieu of termination for default when in the Government's interest:

a. Permit the contractor, the surety, or the guarantor, to continue performance under a revised schedule;

b. Permit the contractor to continue performance by means of a subcontract or other business arrangement;

c. If the requirement no longer exists and the contractor is not liable to the government for damages, execute a no-cost termination.

[1] This "clear and convincing" or "highly probable" (formerly described as "well-nigh irrefragable") standard was recently articulated by the Federal Circuit in Am-Pro Protective Agency, Inc., v. United States, 281 F.3d 1234, 1243 (Fed. Cir. 2002). For years, contractors alleging bad faith by the government needed "well-nigh irrefragable proof" to overcome the strong presumption that government officials acted in good faith. "In fact, for almost 50 years this court and its predecessor have repeated that we are 'loath to find to the contrary [of good faith], and it takes, and should take, well-nigh irrefragable proof to induce us to do so.'" Id. at 1239 (quoting Schaefer v. United States, 224 Ct. Cl. 541, 633 F.2d 945, 948-49 (Ct. Cl. 1980)) (also citing Grover v. United States, 200 Ct. Cl. 337, 344 (1973); Kalvar Corp. Inc., v. United States, 543 F.2d 1298, 1302, 211 Ct. Cl. 192 (1976); Torncello v. United States, 231 Ct. Cl. 20, 681 F.2d 756, 770 (Ct. Cl. 1982); T&M Distribs., Inc. v. United States, 185 F.3d 1279, 1285 (Fed. Cir. 1999)).

d. See ZIOS Corp., ASBCA No. 56626, 10-1 BCA ¶ 34,344 (the contracting officer T4D'd the contract after offering ZIOS the opportunity to withdraw from the contract; ZIOS turned down the offer because it wanted the money); Yonir Tech., Inc., ASBCA No. 56736, 10-1 BCA ¶ 34,417 (contracting officer T4D'd the contract after contractor rejected 3 separate offers to cancel the order at no cost).

2. The FAR provides detailed procedures for terminating a contract for default. FAR 49.402-3. When a default termination is being considered, the government shall decide which termination action to take only after review by contracting and technical personnel, and by counsel, to ensure the propriety of the proposed action. Failure to conduct such a review, while risky, will not automatically overturn a default decision. National Med. Staffing, Inc., ASBCA No. 40391, 92-2 BCA ¶ 24,837.

3. FAR 49.402-3(f) states that the contracting officer shall consider the following factors in determining whether to terminate a contract for default:

   a. The terms of the contract and applicable laws and regulations.

   b. The specific failure of the contractor and the excuses for the failure.

   c. The availability of the supplies or services from other sources.

   d. The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.

   e. The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.

   f. The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.

   g. Any other pertinent facts and circumstances.

4. The contracting officer must explain the decision to terminate a contract for default in a memorandum for the contract file. FAR 49.402-5. The memorandum should recount the factors at FAR 49.402-3(f).

5. Failure of the contracting officer to consider factors at FAR 49.402-3(f) may result in a defective termination. See DCX, Inc., 79 F.3d 132 (Fed. Cir. 1996) (although contracting officer's failure to consider one or more FAR 49.402-3(f) factors does not automatically require conversion to termination for convenience, such failure may aid the court or board in determining whether the contracting officer abused his discretion); Phoenix Petroleum Company, ASBCA No. 42763, 96-2 BCA ¶ 28,284 (failure to analyze FAR factors does not entitle contractor to relief; factors are not a prerequisite to a valid termination).

6. Failure to consider all information available prior to issuing a termination notice could be an abuse of discretion. Jamco Constructors, Inc., VABCA No. 3271, 94-1 BCA ¶ 26,405, aff'd on recon., 94-2 BCA ¶ 26,792 (contracting officer abused discretion by failing to reconcile contradictory information and "blindly" accepting technical representative's estimates for completion of the contract by another contractor).

7. Before terminating a contractor for default, the contracting officer should comply with the pertinent notice requirements (cure notice or show cause notice). FAR 49.402-3(c)-(e). Additional notice to the following third parties may be required:

   a. Surety. If a notice to terminate for default appears imminent, the contracting officer shall provide a written notice to the surety. If the contractor is subsequently terminated, the contracting officer shall send a copy of the notice to the surety. FAR 49.402-3(e)(2).

   b. Small Business Administration. When the contractor is a small business, send a copy of any required notices to the contracting office's small business specialist and the Small Business Regional Office nearest the contractor. FAR 49.402-3(e)(4).

8. The Default Termination Notice.

   a. Contents of the termination notice. FAR 49.102; FAR 49.402-3(g). The written notice must clearly state:

      (1) The contract number and date;

      (2) The acts or omissions constituting the default;

      (3) That the contractor's right to proceed further under the contract (or a specified portion of the contract) is terminated;

(4) That the supplies or services terminated may be purchased against the contractor's account, and that the contractor will be held liable for any excess costs;

(5) If the contracting officer has determined that the failure to perform is not excusable, that the notice of termination constitutes such decision, and that the contractor has the right to appeal such decision under the Disputes clause;

(6) That the Government reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs; and

(7) That the notice constitutes a decision that the contractor is in default as specified and that the contractor has the right to appeal under the Disputes clause. FAR 49.402-3(g).

(8) FAR 49.102(a) provides that the notice shall also include any special instructions and the steps the contractor should take to minimize the impact on personnel (including reduction in work force notice of FAR 49.601-2(g)).

b. A default termination is a final decision that can be appealed. Malone v. United States, 849 F.2d 1441 (Fed. Cir. 1988).

(1) The termination notification must give notice to the contractor of right to appeal the default termination. Failure to properly advise the contractor of its appeal rights may prevent the "appeals clock" from starting if the contractor can show detrimental reliance. Decker & Co. v. West, 76 F.3d 1573 (Fed. Cir. 1996).

(2) When mailed, the notice shall be sent by certified mail, return receipt requested. When hand delivered, a written acknowledgement shall be obtained from the contractor. FAR 49.102(a). A default termination notice is effective when delivered to the contractor. Fred Schwartz, ASBCA No. 20724, 76-1 BCA ¶ 11,916.

9. Contracting officers were required to report terminations for default through their agency channels to the Office of the Undersecretary of Defense. In 2010 this requirement changed to require all termination for cause or default reporting to be accomplished via the Federal Awardee Performance and Integrity Information System.

10. Any termination involving a reduction in employment of 100 or more contractor employees specifically requires congressional notification,

cleared through agency liaison offices before release. DFARS 249.7001; DFARS PGI 249.7001. This notification requirement does not apply for firms performing in Iraq or Afghanistan if the firm is not incorporated in the United States. DoD Class Deviation 2011-O0002. Similar reports are required by the Air Force for terminations with high-level agency interest or litigation potential. See AFFARS MP5349.

VII. RIGHTS AND LIABILITIES ARISING FROM TERMINATIONS FOR DEFAULT

A. Contractor Liability

1. Rule. Upon termination of a contract, the contractor is liable to the government for any **excess costs** incurred in acquiring supplies or services similar to those terminated for default (see FAR 49.402-6) and for any other damages, whether or not repurchase is effected (see FAR 49.402-7). FAR 49.402-2(e).

2. Excess Reprocurement Costs

a. Under fixed-price supply and service contracts, the government can acquire supplies or services similar to those terminated and the contractor will be liable for any excess costs of those supplies or services. FAR 49.402-6; FAR 52.249-8(b); Ed Grimes, GSBCA No. 7652, 89-1 BCA ¶ 21,528; CDA, Inc. v. Social Security Admin., CBCA No. 1558, 12-1 BCA ¶34,990 (upholding agency's assessment of excess reprocurement costs for entire period, including option years, of the follow-on contractor's performance because original contractor had agreed to perform for that duration).

b. The government must show that its assessment was proper by establishing the following:

(1) The reprocured supplies or services are the same as or similar to those involved in the termination. 5860 Chicago Ridge, LLC v. United States, 104 Fed. Cl. 740 (2012) (agency failed to demonstrate that building it leased as a substitute was comparable and that the amount it sought was the precise amount it had spent in reprocurements); Gordon T. Smart, PSBCA No. 6123, 11-1 BCA ¶ 34,695 (post office failed to put on evidence concerning the replacement contract); Odessa R. Brown, PSBCA No. 5362, et al., 11-1 BCA ¶ 34,724; International Foods Retort Co., ASBCA No. 34954, 92-2 BCA ¶ 24,994.

(2) The government actually incurred excess costs. Sequal, Inc., ASBCA No. 30838, 88-1 BCA ¶ 20,382; 5860 Chicago Ridge, LLC v. United States, 104 Fed. Cl. 740 (2012) (agency failed to demonstrate that the amount it sought was the precise amount it had spent in reprocurements); and

(3) The government acted reasonably to minimize the excess costs resulting from the default. Daubert Chem. Co. Inc., ASBCA No. 46752, 94-2 BCA ¶ 26,741 (government acted reasonably where it reprocured quickly, obtained seven bids, and awarded to lowest bidder).

c. Mitigation of damages. The government has an affirmative duty to mitigate damages on repurchase. Ronald L. Collier, ASBCA No. 26972, 89-1 BCA ¶ 21,328; Kessler Chem., Inc., ASBCA No. 25293, 81-1 BCA ¶ 14,949.

(1) If the repurchase is for a quantity of goods in excess of the quantity that was terminated for default, the contracting officer may not charge the defaulting contractor for excess costs beyond the undelivered quantity terminated for default. FAR 49.402-6(a).

(2) If a repurchase is for a quantity not in excess of the quantity that was terminated, the government shall repurchase at as reasonable a price as practicable. FAR 49.402-6(b). The KO may use any terms and acquisition method deemed appropriate for the repurchase. 52.249-8(b). See Al Bosgraaf Son's, ASBCA No. 45526, 94-2 BCA ¶ 26,913 (reprocurement by modification of another contract inadequate to mitigate costs); International Technology Corp., B-250377.5, Aug. 18, 1993, 93-2 CPD ¶ 102 (may award a reprocurement contract to the next-low offeror on the original solicitation when there is a short time span between the original competition and default).

(3) The government is not required to invite bids on repurchase solicitations from a defaulted contractor. Montage Inc., B-277923.2, Dec. 29, 1997, 97-2 CPD ¶ 176.

d. When the repurchase is defective, the defaulting contractor may be relieved of liability for excess costs. Ross McDonald Contracting, GmbH, ASBCA No. 38154, 94-1 BCA ¶ 26,316 (government failed to mitigate damages when exercising option on reprocurement contract awarded to next-low offeror on the original

solicitation rather than compete requirement for option year); Astra Prods. Co. Inc. of Tampa, ASBCA No. 24474, 82-1 BCA ¶ 15,497 (recoverable reprocurement costs reduced where government failed to request proposal from next lowest-priced responsible bidder).

e. The Fulford Doctrine. A contractor may dispute an underlying default termination as part of a timely appeal from a government demand for excess reprocurement costs to avoid the excess costs, even though the contractor failed to appeal the underlying default termination in a timely manner. Fulford Mfg. Co., ASBCA No. 2143, 6 CCF ¶ 61,815 (May 20, 1955); see also Deep Joint Venture, GSBCA No. 14511, 02-2 BCA ¶ 31,914 (GSBCA confirms validity of the Fulford doctrine for post-CDA terminations); D. Moody & Co. v. United States, 5 Cl. Ct. 70 (1984); Kellner Equip., Inc., ASBCA No. 26006, 82-2 BCA ¶ 16,077. While the majority of the existing case law supports and adopts the Fulford Doctrine, those in the field of contractor defense work believe that the Federal Circuit's recent decision in Maropakis may mean an end to the Fulford Doctrine and the beginning of the need to present defenses in anticipation of reprocurement costs and future litigation in order to ensure compliance with the CDA. M. Maropakis Carpentry, Inc. v. United States, 609 F.3d 1323 (Fed. Cir. 2010).

3. Liquidated Damages.

a. Liquidated damages serve as a contractually agreed upon substitute for actual damages caused by late delivery or late completion of work. The government may recover both liquidated damages and an assessment of excess costs (either for reprocurement or for completion of the work) from a contractor upon terminating a contract for default. FAR 49.402-7.

b. The common law rule that liquidated damages will not be enforced if they constitute a penalty applies to government acquisitions. Southwest Eng'g Co. v. United States, 341 F.2d 998 (8th Cir. 1965).

c. A liquidated damages clause will be enforced as reasonable where, at the inception of the contract, the damages are based on a reasonable forecast of possible damages in the event of failure of performance. American Constr. Co., ENGBCA No. 5728, 91-2 BCA ¶ 24,009.

d. If a contract does not have a liquidated damages clause or if the liquidated damages provision of a contract is unenforceable

because it is punitive, the government may recover actual damages to the extent that they are proved. FAR 52.249-10.

4. Common Law Damages

a. The government may also recover common law damages, which may be in lieu of or in addition to excess costs assessed under the default termination clause. FAR 52.249-8(h); Cascade Pac. Int'l v. United States, 773 F.2d 287 (Fed. Cir. 1985) (government awarded common law damages after failing to prove excess reprocurement costs); Hideca Trading, Inc., ASBCA No. 24161, 87-3 BCA ¶ 20,040 (despite failure to reprocure, government entitled to damages at the difference between the contract price and the market price for oil for the period 60 to 90 days after the default termination).

b. The government has the burden of proving that the damages are foreseeable, direct, material, or the proximate result of the contractor's breach of contract. ERG Consultants, Inc., VABCA No. 3223, 92-2 BCA ¶ 24,905 (damages must be foreseeable); Gibson Forestry, AGBCA No. 87-325-1, 91-2 BCA ¶ 23,874 (Forest Service unable to recover cost of tree seedlings when contractor did not know that seedlings had three week life expectancy once lifted for planting).

5. Unliquidated advance and progress payments. The government is entitled to repayment by the contractor of advance and progress payments, if any, attributable to the undelivered work. Smith Aircraft Co., ASBCA No. 39316, 90-1 BCA ¶ 22,475.

B. The Government's Liability

1. Bottom Line – Upon termination for default, government only pays for **value it actually received**. Supply contractor possesses biggest risk because not compensated for work-in-progress.

2. Supply – Government is liable only for the contract price for completed **supplies delivered** and accepted. FAR 52.249-8(f).

3. Service or Construction – Government is liable only for the **reasonable value of work done** before termination, whether or not the services or construction have been contractually accepted by the government. Sphinx Int'l, Inc., ASBCA No. 38784, 90-3 BCA ¶ 22,952.

4. Cost-reimbursement contracts – Government is generally liable for all of the reasonable, allowable, and allocable costs incurred by the contractor, whether or not accepted by the government, plus a percentage of the

contract fee. The fee is somewhat limited, however, as the amount of the contract fee payable to the contractor is based on the work accepted by the government, rather than on the amount of work done by the contractor. FAR 52.249-6.

5. The government may also require the contractor to transfer title and deliver to the government its manufacturing materials, for which the government will pay the reasonable value. FAR 52.249-8(e); FAR 52.249-10(a).

VIII. COMMERCIAL ITEM CONTRACTS: "TERMINATION FOR CAUSE"

A. Background. The Federal Acquisition Streamlining Act, P.L. 103-355, 108 Stat. 3243 (Oct. 13, 1994), established special requirements for the acquisition of commercial items. Congress intended government acquisitions to more closely resemble those customarily used in the commercial market place. FAR 12.201.

B. Applicable Rules for Terminations for Cause

1. For commercial items: use clause FAR 52.212-4.

2. The government can terminate a contract for a commercial item for cause. FAR 12.403 and FAR 52.212-4(m).

3. FAR 52.212-4 contains concepts that are different from "traditional" termination rules contained in FAR Part 49. Consequently, the requirements of FAR Part 49 do not apply when terminating contracts for commercial items. Contracting officers, however, may continue to follow Part 49 as guidance to the extent that Part 49 does not conflict with FAR 12.403 and FAR 52.212-4. FAR 12.403(a).

C. Policy. The contracting officer should exercise the government's right to terminate a contract for a commercial item only when such a termination would be in the best interests of the government. Further, the contracting officer should consult counsel prior to terminating for cause. FAR 12.403(b).

D. General Requirements. FAR 12.403; FAR 52.212-4.

1. Grounds. Under the rules, a contractor may be terminated for cause "in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms or conditions, or fails to provide the government, upon request, with adequate assurances of future performance." FAR 52.212-4(m).

2. Excusable Delay. Contractors are required to notify contracting officers as soon as reasonably possible after the commencement of excusable

delay. FAR 52.212-4(f). In most situations, this requirement should eliminate the need for a show cause notice prior to terminating a contract. FAR 12.403(c)(1).

3. Rights and Remedies:

a. The government's rights and remedies after a termination for cause shall include all the remedies available to any buyer in the commercial market place. The government's preferred remedy will be to acquire similar items from another contractor and to charge the defaulted contractor with any excess reprocurement costs together with any incidental or consequential damages incurred because of the termination. FAR 12.403(c)(2).

b. In the event of a termination for cause, the Government shall not be liable for supplies or services not accepted. FAR 52.212-4(m).

c. If a Board determines that the government improperly terminated for cause, such termination will be deemed a termination for convenience. FAR 52.212-4(m).

4. Procedure to terminate for cause.

a. The CO shall send the contractor written notification that the contract is terminated for cause, reasons for the termination, what remedies the government intends to seek or a date they will notify the contractor of the remedy, and that the notice is a final decision that is appealable under the Disputes clause. FAR 12.403(c)(3).

b. Contracting officers were required to report terminations for default through their agency channels to the Office of the Undersecretary of Defense. In 2010 this requirement changed to require all termination for cause or default reporting to be accomplished via the Federal Awardee Performance and Integrity Information System.

c. Any termination involving a reduction in employment of 100 or more contractor employees specifically requires congressional notification, cleared through agency liaison offices before release. DFARS 249.7001; DFARS PGI 249.7001. Similar reports are required by the Air Force for terminations with high-level agency interest or litigation potential. See AFFARS MP5349.

IX. MISCELLANEOUS

A. Total or partial termination. A default termination may be total or partial. FAR 52.249-8(a)(1).

B. Severable contract requirements. Where a contract includes severable undertakings, default on one effort may not justify termination of the entire contract. T.C. Sarah C. Bell, ENGBCA No. 5872, 92-3 BCA ¶ 25,076.

C. Revocation of Acceptance in Order to Terminate.

1. In some circumstances, the government can revoke its acceptance of performance in order to terminate.

2. American Renovation & Construction Co., ASBCA No. 53723, 10-2 BCA ¶ 34,487 (upheld revocation of work that occurred 25 months previously where government inspector reasonably relied on the contractor's assurance that there were no defects remaining in the work since all visible defects had been corrected); Chilstead Building Co., ASBCA No. 49548, 00-2 BCA ¶31,097 (roofing contractor's representation that it was proceeding in accordance with the drawings followed shortly thereafter by installation of deviant trusses was a gross mistake amounting to fraud despite the government inspector's failure to measure or inspect); Z.A.N. Co., ASBCA No. 25488, 86-1 BCA ¶ 18,612 (delivery of improperly marked watches was a gross mistake amounting to fraud despite the fact that government representatives may not have acted "with a maximum of circumspection"); Massman Constr. Co., ENGBCA No. 3443, 81-2 BCA ¶ 15,212 (contractor's failure to use prequalified weld joints (among other things) was a gross mistake amounting to fraud despite the fact that the government's inspection was "inexcusably bad"); Jo-Bar Mfg. Corp., ASBCA No. 17774, 73-2 BCA ¶ 10, 311 (contractor's determination that aircraft bolts did not have to be heat treated and failure to treat them, coupled with misrepresentation to the government inspector that it had been advised heat treatment was not required was a gross mistake amounting to fraud despite possible lack of in-process inspection by government).

3. However, acceptance must be revoked within a reasonable time after the mistake is discovered or could have been discovered with ordinary diligence. American Renovation & Construction Co., ASBCA No. 53723, 10-2 BCA ¶ 34,487; Bar Ray Prod., Inc. v. United States, 162 Ct. Cl. 836 (1963).

4. No precise formula exists to determine the reasonableness of the delay. American Renovation & Construction Co., ASBCA No. 53723, 10-2 BCA ¶ 34,487. The determination must be made on a case-by-case basis. Id.

5. However, the government's efforts to determine conclusively that the work was defective or to work with the contractor to solve the problem will be taken into consideration in determining the reasonableness of the delay. Perkin-Elmer Corp. v. United States, 47 Fed. Cl. 672 (2000) (revocation of

acceptance more than six years after learning of the defect was unreasonable); Chilstead Building Co. Inc., ASBCA No. 49548, 00-2 BCA ¶31,097 (seven-month delay between discovery of the defects and revocation of acceptance for the Architect-Engineering firm to investigate the cause of the defect was reasonable); Ordnance Parts & Eng'r Co., ASBCA No. 40293, 90-3 BCA ¶ 23,141 (one-year delay between the KO's request for tests and revocation of acceptance where tests took less than two weeks was not "remotely prompt action"); Jung Ah Industrial Co., ASBCA 22632, 79-1 BCA ¶ 13,643, aff'd on recon., 79-2 BCA ¶ 13,916 (10-month delay to test wall paneling to determine if it had been "incombustible treated" was reasonable.

D. Fiscal Considerations. Funds that have been obligated but have not been disbursed at the time of termination for default and funds recovered as excess costs on a defaulted contract remain available for a replacement contract awarded in a subsequent fiscal year. Funding of Replacement Contracts, B-198074, July 15, 1981, 81-2 CPD ¶ 33; Bureau of Prisons-Disposition of Funds Paid in Settlement of Breach of Contract Action, B-210160, Sep. 28, 1983, 84-1 CPD ¶ 91.

E. Conversion to Termination for Convenience. All FAR default clauses provide that an erroneous default termination will be converted to a termination for convenience. FAR 52.249-8(g); FAR 52.249-10(c); FAR 52.249-6(b). But see Apex Int'l Mgmt. Servs., Inc., ASBCA No. 38087, 94-2 BCA ¶ 26,842 (board refuses to limit recovery to termination for convenience costs where government officials acted in bad faith; contractor entitled to breach damages)

F. T4C Proposals Where T4D Appeal Is Pending

1. A contractor, prior to the default being overturned, can submit a termination for convenience settlement proposal to the contracting officer. The proposals will be treated as Contract Disputes Act claims. McDonnell Douglas Corp. v. United States, 37 Fed. Cl. 285 (1997); Balimoy Mfg. Co. of Venice, ASBCA No. 49730, 96-2 BCA ¶ 28,605.

2. The demand for termination for convenience costs from the contracting officer who terminated the contract for default demonstrates the "impasse" required to convert a proposal into a claim.

3. An appeal of a convenience settlement proposal will be dismissed without prejudice to reinstatement if the appeal of a default termination is pending. Poly Design, Inc., ASBCA No. 50862, 98-1 BCA ¶ 29,458.

X. CONCLUSION

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Chapter 26
Alternative Dispute Resolution

2013 Contract Attorneys Deskbook

CHAPTER 26

ALTERNATIVE DISPUTE RESOLUTION

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CHAPTER 26

ALTERNATIVE DISPUTE RESOLUTION (ADR)

I. INTRODUCTION.

A. Objectives.

Following this block of instruction, the student should understand the purpose and application of alternative methods of resolving disputes in the contract law arena (e.g., protests and CDA claims) as required by the Administrative Dispute Resolution Act (ADRA), the Contract Disputes Act (CDA), and the Federal Acquisition Regulation (FAR).

B. References:

1. The Contract Disputes Act of 1978 (CDA), as amended, 41 U.S.C. §§ 7101-7109. Pertinent to ADR, See §7103(h).

2. The Administrative Dispute Resolution Act (ADRA), Pub. L. No. 104-320, 110 Stat 3870, 5 U.S.C. §§ 571-584.

3. Federal Acquisition Regulation (FAR) 33.214, Alternative Dispute Resolution (ADR).

4. DOD Directive 5145.5, Alternative Dispute Resolution (ADR), April 22, 1996. http://www.dtic.mil/whs/directives/. See Appendix 1 of this chapter.

5. Defense Procurement and Acquisition Policy (DPAP), Alternative Dispute Resolution (ADR). The following link will take you to handbooks, guidance, laws, and service specific ADR programs: http://www.acq.osd.mil/dpap/ccap/cc/jcchb/html/Topical/adr.html.

6. Interagency Alternative Dispute Resolution Working Group provides guidance and requirements. http://www.adr.gov/index.html.

C. Statutory Background of the Contract Disputes Act.

The Contract Disputes Act of 1978 (CDA) is the earliest statutory authority for the use of informal, expedited dispute resolution methods in contract disputes. The CDA requires the Boards of Contract Appeals (BCA) to "provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes." 41 U.S.C. §7105(g).

1. The CDA was designed to encourage the resolution of contract disputes by negotiation prior to the onset of formal litigation. S. Rep. No. 95-1118.

2. The CDA favors negotiation between the contractor and the agency at the claim stage, before litigation begins. At this stage the agency is typically represented by the contracting officer, who makes the initial decision on a contractor's claim. If the dispute cannot be resolved between the contractor and the contracting officer, the CDA requires the contracting officer to issue a final decision. The contractor can then appeal this final decision to either a Board of Contract Appeals or the Court of Federal Claims. 41 U.S.C. § 7105; FAR 33.206 and 33.211.

3. Following enactment of the CDA, it became clear that Congress' goal of providing an inexpensive method for contractors to pursue appeals had not been realized. The court-like rules of practice and procedure followed by the Boards, combined with the complex nature of many contract claims, resulted in appeals as time-consuming as litigation in federal court.

D. Statutory Background of the Administrative Dispute Resolution Act. (ADRA).

Congress passed the first ADRA in 1990, in response to increasingly crowded dockets and escalating litigation costs. In the 1990 statute, Congress found that "administrative proceedings had become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes." ADRA of 1990, Pub.L. No. 101-552, §2(2), 104 Stat. 2738 (1990).

1. Congress decided that ADR, used successfully in the private sector, would work in the public sector and would "lead to more creative, efficient and sensible outcomes." ADRA, Pub. L. No. 101-552, § 2(3) and (4), 104 Stat. 2738 (1990).

2. The 1990 ADRA explicitly authorized federal agencies to use ADR to resolve administrative disputes, including contract disputes. ADRA, Pub. L. No. 101-552, § 4(a), 104 Stat. 2738 (1990).

3. Under the 1990 ADRA, ADR was defined as any procedure used, in lieu of adjudication, to resolve issues in controversy, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration, or any combination of these techniques. ADRA, Pub. L. No. 101-552, § 4(b), 104 Stat. 2738 (1990). The ADRA of 1990 expired by its own terms on 1 October 1995.

4. In the 1990s, Congress passed three statutes (the Administrative Dispute Resolution Acts of 1990 and 1996, and the Alternative Dispute Resolution Act of 1998) which, collectively, required each agency to adopt a policy encouraging use of ADR in a broad range of decision making, and required the federal trial courts to make ADR programs available to litigants. These initiatives also include the *Civil Rights Act of 1991*; the *National Performance Review*; Executive Order 12871, *Labor Management Partnerships*; and the Equal Employment Opportunity Commission's regulations. http://www.opm.gov/policy-data-oversight/employee-relations/employee-rights-appeals/alternative-dispute-resolution/handbook.pdf.

E. Amending ADRA. On October 19, 1996, Congress enacted the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat 3870, amending 5 U.S.C. §§ 571-584 (see also Federal Acquisition Circular 97-09, 63 Fed. Reg. 58,586 (Final Rules) (1998), amending the FAR to implement the ADRA)). The 1996 Act:

1. Permanently authorized the ADRA;

2. Redefines ADR as any procedure used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration, and use of ombudsman, or any combination of these techniques;

3. Requires each agency to adopt an ADR policy, to designate a senior official as the agency "dispute resolution specialist" to implement the ADR policy, and to train agency personnel in negotiation and ADR techniques, including mediation and facilitation;

4. Authorizes federal agencies to promulgate policies permitting the use of binding arbitration in dispute resolution on a case-by-case basis, if authorized by the agency head after consultation with the Attorney General;

5. Extends confidentiality protection to certain "dispute resolution communications" made during the course and for the purpose of dispute resolution proceedings, and exempts such communications disclosure under the Freedom of Information Act;

6. Authorizes an exception to full and open competition for the purpose of contracting with a "neutral person" for the resolution of any existing or anticipated litigation or dispute; and

7. Requires the President to designate an agency or establish an interagency committee to facilitate and encourage the use of ADR. By Presidential Memorandum dated 1 May 1998, the Interagency Alternative Dispute Resolution Working Group was established. See http://www.adr.gov.

F. Federal Acquisition Regulation. It is now the government's express policy to attempt to resolve all contract disputes at the contracting officer level. Agencies are encouraged to use ADR procedures to the "maximum extent practicable." FAR 33.204.

1. FAR 33.214(a) identifies four essential elements for the use of ADR techniques:

a. Existence of an issue in controversy;

b. Voluntary election by both parties to participate in the ADR process;

c. Agreement to ADR and terms to be used in lieu of formal litigation; and

d. Participation in the process by officials of both parties who have authority to resolve the issue in controversy.

2. If the contracting officer rejects a contractor's request for ADR, the contracting officer must provide the contractor a written explanation citing one or more of the conditions in 5 U.S.C. 572(b) or other specific reasons that ADR is inappropriate. FAR 33.214. Additionally, when a contractor rejects an agency ADR request, the contractor must inform the agency in writing of the contractor's specific reasons for rejecting the request. FAR 33.214.

G. DOD Policy and Implementation. Each DOD component shall use ADR techniques "whenever appropriate" and shall establish ADR policies and programs. DOD Dir. 5145.5.

1. Army. The Army established a centralized ADR Program Office in the Office of the General Counsel in 2008, pursuant to the Secretary of the Army's 22 Jun 07 ADR policy memorandum. This policy urges Army personnel to use ADR in appropriate cases to resolve disputes as early as feasible, by the fastest and least expensive method possible, and at the lowest possible organizational level. Personnel involved in dispute resolution must receive adequate ADR training, and must consider ADR in every case. The policy designates the Principal Deputy General Counsel as the Army Dispute Resolution Specialist and directs the hiring of personnel to assist in implementing the Army ADR policy. Previously, ADR in the Army was implemented

primarily through subordinate commands and components, for example, the Contract and Fiscal Law Division of the U.S. Army Legal Services Agency (for contract claims and bid protests), Army Materiel Command (workplace and bid protests), the Army Corps of Engineers (contract claims, environmental and workplace disputes), and the Army EEO Complaints Program (discrimination claims). These subordinate commands and components continue to have primary operational control over ADR with respect to disputes within their areas of responsibility, but certain aspects of the ADR program, such as policy and guidance, standards, training programs, and ADR support, are within OGC's area of responsibility. In Army contract disputes, the available guidance is referenced in the 1999 "Electronic Guide to Federal Procurement ADR," a product of the Interagency ADR Working Group Steering Committee, and can be found at http://www.adr.gov/adrguide/. See also US Army Alternative Dispute Resolution Program http://ogc.hqda.pentagon.mil/Practice_Groups/ADR.aspx.

2. Air Force. The Air Force institutionalized its use of ADR in contract disputes by issuance of a comprehensive policy on dispute resolution entitled "ADR First." The policy states that ADR will be the first-choice method of resolving contract disputes if traditional negotiations fail, unless ADR would be inappropriate as judged by the statutory (ADRA) criteria. The ADR First policy represents an affirmative determination to avoid the disruption and high cost of litigation. ADR: Air Force Launches New ADR Initiative; Drafts Legislation to Fund ADR Settlements, Fed. Cont. Daily (BNA) (Apr. 28, 1999); see also Air Force Policy Directive 51-12 (Jan. 9, 2003) and AFFARS 5333.090 (2004). See Air Force ADR website *available at* http://www.adr.af.mil.

3. Navy and Marine Corps. The first Department of Navy ADR policy was issued in 1987, stating "every reasonable step must be taken to resolve disputes prior to litigation." Memorandum, Assistant Secretary of the Navy (Shipbuilding and Logistics), subject: Alternative Dispute Resolution (1987). The current Navy policy states ADR shall be used to the "maximum extent practicable" with the goal of resolving disputes at the earliest stage feasible, by the fastest and quickest means possible, and at the lowest possible organizational level. SECNAVINST 5800.13A (Dec. 22, 2005). See Navy ADR website *available at* http://adr.navy.mil; See USMC *available at* *http://www.hqmc.marines.mil/hrom/EEO/AlternativeDisputeResolution.aspx*

II. DISPUTE RESOLUTION CONTINUUM.

Regarding procurement, guidance, history, and internet links to Acts, Boards, and Service specific matters can be found at http://www.adr.gov/adrguide/.

A. Range.

Alternative dispute resolution techniques exist within a dispute resolution continuum, ranging from dispute avoidance to litigation. The purpose of any ADR method is to settle the dispute without resorting to costly and time-consuming litigation before the courts and boards.

B. Dispute Avoidance.

1. Mechanisms or processes to promote early identification and resolution of potential issues in controversy, before they become disputes. Examples of dispute avoidance processes are partnering, and issue escalation (also known as an "issue ladder") procedures.

2. Partnering.

a. A process by which the contracting parties form a relationship of teamwork, cooperation, and good faith performance. It is a long-term commitment between two or more parties for the purpose of achieving mutually beneficial goals.

b. Partnering fosters communication and agreement on common goals and methods of performance. Examples of common goals are:

(1) The use of ADR and elimination of litigation;

(2) Timely project completion;

(3) High quality work;

(4) Safe workplace;

(5) Cost control;

(6) Value engineering;

(7) Reasonable profit.

c. Partnering is NOT:

(1) Mandatory. It is not a contractual requirement and does not give either party legal rights. The parties must

voluntarily agree to the process, because it is a commitment to an on-going relationship.

(2) A "Cure-All." Reasonable differences will still occur, but one of the benefits of partnering is that it ensures the differences are honest and in good faith.

d. Implementing Partnering. Although voluntary, partnering is typically implemented through formal, specific methods that the parties agree upon. Partnering is labor-intensive, and is therefore best used on more complex projects.

(1) Requires commitment of top management officials of all parties.

(2) Parties need to establish clear lines of communication and responsibility, and agree to ADR methods for resolving legitimate disagreements.

(3) In the Army, both the Army Corps of Engineers and Army Materiel Command have used partnering as a dispute avoidance technique in contracts; for the Corps of Engineers, partnering is also used as a tool to foster collaboration in water projects under Corps supervision. Several very informative publications discussing the Corps' use of partnering are available for download at the Corps Institute for Water Resources' online ADR library at http://www.iwr.usace.army.mil/Home.aspx

3. Issue Escalation.

a. A process of whereby issues that could produce disputes are first referred to a team made up of all parties to the contract or project for resolution.

b. If the issue is not resolved at the first level of review, it is automatically elevated to a higher level of review, usually consisting of the superiors of those in the lower level, for decision.

c. There can be several levels of review up the chain, but the incentive is to avoid higher level review by resolving the issue at the lowest possible level.

C. Unassisted Negotiations.

1. In traditional unassisted negotiation, the parties attempt to reach a settlement without involvement of outside parties.

2. Elements of Successful Negotiation:

a. Parties identify issues upon which they differ.

b. Parties disclose their respective needs and interests.

c. Parties identify possible settlement options.

d. Parties negotiate terms and conditions of agreement.

3. Goal: Each party should be in a better position than if they had not negotiated.

D. ADR Procedures.

Defined broadly to include any procedure or combination of procedures that "may include, but are not limited to, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, and use of ombudsmen," ADR techniques rely upon participation by a third-party neutral. See ADRA of 1996, 5 U.S.C. §§ 571-584 and FAR 33.201. Typically ADR types fall within one of three general categories:

1. Process Assistance/Assisted Negotiations:

a. **Mediation**. Mediation is helpful when the parties are not making progress negotiating between themselves. Mediation is simply negotiation with the assistance of a third party neutral who is an expert in helping people negotiate but has no decision-making authority. See "Alternative Dispute Resolution – Edition III," Briefing Papers No. 03-5, p. 1 (April 2003). See Donald Arnavas, Alternative Dispute Resolution for Government Contracts 7 (2004).

(1) The mediator should be neutral, impartial, acceptable to both parties, and should not have any decision-making power.

(2) A professional mediator will normally approach a dispute with a formal strategy, consisting of a method of analysis, an opening statement, recognized stages of mediation, such as ex parte caucuses, and a variety of mediation tools for breaking impasses and bringing about a resolution.

(3) Mediators (as well as arbitrators and other neutrals) may be retained without full and open competition. FAR 6.302-3(a)(2)(iii) and (b)(3). Moreover, third-party neutral functions (like mediating and arbitrating)

in ADR methods are not inherently governmental functions for which agencies may not contract. See FAR 7.503(c)(2).

(4) Most mediations in contract disputes are "evaluative," i.e., the mediator is a subject matter expert who is expected to offer an opinion on the litigation risk for each party if the matter goes to trial. However, the mediator has no power to decide the issue nor to impose a settlement.

(5) At the ASBCA, the process known as the "settlement judge technique" is most similar to evaluative mediation. This is a flexible procedure that allows the parties to make case presentations to each other in the presence of an ASBCA judge, who then facilitates settlement negotiations. "Alternative Dispute Resolution at the ASBCA," Briefing Papers No. 00-7, p. 7 (June 2000). See, ASBCA Notice Regarding Alternative Methods of Dispute Resolution, available at http://www.asbca.mil/ADR/ADR%202011.pdf.

b. **Mini-Trials**. The term "mini-trial" is a misnomer, as it is NOT a shortened judicial proceeding. In a mini-trial, the parties present either their whole case, or specific issues, to a panel consisting of the neutral and the principals of each party in an abbreviated hearing. An advantage of the mini-trial is it forces the parties to focus on a dispute and settle it early. See ASBCA Notice Regarding Alternative Methods of Dispute Resolution, available at http://www.asbca.mil/ADR/ADR%202011.pdf. See Donald Arnavas, Alternative Dispute Resolution for Government Contracts 7 and 127 (2004).

(1) Mini-trials have been used by the Army Corps of Engineers in several cases. The first was the Tennessee Tombigbee Construction, Inc. case in 1985. In that case, Professor Ralph Nash served as the neutral advisor, and a $17.25 million settlement was worked out between the government and the contractor. See 44 Federal Contracts Reporter (BNA) 502 (1985).

(2) In a mini-trial, the attorneys engage in a brief discovery process and then present their case to a specially-constituted panel. The panel consists of party principals and the neutral advisor if desired.

(a) Each party selects a principal to represent it on the panel. The principal should have sufficient authority permitting unilateral decisions regarding the dispute and should not have been personally or closely involved in the dispute.

(b) The parties should jointly select the neutral advisor, and share expenses. The neutral advisor should possess negotiation and legal skills, and if the issues are highly technical, a technical expert is desirable.

(c) The neutral advisor may perform a number of functions, including answering questions from the principals, questioning witnesses and counsel to clarify facts and legal theories, acting as a mediator and facilitator during negotiations, and generally presiding over the mini-trial to keep the parties on schedule.

(3) After hearing the case, the principals try to negotiate a settlement, with the neutral's assistance if the principals desire it. If the neutral is an ASBCA judge, they may discuss the likely outcome if the case were to go to court or the board (outcome prediction - see below).

2. Outcome Prediction.

a. **Non-Binding Arbitration**. This form of arbitration aids the parties in making their own settlement. It is best used when senior managers do not have time to sit through a mini-trial and when disputes are highly technical. See Donald Arnavas, Alternative Dispute Resolution for Government Contracts, 23 and 127 (2004).

(1) Normally an informal presentation of the case, done by counsel with client input.

(2) Evidence is presented by document, deposition, and affidavit.

(3) Few live witnesses.

(4) The arbitrator’s decision or opinion, sometimes called an award, serves to further settlement discussions. The parties get an idea of how the case may be decided by a court or board.

(5) The arbitrator may also evolve into the role of a mediator after a decision is issued.

b. **Outcome Prediction Conference (GAO).** For bid protests at GAO, parties frequently utilize an "outcome prediction" conference, in which a GAO staff attorney advises the parties as to the perceived merits of the protest in light of the case facts and prior GAO decisions. See Tyecom, Inc. B-287321.3; B-287321.4, April 29, 2002. See also Bid Protests at GAO: A Descriptive Guide available at http://www.gao.gov/products/GAO-09-471SP. See also Donald Arnavas, Alternative Dispute Resolution for Government Contracts, 127 (2004).

3. Adjudication.

a. **Binding Arbitration**. Binding arbitration is the ADR technique that most closely resembles traditional, formal litigation. "Alternative Dispute Resolution – Edition III," Briefing Papers No. 03-5, p. 2 (April 2003). This form of arbitration results in an award, enforceable in courts.

(1) Binding Arbitration in DOD.[1] Pursuant to the ADRA of 1996,[2] federal agencies may use binding arbitration, but only after the head of the agency issues appropriate guidance, in consultation with the Attorney General. The Navy is the first (and, so far, only) DOD agency that has issued guidance authorizing the use of binding arbitration in FAR contracts.[3] To date, only 8 federal agencies have issued guidelines for use of binding arbitration.

(2) There is normally a formal presentation of the case, much like a trial, though strict rules of evidence may not be followed.

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[1] Binding arbitration is a voluntary dispute resolution process where the parties select a neutral decision-maker to hear the dispute and resolve it by rendering a final and binding award, with only limited rights to appeal. Unlike traditional litigation, arbitration provides for simplified procedural rules, and flexibility in the choice of the decision-maker. See DONALD ARNAVAS, ALTERNATIVE DISPUTE RESOLUTION FOR GOVERNMENT CONTRACTS, 23-24 (2004).

[2] See ADRA, 5 U.S.C. § 575(c).

[3] See SECNAV Instruction 5800.15 (5 Mar. 2007) Use of Binding Arbitration for Contract Controversies. This instruction may be accessed at http://www.adr.navy.mil and http://doni.daps.dla.mil/allinstructions.aspx.

(3) Evidence is presented by document, deposition, affidavit, and live witnesses, with full cross-examination.

(4) Arbitration panels consist of one to three arbitrators, who serve to control the proceeding, but do not take an active role in the case presentation.

(5) Private conversations between the parties and the arbitrators are forbidden. This is much different than mediation, during which private conversations between a party and the mediator are not uncommon.

(6) The arbitrator has full responsibility for rendering justice under the facts and law.

(7) The arbitrator's award is binding, so the arbitrator must be more careful about controlling the parties' case presentation and the reliability of the evidence presented.

b. **Summary Trial with Binding Decision (ASBCA).** In practice before the ASBCA, a summary trial results in a binding decision. The parties try the case informally before a board judge on an expedited, abbreviated basis. There is no right to appeal a decision resulting from this process. "Alternative Dispute Resolution at the ASBCA," Briefing Papers No. 00-7, p. 5 (June 2000). See ASBCA Notice Regarding Alternative Methods of Dispute Resolution available at http://www.asbca.mil/ADR/ADR%202011.pdf. See also the Air Force ADR Reference Book, section 4.3.2 available at http://www.adr.af.mil/acquisition/index.html. See Donald Arnavas, Alternative Dispute Resolution for Government Contracts 127 (2004).

III. TIME PERIODS FOR USING ADR.

A. Before Protest or Appeal.

1. Protests. The FAR has long provided authority for agencies to hear protests. FAR 33.103 implements Executive Order 12979 and requires agencies to:

a. Emphasize that the parties shall use their best efforts to resolve the matter with the contracting officer prior to filing a protest (FAR 33.103(b));

b. Provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests, using ADR techniques where appropriate (FAR 33.103(c));

c. Allow for review of the protest at "a level above the contracting officer" either initially or as an internal appeal (FAR 33.103(d)(4)) and,

d. Withhold award or suspend performance if the protest is received within 10 days of award or 5 days after debriefing. FAR 33.103(f)(1)-(3). But an agency protest will not extend the period within which to obtain a stay at GAO, although the agency may voluntarily stay performance. FAR 33.103(f)(4).

2. Appeals. The ADRA provides clear and unambiguous government authority for contracting officers to voluntarily use any form of ADR during the period before an appeal is filed. 5 U.S.C. § 572(a); FAR 33.214(c).

B. After Protest or Appeal.

1. The GAO Bid Protest Regulations now provide that GAO, on its own or upon request, may use flexible alternative procedures to resolve a protest, including ADR procedures. 5 C.F.R. 21.10. See Bid Protests at GAO: A Descriptive Guide *available at* http://www.gao.gov/products/GAO-09-471SP. As noted earlier, parties frequently utilize an "outcome prediction" conference. See also Tyecom, Inc. B-287321.3; B-287321.4, April 29, 2002.

2. With respect to contractor claims, once an appeal is filed, jurisdiction passes to the BCA. When an appeal is filed, the Board gives notice suggesting the parties pursue the possibility of using ADR, including mediation, mini-trials, and summary hearings with binding decisions. The ASBCA has made aggressive use of ADR services in contract appeals disputes. See ASBCA Notice Regarding Alternative Methods of Dispute Resolution *available at* http://www.asbca.mil/ADR/ADR%202011.pdf. See also "Alternative Dispute Resolution at the ASBCA," Briefing Papers No. 00-7 (June 2000).

3. Parties who file appeals with the Court of Federal Claims (COFC) will also be informed of voluntary ADR methods available through the court. In 2007 the Chief Judge of COFC issued General Order No. 44, establishing the ADR Automatic Referral Program, in which all cases (except for bid protests) assigned to a presiding judge are automatically and simultaneously referred to an ADR judge for ADR consideration and participation by the parties.

General Order No. 44, together with the implementing procedures and a sample confidentiality agreement, are available for download at the COFC web site. See http://www.uscfc.uscourts.gov/sites/default/files/ADR_Procedures.pdf

IV. APPROPRIATENESS OF ADR.

A. When is it appropriate to use ADR?

Agencies "may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding." 5 U.S.C. §572(a). Also, government attorneys are to "make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial." Exec. Order No. 12988, § 1(c). Generally, ADR is appropriate for a case when:

1. Unassisted negotiations have failed to resolve the dispute and have reached an impasse;

2. Neither party is looking for binding precedent;

3. The parties wish to preserve a continuing relationship;

4. Confidentiality is important to either or both sides.

B. When is it inappropriate to use ADR? An agency must consider not using ADR when:

1. A definitive or authoritative resolution of the matter is required for precedential value, and an ADR proceeding is not likely to be accepted generally as an authoritative precedent. 5 U.S.C. § 572(b)(1);

2. The matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and an ADR proceeding would not likely serve to develop a recommended policy for the agency. 5 U.S.C. § 572(b)(2);

3. Maintaining established policies is of special importance, so that variations among individual decisions are not increased and an ADR proceeding would not likely reach consistent results among individual decisions. 5 U.S.C. § 572(b)(3);

4. The matter significantly affects persons or organizations who are not parties to the proceeding. 5 U.S.C. § 572(b)(4);

5. A full public record of the proceeding is important, and an ADR proceeding cannot provide such a record. 5 U.S.C. § 572(b)(5); or,

6. The agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in light of changed circumstance, and an ADR proceeding would interfere with the agency's ability to fulfill that requirement. 5 U.S.C. § 572(b)(6).

[Note: The ADRA, 5 U.S.C. § 572(b), only requires that an agency consider not using ADR if any of the six statutory factors are present; if sufficient countervailing factors exist, an agency may use ADR even if any of the six factors applies.]

In addition to the statutory factors militating against ADR, there may be other reasons why ADR would be inappropriate for a particular dispute (e.g., a claim with a significant counterclaim of fraud). Any reason for considering ADR to be inappropriate should be articulable; in some cases, the reason(s) for refusing ADR must be put in writing. See, e.g., FAR 33.214(b) (rejection of an offer or request for ADR must state the reason(s) for rejection in writing).

V. STATUTORY REQUIREMENTS AND LIMITATIONS.

A. Voluntariness.

ADR methods authorized by the ADRA are voluntary, and supplement rather than limit other available agency dispute resolution techniques. 5 U.S.C. § 572(c).

B. Limitations Applicable to Using Arbitration.

1. Arbitration may be used by the consent of the parties either before or after a controversy arises. The arbitration agreement shall be:

   a. in writing,

   b. submitted to the arbitrator,

   c. specify a maximum award and any other conditions limiting the possible outcomes. 5 U.S.C. § 575(a)(1)(B)(2).

2. The Government representative agreeing to arbitration must have express authority to bind the Government. 5 U.S.C. § 575(b)(2).

3. Before using binding arbitration, the agency head, after consulting with the Attorney General, must issue guidance on the appropriate use of binding arbitration. 5 U.S.C. § 571. Recall that the Navy issued an instruction on the appropriate use of binding arbitration in March 2007.[4] Neither the Army nor the Air Force has issued such guidance. Army guidance can be found at http://ogc.hqda.pentagon.mil/ADR/Documents/ADR_Spectrum.pdf. Air Force guidance can be found at http://www.adr.af.mil/factsheets/factsheet.asp?id=7346. See http://www.justice.gov/olp/adr/arbitration_kant.htm.

4. An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit. 5 U.S.C. §575(a)(3).

5. If a contractor rejects an agency request to use ADR, the contractor must notify the agency in writing of the reasons. FAR 33.214(b).

6. Once the parties reach a written arbitration agreement, however, the agreement is enforceable in Federal District Court. 5 U.S.C. §576; 9U.S.C. § 4.

7. An arbitration award does not become final until 30 days after it is served on all parties. The agency may extend this 30-day period for another 30 days by serving notice on all other parties. 5 U.S.C. §580(b).

8. A final award is binding on the parties, including the United States, and an action to enforce an award cannot be dismissed on sovereign immunity grounds. 5 U.S.C. § 580(c).

   a. This provision, enacted as part of the 1996 ADRA, put to rest for the time being a long-standing dispute as to whether an agency can submit to binding arbitration.

   b. DOJ's Historical Policy. The Justice Department had long opined that the Appointments Clause of Article II provides the exclusive means by which the United States may appoint its officers. DOJ's opinion was that only officers could bind the United States to an action or payment. Because arbitrators are virtually never appointed as officers under the Appointments clause, the government was not allowed to participate in binding arbitration.

   c. DOJ's Present Position. However, DOJ has now opined that there is no constitutional bar against the government

[4] See SECNAV Instruction 5800.15, *supra* note 3.

participating in binding arbitration if (http://www.justice.gov/olp/adr/arbitration_kant.htm):

(1) the arbitration agreement preserves Article III review of constitutional issues; and

(2) the agreement permits Article III review of arbitrators' determinations for fraud, misconduct, or misrepresentation. DOJ also points out that the arbitration agreement should describe the scope and nature of the remedy that may be imposed and that care should be taken to ensure that statutory authority exists to effect the potential remedy.

d. Judicial Interpretation. The Court of Federal Claims has found DOJ's memorandum persuasive and agreed that no constitutional impediment precludes an agency from submitting to binding arbitration. Tenaska Washington Partners II v. United States, 34 Fed. Cl. 434 (1995). *Available at* http://www.justice.gov/olp/adr/resources.htm.

C. Judicial Review Prohibited.

Generally, an agency's decision to use or not use ADR is within the agency's discretion, and shall not be subject to judicial review. 5 U.S.C. § 581(b).

1. However, arbitration awards are subject to judicial review under 9 U.S.C. § 10(b).

2. Section 10 authorizes district courts to vacate an arbitration award upon application of any party where the arbitrator was either partial, corrupt, or both.

VI. CONCLUSION.

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Chapter 27
Government Information Practices (GIP)

2013 Contract Attorneys Deskbook

CHAPTER 27

FREEDOM OF INFORMATION ACT

5 USC § 552

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I. REFERENCES.

A. Primary Sources.

1. Freedom of Information Act, 5 U.S.C. § 552, as amended [most recently by the "Openness Promotes Effectiveness in Our National Government Act of 2007" (OPEN Government Act of 2007) signed 31 December 2007].

2. Department of Defense Directive No. 5400.7, DOD Freedom of Information Act Program (28 July 2011, Change 1).

3. Department of Defense Regulation No. 5400.7-R, DOD Freedom of Information Act Program (11 April 2006, Change 1).

4. Army Regulation No. 25-55, The Department of the Army Freedom of Information Act Program (1 November 1997) (does not include 1996 amendments to the Freedom of Information Act).

5. Air Force Manual, DOD 5400.7-R_AFMAN 33-302, Freedom of Information Act Program (21 October 2010).

6. Secretary of the Navy Instruction 5720.42F, Department of the Navy Freedom of Information Act Program (6 January 1999).

7. Marine Corps Order 5720.63, Publication in the Federal Register, Indexing, and Public Inspection of Marine Corps Directives (2 August 1991, Change 1).

8. Commandant's Instruction M5260.3 - The Coast Guard Freedom of Information and Privacy Acts Manual (6 April 2005, Change 5). B.

B. Secondary Sources.

1. 1. Freedom of Information Act Guide (June 2009), a biennial Department of Justice publication (available at http://www.justice.gov/oip/04_3.html) [hereinafter DOJ FOIA Guide].

2. Freedom of Information Case List and updates, a Department of Justice publication (available at http://www.usdoj.gov/oip/cl-tofc.html (pre-May 2002). Additional case list updates available at http://www.justice.gov/oip/court-decisions.html.

3. FOIA UPDATE, a newsletter issued quarterly by the Justice Department's Office of Information and Privacy (OIP), from 1979-

2000. Available on the DoJ FOIA Web site at http://www.justice.gov/oip/foi-upd.htm.

4. FOIA Post, a Web-based successor to the FOIA UPDATE, is electronically published by the DoJ available at http://www.justice.gov/oip/foiapost/mainpage.htm.

5. "Summaries of New Decisions" a feature of FOIA Post, a monthly compilation of all FOIA decisions received by the DoJ Office of Information and Privacy, is available at http://www.justice.gov/oip/foiapost/mainpage.htm.

6. Military Resources Available On-Line.

a. Department of Defense – http://www.dod.mil/pubs/foi/

b. Army – https://www.rmda.army.mil/organization/foia.shtml

c. Navy – https://foia.navy.mil/foia/webbas02.nsf/%28vwwebpage%29/home.htm?opendocu ment

d. Marine Corps – http://www.marines.mil/unit/hqmc/foia/Pages/USMCFOIARESOURCE%20MAT ERIALS.aspx

e. Air Force – http://www.foia.af.mil/

f. Coast Guard – http://www.uscg.mil/foia

II. INTRODUCTION.

A. History/Purpose.

1. 1. Freedom of Information Act (FOIA) was enacted in 1966, and took effect 5 July 1967. It revised the public disclosure section of the Administrative Procedure Act. 5 U.S.C. § 1002 (1964) (enacted in 1946, amended in 1966, and now codified at 5 U.S.C. § 552.)

2. "The basic purpose of the FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). The FOIA firmly established an effective statutory right of

public access to executive branch information in the federal government.

B. Key Concepts.

1. 1. Applies to any and all agency records within the government's possession and control.

2. Disclosure is the rule, not the exception.

3. Generally, the status of the requester and purpose of a request are irrelevant with respect to what records are disclosed. [Requester status is relevant regarding expedited access, fees, and attorney fees].

4. The government has the burden to justify withholding of information.

5. The requester may seek administrative and judicial relief if access to government information is improperly denied.

III. RELEASING AGENCY RECORDS.

A. Publication. § 552(a)(1) (Requires disclosure of agency procedures, substantive rules, functions, organization and general policy through Federal Register publication).

1. 1. How to obtain information from the agency: DOD Reg. 5400.7-R, AR 25-55, DOD 5400.7-R/AFSUP1, SECNAVINST 5720.42F, and MCO 5720.63.

2. Rules of procedure and how to make submissions to the agency: Federal Acquisition Regulation (FAR), DOD FAR Supp., and Army FAR Supp. (AFARS)(contract submissions).

3. Substantive rules of general applicability. NI Industries v. United States, 841 F.2d 1104 (Fed. Cir. 1988); Vigil v. Andrus, 667 F.2d 931 (10th Cir. 1982); United States v. Mowat, 582 F.2d 1194 (9th Cir. 1978); Pruner v. Department of the Army, 755 F. Supp. 362 (D. Kan. 1991).

B. "Reading Room" Materials. § 552(a)(2) (Requires agency to make "available for public inspection and copying" records of final opinions, policy statements, administrative staff manuals, and frequently requested material.)

Stanley v. Department of Defense, et al., No. 98-CV-4116 (S.D. Ill. June 22, 1999) (military hospital operational manuals are "internal housekeeping rules" as opposed to the kind of material of interest to the general public.)

1. 1. Final opinions rendered in the adjudication of cases, specific policy statements, and certain administrative staff manuals. Vietnam Veterans of America v. Department of the Navy, 876 F.2d 164 (D.C. 1989).

2. The agency does not need to make available materials "related solely to the [agency's] internal personnel rules and practices." Hamlet v. United States, 63 F.3d 1097 (Fed. Cir. 1995), see, DOJ FOIA Guide.

3. Copies of disclosed records, frequently requested under FOIA (generally, three approved requests).

4. Reading Room records created after 1 November 1996 must be available on an agency's website.

5. Index for Public Inspection- final opinions of adjudicated cases; policies statements and interpretations not published in Federal Register; administrative staff manuals and instructions that affect a member of the public; frequently requested records that have been previously released (including an index of those records).

C. Release Upon Request. § 552(a)(3). This is the most common means by which the public accesses Government records (and the subject of the remainder of this outline.)

IV. KEYS TO UNDERSTANDING THE FOIA.

A. Key Definitions.

1. What is an "agency?" § 552(f). "Agency" means "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."

a. a. However, the Office of the President and those organizations within the Executive Office of the President whose function is limited to advising and assisting the President are excluded from the definition of agency.

b. Subdivisions of an agency are not treated as independent agencies. Judicial Watch, Inc. v. FBI, 190 F.Supp.2d 29, 30 n.1 (D.D.C. 2002) (stating that proper defendant is the Department of Justice "rather than the FBI, which is a component of DOJ and therefore not an "agency" within the statutory definition").

c. The Department of Defense is our agency.

(1) The Departments of the Army, Air Force, and Navy are components of an agency. Schwartz v. General Accounting Office, No. 00-369, (D.D.C., Nov. 13, 2001) (subdivisions of an agency and individual employees are not proper party defendants under the FOIA).

(2) Federally recognized Army National Guard units are considered part of the Army, therefore, they fall within the definition of an "agency" for FOIA and Privacy Act purposes. In Re: Sealed Case, 551 F.3d 1047 (D.C. Cir. 2009)(holding that as long as the Secretary of the Army has not withdrawn a National Guard's federal recognition, it is part of an agency for purposes of the Privacy Act [and thus the FOIA's] whether or not federally activated). The Privacy Act adopts the Freedom of Information Act's definition of agency (5 USC § 552a(a)(1)).

d. Under the FOIA, the term agency does not include:

(1) (1) Congress, Judiciary, Office of the President (including Advisors), or state agencies. Wright v. Curry, 122 F.App'x 724, (5th Cir. 2004) (state agencies are "expressly exclude[d]" from scope of FOIA); Armstrong v. Executive Office of the President, 90 F.3d 553 (D.C. Cir. 1996) (offices within the Executive Office of the President whose functions are limited to advising and assisting the President do not fall within the definition of "agency"), cert. denied, 117 S.Ct. 1842 (1997); Dow Jones & Co., Inc. v. Department of

Justice, 917 F.2d 571 (D.C. Cir. 1990) (Congress is not an agency for FOIA); Dong v. Smithsonian Inst., 125 F.3d 877 (D.C. Cir. 1997) (holding that Smithsonian lacks both the "authority" necessary for it to qualify as an "authority of the government of the United States" under § 551(1) and the executive Department status necessary under § 552(f)), *cert. denied*, 524 U.S. 922 (1998)).

(2) Private organizations, unless the government engages in "extensive, detailed, and virtually day-to-day supervision." Burka v. HHS, 87 F.3d 508 (D.C.Cir. 1996) (finding data tapes created and possessed by contractor to be agency records because of extensive supervision exercised by agency which "evidenced" constructive control").

(3) Private citizens. *See* Allnut v. Department of Justice, 99 F.Supp. 2d 673 (D. Md. 2000) (records held by private trustee acting as agent for the federal government not subject to the FOIA).

2. What is a "record?" Information collected, produced or maintained by the government which is within the possession and control of the government and which is readily retrievable and reproducible.

a. "Readily Retrievable and Reproducible." Examples include: Books, papers, maps, and photographs, and machine readable materials, regardless of physical form. DOD Reg. 5400.7-R, para. C1.4.3.1.

b. "Possession and Control." An agency must both possess and control the record. Department of Justice v. Tax Analysts, 492 U.S. 136 (1989) (agency must create or obtain the records and must have them in possession because of the legitimate conduct of agency business). DOD Reg. 5400.7-R, para. C1.4.3.3.

(1) (1) Possession of records created by another agency. McGehee v. CIA, 697 F.2d 1095 (D.C. Cir. 1983).

(2) Records generated from sources outside the Government. Records must be either government-

owned or subject to substantial government control or use. Burka v. HHS, 87 F.3d 508 (D.C. Cir. 1996) (data tapes created and possessed by contractor are agency records because they are "constructively controlled" through agency's excessive supervision); Hercules, Inc. v. Marsh, 839 F.2d 1027 (4th Cir. 1988) (contractor-prepared Army post telephone directory is government record because book was government-financed and bore "Property of U.S." legend).

(3) (3) Research Data. Amendment to the Fiscal Year 1999 Omnibus Appropriations Bill required modification of OMB Circular A-110 to allow private parties access to non-profit grantee-held research data through FOIA request [modifying Supreme Court decision in Forsham v. Harris, 445 U.S. 169 (1980) (which held records in possession of federal contractors not accessible under the FOIA even if records relate to contractor's contract with the agency)].

(4) Government contractors managing government records. OPEN Government Act of 2007 clarifies definition of "record" to include information "maintained for an agency by an entity under government contract, for the purpose of records management."

(5) Not agency records where records are not maintained under contract for records management. Historical records of calls maintained by Verizon Wireless, a government Blackberry service provider, do not qualify as "agency records" under 5 U.S. C. 552(f)(2)(B) because they are not "maintained for an agency by an entity under Government contract, for the *purposes of records management*." Amer. Small Bus. League v. SBA, 623 F.3d 1052 (9th Cir. 2010).

c. What is not a "record?"

(1) Personal records. Documents created or maintained without official requirement for the convenience of the creator as a memory refresher and not shared with others for agency use. *See* Bureau of Nat'l Affairs v. United States Department of Justice, 742 F.2d 1484

(D.C. Cir. 1984) (uncirculated appointment calendar and telephone message slips of agency official are not agency records); Fortson v. Harvey, 407 F.Supp. 2d 13 (D.D.C. 2005) (Army officer's notes of investigation were personal records because notes were used only to refresh officer's memory and were neither integrated into agency files nor relied on by other agency employees). DOD Reg. 5400.7-R, para. C1.4.3.2.

(2) Tangible, evidentiary objects. Nichols v. United States, 325 F.Supp 130 (D. Kan. 1971) (archival exhibits consisting of guns, bullets, and clothing pertaining to assassination of President Kennedy are not records); Matthews v. United States Postal Service, No. 92-1208, slip op. at 4, n. 3 (W.D. Mo. Apr. 14, 1994) (computer hardware is not a record).

(3) Documents generated by and under the control of "non-agency" Federal entities. United States v. Anderson, Crim. No. 95-0040, 2003 U.S. LEXIS 725 (E.D. La. Jan. 16, 2003) (grand jury transcripts are court records and, therefore, are not agency records under the FOIA).

(4) A request for uncompiled data (selective information) is not a request for records. Borom v. Crawford, 651 F.2d 500 (7th Cir. 1981) (affirming summary judgment order denying request for parole data compiled by race when no such compilation existed); Krohn v. DOJ, 628 F.2d 195 (D.C. Cir. 1980).

d. The FOIA does not require agencies to create or retain records. Flight Safety Services Corp. v. Department of Labor, 326 F.3d 607 (5th Cir. 2003) (requester's demand that the agency "simply insert new information in the place of the redacted information requires the creation of new agency records, a task the FOIA does not require the government to perform"); DOD Reg. 5400.7-R, para. C1.5.7.

(1) (1) Agency does not have to respond to requester questions. Zemansky v. EPA, 767 F.2d 569 (9th Cir. 1985).

(2) DOD may create a new record when more useful to requester or less burdensome to agency. DOD Reg. 5400.7-R, para C1.5.7.

(3) While the FOIA does not require agencies to create or retain records, the Federal Records Act (now known as the National Archives Act), 44 U.S.C. § 2101 *et seq*., does require record retention pursuant to National Archives and Records Administration schedules. The National Archivist is presently involved in litigation over his orders regarding the retention/destruction of electronic mail/messages.

B. Key Factors Affecting Release.

1. Rule of Segregability. § 552(b); DOD Reg. 5400.7-R, para. C5.2.4.

a. a. Must segregate and release portions of agency records not subject to a withholding exemption. Trans-Pacific Policing Agreement v. United States Customs Serv., 177 F.3d 1022 (D.C. Cir. 1999) (remanded for determination if 10- digit shipping code number could be segregated); Ogelsby v. Department of the Army, 79 F.3d 1172 (D.C. Cir. 1996); Army Times Publishing Co. v. Department of the Air Force, 998 F.2d 1067 (D.C. Cir. 1993).

b. Nonexempt material is not "reasonably segregable" when efforts to segregate amount to an inordinate burden on the agency. Lead Industries Association v. OSHA, 610 F.2d 70 (2d Cir. 1979).

2. Status and purpose of requester.

a. a. As a general rule, status and purpose of the requester are not considered by the agency except in deciding procedural matters such as expedited processing and fee issues. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989).

b. A foreign government is a person under the Act. DOD Reg. 5400.7-R, para. C5.1.3; Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769 (D.D.C. 1974). **However, ...**

c. The Intelligence Authorization Act of 2003, Public Law No. 107-306, 116 Stat. 2383 (2002) amended the FOIA, at 5 U.S.C. § 552(a)(3)(E)(ii), to preclude elements of the intelligence community from disclosing any records in response to a FOIA

request made by any foreign government or international governmental organization, either directly or through a representative. Elements of the intelligence community are identified in 50 U.S.C. § 401a.(4) (includes the Central Intelligence Agency; National Security Agency; Defense Intelligence Agency; and other elements within various Federal agencies).

d. Fugitives are not "persons" for purposes of the FOIA. Doyle v. Department of Justice, 668 F.2d 1365 (D.C. Dir. 1981) (fugitive is not entitled to enforcement of FOIA's access provisions because he cannot expect judicial aid in obtaining government records related to sentence that he was evading); *but see* O'Rourke v. Department of Justice, 684 F.Supp. 716 (D.D.C. 1988) (convicted criminal, fugitive from his home country and undergoing U.S. deportation proceedings, qualified as "any person" for FOIA purposes).

3. Previous releases

a. "Release to one equals release to all."

b. Waiver issues. Students Against Genocide v. Department of State, 257 F.3d 828 (D.C. Cir. 2001) (exemptions were not waived when withheld photographs were displayed, but not distributed, by then-UN Ambassador Madeline Albright during presentation to U.N. Security Council).

4. Discretionary releases. Even if a FOIA exemption applies to information, agencies may decide to release the information unless prohibited by another statute.

a. Department of Justice posture: The Reasonably Forseeable Harm" Standard. The FOIA's exemptions do not require the withholding of information. Agencies have great discretion in determining whether to release requested information.

(1) (1) On 21 January 2009, President Obama issued guidance emphasizing that the FOIA "should be administered with a clear presumption: In the face of doubt, openness prevails" and that, "[a]ll agencies should adopt a presumption in favor of full disclosure." Under this guidance, agencies are strongly encouraged

to make discretionary releases when appropriate. On 19 March 2009, AG Holder published guidance implementing the President's policy. This guidance states that the DOJ will defend a denial of records only if **(1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.**

(2) Implementing the "Reasonably Foreseeable Harm" Standard. Most exemptions already require the identification of some harm to an interest protected by the exemption before the exemption even applies. Therefore, those exemptions are not impacted by the new policy and discretionary releases would not be appropriate. In those situations, agencies must reasonably segregate any non-exempt information and make as much disclosure as possible. Exemptions least affected by the Least affected by the new policy are: Exemption 1, 3, 4, 6, and 7.

5. Department of Defense Posture, **pending new guidance**:

a. **DOD employees must "exercise great caution" in the release of information related to DOD work**. [*See* Memorandum, Deputy Secretary of Defense, Subject: Operations Security Throughout the Department of Defense, dated 18 Oct 2001, at http://www.dod.gov/pubs/foi/dfoipo/docs/names_removal.pdf.]

b. DOD is statutorily authorized to withhold personal identifying information related to personnel stationed overseas or with sensitive or routinely deploying units. [*See* 10 U.S.C. § 130(b).] Current policy requires a much greater protection of information post 9/11 and any information "that personally identifies DoD personnel [is to] be more carefully scrutinized and limited. Under this policy, personally identifying information may be inappropriate for inclusion in any medium available to the general public." [*See* Memorandum, Office of the Secretary of Defense, Subject: Withholding Information that Identifies DoD Personnel, dated 1 Sep 2005, at http://www.dod.gov/pubs/foi/dfoipo/docs/1sep2005memo_PII.pdf.]

6. Format of Records. The 1996 amendments to the Freedom of Information Act (the Electronic Freedom of Information Act

Amendments, or "EFOIA") give the requester choice of format, where readily reproducible. Dayton Newspapers, Inc. v. Department of the Air Force, 35 F. Supp.2d 1033 (S.D. Ohio 1998); *but see* Students Against Genocide v. Department of State, 257 F.3d 828 (D.C. Cir. 2001) (agency is not required to produce new photographs at a different resolution in order to mask the capabilities of the reconnaissance systems that produced them; such a step is not merely a matter of requester's choice of "format").

V. PROCESSING REQUESTS FOR RELEASE.

A. Requirement for a Proper Request. DOD Reg. 5400.7-R, para. C1.4.2.

1. Must request an "agency record." DOD Reg. 5400.7-R, para., C1.4.3.

2. Must reasonably describe the record. DOD Reg. 5400.7-R. para., C1.5.8. *See* Ruotolo v. Department of Justice, 53 F.3d 4 (2d Cir. 1995); AFGE v. Department of Commerce, 907 F.2d 203 (D.C. Cir. 1990); Mason v. Calloway, 554 F.2d 129 (4th Cir. 1977).

3. Must comply with agency rules. DOD Reg. 5400.7-R, para. C1.4.2.

   a. a. Written request required. ("written requests may be received by postal service or other commercial delivery means, by facsimile, or electronically").

   b. Must express willingness to pay fees or, in the alternative, explain why a waiver of fees is appropriate.

   c. Must direct request to the proper DOD component. DOD Reg. 5400.7-R, para. AP 2.2.

   d. Must expressly or impliedly invoke FOIA or an implementing regulation.

B. Required Agency Response. **Note:** Each service has established release and processing procedures. DOD Reg. 5400.7-R, para. C1.4.2; AR 25-55, ch. V; DOD 5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 8.

1. 1. Agency must advise requester of agency's receipt of the request and, if necessary, forward request to the proper agency records custodian.

2. Agency should liberally construe FOIA requests. *See* LaCedra v. Exec. Office for U.S. Attorneys, 317 F.3rd 345 (D.C. Cir. 2003) (in view of obligation "to construe a FOIA request liberally," reading of plaintiff's FOIA request -- for "all documents pertaining to my case . . . [and] specifically" for rewards and fingerprints -- to include only those specific items was "simply implausible" and "also wrong").

3. Agency must evaluate the request for processing priority. The Electronic FOIA amendments modified the court-sanctioned rule of "first-in, first-out" FOIA processing. Open America v. Watergate Special Prosecution Force, 547 F.2d 606 (D.C. Cir. 1976).

   a. Agencies may establish "multi-track" processing in which requests are sorted in accordance with the complexity of the request or potential volume of responsive document. *See* FOIA Update, Vol. XVIII, No. 1, at 6.

   b. Agencies must have procedures to for expedited processing when exceptional circumstances surround a request, such as an imminent threat to life or personal safety or if the requester is a "person primarily engaged in disseminating information" and there is an "urgency to inform the public of actual or alleged Federal Government activity." Al-Fayed v CIA, 254 F.3d 300 (D.C. Cir. 2001) (no expedited processing because there is no evidence that events connected to the deaths of Princess Diana and Dodi Al-Fayed are matters of "current exigency" to the American public); Tripp v. DoD, 193 F. Supp. 2d 229 (D.D.C. 2002) (expedited processing denied because requester is not "primarily engaged in the activity of disseminating information," even though "she has been the object of media attention, and has at times provided information to the media"; requester's "job application to the Marshall Center and the resulting alleged Privacy Act violations by DoD are not the subject of any breaking news story.")

   c. Agency must make "reasonable efforts" to locate records and court may require agency to demonstrate adequacy of search. Dayton Newspapers, Inc. v. VA, 257 F.Supp. 2d 988 (S.D. Ohio 2003) (pursuant to its FOIA regulations, the VA was obligated to search only its headquarters, absent a clear indication that plaintiff sought records maintained in a VA regional office), *sustaining defendant's motion for summary judgment and ordering final judgment*, 510 F.Supp. 2d 441 (S.D. Ohio 2007); Blackman v. Department of Justice, No. 00-3004 (D.D.C. Oct. 9, 2001) (agency's search for deposition

transcripts of one expert witness using "pay records" index was adequate; manual search that would involve 3,000 aviation cases and as many as 37 million pages would be "overly burdensome"), *summary affirmance denied*, No. 01-5431 (D.C. Cir. Mar. 29, 2002) (*per curiam*)); Dayton Newspapers, Inc. v. Department of the Air Force, 35 F.Supp. 2d 1033 (S.D. Ohio 1998) (holding that 51 hours of electronic searching and assembly is "small price to pay").

4. Agency must **segregate and release** nonexempt information. Trans-Pacific Policing Agreement v. United States Customs Serv., 177 F.3d 1022 (D.C. Cir. 1999) (remanded for determination if 10 digit shipping code number could be segregated); Dynalectron Corp. v. Department of the Air Force, 1984 WL 3289 (D.D.C. Oct. 30, 1984). In accordance with the OPEN Government Act of 2007, the requester must be informed of the amount of redacted exempt material withheld and the specific exemption relied upon to withhold the information. *See also* DOD Reg. 5400.7-R, para. C5.2.4.

5. IAW the 1996 EFOIA amendments, the agency must provide responsive records to the requester in the requester's selected format, when possible and reasonable. Dayton Newspapers, Inc. v. Department of the Air Force, 35 F. Supp.2d 1033 (S.D. Ohio 1998).

6. Proper agency officials must act upon the request. Records custodians cannot deny a request; only Initial Denial Authority (IDA) may deny requested records. *See* Enviro Tech Int'l, Inc. v. EPA, 2003 U.S. LEXIS 25493 (N.D. Ill. Mar. 11, 2003) (EPA failed to comply with its regulations when a staff person, rather than a division director, signed EPA's denial of plaintiff's FOIA request) *aff'd* 371 F.3d 370 (7th Cir. 2004).

7. Agency must document any reasons for not releasing a record. DOD Reg. 5400.7-R, para. C5.2.2. The reasons may include:

   a. No responsive records after a "reasonable" search. Gaines v. EEOC, 36 F.App'x 640 (9th Cir. 2002) ("no records" response appropriate where agency had no responsive records).

   b. Agency neither controls nor otherwise possesses record.

   c. Insufficient description of record.

   d. Failure to comply with agency's procedural requirements.

   e. Request is withdrawn.

f. Fee dispute.

g. Duplicate Request.

h. The information is not, by definition, a "record." Oglesby v. U.S. Department of the Army, 920 F.2d 57 (D.C. Cir. 1990).

i. The request is denied in whole or part IAW with FOIA.

C. Requirement to Meet Statutory Time Limits. 5 U.S.C. §§ 552(a)(6)(A) & (B).

1. 1. Initial agency response - 20 working days.

a. a. Agencies have 20 days (excepting Saturdays, Sundays, and legal public holidays) after receipt of a request to comply with or deny the request.

b. In "unusual circumstances," (i.e., voluminous amount of records, consultation with another agency, or retrieval of records from archival storage,) an agency may have an additional ten (10) day extension if the agency tells the requester in writing why it needs the extension and when it will make a determination on the request.

c. Agency's 20 day period to respond to a request commences on the date on which the request is first received by the "appropriate component of the agency, but in any event not later than ten days after the request is received by any component of the agency" designated by the agency to receive requests**.**

d. Agency is allowed to make one request to the requester for information and toll the 20-day period while it awaits the information. Also, agency may toll the 20- day period as often as necessary to clarify with the requester an issue regarding fees. Either tolling period ends upon receipt of the information or clarification sought.

e. Requester dissatisfied with agency response - shall be advised to file an appeal so that it reaches the agency appellate authority no later than 60 calendar days from the date of receipt of the agency response. DOD Reg. 5400.7-R, para. C5.3.3.1.

f. Failure to process timely; fee waiver; ruling that where agency did not act on request by plaintiff (an "all other requester" category requester) for fee waiver, nor act on his administrative appeal, within 20 working days, it could not charge search fees; when requester responded to agency's letter seeking more information concerning the fee waiver, that stopped the tolling of the 20-day period. Bensman v. Nat'l Park Serv., No. 10-1910, 2011 WL 3489507 (D.D.C. Aug. 10, 2011).

g. If agency shows failure to meet time limits was result of "exceptional circumstances" and it is applying due diligence in processing request, then court can allow additional time for administrative processing of request. §552(a)(6)(C). Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976).

h. "Exceptional circumstances" does not include delays that result from a predictable agency workload of requests unless "the agency demonstrates reasonable progress in reducing its backlog of pending requests." 5 U.S.C. §552(a)(6)(C)(ii).

2. Agency response to Appeals - 20 working days.

3. Denial and "constructive denial" of requests.

a. Custodian cannot deny a request. *See* Enviro Tech Int'l, Inc. v. EPA, No. 02 C 4650 (N.D. Ill. Mar. 11, 2003) (EPA failed to comply with its regulations when a staff person, rather than a division director, signed EPA's denial of plaintiff's FOIA request).

b. Records withheld by custodians must be forwarded to the Initial Denial Authority (IDA) for decision on denials.

c. An agency's failure to comply with the time limits for either the initial request or the administrative appeal may be treated as a "constructive exhaustion" of administrative remedies, and a requester may immediately seek judicial review. § 552(a)(6). *See*, Spannaus v. United States Department of Justice, 824 F. 2d 52 (D.C. Cir. 1987).

D. Documenting Agency Action on Requests.

1. Congress requires an annual FOIA processing report to be compiled by each agency. 5 U.S.C. § 552(e)(1). The OPEN Government Act of 2007 added additional requirements that must be reported beginning in 2008. Generally, reporting requirements include: the number of requests for records pending at end of the fiscal year; the average and

median number of days that such requests had been pending; the number of requests for records received by the agency; the number of requests that the agency processed; the average and median number of days taken by the agency to process different types of requests; the number of determinations made by the agency not to comply with requests for records made to the agency, and the reasons for each such determination, etc.

2. DoD components capture data related to FOIA processing on DD Form 2086, Record of Freedom of Information (FOI) Processing Cost (May 2002). In 2008, the Army implemented the Freedom of Information and Privacy Acts Case Tracking System (FACTS). FACTS is a web-based program designed to provide uniform data collection, reporting, and tracking of Army FOIA requests. Its use is mandatory by Army organizations.

3. Each agency is required to make its annual report available on its World Wide Web Site and the Department of Justice is required to link all such reports at one site.

E. Calculating Fees & Processing Fee Waiver Requests. DOD Reg. 5400.7-R, ch. 6.

1. Agencies can require requesters to defray certain costs of agency response.

a. a. The 1966 FOIA permitted agencies to charge fees for services.

b. The 1974 amendments permitted collection of fees for direct expenses only (i.e., duplication and search).

c. In 1986, Congress distinguished between various classes of requesters and established separate fee categories.

d. The OPEN Government Act of 2007 prohibits agencies from collecting search and duplication fees if the agency fails to comply with any time limit, unless an unusual or exceptional circumstance applies to the processing of the request.

2. FOIA Processing Fees. Charges are based on requester's status and purpose. There are three categories of requesters:

a. First - Most favored category: (1) educational, (2) noncommercial scientific institutions (whose purpose is scholarly or scientific research), and (2) representatives of the

news media are charged only for duplication costs after the first 100 pages. *See* Elec. Privacy Info. Ctr. v. DOD, 241 F.Supp. 2d 5 (D.D.C. 2003) (plaintiff, a nonprofit, tax-exempt, educational organization, is a "representative of the news media" for purposes of the FOIA; the determinative question is the organization's "activities," not its corporate structure; plaintiff publishes a biweekly electronic newsletter and has compiled and published 7 books relating to privacy and civil rights; merely maintaining a Web site, by itself, is insufficient to qualify a FOIA requester as a representative of the news media); National Security Archive v. Department of Defense, 880 F.2d 1381 (D.C. Cir. 1989); Stanley v. Department of Defense, et al. No. 98-CV-4117 (S.D. Ill. June 22, 1999).

b. Second - Least favored category: requesters of records for commercial use are charged for search, duplication, and review.

c. Third category: All other requesters are charged for search after the first 2 hours and duplication after the first 100 pages.

3. DOD FOIA Fee Rates. Effective 1 July 2002. 32 CFR Part 286; Federal Register, Vol. 67, No. 90, p. 31127 (May 9, 2002).

a. DOD Search and review costs.

(1) (1) Rate for clerical work (E1–E9/GS1–GS8): $20.00 per hour.

(2) Rate for professional work (O1–O6/GS9–GS15): $44.00 per hour.

(3) Rate for executive review (ES1–ES6/O7–O10): $75.00 per hour.

(4) Rate for contractor work: $40.00 per hour.

b. Duplication costs. Flat rate for office copy reproduction is $.15 per page. Flat rate for microfiche reproduction is $.25 per page.

4. Fee limitations.

a. a. "$15.00 Rule." No fee is charged if costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee. When assessable costs for a FOIA request total $15.00 or less, no fee will be charged

regardless of the requesters' category. DOD Reg. 5400.7-R, para. C6.1.4.2.

b. "$250.00 Rule." When the agency estimates or determines that allowable charges are likely to exceed $250.00, notify the requester and obtain satisfactory assurance of full payment, or for advance payment of up to full amount in the case of requester with no history of payment. DOD Reg. 5400.7-R, para. C6.1.5.2.6.

c. An agency may properly refuse to process FOIA requests if the requester does not pay previous FOIA fees. TPS, Inc. v. Department of the Air Force, 2003 U.S. LEXIS 10925 (N.D. Cal. Mar. 28, 2003) (Navy properly refused to produce requested records based upon requester's outstanding bill of $300 for a 1995 search conducted for plaintiff).

5. Requests for Fee Waiver. Unlike the substantive FOIA analysis, waivers may be based on the requester's status and motive. *See* Schulz v. Hughes, 250 F.Supp. 2d 470 (E.D. Pa. 2003) (plaintiff not entitled to a waiver of fees; the release of information concerning plaintiff's prosecution would not make a significant contribution to the public understanding of federal prosecutions or incarceration); McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282 (9th Cir. 1987) (applying and implicitly approving DOD's regulatory implementation of fee waiver provision).

F. Litigating Denied and Constructively Denied FOIA Requests.

1. Requester must exhaust administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

a. a. Once an agency has responded to a request, regardless of whether the response is timely, the requester can seek judicial review only after appealing to the agency first. *See* Ford v. U.S. Department of Justice, No. 02-7538 (4th Cir. Feb. 5, 2003) (*per curiam*) (affirms district court ruling that plaintiff has not exhausted his administrative remedies where the FBI did not timely respond to his FOIA request but responded before suit was filed, and where the agency denied as untimely plaintiff's appeal of the initial denial because he sent it nearly 10 years after the adverse decision); Hogan v. Huff, 2002 U.S. Dist. LEXIS 11092 (S.D.N.Y. June 21, 2002) (plaintiff failed to take legal action before the arrival of the first set of responsive records); Judicial Watch v. F.B.I., 190 F.Supp. 2d 29 (D.D.C. 2002).

b. A requester's failure to pay FOIA fees constitutes a failure to exhaust administrative remedies. *See*, Oglesby v. Department of the Army, 920 F.2d 57, 66 (D.C. Cir. 1990) (exhaustion does not occur until the required fees are paid or an appeal is taken from the refusal to waive fees).

c. Case is not ripe for adjudication when withholding of records was based upon requester's failure to pay fees associated with a FOIA request. Pietrangelo v. U.S. Department of the Army, 155 F.App'x 526 (2d Cir. 2005) (affirming dismissal for failure to exhaust, despite agency's untimely response, because plaintiff neither paid nor requested waiver of assessed fees).

2. The circumstances which would authorize a judicial stay were narrowed by E-FOIA amendments. Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976). Stays are granted for delays resulting from predictable agency workload of requests only if the agency "demonstrates reasonable progress in reducing its backlog of pending requests."

3. Judicial Review. 5 U.S.C. § 552(a)(4)(B); DOD Reg. 5400.7-R, para. C5.4.

a. Civil action challenging the denial of a request may only be brought by the person who filed the FOIA request. Three Forks Ranch Corp. v. Bureau of Land Mgmt, 358 F.Supp. 2d 1 (D.D.C. 2005) (holding that "a FOIA request made by an attorney must clearly indicate that it is being made 'on behalf of' the corporation to give that corporation standing to bring a FOIA challenge.")

b. Agency, not agency employee, is the proper party defendant. Petrus v. Bowen, 833 F.2d 581 (5th Cir. 1987) ("Neither the Freedom of Information Act nor the Privacy Act creates a cause of action against an individual employee of the agency.")

c. Scope of review - *de novo*.

d. *In camera* inspection is "within the broad discretion of the court." Quinon v. FBI, 86 F.3d 1222 (D.C. Cir. 1996).

e. Discovery is not typically part of a FOIA lawsuit. Heily v. U.S. Department of Commerce, 69 F.App'x 171 (4th Cir. 2003) ("It is well-established that discovery may be greatly restricted in FOIA cases.")

(1) The decision to permit discovery in FOIA cases rests with the district court judge. Wood v. FBI, 432 F.3d 78 (2d Cir. 2005).

(2) When discovery is permitted it is to be sparingly granted. Most often, discovery is limited to investigating the scope of the agency search for responsive documents, the agency's indexing procedures, and similar issues. Schiller v. INS, 205 F. Supp. 2d 648 (W.D. Tex. 2002).

(3) Note: Though not designed to be a federal "discovery tool," the FOIA is frequently used as such by litigants in non-FOIA cases. See Pa. Department of Pub. Welfare v. United States, 2006 U.S. Dist. LEXIS 92807 (W.D. Pa. Dec. 21, 2006) (rejecting agency's argument that simply because the requester has another non-FOIA lawsuit against the agency, its FOIA request is "abusing or misusing FOIA to obtain non-discoverable documents").

(a) (a) Discovery, particularly when a protective order is granted, generally provides greater access to all relevant records or records that could lead to relevant evidence than that provided by the FOIA.

(b) The FOIA is not a substitute for discovery in criminal cases. See Boyd v. DEA, 2002 U.S. Dist. LEXIS 27853 (D.D.C. Mar 8, 2002).

f. Vaughn index. A court may order an agency to submit a detailed index of the documents it seeks to withhold and the reasons justifying such withholding. Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973); *Compare*, Wiener v. FBI, 943 F.2d 972 (9th Cir. 1991) *with* Maynard v. CIA, 986 F.2d 547 (1st Cir. 1993).

(1) The Vaughn index requires a correlation of the information that an agency decides to withhold with the particular FOIA exemption and the agency's justification for withholding. The index includes a general description of each document sought by the FOIA requester and explains the agency's justification for nondisclosure of each individual document or portion of a document.

(2) The index compels the agency to scrutinize any material withheld in justification of its claimed exemption, assists the court in performing its duties, and gives the requester as much information as is legally permissible.

g. Burden of proof. Burden is on the government to establish that a document is exempt from disclosure. 5 U.S.C. § 552(a)(4)(B).

4. Attorney Fees and Costs. § 552(a)(4)(E).

a. Attorney fees are within the discretion of the court when a FOIA plaintiff "substantially prevails." State of Texas v. Interstate Commerce Commission, 935 F.2d 728 (5th Cir. 1991); Education/Instruction, Inc. v. HUD, 649 F.2d 4 (1st Cir. 1981).

(1) Before 2002, the courts determined whether a plaintiff "substantially prevailed" by determining whether prosecution of the action was needed and that action had a causative effect on delivery of information (i.e., the "catalyst theory"). Weisberg v. Department of Justice, 848 F.2d 1265 (D.C. Cir. 1988).

(2) After 2002, the courts required that "in order for plaintiffs in FOIA to become eligible for an award of attorney's fees, they must have been awarded some relief either in a judgment on the merits or in a court-ordered consent decree." Oil, Chemical & Atomic Workers Int'l Union v. Department of Energy, 288 F.3d 452 (D.C. Cir. 2002).

(3) However, the OPEN Government Act of 2007 defines "substantially prevailed" as the obtaining of relief through a judicial order, or an enforceable written agreement, or by a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial. This is a return to the "catalyst theory" of substantially prevailed as described in Weisberg.

(4) The OPEN Government Act of 2007 requires that all fees assessed in FOIA litigation must now be paid by the agency from its annual appropriations rather than from the Claims and Judgment Fund of the United States Treasury.

b. No attorney fees for *pro se* litigants, Burka v. HHS, 87 F.3d 508 (D.C. Cir. 1996), although a law firm representing itself is eligible to claim attorney fees. Baker & Hostetler LLP v. U.S. Department of Commerce, 473 F.3d 312 (D.C.Civ. 2006).

c. Four factors that courts will generally consider to determine whether an award of fees and costs is appropriate under FOIA after determining the requester's eligibility:

(1) Benefit to the public derived from the case;

(2) Commercial benefit to the requester;

(3) Nature of requester's interest in the records sought; and

(4) Whether the agency's withholding of records had a reasonable basis in law. See Church of Scientology v. USPS, 700 F.2d 486 (9th Cir. 1983); LaSalle Extension University v. FTC, 627 F.2d 481 (D.C. Cir. 1980).

d. Commercial requesters and those requesters seeking information for commercial gain should be allowed attorney fees only where there is clear and positive benefit to the public and where the agency withheld information without a reasonable basis in law. Tax Analyst v. U.S. Department of Justice, 965 F.2d 1092 (D.C. Cir. 1992); c*f.* Aviation Data Service v. FAA, 687 F.2d 1319 (10th Cir. 1982).

5. Six year statute of limitations for filing FOIA lawsuits. 28 U.S.C. § 2401; Spannus v. DOJ, 824 F.2d 52 (D.C. Cir. 1987).

VI. NINE EXEMPTIONS PERMIT WITHHOLDING.

A. Exemption 1: Classified Records. This exemption protects matters that are "(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order."

1. Threshold: To qualify for withholding under Exemption 1, a record must be substantively and procedurally properly classified.

2. Classifications are governed by Executive Order. On 29 December 2009, President Obama signed Executive Order 13526. This represents the current US Presidential executive order outlining how classified information should be handled. Effective 29 December 2009, this order revokes and replaces the previous Executive Orders in effect for this, which were EO 12958 and EO 13292. The EO is

implemented by DOD 5200.1- R, AR 380-5; AFR 205-1, and OPNAVINST 5510.1.

a. There are three security classifications: Confidential, Secret, Top Secret. Classification is based upon the potential harm which could result from improper release of the protected documents, information, or materials.

b. For Official Use Only (FOUO). For FOUO information, see Appendix 3 to DoD 5200.1 -R. While not a proper classification under EO 13526, FOUO information may qualify for withholding under another FOIA exemption.

c. "Controlled Unclassified Information" is a categorical designation that refers to unclassified information that does not meet the standards for National Security Classification under Executive Order 13526, as amended, but is (i) pertinent to the national interests of the United States or to the important interests of entities outside the Federal Government, and (ii) under law or policy requires protection from unauthorized disclosure, special handling safeguards, or prescribed limits on exchange or dissemination. President's Memorandum to the Heads of Executive Departments and Agencies, subject: Designation and Sharing of Controlled Unclassified Information (CUI), 44 WEEKLY COMP. PRES. DOC. 673 (May 7, 2008). This categorical designation, with accompanying document markings, is currently being implemented Government-wide and will replace markings currently used for sensitive but unclassified information within DoD (e.g., FOUO, FOUO- LES, LIMITED DISTRIBUTION). Memorandum from David M. Wennegren, DoD Deputy Chief Info. Officer, to Secretaries of the Military Departments, subject: Transition to New Markings for Controlled Unclassified Information (CUI) (Dec. 28, 2007).

3. Segregability applies even in Exemption 1 cases. Ogelsby v. Department of the Army, 79 F.3d 1172 (D.C. Cir. 1996); Oglesby v. Department of the Army, 920 F.2d 57 (D.C. Cir. 1990). [In 1974, following the Court's decision in EPA v. Mink, 410 U.S. 73 (1973), Congress amended the FOIA to require the segregation of nonexempt material in Exemption 1 cases and to permit *in camera* inspections.]

4. Proper classification of records does not obviate the introduction of classified information in litigation.

a. Court conducts *de novo* review of both procedural and substantive propriety of classification. Allen v. CIA, 636 F.2d 1287 (D.C. Cir. 1980).

b. Court may conduct *in camera* inspection, although the court should give substantial weight to agency affidavits. Young v. CIA, 972 F.2d 536 (4th Cir. 1993).

c. Courts will give great deference to agency's expertise and judgment on classification. James Madison Project v. National Archives and Records Administration, 2002 U.S. App. LEXIS 11184 (D.D.C. Mar 5, 2002) (deferring to CIA decision to retain classification of 80-year old records relating to invisible inks), aff'd 2002 U.S. App. LEXIS 21427 (D.C. Cir. Oct. 11, 2002); Weatherhead v. United States, 157 F.3d 735 (9th Cir. 1998), *cert. granted*, 120 S. Ct. 34 (1999), *cert. dismissed and vacated*, 120 S.Ct. 577 (1999) (Court dismisses for mootness, but vacates 9th Circuit's holding that classification decisions are not given deference unless agency first makes acceptable showing of harm); Goldberg v. Department of State, 818 F.2d 71 (D.C. Cir. 1987); Taylor v. Department of the Army, 684 F.2d 99 (D.C. Cir. 1982). *See also* Ctr. for Nat'l Sec. Studies v. United States Department of Justice, 331 F.3d 918 (D.C. Cir. 2003) (in this post 9/11 case, court declares that it could not "conceive of any reason to limit deference to the executive in its area of expertise to certain FOIA exemptions [i.e., Exemptions 1 and 3] so long as the government's declarations raise legitimate concerns that disclosure would impair national security."); Am. Civil Liberties Union v. Department of Justice, No. 02-2077, 2003 U.S. Dist. LEXIS 8363 (D.D.C. May 19, 2003) (disclosure of statistical information regarding the Justice Department's use of surveillance and investigatory tools authorized by the USA PATRIOT Act would reveal intelligence activities, sources, or methods and could be expected to damage national security).

5. Operational Security.

a. a. Post-request classification is authorized. E.O. 13526, section 1.7(d), DOD Reg. 5400.7-R, para. C3.2.1.1.

b. Compilation/Mosaic Theories of classification. The government may withhold apparently harmless bits and pieces of seemingly innocuous information, which when assembled together would reveal classified or exempt information. American Friends Serv. Comm. v DOD, 831 F.2d 441 (3d Cir. 1987); Taylor v. Department of the Army, 684 F.2d 99 (D.C.

Cir. 1982); Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980). Use of the mosaic theory is not limited to Exemption 1 situations.

c. Previous Release of Classified Records Does Not Prevent Subsequent Withholding of Similar Type of Information. Aftergood v. CIA, 1999 U.S. Dist. LEXIS 18135 (D.D.C. Nov. 15, 1999) (CIA properly withheld its fiscal year 1999 total budget request because it may damage national security and reveal "intelligence sources and methods" even though it released the previous two years' budgets).

d. In rare cases mere existence of particular records may be classified. Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976) (request for procurement records concerning Glomar Explorer submarine-retrieval ship; consequently "neither confirm nor deny" response known as "Glomar" response or "Glomarization").

(1) Glomar Denials or Glomarization is the agency's refusal to confirm or deny the existence or nonexistence of requested information or an abstract fact in cases where the sensitive fact or sensitive information would be disclosed by any other response to a particular FOIA request. See Kelly v. CIA, No. 00- 2498 (D.D.C. Aug. 8, 2002) (CIA properly refused to confirm or deny the existence of any records reflecting a covert relationship between the CIA and UCLA because disclosure of whether such records (and activity) exist in relation to any particular academic institution would reveal intelligence sources and methods and would damage national security; exemption protection is not waived by 2 agency memoranda that are general discussions of the CIA's overt and covert relationships with academic institutions in general that have nothing to do with the any specific relationship with UCLA).

(2) Use of Glomar denial not limited to Exemption 1 cases. See DOD Reg. 5400.7-R, para. C3.2.1.1.1., C3.2.1.6.6., and C3.2.1.7.1.3.1; FOIA Update Vol.VII, No. 1 (1986).

B. Exemption 2: Internal Personnel Rules and Practices. This exemption authorizes withholding an agency's internal rules and regulations governing matters pertaining to personnel or human resources.

1. Threshold: The record must be related "solely to internal personnel rules and practices of an agency."

2. Until March of 2011, Exemption 2 was generally interpreted by courts to include two different bases for withholding records from release. These differing bases for withholding were commonly known as "Low 2" and "High 2." The Supreme Court decision in *Milner v. Dep't of the Navy*, 131 S. Ct. 1259 (March 7, 2011) The opinion essentially did away with "High 2" by narrowing the exemption to the "Low 2" version of the exemption.

    a. The Court found the common understanding of the term "personnel rules and practices" when applied by other courts has resulted in little difficulty in determining what qualifies as one of those records. These records "share a critical feature: They concern the conditions of employment in federal agencies—such matters as hiring and firing, work rules and discipline, compensation and benefits." *Id.* at 1265. The court declared that its "construction of the statutory language simply makes clear that Low 2 is all of 2 (and that High 2 is not 2 at all…)." *Id.*

    b. "Exemption 2, consistent with the plain meaning of the term 'personnel rules and practices,' encompasses only records pertaining to issues of employee relations and human resources." *Milner*, at 1271.

    c. A New Three-Part Test: (1) The information must be related to "Personnel" Rules and Practices; *Id.* at 1265 (2) the information must "solely" relate to those personnel rules and policies; and (3) the information must be "internal" to the agency for their records and use. *See id.* at *1265 n.4*.

3. Because of the recency of the *Milner* decision, it may be helpful to understand the distinction that used to be drawn between "Low 2" and "High 2."

    a. The Court of Appeals for the District Court of Columbia Circuit was the leading case interpreting Exemption 2. In *Crooker v. ATF*, 670 F.2d 1051 (1981) the court interpreted the statutory language to create a two-part test for determining the meaning and application of Exemption 2. For records to qualify, first they had to be "predominantly internal," and secondly they had to be of no genuine public interest (Low 2) or of a nature that would risk circumvention of the law (High 2). *See id.* at 1073-74.

b. "Low 2" applied to trivial matters and information in which there is little or no public interest. Even this interpretation of the exemption has been narrowed by *Milner* to clarify that it applies only to internal personnel rules and practices.

c. "High 2" provided authority to withhold information which would provide a requester with the means to circumvent an agency regulation or frustrate an agency function or mission. Examples of withholding under High 2: information concerning the design, array, structure, and construction of ammunition storage facilities; unclassified rules of engagement even though the enemy may be aware of the ROE through experiences with U.S. forces in Iraq; blueprint of agency buildings where contents or infrastructure could be harmed by public disclosure.

C. Exemption 3: Other Federal Withholding Statutes. FOIA Exemption 3 permits withholding of information prohibited from disclosure by another statute. A complete listing of current statutes that have been found as qualifying Exemption 3 statutes is available at http://www.justice.gov/oip/exemption3.pdf.

1. Threshold: One of two disjunctive requirements must be met to withhold under this exemption: the withholding statute must either "(A) [require] that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establish particular criteria for withholding or refer to particular types of matters to be withheld." A statute falls within the exemption's coverage if it satisfies either one of its disjunctive requirements.

2. Examples of federal withholding statutes:

a. a. The Homeland Security Act of 2002, Public Law 107-296, includes a provision that operates as an Exemption 3 statute for "critical infrastructure" information that is obtained by DHS.

b. 42 U.S.C. § 290dd-3, Confidentiality of patient records in an alcohol and drug treatment program.

c. 10 U.S.C. § 1102, DOD Medical Quality Assurance Records.

d. 10 U.S.C. § 2305 and 41 U.S.C. § 253b, prohibiting release of certain contractual proposals.

e. 10 U.S.C. §130b, allows withholding of information on personnel of overseas, sensitive, or routinely deployable units. See Windel v. United States, 2005 U.S. Dist. LEXIS 44422 (D.

Alaska Apr. 11, 2005), (applying protection to members of a routinely deployable unit of the Air National Guard). Pursuant to DoD guidance issued on 9 November 2001, all DOD components shall ordinarily withhold lists of names and other personally identifying information of currently or recently assigned personnel (citing privacy and security concerns). Names, other than lists, mentioned in other documents may be withheld if the release would raise substantial security or privacy concerns (utilize Exemption 6).

f. 10 U.S.C. §130e, allows withholding of information that is determined to be Department of Defense critical infrastructure security information and the public interest consideration in the disclosure does not outweigh preventing the disclosure of the information. Department of Defense critical infrastructure security information means sensitive but unclassified information that, if disclosed, would reveal vulnerabilities, result in significant disruption, destruction or damage of or to DoD operations, property or facilities. These facilities are those owned by or operated on behalf of the DoD. [This responds directly to the issues in Milner.]

g. See annual DoD FOIA Report for complete listing of Exemption 3 statutes relied upon by DoD during the reporting period.

3. Statutes **commonly mistaken** for Exemption 3 withholding statutes:

a. 18 U.S.C. § 1905; The Trade Secrets Act does not qualify because it prohibits only those disclosures "not authorized by law." CNA Fin. Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987).

b. 5 U.S.C. § 552a; The Privacy Act. 41 U.S.C. § 423(a)(1);

c. The Procurement Integrity Act does not qualify because it prohibits only those disclosures "other than as provided by law" and "does not . . . limit the applicability of any . . . remedies established under any other law or regulation." Cf. Pikes Peak Family Housing, LLC v. United States, 40 Fed.Cl. 673 (1998) (provision does not prohibit disclosure in civil discovery because that is "provided by law"). But see Legal & Safety Employer Research, Inc. v. Department of the Army, 2001 U.S. Dist. LEXIS 26278 (E.D. Cal. May 7, 2001) (erroneously holding that the provision qualifies as an Exemption 3 statute).

4. Statutes may have retroactive application. *See* Sw. Ctr. for Biological Diversity v. USDA., 314 F.3d 1060 (9th Cir. 2002) (the court properly applied a recently enacted Exemption 3 statute in existence at the time of its decision [16 U.S.C. § 5937], rather than the law that was in existence at the time the suit was filed; statute protects information identifying the location of northern goshawk nest sites).

5. Carefully worded appropriations acts may qualify under Exemption 3. *See* City of Chicago v. U.S. Department of Treasury, 423 F.3d 777 (7th Cir. 2005) (ruling that appropriation act prohibition on the use of federal funds "to disclose to the public" certain ATF database records "prevents the agency…from acting on a request for disclosure "and that the act's provisions making such data "immune from legal process" prevents a court from utilizing a plaintiff-compensated special master to process such data).

D. Exemption 4: Trade Secrets, and Commercial and Financial Records. This exception balances and safeguards the interests of both the federal government and entities that submit commercial and financial information to the government.

1. Statutory language. The FOIA permits withholding records that are "trade secrets and commercial or financial information obtained from a person that are privileged or confidential."

2. Trade Secrets. There is a difference between the Trade Secrets Act and the FOIA's exemption for trade secrets.

a. For purposes of the FOIA, "Trade Secrets" has a narrow definition.

(1) "[A] secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." Public Citizen Health Research Group v. FDA, 704 F.2d 1280 (D.C. Cir. 1983).

(2) The passage of time may not make trade secrets any less secret. Herrick v. Garvey, 298 F.3d 1184 (10th Cir. 2002) (upholding district court ruling that technical drawings and specification documents for 1935 airplane

still retain commercial value and are protected by Exemption 4).

b. The Trade Secrets Act, 18 U.S.C. § 1905, defines secrets far more loosely. This act criminalizes the unauthorized disclosure of any data protected by Exemption 4. CNA Financial Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987).

(1) Trade Secrets Act applies broadly to virtually all business information and prohibits agency disclosure except as "authorized by law."

(2) FOIA provides such "authority" to disclose business information only if it is nonexempt. CNA Fin. Corp., *supra*.

3. Commercial or financial information. Courts generally give these terms their "ordinary meanings" and reject more limiting definitions. *See* Public Citizen Health Research Group v. Food and Drug Administration, 704 F.2d 1280 (D.C. Cir 1983); s*ee also* Baker & Hostetler LLP v. U.S. Department of Commerce, 473 F.3d 312 (D.C. Cir. 2006) (information about lumber industry's "commercial strengths and challenges" even though they do not "reveal basic commercial operations…or relate to the income producing aspects of a business").

4. From a person. Person is defined as any individual or entity other than the Federal Government or one of its activities. Nadler v. FDIC, 92 F.3d 93 (2d Cir. 1996) (person includes individuals, partnerships, corporations, associations or public and private organizations other than an agency); Stone v. Export-Import Bank of United States, 552 F.2d 132 (5th Cir. 1977) (foreign government agency).

5. Privileged. Generally related to common law privileges, but rarely used as a basis for withholding. Sharyland Water Supply Corp. v. Black, 755 F.2d 397 (5th Cir. 1985); Indian Law Resource Center v. Department of the Interior, 477 F. Supp. 144 (D.D.C. 1979).

6. Confidential. The government can only withhold information that is confidential. The courts have developed two tests to determine whether information is confidential.

a. The "Confidential" test under National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). Two main prongs have developed under case law; however, several courts have left open the possibility of a third prong.

(1) The "Impairment Prong." Would disclosure likely "impair ability of agency to obtain necessary information in the future"? *See* Flight Safety Servs. Corp. v. Department of Labor, 326 F.3d 607 (5th Cir. 2003) (per curiam) (disclosure of salary and wage information in the form of surveys of business establishments would impair the agency's ability to collect such data in the future); Orion Research Inc. v. EPA, 615 F.2d 551 (1st Cir. 1980) (finding impairment for technical proposals because release "would induce potential buyers to submit proposals that do not include novel ideas"); *but see* McDonnell Douglas Corp. v. NASA, 981 F. Supp. 12 (D.D.C. 1997) (no impairment because "government contracting involves millions of dollars and it is unlikely that release of this information will cause [agency] difficulty in obtaining future bids), *rev'd on other grounds*, 180 F.3d 303 (D.D. Cir. 1999); Racal-Milgo Government Systems v. Small Business Administration, 559 F. Supp. 4 (D.D.C. 1981) ("It is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed.").

OR

(2) The "Competitive Harm" prong. Would disclosure likely cause "substantial harm to the competitive position of the person from whom the information was obtained"?

(a) For examples of cases finding competitive harm, see McDonnell Douglas Corp. v. NASA, 180 F.3d 303 (D.C. Cir. 1999) (holding that release of unit price in rocket contract substantiates substantial competitive harm allowing customers to "ratchet down" prices); Gulf & Western Industries Inc. v. United States, 615 F.2d 527 (D.C. Cir. 1979) (actual costs, break even calculations, profits and profit rates); National Parks, supra (detailed financial information including company assets, liability and net worth); MCI Worldcom, Inc. v. GSA, 163 F. Supp. 2d 28 (D.D.C. 2001) ("Reverse FOIA"; protecting computer-based matrices used to calculate telecommunications services;

finding that disclosure would cause competitive harm due competitors underbidding and customers "ratcheting down" their prices); RMS Industries v. Department of Defense, 1993 U.S. Dist. LEXIS 10995 (N.D. Cal. Nov. 24, 1992) (technical and commercial data, names of consultants and subcontractors, performance cost and equipment information).

(b) For examples of cases finding no competitive harm, *see* GC Micro Corporation v. Defense Logistics Agency, 33 F.3d 1109 (9th Cir. 1994) ("percentage and dollar amount of work contracted out to SDB [Small Disadvantaged Businesses] on each defense contract" is "made up of too many fluctuating variables"); Pacific Architects & Engineers v. Department of State, 906 F.2d 1345 (9th Cir. 1990) (reverse FOIA case) (unit prices); Hercules, Inc. v. Marsh, 839 F.2d 1027 (4th Cir. 1988) (holding no competition for Radford Army Ammunition Plant contract);.

(3) [**OR**, thirdly, will disclosure negatively impact other government interests, such as compliance and program effectiveness? In National Parks, the court hinted at this third "prong" but left the issue unresolved. In Critical Mass Energy Project v. National Regulatory Commission, 975 F.2d 871 (D.C. Cir.1992), the court accepted a third basis for designating information confidential.]

(4) Unit prices are not [generally] confidential. *See, e.g.,* Pacific Architects & Eng'rs, Inc. v. Department of State, 906 F.2d 1345 (9th Cir. 1990); Acumenics Research & Technology v. Department of Justice, 848 F.2d 800 (4th Cir. 1988). The disclosure of government contract unit prices is a contentious issue.

(a) Government policy formerly required "submitter notice" in response to requests for contract unit prices, IAW Executive Order 12,600. 52 Fed. Reg. 23,781 (Jul. 23, 1987); see also 3 C.F.R. 235 (1988) *reprinted in* 5 U.S.C. § 552 note (1994). Submitters would then file

"reverse FOIA" lawsuits to prevent the disclosure of unit prices as confidential commercial or financial information.

(b) In 1997, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council announced the change to Part 15 of the Federal Acquisition Regulation. FAR, 48 C.F.R. §§ 15.503(b)(iv), 15.506(d)(2), required disclosure of unit prices, upon request, in government contracts solicited after 1 January 1998. As a result, government policy no longer required submitter notice under EO 12,600.

(c) Despite the best efforts of the Department of Justice and DoD, several courts have held that unit prices may be withheld under the FOIA. *See* Canadian Commer. Corp. v. Department of the Air Force, 514 F.3d 37 (D.C. Cir. 2008) (finding that line item pricing information involved in the option years of a maintenance contract must be protected); McDonnell Douglas Corp. v. Department of the Air Force, 375 F.3d 1182 (D.C. Cir. 2004) (finds that company has shown that disclosure of option prices and vendor pricing and handling factor, but not "over and above" prices, would likely cause substantial harm to its competitive position); McDonnell Douglas Corp. v. NASA, 180 F.3d 303 (D.C. Cir. 1999), *reh'g denied*, No. 98-5251 (D.C. Cir. Oct. 6, 1999) (finding line item price information from contract resulting from pre-1998 contract solicitation to be confidential under National Parks test); MCI Worldcom v. GSA, 163 F. Supp. 2d 28 (D.D.C. 2001) (FAR provisions cannot be read to authorize disclosure of information protected by Exemption 4 because authorizing statute, 41 U.S.C. § 253b(e)(3), prohibits disclosure of exempt info).

(d) Department of Justice policy again requires agencies to follow submitter notice procedures in response to requests for unit prices. On a case-by-case basis, agencies should determine the applicability of Exemption 4 to unit price requests. *See* U.S. Department of Justice,

"Treatment of Unit Prices After McDonnell Douglas v. Air Force," FOIA Post, http://www.usdoj.gov/oip/foiapost/2005foiapost17.htm. The DoD Freedom of Information and Security Review (DFOISR) is expected to issue specific guidance. *See also* R&W Flammann GmbH v. United States, 339 F.3d 1320 (Fed Cir. 2003) (holding, in a pre-award bid protest case concerning unit prices contained in sealed bids – as distinct from prices contained in proposals – which were subject to the public opening requirement contained in a different FAR provision, that such bid prices "entered the public domain upon bid opening, and therefore…did not fall within Exemption 4 of FOIA").

(5) Unit prices and other items within an unsuccessful proposal are not releasable. 10 U.S.C. § 2305(g)(2) or 41 U.S.C. § 253b(m)(2).

b. The "Confidential" test under Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992).

(1) The Critical Mass test: Did the submitter voluntarily provide the information to the agency?

(a) Does the agency possess legal authority to require information submission: statute, executive order, regulation, or "less formal mandate"?

(b) Has the agency exercised such authority?

(c) Whether submitter's participation in agency program was "voluntary" is **not** the test. Contract bids and proposals are considered "required submissions" and therefore releasability is analyzed under the National Parks analysis. *See* McDonnell Douglas Corp. v. NASA, 981 F. Supp 12 (D.D.C. 1997) (information provided in response to a Request for Proposals is a required submission); N.Y. Pub. Interest Research Group v. EPA, 249 F.Supp. 2d 327 (S.D.N.Y. 2003) (FOIA does not protect GE's submissions to EPA constituting recommendations as to how to

clean up the Hudson River Superfund site; the submissions do not reveal anything about GE as a commercial entity; submitted records "are precisely the kind of information that would shed light on agency decision-making"; in *dicta*, declines to apply the D.C. Circuit's *Critical Mass* decision because no other circuit court has expressly adopted it, the Second Circuit has not commented on it); *see also* DFOISR Memorandum, SUBJECT: FIOA Policy on DOD application of Critical Mass (etc.), 93-CORR-014, 27 July 1993; DFOISR Memorandum, SUBJECT: Internal Guidance on DOD Application of Critical Mass (etc.), 93-CORR-094, 23 March 1993.

AND

(2) Is it information "of a kind that would customarily not be released to the public by the person from whom it was obtained?"

(3) For a sample of the variety of Critical Mass case law in the procurement context, *see* Frazee v. United States Forest Serv., 97 F.3d 367 (9th Cir. 1996) ("proposed operating plan" submitted in response to solicitation for offers not "voluntarily" submitted under Critical Mass) (dicta); McDonnell Douglas Corp. v. NASA, 981 F.Supp 12 (D.D.C. 1997) (contractor line item prices not "voluntarily" submitted under Critical Mass), *reversed on other grounds*, 180 F.3d 303 (D.C. Cir. 1999); Comdisco, Inc. v. GSA, 864 F. Supp. 510 (E.D. Va. 1994) (reverse FOIA) (district court finds Critical Mass inapplicable in 4th Circuit) (dicta). *See also* Mallinckrodt Inc. v. West, 140 F.Supp. 2d 1 (D.D.C. 2000) (observing that "it is beyond dispute that unit pricing data is required to be submitted," but finding that rebate and incentive provisions do not constitute pricing data and ruling that they were voluntarily provided under Critical Mass because Blanket Purchase Agreement solicitation stated that they "should," rather than "must," be provided); Cortez III Serv. Corp. v. NASA, 921 F. Supp. 8 (D.D.C. 1996) (negotiated G&A rate ceilings, not required in solicitation but merely requested by contracting officer held "voluntarily submitted under Critical Mass), *appeal dismissed voluntarily*, No. 96-5163 (D.C. Cir. July 3, 1996).

7. How does agency determine what is confidential? *See* EO 12,600 (June 23, 1987) and DOD Reg. 5400.7-R, para. C3.2.1.4.8.

8. Determining whether business information is exempt--notice of proposed release to the submitter of information — "Reverse FOIA"

   a. Notify the submitter of the FOIA request and solicit its views as to whether disclosure would cause substantial competitive harm.

   b. After reviewing submitter's comments, if the agency determines to disclose any information, it must advise the submitter of its rationale and inform it of the date it will make the disclosure. See NW. Coal. for Alternatives to Pesticides v. EPA, 254 F.Supp. 2d 125 (D.D.C. 2003) (upbraiding agency where submitter mailed redacted document to requester).

   c. The agency rationale must be detailed and respond to each of the submitter's claims as it will constitute the "administrative record" that will support the agency's decision to release the requested information. Acumenics Research & Technology v. Department of Justice, 843 F.2d 800 (4th Cir. 1988) ("Reverse FOIA" case). *See* Federal Electric Corp. v. Carlucci, 866 F.2d 1530 (D.C. Cir. 1989) (agency failed to create an adequate agency administrative record).

   d. Businesses that submit documents to the government may file suit under the Administrative Procedures Act (APA) to challenge an agency's decision to release documents pursuant to a FOIA request. Chrysler Corp. v. Brown, 441 U.S. 281 (1979) (discretionary release permissible only if not protected by Exemption 4, thereby "authorized by law"); Gulf Oil Corp. v. Brock, 778 F.2d 834 (D.C. Cir. 1985).

   e. Standard of review of agency action under APA -- review on the administrative record using the arbitrary and capricious standard. Acumenics Research & Technology v. Department of Justice, 843 F.2d 800 (4th Cir. 1988); General Electric Co. v. NRC, 750 F.2d 1394 (7th Cir. 1984).

E. Exemption 5: Privileged Memoranda & Internal Agency Communications. The FOIA permits withholding records that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." Exemption 5 is limited to that information which would "routinely" or "normally" not be available to a party in litigation. FTC v. Grollier, 462 U.S. 19 (1983).

1. Threshold: Memoranda or communications must be "inter-agency or intra-agency."

   a. "Inter- or intra-agency memorandums" may include communications with parties outside the government. Nat'l Institute of Military Justice v. Department of Defense, 512 F.3d 677 (D.C. Cir. 2008) (cert. denied 08-125 (Dec. 15, 2008)) (2-to-1 decision) (memoranda provided to DoD by outside experts for consideration in establishing regulations for terrorist trial commissions qualify under the D.C. Circuit's "consultant corollary").

   b. Competing or conflicting interests may require disclosure of records of communications with "outside consultant." *See* Department of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001) ("intra-agency condition excludes, at the least, communications to or from an interested party seeking government benefit at the expense of other applicants").

2. Scope. Exemption 5 incorporates most common law discovery privileges.

   a. Deliberative Process Privilege. Purpose--to encourage open, frank discussions between subordinates and superiors; protect against premature disclosure of proposed policies before they are adopted; and protect against public confusion that might result from disclosure of reasons and rationales that were not ultimately the grounds for the agency's action. Russell v. Department of the Air Force, 682 F.2d 1045 (D.C. Cir. 1982); Judicial Watch, Inc. v. United States Department of Justice, 102 F.Supp.2d 6 (D.D.C. 2000) (deliberative process privilege protects handwritten notes by the Attorney General which reflect distillations of issues that she memorialized for later reference as part of her decision making process); Bilbrey v. Department of the Air Force, No. 00-0539 (W.D. Mo. Jan, 30, 2001) (protecting advice in two memoranda from wing commander to air force commander concerning nonjudicial punishment for requester charged with two counts of adultery and one of dereliction of duty; factual information in second memoranda used to rebut defense matters raised by requester ordered disclosed; that requester would have received the withheld information had he demanded a court-martial, and that he has a current need for the information, held irrelevant), *aff'd,* 20 Fed. Appx. 597 (8th Cir. 2001).

(1) Courts distinguish between "factual" and "deliberative" information. EPA v. Mink, 410 U.S. 73 (1973) (privilege does not generally protect purely factual matters).

(a) However, agency may withhold facts if they are "inextricably intertwined" with deliberative material. Ryan v. DOJ, 617 F.2d 781 (D.C. Cir. 1980); Jowett, Inc. v. Department of Navy, 729 F. Supp. 871 (D.D.C. 1989).

(b) Agency may also withhold facts if release would disclose the "deliberative process." Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977) (holding that "Exemption five is intended to protect the deliberative process of government and not just deliberative material . . . In some circumstances . . . the disclosure of even purely factual material may so expose the deliberative process within an agency that it must be deemed exempted by section 552(b)(5).")

(c) Deliberative documents and communications do not always have to flow from subordinates to superiors. Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114 (9th Cir. 1988).

(2) Courts also distinguish between "predecisional" and "postdecisional" records.

(a) Agency may withhold predecisional documents. NLRB v. Sears, 421 U.S. 132 (1975) (Deliberative process privilege can never apply to a final agency decision, but Exemption 5 incorporates the attorney-work privilege and documents setting strategy for the case); Lurie v. Department of the Army, 970 F. Supp. 19, 28 (D.D.C. 1997).

(b) Agency cannot withhold predecisional materials when final decision- maker "expressly adopts or incorporates them by reference." NLRB v. Sears, 421 U.S. 132 (1975); Swisher v. Department of the Air Force, 660 F.2d 369 (8th Cir. 1981).

b. Attorney Work-Product Privilege.

(1) Exempts materials "prepared in anticipation of litigation or for trial by or for [a] party or by or for that . . . party's representative (including the . . . party's attorney, consultant, . . . or agent)." Fed.R.Civ.P. 26(b)(3); FTC v. Grolier, 462 U.S. 19 (1983); Safecard Services, Inc. v. SEC, 926 F.2d 1197 (D.C. Cir. 1991). *See* Coleman v. U.S. Department of Justice, No. 02-79-A (E.D. Va. Oct. 7, 2002) (the privilege protects investigatory documents that contain "mental impressions, conclusions, opinions or legal theories" of the attorneys involved).

(2) Courts have recognized that the privilege extends to records prepared in anticipation of litigation even when no specific claim is pending. Schiller v. NLRB, 964 F.2d 1205 (D.C Cir. 1992) (holding that documents that provide tips on handling future litigation are covered by the work product privilege). *See also* Maine v. Department of the Interior, 298 F.3d 60 (1st Cir. 2002) (amended opinion) (concluding that court's earlier opinion which required that litigation be primary factor in creation of documents for which attorney work-product privilege was claimed, was in error). *But cf.* Jongeling v. Army Corps of Eng'rs, No. 02-1020 (D.S.D. Jan. 2, 2003) (attorney work-product privilege cannot be claimed as defendant agency has not shown that the records at issue were prepared "in anticipation of litigation" or "because of" the prospect of litigation; on in camera inspection).

c. Attorney-Client Privilege. The confidential communications from clients to the counsel made for the purpose of securing legal advice or services; and the communications from attorneys to their clients if the communications rest "on confidential information obtained from the client." In re Sealed Cases, 737 F.2d 94, 98-99 (D.C. Cir. 1984). Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977). *See also* Citizens Progressive Alliance v. United States Bureau of Indian Affairs, 241 F. Supp. 2d 1342 (D.N.M. 2002) (privileges not waived when DOJ attorney confidentially disclosed documents to the attorney for interveners because the "common interest privilege," an exception to the inherent confidentiality requirement of the attorney-client privilege or the attorney work-product privilege, allows attorneys facing a common litigation opponent to

exchange privileged communications and attorney work-product in order to adequately prepare a defense).

d. Government's Commercial Information Privilege. Federal Open Market Committee v. Merrill, 443 U.S. 340 (1979) (Exemption 5 incorporates privilege for commercially sensitive documents generated by the government); Morrison- Knudsen Co. v. Department of the Army, 595 F. Supp. 352 (D.D.C. 1984), *aff'd* 762 F.2d 138 (D.C. Cir. 1985) (table cite); Hack v. Department of Energy, 538 F. Supp. 1098 (D.D.C. 1992) (inter-agency cost estimates prepared by government for use in evaluating construction proposals submitted by private contractors).

e. Protection of Certain Confidential Witness Statements. United States v. Weber Aircraft Corp., 465 U.S. 792 (1984) (protecting witness statements given to military personnel in course of military air crash safety investigation); Ahearn v. Department of the Army, 583 F. Supp. 1123 (D. Mass. 1984) (protecting statements made in Inspector General investigations).

f. Presidential Communications Privilege. Loving v. Department of Defense, 550 F.3d 32 (D.C. Cir. 2008) (TJAG's analysis and recommendation to the Secretary of the Army for transmittal to the president for him to determine whether to approve requester's death sentence; ruling this privilege, unlike deliberative process privilege, protects facts; holding that privilege's requirement that the communication must be reviewed by the president or solicited by his immediate advisors is satisfied by the "solicitation" for the TJAG opinion in R.C.M. 1204(c)(2)).

F. Exemption 6: Protection of Personal Privacy. FOIA permits withholding records that are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;"

1. Threshold: Record must be from a "personnel and medical files and **similar files**."

a. "Personal and medical files" are normally easy to identify. Includes military members' OMPF, local unit personnel files, and military medical records.

b. What are "similar files?" Department of State v. Washington Post, 456 U.S. 595 (1986) ("similar files" provision extends to any information of a "personal" nature, such as ones

citizenship); Perlman v. U.S. Department of Justice, 312 F.3d 100 (2d Cir. 2002) (report of investigation is a "similar file" because it is a "detailed Government record"); New York Times Co. v. NASA, 920 F.2d 1002 (D.C. Cir. 1990) (holding that voice recording of the Challenger astronauts is a "similar file" for purposes of FOIA Exemption 6).

c. Information must identify a specific individual; records which identify a group of individuals do not qualify for Exemption 6 withholding unless the information is attributable to all members of the group. Arieff v. Department of the Navy, 712 F.2d 1462 (D.C. Cir. 1983) (list of drugs used by some within a 600-member group); Na Iwi O Na Kupuna v. Dalton, 894 F. Supp. 1397 (D. Haw. 1995) (records pertaining to large group of ancient human remains subject to FOIA, Congress intended Exemption 6 to only "protect the privacy of living members of contemporary society").

2. The balancing test: whether disclosure "would constitute a clearly unwarranted invasion of privacy." Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989). *See also* Bibles v. Oregon Natural Desert Association, 519 U.S. 355 (1997).

a. Identifying the privacy interest to be balanced.

(1) The privacy rights of the deceased is a settled issue.

(a) (Deceased persons have no privacy rights. National Archives & Records Administration v. Favish, 541 U.S. 197 (2004) (unanimous ruling that death-scene photographs can be withheld from the public, and from media exploitation, "to protect…the personal privacy of family members against the uncontrolled release of information"; *See also*; Na Iwi O Na Kupuna v. Dalton, *supra*. (Reverse FOIA suit).

(b) Next-of-kin of deceased persons may have, in certain situations, a colorable privacy interest in "time-of-death" records. New York Times Co. v. NASA, 920 F.2d 1002 (D.C. Cir. 1990) (*en banc*) (voice recordings of space shuttle Challenger astronauts; next-of-kin may have, in rare situations, a colorable privacy interest). *But cf.* Outlaw v. Department of the Army, 815 F.Supp. 505 (D.D.C. 1993) (agency unable to

determine, in connection with murderer's request for death scene photographs, whether murdered First Sergeant had any surviving next of kin 25 years after his death).

(2) Corporations and business associations do not generally have protectable privacy interests. *See* Sims v. CIA, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980). However, persons associated with small businesses, partnerships, and closely held corporations may have protectable interests in their entrepreneurial information. Doe v. Veneman, 230 F.Supp. 2d 739 (W.D. Tex. 2002) ("reverse" FOIA action brought by "incorporated" ranchers who entered into agreements with the government on the use of "anti-wolf livestock protection collar" who seek protection of their own identities, court protects the identities of entrepreneurial entities who have signed the agreements because the agency was making an "overly technical distinction" between individual and business), *aff'd in pertinent part on other grounds*, 380 F.3d 807 (5th Cir. 2004).

(3) "Something, even a modest privacy interest, outweighs nothing every time." Nat'l Association of Retired Federal Employees v. Horner, 879 F.2d 873 879 (D.C. Cir. 1989).

(4) Associated Press v. DOD (2nd Cir. Jan. 5, 2009) (holding that identifying information of Guantanamo Bay detainees in records documenting allegations of abuse and identifying information of detainees' family members in letters submitted to the government are exempt from FOIA disclosure under Exemptions 7(C) and 6 respectively).

b. Identifying the public interest in disclosure. The Reporters Committee decision has limited the concept of public interest under the FOIA to the "core purpose" for which Congress enacted it: to "[shed] light on an agency's performance of its statutory duties." Information that does not directly reveal the operations or activities of the federal government "falls outside the ambit of the public interest that the FOIA was enacted to serve." If records are not informative on the operations and activities of the government, there is no public interest in their release. For an example of a court finding a qualifying public interest see Cochran v. United States, 770 F.2d 949 (11th Cir. 1985) (disclosure of nonjudicial findings and discipline

imposed on Army major general for misuse of government personnel and facilities held proper) (Privacy Act wrongful disclosure suit).

3. Application of the balancing test.

a. Articulate the privacy interest involved. [Note the **"heightened interest in the personal privacy of DoD personnel"** resulting from terrorist activity likely to weigh heavily in favor or protection. *See* 9 November 2001, DoD guidance, at Appendix B]; see also Kimmel v DOD, 2006 U.S. Dist. LEXIS 14904 (D.D.C. Mar. 31, 2006) (protecting "names of civilian personnel below the level of office director and military personnel below the rank of colonel" in documents relating to congressional request that the President advance Rear Admiral Kimmel to the rank of Admiral; finding disclosure of those names would not shed light on the operations and activities of DOD; ruling that the court "has no reason to question" the DOD policy expressing "concern that employees of DOD could become targets of terrorist assaults"). Long v. OPM, No. 05-1522, 2007 U.S. Dist. LEXIS 72887 (N.D.N.Y. Sept. 30, 2007) (An employee's name and duty station are personal in nature and do not relate to the employee's performance of public duties. Disclosure of lists of names does not, by itself, shed light on agency activities.)

b. Articulate the public interest involved.

c. Strike the balance.

d. Examples. FLRA v. DOD, 510 U.S. 487 (1994) (a leading case delineating the "core interests" of FOIA; thorough balancing of interests analysis); Department of State v. Ray, 502 U.S. 164 (1991) (privacy interest of Haitian deportees in their names and addresses outweighs any public interest that might be served by disclosure); Judicial Watch, Inc. v. United States, 84 F.App'x 335 (4th Cir. 2004) (protecting the names of lower-level IRS employees because disclosure would not shed light on the activities of the IRS); Sherman v. Department of the Army, 244 F.3d 357 (5th Cir. 2001) (protecting Social Security numbers in post-1968 award orders; though Army in past released some SSNs of service members, such disclosures do not waive privacy interests because only individuals can waive their privacy interests); Sheet Metal Workers Int'l Ass'n. v. United States Air Force, 63 F.3d 994 (10th Cir. 1995) (Sheet

Metal Workers union engaged in "Davis-Bacon" monitoring--release of payroll records with names and addresses of workers employed on government contracts constitutes a clearly unwarranted invasion of personal privacy); McCutchen v. HHS, 30 F.3d 183 (D.C. Cir. 1994) (names of persons exonerated by investigation protected from disclosure); Providence Journal Co. v. Department of the Army, 981 F.2d 552 (1st Cir. 1992) (the higher the rank, the greater the public interest might be in release of agency record concerning disciplinary action); Homer J. Olsen, Inc. v. U.S. Department of Transp., 2002 U.S. Dist. LEXIS 23292 (N.D. Cal. Dec. 2, 2002) (disclosure of names of contractor and subcontractor employees "would constitute a clearly unwarranted invasion of personal privacy"); Chin v. Department of the Air Force, No. 97-2176 (W.D. LA June 24, 1999) (privacy outweighed the public interest in withholding of identities in general request for fraternization investigations); Mueller v. Department of the Air Force, 63 F. Supp. 2d 738 (E.D. Va. 1999) (denial of request for dismissed non-judicial punishment proceeding documents because public interest was minimal and would shed little light on Air Force's overall conduct).

4. "Categorical Balancing" and Privacy Glomarization. Agency can refuse to confirm or deny categories of records; however, application must be consistent. *See* Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989); Beck v. Department of Justice, 997 F.2d 1489 (D.C. Cir. 1993); DOD Reg. 5400.7-R, para. C3.2.1.6.5.1-2.

G. Exemption 7: Law Enforcement Records. Exempts from disclosure any record or information compiled for law enforcement purposes, the disclosure of which could reasonably be expected to result in any of six specified harms.

1. Threshold. Record must be compiled for a law enforcement purpose.

a. Courts have distinguished between agencies whose primary purpose is law enforcement and agencies with both law enforcement and administrative functions. *See* Jefferson v. Department of Justice, 284 F.3d 172 (D.C. Cir. 2002) (ruling agencies must distinguish between records based on "allegations that could lead to civil and criminal sanctions" and records "maintained in the course of general oversight of government employees").

(1) Agency whose primary function is not law enforcement (e.g., DoD's primary function is war-fighting, not law enforcement) must establish that particular records at

issue involved the enforcement of a statute or regulation within its authority. Jefferson v Department of Justice, *supra* (DoJ's Office of Professional Responsibility has mixed functions, function related to collection of evidence for potential prosecution of attorney sufficiently related to a law enforcement function); Tax Analysts v. IRS, 294 F.3d 71 (D.C. Cir. 2002) (district court erred when it ruled that IRS does not compile information for law enforcement purpose).

(2) The exemption covers all law enforcement records, both "investigatory and non-investigatory materials. Tax Analysts v. IRS, *supra.*

b. Record must have a law enforcement purpose.

(1) Information that was originally compiled for law enforcement purposes, but later summarized in a new document not prepared for law enforcement purposes, is protected under the exemption. Abramson v. FBI, 456 U.S. 615 (1982).

(2) Exemption will protect non-law enforcement records that are "recompiled" for law enforcement purposes. John Doe Agency v. John Doe Corporation, 493 U.S. 146 (1989).

2. An agency *may* withhold law enforcement records under this exemption, but only to the extent disclosure:

a. Could reasonably be expected to interfere with enforcement proceedings,

b. Would deprive a person of a right to a fair trial or an impartial adjudication,

c. Could reasonably be expected to constitute an unwarranted invasion of personal privacy,

d. Could reasonably be expected to disclose the identity of a confidential source. . . in a criminal or national security investigation . . . or information furnished by a confidential source,

e. Would disclose techniques and procedures or would disclose guidelines for law enforcement investigations or prosecutions if

disclosure could reasonably be expected to risk circumvention of the law, or

f. Could reasonably be expected to endanger the life or physical safety of any person.

3. Exception 7(A) does not require an agency to make a specific showing within the context of a particular case.

a. Agency may demonstrate that the disclosure of certain classes of documents would have the effect of interfering with agency enforcement. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978).

b. Agency may rely upon Exemption 7(A) to exempt records only while a law enforcement proceeding [includes prosecution] is pending. See Maydak v. Department of Justice, 218 F.3d 760 (D.C. Cir. 2000) (refusing to allow agency to rely on exemptions not previously "substantiated" after it withdrew reliance upon Exemption 7(A) due to change in underlying circumstances; ordering disclosure of grand jury records, attorney work-product, and law enforcement records without redaction), reh'g en banc denied, No. 98-5492 (D.C. Cir. Oct. 30, 2000), stay granted (D.C. Cir Nov. 29, 2000), cert. denied, 121 S. Ct. 2591 (2001). See also Ctr. for Nat'l Sec. Studies v. United States Department of Justice, 331 F.3d 918 (D.C. Cir. 2003) (upholding withholding of the identities of detainees held during the post-9/11 terrorist investigation, because disclosure "would give terrorist organizations a composite picture of the government investigation" and thus enable them to impede it through "counter-efforts.").

4. Use of Exemption 7(B) is designed to prevent pre-trial publicity that would deprive a person of a fair trial.

a. Use of this exemption dependent upon a two-part test: a pending or imminent proceeding and determination that disclosure more probably than not would interfere with fairness.

b. b. There are few cases in this area. *See* Dow Jones Co., Inc. v. FERC, 219 F.R.D. 167 (C.D. Cal. 2002) (agency has not shown that any trial or adjudication is "pending or truly imminent" or that disclosure would generate pretrial publicity that could deprive the companies or their employees of their right to a fair trial).

5. Exemption 7(C) protects the personal privacy of individuals named in law enforcement files. *See* SafeCard Serv. V. SEC, 926 F.2d 1197 (D.C. Cir. 1991).

   a. Privacy protections standards are greater under 7(C) than Exemption 6 ("reasonably be expected to constitute an unwarranted invasion of personal privacy" versus "clearly unwarranted invasion"). Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

   b. Protects the names of both witnesses and investigators. See Palacio v. Department of Justice, No. 02-5247, 2003 U.S. App. LEXIS 1804 (D.C. Cir. Jan. 31, 2002) (per curiam) (identities of suspects, witnesses, and investigators properly withheld under Exemption 7(C)); Rugiero v. U.S. Department of Justice, 257 F.3d 534 (6th Cir. 2001) (protects the identities of government employees and investigators contained in DEA's investigatory files); Davis v. United States Department of Justice, No. 00-2457 (D.D.C. Mar. 21, 2003) (protects information that would identify FBI Special Agents and support personnel, other federal employees, third parties, informants, subjects of investigative interest, bank personnel, and state, local, federal, and foreign law enforcement personnel). See also Billington v. United States Department of Justice, 11 F.Supp. 2d 45 (D.D.C. 1998) (individual who admitted that he was an FBI informant possesses a diminished privacy interest under Exemption 7(C), but has not waived its protection) aff'd in pertinent part, 233 F.3d 581 (D.C. Cir. 2000).

   c. Glomar responses to targeted requests are appropriate. U.S. Department of Justice v. Reporters Comm. For Freedom of the Press, 489 U.S. 749 (1989) (ruling that FBI properly refused to confirm or deny whether it had a "rap sheet" on an alleged member of organized crime); Oguaju v. United States, 288 F.3d 448 (D.C. Cir. 2002) (Marshall Service properly refused to confirm or deny the existence of records regarding an escapee-turned-informant/ witness at the requester's trial); Pusa v. FBI, 31 F.App'x 567 (9th Cir. 2002) (FBI properly refused to confirm or deny existence of records pertaining to communications between FBI and certain named third parties); Taylor v. Department of Justice, 257 F.Supp. 2d 101 (D.D.C. 2003) (holding there is no public interest in disclosure of third-party information that might assist a convict in challenging his conviction; FBI properly refused to confirm or deny the existence of records on living persons). See also, DOD Reg. 5400.7-R, para. C3.2.1.7.1.3.1-3.

d. Exemption 7(C) may protect privacy of the close survivors of the deceased from disclosure of facts concerning his death. NARA v. Favish, 541 U.S. 157 (2004) (protecting privacy interests of close family members from the pain that would flow from the death scene photographs of Deputy White House Counsel Vincent Foster); Badhwar v. U.S. Department of the Air Force, 829 F.2d 182 (D.C. Cir. 1987) (disclosure of autopsy reports "might shock the sensibilities of surviving kin"); NY Times v. NASA, 782 F.Supp. 628 (D.D.C. 1991) (withholding audiotape of voices of Space Shuttle *Challenger* astronauts recorded immediately before their deaths, to protect family members from pain of hearing final words of loved ones).

e. In a reverse FOIA case, the Supreme Court ruled that a corporation has no personal privacy interest in agency's investigation of its overcharging of schools for telecommunication services; observing that "[a]djectives typically reflect the meaning of corresponding nouns, but not always. Sometimes they acquire distinct meanings of their own" and in this case the "it" would not be reasonable to interpret the adjective "personal" to reflect the meaning of "person." The Supreme Court rejected the argument that the term "person" included a corporation in the phrase "personal privacy" and closed by saying "[w]e trust that AT&T will not take it personally." FCC v. AT&T, Inc., 131 S. Ct. 1177 (2011).

f. Exemption 7(C) may protect privacy by protecting identities of agency supervisors at levels equivalent to GS-14 and GS-15 disciplined for viewing pornography during work hours; "disclosure in this case is not limited to the reputational embarrassment of having misused government property on official time but rather extends to the embarrassment resulting from public knowledge that the conduct was of a sexual nature" and ruling that the disclosure of the names is not necessary to show the agency's "operations and activities" in light of the extensive release of the IG's report. Steese, Evans & Frankel v. SEC, No. 10-1071, Dist. LEXIS 129401 (D. Col. Dec. 7, 2010).

6. The purpose of Exemption 7(D) is to ensure that "confidential sources are not lost through retaliation against the source for past disclosure or because of source's fear of future disclosure." Brandt Construction v. Environmental Protection Agency, 778 F.2d 1258 (7th Cir. 1985).

a. Protects source's identity whenever he provides information under either an express promise of confidentiality or "under circumstances from which such an assurance could reasonably be inferred." See U.S. Department of Justice v. Landano, 508 U.S. 165 (1993); Rosenfeld v. Department of Justice, 57 F.3d 803 (9th Cir. 1995). But see Cooper Cameron Corp. v. U.S. Department of Labor, 280 F.3d 539 (5th Cir. Tex. 2002) (ordering disclosure of OSHA witness statements; finding no express promises of confidentiality despite declarant's statement that agency manual requires express promises to be given; implicitly and aberrationally ruling that circumstances giving rise to an implied promise of confidentiality can occur in a criminal investigation only).

b. The term "confidential source" is provided wider definition than limited meaning within criminal matters. This exemption is not limited to criminal witnesses and victims, rather protections are afforded to broad spectrum of individuals and institutions, excluding federal employees acting in their official capacity. See Retail Credit Company v. Federal Trade Commission, No. 75-0895, 1976 WL 1206 (D.D.C. 1976).

7. Exemption 7(E) provides protections similar to what was previously "High 2." See Coastal Delivery Corp. v. United States Customs Serv., 272 F.Supp.2d 958 (C.D. Cal.2003) (holding agency properly withheld records of Customs Service examinations conducted at the Los Angeles/Long Beach seaport "because terrorists . . . could use the information to discover the rate of inspection and then direct their containers to vulnerable ports."); *reconsideration denied* id. at 966-68 (C.D. Cal. 2003); *appeal dismissed voluntarily*, No. 03-55833 (9th Cir. Aug. 26, 2003).

8. Exemption 7(F) permits the withholding of records necessary to protect the physical safety of a wide range of individuals.

a. No balancing test is required. *See* Living Rivers, Inc. v. United States Bureau of Reclamation, 272 F.Supp.2d 1313 (D. Utah 2003) (withholding of "inundation maps" of potential flood zones beneath Hoover and Glen Canyon Dams because disclosure "could aid in carrying out a terrorist attack" that "could reasonably place at risk the li[ves] or physical safety" of area residents; court held maps were compiled "in direct relation to" a governmental law enforcement function). *But see* ACLU v. DOD, 06-3140, 2008 WL 4287823 (2d Cir. Sept. 22, 2008) (affirming disclosure order of 21 photographs with

identity redacted under Exemption 7(c), showing mistreatment of detainees, even though court accepted that their release "could reasonably be expected to incite violence against United States troops, other Coalition forces, and civilians in Iraq and Afghanistan"; ruling that government's contention that "any individual" encompasses a person identified as belonging to of [sic] a population of national size would, if accepted, circumvent the limitation imposed by the phrase "could reasonably be expected to endanger.")

b. The agency must only show a reasonable likelihood of physical danger to withhold information. L.A. Times Common's, LLC v. Department of the Army, 442 F.Supp.2d 880 (C.D.Cal. 2006) (applying Exemption 7(F) where disclosure of private security contractor company names could endanger the life or safety of many individuals). Ctr. for Nat'l Sec. Studies v. U.S. Department of Justice, 215 F.Supp.2d 94 (D.D.C. 2002) (disclosure of the dates and locations of arrest, detention, and release of post-September 11th detainees would make detention facilities and their occupants vulnerable to retaliatory attacks), *rev'd in other part, aff'd in part on other grounds and remanded*, 331 F.3d 918 (D.C. Cir. 2003).

H. Exemptions 8: Financial Institutions Information.

I. Exemption 9: Geological and Geophysical Information.

VII. EXCLUSIONS.

The FOIA amendment of 1986 provided a new mechanism by which the government could protect limited sensitive law enforcement records. These exclusions permit law enforcement officials to treat agency records as if they were not subject to the FOIA. Unlike normal FOIA responses in which the agency was required to either acknowledge the existence of records or provide a Glomar response, in cases involving exclusions, the agency merely responds that there are no records responsive to the request.

A. Exclusion 1. Investigation or proceedings involving possible criminal law violation, **and** subject unaware of pendency of investigation or proceedings, **and** disclosure of existence of records could reasonably be expected to interfere with enforcement proceedings.

B. Exclusion 2. Informant records maintained under informant's name or identifier, **and** maintained by a criminal law enforcement agency, unless informant's status as an informant has been officially confirmed.

C. Exclusion 3. Records maintained by FBI, **and** pertaining to foreign intelligence or counterintelligence, or international terrorism, **and** existence of records is classified.

VIII. CONCLUSION.

"A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps, both." - Pres. James Madison, August 4, 1822

"We seek a free flow of information...we are not afraid to entrust the American people with unpleasant facts, foreign ideas, alien philosophies, and competitive values." - Pres. John F. Kennedy, February 1962

"With the passage of the FOIA, the burden of proof shifted from the individual to the government. Those seeking information are no longer required to show a need for information.

Instead, the `need to know' standard has been replaced by a `right to know' doctrine. The government now has to justify the need for secrecy." - Introduction to the Citizens Guide on Using the Freedom of Information Act, published by the House Committee on Government Reform, September 2005.

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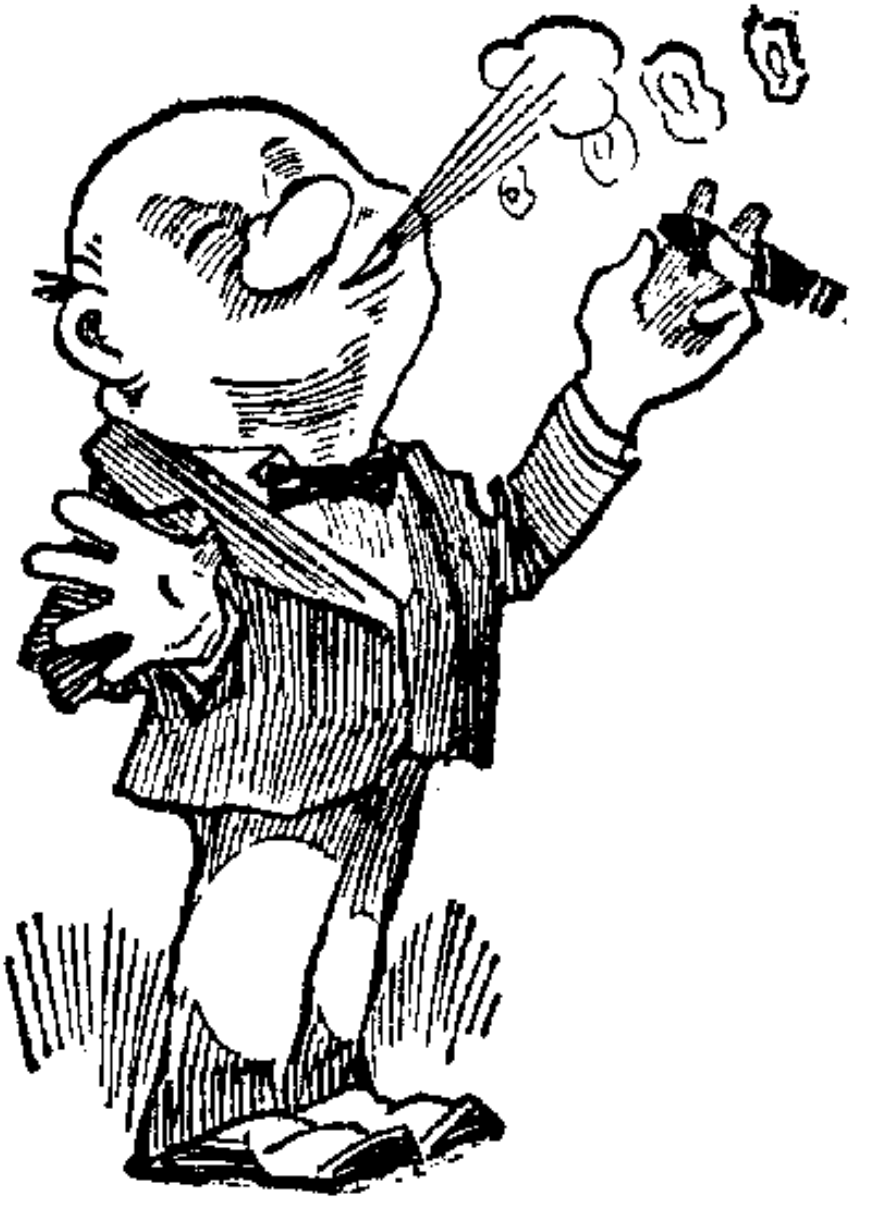
Chapter 28
Procurement Fraud



2013 Contract Attorneys Deskbook

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CHAPTER 28

PROCUREMENT FRAUD

I. INTRODUCTION.

A. "There is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the Government." *Benjamin Franking* (quoted in 146 Cong. Rec. S16998 (2000)).

B. "The United States does not stand on the same footing as an individual in a suit to annul a deed or lease obtained from him by fraud. . . . The financial element in the transaction is not the sole or principle thing involved. This suit was brought to vindicate the policy of the Government. . . . The petitioners stand as wrongdoers, and no equity arises in their favor to prevent granting the relief sought by the United States." Pan Am. Petroleum and Transp. v. United States, 273 U.S. 456, 509 (1927).

C. Fraud is defined as "[a]ny intentional deception . . . including attempts and conspiracies to effect such deception for the purpose of inducing . . . action or reliance on that deception. Such practices include . . . bid-rigging, making or submitting false statements, submission of false claims . . . adulterating or substituting materials, or conspiring to use any of these devices." Army Regulation 27-40, Legal Services, Section II, Terms.

D. Since 1990, there has been a substantial increase in the number, size, and complexity of government procurements.[1] During the same time period, there has been a sharp decrease in the government's acquisition workforce (in the Army, from 10,000 to 5,500).[2] The predictable result has been a decrease in procurement oversight, which has led to increased instances of procurement fraud.

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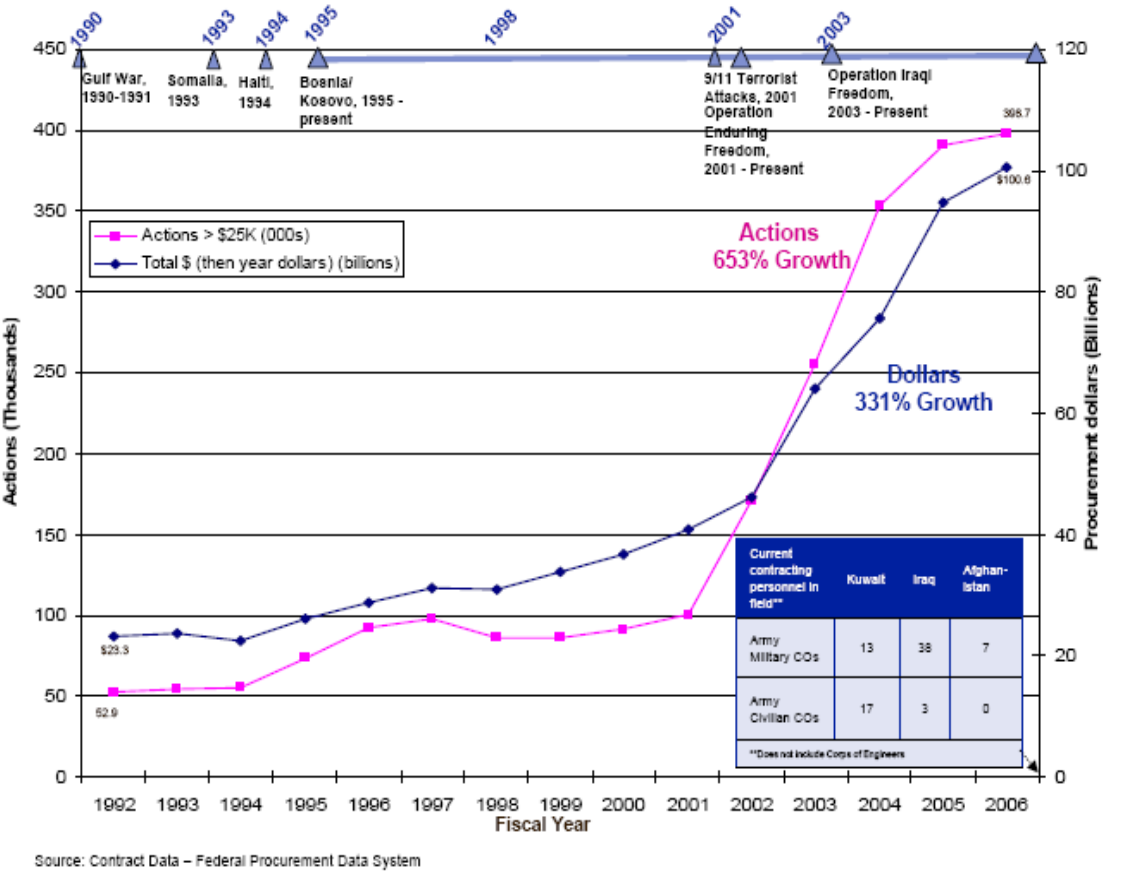
[1] Urgent Reform Required: Army Expeditionary Contracting, Report of the Commission on Army Acquisition and Program Management in Expeditionary Operations, 31 (October 31, 2007) [hereinafter, The Gansler Commission Report].

[2] *Id*. This trend has begun to be reversed as of late. In fact, in FY 2010 the DOD increased its civilian acquisition workforce by 8,500 personnel. U.S. Government Accountability Office, GAO-12-232T, Acquisition Workforce, DOD's Efforts to Rebuild Capacity Have Shown Some Progress (2011)



*The chart above reproduced from The Gansler Commission Report.[3]

II. IDENTIFYING FRAUD.

A. Fraud Before Contract Award: These types of fraud may occur prior to contract award. More than one type of fraud, however, may be present in one case, and at any time within the same acquisition. This is not an all-inclusive list.[4]

1. Bribery, Public Corruption, and Conflicts of Interest.

a. The breach of an employee's duty of loyalty. See, e.g., United States v. Carter, 217 U.S. 286 (1910); United States v. Brewster, 408 U.S. 501 (1972). In these types of fraud, government employees collude with one or more contractors to

[3] The Gansler Commission Report, *supra* note 1.

[4] *See* AR 27-40, Chapter 8 (For additional possible indicators of fraud, the Army's Indicators of Fraud are laid out in AR-27-40, figure 8-1); *see also* Handbook on Fraud Indicators for Contractor Auditors, *available at* http://www.dodig.mil/PUBS/igdh7600.pdf; *see also* further guidance on fraud indicators in procurement on DODIG website at http://www.dodig.mil/Inspections/APO/fraud/Index.htm.

effectuate the fraud. The breach of the government employee's duty of confidentiality may occur as a result of a direct *quid pro quo* bribe, or an indirect conflict of interest.

b. Possible indicators of Bribery, Public Corruption, and Conflicts of Interest.

(1) Unjustified favorable treatment to a contractor.

(2) Acceptance of low quality goods, nonconformance to contract specifications, and/or unjustifiably late delivery of goods or services.

(3) An unusually high volume of purchases from the same contractor or set of contractors.

(4) Procurement officials fail to file financial disclosure forms (this may occur when a procurement official remains directly involved in a procurement in which he/she has a substantial financial stake in).

(5) Procurement official has family members who are employed by contractors which were awarded a government contract.

(6) Purchasing unnecessary or inappropriate goods or services.

2. Bid-Rigging.

a. Occurs when contractors attempt to manipulate the procurement system to circumvent the competition between contractors that would result in the lowest overall cost to the government for the respective acquisition. The absence of competition deprives the government of its most reliable measure of what the price should have been. Under the Sherman Act "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several States, or with foreign nations, is declared to be illegal." The measure of damages is "the difference between what the government actually paid on the fraudulent claim and what it would have paid had there been fair, open and competitive bidding." United States v. Killough, 848 F.2d 1523, 1532 (11th Cir. 1988); see also Brown v. United States, 524 F.2d 693, 706 (1975); United States v. Porat, 17 F.3d 660 (3rd Cir. 1993).

b. Possible indicators of Bid Rigging.

(1) The winning bid price seems to be much higher than the independent government estimate (IGE) or industry averages.

(2) There is a pattern of winning bidders.

(3) The losing bidder(s) typically become the subcontractor of the winning bidder.

(4) The solicitations and/or specifications are written in an overly restrictive way (ie., only one contractor could possibly provide the desired product).

3. Defective Pricing.

a. The Truth in Negotiations Act ("TINA"), 10 U.S.C. § 2306a, together with its implementing regulations, 48 C.F.R. § 15.405 et seq., and FAR sections 15.405 thru 15.406, requires contractors in certain negotiated procurements to disclose and certify that disclosed details concerning expected costs ("cost or pricing data" or "other than cost or pricing data") are accurate, current and complete (see Contract Pricing Chapter, Chapter 12, Contract Attorneys Course Deskbook). Defective Pricing arises when those certified details of expected costs are inaccurate or incomplete. A perceived or actual violation of TINA may serve as the predicate for a fraud investigation and civil or criminal prosecution by the Government. United States v. Broderson, 67 F. 3d 452 (2d Cir. 1995).

b. Possible indicators of Defective Pricing.

(1) Unrealistic cost estimates.

(2) Incomplete cost estimates.

4. Fraudulent Sole Sourcing.

a. Occurs when procurement officials collude with a contractor to unjustifiably direct a contract to a contractor without "full and open" competition (and at a higher price than the government would have paid if the requirement was properly competed). FAR Subpart 6.2 (Full and Open After Exclusion of Sources) and FAR Subpart 6.3 (Other Than Full and Open Competition) provide the limited situations in which contracts may be awarded without full and open competition.

b. Possible indicators of Fraudulent Sole Sourcing.

(1) Specifications so tailored that it appears as if only one contractor could satisfy the requirement.

(2) The required J&A (Justification and Approval) to approve the sole source acquisition is vague and/or incomplete.

(3) The required J&A (Justification and Approval) to approve the sole source acquisition is just below a threshold that would require the J&A to be approved by a higher-level procurement official. The J&A for a sole source acquisition whose price is $650,000 or less, for example, requires the approval of the KO, while those higher than $650,000 require the approval of the Competition Advocate, the head of the procuring activity, or the senior procurement executive of the agency. *See* FAR 6.304.

(4) Previously, the requirement being sole-sourced was successfully procured with full and open competition.

(5) One purchase is unjustifiably split into multiple purchases simply to avoid competition (ie., using simplified acquisition procedures).

B. Fraud After Contract Award: These types of fraud may occur after the contract award. This is not an all-inclusive list.

1. Product Substitution/Defective Product/Defective Testing.

a. Product substitution is "delivery to the government of a product that does not meet the contract requirements." Nash, Schooner, O'Brien-DeBakey, Edwards, The Government Contracts Reference Book, 3rd Edition; The George Washington University, 2007. These terms generally refer to situations where contractors deliver to the Government goods that do not conform to contract requirements without informing the Government. United States v. Hoffman, 62 F. 3d 1418 (6th Cir. 1995).

b. Defective Products and Defective Testing cases are a subset of Product Substitution that occur as a result of the failure of a contractor to perform contractually required tests, or its failure to perform such testing in the manner required by the contract. Often, government officials (KOs, CORs) do not identify defective products at the time of acceptance due to high volumes of goods or services.

c. Possible indicators of product substitution.

(1) Delivery of look-alike goods made from non-specification materials.

(2) Non-testing or defective testing of materials as required by the contract specifications.

(3) Goods that appear to be used when the government contract specify that new goods should be delivered.

(4) Missing source documentation.

(5) Source information on the shipping materials containing the product and/or the actual products identification information consistently removed.

2. False Invoices.

a. May occur when the contractor submits false invoices and/or claims requesting government payment of goods and/or services that were not delivered to the government. Shaw v. AAA Engineering & Drafting, Inc., 213 F.3d 545 (10th Cir. 2000) (stating that monthly invoices submitted when the contractor was knowingly not complying with contract terms can be the basis of False Claims Act liability. A claimant can premise a claim on a "false implied certification of contractual compliance.") False invoices may also occur when a contractor delivers goods but the invoices are inflated (e.g., inflated cost invoices in a cost-reimbursement contract).

b. Possible indicators of False Invoices.

(1) Copied or inappropriately altered supporting documentation (ie, white-outs).

(2) Payment invoice exceeds contract amount.

(3) Invoiced goods cannot be located.

(4) Missing or copied receiving documents.

III. REPORTING FRAUD.

A. *Stop Everything Upon Uncovering Fraud*: Upon uncovering substantial indications of procurement fraud, *STOP EVERYTHING* related to that procurement until the allegations of fraud are properly investigated and resolved. Of note, 41 U.S.C. §7103(c), as implemented by FAR 33.210(b), prohibits any contracting officer or agency head from settling, paying, compromising or otherwise adjusting any claim involving fraud.

B. Government Reporting: Upon receiving or uncovering substantial indications of procurement fraud, the Procurement Fraud Advisor (PFA), usually a contracts attorney in the respective installation or deployed Area Of Responsibility (AOR), will need to report the suspected fraud to the appropriate authorities. AR 27-40, Chapter 8. Prior to submitting any official reports, the PFA should first consult with the Procurement Fraud Branch (PFB) at the Contracts and Fiscal Law Division, USALSA. After consulting with the PFB, the PFA should take the following actions:

1. Report the matter promptly to their supporting Army Criminal Investigation Command (USACIDC) element.

2. Submit a "Procurement Flash Report" to PFB. The flash report should contain the following information:

   a. Name and address of contractor;

   b. Known subsidiaries of parent firms;

   c. Contracts involved in potential fraud;

   d. Nature of the potential fraud;

   e. Summary of the pertinent facts; and

   f. Possible damages.

3. FAR Subsection 9.406-3. Promptly refer to debarring official of matters appropriate for that official's consideration.

4. Remedies Plan. Prepare a comprehensive remedies plan. The remedies plan should include the following:

   a. Summary of allegations;

   b. Statement of adverse impact on DOD mission;

   c. Statement of impact upon combat readiness and safety of DA personnel; and

d. Consideration of each criminal, civil, contractual, and administrative remedy available.

5. Litigation Report. Consult PFB to determine if a litigation report is necessary.

C. Contractor "Mandatory Disclosure" Reporting: The FAR *requires* contractors to disclose "credible evidence" of criminal and/or civil fraud. Prior to 2008, there was a *voluntary* reporting regime.

1. Contractor Disclosure to Avoid Suspension or Debarment (FAR 3.1003(a)(2) and (3)): This requirement applies to all contractors and subcontractors, in all current and future government contracts *and remains a cause of action* for suspension and/or debarment until 3 years after final payment on a contract.

a. FAR 3.1003(a)(2): A contractor may be suspended and/or debarred if a "principal"[5] of the contractor knowingly fails to timely disclose to the Government (in connection with the award, performance, or closeout of a Government contract, *performed by the contractor or one of their subcontractors*) credible evidence of:

(1) a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations of Title 18, US Code; or

(2) a violation of the Civil False Claims Act (31 U.S.C. §§ 3729-3733).

b. Violations of FAR 3.1003(a)(2) remain a cause for suspension and/or debarment for three (3) years *after* the final payment on a contract.

c. FAR 3.1003(a)(3): A contractor may be suspended and/or debarred if a principal of the contractor knowingly fails to timely disclose to the Government (in connection with the award, performance, or closeout of a Government contract, *performed by the contractor or one of their subcontractors*) credible evidence of significant overpayments of a contract.

2. Contractor Disclosure Required for All Contractors by Contract Clause (FAR 52.203-13(b)(3)):[6] This requirement applies to all contractors

[5] FAR 2.101, Definitions ("Principal" means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity).

[6] FAR 52.203-13(b)(2) also requires all contractors to have a written code of business ethics and conduct, and to make a copy of the code available to each employee engaged in the performance of the government contract.

and subcontractors, in all current and future government contracts. The contractor shall timely disclose, in writing, to the agency Inspector General (with a CC to the KO), credible evidence that a principal, employee, agent, or subcontractor has committed:

a. a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations of Title 18, US Code; or

b. a violation of the Civil False Claims Act (31 U.S.C. §§ 3729-3733).

3. Contractor Disclosure Required by the Business Ethics Awareness and Compliance Program's Internal Control System (FAR 52.203-13(c)). FAR 52.203-13 shall be inserted in all contracts that exceed $5,000,000 and the period of performance is 120 days or more.[7]

a. FAR 52.203-13(b) requires the contractor to:

(1) within 30 days of contract award, have a written business code of ethics; and

(2) make available this code of ethics to each employee engaged in the performance of the contract.

b. FAR 52.203-13(c) requires contractors, who are not recognized small businesses pursuant to an award, or who are not performing a contract for the acquisition of a commercial item as defined in FAR 2.101, to within 90 days of award, establish:

(1) an ongoing Business Ethics Awareness and Compliance Program that periodically trains the contractor's principals, employees, and if appropriate, its agents and subcontractors, on the standards and procedures of the contractor's business ethics awareness and compliance program; and

(2) an Internal Control System that facilitates the timely discovery of improper conduct related to the contractor's Government contracts, ensures the corrective measures are promptly instituted and carried out. Among other minimum requirements, the Internal Control System must provide for the timely disclosure, in writing, to the agency Inspector General (with a CC to the respective KO), whenever the contractor has

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[7] FAR 52.203-13(d) requires that contractors incorporate the provisions of FAR 52.203-13 in all subcontracts that have a value of more than $5 million and a period of performance of more than 120 days.

"credible evidence" that a principal, employee, agent, or a subcontractor has committed:

(a) a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations of Title 18, US Code; or

(b) a violation of the Civil False Claims Act (31 U.S.C. §§ 3729-3733).

c. FAR 42.302(a)(71) requires contract administrators to ensure that contractors are complying with the requirements of FAR 52.203-13.

IV. COMBATTING FRAUD: COORDINATING THE FOUR REMEDIES.

A. The Four Government Remedies. There are four general types of remedies available to the government in response to fraud. These four types of remedies are: criminal remedies, civil remedies, administrative remedies and contract remedies. Prior to taking any action in response to fraud, the government must determine what their response strategy will be, because action in one remedy type may limit action in other remedy types. The DOJ will be the lead agency when the government pursues criminal and civil remedies, while the affected agency will be the lead when pursuing administrative and contract remedies.

B. The Government Fraud Fighters:

1. DOD Inspector General and DCIS. Inspector General Act of 1978, Pub. L. 95-452, as amended by Pub. L. No. 97-252; DOD Dir 5106.1. Inspector General of Department of Defense (Apr. 20, 2012).

2. Military Criminal Investigative Organizations. (CID, NCIS, AFOSI)

3. Department of Justice. DOD Instruction. 5525.7, Implementation of the Memorandum of Understanding (MOU) Between the Departments of Justice (DOJ) and Defense Relating to the Investigation and Prosecution of Certain Crimes (Jun. 18, 2007).

4. PFB of the Contract and Fiscal Law Division,(Formerly the Procurement Fraud Division (PFD)), United States Army Legal Services Agency. AR 27-40, Litigation, Ch. 8. Procurement Fraud Advisors (PFA) (subordinate commands) - ensure that commanders and contracting officers pursue, in a timely manner, all applicable criminal, civil, contractual, and administrative remedies.

C. DOJ Fraud Policy. *DOJ policy requires the coordination of parallel criminal, civil, and administrative proceedings* so as to maximize the government's ability to obtain favorable results in cases involving procurement fraud. See U.S. Dep't of Justice, U.S. Atty's Man. ch. 1-12.000 (Coordination of Parallel Criminal, Civil, and Administrative Proceedings) June 1998.

D. DOD Fraud Policy. *DOD policy requires the coordinated use of criminal, civil, administrative, and contractual remedies* in suspected cases involving procurement fraud. See DOD Instr. 7050.05, Coordination of Remedies for Fraud and Corruption Related to Procurement Activities (June 4, 2008). This policy is further explained in individual service regulations.

1. DOD policy requires each department to establish a centralized organization to monitor all significant fraud and corruption cases.

2. Definition of a "significant" case.

   a. All fraud cases involving an alleged loss of $500,000 or more.

   b. All corruption cases that involve bribery, gratuities, or conflicts of interest.

   c. All investigations into defective products, non-conforming products, or product substitution in which a serious hazard to health, safety, or operational readiness is indicated (regardless of loss value).

3. Each centralized organization monitors all significant cases to ensure that all proper and effective criminal, civil, administrative, and contractual remedies are considered and pursued in a timely manner.

4. Product Substitution/Defective Product cases receive special attention.

E. Service Policies:

1. Army Policy: Found in U.S. Dep't of Army Reg. 27-40, Litigation, 19 Sept. 1994.

2. U.S. Dep't of Air Force, Inst. 51-1101, The Air Force Procurement Fraud Remedies Program, 21 Oct. 2003.

3. Navy Policy: Found in SECNAVINST. 5430.92B, Assignment of Responsibilities to Counteract Fraud, Waste, and Related Improprieties within the Department of the Navy, 30 Dec. 2005.

V. CRIMINAL REMEDIES.

A. Conspiracy to Defraud, 18 U.S.C. §286 (with claims) and 18 U.S.C. §371 (in general). The general elements of a conspiracy under either statute include:

1. Knowing agreement by two or more persons which has as its object the commission of a criminal offense, or to defraud the United States; United States v. Upton, 91 F.3rd 677 (5th Cir. 1996);

2. Intentional and actual participation in the conspiracy; and

3. Performance by one or more of the conspirators of an overt act in furtherance of the unlawful goal. United States v. Falcone, 311 U.S. 205, 210-211 (1940); United States v. Richmond, 700 U.S. 1183, 1190 (8th Cir. 1983).

B. Criminal False Claims, 18 U.S.C. §287.

1. The elements required for a conviction under Section 287 include:

a. Proof of a claim for money or property, which is false, fictitious, or fraudulent and material.

b. Made or presented against a department or agency of the United States; and

c. Submitted with a specific intent to violate the law or with a consciousness of wrongdoing, i.e., the person must know at the time that the claim is false, fictitious, or fraudulent. See generally United States v. Slocum, 708 F.2d 587, 596 (11th Cir. 1983) (citing United States v. Computer Sciences Corp., 511 F. Supp. 1125, 1134 (E.D. Va. 1981), rev'd on other grounds, 689 F.2d 1181 (4th Cir. 1981)) (false indemnity claims made to USDA).

2. It is of no significance to a prosecution under section 287 that the claim was not paid. United States v. Coachman, 727 F.2d 1293, 1302 (D.C. Cir.), cert. denied, 419 U.S. 1047 (1984).

C. False Statements. 18 U.S.C. §1001.

1. The elements include proof that:

a. The defendant made a statement or submitted a false entry. "Statement" has been interpreted to include oral and unsworn statements. United States v. Massey, 550 F.2d 300 (5th Cir.), on remand, 437 F. Supp. 843 (M.D. Fla. 1977).

b. The statement was false.

c. The statement concerned a matter within the jurisdiction of a federal department or agency.

d. The government also must prove that a statement was "material." The test of materiality is whether the natural and probable tendency of the statement would be to affect or influence governmental action. United States v. Lichenstein, 610 F.2d 1272, 1278 (5th Cir. 1980); United States v. Randazzo, 80 F. 3d 623, 630 (1st Cir. 1996); United States ex. Rel. Berge v. Board of Trustees University of Alabama, 104 F.3d 1453 (4th Cir. 1997).

e. Intent.

(1) The required intent has been defined as "the intent to deprive someone of something by means of deceit." United States v. Lichenstein, 610 F.2d 1272, 1277 (5th Cir. 1980).

(2) A false statement must be knowingly made and willfully submitted. United States v. Guzman, 781 F.2d 428, (5th Cir. 1986).

D. Mail Fraud and Wire Fraud, 18 U.S.C. §§1341-1343.

1. The essence of the mail fraud and wire fraud statutes is the use of mails or wire communications to execute a scheme to defraud the United States. Both statutes are broadly worded to prohibit the use of the mails or interstate telecommunications systems to further such schemes.

2. The elements of the two offenses are similar. Because the elements are similar, the cases interpreting the more recent wire fraud statute rely on the precedents interpreting mail fraud. See, e.g., United States v. Cusino, 694 F.2d 185 (9th Cir. 1982), cert. denied, 461 U.S. 932 (1983); United States v. Merlinger, 16 F. 3rd 670 (6th Cir. 1994). They include:

a. Formation of a scheme and artifice to defraud.

b. Use of either the mails or interstate wire transmissions in furtherance of the scheme. See United States v. Pintar, 630 F.2d 1270, 1280 (8th Cir. 1980) (mail fraud); United States v. Wise, 553 F.2d 1173 (8th Cir. 1977) (wire fraud).

E. Major Fraud Act, 18 U.S.C. §1031.

1. The Act created a new criminal offense of "major fraud" against the United States. It is designed to deter major defense contractors from committing procurement fraud by imposing stiffer penalties and significantly higher fines.

2. Maximum Punishments: ten years confinement; fines are determined on a sliding scale based on certain aggravating factors. Basic Offense: $1,000,000 per count. Government loss or contractor gain of $500,000 or more: $5,000,000. Conscious or reckless risk of serious personal injury: $5,000,000. Multiple counts: $10,000,000 per prosecution.

3. Elements:

   a. Knowingly engaging in any scheme with intent to defraud the U.S. or to obtain money by false or fraudulent pretenses;

   b. On a U.S. contract; and

   c. Valued at $1,000,000 or more. United States v. Brooks, 111 F.3d 365 (4th Cir. 1997). But see United States v. Nadi, 996 F.2d 548 (2nd Cir. 1993); United States v. Sain, 141 F.3d 463 (Fed. Cir. 1998).

F. Bid Rigging, 15 U.S.C. §1

1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

2. Maximum Penalty. Fine not exceeding $ 100,000,000 if a corporation, or, if any other person, $ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

3. Elements.

   a. Agreement;

   b. Not to Bid, or

   c. To Submit a Sham Bid, or

   d. To Allocate Bids;

   e. Between two or more independent, horizontal entities;

   f. Affecting interstate or foreign commerce

G. Title 10 (UCMJ) Violations. Besides Article 132 – Frauds Against the U.S., there are various specific criminal charges that could apply to

Servicemembers involved in fraud, including (but not limited to): Article 92 - Failure to Obey Order or Regulation, Article 98 - Noncompliance with Procedural Rules, Article 107 – False Official Statements, Article 121 – Larceny and Wrongful Appropriation, Article 133 – Conduct Unbecoming an Officer and a Gentleman. If all else fails, the command can charge one of the enumerated Article 134 articles or fashion their own punitive article related to fraud.

VI. CIVIL REMEDIES.

A. The Civil False Claims Act (FCA). 31 U.S.C. §§ 3729-3733 (1988).

1. Background.

2. The primary litigation weapon for combating fraud is the FCA.

3. 1986 Amendments.

4. 2009 Amendments

B. Liability Under the FCA.

1. In General. 31 U.S.C. §3729(a) imposes liability on any person (defined comprehensively to include corporations, companies, associations, partnerships . . . as well as individuals) who:

   a. Knowingly presents, or causes to be presented a false or fraudulent claim for payment or approval.

   b. Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.

   c. Conspires to defraud the government by having a false or fraudulent claim allowed or paid.

2. The Fraud Enforcement and Recovery Act of 2009 (FERA) clarifies the FCA by holding a contractor liable if they "knowingly presents, or causes to be presented a false or fraudulent claim for payment or approval" or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." Pub. L. No. 111-21, 123 Stat. 1617. This change eliminated language "to get a false or fraudulent claim paid" and thereby clarified the reach of the FCA.

a. Clarification of the FCA was necessary because the Supreme Court decision in *Allison Engine*[8] which held that the FCA did not extend to claims submitted to prime contractors that were then submitted to the government for payment.

b. Before the FERA, *Allison Engine* required *intent* to defraud the Government. There the Supreme Court held: that "it is insufficient for a plaintiff asserting a §3729(a)(2) claim to show merely that the false statement's use resulted in payment or approval of the claim . . .,'" 553 U.S. 662, 663. Instead, a plaintiff asserting a §3729(a)(2) claim must prove that the defendant intended that the false statement be material to the Government's decision to pay or approve the false claim. Similarly, a plaintiff asserting a claim under §3729(a)(3) must show that the conspirators agreed to make use of the false record or statement to achieve this end. Id. at 664.[9]

3. Source of funds used to pay. The funds at issue need not be the United States' own money from Congressional appropriations and drawn from the Treasury. Rather, it is enough if the money belongs to the United States. United States ex rel. DRC, Inc. v. Custer Battles , LLC, et. al., 562 F.3d 295, 304-3052 (holding that Developmental Funds Iraq met the requirements to be a claim under the FCA).

C. Damages.

1. Treble Damages are the substantive measure of liability. 31 U.S.C. §3729 (a); United States v. Peters, 110 F.3d 66 (8th Cir. 1997). Voluntary disclosures of the violation prior to the investigation, preclude the imposition of treble damages.

2. Different Scenarios.

a. Defective Products.

b. Defective Testing.

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[8] Allison Engine, et al. v. United States, ex rel. Sanders, 553 U.S. 662 (2008). The Allison Engine Company was a subcontractor to a Navy prime shipyard contractor for a contract to build destroyers. Allison Engine was subcontracted to build the destroyer generators. Allison Engine knowingly submitted false Certificates of Conformance (CoCs) to the prime asserting that the generators met all the required contract specifications, even though they knew that the generators did not meet the required contract specifications. Allison Engine also submitted payment requests (claims) for the generators. The shipyards subsequently submitted payment claims to the KO with the fraudulent CoCs (unknown to the prime) provided by Allison Engine. The government only introduced the fraudulent claims and CoCs submitted by Allison Engine to the primes, but no evidence of the subsequent claims submitted to the government, or evidence of Allison Engine's intent to defraud the government (as opposed to an intent to defraud the primes).

[9] Allison Engine, et al. v. United States, ex rel. Sanders, 553 U.S. 662 (2008)

c. Bid-Rigging.

d. Bribery and Public Corruption.

D. Civil Penalties.

1. A civil penalty of between $5,500 and $11,000 is authorized per false claim. 31 U.S.C. §3729. The amounts stated in the False Claims Act, 31 U.S.C. section 3729, are $5,000 and $10,000; however, under the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134, §31001, 110 Stat. 1321-373 (1996), federal agencies are required to review and adjust statutory civil penalties for inflation every four years. Consequently, the Department of Justice has adjusted penalties under the False Claims Act to range not less than $5,500 and not more than $11,000 per violation. 28 C.F.R. § 85.3(a)(9)(2011).

2. Imposition is "automatic and mandatory for each false claim." S. Rep No. 345 at 8-10. See also United States v. Hughes, 585 F.2d 284, 286 (7th Cir. 1978) ("[t]his forfeiture provision is mandatory; it leaves the trial court without discretion to alter the statutory amount.")

3. There is no requirement for the United States to prove that it suffered any damages. Fleming v. United States, 336 F.2d 475, 480 (10th Cir. 1964), cert. denied, 380 U.S. 907 (1965). The government also does not have to show that it made any payments pursuant to false claims. United States v. American Precision Products Corp., 115 F. Supp. 823 (D.N.J. 1953).

4. United States v. Halper, 490 U.S. 435 (1989). Defendant faced aggregated penalties of $130,000 for fraud, which had damaged the government in the amount of $585. The court disallowed the full $130,000 penalties, holding that a civil sanction, in application, may be so divorced from any remedial goal as to constitute punishment under some circumstances. The scope of the holding is a narrow one, addressed to "the rare case . . . where a fixed-penalty provision subjects a small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." See United States v. Hatfield, 108 F.3d 67 (4th Cir. 1997).

E. The "Qui Tam" Provisions of the Civil False Claims Act. "Qui tam pro domino rege quam pro se ipso in hac parte sequitur." ("Who as well for the King as for himself sues in this matter.") These provisions allow a private individual to sue contractors who defraud the government in civil court on behalf of the government.

1. The Civil False Claims Act authorizes an individual, acting as a private attorney general, to bring suit in the name of the United States. 31 U.S.C. §3730. The statute gives the Government 60 days to decide

whether to join the action. The Government may ask for an extension of the 60 days. If the Government joins the action, the Government conducts the action. If the Government decides not to join the suit, the individual (known as the "qui tam relator" conducts the action.

2. As an inducement to be a whistleblower, the statute provides that relators are entitled to portions of any judgment against the defendant. 31 U.S.C. § 3730(d).

   a. If the government joins and conducts the suit, the relator is entitled to between 15 and 25 percent of judgment, depending on the relator's contribution to the success of the suit.

   b. If the Government declines to join and the relator conducts the suit, the relator is entitled to between 25 and 30 percent of the judgment, at the discretion of the court.

3. Limitations on Relators. 31 U.S.C. § 3730(e)(4)[10] limits a person's ability to become a qui tam relator by providing that "The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. This is referred to as the "public disclosure bar."

4. Qui Tam Litigation is a growth industry.

5. There have been various Qui Tam developments since the 1986 Qui Tam amendments.[11]

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[10] The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, § 1303 (j)(2) Mar. 10, 2010 (PPAC), amended 31 U.S.C. § 3730(e)(4), likely in response to Schindler Elevator Corp. v. United States ex rel Daniel Kirk, 131S.Ct. 1885 (2011) which applied the public disclosure bar in the prior version of 31 U.S.C. § 3730(e)(4) to disclosure made in response to FOIA request. In Schindler, the relator received a no record response, which was held to be a government record. This holding is likely overruled by the PPAC.

[11] *See* Hughes Aircraft Company v. United States ex rel. Schumer, 520 U.S. 939 (1997) (The first United States Supreme Court case to address the qui tam provisions since the 1986 Amendments); *see also* Bly-Magee v. California, 236 F.3d 1014 (9th Cir. 2001) (FCA claim viable without proof of government injury; state employees liable for acts beyond official duties); *see also* Searcy v. Philips Electronics North America Corp., 117 F.3d 154 (5th Cir. 1997) (Federal Circuits split on government's unlimited right to veto qui tam settlements); *but see* Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir. 1994); *see also* United States ex rel Doyle v. Health Possibilities, P.S.C., 207 F.3d 335 (6th Cir. 2000); *see also U*nited States, ex rel. Dhawan v. New York City Health & Hosp. Corp., 2000 U.S.Dist. LEXIS 15,677 (S.D.N.Y. Oct. 27, 2000) (Prior state court litigation resulted in public disclosure of FCA allegations); *see also* United States, ex rel. Summit v. Michael Baker Corp., 40 F. Supp. 2d 772 (E.D. Va. 1999) (the court held that a qui tam relator may settle his

F. Special Plea in Fraud. 28 U.S.C. § 2514.

1. A claim against the US **shall be forfeited** to the US by any person who corruptly practices or attempts to practice fraud against the United States in the proof, statement, establishment, or allowance thereof.

2. Can only be pled before the Court of Federal Claims.

3. Even a small lie could forfeit the entire claim.

VII. ADMINISTRATIVE REMEDIES.

A. Debarment and Suspension Basics. 10 U.S.C. §2393; FAR Subpart 9.4.

1. Suspension. Action taken by a suspending official to disqualify a contractor temporarily from Government contracting.

2. Debarment. Action taken by a debarring official to exclude a contractor from Government contracting for a specified period.

3. Government policy is to solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. FAR 9.103.

4. Debarment and suspension are discretionary administrative actions to effectuate this policy and shall not be used for punishment. FAR 9.402; United States v. Glymp, 96 F.3d 722, 724 (4th Cir. 1996).

5. Debarring and suspending officials. DFARS 209.403. Any person may refer a matter to the agency debarring official. However, the absence of a referral will not preclude the debarring official from initiating the debarment or suspension process or from making a final decision. 64 Fed. Reg. 62984 (Nov. 18, 1999). In the Army, the debarring official is the Director, Soldier and Family Legal Services.

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retaliation claim under the FCA); *see also* United States, ex rel. Stevens v. Vermont Agency of Natural Resources, 120 S.Ct. 1858 (2000) (A private individual may not bring suit in federal court on behalf of the United States against a state or state agency under the False Claims Act); *see also* Galvan v. Federal Prison Indus., Inc., 199 F.3d 461 (D.C. Cir. 1999) (Sovereign immunity bars qui tam suit against government corporation); *see also* Cook County v. United States ex rel. Chandler, 123 S. Ct. 1239 2003 (2003) (a municipality is a "person" subject to suit under the FCA); *see also* United States, ex rel. Riley v. St. Luke's Episcopal Hospital, 196 F.3d 514 (5th Cir. 1999), rev'd and remanded en banc, 252 F.3d 749 (5th Cir. 2001) (qui tam does not violates the "Take Care" and separation of powers provisions of the Constitution); *see also* United States, ex rel Thorton v. Science Applications Int'l Corp., 207 F.3d 769 (5th Cir. 2000) (the value of administrative claims released by a contractor pursuant to a FCA settlement with the government are part of the settlement "proceeds" that the government must share with the relator); *see also* United States ex rel Holmes v. Consumer Insurance Group, 318 F.3d 1199 (10 Cir. 2003) (en blanc) (federal employee could be a qui tam plaintiff).

6. Debarments can be narrowly tailored to individuals, portions of a company, or to specific products that were the subject of the misconduct. FAR 9.406-1(b).

B. Debarment. Causes for debarment. FAR 9.406-2. DFARS 209.406-2.

1. Debarring official may debar a contractor for a **CONVICTION OF** or **CIVIL JUDGMENT** for:

a. commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract;

b. violation of federal or state antitrust statutes relating to the submission of offers;

c. commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property;

d. commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor;

e. criminal conviction for affixing "Made in America" labels to non-American good; or

f. knowingly providing compensation to a former DoD official in violation of section 847 of the National Defense Authorization Act for Fiscal Year 2008 (involving post employment restrictions.)

2. Debarring official may debar a contractor, based upon a P**REPONDERANCE OF THE EVIDENCE** for:

a. Violation of the terms of a government contract or subcontract so serious as to justify debarment, such as;

(1) Willful failure to perform in accordance with the terms of one or more contracts.

(2) A history of failure to perform, or unsatisfactory performance of, one or more contracts.

b. Violation of the Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

c. Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States or its outlying areas (see Section 202 of the Defense Production Act (Pub. L. 102-558)).

d. Commission of an unfair trade practice as defined in 9.403 (see Section 201 of the Defense Production Act (Pub. L. 102-558)).

e. Delinquent Federal taxes in an amount that exceeds $3,000.

f. Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract there under, credible evidence of—

(1) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

(2) Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or

(3) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001.

g. "Preponderance" means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not. FAR 9.403. See Imco, Inc. v. United States, 33 Fed. Cl. 312 (1995).

3. A contractor may be debarred, based on a determination by the Secretary of Homeland Security or the Attorney General of the United States, that the contractor is not in compliance with Immigration and Nationality Act employment provisions (see Executive Order 12989, as amended by Executive Order 13286). Such determination is not reviewable in the debarment proceedings. FAR 9.406-2(b)(2).

4. A contractor or subcontractor may be debarred for any other cause of so serious or compelling a nature that it affects the present responsibility of a government contractor or subcontractor. FAR 9.406-2(c).

C. Suspension. Causes for suspension. FAR 9.407-2.

1. Upon **ADEQUATE EVIDENCE** of:

a. commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract;

b. violation of federal or state antitrust statutes relating to the submission of offers;

c. commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

d. violation of the Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181;

e. intentionally affixing a "Made in America" label to non-American made goods (see section 202 of the Defense Production Act (Pub. L. 102-558));

f. commission of an unfair trade practice as defined in 9.403 (see section 201 of the Defense Production Act (Pub. L. 102-558));

g. delinquent Federal taxes in an amount that exceeds $3,000. See the criteria at 9.406-2(b)(1)(v) for determination of when taxes are delinquent;

h. knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract there under, credible evidence of—

(1) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

(2) Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or

(3) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001; or

i. Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor.

2. Upon adequate evidence, contractor may also be suspended for any other cause of so serious or compelling a nature that it affects the present responsibility of a government contractor or subcontractor. FAR 9.407-2.

3. "Adequate evidence" means information sufficient to support the reasonable belief that a particular act or omission has occurred. FAR 2.101.

4. Indictment for any of the causes in paragraph a above constitutes "adequate evidence" for suspension. FAR 9.407-2.

5. "Adequate evidence" may include allegations in a civil complaint filed by another federal agency. See SDA, Inc., B-253355, Aug. 24, 1993, 93-2 CPD ¶ 132.

D. Effect of Debarment or Suspension. FAR 9.405; DFARS 209.405.

1. FAR 9.401 provides for government-wide effect of the debarment, proposed debarment, suspension, or any other exclusion of an entity from procurement OR nonprocurement activities.

2. Contractors proposed for debarment, suspended, or debarred may not receive government contracts, and agencies may not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless acquiring agency's head or designee determines that there is a compelling reason for such action. FAR 9.405(a).

3. The general rule is that absent a contrary determination by the ordering activity, debarment has no effect on the *continued performance* of contracts or subcontracts in existence at the time of the proposed or actual suspension or debarment. However, unless an agency head makes a compelling needs determination, orders exceeding the guaranteed minimums may not be place under indefinite delivery contracts, nor may they be placed orders against Federal Supply Schedule contracts, nor may options be exercised or the period of performance be extended in anyway. FAR 9.405-1.

4. Bids received from any listed contractor are opened, entered on abstract of bids, and rejected unless there is a compelling reason for an exception.

5. Proposals, quotations, or offers from listed contractors shall not be evaluated, included in the competitive range, or discussions held unless there is a compelling reason for an exception.

E. Period of Debarment. FAR 9.406-4.

1. Commensurate with the seriousness of the cause(s). Generally, debarment should not exceed three years. The period of any prior suspension, is considered in determining period of debarment. FAR 9.406-4(a).

2. Administrative record must include relevant findings as to the appropriateness of the length of the debarment. Coccia v. Defense Logistics Agency, C.A. No. 89-6544, 1990 U.S. Dist. LEXIS 6079, (E.D. Pa. May 15, 1990). (Upholding 15-year debarment of former government employee convicted of taking bribes and kickbacks from contractors in exchange for contracts.)

3. Debarment period may be extended, but not solely on the original basis. If extension is necessary, normal procedures at FAR 9.406-3 apply. FAR 9.406-4(b).

4. Period may be reduced (new evidence, reversal of conviction or judgment, elimination of causes, bona fide change in management). FAR 9.406-4(c).

5. Inconsistent treatment of corporate officials justifies overturning debarment decision. Kisser v. Kemp, 786 F. Supp. 38 (D.D.C. 1992).

F. Period of Suspension. FAR 9.407-4.

1. Suspension is temporary, pending completion of investigation or any ensuing legal proceedings.

2. If legal proceedings are not initiated within 12 months after the date of the suspension notice, terminate the suspension unless an Assistant Attorney General requests extension.

3. Extension upon request by an Assistant Attorney General shall not exceed 6 months.

4. Suspension may not exceed 18 months unless legal proceedings are initiated within that period.

VIII. CONTRACT REMEDIES.

A. Historical Right.

1. Under common law, where a party to a contract committed an act of fraud affecting a material element of the contract, the fraudulent act constituted a breach on the part of the party committing the act. The innocent party could then, at its election, insist on continuation of contract performance, or void the contract. Once voided, the voiding party would be liable under equity to the other party for any benefit

received. Stoffela v. Nugent, 217 U.S. 499 (1910); Diamond Coal Co. v. Payne, 271 F. 362, 366 (App. D.C. 1921) ("equity refuses to give to the innocent party more than he is entitled to.").

2. Since the U. S. government was often viewed as acting in a "commercial capacity" when it engaged in commercial transactions, the rules of common law and equity applied to resolution of disputes. As such, if the government sought to rescind a contract, it was obligated to restore the contractor to the position it would be in, but-for the breach. Cooke v. United States, 91 U.S. 389, 398 (1875) ("If [the government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there."); Hollerbach v. United States, 233 U.S. 165 (1914); United States v. Fuller Co., 296 F. 178 (1923).

3. The Supreme Court rejected the general rule that the government should be treated like any other party to a contract when fraud occurred. Pan American Petroleum and Transport Co., v. United States, 273 U.S. 456 (1927).

4. Courts and boards have developed an implied or common-law right to terminate or cancel a contract in order to effectuate the public policy of protecting the government in instances of procurement fraud. See United States v. Mississippi Valley Generating Co., 364 U.S. 520, reh'g denied 365 U.S. 855 (1961); Four-Phase Sys., Inc., ASBCA No. 26794, 86-2 BCA ¶ 18,924.

5. A contractor that engages in fraud in dealing with the government commits a material breach, which justifies terminating the entire contract for default. Joseph Morton Co., Inc. v. United States, 3 Cl. Ct. 120 (1983), aff'd 757 F.2d 1273 (Fed. Cir. 1985).

B. Contracting Officer Authority.

1. Actions Clearly Exceeding KO Authority. The Contract Disputes Act (CDA), 41 U.S.C. §7103(a), as implemented by FAR 33.210(b), prohibits any contracting officer or agency head from settling, paying, compromising or otherwise adjusting any claim involving fraud.

2. Actions Clearly Within KO Authority.

a. Refusing Payment. It is the plain duty of administrative, accounting, and auditing officials of the government to refuse approval and to prevent payment of public monies under any agreement on behalf of the United States as to which there is a reasonable suspicion of irregularity, collusion, or fraud, thus reserving the matter for scrutiny in the courts when the facts may be judicially determined upon sworn testimony and

competent evidence and a forfeiture declared or other appropriate action taken. To the Secretary of the Army, B-154766, 44 Comp. Gen. 111 (1964).

b. Suspend Progress Payments. 10 U.S.C. §2307(i); Brown v. United States, 207 Ct. Cl. 768, 524 F.2d 693 (1975); Fidelity Construction, DOT CAB No. 1113, 80-2 BCA ¶ 14,819.

c. Withhold Payment.

(1) When a debarment/suspension report recommends debarment or suspension based on fraud or criminal conduct involving a current contract, all funds becoming due on that contract shall be withheld unless directed otherwise by the Head of the Contracting Activity (HCA) or the debarring official. AFARS 5109.406-3.

(2) Labor standards statutes provide for withholding for labor standards violations. WHA – 41 U.S.C. §6503; DBA – 40 U.S.C. § 3144.

(3) Specific contract provisions may provide for withholding (e.g., service contract deductions for deficiencies in performance).

(4) Terminate Negotiations. FAR 49.106 (end settlement discussions regarding a terminated contract upon suspicion of fraud); K&R Eng'g Co., Inc., v. United States, 222 Ct. Cl. 340, 616 F.2d 469 (1980).

(5) Determine Contractor to be Nonresponsible. FAR Subpart 9.4.

C. Denial of Claims.

1. Section 7103(a) of the CDA prohibits an agency head from settling, compromising or otherwise adjusting any claim involving fraud. 41 U.S.C.S § 7103(a). This limitation is reflected in FAR 33.210, which states that the authority of a contracting officer to decide or resolve a claim does not extend to the "settlement, compromise, payment, or adjustment of any claim involving fraud." Subpart 33.209 of the FAR further provides that contracting officers must refer all cases involving suspected fraud to the agency official responsible for investigating fraud.

2. As a practical matter, the term "denial" is a misnomer in that the contracting officer is precluded from making a final decision on a

contractor's claim where fraud is suspected. As such, denial of a claim consists simply of doing nothing with the claim while other courses of action are pursued.

3. Denial of a claim should be viewed as simply the first of possibly many steps in the resolution of a fraudulent claim.

D. Counterclaims Under the CDA

1. Per 41 U.S.C. §7103(c)(2): "If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim."

2. Until recently, this provision of the CDA has been applied in only a small number of cases. This may in part be due to the deterrent effect of this statute. See United States ex. ral. Wilson v. North American Const., 101 F. Supp.2d 500, 533 (S.D. Tex 2000) (district court unwilling to enforce this provision of the CDA because there were "very few cases applying 41 U.S.C. 604 [previous location in the US Code]."). But see Railway Logistics Intern. v. United States, __ Fed. Cl. __, 2012 WL 171895 (Fed. Cl. 2012) (finding for the government on counterclaim of fraud under 41 U.S.C. §7103(c)(2)); Larry D. Barnes, Inc. (d/b/a TRI-AD Constructors) v. United States, 45 Fed. Appx. 907 (Fed. Cir. 2002) (provision successfully applied by CAFC); UMC Elecs. v. United States, 249 F.3d 1337 (Fed. Cir. 2001) (upholding the COFC determination that the plaintiff was liable under a CDA counterclaim).

3. It is not possible to enforce this section of the CDA in litigation before the boards because of the language at 41 U.S.C. Section 7103(a)(5), which states: "[t]he authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle or determine." The boards have generally interpreted this language as meaning only Department of Justice (DOJ) has the authority to initiated a claim under this provision. This is because (in the eyes of the boards) only DOJ has the authority to administer or settle disputes involving fraud under the current statutory scheme. See TDC Management, DOT BCA 1802, 90-1 BCA ¶ 22,627.

E. Default Terminations Based on Fraud.

1. Where a contractor challenges the propriety of a default termination before a court or board, the government is not precluded under the CDA from introducing evidence of fraud discovered after the default termination, and using that evidence to support the termination in the subsequent litigation. See Joseph Morton Co., Inc. v. United States, 757 F.2d 1273, 1279 (Ct. Cl. 1985) (upholding termination for default when the contractor fraud was unknown at the time of the termination).

2. Some grounds for default termination.

   a. Submission of falsified test reports. Michael C. Avino, Inc., ASBCA No. 317542, 89-3 BCA ¶ 22,156.

   b. Submission of forged performance and payment bonds. Dry Roof Corp., ASBCA No. 29061, 88-3 BCA ¶ 21,096.

   c. Submission of falsified progress payment requests. Charles W. Daff, Trustee in Bankruptcy for Triad Microsystems, Inc. v. United States, 31 Fed. Cl. 682 (1994).

F. Voiding Contracts Pursuant to FAR 3.7

1. Subpart 3.7 of the FAR establishes a detailed mechanism for voiding and rescinding contracts where there has been either a final conviction for illegal conduct in relation to a government contract, or an agency head determination of misconduct by a preponderance of the evidence.

2. Authority to void a contract pursuant to Subpart 3.7 of the FAR is derived from:

   a. 18 U.S.C. §218;

   b. Executive Order 12448, 50 Fed. Reg. 23,157 (May 31, 1985); and,

   c. 41 U.S.C. § 2105(c)(1).

G. Suspending Payments Upon a Finding of Fraud, FAR 32.006.

1. FAR 32.006 allows an agency head to reduce or suspend payments to a contractor when the agency head determines there is "substantial evidence that the contractor's request for advance, partial, or progress payments is based on fraud."

2. The authority of the agency head under this provision may be delegated down to Level IV of the Executive Schedule, which for the

Department of the Army is the Assistant Secretary of the Army for Acquisition, Logistics, and Technology (ASA (ALT)).

3. This provision of the FAR is a potentially powerful tool in that the government can stay payment of a claim without the danger of a board treating the claim as a deemed denial, thus forcing the government into a board proceeding before the government's case can be developed.

4. Only one recorded board decision involving this provision of the FAR. TRS Research, ASBCA No. 51712, 2001-1 BCA ¶ 31,149 (contracting officer suspended payment on invoices pending completion of an investigation involving fraud allegation, but failed to seek written permission from the agency head to take such action; ASBCA found the government in breach of the contract and sustained the appeal).

H. Voiding Contracts Pursuant to the Gratuities Clause, FAR 52.203-3.

1. Allows DOD to unilaterally void contracts, prior to the beginning of performance, upon an agency head finding that contract is tainted by an improper gratuity. Decision authority for the Department of the Army has been delegated to the ASA (ALT).

2. Authority stems from 10 U.S.C. § 2207, which requires the clause in all DOD contracts (except personal service contracts).

3. Considerable due process protections for the contractor.

4. Exemplary damages of between three to ten times the amount of the gratuity.

5. Procedures used very effectively in response to a fraudulent bidding scheme centered out of the Fuerth Regional Contracting Office, Fuerth, Germany. See Schuepferling GmbH & Co., ASBCA No. 45564, 98-1 BCA ¶ 29,659; ASBCA No. 45565, 98-2 BCA ¶ 29,739; ASBCA No. 45567, 98-2 BCA ¶ 29,828; Erwin Pfister General-Bauunternehmen, ASBCA Nos. 43980, 43981, 45569, 45570, 2001-2 BCA ¶ 31,431; Schneider Haustechnik GmbH, ASBCA Nos. 43969, 45568, 2001 BCA ¶ 31,264.

IX. BOARDS OF CONTRACT APPEAL'S TREATMENT OF FRAUD.

A. Jurisdiction.

1. Theoretically, the boards are without jurisdiction to decide appeals tainted by fraud.

a. Under 41 U.S.C. §7105(e), the boards have jurisdiction to decide any appeal from a decision by a contracting officer involving a contract made by their respective agencies.

b. Because the CDA precludes contracting officers from issuing final decisions where fraud is suspected, and the boards only have jurisdiction over cases that can be decided by a contracting officer, the boards are effectively barred from adjudicating appeals involving fraud. See 41 U.S.C. §7103(a)(5).

c. As a practical matter, the boards exercise a form a de facto jurisdiction in that a decision concerning a motion to dismiss an appeal for fraud will have a dispositive effect on the case.

B. Dismissals, Suspensions and Stays.

1. Government must demonstrate that the possibility of fraud exists or that the alleged fraud adversely affects the Board's ability to ascertain the facts. Triax Co., Inc., ASBCA No. 33899, 88-3 BCA ¶ 20,830.

2. Mere allegations of fraud are not sufficient. General Constr. and Dev. Co., ASBCA No. 36138, 88-3 BCA ¶ 20,874. Four-Phase Systems, Inc., ASBCA No. 27487, 84-1 BCA ¶ 17,122.

3. Boards generally refuse to suspend proceedings except under the following limited circumstances:

a. When an action has been commenced in a court of competent jurisdiction, by the handing down of an indictment or by filing of a civil action complaint, so that issues directly relevant to the claim before the board are placed before that court;

b. When the Department of Justice or other authorized investigatory authority requests a suspension to avoid a conflict with an ongoing criminal investigation;

c. When the government can demonstrate that there is a real possibility that fraud exists which is of such a nature as to effectively preclude the board from ascertaining the facts and circumstances surrounding a claim; and

d. When an appellant so requests to avoid compromising his rights in regard to an actual or potential proceeding. See Fidelity Constr., 80-2 BCA ¶ 14,819 at 73,142.

C. Fraud as an Affirmative Defense.

1. Most often, the government elects to treat fraud as a jurisdictional bar, and pursues the issue in a motion to dismiss.

2. When fraud is cited as an affirmative defense, the boards generally treat the issue consistent with cases where it is presented as a jurisdictional bar. See ORC, Inc. ASBCA No. 49693, 97-1 BCA ¶ 28,750.

X. PROCUREMENT FRAUD IN CENTCOM

A. The National Defense Authorization Act for Fiscal Year 2012 (NDAA), Pub. L. No. 112-81, 125 Stat. 1298, § 841 aimed to reduce the ability of the insurgents in the CENTCOM area of responsibility from profiting from US contracts. DFARS 252.225-7993 implements the NDAA requirements.

B. DFARS 252.225-7993 gives the HCA the ability to restrict the award of a contract, or void/terminate a contract if there is information to believe that any funds from a contract are flowing to insurgents, or supporters of the insurgency.

XI. CONCLUSION.

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Chapter 29
Construction Contracting

2013 Contract Attorneys Deskbook

CHAPTER 29

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CHAPTER 29

CONSTRUCTION CONTRACTING

I. INTRODUCTION. Following this block of instruction, students should:

A. Understand the unique clauses and procedures used in construction contracting.

B. Understand how to analyze common legal issues that arise in construction contracting.

II. REFERENCES.

A. Federal Regulations.

1. Federal Acquisition Regulation (FAR) Part 36.

2. Defense Federal Acquisition Regulation Supplement (DFARS) Part 236.

3. Army Federal Acquisition Regulation Supplement (AFARS) Part 5136.

4. Air Force Federal Acquisition Regulation Supplement (AFFARS) Part 5336.

5. Navy Marine Corps Acquisition Regulation Supplement (NMCARS) Part 5236.

B. Army Regulations (AR).

1. AR 420-1, Army Facilities Management (12 February 2008)(RAR Issue Date 28 March 2009) [hereinafter AR 420-1].

2. AR 415-32, Engineer Troop Unit Construction in Connection with Training Activities (15 April 1998) [hereinafter AR 415-32].

3. DA Pam 420-11, Project Definition and Work Classification (18 March 2010) [hereinafter DA Pam 420-11].

C. Air Force Policy Directives (AFPD) and Air Force Instructions (AFI).

1. AFPD 32-90, Real Property Management (6 August 2007) [hereinafter AFPD 32-90].

2. AFI 32-1021, Planning and Programming Military Construction (MILCON) Projects (14 June 2010, amended by memorandum 30 January 2012) [hereinafter AFI 32-1021].

3. AFI 32-1032, Planning and Programming Appropriated Funded Maintenance, Repair, and Construction Projects (15 October 2003, amended by memorandum 10 February 2012) [hereinafter AFI 32-1032].

4. AFI 32-6001, Family Housing Management (21 August 2006) [hereinafter AFI 32-6001].

5. AFI 32-6002, Family Housing Planning, Programming, Design, and Construction (15 January 2008) [hereinafter AFI 32-6002].

6. AFI 65-601, vol. 1, Budget Guidance and Procedures (16 Aug 2012) [hereinafter AFI 65-601].

D. Navy Regulation. OPNAVINST 11010.20G CH-1, Facilities Projects Manual (2 September 2010) [hereinafter OPNAVINST 11010.20G].

E. Richard J. Bednar, John Cibinic, Jr., Ralph C. Nash, Jr., et al., Construction Contracting, published by The George Washington University Government Contracts Program, 1991.

F. Adrian L. Bastianelli, Andrew D. Ness, Federal Government Construction Contracts, published by the American Bar Association Forum on the Construction Industry, 2003.

III. CONCEPTS.

A. Definitions.

1. Construction.

a. Statutory Definition. 10 U.S.C. § 2801(a). The term "military construction" includes "any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements."[1]

b. Regulatory Definitions.

[1] The term "military installation" means "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control." 10 U.S.C. § 2801(c)(4).

(1) FAR 2.101. The term "construction" refers to the construction, alteration, or repair of buildings, structures, or other real property.

(a) Construction includes dredging, excavating, and painting.

(b) "Buildings, structures, or other real property" includes improvements of all types, such as bridges, streets, sewers, power lines, docks, etc.

(c) Construction does not include work performed on vessels, aircraft, or other items of personal property.

(2) Service Regulations. See, e.g., AR 420-1, paragraph 4-17 and Glossary, sec. II; AR 415-32, Glossary, sec. II; AFI 32-1021, paras. 3.2. and 4.2; AFI 32-1032, para. 5.1.1; AFI 65-601, vol. 1, att. 1; OPNAVINST 11010.20G, ch. 2, para. 2.1.1. The term "construction" includes:

(a) The erection, installation, or assembly of a new facility; [2]

(b) The addition, expansion, extension, alteration, conversion, or replacement of an existing facility;

(c) The relocation of a facility from one site to another;

(d) Installed equipment (e.g., built-in furniture, cabinets, shelving, venetian blinds, screens, elevators, telephones, fire alarms, heating and air conditioning equipment, waste disposals, dishwashers, and theater seats); and

(e) Related site preparation, excavation, filling, landscaping, and other land improvements.

2. Military Construction Project. 10 U.S.C. § 2801(b). The term "military construction project" includes "all military construction work . . . necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility . . . ."

B. Fiscal Distinctions.

[2] The term "facility" means "a building, structure, or other improvement to real property." 10 U.S.C. § 2801(c)(2).

1. As a general rule, the government funds construction projects costing not more than $750,000 with Operation and Maintenance (O&M) funds; projects costing more than $750,000, but not more than $2 million, with Unspecified Minor Military Construction (UMMC) funds; and projects costing more than $2 million with Military Construction (MILCON) funds. 10 U.S.C. §§ 2802, 2805. See Construction Funding chapter in CONTRACT & FISCAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, FISCAL LAW COURSE DESKBOOK (current Edition), available on the Judge Advocate General's Legal Center and School Web Page in the "TJAGLCS Publications" library (https://www.jagcnet.army.mil/8525736A005BC8F9).

2. For fiscal law purposes, "construction" does not include repair or maintenance. Therefore, the government may fund repair and maintenance projects with O&M funds, regardless of the cost. AR 420-1, Glossary, sec. II; AFI 32-1032, para. 1.3.2; OPNAVINST 11010.20G, paras. 3.1.1 and 4.1.1.

3. The government must award construction contracts in accordance with FAR Part 36, DFARS Part 236, and any applicable service supplement, regardless of the funding source.

C. Contracting Procedures.

1. As with most procurements, the government must take certain steps to procure construction properly.

2. These steps normally include:

a. Deciding which acquisition method to use;

b. Deciding which contract type to use;

c. Deciding what, if any, pre-bid communications are required (or otherwise warranted);

d. Deciding what information and which clauses to place in the solicitation;

e. Deciding which contractor should receive the award; and

f. Administering the contract.

3. An Independent Government Estimate, or IGE, is necessary if the proposed contract, or any proposed modification to a construction contract, exceeds the simplified acquisition threshold (SAT), currently

$150,000. The Contracting Officer may require an IGE for contracts less than the SAT. The IGE is not normally disclosed to offerors. FAR 36.203. IGEs will be marked "For Official Use Only," or "FOUO." DFARS 236.203.

IV. METHODS OF ACQUIRING CONSTRUCTION.

A. Sealed Bidding. FAR 6.401; FAR 36.103. Contracting officers must use sealed bidding procedures to acquire construction if:

1. Time permits;

2. Award will be made on the basis of price and price-related factors;

3. Discussions are not necessary; and

4. There is a reasonable expectation of receiving more than one bid.

B. Negotiated Procedures. FAR 6.401; FAR 36.103.

1. Contracting officers should use negotiated procedures to acquire construction if:

a. Time does not permit the use of seal bidding procedures;

b. Award will not be made on the basis of price and price-related factors;

c. Discussions are necessary, **or**

d. There is not a reasonable expectation of receiving more than one bid. See Viereck Co., B-222520, Aug. 5, 1986, 86-2 CPD ¶ 152; see also Pardee Constr. Co., B-256414, June 13, 1994, 94-1 CPD ¶ 372.

2. Contracting officers may use negotiated procedures to acquire construction outside the United States, its possessions, or Puerto Rico, even if sealed bidding is otherwise required. FAR 36.103(a).

3. Contracting officers must use negotiated procedures to acquire architect-engineer services. FAR 36.103(b).

C. Design-Build Contracting. 10 U.S.C. § 2305a; 41 U.S.C. § 3309; 10 USC §2862 FAR Subpart 36.3.

1. Background. In the past, a contracting officer could not award a contract to build a project to the firm that designed the project unless the agency

head or authorized representative approved. FAR 36.209. See Lawlor Corp., B-241945.2, Mar. 28, 1991, 70 Comp. Gen. 375, 91-1 CPD ¶ 335. In 1995, however, Congress established new, two-phase design-build selection procedures that allow the same firm to design and build a project. National Defense Authorization Act of 1996, Pub. L. No. 104-106, 110 Stat. 186 (1995).

2. Definitions. FAR 36.102.

a. "Design" is the process of defining the construction requirement, producing the technical specifications and drawings, and preparing the construction cost estimate.

b. "Design-bid-build" is the traditional method of construction contracting in which design and construction are sequential and contracted for separately, with two contracts and two contractors.

c. "Design-build" is a method of construction contracting in which design and construction are combined in a single contract with a single contractor.

d. "Two-phase design-build" is a "design-build" method of construction contracting in which the government selects a limited number of offerors in Phase One to submit detailed proposals in Phase Two.

3. Policy. FAR 36.104. See FAR 36.301(b).

a. A contracting officer may use either design-bid-build or design-build procedures to acquire construction.

b. Unless a contracting officer decides to use design-bid-build (or another authorized acquisition procedure), the contracting officer must use two-phase design-build procedures to acquire construction[3] if:

(1) The contracting officer anticipates receiving three or more offers;

(2) Offerors must perform a substantial amount of design work (and incur substantial expenses) before they can develop their price proposals; and

[3] 10 USC §2862 authorizes use of "turn-key" procedures for military construction within the Department of Defense. As such, DoD military construction may utilize one-phase design build construction instead of two-phase design build specified in FAR Part 36.

(3) The contracting officer has considered the factors set forth in FAR 36.301(b)(2), including:

(a) The extent to which the agency has adequately defined its project requirements;

(b) The time constraints for delivery;

(c) The capability and experience of potential offerors;

(d) The suitability of the project for two-phase design-build procedures;

(e) The capability of the agency to manage the two-phase selection process;

(f) Other criteria established by the head of the contracting activity (HCA).

4. Procedures. FAR 36.303.

a. The agency may issue one solicitation covering both phases, or two solicitations in sequence.

b. Phase One. FAR 36.303-1.

(1) The agency evaluates Phase One proposals to determine which offerors the agency will ask to submit Phase Two proposals.

(2) The Phase One solicitation must include:

(a) The scope of work;

(b) The Phase One evaluation factors (e.g., technical approach, technical qualifications, etc.);

(c) The Phase Two evaluation factors; and

(d) A statement regarding the maximum number of offerors the government intends to include in the competitive range.[4]

[4] This number should not exceed 5 unless the contracting officer determines that including more than five offerors in the competitive range is in the government's best interests. FAR 36.303-1(a)(4).

c. Phase Two. FAR 36.303-2. The contracting officer awards one contract using competitive negotiation procedures.

D. Construction as "Acquisition of Commercial Items," FAR Part 12.

1. On 3 July 2003, the Administrator of the Office of Federal Procurement Policy (OFPP) issued a memorandum stating that FAR Part 12, Acquisition of Commercial Items, "should rarely, if ever be used for new construction acquisitions or non-routine alteration and repair services." Rather, "in accordance with long-standing practice, agencies should apply the policies of FAR Part 36 to these acquisitions." See Memorandum, Administrator of Office of Federal Procurement Policy, to Agency Senior Procurement Executives, Subject: Applicability of FAR Part 12 to Construction Acquisitions (July 3, 2003).

2. The memorandum stated that Part 12 acquisitions are generally well suited for certain types of construction activities "that lack the level of variability found in new construction and complex alteration and repair," such as routine painting or carpeting, simple hanging of drywall, everyday electrical or plumbing work, and similar noncomplex services."

V. CONTRACT TYPES.

A. Firm Fixed-Price (FFP) Contracts. FAR 36.207.

1. Agencies normally award FFP contracts for construction.

2. The contracting officer may require pricing on a lump-sum, unit price, or combination basis.

a. With lump sum pricing, the agency pays a lump sum for:

(1) The total project; or

(2) Defined portions of the project.

b. With unit pricing, the agency pays a unit price for a specified quantity of work units.

c. Agencies must use lump-sum pricing unless:

(1) The contract involves large quantities of work such as grading, paving, building outside utilities, or site preparation;

(2) The agency cannot estimate the quantities of work adequately;

(3) The estimated quantities of work may change significantly during construction; or

(4) Offerors would have to expend spend a lot of time/money to develop adequate estimates.

B. Fixed-Price Contracts with Economic Price Adjustment Clauses (FP w/EPA). FAR 36.207(c). Agencies may use this type of contract if:

1. The use of an EPA clause is customary for the type of work the agency is acquiring;

2. A significant number of offerors would not bid unless the agency included an EPA clause in the contract; or

3. Offerors would include unwarranted contingencies in their prices unless the agency included an EPA clause in the contract.

C. Cost-Reimbursement Contracts. See Military Construction Appropriations Act, 2002, Pub. L. No. 107-64, § 101, 115 Stat. 474 (2001); DFARS 236.271; DFARS 216.306(c); AFARS 5136.271; AFFARS 5336.271; NAPS 5236.271. The Assistant Secretary of Defense (Production and Logistics) (ASD(P&D)) must approve the award of a cost-plus-fixed-fee contract for construction if:

1. The activity uses military construction appropriations;

2. Performance will occur in the United States (Alaska excluded); and

3. The acquiring activity expects the contract to exceed $25,000.

D. Incentive and Other "Fee" Contracts. FAR 36.208. Activities cannot use incentive, cost-plus-fixed-fee, or other types of contracts with cost variation or cost adjustment features at the same work site with firm fixed-price contracts without the approval of the HCA.

E. Indefinite Delivery / Indefinite Quantity Contracts. FAR 16.504. Tyler Const. Group v. United States, 83 Fed. Cl. 94 (2008), aff'd 570 F.3d 1329 (Fed. Cir. 2009). The Federal Circuit held that using an ID/IQ contract to procure construction projects was not specifically prohibited by statute or regulation; thus, it was a permissible innovation under FAR § 1.102(d). Generally, ID/IQ contracts are used to procure services and supplies, but the Federal Circuit affirmed the Army Corps' of Engineer's "innovative" approach to use ID/IQ contracts to procure large-scale construction projects.

F. Job Order Contracting. AFARS Subpart 5117.90. See Schnorr-Stafford Constr., Inc., B-227323, Aug. 12, 1987, 87-2 CPD ¶ 153; Salmon & Assoc., B-227079, Aug. 12, 1987, 87-2 CPD ¶ 152.

1. A job order contract (JOC) is an indefinite-delivery, indefinite-quantity contract used to acquire real property maintenance/repair and minor construction at the installation level.

2. The government develops task specifications and a unit price book. The contractor then multiplies the government's unit price by its own coefficient (e.g., profit + overhead) to arrive at its bid/proposal price.

3. After contract award, the parties enter into bilateral task orders for individual projects based on the tasks and prices specified in the JOC.[5]

4. JOC Limitations.

a. The government should not use a JOC for projects with an estimated value less than $2,000, or greater than $750,000. AFARS 5117.9000(a).

b. The government cannot use a JOC to acquire installation facilities engineering support services (e.g., custodial or ground maintenance services). AFARS 5117.9002(b).

c. The government cannot use a JOC to acquire architect-engineer services. AFARS 5117.9002(b).

d. An IGE is required for orders of $100,000 or more. AFARS 5117.9004-3(c).

e. The government should not use a JOC to acquire work:

(1) Normally set aside for small and disadvantaged businesses;

(2) Traditionally covered by requirements contracts (e.g., painting, roofing, etc.);

(3) Covered by contracts awarded under the Commercial Activities Program; or

(4) The government can effectively and economically accomplish in-house.

[5] Each task order becomes a fixed-price, lump sum contract. AFARS 5117.9003-1(e).

AFARS 5117.9003-3(a).

G. Simplified Acquisition of Base Engineer Requirements (SABER) Program, AFFARS IG5336.9201-ch3.

1. Similar in scope and nature to the Army's JOC program, SABER is an ID/IQ contract vehicle to expedite the execution of non-complex minor construction and maintenance & repair projects. IG5336.9201-ch3, para. 3.2.1.

2. The process of using the SABER is similar to the JOC. An established Unit Price Book and coefficients are combined to price each specific project. IG5336.9201-ch3, para. 3.2.1.1 and 3.2.1.2.

3. SABER Limitations.

a. SABER should not be used to replace a traditional construction program, or for large, complex construction projects. SABER should also not be used for projects that are traditionally single skill/materials projects that are more appropriate for competitively bid contracts or single trade ID/IQs. IG5336.9201-ch3, para. 3.4.1.

b. Saber shall not be used to acquire architect-engineering (A-E) services. IG5336.9201-ch3, para. 3.4.2.1.

c. SABER may not be used to perform non-personal services subject to the Service Contract Act. IG5336.9201-ch3, para. 3.4.2.2.

VI. PRE-BID COMMUNICATIONS.

A. Presolicitation Notices. FAR 36.213-2; FAR 36.701(a); FAR 53.301-1417, Standard Form (SF) 1417, Presolicitation Notice (Construction Contract).

1. The contracting officer must send presolicitation notices to prospective bidders if the proposed contract is expected to equal or exceed the simplified acquisition threshold.

2. Contents. FAR 36.213-2(b). Among other things, presolicitation notices must:

a. Describe the proposed work;[6]

[6] The contracting officer cannot disclose the government cost estimate; however, the contracting officer can state the magnitude of the project in terms of physical characteristics and estimated price range. FAR 36.204; DFARS 236.204. The Estimated price ranges are as follows:

b. State the location of the proposed work;

c. Include relevant dates (e.g., the proposed bid opening date and the proposed contract completion date);

d. State where contractors can inspect the contract plans without charge; *See also* DFARS 252.236-7001.

e. Specify a date by which bidders should submit requests for the solicitation;

f. State whether the government intends to restrict award to small businesses; and

g. Specify the amount the government intends to charge for solicitation documents, if any.

3. Distribution. FAR 36.211.

a. The contracting officer should send presolicitation notices to:

(1) Reach as many prospective offerors as practicable; and

(2) Organizations that maintain display rooms for such information.

b. The contracting officer determines the geographical range of distribution.

B. Government-wide Point of Entry (GPE). FAR 36.213-2(b)(8), FAR 5.003 and 5.204. The contracting officer must also post the presolicitation notice in the GPE.

VII. SOLICITATION.

(a) Less than $25,000.
(b) Between $25,000 and $100,000.
(c) Between $100,000 and $250,000.
(d) Between $250,000 and $500,000.
(e) Between $500,000 and $1,000,000.
(f) Between $1,000,000 and $5,000,000.
(g) Between $5,000,000 and $10,000,000.
(h) More than $10,000,000.

FAR 36.204 -- Disclosure of the Magnitude of Construction Projects. The DFARS provides ranges between $10,000,000 and 500,000,000. (the additional ranges are: $10M - $25M, $25M - $100 M, $100M - $250M, and $250M - $500M.) DFARS 236.204.

A. Forms. FAR 36.701; FAR 53.301-1442, SF 1442, Solicitation, Offer, and Award (Construction, Alteration, or Repair); DFARS 236.701.

1. The contracting officer uses a SF 1442 in lieu of a SF 33.

2. If a bidder fails to return this form with its offer, the offer is nonresponsive. See C.J.M. Contractors, Inc., B-250493.2, Nov. 24, 1992, 92-2 CPD ¶ 376.

B. Supplemental Documents. The contracting officer may provide drawings, specifications, and maps in either hard-copy or completely in electronic format. DFARS 52.236-7001.

C. Statutory Limitations. FAR 36.205; DFARS 252.236-7006.

1. The solicitation must include any statutory cost limitations.[7] See K.C. Brandon Constr., B-245934, Feb. 3, 1992, 92-1 CPD ¶ 139;see also DFARS 252.236-7006(b), Cost Limitation (Jan 1997) ("[a] offeror which does not state separate prices for the items identified in the Schedule as subject to a cost limitation may be considered nonresponsive").

2. The government must normally reject any offer that:

a. Exceeds the applicable statutory limitations;[8] or

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[7] FAR 36.205 -- Statutory Cost Limitations.

(a) Contracts for construction shall not be awarded at a cost to the Government --
(1) In excess of statutory cost limitations, unless applicable limitations can be and are waived in writing for the particular contract; or
(2) Which, with allowances for Government-imposed contingencies and overhead, exceeds the statutory authorization.
(b) Solicitations containing one or more items subject to statutory cost limitations shall state --
(1) The applicable cost limitation for each affected item in a separate schedule;
(2) That an offer which does not contain separately-priced schedules will not be considered; and
(3) That the price on each schedule shall include an approximate apportionment of all estimated direct costs, allocable indirect costs, and profit.
(c) The Government shall reject an offer if its prices exceed applicable statutory limitations, unless laws or agency procedures provide pertinent exemptions. However, if it is in the Government's interest, the contracting officer may include a provision in the solicitation which permits the award of separate contracts for individual items whose prices are within or subject to applicable statutory limitations.
(d) The Government shall also reject an offer if its prices are within statutory limitations only because it is materially unbalanced. An offer is unbalanced if its prices are significantly less than cost for some work, and overstated for other work.

[8] The contracting officer may award separate contracts for individual items whose prices are within the applicable statutory limitations if: (1) the contracting officer included a provision that permits such awards in the solicitation; and (2) such awards are in the government's interest. FAR 36.205(c); FAR 52.214-19.

b. Is only within the statutory limitations because it is materially unbalanced.

See William G. Tadlock Constr., B-252580, June 29, 1993, 93-1 CPD ¶ 502; H. Angelo & Co., B-249412, Nov. 13, 1992, 92-2 CPD ¶ 344.

3. Some statutory limitations are waivable. See 10 U.S.C. § 2853; see also TECOM, Inc., B-240421, Nov. 9, 1990, 90-2 CPD ¶ 386.

D. Site Familiarization Clauses.

1. Site Investigation and Conditions Affecting the Work. FAR 36.210; FAR 36.503; FAR 52.236-3.

a. By submitting a bid, a contractor acknowledges that it has investigated the job site and the conditions affecting the proposed work.

b. Among other things, a contractor is supposed to investigate:

(1) Conditions bearing upon transportation, disposal, handling, and storage of materials;

(2) The availability of labor, water, electric power, and roads;

(3) Uncertainties of weather, river stages, tides, and similar physical conditions at the site;

(4) The conformation and condition of the ground;

(5) The character of needed equipment and facilities;

(6) The character, quality, and quantity of discoverable surface and subsurface materials and/or obstacles;

See Aulson Roofing, Inc., ASBCA No. 37677, 91-2 BCA ¶ 23,720; Fred Burgos Constr. Co., ASBCA No. 41395, 91-2 BCA ¶ 23,706.

c. A contractor need not hire its own geologists or conduct extensive engineering efforts to verify conditions that it can reasonably infer from the solicitation or a site visit. See Michael-Mark Ltd., IBCA No. 2697, 94-1 BCA ¶ 26,453; see also Atherton Constr., Inc., 02-2 BCA ¶ 31,918 ("The duty of bidders to investigate the job site does not require them to conduct time-consuming or costly technical investigations to determine the accuracy of the

Government's drawings or other indications in the solicitation documents.")

d. A contractor must perform at the contract price if the contractor could have discovered a condition by a reasonable site investigation. See H.B. Mac, Inc. v. United States, 153 F.3d 1338, 1346 (Fed. Cir. 1998) ("It is well settled that a contractor is charged with knowledge of the conditions that a pre-bid site visit would have revealed."); see also Conner Brothers Constr. Co., Inc. v United States, 65 Fed. Cl. 657, 673 (2005) ("A contractor who fails to perform an adequate site investigation bears the risk of any condition that it could have discovered if the investigation had been reasonable."); Weeks Dredging & Contracting, Inc. v. United States, 13 Cl. Ct. 193 (1987); Avisco, Inc., ENG BCA No. 5802, 93-3 BCA ¶ 26,172; Signal Contracting, Inc., ASBCA No. 44963, 93-2 BCA ¶ 25,877; cf. I.M.I., Inc., B-233863, Jan. 11, 1989, 89-1 CPD ¶ 30.

e. The government is not normally bound by the contractor's interpretation of government data and representations not included in the solicitation. See Eagle Contracting, Inc., AGBCA No. 88-225-1, 92-3 BCA ¶ 25,018.

2. Physical Data. FAR 36.504; FAR 52.236-4.

a. The contracting officer may provide physical data for the convenience of the contractor.

b. The government is not responsible for a contractor's erroneous interpretations or conclusions. But see United Contractors v. United States, 177 Ct. Cl. 151, 368 F.2d 585 (Ct. Cl. 1966).

3. Changes After Bid Closing Date. The government is normally responsible for increased performance costs caused by changes at a site after the date of bid submission, even if offerors agree to extend the bid acceptance period. See Valley Constr. Co., ENG BCA No. 6007, 93-3 BCA ¶ 26,171.

E. Bid Guarantees. FAR 28.101; FAR 52.228-1; FAR 53.301-24, SF 24, Bid Bond.

1. A bid guarantee ensures that a bidder will:

a. Not withdraw its bid during the bid acceptance period; and

b. Execute a written contract and furnish other required bonds at the time of contract award.

2. Requirement. FAR 28.101-1.

a. The contracting officer must normally require a bid guarantee whenever the solicitation requires performance and payment bonds. Performance and payment bonds are required by the Miller Act, (40 U.S.C. 3131 et seq.) for construction contracts exceeding $150,000, except as authorized by law. FAR 28.102-1. (See Section IX.B, below.)

b. Contracting Officers may still require bid guarantees in construction contracts less than $150,000. See, Lawson's Enterprises, Inc. Comp. Gen., B-286708, Jan. 31, 2001, 2001 CPD ¶ 36.

c. The chief of the contracting office, however, may waive the requirement to provide a bid guarantee if the chief of the contracting office determines that it not in the government's best interest to require a bid guarantee (e.g., for overseas construction, emergency acquisitions, and sole-source contracts).

3. Form.

a. The bid guarantee must be in the form required by the solicitation. See HR Gen. Maint. Corp. B-260404, May 16, 1995, 95-1 CPD ¶ 247; Concord Analysis, Inc., B-239730, Dec. 4, 1990, 90-2 CPD ¶ 452. But see Mid-South Metals, Inc., B-257056, Aug. 23, 1994, 94-2 CPD ¶ 78.

b. The FAR permits offerors to use surety bonds, postal money orders, certified checks, cashier's checks, irrevocable letters of credit, U.S. bonds, and/or cash. See FAR 52.228-1; see also Treasury Dep't Cir. 570 (listing acceptable commercial sureties).

c. If a bidder uses an individual surety, the surety must provide a security interest in acceptable assets equal to the penal sum of the bond. FAR 28.203. See Paradise Const. Co., Comp. Gen. Dec. B-289144, 2001 CPD ¶ 192.

(1) The adequacy of an individual surety's offering is a matter of responsibility, not responsiveness. See Gene Quigley, Jr., B-241565, Feb. 19, 1991, 70 Comp. Gen. 273, 91-1 CPD ¶ 182;see also Tip Top Constr., Inc. v. United States, 2008 WL 3153607 (Fed. Cl. 2008); Harrison Realty Corp., B-254461.2, 93-2 CPD ¶ 345.

(2) A bidder may not be its own individual surety. See Astor V. Bolden, B-257038, Apr. 26, 1994, 94-1 CPD ¶ 288.

4. Penal Amount. FAR 28.101-2 (b). The bid bond must equal 20% of the bid, but not exceed $3,000,000. But see FAR 28.101-4(c).

5. The contracting officer may not accept a bid accompanied by an apparently unenforceable guarantee. Conservatek Indus., Inc., B-254927, Jan. 26, 1994, 1994 WL 29903; MKB Constructors, Inc., B-255098, Jan. 10, 1994, 94-1 CPD ¶ 10; Arlington Constr., Inc., B-252535, July 9, 1993, 93-2 CPD ¶ 10; Cherokee Enter., Inc., B-252948, June 3, 1993, 93-1 CPD ¶ 429; Hugo Key & Son, Inc., B-245227, Aug. 22, 1991, 91-2 CPD ¶ 189; Techno Eng'g & Constr., B-243932, July 23, 1991, 91-2 CPD ¶ 87; Maytal Constr. Corp., B-241501, Dec. 10, 1990, 90-2 CPD ¶ 476; Bird Constr., B-240002, Sept. 19, 1990, 90-2 CPD ¶ 234.

6. Noncompliance with Bid Guarantee Requirements. FAR 28.101-4.

a. Noncompliance with bid guarantee requirements normally renders a bid nonresponsive. See Alarm Control Co., B-246010, Nov. 18, 1991, 91-2 CPD ¶ 472.

b. The contracting officer, however, may waive the requirement to submit a bid guarantee under nine circumstances. FAR 28.101-4(c). See Rufus Murray Commercial Roofing Sys., B-258761, Feb. 14, 1995, 95-1 CPD ¶ 83; Apex Servs., Inc., B-255118, Feb. 9, 1994, 94-1 CPD ¶ 95.

F. Pre-Bid Conferences. FAR 14.207. Contracting officers may hold pre-bid conferences when necessary to brief bidders and explain complex specifications and requirements; however, client control is critical. See Cessna Aircraft Co., ASBCA No. 48118, 95-1 BCA ¶ 27,560.

G. Bid/Proposal Preparation Time. FAR 36.213-3. The contracting officer must give bidders ample time to conduct site visits, obtain subcontractor bids, examine data, and prepare estimates. See Raymond Int'l of Del., Inc., ASBCA No. 13121, 70-1 BCA ¶ 8,341.

VIII. AWARD.

A. Responsiveness Issues.

1. A bid is nonresponsive if it exceeds a statutory dollar limitation. FAR 36.205(c); DFARS 252.236-7006. See Ward Constr. Co., B-240064, July

30, 1990, 90-2 CPD ¶ 87; Wynn Constr. Co., B-220649, Feb. 21, 1986, 86-1 CPD ¶ 184.

2. A bid is nonresponsive if the bidder fails to comply with the bid guarantee requirements. FAR 28.101-4(a). See Maytal Constr. Corp., B-241501, Dec. 10, 1990, 90-2 CPD ¶ 476. But see FAR 28.101-4(c) (listing the nine circumstances under which the contracting officer may waive the requirement to submit a bid guarantee).

3. A bid is nonresponsive if the bidder offers a shorter bid acceptance period than the solicitation requires. See SF 1442, Block 13D.

4. A bid is nonresponsive if the bidder fails to acknowledge a material amendment. See Dutra Constr. Co., B-241202, Jan. 31, 1991, 91-1 CPD ¶ 97; see also MG Mako, Inc., B-404758, April 28, 2011, 2011 CPD ¶ 88 (affirming the agency's rejection of a proposal in response to an RFP for failing to acknowledge a material amendment).

5. A bid is nonresponsive if the bidder fails to acknowledge a Davis-Bacon wage rate amendment unless the offeror is bound by a wage rate equal to or greater than the new rate. See Tri-Tech Int'l, Inc., B-246701, Mar. 23, 1992, 92-1 CPD ¶ 304; Fast Elec. Contractors, Inc., B-223823, Dec. 2, 1986, 86-2 CPD ¶ 627.

6. A bid is nonresponsive if the bidder equivocates on the requirement to obtain permits and licenses. See Bishop Contractors, Inc., B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555.

7. A bid is nonresponsive if it is materially unbalanced. FAR 52.214-19.[9]

   a. The government may reject a bid if the bid prices are materially unbalanced between line items, or between subline items.

   b. A bid is materially unbalanced when:

      (1) The bid is based on prices that are significantly less than cost for some work, and significantly greater than cost for other work and there is reasonable doubt that the bid will result in the lowest overall cost to the government; or

      (2) The bid is so unbalanced that it is tantamount to allowing the contractor to recover money in advance of performing the work. FAR 52.214-19(d).

[9] A bid may be found nonresponsive if the only reason it is below a statutory limitation is because it is materially unbalanced. FAR 36.205(d).

B. Responsibility Issues.

1. Prequalification of Sources. DFARS 236.272. The contracting officer may establish a list of contractors that are qualified to perform a specific contract and limit competition to those contractors.

   a. The HCA must: (1) determine that the project is so urgent or complex that prequalification is necessary; and (2) approve the prequalification procedures.

   b. If the contracting officer believes a small business unqualified for responsibility reasons, the contracting officer must refer the matter to the Small Business Administration (SBA) for a preliminary recommendation.

   c. If the SBA preliminary determination is that the small business is responsible, the contracting officer must allow it to submit a proposal.

   d. Follow the procedures in FAR 19.6, if the small business is in line for award and is found nonresponsible.

2. Performance Evaluation Reports. FAR 36.201; FAR 42.1502 et seq.; FAR 53.301-1420, SF 1420, Performance Evaluation, Construction Contracts; DoD Class Deviation 2011-O0014 Past Performance Reporting, issued on June 27, 2011; AFARS 5136.201; DD Form 2626, Performance Evaluation (Construction).

   a. Contracting activities <u>must</u> prepare performance evaluation reports for:

      (1) Construction contracts valued at $650,000 or more;[10]

      (2) Architect-Engineer services contracts valued at $30,000 or more; and

      (3) Default terminated construction and A-E contracts regardless of contract value.

      FAR 42.1502(e) and (f).

[10] In the Army, contracting activities must prepare performance evaluation reports for each order placed under a JOC of $550,000 or more. AFARS 5136.201(a)(1).

b. Upon their completion, contracting activities must send performance evaluation reports to: U.S. Army Corps of Engineers, Portland District, ATTN: CENWP-CT-I, P.O. Box 2946, Portland, OR 97208-2946. Available on-line at: http://www.nwp.usace.army.mil/ct/i/. You may also reach this data through: www.usace.army.mil.

c. Contracting officers may use performance evaluation reports as part of their preaward survey.

3. Small Businesses. FAR 19.602. Before a contracting officer can reject a small business as nonresponsible, the contracting officer must refer the matter to the SBA for a Certificate of Competency (COC).

4. Performance of Work by Contractor. FAR 36.501; FAR 52.236-1.

a. To assure adequate interest in and supervision of all work involved in larger projects, the contractor shall be required to perform a significant part of the contract work with its own forces. The Contracting Officer has discretion to determine the appropriate amount for the specific project, but it is ordinarily not less than 12 percent.

b. FAR clause 52.236-1 (Performance of Work by the Contractor) shall be inserted in solicitations and contracts when the fixed-price construction contract is expected to exceed $1.5 million.

c. FAR clause 52.236-1 (Performance of Work by the Contractor) does not apply to small business or 8(a) set-asides. FAR 36.501(b). But see FAR clause 52.219-14 (obligating small business concerns and 8(a) contractors to perform certain percentages of work).

d. Whether a contractor intends to perform the contractually required percentage of work with its own forces is normally a matter of responsibility, not responsiveness. See Luther Constr. Co., B-241719, Jan. 28, 1991, 91-1 CPD ¶ 76. But see Blount, Inc. v. United States, 22 Cl. Ct. 221 (1990); C. Iber & Sons, Inc., B-247920.2, Aug. 12, 1992, 92-2 CPD ¶ 99.

C. Price Evaluation.

1. The contracting officer must evaluate additive items properly.

2. The contracting officer must award the contract to the bidder who submits the low bid for the base project and the additive items which, in order of

priority, provide the most features within the applicable funding constraints.

3. The contracting officer must select the low bidder based on the funding available at the time of bid opening. See Huntington Constr., Inc., B-230604, June 30, 1988, 67 Comp. Gen. 499, 88-1 CPD ¶ 619; Applicators Inc., B-270162, Feb. 1, 1996, 96-1 CPD ¶ 32.

IX. CONTRACT ADMINISTRATION.

A. Preconstruction Orientation. FAR 36.212. See FAR 52.236-26; see also FAR 22.406-1; DFARS 222.406-1 (requirement to provide preconstruction information about labor standards).

1. The contracting officer must inform successful offerors of significant matters of interest (e.g., statutory matters, subcontracting plan requirements, contract administration matters, etc.).

2. The contracting officer may issue an explanatory preconstruction letter or hold a preconstruction conference.

B. Performance and Payment Bonds.

1. Requirements. 40 U.S.C. §§ 3131 et seq.; FAR 28.102-1.

a. Contracts Over $150,000. FAR 28.102-1(a); FAR 28.102-3(a); FAR 52.228-15. The contractor must provide performance and payment bonds before it can begin work. See TLC Servs., Inc., B-254972.2, Mar. 30, 1994, 94-1 CPD ¶ 235.

b. Contracts Between $30,000 and $150,000. 40 U.S.C. § 3132; FAR 28.102-1(b); FAR 28.102-3(b); FAR 52.228-13.

(1) The contracting officer must select two or more of the following payment protections:

(a) Payment bonds;

(b) Irrevocable letters of credit;[11]

(c) Tripartite escrow agreements; or

(d) Certificates of deposit.

[11] The contracting officer is supposed to give "particular consideration" to including irrevocable letters of credit as one of the selected payment protections. FAR 28.102-1(b).

(2) The contractor must submit one of the selected payment protections before it can begin work.

2. Performance Bonds. FAR 28.102-2; FAR 52.228-15; FAR 53.301-25, SF 25, Performance Bond.

a. Performance bonds protect the government.

b. The penal amount of the bond is normally 100% of the original contract price.

(1) The contracting officer may reduce the penal amount if the contracting officer determines that a lesser amount adequately protects the government.

(2) The contracting officer may require additional protection if the contract price increases.

3. Payment Bonds. FAR 28.102-2; FAR 52.228-15; FAR 53.301-25-A, SF 25-A, Payment Bond.

a. Payment bonds protect subcontractors and suppliers.

b. The penal amount must equal 100% of the original contract price unless the contracting officer determines, in writing, that requiring a payment bond in that amount is impractical.

(1) If the contracting officer determines that requiring a payment bond in an amount equal to 100% of the original contract price is impractical, the contracting officer must set the penal amount of the bond.

(2) The amount of the payment bond may never be less than the amount of the performance bond.

4. Noncompliance with Bond Requirements. Failure to provide acceptable bonds justifies terminating the contract for default. FAR 52.228-1. See Pacific Sunset Builders, Inc., ASBCA No. 39312, 93-3 BCA ¶ 25,923; see also Airport Indus. Park, Inc. v. United States, 59 Fed.Cl. 332, 334-35 (2004) ("[F]ailure to furnish adequate bonding [as] required by a government ... contract is a material breach that justifies termination for default.").

5. Withholding Contract Payments. FAR 28.106-7.

a. During Contract Performance. The contracting officer should not withhold payments. FAR 28.106-7(a). But see Balboa Ins. Co. v. United States, 775 F.2d 1158 (Fed. Cir. 1985); National Surety Corp., 31 Fed. Cl. 565 (1994); Johnson v. All-State Constr., 329 F.3d 848 (Fed. Cir. 2003) (Government was entitled to withhold progress payments pursuant to its common-law right to set-off pending liquidated damages).[12]

b. After Contract Completion. FAR 28.106-7(b). The contracting officer must withhold final payment if the surety provides written notice regarding the contractor's failure to pay its subcontractors or suppliers.

(1) The surety must agree to hold the government harmless.

(2) The contracting officer may release final payment if:

(a) The parties reach an agreement; or

(b) A court determines the parties' rights.

c. Labor Violations. See generally FAR Part 22.

6. Waiver Provisions. 40 U.S.C. §§3131(d) and 3134; FAR 28.102-1(a).

a. The contracting officer may waive the requirement to provide performance and payment bonds if:

(1) The contractor performs the work in a foreign country and the contracting officer determines that it is impracticable to require the contractor to provide the bonds; or

(2) The Miller Act (or another statute) authorizes the waiver.

b. The Service Secretaries may waive the requirement to provide performance and payment bonds for cost-type contracts.

C. Differing Site Conditions (DSC). FAR 52.236-2.

1. This clause allows for an equitable adjustment if the contractor provides prompt, written notice of a differing site condition.

[12] However, see FAR 52.232-5 -- Payments Under Fixed-Price Construction Contracts. Permits withholding from future payments for improper certification of subcontractor payments.

2. There are two types of differing site conditions. See Renda Marine, Inc. v. United States, 509 F.3d 1372, 1376 (Fed. Cir. 2007); Consolidated Constr., Inc., GSBCA No. 8871, 88-2 BCA ¶ 20,811.

a. Type I Differing Site Conditions. FAR 52.236-2(a)(1). To recover for a Type I condition, the contractor must prove that:

(1) The contract either implicitly or explicitly indicated a particular site condition. See H.B. Mac, Inc. v. United States, 153 F.3d 1338 (Fed.Cir.1998); Franklin Pavkov Constr. Co., HUD BCA No. 93-C-C13, 94-3 BCA ¶ 27,078; Glagola Constr. Co., Inc., ASBCA No. 45579, 93-3 BCA ¶ 26,179; Konoike Constr. Co., ASBCA No. 36342, 91-1 BCA ¶ 23,440; cf. Jack L. Olsen, Inc., AGBCA No. 87-345-1, 93-2 BCA ¶ 25,767.

(2) The contractor reasonably interpreted and relied on the contract indications. See Nova Group, Inc., ASBCA No. 55408, 10-2 BCA ¶ 34533 (finding that it was reasonable for the contractor to rely upon the boring logs and geotechnical reports to prepare its bid and that the contractor reasonably interpreted the logs and reports as indicating weak subsurface conditions); R.D. Brown Contractors, Inc., ASBCA No. 43973, 93-1 BCA ¶ 25,368.

(3) The contractor encountered latent or subsurface conditions that differed materially from those indicated in the contract. See Winter v. Cath-dr/Balti Joint Venture, 497 F.3d 1339 (Fed. Cir. 2007) (upholding a Type I differing site condition claim recovery for encountered roofing materials that differed materially from those anticipated); see also Meredith Constr. Co., ASBCA No. 40839, 93-1 BCA ¶ 25,399; Caesar Constr., Inc., ASBCA No. 41059, 91-1 BCA ¶ 23,639.

(4) The claimed costs were attributable solely to the differing site condition. See P.J. Dick, Inc., GSBCA No. 12036, 94-3 BCA ¶ 27,073.

b. Type II Differing Site Conditions. To recover for a Type II condition, the contractor must prove that:

(1) The conditions encountered were unusual physical conditions that were unknown at the time of contract award. See Walser v. United States, 23 Cl. Ct. 591 (1991); Gulf Coast Trailing Co., ENG BCA No. 5795, 94-2 BCA

¶ 26,921; Soletanche Rodio Nicholson (JV), ENG BCA No. 5796, 94-1 BCA ¶ 26,472.

(2) The conditions differed materially from those ordinarily encountered. See Green Constr. Co., ASBCA No. 46157, 94-1 BCA ¶ 26,572; Virginia Beach Air Conditioning Corp., ASBCA No. 42538, 92-1 BCA ¶ 24,432;Parker Excavating, Inc., ASBCA No. 54637, 06-01 BCA ¶ 33217 ("A Type II differing site condition requires proof of the recognized and usual physical conditions at the work site, proof of the actual physical conditions, proof that the conditions differed from the known and the usual, and proof that the different conditions caused an increase in contract performance.")

3. The DSC clause only covers conditions existing at the time of contract award. Acts of nature occurring after contract award are not differing site conditions. See Arundel Corp. v. United States, 96 Ct. Cl. 77, 354 F.2d 252 (1942); Meredith Constr. Co., ASBCA No. 40839, 93-1 BCA ¶ 25,399; PK Contractors, Inc., ENG BCA No. 4901, 92-1 BCA ¶ 24,583. But see Valley Constr. Co., ENG BCA No. 6007, 93-3 BCA ¶ 26,171; but see Kilgallon Constr. Co., Inc., ASBCA No. 51601, 01-2 BCA ¶ 31,621 ("[Plaintiff] must also prove that interaction of the rain with the pre-existing and unknown site condition produced unforeseeable consequences, i.e., in this case, that unknown soils exhibited behavior or properties when saturated that were not reasonably anticipated.").

4. The contractor may not recover if the contractor could have discovered the condition during a reasonable site investigation. See O.K. Johnson Elec. Co., VABCA No. 3464, 94-1 BCA ¶ 26,505; cf. Urban General Contractors, Inc., ASBCA No. 49653, 96-2 BCA ¶ 28,516; Indelsea, S.A., ENG BCA No. PCC-117, 95-2 BCA ¶ 27,633; Steele Contractors, Inc., ENG BCA No. 6043, 95-2 BCA ¶ 27,653; Operational Serv. Corp., ASBCA No. 37059, 93-3 BCA ¶ 26,190; Sagebrush Consultants, 01-1 BCA ¶ 31,159 (IBCA), and American Constr., 01-1 BCA ¶ 31,202.

5. The contractor cannot create its own differing site condition. See Geo-Con, Inc., ENG BCA No. 5749, 94-1 BCA ¶ 26,359.

6. The contractor must prove its damages. See H.V. Allen Co., ASBCA No. 40645, 91-1 BCA ¶ 23,393; see also Praught Constr. Corp., ASBCA No. 39670, 93-2 BCA ¶ 25,896.

7. The contractor must promptly notify the government. See Engineering Tech. Consultants, S.A., ASBCA No. 43376, 92-3 BCA ¶ 25,100.

a. Untimely notification may bar a differing site condition claim if the late notice prejudices the government. See Moon Constr. Co. v. General Servs. Admin., GSBCA No. 11766, 93-3 BCA ¶ 26,017; see also Hemphill Contracting Co., ENG BCA No. 5698, 94-1 BCA ¶ 26,491; Meisel Rohrbau, ASBCA No. 35566, 92-1 BCA ¶ 24,434; Holloway Constr., Holloway Sand & Gravel Co., ENG BCA No. 4805, 89-2 BCA ¶ 21,713.

b. If the government's defense to a differing site condition claim is made more difficult—but not impossible—by the late notice, courts and boards will normally waive the notice requirement and place a heavier burden of persuasion on the contractor. See Glagola Constr. Co., ASBCA No. 45579, 93-3 BCA ¶ 26,179.

c. When the government is on notice of differing site conditions, but takes no exception to the contractor's notice or its corrective actions, the government must pay the contractor's increased costs. See Potomac Marine & Aviation, Inc., ASBCA No. 42417, 93-2 BCA ¶ 25,865; Parker Excavating, Inc., ASBCA No. 54637, 06-01 BCA ¶ 33217 ("The written notice requirements are not construed hyper-technically to deny legitimate contractor claims when the government was otherwise aware of the operative facts.")

d. Lack of notice of a differing site condition will not bar a contractor's recovery when the government breaches its duty to cooperate by failing to designate an inspector to whom the contractor may give notice during scheduled weekend work. See Hudson Contracting, Inc., ASBCA No. 41023, 94-1 BCA ¶ 26,466.

8. No DSC claim if the contract does not contain the DSC clause. See Marine Industries Northwest, Inc., ASBCA No. 51942, 01-1 BCA ¶ 31,201 (board rejected a Type II DSC claims solely on the basis that there was no DSC clause in the contract. Without the DSC clause, the contractor bears complete risk for any differing conditions encountered); see also Stewartsville Postal Properties, LLC, PSBCA No. 6309, 10-2 BCA ¶ 34559 ("The lease did not include a differing site conditions or changes clause that could result in recovery were Appellant able to prove the required underlying factual conditions.").

9. Final payment bars an unreserved differing site condition claim. FAR 52.236-2(d).

D. Variations in Estimated Quantity. FAR 52.211-18.

1. A fixed-price contract may include estimated quantities for unit-priced items of work.

2. If the actual quantity of a unit-priced item varies more than 15% above or below the estimated quantity, the contracting officer must equitably adjust the contract based on "any increase or decrease in costs due solely to the variation." See Clement-Mtarri Cos., ASBCA No. 38170, 92-3 BCA ¶ 25,192, aff'd sub nom., Shannon v. Clement-Mtarri Cos., No. 93-1268, 12 FPD ¶ 114 (Fed. Cir. 1993); cf. Westland Mechanical, Inc., ASBCA No. 48844, 96-2 BCA ¶ 28,419.

3. Whether a party may demand repricing of work that falls outside the 15% range, or whether the original contract unit price controls, is now settled. Adjustments are based on the difference between the unit cost of the original work, and the unit cost of the work outside the allowable variation range. Foley Co. v. United States, 11 F.3d 1032 (Fed. Cir. 1993). But see TECOM, Inc., ASBCA No. 44122, 94-1 BCA ¶ 26,483.

4. The contractor may request a performance period extension if the variation in the estimated quantity causes an increase in the performance period.

E. Suspension of Work. FAR 52.242-14.

1. The contracting officer may suspend, interrupt, or delay work for the convenience of the government. See Valquest Contracting, Inc., ASBCA No. 32454, 91-1 BCA ¶ 23,381.

2. A government delay is compensable if:

a. It is unreasonable. See Southwest Constr. Corp., ENG BCA No. 5286, 94-3 BCA ¶ 27,120; C&C Plumbing & Heating, ASBCA No. 44270, 94-3 BCA ¶ 27,063; Kimmins Contracting Corp., ASBCA No. 46390, 94-2 BCA ¶ 26,869; F.G. Haggerty Plumbing Co., VABCA No. 4482, 95-2 BCA ¶ 27,671.

b. The contracting officer orders it. See Mergentime Corp., ENG BCA No. 5765, 92-2 BCA ¶ 25,007; Durocher Dock & Dredge, Inc., ENG BCA No. 5768, 91-3 BCA ¶ 24,145. But see Fruehauf Corp. v. United States, 218 Ct. Cl. 456, 587 F.2d 486 (1978); Asphalt Roads & Materials Co., ASBCA No. 43625, 95-1 BCA ¶ 27,544; Henderson, Inc., DOT BCA No. 2423, 94-2 BCA ¶ 26,728; Lane Constr. Corp., ENG BCA No. 5834, 94-1 BCA ¶ 26,358.

c. The contractor has not caused the suspension by its (or its subcontractor's) negligence or failure to perform. See Hvac Constr. Co., Inc. v. United States, 28 Fed. Cl. 690 (1993).

d. The cost of performance increases. See Missile Sys., Inc., ASBCA No. 46079, 94-3 BCA ¶ 27,091; Frazier-Fleming Co., ASBCA No. 34537, 91-1 BCA ¶ 23,378.

3. The contractor may be entitled to delay costs (even if it finishes work on time) if it proves that it planned to finish the work early, but was delayed by the government. See Oneida Constr., Inc., ASBCA No. 44194, 94-3 BCA ¶ 27,237; Labco Constr., Inc., AGBCA No. 90-115-1, 94-2 BCA ¶ 26,910.

4. The contractor may not recover delay costs where the government provides greater access to a work site for a portion of the performance period, without binding the government to increased access for the duration of the entire contract, and the government then restricts access to the original contract requirements. See Atherton Constr., Inc., ASBCA No. 48527, 00-2 BCA ¶ 30,968. (In a family housing renovation contract, the government provided access to more than the contractually required 14 dwelling units for a period of 48 days. Unilateral action by the government, no recovery allowed.)

5. A contractor may be entitled to a performance period extension even if the delay is reasonable. A contractor also may raise government delay as a defense to a default termination or an assessment of liquidated damages. See Farr Bros., Inc., ASBCA No. 42658, 92-2 BCA ¶ 24,991.

6. If both the contractor and the government contribute to a delay and the causes of the delay are so intertwined that the periods and costs of delay cannot be apportioned clearly, neither party can recover for the delay. See Wilner v. United States, 994 F.2d 783, 786 (Fed. Cir. 1993); cf. G. Bliudzius Contractors, ASBCA No. 42366, 93-3 BCA ¶ 26,074.

7. Profit is not recoverable and final payment bars unreserved suspension claims. FAR 52.242-14(b)(2).

8. Constructive Suspensions.

a. A constructive suspension of work may arise if:

(1) The government fails to issue a notice to proceed within a reasonable time after contract award. See Marine Constr. & Dredging, Inc., ASBCA No. 38412, 95-1 BCA ¶ 27,286.

(2) The government fails to provide timely guidance following a reasonable request for direction. See Tayag Bros. Enters., Inc., ASBCA No. 42097, 94-2 BCA ¶ 26,962.

b. A contractor may not recover delay costs for more than 20 days unless the contractor notifies the government of the delay. FAR 52.242-14. This rule, however, is subject to a prejudice test. See George Sollitt Const. Co. v. U.S., 64 Fed. Cl. 229 (Fed. Cl. 2005).

F. Permits and Responsibilities. FAR 52.236-7.

1. A contractor must obtain applicable permits and licenses (and comply with applicable laws and regulations) at no additional cost to the government. See GEM Eng'g Co., DOT BCA No. 2574, 94-3 BCA ¶ 27,202; C'n R Indus. of Jacksonville, Inc., ASBCA No. 42209, 91-2 BCA ¶ 23,970; Holk Dev., Inc., ASBCA No. 40137, 90-2 BCA ¶ 22,852. But see Hills Materials v. Rice, 982 F.2d 514 (Fed. Cir. 1992); Hemphill Contracting Co., ENG BCA No. 5698, 94-1 BCA ¶ 26,491.

2. Burden on contractor is continuing and applies to requirements arising after contract award. See Shirley Const. Co., ASBCA No. 42954, 92-1 BCA ¶ 24,563 ("It is well established that the Permits and Responsibilities clause requires contractors to comply with laws and regulations issued subsequent to award without additional compensation unless there is another clause in the contract that limits the clause to laws and regulations in effect at the time of award.").

3. Normally, licensing is a question of responsibility, not responsiveness. See Restec Contractors, Inc., B-245862, Feb. 6, 1992, 92-1 CPD ¶ 154; Chem-Spray-South, Inc., B-400928.2, June 25, 2009, 2009 CPD ¶ 144; Computer Support Sys., Inc., B-239034, Aug. 2, 1990, 69 Comp. Gen. 645, 90-2 CPD ¶ 94. But see Bishop Contractors, Inc., B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555.

4. A contractor assumes the risk of loss or damage to its equipment.[13] In addition, a contractor is responsible for injuries to third persons. See Potashnick Constr., Inc., ENG BCA No. 5551, 92-2 BCA ¶ 24,985; Aulson Roofing, Inc., ASBCA No. 37677, 91-1 BCA ¶ 23,720.

5. A contractor is responsible for work in progress until the government accepts it. See Labco Constr., Inc., ASBCA No. 44945, 93-3 BCA ¶ 26,027; Tyler Constr. Co., ASBCA No. 39365, 91-1 BCA ¶ 23,646; D.J.

[13] The contractor may bear similar responsibilities under a Government Furnished Property clause. FAR 52.245-4. See Technical Servs. K.H. Nehlsen GmbH, ASBCA No. 43869, 94-1 BCA ¶ 26,377.

Barclay & Co., ASBCA No. 28908, 88-2 BCA ¶ 20,741. But see Fraser Eng'g Co., VABCA No. 3265, 91-3 BCA ¶ 24,223; Joseph Beck & Assocs., ASBCA No. 31126, 88-1 BCA ¶ 20,428.

G. Specifications and Drawings. FAR 52.236-21; DFARS 252.236-7001.

1. The omission or misdescription of details of work that are necessary to carry out the intent of the contract drawings and specifications (or are customarily performed) does not relieve a contractor from its obligation to perform the omitted or misdescribed details of work. A contractor must perform as if the drawings and specifications describe the details fully and correctly. See Wood & Co. v. Dep't of Treasury, GSBCA No. 12452-TD, 94-1 BCA ¶ 26,365; Single Ply Sys., Inc., ASBCA No. 42168, 91-2 BCA ¶ 24,032.

2. The contractor must review all drawings before beginning work, and the contractor is responsible for any errors that a reasonable review would have detected. M.A. Mortenson Co., ASBCA 50,383, 00-2 BCA ¶ 30,936, (denying Mortenson's claim based on omissions in construction drawings), But see Wick Constr. Co., ASBCA No. 35378, 89-1 BCA ¶ 21,239.

3. If the specifications contain provisions that conflict with the contract drawings, the specifications govern. The parties may rely on this order of precedence regardless of whether an ambiguity is patent. See Hensel Phelps Constr. Co., 886 F.2d 1296 (Fed. Cir. 1989); Shemya Constructors, ASBCA No. 45251, 94-1 BCA ¶ 26,346; Rohr, Inc., ASBCA No. 44193, 93-2 BCA ¶ 25,871. But see J.S. Alberici Constr. Co v. General Servs. Admin, GSBCA No. 12386, 94-2 BCA ¶ 26,776. Contracts that contain specifications for alternative CLINs are not conflicting. Fort Myer Construction Corporation v. U.S., Fed. Cir. 2000 (unpub. 24 Jan 2000).

4. The government cannot shift the responsibility for defective design specifications to a contractor through the use of a disclaimer. White v. Edsall Const. Co., Inc., 296 F.3d 1081 (Fed. Cir. 2002) (contractor is not obligated to "ferret out" hidden ambiguities and errors in the Government's specifications and designs.)

H. Liquidated Damages (LDs). FAR 11.502; FAR 36.206; FAR 52.211-12, DFARS Subpart 211.5.

1. The government may assess LDs if:

a. The parties intended to provide for LDs;

b. Anticipated damages attributable to untimely performance were uncertain or difficult to quantify at the time of award; and

c. The LDs bear a reasonable relationship to anticipated government losses resulting from delayed completion.

See K-Con Bldg. Systems, Inc. v. United States, 97 Fed. Cl. 41 (2011) (Contractor failed to establish that the liquidated damages rate of $551 per day was an unreasonable forecast of the damages that the Government would sustain in the event of contractor's breach of contract for the design and construction of prefabricated metal building, and therefore, contracted-for liquidated damages clause was enforceable); see also D.E.W., Inc., ASBCA No. 38392, 92-2 BCA ¶ 24,840; Brooks Lumber Co., ASBCA No. 40743, 91-2 BCA ¶ 23,984; JEM Dev. Corp., ASBCA No. 42645, 91-3 BCA ¶ 24,428; Dave's Excavation, ASBCA No. 35956, 88-3 BCA ¶ 20,911; P&D Contractors, Inc. v. United States, 25 Cl. Ct. 237 (1992).

2. If the damage forecast was reasonable, the government may assess LDs even if it did not incur any actual damages. See Cegers v. United States, 7 Cl. Ct. 615 (1985); American Constr. Co., ENG BCA No. 5728, 91-2 BCA ¶ 24,009. But see Atlantic Maint. Co., ASBCA No. 40454, 96-2 BCA ¶ 28,323. Using a rate from an agency manual that is part of its procurement regulations is presumed reasonable. See Fred A. Arnold, Inc. v. United States, 18 Cl. Ct. 1 (1989), aff'd in part, 979 F.2d 217 (Fed. Cir. 1992); JEM Dev. Corp., ASBCA No. 45912, 94-1 BCA ¶ 26,407.

3. The government may not assess LDs if a project is substantially complete. See Hill Constr. Corp., ASBCA No. 43615, 93-3 BCA ¶ 25,973; Wilton Corp., ASBCA No. 39876, 93-2 BCA ¶ 25,897.

4. The government may not assess LDs if it is partly responsible for the completion delay. See H.G. Reynolds Co., Inc., ASBCA No. 42351, 93-2 BCA ¶ 25,797.

5. A contractor may be excused from LDs if it shows that the delay was: (a) excusable or beyond its control; and (b) without the fault or negligence of it or its subcontractors. See Potomac Marine & Aviation, Inc., ASBCA No. 42417, 93-2 BCA ¶ 25,865; K-Con Bldg. Systems, Inc. v. United States, 97 Fed. Cl. 41, 56 (2011) ("A contractor seeking the remission of liquidated damages on account of excusable delay bears the burden of proving 'the extent of the excusable delay to which it is entitled.'") quoting Sauer Inc. v. Danzig, 224 F.3d 1340, 1345 (Fed. Cir. 2000).

6. Contracting officers must ensure that project completion dates are reasonable to avoid having contractors "pad" their bids to protect against LDs.

7. Another contract clause that sets an alternate rate of compensation for standby time may be enforceable, even if it is quite high, if it serves a different purpose in the contract than a liquidated damages clause. See Stapp Towing Co., ASBCA No. 41584, 94-1 BCA ¶ 26,465.

I. Use/Possession Prior to Completion. FAR 52.236-11.

1. The government may take possession of a construction project prior to its completion (beneficial occupancy).

2. Possession does not necessarily constitute acceptance. See Tyler Constr. Co., ASBCA No. 39365, 91-1 BCA ¶ 23,646. The contractor must complete a project as required by the contract, including all "punch list" items. See Toombs & Co., ASBCA No. 34590, 91-1 BCA ¶ 23,403.

3. The contractor is not responsible for any loss or damage that the government causes. See Fraser Eng'g Co., supra.

4. The contractor may be due an equitable adjustment if possession by the government causes a delay.

X. CONCLUSION.

ATTACHMENT - DIFFERING SITE CONDITIONS (DSC)

What a Contractor Must Show to Recover for DSCs.

TYPE I	TYPE II
Contract documents either implicitly or explicitly indicate a particular site condition.	Conditions encountered were unusual physical conditions that were not known about at time of contract award.
Contractor reasonably interpreted and relied upon the contract indications.	Conditions differed materially from those ordinarily encountered.
Contractor encountered latent/subsurface conditions that differed materially from the conditions indicated in the contract and were reasonably unforeseeable.	
Contractor incurred increased costs that were solely attributable to the DSC.	Contractor incurred increased costs that were solely attributable to the DSC.
Note: 1. If the government made no representations and provided no information, contractor cannot recover. 2. If the contractor discovers the differing conditions prior to bid opening, reliance is unreasonable.	Examples: unexpected soil conditions, old dump at site, buried hazardous materials

NOTES:

1. DSC clause only covers conditions existing at the time of award. Acts of nature occurring after award are not DSCs.
2. A contractor may not recover if the contractor could have discovered the condition during a reasonable site investigation.
3. Recovery for DSC is not available if the contract does not contain the DSC clause.

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Chapter 30
Contingency & Deployment Contracting

2013 Contract Attorneys Deskbook

CHAPTER 30

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K. US Central Command Contracts webpage, *located at* https://www2.centcom.mil/sites/contracts/Pages/Home.aspx (containing training materials, checklists, policy documents, acquisition instructions, and contract clauses).

II. INTRODUCTION

A. General. The past ten years of constant combat operations, as well as humanitarian operations in poorly developed areas, have demonstrated the importance of contingency contracting as a force multiplier. Many of the goods and services required to successfully engage in extended deployment operations cannot be provided by current uniformed forces. To meet those needs, the Department of Defense relies more and more on contracted support. The apparatus for competing, awarding, and supervising contractors in deployed or contingency environments is called "contingency contracting."

1. The Joint Chiefs of Staff, in Joint Publication (JP) 4-10, define Contingency Contracting as:

"[T]he process of obtaining goods, services and construction from commercial sources via contracting means in support of contingency operations. It is a subset of contract support integration and does not include the requirements development, prioritization and budgeting processes. Contracts used in a contingency include theater support, systems support, and external support contracts."

B. Legal Support to Operations. Doctrine covering legal support to operations provides that the Staff Judge Advocates "contract law responsibilities include furnishing legal advice and assistance to procurement officials during all phases of the contracting process and overseeing an effective procurement fraud abatement program." FM 1-04, para. 5-40. Specifically, JAs are to provide "legal advice to the command concerning battlefield acquisition, contingency contracting, use of logistics civil augmentation program, acquisition and cross-servicing agreements . . . and overseas real estate and construction." *Id.*

1. Scope of Duties. Depending on their assigned duties, Legal Counsel should participate fully in the acquisition process at their level, make themselves continuously available to their clients, involve themselves early in the contracting process, communicate closely with procurement officials and contract lawyers in the technical supervision chain, and provide legal and business advice as part of the contract management team. *Id.* para. 5-41; see also AFARS 5101.602-2(c) (describing contracting officers' use of legal counsel).

2. Pre-Deployment. Judge Advocates should take the lead in advocating expeditionary contracting preparation. FM 1-04, para. 13-8. This could involve holding contract/fiscal law classes for supply and logistics personnel, reviewing acquisition and logistics plans as part of the units' OPLAN, and begin available to give advice on the best practices to obtain goods and services while deployed.

3. Operational Support. To provide contract law support in operations, JAs with contract law experience or training should be assigned to division and corps level main and tactical command posts, TSC headquarters, theater army headquarters, and each joint and multinational headquarters. Depending on mission requirements, command structure, and the dollar value and/or complexity of contracting actions, contract law support may be required at various command levels including brigade or battalion. *Id*. paras. 5-39 to 5-43.

4. Contract-Specific Roles. Judge Advocates may be assigned as Command Judge Advocate or Deputy Command Judge Advocate for a Contract Support Brigade (CSB). These JAs serve as the primary legal advisors to CSB commanders, staff, and contracting officials on the full spectrum of legal and policy issues affecting the CSBs peacetime and operational missions. FM 4-92, para. 1-13. Judge Advocates at sustainment brigades, theater sustainment brigades, and expeditionary sustainment brigades perform similar functions. FM 1-04, para. 5-42. Judge Advocates assigned to these and other contracting organizations should have contract law training. *Id*.

5. Demonstrated Importance. After action reports (AAR) from Iraq and Afghanistan consistently indicate that JAs throughout both theaters, regardless of the position to which they are assigned (including brigade judge advocates), daily practiced fiscal law. These same AARs indicated that while most JAs encountered contract law issues less frequently, they needed an understanding of basic contract law principles to intelligibly conduct fiscal law analyses. For JAs assigned to contracting or logistics heavy units, knowledge of contract law was a prerequisite to their daily duties.

C. Applicable Law During a Deployment. Contracting during a deployment involves two main bodies of law: international law, and U.S. contract and fiscal law. FM 1-04, para. 5-38 and 5-39. Attorneys must understand the authorities and limitations imposed by these two bodies of law.

1. International Law.

a. The Law of War – Combat. The Law of War applies during combat operations and imposes limitations, for example, on the use of prisoners of war (PW) for labor. Many contractors are authorized to accompany the force, a technical distinction that allows them to receive POW status should they be captured. See GCIV, ART 4(A)(4).

b. The Law of War – Occupation. The Law of War also applies during occupation, and may also be followed as a guide when no other body of law clearly applies, such as in Somalia in Operation Restore Hope.

c. International Agreements. A variety of international agreements, such as treaties and status of forces agreements (SOFA) may apply. These agreements can have substantial impact on contingency contracting by, for example, limiting the ability of foreign corporations from operating inside the local nation, placing limits and tariffs on imports, and governing the criminal and taxation jurisdiction over contractors and their personnel.

(1) Example: The Diplomatic Note executed between the United States and the Transitional Government of the Islamic State of Afghanistan (12 December 2002) covers many of the duties and rights of the United States and its contractors operating in Afghanistan. The agreement states that "[t]he Government of the United States, its military and civilian personnel, contractors and contractor personnel shall not be liable for any kind of tax or other similar fees assessed within Afghanistan." This type of provision has a profound impact on contract pricing and contractor performance. Legal Counsel must know these agreements in order to properly advise their clients when facing contingency contracting.

(2) International Agreements may also include choice of law provisions relating to contingency contracting. For example, The Diplomatic Note also provides that all contracts awarded by the United states to "acquire materials and services, including construction . . . should be awarded in accordance with the law and regulations of the Government of the United States."

2. U.S. Contract and Fiscal Law. There is no "deployment exception" to Contract or Fiscal Law. Judge Advocates in contingency operations must apply the same standards applicable during garrison operations. However,

local regulations, policies, and authorities that are not otherwise available may exist in contingency operations and provide greater flexibility for commanders in those areas.

a. FAR and agency supplements. The FAR fully applies to contingency contracting. However, the following Parts are most relevant during contingency operations:

(1) FAR Part 6 details the competition requirements for all acquisitions. Subpart 6.3 explains when acquisition personnel may award contracts using less than full-and-open competition if certain conditions exist. In any case where less than full-and-open competition is sought, specific findings must be made.

(2) FAR Part 13 specifies the use of simplified acquisitions. Approximately 95% of all contracting actions in contingency operations will utilize simplified acquisitions, which are based primarily on low acquisition cost. More expensive acquisitions may not qualify.

(3) FAR Part 18 provides a listing of the various FAR provisions allowing expedient and relaxed procedures that may be useful in a contingency situation.

(4) FAR Part 25 and DFARS Part 225 govern foreign acquisitions, including the "Buy American" Act (41 U.S.C. §§ 8301-8305) and other requirements.

(5) FAR Part 50 outlines the extraordinary contractual actions available during emergency situations. These are rarely used due to their low dollar threshold ($50,000) and high approval levels, involving Congressional notification.

b. Fiscal Law. Title 31, U.S. Code; Department of Defense (DOD) Financial Management Regulation FMR (DOD FMR); DFAS-IN 37-1; DFAS Manual 37-100-XX (XX=current fiscal year (FY)). For a more in-depth discussion of fiscal law principles, *see generally* CONTRACT & FISCAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, FISCAL LAW DESKBOOK (updated frequently and available online at www.jagcnet.army.mil).

c. Executive Orders and Declarations.

d. Contingency Funding and Contract Authorizations. Generally, ordinary fiscal and acquisition rules apply during contingency

operations. There is no blanket "wartime" or "contingency" exception to these rules. The fact that an operation is ongoing, however, may:

(1) Make the use of existing authorities easier to justify. For example, the operational situation in a contingency operation will likely give rise to circumstances making it easier to develop a justification and approval to support the use of the unusual and compelling urgency exception to full and open competition located at FAR Section 6.302-2.

(2) Appropriation and authorization acts may contain temporary, extraordinary fiscal and contract authorities specific to a particular operation. Operations in Afghanistan contain numerous examples of these extraordinary authorities, from the expenditure of Commander Emergency Response Funds (CERP) through the Afghanistan First program.

e. Permanent Extraordinary Contract Authority. During a national emergency declared by Congress or the President and for six months after the termination thereof, the President and his delegees may initiate or amend contracts notwithstanding any other provision of law whenever it is deemed necessary to facilitate the national defense. Pub. L. No. 85-804, codified at 50 U.S.C. §§1431-1435; Executive Order 10789 (14 Nov. 1958); FAR Part 50; DFARS Part 250. These powers are broad, but the statute and implementing regulations contain a number of limitations. For example, these powers do not allow waiving the requirement for full and open competition, and the authority to obligate funds in excess of $65,000 may not be delegated lower than the Secretariat level. This authority is rarely used. Additionally, despite this grant of authority, Congress still must provide the money to pay for obligations.

III. DEPLOYMENT CONTRACTING AUTHORITY, PLANNING, PERSONNEL, AND ORGANIZATION

A. Contract vs. Command Authority. Commanders have broad authority to direct operations as required. However, they do not have the authority to obligate the U.S. Government to expend funds.

1. Command Authority. Prescribed by 10 U.S.C. § 164. Includes the authority to perform functions involving organizing and employing commands and forces, assigning tasks and designating objectives, and giving authoritative direction over all aspects of an operation. In a contingency operation, command authority runs from the President thru the Secretary of Defense to the Geographic Combatant Commanders (GCC) and ultimately joint force commanders. Command authority does NOT include the ability to make binding contracts for the U.S. Government. FM 4-92, para. 1-20; *see also* JP 4-10, p. III-4.

2. Contract Authority. Premised on the U.S. Constitution, statute, and regulatory authority (FAR, DFAR, Service supplements). Contracting authority in the operational area flows from the President, then to the Secretary of Defense, through the Service/Agency Head, to the Head of Contracting Activity (HCA), then to the Senior Contracting Official (SCO) or Principal Assistant Responsible for Contracting (PARC), and finally to the contracting officer. Only the contracting officer, by virtue of their contracting warrant, has the authority to obligate the U.S. Government on contractual matters. Any binding contract attempt made by anyone other than a contracting officer will result in an unauthorized commitment. FAR 1.6; JP 4-10, p. I-7; FM 4-92, para. 1-20.

B. Planning. The type of organization to which a JA is assigned will dictate the degree to which they must become involved in planning for contract support. At a minimum, however, JAs should be familiar with how Joint and Army doctrine incorporate planning for contract and contractor personnel support through the Contract Support Integration Plan and Contractor Management Plan.

1. Contract Support Integration Plan (CSIP).

a. In all operations where there will be a significant use of contracted support, the supported GCC and their subordinate commanders and staffs must ensure that this support is properly addressed in the appropriate OPLAN/OPORD. JP 4-10, p. III-16. To achieve this integration, a CSIP must be developed by logistics staff contracting personnel, assisted by the lead Service contracting element (if a lead Service is designated). *Id*. Annex W to the GCC OPLAN/OPORD contains the CSIP. *Id.*

b. The CSIP is a planning mechanism to ensure effective and efficient contract support to a particular operation. The CSIP development process is intended to ensure the operational commander and supporting contracting personnel conduct advanced planning, preparation, and coordination to support deployed forces, and that the contract support integration and contractor management related

guidance and procedures are identified and included in the overall plan. FM 4-92, para. 2-4.

c. At a minimum, the CSIP must include: theater support contracting organization responsibilities; boards and/or center information; operational specific contracting policies and procedures to include Service civil augmentation program/external contract, multi-national, and host-nation support coordination guidance; and, contract administration services delegations. Other elements may include but are not limited to the identification of major requiring activities and information on commercial support capabilities to satisfy requirements. JP 4-10, figure III-3.

d. Each Service component should also publish its own CSIP seeking integration and unity of effort with the supported GCC's CSIP. JP 4-10, III-8.b. For the Army, the CSIP is located in Tab G, Appendix 1, of Annex F, Sustainment. U.S. DEP'T OF ARMY, FIELD MANUAL 5-0, THE OPERATIONS PROCESS table E-2 (Mar. 2010).

2. Contractor Management Plan (CMP).

a. The CMP is related to, but not the same as, the CSIP. While the CSIP is focused on how we will acquire and manage contracted support, the CMP is focused on government obligations under contracts to provide support to contractor personnel. JP 4-10, para. IV-3.b.

b. Contractor management is accomplished through a myriad of different requiring activities, contracting officer representatives, supported units, contracting organizations, and contractor company management personnel. JP 4-10, para. IV-1.b. Therefore, the GCC and subordinate joint forces commander must establish clear, enforceable, and well understood theater entrance, accountability, force protection, and general contractor management and procedures early in the planning stages of any military contingency. JP 4-10, para. IV-1.b(1). To accomplish this task, the GCC should publish a CMP. JP 4-10, para. IV-3.b(1).

c. The CMP should specify operational specific contractor personnel and equipment requirements in order for the Joint Forces Commander, Service components, theater support contracting command, special operations forces, external support contracts, and Defense Logistics Agency to incorporate these into applicable contracts. JP 4-10, para. IV-3.b(1). These requirements may

include, but are not limited to: restrictions imposed by applicable international and host-nation support agreements; contractor related deployment, theater reception, accountability, and strength reporting; operations security plans and restrictions; force protection; personnel recovery; contractor personnel services support; medical support, and redeployment requirements. *Id.*

d. The Joint Forces Command and Service components should prepare supporting CMPs that support the GCC's CMP but provide more specific details. JP 4-10, para. IV-3.b(1); FM 4-92, paras. 2-13 to 2-14.

e. For more detailed information on contingency contractor personnel, *see* CONTRACT & FISCAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, CONTRACT LAW DESKBOOK chpt 31, Contingency Contractor Personnel (updated frequently and available online at www.jagcnet.army.mil).

3. In a developed theater, JAs should familiarize themselves with theater business clearance procedures, theater specific contract clauses and policies, contract and acquisition review boards, as well as resource management policies and standard operating procedures, such as the Money as a Weapons System—Afghanistan (MAAWS-A). AARs from Afghanistan indicate that familiarity with this resource is foundational to anyone who will be providing fiscal or contract law advice in theater.

C. Deployment Contracting Personnel. Contracting authority runs from the Secretary of Defense to the Heads of Contracting Activities (HCA). The HCA appoints a Senior Contracting Official (SCO) or Principal Assistant Responsible for Contracting (PARC). The HCA and SCO/PARC warrant contracting officers (KO) at various levels and with varying levels of authority. AFARS 5101.603-1. The chief of a contracting office, a KO, may appoint field ordering officers (FOOs) to conduct relatively low dollar value purchases. FOOs are authorized to obligate the government to pay for goods or services in accordance with their appointment letters, but FOOs do not normally handle money. Finance Soldiers and Soldiers or Department of Defense (DOD) civilians, known as Class A agents or paying agents, handle money and pay merchants for purchases made by the FOOs.

1. Head of Contracting Activity (HCA). A Flag Officer or equivalent senior executive service (SES) civilian who has overall responsibility for managing a contracting activity. JP 4-10, para. I-2.c(1); FM 4-92, para. 1-4; FAR 2.101.

a. The HCA serves as the approving authority for contracting as stipulated in regulatory contracting guidance.

b. DOD Contracting Activities are listed in the DFARS, and include, among others, Headquarters, U.S. Army Contracting Command, U.S. Army Sustainment Command, U.S. Army Expeditionary Contracting Command, U.S. Army Mission and Installation Contracting Command, U.S. Army Corps of Engineers, U.S. Transportation Command, U.S. Special Operations Command, and the Joint Theater Support Contracting Command. The head of each contracting activity is a HCA. DFARS 202.101; AFARS 5101.601(1).

c. See generally AFARS 5101.601 for a discussion on the responsibilities of HCAs.

2. Senior Contract Official (SCO) (AKA Principal Assistant Responsible for Contracting (PARC)). The SCO is a lead service or joint command designated contracting official who has direct managerial responsibility over theater support contracting.

a. There may be multiple SCOs in the same operational area based on mission or regional focus. For example, at one time in Operation Iraqi Freedom (OIF), there were two SCOs (known as PARCs), one for support to forces and one for reconstruction support. JP 4-10, para. I-2c(2). Presently, C3 has one SCO or PARC for Afghanistan.

b. In the Army, SCOs are known as PARCs. AFARS 5101.601; *cf.* JP 4-10, para. I-2c(2).

(1) HCAs appoint PARCs.

(2) The PARC serves as the senior Army contracting advisor responsible for planning and managing all Army contracting functions which the FAR, DFARS, PGI, AFARS, and other directives does not require the HCA to perform personally (except when the HCA elects to exercise selected authorities). AFARS 5101.601(5).

(3) Example—The Commander of the Army Expeditionary Contracting Command is an HCA. The HCA normally appoints each Contracting Support Brigade Commander as a PARC. FM 4-92, para. 1-4.

3. Contracting Officer (KO). The government official (military officer, enlisted, or civilian) with the legal authority to enter into, administer, and/or terminate contracts. JP 4-10, para. I-2c(3); *see also* FAR 1.602.

   a. Appointed in writing through a warrant (Standard Form 1402) by the HCA or SCO/PARC. JP 4-10, para. I-2c(3).

   b. Only duly warranted contracting officers are authorized to obligate the U.S. Government, legally binding it to make payments against a contract. *Id.*

   c. Three main types of contracting officers: procuring contracting officers (PCOs), administrative contracting officers (ACOs), and terminating contracting officers. *Id.* PCOs enter into contracts. ACOs administer contracts. TCOs settle terminated contracts. A single contracting officer may be responsible for duties in any or all of these areas. FAR 2.101 (definition of "contracting officer").

4. Contracting Officer's Representative (COR). CORs operate as the KO's eyes and ears regarding contract performance, and provide the key link between the command and the KO regarding the command's needs. CORs are organic members of the unit and are assigned to be a COR as an additional duty. CORs are necessary because KOs are normally not located at the site of contract performance. In many cases, contracts will already be in place before the unit deploys, and the KO for the contract is in CONUS or at geographically remote Regional Contracting Center. Commanders must consider whether to request that the KO appoint at least one COR for each contract affecting the unit. The COR can only be appointed by the KO. CORs do NOT exercise any contract authority and are used for communication regarding contract performance. Any issues with the contractor must still be resolved by the KO. *See* DFARS 201.602-2; JP 4-10, para. I-2c(3).

   a. A properly trained COR shall be designated in writing prior to contract award. FAR 1.602-2(d). CORs must be a U.S. Government employee, unless authorized by agency-specific regulations. In this case, DFARS 201-602-2 authorizes officers of foreign governments to act as CORs as well.

   b. HQDA EXORD 048-10: Pre-Deployment Training for Contracting Officer's Representative and Commander's Emergency Response Program (CERP) Personnel, dated 5 Dec. 2009. Requires brigades, brigade equivalents, and smaller units deploying in support of OEF or OIF:

(1) Determine the number of CORs needed to meet theater contracting requirements no later than (NLT) 180 days before the latest arrival date (LAD). Verify COR requirements with the CENTCOM Contracting Command, servicing Regional Contracting Center within the deployed area of responsibility, and with the Defense Contract Management Agency representatives administering the Logistics Civil Augmentation Program (LOGCAP) contract and other support contracts in the unit's deployed location.

(2) If unable to determine specific COR requirements during the Pre-Deployment Site Survey or from other pre-deployment communications, each deploying brigade must train 80 COR candidates. Separate battalions must train 25 COR candidates, and separate companies must train 15 COR candidates.

(3) NLT 90 days before the LAD, ensure COR candidates complete online training courses developed by the U.S. Army Training and Doctrine Command.

(4) CORs must receive supplemental training from the contracting officer that appoints them as a COR.

c. For more detailed information on COR responsibilities, *see* CENTER FOR ARMY LESSONS LEARNED, HANDBOOK 08-47, DEPLOYED COR (Sep. 2008); *see also* DFARS 201.602-2(2); DFARS Class Deviation 2011-O0008, Designation of Contracting Officer's Representative (21 Mar. 2011) (setting forth appointment requirements for CORs).

5. Field Ordering Officer (FOO).

a. Service member or DOD civilian appointed in writing and trained by a contracting officer. AFARS 5101.602-2-90; 5101.603-1; 5101.603-1-90; 5101.603-1-90(b). FOOs are not warranted contracting officers and their FOO duties are considered an extra or collateral duty. JP 4-10, para. I-2c(5).

b. FOOs are usually not part of the contracting element, but are a part of the forward units.

c. FOOs may be authorized to make purchases over the counter with SF44s up to the micro-purchase threshold, place orders against certain indefinite delivery contracts established by KOs, make calls under Blanket Purchase Agreements (BPAs) established by KOs,

and make purchases using imprest funds. AFARS 5101.602-2-90. FOOs may also be government purchase card holders. AFARS 5113.2. FOOs are subject to limitations in their appointment letters, procurement statutes and regulations, and fiscal law. Contracting authority may be limited by dollar amount, subject matter, purpose, time, etc. Typical limitations are restrictions on the types of items that may be purchased and on per purchase dollar amounts. A sample appointment letter is found at AFARS 5153.9002.

d. AFARS 5101.602-2-90 contains guidance on the appointment, training, surveillance, and termination of FOOs. Additionally, contracting activities publish additional FOO guidance applicable to FOOs appointed under the authority of the contracting activity. For an example, *see* http://centcomcc.net as well as MAAWS-A.

6. Paying Agents. Finance specialists, and Soldiers and DOD civilians appointed and trained by Finance, hold money. When FOOs or KOs make purchases using SF44s, the merchant can present the form to the paying agent for payment. Alternatively, and most likely a necessity in an immature theater, the paying agent will accompany the FOO or KO. Once the FOO/KO completes the transactions, the paying agent will pay the merchant. Pre-deployment coordination with finance to determine who the paying agents are and where they will be located will aid the deployed contracting process. Paying agents may not be FOOs. For detailed guidance on paying agents, *see* FM 1-06, app. D; *see also* DOD FMR, vol. 5, para. 020604 (discussing the appointment and responsibilities of paying agents). For Afghanistan specific guidance on paying agents, see the MAAWS-A.

D. Sources of Contracted Support in a Contingency Operation.

1. General. Three different sources of contract support generally are used in support of contingency operations: Theater Support Contracts, Systems Support Contracts, and External Support Contracts.

2. Theater Support Contracts. Contracts awarded by contracting officers in the operational area serving under the direct contracting authority of the Service component, special operations forces command, or designated joint HCA for the designated contingency operation. JP 4-10, p. vii, para. III-6. These contracts are commonly referred to as contingency contracts. *Id.* For example, theater support contracts in Afghanistan include contracts awarded by the CENTCOM Joint Theater Support Contracting Command or any of its Regional Contracting Centers or Offices.

3. Systems Support Contracts. Contracts awarded by Service acquisition program management offices that provide technical support, maintenance and, in some cases, repair parts for selected military weapon and support systems. Systems support contracts are routinely put in place to provide support to newly fielded weapons systems, including aircraft, land combat vehicles, and automated command and control systems. These contracts are often awarded long before and unrelated to specific operation. JP 4-10, p. vii, para. III-4 and app. A. Only the contracting activity that issued the contract has the authority to modify or terminate the contract.

4. External Support Contracts. Contracts awarded from contracting organizations whose contracting authority does not derive directly from the theater support contracting HCA or from system support contracting authorities. External support contracts provide a variety of logistic and other noncombat related services and supply support. JP 4-10, p. vii, para. III-5.

a. Types of Support.

(1) Logistic support includes base operating support, transportation, port and terminal services, warehousing and other supply support functions, facilities construction and management, prime power, and material maintenance. JP4-10, para. III-5a and figure III-2.

(2) Non-logistic support may include communication services, interpreters, commercial computers and information management, and subject to congressional as well as DOD policy limitations, interrogation and physical security service support. *Id.*

b. External support contracting authority does not come as a direct result of the contingency operation. Generally, these contracts are issued during peacetime for use during contingencies by the Service Components. Contracting authority, and therefore the ability to modify contracts, remains with the Service Component. For example, requirements for the Army's Logistics Civil Augmentation Program (LOGCAP) contract are managed by the Army Sustainment Command and the contracts are awarded and managed by the Army Contracting Command, both of which fall under the Army Materiel Command. Only AMC has the authority to change the LOGCAP contract. JP 4-10, para. III-5(b).

c. Major External Support Contracts include each Service's civil augmentation program (CAP) contracts (LOGCAP for the Army,

the Air Force Contract Augmentation Program (AFCAP), and the U.S. Navy Global Contingency Construction Contract (GCCC) and Global Contingency Service Contract (GCSC)); fuel contracts awarded by the Defense Energy Support Center; construction contracts awarded by the U.S. Army Corps of Engineers and Air Force Center for Engineering and Environmental Excellence; and translator contracts awarded by the Army Intelligence and Security Command. JP 4-10, para. III-5(a).

d. Civil Augmentation Program (CAP) Contracts. Provide the supported GCC and subordinate Joint Forces Commander an alternative source for meeting logistic services and general engineering shortfalls when military, host-nation support, multinational, and theater support contract sources are not available or adequate to meet the force's needs. Because these contracts are generally more expensive than theater support contracts, every effort should be made to transition to theater support contracts as soon as possible. JP 4-10, para. III-5 and app. B.

(1) Service CAP similarities. JP 4-10, app. B.

(a) Augment organic military capabilities.

(b) Long term (four to nine years depending on the program) competitively awarded contracts.

(c) Use, or can opt to use, cost-plus award fee ID/IQ task orders.

(d) Potentially compete for the same general commercial support base.

(2) Service CAP differences. JP 4-10, app. B.

(a) Authorized expenditure limit and planning and management capabilities.

(b) Support focus:

(i) LOGCAP focuses on general logistic support and minor construction support. The program utilizes separate support (planning and program support) and performance (task order execution) contracts.

(ii) AFCAP focuses on both construction and general logistic support and can be used for supply support.

(iii) The Navy GCCC focuses exclusively on construction.

(iv) The Navy GSCS focuses on facilities support.

E. Theater Contracting Support Organizational Options.

1. General. There is no single preferred contracting organizational option for theater support contracting organizations; the specific organization option is determined by the Geographic Combatant Commander (GCC) in coordination with the subordinate Joint Force Command and Service Components. JP 4-10, para. III-7a. In general, however, there are three main organizational options: service component support to own forces, choosing a lead Service, and forming a joint theater support contracting command. *Id.* Within the Army, outside of the theater contracting organization options discussed herein, corps, divisions, and brigades do not have any organic contracting officers or authority (beyond FOOs, Government Purchase Cardholders, and so forth). FM 4-92, para. 1-1.

2. Service Component Support to Own Forces.

a. During smaller scale operations with an expected short duration, the GCC may allow the Service component commanders to retain control of their own theater support contracting authority and organizations. This organizational option is also applicable to operations where the bulk of individual Service component units will be operating in distinctly different areas of the joint operations area thus limiting potential competition for the same vendor. JP 4-10, para. III-7b.

b. Army. The Army established the Expeditionary Contracting Command to provide theater support contracting in support of deployed Army forces worldwide and garrison contracting support for Outside the Continental United States Army installations. The ECC Commander is a HCA. The commanders of each of six regionally focused contracting support brigades (CSB) are PARCs or SCOs. FM 4-92, paras. 1-1 to 1-4. In turn, each brigade has a number of contingency contracting battalions, contingency contracting teams, and senior contingency contracting teams. *Id.* para. 1-5. CSB units are deployed as necessary to meet mission contracting requirements. *Id.* paras. 1-22 to 1-23. Specifically, the

CSB may be organized to provide Service component support to Army forces. *Id.* para. 1-24.

3. Lead Service Responsible for Theater Support Contracting.

a. GCCs may designate a specific Service component responsible to provide consolidated theater contracting support. JP 4-10, para. III-7c.

b. Most appropriate for major, long-term operations where the supported GCC and supported joint force commander desire to ensure that there is a consolidated contracting effort within the operational area, but without the need to stand-up an entirely new joint contracting command. JP 4-10, para. III-7c(1).

c. The lead service often has command and control of designated other Service component theater contracting organizations and also has its staff augmented by other Services' contingency contracting personnel. JP 4-10, para. III-7c(1).

d. Within the Army, the CSB may be designated as the lead Service contracting organization (with or without command and control of other Service contracting elements). FM 4-92, para. 1-24.

4. Joint Theater Support Contracting Command.

a. Established by GCC. The joint theater support contracting command is a joint, functional command that has a specified level of command and control authority over designated Service component theater support contracting organizations and personnel within a designated support area. JP 4-10, para. III-7d. For Afghanistan, the CENTCOM Contracting Command (C3) has been established and organized as a Joint Theater Support Contracting Command.

b. Since GCCs do not have their own contracting authority, the joint theater support contracting command's HCA authority flows from one of the Service component's to the operational area. In this option, the joint theater support contracting command headquarters should be established by a Joint Manning Document (JMD). *Id.* For example, C3 falls beneath the Army. DFARS 202.101.

c. Within the Army, the CSB may serve as the building block for the formation of a joint theater support contracting command. FM 4-92, para. 1-24.

5. There is no formally approved, established model for lead Service theater support or the joint theater support contracting command organization options. JP 4-10, app. G, however, provides a general model or organization framework for each type of organization, to include a discussion of legal support to these organizations. Significantly, each of these organizational options will likely include the following subordinate activities:

a. Regional Contracting Centers (RCC). Typically consists of 10-25 warranted contracting officers, enlisted members, and/or DOD civilians often aligned with major land force (division, corps, Marine expeditionary force) headquarters or Air Force wings. JP 4-10, app. G, paras. 2.g, 3.k(1).

b. Regional Contracting Offices (RCO). Organization under the command and control of an RCO head composed of 2 thru 8 warranted contracting officers, enlisted members, and/or DOD civilians. Typically provide area support to specific forward operating bases and or designated areas within the joint operating area. JP 4-10, app. G, paras. 2.h and 3.k(2).

c. Specialty Contracts Division. May be used to provide contracting support for common, joint operations area-wide services or supplies OR to perform complex contracting actions that exceed the RCC and RCO capabilities. JP 4-10, app. G, paras. 2.h and 3.k(3).

IV. REQUIREMENTS GENERATION, APPROVAL, AND CONTRACTING PROCESS

A. General. Once a requirement for goods or services is identified and approved by a requiring activity, resource management, finance operations, and contracting personnel must work in concert to actually acquire and pay for the good or service. Together, these three are known as the "Fiscal Triad." FM 1-06, at vii; FM 4-92, para. 2-17, FM 1-04, app. G.

1. Requiring Activity. Units are requiring activities, regardless of their organizational level. For example, whether a company or a corps requires fuel or base support services, each is a requiring activity. The unit is responsible for developing the requirement, to include clearly defining the requirement and conducting basic market research. JP 4-10, app. G. Unit commanders and staff identify, develop, validate, prioritize, and approve requirements. FM 1-06, at vii.

a. Requiring activities are responsible for developing "acquisition ready" requirements. In coordination with the supporting contracting activity (e.g., RCC or RCO), the requiring activity must be able to describe what is needed to fulfill the minimum acceptable standard for the government. This information allows the contracting activity to create a solicitation against which commercial vendors can bid a proposal and successfully deliver in accordance with the terms of the contract to satisfy a government requirement. FM 4-92, para. 2-18; *see also* JP 4-10, app. G.

b. Specifically, the requiring activity, in coordination with the supporting contracting office, must conduct basic market research, develop an independent government estimate, develop a performance work statement or statement of work, and obtain certified funding from the requiring activity's resource manager. FM 4-92, para. 2-18; *see also* JP 4-10, app. G. Judge Advocates conducting fiscal and contract reviews must carefully review each of these documents. For example, requirements which superficially appear to be services and therefore properly funded with operations and maintenance appropriations may in fact include requirements for construction or the procurement of investment items that may require the use of a different appropriation.

2. Resource Management (RM).

a. Serve as the commander's representative to lead the requirement validation, prioritization, and approval effort.

b. Certifies the availability of funds by executing a purchase, request, and commitment (PR&C) and ensures the use of the funds is legal and proper. As the keeper of the commander's checkbook, the RM does not create requirements and has no acquisition authority. FM 1-04, app. G; FM 1-06, at vii, ch. 1, sec. II; FM 4-92, para. 2-17.

3. Contracting Officers.

a. The only government officials (military officer, enlisted, or civilian) with the legal authority to enter into, administer, and/or terminate contracts. JP 4-10, para. I-2c(3); *see also* FAR 1.602.

b. Upon receipt of certified funding and properly developed requirement, contracts on behalf of the U.S. Government to obtain the good or service. FM 1-04, app. G; FM 1-06, at vii; FM 4-92, para. 2-17

c. Responsible for appointing and training field ordering officers.

4. Finance Operations.

a. As the government's banker, finance is the only triad element with funds disbursement authority. Once a contract has been awarded, finance operations provide vendor payment through cash, check, government purchase card, and electronic funds transfer. FM 1-04, app. G; FM 1-06, at vii, ch. 1, sec. I; FM 4-92, para. 2-17.

b. Funds and clears paying agents.

B. Requirements Approval Process.

1. Ensures the appropriate functional staffs coordinate on, prioritize, approve, and certify funding for the "acquisition ready requirements" package before it is forwarded to the appropriate contracting activity. FM 4-92, para. 2-19. These staff reviews can include, but are not limited to:

a. Legal

b. Supply/logistics/property book.

c. Engineer

d. Medical

e. Signal (information technology and communication)

f. Resource Management

g. Other as needed/required by the circumstances.

2. In major operations, common user logistics (CUL) are coordinated by the GCC and subordinate Joint Forces Commander among the functional staffs through the use of three important contracting related review boards as discussed below. JP 4-10, para. III-3; *see also* FM 4-92, para. 2-19.

3. Combatant Commander Logistic Procurement Support Board (CLPSB). Ensures that contracting and other related logistics efforts are properly coordinated across the entire AOR. JP 4-10, para. III-3.b. Focuses on general policies and AOR-wide issues related to contracting support at the GCC level, to include:

a. Identifying contracting and related issues that may require Joint Staff Office of Primary Responsibility, J-4, and/or Office of the Secretary of Defense action;

b. Establishing AOR-wide contracting and contractor management policies and procedures; and

c. Determining theater support contracting organization structure. JP 4-10, para. III-3.b and figure III-1.

4. Joint Acquisition Review Board (JARB). JP 4-10, para. III-3.c.

a. Utilized to coordinate and control the requirements generation and prioritization of joint common user logistics (CUL) supplies and services that are needed in support of the operational mission.

b. Normally chaired by the Joint Forces Commander or Deputy Commander with participation by the functional staff (to include JAs) as well as theater, external, and system support contracting members.

c. Main role is to make specific approval and prioritization recommendations for all GCC directed, subordinated Joint Forces Commander controlled, high-value and/or high visibility CUL requirements and to include recommendations on the proper source of support for these requirements.

d. Theater support and external support contracting members' role is to inform the other JARB members which contracting mechanisms are readily available for a particular acquisition.

e. For an example, *see* Money as a Weapons System—Afghanistan (MAAWS-A). This contains detailed guidance on the JARB (and related, subordinate, and superior ARBs) and the requirements approval process. Judge Advocates deploying to Afghanistan, regardless of organizational level, must familiarize themselves with the policy contained in these documents in advance of deploying to theater.

f. Once a requirement is validated and approved by the JARB, the resource manager certifies funding and the packet is provided to a contracting activity.

5. Joint Contracting Support Board (JCSB). JP 4-10, para. III-3.d and figure III-1.

a. Focuses on how contracting will procure support in the Joint Operations Area.

b. Reviews contract support requirements forwarded by the JARB and makes recommendations on which specific contracting organizations/venues (e.g., theater v. external) are best suited to fulfill the requirement.

c. Establishes theater support contracting procedures.

d. Chaired by SCO/PARC or subordinate J-4 acquisition officer.

C. Theater Business Clearance (TBC) / Contract Administration Delegation (CAD).

1. During operations, the need may arise to ensure that all contracts performed in the joint operating area are visible, contain certain minimum clauses and requirements, and are being effectively administered.

2. To enable this uniformity of effort in Iraq and Afghanistan, the Deputy Under Secretary of Defense, Acquisition, Technology, and Logistics and the Director of Defense Procurement and Acquisition Policy issued a series of memoranda directing JCC-I/A (now CENTCOM Contracting Command (C3)) to develop TBC procedures, to include procedures on contract administration delegation. Headquarters, Joint Contracting Command – Iraq / Afghanistan, subj.: Theater Business Clearance (TBC) Authority, Procedures, and Requirements for Iraq and Afghanistan, *available at* http://www2.centcom.mil/sites/contracts/Pages/Default.aspx, *also available at* http://centcomcc.net.

3. CENTCOM Contracting Command uses the TBC review process to ensure that contracting officers outside C3 (e.g., external and system support contracting officers) insert mandatory language and clauses in contracts . *Id.* As an example, such clauses include:

a. C3 952.225-0001, Arming Requirements and Procedures for Personal Security Services Contractors and Requests for Personal Protection.

b. C3 952.225-0005, Monthly Contractor Census Reporting

c. C3 952.225-0009, Medical Screening and Vaccination Requirements for Third Country Nationals and Locally Hired Employees Operating in the CENTCOM Area of Responsibility.

d. DFARS 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Forces Deployed Outside the U.S., and DFARS Class Deviation 2007-O0010, Contractor Personnel in the U.S. Central Command Area of Responsibility.

4. The TBC review process also addresses whether in-theater contract administration will be delegated to Defense Contract Management Agency or whether administration will be re-delegated to the procuring contracting officer. *Id.* On May 13, 2013, DPAP issued updates to the TBC policy, including requirements for an in-theater sponsor and in-theater management over contracts, *e.g.* COR, COTR, GTPR. *See* Director, Defense Procurement and Acquisition Policy, subj. Theater Business Clearance Update for the USCENTCOM Area of Responsibility *available at* http://www.acq.osd.mil/dpap.

V. CONTRACTING DURING A DEPLOYMENT

A. General. This section discusses various methods used to acquire supplies and services. It begins with a general discussion of seeking competition, and discusses specific alternatives to acquiring supplies and services pursuant to a new contract to meet the needs of a deploying force.

B. Competition Requirements. The Competition in Contracting Act (CICA), 10 U.S.C. § 2304, requires the government to seek competition for its requirements. *See also* FAR Part 6 and Far 2.101. In general, the government must seek full and open competition by providing all responsible sources an opportunity to compete. No automatic exception is available for contracting operations during deployments.

1. For contracts awarded and performed within CONUS, the statutory requirement of full and open competition for purchases over the simplified acquisition threshold creates a 45-day minimum procurement administrative lead time (PALT), which results from a requirement to publish notice of the proposed acquisition 15 days before issuance of the solicitation (by synopsis of the contract action in the Government-wide Point of Entry (GPE)) at FedBizOpps.gov, followed by a requirement to provide a minimum of 30 days for offerors to submit bids or proposals. Three additional time periods extend the minimum 45-day PALT: 1) time needed for the unit to define the requirement and push it through the requirement generation and approval process; 2) time needed for the contracting office to prepare the solicitation, evaluate offers and award the contract; and 3) time needed after contract award for delivery of supplies or performance of services.

2. There are seven statutory exceptions that permit contracting without full and open competition, which are set forth in 10 U.S.C. § 2304(c) and FAR Subpart 6.3:

a. Only one responsible source and no other supplies or services will satisfy agency requirements. FAR 6.302-1. The contracting

officer may award a contract without full and open competition if the required supplies or services can only be provided by one or a limited number of sources. For example, it may be necessary to award to a particular source where that source has exclusive control of necessary raw materials or patent rights. FAR 6.302-1 provides additional examples of circumstances where use of this exception may be appropriate. This exception allows the KO to limit the competition to those sources that can meet the Government's need.

b. Unusual and compelling urgency. FAR 6.302-2. This exception applies where the need for the supplies or services is of such an unusual or compelling urgency that delay in awarding the contract would result in serious injury to the government. Use of this exception enables the contracting officer to limit the procurement to the only firm(s) he reasonably believes can properly satisfy the requirement in the limited time available.[1] Because of the urgency, the contracting officer is permitted to award the contract even before the written "Justification and Approval" (see paragraph 3 below) is completed. Similarly, the urgency requiring use of this exception can allow the contracting officer to dispense with the 15-day publication requirement. FAR 5.202(a)(2).

c. Industrial mobilization, engineering, developmental, or research capability; or expert services for litigation. FAR 6.302-3. This exception is used primarily when it is necessary to keep vital facilities or suppliers in business, to prevent insufficient availability of critical supplies or employee skills in the event of a national emergency.

d. International agreement. FAR 6.302-4. This exception is used where supplies or services will be used in another country, and the terms of a SOFA or other international agreement or treaty with that country specify or limit the sources. This exception also

[1] This exception can be particularly applicable to meet urgent critical needs relating to human safety and which affects military operations. For example, it was used to procure sandbags in support of Operation Iraqi Freedom (Total Industrial & Packaging Corporation, B-295434, 2005 U.S. Comp. Gen. Proc. Dec. ¶ 38 (Feb. 22, 2005)) and to procure automatic fire suppression systems for U.S. Marine Corps's light armored vehicles (Meggitt Safety Systems, Inc., B-297378, B-297378.2, 2006 U.S. Comp. Gen. LEXIS 27 (Jan. 12, 2006)). However, this exception cannot be used where the urgency was created by the agency's lack of advanced planning. 10 U.S.C. § 2304(f)(5); *see, e.g*., WorldWide Language Resources, Inc.; SOS International Ltd., B-296984; B-296984.2; B-296984.3; B-296984.4; B-296993; B-296993.2; B-296993.3; B-296993.4., 2005 U.S. Comp. Gen. Proc. Dec. ¶ 206 (Nov. 14, 2005) (protest of December, 2004 award of sole-source contract for bilingual-bicultural advisor/subject matter experts in support of Multinational Forces-Iraq sustained where the urgency – the immediate need for the services prior to the January 2005 elections in Iraq – was the direct result of unreasonable actions and acquisition planning by the government 2-3 months earlier).

applies when the acquisition is for a foreign country who will reimburse the acquisition costs (e.g., pursuant to a foreign military sales agreement) directs that the product be obtained from a particular source.

e. Authorized or required by statute. FAR 6.302-5. Full and open competition is not required if a statute expressly authorizes or requires the agency to procure the supplies or services from a specified source, or if the need is for a brand name commercial item for authorized resale.

f. National security. FAR 6.302-6. This exception applies if disclosure of the government's needs would compromise national security. Mere classification of specifications generally is not sufficient to restrict the competition, but it may require potential contractors to possess or qualify for appropriate security clearances. FAR 6.302-6.

g. Public interest. FAR 6.302-7. Full and open competition is not required if the agency head determines that it is not in the public interest for the particular acquisition. Though broadly written, this exception is rarely used because only the head of the agency can invoke it – it requires a written determination by the Secretary of Defense. DFARS 206.302-7.

3. Use of any of these exceptions to full and open competition requires a "Justification and Approval" (J&A). FAR 6.303. For the contents and format of a J&A, refer to AFARS 5106.303, 5153.9004, and 5153.9005. The approving authority is responsible for the J&A, but attorney involvement and assistance is critical to successful defense of the decision to avoid full and open competition. Limiting competition in any way invites protests of the procurement which may interrupt the procurement process. Approval levels for justifications, as listed in FAR 6.304:

a. Actions under $650,000: the contracting officer.

b. Actions from $650,000 to $12.5 million: the competition advocate designated pursuant to FAR 6.501.

c. Actions from $12.5 million to $62.5 million (or $85.5 million for DOD, NASA, and the Coast Guard): the HCA or designee.

d. Actions above $62.5 million (or above $85.5 million for DOD, NASA, and the Coast Guard): the agency acquisition executive. For the Army, this is the Assistant Secretary of the Army for Acquisition, Logistics, and Technology (ASA(ALT)).

4. Contract actions awarded and performed outside the United States, its possessions, and Puerto Rico, for which only local sources will be solicited, generally are exempt from compliance with the requirement to synopsize the acquisition in the GPE. These actions therefore may be accomplished with less than the normal minimum 45-day PALT, but they are not exempt from the requirement for competition. *See* FAR 5.202(a)(12); *see also* FAR 14.202-1(a) (thirty-day bid preparation period only required if procurement is synopsized). Thus, during a deployment, contracts may be awarded with full and open competition within an overseas theater faster than within CONUS, thus avoiding the need for a J&A for other than full and open competition for many procurements executed in rapid fashion. Obtain full and open competition under these circumstances by posting notices on procurement bulletin boards, soliciting potential offerors on an appropriate bidders list, advertising in local newspapers, and telephoning potential sources identified in local telephone directories. *See*, FAR 5.101(a)(2) & (b) and AFARS Manual No. 2, para.4-3.e.

5. Temporary Exceptions. During contingency operations, Congress may authorize temporary exceptions to normal contacting and competition rules through authorization acts or annual or supplemental appropriations acts. Examples in Afghanistan include the Commander's Emergency Response Program, Afghan First Program, and the SC-CASA Program (allowing preferences and set-asides for certain acquisitions from vendors in certain countries along major supply routes to Afghanistan).

C. Methods of Acquisition – Sealed Bidding. This is the appropriate method if award is based only on price and price-related factors, and is made to the lowest, responsive, responsible bidder. *See* FAR Part 14.

1. Sealed bidding procedures must be used if the four conditions enumerated in the Competition in Contracting Act exist. 10 U.S.C. § 2304(a)(2)(A); FAR 6.401; *see also*, Racal Filter Technologies, Inc., B-240579, Dec. 4, 1990, 70 Comp. Gen. 127, 90-2 CPD ¶ 453. These four conditions, commonly known as the "Racal factors," are:

a. Time permits the solicitation, submission, and evaluation of sealed bids;

b. Award will be made only on the basis of price and price-related factors;

c. It is not necessary to conduct discussions with responding sources about their bids; and

d. There is a reasonable expectation of receiving more than one sealed bid.

2. Use of sealed bidding allows little discretion in the selection of a source. Bids are solicited using Invitations for Bids (IFB) under procedures that do not allow for pre-bid discussions with potential sources. A clear description/understanding of the requirement is needed to avoid having to conduct discussions. Sealed bidding requires more sophisticated contractors because minor errors in preparing a bid can make the bid non-responsive and prevent the government from accepting the offer. Only fixed-price type contracts are awarded using these procedures. Sealed bidding procedures are rarely used during active military operations in foreign countries because it is usually necessary to conduct discussions with responding offerors to ensure their understanding of, and capability to meet, U.S. requirements.

D. Methods of Acquisition – Negotiations (also called "competitive proposals").

1. With this acquisition method, award is based on stated evaluation criteria, one of which must be cost, and is made to the responsible offeror whose proposal offers the "best value" to the government. The contracting officer informs potential offerors up front whether best value will be based upon an offeror submitting the "lowest cost, technically acceptable" solution to the government's requirement, or whether best value will be determined on a "cost-technical tradeoff" basis, which allows the government to accept a higher-priced offer if the perceived benefits of the higher-priced proposal outweigh the additional cost. The basis for award (low-cost, technically-acceptable *or* cost-technical tradeoff), and a description of all factors and major subfactors that the contracting officer will consider in making this determination, must be stated in the solicitation. *See* FAR Part 15.

2. Negotiations are used when the use of sealed bids is not appropriate. 10 U.S.C. § 2304(a)(2)(B). Negotiations permit greater discretion in the selection of a source, and allow consideration of non-price factors in the evaluation of offers, such as technical capabilities of the offerors, past performance history, etc. Offers are solicited by use of a Request for Proposals (RFP). Proposals are submitted by offerors and are evaluated in the manner stated in the solicitation. Consistent with the solicitation, the contracting officer may establish a competitive range comprised of the most highly-rated proposals and conduct discussions with those offerors, after which those offerors submit revised proposals for evaluation. Award is made to the offeror whose proposal represents the best value to the government. Negotiations permit the use of any contract type.

E. Simplified Acquisition Procedures.

1. Thresholds. Simplified procedures may be used for procurements below certain dollar amounts. These amounts are specified in FAR Part 2. However, on October 28, 2004, Section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, amended 41 U.S.C. § 1902 (Special Emergency Procurement Authority) to increase each of these thresholds for procurements in support of a contingency operation as defined in 10 U.S.C. § 101(a)(13), or to facilitate defense against or recovery from NBC or radiological attack. Presently, the base thresholds and the increased contingency thresholds are as follows:

a. **Simplified acquisition threshold (SAT)**. Simplified acquisition procedures can be used to procure goods and services up to the "simplified acquisition threshold" (SAT), which is normally $150,000. For purchases supporting a contingency operation but made (or awarded and performed) inside the United States, the SAT is $300,000. For purchases supporting a contingency operation made (awarded and performed) outside the United States, the SAT is $1,000,000. 41 U.S.C. § 1903; FAR 2.101 (restating SAT and defining contingency operation). DFARS Class Deviation 2011-O0009, Simplified Acquisition Threshold for Humanitarian or Peacekeeping Operations (28 Mar. 2011), sets the SAT at $300,000 when soliciting or awarding contracts to be awarded and performed outside the United States to support a humanitarian or peacekeeping operation. *See* FAR 2.101 (defining humanitarian or peacekeeping operation).

b. **Micro-purchase threshold**. The "micro-purchase threshold," below which purchases may be made without competition, is normally $3,000. For purchases supporting a contingency operation but made (or awarded and performed) inside the United States, the micro-purchase threshold is $15,000. For purchases supporting a contingency operation made (or awarded and performed) outside the United States, the micro-purchase threshold is $30,000. 41 U.S.C. § 1903; FAR 2.101.

c. **Commercial items**. Prior to 1 January 2012, the Commercial Items Test Program (CITP) authorized DoD to utilize simplified acquisition procedures up to an amount well above the SAT for the purchase of commercial items. This authority expired on 1 Jan 2012, but was renewed by Section 822 of the National Defense Authorization Act (NDAA) for Fiscal Year 2013, Public Law 112-239, which extends this test program until January 1, 2015. The

commercial items test program threshold is $6,500,000. For purchases supporting a contingency operation, the threshold was $12,000,000. 41 U.S.C. § 1903; FAR 13.500(e).

2. About 95% of the contracting activity conducted in a deployment setting will be simplified acquisitions. The following are various methods of making or paying for these simplified purchases. Most of these purchases can be solicited orally, except for construction projects exceeding $2,000 and complex requirements. *See* FAR 13.106-1(d). The types of simplified acquisition procedures likely to be used during a deployment are:

   a. Purchase Orders. FAR Subpart 13.302; DFARS Subpart 213.302; AFARS Subpart 5113.302 and 5113.306 (for use of the SF 44).

   b. Blanket Purchase Agreements (BPA). FAR Subpart 13.303; DFARS Subpart 213.303; AFARS Subpart 5113.303.

   c. Imprest Fund Purchases. FAR 13.305; DFARS Subpart 213.305; DOD FMR vol. 5, para. 0209.

   d. Government Purchase Card Purchases. FAR 13.301; DFARS 213.279, 213.301; AFARS Subpart 5113.2.

   e. Accommodation checks/government purchase card convenience checks. DoD FMR, vol. 5, ch. 2, para. 0210; *see also* DFARS 213.270(c)(6).

3. <u>Purchase Orders</u>. A purchase order is an offer to buy supplies or services, including construction. Purchase orders usually are issued only after requesting quotations from potential sources. Issuance of an order does not create a binding contract. A contract is formed when the contractor accepts the offer either in writing or by performance. In operational settings, purchase orders may be written using three different forms.

   a. DD Form 1155 or SF 1449. These are multi-purpose forms which can be used as a purchase order, blanket purchase agreement, receiving/inspection report, property voucher, or public voucher. They contain some contract clauses, but users must incorporate all other applicable clauses. FAR 13.307; DFARS 213.307; DFARS PGI 213.307. *See* clause matrix in FAR Part 52. When used as a purchase order, the KO may make purchases up to the simplified acquisition threshold. Only KOs are authorized to use these forms.

   b. Standard Form (SF) 44. This is a pocket-sized form intended for over-the-counter or on-the-spot purchases. Clauses are not incorporated. Use this form for “cash and carry” type purchases.

Ordering officers, as well as KOs, may use this form. Reserve unit commanders may use the SF 44 for purchases not exceeding the micro-purchase threshold when a Federal Mobilization Order requires unit movement to a Mobilization Station or site, or where procurement support is not readily available from a supporting installation. FAR 13.306; DFARS 213.306; AFARS 5113.306. Conditions for use:

(1) As limited by KO's warrant or FOO's appointment letter.

(2) Away from the contracting activity.

(3) Goods or services are immediately available.

(4) One delivery, one payment.

c. Ordering officers may use SF 44s for purchases up to the micro-purchase threshold for supplies or services, except that purchases up to the simplified acquisition threshold may be made for aviation fuel or oil. During a contingency operation, a contracting officer may make purchases up to the simplified acquisition threshold. *See* DFARS 213.306(a)(1).

4. Blanket Purchase Agreements (BPA). FAR Subpart 13.303; DFARS 213.303-5; and AFARS 5113.303. A BPA is a simplified method of filling anticipated repetitive needs for supplies or services essentially by establishing "charge account" relationships with qualified sources of supply. They are not contracts but merely advance agreements for future contractual undertakings. BPAs set prices, establish delivery terms, and provide other clauses so that a new contract is not required for each purchase. The government is not bound to use a particular supplier as it would be under a requirements contract. KO negotiates firm-fixed-prices for items covered by the BPA, or attaches to the BPA a catalog with pertinent descriptions/prices.

a. BPAs are prepared and issued on DD Form 1155 or SF 1449 and must contain certain terms/conditions. FAR 13.303-3:

(1) Description of agreement.

(2) Extent of obligation.

(3) Pricing.

(4) Purchase limitations.

(5) Notice of individuals authorized to place purchase orders under the BPA and dollar limitation by title of position or name.

(6) Delivery ticket requirements.

(7) Invoicing requirements.

b. KOs may authorize ordering officers and other individuals to place calls (orders) under BPAs. FAR 13.303, AFARS 5113.303-2. Existence of a BPA does not per se justify sole-source procurements. FAR 13.303-5(c). Consider BPAs with multiple sources. If insufficient BPAs exist, solicit additional quotations for some purchases and make awards through separate purchase orders.

5. Imprest Funds. An imprest fund is a cash fund of a fixed amount established by an advance of funds from a finance or disbursing officer to a duly appointed cashier. The cashier disburses funds as needed to pay for certain simplified acquisitions. Authorized individuals (ordering officers and contracting officers) make purchases and provide the receipts to the cashier. When documented expenditures deplete the amount of cash in the imprest fund, the cashier may request to have the fund replenished. FAR 13.305; DFARS 213.305; DOD FMR vol. 5, para. 0209.

a. DOD activities are not authorized to use imprest funds unless the Under Secretary of Defense (Comptroller) approves an exception to policy for a contingency or classified operation. DOD FMR, vol. 5, para. 020902.

b. Imprest funds may not exceed $10,000 and a single transaction may not exceed $500. During contingency operations, the designated area commander may increase the ceiling on cash holdings to $100,000 and the single transaction limit to $3,000. DOD FMR 020903.

c. DOD FMR vol. 5, para. 0209, contains detailed guidance on the appointment, training, and procedures governing the use of imprest funds, to include permissible and prohibited expenditures. Imprest fund cashiers should receive training in their duties, liabilities, and the operation of an imprest fund prior to deployment.

6. Government-wide Purchase Card (GPC). Authorized GPC holders may use the cards to purchase goods and services up to the micro-purchase threshold. FAR 13.301(c). In a contingency operation, KOs may use the cards for purchases up to the SAT. DFARS 213.301(3). Overseas, even if

not in a designated contingency operation, authorized GPC holders may make purchases up to $30,000 for certain commercial items/services for use outside the U.S., but not for work to be performed by workers recruited within the United States. *See* DFARS 213.301(2) (containing additional limitations on this authority). The GPC can also be used as a payment instrument for orders made against Federal Supply Schedule contracts, calls made against a Blanket Purchase Agreement (BPA), and orders placed against Indefinite Delivery/Indefinite Quantity (IDIQ) contracts that contain a provision authorizing payment by purchase card. FAR 13.301(c); AFARS 5113.202-90. Funds must be available to cover the purchases. Special training for cardholders and billing/certifying officials is required. AFARS 5113.201(c). Issuance of these cards to deploying units should be coordinated prior to deployment, because there may be insufficient time to request and receive the cards once the unit receives notice of deployment.

7. Accommodation Checks/Purchase Card Convenience Checks. Commands involved in a deployment may utilize accommodation checks and/or GPC convenience checks in the same manner as they are used during routine operations. Checks should only be used when Electronic Funds Transfer (EFT) or the use of the government purchase card is not possible. *See* DoD FMR, vol. 5, ch. 2, para. 0210. Government purchase card convenience checks may not be issued for purchases exceeding the micro-purchase threshold. *See* DoD FMR, vol. 5, ch. 2, para. 021001.B.1.

8. Commercial Items Acquisitions. FAR Part 12. Much of our deployment contracting involves purchases of commercial items. The KO may use any simplified acquisition method to acquire commercial items, or may use one of the other two acquisition methods (sealed bidding or negotiations). All three acquisition methods are streamlined when procuring commercial items. FAR Part 12 sets out a series of special simplified rules, to include a special form, simplified clauses, and streamlined procedures that may be used in acquiring commercial items. However, any contract for commercial items must be firm-fixed-price or fixed-price with economic price adjustment. FAR 12.207.

9. Simplified Acquisition Competition Requirements. The requirement for full and open competition does not apply to simplified acquisitions. However, for simplified acquisitions above the micro-purchase threshold, there is still a requirement to obtain competition "to the maximum extent practicable," which ordinarily means soliciting at least 3 quotes from sources within the local trade area. FAR 13.104(b). For purchases at or below the micro-purchase threshold, there is no competition requirement at all, and obtaining just one oral quotation will suffice so long as the price

is fair and reasonable. FAR 13.202(a)(2). Additional simplified acquisition competition considerations:

a. Micro-purchases. While there is no competition requirement, micro-purchases shall be distributed equitably among qualified sources to the extent practicable. FAR 13.202(a)(1). If practicable, solicit a quotation from other than the previous supplier before placing a repeat order. Oral solicitations should be used as much as possible, but a written solicitation must be used for construction requirements over $2,000. FAR 13.106-1(d).

b. Simplified acquisitions above the micro-purchase threshold. Because there is still a requirement to promote competition "to the maximum extent practicable," KOs may not sole-source a requirement above the micro-purchase threshold unless the need to do so is justified in writing and approved at the appropriate level. FAR 13.501. Soliciting at least three sources is a good rule of thumb to promote competition to the maximum extent practicable. Whenever practicable, request quotes from two sources not included in the previous solicitation. FAR 13.104(b). You normally should also solicit the incumbent contractor. J. Sledge Janitorial Serv., B-241843, Feb. 27, 1991, 91-1 CPD ¶ 225.

c. Requirements aggregating more than the SAT or the micro-purchase threshold may not be broken down into several purchases merely to avoid procedures that apply to purchases exceeding those thresholds. FAR 13.003(c).

10. Publication (Notice) Requirements. Normally, contracting officers are required to publish a synopsis of proposed contract actions over $25,000 on the Government-wide point of entry (GPE) at FedBizOpps.gov. 15 U.S.C. § 637(e); 41 U.S.C. § 1708; FAR 5.101(a)(1) and FAR 5.203. For actions estimated to be between $15,000 and $25,000, public posting (displaying notice in a public place) of the proposed contract action for 10 days is normally required. 15 U.S.C. § 637(e); 41 U.S.C. § 1708; FAR 5.101(a)(2). None of these notice requirements exist if the disclosure of the agency's needs would compromise national security. 15 U.S.C. § 637(g)(1)(B); 41 U.S.C. § 1708; FAR 5.101(a)(2)(ii) and FAR 5.202(a)(1). Disclosure of most needs in a deployment would not compromise national security. Still, the requirement to publish notice in FedBizOpps.gov is often not required in deployment contracting because there are other exemptions listed at FAR 5.202 that will often apply. For example, publication is not required for contracts that will be made and performed outside the United States, and for which only local sources will be solicited. FAR 5.202(a)(12). Accordingly, notice of proposed contract

actions overseas is accomplished primarily through public posting at the local equivalent of a Chamber of Commerce, bulletin boards outside the deployed contracting office, or other locations readily accessible by the local vendor community. *See* FAR 5.101(a)(2) & (b)

F. Use of Existing Contracts to Satisfy Requirements.

1. Existing ordering agreements, indefinite delivery contracts, and requirements contracts may be available to meet recurring requirements, such as fuel, subsistence items, and base support services. Investigate the existence of such contracts with external and theater support contracting activities. For a discussion of theater and external support contracts, *see supra* subpart III.C.

2. Theater Support Contracts. In developed theaters, the theater contracting activity (regardless of organizational type) may have existing indefinite quantity-indefinite delivery (IDIQ) contracts, BPAs, or requirements contracts available to efficiently satisfy a unit's needs. For example, C3 may have multiple award IDIQ contracts for base support services and security services. If a unit has a requirement for either of these services, C3 may expeditiously award the task order to one awardees of the underlying IDIQ contract utilizing the "fair opportunity" to be considered procedures in FAR 16.5.

G. Alternative Methods for Fulfilling Requirements**.** New and existing contracts are not the only method of meeting the needs of deployed military forces. The military supply system is the most common source of supplies and services. Cross-servicing agreements and host-nation support agreements exist with NATO, Korea, and other major U.S. allies. Similarly, under the Economy Act, other government agencies may fill requirements for deployed forces, either from in-house resources or by contract. Finally, service secretaries retain substantial residual powers under Public Law 85-804 that may be used to meet critical requirements that cannot be fulfilled using normal contracting procedures.

1. Host nation support and acquisition and cross-servicing agreements are also means of fulfilling the needs of deployed U.S. forces and are addressed in 10 U.S.C. § 2341-2350; governed by U.S. Dep't of Defense, Dir. 2010.9, Acquisition and Cross-Servicing Agreements (28 Apr. 2003); and implemented by Joint Chiefs of Staff, Instr. 2120.01A, Acquisition and Cross-Servicing Agreements (27 Nov. 2006). Army guidance is located in U.S. Dep't of Army, Reg. 12-1, Security Assistance, International Logistics, Training, and Technical Assistance Support Policy and Responsibilities (24 Jan. 2000). These authorities permit acquisitions and transfers of specific categories of logistical support to take advantage of existing stocks in the supply systems of the U.S. and allied nations.

Transactions may be accomplished notwithstanding certain other statutory rules related to acquisition and arms export controls. For further information, *see* Contract & Fiscal Law Dep't, The Judge Advocate General's School, U.S. Army, Fiscal Law Deskbook, ch. 10, Operational Funding (updated frequently and available online at www.jagcnet.army.mil).

2. The Economy Act (31 U.S.C. § 1535) provides another alternative means of fulfilling requirements. An executive agency may transfer funds to another agency, and order goods and services to be provided from existing stocks or by contract. For example, the Air Force could have construction performed by the Army Corps of Engineers, and the Army might have Department of Energy facilities fabricate special devices for the Army. Procedural requirements for Economy Act orders, including obtaining contracting officer approval on such actions, are set forth in FAR 17.5; DFARS 217.5; U.S. Dep't of Defense, Instr. 4000.19, Interservice and Intragovernmental Support (25 April 2013); and DFAS-IN 37-1. For further information, *see* Contract & Fiscal Law Dep't, The Judge Advocate General's School, U.S. Army, Contract Law Deskbook, ch. 11, Interagency Acquisitions (updated frequently and available online at www.jagcnet.army.mil).

3. Extraordinary contractual actions under Pubic Law 85-804. During a national emergency declared by Congress or the President and for six months after the termination thereof, the President and his delegees may initiate or amend contracts notwithstanding any other provision of law whenever it is deemed necessary to facilitate the national defense. Pub. L. No. 85-804, codified at 50 U.S.C. §§1431-1435; Executive Order 10789 (14 Nov. 1958); FAR Part 50; DFARS Part 250. These powers are broad, but the statute and implementing regulations contain a number of limitations. For example, these powers do not allow waiving the requirement for full and open competition, and the authority to obligate funds in excess of $65,000 may not be delegated lower than the Secretariat level. This authority is rarely used. Additionally, despite this grant of authority, Congress still must provide the money to pay for obligations

H. Leases of Real Property. The Army is authorized to lease foreign real estate for military purposes. 10 U.S.C. § 2675. True leases normally are accomplished by the Army Corps of Engineers using Contingency Real Estate Support Teams (CREST).

VI. POLICING THE CONTRACTING BATTLEFIELD

A. **Ratification of Contracts Executed by Unauthorized Government Personnel.** Only warranted KOs can legally bind the government in contract. However,

sometimes other government officials purport to bind the government. This may occur, for example, when a commander directs a contractor to take actions beyond the scope of an existing contract or in the absence of a contract. An "unauthorized commitment" is an agreement that is not binding on the government solely because it was made by someone who did not have authority to bind the government. (FAR 1.602-3).

1. Because the person making the unauthorized commitment had no authority to bind the government, the government has no obligation to pay the unauthorized commitment. However, someone with actual authority to bind the government may choose to subsequently ratify the unauthorized commitment.

2. Based upon the dollar amount of the unauthorized commitment, the following officials have the authority to ratify the unauthorized commitment (*See* FAR 1.602-3; AFARS 5101.602-3):

   a. Up to $10,000 - Chief of Contracting Office

   b. $10,000 - $100,000 – PARC or SCO

   c. Over $100,000 – HCA

3. These officials may ratify only when (FAR 1.602-3(c)):

   a. The government has received the goods or services.

   b. The ratifying official has the authority to enter into a contractual commitment.

   c. The resulting contract would have otherwise been proper if made by an appropriate contracting officer.

   d. The price is fair and reasonable.

   e. The contracting officer recommends payment and legal counsel concurs, unless agency procedures do not require such concurrence.

   f. Proper funds are available and were available at the time the unauthorized commitment was made.

B. Extraordinary Contractual Actions. If ratification is not appropriate, for example, where no agreement was reached with the supplier, the taking may be compensated as an informal commitment. FAR 50.102-3; 50.103-2(c).

Alternatively, the supplier may be compensated using service secretary residual powers. FAR Subpart 50.104.

1. Requests to formalize informal commitments must be based on a request for payment made within 6 months of furnishing the goods or services, and it must have been impracticable to have used normal contracting procedures at the time of the commitment. FAR 50.102-3(d).

2. These procedures have been used to reimburse owners of property taken during the Korean War (AFCAB 188, 2 ECR § 16 (1966)); in the Dominican Republic (Elias Then, Dept. of Army Memorandum, 4 Aug. 1966); in Jaragua S.A., ACAB No. 1087, 10 Apr. 1968; and in Panama (Anthony Gamboa, Dep't of Army Memorandum, Jan. 1990).

C. Quantum Meruit.

1. Prior to 1995-1996, the Comptroller General had authority under 31 U.S.C. § 3702 to authorize reimbursement on a quantum meruit or quantum valebant basis to a firm that performed work for the government without a valid written contract.

2. Under quantum meruit, the government pays the reasonable value of services it actually received on an implied, quasi-contractual basis. Maintenance Svc. & Sales Corp., 70 Comp. Gen. 664 (1991).

3. The GAO used the following criteria to determine justification for payment:

   a. The goods or services for which the payment is sought would have been a permissible procurement had proper procedures been followed;

   b. The government received and accepted a benefit;

   c. The firm acted in good faith; and

   d. The amount to be paid did not exceed the reasonable value of the benefit received. Maintenance Svc. & Sales Corp., 70 Comp. Gen. 664 (1991).

4. Congress transferred the claims settlement functions of the GAO to the Office of Management and Budget, which further delegated the authority. See The Legislative Branch Appropriations Act, 1996, Pub. L. 104-53, 109 Stat. 514, 535 (1995); 31 U.S.C. 3702.

5. The Claims Division at the Defense Office of Hearings and Appeals (DOHA) settles these types of claims for the Department of Defense. DOHA decisions can be found at www.defenselink.mil/dodgc/doha.

D. Contract Disputes Act (CDA) claims. If the contractor believes it can meet its burden in proving an implied-in-fact contract, it can appeal a contracting officer's final decision to the United States Court of Federal Claims or the cognizant board of contract appeals. 41 U.S.C. §§ 7101-7109; FAR Subpart 33.2.

E. Contracting With The Enemy.

1. Section 841 of the 2012 NDAA (Public Law 112-81) authorizes the HCA to restrict award, terminate contracts already awarded, or void contracts to contractors who directly or indirectly fund the insurgency or forces opposing the U.S. in the CENTCOM theater of operations. Further, the CENTCOM Commander can use battlefield intelligence to make this determination and does not have to disclose that intelligence to the affected contractor. This authority applies to all contracts that will be executed in the CENTCOM AOR for more than $100,000.

2. Section 842 of the 2012 (Public Law 112-81) NDAA requires the inclusion of a contract term for contracts covered by sections 841 and 842 that allows the government to inspect "any records of the contractor" or subcontractor to ensure contract funds are not going to support the insurgency or otherwise oppose US action in the CENTCOM AOR.

VII. CONCLUSION

Individuals who have little to no contracting experience often spend staggering sums of money in support of their unit's mission. The most important thing to remember when dealing with the expenditure of appropriated funds, whatever the vehicle or mechanism, is that each decision to spend money carries consequences. To that extent, it is worth the time and effort to prepare, research, reach out, and be diligent to adhere to contracting rules and regulations. Judge Advocates are encouraged to develop reach-back relationships prior to deployment, both within their command and outside, so difficult questions can be answered accurately and quickly.

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Chapter 31
Contingency Contractor Personnel

2013 Contract Attorneys Deskbook

CHAPTER 31

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CHAPTER 31

CONTINGENCY CONTRACTOR PERSONNEL

I. INTRODUCTION

Throughout the history of U.S. military operations, the U.S. Military has relied upon goods and services provided by contractors. Contractors multiply the effectiveness of our fighting force by freeing up uniformed personnel to focus on primary duties. However, this reliance has grown over the years to the extent that there are often as many contractors on the battlefield as there are uniformed personnel. A report by the Commission on Wartime Contracting cited that the Defense Department alone had 207,533 contractors in Iraq and Afghanistan as of 31 March 2010. This represented a ratio of soldiers to contractors of approximately 1:1. Contractor roles have also expanded, now including such tasks as personnel and static security. No matter what type of unit a deploying Judge Advocate is advising, it is almost certain that the unit will rely on contracted support for at least some functions. Accordingly, it is paramount that Judge Advocates understand the relationship between DoD and contractor personnel while conducting contingency operations.

II. REFERENCES

A. U.S. Dep't of Defense, Defense Federal Acquisition Reg. Supp. 225.74 [hereinafter DFARS], with its accompanying clause at DFARS 252.225-7040; U.S. Dep't of Defense, Defense Procedures, Guidance, and Information 225.74 [hereinafter DFARS PGI]; DFARS Class Deviation 2011-O0004, Contractor Personnel Performing in the United States Central Command Area of Responsibility, 25 Apr. 2011, available at http://www.acq.osd.mil/dpap/policy/policyvault/USA001267-11-DPAP.pdf [hereinafter DFARS Class Deviation 2011-O0004).

B. U.S. Dep't of Defense, Instr. 3020.41, Operational Contract Support (20 Dec. 2011) [hereinafter DoDI 3020.41].

C. U.S. Dep't of Defense, Instr. 3020.50, Private Security Contractors (PSCs) Operating in Contingency Operations, Humanitarian or Peace Operations, or Other Military Operations or Exercises (1 Aug. 2011) [hereinafter DoDI 3020.50].

D. U.S. Dep't of Defense, Instr. 5525.11, Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members (3 Mar. 2005) [hereinafter DoDI 5525.11].

E. Army Contractors Accompanying the Force (CAF) (AKA Contractors on the Battlefield) Guidebook, Procurement and Industrial Base Policy Office under the

Deputy Assistant Secretary of the Army (Policy and Procurement), September 2003, available at http://www.afsc.army.mil/gc/files/CAF%20Guidebook.doc [hereinafter CAF Guidebook].

F. Army Sustainment Command Contractors on the Battlefield Webpage, located at http://www.aschq.army.mil/home/BattlefieldResourceLibrary.aspx (containing links to contingency contractor personnel related materials and websites).

G. Assistant Sec'y of the Army (Acquisition, Logistics and Tech.), Contingency Contracting and Contractor on the Battlefield Library, available at https://www.alt.army.mil/portal/page/portal/oasaalt/SAAL-ZP-Contingency-Contracting (containing links to materials relevant to contingency contracting; deployments; contingency contractor personnel; suggested contracting clauses; contingency contracting articles; etc.).

H. CENTCOM Contracting Command (C3) Training Website, located at http://centcomcc.net/ (containing training materials, checklists, policy documents, acquisition instructions, and contract clauses).

I. U.S. Dep't Of Army, Reg. 715-9, Operational Contract Support Planning and Management (20 Jul. 2011) [hereinafter AR 715-9].

J. U.S. Dep't Of Army, Reg. 700-137, Logistics Civil Augmentation Program (LOGCAP) (28 Dec. 2012) [hereinafter AR 700-137].

K. See Section IX below for additional references.

III. CATEGORIES OF CONTRACTORS

A. General.

1. The contract is the only legal basis for the relationship between a contractor and the U.S. Government. As such, the contract is the primary resource one should consult on issues relating to contractor support and operations in theater. Known generally as "contingency contractor personnel," these are individual contractors, individual subcontractors at all tiers, contractor employees, and sub-contractor employees at all tiers under all contracts supporting the Military Services during Contingency Operations. See DODI 3020.41, Part II (definitions). However, they are not all afforded the same legal status, access to government-provided benefits, and access to government property (installations, billeting, etc.).

2. Types of contingency contractors. A contract may generally characterize a contractor's relationship to the U.S. government into one of four broad categories, based on the terms included in their respective contracts: (1) Contractors Authorized to Accompany the Force (CAAF); (2) DoD contractors not accompanying the U.S. Armed Forces in the CENTCOM AOR; (3) DoD contractors not accompanying the U.S. Armed Forces

outside the CENTCOM AOR; and (4) Non-DoD contractors (e.g., Department of State, U.S. Agency for International Development, etc.).

3. Letter of Authorization (LOA). The LOA is a document that memorializes all the support due to a contractor under their contract. Each individual contractor should carry a copy of his or her LOA on their person at all times, as this document provides their authorization to obtain the support/services that are called for under the contract. Without this document, it will be very difficult to determine what support a particular individual should receive.

B. Contractors Authorized to Accompany the Force (CAAF).

1. CAAF are afforded the highest amount of access to government furnished benefits and resources, and carry the most protected legal status possible for civilians. These contractors are imbedded in units, live in government housing on the compound or camp, and perform duties often alongside uniformed personnel. They are often highly skilled, and many are former members of the military. Though most CAAF contractors accompany the force into the CENTCOM AOR, they may also accompany the U.S. Military on other contingency operations, such as those conducted in Haiti.

2. Legal Status. The Geneva Conventions and other international agreements define a contractor's status as a civilian accompanying the force in the field. Civilians accompanying the force are generally defined as persons who accompany the Armed Forces without actually being members thereof and are responsible for the welfare of the armed forces. Authorization to accompany the force is demonstrated by possession of a DD Form 489 (Geneva Conventions Identity Card for Persons who Accompany the Armed Forces). These individuals are usually U.S. citizens, but may be third-country nationals (TCNs) or local nationals (LNs).

3. Government Support.

a. DoDI 3020.41 establishes and implements policy and guidance, assigns responsibilities, and serves as a comprehensive source of DoD policy and procedures concerning requirements for management and interaction with CAAF.

b. Obtaining CAAF status begins with the language in the underlying contract. If the contract (or portions of the contract) requires employees to have CAAF status, that contract will contain DFARS Clause 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States." This clause applies to CAAF who accompany U.S. forces

in contingency operations, humanitarian or peacekeeping operations, or other operations or exercises as approved by the Combatant Commander. It provides a number of important authorizations and requirements, including:

(1) Access to health care (on a reimbursable basis), including resuscitative care, stabilization, hospitalization at level III military treatment facilities, and assistance with patient movement in emergencies where loss of life, limb, or eyesight could occur.

(2) Government-provided security, if:

(a) the contractor cannot obtain effective security services;

(b) effective security services are unavailable at a reasonable cost; or

(c) threat conditions necessitate security through military means.

4. To use deadly force, though only in self-defense (or when such force appears reasonably necessary to execute a security mission, if that is what their contract requires). CAAF may be armed upon approval of the Combatant Commander.

5. To be considered a Prisoner of War if captured by the enemy, and to carry a Geneva Conventions ID card identifying the individual as covered by GPW as authorized to accompany the force.

6. To be processed through a military pre-deployment site, such as the CONUS Replacement Center (CRC) at Ft. Benning, GA.

C. Non-CAAF, Performing in CENTCOM AOR.

1. Not all contractor personnel in a designated operational area are or will be CAAF, even though they are operating in the CENTCOM AOR and often alongside DOD employees. As an example, the DFARS PGI states that contractor personnel performing reconstruction contracts generally are not authorized to accompany the U.S. Armed Forces.

2. DFARS Class Deviation 2011-O0004, Contractor Personnel in the United States Central Command (CENTCOM) Area of Responsibility (AOR), governs contractor personnel in the CENTCOM AOR who are not authorized to accompany the force.

3. The main difference between these contractors and those designated as CAAF is found in the support provided to, and accountability of, those contractors:

a. Non-CAAF contractors receive a lower level of support from the U.S. Government (e.g., security protection and medical treatment), and

b. Non-CAAF may not be subject to the UCMJ for offenses committed in theater.

D. Non-CAAF, Performing Outside the CENTCOM AOR.

Some contractors may be hired to perform work outside the United States in support of a contingency operation, but will not actually go into the CENTCOM AOR (for example, to support operations in Haiti). DFARS 225.301-4 requires use of the clause at FAR 52.225-19 when defense contractors will (a) not accompany the Armed Forces and (b) perform in a designated operational area or support a diplomatic or consular mission outside the United States and outside the CENTCOM AOR.

E. Non-DoD Contractors in Contingency Environments.

Contractors of other government agencies, such as the Department of State, are governed by the FAR Part 25.3 and its accompanying clause at FAR 52.225-19 as well as other agency specific regulations and directives.

IV. TYPES OF CONTRACTS

A. General.

Contingency operations require many contracts to support full operations. These may be let by local contracting personnel (for smaller requirements). However, many of the contracts required are too large and complicated to be executed within theater. Accordingly, some contracts are let CONUS to support operations overseas. Still others are let based on the requirement to support specific systems (weapons or otherwise) wherever they may be used. All of these contracts may support a contingency operation, but they are grouped into three main categories for purposes of understanding the contracting authorities used to procure the various services.

B. External Support Contracts.

External Support Contracts are prearranged contracts let by authorities outside the contingency operating area, but which support the effort. They are called “external” because the authority used to enter into these contracts is derived from authorities other than those present in theater.

Examples include the Army Logistics Civil Augmentation Program (LOGCAP), the Air Force Contract Augmentation Program, the Navy Construction Capabilities Contract, Civil Reserve Air Fleet contracts, and war reserve materiel contracts. Support under external support contracts is often designated as "essential contractor services" under the contract.

Contract personnel under external support contracts who are hired predominantly from outside the operational area to support deployed operational forces. External support contractors include TCN personnel and local national personnel who are hired under a subcontract relationship of a prime external support contract.

C. System Support Contracts.

1. System Support Contracts are awarded by acquisition program management (PM) offices to support specific weapons or other systems. For example, a system support contract for Mine Resistant Ambush Protected (MRAP) vehicles would be awarded when the vehicles are purchased and would support maintenance, modification, troubleshooting, and operation requirements. They provide essential support to specific systems throughout the system's life cycle (including spare parts and maintenance for key weapons systems, command and control infrastructure, and communications systems) across the range of military operations. Support under systems support contracts is often designated as "essential contractor services" under the contract.

2. Contract personnel under systems support contracts normally have high levels of technical expertise, and are hired to support specific military systems. These are often U.S. Citizens and are considered CAAF in most cases.

D. Theater Support Contracts.

1. Contracts awarded within the contingency operations area to support deployed operational forces are called Theater Support Contracts. Military contracting personnel with the deployed force, working under the contracting authority of the theater, component, or joint forces command contracting chief, normally award and administer these contracts. Theater support contracts provide goods, services, and minor construction, usually from the local vendor base, to meet the immediate needs of operational commanders. Most of these contracts do not provide essential contractor services; however, there are exceptions such as fuel and transportation support.

2. Contract personnel under theater support contracts that are hired in, and operating in, a specific operational area. They are often LNs or TCNs and are usually not considered CAAF.

V. LEGAL STATUS

A. International Law.

1. Contractors may support military operations as "civilians accompanying the force." Contractors must be designated as such by the military force they are accompanying and must be provided an appropriate identification (ID) card under the Geneva Conventions.

2. If captured during armed conflict, CAAF are entitled to POW status.

3. CAAF may support operations through indirect participation, such as by providing communications support, transporting munitions and other supplies, performing maintenance on military equipment, and other logistic services. CAAF who "engage in hostilities" risk being treated as combatants (and thus being targeted, etc.). Further, they risk being treated as "unprivileged belligerents" (and thus as war criminals).

4. Arming of CAAF, and CAAF performance of security services, are addressed below in Section VI.

5. Each service to be performed by CAAF in contingency operations shall be reviewed, on a case-by-case basis, in consultation with the servicing legal office to ensure compliance with applicable law and regulation.

B. Host Nation (HN) and Third-Country National (TCN) Laws.

1. Subject to international agreements, CAAF are subject to HN law and the law of their home country (TCN law).

2. **Status of Forces Agreements (SOFAs)**. SOFAs are international agreements between two or more governments that provide various privileges, immunities, and responsibilities and enumerate the rights and responsibilities of individual members of the deployed force. The United States does not have SOFA arrangements with every country, and some SOFAs do not adequately cover all contingencies. As such, it is possible that CAAF and Soldiers will be treated differently by a local government.

a. CAAF may or may not be subject to criminal and/or civil jurisdiction of the host country to which they are deploying. CAAF status will depend upon the specific provisions of the SOFA, if any, that are applicable between the U.S. and the country of deployment at the time of deployment.

b. If an international agreement (e.g., SOFA) does not address CAAF status, the contractor may be unable to perform because their employees may not be able to enter the country or the contractor

could be treated as a foreign corporation subject to local laws and taxation policies.

c. The North Atlantic Treaty Organization (NATO) SOFA is generally accepted as the model for bilateral and multilateral SOFAs between the U.S. Government and host nations around the world.

d. The NATO SOFA covers three general classes of sending state personnel: 1) Members of the "force," i.e., members of the armed forces of the sending state; 2) Members of the "civilian component," i.e., civilian employees of the sending state; 3) "Dependents," i.e., the spouse or child of a member of the force or civilian component that is dependent upon them for support.

e. Under the generally accepted view of the NATO SOFA, contractor employees are not considered members of the civilian component. Accordingly, special technical arrangements or international agreements generally must be concluded to afford contractor employees the rights and privileges associated with SOFA status.

f. If there is no functioning government with which the Department of State can negotiate a SOFA, contract planners must comply with the policy and instructions of the Combatant Commander when organizing the use of contractors in that country.

g. If there is any contradiction between a SOFA and an employer's contract, the terms of the SOFA will take precedence.

h. The following websites may help determine if the U.S. has a SOFA agreement with a particular country: http://www.jagcnet.army.mil (CLAMO section); https://aflsa.jag.af.mil/INTERNATIONAL (site requires FLITE registration and password); http://www.state.gov (this webpage also contains country studies, a quick way to learn about a country to which personnel are deploying).

3. Contingency contractor personnel remain subject to the laws of their home country. Application of U.S. law is discussed below in Section VII.

C. Afghanistan.

1. **US Contractors - Operation Enduring Freedom**.

a. Authority. United States relations with the Islamic Republic of Afghanistan and immunities are discussed in the Agreement Regarding the Status of United States Military and Civilian Personnel of the U.S. Department of Defense Present in

Afghanistan in Connection with Cooperative Efforts in Response to Terrorism, Humanitarian and Civic Assistance, Military Training and Exercises, and Other Activities. This Agreement, drafted as a Diplomatic Note, entered into force on 28 May 2003, as effected by exchanges of notes on 26 September 2002 (Note 202), 12 December 2002 (Note 791), and 28 May 2003 (Note 93).

b. U.S. Military and Civilian Personnel. Provided a "status equivalent to that accorded to the administrative and technical staff of the Embassy of the United States of America under the Vienna Convention on Diplomatic Relations of April 18, 1981."

c. Contractor Personnel.

(1) The Agreement affirms U.S. criminal jurisdiction over contractor personnel. However, the agreement also provides that contractors remain subject to the criminal jurisdiction of the Islamic Republic of Afghanistan. The Agreement does not state which country has primary jurisdiction.

(2) The Agreement precludes the transfer or surrender of contractor and other U.S. personnel to an international tribunal or any other entity or state without the express consent of the United States.

2. International Security Assistance Force (ISAF) Contractors.

a. Contracts with ISAF forces are governed by a 2002 Military Technical Agreement negotiated with the Afghan Interim Authority.

b. This agreement provides that "all ISAF and supporting personnel are subject to the exclusive jurisdiction of their own governments. ISAF personnel are immune from arrest or detention by Afghan authorities, and may not be turned over to any international tribunal or any other entity or State without the express consent of the contributing nation."

VI. ADMINISTRATIVE ACCOUNTABILITY AND PROCESSING

A. **General**. Combatant Commanders are responsible, with assistance from their Component Commanders, for overall contractor visibility within their AOR.

B. The Synchronized Pre-deployment and Operational Tracker (SPOT).

1. All defense contractors awarded contracts that support contingency operations are required, per contract, to register their employees in the

SPOT system. Registration in SPOT is required in order to receive a Letter of Authorization (LOA). *See infra* Subpart V.B. for a discussion of LOAs.

2. Pursuant to requirements in the 2008 and 2009 National Defense Authorization Acts, the Departments of Defense and State, together with USAID, entered into a "Memorandum of Understanding Relating to Contracting in Iraq and Afghanistan." In this document, the three parties agreed to use the SPOT system as the system of record for tracking all contractors in those locations. The agencies must include in the database information on contacts with more than 14 days of performance or valued at more than $100,000.

3. SPOT relationship to CENTCOM CENSUS. United States Central Command performs a quarterly census of all contractors in the CENTCOM AOR. The census is an alternate means of providing more complete information on contractor personnel in Iraq and Afghanistan pending full implementation of the SPOT database.

4. SPOT may be accessed at https://spot.altess.army.mil/default.aspx.

C. Contractor Responsibilities.

1. Accountability. All contingency contractor personnel must be registered in SPOT. These contractors are responsible for knowing the general location of their employees and shall keep the database updated. The clauses at DFARS 252.225-7040(g), DFARS Class Deviation 2011-O0004(g), and DFARS 225.301-4(2) (which references the Clause at FAR 52.225-19) impose this same requirement on all defense contractors in any contingency environment covered by the clauses.

2. Personnel Requirements.

a. Medical. Contractors are responsible for providing medically and physically qualified personnel. Any CAAF deemed unsuitable to deploy during the deployment process, due to medical or dental reasons, will not be authorized to deploy. The clauses at DFARS 252.225-7040(e)(ii), DFARS Class Deviation 2011-O0004(e)(2)(ii), and FAR 52.225-19(e)(2)(ii) impose this same requirement on all defense contractors in any contingency environment covered by the clauses. Further, the SECDEF may direct mandatory immunizations for CAAF performing DoD-essential services. Contracts must stipulate that CAAF must provide medical, dental and DNA reference specimens, and make available medical and dental records.

b. Contracting officers may authorize contractor-performed medical deployment processing. Contracting officers shall coordinate with

and obtain approval from the military departments for contractor-performed processing.

D. CONUS Replacement Centers (CRC) and Individual Deployment Cites (IDS).

1. All CAAF shall report to a deployment center designated in the contract, or be processed through a government-authorized deployment processing facility before deploying to a contingency operation. Actions at the deployment center include:

a. Validating accountability information in the joint database; verify: security background checks completed, possession of required vehicle licenses, passports, visas, and next of kin/emergency data cards;

b. Issuing/validating proper ID cards;

c. Issuing applicable government-furnished equipment;

d. Providing medical/dental screenings and required immunizations. Screening will include HIV testing, pre- and post-deployment evaluations, dental screenings, and TB skin tests. A military physician will determine if the contractor employee is qualified for deployment and will consider factors such as age, medical condition, job description, medications, and requirements for follow-up care;

e. Validating/completing required theater-specific training (e.g., law of war, detainee treatment, Geneva Conventions, General Orders, standards of conduct, force protection, nuclear/biological/chemical, etc);

f. All CAAF shall receive deployment processing certification (annotated in the letter of authorization (LOA) or separate certification letter) and shall bring this certification to the JRC and carry it with them at all times;

2. Waivers. For less than 30-day deployments, the Combatant Commander may waive some of the formal deployment processing requirements, including processing through a deployment center. Non-waivable requirements include possession of proper ID card, proper accountability, and medical requirements (unless prior approval of qualified medical personnel). CAAF with waivers shall carry the waiver with them at all times.

3. **Contractor Personnel Other than CAAF**. Contractors not accompanying the Armed Forces and who are arriving from outside the area of performance must also process through the departure center

specified in the contract or complete another process as directed by the contracting officer to ensure minimum theater admission requirements are satisfied.

E. Joint Replacement Center (JRC). CAAF shall process through an in-theater reception center upon arrival at the deployed location. The JRC will validate personnel accountability, ensure theater-specific requirements are met, and brief CAAF on theater-specific policies and procedures. DFARS 252.225-7040(f) subjects CAAF to similar procedures. Contractors not accompanying the Armed Forces arriving from outside the area of performance must process through a reception center as designated by the contracting officer upon arrival at the place of performance.

VII. LOGISTICS SUPPORT

A. Policy.

Generally, contractors are responsible for providing for their own logistical support and logistical support for their employees. However, in austere, uncertain, and/or hostile environments, the DoD may provide logistical support to ensure continuation of essential contractor services. The contracting office is required to verify the logistical and operational support that will be available for CAAF.

B. Letter of Authorization (LOA).

1. An LOA shall be issued via the SPOT system for all CAAF, as well as for other designated non-CAAF contractors. The LOA will be required for processing through a deployment center, travel to/from/within the AOR, and will detail the privileges and government support to which each contractor employee is entitled.

2. All contractors issued an LOA shall carry the LOA with them at all times.

3. The LOA shall state the intended length of assignment in the AOR, and identify the government facilities, equipment, and privileges the CAAF/CAAF is entitled to use.

C. Individual Protective Equipment (IPE).

Upon determination of the Combatant Commander, CAAF and designated non-CAAF contractors will be provided body armor, a ballistic helmet, and a chemical/biological ensemble. The equipment is typically issued at the deployment center and must be returned upon redeployment. The decision of contractor personnel to wear any issued protective equipment is voluntary; however, the Combatant Commander, subordinate JFC and/or ARFOR Commander may require contractor employees to be

prepared to wear Chemical, Biological, and Radiological Element (CBRE) and High-Yield Explosive defensive equipment.

D. Clothing.

Generally, contractors are required to furnish their own appropriate clothing and may not wear military or military look-alike clothing. However, the Combatant Commander may authorize contractor wear of certain items for operational reasons. Any such wear must be distinguishable from combatants (through the use of armbands, headgear, etc.).

E. Government Furnished Equipment (GFE).

1. GFE may include protective equipment, clothing, or other equipment necessary for contract performance.

2. The contract must specify that the contractor is responsible for storage, maintenance, accountability, and performance of routine inspection of Government furnished property. The contract must also specify contractor responsibilities for training and must specify the procedures for accountability of Government furnished property.

3. Contractor employees will be responsible for maintaining all issued items and must return them to the issuer upon redeployment. In the event that issued clothing and/or equipment is lost or damaged due to negligence, a financial liability investigation of property loss will be initiated IAW AR 735-5. According to the findings of the Survey Officer, the government may require reimbursement from the contractor.

F. Legal Assistance. Legal assistance services are not available to contractors either in theater or at the deployment processing center.

G. I.D. Cards.

1. Contingency Contractor Personnel will receive one or more of the following three distinct forms of identification:

a. **Common Access Card (CAC)**. Required for access to facilities and use of privileges afforded to military, government civilians, and/or military dependents. CAAF are issued CACs.

b. **DD Form 489** (Geneva Conventions Identity Card for Persons who Accompany the Armed Forces). Identifies one's status as a contractor employee accompanying the U.S. Armed Forces. Must be carried at all times when in the theater of operations. Pursuant to the Geneva Convention Relative to the Treatment of Prisoners

of War, Article 4(4), if captured, contractors accompanying the force are entitled to prisoner of war status.

c. **Personal identification tags**. The Army requires all CAAF to have personal ID tags. The identification tags will include the following information: full name, social security number, blood type, and religious preference. These tags should be worn at all times when in the theater of operations.

2. In addition, other identification cards, badges, etc., may be issued depending upon the operation. For example, when U.S. forces participate in United Nations (U.N.) or multinational peace-keeping operations, contractor employees may be required to carry items of identification that verify their relationship to the U.N. or multinational force.

3. If the contractor processes CAAF for deployment, it is the responsibility of the contractor to ensure CAAF receive required identification prior to deployment.

H. Medical and Dental Care. Based on specific contract clauses, CAAF are entitled to resuscitative care, stabilization, hospitalization at level III Military Treatment Facilities (MTF), and assistance with patient movement in emergencies where loss of life, limb, or eyesight could occur. The following applies:

1. All costs associated with treatment and transportation are reimbursable to the government.

2. **Resuscitative care**. The aggressive management of life and limb-threatening injuries. Examples of emergencies include refills of prescription/life-dependent drugs, broken bones, and broken teeth.

3. **Primary Care**. Primary medical or dental care is NOT authorized and will not be provided unless specifically authorized under the terms of the contract and the corresponding LOA.

4. **Long term care**. Long term care will not be provided.

I. Evacuation, Next of Kin Notification, Personnel Recovery, Mortuary Affairs.

1. **Evacuation**. The government will provide assistance, to the extent available, to U.S. and TCN contractors if the Combatant Commander orders a mandatory evacuation.

2. **NOK Notification**. The contractor is responsible for notification of the employee-designated NOK in the event an employee dies, requires evacuation due to an injury, or is isolated, missing, detained, captured, or abducted.

3. The government will assist, in accordance with DoDD 2310.2, Personnel Recovery, in the case of isolated, missing, detained, captured, or abducted CAAF.

4. **Mortuary Affairs**. Mortuary affairs will be handled in accordance with DoDD 1300.22, Mortuary Affairs Policy.

J. **Religious Support**. Access to military religious support may be authorized under the terms of a contract.

K. Military Postal Service (MPS). U.S. citizen CAAF contractors will be authorized to use MPS. However, non-U.S. citizen CAAF and other contractors may only use MPS to send their paychecks to their homes of record.

L. Morale, Welfare, and Recreation (MWR) Support. CAAF who are also U.S. Citizens will be authorized to use MWR and exchange services, including post exchanges and vendors. However, non-U.S. and non-CAAF contractors will not be authorized.

M. American Red Cross (ACS) Services. ARC services such as emergency family communications and guidance for bereavement airfare are available to contractors in the area of operations.

N. Hostage Aid. When the Secretary of State declares that U.S. citizens or resident aliens are in a "captive status" as a result of "hostile action" against the U.S. government, CAAF personnel and his/her dependents become entitled to a wide range of benefits. Potential benefits include: continuation of full pay and benefits, select remedies under the Servicemembers' Civil Relief Act, physical and mental health care treatment, education benefits to spouses or dependents of unmarried captives, and death benefits. Eligible persons must petition the Secretary of State to receive benefits. Responsibility for pursuing these benefits rests with the contractor employee, the employee's family members, or the contractor.

VIII. SECURITY, WEAPONS, AND USE OF FORCE

A. Security.

1. CAAF and designated non-CAAF personnel may be eligible for US-provided security. It is DoD policy to develop a plan for protection of CAAF in locations where there is not sufficient or legitimate civil authority and the commander decides it is in the interests of the government to provide security because the contractor cannot obtain effective security services, such services are unavailable at a reasonable cost, or threat conditions necessitate security through military means. In contrast, DFARS Class Deviation 2011-O0004(c), which pertains to contractors who are not authorized to accompany the Armed Forces,

provides that the contractor is responsible for all security support required for contractor personnel engaged in the contract.

2. The contracting officer shall include the level of protection to be provided to CAAF in the contract.

3. In appropriate cases, the Combatant Commander may provide security through military means, commensurate with the level of security provided to DoD civilians.

4. All contingency contractors shall comply with applicable Combatant Commander and local commander force protection policies.

B. CAAF Arming for Self-Defense.

1. In accordance with applicable U.S., HN, and international law, and relevant international agreements, on a case-by-case basis, the Combatant Commander (or general officer designee) may authorize CAAF arming for **individual** self-defense.

2. Acceptance of weapons by contractors must be voluntary and permitted by the contractor and the contract.

3. The government must furnish or ensure weapons training and briefings on the rules for the use of force.

4. The contractor must ensure that employees are not prohibited under U.S. law to possess firearms (e.g., Lautenberg Amendment, 18 U.S.C. § 922(d)(9)).

5. Unless immune from HN jurisdiction, contractors shall be advised that the inappropriate use of force may subject them to U.S. or HN prosecution and civil liability.

6. All applications for arming contingency contractors shall be reviewed on a case-by-case basis by the Staff Judge Advocate to the Combatant Commander.

C. Security Services.

1. If consistent with applicable U.S., HN, and international law, international agreements, DoDI 3020.41, and DoDI 3020.50, a defense contractor may be authorized to provide security services for other than uniquely military functions. Contracts for security services shall be used cautiously in contingency operations where major combat operations are ongoing or imminent. Whether a particular use of contract security personnel to protect military assets is permissible is dependent on the facts and requires

legal analysis considering the nature of the operation, the type of conflict, and a case-by-case determination.

a. Private Security Company (PSC). A PSC is a company employed by the DoD performing "private security functions" under a "covered contract" in a contingency operation. In an area of "combat operations" as designated by the Secretary of Defense, the term PSC expands to include all companies employed by U.S. Government agencies that are performing "private security functions" under a "covered contract." The definition of PSC similarly expands in areas designated as "other significant military operations" by both the Secretary of Defense and Secretary of State.

b. Private Security Functions include:

(1) Guarding of personnel, facilities, designated sites, or property of a Federal agency, the contractor or subcontractor, or a third party.

(2) Any other activity for which personnel are required to carry weapons in the performance of their duties. Contractor personnel armed for self-defense are not subject to requirements of DoDI 3020.50; DoDI 3020.41 continues to prescribe policies related to the arming of individual contractors for self-defense.

(3) Contractors are not authorized to perform inherently governmental functions. Therefore, any private security function is limited to a defensive response to hostile acts or demonstrated hostile intent.

c. Covered Contracts include:

(1) A DoD contract for the performance of security services or delivery of supplies in an area of contingency operations, humanitarian or peace keeping operations, or other military operations or exercises, outside the United states. A "contingency operation" is a military operation that is either designated as such by the Secretary of Defense or becomes a contingency operation as a matter of law under 10 U.S.C. § 101(a)(13).

(2) A contract of a non-DoD Federal agency for performance of services or delivery of supplies in an area of combat operations or other significant military operations, as designated by the Secretary of Defense.

2. Requests for permission to arm PSCs to provide security services shall be reviewed by the Staff Judge Advocate to the Combatant Commander. The request will then be approved or denied by the Combatant Commander, or a specifically identified designee no lower than general officer.

3. Requirements for requesting permission to arm PSCs to provide security services are listed in DODI 3020.50.

4. Upon approval of the request, the Combatant Commander will issue written authorization to the defense contractor identifying who is authorized to be armed and the limits on the use of force.

5. DoDI 3020.50, Enclosure 3, tasks Combatant Commanders to develop and implement guidance and procedures to maintain accountability of PSC personnel. This regulation discusses in-depth the minimum requirements for this guidance, which deals with security, arming, accountability, and rules for the use of force.

6. DFARS Class Deviation 2011-O0004(i) requires non-CAAF PSC personnel to comply with all United States, DoD, and other rules and regulations as applicable, to include guidance and orders issued by the CENTCOM Commander regarding possession, use, safety, and accountability of weapons and ammunition.

7. CENTCOM Contracting Command Clauses 952.225-0001, Arming Requirements and Procedures for Personal Security Services Contractors and for Requests for Personal Protection (Aug. 2010) and 952.225-0002, Armed Personnel Incident Reports, implement many of these requirements.

IX. COMMAND, CONTROL AND DISCIPLINE

A. General. Command and control, including direction, supervision, and discipline, of contractor personnel is significantly different than that of military personnel or even government civilian employees.

1. The contract is the only legal basis for the relationship between DoD and the contractor. The contract shall specify the terms and conditions under which the contractor is to perform.

2. Functions and duties that are inherently governmental are barred from private sector performance. Additionally, the contracting officer is statutorily required to make certain determinations before entering into a contract for the performance of each function closely associated with inherently governmental functions.

3. Contractor personnel are not under the direct supervision of military personnel in the chain of command. However, CAAF and certain non-

CAAF personnel working on military facilities are under the direct authority of local commanders for administrative and force protection issues. Contractor personnel shall not be supervised or directed by military or government civilian personnel.

4. The Contracting Officer is the designated liaison for implementing contractor performance requirements. The Contracting Officer is the only government officials with the authority to increase, decrease, or materially alter a contract scope of work or statement of objectives. Only the designated contracting officer's representative (COR) shall communicate the Army's requirements to the contractor and prioritize the contractor's activities consistent with the contract.

5. Contractor personnel cannot command, supervise, or control military or government civilian personnel.

B. Orders and Policies.

1. All contracts involving contractor personnel should include provisions requiring contractor personnel to comply with: U.S. and HN laws; applicable international agreements; applicable U.S. regulations, directives, instructions, policies, and procedures; orders, directives, and instructions issued by the Combatant Commander relating to force protection, security, health, safety, or relations and interaction with local nationals.

2. Commanders and legal advisers must be aware that interaction with contractor personnel may lead to unauthorized commitments and possible Anti-Deficiency Act (ADA) violations. While Contracting Officers are the only government officials authorized to change contracts, actions by other government officials, including commanders, CORs, etc., may bind the government under alternative theories of recovery.

3. Contract changes (direction to contractor personnel) in emergency situations.

a. **DFARS**. The DFARS maintains the general rule that only Contracting Officers may change a contract, even in emergency situations. The DFARS clause does expand the scope of the standard Changes Clause, by allowing, in addition to changes otherwise authorized, that the Contracting Officer may, at any time, make changes to Government-furnished facilities, equipment, material, services, or site.

b. **DoDI**. The Instruction states that the ranking military commander may, in emergency situations (e.g., enemy or terrorist actions or natural disaster), urgently recommend or issue warnings or messages urging that CAAF and non-CAAF personnel take

emergency actions to remove themselves from harm's way or take other appropriate self-protective measures.

C. Discipline.

1. The contractor is responsible for disciplining contractor personnel; commanders have LIMITED authority to take disciplinary action against contractor personnel.

2. Commander's Options.

a. Revoke or suspend security access or impose restriction from installations or facilities.

b. Request that the contracting officer direct removal of the individual.

3. **Contracting Officer Options**. The Contracting Officer may direct the contractor, at its own expense, to remove and replace any contractor personnel who jeopardize or interfere with mission accomplishment or who fail to comply with or violate applicable requirements of the contract. The contractor shall have on file a plan showing how the contractor would replace contractors who are so removed.

4. Specific jurisdiction for criminal misconduct is subject to the application of international agreements. Application of HN and TCN law is discussed above in Section III.

5. Military Extraterritorial Jurisdiction Act of 2000, *as amended by* § 1088 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (MEJA).

a. **Background**. Since the 1950s, the military has been prohibited from prosecuting by courts-martial civilians accompanying the Armed Forces overseas in peacetime who commit criminal offenses. Many Federal criminal statutes lack extraterritorial application, including those penalizing rape, robbery, burglary, and child sexual abuse. In addition, many foreign countries decline to prosecute crimes committed within their nation, particularly those involving U.S. property or another U.S. person as a victim. Furthermore, military members who commit crimes while overseas, but whose crimes are not discovered or fully investigated prior to their discharge from the Armed Forces are no longer subject to court-martial jurisdiction. The result is jurisdictional gaps where crimes go unpunished.

b. **Solution**. The MEJA closes the jurisdictional gaps by extending Federal criminal jurisdiction to certain civilians overseas and former military members.

c. Covered Conduct:

(1) Conduct committed outside the United States, that

(2) Would be a crime under U.S. law if committed within U.S. special maritime and territorial jurisdiction, that is

(3) Punishable by imprisonment for more than one year.

d. Covered Persons include:

(1) Members of the Armed Forces who, by Federal indictment or information, are charged with committing an offense with one or more defendants, at least one of whom is not subject to the UCMJ;

(2) Members of a Reserve component who commit an offense when they are not on active duty or inactive duty for training;

(3) Former members of the Armed Forces who were subject to the UCMJ at the time the alleged offense was committed, but are no longer subject to the UCMJ;

(4) Civilians employed by the Armed Forces outside the United States, who are not a national of or resident in the HN, who commit an offense while outside the United States in connection with such employment. Such civilian employees include:

(a) Persons employed by DoD, including NAFIs;

(b) Persons employed as a DoD contractor, including subcontractors at any tier;

(c) Employees of a DoD contractor, including subcontractors at any tier;

(d) Civilian employees, contractors (including subcontractors at any tier), and civilian employees of a contractor (including subcontractors at any tier) of any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the DoD overseas.

(5) Civilians accompanying the Armed Forces:

(a) Dependents of anyone covered above if the dependent resides with the person, allegedly committed the offense while outside the United States, and is not a national of or ordinarily resident in the HN. Command sponsorship is not required for the MEJA to apply.

(6) The MEJA does not apply to persons whose presence outside the United States at the time the offense is committed is solely that of a tourist, student, or is otherwise not accompanying the Armed Forces.

(7) **Foreign Criminal Jurisdiction**. If a foreign government, in accordance with jurisdiction recognized by the U.S., has prosecuted or is prosecuting the person, the U.S. will not prosecute the person for the same offense, absent approval by the Attorney General or Deputy Attorney General.

(8) TCNs who might meet the requirements above for MEJA jurisdiction may have a nexus to the United States that is so tenuous that it places into question whether the Act should be applied. The DOS should be notified of any potential investigation or arrest of a TCN.

e. DoDI 5525.11 contains detailed guidance regarding the procedures required for MEJA use, including investigation, arrest, detention, representation, initial proceedings, and removal of persons to the United States or other countries. Further, much authority is delegated to Combatant Commanders, so local policies must be researched and followed.

6. Uniform Code of Military Justice (UCMJ).

a. Retired military members who are also CAAF are subject to the UCMJ. Art. 2(a)(4), UCMJ. DA policy provides that retired Soldiers subject to the UCMJ will not be tried for any offense by any courts-martial unless extraordinary circumstances are present. Prior to referral of courts-martial charges against retired Soldiers, approval will be obtained from Criminal Law Division, ATTN: DAJA–CL, Office of The Judge Advocate General, HQDA.

b. Under the law for at least the past 30 years, CAAF were only subject to the UCMJ in a Congressionally declared war. During that time, there was never UCMJ jurisdiction over CAAF because there were no Congressionally declared wars.

c. Congress amended the UCMJ in the John Warner National Defense Authorization Act for Fiscal Year 2007 (2007 NDAA). In section 552 of the 2007 NDAA, Congress changed Article 2(a)(10), addressing UCMJ jurisdiction over civilians accompanying the Armed Forces, from "time of war" to "time of declared war or contingency operation." This change now subjects CAAF and other civilians accompanying the Armed Forces to the UCMJ in contingency operations.

d. It is not clear whether this congressional attempt at expanding UCMJ jurisdiction over civilians in less-than Congressionally declared war is constitutional. Prior Congressional attempts at expanding UCMJ jurisdiction have been rejected by the courts as unconstitutional.

e. The Secretary of Defense published guidance on the exercise of this expanded UCMJ jurisdiction in March 2008. Office of the Secretary of Defense memorandum, Subject: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations, dated March 10, 2008. This guidance requires, among other things, that the Department of Justice be notified and afforded an opportunity to pursue U.S. federal criminal prosecution under the MEJA or other federal laws before disciplinary action pursuant to the UCMJ authority is initiated.

X. OTHER CONTINGENCY CONTRACTOR ISSUES

A. Living Conditions.

1. Generally, when provided by the government, CAAF living conditions, privileges, and limitations will be equivalent to those of the units supported unless the contract with the Government specifically mandates or prohibits certain living conditions.

2. Tours of Duty. Contingency Contractor Personnel tours of duty are established by the contractor and the terms and conditions of the contract between the contractor and the government. Emergency-based on-call requirements, if any, will be included as special terms and conditions of the contract.

3. Hours of Work. Contractors must comply with local laws, regulations, and labor union agreements governing work hours. Federal labor laws that govern work hours and minimum rates of pay do not apply to overseas locations. FAR 22.103.1 allows for longer workweeks if such a

workweek is established by local custom, tradition, or law. SOFAs or other status agreements may impact work hours issues.

B. Life and Health Insurance.

1. Unless the contract states otherwise, the Army is not statutorily obligated to provide health and/or life insurance to a contractor employee. Policies that cover war time deployments are usually available from commercial insurers.

2. Contractors and their employees bear the responsibility to ascertain how a deployment may affect their life and health insurance policies and to remedy whatever shortcomings a deployment may cause.

C. Worker's Compensation-Type Benefits.

1. Several programs are available to ensure "worker's comp" type insurance cover contractor employees while deployed and working on government contracts. Pursuing any of the following benefits is up to the contractor employee or the contractor.

2. Defense Base Act (DBA) 42 U.S.C. §§ 1651 *et seq.*; FAR 28.305 and 52.228-3; DFARS 228.305, 228.370(a), and 252.228-7000.

a. Requires contractors to obtain worker's compensation insurance coverage or to self-insure with respect to injury or death incurred in the scope of employment for "public work" contracts or subcontracts performed outside the United States.

b. FAR Clause 52.228-3, Workers' Compensation Insurance (Defense Base Act), is required in all DoD service contracts performed, entirely or in part, outside the U.S. and in all supply contracts that require the performance of employee services overseas.

3. Longshoreman and Harbor Worker's Compensation Act (LHWCA) 33 U.S.C. §§ 901-950, DA Pamphlet 715-16, paragraphs 10-5c to 10-5d. Applicable by operation of the DBA. The LHWCA provides compensation for partial or total disability, personal injuries, necessary medical services/supplies, death benefits, loss of pay and burial expenses for covered persons. Statute does not focus on fault.

4. War Hazards Compensation Act (WHCA) 42 U.S.C. §§ 1701-17, FAR 52.228-4, DFARS 228.370(a). The WHCA provides that any contractor employee who is killed in a "war risk hazard" will be compensated in some respects as if the CAAF were a full time government civilian employee. WHCA benefits apply regardless of whether the injury or death is related to the employee's scope of employment.

D. Pay. CAAF pay and benefits are governed by the CAAF employment contract with the contractor. The U.S. Government is not a party to this employee-employer relationship. CAAF are not entitled to collect any special pay, cash benefits or other financial incentives directly from the U.S. Government.

E. Veteran's Benefits. Service performed by CAAF is NOT active duty or service under 38 U.S.C. 106. DoD policy is that contractors operating under this clause shall not be attached to the armed forces in a way similar to the Women's Air Forces Service Pilots of World War II. Contractors today are not being called upon to obligate themselves in the service of the country in the same way as the Women's Air Forces Service Pilots or any of the other groups listed in 38 U.S.C. 106.

F. Continued Performance During a Crisis.

1. During non-mandatory evacuation times, Contractors shall maintain personnel on location sufficient to meet contractual obligations.

2. DoDI 3020.41 requires planning to minimize the impact of losing essential contractor services by, among other things, including contract terms that obligate contractors to ensure the continuity of essential contractor services. Contracts involving essential contractor services that support mission essential functions may contain the clause at DFARS Class Deviation 2009-O0010, Continuation of Essential Contractor Services.

3. There is no "desertion" offense for contractor personnel. Commanders should plan for interruptions in services if the contractor appears to be unable to continue support.

XI. ADDITIONAL REFERENCES

1. Geneva Conventions of 1949 and Additional Protocol of 1977.
2. 18 U.S.C. § 922(d), Unlawful Acts (providing firearms to certain persons).
3. 22 U.S.C. § 3261 *et seq.*, Responsibility of the Secretary of State (for U.S. citizens abroad).
4. AR 700-4 (Logistics Assistance).
5. AR 570-9 (Host Nation Support).
6. AR 12-1 (International Logistics).
7. FM-4-100.2 (formerly FM-100-10-2) – Contracting Support on the Battlefield.
8. FM 4-92, Contracting Support Brigade
9. DA PAM 27-1-1 (Geneva Convention Protocols).
10. DA PAM 715-16 (Contractor Deployment Guide).
11. DoDI 4161.2 (Government Property in Possession of Contractors).
12. DoDI 1300.23 (Isolated Training for DoD Civilian and Contractors).
13. DoDI 1000.1 (Geneva Convention ID Cards).
14. DoDI 1100.22 (Guidance for Determining Workforce Mix).

15. DoDI 3020.37 (Continuation of Essential DoD Contractor Services Crisis).
16. DoDD 5000.1 (The Defense Acquisition System).
17. DoDD 3025.1 (Non-combatant Evacuation Operations).
18. Joint Pub 1-2, Definitions.
19. Joint Pub 4-0, Doctrine for Logistics Support of Joint Operations, Contractors in Theater.
20. Joint Pub 4-10, Operational Contract Support.
21. AMC Pamphlet, 715-18. AMC Contracts and Contracting Supporting Military Operations. 16 June 1999.
22. Defense Contingency Contracting Officer's Representative Handbook (Sep. 2012), *available at* http://www.acq.osd.mil/dpap/ccap/cc/corhb/index.html.
23. Under Secretary of Defense, Acquisition, Technology, and Logistics, Defense Procurement and Acquisition Policy, Contingency Contracting, Defense Contingency Contracting Handbook: Essential Tools, Information, and Training to Meet Contingency Contracting Needs for the 21st Century (Oct. 2012).

XII. CONCLUSION

During Contingency Operations, the U.S. Military will continue to utilize contractor support to perform many non-governmental functions. The individuals employed by defense contractors will be present in the theater of operations and will often live and work side-by-side with uniformed military personnel. It is imperative, given this close relationship and mutual dependence, that Judge Advocates understand the proper legal context for our relationship with contractors on the battlefield, and know how to ensure they are properly provided for, supervised, and employed.

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Chapter 32A
Army Nonappropriated Fund Contracting

2013 Contract Attorneys Deskbook

CHAPTER 32A

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CHAPTER 32A

ARMY NONAPPROPRIATED FUND CONTRACTING

I. INTRODUCTION.

Non-appropriated funds (NAFs) are monies derived from sources other than the U.S. Treasury (i.e. other than the U.S. taxpayers). Although NAFs are not subject to the fiscal controls applied to normal appropriated funds, such as the Antideficiency Act (31 U.S.C. § 1341 et. seq.) and the Federal Acquisition Regulation (FAR), they are still subject to many requirements and controls to ensure they are not misused or wasted. This chapter details the primary DOD and Army resources for the use of NAFs for contracting purposes.

II. REFERENCES

A. 10 U.S.C. § 2783. Requires the Secretary of Defense to prescribe regulations governing NAF funds and sets out punishments for violating those regulations.

B. 10 U.S.C. § 3013(b)(9). Provides Secretary of the Army the authority to administer the MWR program.

C. U.S. DEP'T OF DEFENSE, DIR. 4105.67, NONAPPROPRIATED FUND (NAF) PROCUREMENT POLICY (2 May 2001, with changes as of 30 July 2002) [hereinafter DODD. 4105.67].

D. U.S. DEP'T OF DEFENSE, INSTR. 1015.15, ESTABLISHMENT, MANAGEMENT, AND CONTROL OF NONAPPROPRIATED FUND INSTRUMENTALITIES AND FINANCIAL MANAGEMENT OF SUPPORTING RESOURCES (31 October 2007, with Change 1, administratively reissued 20 March 2008) [hereinafter DODI 1015.15].

E. U.S. DEP'T OF DEFENSE, INSTR. 4105.71, NONAPPROPRIATED FUND (NAF) PROCUREMENT PROCEDURE (26 February 2001, with Change 1, administratively reissued 30 July 2002) [hereinafter DODI 4105.71].

F. U.S. DEP'T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, vol. 13, *available at* http://www.defenselink.mil/comptroller/fmr/ [hereinafter DOD FMR] (discussing nonappropriated funds policy and procedures).

G. Army Regulations.

1. NAFI General Contracting and Funding Policies: The U.S. DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. pt 5101.9001 [hereinafter AFARS], provides that NAF contracting policies and procedures are set forth in Army regulation. U.S. DEP'T OF ARMY, REG. 215-4, NONAPPROPRIATED FUND CONTRACTING (29 July 2008) [hereinafter AR

215-4]; U.S. DEP'T OF ARMY, REG. 215-1, MORALE, WELFARE, AND RECREATION ACTIVITIES AND NONAPPROPRIATED FUND INSTRUMENTALITIES (24 September 2010) [hereinafter AR 215-1], and; U.S. DEP'T of ARMY, REG. 215-7, CIVILIAN NONAPPROPRIATED FUNDS AND MORALE, WELFARE, AND RECREATION ACTIVITIES (26 January 2001), govern overall Army nonappropriated contracting and funding policies. U.S. DEP'T OF ARMY, REG. 215-8, ARMY AND AIR FORCE EXCHANGE SERVICE OPERATIONS ch. 8 (5 October 2012) [hereinafter AR 215-8], provides additional guidance on Army and Air Force Exchange contracting. Each Army Nonappropriated Fund Instrumentality (NAFI) also promulgates its own individual regulations governing their NAFI-specific funding policies, which must conform to the DOD and Army policies.

2. NAFI Construction and Funding Policies: U.S. DEP'T OF ARMY, REG. 215-4, NONAPPROPRIATED FUND CONTRACTING (29 July 2008) [hereinafter AR 215-4]; U.S. DEP'T OF ARMY, REG. 420-1, ARMY FACILITIES MANAGEMENT ch. 4 (12 February 2008, incorporating Rapid Action Revision 2, 24 August 2012); U.S. DEP'T OF ARMY, PAM 420-6, DIRECTORATE OF PUBLIC WORKS RESOURCE MANAGEMENT SYSTEM (15 May 1997), and; U.S. DEP'T OF ARMY, PAM 420-1-2, ARMY MILITARY CONSTRUCTION AND NONAPPROPRIATED-FUNDED CONSTRUCTION PROGRAM DEVELOPMENT AND EXECUTION (2 April 2009), govern Army NAFI construction contracting and funding.

H. U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FED. APPROPRIATIONS LAW, Vol. III, ch. 15, subch. C, Nonappropriated Fund Instrumentalities, GAO-08-978SP (2008) [hereinafter GAO REDBOOK].

III. DEFINITIONS AND STATUTORY CONTROLS

A. "Nonappropriated Fund Instrumentality (NAFI)," AR 215-4, Consolidated Glossary, Sec. II, Terms:

An integral DOD organizational entity that performs an essential Government function. It acts in its own name to provide or assist other DOD organizations providing morale, welfare, and recreational programs for military personnel and civilians. It is established and maintained individually or jointly by the heads of the DOD components. As a fiscal entity, it maintains custody and control over its nonappropriated funds. It is responsible for the prudent administration, safeguarding, preservation, and maintenance of those appropriated fund resources made available to carry out its function. With its nonappropriated funds, the NAFI contributes to the morale, welfare, and recreation programs of other authorized organizational entities when so authorized. It is not incorporated under the laws of any State or the District of Columbia and enjoys the legal status of an instrumentality of the United States.

B. "Nonappropriated Funds (NAFs)," AR 215-4, Consolidated Glossary, Sec. II, Terms:

Cash and other assets received by NAFIs from sources other than monies appropriated by the Congress of the United States. NAFs are government funds used for the collective benefit of those who generate them: military personnel, their dependents, and authorized civilians. These funds are separate and apart from funds that are recorded in the books of the Treasurer of the United States.

C. General NAFI Legal Structure. Congress directed DOD to issue regulations governing the management and use of NAFs, and has made DOD personnel subject to penalties for their misuse. All NAFIs are created by DOD and its components, and all NAFs are government funds. However, NAFs are not appropriated by Congress or controlled by the Treasury Department. NAFIs, as fiscal entities, control their NAFs. 10 U.S.C. § 2783. As a result, the basic fiscal structure of appropriated funds (Purpose, Time, Amount) may not apply to a NAFI, depending on the type of NAFI and the source of funds being used by a respective NAFI. Congress may legislate restrictions on the use of NAFs, and/or it may exempt *appropriated* funds from the basic fiscal structure when a NAFI is provided appropriated funds. For example:

1. Purchase of Malt Beverages and Wine. A NAFI in the United States may purchase beer and wine for resale on an installation only from in-State sources. In states other than Alaska & Hawaii, alcoholic beverages containing distilled spirits will be purchased from the most competitive source, with price and other factors taken into account. 10 USC § 2495; Department of Defense Appropriations Act, 2012, Pub. L. 112-74, § 8066 (23 December 2011); *see also* AR 215-1, para. 10-6. In Alaska and Hawaii, this restriction extends to the purchase and delivery of alcoholic beverages containing distilled spirits.

2. Pricing of Wine Overseas. NAFIs located on military installations outside the United States must price and distribute wines produced in the United States equitably when compared with wines produced by the host nation. *See* AR 215-1, para.10-13.

3. MWR Programs and UFM accounting: MWR programs are a type of Army program authorized to use a mixture of appropriated (APF) funds and NAF to carry out its mission. MWR programs are designated by DOD as critical to provide for esprit de corps, comfort, pleasure, contentment, as well as mental and physical productivity of authorized DOD personnel. AR 215-1. Once DOD designates a NAFI to support an MWR program, the NAFI may use Uniform Funding and Management (UFM) procedures authorized by Congress. *See* 10 U.S.C. § 2491; *see also* DODI 1015.15; AR 215-1, para. 5-3. UFM accounting procedures allow the NAFI to treat any appropriated funds received by the program as if they were nonappropriated funds, subject only to the regulations of use.

IV. NAFI FUNDING OVERVIEW

A. What are Nonappropriated Funds (NAFs)?

1. NAFs are Government funds subject to controlled use. All DOD personnel have a fiduciary responsibility to use NAFs properly and prevent waste, loss, mismanagement, or unauthorized use. Violators are subject to administrative and criminal sanctions. *See* 10 U.S.C. § 2783.

2. NAFs are monies which are not appropriated by the Congress of the United States. These funds are separate and apart from funds that are recorded in the books of the U.S. Treasury.

3. Within the Department of Defense (DOD), NAFs come primarily from the sale of goods and services to military and civilian personnel and their family members, and may be used to support Morale, Welfare, and Recreation (MWR), lodging, civilian welfare, post restaurant, certain religious and educational programs, and a variety of non-MWR activities.

4. NAFs are government funds used for the collective benefit of military personnel, their family members, and authorized civilians. DOD FMR, vol. 13, ch. 1, para. 010213; DODI 1015.15, para. 4; AR 215-1, Glossary.

B. Nonappropriated Fund Instrumentality (NAFI).

1. A U.S. Government organization and fiscal entity that performs an essential Government function. It acts in its own name to provide or assist other DOD organizations in providing a variety of MWR and non-MWR programs for military personnel, their families, and authorized civilians.

2. It is established and maintained individually or jointly by two or more DOD components. As a fiscal entity, it maintains custody and control over its NAFs, equipment, facilities, land, and other assets. It enjoys the legal status of an instrumentality of the United States. DOD FMR vol.13, ch. 1, para. 010214; DODD 1015.15, para. 4; AR 215-1, Glossary.

3. In *Standard Oil Co. of California v. Johnson*, 316 U.S. 481 (1942), the Supreme Court concluded that post exchanges were an integral part of the War Department and enjoyed whatever immunities the Constitution and federal statutes provided the Federal Government.

V. AUTHORITY TO CONTRACT

A. Generally. Only warranted contracting officers are authorized to execute, administer, and terminate NAF contracts. Army regulations govern the appointment of NAF contracting officers. Also, AFARS 5101.9002 authorizes

APF contracting officers may also be designated as NAF contracting officers.[1] The authority of these contracting officers is limited by their warrant. AR 215-4, paras. 1-11 to 1-13. An exception exists for "emergency situations." *See infra* subparagraph VI.B.6.

B. Contracting Officers and Related Personnel.

1. Commanding General, Installation Management Command (IMCOM): Responsible for developing centralized NAF contracting support where and when feasible and providing oversight of NAF procurement offices. AR 215-1, para. 2-3.

2. Commanding General, Family and Morale, Welfare, and Recreation Command (FMWRC):

a. Prior to 3 June 2011. Before FMWRC was deactivated, the FMWRC Commander was responsible for implementing NAF contracting policies and procedures, establishing clear lines of authority, accountability, and had authority to grant warrants to contracting officers at any dollar level. AR 215-4, para. 1-8.

b. Deactivated as a command on 3 June 2011. Many FMWRC functions now fall under the Commander, IMCOM, or the IMCOM G-9. As of this update, no comprehensive revision to AR 215-4 has been attempted, and changes in NAF contracting authority are not yet finalized. Per IMCOM's webpage, the mission of the G9 is to serve the needs and interests of each individual in the Army community for the duration of their association with the military. Until FMWRC responsibilities are fully integrated into IMCOM, however, there may be some uncertainty as to which directorate within IMCOM is responsible for a particular function.

3. Chief, Acquisition Officer: Senior acquisition advisor to senior leadership on NAF acquisition policies and processes. Possesses authority to appoint contracting officers with warrants not to exceed $5 million. AR 215-4, para. 1-9.

4. Contracting officer authority. AR 215-4, para. 1-12.

a. Negotiate, award, administer, or terminate contracts and make related determinations and findings.

[1] Note that if an APF contracting officer obtains a NAF warrant, the NAF warrant will help establish that a NAF procurement is not an "agency procurement" for the purposes of GAO protest jurisdiction. For a discussion of GAO protest jurisdiction, *see infra* Subpart XIII.A.

b. Appoint administrative contracting officers (ACOs), contracting officer's representatives (CORs), blanket purchase agreement (BPA) callers, and ordering officers, in writing, clearly defining responsibilities and the limits of authority.

5. A warranted contracting officer may appoint some, or all, of the following:

a. Ordering Officers. Must be appointed in writing by a warranted contracting officer. Can place delivery orders against indefinite delivery type contracts, up to $25,000, providing the ID/IQ contract terms permit such orders. AR 215-4, paras. 1-12*b*(2)*(c)*, 6-7.

b. Blanket Purchase Agreement (BPA) Callers. Must be appointed in writing by warranted contracting officer.

(1) Call authority up to simplified acquisition threshold (currently $100,000,[2] $250,000 for commercial items) if caller is within the contracting office. AR 215-4, paras. 1-12*b*(2)*(d)*, 3-12*b*(4), 3-12*c*.

(2) Limited to competition threshold (currently $5,000) if caller is outside a contracting office. AR 215-4, paras. 1-12*b*(2)*(d)*, 3-12*c*.

c. Administrative Contracting Officers (ACO). Appointed in writing by warranted contracting officer to handle certain delineated aspects of contract management. AR 215-4, paras. 1-12*b*(2)*(a)*, 6-6.

d. Contracting Officer's Representatives (COR). Appointed in writing by a warranted contracting officer and serves as liaison between the contractor and the contracting officer. Responsible for the technical and administrative monitoring of the contract. No authority to change the terms or conditions of the contract. AR 215-4, para. 1-12*b*(2)*(b)* and Glossary, Section II.

6. Emergency purchases – No warrant requirement.

a. When unforeseeable events occur that are likely to cause a loss of NAFI property, assets, or revenues if immediate action is not

[2] AR 215-4, para. 3-3, states that the simplified acquisition threshold for NAF contracting is $100,000. FAR Case 2008-024, Inflation Adjustment of Acquisition –Related Thresholds, 30 August 2010 (effective 1 October 2010), however, recently changed the simplified acquisition threshold to $150,000 for acquisitions subject to the Federal Acquisition Regulation. It is not clear at this time whether the simplified acquisition threshold and similar acquisition-related thresholds in AR 215-4 will be adjusted in light of FAR Case 2008-024.

taken, unwarranted individuals may incur obligations on behalf of a NAFI. Emergency purchases create binding obligations, so they need not be ratified by the contracting officer. The emergency purchase action, however, must be received in the NAF contracting office not later than 2 working days following the emergency action. AR 215-4, para. 2-24.

b. NAF contracting officers must train personnel in emergency contracting procedures and maintain a list individuals authorized to make such purposes.[3] AR 215-4, para. 2-24.

7. Ratification actions. AR 215-4, para. 1-16.

a. Contracting decisions made by unwarranted officials or by warranted officials exceeding their warrant authority are not binding on the NAFI. Accordingly, requiring activities shall forward acquisition requirements to a warranted contracting officer for action in accordance with the policies and principles of this regulation. In the event that an official other than a contracting officer binds the NAFI, that action is an unauthorized commitment and requires ratification.

b. Ratification is the act of approving, by an official who has the authority to do so, an unauthorized commitment for the purpose of paying for supplies or services provided to the NAFI. Ratification approval authorities can be found at AR 215-4, para. 1-16d.

8. Restriction on Obligation of Appropriated Funds (APF). When obligating only NAF, contracting officials (both APF and NAF), shall follow the NAF policy and guidance contained in AR 215-4, and based on prudent discretion and sound business judgment, may employ other appropriate acquisition procedures that do not violate applicable laws, statutes, and regulations. AR 215-4, para. 1-1*b*; *see also* DODI 4105.67, para. 4.1. Generally, however, procurements that combine APF and NAF dollars will be accomplished by an APF contracting officer using APF contracting procedures. AR 215-4, para. 1-13*f*. There are two exceptions to this rule:

a. MWR Utilization, Support, and Accountability Funding (MWRUSA) Funding. AR 215-4, para. 1-13*f*; <u>see</u> AR 215-1, para. 5-2.

b. Uniform Funding and Management (UFM). 10 USC § 2491; AR 215-1, para. 5-3.

[3] Under previous version of AR 215-4, the chief of the NAF contracting office appointed individuals to make purchases totaling $2,500 or less after normal duty hours. This $2,500 limitation is no longer in effect.

VI. ACQUISITION PLANNING AND DEVELOPMENT

A. Purpose. Obtain the best value for its supply, service, and construction requirements. AR 215-4, para. 2-1.

B. Requiring Activity. Requiring activity prepares a statement of work (SOW), justifies a sole-source or brand-name purchase where requested, and submits purchase request with necessary approvals and certification of funds availability. AR 215-4, para. 2-1*a*.

C. Contracting Office. Provides advice to requiring activity, maintains source lists, determines appropriate acquisition process, awards contracts, appoints ACOs and CORs as necessary, and administers contracts. AR 215-4, para. 2-1*b*.

D. Acquisition Planning Team / Acquisition Plans. Required for all acquisitions over $100,000 (unless commercial items), including option years. AR 215-4, paras. 2-1*c* and 2-1*d*.

E. Bulk Funding. System establishes a reserve of funds to be used for an approved purpose over an identified period of time (like a prepaid credit card). Enables contracting officers to purchase ongoing requirements more efficiently. Bulk funding should be used whenever practicable. AR 215-4, para. 2-1*f*(4).

F. Contracting Methods. AR 215-4, para. 2-5; *see also infra* Part VIII (discussing acquisition methods).

1. Simplified Acquisitions. AR 215-4, Chapter 3. Where the purchase of supplies and services, including construction, is not complex and does not exceed the simplified acquisition threshold (currently $100,000), [4] or for commercial items at $250,000 or less.

   a. Can be accomplished by oral quotations, or by a written paper or electronic solicitation to prospective offerors, if evaluating price alone.

   b. Other simplified acquisition techniques include BPAs, purchase cards, delivery or task orders can also be used.

2. Negotiations. AR 215-4, Chapter 4. Negotiations is the preferred method of contracting for NAFIs. AR 215-4, para. 4-1.

[4] AR 215-4, para. 3-3, states the simplified acquisition threshold is $100,000. However, FAR Case 2008-024, Inflation Adjustment of Acquisition –Related Thresholds, 30 August 2010 (effective 1 October 2010), recently changed the simplified acquisition threshold to $150,000 for acquisitions subject to the Federal Acquisition Regulation. It is not clear at this time whether the simplified acquisition threshold and similar acquisition-related thresholds in AR 215-4 will be adjusted in light of FAR Case 2008-024.

3. Sealed Bidding. AR 215-4, Chapter 5. Sealed bidding may be used only when the following five factors are present:

   a. Price is the only evaluation factor.

   b. Current and accurate purchase descriptions or specifications have been developed.

   c. Time permits the solicitation, submission and evaluation of bids.

   d. It is not necessary to conduct discussions with the respective bidders.

   e. There is a reasonable expectation of receiving more than one bid. AR 215-4, para. 5-1.

G. Types of Contracts. AR 215-4, para. 2-8.

1. Purchase Orders. Most commonly used to acquire simple supplies and services. Para. 2-8b/c.

2. Firm-fixed price (FFP) contracts *are the preferred contract type for most NAF procurements.* Least risk to the NAFI. Para. 2-8d. *See also* DODD 4105.67, para. 4.6.

3. FFP with economic price adjustments. Allows price fluctuation based on specified contingencies. Para. 2-8e.

4. Indefinite delivery contracts. Includes requirements contracts, indefinite quantity, and definite quantity contracts. Para. 2-8f.

5. Cost-plus-percentage-of-cost contracts are prohibited. Para. 2-8a.

H. Types of Agreements. AR 215-4, para. 2-9.

1. Basic Ordering Agreements (BOA). A written agreement between the NAFI and a contractor containing terms and conditions that will apply to future, potential orders, including pricing, a description of supplies or services to be provided, and the method for issuing orders under the agreement. A BOA is not a contract because it does not require the placement of any orders against it. An order placed in accordance with the terms of the BOA is a contractual instrument against which funds are obligated. Para. 2-9a.

2. Blanket Purchase Agreements (BPA). A simplified method of procurement for filling anticipated, repetitive needs for goods or services. The BPA is not a contract because it does not require the placement of any orders and no funds are obligated until the time of ordering. Ordering

officer places call orders against BPA when supplies or services are needed. Para. 2-9b.

I. Length of Contracts. Generally, contracts should not exceed five years, including options, without written justification and approval by the contracting officer. NAF contracts may not exceed 10 years except public-private venture contracts upon a written determination of the contracting officer. This limitation does not apply to construction contracts with a specified delivery date. AR 215-4, para. 2-4.

VII. COMPETITION AND SOURCES OF SUPPLIES AND SERVICES

A. Competition. The Competition in Contracting Act (CICA) does not apply to NAFIs unless appropriated funds are obligated. 10 U.S.C. § 2303; *Gino Morena Enters*., B-224235, Feb. 5, 1987, 87-1 CPD ¶ 121; DODD 4105.67, para. 4.9.

1. Although CICA statutory requirements do not apply to NAFI acquisitions involving only NAFs, service regulations require maximum practicable competition. Sole source procurements must be justified. AR 215-4, paras. 1-1, 2-12, and 2-13.

a. For purchases of $5,000 or less, NAFIs need not seek competition if the price obtained is fair and reasonable and purchases are distributed equitably among qualified suppliers. AR 215-4, para. 2-12.

b. For purchases costing more than $5,000, NAFIs must compete the acquisitions (except those for commercial entertainment) unless a sole source acquisition is justified. AR 215-4, paras. 2-12 and 2-13; *see also* AR 215-1, para. 8-18; AR 215-4, para. 7-8*c* (discussing "competition" rules for entertainment contracts) . Competition exists if:

(1) the activity solicits at least three responsible offerors; and

(2) at least two offerors independently submit responsive offers. AR 215-4, para. 2-12.

c. A NAFI may, but need not, synopsize acquisitions at fedbizopps.gov.

2. Sole source acquisitions. AR 215-4, para. 2-13.

a. Contracting officers must approve all sole source acquisitions in writing. AR 215-4, para. 2-15.

b. Sole source acquisitions can be based on:

(1) The NAFI's minimum needs can only be satisfied by unique supplies, services, or capabilities available from only one source and no other types or sources of supplies or services will satisfy the NAFI requirement;

(2) The supplies or services are protected by limited rights in data, patents, copyrights, secret processes, trade secrets, or other proprietary restrictions, warranties, or licenses and are available only from the originating source;

(3) The requester has determined that only specified makes or models of equipment, components, accessories, or specific academic or professional credentials will satisfy the requirement, and only one source meets the criteria;

(4) The requirement is for unique repair or replacement parts for existing equipment for which substitutions cannot be made; or

(5) Access to utility services such as electric power or energy, gas, water, or cable television is restricted by local law, custom, or availability, and only one supplier can furnish the service within that geographical area or the contemplated contract is for construction of a part of a utility system and the local utility company is the only source available or authorized to work on the system.

B. Use of existing contracts and agreements.

1. Government sources of supply for NAFI requirements include the General Services Administration (GSA), Defense Supply Depots, and commissaries. AR 215-4, para. 2-22.

2. Other NAF sources include, but are not limited to, the Army and Air Force Exchange Service (AAFES), AFNAFPO, Navy Exchange Command, Marine Corps Exchange System, FMWRC, and NAF Contracting. AR 215-4, para. 2-22.

3. FAR Subparts 8.6 and 8.7, which require activities to purchase certain supplies from the Federal Prison Industries, Inc. (UNICOR) and the blind or severely disabled, apply to NAF acquisitions. 18 U.S.C. § 4124; 41 U.S.C. §§ 8502-8504; AR 215-4,para. 2-11.

4. Competition requirements for use of existing contracts and agreements. AR 215-4, para. 2-22.

a. Contracts / schedules that were previously awarded competitively, such as GSA multiple award schedules and the ID/IQ consolidated

contracts, are considered to have met the competition requirement. Thus ordering officers need not obtain further competition or make a fair and reasonable price determination when using these sources. Procedures for using schedules or contracts that have not been competitively awarded:

(1) Ordering officers can place orders at or below the competition threshold.

(2) Orders exceeding the competition threshold (but not exceeding the maximum order threshold) should be placed with the schedule contractor that can provide the best value to the NAFI. At a minimum, at least three sources / schedules must be checked.

5. NAFIs may solicit commercial vendors. Activities may use solicitation mailing lists developed by the NAF contracting office or obtained from the APF contracting office. AR 215-4, para. 2-6.

6. A NAFI may contract with Government employees and military personnel when such contracts are funded solely with NAF. Such contracts shall be nonpersonal service contracts. Examples of these types of contracts include sports officials, arts and crafts instructors, and other MWR activities. Under previous regulations, such contracts were prohibited without installation commander's approval. AR 215-4, para. 1-21; AR 215-4, para. 7-9d.

C. Prohibited Sources.

1. Generally, NAFIs may not solicit offers from, award contracts to, or consent to subcontracts with firms or individuals that have been suspended, debarred, or proposed for debarment. AR 215-4, para. 1-20.

a. NAFIs may or may not continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, or proposed for debarment. The CG, FMWRC, or designee, with input from contracting, technical personnel, and legal counsel, will make a determination, in writing, as to whether continued performance is in the best interest of the NAFI. Para. 1-20c.

b. Absent termination, the NAFI can continue to place orders against existing contracts.

c. Options may be extended only if the CG, FMWRC,[5] IMCOM regional director, garrison commander, or designee, states in writing the compelling reason for the extension or renewal.

2. Contractors on the "List of Parties Excluded from Federal Procurement and Nonprocurement Programs" as having been declared ineligible on the basis of statute or other regulatory procedure are excluded from receiving contracts or subcontracts. AR 215-4, para. 1-20*b*.

3. Economy Act and Interagency Acquisition Authority. NAFIs are instrumentalities of the Federal Government. *Standard Oil Co. of California v. Johnson*, 316 U.S. 481 (1942); GAO REDBOOK, 15-238 to 15-241. Notwithstanding this status, the Comptroller General has determined that the Economy Act and other interagency acquisition authorities do not extend to NAFIs. *Obtaining Goods & Servs. from Nonappropriated Fund Activities Through Intra-Dept. Procedures*, B-148581, Nov. 21, 1978, 58 Comp. Gen. 94; GAO REDBOOK, 15-249 to 15-250. "[O]btaining goods and services from a NAFI is 'tantamount to obtaining them from non-Governmental, commercial sources.'" GAO REDBOOK, 15-250 (quoting *Obtaining Goods & Servs. from Nonappropriated Fund Activities Through Intra-Dept. Procedures*, B-148581, Nov. 21, 1978, 58 Comp. Gen. 94). Therefore, absent a statutory exception, agencies must use competitive contractual procedures or sole source justifications for other than full and open competition when acquiring goods or services from a NAFI. GAO REDBOOK, 15-250.

4. Historically, the Comptroller General questioned whether it was even appropriate for agencies to contractually acquire goods and services from a NAFI because NAFIs exist "primarily to help foster the morale, welfare, and recreation needs of government officers and employees." GAO REDBOOK, 15-250. Notwithstanding these concerns, the Comptroller General had "recognized situations in which it may be appropriate for agencies to procure goods and services from NAFIs through the competitive procurement process and sole sourcing procurements [with proper justification and approval]." GAO REDBOOK, 15-250 to 15-252.

5. Major DOD NAFI Statutory Exception. In 1997, Congress provided that Department of Defense NAFIs "may enter into a contract or other agreement with another element of the Department of Defense or with another Federal Department, agency, or instrumentality to provide or obtain goods and services beneficial to the efficient management and operation of the exchange system or that morale, welfare, and recreation

[5] On 3 June 2011, the Army Family and Morale, Welfare, and Recreation Command deactivated in a ceremony at Fort Sam Houston. Army Family and Morale, Welfare and Recreation functions will likely fall upon the Commander, IMCOM, or the IMCOM G9. Until FMWRC responsibilities are fully integrated into IMCOM, however, there may be some uncertainty as to which directorate within IMCOM is responsible for a particular function.

system." 1997 National Defense Authorization Act, Pub. L. 104-201, § 341(a)(1), 110 Stat. 2422, 2488 (Sept. 23, 1996), *codified at* 10 U.S.C. §2492; DODI 4105.67, para. 4.10; AR 215-1, para. 13-12*d*; AR 215-8, para. 8-1*e* (AAFES).[6] Note, however, that:

a. There is no statutory definition of "other agreements"; and

b. In applying 10 U.S.C. §2492, there must be a benefit to the NAFI which is usually financial in nature. Accordingly, the Government may not require performance by a NAFI to benefit the Government without any benefit to the NAFI.

c. Department of Defense NAFIs may not enter into contracts or agreements with DOD elements or other federal agencies that will result in the loss of existing contractor jobs on the installation created pursuant to the Randolph-Sheppard, Javits-Wagner-O'Day Act, or small business programs. AR 215-1, para. 13-12*d*; AR 215-8, para. 8-1*e* (AAFES).

d. AR 215-1, para. 13-12*c*(2) specifically authorizes the use of APF Government Purchase Cards at NAFIs, including AAFES, up to $2,500[7] provided the Government rotates purchases among available vendors.

VIII. ACQUISITION METHODS

A. DOD Policy. DODD 4105.67, paras. 4.1. and 4.2, provide that NAFIs shall conduct procurements:

1. Primarily through competitive negotiation;

2. By trained procurement personnel;

3. In a fair, equitable, and impartial manner; and

4. To the advantage of the NAFI.

B. Simplified Acquisitions and Commercial Items. AR 215-4, ch. 3.

1. Policy.

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[6] Government agencies may consider AAFES as a provider of goods and services pursuant to 10 U.S.C. § 2492 prior to the initiation of the competitive procurement process. However, if the competitive procurement process by other Government activities has been initiated, then pursuant to 10 U.S.C. § 2492, AAFES may submit bids or proposals in response to the competitive procurement. AR 215-8, para. 8-1*f*.

[7] It is unclear why AR 215-1, which was revised on 24 September 2010, limits the GPC threshold to $2,500. Prior to the regulation's republication, the APF micro-purchase threshold increased to $3,000 (except for construction contracts ($2,000) and contracts subject to the Services Contract Act ($2,500).

a. NAFIs shall use Simplified Acquisition procedures to the maximum extent practical for the acquisition of supplies and services, including construction, that do not exceed the simplified acquisition threshold. NAFIs may use simplified acquisition procedures for "commercial items" up to $250,000. AR 215-4, para. 3-2.

(1) Construction is not considered a commercial item.

(2) Authorized personnel shall make purchases using the simplified acquisition method that is most suitable, efficient, and economical based on the circumstances of each acquisition using any appropriate combination of simplified acquisition procedures and formal acquisition procedures. AR 215-4, para. 3-2e.

b. Do not split purchases to get under the simplified acquisition threshold.

c. Contracting officer must also:

(1) Promote competition by soliciting at least three sources;

(2) Establish reasonable deadlines for submissions;

(3) Consider all quotations or offers timely received; and

(4) Use innovative simplified acquisition procedures where appropriate and not otherwise prohibited. AR 215-4, para. 3-2f.

2. The NAF policy for using Simplified Acquisitions does not apply if NAFI can meet its requirement using –

a. Required sources of supply;

b. Existing indefinite delivery contracts; or

c. Other established contracts. AR 215-4, para. 3-2*a*.

3. When using simplified acquisition procedures, the NAF contracting officer should solicit quotations orally or electronically where appropriate. AR 215-4, para. 3-6.

4. Construction. Solicitations for construction contracts must be in writing if requirement exceeds $2,000. AR 215-4, para. 3-6*d*.

5. Competition.

a. The contracting officer shall solicit at least three sources of supplies or services from the sources whose offer may be the most advantageous to the NAFI. AR 215-4, para. 3-6*a*.

b. If the contracting officer determines that there are fewer than three sources available that can meet the requirement, the contracting officer must document the file with the reasons why additional sources could not be obtained. AR 215-4, para. 3-6*a*.

c. The contracting officer shall not solicit on a sole source basis unless the provisions of AR 215-4, paras. 2-13 or 2-14 apply. AR 215-4, para. 3-6*a*.

d. When soliciting offers or quotations, the contracting officer must notify potential offerors of the basis upon which award might be made (price alone or price and other factors such as past performance and quality). Solicitations may, but need not, inform potential offerors of relative weights of evaluation factors. AR 215-4, para. 3-6*b*.

6. Legal effect of quotations. AR 215-4, para. 3-4.

a. A quote received in response to a request for quotation (DA form 4067) is not an offer and cannot be accepted by the NAFI to form a binding contract. Issuance by the NAFI of an order for supplies and services also does not form a contract – the order in response to the quote constitutes the offer.

b. The order/offer becomes a contract if and when the contractor accepts the order, either in writing or by furnishing the requested supplies, or beginning performance on the requested service.

c. The NAFI may amend or cancel its order at any time prior to the contractor accepting the order.

7. Evaluations of quotes and offers. AR 215-4, para. 3-5

a. Generally. The contracting officer will evaluate all offers received by the specified date in an impartial manner, inclusive of transportation costs, against criteria established in the solicitation.

b. The contracting officer has broad discretion in developing suitable evaluation procedures.

c. Formal evaluation plans, establishing competitive ranges, conducting discussions, and scoring offers are <u>not required</u>, but contracting officers must ensure that offers can be evaluated in a fair and efficient manner.

d. Evaluation of factors other than price, such as past performance, are not required, but if used, they must be based on information such as the contracting officer's knowledge of and previous experience with the supply or service being requested, customer surveys, or other reasonable basis.

8. Award and documentation. AR 215-4, para. 3-7.

a. Fair and reasonable price determination must be made in writing before award.

b. File documentation should be minimal, but must support contracting officer's process and decisions.

c. The contracting officer can request a contractor's written acceptance of a purchase order if acceptance prior to performance is deemed appropriate by the contracting officer. AR 215-4, para. 3-8.

9. Solicitation and Contract Forms.

a. Commercial Items. Use DA Form 4066.

b. Other than Commercial Items. Use DA Form 4067 unless quotes are solicited orally or electronically.

c. Generally, a purchase order is used for simplified acquisitions unless the contracting officer determines that due to risk or other factors, a formal contract, including all of its requisite clauses, is appropriate.

10. Blanket Purchase Agreements (BPA). BPAs provide a simplified method for filling anticipated repetitive needs for supplies and services by establishing "charge accounts" with qualified sources of supply. AR 215-4, paras. 3-10.

a. Prepared on DA Form 4067-1. Do not cite accounting codes. AR 215-4, para. 3-12*a*.

b. Must include: terms of agreement; a list of authorized BPA callers authorized to make purchases under the BPA; extent of obligations; purchase limits; requirement for delivery tickets; invoicing information. AR 215-4, para. 3-12*b*.

c. Existence of BPA does not justify sole source procurement. AR 215-4, para. 3-12*c*(5).

d. Review requirements. A sampling of BPAs must be reviewed annually by the contracting officer to ensure proper procedures are being followed. All BPAs exceeding $100,000 in annual usage must be reviewed annually. AR 215-4, para. 3-13.

11. Purchase Card Program. The Army NAF purchase card program provides a method of payment for the purchase of supplies and services for Government/NAFI use. AR 215-4, para. 3-16*a*; *see also* AR 215-1, para. 13-12.

a. GSA is the issuing authority for the purchase card program contract. AR 215-4, para. 3-16*a*.

b. The FMWRC, NAF Contracting Directorate, Policy Division coordinates the program. AR 215-4, para. 3-16.

12. Contracting officers may issue task or delivery orders for the future delivery of supplies, or the future performance of nonpersonal services against existing contracts. The NAFI must pay the amount stated on the order if the contractor performs. Contract clauses are not used with task or delivery orders because they are already included in the contract against which the orders are placed. AR 215-4, para. 3-17.

C. Negotiated Acquisitions. AR 215-4, ch. 4.

1. Generally.

a. Negotiation is a means of contracting using either competitive or noncompetitive proposals and discussions. It is a flexible contracting method that permits contracting personnel to discuss contractual issues related to price, schedule, technical requirements, type of contract, or other terms. AR 215-4, para. 4-1.

b. Negotiation is the preferred method of contracting for NAF procurements and will be accomplished on a competitive basis to the maximum extent practicable. AR 215-4, para. 4-1.

c. Best Value. Contracting officers can obtain “best value” by either a tradeoff process or a lowest priced, technically acceptable process. AR 215-4, para. 4-2a(1) and 4-2a(2).

d. Price and quality must be an evaluation factor in every source selection. AR 215-4, paras. 4-2*c* and 4-2*d*.

e. Multiple Awards. Solicitation must inform potential offerors if multiple awards will be considered. AR 215-4, para. 4-2*e*.

f. Solicitation terms and conditions. AR 215-4, para. 4-3.

(1) Options. Permissible. The NAFI, not the contractor, exercises options.

(2) Delivery performance and time. Must be realistic and stated in all contracts.

(3) Quality assurance. Include appropriate inspection, acceptance, and warranty requirements.

(4) Liquidated damages. AR 215-4, para. 1-26 and 4-3d. Amount must be reasonable. Consider using only if:

(a) The time of delivery or performance is critical and the NAFI may reasonably expect to suffer damage if delivery or performance is late; and

(b) The exact amount of damage would be difficult or impossible to ascertain or prove if contractor fails to perform, IAW contract requirements.

g. Uniform Contract Format. AR 215-4, para. 4-7. Contracting officers will normally prepare solicitations and resulting contracts using the uniform contract format located at Appendix D, AR 215-4.

2. Negotiated procedures.

a. Source Selection Authority. The contracting officer is the source selection authority unless the Chief Acquisition Officer formally appoints another individual as the SSA for a particular acquisition or group of acquisitions. AR 215-4, para. 4-4.

b. Early exchange of information with industry is encouraged. AR 215-4, para.4-5.

c. Request for proposals (RFP). Instrument by which negotiated acquisitions are initiated. Serves as the written solicitation that provides a potential offeror with the opportunity to offer a price and a plan for accomplishing a particular acquisition.

(1) Issued on a DA Form 4069. AR 215-4, para. 4-6.

(2) Proposal in response to an RFP is an offer that the government can accept to form a binding contract.

d. Amending the solicitation. AR 215-4, para. 4-8.

(1) Before closing date, issue amendments on DA Form 4073 to all prospective offerors.

(2) After closing date for RFP, issue to all offerors who have not been eliminated from the competition.

(3) If amendment is so substantial as to alter the playing field and additional sources may be interested, the contracting officer shall cancel the original solicitation and re-solicit, regardless of the stage of the process.

e. Late proposals and late modifications. AR 215-4, para. 4-11b(1)-(4).

f. Exchanges with offerors after receipt of proposals. AR 215-4, para. 4-14.

(1) Clarifications. If award will be made without discussions, clarifications may be used to allow an offeror to clarify certain aspects of its proposal (for example, the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not had a previous opportunity to respond) or to resolve minor or clerical errors.

(2) Communications. Exchanges with offerors after receipt of proposals but prior to the establishment of the competitive range – intended to aid the contracting officer in determining which proposals should be included in the competitive range. The competitive range is the group of most highly rated offerors with whom discussions will be conducted.

(a) Limited to offerors who submitted proposals.

(b) May only be held with offerors whose exclusion or inclusion in the competitive range is uncertain.

(c) Shall be held with offerors whose past performance information is the determining factor preventing them from being placed in the competitive range.

(d) May be conducted to enhance NAFI understanding of the proposal, allow reasonable interpretation of the proposal, or facilitate the NAFI's evaluation process.

(e) Are for the purpose of addressing issues that must be explored to determine whether a proposal should be placed in the competitive range.

(f) Do not provide an opportunity for an offeror to revise its proposal.

(3) Discussions. Negotiations that occur after establishment of a competitive range that may, at the contracting officer's discretion, result in an offeror being allowed to revise its proposal.

(a) Discussions must be held with each offeror in the competitive range and must be tailored to the individual offeror's proposal.

(b) The contracting officer should disclose to each offeror in the competitive range, the significant weaknesses, deficiencies, and other aspects of its proposal (such as cost, price, technical approach, past performance, and terms and conditions) that in the contracting officer's opinion could be altered or amended to materially enhance the proposal's potential for award.

(c) Primary purpose is to maximize best value to NAFI.

(d) Award may be made without discussions if the solicitation states that is the NAFI's intent.

(4) Limitations on discussions.

(a) Cannot favor one offeror over another.

(b) Can not reveal names of other offerors.

(c) Can not reveal another offeror's technical solution or any other information that would compromise an offeror's intellectual property.

(d) Can not reveal other offerors' prices, but can reveal to an offeror that its price is considered too high or low and reveal the results of analysis supporting that conclusion.

(e) Can not reveal the names of individuals providing reference information about an offeror's past performance.

g. Proposal Revisions. AR 215-4, para. 4-15.

h. Contract award and Debriefing Offerors. AR 215-4, paras. 4-18 through 4-20.

i. Protests. AR 215-4, para. 4-21.

(1) A protest is a written objection by an interested party. An interested party is an actual or prospective offeror whose direct economic interest would be affected by the award of, or failure to award, a particular contract.

(2) Unlike APF protests, the Government Accountability Office (GAO) does not generally have jurisdiction over contracts obligating NAF, although obligation of NAF by APF contracting officers may result in GAO jurisdiction.

(3) Protests are made to the contracting officer. The contracting officer has the authority to resolve protests below $250,000 by issuing a written decision. For protests of $250,000 or more, the contracting officer must forward the protest to the Chief Acquisition Officer for resolution.

(4) Protests prior to award. Award should be delayed until the protest is resolved unless contracting officer's supervisor makes a determination that the award should be made in accordance with AR 215-4, para. 4-21c, and legal advice is obtained.

(5) The contracting officer or CAO, as appropriate, considers the merits of protest and takes appropriate actions which can include rejection of all proposals and the issuance of a new solicitation or using revised evaluation criteria (with corresponding notice to potential offerors and adjusting the due date for proposals).

(6) Protests after award. To be considered, a protest must be received within 10 days of notification of award. No requirement to suspend performance, but if compelling reasons dictate performance should be suspended, the contracting officer or CAO as appropriate should seek a no-cost suspension with the awardee until the protest can be resolved. If no-cost suspension cannot be reached, seek legal counsel.

(7) Written decision required by the contracting officer or CAO as appropriate with notice of appeal rights to the CG, FMWRC.

(8) Appeals. Appellate authority must seek legal advice before deciding appeal.

(9) Litigation. For a discussion of NAFI protest litigation, *see infra* Part XIII.A.

j. Mistakes after award. AR 215-4, para. 4-22. Generally, only correct a mistake if there is a benefit to the NAFI and if modification does not change the essential requirements of the contract.

D. Sealed Bidding. AR 215-4, Chapter 5.

1. Constitutes the least used method of contracting and is not preferred for NAFI contracting. It may be used only if:

a. Price is the only evaluation factor;

b. Current and accurate purchase descriptions or specifications have been developed;

c. Time permits the solicitation, submission, and evaluation of bids;

d. Discussions with bidders are unnecessary; <u>and</u>

e. There is a reasonable expectation of receiving more than one sealed bid. *See* AR 215-4, para. 5-1.

2. Sealed bidding procedures. AR 215-4, paras. 5-2 through 5-23.

a. Preparation of Invitations for bids (IFBs). AR 215-4, para. 5-2.

b. Late bids, late bid modifications, and late bid withdrawals. Generally, bidders are responsible for submitting bids, modifications, or withdrawals to the NAFI office designated in the IFB by the time specified in the IFB. Bidders may use any method of transmission authorized in the IFB, to include facsimile. If no time is specified, the time for receipt is 4:30 pm. local time for the designated NAFI location on the date the bids are due. AR 215-4, para. 5-12.

c. Amendment and cancellation of bids. AR 215-4, paras. 5-10, 5-11.

d. Late bids, late modification of bids, or late withdrawal of bids. AR 215-4, para. 5-12.

e. Mistakes. AR 215-4, paras. 5-16 and 5-18.

f. Two-step sealed bidding. AR 215-4, para. 5-19 through 5-23.

(1) Generally. A combination of competitive procedures designed to obtain benefits of sealed bidding when adequate specifications are not available.

(2) Step 1. Requests for, submission, evaluation, and (if necessary) discussion of technical proposals. No pricing is involved. The objective is to determine the acceptability of the supplies or services offered.

(3) Step 2. Sealed priced bids submitted by those who submitted acceptable technical proposals. Submitted bids are evaluated and the awards made in accordance with evaluation factors stated in the solicitation.

(4) Use in preference to negotiated procurement if:

(a) Available specifications are not definite or complete or may be too restrictive without technical evaluation, and any necessary discussion of the technical aspects of the requirement to ensure mutual understanding between each source and the NAFI;

(b) Definite criteria exist for the evaluation of the technical proposals;

(c) More than one technically qualified source is expected to be available;

(d) Sufficient time is available; and

(e) A firm-fixed price or FFP with EPA contract will be used. AR 215-4, para. 5-20.

g. Contract award. Award to the lowest responsible, responsive bidder. Only award contracts that are firm-fixed price (FFP) or FFP with economic price adjustment. AR 215-4, para. 5-17.

h. Protests. AR 215-4, para. 4-21. *See supra* para. VIII.C.2.i (discussing protests to the agency); *infra* subpart XIII.A (discussing protest litigation).

IX. CONTRACT ADMINISTRATION

A. Contract Modifications. Contracting officers acting within the scope of their authority may issue contract modifications using DA Form 4073 electronic formats. AR 215-4, para. 6-2.

1. Unilateral:

   a. A unilateral modification is a contract modification that is signed by the contracting officer only.

   b. Unilateral modifications are used to:

      (1) Make administrative changes;

      (2) To issue change orders under the changes clause;

      (3) To make changes authorized by other contact clauses (for example, the option clause); and

      (4) To issue termination notices.

2. Bilateral (also called supplemental agreements):

   a. Bilateral modifications are changes in contracts requiring mutual consent by both the contracting officer and the contractor.

   b. The contracting officer signs bilateral modifications after the contractor has signed.

   c. Bilateral modifications are used to:

      (1) Make negotiated equitable adjustments as a result of issuing a change order under the changes clause, to include a constructive change – the contracting officer will make a written determination that the new price is fair and reasonable.

      (2) Reflect other agreements of the parties that change the terms of the contract – cannot be used to expand the scope of work for a contract.

B. Change Orders. NAF contracts generally contain a changes clause that permits the contracting officer to make unilateral changes, in designated areas, within the general scope of the contract. The contractor must continue performance of the contract as changed. The changes clause provides for an equitable adjustment to be made if the contractor experiences an increase or decrease in cost of the work as a result of the change. AR 215-4, para. 6-3.

C. Constructive Changes. Any conduct by a contracting officer or other authorized representative, other than an ordered change, having the effect of requiring the contractor to perform new work or work different from that required by the contract. Constructive changes entitle the contractor to relief under the changes clause. Examples include: requiring a contractor to meet a delivery schedule

despite an excusable delay; NAFI furnishing defective specs or misinterpreting the contract; or overzealous inspection. AR 215-4, para. 6-4.

D. Contracting Officers Representative (COR) / Administrative Contracting Officers (ACO) / Ordering Officers. AR 215-4, paras. 6-5 to 6-7.

1. A COR may be appointed by the contracting officer in writing. Terms and limitations of COR must be set out in appointment memo. However, COR may <u>not</u> issue, authorize, agree to, or sign any contract or modification or in any way obligate the payment of funds by the NAFI.

2. Administrative Contracting Officers (ACO). The contracting officer shall appoint ACOs in writing. ACOs must be warranted contracting officers in their own right.

3. Ordering Officers. Ordering officers appointed in writing by the CO can place delivery orders against indefinite delivery type contracts awarded by the contracting officer. The ordering officer will be under the technical supervision and review of the contracting officer.

E. Performance Delay. AR 215-4, para. 6-8.

1. Excusable delay for causes beyond the contractor's control should be handled by a bilateral contract modification extending contract performance or terminating the contract for convenience.

2. Inexcusable delays have a variety of remedies from termination to bilateral modification and downward price adjustment.

F. Suspension of Work and Stop-Work. AR 215-4, para. 6-9.

1. The contracting officer may order a suspension of work for a reasonable period of time in a construction contract where appropriate.

2. The contracting officer may give a stop work order in either a service or supply contract where appropriate. Work stoppage may be required for state-of-the-art breakthroughs in technology or program realignment.

3. The contracting officer must include a suspension of work clause in all fixed price construction or architect-engineer contracts.

4. The contracting officer may include a stop-work order clause in solicitations and contracts for supplies and services.

G. Terminations. AR 215-4, para. 6-10.

1. The terminations clause authorizes contracting officers to terminate contracts when it is in the NAFI's best interest. Terminations can be for

convenience or default. All termination notices must be in writing. Contracting officers can enter settlement agreements.

2. No-fault terminations. For use in concession contracts only, under the no-fault clause (optional), either party can terminate by giving advanced written notice of a predetermined amount of time (usually 30 days).

3. Termination for default.

   a. Cure notice. Issue if time permits prior to delivery date.

   b. Show cause notice. Issue if no realistic time for a cure notice or if delivery period has expired.

4. Contract Disputes and Appeals. AR 215-4, para. 6-11.

   a. In accordance with the Disputes Clause, the Contracts Disputes Act (CDA) does not apply to NAFI contracts. AR 215-4, para. 6-11*a*.[8] As an exception, the CDA applies to contracts with military exchange services, including the Army and Air Force Exchange Service. 41 U.S.C. § 7102(a); 28 U.S.C. §§ 1346, 1491; AR 215-8, para. 8-3*b*; *see also Pacrim Pizza Co. v. Prie*, 304 F.3d 1291 (Fed. Cir. 2002); *PNL Commercial Corp.*, ASBCA No. 53816, 04-1 BCA ¶ 32552.

   b. Prior to final decision, the contracting officer should make every reasonable attempt to settle the dispute amicably. If that fails, the contracting officer issues a final decision.

   c. Requirements for final decision.

      (1) Burden rests on the contractor. The contractor must submit written evidence substantiating the claim "to the satisfaction of the contracting officer," on both merits and quantum of claim.

      (2) Final decision must be in writing and include relevant facts and basis for the decision.

      (3) Notice that this is a final decision and notice of appeal. See required paragraph language at AR 215-4, para. 6-11*c*(3).

      (4) Mail final decision to contractor by certified mail, return receipt requested.

[8] *But see infra* Part XIII.B.2 (discussing *Slattery v United States*, 635 F.3d 1298 (C.A.F.C. 2011), in which the *en banc* Federal Circuit overruled *AINS* and found that the Court of Federal Claims had Tucker Act jurisdiction over contract disputes involving all NAFIs if the NAFIs were performing a governmental function).

d. Processing Appeals with the ASBCA. Contractor will forward notice of appeal, together with envelope showing postmark, to relevant higher headquarters without comment, and to the ASBCA for docketing. A copy of the notice of appeal and the transmittal letter to the ASBCA will be forwarded to the local staff judge advocate.

e. Within 30 days of notice of appeal, the contracting officer, with the assistance of legal counsel, will compile five copies of the appeal file (Rule 4 file) and comply with the direction of the trial attorney at the Contract and Fiscal Law Division who will coordinate with the ASBCA.

f. The decision of the ASBCA is a final decision.

g. Litigation. For a discussion of NAFI disputes litigation, *see infra* Part XIII.B.

5. Contract Claims. AR 215-4, para. 6-12.

a. Claims arising out of the operations of the Army installation and regional NAFIs, other than AAFES and the Army Civilian Welfare Funds (ACWF) will be paid out of the IMCOM Regional Single MWR Fund.

b. Claims arising from operations of the ACWF will be settled as directed in AR 215-7.

c. Claims arising out of AAFES claims will be settled as directed in AR 215-8.

d. The Equal Access to Justice Act,[9] 5 U.S.C. § 504, does not apply to NAFI contracts with the exception of exchange services contracts because jurisdiction to award fees and cost under the EAJA is limited to appeals adjudicated under the Contracts Disputes Act. *See PNL Commercial Corp.,* ASBCA No. 53816, 04-1 BCA ¶ 32552.

6. Payment.

a. Advance payments may be provided on any type of contract, but they are the least preferred method of contract financing. They

9 The EAJA provides that "[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504(a)(1).

are not authorized if other standard payments (partial, progress, or on-receipt) are available. AR 215-4, para. 6-18.

b. Prompt Payment Act. 5 C.F.R. 1315. NAF contracting officers must comply with policies and clauses for implementing Office of Management and Budget (OMB) prompt payment regulations. Include specific prompt payment clause in each applicable solicitation. Refer to FAR, Subpart 32.9 for details. AR 215-4, para. 6-16.

c. Fiscal issues. Because Congress does not appropriate NAF monies, **funds do not expire at the end of the fiscal year**. However, finance offices may close out actions based on fiscal years so contracting officers must coordinate with their finance offices to keep monies active if contracts cross fiscal years. AR 215-4, para. 6-28.

7. Contract Close-out. AR 215-4, para. 6-32.

X. SPECIAL CATEGORIES OF CONTRACTING

A. Concession Contracts—General. AR 215-4, para. 7-1.

1. A concession contract is a license or permit for an activity/business to sell goods and services to authorized NAFI patrons at a designated location for a specified period of time. Examples include retail merchandise, vending or amusement machines, special events, food service or instruction. Concession contracts may be for a long or short term.

2. Before a concession contract is awarded, the garrison commander or general manager at an AFRC, ARMP, or designee, must determine that the requirement is normally a part of, and directly related to, the purpose of the MWR program as specified in AR 215-1 and must authorize, in writing, the MWR activity to operate a resale activity by concession contract.

3. The NAFI receives a flat fee or percentage of gross sales from the concessionaire.

4. Insurance. Contracting officer shall determine the types of insurance coverage necessary for the contractor to obtain to protect the interests of the NAFI. Coverage may include bodily injury and property damage; workmen's compensation; property insurance; automobile liability; etc. Contact FMWRC risk management office (RIMP) for assistance in determining appropriate amounts of insurance.

a. Amusement company contracts must include requirements for public liability insurance in the amounts specified by the contracting officer.

b. Certificates of insurance, in the types and amounts determined appropriate by the contracting officer, must be provided to the contracting officer before beginning contract performance.

B. Long-Term Concession Contracts. AR 215-4, para. 7-2.

1. Over 30 days, even if days do not run consecutively (for example, every Sunday for one year).

2. Solicitation must put offerors on notice of:

a. Records that must be kept;

b. NAFI's right to audit and inspect records and premises;

c. Concessionaire's responsibility to safeguard all assets in its possession in which the Government or NAFI have an interest;

d. Concessionaire must certify the integrity of its financial records;

e. The reports the concessionaire must provide;

f. Whether the concessionaire fee is a fixed fee or based on a percentage of sales;

g. The fact that prices must be clearly listed in English and that the contracting office approves prices and changes to pricing;

h. A schedule of prices for any service charges and the fee or commission to be offered the NAFI;

3. Price competition may be based on the selling price, concession fee, or both.

4. If a service over $2,500 is involved, the Service Contract Act may apply. AR 215-4, para. 7-2 and 7-9. *See Ober United Travel Agency v. Department of Labor*, 135 F.3d 822 (D.C. Cir. 1998) (citing DOL provision that adopts contractor gross receipts under a concession contract as the contract "value").

C. Short-Term Concession Contracts. AR 215-4, para. 7-5.

1. Performance for 30 days or less (regardless whether days are consecutive).

2. The contracting officer may format a standard short-term concessionaire contract (DA Form 5756) for a one-time legal sufficiency determination for repetitive short-term concession contracts.

3. Contract will include, at a minimum:

a. NAFI furnished supplies and services (space, water, etc);

b. Concessionaire furnished supplies and equipment (signage, displays, chairs, etc.);

c. Any limitations on performance or non-competition clauses, such as restrictions on concessionaire advertisements or selling beyond booth area;

d. Days and hours of operation;

e. Concessionaire's responsibility for site appearance and clean up;

f. Points of contact;

g. Responsibility for obtaining licenses, passes, permits, and health and safety requirements;

h. Mandatory clauses (termination, disputes, and audit).

D. Merchandise Concessions. AR 215-4, para. 7-3.

1. Prices for items should be included in contract.

2. In addition to requirements for concession contracts generally, additional requirements to be included in merchandise concession contract include:

a. Party responsible for purchasing supplies to be sold in shop;

b. The type of items to be offered in the concession;

c. Vandalism / theft reporting requirements;

d. Party responsible for equipment maintenance and utilities;

e. Procedures for clean up and disposition of unsold merchandise at conclusion of contract.

E. Vending and Amusement Machines (not including slot machines or other machines operated by the ARMP). AR 215-4, para 7-4.

1. In addition to general concession contract requirements, vending and amusement machine contracts must include:

a. The number of machines plus the machine type, manufacturer, and ID number;

b. Location of machines during contract performance;

c. Procedures for locking devices and sales accountability (*see* AR 215-1);

d. The responsibility of the concessionaire to notify the contracting officer before rotating, removing, or changing machines;

e. Time period for stocking, repairing, and servicing the machines;

f. Customer refund procedures;

g. Capability of coin counting machines to reject "slugs" or foreign coins;

h. Requirements for inspection and handling of food placed in vending machines;

i. Establishment of reporting procedures to be used if the concessionaire discovers the machines have been vandalized;

j. The concessionaire shall not make any alteration in the physical structure of the area in the NAFI facility provided for placement of the machines, without prior approval from the contracting officer;

k. Space, plumbing, electrical requirements available to the concessionaire.

2. Randolph-Sheppard Act may apply. *See* 20 U.S.C. § 107, *et. seq.*; U.S. Dep't of Army, Reg. 210-25, Vending Facility Program for the Blind on Federal Property (30 June 2004).

F. Consignment Agreements. Use DA form 5755, Consignment Agreement (Nonappropriated Funds). AR 215-4, para. 7-6.

G. Entertainment Contracts. AR 215-4, para. 7-8.

1. Entertainment is any form of activity that provides amusement, enjoyment, interest, or diversion from daily routine activities and promotes the general morale and recreation of soldiers and their families. These types of contracts are referred to as revenue-generating contracts when awarded on a percentage basis. Funding is IAW AR 215-1 requirements.

2. AR 215-4 does not normally require competition for these contracts; however, it does prohibit the exclusive use of one entertainer or agent when there is more than one entertainer or agent who can provide similar, comparably priced services within the geographic area. *See* AR 215-4, para. 7-8b and c.

3. Copyrighted material.

   a. Clearances are required before copyrighted material can be performed on stage. Procedures for obtaining these clearances is contained in AR 215-1, Appendix H.

   b. Copyright and royalty clearances will be included in the contract file.

4. Government Employees. An entertainment contract will not be entered into between an MWR activity and a government employee or any organization substantially owned or controlled by one or more government employees unless the activity's needs cannot otherwise reasonably be met. AR 215-1, para. 8-18*b*(7). *But see* AR 215-4, para. 1-21, for language generally permitting contracts with government employees when funded only with NAF.

5. The Service Contract Act (SCA) may apply if the entertainment requires the use of stage hands or other technicians. See AR 215-4, para. 7-9e.

6. The contract must contain a cancellation clause and a liquidated damages clause, as well as insurance requirements. AR 215-4, para. 7-8d and d(4).

H. Contracts with Amusement Companies and Traveling Shows. AR 215-4, para.7-7.

I. Service Contracts. AR 215-4, para. 7-9.

1. Contracts to perform an identifiable task, rather than furnish an end product. Examples include operation of NAFI equipment or facilities, instructions and training, sports officials, architect-engineer services (*see* AR 215-4, para. 8-2), housekeeping, grounds maintenance, repair of equipment, etc.

2. Nonpersonal service contracts are those in which contractor personnel are not subject, whether by the contract terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government or the NAFI and its employees

3. Personal services contracts are contracts that, by their express terms or by the manner of its administration, make the contractor personnel appear to be NAFI or Government employees.

4. Policy:

a. Agencies should use performance based contracting methods to the maximum extent practicable for the acquisition of services except for: construction, architect-engineer services, utility services, and services that are incidental to supply purchases.

b. A NAFI shall not award a contract for the performance of an inherently governmental function. *See* AR 215-3, Nonappropriated Funds Personnel Policy (29 August 2003).

c. Personal services contracts are generally prohibited. AR 215-4, para. 7-9d.

5. The Service Contract Act (SCA).

a. 41 U.S.C §§6701 et seq; FAR 22.1007 and 22.1008.

b. The SCA is primarily for services performed by non-exempt service workers. The SCA provides for minimum wages and fringe benefits for service workers engaged in contracts valued over $2,500. The contracting officer is responsible for incorporating wage determinations acquired from Department of Labor at www.dol.gov/esa/minwage/america.htm into the solicitation.

c. The Army labor advisor has determined that the exception to the Services Contract Act for National Park Service concession contracts does not apply to MWR NAFIs.[10]

6. Davis Bacon Act. 40 U.S.C §§3141 *et seq*; FAR 22.403-1, FAR 22.404. Generally covers wages for construction contractor employees. However, certain services performed under construction contracts are still covered by the SCA. If construction contract is solely for services contract for dismantling, demolition, or removal of improvements without follow on construction, then the SCA applies. Otherwise the Davis-Bacon Act applies (federally funded construction projects over $2000). AR 215-4, para. 7-9*l*.

J. Insurance Contracts. AR 215-4, para. 7-10.

K. Information Technology Requirements. AR 215-4, para. 7-11.

L. Construction and Architect-Engineer (A-E) Contracts. AR 215-4, Chapter. 8.

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10 36 C.F.R. § 51.3 describes National Park Service concession contracts as follows: "Concession contracts are not contracts within the meaning of . . . the Contracts Dispute Act and are not service or procurement contracts within the meaning of statutes, regulations or policies that apply only to federal service contracts or other types of federal procurement actions."

1. The process for awarding NAF construction and A-E service contracts is similar to that for the same type of APF contracts.

2. Performance and payment bonds are required for most construction projects. AR 215-4, paras. 2-19; 7-10*o* and *p*.

3. Labor standards. The Davis-Bacon Act, the Copeland Act, and Contract Work Hours and Safety Standards Act apply to construction contracts that exceed $2,000. AR 215-4, para. 8-1*l*.

4. Buy American Act. The Buy American Act – Balance of Payments Program (Construction Materials) is not applicable to NAF funded construction contracts. By its terms, the Act only applies to APF funded contracts. AR 215-4, para. 1-25*b*.

5. AR 215-1, Chapter 15, Section II, contains additional guidance on NAFI construction planning, programming, funding, and project documentation. AR 215-1, Appendix E, contains detailed construction funding guidance. AR 420-1 and DA PAM 420-1-3, Army Military Construction and Nonappropriated-Funded Construction Program Development and Execution (2 April 2009) contain additional significant guidance.

M. Purchase of Alcoholic Beverages. See Section III.C.1 and .2 above.

N. Commercial Sponsorship. AR 215-1, Chapter 11, Section II.

1. Definition. "Commercial sponsorship is the act of providing assistance, funding, goods, equipment (including fixed assets), or services to a MWR program(s) or event(s) by . . . [a sponsor] . . . for a specific (limited) period of time in return for public recognition or opportunities for advertising or other promotions." AR 215-1, para. 11-6.

2. Advertising and Commercial Sponsorship are marketing, not contracting functions and are performed by personnel specifically designated by a command authority (normally the Director, Family Morale, Welfare, and Recreation). AR 215-1, para. 11-13.

3. Procedures. Activities using commercial sponsorship procedures must ensure, among other matters, that:

a. Obligations and entitlements of the sponsor and the MWR program are set forth in a written agreement that does not exceed one year, though such agreements may be renewed for a total of 5 years. All agreements require a legal review by the servicing legal office. AR 215-1, para. 11-8a;

b. The activity disclaims endorsement of any supplier, product, or service in any public recognition or printed material developed for the sponsorship event. AR 215-1, para. 11-8d;

c. The commercial sponsor certifies in writing that it shall not charge costs of the sponsorship to any part of the government. AR 215-1, para. 11-9c; and

d. Officials responsible for contracting are not directly or indirectly involved with the solicitation of commercial vendors, except for those officials who administer NAF contracts. AR 215-1, para. 11-13a.

O. MWR Advertising. AR 215-1, Chapter 11, Section I.

XI. LABOR AND SOCIO-ECONOMIC POLICIES.

A. Socioeconomic Policies.

1. The Small Business Act (SBA). The SBA does not apply to NAF acquisitions. However, contracting officers may solicit small businesses and minority firms to compete for NAF requirements. AR 215-4, para. 1-23.

2. Foreign acquisition. NAF contracting officers will comply with the following when acquiring foreign supplies and services, as applicable. AR 215-4, para. 1-25.

a. Buy American Act – Balance of Payments Program (excluding NAF funded construction because the Buy American Act by its terms only applies to APF funded contracts). 41 U.S.C § 8301-8305; AR 215-4, para. 1-25*b*.

b. DOD International Balance of Payments Program. DOD Directive 7060.3.

c. The Trade Agreements Act of 1979. 19 U.S.C § 2501, *et seq*.

d. The Caribbean Basin Recovery Act. Pub. L. No. 98-67, Title II, as amended.

e. Israeli Free Trade Implementation Act of 1985. 19 U.S.C § 2112 note.

f. The North American Free Trade Agreement Implementation Act of 1993. 19 U.S.C § 3301 *et seq*.

B. Labor laws. AR 215-4, para. 1-22.

1. Davis-Bacon Act (40 U.S.C § 3141 *et. seq.*) – construction wages.

2. Copeland Act (18 U.S.C § 874 and 40 U.S.C § 3145) – construction – anti-kickback.

3. Walsh-Healey Public Contracts Act (41 U.S.C §§ 6501 *et seq*; FAR 22.6) – all contracts over $15,000 – wages and working conditions.

4. Equal Employment Opportunity. Executive Order 11246, as amended; FAR 22.807.

5. Service Contract Act of 1965 as amended (41 U.S.C § 6701 *et seq.*; FAR 22-1007 and 22-1008). Minimum wage in service contracts greater than $2500.

6. Contract Work Hours and Safety Standards Act (40 U.S.C § 3701 *et seq.*) for contracts greater than $100,000.

XII. LEGAL REVIEW

A. Legal counsel should review NAF contracting actions in all cases required by regulation and in any other cases when requested by the NAF contracting officer.

B. Required legal reviews. AR 215-4, para. 1-17.

1. Proposed awards resulting from unsolicited proposals.

2. Decisions concerning claims, disputes, protests, and appeals.

3. Novations, change of name agreements, and assignment of claims.

4. Termination actions.

5. Recommendations for suspension or debarment.

6. Requests for release of information under the FOIA.

7. Ratification actions.

8. Congressional inquiries related to NAF acquisitions.

9. Contract-related ethical violations covered in the JER and Fraud covered in AR 27-40.

10. Proposed contractual documents related to the purchase or lease of real estate or license for use of real estate.

11. Questions regarding NAFI tax status.

12. Labor irregularities associated with possible labor violations..

13. Show cause and cure notices.

14. Determinations of personal / nonpersonal services.

15. Decisions concerning late proposals.

16. Determinations of no responsiveness or no responsible offerors.

17. Prior to initial use, standard form BPAs, BOAs, consignment, and concessionaire contracts.

18. Any time an alternate contract form is used.

19. All revenue generating contracts not covered in 17 above.

20. Solicitations and contracts in excess of the simplified acquisition threshold.

21. Awards incorporating contractor terms or conditions.

22. Indefinite delivery solicitations and contracts with aggregate orders expected to exceed $100,000.

23. Obligations concerning patents, copyrights, rights in data, and licensing agreements.

24. Bankruptcy proceedings related to a contractor.

25. Contracts with Government employees and military personnel.

26. Questions concerning EEO exemptions.

27. Potential contractor conflicts of interest.

28. Delivery or task orders above $500,000.

C. Legal review will, in writing, state whether a proposed action is legally sufficient and will recommend a course of action to overcome any deficiencies. If action is legally sufficient but contains other deficiencies, those should be addressed separately from the legal sufficiency decision.

XIII. LITIGATION INVOLVING NAF CONTRACTS

A. Protests. AR 215-4, para. 4-21.

1. GAO Jurisdiction.

a. NAFI procurements. Normally the GAO will not exercise jurisdiction regarding protests of NAFI contracts. The GAO normally lacks jurisdiction over procurements conducted by NAFIs because its authority extends only to "federal agency" acquisitions. *See* 31 U.S.C. § 3551; 4 C.F.R. § 21.5(g) (GAO bid protest rule implementing its statutory jurisdiction). A NAFI is not a "federal agency." *See DSV, GmbH*, B-253724, June 16, 1993, 93-1 CPD ¶ 468; GAO REDBOOK, 15-253 to 15-254. Protests are resolved under agency "appeal" procedures set forth in AR 215-4, para. 4-21, as discussed *supra* Part VIII.C.2.i.

b. Exceptions:

(1) Procurements conducted by an APF contracting officer. The GAO has jurisdiction to consider protests involving procurements conducted "by or for a federal agency," regardless of the source of funds involved. *Barbarosa Reiseservice GmbH*, B-225641, May 20, 1987, 87-1 CPD ¶ 529. *See also Thayer Gate Development Corp.*, B-242847.2, Dec. 9, 1994 (GAO will assert jurisdiction if it finds the agency involvement so pervasive that the NAFI has become a conduit for the agency). APF activities may also provide "in-kind" support to NAFIs. APF contracting support to NAFIs may subject the action to the Competition in Contracting Act.

(2) The GAO may consider a protest involving a NAFI if the protestor alleges the agency used a NAFI to avoid competition requirements. *Premier Vending*, B-256560, July 5, 1994, 94-2 CPD ¶ 8; *cf. LDDS Worldcom*, B-270109, Feb. 6, 1996, 96-1 CPD ¶ 45 (no evidence Exchange was acting as a conduit for Navy or that Navy participation was pervasive).

2. COFC Jurisdiction. The COFC also normally will not exercise jurisdiction over protests involving a NAFI contract. But note that the COFC held in *Southern Foods* that because the NAFI did not meet all four prongs of the *AINS* test (specifically in that the Army NAFI did receive some appropriated funds), the COFC could exercise jurisdiction over the contractor's claim. *Southern Foods, Inc. v. United States*, 76 Fed. Cl. 769 (2007).[11]

[11] In *Southern*, the court based its decision on a finding that the U.S. Army Community and Family Support Center (CFSC), the predecessor of FMWRC, was not a NAFI. Although the CFSC was not a NAFI, the court attributed the execution of the contract to CFSC instead of correctly attributing the execution of the contract to the Army Morale, Welfare, and Recreation Fund. Therefore, the court may have based its decision on a faulty premise.

B. Disputes. AR 215-4, paras. 6-11 to 6-13.

1. The requirement for a final decision.

a. If the contracting officer fails to resolve a dispute arising under or relating to the contract, the contracting officer issues a final decision per the disputes clause contained in the NAF contract. AR 215-4, para. 6-11; *see supra* Subpart IX.G.4 (discussing the final decision process).

b. The contracting officer's decision lacks finality if it advises the contractor of its appeal rights under the contract incorrectly and the contractor is prejudiced by the deficiency. *Decker & Co. v. West*, 76 F.3d 1573 (Fed. Cir. 1996); *Wolverine Supply, Inc.*, ASBCA No. 39250, 90-2 BCA ¶ 22,706.

2. Historically, courts and boards did not exercise jurisdiction over NAFI contract disputes. As instrumentalities of the United States, NAFIs were immune from suit because Congress has not waived immunity for NAFIs under the Tucker Act (28 U.S.C. § 1346(a)(2)), the Contract Disputes Act (CDA) (41 U.S.C. § 7102(a)), or the Administrative Procedures Act. *See Swiff-Train Co. v. United States*, 443 F.2d 1140 (5th Cir. 1971); *AINS, Inc. v. United States*, 56 Fed. Cl. 522 (2003) (aff'd at 365 F. 3d. 1333, Fed. Cir. 2004); *Commercial Offset Printers, Inc.*, ASBCA No. 25302, 81-1 BCA ¶ 14,900).

a. Established Exceptions.

(1) Express or implied-in-fact contracts entered into by DOD, Coast Guard, and NASA exchange services, although NAFIs, are contracts of the United States for purposes of determining jurisdiction under the Tucker Act and the Contract Disputes Act. 28 U.S.C. § 1491(a)(1); *Pacrim Pizza Co. v. Prie*, 304 F.3d 1291 (Fed. Cir. 2002); *PNL Commercial Corp.*, ASBCA No. 53816, 04-1 BCA ¶ 32552.

(2) The Court of Appeals for the Federal Circuit (CAFC) held that the COFC has jurisdiction over a contract dispute with the Navy Resale and Services Support Office (NAVRESSO) even though it was not mentioned by name in the Tucker Act as an enumerated NAFI. The court treated NAVRESSO the same as the exchange services because of its responsibility for managing Navy exchanges. *McDonald's Corp. v. United States*, 926 F.2d 1126 (Fed. Cir. 1991).

b. Court of Federal Claims (COFC) Treatment. It held in *AINS* that the COFC did not have jurisdiction over a contract dispute with the U.S. Mint because the Mint is a NAFI and as such, there is no waiver of sovereign immunity. *AINS* at 543. To determine whether a federal entity is a "NAFI" and thus not subject to the CDA (so, federal courts are generally without jurisdiction), the *AINS* court used a four-part test:

(1) It must *not* receive its monies by federal appropriations;

(2) Its funding must derive "primarily from [the entity's] own activities, services, and product sales";

(3) There "must be a clear expression by Congress that the agency was to be separated from general federal revenues"; and

(4) Absent a statutory amendment, there is no situation in which appropriated funds could be used to fund the federal entity.

c. Court of Appeals for the Federal Circuit Overrules *AINS*:

(1) In *Slattery v United States*, 635 F.3d 1298 (C.A.F.C. 2011), the *en banc* Federal Circuit overruled *AINS* and found that the Court of Federal Claims had Tucker Act jurisdiction over contract disputes involving all NAFIs if the NAFIs were performing a governmental function.

(2) "The jurisdictional criterion is not how the government entity is funded or its obligations met, but whether the government entity was acting on behalf of the government." *Slattery*, 635 F.3d at 1301. "When a government agency is asserted to have breached an express or implied contract that it entered on behalf of the United States, there is Tucker Act jurisdiction of the cause unless such jurisdiction was explicitly withheld or withdrawn by statute." *Id*. at 1321. Accordingly, the court found that Tucker Act jurisdiction does not depend on nor is limited by whether the government entity receives or draws upon appropriated funds.

3. The Armed Services Board of Contract Appeals (ASBCA) has jurisdiction over NAF contract disputes if:

a. The contract incorporates a disputes clause that grants such jurisdiction. *COVCO Hawaii Corp.*, ASBCA No. 26901, 83-2 BCA ¶ 16,554.

b. The contract contains no disputes clause, but DOD regulations require incorporation of a jurisdiction-granting clause in the NAF contract. *Recreational Enters.,* ASBCA No. 32176, 87-1 BCA ¶ 19,675.

c. The contractor seeks non-monetary, declaratory judgment. *See SUFI Network Services, Inc.,* ASBCA No. 54503, 04-01 BCA ¶ 32,606.

d. ASBCA possesses (non-CDA) authority to review breach of NAFI contract claims through Tucker Act. *See* SUFI Network Servs., Inc. v. United States, (102 Fed. Cl. 656 (2012) (applying *Slattery* holding to ASBCA); *See also*, Minesen Co. v. McHugh, 671 F.3d 1332 (C.A. Fed., 2012) (declining to apply Slattery to the NAFI doctrine's applicability to the CDA).

4. The CAFC has refused to hear appeals from decisions of the ASBCA concerning NAFI contracts. It most recently affirmed this stance in *Minesen Co. v. McHugh*, 671 F.3d 1332 (Fed. Cir. 2012), where the court upheld a contract provision that waived any appeals rights beyond the ASBCA's final decision. See also *Strand Hunt Constr., Inc. v. West,* 111 F.3d 142 (Fed. Cir. 1997) (unpub); *Maitland Bros. v. Widnall*, 41 F.3d 1521 (Fed. Cir. 1994) (unpub).

5. The ASBCA has refused to read the Protest After Award clause into a NAF contract awarded by an APF contracting officer, even though the clause was required by regulation. *F2M, Inc.,* ASBCA No. 49719, 97-2 BCA ¶ 28,982 (citing *Dawn Cleaners, Inc.,* ASBCA No. 20653, 76-2 BCA ¶ 12,198 for the proposition that the Christian Doctrine is inapplicable to NAFI procurements).

XIV. CONCLUSION

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Chapter 32B
Air Force Nonappropriated Fund Contracting

2013 Contract Attorneys Deskbook

CHAPTER 32B

AIR FORCE NONAPPROPRIATED FUND CONTRACTING

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AIR FORCE NONAPPROPRIATED FUND CONTRACTING

I. INTRODUCTION

II. REFERENCES

A. 10 U.S.C. § 8013(b)(9)

B. 10 U.S.C. § 2783

C. GAO, Principles of Federal Appropriations Law, 15-226 to 15-277 (3d ed., vol. III, 2008).

D. DOD Regulations

1. DODI 1015.10, Programs for Military Morale Welfare, and Recreation (6 Jul 2009, Change 1, 6 May 2011).

2. DODI 1015.15, Establishment, Management, and Control of Non-Appropriated Fund Instrumentalities and Financial Management of Supporting Resources (31 Oct 2007, Change 1, 20 Mar 2008).

3. DODI 1330.9, Armed Services Exchange Regulations (7 Dec 2005).

4. DODI 4105.71, Nonappropriated Fund (NAF) Procurement Procedure (26 Feb 2001, Change 1, 30 Jul 2002).

5. DODD 4105.67, Nonappropriated Fund Procurement Policy (2 May 2001, Change 1, 30 Jul 2002).

6. DODD 7000.14-R, DOD Financial Management Regulation, Volume 13, Non-appropriated Funds Policy and Procedures (Apr 2013).

E. Air Force Regulations. There are several Air Force instructions, policy directives, and manuals that govern NAF contracting and commercial sponsorships available by departmental series on the Air Force electronic publishing website (www.e-publishing.af.mil) These include:

1. 32 Series: AFI 32-1022, Planning and Programming Nonappropriated Fund Facility Construction Projects (20 May 09).

2. 34 Series: AFPD 34-2, Managing Nonappropriated Funds (7 Jan 1994); AFI 34-108, Commercial Sponsorship and Sale of

Advertising (12 Oct 2011); AFI 34-124, Air Force Morale, Welfare, and Recreation Advisory Board (AFMWRAB) (25 July 1994); AFI 34-201, Use of Nonappropriated Funds (17 June 2002); AFI 34-202, Protecting Nonappropriated Fund Assets (27 Aug 2004); AFI 34-205, Services Nonappropriated Fund Facility Projects (5 July 2011); AFI 34-275, Air Force Nonappropriated Fund Government Purchase Card Program (23 June 2011).

3. 64 Series: AFPD 64-3, Nonappropriated Fund (NAF) Contracting System (1 Dec 2005); AFMAN 64-302, Nonappropriated Fund (NAF) Contracting Procedures (16 Nov 2011); and

4. 65 Series: AFI 65-106, Appropriated Fund Support of Morale, Welfare, and Recreation (MWR) and Nonappropriated Fund Instrumentalities (NAFIs) (6 May 2009); AFI 65-107, Nonappropriated Funds Financial Management Oversight Responsibilities (1 Dec 1999).

III. DEFINITIONS AND STATUTORY CONTROLS

A. Nonappropriated Fund Instrumentality (NAFI). AFMAN 64-302, Atch 1, Glossary.

> An integral DoD organizational entity that performs a government function. It acts in its own name to provide or assist DoD components in providing morale, welfare and recreational programs for military personnel and authorized civilians. As a fiscal entity, it maintains custody and control over its nonappropriated funds. It is not incorporated under the law of any state or of the District of Columbia and it enjoys the legal status of an instrumentality of the United States.

B. Nonappropriated Funds (NAFs). AFI 34-201, para 1.1 and 1.2. NAFs are government funds but are separate and apart from funds that are recorded in the books of the US Treasury. They are not appropriated by the Congress. NAFs come primarily from the sale of goods and services to DOD military and civilian personnel and their families. The purpose of NAF funds is for the "collective benefit of military personnel, their families, and authorized civilians. These funds support morale, welfare, and recreation (MWR) programs, lodging, certain religious and educational programs, and other programs…"

C. Statutory Controls on Nonappropriated Funds (NAFs). Congress has directed DOD to issue regulations governing the management and use of NAFs, and has made DOD personnel subject to penalties for their misuse. All NAFIs are created by DOD and it components, and all NAFs are government funds. However, NAFs are not appropriated by Congress or

controlled by the U.S. Department of Treasury. NAFIs, as fiscal entities, control their NAFs. 10 U.S.C. § 2783. Nevertheless, Congress may control the use of NAFs. For example:

1. 10 U.S.C. § 2783

   a. "[T]he Secretary of Defense shall prescribe regulations governing—(1) the purposes for which nonappropriated funds of a nonappropriated fund instrumentality of the United States within the Department of Defense may be expended; and (2) the financial management of such funds to prevent waste, loss, or unauthorized use."

   b. Additionally, this statute contains provisions sometimes referred to as the "NAF Anti-Deficiency Act" wherein it states that a DOD civilian employee paid by NAF funds who commits a "substantial violation" of DOD NAF regulations "shall be subject to the same penalties" for misuse of appropriated funds (i.e. $5,000 fine or two years confinement or both).

2. 10 U.S.C. § 8013(b)(9) states that the "Secretary of the Air Force is responsible for and has the authority necessary to conduct all affairs of the Department of the Air Force, including . . . [a]dministering (including the morale and welfare of personnel)."

3. Alcohol. A NAFI in the United States may purchase/sell beer and wine only from sources doing business in the state in which the military installation is located. 10 U.S.C. § 2495(a)(2). NAFIs located on military installations outside the United States may purchase/sell wine from host-nation sources so long as the NAFI gives "appropriate treatment" to wines produced in the United States to ensure such wines are given "equitable distribution, selection, and price" when compared to wines produced by the host nation. 10 U.S.C. § 2495a.

D. Regulatory Controls on NAFs

1. DODI 1015.10, Programs for Military Morale Welfare, and Recreation, Enclosure 5. MWR activities are placed into three separate categories based on the purpose of the program. The category is also important for determining how the program is funded (i.e. the level of NAF to appropriated fund support).

   a. <u>Category A, Mission Sustaining Activities</u>. Programs in this category promote the physical and mental well-being of the military member, a requirement that supports accomplishment of the basic military mission. *They are*

supported almost entirely by appropriated funds (APFs), with the use of NAFs limited to specific instances where APFs are prohibited by law or where the use of NAFs is essential for the operation of a facility or program. Examples are physical fitness facilities, libraries, unit-level sports, parks and picnic areas.

b. Category B, Basic Community Support Activities. Programs in this category satisfy the basic physiological and psychological needs of the services members and families providing community support systems that make "DOD installations temporary hometowns for a mobile military population." *They are supported by a "substantial amounts of APF support" but differ from category A programs in that they have an ability to generate some NAF revenue*, but they lack the ability to support themselves and could not function without APF support. Examples are automotive skills centers, youth activities, child development programs, arts and crafts centers, recreational swimming, riding stables, small (12 lanes or less) bowling alleys, and outdoor recreation centers.

c. Category C, Revenue-Generating Activities. Programs in this category have the business capability to generating enough income to cover most of their operation expenses, but they lack the ability to sustain themselves based purely on operations expenses. *So, they receive limited APF support.* Examples are golf courses, clubs, boating activities, lodging, large (over 16 lanes) bowling alleys, commercial travel services.

2. AFI 65-106, Appropriated Fund Support of Morale, Welfare, and Recreation (MWR) and Nonappropriated Fund Instrumentalities, para. 2.1. discusses the categories and funding levels of MWR activities.

IV. AUTHORITY TO CONTRACT

A. General. Only NAF warranted contracting officers are authorized to execute, administer, and terminate NAF contracts. The authority of these contracting officers is limited by their NAF warrants. The Director of NAF Purchasing, Headquarters Air Force Services Agency appoints NAF contracting officers and issues warrants commensurate with each applicant's training and experience. There are limited and unlimited NAF contracting officer warrants. AFMAN 64-302, Chapter 3.

B. Emergency purchase procedure exception.

1. When unforeseeable events occur that are likely to cause a loss of NAFI property or assets if immediate action is not taken, unwarranted individuals may incur obligations on behalf of a NAFI. AFMAN 64-302, para. 3.10.

2. Warrants are not required for Special Morale and Welfare (SM&W) purchases under the commander's SM&W expenditure authority, petty cash purchases, or purchases from other NAFIs. AFMAN 64-302, para. 3.11.

C. Contracting Officers. The Air Force has three different offices responsible for NAF contracting - the installation NAF contracting office, the Air Force NAF Procurement Office (AFNAFPO), and the Servicing Contracting Office (SCO).

1. Installation NAF Contracting Officers

a. The Director of NAF Purchasing, Headquarters Air Force Services Agency (HQ AFSVA/SVC) appoints installation NAF contracting officers. There are two types of "limited" NAF contracting officer warrants—with dollar limits of $5,000 and $25,000. The higher dollar limit requires completion of additional contracting courses. The commander of the Force Support Squadron at the installation where the contracting officer is assigned recommends and provides justification for the appointment of a NAF contracting officer. AFMAN 64-302, paras. 3.6 and 3.7.

b. Additional limits on a NAF contracting officer's authority to contract. AFMAN 64-302, para 3.7.3.

(1) Nonpersonal services, interior design service, and concessionaire contracts for services: The NAF contracting officer may obligate up to $2,500 when the Service Contract Act applies (NOTE: The Act applies in all 50 states, the District of Columbia and U.S. territories). For contracts performed both inside and outside the U.S., the Act only applies to the portion of the contract performed inside the U.S.).

(2) Education and Training Services: The NAF contracting officer may purchase education and training services with the NAF Purchase Card (NAF P-Card). Individual transactions may not exceed $2,500. AFMAN 64-302, paras. 3.7.3.5 and 9.4.1.

Vocational training and part-time college level education of NAF personnel in excess of $25,000 must be competed unless a sole source justification is included in the contract file. AFMAN 64-302, para. 11.9.

(3) Construction: The NAF contracting officer may obligate up to $2,000 when the Davis-Bacon Act applies (all 50 states, the District of Columbia and U.S. territories).

c. Unlimited Contracting Officer Authority: The NAF contracting officer's authority to purchase items for resale, contracts for entertainment, items for bingo prizes, concessionaire contracts for open house events/tickets and tours, and purchases from specified government sources (e.g., GSA, commissaries, exchanges, other Air Force Services of DoD activities), <u>is unlimited</u>, subject to fund availability. AFMAN 64-302, para 3.8.

2. The Air Force NAF Procurement Office (AFNAFPO). The AFNAFPO formulates and oversees NAF contracting procedures throughout the Air Force. AFI 64-301, para. 1.2. AFNAFPO is responsible for:

a. Formulating Air Force NAF contracting procedures.

b. Managing the Commander's Smart Buy Program (a cooperative purchasing program between AFNAFPO and base level NAF activities).

c. Providing NAF contract training and issuing NAF contracting warrants.

d. Approving ratification actions above base level thresholds.

e. Requesting qualified sources evaluate contracting processes and actions.

f. Providing support for NAF requirements exceeding base level warrant authorization.

g. Representing the Air Force on the DOD subcommittee for NAF contracting.

h. Awarding contracts exceeding the authority of a NAF contracting officer.

3. Servicing Contracting Office (SCO)

a. A base, central, or regional appropriated fund (APF) contracting office supporting one or more installations. AFMAN 64-302, Atch 1, Glossary.

b. The SCO coordinates with NAF contracting officers to ensure an effective NAF contracting program. AFMAN 64-302, para. 1.7.

c. The SCO purchases all NAF requirements other than those specifically assigned to the AFNAFPO or the NAF contracting officer. AFMAN 64-302, para. 1.7.1. For example, the SCO must solicit, award, and administer NAF construction contracts that exceed NAF contracting officer purchasing authority. AFMAN 64-302, para. 5.1.3.

D. Responsibilities of the Staff Judge Advocate or Contract Attorney. AFMAN 64-302, para. 1.8. The SJA or Contract Attorney "shall provide legal oversight" of all NAF contracting activities and conduct annual ethics briefings or other authorized training. Additionally, the SJA will determine:

1. Whether NAF contracting actions comply with AFMAN 64-302 and AFPD 64-1.

2. Whether proposed ratifications are legally sufficient.

3. Whether a proposed resolution of a contract dispute is legally supportable.

4. The legal sufficiency of proposed contracting actions.

E. NAF Ratification Procedures. AFMAN 64-302, para. 12.7.

1. Personnel holding the following positions are authorized to approve or disapprove ratification of unauthorized commitments in the following amounts:

a. $50,000 or less: Force Support Squadron Commander of the installation.

b. Over $50,000: AFNAFPO.

2. Procedures. AFMAN 64-302, para. 12.7.

a. The individual who committed the unauthorized act prepares a statement of all pertinent facts and a purchase request/contract and forwards to his/her supervisor.

b. The supervisor reviews the statement and certifies whether the items were received and used for an authorized purpose; that proper funds were available at the time; and indicates what actions were taken to prevent recurrence. Supervisor forwards all documentation (employee's statement, supervisor's certification, invoice, and funded purchase request) to the NAF contracting officer.

c. The NAF contracting officer then reviews the ratification package for adequacy, prepares the necessary contractual documents, and forwards to the servicing legal office for review.

d. The legal office reviews the ratification package for legal sufficiency and then forwards to the ratification authority.

e. The ratification authority reviews the ratification package and if approved, he/she forwards the package to the contracting officer who will sign the purchase request (officially binding the government) and forward for distribution.

V. SPECIAL NAF REQUIREMENTS

A. The FAR, DFARS, and AFFARS do not apply to NAF procurements except as required by AFMAN 64-302. While FAR procedures are used as guidance in support of NAF purchasing processes, only those clauses required by law or otherwise stated shall be mandatory. For discussion of mandatory NAF contracting requirements, see AFMAN 64-302, para. 5.1.1. and Chapter 6.

1. General Rule. NAF contracts shall contain only those clauses and certifications required for the purpose of complying with federal law, DOD requirements and protecting the interests of the NAFI. AFMAN 64-302, para. 6.1. General provisions and representations/certifications are available on-line at www.afnafpo.com.

2. For purchases made with both NAF and APF, the acquisition will be conducted by an *APF contracting office using FAR procedures*. AFMAN 64-302, para. 5.1.1.

3. When FAR clauses are used in NAFI contracts, references to "Government" should be changed to "NAFI." AFMAN 64-302, para. 5.1.

B. Performance Period. AFMAN 64-302, para. 6.12.

1. If the contract is subject to the Service Contract Act (SCA), then the performance period is restricted to 5 years.

2. If the contract is *not* subject to SCA, then the performance period will be determined by the contracting officer. Contracts exceeding 10 years duration must be supported by the contracting officer's determination that it is in the NAFI's best interest.

3. But, there is no restriction on the performance period regarding contracts for the lease of real property.

4. Blanket Purchase Agreements (BPAs) and Nonappropriated Fund Purchase Agreements (NPAs) must state the beginning and ending dates of the basic period and may include option periods, but will not exceed 10 years.

C. Requirements Based on Type of Contract

1. Purchase request (PR) contracts. AFMAN 64-302, chap. 7. PRs are unilateral offers to buy items on the open market at specified prices. PR are binding on the government when the firm accepts the offer either by signing the PR or by initiating performance.

a. PRs requests shall at a minimum identify the requesting NAFI, the requirement, and the requested delivery date.

b. PRs for services should also have a Performance Work Statement (PWS) or Statement of Work (SOW). There are no prescribed forms for submitting the PR. The submission must be in a form determined acceptable by the contracting officer.

c. All PRs must contain certification of fund availability (signed by a fund certifying authority) before initiating purchasing action.

2. Construction contracts executed by the AFNAFPO may be executed using the FAR as a guideline. However, the acquisition process may be based on standard commercial practices if such practices are in the best interest of the NAFI. AFMAN 64-302, para. 6.2.

VI. COMPETITION, SOLICITATIONS, AND AWARD

A. Competition. The Competition in Contracting Act (CICA) does not apply to NAFIs unless appropriated funds are obligated. 10 U.S.C. § 2303; Gino Morena Enters., B-224235, Feb. 5, 1987, 87-1 CPD ¶ 121.

B. Purchases of $5,000 or less. Competition is not required; contracting officer's signature certifies prices are fair and reasonable. AFMAN 64-302, para. 6.6.1.

C. Purchases exceeding $5,000 and up to the Simplified Acquisition Threshold (SAT, generally $150,000). At least two sources must be solicited. AFMAN 64-302, para. 6.6.2.

D. Purchases exceeding the SAT. Written or electronic solicitations must be issued to a minimum of three qualified sources. If only one bid/offer is received, the contracting officer must include a written determination of price reasonableness. AFMAN 64-302, para. 6.6.2.

E. Special Source Requirements

1. Brand Name/Sole Source. Requesting activity must provide written justification for brand name/sole source purchases. Contracting officer determines if there is sufficient justification. AFMAN 64.302, para. 6.8.

2. Activities are to be aware of and place orders for products on the mandatory "Procurement List" from the blind and severely disabled. AFMAN 64-302, para. 6.13.

3. Contracting officers are encouraged to purchase products or classes of products/services provided by Federal Prison Industries to the maximum extent possible. AFMAN 64-302, para. 6.14.

4. Orders/contracts that include the purchase of hazardous materials must be coordinated with the Hazardous Materials Pharmacy (see AFI 32-7086) and include FAR 52.223-3, Hazardous Material Safety Data, by reference or in full text. AFMAN 64-302, para. 6.15

5. Controlled medical substances purchased for the base veterinarian must include the veterinarian's Drug Enforcement Agency (DEA) number. AFMAN 64-302, para. 6.16.

6. Resale/Rental items. Competition is not required for resale or rental items. When competition is not obtained, the contracting officer will prepare a determination of price reasonableness for the file. AFMAN 64-302, para. 6.7.

F. Synopsis. AFMAN 64-302, para. 8.3.

1. Not required for NAF purchases.

2. NAF contracting officers <u>may</u> synopsize requirements when in the NAFI's best interest.

3. Solicitation and contract award notices for synopsized NAF purchases shall include special language regarding the purchase:

> "This is a nonappropriated fund purchase and it does not obligate appropriated funds of the United States Government. Nonappropriated funds are generated by the military community through the sale of goods and services and the collection of fees and charges for participation in military community programs. This purchase does not involve federal tax dollars."

G. Solicitations. AFMAN 64-302, para. 8.1.

1. May be *written or verbal* depending on the dollar value/complexity of the requirement.

2. Written solicitations <u>must</u> be used for open market purchases exceeding the SAT.

H. Basis for Award. AFMAN 64-302, para. 8.5.

1. If factors other than price alone are used as the basis for award, these factors shall be identified in the solicitation with their order of importance. AFMAN 64-302, para. 8.5.

2. Purchases up to and including the SAT. Using price and other factors as the basis of award, the contracting officer will document the file with the rationale for making the award to a particular contractor. AFMAN 64-302, para. 8.5.1.

3. Purchases over the SAT. Using price and other factors as the basis of award, the contracting officer will prepare a written summary of the analysis of all offers showing the results of the evaluation in relation to price, technical factors, and past performance. This document is marked "Source Selection Sensitive" and will not be released to the public. AFMAN 64-302, para. 8.5.2.

I. Responsibility. Before award of any contract, the contracting officer must determine the responsibility of the prospective awardee, using the responsibility standards in FAR 9.104-1. AFMAN 64-302, para. 6.10.

J. Debriefings. Debriefings to unsuccessful offerors will be conducted following award if determined appropriate by the contracting officer. The unsuccessful offeror must request in writing the debriefing within 3 days after receiving notice of contract award. AFMAN 64-302, para. 8.12.

VII. ACQUISITION METHODS

A. DOD Policy. DoDI 4105.71, para. 4, and DoDD 4105.67, para. 4, provide that NAFIs shall conduct procurements:

1. By competitive negotiation, to the maximum extent practicable;

2. By trained procurement personnel;

3. In a fair, equitable, and impartial manner; and

4. To the best advantage of the NAFI.

B. Blanket Purchase Agreements (BPAs) provide a method of purchasing supplies and services on a recurring basis when the use of the NAF P-card is not practicable. NAF contracting officers negotiate BPAs. AFMAN 64-302, Chapter 10.

C. Delivery Orders are orders written against an existing contract or agreement. Terms and conditions set forth in the basic contract will apply to deliver orders issued. Competition is not required when issuing a delivery order. AFMAN 64-302, para. 8.9.

D. NAF Purchase Card (P-Card). The NAF P-Card is the preferred method for acquiring standard commercial items within specified dollar thresholds. AFMAN 64-302, Chapter 9 (see also AFI 34-275, Air Force NAF Government Purchase Card Program).

1. AFNAFPO establishes purchasing thresholds for use of the NAF government purchase card. Further limitations may be set at the installation or MAJCOM level. AFMAN 64-302, para. 9.4.

2. NAF P-Card may be used to purchase supplies, equipment, and non-personal services. Individual transactions may not exceed $2,500, except purchases for the education and training program and purchases from the Commissary, AAFES, NEX, Prime Vendor, and printing services from DAPS have a single purchase limit of $25,000. AFMAN 64-302, para. 9.4.1.

3. Warranted contracting officers may use the purchase card as a method of payment on purchase orders/delivery orders up to the limit of their warrant. AFMAN 64-302, para. 9.4.2.

4. AFMAN 64-302, para. 9.4.3, provides that the purchase card shall not be used for the following:

a. Personal purchases.

b. Use as a travel card for official government travel or cash Advances.

c. Rental or lease of land or buildings.

d. Purchase of hazardous/dangerous items, such as munitions, toxin, firearms.

e. Items designated for purchase with APFs.

E. Purchase Order. AFMAN 64-302, para 8.6.

1. A purchase order is a unilateral offer to buy items on the open market at a specified price.

2. Purchase orders are binding when the commercial business accepts the offer either by signing the order or by initiating performance.

F. Special Contracts and Agreements. AFMAN 64-302, Chapter 11 provides details on the following special contracts/agreements:

1. Entertainment Contracts. Para. 11.2.

2. Aircraft Lease Agreements. Para. 11.3.

3. Aero Club Instructor and Mechanic Contracts. Para. 11.4.

4. Individual Service Contracts. Para. 11.5.

5. Nonpersonal Services Contracts. Para. 11.6.

6. Concessionaire Contracts. Para. 11.8.

7. Training and Education Contracts. Para. 11.9.

8. Contracting with Government Employees. Para. 11.10.

VIII. LITIGATION INVOLVING NONAPPROPRIATED FUND CONTRACTS

A. Protests. AFMAN 64-302, para. 12.5.

1. GAO Jurisdiction

a. NAFI procurements. Normally the GAO will not exercise jurisdiction regarding protests of NAFI contracts. The GAO normally lacks jurisdiction over procurements conducted by NAFIs because its authority extends only to "federal agency" acquisitions. See 31 U.S.C. § 3551; 4 C.F.R. § 21.5(g) (GAO bid protest rule implementing its statutory jurisdiction). A NAFI is not a "federal agency." See DSV GmbH, B-253724, June 16, 1993, 93-1 CPD ¶ 468. Protests are resolved under agency "appeal" procedures set forth in AFMAN 64-302, para. 12.5.

b. Exceptions:

(1) Procurements conducted by an APF contracting officer. The GAO has jurisdiction to consider protests involving procurements conducted "by or for a federal agency," regardless of the source of funds involved. Barbarosa Reiseservice GmbH, B-225641, May 20, 1987, 87-1 CPD ¶ 529. See also Thayer Gate Development Corp., B-242847.2, Dec. 9, 1994 (GAO will assert jurisdiction if it finds the agency involvement so pervasive that the NAFI has become a conduit for the agency). APF activities may also provide "in-kind" support to NAFIs. APF contracting support to NAFIs may subject the action to the Competition in Contracting Act.

(2) The GAO may consider a protest involving a NAFI if the protestor alleges the agency used a NAFI to avoid competition requirements. Premiere Vending, B-256560, July 5, 1994, 94-2 CPD ¶ 8; cf. LDDS Worldcom, B-270109, Feb. 6, 1996, 96-1 CPD ¶ 45 (no evidence Exchange was acting as a conduit for Navy or that Navy participation was pervasive); Asiel Enters., Inc., B-406780, B-406836, Aug. 28, 2012, 2012 CPD ¶ 242 (protest challenging Air Foce use of NAFI to provide mission essential food service supported with entirely appropriated funds sustained).

2. COFC Jurisdiction. The COFC also normally will not exercise jurisdiction over protests involving a NAFI contract. But note that the COFC held in *Southern Foods* that because the NAFI did not meet all four prongs of the *AINS* test (specifically in that the Army NAFI did receive some appropriated funds), the COFC could

exercise jurisdiction over the contractor's claim. Southern Foods, Inc. v. United States, 76 Fed. Cl. 769 (2007).[1]

3. Agency Protest Procedures

a. AFNAFPO makes determinations on protests for NAF contracts executed centrally. The contractor has **10 days** from the date of a decision to appeal to Contract Support, Deputy Assistant Secretary (Contracting). AFMAN 64-302, para. 12.5.

b. The NAF contracting officer resolves protests filed at base level. The servicing legal office reviews all protests prior to the contracting officer's final decision. Appeals of the contracting officer's decision must be filed **within 10 days** and are forwarded to AFNAFPO. The Director of NAF Purchasing is the decision authority on appeals. AFMAN 64-302, para. 12.5.

B. Claims

1. The contracting officer is responsible for processing contract claims filed against the NAFI. AFMAN 64-302, para. 12.6.

2. Normally, courts and boards will not exercise jurisdiction over NAFI contract disputes. As instrumentalities of the United States, NAFIs are immune from suit. Congress has not waived immunity for NAFIs under the Tucker Act (28 U.S.C. § 1346(a)(2)), the Contract Disputes Act (CDA) (41 U.S.C. § 7102(a)), or the Administrative Procedures Act. See Swiff-Train Co. v. United States, 443 F.2d 1140 (5th Cir. 1971); AINS, Inc. v. United States, 56 Fed. Cl. 522 (2003) (aff'd at 365 F. 3d. 1333, Fed. Cir. 2004);

[1] In the *Southern*, the COFC considered a post-award protest filed by Southern Foods arguing that the United States Army Community and Family Support Center's (a NAFI) decision to award a food service contract to United States Foodservice, Inc. was "arbitrary." *Southern Foods* at 770. The protester requested the COFC to set aside the award and to require that the NAFI re-solicit the requirement. While the NAFI argued that the COFC did not have jurisdiction over the protest under the *AINS* test, the COFC found that the NAFI did not meet all four prongs of the *AINS* test and therefore, the court did have jurisdiction in this matter. *Id.* at 775. *See also* AINS, Inc. v. United States, 56 Fed. Cl. 522 (2003) (aff'd at 365 F. 3d. 1333, Fed. Cir. 2004). *See infra* the section in this outline concerning COFC jurisdiction in contract claims for additional discussion of the *AINS* case; *AINS* found that if a NAFI meets the following prongs, then the COFC may not exercise jurisdiction: (a) It must *not* receive its monies by federal appropriations; (b) Its funding must derive "primarily from [the entity's] own activities, services, and product sales"; (c) There "must be a clear expression by Congress that the agency was to be separated from general federal revenues"; and (d) Absent a statutory amendment, there is no situation in which appropriated funds could be used to fund the federal entity. *Id.*

Commercial Offset Printers, Inc., ASBCA No. 25302, 81-1 BCA ¶ 14,900.

a. Exception. Express or implied-in-fact contracts entered into by DOD, Coast Guard, and NASA exchange services, which are NAFIs, nevertheless are contracts of the United States for purposes of determining jurisdiction under the Tucker Act and the CDA. 28 U.S.C. § 1491(a)(1).

b. The Court of Federal Claims (COFC). It held in *AINS* that the COFC did not have jurisdiction over a contract dispute with the U.S. Mint because the Mint is a NAFI and as such, there is no waiver of sovereign immunity. *AINS* at 543. To determine whether a federal entity is a "NAFI" and thus not subject to the CDA (so, federal courts are generally without jurisdiction), the *AINS* court used a four-part test:

(1) It must *not* receive its monies by federal appropriations;

(2) Its funding must derive "primarily from [the entity's] own activities, services, and product sales";

(3) There "must be a clear expression by Congress that the agency was to be separated from general federal revenues"; and

(4) Absent a statutory amendment, there is no situation in which appropriated funds could be used to fund the federal entity. AINS, Inc. v. United States, 56 Fed. Cl. 522 at 533 (2003) (aff'd at 365 F. 3d. 1333, Fed. Cir. 2004)

3. The Armed Services Board of Contract Appeals (ASBCA) has jurisdiction over NAF contract disputes if:

a. The contract incorporates a disputes clause that grants such jurisdiction. SUFI Network Services, Inc., ASBCA No. 54503, 04-1 BCA ¶ 32,606.

b. The contract contains no disputes clause, but DOD regulations require incorporation of a jurisdiction-granting clause in the NAF contract. Recreational Enters., ASBCA No. 32176, 87-1 BCA ¶ 19,675.

c. Note that the CAFC has refused to hear appeals of ASBCA decisions concerning NAFI contracts. Strand Hunt Constr.,

Inc. v. West, 111 F.3d 142 (Fed. Cir. 1997)(unpub); McDonald's Corp. v. United States, 926 F.2d 1126 (Fed. Cir. 1991); Maitland Bros. v. Widnall, 41 F.3d 1521 (Fed. Cir. 1994)(unpub).

IX. COMMERCIAL SPONSORSHIP

A. Definition

1. Commercial sponsorship is the act of providing assistance, funding, goods, equipment or services to support MWR activities, events or programs, by an individual, company or other entity (sponsor) for a specific limited time period, in return for public recognition or advertising promotions. AFI 34-108, Atch 1.

2. Only Force Support Squadron (FSS) MWR programs may use the commercial sponsorship program. AFI 34-108, para. 1.4.

3. The commercial sponsorship program cannot be used to offset expenses of programs or activities of other Air Force organizations, units, or private organizations. AFI 34-108, para. 1.4.

B. Key Players

1. Headquarters Air Force Director of Services (HQ USAF/A1S): Approves or disapproves any requests for sponsor corporate advertising benefits. Approves sponsorship offers valued at more than $100,000. AFI 34-108, para. 1.6.1

2. MAJCOM Commanders: Approve or disapprove sponsorships of $5,000 through $100,000, and may delegate approval authority for up to $50,000 to the MAJCOM Vice Commander, Chief of Staff, or Services Director. The MAJCOM Commander may delegate approval authority up to $25,000 to an installation commander. AFI 34-108, para. 1.6.4.

3. Installation Commanders: Approve or disapprove sponsorship worth $5,000 or less, or other values as delegated by the MAJCOM commander. The Installation Commander may delegate authority for approval or disapproval and acceptance or sponsorships worth up to $5,000 to the Mission Support Group Commander or FSS Commander. AFI 34-108, para. 1.6.5.3.

4. FSS Commander: Appoints a commercial sponsorship program manager and reviews all proposals and agreements. AFI 34-108, para. 1.6.6.

5. Commercial Sponsorship Program Manager: Manages the agreements, and fosters program awareness among the installation and civilian sectors. AFI 34-108, para. 1.6.7.

6. Legal Officers. Review all sponsorship agreements at their respective levels. AFI 34-108, para. 1.6.8.

7. Supporting Contracting Officers. AFI 34-108, para. 1.6.10.

a. Both the NAF and APF contracting officers review agreements to ensure that offers are not accepted from barred contractors, do not conflict with existing contracts, memoranda of understanding, or other similar agreements.

b. The NAF contracting officer reviews and coordinates on sponsorship agreements for technical sufficiency, completeness, and content.

C. Types of Commercial Sponsorships

1. Unsolicited Commercial Sponsorships. AFI 34-108, para. 2.1.

a. Must be entirely initiated by prospective sponsors or their representatives.

b. FSS activities may generate sponsorship awareness using various means, such as brochures, advertisements, news releases or information letters, however, they may not provide information about specific needs.

2. Solicited Commercial Sponsorships. AFI 34-108, para. 2.2.

a. The Solicited Commercial Sponsorship Program is the only authorized method for soliciting commercial sponsors for MWR events.

b. Announcements. All sponsorship solicitations must be announced to the maximum number of potential sponsors.

c. Restrictions

(1) The MWR elements of Services may not solicit sponsorship from alcohol or tobacco companies under any circumstances. Companies that manufacture or distribute alcoholic beverages or tobacco products may be allowed to provide unsolicited sponsorship at the discretion of the commanding authority. AFI 34-108, para. 2.2.2.2.

(2) The MWR elements of Services may not *solicit* from "military systems divisions of defense contractors." However, unsolicited offers may be accepted from any segment of a defense contractor. AFI 34-108, para. 2.2.2.2.

D. General Considerations. . Activities using commercial sponsorship procedures must ensure that:

1. Obligations and entitlements of the sponsor and the MWR program are set forth in a written agreement. See AFI 34-108, Attachment 2.

2. The activity disclaims endorsement of any supplier, product, or service in any public recognition or printed material developed for the sponsorship event. AFI 34-108, paras. 2.3 and 2.10.

3. The commercial sponsor certifies in writing that it shall not charge costs of the sponsorship to any part of the government. AFI 34-108, para. 2.11.

4. Officials responsible for contracting are not directly or indirectly involved with the solicitation of commercial vendors, except for those officials who administer NAF contracts.

X. CONCLUSION

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CHAPTER 33

CONTRACT LAW RESEARCH

I. STARTING POINT – THE CONTRACT

A. What Does the Contract Say?

1. Solicitation Provisions and Contract Clauses.

a. "Solicitation provision" or "provision" means a term or condition used only in solicitations and applying only before contract award. FAR 2.101.

b. "Contract clause" or "clause" means a term or condition used in contracts or in both solicitations and contracts, and applying after contract award or both before and after award. FAR 2.101.

2. For provisions/clauses incorporated by reference, see FAR Part 52 and Part 52 of the appropriate supplements. See FAR 52.102.

B. What Should the Contract Have Said?

1. Clauses required by statute or regulation will be incorporated into a contract by operation of law. G. L. Christian & Assoc. v. United States, 160 Ct. Cl. 1, 312 F.2d 418, cert. denied, 375 U.S. 954 (1963) (regulations published in the Federal Register and issued under statutory authority have the force and effect of law).

2. Clauses included in a contract in violation of statutory or regulatory criteria will be read out of a contract. Carrier Corp., GSBCA No. 8516, 90-1 BCA 22,409; Charles Beseler Co., ASBCA No. 22669, 78-2 BCA 13,483 (where contracting officer acts beyond scope of actual authority, Government not bound by his acts).

3. A clause incorporated erroneously will be replaced with the correct one. S.J. Amoroso Constr. Co. v. United States, 12 F.3d 1072 (Fed. Cir. 1993).

II. STATUTES

A. The Armed Services Procurement Act of 1947 (ASPA). 10 U.S.C. §§ 2301-2329.

1. Basic procurement statute.

2. Covers DoD, NASA, and Coast Guard.

B. The Federal Property and Administrative Service Act (FPASA). 41 U.S.C. §§ 3101 and various provisions.

1. Basic procurement statute.

2. Covers GSA and other federal agencies not covered by ASPA.

C. Competition in Contracting Act (CICA). Pub. L. No. 98-369 (1983). Current statutes: 10 U.S.C. §§ 2301-2306; 41 U.S.C. §§ 102-134.

1. Amended ASPA and FPASA to make both statutes identical.

2. Changes have been made to both the ASPA and the FPASA since the enactment of CICA, so there now are differences between the statutes.

D. Contract Disputes Act of 1978 (CDA). 41 U.S.C. §§ 7101-7109.

1. Waiver of sovereign immunity for contract appeals to agency boards of contract appeals (BCAs) and direct access suits to the United States Court of Federal Claims.

2. Covers claim process, certification, litigation, boards of contract appeals, etc.

E. Tucker Act. 28 U.S.C. § 1491.

1. Basic jurisdictional statute for the United States Court of Federal Claims.

2. Creates "exclusive" judicial forum for resolution of pre-award protests. 28 U.S.C. § 1491(a)(3).

F. Equal Access To Justice Act (EAJA). 5 U.S.C. § 504, 28 U.S.C. § 2412(d).

1. Requires the government to pay attorney's fees if the prevailing party is a small business and the government's position was not substantially justified.

2. Title 5 applies to the BCAs. Title 28 applies to the U.S. Court of Federal Claims. The EAJA does not apply to bid protest actions.

G. Annual Authorization and Appropriation Acts.

1. **Practice Note:** The Library of Congress website "Thomas" (http://thomas.loc.gov/) is your best source for recent legislative materials. Limited coverage (mainly the text of enacted legislation) begins with the 93rd Congress (1973). Complete coverage (including legislative history) begins with the 104th Congress (1995).

H. Statutory Research.

1. The FAR normally cites the pertinent statutory citation that is being implemented by that portion of the FAR.

   Example: FAR Subpart 22.4 deals with labor standards for contracts that involve construction. FAR 22.403 cross-references the Davis-Bacon Act (40 U.S.C. §§ 276a – 276a-7), the Copeland Act (18 U.S.C. § 874 and 40 U.S.C. 276c), and the Contract Work Hours and Safety Standards Act (40 U.S.C. §§ 327 – 333) which are the statutes that are being implemented in FAR Subpart 22.4.

2. Laws Relating to Federal Procurement. A compilation of statutes dealing with government contracting prepared by the House Committee on Armed Services. An electronic version (amended through Dec. 31, 2002) is available at: http://armedservices.house.gov/comdocs/reports/FederalProcurement-2003.PDF.

3. The U.S. Code is broken down into titles which typically cover a given subject-matter area.

   Example: Statutes pertaining to DOD are typically found in Title 10. A statute dealing only with restrictions on DOD's ability to enter into a contract will likely be found in Title 10. Statutes dealing with restrictions applicable to all federal agencies or to all civilian agencies are generally found in Title 41.

4. You can run a search on either a specialized legal database, such as LEXISTM or WestlawTM, or on the U.S. Code website (located at: http://www.gpoaccess.gov/uscode/index.html).

5. U.S. Code Annotated Index. This index contains a listing arranged by subject of the codified U.S. statutes.

III. REGULATIONS

A. Federal Acquisition Regulation (FAR).

1. Became effective on 1 April 1984. The FAR replaced the Defense Acquisition Regulation (DAR), the Federal Procurement Regulation (FPR), and the NASA Procurement Regulation (NASAPR). [Note: you may also hear some "old-timers" refer to the Armed Services Procurement Regulation (or ASPR) – the ASPR went into effect in 1948 and remained in effect until it was replaced by the DAR in 1978.]

2. The General Services Administration has been tasked with the responsibility for publishing the FAR and any updates to it. FAR 1.201-2.

3. Locating the FAR.

a. The Government Printing Office (GPO) previously printed periodic updates to the FAR in the form of Federal Acquisition Circulars (FAC). Effective 31 December 2000, the GPO no longer produces printed copies of the FACs or updated versions of the FAR. See 65 Fed. Reg. 56,452 (18 September 2000).

b. Currently only electronic versions of the FAR and the FACs are available. The FAR is found at Chapter 1 of Title 48 of the Code of Federal Regulations (C.F.R.). Proposed and final changes to the FAR are published electronically in the Federal Register.

c. The official electronic version of the FAR (maintained by GSA) is available at http://www.arnet.gov/far/ [Note: this site also permits you to sign up for an electronic notification of proposed and final changes to the FAR]. The Air Force FAR Site contains a very user-friendly version of the FAR as well as several supplements. It is found at: http://farsite.hill.af.mil/.

B. Departmental and Agency Supplemental Regulations. FAR Subpart 1.3.

1. Agencies are permitted to issue regulations that implement or supplement the FAR.

2. Most agencies have some form of supplemental regulation. The FAR requires these supplements to be published in Title 48 of the C.F.R. FAR 1.303. The following chart shows the location within Title 48 for each of the respective agency supplementation:

Chapter	Agency/Department
2	Defense FAR Supplement (DFARS). The DFARS was completely revised in 1991. Available at each of the following sites: http://www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html and http://farsite.hill.af.mil/VFDFARA.HTM.
3	Health and Human Services (HHSAR)
4	Agriculture (AGAR)
5	General Services Administration Regulation (GSAR)
6	State (DOSAR)
7	Agency For International Development (AIDAR)
8	Veterans Affairs (VAAR)
9	Energy Acquisition Regulation (DEAR). Available at: http://farsite.hill.af.mil/vfdoea.htm/

10	Treasury (DTAR)
Chapter	Agency/Department
12	Transportation Acquisition Regulation (TAR)
13	Commerce (CAR)
14	Interior (DIAR)
15	Environmental Protection Agency (EPAAR)
16	Office of Personnel Management
17	NASA FAR Supplement (NFS). Available at: http://farsite.hill.af.mil/VFnasaa.HTM.
19	United States Information Agency
22	Small Business Administration
24	Housing And Urban Development (HUDAR)
25	National Science Foundation
28	Justice (JAR)
29	Labor (DOLAR)
30	Homeland Security (HSAR)
35	Panama Canal Commission
44	Federal Emergency Management Agency
51	Army FAR Supplement (AFARS). Also available at: http://farsite.hill.af.mil/vfafara.htm.
52	Navy Acquisition Procedures Supplement (NAPS). Also available at: http://farsite.hill.af.mil/vfnapsa.htm.
53	Air Force FAR Supplement (AFFARS). Also available at: http://farsite.hill.af.mil/vfaffara.htm.
54	Defense Logistics Acquisition Regulation Supplement (DLAR)

C. The FAR System.

1. The FAR is divided into eight (8) subchapters and fifty-three (53) parts. Parts are further divided into subparts, sections, and subsections.

	Subchapter A: General
Part 1:	Federal Acquisition Regulations System
Part 2:	Definitions of Words and Terms
Part 3:	Improper Business Practices and Personal Conflicts of Interest
Part 4:	Administrative Matters00
	Subchapter B: Acquisition Planning
Part 5:	Publicizing Contract Actions
Part 6:	Competition Requirements
Part 7:	Acquisition Planning
Part 8:	Required Sources of Supplies and Services
Part 9:	Contractor Qualifications
Part 10:	Market Research
Part 11:	Describing Agency Needs
Part 12:	Acquisition of Commercial Items.
	Subchapter C: Contracting Methods and Contract Types
Part 13:	Simplified Acquisition Procedures
Part 14:	Sealed Bidding
Part 15:	Contracting by Negotiation
Part 16:	Types of Contracts
Part 17:	Special Contracting Methods
Part 18:	Emergency Acquisitions
	Subchapter D: Socioeconomic Programs
Part 19:	Small Business Programs.
Part 20:	[Reserved]
Part 21:	[Reserved]
Part 22:	Application of Labor Law to Government Acquisitions
Part 23:	Environment, Conservation, Occupational Safety, and Drug-Free Workplace
Part 24:	Protection of Privacy and Freedom of Information
Part 25:	Foreign Acquisition
Part 26:	Other Socioeconomic Programs

	Subchapter E: General Contracting Requirements
Part 27:	Patents, Data, and Copyrights
Part 28:	Bonds and Insurance
Part 29:	Taxes
Part 30:	Cost Accounting Standards
Part 31:	Contract Cost Principles and Procedures
Part 32:	Contract Financing
Part 33:	Protests, Disputes, and Appeals
	Subchapter F: Special Categories of Contracting
Part 34:	Major System Acquisition
Part 35:	Research and Development Contracting
Part 36:	Construction and Architect-Engineer Contracts
Part 37:	Service Contracting
Part 38:	Federal Supply Schedule Contracting
Part 39:	Acquisition of Information Resources
Part 40:	[Reserved]
Part 41:	Acquisition of Utility Services.
	Subchapter G: Contract Management
Part 42:	Contract Administration
Part 43:	Contract Modifications
Part 44:	Subcontracting Policies and Procedures
Part 45:	Government Property
Part 46:	Quality Assurance
Part 47:	Transportation
Part 48:	Value Engineering
Part 49:	Termination of Contracts
Part 50:	Extraordinary Contractual Actions
Part 51:	Use of Government Sources by Contractors
	Subchapter H: Clauses and Forms
Part 52:	Solicitation Provisions and Contract Clauses
Part 53:	Forms

2. The FAR organizational system applies to the FAR and all agency supplements to the FAR. See FAR 1.303.

3. Arrangement. The digits to the left of the decimal point represent the part number. The digits to the right of the decimal point AND to the left of the dash represent the subpart and section. The digits to the right of the dash represent the subsection. See FAR 1.105-2.

   Example: FAR 45.303-2. We are dealing with FAR Part 45. The Subpart is 45.3. The Section is 45.303 and the subsection is 45.303-2.

4. Correlation Between FAR Parts and Clauses/Provisions. All clauses and provisions are found in FAR Subpart 52.2. As a result, they each begin with "52.2." The next two digits in each clause or provision corresponds to the FAR Part in which that particular clause or provision is discussed and prescribed. The number following the hyphen is assigned sequentially and relates to the number of clauses and provisions dealing with that FAR Part. See FAR 52.101(b).

   Example: FAR 52.245-2 (prescribed by FAR 45.303-2). This was the second clause developed dealing with Government Property (the subject of FAR Part 45).

5. Correlation Between FAR and Agency Supplements. Agency FAR Supplements that further implement something that is also addressed in the FAR must be numbered to correspond to the appropriate FAR number. Agency FAR Supplements that supplement the FAR (discuss something not addressed in the FAR) must utilize the numbers 70 and up. See FAR 1.303(a).

   Example: FAR 45.407 discusses contractor use of government equipment. The portion of the DFARS addressing this same topic is found at DFARS 245.407. The portion of the AFARS further implementing this topic is found at AFARS 5145.407. FAR 6.303-2 addresses what needs to be included in a justification and approval document (for other than full & open competition). It does not prescribe the actual format, however. The Army has developed a standardized format for its justification and approval documents. AFARS 5106.303-2-90 provides the supplemental requirement to use this format which is contained in the supplemental form AFARS 5153.9005.

D. Other Regulations.

1. Universally Applicable Regulations. Outside of the FAR, there are several miscellaneous areas (i.e. environmental, labor) related to government contracts that have extensive regulatory systems. As with statutes, the FAR normally provides a cross-reference to these other regulations.

   Example: FAR Subpart 22.4 deals with labor standards for contracts that involve construction. FAR 22.403 cross-references the Department of Labor's set of regulations that it has issued to implement the Davis-Bacon Act, the Copeland Act, and the Contract Work Hours and Safety Standards Act.

2. Agency-Specific Regulations. In addition to agency supplements to the FAR, agencies will occasionally have regulations that provide guidance on procurements and acquisitions.

   a. Normally, these regulations are found on the agency's "Publication's Website." Each of the defense services and agencies (and many of the civilian agencies) has a website containing electronic copies of most of their regulations. Below is a listing of several such websites:

      (1) DOD Regulations: http://www.dtic.mil/whs/directives/.

      (2) Joint Publications (joint doctrine and procedures for the employment of forces in joint operations): http://www.dtic.mil/doctrine/.

      (3) Army Regulations: http://www.apd.army.mil/.

      (4) Air Force Regulations: http://www.e-publishing.af.mil/.

      (5) Navy Regulations: http://doni.daps.dla.mil/default.aspx.

      (6) Marine Corps Regulations: http://www.usmc.mil/.

      (7) Coast Guard Regulations: http://www.uscg.mil/directives/.

      (8) Department of the Interior Regulations: http://www.doi.gov/pfm/.

      Search Techniques. Most publication websites allow you to perform a search of the text of the regulations. In addition, most agencies normally group their regulations by subject matter.

Example: The Army groups all regulations related to research, development, and/or acquisition into its 70 series of regulations (AR 70-1 deals with Army Acquisition Policy etc.). The Air Force breaks down its regulations a little more vigorously. All regulations related to research and development are found in the 61 series, all regulations related to acquisition are found in the 63 series, and all regulations dealing with contracting are located in the 64 series. The Department of Defense groups all regulations related to acquisition into its 4200 series (DOD Directive 4205.2 deals with acquiring advisory and assistance services).

IV. COURTS

A. General. Most court cases concerning government contracts are decided in the U.S. Court of Federal Claims (formerly the Court of Claims, and the U.S. Claims Court), the U.S. Court of Appeals for the Federal Circuit, and the U.S. Supreme Court. A few contract cases have been decided in the federal district courts and numbered U.S. Courts of Appeals.

B. United States Supreme Court.

1. Decisions are reported in the official Supreme Court Reporter (U.S.) and unofficial reporters (S. Ct. and L.Ed.2d).

2. United States Federal Claims Court Reporter (Fed. Cl.) contains procurement-related decisions of the U.S. Supreme Court resulting from appeals from the U.S. Court of Federal Claims (COFC) and the U.S. Court of Appeals for the Federal Circuit (CAFC).

3. Federal Court Procurement Decisions (FPD) contains procurement-related decisions of the U.S. Supreme Court resulting from appeals from the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit. This Reporter was discontinues in 1998. Cited in older publications.

4. New decisions are reported and summarized in United States Law Week (U.S.L.W.).

5. Recent opinions of the Supreme Court can also be found electronically at: http://www.supremecourtus.gov/opinions/opinions.html.

C. United States Courts of Appeals. Cases are reported in West's Federal Reporter (F., F.2d, and F.3d). Of primary interest are the decisions of the Court of Appeals for the Federal Circuit upon appeals from the U.S. Court of Federal Claims and the boards of contract appeals. The court's contract decisions are reprinted in the FPD, Cl. Ct., Fed. Cl. and CCF. Recent CAFC opinions can be found electronically at: http://www.cafc.uscourts.gov/.

D. United States District Courts. Cases are reported in West's Federal Supplement (F. Supp.) and West's Federal Supplement 2d Series (F. Supp. 2d).

E. United States Court of Claims. Decisions of the old Court of Claims appear in the official United States Court of Claims reports (Ct. Cl.) and in West's Federal Reporter (before 1960 in West's Federal Supplement). The Federal Courts Improvement Act (FCIA) of 1982 bifurcated the Court of Claims and created the United States Claims Court and the United States Court of Appeals for the Federal Circuit. 28 U.S.C. § 171 *et seq.*, §§ 1494-1497, and §§ 1499-1503.

F. United States Court of Federal Claims. Decisions since the Court's inception in October 1982 are published in West's Claims Court Reporter (Cl. Ct.). In 1992 (Vol. 27) this publication was renamed the Federal Claims Reporter (Fed. Cl.) with the change in the court's name. Recent COFC opinions (those published since July, 1997) can be found at: http://www.uscfc.uscourts.gov/opinions-decisions-0.

V. BOARDS OF CONTRACT APPEALS

A. History Behind the Boards.

1. Before 1855, government contractors had no forum in which to sue the United States. In 1855, the Congress created the Court of Claims as an Article I (legislative) court to consider claims against the United States and recommend private bills to Congress. Act of February 24, 1855, 10 Stat. 612. The service secretaries, however, continued to resolve most contract claims. As early as 1861, the Secretary of War appointed a board of three officers to consider and decide specific contract claims. See Adams v. United States, 74 U.S. 463 (1868).

2. During World War I (WWI), the War and Navy Departments established full-time BCAs to hear claims involving wartime contracts. The War Department abolished its board in 1922, but the Navy board continued in name (if not fact) until World War II (WWII). WWII again showed that boards of contract appeals were needed to resolve the massive number of wartime contract disputes. See Penker Constr. Co. v. United States, 96 Ct. Cl. 1 (1942). Thus, the War Department created a board of contract appeals, and the Navy revived its board. In 1949, the Department of Defense (DOD) merged the two boards to form the current ASBCA.

3. In 1966, the Supreme Court clarified the relationship between the Court of Claims and the agency BCAs by limiting the jurisdiction of the boards to cases "arising under" remedy granting clauses in the contract. See Utah Mining and Constr. Co. v. United States, 384 U.S. 394 (1966). The enactment of the Contract Disputes Act (CDA) in 1978 resulted in BCAs having jurisdiction equivalent to the Court of Claims.

B. Board of Contract Appeals Decisions (BCA). Published by CCH in bound casebooks dating from 1956 (first volume is 56-2). Includes most decisions and orders of the various boards of contract appeals. One or more volumes are published annually depending on the number of decisions issued (three volumes per year since 1984). Features: alphabetical list of appellants, docket number by title of board, and topical index.

C. BCA Websites. The following board websites are also available:

1. Armed Services Board of Contract Appeals (ASBCA): http://docs.law.gwu.edu/asbca/.

2. Civilian Board of Contract Appeals (CBCA): http://www.cbca.gsa.gov/mission.htm.

VI. COMPTROLLER GENERAL'S DECISIONS

A. The Budget and Accounting Act of 1921 established the GAO as an investigative arm of Congress charged with examining all matters relating to the receipt and disbursement of public funds. 31 U.S.C. § 702. The Comptroller General heads the GAO and issues legal opinions and reports to agencies concerning the availability and use of appropriated funds. The GAO entertained bid protests concomitant to this function until the Competition in Contracting Act of 1984 (CICA) was passed at which point the GAO was officially given authority to consider bid protests. DataVault Corp., B-249054, Aug. 27, 1992, 92-2 CPD 133. See also Cibinic and Lasken, The Comptroller General and Government Contracts, 38 Geo. Wash. L. Rev. 349 (1970); FAR Subpart 33.201.

B. Decisions of the Comptroller General of the United States (Comp. Gen.).

1. The Government Printing Office (GPO) publishes decisions of the Comptroller General. Prior to September 30, 1994, the GPO distributed written copies of selected decision.

a. Separate topical indices & digests from 1894 to the present.

b. Contains only about 10% of total decisions issued each year.

c. No legal distinction between published and unpublished decisions.

2. The GPO Access website contains electronic copies of decisions from October, 1995 to the present. GPO indicates that it places new decisions onto this database within two business days after the decision has been released. The GPO Access website is located at: http://www.gpoaccess.gov/.

3. The GAO website (http://www.gao.gov/decisions/bidpro/bidpro.htm) also contains electronic copies of decisions issued within the past 60 days.

You can also subscribe to a GAO electronic alert that will issues daily notifications of the reports, decisions, and opinions that GAO has issued (sign up for this service at: http://www.gao.gov/subscribe/).

4. Information regarding a pending protest (file number, protester's name, agency involved, solicitation number involved, and expected date a decision is due) can also be found on the following GAO website: http://www.gao.gov/decision/docket/.

5. For unpublished decisions and Government Accountability Office (GAO) Reports, call the GAO at (202) 512-6000.

6. Comptroller General's Procurement Decisions (CPD). Published by West Publishing Group. Contains every decision in a loose-leaf reporter updated monthly. Also has a separate index volume with three indices: 1) B-Number Index; (2) Government Volume Index; and (3) Subject-Matter Index.

VII. JOURNALS, PERIODICALS, CITATORS AND REPORTERS

A. The Government Contractor (GC). Published by the West Publishing Company since January 1959. Produced weekly in loose-leaf format (three-hole punch version). Contains reports and analyses of all significant government contract decisions and rulings by the courts, boards, and Comptroller General. It also gives notice of proposed and final statutory and regulatory changes. Material is indexed by name, decision number, and subject matter. Available at: http://west.thomson.com/productdetail/5062/15864283/productdetail.aspx?promcode=555366.

B. Federal Contracts Reports (Fed. Cont. Rep.). Published by the Bureau of National Affairs, Inc. (BNA) since 1964 in a weekly newsletter format. Reports on all major developments in government contracts. Provides commentary and "history" leading up to changes in law and regulation. Indexed by subject matter and contains a table of cases reported. Cumulative indices are issued each quarter and every six months. Available at: http://www.bna.com/products/corplaw/fcr.htm.

C. Public Contract Law Journal (Pub. Cont. L.J.). Specializes in contract law articles. Published by Section on Public Contract Law of the ABA. Website: http://www.pclj.org/.

D. The Nash & Cibinic Report (N&CR). Published monthly by West Publishing Company beginning January 1987. Provides government contract analysis by Professors Ralph C. Nash and John Cibinic. Articles cover various topics within government contract law the authors feel require more detailed commentary. A N&C Roundtable held in early December of each year is complimentary to subscribers. The Roundtable offers a discussion by guest experts of several major

areas of current interest. Available at: http://west.thomson.com/store/product.asp?product%5Fid=15864305.

E. Briefing Papers. Monthly issue deals with a specific area of contract law - emphasis is practical and very thorough. Published by West Publishing Company. Available at: http://west.thomson.com/store/product.asp?product%5Fid=15864283.

F. Government Contracts Reporter. Comprehensive procurement legal research tool. Published by CCH and available either through the internet or a CD-ROM issued monthly. Available at: http://onlinestore.cch.com/default.asp?SessionID=1400794&ProductID=125&WBID={4058371F-7BC7-11D7-A917-00508BE3712D}

G. Government Contracts Citator. Published by West Publishing Company. Updated quarterly. Arranged in two major divisions (court and agency decisions in one and comptroller general decisions in another). Each of these lists decisions and then also lists the names of any subsequent decisions that cite that particular decision. Available at: http://west.thomson.com/store/product.asp?product%5Fid=15865557.

H. CCH Cost Accounting Standards Guide. Available in loose-leaf and CD-ROM format (also available at: http://onlinestore.cch.com/default.asp?SessionID=1400794&ProductID=88&WBID={4058371F-7BC7-11D7-A917-00508BE3712D}). Updated monthly. Covers actions of the Cost Accounting Board, federal agencies, and Congress concerning cost accounting practices.

I. National Contract Management Journal. Published by the National Contract Management Association (NCMA) twice each year. NCMA also publishes the Contract Management magazine on a monthly basis. Both publications typically contain a non-legal discussion of broad range of procurement and contract administration issues. Website: http://www.ncmahq.org/.

J. The Army Lawyer. Contains an article devoted to recent developments in contract and fiscal law - *Contract and Fiscal Law Developments of 200X - The Year in Review* which was published in the January issue each year through 2008. Also contains Contract Law Notes published on an ad hoc basis. Available at: https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/ArmyLawyer.nsf/AL?OpenForm.

VIII. TEXTS

A. Note: These are both current and historical texts.

B. Frank M. Alston, Margaret M. Worthington & Lewis P. Goldsman, Contracting with the Federal Government, published by John Wiley & Sons, Inc., 4th edition,

1998. Written primarily for accounting audience. Incorporates numerous FAR forms.

C. Donald P. Arnavas and William J. Ruberry, Government Contract Guidebook, published by Federal Publications, Inc., 1st edition, 1986, 1990 supplement. Broad overview of formation and administration issues.

D. James P. Bedingfield and Louis I. Rosen, Government Contract Accounting, published by Federal Publications, Inc., 2d edition, 1985.

E. Richard J. Bednar, John Cibinic, Jr., Ralph C. Nash, Jr., et al., Construction Contracting, published by The George Washington University Government Contracts Program, 1991.

F. John Cibinic, Jr. and Ralph C. Nash, Jr., Formation of Government Contracts, published by The George Washington University Government Contracts Program, 3d edition, 1998.

G. John Cibinic, Jr. and Ralph C. Nash, Jr., Administration of Government Contracts, published by The George Washington University Government Contracts Program, 3d edition, 1995.

H. John Cibinic, Jr. and Ralph C. Nash, Jr., Cost Reimbursement Contracting, published by The George Washington University Government Contracts Program, 2d edition, 1993.

I. Department of Defense, Armed Services Pricing Manual (ASPM), published by the Government Printing Office in 2 volumes in 1986, 1987.

J. John Cibinic, Jr. and Ralph C. Nash, Jr., Competitive Negotiation: The Source Selection Process, published by the George Washington University Government Contracts Program, 2d edition, 1999.

K. DoD Defense Contract Audit Agency, DCAA Contract Audit Manual, DCAAM 7640.1, published by the Government Printing Office in 2 volumes, updated regularly. Available at: http://www.dcaa.mil/cam.htm.

L. Brian C. Elmer, Jean-Pierre Swennen and Richard L. Beizer, Government Contract Fraud, published by Federal Publications, Inc., 1st edition, 1985.

M. Government Accountability Office, Principles of Federal Appropriations Law:

Third Edition (with annual updates)
Vol. I, January 2004 (http://www.gao.gov/special.pubs/d04261sp.pdf)
Vol. II, February 2006 (http://www.gao.gov/special.pubs/d06382sp.pdf)

Second Edition

Vol. III, November 1994 (http://www.gao.gov/special.pubs/og94033.pdf)
Vol. IV, March 2001 (http://www.gao.gov/special.pubs/d01179sp.pdf)
Vol. V, April 2002 (http://www.gao.gov/special.pubs/d02271sp.pdf)

N. Andrew K. Gallagher, Negotiated Procurement, published by GCA Publications, Inc. in hardback with loose-leaf supplements through 1984. Outdated, but still useful.

O. Noel Keyes, Government Contracts Under The FAR, published by West Publishing, 1986, and pocket part. Organized to coincide with the FAR's 53 parts.

P. Peter S. Latham, Government Contract Disputes, published by Federal Publications, Inc., 2d edition, 1988, 1991 supplement.

Q. James F. Nagle, How to Review a Federal Contract: Understanding and Researching Government Solicitations and Contracts, published by the American Bar Association, 2d edition, 2000.

R. James F. Nagle, History of Government Contracting, published by The George Washington University Government Contracts Program, 2d edition, 1999.

S. Ralph C. Nash, Jr., Government Contract Changes, published by Federal Publications, Inc., 2d edition, 1989.

T. Ralph C. Nash, Jr. and Leonard Rawicz, Intellectual Property in Government Contracts, published by The George Washington University Government Contracts Program, 5th edition, 2001.

U. Ralph C. Nash, Jr., Steven L. Schooner, and Karen R. O'Brien, The Government Contracts Reference Book: A Comprehensive Guide to the Language of Procurement, published by The George Washington University Government Contracts Program, 1998.

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W. Melvin Rishe, Contract Costs, published by Federal Publications, Inc., 1st edition, 1984.

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Y. Seyfarth, Shaw, Fairweather & Geraldson, The Government Contract Compliance Handbook published by Federal Publications, Inc., 2d edition, 1991. Good appendices.

Z. Paul Shnitzer, Government Contract Bidding, published by Federal Publications, Inc., 3rd edition, 1987, 1991 supplement.

AA. John W. Whelan and James F. Nagle, Federal Government Contracts: Cases and Materials, published by Foundation Press in 2002, with supplements.

BB. Steven W. Feldman, Government Contracts Awards: Negotiation & Sealed Bidding, published by Clark Boardman Callaghan in 1995 in three volumes, with annual supplements.

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A. Patricia A. Tobin, Michelle Wu, Leslie Lee, and Ian D. Rupell, Practitioners' Research Guide: An Update To Researching Government Contracts Law On The Internet, 28 Pub. Cont. L. J. 247 (1999).

B. Holmes and Holmes, Techniques for Researching Public Contract Law, 10 Pub. Cont. L. J. 58 (1978).

X. COMPUTER-ASSISTED LEGAL RESEARCH

A. LEXIS (Mead Data Central). www.lexis.com. Use: Legal**:** Area of Law - By Topic: Public Contracts.

B. WESTLAW (West Publishing Company). www.westlaw.com. Use: Topical Practice Areas: Government Contracts.

C. Federal Legal Information Through Electronics (FLITE). Managed by the US Air Force, Legal Services and Research Division; Maxwell AFB, Alabama. Covers BCA decisions, Comptroller General opinions, federal court decisions, Army regulations, and Air Force instructions. Free to Air Force and Army Attorneys. Other federal agencies must pay a fee (amount varies with size of search). However, the Legal Research Division will perform research for all DoD attorneys free of charge. Phone number: (334) 953-3008, DSN 493-3008. You can FAX your questions to the Research Division at: (334) 953-3008, DSN 493-7159. Internet access: https://aflsa.jag.af.mil/.

D. JAGCNET. Operated by the Department of the Army, Office of The Judge Advocate General. Internet access: http://www.jagcnet.army.mil. Serves as a clearinghouse for information and questions on government contract and fiscal law; environmental law, ethics and standards of conduct; and procurement integrity, among others. Free to Department of Defense attorneys, paralegals, and enlisted legal personnel. TJAGLCS Contract and Fiscal Law Deskbooks regularly uploaded to bulletin board/database and may be downloaded by authorized users. Publications of The Judge Advocate General's School (TJAGLCS) are also available at:

https://www.jagcnet.army.mil/8525736A005BC8F9. The TJAGLCS portion of JAGCNET is open to the general public, without registration.

XI. TRAINING

A. TJAGLCS. A schedule of upcoming TJAGLCS courses may be found at: https://www.jagcnet.army.mil/8525736A005BC8F9.

1. Contract Attorneys Course, intended for attorneys practicing contract law as their primary practice with less than two years experience in contract law. Course offered twice per year.

2. Operational Contracting Course, intended for attorneys who have attended either a Contract Attorneys Course or the Graduate Course and who will be deploying to provide contract law support. Course offered once each spring.

3. Fiscal Law Course, intended for anyone affecting the use of appropriated funds. Course offered twice each year at TJAGLCS, as well as distributed via satellite once each spring.

4. Advanced Contract Law Course, intended for attorneys practicing contract law for more than two years. This course explores current, advanced, and specialty areas of contract law. Course offered in March of odd-numbered years – 2009, 2011, etc);

5. Procurement Fraud Course. Course offered in the spring of even-numbered years – 2008, 2010, etc;

6. Advanced Contract Litigation Course. Course offered in March of even-numbered years – 2008, 2010, etc;

7. Contract and Fiscal Law Symposium, intended for senior practitioners interested in discussing policy level issues impacting federal acquisition. This course is held the first week of December.

B. Defense Acquisition University. Course info and schedule found at: http://www.dau.mil/catalog/.

C. Federal Acquisition Institute. Course info found at: http://www.fai.gov/.

D. Federal Publications. Course info and schedules found at: http://www.fedpubseminars.com/seminar/gcplist.html.

E. National Contract Management Association. Information on local chapters and training events found at: http://www.ncmahq.org/.

F. ESI, International. Course info and schedules found at: http://www.esi-intl.com/public/contracting/governmentcontracting.asp.

G. Northwest Procurement Institute: http://www.npi-training.com/.

H. Management Concepts, Inc.: http://www.mgmtconcepts.com/acquisition/acquisition.asp.

I. Business Management Research Associates: http://www.bmra.com/catalog.htm.

J. Department of Agriculture Graduate School (a non-appropriated fund instrumentality of the USDA). Course info and schedules found at: http://grad.usda.gov/.

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Website Name	Web Address

APPENDIX - WEBSITES

GOVERNMENT CONTRACT AND FISCAL LAW WEBSITES AND ELECTRONIC NEWSLETTERS

The first table below contains hypertext links to websites that practitioners in the government contract and fiscal law fields utilize most often. If you are viewing this document in an electronic format, you can click on the web address in the second column and open the requested website. Particularly useful websites are in **bold** type. It may be easier to access the AF secure sites through WebFLITE.

The second table on the final page below contains links to websites that allow you to subscribe to various electronic newsletters of interest to practitioners. Once you have joined one of these news lists, the list administrator will automatically forward electronic news announcements to your email address. These electronic newsletters are convenient methods of keeping informed about recent and/or upcoming changes in the field of law.

Website Name	Web Address

A

Acquisition Network (AcqNet)	http://www.arnet.gov
Acquisition Review Journal (from DAU)	http://www.dau.mil/pubs/arqtoc.asp
AT&L Knowledge Sharing System	https://akss.dau.mil/default.aspx
Acquisition Streamlining and Standardization Information System (ASSIST)	http://assist.daps.dla.mil/online/start/
ACQWeb (Office of Undersecretary of Defense for Acquisition Logistics & Technology)	http://www.acq.osd.mil
Agency for International Development	http://www.usaid.gov/
Air Force Acquisition	http://www.safaq.hq.af.mil/
Air Force Alternative Dispute Resolution (ADR) Program	http://www.adr.af.mil
Air Force Audit Agency	https://www.afaa.hq.af.mil/domainck/index.shtml
Air Force Contracting	http://ww3.safaq.hq.af.mil/contracting/
Air Force FAR Site	http://farsite.hill.af.mil
Air Force FAR Supplement	http://farsite.hill.af.mil/vfaffar1.htm
Air Force Materiel Command FAR Supplement	http://farsite.hill.af.mil/vfafmc1.htm

Website Name	Web Address
Air Force Materiel Command Homepage	https://www.afmc-mil.wpafb.af.mil/index.htm
Air Force Materiel Command Contracting Toolkit	https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pkopr1.htm
Air Force Financial Management & Comptroller	http://www.saffm.hq.af.mil/
Air Force General Counsel	http://www.safgc.hq.af.mil/
Air Force Home Page	http://www.af.mil/
Air Force Logistics Management Agency	http://www.aflma.hq.af.mil/
Air Force Materiel Command	https://www.afmc-mil.wpafb.af.mil/
Air Force Materiel Command Staff Judge Advocate	https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/JA/
Air Force Publications	http://www.e-publishing.af.mil/
American Bar Administration (ABA) Legal Technology Resource Center	http://www.lawtechnology.org/lawlink/home.html
ABA Network	http://www.abanet.org/
ABA Public Contract Law Journal (PCLJ)	http://www.pclj.org/
ABA Public Contract Law Section	http://www.abanet.org/contract/
ABA Public Contract Law Section Bid Protests Committee	http://www.abanet.org/dch/committee.cfm?com=PC402000
Armed Services Board of Contract Appeals (ASBCA)	http://docs.law.gwu.edu/asbca/
Army Acquisition (ASA(ALT))	https://www.alt.army.mil/portal/page/portal/oasaalt
Army Acquisition Support Center	http://asc.army.mil/
Army Audit Agency	http://www.hqda.army.mil/AAAWEB/
Army Contracting Agency	http://aca.saalt.army.mil/
Army Corps of Engineers Home Page	http://www.usace.army.mil/
Army Corps of Engineers Legal Services	http://www.usace.army.mil/CECC/Pages/Home.aspx
Army Field Support Command Contractor on the Battlefield Library	http://www.afsc.army.mil/gc/battle2.asp
Army Financial Management & Comptroller	http://www.asafm.army.mil/
Army General Counsel	http://www.hqda.army.mil/ogc/
Army Home Page	http://www.army.mil/
Army Materiel Command (AMC)	http://www.amc.army.mil/
AMC Contracting Policy Vault	http://www.amc.army.mil/amc/rda/pvault.html
AMC Counsel	http://www.amc.army.mil/amc/command_counsel/
AMC Logistics Web Portal	https://aeps.ria.army.mil/
Army Portal	https://www.us.army.mil/appiansuite/login/login.fcc?TYPE=33554433&REALMOID=06-b476a858-73dc-10a1-9a8e-

Website Name	Web Address
	832f882fff3d&GUID=&SMAUTHREASON=0&METHOD=GET&SMAGENTNAME=SMwMjEqv5sB44%2bpUfE3qs4QL2G7Q0LjAUZ221N62Zll%2bTwHPFwKZd8Wg%3d%3d&TARGET=SMhttp%3a%2f%2fwww%2eus%2earmy%2emil%3a81%2fsuite%2fportal%2fauthenticate%2edo
Army Publishing Directorate (Army Pubs)	http://www.usapa.army.mil
Army Single Face to Industry (ASFI)	https://acquisition.army.mil/asfi/

B

Boards of Contract Appeals Bar Association	http://www.bcaba.org/
Budget of the United States	http://www.gpoaccess.gov/usbudget/

C

Central Contractor Registration (CCR)	http://www.ccr.gov/
Civilian Board of Contract Appeals	http://www.cbca.gsa.gov/mission.htm
Coast Guard Home Page	http://www.uscg.mil
Code of Federal Regulations	http://www.access.gpo.gov/nara/cfr/cfr-table-search.html
Electronic Code of Federal Regulations (eCFR)	http://www.gpoaccess.gov/ecfr
Comptroller General	http://www.gao.gov/index.html
Comptroller General Bid Protest Decisions	http://www.gao.gov/decisions/bidpro/bidpro.htm
Comptroller General Decisions via GPO Access	http://www.gpoaccess.gov/gaodecisions/index.html
Comptroller General Legal Products	http://www.gao.gov/legal.htm
Comptroller General Principles of Federal Appropriations Law	http://www.gao.gov/legal/redbook.html
Congressional Bills	http://www.gpoaccess.gov/bills/index.html
Congressional Documents	http://www.gpoaccess.gov/legislative.html
Congressional Documents via Thomas	http://thomas.loc.gov/
Congressional Record	http://www.gpoaccess.gov/crecord/index.html
Contingency Contracting (Army AMC)	http://www.amc.army.mil/amc/rda/rda-ac/ck/ck-source.htm
Contract Pricing Reference Guides	http://www.acq.osd.mil/dpap/cpf/contract_pricing_reference_guides.html
Contract Review Checklist (AF	https://www.my.af.mil/gcss-

Website Name	Web Address

Electronic Systems Command – Secure Site)	af/USAF/ep/browse.do?categoryId=-951901&parentCategoryId=-64698&channelPageId=-64679
Cornell University Law School (extensive list of links to legal research sites)	www.law.cornell.edu
Cost Accounting Standards (CAS – found in the Appendix to the FAR)	http://farsite.hill.af.mil/reghtml/regs/far2afmcfars/fardfars/far/farapndx1.htm
Cost Accounting Standards Board (CASB) (Currently unavailable due to change in administration – January 2009)	http://www.whitehouse.gov/omb/procurement/casb.html
Court of Appeals for the Federal Circuit (CAFC)	http://www.cafc.uscourts.gov/
Court of Federal Claims (COFC)	http://www.uscfc.uscourts.gov/

D

Davis Bacon Wage Determinations	http://www.gpo.gov/davisbacon/
Debarred List (known as the Excluded Parties Listing System)	http://epls.arnet.gov
Defense Acquisition Guidebook	http://akss.dau.mil/dag/
Defense Acquisition Regulations Systems Directorate (the DAR Council)	http://www.acq.osd.mil/dpap/dars/index.htm
Defense Acquisition University (DAU)	http://www.dau.mil/
Defense Installation & Environment	http://www.acq.osd.mil/ie/
Defense Comptroller	http://www.dtic.mil/comptroller/
Defense Contract Audit Agency (DCAA)	http://www.dcaa.mil/
Defense Contract Management Agency (DCMA)	http://www.dcma.mil/
Defense Procurement and Acquisition Policy (DPAP) Electronic Business	http://www.acq.osd.mil/scst/index.htm
Defense Finance and Accounting Service (DFAS)	http://www.dod.mil/dfas/
DFAS Electronic Commerce Home Page	http://www.dfas.mil/contractorpay/electroniccommerce.html

Website Name	Web Address
Defense Logistics Agency (DLA) Home Page	http://www.dla.mil/default.aspx
Defense Procurement and Acquisition Policy (DPAP)	http://www.acq.osd.mil/dpap/
Defense Standardization Program	http://dsp.dla.mil/
Defense Technical Information Center	http://www.dtic.mil
Department of Commerce, Office of General Counsel, Contract Law Division	http://www.ogc.doc.gov/ogc/contracts/cld/cld.html #ContractLaw
Department of Energy Acquisition Guide	http://management.energy.gov/policy_guidance/Acquisition_Guide.htm
Department of Energy Acquisition Regulation	http://management.energy.gov/DEAR.htm
Department of the Interior Acquisition Regulation	http://www.doi.gov/pam/aindex.html
Department of Justice	http://www.usdoj.gov
Department of Justice Legal Opinions	http://www.usdoj.gov/olc/opinionspage.htm
Department of Labor Acquisition Regulation	http://www.dol.gov/dol/allcfr/OASAM/Title_48/Part_2901/toc.htm
Department of State Acquisition Regulation	http://www.statebuy.state.gov/dosar/dosartoc.htm
Department of Transportation Acquisition Regulation	http://www.dot.gov/ost/m60/tamtar/tar.htm
Department of Transportation Acquisition Manual	http://www.dot.gov/ost/m60/earl/tam.htm
Department of Veterans Affairs	http://www.va.gov
Department of Veterans Affairs Board of Contract Appeals	http://www1.va.gov/bca/
DOD E-Mall	https://emall6.prod.dodonline.net/main/welcome_to_DOD_EMALL.jsp
DOD Financial Management Regulations	http://www.dtic.mil/comptroller/fmr/
DOD General Counsel	http://www.defenselink.mil/dodgc/
DOD Home Page	http://www.defenselink.mil
DOD Inspector General (Audit Reports)	http://www.dodig.osd.mil
DOD Instructions and Directives	http://www.dtic.mil/whs/directives/
DOD Purchase Card Program	http://www.acq.osd.mil/dpap/pdi/pc/policy_documents.html
DoD Single Stock Point for Military Specifications, Standards and Related Publications	http://dodssp.daps.dla.mil/
DOD Standards of Conduct Office (SOCO)	http://www.defenselink.mil/dodgc/defense_ethics/

Website Name	Web Address

E

ESI, International (training in government contracts)	http://www.esi-intl.com/public/contracting/governmentcontracting.asp
Excluded Parties Listing System	http://epls.arnet.gov
Executive Orders	http://www.gpoaccess.gov/wcomp/index.html
Executive Orders (alternate site)	http://www.archives.gov/federal_register/executive_orders/disposition_tables.html
Export Administration Regulations	http://www.gpo.gov/bis/index.html

F

FAR Site (Air Force)	http://farsite.hill.af.mil
FAR – GSA Alternate Site	http://www.arnet.gov/far/
Federal Acquisition Institute (FAI)	http://www.fai.gov/
Federal Business Opportunities (FedBizOpps)	http://www.fedbizopps.gov/
Federal Legal Information Through Electronics (FLITE) (AF WebFLITE)	https://aflsa.jag.af.mil/php/dlaw/dlaw.php (registration required)
Federal Marketplace	http://www.fedmarket.com/
Federal Prison Industries, Inc (UNICOR)	http://www.unicor.gov/
Federal Procurement Data System	https://www.fpds.gov/
Federal Publications	http://www.fedpubseminars.com/seminar/gcplist.html
Federal Register via GPO Access	http://www.gpoaccess.gov/fr/index.html
Federally Funded R&D Centers (FFRDC)	http://www.nsf.gov/sbe/srs/nsf99334/start.htm
Financial Management Regulations	http://www.dod.mil/comptroller/fmr/
FindLaw	http://www.findlaw.com
FirstGov	http://www.usa.gov/

G

Government Accountability Office (GAO) Appropriations Decisions	http://www.gao.gov/decisions/appro/appro.htm
GAO Comptroller General Bid Protest Decisions	http://www.gao.gov/decisions/bidpro/bidpro.htm
GAO Comptroller General Decisions via GPO Access	http://www.gpoaccess.gov/gaodecisions/index.html
GAO Comptroller General Legal Products	http://www.gao.gov/legal.htm
GAO Home Page	http://www.gao.gov
General Services Administration (GSA)	http://www.arnet.gov/GSAM/gsam.html

Website Name	Web Address
Acquisition Manual	
GSA Advantage	http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_OVERVIEW&contentId=11887
GSA Federal Supply Service (FSS)	http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=10322&contentType=GSA_BASIC
Google	http://www.google.com
GovCon (Government Contracting Industry)	http://www.govcon.com/content/homepage
Government Online Learning Center	http://www.golearn.gov/
Government Printing Office (GPO) Access	http://www.gpoaccess.gov/index.html

J

JAGCNET (Army JAG Corps Homepage)	http://www.jagcnet.army.mil/
TJAGLCS Homepage	http://www.jagcnet.army.mil/TJAGLCS
Javits-Wagner-O'Day Act (JWOD)	http://www.jwod.gov/jwod/index.html
Joint Electronic Library (Joint Publications)	http://www.dtic.mil/doctrine/index.htm
Joint Travel Regulations (JFTR/JTR)	http://perdiem.hqda.pentagon.mil/perdiem/

L

Library of Congress	http://lcweb.loc.gov

M

Marine Corps Home Page	http://www.usmc.mil
MEGALAW	http://www.megalaw.com
MWR Home Page (Army)	http://www.ArmyMWR.com

N

NAF Financial (Army)	http://www.asafm.army.mil/fo/fod/naf/naf.asp
National Aeronautics and Space Administration (NASA) Acquisition	http://prod.nais.nasa.gov/cgi-bin/nais/index.cgi
National Contract Management Association	http://www.ncmahq.org/
National Industries for the Blind (NIB)	www.nib.org

Website Name	Web Address
National Industries for the Severely Handicapped (NISH)	www.nish.org/
National Partnership for Reinventing Government (aka National Performance Review or NPR). Note: the library is now closed & only maintained in archive.	http://govinfo.library.unt.edu/npr/index.htm
Naval Supply Systems Command (NAVSUP)	https://www.navsup.navy.mil/navsup
Navy Acquisition One Source	http://acquisition.navy.mil/rda/home/acquisition_one_source
Navy Electronic Commerce On-line	https://www.neco.navy.mil/
Navy Financial Management and Comptroller	http://www.fmo.navy.mil/policies/regulations.htm
Navy General Counsel	http://www.ogc.navy.mil/
Navy Home Page	http://www.navy.mil
Navy Directives and Regulations	http://doni.daps.dla.mil/default.aspx
Navy Research, Development and Acquisition	http://www.acquisition.navy.mil/
North American Industry Classification System (formerly the Standard Industry Code)	http://www.osha.gov/pls/imis/sicsearch.html

O

Office of Acquisition Policy within GSA	http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8203&channelPage=/ep/channel/gsaOverview.jsp&channelId=-13069
Office of Federal Procurement Policy (OFPP) Best Practices Guides	http://www.whitehouse.gov/omb/omb/management/procurement_index_guides/
Office of Government Ethics (OGE)	http://www.usoge.gov
Office of Management and Budget (OMB)	http://www.whitehouse.gov/omb/

P

Per Diem Rates (GSA)	http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8203&channelId=-15943
Per Diem Rates (DoD)	http://perdiem.hqda.pentagon.mil/perdiem/
Producer Price Index	http://www.bls.gov/ppi/
Program Manager (a periodical from DAU)	http://www.dau.mil/pubs/pmtoc.asp
Public Contract Law Journal	http://www.pclj.org/
Public Papers of the President of the United	http://www.gpoaccess.gov/pubpapers/search.html

Website Name	Web Address
States	
Purchase Card Program	http://www.acq.osd.mil/dpap/pdi/pc/policy_documents.html

R

Rand Reports and Publications	http://www.rand.org/publications/

S

Service Contract Act Directory of Occupations	http://www.dol.gov/esa/whd/regs/compliance/wage/SCADirV5/SCADirectVers5.pdf
Share A-76 (DOD site)	http://sharea76.fedworx.org/sharea76/Home.aspx
Small Business Administration (SBA)	http://www.sba.gov/
Small Business Administration (SBA) Government Contracting Home Page	http://www.sba.gov/GC/
Small Business Innovative Research (SBIR)	http://www.acq.osd.mil/sadbu/sbir/
Standard Industry Code (now called the North American Industry Classification System)	http://www.osha.gov/oshstats/sicser.html
Steve Schooner's homepage	http://www.law.gwu.edu/Faculty/profile.aspx?id=1740

T

Travel Regulations	http://perdiem.hqda.pentagon.mil/perdiem/trvlregs.html

U

U.S. Business Advisor (sponsored by SBA)	http://www.business.gov
U.S. Code	http://uscode.house.gov/
U.S. Code	http://www.gpoaccess.gov/uscode/index.html
U.S. Congress on the Net	http://thomas.loc.gov
U.S. Court of Appeals for the Federal Circuit (CAFC)	http://www.cafc.uscourts.gov/
U.S. Court of Federal Claims	http://www.uscfc.uscourts.gov/
U.S. Department of Agriculture (USDA) Graduate School	http://grad.usda.gov/
UNICOR (Federal Prison Industries, Inc.)	http://www.unicor.gov/

Website Name	Web Address

W

Wage Determination On-Line	http://www.wdol.gov/
Where in Federal Contracting?	http://www.wifcon.com/

Newsletter Name	Web Address to Subscribe
Army Material Command (AMC) Updates (see subscribe link bottom of website)	http://www.amc.army.mil/amc/rda/pvault.html
Defense and Security Publications via GPO Access	http://listserv.access.gpo.gov/scripts/wa.exe?SUBED1=gpo-defpubs-l&A=1
Defense Federal Acquisition Regulation Supplement (DFARS) News	http://www.acq.osd.mil/mailman/listinfo/dar/
Federal Acquisition Regulation (FAR) News	http://www.arnet.gov/far/mailframe.html
Federal Register via GPO Access	http://listserv.access.gpo.gov/scripts/wa.exe?SUBED1=fedregtoc-l&A=1
Government Accountability Office (GAO) Reports Testimony, and/or Decisions	http://www.gao.gov/subtest/subscribe.html
GovTrack.us (Legislation Web-site)	http://www.govtrack.us/
GPO Listserv	http://listserv.access.gpo.gov/
GSA Listserv	http://listserv.gsa.gov/archives/index.html

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Chapter 34

Responsibility, Timeliness, and Organizational Conflict of Interests (OCI)

2013 Contract Attorneys Deskbook

CHAPTER 34

RESPONSIBILITY, TIMELINESS, AND ORGANIZATIONAL CONFLICTS OF INTERESTS (OCIs)

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CHAPTER 34

RESPONSIBILITY, TIMELINESS, AND ORGANIZATIONAL CONFLICTS OF INTERESTS (OCIs)

I. INTRODUCTION

Responsibility, timeliness, and OCIs are great examples of government contract concepts that apply to multiple procurement methods. Specifically, these concepts are applicable in FAR Part 14 and 15 procurements (sealed bidding and negotiated procurements). As a result, understanding these concepts and their applicability to each procurement methods is necessary for comprehensive understanding of government contracting.

II. RESPONSIBILITY

A. Overview:

1. Chief concern: Does the company have the technical ability and capacity to perform the contract? (Differs from "responsiveness" as discussed in the Sealed Bidding Outline. Responsiveness concerns whether the bid conforms to the essential, material requirements of the IFB, while, responsibility describes the contractor's capacity to perform.)

2. Government acquisition policy requires that the contracting officer make an affirmative determination of responsibility prior to award. FAR 9.103.

3. General rule. The contracting officer may award only to a responsible bidder. FAR 9.103(a); Theodor Arndt GmbH & Co., B-237180, Jan. 17, 1990, 90-1 CPD ¶ 64 (responsibility requirement implied); Atlantic Maint., Inc., B-239621.2, June 1, 1990, 90-1 CPD ¶ 523 (an unreasonably low price may render bidder nonresponsible); but see The Galveston Aviation Weather Partnership, B-252014.2, May 5, 1993, 93-1 CPD ¶ 370 (below-cost bid not legally objectionable, even when offering labor rates lower than those required by the Service Contract Act).

B. Definition.

1. Responsibility refers to an offeror's apparent **ability** and **capacity** to perform. To be responsible, a prospective contractor must meet the standards of responsibility set forth at FAR 9.104. FAR 9.101; Kings Point Indus., B-223824, Oct. 29, 1986, 86-2 CPD ¶ 488.

2. Responsibility is determined at any time prior to award. Therefore, the bidder may provide responsibility information to the contracting officer at any time before award. FAR 9.103; FAR 9.105-1; ADC Ltd., B-254495, Dec. 23, 1993, 93-2 CPD ¶ 337 (bidder's failure to submit security clearance documentation with its bid is not a basis for rejection of bid); Cam Indus., B-230597, May 6, 1988, 88-1 CPD ¶ 443.

C. Types of Responsibility.

1. **General** standards of responsibility. FAR 9.104-1.

a. Definition. Minimum contractor qualification standards.

b. Financial resources. The contractor must demonstrate that it has adequate financial resources to perform the contract or that it has the ability to obtain such resources. FAR 9.104-1(a); Excavators, Inc., B-232066, Nov. 1, 1988, 88-2 CPD ¶ 421 (a contractor is nonresponsible if it cannot or does not provide acceptable individual sureties).

(1) Bankruptcy. Nonresponsibility determinations based solely on a bankruptcy petition violate 11 U.S.C. § 525. This statute prohibits a governmental unit from denying, revoking, suspending, or refusing to renew a license, permit, charter, franchise, or other similar grant to, or deny employment to, terminate employment of, or discriminate with respect to employment against, a person that is or has been a debtor under 11 U.S.C. § 525, solely because such person has been a debtor under that title. Bender Shipbuilding & Repair Company v. United States, 297 F.3d 1358 (Fed. Cir. 2002) (upholding contracting officer's determination that awardee was responsible even though awardee filed for Chapter 11 Bankruptcy reorganization); Global Crossing telecommunications, Inc., B-288413.6, B-288413.10, June 17, 2002, 2002 CPD ¶ 102 (upholding contracting officer's determination that a prospective

contractor who filed for Chapter 11 was not responsible).

(2) The courts have applied the bankruptcy anti-discrimination provisions to government determinations of eligibility for award. In re Son-Shine Grading, 27 Bankr. 693 (Bankr. E.D.N.C. 1983); In re Coleman Am. Moving Serv., Inc., 8 Bankr. 379 (Bankr. D. Kan. 1980).

(3) A determination of responsibility should not be negative **solely** because of a prospective contractor's bankruptcy. The contracting officer should focus on the contractor's ability to perform the contract, and justify a nonresponsibility determination of a bankrupt contractor accordingly. Harvard Interiors Mfg. Co., B-247400, May 1, 1992, 92-1 CPD ¶ 413 (Chapter 11 firm found nonresponsible based on lack of financial ability); Sam Gonzales, Inc.—Recon., B-225542.2, Mar. 18, 1987, 87-1 CPD ¶ 306.

c. Unpaid Tax Liability: Appropriated funds cannot be used to enter into a contract with a corporation that has unpaid federal tax liability (after exhaustion of remedies) or was convicted of a felony criminal violation in the preceding 24 months , unless the agency considered suspension or debarment and decided this action was not necessary to protect the interests of the Government. DFARS 252. 209-7999.

d. Delivery or performance schedule: The contractor must establish its ability to comply with the delivery or performance schedule. FAR 9.104-1(b); System Dev. Corp., B-212624, Dec. 5, 1983, 83-2 CPD ¶ 644.

e. Performance record: The contractor must have a satisfactory performance record. FAR 9.104-1(c). Information Resources, Inc., B-271767, July 24, 1996, 96-2 CPD ¶ 38; Saft America, B-270111, Feb. 7, 1996, 96-1 CPD ¶ 134; North American Constr. Corp., B-270085, Feb. 6, 1996, 96-1 CPD ¶ 44; Mine Safety Appliances, Co., B-266025, Jan. 17, 1996, 96-1 CPD ¶ 86.

(1) The contracting officer **shall presume** that a contractor seriously deficient in recent contract performance is nonresponsible. FAR 9.104-3(b).

(2) See Schenker Panamericana (Panama) S.A., B-253029, Aug. 2, 1993, 93-2 CPD ¶ 67 (agency justified in nonresponsiblity determination where moving contractor had previously failed to conduct pre-move surveys, failed to provide adequate packing materials, failed to keep appointments or complete work on time, dumped household goods into large containers, stacked unprotected furniture onto trucks, dragged unprotected furniture through hallways, and wrapped fragile goods in a single sheet of paper; termination for default on prior contract not required). See also Pacific Photocopy & Research Servs., B-281127, Dec. 29, 1998, 98-2 CPD ¶ 164 (contracting officer properly determined that bidder had inadequate performance record on similar work based upon consistently high volume of unresolved customer complaints).

(3) See Ettefaq-Meliat-Hai-Afghan Consulting, Inc. v. United States, 106 Fed. Cl. 429 (2012) (Contracting Officer's decision to find contractor nonresponsible based upon an intelligence report that stated contractor submitted fraudulent statements and credentials, failed to meet delivery requirements on a previous contract was reasonable).

f. Business ethics: The contractor must have a satisfactory record of business ethics. FAR 9.104-1(d); FAR 9.407-2; FAR 14.404-2(h); Interstate Equip. Sales, B-225701, Apr. 20, 1987, 87-1 CPD ¶ 427. See Ettefaq-Meliat-Hai-Afghan Consulting, Inc. v. United States, 106 Fed. Cl. 429 (2012) (Contracting Officer decision to find a contractor nonresponsible must be rational and reasonable; given issues with contractor's performance in previous contract and submission of fraudulent statements, credentialing, and non-compliance, a Contracting Officer does not need to look at each instance to determine if the instance supports nonresponsibility, but at the totality of circumstances to find nonresponsibility.

g. Management/technical capability: The contractor must display adequate management and technical capability to perform the

contract satisfactorily. FAR 9.104-1(e); TAAS-Israel Indus., B-251789.3, Jan. 14, 1994, 94-1 CPD ¶ 197 (contractor lacked design skills and knowledge to produce advanced missile launcher power supply).

h. Equipment/facilities/production capacity: The contractor must maintain or have access to sufficient equipment, facilities, and production capacity to accomplish the work required by the contract. FAR 9.104-1(f); IPI Graphics, B-286830, B-286838, Jan. 9, 2001, 01 CPD ¶ 12 (contractor lacked adequate production controls and quality assurance methods).

i. Be otherwise qualified and eligible to receive an award under applicable laws and regulations. FAR 9.104-1(g); Active Deployment Sys., Inc., B-404875, May 25, 2011; Bilfinger Berger AG Sede Secondaria Italiana, B-402496, May 13, 2010, 2010 CPD ¶ 125.

2. **Special** or definitive standards of responsibility. FAR 9.104-2(a).

a. Definition: Specific and objective standard established by a contracting agency in a solicitation to measure an offeror's ability to perform a given contract. They may be qualitative or quantitative. D.H. Kim Enters., B-255124, Feb. 8, 1994, 94-1 CPD ¶ 86.

b. To be a definitive responsibility criterion, the solicitation provision must reasonably inform offerors that they must demonstrate compliance with the standard as a precondition to receiving the award. Public Facility Consortium I, LLC; JDL Castle Corp., B-295911, B-295911.2, May 4, 2005, 2005 CPD ¶ 170 at 3.

c. Evaluations using definitive responsibility criteria are subject to review by the Small Business Administration (SBA) through its Certificate of Competency process. FAR 19.602-4.

d. Examples:

(1) Requiring that a prospective contractor have a specified number of years of **experience** performing the same or similar work is a definitive responsibility standard. J2A2JV, LLC, B-401663.4, Apr. 19, 2010, 2010 CPD ¶ 102 (did not meet definitive responsibility criterion

requiring at least 5 years experience and solicitation language may not reasonably be interpreted as permitting use of a subcontractor's experience); M & M Welding & Fabricators, Inc., B-271750, July 24, 1996, 96-2 CPD ¶ 37 (IFB requirement to show documentation of at least three previously completed projects of similar scope); D.H. Kim Enters., B-255124, Feb. 8, 1994, 94-1 CPD ¶ 86 (IFB requirements for 10 years of general contracting experience in projects of similar size and nature and for successful completion of a minimum of two contracts of the same or similar scope within the past two years, on systems of a similar size, quantity and type as present project); Roth Brothers, Inc., B-235539, 89-2 CPD ¶ 100 (IFB requirement to provide documentation of at least three previously completed projects of similar scope); J.A. Jones Constr. Co., B-219632, 85-2 CPD ¶ 637 (IFB requirement that bidder have performed similar construction services within the United States for three prior years); Hardie-Tynes Mfg. Co., B-237938, Apr. 2, 1990, 90-1 CPD ¶ 587 (agency properly considered manufacturing experience of parent corporation in finding bidder met the definitive responsibility criterion of five years manufacturing experience); BBC Brown Boveri, Inc., B-227903, Sept. 28, 1987, 87-2 CPD ¶ 309 (IFB required five years of experience in transformer design, manufacture, and service - GAO held that this definitive responsibility criterion was satisfied by a subcontractor).

(2) Requirement for an offeror to demonstrate in its proposal the capability to pass an audit by completing and submitting prescreening audit forms is **not** a definitive responsibility standard because it did not contain a specific and objective standard. It relates only to the general responsibility of the awardee, that is its ability to perform the contract specific with all legal requirements. T.F. Boyle Transportation, Inc., B-310708; B-310708.2, Jan. 29, 2008.

(3) Requirement for an offeror to "specify up to three contracts of comparable magnitude and similar in nature to the work required and performed within the last three years," was **not** a definitive responsibility

criterion, but an informational requirement. Nilson Van & Storage, Inc., B-310485, Dec. 10, 2007. Compare Charter Envtl., Inc., B-207219, Dec. 5, 2005, 2005 CPD ¶ 213 at 2-3 (standard was definitive responsibility criterion where it required offeror to have successfully completed at least three projects that included certain described work, and at least three projects of comparable size and scope).

D. **Subcontractor** responsibility issues.

1. Overview

a. The agency may review subcontractor responsibility. FAR 9.104-4(a).

b. Subcontractor responsibility **is determined in the same fashion as** is the responsibility of the prime contractor. FAR 9.104-4(b)

2. Statutory/Regulatory Compliance.

a. Licenses and permits.

(1) When a solicitation contains a **general** condition that the contractor comply with state and local licensing requirements, the contracting officer need not inquire into what those requirements may be or whether the bidder will comply. James C. Bateman Petroleum Serv., Inc., B-232325, Aug. 22, 1988, 88-2 CPD ¶ 170; but see International Serv. Assocs., B-253050, Aug. 4, 1993, 93-2 CPD ¶ 82 (where agency determines that small business will not meet licensing requirement, referral to SBA required).

(2) On the other hand, when a solicitation requires **specific** compliance with regulations and licensing requirements, the contracting officer may inquire into the offeror's ability to comply with the regulations in determining the offeror's responsibility. Intera Technologies, Inc., B-228467, Feb. 3, 1988, 88-1 CPD ¶ 104.

b. Statutory certification requirements.

(1) Small business concerns. The contractor must certify its status as a small business to be eligible for award as a small business. FAR 19.301.

(2) Equal opportunity compliance. Contractors must certify that they will comply with "equal opportunity" statutory requirements. In addition, contracting officers must obtain pre-award clearances from the Department of Labor for equal opportunity compliance before awarding any contract (excluding construction) exceeding $10 million. FAR Subpart 22.8. Solicitations may require the contractor to develop and file an affirmative action plan. FAR 52.222-22 and FAR 52.222-25; Westinghouse Elec. Corp., B-228140, Jan. 6, 1988, 88-1 CPD ¶ 6.

(3) Submission of lobby certification. Tennier Indus., B-239025, July 16, 1990, 90-2 CPD ¶ 25.

c. Organizational conflicts of interest. FAR 9.5. Government policy precludes award of a contract, without some restriction on future activities, if the contractor would have an actual or potential unfair competitive advantage, or if the contractor would be biased in making judgments in performance of the work. Necessary restrictions on future activities of a contractor are incorporated in the contract in one or more organizational conflict of interest clauses. FAR 9.502(c); The Analytic Sciences Corp., B-218074, Apr. 23, 1985, 85-1 CPD ¶ 464.

E. Responsibility Determination Procedures.

1. Sources of information. The contracting officer must obtain sufficient information to determine responsibility. FAR 9.105.

2. Contracting officers may use pre-award surveys. FAR 9.105-1(b); FAR 9.106; DFARS 209.106; Accurate Indus., B-232962, Jan. 23, 1989, 89-1 CPD ¶ 56.

3. Contracting officer must check the list entitled "Parties Excluded from Procurement Programs." FAR 9.105-1(c); see also AFARS 9.4 and FAR Subpart 9.4. But see R.J. Crowley, Inc., B-253783, Oct. 22, 1993, 93-2 CPD ¶ 257 (agency improperly relied on non-current list of ineligible contractors as basis for rejecting bid; agency should have consulted electronic update).

4. Contracting and audit agency records and data pertaining to a contractor's prior contracts are valuable sources of information. FAR 9.105-1(c)(2).

5. Contracting officers also may use contractor-furnished information. FAR 9.105-1(c)(3). International Shipbuilding, Inc., B-257071.2, Dec. 16, 1994, 94-2 CPD ¶ 245 (agency need not delay award indefinitely until the offeror cures the causes of its nonresponsibility).

F. GAO review of responsibility determinations.

1. Prior to 1 January 2003, GAO would not review any **affirmative** responsibility determinations absent a showing of bad faith or fraud. 4 CFR § 21.5(c) (1995); see Hard Bottom Inflatables, Inc., B-245961.2, Jan. 22, 1992, 92-1 CPD ¶ 103.

2. Today, as a general matter GAO **still** does not review an affirmative determination of responsibility. 4 C.F.R. § 21.5(c); Active Development Sys., Inc., B-404875, May 25, 2011; Navistar Defense, LLC; BAE Sys., Tactical Vehicle Sys. LP, B-401865 et al., Dec. 14, 2009, 2009 CPD ¶ 258.

3. However, there are two **exceptions**:

a. **Definitive** responsibility criteria in the solicitation that are not met, as opposed to general responsibility criteria. 4 C.F.R. § 21.5(c); Active Development Sys., Inc., B-404875, May 25, 2011; T.F. Boyle Transp., Inc., B-310708, B-310708.2, Jan. 29, 2008, 2008 CPD ¶ 52.

b. Evidence is identified that raises serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation. 4 C.F.R. § 21.5(c); 67 Fed. Reg. 79,833 (Dec. 31, 2002); Active Development Sys., Inc., B-404875, May 25, 2011; T.F. Boyle Transp., Inc., B-310708, B-310708.2, Jan. 29, 2008, 2008 CPD ¶ 52.American Printing House for the Blind, Inc., B-298011, May 15, 2006, 2006 CPD ¶ 83 at 5-6; Government Contracts Consultants, B-294335, Sept. 22, 2004, 2004 CPD ¶ 202 at 2. See Impresa Construzioni Geom. Domenico Garufi, 52 Fed. Cl. 421 (2002) (finding the contracting officer failed to conduct an independent and informed responsibility determination); Southwestern Bell Tel. Co., B-292476, Oct. 1,

2003, 2003 CPD ¶ 177 at 7-11 (GAO reviewed allegation where evidence was presented that the contracting officer failed to consider serious, credible information regarding awardee's record of integrity and business ethics).

4. Nonresponsibility determinations:

a. GAO **will** review nonresponsibility determinations for reasonableness. Schwender/Riteway Joint Venture, B-250865.2, Mar. 4, 1993, 93-1 CPD ¶ 203 (determination of nonresponsibility unreasonable when based on inaccurate or incomplete information).

III. TIMELINESS

A. Overview. this timeliness section discusses two areas of government contracting that are most affected by timing requirements: first, **contract actions must be publicized a minimum period of time**, and second, bids and proposals must be **submitted on time**. Government errors in either area can significantly delay contract performance and/or end the acquisition effort.

B. **Publicizing Contract Actions**. FAR 5.002. Prior to awarding government contracts, agencies must comply with the publicizing requirements of FAR Part 5. Publicizing contract actions increases competition, broadens industry participation, and assists small business concerns in obtaining contracts and subcontracts.

1. Definitions:

a. Publicizing: Disseminating information in a public forum so that potential vendors are informed of the agency's need, and the agency's proposed contract action.

b. Posting: A limited form of publicizing where a contracting officer informs the public of a proposed contract action by displaying a synopsis or solicitation in a public place (usually a "contract action display board" outside the contracting office), or by an equivalent electronic means (usually a contracting office webpage).

c. Synopsis: A notice to the public which summarizes the anticipated solicitation.

d. Solicitation: A request for vendors to fulfill an agency need via a government contract.

2. Publicizing Requirements. To determine the publicizing requirement for an acquisition, one must first decide if the item is a commercial item and, next, decide the dollar threshold for the acquisition. (This determination is necessary regardless of whether the agency uses sealed bidding or negotiated procurement.)

a. **Non-Commercial Items**: Contracting officers must publicize proposed contract actions as follows:

(1) For proposed contract actions expected to exceed the simplified acquisitions threshold, agencies must synopsize on the Government-wide point of entry (GPE)[1] for at least **15 days**, and then issue a solicitation and allow at least **30 days** to respond. FAR 5.101(a)(1), 5.203(a) & (c).

(2) For proposed contract actions expected to exceed $25,000 but less than the simplified acquisitions threshold, agencies must synopsize on the GPE for at least **15 days** and then issue a solicitation and allow a "reasonable opportunity to respond." *This can be less than 30 days*. FAR 5.201(b)(1)(i) and FAR 5.203(b).

(3) For proposed contract actions expected to exceed $15,000, but not expected to exceed $25,000, agencies must post (displayed in a public place or by an appropriate and equivalent electronic means), a synopsis of the solicitation, *or the actual solicitation*, for at least **10 days**. If a contracting officer posts a synopsis, then they must allow "a reasonable opportunity to respond" after issuing the solicitation. FAR 5.101 (a)(2).

(4) For proposed contract actions less than $15,000 and/or the micro-purchase threshold, there are no required publicizing requirements.

b. Commercial Items:

[1] The GPE is available online at the Federal Business Opportunities (FedBizOpps) website, *available at* www.fbo.gov.

(1) The publicizing requirements for commercial items under $25,000 are the same as for non-commercial items. See above.

(2) Commercial items over **$25,000**: The contracting officer may publicize the agency need, at his/her discretion, in one of two ways:

(3) Combined synopsis/solicitation: Agencies may issue a combined synopsis/solicitation on the GPE in accord with FAR 12.603. The agency issues a combined synopsis/solicitation and then provides a "reasonable response time." See FAR 5.203(a)(2), FAR 12.603(a) and 12.603(c)(3)(ii).

(4) Shortened synopsis/solicitation: Agencies may issue a separate synopsis and solicitation on the GPE. The synopsis must remain on the GPE for a "reasonable time period," *which may be less than 15 days*. The agency should then issue the solicitation on the GPE, providing potential vendors a "reasonable opportunity to respond" to the solicitation, *which may be less than 30 days*.

C. Late Bids and Proposals.

1. Definition of "late."

a. A "late" bid/proposal , modification, or withdrawal is one that is received in the office designated in the IFB or RFP **after** the exact time set for bid opening. FAR 14.304(b)(1); FAR 15.208

b. If the IFB or RFP does not specify a time, the time for receipt is 5:00 P.M., local time, for the designated government office. Id.

2. General rule → **LATE IS LATE;** FAR 14.304(b)(1); FAR 15.208; FAR 52.214-7.

a. Lani Eko & Company, CPAs, PLLC, B-404863, June 6, 2011 (it is an offeror's responsibility to deliver its proposal to the place designated in the solicitation by the time specified, and late receipt generally requires rejection of the proposal); O.S. Sys., Inc., B-292827, Nov. 17, 2003, 2003 CPD ¶ 211; Integrated Support sys., Inc., B-283137.2, Sept. 10, 1999, 99-2 CPD ¶51; The Staubach Co., B-276486, May 19, 1997, 97-1

CPD ¶ 190, citing Carter Mach. Co., B-245008, Aug. 7, 1991, 91-2 CPD ¶ 143.

b. There are **exceptions** to the late bid rule. These exceptions, listed below, only apply if the contracting officer receives the late bid **prior to contract award**. FAR 14.304(b)(1), FAR 15.208

3. **Exceptions to the Late Bid/Proposal Rule**. Commonalities among FAR exceptions and judicially created exceptions are: bid/proposal must get to agency before award, bid/proposal must be out of bidder's control, accepting the late bid/proposal must not unduly delay the acquisition.

a. **Electronically submitted bids.** A bid/proposal may be considered if it was transmitted through an electronic commerce method authorized by the solicitation and was received at the initial point of entry to the Government infrastructure by the Government not later than 4:30 P.M. one working day prior to the date specified for the receipt of bids/proposal. FAR 14.304(b)(1)(i); but see Watterson Constr. Co. v US, 98 Fed. Cl. 84; see also Insight Systems Corp., and Centerscope Technologies, Inc., --- Fed. Cl. ----, 2013 WL 1875987 (Fed. Cl.).

b. **Government control.** A bid/proposal may be considered if there is acceptable evidence to establish that it was received at the Government installation designated for receipt of bids/proposals and was under the Government's control prior to the time set for receipt of bids/proposals. FAR 14.304(b)(1)(ii).

(1) J. L. Malone & Associates, B-290282, July 2, 2002 (receipt of a bid by a contractor, at the direction of the contracting officer, satisfied receipt and control by the government).

(2) Watterson Constr. Co. v US, 98 Fed.Cl. 84 (recognizing that the express terms of this exception do not apply to proposals submitted by e-mail, court finds, nevertheless, that once an email leaves a bidder's inbox and reaches the government server it is within the government's control; actual receipt by contracting officer is not necessary).

(3) Insight Systems Corp., and Centerscope Technologies, Inc., --- Fed. Cl. ----, 2013 WL 1875987 (Fed. Cl.) (wherein the Court found that a proposal transmitted and received by the government email server prior to the deadline, but not forwarded to the next server in the government email system was covered under the Government Control exception).

4. **The "Government Frustration" Rule.** Note: This rule has no statutory or regulatory basis; rather, the GAO fashioned the rule under its bid protest authority.

a. **General rule**: If timely delivery of a bid/proposal, modification, or withdrawal that is hand-carried by the offeror (or commercial carrier) is frustrated by the government such that the government is the **paramount cause** of the late delivery, and if the consideration of the bid would not compromise the integrity of the competitive procurement system the then the bid is timely. U.S. Aerospace, Inc., B-403464, B-403464.2, Oct. 6, 2010, 2010 CPD ¶ 225 (a late hand-carrier offer may be considered for award if the government's misdirection or improper action was the paramount cause of the late delivery and consideration would not compromise the integrity of the competitive process);

b. Examples:

(1) Lani Eko & Co., CPAs, PLLC, B-404863, June 6, 2011 (citing Caddell Constr. Co., Inc., B-280405, Aug. 24, 1998, 98-2 CPD ¶ 50) (improper government action is "affirmative action that makes it impossible for the offeror to deliver the proposal on time").

(2) Computer Literacy World, Inc., GSBCA 11767-P, May 22, 1992, 92-3 BCA ¶ 25,112 (government employee gave unwise instructions, which caused the delay); Kelton Contracting, Inc., B-262255, Dec 12, 1995, 95-2 CPD ¶ 254 (Federal Express Package misdirected by agency); Aable Tank Services, Inc., B-273010, Nov. 12, 1996, 96-2 CPD ¶ 180 (bid should be considered when its arrival at erroneous location was due to agency's affirmative misdirection)

(3) Richards Painting Co., B-232678, Jan. 25, 1989, 89-1 CPD ¶ 76 (late proposal should be considered when bid opening room was in a different location than bid receipt room, protestor arrived at bid receipt location before the time set for bid opening, the room was locked, there was no sign directing bidder to the bid opening room and protestor arrived at bid opening room 3 minutes late).

(4) Palomar Grading & Paving, Inc., B-274885, Jan. 10, 1997, 97-1 CPD ¶ 16 (late proposal should be considered where lateness was due to government misdirection and bid had been relinquished to UPS); Select, Inc., B-245820.2, Jan. 3, 1992, 92-1 CPD ¶ 22 (bidder relinquished control of bid by giving it to UPS).

(5) The government may consider commercial carrier records to establish time of delivery to the agency, if corroborated by relevant government evidence. Power Connector, Inc., B-256362, June 15, 1994, 94-1 CPD ¶ 369 (agency properly considered Federal Express tracking sheet, agency mail log, and statements of agency personnel in determining time of receipt of bid).

c. If the government is not the **paramount cause** of the late delivery of the hand-carried bid/proposal , then the general rule applies—late is late.

(1) U.S. Aerospace, Inc., B-403464, B-403464.2, Oct. 6, 2010, 2010 CPD ¶ 225 (even in cases where the late receipt may have been caused, in part, by erroneous government action, a later proposal should not be considered if the offeror significantly contributed to the late receipt by not doing all it could or should have done to fulfill its responsibility.).

(2) Lani Eko & Co., CPAs, PLLC, B-404863, June 6, 2011 (paramount cause of late delivery stemmed from the fact that courier arrived at the designated building with one minute to spare; assumed risk that any number of events might intervene to prevent the timely submission of the proposals); Pat Mathis Constr. Co., Inc., B-248979, Oct. 9, 1992, 92-2 CPD ¶ 236.

(3) B&S Transport, Inc., B-404648.3, Apr. 8, 2011, 2011 CPD ¶ 84 (despite government misdirection to the wrong bid opening room, protester's actions were paramount cause for the late delivery; record shows courier was not entered in the visitor system prior to arrival, did not have appropriate contact information to obtain a sponsor for entry, arrived less than 10 min before proposal receipt deadline).

(4) ALJUCAR, LLC, B-401148, June 8, 2009, 2009 CPD ¶ 124 (a protester contributed significantly to a delay where it fails to provide sufficient time for delivery at a secure government facility).

(5) Selrico Services, Inc., B-259709.2, May 1, 1995, 95-1 CPD ¶ 224 (erroneous confirmation by agency of receipt of bid).

(6) O.S. Sys., Inc., B-292827, Nov. 17, 2003, 2003 CPD ¶ 211 (while agency may have complicated delivery by not including more explicit instructions in the RFP and by designating a location with restricted access, the main reason that the proposal was late was because the delivery driver was unfamiliar with the exact address, decided to make another delivery first, and attempted to find the filing location and the contracting officer unaided, rather than seeking advice concerning the address and location of the contracting officer immediately upon entering the facility).

d. The bidder must not have contributed substantially to the late receipt of the bid; it must act reasonably to fulfill its responsibility to deliver the bid to the proper place by the proper time. Bergen Expo Sys., Inc., B-236970, Dec. 11, 1989, 89-2 CPD ¶ 540 (Federal Express courier refused access by guards, but courier departed); Monthei Mechanical, Inc., B-216624, Dec. 17, 1984, 84-2 CPD ¶ 675 (bid box moved, but bidder arrived only 30 seconds before bid opening).

D. Extension of Bid Opening to Prevent "Late" Bids

1. Historically, even if the deadline for proposals had passed, GAO allowed contracting officer's to extend the closing time for receipt of proposals if they did so to **enhance competition**. The contracting

officer simply issued an amendment to the solicitation extending the deadline. GAO permitted this to happen up to five days after the deadline, in some cases. (See below for examples). GAO saw this as a way to enhance competition under the Competition In Contracting Act (CICA). **GAO created exception** to the "Late is Late" Rule.

a. Geo-Seis Helicopters, Inc., B-299175, B-299175.2, Mar. 5, 1997 (holding an agency may amend a solicitation to extend closing after the expiration of the original closing time in order to enhance competition); but see Chestnut Hill Constr. Inc, B-216891, Apr. 18, 1985, 85-1 CPD ¶ 443 (important of maintaining the integrity of the competitive bidding system outweighs any monetary savings that would be obtained by considering a late bid).

b. Varicon Int'l, Inc.; MVM, Inc., B-255808, B-255808.2, Apr. 6, 1994, 94-1 CPD ¶ 240 (it was not improper for agency to amend a solicitation to extend the closing time for receipt of proposals five days after the initial proposal due date passed because the agency extended the date to enhance competition and allow two other offerors to submit proposals),

c. Institute for Advanced Safety Studies -- Recon., B-21330.2, July 25, 1986, 86-2 CPD ¶ 110 at 2 (it was not improper for agency to issue an amendment extending the closing time 3 days after expiration of the original closing time).

d. Fort Biscuit Co., B-247319, May 12, 1992, 92-1 CPD ¶ 440 at 4 (it was not improper for agency to extend closing time to permit one of four offerors more time to submit its best and final offer).

2. **Currently**, COFC does not recognize GAO's exception as valid. There is no CAFC decision reconciling GAO and COFC. COFC's analysis is that the GAO exception is not listed in the FAR. The FAR councils considered an amendment identical to the GAO exception in 1997 and rejected it after public comment. In **Geo-Seis Helicopters v. United States**, COFC rejected the agency's reliance on the GAO exception, 77 Fed. Cl. 633 (2007), and granted the protestor fees under the Equal Access to Justice Act (EAJA), 79 Fed. Cl. 74 (2007), because COFC found that the government's was "not substantially justified" in believing the GAO "ipse dixit" exception was valid law. "GAO precedent could not excuse deviation from explicit, unambiguous regulations that directly contradict that position." 79

Fed. Cl. at 70 (*quoting* Filtration Dev. Co. v. U.S., 63 Fed. Cl. 612, 621 (2005).

IV. ORGANIZATIONAL CONFLICTS OF INTEREST

A. Overview. An organizational conflict of interest, or "Unfair Competitive Advantage," arises where "because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage." FAR 2.101 (*emphasis added*).

1. The contracting agency is responsible for determining whether an actual or apparent conflict of interest will arise, and whether and to what extent the firm should be excluded from the competition. FAR 9.504 & 9.505.

2. An OCI may exist with respect to existing procurement, or with respect to a future acquisition. FAR 9.502(c).

B. The three types of OCIs

1. Unequal Access to Information. ("Unfair access to non-public information") OCI occurs when, as part of its performance of a government contract, a firm has access to non-public information (including proprietary information and non-public source selection information) that may provide the firm with a competitive advantage in a competition for a different government contract. FAR 9.505-4. Aetna Gov't Health Plans, Inc., B-254397.15, July 27, 1995, 95-2 CPD ¶ 129. To constitute an OCI it is sufficient that the offeror has access to the information; actual use does not have to be shown.

a. GAO sustained a finding of an OCI where awardee employed in its proposal preparation a former high-ranking official of the procuring agency who had participated in planning procurement and had access to non-public competitor and source selection information, and contracting officer was not informed of and therefore did not consider the matter. "Health Net Fed. Servs., LLC, B-401652.3,.5, Nov. 4, 2009, 2009 CPD ¶ 220.

b. Johnson Controls World Serv., B-286714.2, Feb. 13, 2001, 2001 CPD ¶ 20 (OCI found in the award of a logistics support contract where the awardee's subcontractor, under separate

contract, had access to a competitively beneficial but non-public database of maintenance activities that was beyond what would be available to a typical incumbent installation logistics support contractor).

c. Kellog, Brown, & Root Serv., Inc., Comp. Gen. B-400787.2, Feb. 23, 2009 CPD ¶ 692647 (upholding the contracting officer's decision to disqualify KBR from competing for two task orders under the LOGCAP IV contract because the KBR program manager improperly accessed rival propriety information erroneously forwarded to the program manager by the contracting officer. The GAO stated, "[W]herever an offeror has improperly obtained proprietary proposal information during the course of a procurement, the integrity of the procurement is at risk, and an agency's decision to disqualify the firm is generally reasonable, absent unusual circumstances.").

d. For there to be an unequal access OCI, the information received must be real, substantial, competitively useful, and non-public.

(1) When a government employees participates in the drafting an SOW, this does not necessarily demonstrate that the employee's post government work for an offeror created n OCI, where the employee's work was later released to the public as part of the solicitation. Further, the contracting officer could neither "conclusively establish, nor rule out the possibility" that former government employee had access to competitively useful source selection information, determination that appearance of impropriety had been created by the protester's hiring of a former government employee was unreasonable, because determination was based on assumptions rather than hard facts. VSE Corp., B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268 (where)

(2) Raytheon Technical Servs. Co. LLC, B-404655, Oct. 11, 2011, 2011 CPD ¶ 236 (unequal access to information" protest denied where allegations were based upon suspicion rather than "hard facts," and contracting officer conducted reasonable investigation

and concluded that awardee did not have access to competitively useful non-public information).

(3) CACI Inc., Federal, B-4030642, Jan. 28, 2011, 2011 CPD ¶ 31 (holding no unequal access to information OCI resulted from access to protester's information, where information had been furnished to the Government without restriction as to its use).

(4) ITT Corp. – Electronic Sys., B-402808, Aug. 6, 2010, 2010 CPD ¶178 (no OCI where the awardee had access to information that the protestor had provided to the government under a Government Purpose Rights license, since the protester had access to same information and government had the legal right to provide it to the awardee).

(5) Dayton T. Brown, Inc., B402256, Feb. 24, 2010, 2010 CPD ¶ 72 (finding where protocols were provided to all offerors, awardee with access to protocols did not have unfair access to information OCI).

e. The "natural advantage of incumbency" will not create an OCI by itself.

(1) Qineti North America, Inc., B-405008, July 27, 2011, 2011 CPD ¶ 154 (holding that an offeror may possess unique information, advantages and capabilities due to its prior experience under a government contract – either as an incumbent contractor or otherwise; the government is not necessarily required to equalize competition to compensate for such an advantage, unless there is evidence of preferential treatment or other improper action).

(2) PAI Corp. vs. United States, 2009 WL 3049213 (Ct. of Fed. Cl. Sept. 14. 2009) (stating that any competitive advantage was result of natural advantage of incumbency rather than access to nonpublic information which had no competitive value; since contracting officer found that no significant OCI existed, she was not required to prepare written analysis), affirmed, 614 F3d. 1347 (Fed. Cir. 2010).

(3) ARINC Eng'g Servs., LLC, 77 Fed. Cl. 196 (2007) (prejudice is presumed when offeror has non-public information that is competitively useful and unavailable to protester, but in order to prevail the protestor must show that contractor had more than just the normal advantages of incumbency – e.g. that awardee was "so embedded in the agency as to provide it with insight into the agency's operations beyond that which would be expected of a typical government contractor.")

(4) Systems Plus Inc. vs. United States, 69 Fed. Cl. 1 (2003) (the natural advantage of incumbency, by itself, does not create an OCI).

f. The actions or knowledge of a subcontractor or other team member can create an OCI.

(1) Awardee had unequal access to information when subcontractor that it ultimately acquired following contract award had access to competitively useful, non-public information. B.L. Harbert-Brasfield & Gorie, Comp. Gen. B-402229, Feb. 16, 2010, 2010 CPD ¶ 69.

(2) Maden Techs., B-298543.2, Oct. 30, 2006, 2006 CPD ¶ 167 (potential OCI from awardee's use of subcontractor that had served as evaluator for agency in previous procurement was mitigated where subcontractor had signed nondisclosure agreement and did not aid awardee in preparing proposal)

(3) Mech. Equip. Co., Inc., et al, B-292789, Dec. 15, 2003, 2004 CPD ¶ 192 (no unequal access OCI where awardee's subcontractor was long time incumbent services provider but there was no evidence it had advance access to procurement information).

g. An unequal access to information OCI will not result from information that is not obtained by a government contract. CapRock Govt. Solutions, Inc., B-402490, May 11, 2010, 2010 CPD ¶ 124 (no unequal access to information OCI where information in dispute was not obtained as part of performance of government contract).

h. Information from a former Government employee. Where non-public information is obtained from a former government employee, the issue will be treated as if the information had been obtained under a government contract. GAO generally will not presume access to non-public, competitively sensitive information, but will presume prejudicial use of such information once access is shown. TeleCommunication Sys. Inc., B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229; Unisys Corp., B-403054.2, Feb. 8, 2011, 2011 CPD ¶ 61; Chenega Fed. Sys., B-299310.2, Sept. 28, 2007, 2007 CPD ¶ 70

2. Impaired Objectivity OCI. Occurs when the nature of contractors's work under one contract could give it the opportunity to benefit on other contracts. If the contractor is using subjective judgment or giving advice, and its other business interests could be affected by that judgment or advice, its objectivity may be impaired. An example would be if it were to have the opportunity to evaluate itself, an affiliate, or a competitor, either through an assessment of its performance under another contract or through an evaluation of its own proposal. The issue is not whether biased advice was actually given but whether a reasonable person would find that the contractor's objectivity could have been impaired. Note that a biased ground rules OCI may also involved impaired objectivity. FAR §9.505-3. Aetna Gov't Health Plans, Inc., B-254397.15, July 27, 1995, 95-2 CPD ¶ 129. See Cahaba Safeguard Adm'r, LLC, Comp. Gen. B-401842.2, Jan. 25, 2010, 2010 CPD ¶ 39 (discussing agency's handling of an impaired objectivity conflict of interest); L-3 Serv., Inc., Comp. Gen. B-400134.11, Sept. 3, 2009, 2009 CPD ¶ 171.

a. A protest was sustained where the awardee of a contract for advisory and assistance services and technical analysis sold related products and services and could provide information that might influence acquisition decisions concerning those products. The Analysis Group, LLC, B-401726.2, Nov. 13, 2009, 2009 CPD ¶ 237; The Analysis Group, LLC, B-401726.3, Apr. 18, 2011, 2011 CPD ¶ 166 (protest denied where agency conducted its own investigation and thoroughly analyzed potential OCI, concluding that risk of potential OCI remained but was outweighed by benefit to Government, and properly executed waiver)

b. Nortel Govt. Solutions, B-299522.5, B-299522.6, Dec. 30, 2008, 2009 CPD ¶ 10 (protest sustained where agency did not give meaningful consideration to a potential impaired

objectivity OCI, also noted: firewall is "virtually irrelevant to an OCI involving potentially impaired objectivity," because the OCI involves the entire organization, not just certain individuals).

c. Remote relationships. Some relationships are too "remote" to create an impaired objectivity OCI risk, and some activities are too "ministerial" to give the contractor an opportunity to act in other than the government's interest.

(1) Valdez Int'l Corp., B402256.3, Dec. 29, 2010, 2011 CPD ¶ 13 (affirming contracting officer decision, after comprehensive and well documented review, that impaired objectivity OCI was minimal because standardized protocols and processes limited the amount of independent judgment required).

(2) Marinette Marine Corp., B-400697 et al., Jan. 12, 2009, 2009 CPD ¶ 16 (holding no impaired objectivity OCI found where entity that helped agency in proposal evaluation provided advice to both awardee and protester, without any contractual or financial arrangement).

(3) Leader Comm'ns, Inc, B-298734, Dec. 7, 2006, 2006 CPD ¶ 192 (finding that awardee did not have impaired objectivity OCI as a result of its performance of separate contract because any services that overlapped would be administrative only).

3. Biased Ground Rules OCI. Occurs when, as part of its performance on a government contract, a firm has helped (or is in a position to help) set the ground rules for procurement of another government contract, for example, by writing the statement of work or the specifications, or establishing source selection criteria. The primary concern is that the firm could skew the competition in its own favor, either intentionally or not. FAR 9.505-1 and 9.505-2. Aetna Gov't Health Plans, Inc., B-254397.15, July 27, 1995, 95-2 CPD ¶ 129.

a. The FAR standard is whether the information supplied led "directly, predictably, and without delay" to the statement of work. FAR 9.505-2(b).

b. Examples

(1) GAO upheld a protestor's exclusion on the basis of "biased ground rules" OCI. The protestor prepared a report that the agency used to draft the statement of work. Despite the fact that the awardee expected the report to be used only as part of a sole source procurement, rather than competitive procurement, the protestor was properly excluded. There is no "foreseeability" caveat to the rule. Energy Sys. Group, B402324, Feb. 26, 2010, 2010 CPD ¶ 73.

(2) The GAO has held that the relevant concern is not whether a firm drafted specifications that were adopted into the solicitation, but whether the firm was in a position to affect the competition, intentionally or not, in favor of itself. Also, it was unreasonable for the agency to rely on a mitigation plan that was undisclosed to, unevaluated by, and unmonitored by the agency. L-3 Servs., Inc., B-400134.11, Sept. 3, 2009, 2009 CPD ¶ 171.

(3) Celadon Labs., Inc., B-298533, Nov., 1 2006, 2006 CPD ¶ 158 (sustaining a protest where outside evaluators, retained to review proposals involving two different, competing technologies, were all employed by firms that promoted the technology challenged by protestor's proposal).

(4) Filtration Dev. Co. LLC, 60 Fed. Cl. 371 (2004) (Systems engineering and technical assistance (SETA) contractor, which was in a position to favor its own products, was precluded from supplying components even though the agency claimed the contractor had not provided services in connection with those products; court held that the OCI had to be evaluated when the contractor became contractually obligated to perform SETA services, regardless of whether it actually performed them).

c. No OCI is created where the contractor has overall systems responsibility, or where input is provided by a developmental contractor or industry representative. Lockheed Martin Sys. Integration – Owego, B-287190.2, May 25, 2001, 2001 CPD ¶ 110; Vantage Assoc., Inc. v. United States, 59 Fed. Cl. 1, 10 (2003) .

C. Examples. Subpart 9.5, especially section 9.508, of the FAR describes several situations that illustrate real or potential OCIs:

1. Providing systems engineering and technical direction for a system but not having overall contractual responsibility for its development or for its integration, assembly and checkout, or its production," the government's concern is that a contractor performing these activities "occupies a highly influential and responsible position in determining a system's basic concepts and supervising their execution by other contractors," and should" <u>not be "in a position to make decisions favoring its own products or capabilities.</u>

2. Preparing and furnishing complete specifications covering non-developmental items- " the government's concern is that the contractor "could draft specifications favoring its own products or capabilities," which might not provide the government unbiased advice. This rule does not apply to:

   a. contractors who furnish specifications regarding a product they provide (e.g., where the government purchases a data package from the original manufacturer, to use for future competitions);

   b. situations where contractors act as industry representatives and are supervised and controlled by government representatives (e.g., when the government issues a Request For Information ("RFI") to potential offerors); or

   c. development contractors (where experienced contractors will have an unavoidable competitive advantage which will improve the time and quality of production).

3. Where a contractor prepares a work statement to be used in a competitive acquisition – "or provides material leading directly, predictably, and without delay to such a work statement" – the <u>government's concern is that the contractor might favor its own products or capabilities</u>. (FAR 9.505-2(b)) Accordingly, the contractor may not supply the system or services unless:

   a. it is the sole source;

   b. it participated in the development and design work (where experienced contractors will have an unavoidable competitive advantage which will improve the time and quality of production); or

c. more than one contractor helped prepare the work statement.

4. A contractor should not be awarded a contract to evaluate its own (or a competitor's) offers for products or services, without "proper safeguards to ensure objectivity." (FAR 9.505-3).

5. If a contractor requires proprietary information from others to perform a contract, it must agree to protect the information from unauthorized use or disclosure and to refrain from using the information for any other purpose. (FAR 9.505-4).

a. The contracting officer is directed to obtain copies of the required confidentiality agreements.

b. These restrictions also apply to proprietary and source selection information obtained from "marketing consultants," who are defined (in FAR 9.501) as independent contractors who provide advice, information, direction or assistance in connection with an offer, not including legal, accounting, training, routine technical services, or "advisory and assistance services" (as defined in Subpart 37.2).

D. Contractor Responsibilities. FAR Subpart 9.5 is directed principally at the government. Taking the government's responsibilities into account, however, contractors should do the following:

1. Identify actual and potential OCIs, both proactively and in response to inquiries from the contracting officer.

2. Actively communicate with the contracting officer to agree upon ways to avoid or mitigate potential OCIs.

3. Execute appropriate confidentiality agreements when proprietary information from third parties will be needed to perform a contract.

4. Make necessary inquiries of marketing consultants to ensure that they do not provide an unfair competitive advantage.

E. Government Considerations Related to OCIs.

1. <u>Obligation for oversight</u>

a. Contracting Officers (and other contracting officials) must identify and evaluate potential OCI as early in the contracting process as possible. FAR 9.504(a)(1). Each individual

contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. QinetiQ North America, Inc., Comp. Gen. B-405008, B405008.2, July 27. 2011, 2011 CPD ¶ 154. Because conflicts of interest may arise in situations not specifically addressed in FAR Subpart 9.5, individuals need to use common sense, good judgment, and sound discretion when determining whether a potential conflict exists. FAR 9.505. See L-3 Serv., Inc., Comp. Gen. B-400134.11, Sept. 3, 2009, 2009 CPD ¶ 171.

b. Contracting Officers must avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR 9.504(a)(2); Energy Sys. Group, Comp. Gen. B-402324, Feb. 26, 2010, 2010 CPD ¶ 73.

c. The GAO review found the contracting officer failed to adequately analyze whether a biased ground rules OCI existed, and that there were no hard facts to show that awardees' work had put it in a position to materially affect the competition. To succeed the protester must also demonstrate that contracting officer's failure could have materially affected the outcome of the competition. QinetiQ North America, Inc., B-405008, July 27, 2011, 2011 CPD ¶ 154.

d. The responsibility for determining whether an actual or apparent conflict of interest will arise, and to what extent the firm should be excluded from the competition, rests with the contracting agency. The GAO will not overturn an agency's determination unless a protestor can show, based upon "hard facts," that the agency's OCI determination is arbitrary and capricious. QinetiQ North America, Inc., Comp. Gen. B-405008, B405008.2, July 27. 2011, 2011 CPD ¶ 154.

2. Reasonable consideration of offerors mitigation plan. The contracting officer must reasonably consider a potentially excludable offeror's OCI mitigation plan.

a. The GAO sustained a protest where the agency excluded the protestor from a competition because of a possible impaired objectivity OCI, but the agency failed to give the contractor the opportunity to avoid or mitigate the OCI, and had not given the protestor an opportunity to respond to the agency's concerns.

AT&T Gov't Solutions, Inc., B-400216, Aug. 28, 2008, 2008 CPD ¶ 170.

b. Evaluating proposals evenly (agency improperly downgraded score of protester, based on OCI risk, while failing to evaluate potential OCI of awardees on equal basis) Research Analysis & Maintenance, Inc., Westar Aerospace & Def. Group, Inc., B-292587.4 et al., Nov. 17, 2003, 2004 CPD ¶ 100.

3. Apparent OCI. The contracting officer may exclude an offeror based on an "apparent" OCI, even if there is no evidence of an actual impact.

a. An appearance of an unfair competitive advantage based upon hiring of a government employee, without proof of an actual impropriety, is enough to exclude an offeror if the determination of unfair competitive advantage is based upon facts and not on mere innuendo. Health Net Fed. Servs., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 28; see NKF Eng'g, Inc., v. US, 805 F.2d 372 (Fed. Cir 1986) (overturning lower court's holding that appearance of impropriety, alone, is not a sufficient basis to disqualify an offeror could be enough, and finding that the agency reasonably disqualified the offeror based upon the appearance of impropriety.)

b. VRC, Inc., B-310100, Nov. 2, 2007, 2007 CPD ¶ 202 (contracting officer properly excluded offeror because there was an appearance of a conflict, where an employee of a company with ownership ties to the offeror worked in the agency's contracting division and had direct access to source selection information).

c. Lucent Tech. World Servs. Inc., B-295462, Mar. 2, 2005, 2005 CPD ¶ 55 (protest challenging exclusion from the procurement denied where the contracting officer reasonably determined that the protester had an OCI arising from its preparation of technical specification used by agency in solicitation (although Army was kept appraised of Lucent's progress in drafting specifications, it did not exercise supervision and control, the Army's modification was not a major revision, and vast majority of technical specifications remained unchanged).

F. Waiver. The Government has the right to waive an OCI requirement. FAR 9.503.

1. The Analysis Group, LLC, B-401726.3, Apr. 18, 2011, 2011 CPD ¶ 166 (protest denied where agency conducted its own investigation thoroughly analyzed potential OCI, concluded that risk of potential OCI remained but was outweighed by benefit to Government, and properly executed waiver).

2. Cigna Govt. Servs., LLC, B-401068, Sept. 9, 2010, 2010 CPD ¶230 (denying protest challenging agency's waiver of OCI where, in compliance with FAR requirements, waiver request detailed extent of conflict and authorized agency official determined that waiver was in government's interest).

3. MCR Federal, LLC, B-401854.2, Aug. 17, 2010, 2010 CPD ¶196 (where, in compliance with FAR § 9.504, the agency made a written request for a waiver that described the OCI concerns, the potential effect if not avoided, neutralized, or mitigated, and the government's interest in allowing the offerors to compete for the award notwithstanding the OCI concerns, and the designated official approved the waiver, the agency met waiver requirements)

G. Mitigating the risk of OCIs. In most cases it is not possible to mitigate an OCI after the fact, so mitigation must address prospective OCIs. In general, GAO will give substantial deference to a mitigation plan, as long as the agency has investigated and dealt with the conflict issues and the plan is tailored to the specific situation.

1. Unequal access OCIs

a. Establish a firewall, or a combination of procedures and security measures that block the flow of information between contractor personnel who have access to non-public competitive information and other contractor employees who are preparing the proposal. The potential competitive advantage resulting from the unequal access will be nullified if the information cannot cross the firewall to be used in a competitive procurement. Enterprise Information Servs., B-405152, Sept. 2, 2011, 2011 CPD ¶ 174; LEADS Corp., B-292465, Sept. 26, 2003, 2003 CPD ¶ 197.

b. Disclose sensitive information to all offerors. Johnson Controls World Servs., Inc., B-286714.3, Aug. 20, 2001, 2001 CPD ¶ 145; Sierra Military Health Servs., Inc. vs. United States, 58 Fed. Cl. 573 (2003) (sharing information with competing offerors could adequately mitigate the OCI).

2. Impaired objectivity OCIs

a. Can be mitigated by excluding from work, or even removing, a conflicted subcontractor. Karrar Sys. Corp., B-310661, Jan. 3, 2008, 2008 CPD ¶ 51; Business Consulting Assocs., LLC, B-299758.2, Aug. 1, 2007, 2007 CPD ¶ 134

b. In some cases an impaired objectivity OCI can be mitigated by having work performed by a firewalled subcontractor, or even by the agency itself. Cahaba Safeguard Administrators, LLC, B-401842.2; C2C Solution, Inc., B-401106.5,6, Jan. 25, 2010, June 21, 2010, 2010 CPD ¶ 38 and 39; Alion Sci. & Tech. Corp., B-297022.4, Sept. 26, 2006, 2006 CPD ¶ 146. (Alion II) (GAO upheld the agency's analysis and approval of ITT's firewalled subcontractor plan even though one-third of the work would be done by a subcontractor, because the conflicted work could easily be segregated and assigned to the subcontractor).

c. Increased oversight of work.

(1) Valdez Int'l Corp., B402256.3, Dec. 29, 2010, 2011 CPD ¶ 13 (affirming contracting officer decision, after comprehensive and well documented review that impaired objectivity OCI was minimal because standardized protocols and processes limited the amount of independent judgment required, and analysis would be done by subcontractors).

(2) Wyle Labs., Inc., B-288892.2, Dec. 19, 2001, 2002 CPD ¶ 12 (deciding that where government personnel, rather than contractor personnel, would be measuring contractor performance, no OCI was created by the award of multiple contracts to the contractor).

(3) Deutsche Bank, B-289111, Dec. 12, 2001, 2001 CPD ¶ 210 (finding dispositive that the firewalled subcontractor reported directly to the agency).

3. Biased ground rules OCIs. These are difficult to mitigate, because once a party has influenced the specifications the harm has already been done. If the government is not able to obtain input from multiple potential contractors, the best mitigation strategy looking forward may be for the potential contractor to avoid tasks that will create an OCI –

either by refraining from submitting a proposal, or by entering into a contract that allows it to recues itself from work that might create a future conflict.

H. Defense FAR Supplement (DFARS) Rule

1. Background**.** The DFARS Rule addresses the mandate contained in Section 207 of the Weapons System Acquisition Reform Act of 2009 (WSARA), Pub. L. 111-23, 123 Stat. 1704, 41 U.S.C. §2304, which required the Department of Defense "to revise the Defense Supplement to the Federal Acquisition Regulation to provide uniform guidance and tighten existing requirements for organizational conflicts of interest by contractors in **major defense acquisition programs (MDAP)**."[2] The DFARS Rule supplements the existing FAR Rule, but takes precedence to the extent that the rules are inconsistent. DFARS 209.571-2(b).

2. Applicability

a. The Final Rule applies only to programs which are MDAPs or have the potential to become MDAPs ("Pre-MDAPs"). DFARS 209.571-1, 2.

b. MDAPs are defined in 10 U.S.C. §2430 as DoD acquisition programs (excluding highly classified programs) that are so designated by the Secretary of Defense or that are estimated to require an eventual total expenditure for R&D, test and evaluation of more than $300 Million or total expenditure for procurement of more than $1.8 Billion, based on FY 1990 dollars.

c. Pre-MDAPs are defined as programs that are in the Materiel Solution Analysis or Technology Development Phases preceding Milestone B of the Defense Acquisition System, and have been identified as having the potential to become MDAPs.

3. Mitigating OCIs (DFARS 209.571-4)

a. Where the contracting officer and contractor have agreed to mitigate an OCI, a Government-approved OCI Mitigation Plan

[2] WSARA was enacted in response to a report issued by the Defense Science board Task Force on Defense Industrial Structure for Transformation , which expressed concern regarding the acquisition of numerous systems engineering firms by large defense contractors.

should be incorporated into the contract. This has several benefits. It facilitates enforcement and predictability. Both the contractor and the Government (as well as subsequent contracting officers) will be bound by the plan.

b. Where the contracting officer (after consulting with legal counsel) determines that an otherwise successful offeror is unable to effectively mitigate an OCI, the contracting officer shall use another approach to resolve the OCI, select another offeror, or request a waiver (in accordance with the procedure set forth in the FAR).

4. Restrictions on SETA (systems engineering and technical assistance) contractors.

a. The DFARS Final Rule requires that DoD obtain advice on SETA contractors with respect to MDAPs or Pre-MDAPs from sources that are objective and unbiased, such as Federally Funded Research and Development Centers (FFRDC's)[3] or other sources that are independent of major defense contractors. DFARS 209.571-7(a)

(1) "Systems engineering" is defined as "an interdisciplinary technical effort to evolve and verify an integrated and total life cycle balanced set of system, people, and process solutions that satisfy customer needs."

(2) "Technical assistance" is defined as "the acquisition support, program management support, analyses, and other activities involved in the management and execution of an acquisition program."

(3) "Systems engineering and technical assistance" is defined as "a combination of activities related to the development of technical information to support various acquisition processes."

(4) SETA does not include "design and development work of design and development contractors."

[3] Federally Funded Research and Development Centers (FFRDC) are defined in FAR 2.101 as activities that are sponsored under a broad charter by a Government agency (or agencies) for the purpose of performing, analyzing, integrating, supporting, and/or managing basic or applied research and/or development, and that receive 70 percent or more of their financial support from the Government.

b. Contracts for SETA services for MDAPs or Pre-MDAPs shall prohibit the contractor (or any affiliate) from participating as contractor or Major Subcontractor[4] in the development or construction of a weapon system under such program. DFARS 209.571-7(b)(1).

c. This prohibition may not be waived. It does not apply, however, if the head of the contracting activity determines that "an exception is necessary because DoD needs the domain experience and expertise of the highly qualified, apparently successful offeror," and that the apparently successful offeror will be able to provide objective and unbiased advice without a limitation of future participation. DFARS 209.571-7(b)(2).

5. Post Script. As noted, the proposed DFARS OCI rule contained provisions that would have applied to all DoD acquisitions and not just those for MDAPs. Although the Final Rule was limited to MDAPs, after issuing the Final Rule the Defense Acquisition Regulations Council worked with the Civilian Acquisition Regulations Council, OFPP, and OGE as they drafted an amended OCI FAR rule.

I. Venue.

The Court of Federal Claims (COFC) and the GAO have independent protest jurisdiction. As a result, disappointed offerors sometimes seek "two bites at the apple" and file a protest at the COFC after losing at the GAO. While GAO decisions are accorded a high degree of deference by the COFC, they are not binding on it, especially as to questions of law. Grunley-Walsh Int'l LLC vs. United States, 78 Fed. Cl. 35 (2007). This can lead to a time consuming and convoluted OCI process.

V. CONCLUSION

[4] A "Major Subcontractor" is defined in DFARS 252.209-7009 as one who is awarded a subcontract that exceeds both the cost and pricing data threshold and 10% of the contract value, or $50 Million.

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APPENDIX - PUBLICATION TIMELINES

Publicizing Synopsis/Solicitation and Response Time Requirements[1]

Amount of Acquisition	Non-Commercial Items	Commercial Items
$0 – Micro-purchase Threshold[2]	NA	NA
>$3K - $15K	NA[3]	NA
>$15K - $25K	Post synopsis or solicitation electronically or in public place for at least 10 days, unless soliciting orally (FAR 5.101(a)(2)).[4] If KO posts a synopsis, allow "reasonable opportunity to respond" after issuing solicitation.	Same as >15K - $25K Non-Comm Items
>$25K- $SAT[5]	Synopsize on GPE[6] for 15 days. Then issue solicitation[7] and allow a "reasonable opportunity to respond." (FAR 5.201(b)(1)(i) and 5.203(b).	**Option #1:** Synopsize on GPE for "reasonable period" (can be less than 15 days). Then, issue solicitation and allow "reasonable opportunity to respond" (can be less than 30 days) (FAR 5.203(a)(1), (b), and (c). **Option #2:** Use combined synopsis/solicitation procedure (there is no separate synopsis and solicitation). KO will establish a "reasonable response time." (FAR 5.203(a)(2) and 12.603(a) and (c)(3)(ii).
>$SAT	Synopsize on GPE for 15 days (FAR 5.203(a)). Issue solicitation and allow 30 days to respond (FAR 5.101(a)(1) and 5.203(c)).	Same as $25K - $SAT Comm Items above.

1. "Publicizing" or "notice" requirements are satisfied by posting a synopsis (i.e., summary) of a planned solicitation for the required period and in appropriate locations. The "solicitation response time" is the period starting the first day a solicitation is posted or mailed to potential offerors.
2. Generally the micro-purchase threshold is $3K; for construction it is $2K; for acquisitions subject to the Service Contracts Act it is $2.5K; in support of contingency ops/or NBCR defense it is $15K for inside the U.S. and $30K for outside the U.S.
3. No written solicitations required. Oral solicitations should be used to the "maximum extent practicable." FAR 13.106-1(c).
4. Oral solicitation for requirements estimated between $15K - $25K should be used for non-complex requirements only.
5. "SAT" means "simplified acquisition threshold" under FAR Part 13 – normally $150K. See simplified acquisition threshold chart on page 2.
6. Government-wide Point of Entry (GPE). The GPE is located at www.fedbizops.com.
7. "Issue solicitation" means to publicize it on GPE, or by other electronic means, or to send it to potential offerors.

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Appendix A
Alphabetical Listing of Contract Abbreviations

2013 Contract Attorneys Deskbook

AAA	Army Audit Agency
ACA	Army Contracting Agency
ACAB	Army Contract Adjustment Board
ACAT	Acquisition Category
ACO	Army Contracting Officer
ACSA	Acquisition and Cross Servicing Agreement
ADA	Anti-Deficiency Act
ADPE	Automatic Data Processing Equipment
ADR	Alternative Dispute Resolution
ADRA	Administrative Dispute Resolution Act
AECA	Arms Export Control Act
AFARS	Army Federal Acquisition Regulation Supplement
AFFARS	Air Force Federal Acquisition Regulation Supplement
AFSA	Afghanistan Freedom Support Act
AGBCA	Department of Agriculture Board of Contract Appeals
AL	Acquisition Letter
AMWRF	Army Morale, Welfare and Recreation Fund
ANA	Afghan National Army
ANSWER	Applications and Support for Widely Diverse End User Requirements
AO	Area of Operations
AOA	Acquisition-only Agreement
AOR	Area of Responsibility
APA	Administrative Procedures Act
APC	Asia Pacific Center for Security Studies
APF's	Appropriated Funds
AP Plan	Advanced Procurement Plan
AR	Army Regulation
ARB	Combatant Commander‘s Acquisition Review Board
ARC	American Red Cross
ASA	(ALT) Assistant Secretary of the Army (Acquisition, Logistics and Technology)
ASA	(FM&C) Assistant Secretary of the Army (Financial Management and Comptroller)
ASBCA	Armed Services Board of Contract Appeals
ASC	Army Sustainment Command
ASCP	Army Small Computer Program
ASCPA	Army Services Procurement Act
ASPM	Armed Services Pricing Manual
ASCSA	Acquisition and Cross-Servicing Agreement

BCM	Business Clearance Memorandum
BEA	Army Business Enterprise Architecture
BOA	Basic Ordering Agreement
BOD	Beneficial Occupancy Date
BOM	Bill of Materials
BPA	Blanket Purchase Agreement
BPD	Board of Contract Appeals Bid Protest Decisions
CAA	Consolidated Appropriations Act
CAAS	Contracts for Advisory and Assistance Services
C&A	Certified and Accredited
C&S	Commodities and Services
CAF	Army Contractors Accompanying the Force
CAFC	Court of Appeals for Federal Circuit
CAP	Commercial Activities Panel/Program
CAS	Cost Accounting Standards
CASB	Cost Accounting Standards Board
CBA	Collective Bargaining Agreement
CBCA	Civilian Board of Contract Appeals
CBD	Commerce Business Daily
CCA	Contingency Construction Authority
CCH	Commerce Clearing House
CCIF	Combatant Commander Initiative Funds
CCP	Contingency Contracting Personnel
CCR	Central Contractor Registration
CDA	Contract Disputes Act
CDF	Contractors Deploying with the Force
CDRL	Contract Data Requirements List
CERP	Commander’s Emergency Response Program
CFR	Code of Federal Regulations
CICA	Competition in Contracting Act
CIO	Chief Information Officer
CITP	Commercial Items Test Program
CJCS	Chairman of the Joint Chiefs of Staff
CJTF	Combined Joint Task Force
CKO	Contingency Contracting Officer
CLEAs	Civilian Law Enforcement Agency
CLIN	Contract Line item Number

COTS	Commercially Available of the Shelf
CPA	Coalition Provisional Authority
CPAF	Cost plus Award Fee Contract
CPD	Congressional Presentation Document
CPD	Comptroller General's Procurement Decisions
CPFF	Cost plus Fixed Fee Contract
CPIF	Cost plus Incentive Fee Contract
CPPC	Cost-Plus Percentage of Cost
CR	Continuing Resolution
CRA	Continuing Resolution Authority
CRA	Continuing Resolution Act
CRC	CONUS Replacement Center
CSF	Coalition Support Fund
CSO	Competitive Sourcing Official
CSP	Contracting Support Plan 30-5
CWAS	Contractor Weighted Average Share
CWAS-NA	Contractor Weighted Average Share- Not Applicable
CWHSSA	Contract Work Hours and Safety Standards Act
DA	Department of the Army
D&F	Determination and Finding
DAC	Defense Acquisition Circular
DA Form	Department of the Army Form
DAMS	Divide-Apply-Make-See (Approach to Pricing Adjustments)
DAPS	Documentation and Production Service
DAR	Defense Acquisition Regulation
DARC	Defense Acquisition Regulatory Council
DASA (I&H)	Deputy Assistant Secretary of the Army for Installations and Housing
DAU	Defense Acquisition University
DBA	Davis-Bacon Act 14-3
DBA	Defense Base Act 31-24
DBOF	Defense Business Operations Fund
DCA	Defense Communications Agency
DCAA	Defense Contract Audit Agency
DCAAM	Defense Contract Audit Manual
DCCEP	Developing Countries Combined Exercise Program
DCMA	Defense Contract Management Agency
DCMCR	Defense Contract Management Command Region

DOD	Department of Defense
DODAA	Department of Defense Appropriations Act
DODAAC	Department of Defense Activity Address Code
DOD FMR	DoD Financial Management Regulation
DODIG	Department of Defense Inspector General
DOE	Department of Energy
DOHA	Defense Office of Hearings and Appeals
DOI	Department of the Interior
DOL	Department of Labor
DOMOPS	Domestic Military Operations
DOS	Department of State
DOT	Department of Transportation
DOT CAB	Department of Transportation Contract Appeals Board
DPA	Delegation of Procurement Authority
DPAP	Defense Procurement and Acquisition Policy
DPRO	Defense Plant Representative's Office
DRI	Defense Reform Initiative
DRM	Director of Resource Management
DRMS	Defense Reutilization and Marketing Service
DSC	Differing Site Conditions
DSCA	Defense Security Cooperation Agency
DUNS	Data Universal Numbering System
E&E	Emergency and Extraordinary
EAJA	Equal Access to Justice Act
EBCA	Department of Energy Board of Contract Appeals
EDA	Excess Defense Articles
EEE	Emergency and Extraordinary Expenses
EEO	Equal Employment Opportunity
EFT	Electronic Funds Transfer
EIT	Electronic and Information Technology
ENG BCAUS	Army Corps of Engineers Board of Contract Appeals
EO	Executive Order
EOQ	Economic order quantity
ESA	Enterprise Software Agreement
ESAA	Emergency Supplemental Appropriations Act for Defense and Reconstruction FY04
ESF	Economic Support Fund
ESF	Emergency Support Functions

FCCM	Facilities Capital Cost of money
FCIA	Federal Courts Improvement Act
FCO	Federal Coordinating Officer (DOMOPS)
FEDBIZOPS	Current Government Wide Point of Entry (Replaced CBD)
FEDCAC	Federal Computer Acquisition Center
FEDSIM	Federal Systems Integration and Management Center
FEPP	Foreign Excess Personal Property
FFP	Contract Firm Fixed Price Contract
FHA	Family Housing, Army
FIPR	Federal Information processing Resources
FIRMR	Federal Information Resource Management Regulation
FLSA	Fair Labor Standards Act
FMF	Foreign Military Financing
FML	Foreign Military Lease
FMS	Foreign Military Sales
FMS	Financial Management Service
FOAA	Foreign Operations, Export Financing, and Related Programs Appropriations Act
FOO	Field Ordering Officer
FPASA	Federal Property and Administrative Services Act
FPD	Federal Court Procurement Decisions
FPI	Federal Prison Industries AKA UNICOR
FP	Fixed Price
FPI	Contract Fixed Price Incentive Contract
FPR	Final Proposal Revision 8-50
FP-R	Contract Fixed Price Contracts with Price Redetermination
FP w/EPA	Fixed Price with Economic Price Adjustment Contract
FRG	Family Readiness Group
FSS	Federal Supply Schedule
FTE	Full-time Equivalent
FUSMO	Funding United States Military Operations
FY	Fiscal Year

G&A	General and Administrative
GAO	Government Accountability Office
GETA	Government Employees Training Act
GFE	Government Furnished Equipment
GFM	Government Furnished Material
GIP	Government Information Practices

HA	Humanitarian Assistance
HCA	Head of Contracting Agency
HCA	Humanitarian and Civic Assistance
HIDTA	High Intensity Drug Trafficking Area
HN	Host Nation
HQDA	Headquarters, Department of the Army
HRA	Human Resource Advisor
HUD BCA	Department of Housing and Urban Development Board of Contract Appeals
IAW	Inspection, Accordance and Warranty
IBCA	Department of Interior Board of Contract Appeals
ID/IQ	Indefinite Quantity/Indefinite Delivery Contract
IDS	Individual Replacement Site 31-9
IFB	Invitation for Bids
IFF	Iraqi Freedom Fund
IGA	Intra-governmental Acquisition
IGCE	Independent Government Cost Estimate (AKA: IGE)
IGO	International Governmental Organization
IMCOM	Installation Management Command
IMET	International Military Education and Training
INL	Bureau of International Narcotics and Law Enforcement (DOS)
INCLE	International Narcotics and Criminal Law Enforcement
IO	Investigating Officer
IP	Intellectual Property
IRO	Independent Review Officer
IRRF	Iraq Relief and Reconstruction Fund
ISFF	Iraq Security Forces Fund
ITARs	International Traffic in Arms Regulations
ITMRA	The Information Technology Management and Reform Act
ITOP	Information Technology Omnibus Procurement
J&A	Justification and Approval
JCCI/A	Joint Contracting Command Iraq/Afghanistan
JFTR	Joint Federal Travel Regulation
JOC	Job Order Contract 29-7
JRC	Joint Reception Center 31-3
JTR	Joint Travel Regulation

LHWCA	Longshoreman and Harbor Worker s Compensation Act 31-24
LOA	Letter of Agreement
LOA	Letter of Authorization 31-10\
LOE	Level of Effort
LOGCAP	Logistics Civil Augmentation Program
LOO	Letter of Obligation
LPTA	Lowest Price Technically Acceptable
LSSS	Logistic Support, Supplies, and Services
MAAWS	Money as a Weapon System (MNCI CJ8)
MAC	Multi-agency Contract
MACOM	Major Command
MAS	Multiple Award Schedule 9-43
MCA	Military Construction, Army
MCCA	Military Construction Codification Act
MEJA	Military Extraterritorial Jurisdiction Act 31-20
MEO	Most Efficient Organization
MILCON	Military Construction
MILCONAA	Military Construction Appropriations Act
MILPER	Military Personnel
MIPR	Military Interdepartmental Purchase Request
MMCP	Military to Military Contact Program
MOA	Memorandum of Agreement
MPS	Military Postal System
MRS	Miscellaneous Receipts Statute
NAF's	Non-Appropriated Funds
NAFI	Non-Appropriated Fund Instrumentality
NAICS	North American Industry Classification Code 13-2
NAPS	Navy Acquisition Procedures Supplement
NCD	Navy Contract Directives
NDAA	National Defense Authorization Act
NDI	Non-developmental Item
NIB	National Industries for the Blind
NMCARS	Navy Marine Corps Acquisition Regulations Supplement
NOA	Notice of Appeal
NOK	Next of Kin 31-13
NPR	National Performance Review

OHDACA	Overseas Humanitarian, Disaster, and Civic Aid
OMA	Operations and Maintenance, Army
OMB	Office of Management and Budget
OPA	Office of Public Affairs (Embassy)
OPA	Other Procurement, Army
ORF	Official Representation Funds
ORHA	Office of Reconstruction and Humanitarian Assistance
OSD	Office of the Secretary of Defense
PACER	Public Access to Court Electronic Records
PARC	Principal Assistant Responsible for Contracting
PCH&T	Packaging, Crating, Handling, and Transportation
PCO	Procuring Contracting Officer
PDS	Permanent Duty Station
PFA	Procurement Fraud Advisor
PFB	Procurement Fraud Branch, Contract and Fiscal Law Division, US Army Legal Service Agency
PFP	Partnership for Peace
PIA	Procurement Integrity Act 17-8
PIK	Payment-in-Kind
PMR	Procurement Management Review
POA	Period of Availability
POLAD DOS	Political Advisor
PPA	Prompt Payment Act
PPV	Public-Private Ventures
PR	Purchase Request
PR&C	Purchase Request and Commitment
PRT QRF	Provincial Reconstruction Team Quick Response Fund
PTO	Patent and Trademark Office
PWD	Procurement Work Directive
PWS	Performance Work Statement
QASP	Quality Assurance Surveillance Plan
QDR	Quadrennial Defense Review
QPL	Qualified Products List
R&D	Research and Development
RCFC	Rules of the Court of Federal Claims

SAA	Supplemental Appropriations Act
SAF	Subject to the Availability of Funds
SAGC	Secretary of the Army General Counsel
SAP	Simplified Acquisition Procedures
SAT	Simplified Acquisition Threshold
SAMM	Security Assistance Management Manual
SABER	Simplified Acquisition of Base Engineer Requirements
SBA	Small Business Administration
SCA	McNamara-O'Hara Service Contract Act
SCO	Servicing Contracting Office 32B-8
SDN	Standard Document Number
SLA	State Licensing Agency
SLCF	Streamlined Competition Form
SM&W	Special Morale and Welfare
SOF	Special Operations Forces
SOFA	Status of Forces Agreement
SOO	Statement of Objectives 6-56
SOW	Statement of Work
SPS	Standard Procurement System
SSA	Source Selection Authority 8-55
SSEB	Source Selection Evaluation Board
SSP	Source Selection Plan
STARS GWAC	Vehicle managed by GSA
T4C	Termination for Convenience
T4D	Termination for Default
TAA	Trade Agreements Act 13-43
T&E	Train and Equip
T&M	Contract Time and Materials Contract
TCN	Third Country National
TCO	Termination Contracting Officer
TDP	Targeted Development Program
TIN	Taxpayer Identification Number
TINA	Truth in Negotiations Act
TRO	Temporary Restraining Order
UCA	Undefinitized Contract Action

WAWF	Wide Area Work Flow
WD	Wage Determination
WDOL	Wage Determinations Online
WHA	Walsh-Healy Public Contracts Act 14-20
WHCA	War Hazards Compensation Act 31-24