

Chapter 32A

Army Nonappropriated Fund Contracting



2014 Contract Attorneys Deskbook

THIS PAGE INTENTIONALLY LEFT BLANK

CHAPTER 32A

ARMY NONAPPROPRIATED FUND CONTRACTING

I. INTRODUCTION	1
II. REFERENCES	1
III. DEFINITIONS AND STATUTORY CONTROLS.....	2
IV. NAFI FUNDING OVERVIEW	4
A. What are Nonappropriated Funds (NAFs)?.....	4
B. Nonappropriated Fund Instrumentality (NAFI).....	4
V. AUTHORITY TO CONTRACT.....	4
A. Generally	4
B. Contracting Officers and Related Personnel	5
VI. ACQUISITION PLANNING AND DEVELOPMENT.....	8
A. Purpose.....	8
B. Requiring Activity.	8
C. Contracting Office	8
D. Acquisition Planning Team / Acquisition Plans.....	8
E. Bulk Funding	8
F. Contracting Methods.....	8
G. Types of Contracts.....	9
H. Types of Agreements	9
I. Length of Contracts	10
VII. COMPETITION AND SOURCES OF SUPPLIES AND SERVICES	10
A. Competition	10
B. Use of existing contracts and agreements	11

C.	Prohibited Sources	12
VIII.	ACQUISITION METHODS	14
A.	DOD Policy.	14
B.	Simplified Acquisitions and Commercial Items.....	14
C.	Negotiated Acquisitions.....	18
D.	Sealed Bidding.....	23
IX.	CONTRACT ADMINISTRATION.....	24
A.	Contract Modifications.	24
B.	Change Orders	25
C.	Constructive Changes	25
D.	Contracting Officers Representative (COR)	26
E.	Performance Delay	26
F.	Suspension of Work and Stop-Work.	26
G.	Terminations.....	26
X.	SPECIAL CATEGORIES OF CONTRACTING.....	29
A.	Concession Contracts—General.....	29
B.	Long-Term Concession Contracts	30
C.	Short-Term Concession Contracts.....	30
D.	Merchandise Concessions	31
E.	Vending and Amusement Machines	31
F.	Consignment Agreements	32
G.	Entertainment Contracts.....	32
H.	Contracts with Amusement Companies and Traveling Shows	33
I.	Service Contracts.....	33
J.	Insurance Contracts.....	34

K.	Information Technology Requirements	34
L.	Construction and Architect-Engineer (A-E) Contracts.....	34
M.	Purchase of Alcoholic Beverages	35
N.	Commercial Sponsorship	35
O.	MWR Advertising	36
XI.	LABOR AND SOCIO-ECONOMIC POLICIES.....	36
A.	Socioeconomic Policies	36
B.	Labor laws	36
XII.	LEGAL REVIEW	37
A.	Generally	37
B.	Required legal reviews.....	37
XIII.	LITIGATION INVOLVING NAF CONTRACTS.....	38
A.	Protests.....	38
B.	Disputes.....	40
XIV.	CONCLUSION.....	42

This page left intentionally blank.

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 AND PROCEDURE (26 February 2014) [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. 4105.67, NONAPPROPRIATED FUND (NAF) PROCUREMENT POLICY AND PROCEDURE (26 February 2014 [hereinafter DODI 4105.67].
- 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 (RAR 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. 1-12b(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. 1-12b(2)(d), 3-12b(4), 3-12c.
 - (2) Limited to competition threshold (currently \$5,000) if caller is outside a contracting office. AR 215-4, paras. 1-12b(2)(d), 3-12c.
 - c. **Administrative Contracting Officers (ACO).** Appointed in writing by warranted contracting officer to handle certain delineated aspects of contract management. AR 215-4, paras. 1-12b(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. 1-12b(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*; see 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. 2-1a.
- 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. 2-1b.
- D. Acquisition Planning Team / Acquisition Plans. Required for all acquisitions over \$100,000 (unless commercial items), including option years. AR 215-4, paras. 2-1c and 2-1d.
- 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. 2-1f(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. 7-8c (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, synopsise 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 \$2,500⁷ 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.

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. 3-2a.
 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. 3-6d.
 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. 3-6a.
 - 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. 3-6a.
 - 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. 3-6a.
 - 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. 3-6b.
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 not required, 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. 3-12a.
 - 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. 3-12b.
 - c. Existence of BPA does not justify sole source procurement. AR 215-4, para. 3-12c(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. 3-16a; *see also* AR 215-1, para. 13-12.
 - a. GSA is the issuing authority for the purchase card program contract. AR 215-4, para. 3-16a.
 - 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. 4-2c and 4-2d.
 - e. Multiple Awards. Solicitation must inform potential offerors if multiple awards will be considered. AR 215-4, para. 4-2e.

- 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; and
 - 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 contract 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 not 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. 6-11a.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. 8-3b; *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. 6-11c(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. 8-18b(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. 7-9l.
- 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.

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