2020 CONTRACT ATTORNEYS DESKBOOK

Contract and Fiscal Law Department
The Judge Advocate General's Legal Center and School
United States Army
Charlottesville, Virginia

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CONTRACT AND FISCAL LAW DEPARTMENT

BIOGRAPHIES OF PROFESSORS

LIEUTENANT COLONEL RYAN A. HOWARD, JA, Department Chair and Professor, Contract and Fiscal Law Department, The Judge Advocate General's Legal Center and School (TJAGLCS). B.A., Wheaton College, 2001; J.D., Northern Illinois University College of Law, 2005; Judge Advocate Officer Basic Course, 2005; LL.M in Military Law with Contract and Fiscal Law Specialty, TJAGLCS, 2013; Command and General Staff College, 2016. Career Highlights: Chief, Contract and Fiscal Law, USCENTCOM, MacDill AFB, FL, 2019-2020; Senior Observer-Coach-Trainer, The Joint Readiness Training Center, Fort Polk, LA, 2016-2018; Professor, Contract and Fiscal Law Department, TJAGLCS, 2013-2015; Knowledge Management Attorney, International and Operational Law Division, OTJAG, Pentagon, 2011-2012; Senior Trial Counsel, 21st Theater Sustainment Command, Kaiserslautern, Germany, 2009-2011; Brigade Judge Advocate, 159th Combat Aviation Brigade, 2007-2009; Civil and Administrative Law Attorney, 101st Airborne Division (Air Assault), COB Speicher, Iraq, 2006-2007. Member of the Bar of Illinois; admitted to practice before the Supreme Court of the United States.

MAJOR CRAIG M. SCROGHAM, JA, Vice Chair and Professor, Contract and Fiscal Law Department. B.S., University of Georgia, Athens, 2000; J.D., Seton Hall Law School, 2006; Judge Advocate Officer Basic Course, 2007; LL.M. in Military Law, The Judge Advocate General's Legal Center and School, 2016; The United States Army Command and General Staff College, 2019-2020. Career Highlights: Chief of Administrative Law, 1st Cavalry Division, Fort Hood, Texas, 2018-2019; Brigade Judge Advocate, 20th Engineer Brigade, Fort Bragg, NC, 2016-2018; Future Concepts Officer, The Judge Advocate General's Legal Center and School, 2014-2015; Contracts Attorney, 410th Contract Support Brigade, Fort Sam Houston, TX, 2012-2014; Chief of Operational Law, United States Army South, Fort Sam Houston, TX, 2010-2012; Operational Law Attorney/Rule of Law Attorney, 4th Brigade Combat Team, 4th Infantry Division, Afghanistan, FOB Fenty 2009-2010; Trial Counsel, Fort Carson, CO, 2008-2009; Tax Center OIC/Legal Assistance Attorney, Fort Carson, CO, 2007-2008. Member of the Bar of New Jersey; admitted to practice before the Supreme Court of the United States.

MAJOR DANIEL R. BEAUDRY, JA, Professor, Contract and Fiscal Law Department. B.B.A., University of Georgia, 2005; J.D., Wake Forest University School of Law, 2009; M.B.A., Wake Forest University School of Business, 2009; LL.M., Military Law with Contract and Fiscal Law Specialty, The Judge Advocate General's Legal Center and School, 2019. Previous assignments include Administrative Law Attorney, XVIII Airborne Corps, Fort Bragg, North Carolina, 2017-2018; Senior Special Victims Counsel, XVIII Airborne Corps, Fort Bragg, North Carolina, 2016-2017; Brigade Judge Advocate, Task Force Sinai, Sinai, Egypt, 2015-2016; Trial Counsel, 1st Sustainment Command (Theater), Fort Bragg, North Carolina, 2015; Administrative Law Attorney, 1st Sustainment Command (Theater), Fort Bragg, North Carolina, 2014-2015; Contract Attorney, Mission and Installation Contracting Command-Fort Belvoir, Fort Belvoir, Virginia, 2012-2014; Operational Law Attorney, Army Central Command, Shaw Air Force Base, Sumter, South Carolina, 2011-2012; Contract and Fiscal Law Attorney, Army Central Command, Shaw Air Force Base, Sumter, South Carolina, 2010-2011. Member of the

bars of North Carolina, the United States Court of Appeals for the Armed Forces, and the Supreme Court of the United States.

MAJOR TODD M. CHARD, JA, Professor, Contract and Fiscal Law Department. B.A., Siena College, 2000; M.S.W., University at Buffalo, 2007; J.D., University at Buffalo School of Law, 2008; Judge Advocate Officer Basic Course, 2009; LL.M. in Military Law with Contract and Fiscal Law Specialty, The Judge Advocate General's Legal Center and School, 2018. Career Highlights: Strike Cell Judge Advocate, 1st Infantry Division, Erbil, Iraq, 2017; Chief, International & Operational Law, 1st Infantry Division and Fort Riley, Kansas, 2016; Senior Trial Counsel, 1st Infantry Division and Fort Riley, Kansas, 2014-2016; Defense Counsel, United States Army Trial Defense Service, United States Military Academy, New York, 2012-2014; Trial Counsel, 3rd Infantry Division and Fort Stewart, Georgia, 2011-2012; Chief, International & Operational Law, 3rd Infantry Division and Fort Stewart, Georgia, 2011; Chief, Client Services, Multi-National Division-North and 3rd Infantry Division, COB Speicher, Iraq, 2009-10; Legal Assistance Attorney, 3rd Infantry Division and Fort Stewart, Georgia, 2009. Member of the Bars of Connecticut and New York; admitted to practice before the Supreme Court of the United States and the United States Court of Appeals for the Armed Forces.

MAJOR CLAYTON J. COX, JA, Professor, Contract and Fiscal Law Department. B.A., Brigham Young University, 2007; J.D., Brigham Young University J. Reuben Clark Law School, 2011; Judge Advocate Staff Officer Course, 2013; Squadron Officer School, Inter-American Air Forces Academy, Lackland Air Force Base, Texas, 2016; LL.M., Military Law with Contract and Fiscal Law Concentration, The Judge Advocate General's Legal Center and School, 2019. Career Highlights: Area Defense Counsel, Air Force Legal Operations Agency, Tinker Air Force Base, Oklahoma, 2016-2018; Chief, Adverse Actions, Civil Law, Claims, and Legal Assistance, 341st Missile Wing, Malmstrom Air Force Base, Montana, 2013-2016. Member of Bar of Utah; admitted to practice before the United States Court of Appeals for the Armed Forces and the Air Force Court of Criminal Appeals.

MAJOR CHRISTOPHER D. ELDER, JA, Professor, Contract and Fiscal Law Department. B.A., Texas Tech University, 2002; J.D., University of Louisville, Brandeis School of Law, 2009; LL.M., Military Law with Contract and Fiscal Law Specialty, The Judge Advocate General's Legal Center and School, 2019. Previous assignments include Administrative Law Attorney, 1st Armored Division, Fort Bliss, Texas, 2016-2018; Chief, Contract and Fiscal Law, Combined Joint Forces Land Component Command – Operation Inherent Resolve, Baghdad, Iraq, 2017-2018; Trial Defense Counsel, Trial Defense Service – Eurasia, Kaiserslautern, Germany, 2013-2016; Trial Counsel, 16th Combat Aviation Brigade, Joint Base Lewis-McChord, Washington, 2012-2013; Trial Counsel, 62d Medical Brigade, Joint Base Lewis-McChord, Washington, 2011-2012; Legal Assistance Attorney, I-Corps, Joint Base Lewis-McChord, Washington, 2010-2011. Member of the bar of Kentucky and admitted to practice before the Army Court of Criminal Appeals and the Supreme Court of the United States.

MAJOR DAVID R. MAROLD, JA, Professor, Contract and Fiscal Law Department. B.S., United States Military Academy, 2008; J.D., Washington University School of Law, 2016; M.S.F., Washington University Olin Business School, 2016; Judge Advocate Officer Basic

Course, 2017; LL.M. in Military Law with Contract and Fiscal Law Specialty, The Judge Advocate General's Legal Center and School, 2020. Career Highlights: Chief of National Security Law, XVIII Airborne Corps, Fort Bragg, North Carolina, 2019; Chief of Contract and Fiscal Law, Combined Joint Task Force Operation Inherent Resolve, Camp Arifjan, Kuwait, September 2018 – March 2019; Trial Counsel, XVIII Airborne Corps and 525th Military Intelligence Brigade, XVIII Airborne Corps, Fort Bragg, North Carolina, June 2017 – September 2018; Administrative Law Attorney, XVIII Airborne Corps, Fort Bragg, North Carolina, September 2016 – May 2017; Battalion S1, 2d Battalion, 34th Armor Regiment, 1st Brigade, 1st Infantry Division, Fort Riley, Kansas, May 2012 – June 2013; Reconnaissance Platoon Leader, 2d Battalion, 34th Armor Regiment, 1st Brigade, 1st Infantry Division, Kandahar, Afghanistan, July 2011 – April 2012; Company Executive Officer, Company B, 2d Battalion, 34th Armor Regiment, 1st Brigade, 1st Infantry Division, Fort Riley Kansas and Kandahar, Afghanistan, July 2010 – June 2011; Infantry Platoon Leader, Company B, 2d Battalion, 34th Armor Regiment, 1st Brigade, 1st Infantry Division, Fort Riley Kansas, May 2009 – June 2010. Member of the bar of Missouri.

MAJOR ANNEMARIE P.E. VAZQUEZ, JA, Professor, Contract and Fiscal Law Department. B.S., Minnesota State University, 2002; J.D., Mitchell Hamline University School of Law, 2008; Judge Advocate Officer Basic Course, 2010; LL.M., Military Law with National Security Law Specialty, The Judge Advocate General's Legal Center and School, 2019. Career highlights include Defense Counsel, Trial Defense Service Field Office, Fort Bliss, Texas, 2017-2018; Recruiting Officer, Judge Advocate Recruiting Office, Fort Belvoir, Virginia 2015-2017; Brigade Judge Advocate, 108th Air Defense Artillery Brigade, XVIII Airborne Corps, Fort Bragg, North Carolina, 2013-2015; Special Assistant United States Attorney, 1st Infantry Division, Fort Riley, Kansas, 2011-2013; Administrative Law Attorney, 1st Infantry Division, Camp Arifjan, Kuwait, and Fort Riley, Kansas, 2010-2011; Rule of Law Attorney, 1st Infantry Division, Contingency Operating Base-Basra, Iraq, 2009-2010; Legal Assistance Attorney, 1st Infantry Division, Fort Riley, Kansas, 2009. Member of the bar of Minnesota, the United States Army Court of Criminal Appeals, and the Supreme Court of the United States.

BIOGRAPHIES OF RESERVE PROFESSORS

LIEUTENANT COLONEL BRIAN J. CHAPURAN, JA, USAR, Professor and Vice Chair, Contract and Fiscal Law Department. B.A., Birmingham-Southern College, 1997; J.D., Wake Forest University School of Law, 2000; Judge Advocate Officer Basic Course, 2000; LL.M., Military Law, The Judge Advocate General's Legal Center and School, 2009. Career Highlights: Associate General Counsel – Acquisition, Missile Defense Agency, Redstone Arsenal, AL, 2018-present; Of Counsel, Maynard, Cooper, & Gale PC, Huntsville, AL, 2016-2018; Team Leader, 139th Legal Operations Detachment, Nashville, TN, 2016-2019; Deputy Staff Judge Advocate, 3d Infantry Division & Ft. Stewart, Ft. Stewart, GA, 2015-2016; Trial Attorney and Team Chief, Contract and Fiscal Law Division, Ft. Belvoir, VA, 2013-2015; Attorney-Advisor, Contract and Fiscal Actions Branch, The Pentagon, 2012-2013; Legal Advisor, Office of Security Cooperation – Iraq, Baghdad, Iraq, 2011-2012; Chief, Contract and Fiscal Law, U.S. Forces Iraq, Baghdad, Iraq, 2011; Command Judge Advocate, 3d Sustainment Command (Expeditionary), Ft. Knox, KY, 2009-2011; Assistant District Attorney, Chattanooga, TN, 2006-2008; Chief, Operational Law, 3397th Garrison Support Unit, Chattanooga, TN, 2006-2008; Assistant District Attorney, Winston-Salem, NC, 2004-2006; Legal Assistance Attorney, 12th Legal Support Organization, High Point, NC, 2006; Trial Counsel, U.S. Army Infantry Center, Ft. Benning, GA, 2002-2004; Group Judge Advocate, 36th Engineer Group, Tallil, Iraq, 2003; Administrative/Operational Law Attorney and Legal Assistance Attorney, 1st Cavalry Division, Ft. Hood, TX, 2000-2002. Member of the bar of Alabama; admitted to practice before the United States Court of Federal Claims and the Court of Appeals for the Federal Circuit.

LIEUTENANT COLONEL PETER "DAN" DIPAOLA, JA, USAR, Professor, Contract and Fiscal Law Department. B.A., University of Notre Dame, 1994; J.D., Indiana University School of Law, 1997; Judge Advocate Officer Basic Course, 1998; U.S. Army Management Staff College, 2006; MSS, U.S. Army War College, 2019. Career Highlights: Deputy Chief Counsel, 409th Contracting Support Brigade, Kaiserslautern, Germany, 2010-present; Supervisory Attorney/Attorney-Advisor (Contracts), Mission & Installation Contracting Command Center, Fort Eustis, VA, 2003-2010; Attorney-Advisor (Fiscal), Contract and Fiscal Law Division, U.S. Army Europe, Wiesbaden, Germany, 2018-2020; Senior Training Developer, The Judge Advocate General's Legal Center and School, Charlottesville, VA, 2014-2017; Trial Attorney, Contract & Fiscal Law Division, U.S. Army Legal Services Agency, Fort Belvoir, VA, 2011-2014 & 2003-2007; Professor, Contract and Fiscal Law Department, Charlottesville, VA, 2007-2011; Attorney-Advisor (Contracts), U.S. Army Training and Doctrine Command Acquisition Center, Fort Eustis, VA, 2002-2003; Trial Defense Counsel, U.S. Army Trial Defense Service, Fort Drum, NY, 1999-2002; Legal Assistance Attorney, 10th Mountain Division (Light Infantry), Fort Drum, NY, 1998-1999. Member of the Bar of Illinois; admitted to practice before the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Armed Forces.

CAPTAIN BRENT DURHAM, JA, USAR, Professor, Contract and Fiscal Law Department. B.A., Louisiana State University, 2006; J.D., Louisiana State University, Paul M. Hebert Law Center, 2010; Judge Advocate Officer Basic Course, 2017 (Commandant's List). Career Highlights: Deputy Assistant General Counsel for Procurement, Pension Benefit Guaranty Corporation, Washington, D.C., 2019-Present; Trial Attorney, Contract and Fiscal Law Department, 151st Legal Operations Detachment, Alexandria, Virginia, 2017-2020; Lead Counsel, Mission and Installation Contracting Command (MICC), Fort Belvoir, Virginia, 2016-2019; Contract-Fiscal & Administrative Law Attorney, Joint Readiness Training Center (JRTC), Fort Polk, Louisiana, 2013-2016; Attorney & Ethics Instructor, Louisiana Board of Ethics, Baton Rouge, Louisiana, 2011-2013. Member of the Bar of Louisiana.

MAJOR SEAN P. GALVIN, JA, USAR, Professor, Contract and Fiscal Law Department. B.A., University of Delaware, 2004, J.D., Rutgers School of Law, 2007, LL.M. Government Procurement Law, The George Washington University School of Law, 2011. Career Highlights: Program Counsel, U.S. Cyber Command, Fort Meade, MD, 2018-Present; Assistant Legal Counsel, Administrative and Civil Law, U.S. Africa Command, Stuttgart, Germany, 2016-2019; Assistant Counsel, U.S. Army Corps of Engineers, Alexandria, VA, 2014-2018; Domestic Operations Law Attorney, U.S. Northern Command-Joint Task Force Civil Response, Fort. Eustis, VA, 2013-2016; Assistant Counsel, Defense Logistics Agency Energy, Fort Belvoir, VA, 2012-2014; Special Assistant U.S. Attorney for the Middle District of Pennsylvania, Scranton, PA, 2011-2012; General Attorney, U.S. Army Materiel Command, Tobyhanna Army Depot, PA, 2010-2012; Defense Counsel, 328th Trial Defense Team, Fort. Indiantown Gap, PA, 2010; Trial Counsel, 213th Area Support Group, Allentown, PA, 2008-2010. Member of the Pennsylvania Bar.

CAPTAIN WILLIAM R. GAMBLE, JA, USAR, Professor, Contract and Fiscal Law Department; B.S., Northeastern University (cum laude), 2007; J.D., Tulane University Law School, 2010. Career Highlights: Corporate Counsel, Google, Washington, DC, 2019-present; General Counsel, Defense Digital Service, Department of Defense, Washington, DC, 2018-2019; Associate General Counsel, Executive Office of the President, Office of Administration, Washington, DC, 2013-2018; Acquisition Program Manager, Executive Office of the President, Office of Administration, Washington, DC, 2010-2013; Operational Law Attorney and Trial Counsel, 55th Sustainment Brigade, Fort Belvoir, VA, 2015-2017; Cyber and Intelligence Law Attorney (primarily supporting U.S. Army Intelligence and Security Command), 10th Legal Operations Detachment, Gaithersburg, MD, 2012-2015. Member of the Bar of Alabama; admitted to practice before the Supreme Court of the United States.

MAJOR JUSTIN A. GRAF, JA, USAR, Professor, Contract and Fiscal Law Department. B.A., Middlebury College, 2002; M.P.I.A., University of California, San Diego, 2005; J.D., College of William and Mary, School of Law, 2008; Military Intelligence Officer Basic Course, 2007; Judge Advocate Officer Basic Course, 2016, Honor Graduate, Distinguished Graduate International and Operational Law; Judge Advocate Officer Advance Course, 2017, Commandant's List. Career Highlights: Lead Counsel, Mission1st Group, Inc., 2018-Present; Team Lead, Contracts Team, 151st Legal Operations Detachment, Alexandria, VA, 2018-2019; Contract and Fiscal Attorney, Headquarters, United States Army Intelligence & Security Command, Fort Belvoir, VA 2016-2018; Managing Associate, Government Contracts Practice

Group, Dentons US LLP, 2015-2016; Action Officer, Joint Special Operations Command, Ft. Bragg, 2015; Associate General Counsel, ACADEMI LLC, Virginia, 2014-2015; G2, USFOR-A Deputy Commander-Support, Afghanistan, 2014; Corporate Counsel, The SI Organization, Virginia, 2012-2014; Watch Officer (G-2), Army G2, Pentagon, 2012-2014; Justice Advisor, CJIATF-435, Afghanistan, 2011-2012; Attorney/Advisor, Criminal Investigation Task Force (CITF), Ft. Belvoir and Iraq, 2010-2011; S2, 5/19th SFG(A), Colorado National Guard, Watkins, Colorado, 2008-2010. Member of the bars of Colorado, Washington D.C., and Virginia (Corporate Counsel).

CAPTAIN ZACHARY F. JACOBSON, JA, USAR, Contract and Fiscal Law Department. B.A., Mount Saint Mary's University, 2010; J.D., Mitchell-Hamline School of Law, 2013; Judge Advocate Officer Basic Course, TJAGLCS, 2014; Judge Advocate Officer Advanced Course, TJAGLCS, 2018. Career Highlights: Trial Attorney, US Army Legal Services Agency, Contract and Fiscal Law Division, Fort Belvoir, VA, 2020 – Present; Assistant Counsel for Procurement Law and Contract Disputes, Headquarters, US Army Corps of Engineers, Washington, DC, 2018-2020; Acting District Counsel, US Army Corps of Engineers Afghanistan District, Bagram, Afghanistan, 2019; Assistant Counsel for Real Estate Law, Headquarters, US Army Corps of Engineers, Washington, DC, 2017-2018; Contract and Fiscal Law Attorney, 151st Legal Operations Detachment, Alexandria, VA, 2018-2019; Chief Counsel's Military Honors Program Judge Advocate, Headquarters, US Army Corps of Engineers, 2014-2017. Member of the Bar of Minnesota; admitted to practice before the Supreme Court of the United States.

MAJOR AARON S. RALPH, JA, USAR, Contract and Fiscal Law Department. B.A. University of Redlands, 2001; J.D., *with Great Distinction*, University of the Pacific, McGeorge School of Law (Order of the Coif), 2004; 166th Judge Advocate Officer Basic Course (Honor Graduate), 2005; LL.M., in Government Procurement Law, *with Highest Honors*, The George Washington University Law School, 2013. Career Highlights: Senior Associate, Pillsbury Winthrop Shaw Pittman, LLP, 2016-present; Associate, Greenberg Traurig, 2014-2016; Attorney-Advisor (Government Contracts), United States Air Force Acquisition Law & Litigation Directorate, Joint Base Andrews, 2012–2014; Training Officer, Defense Counsel Assistance Program, USALSA, Fort Belvoir, 2011–2012; General Law Attorney, Office of The Judge Advocate General, Pentagon, 2009–2011; Trial Defense Counsel, Baumholder Germany, 2008–2009; Fiscal Law and Administrative Law Attorney, Multi-National Division–North, Tikrit, Iraq, 2007–2008; Trial Counsel (2nd Brigade Combat Team), Administrative Law Attorney, Claims Attorney, and Legal Assistance Attorney, 1st Armored Division, Baumholder, Germany, 2005–2008. Member of the District of Columbia Bar and the State Bar of California.

CHAPTER 1

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CHAPTER 1

INTRODUCTION TO GOVERNMENT CONTRACT LAW

I. COURSE OVERVIEW

A. The Government Contract Law Deskbook, Volumes I and II.

1. The deskbook volumes are organized into two phases of Government Contracting - Contract Formation and Contract Administration. Contract Formation topics will generally be covered during the first week of the Contract Attorneys Course, while Contract Administration topics will generally be covered during the second week of the course.

2. These phases are not necessarily distinct, however, they are separated to aid understanding. Practitioners must realize that these steps often run together or are out of sequence. Early and frequent attorney involvement in any of these steps will often prevent problems from arising in other steps. Representative flow diagrams of these phases appear below.

3. Electronic versions of the deskbook are available on the TJAGLCS Contract and Fiscal Law Department's webpage on JAGCNet.

B. Part I - Contract Formation. Contract Formation entails the process and requirements for procuring goods and services on behalf of the Government. The formation phase concerns issues that arise primarily when entering into a contract. It generally begins with the process of defining the Government's requirements. Major topics include:

1. Authority: What individuals have the authority to bind the Government in a contract action?

2. Competition: What are the minimum requirements to solicit competition among contractors to fill the Government's needs, and are there any applicable exceptions?

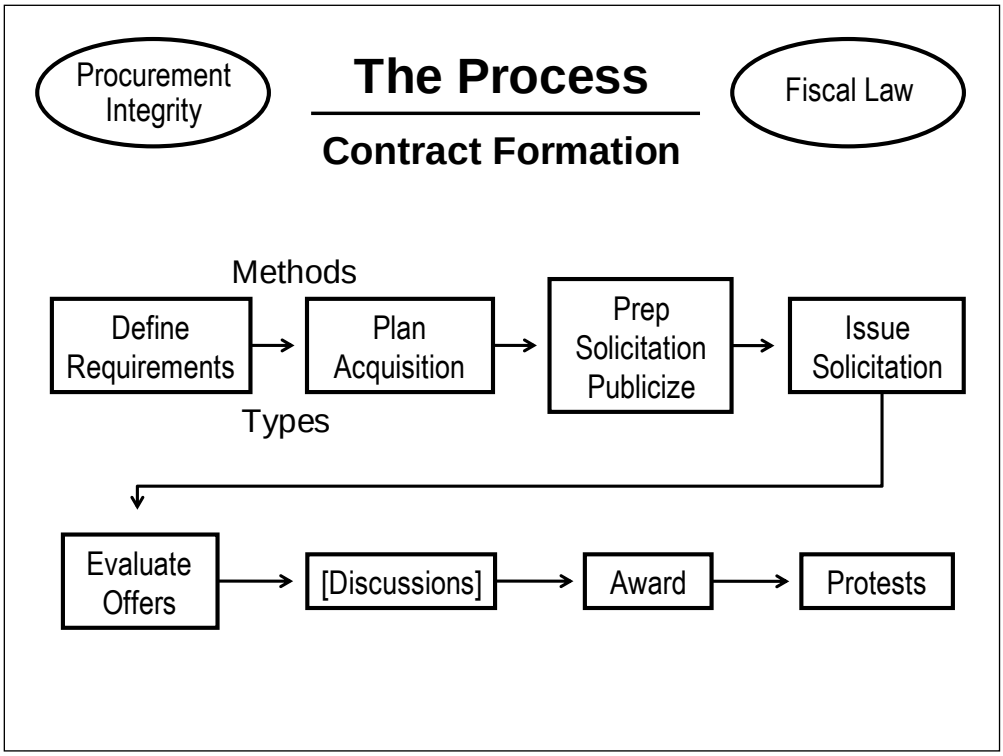
3. Methods of acquisition (e.g., simplified acquisition, sealed bidding, contracting by negotiation): What contracting method will be used to solicit bids, quotes, or proposals, and how will those responses be evaluated against each other in order to select a winner?

4. Contract types: How will the contract be structured and what are the pricing mechanisms?

5. Socioeconomic policies: Are there public policy concerns or requirements that apply?

6. Protests: Has the Government followed all applicable regulations and its own procurement approach such that an award is both fair and prudent?

7. Procurement fraud: Has the procurement been tainted by unethical or illegal conduct?



C. Part II - Contract Administration. Part II of the course, contract administration, concerns contract performance, and other special topics. Once the contract is awarded, numerous oversight and management responsibilities continue to ensure the Government gets what it bargained for and to protect the Contractor against unfair treatment. The administration phase concerns issues that arise primarily during the performance of a contract. Major topics include:

1. Contract changes: How do changed requirements affect an existing contract?

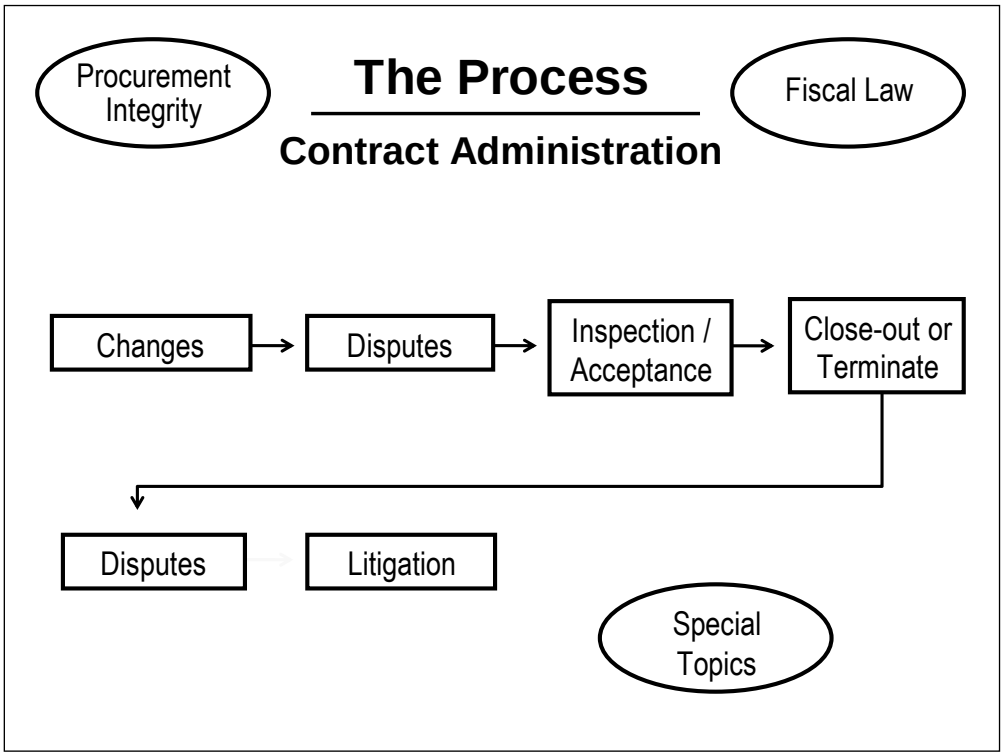
2. Inspection and acceptance: How does the Government ensure it gets the quality and quantity of goods and services for which it contracted?

3. Terminations for default and for the convenience of the Government: When can the Government terminate a contract?

4. Contract claims and disputes: How are disagreements between the contractor and the Government resolved?

5. Procurement integrity and ethics in Government contracting: Are contracts administered fairly, ethically, and legally?

6. Alternative Dispute Resolution (ADR): Are there alternate forums to resolve contractor/Government disputes?



D. Deployment Contracting and Contingency Contractor Personnel –there are unique policies and procedures that apply to federal procurements in a contingency environment.

E. Other Great Resources.

1. John Cibinic, Jr., Ralph C. Nash, Jr., and Christopher R. Yukins, Formation of Government Contracts, 4th edition, 2011.

2. John Cibinic, Jr., Ralph C. Nash, Jr., and James F. Nagle, Administration of Government Contracts, 5th edition, 2016.

3. A listing of some contract law terminology and common abbreviations is found at Appendix A of the Government Contract Law Deskbook, Volume I. For further information, definitions, and explanations, *see* Ralph C. Nash, Jr., Karen R. O'Brien-DeBakey, and Steven L. Schooner, The Government Contracts Reference Book, 4th edition, 2014.

II. COMMERCIAL/GOVERNMENT CONTRACT COMPARISON

A. Interrelationship of Commercial and Government Contract Law. The government, when acting in its proprietary capacity, is bound by ordinary commercial law unless otherwise provided by statute or regulation:

"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." Cooke v. United States, 91 U.S. 389, 398 (1875).

B. Federal Statutes and Regulations Preempt Commercial Law. Government statutes and regulations preempt and predominate over commercial law in nearly every aspect:

"Our statute books are filled with acts authorizing the making of contracts with the government through its various officers and departments, but, in every instance, the person entering into such a contract must look to the statute under which it is made, and see for himself that his contract comes within the terms of the law." The Floyd Acceptances, 74 U.S. 666, 680 (1868).

C. Agency Supplements. Numerous agency and command-level supplements provide additional direction and constraint over the public procurement process. *See* Chapter 2, Contract Format and the FAR.

III. ROLE OF PUBLIC POLICY IN GOVERNMENT CONTRACT LAW

A. Objectives of Government Contracting (*See* Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUBLIC PROCUREMENT LAW REVIEW 103 (2002) available at (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304620). In a short but insightful article, Professor Schooner describes various objectives and principles of a public contracting system. These principles are sometimes difficult to harmonize and may create points of friction for practitioners. A few of the objectives and principles are highlighted below and are recurring themes throughout this deskbook and federal acquisition regulations.

1. Core Principles: Competition, Transparency, Integrity, Fairness.

2. Socioeconomic Policies: e.g., Labor Standards, FAR Part 22; Foreign Acquisition, FAR Part 25; Small Business Programs, FAR Part 19; Other Socioeconomic Programs, FAR Part 26.

3. Customer Satisfaction.

B. The Procurement Environment: The Acquisition Workforce. The Government's ability to efficiently procure quality goods and services at reasonable prices is directly tied to the size and quality of the acquisition workforce. Numerous initiatives have been launched in recent years to establish specific education and training standards for civilian and military contracting professionals (*see, e.g.*, Defense Acquisition Workforce Development Fund (DAWDF) Sec. 852 of the 2008 National Defense Authorization Act, Public Law No. 110-181). Contract attorneys are not typically considered part of the acquisition workforce, but they are a recognized member of any acquisition team and bring a unique skill set that can help detect, avoid, and resolve problems. Contract attorneys must work with the other participants in the acquisition process. The graphic below lists many of the players typically involved in the procurement process.

The Players

GOVERNMENT	CONTRACTOR
Commander	Owner / CEO / Shareholders
Comptroller	Banker & Finance
Requiring Activity	Marketers
User	Production
Technical Activity	Engineering
Contracts Office	Contract Administration
Small Business Advocate	Purchasing
Competition Advocate	Subcontractors Suppliers
Legal Office	In-House / Outside Counsel
Contract Administration Office	Quality Assurance
Defense Contract Audit Agency	Internal Auditors

C. Public Policy and Contract Clauses

1. Clauses required by statute or regulation will be incorporated into a contract by operation of law. Voices R Us, ASBCA Nos. 51026, 51070, 98-1 BCA ¶ 29,660; 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. Empresa de Viacao Terceirense, ASBCA No. 49827, 00-1 BCA ¶ 30,796; 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).

4. Contracts tainted by fraud in the inducement may be void ab initio, cannot be ratified, and contractors may not recover costs incurred during performance. Schuepferling GmbH & Co., KG, ASBCA No. 45564, 98-1 BCA ¶ 29,659; Godley v. United States, 5 F.3d 1473 (Fed. Cir. 1993).

IV. CONTRACT ATTORNEY ROLES

A. Advisor to the Commander and the Contracting Officer.

1. Advise on formation and administration phase issues.

2. Advise on fiscal law issues.

B. Litigator.

1. Protect the record (whether formation or administration).

2. Litigate protests.

3. Litigate disputes.

4. Litigate collateral matters before federal bankruptcy, district, and circuit courts.

C. Fraud Fighter.

1. Advise how to prevent, detect, and correct fraud, waste, and abuse.

2. Provide litigation support for fraud cases.

D. Business Counselor.

1. Ensure the commander and contracting officer exercise sound business judgment.

2. Provide opinions on the exercise of sound business practices.

3. Counsel is part of the contracting officer's team. FAR 1.603-2, 15.303(b)(1). Army policy requires counsel to participate fully in the entire acquisition process, from acquisition planning through contract

completion or termination and close out. Army Federal Acquisition Regulation Supplement (AFARS) 5101.602-2.

V. CONTINUING EDUCATION FOR CONTRACT LAW PROFESSIONALS

A. Basic Courses.

1. Contract Attorneys Course (CAC).

a. Provides instruction on basic legal concepts pertaining to government contract law.

b. The course is offered annually and lasts two weeks.

2. Fiscal Law Course.

a. Provides training on the statutory and regulatory limitations governing the obligation and expenditure of appropriated funds, and an insight into current fiscal law issues within DOD and other federal agencies.

b. The course is offered annually and lasts 4 ½ days.

B. Advanced Courses.

1. Advanced Contract Attorneys Course

a. Provides intermediate level instruction on legal concepts pertaining to government contract law; topics will rotate between contract formation and contract administration.

b. The course is offered every other year (odd years) and lasts 4.5 days.

c. Course attendance is limited to intermediate-level contract law attorneys with 2-5 years of recent contract experience.

2. Government Contract and Fiscal Law New Developments Course.

a. This course covers significant Government procurement law developments in legislation, case law, and policy, and provides advanced instruction on selected topics.

b. The course is offered annually and lasts 3 ½ days.

c. Course attendance is limited to senior-level contract law attorneys.

3. Procurement Fraud Course.

a. This course provides amplifying guidance and instruction on current policies and trends for procurement attorneys who serve as procurement fraud advisors.

b. The course is offered every other year (even years) and lasts 2.5 days.

c. This course is administered in conjunction with the Army's Procurement Fraud Branch.

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CHAPTER 2

CONTRACT FORMAT AND THE FAR

I. INTRODUCTION TO CONTRACT REVIEW

A. The key to successful contract review is to integrate yourself into the acquisition from the very beginning (proactive vs. reactive lawyering).

B. Every acquisition starts with *Acquisition Planning*. *See* Federal Acquisition Regulation (FAR) Part 7; Defense Federal Acquisition Regulation Supplement (DFARS) Part 207. Be a part of the **Acquisition Planning Team**. Establish a rapport with your supported contracting office / program office/ resource management office. The FAR can be found at http://www.acquisition.gov/far/. The FAR, DFARS, Army, Navy, Air Force, Marine, and other agencies' supplemental regulations can be found at http://farsite.hill.af.mil/.

C. Checklists

1. You will find contract review checklists to be very helpful when you first start reviewing contracts. If your office does not already have checklists contact another office and/or create a checklist.

2. A basic contract review checklist is at Attachment 1.

D. Legal Reviews

1. Contracting officers should obtain legal advice during all phases of acquisitions. Legal counsel shall review proposed contracting actions in "accordance with locally established procedures and as otherwise required by law, regulation, or policy." Army Federal Acquisition Regulation Supplement (AFARS) 5101.602-2-90. While AFARS 5101.602-2-90 does not include a list of actions requiring legal review, Air Force Federal Acquisition Regulation Supplement (AFFARS) 5301.602-2 does include a list of contracting actions where Air Force contracting officers must obtain legal advice. This list can be used for all services as a good reference for the types of matters about which a contracting officer must obtain legal advice, coordination, and review, regardless of dollar amount:

(a) When there is doubt or controversy about the interpretation or application of statutes, directives, and regulations;

(b) When using or applying unique or unusual contract provisions;

(c) When actions are likely to be subject to public scrutiny or receive higher-level agency attention;

(d) When a protest or claim is likely;

(e) When contemplating the use of alternative dispute resolution;

(f) Use of liquidated damages provisions in contracts for other than construction;

(g) Award fee or award term plans;

(h) Source selection decisions and supporting documentation for actions accomplished pursuant to the requirements of MP5315.3;

(i) Issues dealing with licensing, technical data rights and patents;

(j) Mistakes in bid (See FAR 14.407);

(k) Protests before and after award;

(l) Ratifications;

(m) Disputes;

(n) Contractor claims;

(o) Termination for default/cause;

(p) Terminations for convenience, except cancellations or terminations of purchase orders;

(q) Debarment or suspension actions;

(r) Individual or class deviations; and,

(s) Any other legal issue at the discretion of the Contracting Officer or supporting legal office.

(t) All Justification and Approval (J&A) requests for actions expected to exceed $700,000

2. In addition to the general conditions identified in AFFARS 5301.602-2(c)(i)(A), above, contracting officers must obtain legal review on Operational contract actions based on the dollar figure.

II. CONTRACT FORMAT

A. Uniform Contract Format. Standard Form 33 (SF 33, General Services Administration (GSA)) "Solicitation, Offer and Award," can be found at http://www.gsa.gov/portal/forms/type/SF.

1. Divided into Four Parts.

   a. Part I – The Schedule: Sections A-H.

   b. Part II – Contract Clauses: Section I.

   c. Part III – List of Documents, Exhibits and other Attachments: Section J.

   d. Part IV – Representations and Instructions: Sections K-M.

2. Section A: Solicitation/Contract Form (SF 33).
   Contains administrative information pertinent to the solicitation (i.e., solicitation number, proposal due date, government points of contact, table of contents, etc.).

3. Section B: Supplies or Services and Prices/Costs.
   Contains a brief description of the supplies and services and quantities required, the unit prices, and total prices. This description of supplies, services, quantities, and associated pricing is referred to and identified with a specific contract line item number (CLIN or CLINs).

4. Section C: Description/Specifications/Statement of Work.
   Contains a more elaborate description of the items contained in Section B, and describes what the government's substantive requirements are and what the contractor is to accomplish/deliver.

5. Section D: Packaging and Marking (Only for Supplies).
   Contains specific information on requirements for packaging and marking of items to be delivered.

6. Section E: Inspection and Acceptance (IAW).
   Contains information on how the government will inspect and conditions for acceptance of items and services to be delivered under the contract.

7. Section F: Deliveries or Performance.
   Specifies the requirement for time, place, and method of delivery or performance for items and services to be delivered under the contract.

8. Section G: Contract Administration Data.
Contains accounting and appropriation data and required contract administration information and instructions.

9. Section H: Special Contract Requirements.
Contains contractual requirements that are not included in other parts of the contract, including special clauses that only pertain to that particular acquisition.

10. Section I: Contract Clauses.
Contains all clauses required by law or regulation. They are commonly referred to as "boilerplate" clauses because they are normally inserted into most contracts.

11. Section J: List of Attachments.
Contains or lists documents, attachments, or exhibits that are a material part of the contract. Some examples of these documents are the specifications, the contract data requirements list (CDRL), and/or checklists of mandatory minimum requirements.

12. Section K: Representations, Certifications, and Other Statements of Offerors.
Contains representations, certifications, and other information required from each contractor. Some examples are: Procurement Integrity Certification, Small Business Certification, Place of Performance, and Ownership.

13. Section L: Instructions, Conditions and Notices to Offerors.
Tells the offerors what is to be provided in their proposal and how it should be formatted. It guides offerors in preparing their proposals, outlines what the government plans to buy, and emphasizes any government special interest items or constraints.

14. Section M: Evaluation Factors for Award.
Forms the basis for evaluating each offeror's proposal. It informs offerors of the relative order of importance of assigned criteria so that an integrated assessment can be made of each offeror's proposal.

III. FEDERAL ACQUISITION REGULATION (FAR) SYSTEM

A. Federal Acquisition Regulation (FAR).

1. The FAR 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).

2. The General Services Administration (GSA) is 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 FAR. *See* 65 Fed. Reg. 56,452 (18 September 2000).

b. Currently only electronic versions of the FAR 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.acquisition.gov/far/ . The Air Force FARSite also contains a 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)
3	Health and Human Services
4	Agriculture
5	General Services Administration
6	State
7	Agency for International Development
8	Veterans Affairs
9	Energy
10	Treasury
12	Transportation
13	Commerce

14	Interior
15	Environmental Protection Agency
16	Office of Personnel Management (Federal Employees Health Benefits)
17	Office of Personnel Management
18	National Aeronautics and Space Administration (NASA)
19	Broadcasting Board of Governors
20	Nuclear Regulatory Commission
21	Office of Personnel Management (Federal Employees Group Life Insurance)
23	Social Security Administration
24	Housing and Urban Development
25	National Science Foundation
28	Justice
29	Labor
30	Homeland Security
34	Education
51	Army FAR Supplement (AFARS)
52	Navy Marine Corps Acquisition Procedures Supplement (NAPS)
53	Air Force FAR Supplement (AFFARS)
54	Defense Logistics Acquisition Regulation Supplement (DLAR)

C. Layout of the FAR.

1. The FAR is divided into 8 subchapters and 53 parts. Parts are further divided into subparts, sections, and subsections. This organizational system applies to the FAR and all agency supplements to the FAR.

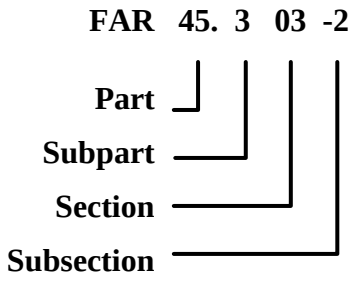
	Subchapter A: General
Part 1:	Federal Acquisition Regulation System
Part 2:	Definitions of Words and Terms
Part 3:	Improper Business Practices and Personal Conflicts of Interest
Part 4:	Administrative Matters
	Subchapter B: Acquisition Planning
Part 5:	Publicizing Contract Actions
Part 6:	Competition 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 Laws to Government Acquisitions
Part 23:	Environment, Energy and Water Efficiency, Renewable Energy Technologies, 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 Administration
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 Technology
Part 40:	[Reserved]
Part 41:	Acquisition of Utility Services
	Subchapter G: Contract Management
Part 42:	Contract Administration and Audit Services
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. 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.

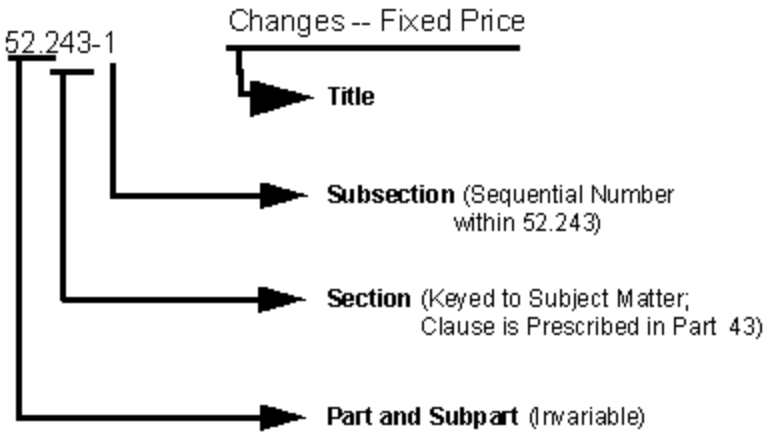
Example: FAR 45.303-2. We are dealing with FAR Part 45. The Subpart is 45.3. The Section is 45.303 and the subsection is 45.303-2



3. Correlation Between FAR Parts and Clauses/Provisions. All FAR clauses and provisions are found in 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 clause or provision is then completed by a hyphen and a sequential number assigned within each section of Subpart 52.2. *See* FAR 52.101(b).

Example: FAR 52.245-2. This is a clause (as shown by the "52.2") that deals with Government Property (as shown by the "45," indicating that it is prescribed in FAR Part 45). The "-2" is simply the sequential number of the clause within Section 52.245, and does not correlate to any other portion of the FAR.



4. How to Determine if a Clause or Provision Should Be Included in the Contract. Each clause or provision listed in the FAR cross-references a FAR Section that prescribes when it should or may be included into a contract. The "FAR Smart Matrix" summarizes these prescriptions. It is found at: https://www.acquisition.gov/far-smart-matrix. A 22 April 2013, memorandum from the Office of the Under Secretary of Defense, Acquisition, Technology, and Logistics, implements Defense-wide use of the contract Clause Logic Service (CLS). The memorandum can be found at http://www.acq.osd.mil/dpap/policy/policyvault/USA001481-13-DPAP.pdf.

5. Correlation Between FAR and Agency Supplements. Agency FAR Supplements that further implement something that is 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 45.102 discusses policy for contractor use of government equipment. The portion of the DFARS addressing this same topic is found at DFARS 245.102 (the "2" denotes the Defense FAR Supplement, which

is found at Chapter 2 of Title 48, C.F.R.). Similarly, the portion of the AFARS further implementing this topic is found at AFARS 5145.102 (the "51" denotes the Army FAR Supplement, which is found at Chapter 51 of Title 48, C.F.R.).

Example: FAR 6.303-2 addresses the required contents of a justification and approval (J&A) document (for other than full & open competition). AFARS 5106.303-2 supplements that information by requiring that a copy of the approved acquisition plan also be attached to the J&A. FAR Part 53 provides forms for use in acquisition, but does not contain a form for J&As. AFARS 5153.206-91 supplements the FAR by adding a standardized format for J&A documents.

ATTACHMENT 1: SAMPLE CONTRACT REVIEW CHECKLIST

SOLICITATION/CONTRACT AWARD CHECKLIST

NOTE: The following checklist is a "broad brush" tool designed to GENERALLY assist you in conducting solicitation and contract award reviews. DO NOT use this checklist as a substitute for examining the relevant statutes and regulations.

Section I--Solicitation Documentation

1. *Purchase Request.*

_____ a. Is it in the file?

_____ b. Is the desired delivery or start date consistent with the date stated in the IFB/RFP?

_____ c. Does the description of the desired supplies or services correspond to that of the IFB/RFP?

_____ d. Does the purchase request contain a proper fund citation?

_____ e. Are funds properly certified as available for obligation?

_____ f. Are the funds cited proper as to purpose? 31 U.S.C § 1301.

_____ g. Are the funds cited current and within their period of availability? 31 U.S.C. § 1552.

_____ h. Are the funds cited of sufficient amount to avoid Antideficiency Act issues? 31 U.S.C. §§ 1341, 1511-1517.

_____ i. Is the procurement a severable services contract to which the provisions of 10 U.S.C. § 2410a apply?

_____ j. If appropriate, does the solicitation contain either the Availability of Funds clause at FAR 52.232-18 or the Availability of Funds for the Next Fiscal Year at FAR 52.232-19 (one year indefinite quantity contracts)?

2. *Method of Acquisition.*

_____ a. What is the proposed method of acquisition?

_____ b. Is the "sealed bidding" method required? FAR 6.401(a).

_____ c. Has the activity excluded sources? If so, have applicable competition requirements been met? FAR Subpart 6.2.

_____ d. Has the activity proposed meeting its requirements without obtaining full and open competition? FAR Subpart 6.3.

_____ e. Does a statutory exception permit other than full and open competition? FAR 6.302.

_____ f. If other than full and open competition is proposed, has the contracting officer prepared the required justification and include all required information? FAR 6.303. Does it make sense?

_____ g. Have the appropriate officials reviewed and approved the justification? FAR 6.304.

_____ h. Is this a contract for supplies, services, or construction amounting to $250,000 or less ($1,500,000 in an overseas contingency), triggering the simplified acquisition procedures? FAR 2.101; FAR Part 13.

_____ i. May the activity meet its needs via the required source priorities listed in FAR Part 8?

3. *Publicizing the Solicitation.*

_____ a. Has the contracting officer published the solicitation as required by FAR 5.101 and FAR Subpart 5.2?

_____ b. Has the activity allowed adequate time for publication? FAR 5.203.

_____ c. If acquiring commercial items, does the combined synopsis/solicitation procedure apply? FAR 12.603.

4. *Solicitation Instructions.*

_____ a. Does the solicitation state the date, time, and place for submitting offers? Is the notation on the cover sheet consistent with the SF 33?

_____ b. Is the time for submitting offers adequate? FAR 14.202-1.

_____ c. Are the required clauses listed in FAR 14.201 (for IFBs) or FAR 15.209 and FAR 15.408 (for RFPs) and the matrix at FAR 52 included in the solicitation?

_____ d. If a construction contract, have the special requirements and procedures of FAR Part 36 been followed?

5. *Evaluation Factors*.

_____ a. Does the solicitation state the evaluation factors that will be used to determine award? FAR 14.101(e) and FAR 14.201-8 (for IFBs); FAR 15.304 (for RFPs).

_____ b. Are the evaluation factors clear, reasonable, and not unduly restrictive?

_____ c. In competitive proposals or negotiations, are all evaluation factors identified, including cost or price and any significant sub-factors that will be considered? Is the relative importance of each disclosed? FAR 15.304 and FAR 15.305.

_____ d. If past performance is required as an evaluation factor, has it been included? FAR 15.304(c)(3); FAR 15.305(a)(2).

6. *Pricing*.

_____ a. Is the method of pricing clear?

_____ b. Are appropriate audit clauses included in the solicitation? FAR 14.201-7; FAR 15.408.

_____ c. Does the Truth in Negotiations Act apply to this solicitation or request? FAR Subpart 15.4; FAR 15.403.

_____ d. If the Truth in Negotiations Act applies, does the solicitation contain the required clauses? FAR 15.408.

7. *Contract Type*.

_____ a. Is the proposed type of contract appropriate? FAR 14.104; FAR 16.102.

_____ b. If the proposed contract is for personal services, has the determination concerning personal services been executed? FAR 37.103. Does a statutory exception permit the use of a personal services contract? FAR 37.104; 5 U.S.C. § 3109 and 10 U.S.C. § 129b.

_____ c. If the proposed contract is a requirements contract, is the estimated total quantity stated? Is the estimate reasonable? If feasible, does the solicitation also state the maximum quantity? FAR 16.503. Is appropriate ordering and delivery information set out? FAR 16.505. Are required clauses included in the solicitation? FAR 16.506.

_____ d. If the proposed contract is an indefinite quantity type contract, are the minimum and maximum quantities stated and reasonable? FAR 16.504. Is appropriate

ordering and delivery information set out? FAR 16.505. Are required clauses included in the solicitation? FAR 16.506.

_____ e. Does the preference for multiple awards apply? FAR 16.504(c).

8. *Purchase Description or Specifications.*

_____ a. Are the purchase descriptions or specifications adequate and unambiguous? FAR 11.002; FAR 14.201-2(b) and (c); FAR 15.203.

_____ b. If a brand name or equal specification is used, is it properly used? FAR 11.104.

_____ c. Are the provisions required by FAR 11.204 included in the solicitation?

9. *Descriptive Data and Samples.*

_____ a. Will bidders be required to submit descriptive data or bid samples with their bids?

_____ b. If so, have the requirements of FAR 14.202-4 and FAR 14.202-5 been met?

10. *Packing, Inspection, and Delivery.*

_____ a. Is there an F.O.B. point? FAR 46.505.

_____ b. Are appropriate quality control requirements identified? FAR 46.202.

_____ c. Is there a point of preliminary inspection and acceptance? FAR 46.402.

_____ d. Is there a point of final inspection? FAR 46.403.

_____ e. Have the place of acceptance and the activity or individual to make acceptance been specified? FAR 46.502; FAR 46.503.

_____ f. Is the delivery schedule reasonable? FAR 11.402.

11. *Bonds and Liquidated Damages.*

_____ a. Are bonds required? FAR Part 28.

_____ b. If so, are the requirements clearly stated in the specification?

_____ c. Is there a liquidated damages clause? Does it conform to the requirements of FAR 11.502. Is the amount reasonable? Are required clauses incorporated? FAR 11.503.

12. *Government-Furnished Property*.

_____ a. Will the government furnish any type of property, real or personal, in the performance of the contract?

_____ b. If so, is the property clearly identified in the schedule or specifications? Is the date of delivery clearly specified?

_____ c. Has the contractor's property accountability system been reviewed and found adequate? FAR 45.104.

_____ d. Are the contractor's and the government's responsibilities and liabilities stated clearly? FAR 52.245-2; FAR 52.245-5.

_____ e. Have applicable requirements of FAR Part 45 been met? Are required clauses present?

13. *Small Business Issues*.

_____ a. Is the procurement one that has been set-aside for small businesses? FAR Subpart 19.5. If so, is the procurement a total set-aside pursuant to FAR 19.502-2 or a partial set-aside pursuant to FAR 19.502-3?

_____ b. Is the procurement appropriate for a "small disadvantaged business" participating as part of the Small Business Administration's "8(a) Program"? FAR Subpart 19.8. If so, does the entity meet the eligibility criteria for 8(a) participation?

_____ c. If the solicitation contains bundled requirements, has the activity satisfied the requirements of FAR 7.107, FAR 10.001, FAR 15.304, and FAR 19.101, 19.202-1?

_____ d. Does the solicitation contain the small business certification? FAR 19.301.

_____ e. Does the solicitation contain the proper Standard Industrial Classification code or North American Industry Classification System code? FAR 19.102.

14. *Environmental Issues*.

_____ a. Has the government considered energy efficiency and conservation in drafting its specifications and statement of work? FAR 23.203.

_____ b. Has the government considered procuring items containing recycled or recovered materials? FAR 23.401.

_____ c. Has the government considered procuring environmentally preferable and energy-efficient products and services? FAR 23.700.

_____ d. Do the contract specifications require the use of an ozone-depleting substance? FAR 23.803; DFARS 207.105.

15. *Labor Standards*.

_____ a. Does the Wage Rate Requirements Statute (formerly known as the Davis-Bacon Act) or the Service Contract Labor Standards (formerly known as the Service Contract Act) apply to this acquisition? FAR Subparts 22.4 and 22.10.

_____ b. If so, have the proper clauses and wage rate determinations been incorporated into the solicitation?

16. *Clarity and Completeness*.

_____ a. Have you read the entire solicitation?

_____ b. Do you understand it?

_____ c. Are there any ambiguities?

_____ d. Is it complete?

_____ e. Are the provisions, requirements, clauses, etc. consistent?

_____ f. Are there any unusual provisions or clauses in the solicitation? Do you understand them? Do they apply?

Section II--Contract Award Checklist

1. *Sealed Bid Contracts*.

_____ a. Review the previous legal review of the solicitation. Has the contracting activity made all required or recommended corrections?

_____ b. Did the contracting officer amend the solicitation? If so, did the contracting officer distribute amendments properly? FAR 14.208.

_____ c. Has a bid abstract been prepared? FAR 14.403. Is it complete? Does it disclose any problems?

_____ d. Is the lowest bid responsive? FAR 14.301; FAR 14.404-1; FAR 14.103-2(d). Are there any apparent irregularities?

_____ e. Is there reason to believe that the low bidder made a mistake? FAR 14.407. Has the contracting officer verified the bid?

_____ f. Has the contracting officer properly determined the low bidder? FAR 14.408-1.

_____ g. Is the price fair and reasonable? FAR 14.408-2.

_____ h. Has the contracting officer properly determined the low bidder to be responsible? FAR 14.408-2; FAR Subpart 9.1.

_____ i. If the low bidder is a small business that the contracting officer has found non-responsible, has the contracting officer referred the matter to the SBA? FAR 19.601. If so, has the SBA issued or denied a Certificate of Competency to the offeror? FAR 19.602-2.

_____ j. Did the contracting officer address any late or improperly submitted bids? FAR Subpart 14.4.

_____ k. Are sufficient and proper funds cited?

_____ l. Has the activity incorporated all required clauses and any applicable special clauses?

_____ m. Is the proposed contract clear and unambiguous? Does it accurately reflect the requiring activity's needs?

_____ n. If a construction contract, have FAR Part 36 requirements been satisfied?

_____ o. If the acquisition required a synopsis in fedbizopps.gov, is there evidence of that synopsis in the file? Was the synopsis proper?

2. *Negotiated Contracts*.

_____ a. Review the previous legal review of the RFP. Have all required or recommended corrections been made?

_____ b. Were any amendments made to the RFP? If so, were they prepared and distributed properly? FAR 15.206.

_____ c. Was any pre-proposal conference conducted properly? FAR 15.201.

_____ d. Did the contracting officer address any late or improperly submitted proposals? FAR 15.208.

_____ e. Has an abstract of proposals been prepared? Is it complete? Does it reveal any problems?

_____ f. Is a pre-negotiation Business Clearance Memorandum (BCM) required? Is it complete? Does it reveal any problems?

_____ g. Were discussions conducted? FAR 15.209; FAR 15.306. If not, did the solicitation contain a clause notifying offerors that the government intended to award without discussions? FAR 15.209(a). If so, were discussions held with all offerors in the properly determined competitive range? FAR 15.209(a); FAR 15.306(c).

_____ h. **Were proposals evaluated in accordance with the factors set forth in the request for proposals? FAR 15.305; FAR 15.303.**

_____ i. Did the contracting officer properly address any changes to the government's requirements? FAR 15.206.

_____ j. Were applicable source selection procedures followed and documented? FAR 15.308; FAR 15.305.

_____ k. If applicable, did the contracting officer address make or buy proposals? FAR 15.407-2.

_____ l. If the Truth in Negotiations Act applies, has the contractor submitted a proper certification? Is it complete and signed? FAR 15.406-2.

_____ m. Is a post-negotiation Business Clearance Memorandum (BCM) required? Is it complete? Does it reveal any problems?

_____ n. Are all negotiated prices set forth in the contract?

_____ o. Has the contracting officer incorporated required and special clauses in the proposed contract?

_____ p. Is the proposed price fair and reasonable?

_____ q. **Are sufficient and proper funds cited?**

_____ r. Is the proposed contract clear and unambiguous? Does it make sense? Does it reflect the requiring activity's needs?

_____ s. If a construction contract, has the contracting officer satisfied the requirements of FAR Part 36 (and supplements)?

ATTACHMENT 2: SAMPLE SOLICITATION

SOLICITATION, OFFER AND AWARD	1. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700)	RATING	PAGE 1 OF 57 PAGES

2. CONTRACT NUMBER	3. SOLICITATION NUMBER	4. TYPE OF SOLICITATION	5. DATE ISSUED	6. REQUISITION/PURCHASE NUMBER
	HQ00034-07-R-1058	☐ SEALED BID (IFB) ☒ NEGOTIATED (RFP)	12/21/2007	KRS1017071323

7. ISSUED BY CODE HQ0034

WHSACQUISITION & PROCUREMENT OFFICE
1777 NORTH KENT ST, SUITE 12063, ARLINGTON, VA 22209

8. ADDRESS OFFER TO *(If other than item 7)*
See Item 7

NOTE: In sealed bid solicitations "offer" and "offeror" mean "bid" and "bidder".

SOLICITATION

9. Sealed offers in original and _____ copies for furnishings the supplies or services in the Schedule will be received at the place specified in item 8, or if hand carried, in the depository located in See Solicitation Section L until 2:30 PM *(Hour)* local time 2/6/2008 *(Date)*

CAUTION - LATE Submissions, Modifications, and Withdrawals: See Section L, Provision No. 52.214-7 or 52.215-1. All offers are subject to all terms and conditions contained in this solicitation.

10. FOR INFORMATION CALL:	A. NAME	B. TELEPHONE *(NO COLLECT CALLS)* AREA CODE	NUMBER	EXTENSION	C. E-MAIL ADDRESS
	KORTNEE STEWART	703	6963858		kortnee.stewart.ctr@whs.mil

11. TABLE OF CONTENTS

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X	E	INSPECTION AND ACCEPTANCE	22-23	X	K	REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS	41-43
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X	G	CONTRACT ADMINISTRATION DATA	25-27	X	L	INSTRUCTIONS, CONDITIONS, AND NOTICES TO OFFERORS	44-54
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OFFER *(Must be fully completed by offeror)*

NOTE: Item 12 does not apply if the solicitation includes the provisions at 52.214-16, Minimum Bid Acceptance Period.

12. In compliance with the above, the undersigned agrees, if this offer is accepted within _____ calendar days *(60 calendar days unless a different period is inserted by the offeror)* from the date for receipt of offers specified above, to furnish any or all items upon which prices are offered at the set opposite each item, delivered at the designated point(s), within the time specified in the schedule.

13. DISCOUNT FOR PROMPT PAYMENT *(See Section I, Clause No. 52.232-8)*	10 CALENDAR DAYS (%)	20 CALENDAR DAYS (%)	30 CALENDAR DAYS (%)	CALENDAR DAYS(%)

14. ACKNOWLEDGMENT OF AMENDMENTS *(The offeror acknowledges receipt of amendments to the SOLICITATION for offerors and related documents numbered and dated):*	AMENDMENT NO.	DATE	AMENDMENT NO.	DATE

15A. NAME AND ADDRESS OF OFFEROR — CODE _____ FACILITY _____

16. NAME AND THE TITLE OF PERSON AUTHORIZED TO SIGN OFFER*(Type or print)*

15B. TELEPHONE NUMBER AREA CODE	NUMBER	EXTENSION	☐ 15C. CHECK IF REMITTANCE ADDRESS IS DIFFERENT FROM ABOVE - ENTER SUCH ADDRESS IN SCHEDULE.	17. SIGNATURE	18. OFFER DATE

AWARD *(To be completed by Government)*

19. ACCEPTED AS TO ITEMS NUMBERED	20. AMOUNT	21. ACCOUNTING AND APPROPRIATION

22. AUTHORITY FOR USING OTHER THAN FULL OPEN COMPETITION:
☐ 10 U.S.C. 2304 (c) ☐ 41 U.S.C. 3304(a) ( )

23. SUBMIT INVOICES TO ADDRESS SHOWN IN *(4 copies unless otherwise specified)* — ITEM

24. ADMINISTERED BY *(If other than Item 7)*

25. PAYMENT WILL BE MADE BY — CODE

26. NAME OF CONTRACTING OFFICER *(Type or print)*

27. UNITED STATES OF AMERICA *(Signature of Contracting Officer)*

28. AWARD DATE

IMPORTANT - Award will be made on this Form, or on Standard Form 26, or by other authorized official written notice.

AUTHORIZED FOR LOCAL REPRODUCTION
Previous edition is unusable

STANDARD FORM 33 (REV. 6/2014)
Prescribed by GSA - FAR (48 CFR) 53.214 (c)

Section B - Supplies or Services and Prices

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0001		12	Months		
	Pentagon Custodial - Base Year FFP Period of Performance: Base Year 1 Sept 2014 – 30 Aug 2015. PURCHASE REQUEST NUMBER: KRS1017071323				
				NET AMT	

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0002		12	Months		
	Pentagon Custodial - Option Year One FFP Period of Performance: Option Year One 1 Sep 2015 – 30 Aug 2016. PURCHASE REQUEST NUMBER: KRS1017071323				
				NET AMT	

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0003		12	Months		
	Pentagon Custodial - Option Year Two FFP Period of Performance: Option Year Two 1 Sep 2016 – 30 Aug 2017. PURCHASE REQUEST NUMBER: KRS1017071323				
				NET AMT	

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0004		12	Months		
	Pentagon Custodial - Option Year Three FFP Period of Performance: Option Year Three 1 Sep 2017 – 30 Aug 2018 PURCHASE REQUEST NUMBER: KRS1017071323				
				NET AMT	

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0005		12	Months		
	Pentagon Custodial - Option Year Four FFP Period of Performance: Option Year Four 1 Sep 2018 – 30 Aug 2019. PURCHASE REQUEST NUMBER: KRS1017071323				
				NET AMT	

Section C - Descriptions and Specifications

PERFORMANCE WORK STATEMENT
Section C: Performance Work Statement
December 5, 2007

Part 1: General Information

1.1 Introduction

The purpose of this contract is to fulfill a need of the Pentagon for custodial services. The Pentagon is the headquarters of the United States Department of Defense (DoD) and the world's largest low-rise office building. It is at once a building, an institution, and a national symbol.

1.2 Background

This contract follows the fifth year of a five-year contract. This contract is offered as a one-year contract with a possible additional four option years depending on the Contractor's performance and/or other factors. This is a firm-fixed-price contract with line items for additional work such as additional carpet cleaning. Existing problems include the large number of people that work in the Pentagon, the sheer size of the Pentagon, and the high level of Pentagon security. Historically, the following performance issues characterize contracts of this type:

- Excessive noise generated by trash removal
- Lack of contractor coordination when servicing secure areas
- Inadequate supervision
- Mishandling of recyclable materials
- Response to government requests for unscheduled cleaning
- Inadequate contractor quality control

In providing the required end results for this contract, the Government will use CPARS to assess performance and reward the contractor for meeting contract requirements and avoiding the historic non-performance issues noted above. In order to earn the highest ratings, the contractor must have "substantially exceeded the contract performance requirements without commensurate additional costs to the Government." This principle should guide the contractor's efforts to achieve the standards of this contract.

1.3 Objectives

The objective of this contract is to provide the Pentagon with high quality, timely, proactive and responsive custodial services.

1.4 Scope

The Pentagon presently houses approximately 26,000 military and civilian employees and about 3,000 non-defense support personnel dedicated to protecting our national interests. The

Pentagon sits on 34 acres of land including the five-acre center court, making a footprint large enough to accommodate five Capitol buildings. In spite of the Pentagon's tremendous size, it takes only seven minutes to walk between any two points of the building because of its unique design.

There are approximately 6,600,000 gross square feet of space, 280 restrooms, 7,750 windows, 130 stairways, 40 escalators, elevators, 17.5 miles of corridors, and 700 water fountains. These figures are approximate, and are subject to change as the renovation is completed.

The Pentagon custodial requirements will be met by two contracts; this contract and a NISH contract, with which coordination will often be required. This contract will be responsible for providing service for the 2nd floor of the Pentagon, the Metro Entrance, the outside trash removal, and the PENREN trailers not housed in the PENREN Compound. Attachment J-C1 details the specific area responsibilities covered by this contract. This contract has four major functional areas to be performed:

Interior cleaning
Exterior cleaning including parking lots and sidewalks
Trash/Recyclable Material Management
Miscellaneous services

The following types of cleaning are required:

Basic cleaning service: Basic cleaning services require cleaning of an area only when the appearance of that particular area falls below the stated standard specified in the Performance Matrix.

Scheduled cleaning service: Service performed on a contractor determined schedule.

Continuous cleaning service: Custodial services on a continuous process due to the large volume of traffic or high profile of occupants.

Spot cleaning: Localized cleaning in response to a customer service request or Contractor identified requirement.

The contractor may employ any cost-effective, flexible combination of cleaning types so long as the areas are maintained in accordance with the contract standards. The Pentagon is not a typical commercial office building requiring only scheduled custodial services. The occupants of the Pentagon demand a high standard of cleaning that may require an aggressive contractor inspection system that quickly identifies areas that fall below required standards. Some areas may necessitate continuous cleaning in order to maintain the standards. The contract requires close monitoring of all areas, especially when weather or other circumstances cause areas to repeatedly fall below standards. The use of scheduled services alone may not be sufficient to maintain areas in a consistently clean state, especially high use, public areas.

The Government intends to aggressively assess the effectiveness of the Contractor's continuous inspection system required by FAR 52.246-4 Inspection of Services Fixed Price to detect and correct instances of failing to meet contract standards.

A "reasonable person" standard will be used in assessing the contractor's ability to ensure the areas present the appearance one would expect in a high profile environment. The Government does not desire surfaces or containers to be cleaned unnecessarily. By the same token, the Government does not believe that merely vacuuming or sweeping once a day meets the required standard of a clean and neat appearance if area's appearance declines.

The Pentagon has been identified as the "Energy Efficient and Environmentally Sensitive Showcase Building" for the Department of Defense (DoD) worldwide. The Pentagon is one of the most visible elements of this showcase designation for the general public, national, and international dignitaries alike. Custodial services are a major factor in maintaining this standing.

The contractor is expected to use green cleaning as a holistic approach to janitorial services, taking into account:

(1) the health, safety, and environmental risks of products and processes associated with cleaning;
(2) the mission and use of the facility to be cleaned and the behavior of facility occupants; and
(3) the cleaning, maintenance, and sanitation needs of the facility.

The government desires the process of cleaning that involves alternative products, applying those products in different ways, and evaluating and/or changing behaviors associated with how buildings are used to reduce risks while maintaining a satisfactory level of cleanliness and disinfection.

When blocks of space totaling 10,000 square feet or more are expected to remain unoccupied for 30 calendar days or longer, deductions will be made from the monthly payment due the Contractor. The Contracting Officer (CO) will give the Contractor a written notice of the effective date the areas are to be dropped from or returned to the normal cleaning schedule at least three full working days in advance of this date.

The period of deducting for unoccupied space will begin on the effective date as stipulated in writing by the CO and will continue until the effective date on which the cleaning is resumed. The 10,000 square feet may be made up of small blocks of non-contiguous space. Subsequent blocks of space less than 10,000 square feet in the same vicinity may be added after the initial 10,000 square-feet threshold is met.

When adding or deducting space the Government will utilize the square foot unit price for General, Executive, restrooms and other areas to accomplish additions/deductions for the base and each option year. Unit prices are specified in Section B, Attachment J-B1 – J-B6.

The Pentagon Reservation is undergoing extensive renovation. As a consequence the workload in terms of square footage and equipment type and number may significantly change during the contract period.

The performance of the contract requires TOP SECRET FACILITY CLEARANCE with selected contractor personnel requiring TOP SECRET clearances (see Attachment J-C2, "Contract Security Classification Specification").

1.5 Applicable Documents

Publications	Title
Federal Hazard Communication Program (29 CFR 1910.1200)	http://www.ilpi.com/msds/osha/1910_1200.html
Hazardous waste operations and emergency response. - 1910.120	http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=9765
Contractor Performance Assessment Report System (CPARS)	http://cpars.navy.mil/
Green Seal Product Standards	GS-37: GS Environmental Standard for General Purpose, Bathroom, and Glass Cleaners Used for Industrial and Institutional GS-40: Floor Care Products GS-08 Household Cleaners

Part 2: Definitions

After hours: The hours of the day following the normal working hours of 7:00AM to 4:30PM, Monday through Friday
Basic cleaning services: Requires cleaning only when dirt, debris, etc., are visible.
Carpet: Includes wall-to-wall, carpet tile, room-size rugs, area rugs, elevator and entrance floor mats.
Clean window: Includes washing interior and exterior glass, and all window surfaces including head, sash, sills, sun and insect screens (where applicable), and removal of all grit, dust, dirt, stains, insects, finger marks, streaks, spots, cloudy film and graffiti.
Clean: Free of dirt, film, graffiti, smudges, spots, streaks, debris, stains, dust, soil, gum, cobwebs, other foreign matter, excessive moisture, mold, and mildew; and is odor-free.
Clinical cleaning services: Requires cleaning to remove all soil, including bacteria.
Disinfect: The process of cleaning to remove germs and/or cause of infection.

Damaged: Operation of device mechanically impaired or otherwise diminished from original state in a noticeable way to include, but not limited to, unsecured, sharp edges, cracks, or noticeably marred.
Disinfect: Clean so as to destroy disease carrying microorganisms and prevent infection.
Emergency Condition: A situation calling for immediate response to address a critical situation.
Executive Office Areas Space: These areas require regularly scheduled cleaning of surfaces regardless of whether dirt is visible.
Exterior cleaning: The cleaning of surfaces outside of the building to include hard surfaces such as parking lots, bus shelters, taxi stands, guard booths, walkways, stairways, elevators, entrances, doors, glass and windows, smoker ash urns, and trash pickup
Green Cleaning: A comprehensive approach to cleaning designed to reduce the impacts on the health of a building's occupants and workers, and reducing the environmental impact from the products selected for and used in the cleaning process.
Interior cleaning: The cleaning of surfaces inside of the building to include hard surfaces in restrooms, sink rooms, kitchenettes, stairways, elevators, escalators, entrances, and drinking fountains.
Quiet: Non-audible to occupants of adjacent offices.
Regular hours: Monday – Friday, 0700 to 1700 hours, excluding Federal Holidays and weekends.
Scheduled cleaning services: Requires service on a regular schedule whether dirt is visible or not.
Secured Space: Areas requiring secret or higher clearances for access.
Spot Cleaning: Perform the standard cleaning functions not specifically listed but necessary to maintain the satisfactory level of cleanliness, to perform standard cleaning functions more often than planned frequency due to outside conditions.
Surfaces: In addition to walls, floors, and ceilings, surfaces include area rugs, carpets, restroom stall partitions, doors, windows, window frames, sills, air-returns, vents, corners, furniture, glass, glass desktops partitions, computer centers, pictures, blinds, bookcases, stairs, and recycle and trash receptacles.

Part 3: Government Furnished

The Government will provide limited storage space within the building for the contractor. The space is subject to change in both location and square footage.

Any existing equipment within the space assigned to the Contractor such as clothes lockers, tables, benches, chairs, etc., placed in the building by the Government may be used by the Contractor during the term of the contract provided written authorization is received in advance from the Contracting Officer Representative (COR). The Contractor shall maintain Government provided space in a neat, clean, and orderly fashion, and return the space to the Government at the expiration of the contract in the same condition as at the beginning of its use. The Government will not be responsible for any damage or loss to the Contractor's stored supplies, materials, or equipment.

The Government will provide access to sink rooms (with utility sinks), where available, at various points throughout the building. The Contractor shall keep sink rooms clean and orderly, and shall not use these rooms as employee break rooms or for storing equipment including mops, brooms, dust cloths, and other custodial items. The Contractor shall keep sink room doors closed and the light(s) and water turned off when not in use.

The Government will provide hot and cold water as necessary for the Contractor to perform the requirements herein and limited to the normal water supply provided in the building.

The Government will provide space in the building, furniture, and furnishings (to include a telephone and one computer for restricted use) for a Project Manager/Supervisor's office to be used for official business in the performance of this contract. The computer and telephones supplied by the Government are to be used only for work related activities and communications within or between the buildings. The Contractor or its employees shall not use the computer or telephones in any manner for personal advantage, business gain, or other personal endeavor. The Contractor shall arrange with the telephone company for the installation of private business telephone line(s) for its personal or business use, and shall pay all costs for the installation and maintenance of it.

The Government will furnish office desktop and public recycling containers. The Contractor shall distribute containers as needed to the appropriate locations as directed by the COR or the Recycling Program Manager.

The Government will provide ice melt for snow and ice removal.

Part 4: Contractor Furnished

Unless otherwise specified, the Contractor shall furnish all supplies, materials, and equipment necessary for the performance of work under this contract. All supplies and materials shall be of a type and quality that conform to applicable Federal specifications and standards and, to the extent feasible and reasonable, include the exclusive use of bio-based products. All dispensers/receptacles shall be considered, as is condition upon start date of the contract. All dispensers and receptacles are defined as, but not limited to sanitary napkin receptacles, toilet seat cover dispensers, toilet paper dispensers, paper towel dispensers and soap dispensers. The contractor shall buy and replace broken or damaged items for the remainder of the contract. All supplies, materials, and equipment to be used in the work described herein are subject to the approval of the COR.

The Contractor shall submit to the COR a list indicating the name of the manufacturer, the brand name, and the intended use of each of the materials, proposed for use in the performance of its work. The Contractor shall not use any materials, chemicals, or compounds which the COR determines would be unsuitable for the intended purpose or harmful to the surfaces to which applied or, as might be the case for such items as paper or soap products, unsatisfactory for use by occupants. The Contractor shall utilize products and material made from bio-based materials (e.g., bio-based cleaners, bio-based degreasers, bio-based laundry detergent) to the maximum

extent possible without jeopardizing the intended end use or detracting from the overall quality delivered to the end user. For the bio-based content products evaluation, all non-chemical products proposed for use under this contract must conform to the Department of Agriculture (USDA) Designated Bio-based Products List (DBPL) whenever practicable. Contractors should provide data for their bio-based solvents and cleaners to document bio-based content, and source of bio-based material (i.e. particular crop or livestock).

Any material which the COR suspects does not meet Federal specifications or standards shall be tested at the Contractor's expense by an independent testing laboratory qualified to perform such tests as are required. A copy of the laboratory report giving the results of the test and a sample of each product, if requested, shall be submitted to the COR. These products shall meet the requirements established by applicable Federal specifications and standards or be considered unacceptable for use.

Material Safety Data Sheets (MSDS). The Contractor shall comply with all applicable provisions of the Federal Hazard Communication Program (29 CFR 1910.1200). The Contractor shall provide the COR with a MSDS for each material in use or stored on the Pentagon Reservation. In addition, within 30 days of contract award, the Contractor shall provide the COR with the approximate quantities (i.e., ± ten percent) and the location(s) of all materials requiring an MSDS stored by the Contractor on the Pentagon Reservation. The Contractor shall update this information at least once each quarter or more frequently when quantities for any material change by more than ten percent for any single product. The Pentagon Building Manager or CO reserves the right to disapprove of any materials, chemicals or degreasers.

Restroom Soap: The Contractor shall provide a restroom soap that is green seal approved. Antimicrobial institutional hand cleanser may be provided only upon approval of the COR.

Environmentally Preferred Products (EPP): The Contractor shall meet or exceed the mandatory environmental preferable criteria and required consistencies and incorporated in the Contractor’s Stewardship Plan as specified in paragraph C-6.9.1 for all of the chemical cleaning-products used during the performance of the contract.

Cleaning Equipment: The Contractor shall furnish all necessary cleaning equipment. The Contractor shall use only vacuums equipped with HEPA filters for work performed under this contract. The Contractor shall not use equipment powered by combustion engines (e.g., gasoline, propane, CNG, diesel) for use or storage in areas other than locations approved, in advance, by the COR.

The Contractor shall furnish carts and containers constructed from noncombustible or flame resistant products that fall within established guidelines for the collection and/or storage of waste materials and recyclables.

Uniforms: The Contractor shall require its employees, supervisors and sub-contractors to wear distinctive uniform clothing and shall assure that every employee is in uniform upon contract start date. Employees shall wear uniforms consisting of shirts and trousers, coveralls, or smocks

for men, and dresses, and blouses with skirts or slacks, or smocks, as appropriate, for women. The uniform shall have the Contractor's name, easily identifiable, permanently attached above the waist. The color or color combination of the Contractor's uniforms worn on the Pentagon Reservation shall be approved, in advance, by the COR. Unless the performance of a particular task requires otherwise, the Contractor's employees shall maintain an appearance that is neat and clean, and reflects favorably upon both the Contractor and the Department of Defense.

Equipment Markings: All contractor equipment to include vacuums, trash carts, mop ringers, etc. shall be professionally and permanently stenciled. Handwritten company names, individual worker's name, etc. will not be permitted and will require the subject item to be removed from service.

Part 5: Specific Requirements

The Contractor shall provide custodial services that result in a building appearance and sanitation level consistent with show casing the Pentagon as a building, institution, and national defense symbol for the general public, and national and international dignitaries.

The contractor shall meet or exceed all performance-based requirements detailed in the Performance-based Matrix at C.5.5. Each requirement has associated measurable performance standards.

5.1 Interior Cleaning. The Contractor shall clean, to include spot cleaning, the interior spaces consistent with standards in the Performance Based Matrix at C.5.5. Areas requiring cleaning are listed below.

5.1.1 Restrooms. The Contractor shall clean all restroom, showers, kitchenettes surfaces.

5.1.2 Office and Conference Spaces. The Contractor shall clean all general, Executive, and Secure Office and Conference Space surfaces.

The Contractor shall submit to the COR a schedule to shampoo all carpet in renovated space every two years. The Contractor shall report all worn out carpet to the COR. Upon space renovation, additional carpet cleaning requirements may be added to the contract.

5.1.3 Entrances/Lobbies, and Corridors. The Contractor shall clean entrances, lobbies, and corridors. SECDEF Corridor at the River and Mall Entrances and their lobbies and joining corridors are high profile areas.

5.1.4 Stairways/Stairwells. The Contractor shall clean all stairwells and stairs, landings, railings, ledges, and grille surfaces.

5.1.5 Loading Areas (including platforms and docks). The Contractor shall clean all surfaces.

5.1.6 Elevators (passenger and freight) and Escalators. The Contractor shall clean interior elevators and escalators .

5.1.7 Vending Areas. The Contractor shall clean all floor and wall surfaces. While vending machine equipment sanitation is the responsibility of the vending machine supplier, the Contractor shall clean vending areas.

5.1.8 Drinking Fountains. The Contractor shall clean all surfaces .

5.1.9 Grease Traps. The Contractor shall pump, pressure wash and clean grease traps with the result(s) described in the Performance-based Matrix.

The Contractor shall dispose of all material/waste in accordance with applicable Federal, Commonwealth of Virginia, and local rules/regulations. Copies of all waste manifests for Pentagon solid wastes will be provided to the COR.

The Contractor shall provide the COR all required information to gain access to the Pentagon Reservation no less than 48 hours prior to start of work during normal duty hours. Any delay or non-performance due to the contractor failing to coordinate with the COR shall be at no cost to the Government.

The Contractor shall perform this requirement each alternate Saturday for the duration of this contract between the hours of 7:00AM and 4:30PM unless otherwise requested by the CO or COR. The Contractor shall shift the hours of performance to meet the needs of the Government upon receiving a 24 hour notification at no additional cost to the Government. The Contractor shall sign in/out with the COR.

The Contractor shall inform the COR if more frequent cleaning is required to allow for proper scheduling.

The Contractor shall only use electrical portable pump and pressure-washing equipment.

Grease trap locations are indicated in the list below:

Equipment Location List	**Number of Grease Traps**
G2-1 Food Service Loading Dock	1
G2-2 PLC2 Kitchen	1
G2-3 Corridor 3&4 Elevator Bank	1
G2-4 Corridor 5, D Ring	1
G2-5 Corridor 7&8 Elevator Bank	1
G2-6 Corridor 7, E Ring	1
G2-7 Corridor 8, Basement	1
G2-8 Corridor 8, C Ring Mechanical Room	TBD

5.2 Exterior Cleaning. The Contractor shall clean the exterior spaces identified below.

5.2.1 Elevators. The Contractor shall clean all exterior passenger elevators.

5.2.2 Windows (interior and exterior). The Contractor shall clean all interior windows on the 2nd Floor, and all exterior window sides of the entire building to include glass, frames, and ledges. The Contractor shall clean the ten (10) METRO awnings after hours. The Contractor shall submit a detailed work schedule to the COR no less than fourteen (14) calendar days before the start of work.

The Contractor shall adhere to the following minimum window washing schedule requirements:

April 15 – May 30	Clean all windows + 5100 SF of additional glass
July 1 – July 25	Clean 350 windows (obstructed windows, bus stops, taxi stands, kiss & drop shelters, and Metro awnings)
Aug 1 – Aug 15	Clean 350 windows (obstructed windows, bus stops, taxi stands, kiss & drop shelters, and Metro awnings)
Sept 15 – Oct 30	Clean all windows + 5100 SF of additional glass
Within 48 hours	Clean up to 25 windows and/or 1000 SF of glass (2X/YR)

5.2.3 Guard Booths, Trailers, Outbuildings and Bus Shelters. The Contractor shall clean all surfaces.

5.2.4 Loading Areas. The Contractor shall clean all surfaces. The Contractor shall not store products or equipment on the loading areas.

5.2.5 Exterior Surfaces. Contractor shall clean center courtyard, steps, walk-off mats, landings, parking lots, pavement, concrete drive surfaces, and sidewalks.

5.2.6 Smoker Ash Urns. Contractor shall clean smoker ash urns.

5.3 Trash/Recyclable Material Management. The Contractor shall collect trash and recyclables, and service recycling bins. The Contractor shall supply additional trash containers for special bulk-trash requests and special events. The Contractor shall not dispose of recycled material as refuse. The Contractor shall remove obvious contaminants when emptying recycle bins.

5.4 Miscellaneous Services.

5.4.1 Emergency Service. In the event the Project Manager or Designated Representative is notified that an emergency condition exists, the Contractor shall position appropriate resources at the site of the emergency within 15 minutes during normal work hours and within 90 minutes after normal working hours.

5.4.2 Customer Service Requests. The Contractor shall have customer service requests corrected within 45 minutes or sooner of notification during normal working hours. The Pentagon Building Management Office (PBMO) will receive service call requests from building occupants and notify the Contractor of the work required. Historically, tasks included providing appropriate waste and recycling receptacles for special tasks, servicing restrooms, cleaning, waste removal, emptying recycling containers, and other miscellaneous requests for janitorial services.

5.4.3 Response to Occupant Complaints.

The COR, the PBMO, or the Building Operations Command Center (BOCC) will report all complaints to the Contractor. The Contractor shall respond within 15 minutes to complaints and resolve problem within 30 minutes. The Contractor shall submit written documentation of service follow-up and response time to the COR within 24 hours of service completion.

5.4.4 Special Events. The Contractor shall provide and monitor portable restroom facilities as well as cleaning and servicing. The contractor shall also provide and monitor trash receptacles to prevent overflowing in the designated areas. The Contractor shall monitor and clean designated areas specified prior to, during, and at the completion of the event

5.4.5 Snow and Ice Removal. During regular hours, the Contractor shall clear entranceways, stairs, sidewalks, bus and shuttle shelters, pedestrian bridges of snow and ice. Contractor shall clear and de-ice passageways and steps for modular buildings and trailers.

Performance-Based Matrix				
Desired End Result(s)	**Feature(s) of end result to be surveyed.**	**The required performance level for each feature.** **"What success looks like"**	**Quality Assurance Inspection Method**	**Incentive**
The Contractor shall provide custodial services that result in a building appearance and sanitation level consistent with show casing the Pentagon as a building, institution, and national defense symbol for the general public, and national and international dignitaries. Contractor Inspection System required by 52.246-4 achieves performance standards. 7.11	**De-icing and snow removal** **5.4.5**	All surfaces continually free of ice and snow. Contractor provides appropriate snow removal equipment and in sufficient quantities to ensure snow does not accumulate.	Methods include but are not limited to 100% inspection, random sampling, planned sampling, incidental inspections and validated customer complaints.	Payment of contract price if performance meets requirements. Final and interim CPARS performance evaluations for use in future Government source selections.
	Floors **5.1.1** **5.1.2** **5.1.3** **5.1.4** **5.1.5** **5.1.6** **5.1.7** **5.2.1** **5.2.3** **5.2.4**	Floors are clean and appear uniform, and/or sanitation-related safety hazards. Baseboards are free of floor cleaning residues or marks. All items moved during cleaning are in their original position. Terrazzo floors are clean and have high luster. Elevator floors have high luster. Elevator pit not used for floor sweepings or drains.		
	Re-waxed floors **5.1.2** **5.1.3** **5.1.7**	Stripped floor: Floor is ready for the reapplication of sealer and floor finish, i.e., free of dirt, stains, deposits, wax, finish, water, and cleaning solutions. Sealed floor: Uniform appearance, with all evidence of splashing on baseboards and furniture/fixtures completely removed. Re-waxed floor: Floors have a uniform high gloss shine. All moved items during stripping, sealing, and waxing are in their original position. Floors meet or exceed 0.5 – 0.6 slip/trip/fall coefficient.		

	Walls/Ceiling **5.1.1** **5.1.2** **5.1.3** **5.1.4** **5.1.5** **5.1.6** **5.1.7** **5.2.1** **5.2.3** **5.2.4**	All surfaces are clean. Surfaces are not damaged during cleaning operations.		
	Doors **5.1.1** **5.1.2** **5.1.3** **5.1.4** **5.1.5** **5.1.6** **5.1.7** **5.2.1** **5.2.3** **5.2.4**	All door surfaces are clean. Door handles and plates are free of tarnish, streaks, stains, and hand marks. Elevator door tracks clean.		
	Drinking Fountains **5.1.3** **5.1.8**	All surfaces, including orifices, bubblers, and drains are clean and disinfected.		
	Glass to include mirror and Plexiglas, and plain glass **5.1.1** **5.1.3** **5.1.4** **5.1.6** **5.2.2** **5.2.3**	All surfaces are clean.		
	Walk-off mats **5.2.5**	Walk-off mats are appropriately placed and clean, with no moisture or grit underneath.		

	Restrooms, showers, kitchenettes **5.1.1**	All surfaces fixtures are clean. Metal surfaces polished. All product dispensers are functional and not damaged. Paper and soap products are stocked so that supplies do not run out before the next service. COR notified whenever graffiti cannot be removed. Restroom floors are clean but not waxed.		
	Trash Containers **5.1.1** **5.1.2** **5.1.3** **5.1.4** **5.1.5** **5.1.7** **5.2.3** **5.2.5** **5.3**	No trash containers, including sanitary-napkin receptacle, overflow. The area surrounding the container is clean. The container is clean. All trash that falls while removing collected trash is removed. Plastic trashcan liners are replaced as necessary. Trash containers are in original locations after emptied. Items near trash receptacles marked "TRASH" are removed. Trash is not transferred from cart to cart in Corridor space. All collected trash is placed a Government compacter located outside on the RDF loading dock. The area surrounding compacter is clean. Wheels are quiet.		

	Recycle Bins **5.1.3** **5.1.7** **5.2.5**	No recycle bin is full. The bin exterior and interior are clean. The area surrounding the bin is clean and clear of recyclables. Bins in need of repair or missing are reported to the COR within 24 hours. Recyclables are not disposed of as trash. All recyclables that fall during removal are retrieved and properly handled. The plastic recycle bin liner is replaced as necessary. The recycle bin is in its original location after emptied. Recyclables are not transferred from cart to cart in Corridor space. All collected recyclables are placed and contained in the nearest Government provided designated container located outside the building. The area surrounding each container is clean.		
	Trash/Recycle Carts **5.3**	Carts are clearly labeled. Carts are clean and in good repair. Cart wheels are quiet. No carts are parked in Corridors full or unattended. Carts are not loaded to obstruct vision of operator. Trash/Recyclables are not staged in Corridors. Wheels are quiet.		
	Loading Areas **5.1.5** **5.2.4**	Loading areas are kept clean.		
	Interior walk-off mats **5.1.3**	Mats are placed in original position. Mats are clean.		
	Windows **5.2.2**	Cleaning scheduled between 7:30 A.M. to 8:30 P.M., Monday through Friday, excluding Government holidays unless COR approval obtained. Cleaning schedule is coordinated with tenants. Interior and exterior window sides are clean.		

	Carpet surface **5.1.2** **5.1.3**	Carpet is clean per Original Equipment Manufacturer (OEM). Carpet is clean and free of excess moisture, after shampooing. There are no soap residues on any surfaces. "Caution – Wet Floor" signs posted while carpet is wet. Damaged carpet or un-removable stains are reported to the COR within twenty-four (24) hours.		
	Escalator steps **5.1.6**	Steps cleaned in accordance with Original Equipment Manufacturer (OEM) requirements.		
	Pavement/ Concrete Drive surfaces **5.2.5**	Surfaces are clean and power/pressure washed as necessary. K9 checkpoint clean and free of accumulated petroleum products. All debris is picked up and removed. No debris is put in the planting beds. No debris/trash is transported through the building from the outside en-route to the RDF.		
	Entrance surfaces **5.1.4** **5.2.3** **5.2.5**	During regular hours, entrances are clean. Metal doorknobs, push bars, kick plates, railings, and other metal surfaces are clean and polished. Wood surfaces are clean and polished. Surfaces are clear of snow/ice.		
	Smoker Ash Urns **5.2.6**	100 percent of all butts are removed. Cinders are dry and surface level.		
	Grease Traps **5.1.9**	Grease Traps are free of grease, liquids, and/or solid materials. All spills are properly managed. The trap area and spill areas are sanitized. Each trap is in proper working order at work completion. No overflows are caused by lack of cleaning.		

	Business Relationship	100 percent of the time, the Contractor cooperative, committed to customer satisfaction, and has a business-like concern for the interest of the customer.		
	Safety **7.7**	Emergency assistance numbers and instructions are conspicuously posted. An effective and active safety, first aid, hazardous material handling, blood-borne pathogen, and asbestos awareness training schedule is performed. Contractor employees are familiar with all building fire alarm messages. All accidents reported, OSHA supplemental form 101 submitted, and full cooperation given to the COR. All oil or hazardous substance spills are reported to the COR and or the Building Manager. All personnel use the proper Personal Protective Equipment for the task at hand. All PPE meets NIOSH, MSHA, and ANSI requirements. All PPE is maintained and clean. Employees, occupants, and visitors protected from injury using OSHA standards.		

	Plan **Report accuracy** **Cause of breech** **Corrective Action** **Trends** **Independent audit**	95 percent plan requirements were followed. 100 percent of all reports accurately reflect task performance Actual cause of performance problem correctly identified 95% of the time. Corrective actions implemented in a timely manner and satisfactory resolve performance problem Performance trends accurately identified and appropriately acted upon Inspection system independently audited to ensure validity of results.		

Part 6: Administrative Requirements

6.1 Clearances. The Contractor shall provide employees with a Top Secret Clearance for service in secured spaces.

6.2 Suitability Check. The Contractor shall provide NCIC cleared personnel.

6.3 Personnel. When contract work is in progress, the Contractor PM or alternate shall be available at all times during normal hours of operation to receive notices, reports, or requests from the COR or his authorized representative. All Contractor personnel shall have the ability to speak, read and understand English to successfully perform the task(s).

6.3.1 Project Manager. The PM shall have the ability to speak and understand English clearly.

6.3.3 Supervisors. All supervisors shall have the ability to speak and understand English clearly. At least one supervisor shall be present at the work site at all times when contract work is in progress and shall have the authority to act for the Contractor on a day-to-day basis and to sign inspection reports and all other correspondence on behalf of the Contractor.

6.4 Emergency Procedures.
Contractor shall coordinate with the PBMO to develop procedures for the Contractor's role in the event of an emergency evacuation of one or all buildings. Contractor shall ensure all employees

are organized, trained, and participate in building fire and civil defense drills. Contractor shall ensure that all employees report fire, hazardous conditions, maintenance deficiencies, graffiti, and evidence of pests.

6.5 Energy Conservation. Contractor shall fully support and participate in the energy-conservation program within the facilities. Ensure contractor personnel use lights or other energy-consuming equipment only in areas where and when work is actually being performed, and that lights are turned off, and equipment secured when not in use or needed. Fully support and participate in the recycling program within the Pentagon.

6.6 Contractor Employee Training. Contractor shall provide at contract start for COR acceptance with a comprehensive employee training plan that ensures all employees are aware of appropriate behavior while working on a Government facility. Suggested topics:

- Emergency Awareness
- Health and Safety
- Do not adjust mechanical equipment controls for heating, ventilation, and air-conditioning systems.
- Turn off water faucets and valves when not needed.
- Close windows and turn off lights and fans when not in use.
- Turn in found articles to the COR.
- Notify security personnel on duty when an unauthorized or suspicious person is seen on the premises.
- Report safety hazards immediately and maintenance deficiencies promptly.
- Report immediately conditions or circumstances that prevent the accomplishment of assigned work.
- First Aid
- Blood-borne Pathogen
- Asbestos-Awareness.
- Use, handling, and storage of hazardous materials according to the Hazard Communication Standard (29 CFR 1910.1200)
- First Responder Awareness training (29 CFR 1910.120 (q))

6.7 Meetings. The Contractor shall notify the COR at least three days in advance of all safety meetings. The Contractor shall review the effectiveness of the safety effort, resolve current health and safety problems, provide a forum for planning safe operations and activities, and update the accident prevention program.

6.8 Damage to Government Property. The Contractor shall immediately report any damage of Government Property to the COR. The Contractor shall be responsible for any damage caused by Contractor operations.

6.9 Quality Control (QC). The Contractor shall institute a complete QC Program to ensure that the requirements of this contract are fulfilled as specified. At minimum, the Contractor shall include the following elements in the program:

- A comprehensive inspection system of all the scheduled and unscheduled services required in this document.
- The name(s) and contact information of the designated QC Inspector(s) and their backups who will be performing the inspections.
- A proactive methodology to identify and correct problems before the COR and/or other PBMO personnel identify or are made aware of such problems.
- An organized, current file of all Contractor conducted inspections, corrective actions taken, and follow-up inspections.
- Government receipt of all QC reports same day generated.

6.10 Environmental Management. In order to comply with federally mandated environmental preference programs and Department of Defense (DOD) "Green Procurement Program" (GPP) policy, the Government requires the use of environmentally preferable products and services. These program elements include: recovered material products, energy and water efficient products, alternative fuels and fuel efficiency, bio-based products, non-ozone depleting substances, priority chemicals, and environmentally preferable products. These program elements are described on the Office of the Federal Environment Executive website (http://www.ofee.gov).

Products and Materials. Custodial cleaning products required in the performance of this SOW shall meet as a minimum, Green Seal Product Standards (http://www.greenseal.org/findaproduct/index.cfm). If it is determined that a product does not meet Government performance requirements, the contractor shall submit a proposed alternative that would meet the performance requirements with the lowest environmental impact for evaluation and acceptance. Products that fall under the Environmental Protection Agency (EPA) Comprehensive Procurement Guidelines (CPG) (http://www.epa.gov/cpg) shall meet the minimum recovered (recycled) content. Bio-based products shall be used upon issuance of the bio-based product listing from the United States Department of Agriculture (USDA) (http://www.usda.gov). The contractor shall purchase and use Energy Star or other energy efficient items listed on the Department of Energy's Federal Energy Management Program (FEMP) Product Energy Efficiency Recommendations product list. Supplements or amendments to listed publications from any organizational level may be issued during the life of the contract. Before implementing any change that will result in a change to the contract price, the contractor shall submit to the Contracting Officer a price proposal within 30 calendar days following receipt of the change. An equitable adjustment (increase or decrease) will be negotiated, if applicable, under the "Changes" clause of the contract.

7.0 Required Submittals and Reports.

7.1 Management and Environmental Stewardship Plan (MESP). Within 10 days after contract award the Contractor shall submit a MESP for approval by the CO. The Contractor shall make such revisions to the MESP as are deemed necessary by the CO. The MESP will be reviewed and updated annually, and as required by the Contracting Officer. The Contractor shall include in the MESP:

- Their written policy stating its commitment to environmental management, employee health and safety, and the use of environmentally preferable products.
- The establishment and facilitation of a Stewardship Task Force to be composed of Contractor and Government representatives to convene quarterly at minimum, to review all aspects of performance involving specific undertakings of this MESP
- A comprehensive list of materials, their associated label and MSDS, and the intended purpose of each material to be used on this contract. Once this materials list is approved by the CO, the Contractor shall only use materials from this list in the building. Any alternative material must be approved in writing by the CO.
- A plan of how it will keep abreast of the development and increasing availability of EPP and how EPP products will be incorporated into contract performance.
- A plan of how it will conform to the Comprehensive Procurement Guidelines (CPG) published by EPA with respect to recovered material products. The Contractor shall update its MESP to accommodate CPG revisions. The Contractor shall estimate the quantities of recycled-content and EPP that shall be purchased during the term of this Contract.
- Name of individual identified as Stewardship Coordinator who will serve as the point person for all environmental performance issues and participate in the Government's Stewardship Task Force Committee. ((ASTM Standard (Stewardship in the Cleaning of Commercial and Institutional Buildings))

7.2 Waste Minimization and Recycling Program (WMRP). The Contractor shall implement a WMRP designed to minimize the Contractor's on-site generation of non-recyclable waste generated during contract performance within 30 days of contract award. The Contractor shall use the recycling plan developed by the Government as a guide in defining their program. The Contractor shall also include in the WMRP enhancement of the separation of recyclable materials from non-recyclable waste generated by the building, detailing collection-point- and/or post-collection-point-separation of recyclable materials. The Contractor shall:

- Monitor the volume of waste managed and recyclables recovered
- Determine the rate(s) of participation in offices throughout the buildings
- Define activities to promote occupant participation and discourage contamination of recovered materials
- Ensure that the Contractor's personnel observe and promote the WMRP
- Establish procedures to recover and recycle the following materials; at a minimum: aluminum containers (e.g., beverage cans), containers of Polyethylene Terephthalate (PETE-1) or High Density Polyethylene (HDPE-2) plastic (e.g., drink bottles), clear, green and brown glass bottles and jars, white and mixed office paper, newspaper, cardboard, telephone and other books, toner/ink cartridges, and scrap metal, including steel containers.

7.3 Hazardous Material Storage. The Contractor shall define and submit a plan for hazardous material storage in conformance with good housekeeping practices, the National Fire Prevention Association (NFPA) Code, and applicable federal and municipal regulations.

7.4 Hazardous Waste Disposal. The Contractor's Plan shall define and submit proper hazardous waste identification and disposal procedures in accordance with federal Resource Conservation and Recovery Act (RCRA) regulations and the Virginia Department of Environmental Quality (VDEQ).

7.5 Communication Policies. The Contractor shall define and submit strategies to receive feedback from building occupants on operations and complaints, and to give self-help guidance to building occupants. The Contractor shall first have these strategies and communications approved by the Stewardship Task Force or the CO.

7.6 Inclement Weather. The Contractor shall submit contingency plans for inclement weather.

7.7 Health and Safety Plan. Within 10 days after contract award the Contractor shall submit a Health and Safety Plan for approval by the CO. The Contractor's Health and Safety Plan shall ensure a safe environment is provided for all Contractor personnel, building occupants, and visitors. The CO will review the proposed program for compliance with OSHA and contract requirements. The Contractor shall include:

- A schedule of safety meetings
- First-aid procedures
- An outline of each work phase, the hazards associated with each phase, and the methods proposed to ensure property protection, and public, building occupant, and Contractor employee safety.
- A comprehensive training schedule, both initial and continuing.
- An emergency situation plan for events such as such as employee strikes, floods, fires, explosions, power outages, spills, and wind storms. The Contractor shall take into consideration existing government emergency plans, the nature of activities, site conditions, and degree of exposure of persons and property.

7.8 Staffing Plan. Within 10 days after contract award the Contractor shall submit a staffing plan to the CO that identifies all personnel expected to be employed in the performance of this contract. Additionally the plan shall identify key personnel including the roles and responsibilities of the staff.

7.9 Cleaning Schedule. The Contractor shall detail and submit a schedule of all daily cleaning.

7.10 Trash/Recyclable Materials Removal Plan. The Contractor shall provide a plan for trash and recyclable materials removal. The Contractor shall include in this plan the schedule, transportation process, and the number of carts to be used for each type of waste.

7.11 Quality Control (QC) Plan. Within 10 days after contract award the Contractor shall submit a QC Plan for CO review and approval.

7.12 Daily Report. The Contractor shall personally submit daily QC reports to the COR within 24 hours of all work performed. The Contractor shall notify the COR of deficiencies and

problems such as, but not limited to plumbing, leaks, lighting replacement, elevator and escalator malfunctions, damaged, missing, or required recycling containers, sanitary dispensers, safety hazards, health hazards, fire hazards, non-removable stains and methods used to accomplish resolution immediately.

7.13 Monthly Report. The Contractor shall electronically submit a monthly report to the COR by the tenth (10th) calendar day of the following month detailing the performance of the Contractor. The Contractor shall include, but is not limited to the following information

- A general performance overview of the month
- Updates/progress reports of any pertinent schedules
- Accurate amounts of each cleaning product used
- Accurate amounts of all restroom supplies used
- A calendar of events, plans, meetings, and/or special situations for the next 60 days
- Special activities accomplished, e.g., safety training
- Volume of waste managed and recyclables recovered
- Condition of each grease trap, a list of discrepancies found during each performance period, and an accurate amount of waste removed from each trap.
- If applicable, proof of proper disposal of hazardous waste(s) manifest(s).
- Documentation (to include list of attendees) of any training required by law

7.14 Coordination With Other Custodial Contractors. The Contractor shall coordinate as required with the AbilityOne (NISH) Contractor performing custodial services in the Pentagon.

7.15 Ordering Additional Services. Using the unit prices in Section B, "Schedule of Prices", the Government may modify this contract to add additional custodial services such as additional carpet cleaning, additional support of special events or additional custodial services required in the event of an emergency. Additional custodial services may be required anywhere in the Pentagon. Additional services may be required on a short or long term basis.

Section E - Inspection and Acceptance

INSPECTION AND ACCEPTANCE TERMS

Supplies/services will be inspected/accepted at:

CLIN	INSPECT AT	INSPECT BY	ACCEPT AT	ACCEPT BY
0001	Destination	Government	Destination	Government
0002	Destination	Government	Destination	Government
0003	Destination	Government	Destination	Government
0004	Destination	Government	Destination	Government
0005	Destination	Government	Destination	Government

CLAUSES INCORPORATED BY REFERENCE

52.246-16	Responsibility For Supplies	APR 1984
252.246-7000	Material Inspection And Receiving Report	MAR 2003

CLAUSES INCORPORATED BY FULL TEXT

52.246-4 INSPECTION OF SERVICES--FIXED-PRICE (AUG 1996)

(a) Definitions. "Services," as used in this clause, includes services performed, workmanship, and material furnished or utilized in the performance of services.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the services under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires.

(c) The Government has the right to inspect and test all services called for by the contract, to the extent practicable at all times and places during the term of the contract. The Government shall perform inspections and tests in a manner that will not unduly delay the work.

(d) If the Government performs inspections or tests on the premises of the Contractor or a subcontractor, the Contractor shall furnish, and shall require subcontractors to furnish, at no increase in contract price, all reasonable facilities and assistance for the safe and convenient performance of these duties.

(e) If any of the services do not conform with contract requirements, the Government may require the Contractor to perform the services again in conformity with contract requirements, at no increase in contract amount. When the defects in services cannot be corrected by reperformance, the Government may (1) require the Contractor to take necessary action to ensure that future performance conforms to contract requirements and (2) reduce the contract price to reflect the reduced value of the services performed.

(f) If the Contractor fails to promptly perform the services again or to take the necessary action to ensure future performance in conformity with contract requirements, the Government may (1) by contract or otherwise, perform the services and charge to the Contractor any cost incurred by the Government that is directly related to the performance of such service or (2) terminate the contract for default.

(End of clause)

FAILURE TO PERFORM SERVICES

E-1 CONSEQUENCES OF CONTRACTOR'S FAILURE TO PERFORM SERVICES

The Contractor shall perform all of the contract requirements. The Contractor is responsible for maintaining an effective Quality Control Program during the course of the contract. Failure to maintain adequate quality control may result in Termination for Default. The Government may apply one or more surveillance methods to determine Contractor compliance and may deduct an amount from the Contractor's invoice or otherwise withhold payment for unsatisfactory or nonperformed work. Surveillance methods include, but are not limited to, 100% inspection, random sampling, planned sampling, incidental inspections and validated customer complaints. The Government reserves the right to change surveillance methods at any time during the contract without notice to the Contractor. In the case of unsatisfactory or nonperformed work, the Government:

i. may give the Contractor written notice of observed deficiencies prior to deducting for unsatisfactory or nonperformed work and/or assessing other damages. Such written notice shall not be a prerequisite for withholding payment for nonperformed work.
ii. may, at its option, allow the Contractor an opportunity to reperform the unsatisfactory or nonperformed work, at no additional cost to the Government. In the case of daily work, corrective action must be completed within 30 minutes following notice to the Contractor by the Government. In the case of other work, corrective action must be completed within twenty-four hours of notice. Reperformance by the Contractor does not waive the Government's right to terminate for nonperformance in accordance with FAR clause 52.249-8, "Default (Fixed-Price Supply and Service)" of Section I and all other remedies for default as may be provided by law.
iii. Shall deduct from the Contractor's monthly invoice all amounts associated with the unsatisfactory or nonperformed work at the prices set out in the Schedule and any accompanying exhibits or provided by other provisions of this contract, unless the Contractor is required to

reperform and satisfactorily completes the work. In addition to deducting for unsatisfactory or nonperformed work the Government will total the square footage of all interior space where service has been unsatisfactory or service has not been performed, compare it to the Assignable Square Footage (Attachment J-C1) and deduct, as liquidated damages, an additional 5% of the Contractor's monthly invoice amount if the total square footage of unsatisfactory or nonperformed work exceeds 5% of the Assignable Square Footage.

iv. may, at its option, perform the work by Government personnel or by other means. The Government will reduce the amount of payment to the Contractor, by the amount paid to any Government personnel (based on wages, retirement and fringe benefits) plus material, or by the actual costs incurred to accomplish the work by other means. If the actual costs cannot be readily determined, the prices set out in the Schedule and any accompanying exhibits will be used as the basis for the deduction.

Section F - Deliveries or Performance

DELIVERY INFORMATION

CLIN	DELIVERY DATE	QUANTITY	SHIP TO ADDRESS	UIC
0001	POP 01-SEP 14 TO 30-AUG-2015	N/A	FEDERAL FACILITIES DIVISION DAVID BROWN REMOTE DELIVERY FACILITY 100 WASHINTON BLVD. ARLINGTON VA 22201 703-697-7351 FOB: Destination	HQ0015
0002	POP 01-SEP 15 TO 30-AUG-2016	N/A	(SAME AS PREVIOUS LOCATION) FOB: Destination	HQ0015
0003	POP 01-SEP 16 TO 30-AUG-2017	N/A	(SAME AS PREVIOUS LOCATION) FOB: Destination	HQ0015
0004	POP 01-SEP 17 TO 30-AUG-2018	N/A	(SAME AS PREVIOUS LOCATION) FOB: Destination	HQ0015
0005	POP 01-SEP 18 TO 30-AUG-2019	N/A	(SAME AS PREVIOUS LOCATION) FOB: Destination	HQ0015

CLAUSES INCORPORATED BY REFERENCE

52.242-15	Stop-Work Order	AUG 1989
52.242-17	Government Delay Of Work	APR 1984

Section G - Contract Administration Data

CLAUSES INCORPORATED BY FULL TEXT

252.201-7000 CONTRACTING OFFICER'S REPRESENTATIVE (DEC 1991)

(a) "Definition. Contracting officer's representative" means an individual designated in accordance with subsection 201.602-2 of the Defense Federal Acquisition Regulation Supplement and authorized in writing by the contracting officer to perform specific technical or administrative functions.

(b) If the Contracting Officer designates a contracting officer's representative (COR), the Contractor will receive a copy of the written designation. It will specify the extent of the COR's authority to act on behalf of the contracting officer. The COR is not authorized to make any commitments or changes that will affect price, quality, quantity, delivery, or any other term or condition of the contract.

(End of clause)

CONTRACTING OFFICER’S REPRESENTATIVE (COR)

The COR is a representative for the Government with limited authority who has been designated in writing by the Contracting Officer to provide technical direction, clarification, and guidance with respect to existing specifications and statement of work (SOW)/statement of objectives (SOO) as established in the contract. The COR also monitors the progress and quality of the Contractor’s performance for payment purposes. The COR shall promptly report Contractor performance discrepancies and suggested corrective actions to the Contracting Officer for resolution.

The COR is NOT authorized to take any direct or indirect actions or make any commitments that will result in changes to price, quantity, quality, schedule, place of performance, delivery or any other terms or conditions of the written contract.

The Contractor is responsible for promptly providing written notification to the Contracting Officer if it believes the COR has requested or directed any change to the existing contract (or task/delivery order). No action shall be taken by the Contractor for any proposed change to the contract until the Contracting Officer has issued a written directive or written modification to the contract (or task/delivery order). The Government will not accept and is not liable for any alleged change to the contract unless the change is included in a written contract modification or directive signed by the Contracting Officer.

If the Contracting Officer has designated an Alternate COR (ACOR), the ACOR may act only in the absence of the COR (due to such reasons as leave, official travel, or other reasons for which the COR is expected to be gone and not readily accessible for the day).

COR authority IS NOT delegable.

INVOICING INSTRUCTIONS (WHS, A&PO Mar 2007)

In compliance with DFARS 252.232-7003, "Electronic Submission of Payment Request (March 2003)", Washington Headquarters Services, Acquisition & Procurement Office (WHS, A&PO) utilizes WAWF-RA to electronically process vendor request for payment. The web based system is located at https://wawf.eb.mil, which provides the technology for government contractors and authorized Department of Defense (DOD) personnel to generate, capture and process receipt and payment-related documentation in a paperless environment. The contractor is required to utilize this system when submitting invoices and receiving reports under this contract. Submission of hard copy DD250/Invoice/Public Vouchers (SF1034) will no longer be accepted for payment.

The contractor shall (i) ensure an Electronic Business Point of Contract is designated in Central Contractor Registration at http://www.ccr.gov/ and (ii) register to use WAWF-RA at https://wawf.eb.mil
within ten (10) days after award of the contract or modification incorporating WAWF-RA into the contract. The designated CCR EB point of contact is responsible for activating the company's CAGE code on WAWF by calling 1-866-618-5988. Once the company CCR EB is activated, the CCR EB will self-register on the WAWF and follow the instructions for a group administrator. Step by step instructions to register are available at http://wawf.eb.mil.

The contractor is directed to select either "Invoice as 2-in-1" for services only or "Invoice and Receiving Report (Combo)" for supplies or any combination of goods and services. Both types of invoices fulfill the requirement for submission of the Material Inspection and Receiving Report, DD Form 250.

Back up documentation may be attached to the invoice in WAWF under the "Misc Info" tab. Fill in all applicable information under each tab.

The following required information should automatically pre-populate in WAWF; if it does not populate, or does not populate correctly, enter the following information:

"Issue by DoDAAC" field enter **HQ0034**

"Admin DoDAAC" field enter **HQ0034**

"Payment DoDAAC" field enter **To Be Determined**

"Service Acceptor/Extension" or "Ship to/ Extension" field enter **HQ0015**

"Inspect By DoDAAC/ EXT" fields **Leave Blank**

"LPO DoDAAC/ EXT" fields **Leave Blank**

Contractor shall verify that the DoDAACs automatically populated by the WAWF-RA system match the above information. If these DoDAACs do not match then the contractor shall correct the field(s) and notify the contracting officer of the discrepancy (ies).

Take special care when entering Line Item information . The Line Item tab is where you will detail your request for payment and material/services that were provided based upon the contract. Be sure to fill in the following items exactly as they appear in the contract:

- Item Number: If the contract schedule has more than one ACRN listed as sub items under the applicable Contract Line Item Number (CLIN), use the 6 character, separately identified Sub Line Item Number (SLIN) (e.g. – 0001AA) or Informational SLIN (e.g. – 000101), otherwise use the 4 character CLIN (e.g. – 0001).
- ACRN: Fill-in the applicable 2 alpha character ACRN that is associated with the CLIN or SLIN.

Note – DO NOT INVOICE FOR MORE THAN IS STILL AVAILABLE UNDER ANY CLIN/SLIN/ ACRN.

- Unit Price
- Unit of Measure

Shipment numbers must be formatted as follows:

Three (3) alpha characters followed by four (4) numeric characters.

For Services, enter 'SER' followed by the last 4 digits of the invoice number.

For Construction, enter 'CON' followed by the last 4 digits of the invoice number.

For Supplies, enter 'SUP' followed by the last 4 digits of the invoice number.

If the invoice number is less than 4 digits, enter leading zeros.

Before closing out of an invoice session in WAWF-RA but after submitting your document or documents, the contractor will be prompted to send additional email notifications. Contractor shall click on "Send More Email Notification" on the page that appears. Add the following email address joe.snuffy.mil@mail.milin the first email address block and add any other additional email addresses desired in the following blocks. This additional notification to the government is important to ensure that all appropriate persons are aware that the invoice documents have been submitted into the WAWF-RA system.

If you have any questions regarding WAWF, please contact the WAWF Help Desk at 1-866-618-5988.

Section G - Contract Administration

G-1 DESIGNATION OF PRINCIPAL CONTRACTING OFFICER

The Principal Contracting Officer for this contract is:

Supervisory Contracting Officer,
Facilities Support Services Team
WHS Acquistion and Procurement Office
1777 North Kent St.
Arilington, VA 22209

Section H - Special Contract Requirements

CLAUSES INCORPORATED BY REFERENCE

252.247-7006 Removal of Contractor's Employees DEC 1991

SPECIAL CONTRACT REQUIREMENTS

H-1 SECURITY REQUIREMENTS

a. Security Classification Guidance

All Security Classification Guidance is provided on DD Form 254, Department of Defense Contract Security Classification Specification (hereafter referred to as the DD 254) at Attachment J-C2. Any changes or additional security classification guidance shall be provided to the Contractor in writing, through updates and modifications to the DD 254. At no time will the Government issue classification guidance in any other form (verbal, e-mail, etc.).

b. Facility Security Clearance (FCL)

Performance of this contract requires a TOP SECRET facility clearance. The Contractor's Facility Security Officer (FSO) shall report, in writing, to the Contracting Officer any changes in the Contractor's security status throughout the contract period of performance.

c. Personnel Security Clearance (PCL)

Contractor employees assigned to this project require a PCL at the level (Confidential, Secret or Top Secret) identified in block 1.a of the DD Form 254. Prior to assignment of Contractor employees to this project, the Contractor's FSO shall submit PCL validation through use of a Visit Authorization Request (VAR) for each employee, in accordance with DoD 5220.22-M, National Industrial Security Program Operating Manual (NISPOM) to the designated security representative.

Changes in PCL status of Contractor employees shall be forwarded in writing to the Contracting Officer and the designated security representative.

d. Sub-Contractors

Subcontractors shall comply with the same security requirements as the Contractor. The Contractor shall issue DD 254s to each subcontractor reflecting the same security requirements applicable to the prime contract. The contractor shall also sponsor subcontractor(s) for an FCL and associated PCL(s) required in accordance with the DD 254.

H-2 DoD BUILDING PASS ISSUANCE

a. All personnel employed by a civilian commercial firm to perform work whose activity at any time requires passage into Government-occupied portions of the Pentagon or any other DoD facility on or off the Pentagon Reservation, shall be required to obtain a Temporary Department of Defense (DoD) Building Pass/Access Card.

b. The Contractor shall be responsible for having each employee requiring a Temporary DoD Building Pass/Access Card prepare the necessary applications, advising personnel of their obligations, filing the applications with the Contracting Officer, maintaining personnel files and re-filing applications for personnel in the event that clearances must later be extended. Personnel requiring a Temporary DOD Building Pass/Access Card must be either a citizen of the United States of America (USA) or a foreign national authorized to work in the USA under federal immigration and naturalization laws.

c. The Government will issue DoD building passes to eligible persons upon the completion of a National Criminal Information Check (NCIC) or National Agency Check (NAC). This is a search of the nationwide computerized information system established as a service to all criminal justice agencies. Processing of completed applications for initial pass issuance or renewal of existing passes will require three to five working days.

H-3 LOCAL INSURANCE

a. In accordance with the contract clause entitled "Insurance—Work on a Government Installation", FAR 52.228-5, the Contractor shall procure and maintain during the entire period of its performance under this contract, as a minimum, the following insurance:

Type	**Amount**
Comprehensive General Liability:	
Bodily Injury or Death	$500,000 per occurrence
Motor Vehicle Liability (for each vehicle):	
Bodily Injury or Death	$200,000 per person
	$500,000 per occurrence
Property Damage	$20,000 per occurrence
Workers' Compensation & Employer's Liability	$100,000 per person *

*Worker's Compensation and Employer's Liability: Contractors are required to comply with applicable Federal and State workers' compensation and occupational disease statutes. If occupational diseases are not compensable under those statutes, they shall be covered under the employer's liability section of the insurance policy, except when contract operations are so co-mingled with a contractor's commercial operations that it would not be practical to require this coverage. Employer's liability coverage of at least $100,000 shall be required, except in States with exclusive or monopolistic funds that do not permit workers' compensation to be written by private carriers.

b. Prior to the commencement of work hereunder, the Contractor shall furnish to the Contracting Officer a certificate of written statement of the above required insurance. The policies evidencing required insurance shall contain an endorsement to the effect that cancellation, or any material change in policies adversely affecting the interests of the Government in such insurance, shall not be effective for such period as may be prescribed by the laws of the State in which this contract is to be performed and in no event less than thirty (30) days after written notice thereof to the Contracting Officer.

c. The Contractor agrees to insert the substance of this clause, including this paragraph, in all subcontracts hereunder.

H-4 COMPLIANCE WITH PENTAGON REGULATIONS

The site of the work is on a Federal Reservation Complex and the Contractor shall observe rules and regulations issued by the Director, Washington Headquarters Service (WHS) covering general safety, security, sanitary requirements, pollution and noise control, traffic regulations and parking. Information regarding requirements may be obtained by contacting the Contracting Officer, who will provide such information or assist in obtaining it from the appropriate authorities.

H-5 UTILITY SERVICES

a. Utility Services furnished to the Contractor by the Government from the Government's existing system outlets and/or supplies will be at no cost to the contractor. (See FAR Clause 52-236-14, Availability and Use of Utility Services.)

b. The Contractor shall make his/her own arrangements for services and coordinate with the Inspector any requirements that would cause a disruption in the electrical or water supply. NOTE: all disruption of services concerning electrical or water supply must be coordinated with the inspector and scheduled by the inspector prior to disconnection.

H-6 IDENTIFICATION OF EMPLOYEES

All Contractor and subcontractor personnel attending meetings, answering Government telephones, and working in other situations where their contractor status is not obvious to third parties are required to identify themselves as such to avoid creating an impression that they are Government officials. All documents or reports produced by the Contractor shall be marked as contractor products or otherwise indicate that contractor participation is disclosed.

H-7 SUBSTITUTION OF KEY PERSONNEL

a. A requirement of this contract is to maintain stability of personnel proposed in order to provide quality services. The contractor agrees to assign only those key personnel whose resumes were submitted and approved and who are necessary to fulfill the requirements of the contract. No

changes in key personnel, including but not limited to the substitution or addition of key personnel, shall be made except in accordance with this clause.

b. If key personnel become unavailable for work under the contract for whatever reason for a continuous period exceeding thirty (30) working days, or are expected to devote substantially less effort to the work than indicated in the proposal, the contractor shall propose a substitution for such personnel in accordance with paragraph (d) below.

c. The contractor agrees that changes in key personnel will not be made unless necessitated by compelling reasons. Compelling reasons include, but are not limited to, serious illness, death, termination of employment, declination of an offer of employment (for those individuals proposed as contingent hires), and family friendly / maternity leave. When the contractor determines that compelling reason to change key personnel exists, the contractor shall submit a request in accordance with subparagraph (d) below to the Contracting Officer and obtain Contracting Officer approval prior to changing key personnel.

d. All proposals to change or add key personnel shall be submitted, in writing, to the Contracting Officer not less than fifteen (15) days prior to the date of the proposed substitution/addition. In those situations where a security clearance is required, the request must be submitted not less than thirty (30) days prior to the date of the proposed substitution/addition. Each proposal or request shall provide a detailed explanation of the circumstances necessitating the proposed change, the resume of the individual proposed for substitution or addition, information regarding the financial impact of the change, and any other relevant information. All proposed substitutes (no matter when they are proposed during the performance period) shall have qualifications that are equal to or higher than the qualifications of the person being replaced.

e. The Contracting Officer shall evaluate requests to change or add key personnel and will approve/disapprove the request in writing and so notify the contractor.

f. If the Contracting Officer determines that the suitable and timely replacement of personnel who have been reassigned, terminated, or have otherwise become unavailable to perform under the contract is not reasonably forthcoming, or that the resultant reduction of productive effort would impair the successful completion of the contract, the contract may be terminated for default or for the convenience of the Government, as appropriate. Alternatively, at the Contracting Officer's discretion, if the Contracting Officer finds the Contractor to be at fault for the condition, the Contracting Officer may adjust the contract price or fixed fee downward to compensate the Government for any delay, loss, or damage as a result of the Contractor's action.

g. Noncompliance with the provisions of this clause will be considered a material breach of the terms and conditions of this contract for which the Government may seek any and all appropriate remedies including Termination for Default pursuant to FAR Clause 52.249-8, "Default (Fixed-Price Supply and Service)."

H-8 WORK STOPPAGES FOR OFFICIAL CEREMONIES

The Contractor shall provide for work stoppages as required for official ceremonies in the facility. A schedule of known ceremonies can be obtained from the Contracting Officer. The Contractor shall provide for a total of 4 days of work stoppages due to this requirement

H-9 DELIVERIES

a. All deliveries shall be processed through the Pentagon Remote Delivery Facility (RDF) site. The following information must be submitted to the COR or designated security representative 24 hours prior to scheduled delivery

(1) Name of driver & passenger (if any)
(2) Name of company
(3) State of vehicle registration and license number
(4) Contents of delivery

b. Security personnel staff the RDF from 4:30 AM until 5:30 PM (M-F) and 6:30 AM until 1:30 PM (Sat only). Arrangements can be made for deliveries outside of the hours by coordinating with the COR.

H-10 WORK BY OTHER CONTRACTORS

The Government has awarded and will award other contracts for similar and specialized work, which is outside the scope of this contract or outside the scope of the awarded options. These contracts will involve additional work at or near the site of the work under this contract. The contractor shall fully coordinate its work with the work of other Government contractors (hereafter called OGCs) and with the Contracting Officer. The Contractor shall carefully adapt its schedule and performance of the work under this contract to accommodate the work of the OGCs, and shall take coordination direction from the Contracting Officer. The OGCs will be placed under similar contracting conditions regarding coordination. The Contractor shall make every reasonable effort to avoid interference with the performance of work by the OGCs, as scheduled by the OGCs or by the Government.

Section I - Contract Clauses

CLAUSES INCORPORATED BY REFERENCE

52.202-1	Definitions	JUL 2004
52.203-3	Gratuities	APR 1984
52.203-5	Covenant Against Contingent Fees	APR 1984
52.203-6	Restrictions On Subcontractor Sales To The Government	SEP 2006
52.203-7	Anti-Kickback Procedures	JUL 1995
52.203-8	Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity	JAN 1997
52.203-10	Price Or Fee Adjustment For Illegal Or Improper Activity	JAN 1997
52.203-12	Limitation On Payments To Influence Certain Federal Transactions	SEP 2005
52.204-4	Printed or Copied Double-Sided on Recycled Paper	AUG 2000
52.204-7	Central Contractor Registration	JUL 2006
52.204-9	Personal Identity Verification of Contractor Personnel	NOV 2006
52.209-6	Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, or Proposed for Debarment	SEP 2006
52.211-5	Material Requirements	AUG 2000
52.215-2	Audit and Records--Negotiation	JUN 1999
52.215-8	Order of Precedence--Uniform Contract Format	OCT 1997
52.215-19	Notification of Ownership Changes	OCT 1997
52.219-6	Notice Of Total Small Business Set-Aside	JUN 2003
52.219-8	Utilization of Small Business Concerns	MAY 2004
52.219-9	Small Business Subcontracting Plan	SEP 2007
52.222-3	Convict Labor	JUN 2003
52.222-4	Contract Work Hours and Safety Standards Act - Overtime Compensation	JUL 2005
52.222-21	Prohibition Of Segregated Facilities	FEB 1999
52.222-26	Equal Opportunity	MAR 2007
52.222-35	Equal Opportunity For Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans	SEP 2006
52.222-36	Affirmative Action For Workers With Disabilities	JUN 1998
52.222-37	Employment Reports On Special Disabled Veterans, Veterans Of The Vietnam Era, and Other Eligible Veterans	SEP 2006
52.222-39	Notification of Employee Rights Concerning Payment of Union Dues or Fees	DEC 2004
52.222-41	Service Contract Act Of 1965, As Amended	JUL 2005

52.222-43	Fair Labor Standards Act And Service Contract Act - Price Adjustment (Multiple Year And Option)	NOV 2006
52.223-5	Pollution Prevention and Right-to-Know Information	AUG 2003
52.223-6	Drug-Free Workplace	MAY 2001
52.223-10	Waste Reduction Program	AUG 2000
52.223-13	Certification of Toxic Chemical Release Reporting	AUG 2003
52.223-14	Toxic Chemical Release Reporting	AUG 2003
52.225-13	Restrictions on Certain Foreign Purchases	FEB 2006
52.226-1	Utilization Of Indian Organizations And Indian-Owned Economic Enterprises	JUN 2000
52.227-1	Authorization and Consent	JUL 1995
52.228-5	Insurance - Work On A Government Installation	JAN 1997
52.229-3	Federal, State And Local Taxes	APR 2003
52.232-1	Payments	APR 1984
52.232-8	Discounts For Prompt Payment	FEB 2002
52.232-9	Limitation On Withholding Of Payments	APR 1984
52.232-11	Extras	APR 1984
52.232-17	Interest	JUN 1996
52.232-18	Availability Of Funds	APR 1984
52.232-23	Assignment Of Claims	JAN 1986
52.232-25	Prompt Payment	OCT 2003
52.232-33	Payment by Electronic Funds Transfer--Central Contractor Registration	OCT 2003
52.232-35	Designation of Office for Government Receipt of Electronic Funds Transfer Information	MAY 1999
52.233-1	Disputes	JUL 2002
52.233-3	Protest After Award	AUG 1996
52.233-4	Applicable Law for Breach of Contract Claim	OCT 2004
52.237-2	Protection Of Government Buildings, Equipment, And Vegetation	APR 1984
52.237-3	Continuity Of Services	JAN 1991
52.242-13	Bankruptcy	JUL 1995
52.243-1	Changes--Fixed Price	AUG 1987
52.243-1 Alt II	Changes--Fixed-Price (Aug 1987) - Alternate II	APR 1984
52.244-5	Competition In Subcontracting	DEC 1996
52.244-6	Subcontracts for Commercial Items	MAR 2007
52.246-25	Limitation Of Liability--Services	FEB 1997
52.248-1	Value Engineering	FEB 2000
52.249-2 Alt II	Termination For Convenience Of The Government (Fixed Price) (May 2004) - Alternate II	SEP 1996
52.249-8	Default (Fixed-Price Supply & Service)	APR 1984
52.253-1	Computer Generated Forms	JAN 1991

252.204-7000	Disclosure Of Information	DEC 1991
252.204-7003	Control Of Government Personnel Work Product	APR 1992
252.204-7004 Alt A	Central Contractor Registration (52.204-7) Alternate A	NOV 2003
252.205-7000	Provision Of Information To Cooperative Agreement Holders	DEC 1991
252.209-7001	Disclosure of Ownership or Control by the Government of a Terrorist Country	OCT 2006
252.209-7002	Disclosure Of Ownership Or Control By A Foreign Government	JUN 2005
252.209-7004	Subcontracting With Firms That Are Owned or Controlled By The Government of a Terrorist Country	DEC 2006
252.215-7000	Pricing Adjustments	DEC 1991
252.219-7003	Small Business Subcontracting Plan (DOD Contracts)	APR 2007
252.223-7006	Prohibition On Storage And Disposal Of Toxic And Hazardous Materials	APR 1993
252.225-7002	Qualifying Country Sources As Subcontractors	APR 2003
252.225-7012	Preference For Certain Domestic Commodities	JAN 2007
252.225-7031	Secondary Arab Boycott Of Israel	JUN 2005
252.226-7001	Utilization of Indian Organizations and Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns	SEP 2004
252.232-7003	Electronic Submission of Payment Requests	MAR 2007
252.232-7010	Levies on Contract Payments	DEC 2006
252.241-7001	Government Access	DEC 1991
252.243-7001	Pricing Of Contract Modifications	DEC 1991
252.243-7002	Requests for Equitable Adjustment	MAR 1998
252.244-7000	Subcontracts for Commercial Items and Commercial Components (DoD Contracts)	JAN 2007
252.247-7023	Transportation of Supplies by Sea	MAY 2002

CLAUSES INCORPORATED BY FULL TEXT

52.217-8 OPTION TO EXTEND SERVICES (NOV 1999)
The Government may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months. The Contracting Officer may exercise the option by written notice to the Contractor within the current Period of Performance.

(End of Clause)

52.217-9 OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 2000)

(a) The Government may extend the term of this contract by written notice to the Contractor within the current Period of Performance; provided that the Government gives the Contractor a preliminary written notice of its intent to extend before the contract expires. The preliminary notice does not commit the Government to an extension.

(b) If the Government exercises this option, the extended contract shall be considered to include this option clause.

(c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed 60 months (not including any extension authorized under FAR clause 52.217-8).

(End of Clause)

52.245-2 GOVERNMENT PROPERTY INSTALLATION OPERATION SERVICES (JUNE 2007)

(a) This Government Property listed in paragraph (e) of this clause is furnished to the Contractor in an ``as-is, where is" condition. The Government makes no warranty regarding the suitability for use of the Government property specified in this contract. The Contractor shall be afforded the opportunity to inspect the Government property as specified in the solicitation.

(b) The Government bears no responsibility for repair or replacement of any lost, damaged or destroyed Government property. If any or all of the Government property is lost, damaged or destroyed or becomes no longer usable, the Contractor shall be responsible for replacement of the property at Contractor expense. The Contractor shall have title to all replacement property and shall continue to be responsible for contract performance.

(c) Unless the Contracting Officer determines otherwise, the Government abandons all rights and title to unserviceable and scrap property resulting from contract performance. Upon notification to the Contracting Officer, the Contractor shall remove such property from the Government premises and dispose of it at Contractor expense.

(d) Except as provided in this clause, Government property furnished under this contract shall be governed by the Government Property clause of this contract.

(e) Government property provided under this clause:

Performance Work Statement C-1 Section 3.
(End of clause)

52.252-2 CLAUSES INCORPORATED BY REFERENCE (FEB 1998)

This contract incorporates one or more clauses by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available. Also, the full text of a clause may be accessed electronically at this/these address(es): http://acquisition.gov/far/index.html - or - http://farsite.hill.af.mil/VFDFARA.HTM

(End of clause)

52.252-6 AUTHORIZED DEVIATIONS IN CLAUSES (APR 1984)

(a) The use in this solicitation or contract of any Federal Acquisition Regulation (48 CFR Chapter 1) clause with an authorized deviation is indicated by the addition of "(DEVIATION)" after the date of the clause.

(b) The use in this solicitation or contract of any other (48 CFR) clause with an authorized deviation is indicated by the addition of "(DEVIATION)" after the name of the regulation.

(End of clause)

252.204-7001 COMMERCIAL AND GOVERNMENT ENTITY (CAGE) CODE REPORTING (AUG 1999)

(a) The offeror is requested to enter its CAGE code on its offer in the block with its name and address. The CAGE code entered must be for that name and address. Enter “CAGE” before the number.

(b) If the offeror does not have a CAGE code, it may ask the Contracting Officer to request one from the Defense Logistics Information Service (DLIS). The Contracting Officer will--

(1) Ask the Contractor to complete section B of a DD Form 2051, Request for Assignment of a Commercial and Government Entity (CAGE) Code;

(2) Complete section A and forward the form to DLIS; and

(3) Notify the Contractor of its assigned CAGE code.

(c) Do not delay submission of the offer pending receipt of a CAGE code.

(End of provision)

Section J - List of Documents, Exhibits and Other Attachments

J-B1 - J-B5 ATTACHMENTS

Attachment J-B1 - Schedule of Prices/Deductions

Base Performance Period

Area	Estimated Quantity	Unit	Unit Price	Total
Pentagon				
Restrooms	51,192	sq ft		
Corridors	83,517	sq ft		
Stairwells	11,164	sq ft		
Escalators	1,547	sq ft		
Elevators	4,439	sq ft		
Metro Entrance 1st Floor	20,926	sq ft		
Senior Executive Offices	36,188	sq ft		
Executive Offices	36,959	sq ft		
General Offices	506,059	sq ft		
Conference Rooms/Class Rooms/Training Rooms	17,972	sq ft		
Laboratories	736	sq ft		
Structurally Changed Spaces	7,112	sq ft		
Communication Rooms	34,338	sq ft		
Butler Building	22,621	sq ft		
Total Interior	834,770	sq ft		
Exterior Grounds	6,098,400	sq ft		
Window Cleaning	1,240	ea		
*Total	7,767,940	sq ft		
*The contractor's total price must match the total price for the CLINS in Section B.				
Unit Price for Additional Carpet Cleaning	1	sq yd		

Attachment J-B2 - Schedule of Prices/Deductions

Option Period One Performance Period

Area	Estimated Quantity	Unit	Unit Price	Total
Pentagon				
Restrooms	51,192	sq ft		
Corridors	83,517	sq ft		
Stairwells	11,164	sq ft		
Escalators	1,547	sq ft		
Elevators	4,439	sq ft		
Metro Entrance 1st Floor	20,926	sq ft		
Senior Executive Offices	36,188	sq ft		
Executive Offices	36,959	sq ft		

General Offices	506,059	sq ft		
Conference Rooms/Class Rooms/Training Rooms	17,972	sq ft		
Laboratories	736	sq ft		
Structurally Changed Spaces	7,112	sq ft		
Communication Rooms	34,338	sq ft		
Butler Building	22,621	sq ft		
Total Interior	834,770	sq ft		
Exterior Grounds	6,098,400	sq ft		
Window Cleaning	1,240	ea		
*Total	7,767,940	sq ft		
*The contractor's total price must match the total price for the CLINS in Section B.				
Unit Price for Additional Carpet Cleaning	1	sq yd		

Attachment J-B3 - Schedule of Prices/Deductions
Option Period Two Performance Period

Area	Estimated Quantity	Unit	Unit Price	Total
Pentagon				
Restrooms	51,192	sq ft		
Corridors	83,517	sq ft		
Stairwells	11,164	sq ft		
Escalators	1,547	sq ft		
Elevators	4,439	sq ft		
Metro Entrance 1st Floor	20,926	sq ft		
Senior Executive Offices	36,188	sq ft		
Executive Offices	36,959	sq ft		
General Offices	506,059	sq ft		
Conference Rooms/Class Rooms/Training Rooms	17,972	sq ft		
Laboratories	736	sq ft		
Structurally Changed Spaces	7,112	sq ft		
Communication Rooms	34,338	sq ft		
Butler Building	22,621	sq ft		
Total Interior	834,770	sq ft		
Exterior Grounds	6,098,400	sq ft		
Window Cleaning	1,240	ea		
*Total	7,767,940	sq ft		
*The contractor's total price must match the total price for the CLINS in Section B.				
Unit Price for Additional Carpet Cleaning	1	sq yd		

Attachment J-B4 - Schedule of Prices/Deductions

Option Period Three Performance Period

Area	Estimated Quantity	Unit	Unit Price	Total
Pentagon				
Restrooms	51,192	sq ft		
Corridors	83,517	sq ft		
Stairwells	11,164	sq ft		
Escalators	1,547	sq ft		
Elevators	4,439	sq ft		
Metro Entrance 1st Floor	20,926	sq ft		
Senior Executive Offices	36,188	sq ft		
Executive Offices	36,959	sq ft		
General Offices	506,059	sq ft		
Conference Rooms/Class Rooms/Training Rooms	17,972	sq ft		
Laboratories	736	sq ft		
Structurally Changed Spaces	7,112	sq ft		
Communication Rooms	34,338	sq ft		
Butler Building	22,621	sq ft		
Total Interior	834,770	sq ft		
Exterior Grounds	6,098,400	sq ft		
Window Cleaning	1,240	ea		
*Total	7,767,940	sq ft		
*The contractor's total price must match the total price for the CLINS in Section B.				
Unit Price for Additional Carpet Cleaning	1	sq yd		

Attachment J-B5 - Schedule of Prices/Deductions
Option Period Four Performance Period

Area	Estimated Quantity	Unit	Unit Price	Total
Pentagon				
Restrooms	51,192	sq ft		
Corridors	83,517	sq ft		
Stairwells	11,164	sq ft		
Escalators	1,547	sq ft		
Elevators	4,439	sq ft		
Metro Entrance 1st Floor	20,926	sq ft		
Senior Executive Offices	36,188	sq ft		
Executive Offices	36,959	sq ft		
General Offices	506,059	sq ft		
Conference Rooms/Class Rooms/Training Rooms	17,972	sq ft		
Laboratories	736	sq ft		

Structurally Changed Spaces	7,112	sq ft		
Communication Rooms	34,338	sq ft		
Butler Building	22,621	sq ft		
Total Interior	834,770	sq ft		
Exterior Grounds	6,098,400	sq ft		
Window Cleaning	1,240	ea		
*Total	7,767,940	sq ft		
*The contractor's total price must match the total price for the CLINS in Section B.				
Unit Price for Additional Carpet Cleaning	1	sq yd		

NOTICE OF WAGE DETERMINATION

Any contract awarded as a result of this solicitation will be subject to Wage Determination CBA-2014-0091.

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ATTACHMENT 3: J-C1

ESTIMATED BUILDING AREA MEASUREMENTS*

Internal Assignable Square Footage on 04/01/14 (2nd Floor)	**931,881**
External Square Footage	**5,100,000**
Pentagon Estimated Square Footages (2nd Floor)	
Restrooms	51,192
Corridors	83,517
Stairwells	11,164
Escalators	1,547
Elevators	4,439
Metro Entrance 1st Floor	20,926
Senior Executive Offices	36,188
Executive Offices	36,959
General Offices	506,059
Conference Rooms/Class Rooms/ Training Rooms	17,972
Laboratories	736
Structurally Changed Spaces	7,112
Communications	34,338
Estimated Carpeted Area	
Pentagon (2nd Floor)	639,364 (71,040 SY)
Floor Mats	5,000 (556 SY)
Estimated Window Count	
Interior Window Sides	540
Exterior Window Sides	6,925
Additional Glass SF	5,500

*All estimates are based on the renovation schedule and square footage estimates provided by PENREN and/or reported on FIMS. PENREN estimates Corridors 9 to 1 to be closed for renovation on 04/01/2014.

J-L1 ATTACHMENT
Past Performance Data Sheet
**See Separate Attachment.

J-L2 ATTACHMENT
Past Performance Questionnaire
**See Separate Attachment.

J-C2 ATTACHMENT
Contract Security Classification – DD254
**See Separate Attachment.

Section K - Representations, Certifications and Other Statements of Offerors

CLAUSES INCORPORATED BY REFERENCE

52.203-11	Certification And Disclosure Regarding Payments To Influence Certain Federal Transactions	SEP 2005
252.209-7001	Disclosure of Ownership or Control by the Government of a Terrorist Country	OCT 2006
252.209-7002	Disclosure Of Ownership Or Control By A Foreign Government	JUN 2005

CLAUSES INCORPORATED BY FULL TEXT

52.203-2 CERTIFICATE OF INDEPENDENT PRICE DETERMINATION (APR 1985)

(a) The offeror certifies that --

(1) The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to –

(i) Those prices,

(ii) The intention to submit an offer, or

(iii) The methods of factors used to calculate the prices offered:

(2) The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and

(3) No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

(b) Each signature on the offer is considered to be a certification by the signatory that the signatory --

(1) Is the person in the offeror's organization responsible for determining the prices offered in this bid or proposal, and that the signatory has not participated and will not participate in any action contrary to subparagraphs (a)(1) through (a)(3) of this provision; or

(2) (i) Has been authorized, in writing, to act as agent for the following principals in certifying that those principals have not participated, and will not participate in any action contrary to subparagraphs (a)(1) through (a)(3) of this provision

_____ (insert full name of person(s) in the offeror's organization responsible for determining the prices offered in this bid or proposal, and the title of his or her position in the offeror's organization);

(ii) As an authorized agent, does certify that the principals named in subdivision (b)(2)(i) above have not participated, and will not participate, in any action contrary to subparagraphs (a)(1) through (a)(3) above; and

(iii) As an agent, has not personally participated, and will not participate, in any action contrary to subparagraphs (a)(1) through (a)(3) of this provision.

(c) If the offeror deletes or modifies subparagraph (a)(2) of this provision, the offeror must furnish with its offer a signed statement setting forth in detail the circumstances of the disclosure. (End of clause)

52.204-8 ANNUAL REPRESENTATIONS AND CERTIFICATIONS (JAN 2006)

(a)(1) The North American Industry Classification System (NAICS) code for this acquisition is 561720.

(2) The small business size standard is $15 Million.

(3) The small business size standard for a concern which submits an offer in its own name, other than on a construction or service contract, but which proposes to furnish a product which it did not itself manufacture, is 500 employees.

(b)(1) If the clause at 52.204-7, Central Contractor Registration, is included in this solicitation, paragraph (c) of this provision applies.

(2) If the clause at 52.204-7 is not included in this solicitation, and the offeror is currently registered in CCR, and has completed the ORCA electronically, the offeror may choose to use paragraph (b) of this provision instead of completing the corresponding individual representations and certifications in the solicitation. The offeror shall indicate which option applies by checking one of the following boxes:

(_x_) Paragraph (c) applies.

(__) Paragraph (c) does not apply and the offeror has completed the individual representations and certifications in the solicitation.

(c) The offeror has completed the annual representations and certifications electronically via the Online Representations and Certifications Application (ORCA) website at http://orca.bpn.gov. After reviewing the ORCA database information, the offeror verifies by submission of the offer that the representations and certifications currently posted electronically have been entered or

updated within the last 12 months, are current, accurate, complete, and applicable to this solicitation (including the business size standard applicable to the NAICS code referenced for this solicitation), as of the date of this offer and are incorporated in this offer by reference (see FAR 4.1201); except for the changes identified below [offeror to insert changes, identifying change by clause number, title, date]. These amended representation(s) and/or certification(s) are also incorporated in this offer and are current, accurate, and complete as of the date of this offer.

FAR Clause	Title	Date	Change

Any changes provided by the offeror are applicable to this solicitation only, and do not result in an update to the representations and certifications posted on ORCA.
(End of Provision)

52.222-22 PREVIOUS CONTRACTS AND COMPLIANCE REPORTS (FEB 1999)

The offeror represents that --

(a) ( ) It has, ( ) has not participated in a previous contract or subcontract subject to the Equal Opportunity clause of this solicitation;

(b) ( ) It has, ( ) has not, filed all required compliance reports; and

(c) Representations indicating submission of required compliance reports, signed by proposed subcontractors, will be obtained before subcontract awards.

(End of provision)

REPS & CERTS

K-1 AUTHORIZED NEGOTIATORS

The offeror or quoter represents that the following persons are authorized to negotiate on its behalf with the Government in connection with this request for proposals or quotations: (List names, titles, and telephone numbers of the authorized negotiators).

K-2 PERIOD OF ACCEPTANCE FOR OFFERS

In compliance with the solicitation, the offeror agrees, if this offer is accepted within 90 calendar days from the date specified in the solicitation for receipt of offers, to furnish any or all items on which prices are offered at the price set opposite each item, delivered at the designated point(s), within the time specified in the Schedule.

Section L - Instructions, Conditions and Notices to Bidders

CLAUSES INCORPORATED BY REFERENCE

52.204-6	Data Universal Numbering System (DUNS) Number	OCT 2003
52.222-24	Preaward On-Site Equal Opportunity Compliance Evaluation	FEB 1999
52.237-1	Site Visit	APR 1984
252.204-7001	Commercial And Government Entity (CAGE) Code Reporting	AUG 1999

CLAUSES INCORPORATED BY FULL TEXT

52.215-1 INSTRUCTIONS TO OFFERORS--COMPETITIVE ACQUISITION (JAN 2004)

(a) Definitions. As used in this provision--

“Discussions” are negotiations that occur after establishment of the competitive range that may, at the Contracting Officer's discretion, result in the offeror being allowed to revise its proposal.

“In writing or written” means any worded or numbered expression which can be read, reproduced, and later communicated, and includes electronically transmitted and stored information.

“Proposal modification” is a change made to a proposal before the solicitation's closing date and time, or made in response to an amendment, or made to correct a mistake at any time before award.

“Proposal revision” is a change to a proposal made after the solicitation closing date, at the request of or as allowed by a Contracting Officer as the result of negotiations.

“Time”, if stated as a number of days, is calculated using calendar days, unless otherwise specified, and will include Saturdays, Sundays, and legal holidays. However, if the last day falls on a Saturday, Sunday, or legal holiday, then the period shall include the next working day.

(b) Amendments to solicitations. If this solicitation is amended, all terms and conditions that are not amended remain unchanged. Offerors shall acknowledge receipt of any amendment to this solicitation by the date and time specified in the amendment(s).

(c) Submission, modification, revision, and withdrawal of proposals. (1) Unless other methods (e.g., electronic commerce or facsimile) are permitted in the solicitation, proposals and

modifications to proposals shall be submitted in paper media in sealed envelopes or packages (i) addressed to the office specified in the solicitation, and (ii) showing the time and date specified for receipt, the solicitation number, and the name and address of the offeror. Offerors using commercial carriers should ensure that the proposal is marked on the outermost wrapper with the information in paragraphs (c)(1)(i) and (c)(1)(ii) of this provision.

(2) The first page of the proposal must show--

(i) The solicitation number;

(ii) The name, address, and telephone and facsimile numbers of the offeror (and electronic address if available);

(iii) A statement specifying the extent of agreement with all terms, conditions, and provisions included in the solicitation and agreement to furnish any or all items upon which prices are offered at the price set opposite each item;

(iv) Names, titles, and telephone and facsimile numbers (and electronic addresses if available) of persons authorized to negotiate on the offeror's behalf with the Government in connection with this solicitation; and

(v) Name, title, and signature of person authorized to sign the proposal. Proposals signed by an agent shall be accompanied by evidence of that agent's authority, unless that evidence has been previously furnished to the issuing office.

(3) Submission, modification, or revision, of proposals.

(i) Offerors are responsible for submitting proposals, and any modifications, or revisions, so as to reach the Government office designated in the solicitation by the time specified in the solicitation. If no time is specified in the solicitation, the time for receipt is 4:30 p.m., local time, for the designated Government office on the date that proposal or revision is due.

(ii)(A) Any proposal, modification, or revision received at the Government office designated in the solicitation after the exact time specified for receipt of offers is “late” and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late offer would not unduly delay the acquisition; and--

(1) If it was transmitted through an electronic commerce method authorized by the solicitation, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals; or

(2) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of offers and was under the Government's control prior to the time set for receipt of offers; or

(3) It is the only proposal received.

(B) However, a late modification of an otherwise successful proposal that makes its terms more favorable to the Government, will be considered at any time it is received and may be accepted.

(iii) Acceptable evidence to establish the time of receipt at the Government installation includes the time/date stamp of that installation on the proposal wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel.

(iv) If an emergency or unanticipated event interrupts normal Government processes so that proposals cannot be received at the office designated for receipt of proposals by the exact time specified in the solicitation, and urgent Government requirements preclude amendment of the solicitation, the time specified for receipt of proposals will be deemed to be extended to the same time of day specified in the solicitation on the first work day on which normal Government processes resume.

(v) Proposals may be withdrawn by written notice received at any time before award. Oral proposals in response to oral solicitations may be withdrawn orally. If the solicitation authorizes facsimile proposals, proposals may be withdrawn via facsimile received at any time before award, subject to the conditions specified in the provision at 52.215-5, Facsimile Proposals. Proposals may be withdrawn in person by an offeror or an authorized representative, if the identity of the person requesting withdrawal is established and the person signs a receipt for the proposal before award.

(4) Unless otherwise specified in the solicitation, the offeror may propose to provide any item or combination of items.

(5) Offerors shall submit proposals in response to this solicitation in English, unless otherwise permitted by the solicitation, and in U.S. dollars, unless the provision at FAR 52.225-17, Evaluation of Foreign Currency Offers, is included in the solicitation.

(6) Offerors may submit modifications to their proposals at any time before the solicitation closing date and time, and may submit modifications in response to an amendment, or to correct a mistake at any time before award.

(7) Offerors may submit revised proposals only if requested or allowed by the Contracting Officer.

(8) Proposals may be withdrawn at any time before award. Withdrawals are effective upon receipt of notice by the Contracting Officer.

(d) Offer expiration date. Proposals in response to this solicitation will be valid for the number of days specified on the solicitation cover sheet (unless a different period is proposed by the offeror).

(e) Restriction on disclosure and use of data. Offerors that include in their proposals data that they do not want disclosed to the public for any purpose, or used by the Government except for evaluation purposes, shall--

(1) Mark the title page with the following legend: This proposal includes data that shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed--in whole or in part--for any purpose other than to evaluate this proposal. If, however, a contract is awarded to this offeror as a result of--or in connection with-- the submission of this data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the resulting contract. This restriction does not limit the Government's right to use information contained in this data if it is obtained from another source without restriction. The data subject to this restriction are contained in sheets [insert numbers or other identification of sheets]; and

(2) Mark each sheet of data it wishes to restrict with the following legend: Use or disclosure of data contained on this sheet is subject to the restriction on the title page of this proposal.

(f) Contract award. (1) The Government intends to award a contract or contracts resulting from this solicitation to the responsible offeror(s) whose proposal(s) represents the best value after evaluation in accordance with the factors and subfactors in the solicitation.

(2) The Government may reject any or all proposals if such action is in the Government's interest.

(3) The Government may waive informalities and minor irregularities in proposals received.

(4) The Government intends to evaluate proposals and award a contract without discussions with offerors (except clarifications as described in FAR 15.306(a)). Therefore, the offeror's initial proposal should contain the offeror's best terms from a cost or price and technical standpoint. The Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals.

(5) The Government reserves the right to make an award on any item for a quantity less than the quantity offered, at the unit cost or prices offered, unless the offeror specifies otherwise in the proposal.

(6) The Government reserves the right to make multiple awards if, after considering the additional administrative costs, it is in the Government's best interest to do so.

(7) Exchanges with offerors after receipt of a proposal do not constitute a rejection or counteroffer by the Government.

(8) The Government may determine that a proposal is unacceptable if the prices proposed are

materially unbalanced between line items or subline items. Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more contract line items is significantly overstated or understated as indicated by the application of cost or price analysis techniques. A proposal may be rejected if the Contracting Officer determines that the lack of balance poses an unacceptable risk to the Government.

(9) If a cost realism analysis is performed, cost realism may be considered by the source selection authority in evaluating performance or schedule risk.

(10) A written award or acceptance of proposal mailed or otherwise furnished to the successful offeror within the time specified in the proposal shall result in a binding contract without further action by either party.

(11) If a post-award debriefing is given to requesting offerors, the Government shall disclose the following information, if applicable:

(i) The agency's evaluation of the significant weak or deficient factors in the debriefed offeror's offer.

(ii) The overall evaluated cost or price and technical rating of the successful and the debriefed offeror and past performance information on the debriefed offeror.

(iii) The overall ranking of all offerors, when any ranking was developed by the agency during source selection.

(iv) A summary of the rationale for award.

(v) For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror.

(vi) Reasonable responses to relevant questions posed by the debriefed offeror as to whether source-selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the agency.

(End of provision)

52.215-20 REQUIREMENTS FOR COST OR PRICING DATA OR INFORMATION OTHER THAN COST OR PRICING DATA (OCT 1997)

(a) Exceptions from cost or pricing data. (1) In lieu of submitting cost or pricing data, offerors may submit a written request for exception by submitting the information described in the following subparagraphs. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted, and whether the price is fair and reasonable.

(i) Identification of the law or regulation establishing the price offered. If the price is controlled under law by periodic rulings, reviews, or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

(ii) Commercial item exception. For a commercial item exception, the offeror shall submit, at a minimum, information on prices at which the same item or similar items have previously been sold in the commercial market that is adequate for evaluating the reasonableness of the price for this acquisition. Such information may include--

(A) For catalog items, a copy of or identification of the catalog and its date, or the appropriate pages for the offered items, or a statement that the catalog is on file in the buying office to which the proposal is being submitted. Provide a copy or describe current discount policies and price lists (published or unpublished), e.g., wholesale, original equipment manufacturer, or reseller. Also explain the basis of each offered price and its relationship to the established catalog price, including how the proposed price relates to the price of recent sales in quantities similar to the proposed quantities;

(B) For market-priced items, the source and date or period of the market quotation or other basis for market price, the base amount, and applicable discounts. In addition, describe the nature of the market;

(C) For items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item.

(2) The offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and the reasonableness of price. For items priced using catalog or market prices, or law or regulation , access does not extend to cost or profit information or other data relevant solely to the offeror's determination of the prices to be offered in the catalog or marketplace.

(b) Requirements for cost or pricing data. If the offeror is not granted an exception from the requirement to submit cost or pricing data, the following applies:

(1) The offeror shall prepare and submit cost or pricing data and supporting attachments in accordance with Table 15-2 of FAR 15.408.

As soon as practicable after agreement on price, but before contract award (except for unpriced actions such as letter contracts), the offeror shall submit a Certificate of Current Cost or Pricing Data, as prescribed by FAR 15.406-2.

(End of provision)

52.215-20 REQUIREMENTS FOR COST OR PRICING DATA OR INFORMATION OTHER THAN COST OR PRICING DATA (OCT 1997)—ALTERNATE IV (OCT 1997)

(a) Submission of cost or pricing data is not required.

(b) Provide Schedule of Prices/Deductions (see J-B1 – J-B5 Attachments).

(End of provision)

52.216-1 TYPE OF CONTRACT (APR 1984)

The Government contemplates award of a Firm Fixed Price contract resulting from this solicitation.

(End of provision)

52.233-2 SERVICE OF PROTEST (SEP 2006)

(a) Protests, as defined in section 33.101 of the Federal Acquisition Regulation, that are filed directly with an agency, and copies of any protests that are filed with the Government Accountability Office (GAO), shall be served on the Contracting Officer (addressed as follows) by obtaining written and dated acknowledgment of receipt from

Washington Headquarters Services / Acquisition & Procurement Office
Contracting Officer: Mr. David Julian
1777 North Kent Street, Suite 12063
Arlington, VA 22201

(b) The copy of any protest shall be received in the office designated above within one day of filing a protest with the GAO.

(End of provision)

52.252-1 SOLICITATION PROVISIONS INCORPORATED BY REFERENCE (FEB 1998)

This solicitation incorporates one or more solicitation provisions by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available. The offeror is cautioned that the listed provisions may include blocks that must be completed by the offeror and submitted with its quotation or offer. In lieu of

submitting the full text of those provisions, the offeror may identify the provision by paragraph identifier and provide the appropriate information with its quotation or offer. Also, the full text of a solicitation provision may be accessed electronically at this/these address(es):

http://acquisition.gov/far/index.html - or - http://farsite.hill.af.mil/VFDFARA.HTM

(End of provision)

52.252-5 AUTHORIZED DEVIATIONS IN PROVISIONS (APR 1984)

(a)The use in this solicitation of any Federal Acquisition Regulation (48 CFR Chapter 1) provision with an authorized deviation is indicated by the addition of "(DEVIATION)" after the date of the provision.

(b)The use in this solicitation of any Federal Acquisition Regulation (48 CFR Chapter 1-2) provision with an authorized deviation is indicated by the addition of "(DEVIATION)" after the name of the regulation.

(End of provision)

INSTRUCTIONS TO OFFERORS

L-1 PRE-AWARD SURVEY

A pre-award survey may be conducted when the Contracting Officer determines it to be in the Government's interest.

L-2 DEADLINE FOR RECEIPT OF QUESTIONS FROM PROSPECTIVE OFFERORS

Potential offerors may submit questions in writing, regarding the performance work statement and the terms and conditions of this solicitation, by mail, courier, email or fax, but questions must be received in the office designated below **no later than 4:00 PM local time on 16 July 2014.**

Submit questions to:

PV1 Joe Snuffy, Contract Specialist
WHS Acquisition and Procurement Office
1777 North Kent St.
Suite 12063
Arlington, VA 22209
FAX: 703-696-4164

Email: joe.snuffy.mil@mail.mil

L-3 ADDRESS AND OFFER DUE DATE

Proposals, in the quantities specified, shall be received at:

WHS Acquisition & Procurement Office
Attn: PV1 Joe Snuffy
1777 North Kent St.
Arlington, VA 22209

Offers shall be received in the office identified above by 2:30 PM local time on 06 August 2014.
Late submissions will not be accepted.

L-4 SITE VISIT AND PRE-PROPOSAL CONFERENCE

Offerors are urged and expected to inspect the site where services are to be performed and to satisfy themselves regarding all general and local conditions that may affect the cost of contract performance, to the extent that the information is reasonably obtainable. A site visit and pre-proposal conference is scheduled for **10:00 AM on 10 July 2014**. Details regarding the location and procedures for access will be issued by amendment.

L-5 PROPOSAL PREPARATION

Offerors must submit offers using the following submission guidance and information. Failure of an offeror to address any items listed may make the offer unacceptable and may result in its not being considered for award.

a. Offer shall remain firm for at least 90 calendar days (offeror shall enter 90 in Block 12 of the SF33) and can be submitted via FEDEX, United States Postal Service (USPS), U.S. Mail, or another commercial carrier; however, the use of USPS is not recommended as the single method of submission. Offers shall be submitted to the address in paragraph L-3 above.

b. Neither telegraphic nor facsimile offers will be considered; however, offers may be modified by written, telegraphic, or facsimile notice, if that notice is received by the time specified for receipt of offers.

c. Offerors must submit one original and three (3) copies of their technical (Volume I), one original and one copy of their price proposal, past performance and business information (Volume II), including all attachments, on separate CD-ROMs using Microsoft Office 2000 or 2003 compatible format.

L-6 GENERAL PROPOSAL REQUIREMENTS

a. All proposals must clearly and convincingly demonstrate that the offeror has a thorough understanding of the requirements and associated risks, and is able, willing, and competent to devote the resources necessary to meet or exceed the requirements.

b. Should any aspect of the Contractor's proposal change after submission but prior to award, the Contractor shall promptly notify the Contracting Officer of the change. Note that substantial changes may require dismissal of the proposal from consideration.

c. Offer's outside wrapper shall clearly indicate that it is a submission under this solicitation.

L-7 GENERAL PROPOSAL CONTENT

Each proposal shall contain the following:

i. Standard Form 33, or equivalent. Failure to do so may lead to rejection of the offer.
ii. Cover Letter. All offerors shall submit a cover letter including a concise statement of what is being proposed The statement should be complete, not more than two pages, and should clearly indicate reasons why a contract should be awarded to the offeror, with appropriate summary of highlights and references to the body of the proposal. This letter shall outline and explain any deviations, exceptions, or conditional assumptions taken to the requirements of this solicitation. Further, sufficient amplification and justification to permit evaluation must support any deviations, exceptions, or conditional assumptions. To the extent that there is any inconsistency between the terms and conditions of the solicitation and those proposed by the offeror, which inconsistency has not been clearly disclosed to the Government by the offeror, the Government's terms and conditions shall control in the event that a contract is awarded.
iii. Technical Proposal – Volume I (provide one original and 3 copies).
iv. Price Proposal, Past Performance Data and Business Information – Volume II (provide one original and one copy).

L-8 TECHNICAL PROPOSAL – VOLUME I

a. Proposal Contents. The technical proposal must demonstrate an ability to comply with all requirements in the solicitation. General statements that the Offeror can or will comply with the requirements, that standard procedures will be used, that well known techniques will be used, or paraphrases of the RFP's Statement of Work/Specification in whole or in part, **will not** constitute compliance. Failure to conform to any of the requirements of the RFP may form the basis for rejection of the proposal.

b. Proposal Length. The Technical Proposal must not exceed 75 pages, single-sided; including the original technical proposal and additional or change pages submitted with an offeror's final proposal revision, excluding foldouts, blank pages, title pages, tab indices and table of contents. Changed pages shall be clearly identified as such and should be provided on colored paper with the revisions clearly marked. If the offeror elects to submit a complete revised technical proposal, revisions must be clearly identified. Each page shall be 8 ½ x 11 inches, doubled-spaced, 12-point font, with one-inch margins. This limit extends to all introductory comments,

overviews, text, illustrations, graphics, appendices and other pertinent information. Graphics and appendices must be single-spaced. Graphics are exempt from the 12-point font and one-inch margin requirements. Plans and Drawings are not included in the 75-page limit. The Technical Proposal must be bound separately in a binder and all foldouts must be in sleeves and placed in the binder. Claims as to proprietary data must specifically identify page(s), paragraph(s), sentence(s), and must not be generalized. Pages shall be numbered and paragraphs identified by a commonly used and consistent system to assist in referencing specific areas of the proposal. Pages shall also have a header or footer that contains at a minimum, contractor name and solicitation number. Enclosures must be identified on all pages.

c. Technical Information. Offeror shall address their technical capability to adequately perform the requirements set forth in Section C. At a minimum, the proposal shall provide information supporting the Contractor's ability to meet contract requirements in the areas listed below (keyed to the Evaluation Factors in Section M).

Factor	Subfactor	Specific Instructions
(1) Technical Requirements	Subfactor a. "Possession of a Top Secret Facility Clearance (Evaluated on a Pass/Fail Basis)	Provide a copy of the offerors Defense Security Service Facility Clearance letter documenting possession of a Top Secret Facility Clearance.
(1) Technical Requirements	Subfactor b. "Adequacy, Feasibility and Technical Merit"	Provide an overview of the offerors method and approach for delivering quality custodial services to the Pentagon.
(1) Technical Requirements	Subfactor c. "Proposed Methodology"	Provide an overview of the offeror's and any major subcontractors proposed method for meeting the performance requirements including capabilities and skills. Provide an overview of the offeror's plans for addressing the general historic performance issues identified in Section C, paragraph 1.2.

Factor	Subfactor	Specific Instructions
(1) Technical Requirements	Subfactor d.”Technical Experience and Capability”	Summarize the offeror’s and any major subcontractors experience and qualifications in providing custodial services of a similar type and magnitude.
(2) Management	Subfactor a. “Key Personnel and Organizational Structure”	Describe the offerors organizational structure proposed for managing this contract. Provide organizational charts and resumes of key personnel.
(2) Management	Subfactor b. “Quality System”	Provide a draft Quality Control Plan.
(2) Management	Subfactor c. “Management and Environmental Stewardship”	Provide a draft Management and Environmental Stewardship Plan
(2) Management	Subfactor d. “Health and Safety”	Provide a draft Health and Safety Plan
(2) Management	Subfactor e.”Ability of Organization to Respond to Problems”	Summarize the ability of the offerors organizational structure to respond to problems, mitigate risk and maintain performance.

Factor	Subfactor	Specific Instructions
(3) Past Performance		See paragraph L-9 below.
(4) Participation of Small Businesses, HUBZone Small Businesses, Small Disadvantaged Businesses and Women-Owned Small Business Concerns		Outline plan to award subcontracts to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns in performance of the contract.

L-9 PAST PERFORMANCE PROPOSAL – VOLUME II

a. The Offeror past performance proposal must address corporate past performance in performing projects similar in size and scope to the effort required by Section C. The Contractor's relevant Past Performance will be evaluated to assess the extent of its ability to perform the contract successfully (quality of product or service, accuracy and completeness, timeliness of delivery/work, business relations, customer satisfaction, key personnel and staffing (including subcontractors/partners).

b. Offeror shall submit a Past Performance Data Sheet, Section J, Attachment J-L1, for three (3) Government or commercial contracts for services directly related or similar to the services required in Section C. Information for contracts or subcontracts shall be for relevant contracts and subcontracts currently in process or completed within the past five (5) years. Specifically address the following items:
i. The nature of the effort
ii. The tasks performed, including the deliverables, as they relate to Section C
iii. Timeliness of deliveries
iv. The extent of involvement (as a prime versus a subcontractor)
v. The period of performance
vi. The utilization of subcontractor technical support versus in-house technical support
vii. Remote site management experience
viii. Point of contact, phone and fax number for each contact listed

c. The Offeror shall complete the top portion of page 1, Section J, Attachment J-L2, Past Performance Questionnaire, and send it to each of the three (3) customers for the contracts

identified above on Attachment J-L1. As stated in Attachment J-L2, the reference will complete this form and return it directly to the Government by the solicitation closing date.

d. In accordance with FAR 15.305(a)(2)(iv), an Offeror without a record of relevant past performance or for whom information on past performance is not available will not be evaluated favorably or unfavorably on past performance (neutral evaluation).

e. The Government will consider past or current contracts (including Federal, State and local government and private) for efforts similar to the Government requirement. The Government will consider information provided on problems encountered on the identified contracts and associated corrective actions. Contractors with a negative past performance rating will be afforded an opportunity to address alleged deficiencies. The Government may also consider information obtained from any other sources when evaluating past performance. Failure of a contractor to disclose a relevant Government contract with poor past performance may affect the contractor's past performance rating.

f. The Government may consider past performance information regarding predecessor companies, key personnel who have relevant experience or subcontractors that will perform major or critical aspects of the requirement when such information is relevant.

g. Evaluation of past performance will include an evaluation of the contractor's past performance in complying with the requirements of FAR clauses 52.219-8, and DFARS 252.219-7003, as applicable.

L-10 PRICE PROPOSAL – VOLUME II

Proposal Contents: The price proposal shall consist of the following:
i. Completed SF33
ii. Completed Section B
iii. Completed Attachment, Schedule of Prices/Deductions, J-B1 – J-B5
iv. Completed Section K (Representations and Certifications)

L-11 SECURITY

This procurement is restricted to offerors with an active TOP SECRET facility clearance granted by a Military Department. Offers received from firms that do not have an active TOP SECRET FACILITY clearance will not be considered.

L-12 SPECIAL NOTICE TO OFFERORS

a. Failure to submit any of the information requested by this solicitation may be cause for unfavorable consideration.

b. Upon receipt, all proposals become Government property.

c. After award, the Government reserves the right to publish any and/or all technical and cost related submissions provided by the successful Offeror (s) in any Government database or publication.

L-13 CONFIDENTIAL INFORMATION

The Freedom of Information Act (FOIA) and its amendments have resulted in an increasing number of requests from outside the Government for copies of contract qualifications and proposals submitted to federal agencies. If an offeror's submissions contain information that he/she believes should be withheld from such requestors under FOIA on the grounds that they contain "trade secrets and commercial or financial information" [5 USC§552(b)(4)], the offeror should mark its submissions in the following manner: i. The following notice should be placed on the title page: "Some parts of this document, as identified on individual pages, are considered by the submitter to be privileged or confidential trade secrets or commercial or financial information not subject to mandatory disclosure under the Freedom of Information Act. Material considered privileged or confidential on such grounds is contained on page(s) _____". ii. Each individual item considered privileged or confidential under FOIA should be marked with the following notice: "The data or information is considered confidential or privileged, and is not subject to mandatory disclosure under the Freedom of Information Act"

Section M - Evaluation Factors for Award

CLAUSES INCORPORATED BY REFERENCE

52.217-5	Evaluation Of Options	JUL 1990
52.232-15	Progress Payments Not Included	APR 1984

EVALUATION FACTORS

M-1 BASIS FOR AWARD

Award will be made to the responsible offeror whose offer, conforming to the solicitation, represents the best overall value to the Government, given the outcome of the Government's evaluation of each offeror's technical proposal, socioeconomic program utilization proposal, past performance and price proposal. In selecting the best overall offer for award, the Government will consider the quality offered, which includes all non-price factors, for the evaluated price. The relative quality of offers will be based upon the Government's evaluation of the offeror's ability to exceed the minimum performance requirements of this solicitation and the risk of nonperformance, defective performance or late performance under the resulting contract. The quality of offers will be compared to the differences in the overall price to the Government. The Government may award on the basis of a proposal with superior ratings even though it may result

in a higher price to the Government. No award will be made to an offeror who has received a marginal or unsatisfactory rating in any factor or subfactor.

M-2 EVALUATION FACTORS

The offer must be realistic in both technical approach and total price. Offers that are unrealistic in terms of technical approach or unrealistically low in price will be considered indicative of a lack of understanding of the complexity and risk in the contract requirements. Unrealistic offers will not be considered for award.

The ability of the offeror to perform all aspects of the anticipated contract from inception to completion will be considered as part of the overall "realism" evaluation. Pursuant to FAR 52.215-1(f), Instructions to Offerors-Competitive Acquisition (JAN 2004), the Government may evaluate offers and award contract(s) without discussions with offerors. The Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary.

To arrive at the best value decision, the Technical Evaluation Committee (TEC) will evaluate the technical factors and the Source Selection Authority (SSA) will base the source selection decision on an integrated assessment of the submitted proposals in accordance with the evaluation factors and sub-factors established within the solicitation. The SSA may select a higher-priced offeror if that offeror is evaluated to have a superior technical and management approach, and a demonstrated past performance record that outweighs the benefits of any price difference.

In selecting the best overall offer, the following factors will be considered: (1) technical, (2) management, (3) past performance, (4) Participation of Small Businesses, HUBZone Small Businesses, Small Disadvantaged Businesses and Women-Owned Small Business Concerns and (5) price to the Government. All factors and sub-factors are listed in descending order of importance. When combined, the non-price factors are slightly more important than price. Price will become increasingly important as the non-price evaluation factors become increasingly equal. Price will not be a numerically weighted factor in the evaluation of proposals and the importance of price does not bear a linear relationship to the importance of the technical proposal and past performance. The importance of price in the evaluation for award will depend upon the differences in evaluated technical quality and in past performance among offerors and, as stated above, will increase as the differences decrease. The following evaluation factors will be used for this source selection:

(1) Technical Requirements:

a. Possession of a Top Secret Facility Clearance (Evaluated on a Pass/Fail Basis)
b. Adequacy, Feasibility and Technical Merit
c. Proposed Methodology
d. Technical Experience and Capability

(2) Management:

a. Key Personnel and Organizational Structure

b. Quality System
c. Management and Environmental Stewardship
d. Health and Safety
e. Ability of Organization to Respond to Problems

(3) Past Performance

(4) Participation of Small Businesses, HUBZone Small Businesses, Small Disadvantaged Businesses and Women-Owned Small Business Concerns

(5) Price

Proposals will be evaluated and ranked considering the following:

(1) Technical:

a. Security Clearance. This evaluation subfactor will consider if the offeror has an active Top Secret Facility Clearance as evidenced by a copy of its Defense Security Facility Clearance (DSSFC) letter provided with their proposal. This subfactor will be evaluated on a pass/fail basis. **Offerors not having an active Top Secret Facility Clearance will not be evaluated for award.**

b. Adequacy, Feasibility and Technical Merit. This technical evaluation subfactor will consider the adequacy, feasibility and technical merit of the Contractor's method and approach for delivering quality custodial services to the Pentagon including the Contractor's understanding of and approach to meeting overall requirements as described in Section C.

c. Proposed Methodology. This technical evaluation subfactor will consider the offeror's proposed methodology for meeting the performance requirements including the offeror's and any major subcontractor's capabilities and skills. Evaluation of this subfactor will also consider the offerors methodology for addressing the general historic performance issues identified in Section C, paragraph 1.2.

d. Technical Experience and Capability. This technical subfactor will consider the offeror's and major subcontractor's depth of experience and qualifications in delivering quality custodial services similar in scope and type as those specified in Section C.

(2) Management:

a. Key Personnel and Organizational Structure. This management subfactor will consider the relevant experience and ability of the current corporate management structure and organization, including key personnel and changes to the organization, proposed for managing performance of the contract. Evaluation will consider the ability of the company to establish organizational controls and procedures to ensure a safe and hazard free work environment. Evaluation of this subfactor will also include an evaluation of major subcontractors' management structure and

their relevant experience and ability to perform the requirements of the proposed contract as well as the plan for obtaining and retaining key staff.

b. Quality System: This subfactor will consider the proposed quality system that will be used in the performance of this contract and how well the offeror demonstrates that it will meet the requirements of Section C. Consideration shall be given to whether the offeror has achieved certification or whether it is pursuing certification to an internationally accepted and certified quality system and when certification to that system is anticipated.

c. Management and Environmental Stewardship: This subfactor will consider the offerors commitment to environmental management, employee health and safety, and the use of environmentally preferable products.

d. Health and Safety: This subfactor will consider the offerors commitment to a safe environment for Contractor personnel, building occupants and visitors.

e. Ability of Organization to Respond to Problems: Organizational structure's ability to respond to rapidly emerging problems to include how the organization will evaluate problems and coordinate implementation of risk mitigation strategies to maintain performance, quality, and schedule.

(3) Past Performance. Each offeror's past performance will be evaluated as part of the Government's overall evaluation of best value. At a minimum, this evaluation will take into account past performance information submitted as a part of each offeror's proposal including information regarding predecessor companies, key personnel who have relevant experience and subcontractors that will perform major or critical aspects of the requirement. For those offerors without a record of relevant past performance or for whom information on past performance is not available, the offeror will receive a neutral past performance rating. Offerors with a negative past performance rating will be afforded an opportunity to address alleged deficiencies.

(4) Participation of Small Businesses. The offeror will be evaluated on the extent to which it plans to participate, through joint ventures, teaming arrangements, and subcontracts, with small businesses (SB), HUBZone small businesses (HUBZone), small disadvantaged businesses (SDB), women-owned small businesses (WOSB), and service disabled veteran-owned small businesses (SDVOSB) in the performance of the contract.

(5) Price

General. Price will not be a numerically weighted factor in the evaluation of proposals; neither will importance of price bear a linear relationship to technical proposals. The Government's decision as to which individual offer(s) represents the best value will be made after considering the overall cost to the Government and comparing the other evaluation factors addressed in each proposal. The Government may make an award to an offeror with a proposal that contains superior technical features even if such a decision results in additional price to the Government. Pricing will also be evaluated to determine whether it is materially unbalanced. As the difference

in the evaluated quality among the offers with the highest rated combination of technical and past performance decreases, the importance of price as an evaluation factor shall increase, and may become the determinative factor for making award. Pursuant to FAR 52.215-1(f)(4), Instructions to Offerors-Competitive Acquisition (JAN 2004), the Government may evaluate offers and award contract(s) without discussions with offerors. The offeror's Fixed Price CLINs shall be evaluated by summing the total Firm Fixed Price line item for each year of the contract (base plus options). Fixed price proposals will be reviewed for reasonableness, affordability, and realism to determine whether they reflect an understanding of the requirements or contain apparent mistakes. The offeror's proposed approach must be consistent with the cost/price proposal. As part of the cost/price evaluation, proposals may be reviewed to identify any significant unbalanced pricing including unbalancing in the Schedule of Prices. In accordance with FAR 15.404-1(g), Unbalanced Pricing, a proposal may be rejected if the Contracting Officer determines the lack of balance poses an unacceptable risk to the Government. If applicable, the cost/price proposals will also be evaluated to ensure they comply with the standards set for non-exempt employees established by the Department of Labor (DOL) through the Services Contract Act, 41 USC 351 et sig.; its implementing regulations; and the appropriate wage determination issued by the DOL. These standards include, but are not limited to, minimum direct labor rates, minimum health and welfare benefits per hour, and minimum vacation and holiday hours. Cost may play an additional role since considerations of cost in terms of best value and affordability may be controlling in circumstances where two or more proposals are otherwise adjudged equal or when a technically superior proposal is at a cost that the Government cannot afford.

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ATTACHMENT 4: J-L1

PAST PERFORMANCE DATA

1. Complete Name of Reference (Government agency, commercial firm, or other organization)	
2. Complete Address of Reference	
3. Contract Number or other control number	4. Date of contract
5. Date work was begun	6. Date work was completed
7. Contract type, initial contract price, estimated cost and fee, or target cost and profit or fee	8. Final amount invoiced or amount invoiced to date
9a. Reference/Technical point of contact (name, title, address, telephone no. and email address)	9b. Reference/Contracting point of contact (name, title, address, telephone no. and email address)
10. Location of work (country, state or province, county, city)	
11. Current status of contract (choose one): [ ] Ongoing [ ] Complete [ ] Terminated for Convenience [ ] Terminated for Default [ ] Other (explain)	
12. Provide brief information describing the contract and the relevancy of the effort to be performed in accordance with the SOW and requirements of the solicitation. Provide an estimated % of relevancy of the referenced contract to the requirements set forth in this solicitation. Relevance shall address the following areas: Provision of layberth facility and associated services. Relevance can be discussed in further detail on the attached summary description as set forth in block 14 below.	
13a. Did this contract require a Small Business Subcontracting Plan pursuant to FAR 52.219-9? Yes ____, No_____. 13b. If "Yes" to 13a, have you regularly submitted SF 294/295 reports on time? 13c. Attach a copy of your most recently submitted SF 294.	
14. **Provide a summary description of contract work, not to exceed two pages in length. Describe the nature and scope of work, its relevancy to this contract, and a description of any problems encountered and your corrective actions. Attach the explanation to this form.**	

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ATTACHMENT 5: J-L2

PAST PERFORMANCE QUESTIONNAIRE
Source Selection Sensitive
See FAR 2.101 and 3.104

TO: _____ **FACSIMILE:**_____

PHONE:_____ **EMAIL:**_____

Information Request

Washington Headquarters Services is currently in the process of soliciting offers for a contract for the provision of Custodial Services. [CONTRACTOR NAME] provided your name and organization as a reference regarding [CONTRACT DESCRIPTION past performance under [CONTRACT NO.]. Specifically, we are looking for past performance information in the following areas:

a.) Quality of Service
b.) Timeliness or Scheduling of Service
c.) Business Relations/Customer Satisfaction
d.) Key Personnel and Staffing (Including Subcontractors)

In order for our team to compile its evaluation, we request that you complete the attached survey form and email it, and any other pertinent information by [SOLICITATION CLOSING DATE] to Joe Snuffy joe.snuffy,mil@mail,mil
Information can also be sent via facsimile to the attention of Joe Snuffy at FAX: (703) 696-4164.

For your convenience, a cover sheet for use in mailing/faxing is provided below.

Washington Headquarters Services, Acquisition and Procurement Office
Attn: Joe Snuffy
1777 North Kent At.
Suite 12063
Arlington, VA 22209

From: (Name and Address of Firm) _____
_____
(Point of Contact Name)
_____
(Facsimile/Phone Number) _____
(E-mail Address) _____

To (Point of Contact Name) __Joe Snuffy_____
(Facsimile/Phone Number) __(703) 696-3858 FAX: (703) 696-4164____
(E-mail Address) __joe.snuffy.mil@mail.mil_____

PAST PERFORMANCE QUESTIONNAIRE
SOURCE SELECTION SENSITIVE
See FAR 2.101 and 3.104

CONTRACTOR PERFORMANCE EVALUATION SURVEY

CONTRACTOR NAME:_____CONTRACT NUMBER:_____
EVALUATION PERIOD:_____CONTRACT VALUE: $_____

1. Please describe the service/supply provided by the Contractor for your firm.

2. Please provide ratings and comments regarding the Contractor's performance in each area below using the following ratings: Exceptional (E), Very Good (VG), Satisfactory (S), Marginal (M), or Unsatisfactory (U). See next page for definition of ratings. **For all ratings EXCEPT "Satisfactory," please provide a brief explanation.**

		Exceptional	Very Good	Satisfactory	Marginal	Unsatisfactory
OVERALL PAST PERFORMANCE RATING Please provide an overall rating of the contractor's past performance for the referenced contract/delivery order.						
a.) Quality of Service:						
Conformance to contract requirements, appropriateness of personnel, accuracy of reports, and technical excellence.						
b.) Timeliness or Scheduling of Service/Deliveries:						
Timeliness of performance, met interim milestones, reliable, responsive to technical and contractual direction as to scheduling.						
c.) Business Relations/Customer Satisfaction						
Effective management, prompt notification of problems, reasonable/cooperative behavior, proactive, timely award and management of subcontracts, effective small business/small disadvantaged business						
d.) Key Personnel and Staffing (Including Subcontractors)						
Quality of key personnel and how well key personnel managed their portion of the contract.						

3. Would you hire this contractor to provide services for your organization in the future? _____ Please provide comments using additional pages, if desired.

Signed:_____
Print Name: _____

PAST PERFORMANCE DEFINITIONS

The following definitions are to be used when assessing past performance:

EXCEPTIONAL/VERY LOW PERFORMANCE RISK (E)

No doubt exists that the offeror will successfully perform the required effort.

VERY GOOD/LOW PERFORMANCE RISK (VG)

Little doubt exists that the offeror will successfully perform the required effort.

SATISFACTORY/MODERATE PERFORMANCE RISK (S)

Some doubt exists that the offeror will successfully perform the required effort.

MARGINAL/HIGH PERFORMANCE RISK (M)

Substantial doubt exists that the offeror will successfully perform the required effort.

UNSATISFACTORY/VERY HIGH PERFORMANCE RISK (U)

Extreme doubt exists that the offeror will successfully perform the required effort.

NEUTRAL (N)

The offeror, its subcontractors or team members and/or its key personnel have no significant performance record relevant or identifiable to the services to be performed.

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ATTACHMENT 6: J-C2

CLASSIFICATION *(When filled in)*:

DEPARTMENT OF DEFENSE
CONTRACT SECURITY CLASSIFICATION SPECIFICATION
(Please read Instructions BEFORE completing this application.) (The requirements of the National Industrial Security Program (NISP) apply to all security aspects of this effort involving classified information.)

OMB No. 0704-0567
OMB approval expires October 31, 2020

The public reporting burden for this collection of information, 0704-0567, is estimated to average 70 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Washington Headquarters Services, at whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

RETURN COMPLETED FORM AS DIRECTED IN THE INSTRUCTIONS.

1. CLEARANCE AND SAFEGUARDING

a. LEVEL OF FACILITY SECURITY CLEARANCE (FCL) REQUIRED *(See Instructions.)*: Top Secret

b. LEVEL OF SAFEGUARDING FOR CLASSIFIED INFORMATION/MATERIAL REQUIRED AT CONTRACTOR FACILITY: None (See instructions)

2. THIS SPECIFICATION IS FOR: *(X and complete as applicable.)*

- [ ] a. PRIME CONTRACT NUMBER *(See Instructions.)*
- [ ] b. SUBCONTRACT NUMBER
- [X] c. SOLICITATION OR OTHER NUMBER: HQ00034-07-R-1058 — DUE DATE *(YYYYMMDD)*: 20080206

3. THIS SPECIFICATION IS: *(X and complete as applicable.)*

- [X] a. ORIGINAL *(Complete date in all cases.)* — DATE *(YYYYMMDD)*: 20071218
- [ ] b. REVISED *(Supersedes all previous specifications.)* — REVISION NO.: — DATE *(YYYYMMDD)*:
- [ ] c. FINAL *(Complete item 5 in all cases.)* — DATE *(YYYYMMDD)*:

4. IS THIS A FOLLOW-ON CONTRACT? [ ] NO [X] YES. If Yes, complete the following:
Classified material received or generated under MDA946-03-C-0001 *(Preceding Contract Number)* is transferred to this follow-on contract.

5. IS THIS A FINAL DD FORM 254? [X] NO [ ] YES. If Yes, complete the following:
In response to the contractor's request dated _____, retention of the classified material is authorized for the period of: _____

6. CONTRACTOR *(Include Commercial and Government Entity (CAGE) Code.)*

a. NAME, ADDRESS, AND ZIP CODE	b. CAGE CODE	c. COGNIZANT SECURITY OFFICE (CSO) *(Name, Address, ZIP Code, Telephone)*

7. SUBCONTRACTOR(S) *(Click button to add more subcontractors.)* Add More Items

a. NAME, ADDRESS, AND ZIP CODE	b. CAGE CODE	c. COGNIZANT SECURITY OFFICE(S) (CSOs) *(Name, Address, ZIP Code, Telephone)*

8. ACTUAL PERFORMANCE *(Click button to add more locations.)* Add More Items

a. LOCATION(S) *(For actual performance, see Instructions.)*	b. CAGE CODE *(If applicable, see instructions.)*	c. COGNIZANT SECURITY OFFICE(S) (CSOs) *(Name, Address, ZIP Code, Telephone) (If applicable, see instructions.)*

9. GENERAL UNCLASSIFIED DESCRIPTION OF THIS PROCUREMENT *(Click here if more space is needed.)* Add Page

10. CONTRACTOR WILL REQUIRE ACCESS TO: *(X all that apply. Provide details in Blocks 13 or 14 as set forth in the instructions.)*

- [ ] a. COMMUNICATIONS SECURITY (COMSEC) INFORMATION
- [ ] b. RESTRICTED DATA
- [ ] c. CRITICAL NUCLEAR WEAPON DESIGN INFORMATION (CNWDI) *(If CNWDI applies, RESTRICTED DATA must also be marked.)*
- [ ] d. FORMERLY RESTRICTED DATA
- [ ] e. NATIONAL INTELLIGENCE INFORMATION:
  - [ ] (1) Sensitive Compartmented Information (SCI)
  - [ ] (2) Non-SCI
- [ ] f. SPECIAL ACCESS PROGRAM (SAP) INFORMATION
- [ ] g. NORTH ATLANTIC TREATY ORGANIZATION (NATO) INFORMATION
- [ ] h. FOREIGN GOVERMENT INFORMATION
- [ ] i. ALTERNATIVE COMPENSATORY CONTROL MEASURES (ACCM) INFORMATION
- [ ] j. CONTROLLED UNCLASSIFIED INFORMATION (CUI) *(See instructions.)*
- [X] k. OTHER *(Specify) (See instructions.)*

DD FORM 254, NOV 2017 — PREVIOUS EDITION IS OBSOLETE. — Adobe LiveCycle Designer ES4

CLASSIFICATION *(When filled in)*:

CLASSIFICATION *(When filled in)*:

11. IN PERFORMING THIS CONTRACT, THE CONTRACTOR WILL: *(X all that apply. See instructions. Provide details in Blocks 13 or 14 as set forth in the instructions.)*

X	a. HAVE ACCESS TO CLASSIFIED INFORMATION ONLY AT ANOTHER CONTRACTOR'S FACILITY OR A GOVERNMENT ACTIVITY *(Applicable only if there is no access or storage required at contractor facility. See instructions.)*		h. REQUIRE A COMSEC ACCOUNT
	b. RECEIVE AND STORE CLASSIFIED DOCUMENTS ONLY		i. HAVE A TEMPEST REQUIREMENT
	c. RECEIVE, STORE, AND GENERATE CLASSIFIED INFORMATION OR MATERIAL		j. HAVE OPERATIONS SECURITY (OPSEC) REQUIREMENTS
	d. FABRICATE, MODIFY, OR STORE CLASSIFIED HARDWARE		k. BE AUTHORIZED TO USE THE DEFENSE COURIER SERVICE (DCS)
X	e. PERFORM SERVICES ONLY		l. RECEIVE, STORE, OR GENERATE CONTROLLED UNCLASSIFIED INFORMATION (CUI). *(DoD Components: refer to DoDM 5200.01, Volume 4 only for specific CUI protection requirements. Non-DoD Components: see instructions.)*
	f. HAVE ACCESS TO U.S. CLASSIFIED INFORMATION OUTSIDE THE U.S., PUERTO RICO, U.S. POSSESSIONS AND TRUST TERRITORIES	X	m. OTHER *(Specify) (See instructions)*
	g. BE AUTHORIZED TO USE THE SERVICES OF DEFENSE TECHNICAL INFORMATION CENTER (DTIC) OR OTHER SECONDARY DISTRIBUTION CENTER		

12. PUBLIC RELEASE. Any information *(classified or unclassified)* pertaining to this contract shall not be released for public dissemination except as provided by the National Industrial Security Program Operating Manual (NISPOM) or unless it has been approved for public release by appropriate U.S. Government authority. Proposed public releases shall be submitted for review and approval prior to release to the appropriate government approval authority identified here with at least office and phone contact information and if available, an e-mail address. *(See instructions)*

DIRECT [X] THROUGH *(Specify)*

Directorate Freedom of Information and Security Review
1155 Defense Pentagon, RM 2C757 Washington, DC 20301-1155

PUBLIC RELEASE AUTHORITY:

13. SECURITY GUIDANCE. The security classification guidance for classified information needed for this effort is identified below. If any difficulty is encountered in applying this guidance or if any other contributing factor indicates a need for changes in this guidance, the contractor is authorized and encouraged to provide recommended changes; to challenge the guidance or the classification assigned to any information or material furnished or generated under this contract; and to submit any questions for interpretation of this guidance to the official identified below. Pending final decision, the information involved shall be handled and protected at the highest level of classification assigned or recommended. *(Fill in as appropriate for the classified effort. Attach, or forward under separate correspondence, any documents/guides/extracts referenced herein. Click button to add additional pages as needed to provide complete guidance.)* Add Page

9. The solicitation is for a follow-on to contract MDA945-03-C-0001. Contract MDA945-03-C-0001 required a TOP SECRET facility clearance. However, no classified material was received or generated under this contract.

10. The contractor will be required to enter secure spaces to perform custodial tasks such as trash removal, vacuuming, dusting, window washing, carpet cleaning, etc.

11a. Due to the nature of the service, the [illegible] eduling information of high-ranking officials visiting the Pentagon.

11b. The contractor will enter secure spa[illegible] al services to the Pentagon's needs.

13. Security guidance.

14. ADDITIONAL SECURITY REQUIREMENTS. Requirements, in addition to NISPOM requirements for classified information, are established for this contract.

[X] No [ ] Yes *(If Yes, identify the pertinent contractual clauses in the contract document itself, or provide an appropriate statement which identifies the additional requirements. Provide a copy of the requirements to the CSO. Use Item 13 or click button if additional space is needed.)* Add Page

15. INSPECTIONS. Elements of this contract are outside the inspection responsibility of the CSO. Add Page [X] No [ ] Yes
(If Yes, explain and identify specific areas and government activity responsible for inspections. Click button or use Item 13 if additional space is needed.)

16. GOVERNMENT CONTRACTING ACTIVITY (GCA) AND POINT OF CONTACT (POC)

a. GCA NAME	b. ACTIVITY ADDRESS CODE (AAC) OF THE CONTRACTING OFFICE *(See instructions.)*	c. ADDRESS *(Include ZIP Code.)*
d. POC NAME *(See instructions.)*	e. POC TELEPHONE *(Include Area Code.)*	f. EMAIL ADDRESS *(See instructions.)*

17. CERTIFICATION AND SIGNATURES. Security requirements stated herein are complete and adequate for safeguarding the classified information to be released or generated under this classified effort. All questions shall be referred to the official named below.

a. TYPED NAME OF CERTIFYING OFFICIAL *(Last, First, Middle Initial) (See instructions.)*	b. TITLE Security Manager		c. ADDRESS *(Include ZIP Code.)*
d. AAC OF THE CONTRACTING OFFICE *(See instructions.)*	e. CAGE CODE OF THE PRIME CONTRACTOR *(See instructions.)*		
f. TELEPHONE *(Include Area Code.)*	g. EMAIL ADDRESS *(See instructions.)*	h. DATE	i. SIGNATURE

18. REQUIRED DISTRIBUTION BY THE CERTIFYING OFFICIAL

- [X] a. CONTRACTOR
- [ ] b. SUBCONTRACTOR
- [X] c. COGNIZANT SECURITY OFFICE FOR PRIME AND SUBCONTRACTOR
- [ ] d. U.S. ACTIVITY RESPONSIBLE FOR OVERSEAS SECURITY ADMINISTRATION
- [X] e. ADMINISTRATIVE CONTRACTING OFFICER
- [X] f. OTHERS AS NECESSARY *(If more room is needed, continue in Item 13 or on additional page if necessary.)*

DD FORM 254 (BACK), NOV 2017 CLASSIFICATION *(When filled in)*:

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT	1. CONTRACT ID CODE	PAGE 1 OF PAGES 2
	J	

2. AMENDMENT/MODIFICATION NUMBER	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQUISITION NUMBER	5. PROJECT NUMBER (If applicable)
0001	01/03/2008	KRS1017071323	

6. ISSUED BY CODE	7. ADMINISTERED BY (If other than Item 6) CODE
WHS ACQUISITION & PROCUREMENT OFFICE 1777 NORTH KENT ST SUITE 12063 ARLINGTON, VA 22209	See Item 6

8. NAME AND ADDRESS OF CONTRACTOR (Number, street, county, State and ZIP Code)	(X)	9A. AMENDMENT OF SOLICITATION NUMBER
	☒	HQ0034-07-R-1058
		9B. DATED (SEE ITEM 11) 12/21/2007
	☐	10A. MODIFICATION OF CONTRACT/ORDER NUMBER
		10B. DATED (SEE ITEM 13)
CODE / FACILITY CODE		

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☒ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ☐ is extended. ☒ is not extended.

Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning 1 copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or electronic communication which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by letter or electronic communication, provided each letter or electronic communication makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)

13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS. IT MODIFIES THE CONTRACT/ORDER NUMBER AS DESCRIBED IN ITEM 14.

CHECK ONE	
☐	A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NUMBER IN ITEM 10A.
☐	B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation data, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).
☐	C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:
☐	D. OTHER (Specify type of modification and authority)

E. IMPORTANT: Contractor ☐ is not ☐ is required to sign this document and return _____ copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

The purpose of this Amendment is to provide details for the scheduled site visit 10 January 2008 - 10:00 AM and incorporate Attachment J-C2.

See Continuation Sheet

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)	
15B. CONTRACTOR/OFFEROR	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA	16C. DATE SIGNED
(Signature of person authorized to sign)		(Signature of Contracting Officer)	1/3/2008

Previous edition unusable

STANDARD FORM 30 (REV. 11/2016)
Prescribed by GSA FAR (48 CFR) 53.243

INSTRUCTIONS *(Back Page)*:

Instructions for items other than those that are self-explanatory, are as follows:

(a) Item 1 (Contract ID Code). Insert the contract type identification code that appears in the title block of the contract being modified.

(b) Item 3 (Effective date).

(1) For a solicitation amendment, change order, or administrative change, the effective date shall be the issue date of the amendment, change order, or administrative change.

(2) For a supplemental agreement, the effective date shall be the date agreed to by the contracting parties.

(3) For a modification issued as an initial or confirming notice of termination for the convenience of the Government, the effective date and the modification number of the confirming notice shall be the same as the effective date and modification number of the initial notice.

(4) For a modification converting a termination for default to a termination for the convenience of the Government, the effective date shall be the same as the effective date of the termination for default.

(5) For a modification confirming the contracting officer's determination of the amount due in settlement of a contract termination, the effective date shall be the same as the effective date of the initial decision.

(c) Item 6 (Issued By). Insert the name and address of the issuing office. If applicable, insert the appropriate issuing office code in the code block.

(d) Item 8 (Name and Address of Contractor). For modifications to a contract or order, enter the contractor's name, address, and code as shown in the original contract or order, unless changed by this or a previous modification.

(e) Items 9, (Amendment of Solicitation Number - Dated), and 10, (Modification of Contract/Order Number - Dated). Check the appropriate box and in the corresponding blanks insert the number and date of the original solicitation, contract, or order.

(f) Item 12 (Accounting and Appropriation Data). When appropriate, indicate the impact of the modification on each affected accounting classification by inserting one of the following entries:

(1) Accounting classification ----------
Net increase $ ----------

(2) Accounting classification ----------
Net decrease $ ----------

NOTE: If there are changes to multiple accounting classifications that cannot be placed in block 12, insert an asterisk and the words "See continuation sheet".

(g) Item 13. Check the appropriate box to indicate the type of modification. Insert in the corresponding blank the authority under which the modification is issued. Check whether or not contractor must sign this document. (See FAR 43.103.)

(h) Item 14 (Description of Amendment/Modification).

(1) Organize amendments or modifications under the appropriate Uniform Contract Format (UCF) section headings from the applicable solicitation or contract. The UCF table of contents, however, shall not be set forth in this document.

(2) Indicate the impact of the modification on the overall total contract price by inserting one of the following entries:

(i) Total contract price increased by $ .....

(ii) Total contract price decreased by $.....

(iii) Total contract price unchanged.

(3) State reason for modification.

(4) When removing, reinstating, or adding funds, identify the contract items and accounting classifications.

(5) When the SF 30 is used to reflect a determination by the contracting officer of the amount due in settlement of a contract terminated for the convenience of the Government, the entry in Item 14 of the modification may be limited to --

(i) A reference to the letter determination; and

(ii) A statement of the net amount determined to be due in settlement of the contract.

(6) Include subject matter or short title of solicitation/contract where feasible.

(i) Item 16B. The contracting officer's signature is not required on solicitation amendments. The contracting officer's signature is normally affixed last on supplemental agreements.

STANDARD FORM 30 (REV. 11/2016) **BACK**

SECTION SF 30 BLOCK 14 CONTINUATION PAGE

SUMMARY OF CHANGES

SECTION L - INSTRUCTIONS, CONDITIONS AND NOTICES TO BIDDERS

The following have been added by full text:
SITE VISIT INFORMATION

A site visit has been scheduled for January 10, 2008 @ 10:00 A.M. The site visit will be followed by a brief pre-proposal conference. All contractors are strongly suggested to attend the site visit. Each contractor is allowed only two individuals for attendance. All attendees are required to meet at the Pentagon Metro entrance (outside) at least 15 minutes prior to the scheduled start of the site visit. Attendees shall submit company name, individuals name, a valid driver's license number including state of issue, and Social Security number in advance for access to the building unless they currently have a Pentagon access badge. Two forms of picture identification shall be required to be shown upon arrival. All required information will need to be forwarded to Mr. Tom Boardman at tom.boardman@whs.mil by 12:00 P.M. on 8 January 2008.

(End of Summary of Changes)

CHAPTER 3

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CHAPTER 3

AUTHORITY TO CONTRACT

I. INTRODUCTION

"The United States Government employs over 3 million civilian employees. Clearly, federal expenditures would be wholly uncontrollable if Government employees could, of their own volition, enter into contracts obligating the United States." City of El Centro v. U.S., 922 F.2d 816, 820 (Fed. Cir. 1990).

II. OBJECTIVES

Following this block of instruction, students should:

A. Understand the elements of a contract and the different ways that a contract can be formed.

B. Understand the constitutional, statutory, and regulatory bases that permit federal executive agencies to contract using appropriated funds (APFs).

C. Understand how individuals acquire the power to contract on behalf of the government.

D. Understand the different theories that bind the government in contract.

E. Understand what constitutes an "unauthorized commitment" and be able to describe how, and by whom, unauthorized commitments may be ratified.

III. METHODS OF CONTRACT FORMATION

A. FAR Definition of a Contract: A contract is a mutually binding legal relationship obligating the seller to furnish supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments obligating the government to expend appropriated funds and, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and

bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. § 6301, *et seq*. See FAR 2.101

B. Express Contract.

1. An express contract is a contract whose terms the parties have explicitly set out. BLACK'S LAW DICTIONARY (11th ed. 2019).

2. The required elements to form a government contract are:

   a. mutual intent to contract;

   b. offer and acceptance; and

   c. conduct by an officer having the actual authority to bind the government in contract.

Allen Orchards v. United States, 749 F. 2d 1571, 1575 (Fed. Cir. 1984); OAO Corp. v. United States, 17 Cl. Ct. 91 (1989); Nascent Group, J.V. v. United States, 103 Fed. Cl. 338 (2012).

3. Requirement for contract to be in writing. See FAR 2.101 definition of contract, supra.

   a. Oral contracts are generally not enforceable against the government unless supported by documentary evidence. See 31 U.S.C. § 1501(a)(1) (an amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of a binding agreement between an agency and another person that is in writing, in a way and form, and for a purpose authorized by law).

   b. The predecessor provision to 31 U.S.C. § 1501(a)(1) was construed as requiring a written contract to obtain court enforcement of an agreement. United States v. American Renaissance Lines, Inc., 494 F.2d 1059 (D.C. Cir. 1974), cert. denied, 419 U.S. 1020 (1974) (Government unable to obtain damages for an unperformed oral contract for carriage.)

   c. The Court of Claims has held that failure to reduce a contract to writing under 31 U.S.C. 1501(a)(1) should not preclude recovery. Rather, a party can prevail if it introduces additional facts from which a court can infer a meeting of the minds. Narva Harris Construction Corp. v. United States, 574 F.2d 508 (1978).

d. The Ninth Circuit Court of Appeals has held that FAR 2.101 does not prevent a court from finding an implied-in-fact contract. PACORD, Inc. v. United States, 139 F.3d 1320, 1323 (9th Cir. 1998).

e. The Armed Services Board of Contract Appeals (ASBCA) has followed the Narva Harris position. Various correspondence between parties can be sufficient "additional facts" and "totality of circumstances" to avoid the statutory prohibition in 31 U.S.C. § 1501(a)(1) against purely oral contracts. Essex Electro Engineers, Inc., ASBCA Nos. 30118, 30119, 88-1 BCA ¶ 20,440; Vec-Tor, Inc., ASBCA Nos. 25807 and 26128, 84-1 BCA ¶ 17,145.

f. The ASBCA has found a binding oral contract existed where the Army placed an order against a GSA requirements contract. C-MOR Co., ASBCA Nos. 30479, 31789, 87-2 BCA ¶ 19,682 (however, the Army placed a written delivery order following a telephone conversation between the contract specialist and C-MOR). But see RMTC Sys., AGBCA No. 88-198-1, 91-2 BCA ¶ 23,873 (shipment in response to phone order by employee without contract authority did not create a contract).

C. Implied Contracts

1. Implied-in-Fact Contract.

a. Where there is no written contract, contractors often attempt to recover by alleging the existence of a contract "implied-in-fact."

b. An implied-in-fact contract is "founded upon a meeting of the minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." Baltimore & Ohio R.R. Co. v. United States, 261 U.S. 592, 597 (1923).

c. The requirements for an implied-in-fact contract are the same as for an express contract; only the nature of the evidence differs. OAO Corp. v. United States, 17 Cl. Ct. 91 (1989) (finding implied-in-fact contract for start-up costs for AF early warning system). See, generally, Willard L. Boyd III, Implied-in-Fact Contract: Contractual Recovery against the Government without an Express Agreement, 21 Pub. Cont. L. J. 84-128 (Fall 1991).

2. Implied-in-Law Contract.

a. An implied-in-law contract is not a true agreement to contract. It is a "fiction of law" where "a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress." Baltimore & Ohio R.R. Co. v. United States, 261 U.S. 592, 597 (1923).

b. When a contractor seeks recovery under an implied-in-law theory, the government should file a motion to dismiss for lack of jurisdiction. Neither the Contract Disputes Act (CDA) nor the Tucker Act grants jurisdiction to courts and boards to hear cases involving implied-in-law contracts. 41 U.S.C. §§ 601-613; 28 U.S.C. §§ 1346 and 1491. See Hercules, Inc. v. United States, 516 U.S. 417 (1996); Amplitronics, Inc., ASBCA No. 44119, 94-1 BCA ¶ 26,520

IV. AUTHORITY OF AGENCIES

A. Constitutional. As a sovereign entity, the United States has inherent authority to contract in order to discharge governmental duties. United States v. Tingey, 30 U.S. (5 Pet.) 115 (1831). This authority to contract, however, is limited. Specifically, a government contract must:

1. Not be prohibited by law; and

2. Be an appropriate exercise of governmental powers and duties.

B. Statutory. Congress has enacted various statutes regulating the acquisition of goods and services by the government. These include the:

1. Federal Property and Administrative Services Act of 1949 (FPASA), 41 U.S.C. §§ 251-260. FPASA was repealed and now has provisions contained in Revised Titles, see 40 U.S.C.S. §§ 101-2, 111-13, 121-26, 301-4, 311-13, 321-23, 501-29, 541-59, 571-74, 581-93, 601-11, 701-5, 901-5, 1101-4; 41 U.S.C.S. §§ 102-3, 105-16, 151-53, 3101-6, 3301, 3303-11, 3501-8, 3701-8, 3901-3, 3905, 4101, 4103, 4105, 4106, 4301-10, 4501-6, 4709. The FPASA governs the acquisition of all property and services by all executive agencies except DOD, Coast Guard, NASA, and any agency specifically exempted by 40 U.S.C. § 474 or any other law.

2. Office of Federal Procurement Policy Act (OFPPA), 41 U.S.C. § 401 et. seq. OFPPA was repealed and now has provisions contained in a Revised Title, see 41 U.S.C.S. §§ 102-5, 107-16, 131-34, 1101-2, 1121-22, 1124-27, 1130-31, 1301-4, 1311-12, 1501-6, 1701-3, 1705, 1707-12, 1901-3, 1905-8, 2101-7, 2301-2, 2305-10, 2312, 7105. This legislation

applies to all executive branch agencies, and created the Office of Federal Procurement Policy (OFPP) within the Office of Management and Budget. The Administrator of the OFPP is given responsibility to "provide overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies." 41 U.S.C. § 1121(a).

3. Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304.

   a. CICA amended the ASPA and the FPASA to make them identical. Because of subsequent legislative action, they are now different in some significant respects.

   b. CICA mandates full and open competition for many, but not all, purchases of goods and services.

4. The Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, 108 Stat. 3243. FASA amended various sections of the statutes described above.

5. Clinger-Cohen Act, Pub. L. No. 104-106, Division E, § 5101, 110 Stat. 680 (1996) (previously known as the Information Technology Management Reform Act (ITMRA)). This statute governs the acquisition of information technology by federal agencies. It repealed the Brooks Automatic Data Processing Act, 40 U.S.C. § 759.

6. Annual DOD Authorization and Appropriation Acts.

C. Regulatory

1. Federal Acquisition Regulation (FAR), codified at 48 C.F.R. Chapter 1.

   a. The FAR is the principal regulation governing federal executive agencies in the use of appropriated funds to acquire supplies and services.

   b. The DOD, NASA, and the General Services Administration (GSA) issue the FAR jointly.

   c. These agencies publish proposed, interim, and final changes to the FAR in the Federal Register (https://www.federalregister.gov/). They issue changes to the FAR in Federal Acquisition Circulars (FACs).

2. Agency regulations. The FAR system consists of the FAR and the agency regulations that implement or supplement it. The following regulations

supplement the FAR. (The FAR and its supplements are available at https://www.acquisition.gov/browse/index/far).

a. Defense Federal Acquisition Regulation Supplement (DFARS), codified at 48 C.F.R. chapter 2. The Defense Acquisition Regulation (DAR) Council publishes DFARS changes/proposed changes in the Federal Register, and issues them as Defense Acquisition Circulars (DACs).

b. Army Federal Acquisition Regulation Supplement (AFARS).

c. Air Force Federal Acquisition Regulation Supplement (AFFARS).

d. Navy Marine Corps Acquisition Regulation Supplement (NMCARS).

e. The AFARS, AFFARS, and NMCARS are not codified in the C.F.R. The military departments do not publish changes to these regulations in the Federal Register but, instead, issue them pursuant to departmental procedures.

3. Major command and local command regulations.

V. AUTHORITY OF PERSONNEL

A. Contracting Authority

1. Agency Head

a. The FAR vests contracting authority in the head of the agency. FAR 1.601(a). Within DOD, the heads of the agencies are the Secretaries of Defense, the Army, the Navy, and the Air Force. DFARS 202.101.

b. In turn, the head of the agency may establish subordinate contracting activities and delegate broad contracting authority to the heads of the subordinate activities. FAR 1.601(a).

2. Heads of Contracting Activities (HCAs)

a. HCAs have overall responsibility for managing all contracting actions within their activities.

b. There are over 60 DOD contracting activities, plus others who possess contracting authority delegated by the heads of the various defense agencies. Examples of DOD contracting activities include

U.S. Army Intelligence and Security Command, Naval Air Systems Command, and Air Force Materiel Command. DFARS 202.101.

c. HCAs are contracting officers by virtue of their position. See FAR 1.601; FAR 2.101.

d. HCAs may delegate some of their contracting authority to deputies.

(1) In the Army, HCAs appoint a Senior Contracting Official (SCO), formerly called a Principal Assistant Responsible for Contracting (PARC), as the senior staff official of the contracting function within the contracting activity. The SCO has direct access to the HCA and should be one organizational level above the contracting office(s) within the HCA's command. AFARS 5101.693.

(2) The Air Force and the Navy also permit delegation of contracting authority to certain deputies. AFFARS 5301.601; NMCARS 5201.601-90.

3. Contracting officers

a. Agency heads or their designees select and appoint contracting officers. Appointments are made in writing using the SF 1402, Certificate of Appointment. Delegation of micro-purchase authority shall be in writing, but need not be on a SF 1402. FAR 1.603-3.

b. Contracting officers may bind the government only to the extent of the authority delegated to them on the SF 1402. Information on a contracting officer's authority shall be readily available to the public and agency personnel. FAR 1.602-1(a).

4. Contracting Officer Representatives (COR).

a. Contracting officers may authorize selected individuals to perform specific technical or administrative functions relating to the contract. A COR may also be referred to as a Contracting Officer's Technical Representative (COTR) or Quality Assurance Representative (QAR).

b. Typical COR designations do not authorize CORs to take any action, such as modification of the contract that obligates the

payment of money. See AFARS 5153.303-1, Sample COR designation.

B. Actual Authority

1. The government is bound only by government agents acting within the actual scope of their authority to contract. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947) (government agent lacked authority to bind government to wheat insurance contract not authorized under Wheat Crop Insurance Regulations); Hawkins & Powers Aviation, Inc. v. United States, 46 Fed. Cl. 238 (2000) (assistant director of Forest Service lacked authority to modify aircraft contract); Schism v. United States, 316 F.3d 1259 (Fed. Cir. 2002) (military recruiters lacked the authority to bind the government to promises of free lifetime medical care).

2. Actual authority can usually be determined by viewing a contracting officer's warrant or a COR's letter of appointment. See Farr Bros., Inc., ASBCA No. 42658, 92-2 BCA ¶ 24,991 (COR's authority to order suspension of work not specifically prohibited by appointment letter).

3. The acts of government agents which exceed their contracting authority do not bind the government. See HTC Indus., Inc., ASBCA No. 40562, 93-1 BCA ¶ 25,560 (contractor denied recovery although contracting officer's technical representative encouraged continued performance despite cost overrun on the cost plus fixed-fee contract); Johnson Management Group CFC v. Martinez, 308 F.3d. 1245 (Fed. Cir. 2002) (contracting officer was without authority to waive a government lien on equipment purchased with government funds).

C. Apparent Authority

1. Definition. Authority that a third party reasonably believes an agent has, based on the third party's dealings with the principal, even though the principal did not confer or intend to confer the authority. BLACK'S LAW DICTIONARY (11th ed. 2019).

2. The government is not bound by actions of one who has apparent authority to act for the government. Liberty Ammunition v. U.S., 835 F.3d 1388 (2014); Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947); Sam Gray Enterprises, Inc. v. United States, 43 Fed. Cl. 596 (1999) (embassy *chargé d'affaires* lacked authority to bind government); Mark L. McAfee v. United States, 46 Fed. Cl. 428 (2000) (Assistant U.S. Attorney lacked authority to forgive plaintiff's farm loan in exchange for cooperation in foreclosure action); Austin v. United States, 51 Fed.Cl. 718 (2002) (employees of the U.S. Marshall Service possessed no authority to bind

the government to pay informant in witness protection program a stipend or damages resulting from the informant's move).

3. In contrast, contractors are bound by apparent authority. American Anchor & Chain Corp. v. United States, 331 F.2d 860 (Ct. Cl. 1964) (government justified in assuming that contractor's plant manager acted with authority); but see Appeals of Seven Seas Shipchandlers, LLC, ASBCA Nos. 57875, 57876, 57877, 57878, 57879, 13-1 BCA ¶ 35,193 (where the Government did not follow its own payment processes, it could not show that it paid the contractor based on the theory that a non-employee of the contractor who collected payment had apparent authority).

VI. THEORIES THAT BIND THE GOVERNMENT

The following are often used in combination to support a contractor's claim of a binding contract action.

A. Implied authority

1. Use of this theory requires that the government employee have some actual authority.

2. Courts and boards may find implied authority to contract if the questionable acts, orders, or commitments of a government employee are an integral or inherent part of that person's assigned duties. See H. Landau & Co. v. United States, 886 F.2d 322, 324 (Fed. Cir. 1989); Confidential Informant v. United States, 46 Fed. Cl. 1 (2000) (even though FBI agents lacked actual authority to contract for rewards, government may be liable under theory of "implied actual authority"); Sigma Constr. Co., ASBCA No. 37040, 91-2 BCA ¶ 23,926 (contract administrator at work site had implied authority to issue change orders issued under exigent circumstance [drying cement]); Switlik Parachute Co., ASBCA No. 17920, 74-2 BCA ¶ 10,970 (quality assurance representative had implied authority to order 100% testing of inflatable rafts).

3. Contracting authority is integral to an employee's duties when:

   a. The employee cannot perform his assigned tasks without such authority, and

   b. The relevant agency's regulations do not grant the authority to other agency employees. SGS-92-X003 v. United States, 74 Fed. Cl. 637 (2006).

4. However, contract changes cannot be an "integral part" of an employee's duties if the contract explicitly reserves or prohibits that authority. Winter v. Cath-dr/Balti Joint Venture, 497 F.3d 1339 (Fed. Cir. 2007) (despite his assigned responsibilities and the Navy's indications that he had authority to make contract changes, Program Manager did not have express or implied authority where the contract's clauses explicitly granted to the contracting officer the exclusive authority to modify the contract); Aero-Abre, Inc., v. United States, 39 Fed. Cl. 654 (1997) (no implied actual authority where a regulation, contract, or letter expressly prohibits an employee from possessing actual authority).

B. Ratification.

1. Formal or Express. FAR 1.602-3 provides the contracting officer with authority to ratify certain unauthorized commitments. See section VII, infra. Henke v. United States, 43 Fed. Cl. 15 (1999); Khairallah v. United States, 43 Fed. Cl. 57 (1999) (no ratification of unauthorized commitments by DEA agents); Strickland v. U.S., 382 F. Supp. 2d 1334 (2005) (official had no authority, and no evidence presented of ratification).

2. Implied (adoption). A court or board may find ratification by implication where a contracting officer has actual or constructive knowledge of the unauthorized commitment and adopts the act as his own. The contracting officer's failure to process a claim under the procedures of FAR 1.602-3 does not preclude ratification by implication. Reliable Disposal Co., ASBCA No. 40100, 91-2 BCA ¶ 23,895 (KO ratified unauthorized commitment by requesting payment of the contractor's invoice); Tripod, Inc., ASBCA No. 25104, 89-1 BCA ¶ 21,305 (KO's knowledge of contractor's complaints and review of inspection reports evidenced implicit ratification); Digicon Corp. v. United States, 56 Fed. Cl. 425 (2003) (COFC found "institutional ratification" where Air Force issued task orders and accepted products and services from appellant over a sixteen month period).

C. Imputed Knowledge.

1. This theory is sometimes used when the contractor fails to meet the contractual obligation to give written notice to the contracting officer of, for example, a differing site condition. Williams v. United States, 127 F. Supp. 617 (Ct. Cl. 1955) (contracting officer deemed to have knowledge of road paving agreement on Air Force base).

2. When the relationship between two persons creates a presumption that one would have informed the contracting officer of certain events, the boards may impute the knowledge of the person making the unauthorized

commitment to the contracting officer. Sociometrics, Inc., ASBCA No. 51620, 00-1 BCA ¶ 30,620 ("While the [contract] option was not formally exercised, the parties conducted themselves as if it was"); Leiden Corp., ASBCA No. 26136, 83-2 BCA ¶ 16,612 ("It would be inane indeed to suppose that [the government inspector] was at the site for no purpose").

D. Equitable Estoppel

1. A contractor's reasonable, detrimental reliance on statements, actions, or inactions by a government employee may estop the government from denying liability for the actions of that employee. Lockheed Shipbldg. & Constr. Co., ASBCA No. 18460, 75-1 BCA ¶ 11,246 (government estopped by Dep. Secretary of Defense's consent to settlement agreement).

2. To prove estoppel in a government contract case, the party must establish:

   a. Knowledge of the facts by the party to be estopped;

   b. Intent, by the estopped party, that his conduct shall be acted upon, or actions such that the party asserting estoppel has a right to believe it is so intended;

   c. Ignorance of the true facts by the party asserting estoppel; and

   d. Detrimental reliance. Emeco Industries, Inc. v. United States, 485 F.2d 652, at 657 (Ct. Cl. 1973).

3. If asserted against the government, appellant must demonstrate government affirmative misconduct as a prerequisite for invoking equitable estoppel. Zacharin v. United States, (213 F.3d 1366) (Fed. Cir. 2001); Rumsfeld v. United Technologies Corp., 315 F. 3d 1361 (Fed. Cir. 2003); Lua v. U.S., 843 F.3d 950 (2016); Appeal of SplashNote Systems, Inc., 12-1 BCA ¶ 34,899, Nov. 29, 2011; and Appeal of F Unitech Services Group, Inc., 16 ASBCA No. 56482, May 22, 2012.

4. However, see Mabus v. General Dynamics C4 Systems, Inc., 633 F.3d 1356 (Fed. Cir. Feb. 4, 2011), which, citing A.C. Aukerman Co. v. R.L. Chaides Construction Co., 960 F.2d 1020 (Fed. Cir. 1992), replaced the four-part estoppel test with a three-part test requiring proof of:

   a. Misleading conduct, which may include not only statements and actions but silence and inaction, leading another to reasonably infer that rights will not be asserted against it;

   b. Reliance upon this conduct; and

c. Due to this reliance, material prejudice if the delayed assertion of such rights is permitted.

VII. UNAUTHORIZED COMMITMENTS

A. Definition. An unauthorized commitment is an agreement that is nonbinding solely because the government representative who made it lacked the authority to enter into that agreement. FAR 1.602-3.

B. Ratification.

1. Ratification is the act of approving an unauthorized commitment, by an official who has the authority to do so, for the purpose of paying for supplies or services provided to the government as a result of an unauthorized commitment. FAR 1.602-3.

2. The government may ratify unauthorized commitments if:

a. The government has received and accepted supplies or services, or the government has obtained or will obtain a benefit from the contractor's performance of an unauthorized commitment.

b. At the time the unauthorized commitment occurred, the ratifying official could have entered into, or could have granted authority to another to enter into, a contractual commitment which the official still has authority to exercise.

c. The resulting contract otherwise would have 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 expressly do not require such concurrence.

f. Funds are available and were available when the unauthorized commitment occurred.

g. Ratification is within limitations prescribed by the agency.

3. Army HCAs may delegate the authority to approve ratification actions, without the authority to redelegate, to the following individuals.

a. PARC (for amounts of $100,000 or less) (AFARS 5101.602-3(b)(3)); and

b. Chiefs of Contracting Offices (for amounts of $10,000 or less) (AFARS 5101.602-3(b)(3)).

4. The Air Force and the Navy also permit ratification of unauthorized commitments, but their limitations are different than those of the Army. See AFFARS 5301.602-3; NMCARS 5201.602-3.

C. Alternatives to Ratification. If the agency refuses to ratify an unauthorized commitment, a binding contract does not arise. A contractor can pursue one of the following options:

1. Requests for extraordinary contractual relief.

a. Contractors may request extraordinary contractual relief in the interest of national defense. FAR Part 50.

b. FAR 50.103-2(c) authorizes, under certain circumstances, informal commitments to be formalized for payment where, for example, the contractor, in good faith reliance on a government employee's apparent authority, furnishes supplies or services to the agency. Radio Corporation of America, ACAB No. 1224, 4 ECR ¶ 28 (1982) (contractor granted $648,747 in relief for providing, under an informal commitment with the Army, maintenance, repair, and support services for electronic weapon system test stations).

c. Operational urgency may be grounds for formalization of informal commitments under P.L. 85-804. Vec-Tor, Inc., ASBCA Nos. 25807, 26128, 85-1 BCA ¶ 17,755.

2. Doubtful Claims

a. 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.

b. Under quantum meruit, the government pays the reasonable value of services it actually received on an implied, quasi-contractual basis. Maintenance Svc. & Sales Corp., B-242019, 70 Comp. Gen. 664 (1991).

c. The GAO used the following criteria to determine justification for payment:

(1) The goods or services for which the payment is sought would have been a permissible procurement had proper procedures been followed;

(2) The government received and accepted a benefit;

(3) The firm acted in good faith; and

(4) The amount to be paid did not exceed the reasonable value of the benefit received. Maintenance Svc. & Sales Corp., B-242019, 70 Comp. Gen. 664, *6 (1991).

d. 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.

e. The Claims Division at the Defense Office of Hearings and Appeals (DOHA) settles claims under 31 U.S.C. 3702 for the Department of Defense. DOHA decisions can be found at http://ogc.osd.mil/doha/.

3. 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.

VIII. CONCLUSION

Contract authority is a foundational element of the government acquisitions process. Contract Attorney's should be prepared to educate and train members of their organization on the importance of ensuring that all commitments on behalf of the government originate from an individual who has appropriate authority and comply with all regulatory requirements.

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CHAPTER 4

FUNDING AND FUND LIMITATIONS

I. INTRODUCTION

A. Source of Funding and Fund Limitations. The U.S. Constitution gives Congress the authority to raise revenue, borrow funds, and appropriate the proceeds for federal agencies. This Constitutional "power of the purse" includes the power to establish restrictions and conditions on the use of funds appropriated. To curb fiscal abuses by the executive departments, Congress has also enacted additional fiscal controls through statute.

1. U.S. Constitution, Art. I, § 8, grants to Congress the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . ."

2. U.S. Constitution, Art. I, § 9, provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . ."

3. The "Purpose Statute," 31 U.S.C. § 1301. The Purpose Statute provides that agencies shall apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law.

4. The Antideficiency Act (ADA), 31 U.S.C. §§ 1341, 1342, 1350, 1351, and 1511-1519, consists of several statutes that authorize administrative and criminal sanctions for the unlawful obligation and expenditure of appropriated funds.

5. Congress and the Department of Defense (DoD) have agreed informally to additional restrictions. The DoD refrains from taking certain actions without first giving prior notice to, and receiving consent from, Congress. These restraints are embodied in regulation.

B. The Basic Fiscal Limitations.

1. An agency may obligate and expend appropriations only for a proper **purpose**;

2. An agency may obligate only within the **time** limits applicable to the appropriation (e.g., Operation & Maintenance funds are available for obligation for one fiscal year); and

An agency may not obligate more than the **amount** appropriated by Congress, amounts apportioned to the agency, or in excess of the amount permitted by agency regulation.

C. The Supreme Court's Fiscal Law Philosophy: "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States v. MacCollom*, 426 U.S. 317 (1976).

3.

II. KEY TERMINOLOGY

A. Fiscal Year (FY). The Federal Government's fiscal year begins on 1 October and ends on 30 September.

B. Obligation. An obligation is any act that legally binds the government to make payment. Obligations are amounts representing orders placed, contracts awarded, services received, and similar transactions during an accounting period that will require payment during the same or a future period. This includes payments for which obligations previously have not been recorded and adjustments for differences between obligations previously recorded and actual payments to liquidate those obligations. The amount of obligations incurred is segregated into undelivered orders and accrued expenditures - paid or unpaid. For purposes of matching a disbursement to its proper obligation, the term obligation refers to each separate obligation amount identified by a separate line of accounting. DoD FMR, Glossary, p. 21.

C. Period of Availability. Most appropriations are available for obligation for a limited period of time. Funds that are not legally obligated before their period of availability expires are no longer available for new obligations. The period of availability applies to the obligation of funds, not the liquidation of the obligation by disbursement of payment (expenditure). DFAS-IN 37-1, ch.8 (Feb. 2017), Glossary (Mar. 2017); *see also* DOD FMR, vol. 3, ch. 15, para. 150204 (Aug. 2015); A Glossary of Terms Used in the Federal Budget, GAO-05-734SP (Sep. 2005); GAO Redbook, Vol. II, page 7-3 to 7-4.

D. Budget Authority. Budget authority means "the authority provided by Federal law to incur financial obligations . . . ." 2 U.S.C. § 622(2). It is the authority provided by law to enter into obligations that will result in immediate or future outlays involving Federal Government funds. The basic forms of budget authority are appropriations authority to borrow, and contract authority. Budget authority relates to direct programs. See also, DoD, DoD FMR, Glossary, p. 6.

E. Contract Authority. It is a statutory authority to incur obligations but with liquidation of obligations dependent upon future actions of the Congress. This authority permits agencies to obligate funds in advance of appropriations, but not to pay or disburse those funds absent some additional appropriations authority.

DoD FMR, Glossary, p. 10. See, e.g., 41 U.S.C. § 11 (Feed and Forage Act); DoD FMR, vol. 3, ch. 19, para. 190302 (Aug. 2015).

F. Authorization Act. An authorization act is a statute, typically passed annually, by Congress that authorizes the appropriation of funds for programs and activities. An authorization act does not provide budget authority. That authority stems from the appropriations act. Authorization acts frequently contain restrictions or limitations on the obligation of appropriated funds. A Glossary of Terms Used in the Federal Budget, GAO-05-734SP (Sep. 2005).

G. Appropriations Act. An appropriation is a statutory authorization to "incur obligations and make payments out of the U.S. Treasury for specified purposes." An appropriations act is the most common form of budget authority. A Glossary of Terms Used in the Federal Budget, GAO-05-734SP (Sep. 2005).

1. The Army receives the bulk of its funds from two annual Appropriations Acts: (1) the Department of Defense Appropriations Act; and (2) the Military Construction Appropriations Act.

2. The making of an appropriation must be stated expressly. An appropriation may not be inferred or made by implication. Principles of Fed. Appropriations Law, vol. I (4th ed.) p. 2-23, GAO-16-464SP (March 10, 2016).

H. Comptroller General and Government Accountability Office (GAO).

2. The Comptroller General of the United States heads the GAO, an investigative arm of Congress charged with examining all matters relating to the receipt and disbursement of public funds. http://www.gao.gov/about/index.htmlThe GAO was established by the Budget and Accounting Act of 1921 (31 U.S.C. § 702) to audit

3. government agencies.

4. The Comptroller General issues opinions and reports to federal agencies concerning the propriety of appropriated fund obligations or expenditures.

Comptroller General decisions and opinions are identified by a B-number and date (e.g., B-324214, January 27, 2014). Some decisions predating 1995 were published in Decisions of the Comptroller General of the United States. Those decisions have B-numbers but are generally identified by volume, page number, and the year the decision was issued (e.g., 73 Comp. Gen. 77 (1994)).

I. Accounting Classifications. Accounting classifications are codes used to manage appropriations. They are used to implement the administrative fund control system and to ensure that funds are used correctly. An accounting classification is commonly referred to as a **fund cite**. DFAS-IN Manual 37-100-XX, The Army Mgmt. Structure, provides a detailed breakdown of Army accounting classifications.

The following is a sample fund cite:

1. The first two digits represent the military department. For example, "**21**" denotes the Department of the Army. For the Air Force, these two digits will be **57**; for the Navy, **17**; and for the Department of Defense, **97**.

2. The third digit shows the fiscal year/period of availability of the appropriation. The "8" in the example shown indicates FY 2018 funds. Installation contracting typically uses annual appropriations. Other fiscal year designators encountered less frequently include:

   a. Third Digit = X = No year appropriation. This appropriation is available for obligation indefinitely.

   b. Third Digit = 8/1 = Multi-year appropriation (in this case, a 3 year appropriation). In this example, funds were appropriated in FY 2018 and remain available through FY 2021.

3. The next four digits reveal the type of the appropriation. The following designators are used within DoD fund citations:

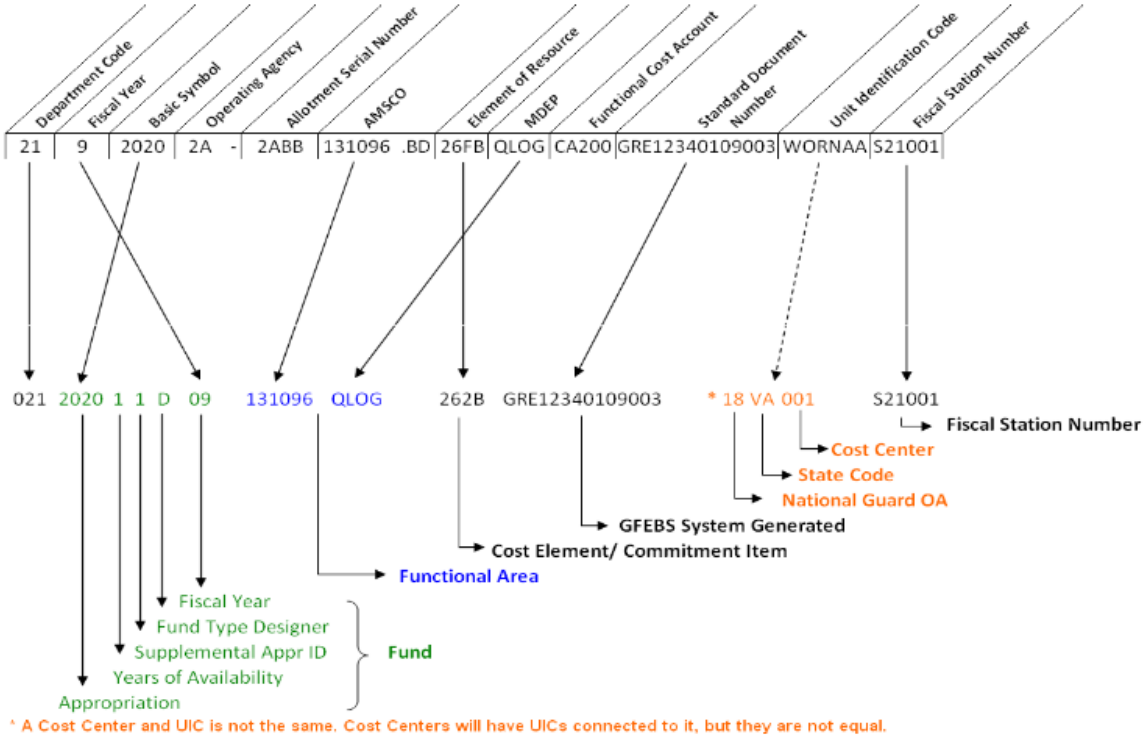
Appropriation Type	Army	Navy	Marine Corps	Air Force	OSD
Military Personnel	**21*2010**	**17*1453**	**17*1105**	**57*3500**	**N/A**
Reserve Personnel	**21*2070**	**17*1405**	**17*1108**	**57*3700**	**N/A**
National Guard Personnel	**21*2060**	**N/A**	**N/A**	**57*3850**	**N/A**
Operations & Maintenance	**21*2020**	**17*1804**	**17*1106**	**57*3400**	**97*0100**
Operations & Maintenance, Reserve	**21*2080**	**17*1806**	**17*1107**	**57*3740**	**N/A**
Operations & Maintenance, National Guard	**21*2065**	**N/A**	**N/A**	**57*3840**	**N/A**

Procurement, Aircraft	**21*2031**	**17*1506**		**57*3010**	**N/A**
Procurement, Missiles	**21*2032**	**17*1507 (not separate – the combined appropriation is entitled Weapons Procurement)**	**17*1109**	**57*3020**	**N/A**
Procurement, Weapons & Tracked Vehicles	**21*2033**			**N/A**	**N/A**
Procurement, Other	**21*2035**	**17*1810**		**57*3080**	**97*0300**
Procurement, Ammunition	**21*2034**	**17*1508**		**57*3011**	**N/A**
Shipbuilding & Conversion	**N/A**	**17*1611**		**N/A**	**N/A**
Res., Develop., Test, & Eval.7	**21*2040**	**17*1319**		**57*3600**	**97*0400**
Military Construction	**21*2050**	**17*1205**		**57*3300**	**97*0500**
Family Housing Construction	**21*0702**	**17*0703**		**57*0704**	**97*0706**
Reserve Construction	**21*2086**	**17*1235**		**57*3730**	**N/A**
National Guard Construction	**21*2085**	**N/A**	**N/A**	**57*3830**	**N/A**

* The asterisk in the third digit is replaced with the last number in the relevant fiscal year. For example, Operation & Maintenance (O&M), Army funds for FY2018 would be depicted as 2182021.

** This chart is derived from the archived version of the DOD FMR, vol. 6B.

J. General Fund Enterprise Business System (GFEBS). The Army transitioned to GFEBS, which modifies the way information is captured, summarized, reviewed and presented. Among the changes is a new line of accounting (LOA). Information can be found in the FY 2020 Army Funds Management Data Reference Guide, chs 2 and. 4. Below is a comparison of the new LOA with the legacy LOA.



III. AVAILABILITY AS TO PURPOSE

A. 1. The "Purpose Statute" provides that agencies shall apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law. 31 U.S.C. § 1301(a).

2. The Purpose Statute does not require Congress to specify every item of expenditure in an appropriation act, although it does specify the purpose of many expenditures. Rather, agencies have reasonable discretion to determine how to accomplish the purpose of an appropriation. Internal Revenue Serv. Fed. Credit Union—Provision of Automatic Teller Mach., B-226065, 66 Comp. Gen. 356 (1987).

An appropriation for a specific purpose is available to pay expenses necessarily incident to accomplishing that purpose. Secretary of State,

B-150074, 42 Comp. Gen. 226, 228 (1962); Major General Anton Stephan, A-17673, 6 Comp. Gen. 619 (1927).

B. The "Necessary Expense" Doctrine (the 3-part test for a proper purpose). Where a particular expenditure is not specifically provided for in the appropriation act, it is permissible if it is necessary and incident to the proper execution of the general purpose of the appropriation. The GAO applies a three-part test to determine whether an expenditure is a "necessary expense" of a particular appropriation:

1. The expenditure must bear a **logical relationship** to the appropriation sought to be charged. In other words, it must make a **direct contribution** to carry out either a specific appropriation or an authorized agency function for which more general appropriations are available.

2. The expenditure must **not be prohibited by law**.

3. The expenditure must **not be otherwise provided for**; that is, it must not be an item that falls within the scope of some other appropriation or statutory funding scheme.

Principles of Fed. Appropriations Law, vol. I, ch. 2, 3-16 & 3-17, GAO-17-797SP (4th ed. 2017). See Presidio Trust—Use of Appropriated Funds for Audio Equipment Rental Fees and Services, B-306424, 2006 U.S. Comp. Gen. LEXIS 57 (Mar. 24, 2006).

C. Application of the Necessary Expense Test.

1. The first prong of the "necessary expense" test has been articulated in some other, slightly different ways as well. *See e.g.*, Internal Revenue Serv. Fed. Credit Union—Provision of Automatic Teller Machine, B-226065, 66 Comp. Gen. 356, 359 (1987) ("an expenditure is permissible if it is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of that function"); Army—Availability of Army Procurement Appropriation for Logistical Support Contractors, B-303170, 2005 U.S. Comp. Gen. LEXIS 71 (Apr. 22, 2005) ("the expenditure must be reasonably related to the purposes that Congress intended the appropriation to fulfill").

2. However, the basic concept has remained the same: the important thing is the relationship between the expenditure to the appropriation sought to be charged.

The concept of "necessary expense" is a relative one, and determinations are fact/agency/purpose/appropriation specific. *See* Federal Executive Board – Appropriations – Employee Tax Returns – Electronic Filing, B-259947, Nov. 28, 1995, 96-1 CPD ¶ 129; Use of Appropriated Funds for an Employee Electronic Tax Return Program, B-239510, 71 Comp. Gen. 28 (1991).

A necessary expense does not have to be the only way, or even the best way, to accomplish the object of an appropriation. Secretary of the Interior, B-123514, 34 Comp. Gen. 599 (1955). However, a necessary expense must be more than merely desirable. Utility Costs under Work-at-Home Programs, B-225159, 68 Comp. Gen. 505 (1989).

3. Agencies have reasonable discretion to determine how to accomplish the purposes of appropriations. *See* Customs and Border Protection—Relocation Expenses, B-306748, 2006 U.S. Comp. Gen. LEXIS 134 (July 6, 2006). An agency's determination that a given item is reasonably necessary to accomplishing an authorized purpose is given considerable deference. In reviewing an expenditure, the GAO looks at "whether the expenditure falls within the agency's legitimate range of discretion, or whether its relationship to an authorized purpose is so attenuated as to take it beyond that range." Implementation of Army Safety Program, B-223608 1988 U.S. Comp. Gen. LEXIS 1582 (Dec. 19, 1988).

4.

D. Determining the Purpose of a Specific Appropriation.

1. Appropriations Acts.

a. An appropriation is a statutory authorization to incur obligations and make payments out of the Treasury for specified purposes. [1] Aside from any emergency supplemental appropriations, Congress generally enacts twelve (12) appropriations acts annually, two of which are devoted specifically to DoD: The Department of Defense Appropriations Act (DODAA), and the Military Construction Appropriations Act. [2] Within these two acts, the DoD has nearly 100 separate appropriations available to for different purposes.

b. Appropriations are differentiated by service (e.g., Army, Navy), component (e.g., Active, Reserve), and purpose (e.g., Procurement, Research and Development). The major DoD appropriations provided in the annual Appropriations Act are:

(1) Operation & Maintenance (O&M) – used for the day-to-day expenses of training exercises, deployments, operating and maintaining installations, etc.;

[1] *See* "A Glossary Of Terms Used In The Federal Budget Process", pp.13-14, GAO-05-734SP (September 2005).

[2] As of late, Congress has relied upon Omnibus, Continuing Resolutions, or Consolidated Appropriations Acts. *See e.g.*, Consolidated Appropriations Act, 2020, Pub. L. 116-93, (hereinafter, "FY20 Appropriations Act"); Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, Pub. L. 115-245 (hereinafter, "FY19 Appropriations Act"); Consolidated Appropriations Act, 2018, Pub. L. 115-141, 132 Stat. 348 (hereinafter, "FY18 Appropriations Act").

(2) Personnel – used for pay and allowances of uniformed personnel, permanent change of station travel, etc.;

(3) Research, Development, Test and Evaluation (RDT&E) – used for expenses necessary for basic and applied scientific research, development, test, and evaluation, including maintenance and operation of facilities and equipment;

(4) Procurement (various) – used for production and modification of aircraft, missiles, weapons, tracked vehicles, ammunition, shipbuilding and conversion, and "other procurement."

c. By regulation, the DoD has assigned most types of expenditures to a specific appropriation. *See* DFAS-IN Manual 37-100-XX, The Army Management Structure (August XX). The manual is reissued every FY. [XX = appropriate FY].

d. The text of appropriations acts may be found at www.congress.gov.

2. Authorization Act.

a. Annual authorization acts generally precede DoD's appropriations acts. There is no general requirement to have an authorization in order for an appropriation to occur. However, Congress has by statute created certain situations in which it must authorize an appropriation. For example, 10 U.S.C. § 114(a) states that "No funds may be appropriated for any fiscal year" for certain purposes, including procurement, military construction, and RDT&E "unless funds therefore have been specifically authorized by law." However, there are no practical consequences if Congress appropriates funds without an authorization, as such a statute is "essentially a congressional mandate to itself." Principles of Fed. Appropriations Law, vol. I (4th ed.) p. 2-56, GAO-16-464SP (March 10, 2016).

3. b. The authorization act may clarify the intended purpose of a specific appropriation, or contain restrictions on using appropriated funds. An authorization act does not provide budget authority. Only an appropriations act provides budget authority.

Organic Legislation. Organic legislation creates a new agency or establishes a program or function within an existing agency that a subsequent appropriation act will fund. Organic legislation provides the

agency with authority (but not the budget authority) to conduct the program, function, or mission and to utilize appropriated funds to do so.

4. Miscellaneous Statutory Provisions. Congress often enacts statutes that expressly allow, prohibit, or place restrictions upon the usage of appropriated funds. For example, 10 U.S.C. § 2491a prohibits DoD from using its appropriated funds to operate or maintain a golf course except in foreign countries or isolated installations within the United States. For example, 10 U.S.C. § 2261 permits DoD to use its appropriated funds "to procure recognition items of nominal or modest value for the recruitment or retention purposes."

5. Legislative History. Legislative history is any Congressionally-generated document related to a bill, from the time the bill is introduced to the time it is passed. This includes the text of the bill itself, conference and committee reports, floor debates, and hearings.

a. Legislative history may be useful for resolving ambiguities or confirming the intent of Congress. However, Congress's "authoritative statement is the statutory text, not the legislative history." Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 568 (2005).

b. If the underlying statute clearly conveys Congress's intent, however, agencies will not be further restricted by what is included in legislative history. Intertribal Bison Cooperative, B-288658, 2001 U.S. Comp. Gen. LEXIS 174 (Nov. 30, 2001); ANGUS Chem. Co., B-227033, Aug. 4, 1987, 87-2 CPD ¶ 127 (stating "there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history for the purpose of writing into law that which is not there"); Navy – Re-enlistment Gifts, 2006 U.S. Comp. Gen. LEXIS 165 (use of legislative history to "illuminate intent," as opposed to "writing into the law that which is not there."); SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD ¶ 30 (indicating if Congress provides a lump sum appropriation without statutorily restricting what can be done with the funds, a clear inference is that it did not intend to impose legally binding restrictions); LTV Aerospace Corp., B-183851, Oct. 1, 1975, 55 Comp. Gen. 307, 75-2 CPD ¶ 203 (indicating the Navy was not bound by a provision within the conference report accompanying the 1975 Defense Appropriations Act stipulating that adaptation of the Air Force's F-16 to enable it to be capable of carrier operations was the prerequisite for the Navy's use of $20 million in funds provided for a Navy fighter). See also Arlington Central School District

Board of Education v. Murphy, 548 U.S. 291 (2006) (rejecting claims for expert fees which were based solely on legislative history and not mentioned in the statute under which the claims were brought).

c. Legislative history also may not support an otherwise improper expenditure. Alberto Mora, Gen. Counsel, U.S. Info. Agency, B-248284.2, Sept. 1, 1992, 1992 U.S. Comp. Gen. LEXIS 1104 (agency violated the purpose statute when it utilized construction funds to host an overseas exhibit that should have been funded with salaries and expenses funds where the agency had only received informal written approval from the Chairmen of the House and Senate Subcommittees to reprogram the construction funds into salaries and expenses funds).

Budget Request Documentation.

6. a. Agencies are required to justify their budget requests. Volumes 2A and 2B of the DoD FMR provide guidance on the documentation that must be generated to support defense budget requests. These documents are typically referred to as Justification Books, with a book generated for each appropriation.

b. These justification documents contain a description of the proposed purpose for the requested appropriations. An agency may reasonably assume appropriations are available for the specific purposes requested, unless otherwise prohibited.

c. Agencies generally place their past and current year budget submissions on the web. The Defense-wide budget materials can be found at http://comptroller.defense.gov/budgetmaterials.aspx. The Army's budget materials can be found

7. athttps://www.asafm.army.mil/offices/bu/content.aspx?what=BudgetMaterials.

Agency Regulations.

a. When Congress enacts organic legislation, it rarely prescribes exactly how the agency is to carry out that new mission. Instead, Congress leaves it up to the agency to implement the authority in agency-level regulations.

b. If the agency, in creating a regulation, interprets a statute, that interpretation is granted a great deal of deference. Thus, if an agency regulation determines appropriated funds may be used for a particular purpose, that agency-level determination will normally

not be overturned unless it is clearly erroneous. Intertribal Bison Cooperative, B-288658, 2001 U.S. Comp. Gen. LEXIS 174 (Nov. 30, 2001).

c. Agency-level regulations may also place restrictions on the use of appropriated funds. For example, although the GAO sanctioned the use of appropriated funds to purchase commercially-produced business cards for agency employees, each of the military departments have implemented policies that permit only recruiters and criminal investigators to purchase them (everyone else must produce their business cards in-house, using their own card stock and printers).

8. Case Law. Comptroller General opinions are a valuable source of guidance as to the propriety of appropriated fund obligations or expenditures for particular purposes. While not technically binding on the Executive Branch, these opinions are nonetheless deemed authoritative. Opinions are available at https://www.gao.gov/legal/appropriations-law-decisions/search.

E. Election Doctrine. What if you have two equally available appropriations to fund an acquisition? i.e., neither appropriation is more specific? The GAO's Election Doctrine states that if two or more appropriations are equally available, then the agency may choose which appropriation to use. Once the agency chooses a certain appropriation for that type of acquisition, however, the agency must continue to use the same appropriation for all acquisitions of that type, unless the agency informs Congress of its intent to change for the next fiscal year – i.e., once the agency makes its choice of appropriation, they are bound by that choice.

F. Expense/Investment Threshold.

2. Expenses are costs of resources consumed in operating and maintaining DoD, and are normally financed with O&M appropriations. (*See* DoD FMR, vol. 2A, ch. 1, para. 010201.) Common examples of expenses include civilian employee labor, rental charges for equipment and facilities, fuel, maintenance and repair of equipment, utilities, office supplies, and various services.

3. Investments are "costs to acquire capital assets," or assets which will benefit both current and future periods and generally have a long-life span. DoD FMR, vol. 2A, ch. 1, para. 010201.D.2. Investments are normally financed with procurement appropriations.

Exception Permitting Purchase of Investments With O&M Funds. In each year's DODAA, Congress has permitted DoD to utilize its O&M appropriations to purchase investment items having a unit cost that is less

than a certain threshold. *See e.g.*, § 8031 of FY20 Appropriations Act (current threshold is $250,000).[3] *See also* DoD FMR, vol. 2A, ch. 1, para. 010201.D.1 (implementing the $250,000 threshold).

Systems. Various audits have revealed that local activities use O&M appropriations to acquire computer systems, security systems, video telecommunication systems, and other systems costing more than the investment/expense threshold. This constitutes a violation of the Purpose Statute, and may result in a violation of the Antideficiency Act.

4.

a. Agencies must consider the "system" concept when evaluating the procurement of items. The determination of what constitutes a "system" must be based on the **primary function** of the items to be acquired, as stated in the approved requirements document.

b. A system exists if a number of components are designed primarily to function within the context of a whole and will be interconnected to satisfy an approved requirement.

c. Agencies may purchase multiple end items of equipment (e.g., computers), and treat each end item as a separate "system" for funding purposes, only if the primary function of the end item is to operate independently.

d. Agencies may not fragment or piecemeal the acquisition of an interrelated system of equipment merely to avoid exceeding the O&M threshold.

e. The Systems concept does not apply to the purchase of expense items which are purchased with O&M regardless of cost.

f. Example: An agency is acquiring 200 stand-alone computers and software at $2,000 each (for a total of $400,000). The appropriate color of money for the purchase of the 200 computers is determined by deciding whether the primary function of the computers is to operate as independent workstations (i.e., 200 systems) or as part of a larger system. If the computers are designed to primarily operate independently, they should be considered as separate end items and applied against the expense/ investment criteria individually. If they function as a component of a larger system (i.e., interconnected and primarily designed to

[3] Since 2008, Congress allowed for an increase to $500,000 for Combatant Commanders engaged in contingency operations overseas upon SECDEF approval. *See e.g.*, § 9010 of FY20 Appropriations Act.

operate as one), then they should be considered a system and the total cost applied against the expense/investment criteria.

IV. AVAILABILITY AS TO TIME

A. The Time Rule. 31 U.S.C. §§ 1502(a), 1552. An appropriation is typically available for obligation for a definite period of time. An agency must incur a legal obligation to pay money within an appropriation's period of availability. If an agency fails to obligate funds before they expire, those funds are no longer available for new obligations.

1. Expired funds retain their "fiscal year identity" for five years after the end of the period of availability. During this time, the funds are available to adjust existing obligations, or to liquidate prior valid obligations, but not to incur new obligations.

2. There are some important exceptions to the general prohibition against obligating funds after the period of availability.

a. Bid Protests. Funds available for obligation on a contract at the time a protest is filed shall remain available for obligation for 100 calendar days after the date on which the final ruling is made on the protest. This authority applies to protests filed with the agency, at the Government Accountability Office, or in the Court of Federal Claims. *See* 31 U.S.C. § 1558; FAR 33.102(c); DOD FMR, vol. 3, ch. 8, 081303.

b. Terminations for Default. If a contract or order is terminated for default, and the bona fide need still exists, then the originally obligated funds remain available for obligation for a re-procurement, even if they otherwise would have expired. *See* Lawrence W. Rosine Co., B-185405, 55 Comp. Gen. 1351 (1976). Note that certain restrictions and limitations apply. *See* Navy, Replacement Contract, B-238548, Feb. 5, 1991, 70 Comp. Gen. 230, 91-1 CPD ¶ 117; Funding of Replacement Contracts, B-198074, July 15, 1981, 60 Comp. Gen. 591, 81-2 CPD ¶ 33; DOD FMR, vol. 3, ch. 10, para. 100308. If a re-procurement will result in an obligation that exceeds $4 million then the action must first be submitted to USD(C) for approval. *See* DOD FMR, vol. 3, ch. 10, para. 100306 and 100307.

c. Terminations for Convenience. When a contract is terminated for the convenience of the government, the contractor may be entitled to a settlement that typically includes payment for costs incurred, reasonable profit, and reasonable costs of settlement of the terminated work. *See e.g.*, FAR 52.249-2. Generally, a

termination for convenience of the government extinguishes the availability of prior year funds remaining on the contract, but such funds may be used in certain instances. Navy, Replacement Contract, B-238548, Feb. 5, 1991, 91-1 CPD ¶ 117; Matter of Replacement Contracts, B-232616, 68 Comp. Gen. 158 (1988). Again, note that certain restrictions and limitations may apply.

B. The "Bona Fide Needs" Rule.

1. Government agencies may not purchase goods or services they do not require. Because appropriations are generally only available for limited periods of time, it is important to understand when an agency actually requires a good or service. *See* 31 U.S.C. § 1552. Until that requirement (need) accrues, no authorization exists to obligate appropriated funds. Once the need accrues, an agency may only obligate appropriated funds that are current at that time.

2. The "Bona Fide Needs" rule is a timing rule that requires **both the timing of the obligation and the bona fide need to be within the fund's period of availability**. See DoD FMR, Vol. 3, Ch. 8, para. 080201.

3. **Current year money for current year needs**. "[P]ayment is chargeable to the fiscal year in which the obligation is incurred as long as the need arose, or continued to exist in, that year. . . ." Principles of Fed. Appropriations Law, vol. I, p. 5-14, GAO-04-261SP (3d ed. 2004).

C. Bona Fide Needs Rule Applied to Supply Contracts.

1. Supplies are generally a bona fide need in the period in which they are used. Orders for supplies are proper only when the supplies are actually required. Thus, supplies needed for operations during a given fiscal year are bona fide needs of that year. Maintenance Serv. and Sales Corp., B-242019, 70 Comp. Gen. 664 (1991); 64 Comp. Gen. 359 (1985).

2. Exceptions. Supply needs of a future fiscal year are the bona fide needs of the subsequent fiscal year, unless an exception applies. Two recognized exceptions are the stock-level exception and the lead-time exception. DoD FMR, vol. 3, ch. 8, para. 080304.

a. Stock-Level Exception. Supplies ordered to meet authorized stock levels are the bona fide need of the year of purchase, even if the agency does not use them until a subsequent fiscal year. A bona fide need for stock exists when there is a present requirement for items to meet authorized stock levels (replenishment of operating stock levels, safety levels, mobilization requirements, authorized backup stocks, etc.). To Betty F. Leatherman, Dep't of Commerce,

B-156161, 44 Comp. Gen. 695 (1965); DoD FMR, vol. 3, ch. 8, para. 080304. However, fiscal year-end stockpiling of supplies in excess of normal usage requirements is prohibited.

b. Lead-Time Exception. This exception recognizes that agencies may need and contract for an item in a current FY, but cannot physically obtain the item in the current FY due to the lead-time necessary to produce and/or deliver it. There are two variants that comprise the lead-time exception.

(1) Delivery Lead-Time. If an agency cannot obtain materials in the same FY in which they are needed and contracted for, delivery in the next FY does not violate the "Bona Fide Needs" rule as long as the time between contracting and delivery is not excessive, and the procurement is not for standard, commercial items readily available from other sources. DoD FMR vol. 3, ch. 8, para. 080304; Administrator, General Services Agency, B-138574, 38 Comp. Gen. 628, 630 (1959).

(2) Production Lead-Time. An agency may contract in one FY for delivery and use in the subsequent FY if the item cannot be obtained on the open market at the time needed for use, so long as the intervening period is necessary for the production of the item in question. Chairman, United States Atomic Energy Commission, B-130815, 37 Comp. Gen. 155 (1957). The procurement must not be for standard commercial items readily available from other sources. DoD FMR vol. 3, ch. 8, para. 080304.

D. Bona Fide Needs Rule Applied to Service Contracts.

2. General Rule. Services are generally the bona fide need of the fiscal year in which they are performed. Theodor Arndt GmbH & Co., B-237180, Jan. 17, 1990, 90-1 CPD ¶ 64; EPA Level of Effort Contracts, B-214597, 65 Comp. Gen. 154 (1985). Thus, in general, services must be funded with funds current as of the date the service is performed.

Severable services.

a. A service is severable if it can be separated into components that independently meet a separate need of the government. The services are continuing or recurring in nature. DoD FMR vol. 3, ch. 8, para. 080304.B. Examples include grounds and facilities maintenance, dining facility services, and transportation services. Most service contracts are severable.

b. Absent an exception, the default rule for severable services is to fund them with current year funds from the date of award through the end of the fiscal year.

c. Statutory Exception for Severable Services. 10 U.S.C. § 2410a permits DoD agencies to award severable service contracts for a period not to exceed 12 months at any time during the fiscal year, funded completely with current appropriations.. Non-DoD agencies have similar authority. *See* 41 U.S.C. § 3902. This statutory exception provides flexibility to annual funds so that all contracts do not have to end on 30 September, but it only applies to annual year funds. It cannot be used to extend the period of availability of an expiring multiple year appropriation. Severable Services Contract, B-317636, 2009 CPD ¶ 89 (Apr. 21, 2009).

3. Non-severable Services. If the services are non-severable (i.e., a contract that seeks a single or unified outcome, product, or report), agencies must obligate funds for the entire undertaking at contract award, even if performance will cross fiscal years. *See* Incremental Funding of U.S. Fish & Wildlife Serv. Research Work Orders, B-240264, 73 Comp. Gen. 77 (1994) (work on an environmental impact statement properly crossed fiscal years); Proper Fiscal Year Appropriation to Charge for Contract and Contract Increase, B-219829, 65 Comp. Gen. 741 (1986) (contract for study and report on psychological problems among Vietnam veterans was non-severable).

V. LIMITATIONS BASED UPON AMOUNT

A. The Antideficiency Act (ADA), 31 U.S.C. §§ 1341-42, 1511-17, prohibits:

2. Making or authorizing an expenditure or obligation in excess of the amount available in an appropriation. 31 U.S.C. § 1341(a)(1)(A).

Making or authorizing expenditures or incurring obligations in excess of an apportionment or a formal subdivision of funds. 31 U.S.C. § 1517(a).

a. Apportionment. The Office of Management and Budget (OMB) apportions funds over their period of availability to agencies for obligation. 31 U.S.C. § 1512. This means that OMB divides the funds up into quarterly installments, to prevent agencies from obligating the entire fiscal year's appropriations too quickly and needing supplemental appropriations.

b. Formal Administrative Subdivisions ("Allotments"). The ADA also requires agencies to establish certain administrative controls of apportioned funds. 31 U.S.C. § 1514. These formal limits are

referred to as allocations and allotments. In the Army, the Operating Agency/Army Command (ACOM) generally is the lowest command level at which the formal administrative subdivisions of funds are maintained for O&M appropriations.

c. Informal Administrative Subdivisions ("Allowances"). Agencies may further subdivide funds at lower levels (e.g., within an installation). These subdivisions are generally informal targets or allowances. These are not formal subdivisions of funds, and obligating in excess of these limits does not, in itself, violate the ADA.

Incurring an obligation in advance of an appropriation, unless authorized by law. 31 U.S.C. § 1341(a)(1)(B).

B. Accepting voluntary services, unless otherwise authorized by law. 31 U.S.C. § 1342 However, an agency may accept "gratuitous" services under certain circumstances. *See* Section V.D.5. below for more information. The ADA imposes prohibitions (or fiscal controls) at three levels: (1) at the **appropriations** level, (2) at the **apportionment** level, and (3) at the **formal subdivision** level. The fiscal controls at the appropriations level are derived from 31 U.S.C. § 1341(a)(1)(A) and (B). The fiscal controls at the apportionment level and at the formal subdivision level are derived from 31 U.S.C. § 1517(a). Thus, if an officer or employee of the United States violates the prohibitions (or fiscal controls) at any of these three levels, that officer thereby violates the ADA.

C. Application of the ADA is very broad:

1. The ADA applies to "any officer or employee of the United States Government" and thus, it applies to all branches of the federal government—executive, legislative, and judicial. Red Book, vol. II, 6-37. Nevertheless, whether a federal judge is an "officer or employee" of the U.S. Government remains an open question, in some cases. *See* Red Book, vol. II, 6-39.

2. By the plain wording of the statute, 31 U.S.C. § 1341 specifically applies to any officer or employee who makes or authorizes an expenditure or obligation. Additionally, the DoD applies the ADA by regulation to "[a]ctivity/commanding officers, directors, budget officers, or fiscal officers . . . because of their overall responsibility or position. . . ." *See* DoD FMR, vol. 14, ch. 3, para. 030603.C.11.

D. Correcting a Potential ADA Violation. The use of the wrong appropriation, or the use of the wrong fiscal year funds, will not result in an ADA violation if the error can be properly corrected. The accounts can be adjusted to replace the

erroneously obligated funds with the proper funds (correct appropriation, year, and amount) without having an ADA violation if these two conditions are met:

The proper funds were available at the time of the obligation; and

The proper funds are available at the time of correction.

See DoD FMR vol. 14, ch. 2, 020102.C.; To the Hon. Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984); Interagency Agreements—Obligation of Funds under an Indefinite Delivery, Indefinite Quantity Contract, B-308969 (May 31, 2007); Principles of Fed. Appropriations Law, vol. II, ch. 6, pages 6-79 to 6-80, GAO-06-382SP (3d ed. 2006) (discussing the correction of a violation by making an appropriate adjustment of accounts).

E. Investigating and Reporting Violations. If an Antideficiency Act violation is suspected, the agency must investigate to identify the responsible individual.

1. The DoD FMR contains the primary DoD guidance regarding investigation and reporting of ADA violations. According to the FMR, an individual learning of or detecting a suspected ADA violation must report within two weeks the possible violation to his/her chain of command. DoD FMR vol. 14, ch. 3, 030202.B.

2. The first step in the investigation process is a preliminary review to gather basic facts and establish whether an Antideficiency Act violation "may have occurred." DoD FMR, vol. 14, ch. 3, 0304. The focus is on the potential violation, not on corrective actions. The results of the preliminary review should be forwarded to the applicable DoD component Comptroller. DoD FMR, vol. 14, ch 3, 030406.

3. If the DoD component Comptroller determines there is adequate evidence that a reportable and incurable violation of the ADA has occurred, a formal investigation must be initiated. DoD FMR, vol. 14, ch 3, 030601. If no violation is found, the preliminary review completes the investigation process.

4. The purpose of the formal investigation is to determine the "event that caused the potential violation, the responsible individual(s), and action(s) taken to ensure that a similar violation does not occur in the future." DoD FMR, vol. 14, ch. 3, 030601.B.. The appointing official is at the DoD Component level unless this authority has been delegated to a "senior activity/commander or direction of the organization assigned responsibility for conducting the investigation." The investigating officer must be adequately trained and qualified to conduct the formal investigation. DoD FMR vol. 14, ch. 3, 030602.A.

5. The investigation report *must* assign responsibility for the violation to "one or more responsible officials." A finding that no individual was responsible is unacceptable. DoD FMR, vol. 14, ch. 3, 030603.C.6. Generally, the responsible party will be the highest ranking official in the decision-making process who had actual or constructive knowledge of the actions taken and the impropriety or questionable nature of such actions. *See* To Dennis P. McAuliffe, B-222048, 1987 US Comp. Gen. LEXIS 1631, Feb. 10, 1987.

6. At the conclusion of the formal investigation, the final Report of Investigation will be forwarded to the Deputy Chief Financial Officer (DCFO) in the Office of the Under Secretary of Defense (Comptroller) (OUSD(C)). If OUSD(C) agrees with the report, it will prepare notification letters to the President (through the Director of OMB), Congress, and the GAO. OMB Cir. A-11, para. 145.7; DoD FMR, vol. 14, ch. 3, 0311.

7. The GAO maintains an online database of all reported ADA violations. See https://www.gao.gov/legal/appropriations-law-decisions/resources#reports.

F. Voluntary Services. An officer or employee may not accept voluntary services or employ personal services exceeding those authorized by law, except for emergencies involving the safety of human life or the protection of property. 31 U.S.C. § 1342; To Glenn English, B-223857, Feb. 27, 1987 (unpub.).

1. Voluntary services are those services rendered without a prior contract for compensation or without an advance agreement that the services will be gratuitous. Recess Appointment of Sam Fox, B-309301, 2007 US Comp. Gen. LEXIS 97, June 2007; Army's Authority to Accept Servs. From the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, July 26, 1982 (unpub.).

2. Acceptance of voluntary services does not create a legal obligation. Richard C. Hagan v. United States, 229 Ct. Cl. 423, 671 F.2d 1302 (1982); T. Head & Co., B-238112, July 30, 1990 (unpub.); Nathaniel C. Elie, B-218705, 65 Comp. Gen. 21 (1985). *But see* T. Head & Co. v. Dep't of Educ., GSBCA No. 10828-ED, 93-1 BCA ¶ 25,241.

3. Examples of Voluntary Services Authorized by Law

a. 5 U.S.C. § 593 (agencies may accept voluntary services in support of alternative dispute resolution).

b. 5 U.S.C. § 3111 (student intern programs).

c. 10 U.S.C. § 1588 (implemented in DODI 1100.21) (military departments may accept voluntary services for medical care, museums, natural resources programs, or family support activities).

d. 10 U.S.C. § 2602 (the President may accept assistance from Red Cross).

e. 10 U.S.C. § 10212 (the SECDEF or a Secretary of military department may accept services of reserve officers as consultants or in furtherance of enrollment, organization, or training of reserve components).

f. 33 U.S.C. § 569c (the Corps of Engineers may accept voluntary services on civil works projects).

4. Application of the Emergency Exception. This exception is limited to situations where immediate danger exists. Voluntary Servs.—Towing of Disabled Navy Airplane, A-341142, 10 Comp. Gen. 248 (1930) (exception not applied); Voluntary Servs. in Emergencies, 2 Comp. Gen. 799 (1923). This exception does not include "ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property." 31 U.S.C. § 1342.

5. Gratuitous Services Distinguished.

a. It is not a violation of the Antideficiency Act to accept free services from a person who agrees, in writing, to waive entitlement to compensation. *See* Department of the Treasury—Acceptance of Voluntary Services, B-324214 (Jan. 27, 2014); Recess Appointment of Sam Fox, B-309301, 2007 US Comp. Gen. LEXIS 97, June 2007; Army's Authority to Accept Servs. From the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, July 26, 1982 (unpub.); To the Adm'r of Veterans' Affairs, B-44829, 24 Comp. Gen. 314 (1944); To the Chairman of the Fed. Trade Comm'n, A-23262, 7 Comp. Gen. 810 (1928).

b. An employee may not waive compensation if a statute establishes entitlement, unless another statute permits waiver. To Tom Tauke, B-206396, Nov. 15, 1988 (unpub.); The Agency for Int'l Dev.—Waiver of Compensation Fixed by or Pursuant to Statute, B-190466, 57 Comp. Gen. 423 (1978) (AID employees could not waive salaries); In the Matter of Waiver of Compensation, Gen. Servs. Admin., B-181229, 54 Comp. Gen. 393 (1974); To the Director, Bureau of the Budget, B-69907, 27 Comp. Gen. 194 (1947) (expert or consultant salary waivable); To the President,

United States Civil Serv. Comm'n, B-66664, 26 Comp. Gen. 956 (1947).

c. Acceptance of gratuitous services may be an improper augmentation of an appropriation if federal employees normally would perform the work, unless a statute authorizes gratuitous services. Compare Community Work Experience Program—State Gen. Assistance Recipients at Fed. Work Sites, B-211079.2, Jan. 2, 1987 (unpub.) (augmentation would occur) with Senior Community Serv. Employment Program, B-222248, Mar. 13, 1987 (unpub.) (augmentation would not occur). But see Federal Communications Comm'n, B-210620, 63 Comp. Gen. 459 (1984) (noting that augmentation entails receipt of funds).

G. Augmentation of Appropriations & Miscellaneous Receipts.

General rule: Augmentation of appropriations is not permitted.

1. a. Augmentation is action by an agency that increases the effective amount of funds available in an agency's appropriation. This generally results in expenditures by the agency in excess of the amount originally appropriated by Congress.

b. Basis for the Augmentation Rule. An augmentation normally violates one or more of the following provisions:

(1) U.S. Constitution, Article I, section 9, clause 7: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

(2) 31 U.S.C. § 1301(a) (Purpose Statute): "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

(3) 31 U.S.C. § 3302(b) (Miscellaneous Receipts Statute): "Except as [otherwise provided], an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without any deduction for any charge or claim."

2. Types of Augmentation.

a. Augmenting by using one appropriation to pay costs associated with the purposes of another appropriation. This violates the Purpose Statute, 31 U.S.C. § 1301(a). U.S. Equal Employment Opportunity Comm'n – Reimbursement of Registration Fees for

Fed. Executive Board Training Seminar, B-245330, 71 Comp. Gen. 120 (1991); Nonreimbursable Transfer of Admin. Law Judges, B-221585, 65 Comp. Gen. 635 (1986); Department of Health and Human Servs. – Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985).

(1) Example: If the Air Force were to buy air-to-air missiles using its "Procurement, Ammunition, Air Force" appropriation instead of its more specific "Procurement, Missiles, Air Force" appropriation, this would enable it to purchase a greater overall quantity of missiles (some using the missile appropriation and some using the ammunition appropriation) than Congress desired.

b. Augmenting an appropriation by retaining government funds received from another source.

(1) This violates the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b). See Scheduled Airlines Traffic Offices, Inc. v. Dep't. of Def., 87 F.3d 1356 (D.C. Cir. 1996) (indicating that a contract for official and unofficial travel, which provided for concession fees to be paid to the local morale, welfare, and recreation account, violates Miscellaneous Receipts Statute; note, however, that Congress has subsequently enacted statutory language – found at 10 U.S.C. § 2646 – that permits commissions or fees in travel contracts to be paid to morale, welfare, and recreation accounts); Interest Earned on Unauthorized Loans of Fed. Grant Funds, B-246502, 71 Comp. Gen. 387 (1992); But see Bureau of Alcohol, Tobacco, and Firearms – Augmentation of Appropriations – Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988) (noting that 31 U.S.C. § 3302 **only applies to monies** received, not to other property or services).

(2) Expending the retained funds generally violates the constitutional requirement for an appropriation. See Use of Appropriated Funds by Air Force to Provide Support for Child Care Ctrs. for Children of Civilian Employees, B-222989, 67 Comp. Gen. 443 (1988).

3. Statutory Exceptions to the Miscellaneous Receipts Statute. Some examples of the statutes Congress has enacted which expressly authorize agencies to retain funds received from a non-Congressional source include:

a. Economy Act. 31 U.S.C. § 1535 authorizes interagency orders. The ordering agency must reimburse the performing agency for the costs of supplying the goods or services. 31 U.S.C. § 1536 specifically indicates that the servicing agency should credit monies received from the ordering agency to the "appropriation or fund against which charges were made to fill the order." *See also* 41 U.S.C. § 6307 (providing similar intra-DoD project order authority.

b. Foreign Assistance Act. 22 U.S.C. § 2392 authorizes the President to transfer State Department funds to other agencies, including DoD, to carry out the purpose of the Foreign Assistance Act.

c. Revolving Funds. Revolving funds are management tools that provide working capital for the operation of certain activities. The receiving activity must reimburse the funds for the costs of goods or services when provided. *See* 10 U.S.C. § 2208; National Technical Info. Serv., B-243710, 71 Comp. Gen. 224 (1992); Administrator, Veterans Admin., B-116651, 40 Comp. Gen. 356 (1960).

d. Proceeds received from bond forfeitures, but only to the extent necessary to cover the costs of the United States. 16 U.S.C. § 579c; USDA Forest Serv. – Auth. to Reimburse Gen. Appropriations with the Proceeds of Forfeited Performance Bond Guarantees, B-226132, 67 Comp. Gen. 276 (1988); National Park Serv. – Disposition of Performance Bond Forfeited to Gov't by Defaulting Contractor, B-216688, 64 Comp. Gen. 625 (1985) (forfeited bond proceeds to fund replacement contract).

e. Defense Gifts. 10 U.S.C. § 2608. The Secretary of Defense may accept monetary gifts and intangible personal property for defense purposes. However, these defense gifts may not be expended until appropriated by Congress.

f. Health Care Recoveries. 10 U.S.C. § 1095(g). Amounts collected from third-party payers for health care services provided by a military medical facility may be credited to the appropriation supporting the maintenance and operation of the facility.

g. Recovery of Military Pay and Allowances. Statutory authority allows the government to collect damages from third parties to compensate for the pay and allowances of soldiers who are unable to perform military duties as a result of injury or illness resulting from a tort. These amounts "shall be credited to the appropriation that supports the operation of the command, activity, or other unit

to which the member was assigned." 42 U.S.C. § 2651. The U.S. Army Claims Service takes the position that such recoveries should be credited to the installation's O&M account. *See* Affirmative Claims Note, *Lost Wages under the Federal Medical Care Recovery Act*, ARMY LAW., Dec, 1996, at 38.

h. Military Leases of Real or Personal Property. 10 U.S.C. § 2667(d)(1). Rentals received pursuant to leases entered into by a military department may be deposited in special accounts for the military department and used for facility maintenance, repair, or environmental restoration.

i. Damage to Real Property. 10 U.S.C. § 2782. Amounts recovered for damage to real property may be credited to the account available for repair or replacement of the real property at the time of recovery.

j. Proceeds from the sale of lost, abandoned, or unclaimed personal property found on an installation. 10 U.S.C. § 2575. Proceeds are credited to the operation and maintenance account and used to pay for collecting, storing, and disposing of the property. Remaining funds may be used for morale, welfare, and recreation activities.

k. Host nation contributions to relocate armed forces within a host country. 10 U.S.C. § 2350k.

l. Government Credit Card and Travel Refunds. Section 8067 of the FY 2008 Defense Appropriations Act (Pub. Law 110-116) granted permanent authority ("in the current fiscal year and hereafter . . .) to credit refunds attributable to the use of the Government travel card, the Government Purchase Card, and Government travel arranged by Government Contracted Travel Management Centers, to the O&M and RDT&E accounts of the Department of Defense "which are current when the refunds are received."

m. Conference Fees. 10 U.S.C. § 2262. Congress authorized the Department of Defense to collect fees from conference participants and to use those collected fees to pay the costs of the conference. Any amounts collected in excess of the actual costs of the conference must still be deposited into the Treasury as miscellaneous receipts.

4.

GAO Sanctioned Exceptions to the Miscellaneous Receipts Statute. In addition to the statutory authorities detailed above, the GAO recognizes other exceptions to the Miscellaneous Receipts Statute, including:

a. Replacement Contracts. An agency may retain recovered excess re-procurement costs to fund replacement contracts. Bureau of Prisons – Disposition of Funds Paid in Settlement of Breach of Contract Action, B-210160, 62 Comp. Gen. 678 (1983).

(1) This rule applies regardless of whether the government terminates for default or simply claims for damages due to defective workmanship.

(2) The replacement contract must be coextensive with the original contract, i.e., the agency may re-procure only those goods and services that would have been provided under the original contract.

(3) Amounts recovered that exceed the actual costs of the replacement contract must be deposited as miscellaneous receipts.

(4) The replacement contract is executed without undue delay. *See* Navy, Replacement Contract, B-238548, Feb. 5, 1991, 70 Comp. Gen. 230, 91-1 CPD ¶ 117 (holding that funds are available after contracting officer's determination that original award was improper); Funding of Replacement Contracts, B-198074, July 15, 1981, 60 Comp. Gen. 591, 81-2 CPD ¶ 33; DOD FMR, vol. 3, ch. 10, para. 100308; DFAS-IN 37-1, Table 8-7.

b. Refunds.

(1) Refunds for erroneous payments, overpayments, or advance payments may be credited to agency appropriations. Department of Justice – Deposit of Amounts Received from Third Parties, B-205508, 61 Comp. Gen. 537 (1982) (agency may retain funds received from carriers/insurers for damage to employee's property for which agency has paid employee's claim); International Natural Rubber Org. – Return of United States Contribution, B-207994, 62 Comp. Gen. 70 (1982).

(2) Amounts that exceed the actual refund must be deposited as miscellaneous receipts. Federal Emergency Mgmt. Agency – Disposition of Monetary Award Under False Claims Act, B-230250, 69 Comp. Gen. 260 (1990) (agency may retain reimbursement for false claims, interest, and administrative expenses in revolving fund; treble damages and penalties must be deposited as miscellaneous receipts).

(3) Funds recovered by an agency for damage to government property, unrelated to performance required by the contract, must be deposited as miscellaneous receipts. Defense Logistics Agency – Disposition of Funds Paid in Settlement of Contract Action, B-226553, 67 Comp. Gen. 129 (1987) (negligent installation of power supply system caused damage to computer software and equipment; insurance company payment to settle government's claim for damages must be deposited as miscellaneous receipts).

(4) Refunds must be credited to the appropriation charged initially with the related expenditure, whether current or expired. Accounting for Rebates from Travel Mgmt. Ctr. Contractors, B-217913.3, 73 Comp. Gen. 210 (1994); This rule applies to refunds in the form of a credit. See Principles of Fed. Appropriations Law, vol. II, ch. 6, 6-174, GAO-06-382SP (3d ed. 2006); Appropriation Accounting —Refunds and Uncollectibles, B-257905, Dec. 26, 1995, 96-1 CPD ¶ 130 (recoveries under fraudulent contracts are refunds, which should be credited to the original appropriation, unless the account is closed).

c. Receipt of property other than cash. When the government receives a replacement for property damaged by a third party in lieu of cash, the agency may retain the property. Bureau of Alcohol, Tobacco, and Firearms—Augmentation of Appropriations —Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988) (replacement by repair of damaged vehicles).

d. Funds held in trust for third parties. When the government receives custody of cash or negotiable instruments that it intends to deliver to the rightful owner, it need not deposit the funds into the treasury as a miscellaneous receipt. The Honorable John D. Dingell, B-200170, 60 Comp. Gen. 15 (1980) (money received by Department of Energy for oil company overcharges to their customers may be held in trust for specific victims).

e. Non-reimbursable Details. The Comptroller General has held that non-reimbursable agency details of personnel to other agencies are generally unallowable. Department of Health and Human Servs. – Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985); The Hon. Robert W. Houk, B-247348, 1992 U.S. Comp. Gen. LEXIS 837 (Jun. 22, 1992). However, as exceptions to this rule, non-reimbursable details are permitted under the following circumstances:

(1) A law authorizes non-reimbursable details. *See, e.g.*, 3 U.S.C. § 112 (non-reimbursable details to White House); The Honorable William D. Ford, Chairman, Comm. on Post Office and Civil Serv., House of Representatives, B-224033, 1987 U.S. Comp. Gen. LEXIS 1695.

(2) The detail involves a matter similar or related to matters ordinarily handled by the detailing agency and will aid the detailing agency's mission. Details to Congressional Comm'ns., B-230960, 1988 U.S. Comp. Gen. LEXIS 334.

(3) The detail is for a brief period, entails minimal cost, and the agency cannot obtain the service by other means. Dept. of Health and Human Servs. Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985).

VI. TYPICAL QUESTIONABLE EXPENSES AND COMMON PROBLEMS

C. Agencies may have specific guidance about "questionable" expenditures. *See, e.g.*, AFMAN 65-605, Vol. 1 Budget Guidance and Technical Procedures (24 Oct 2018).

D. Clothing. Buying clothing for individual employees generally does not materially contribute to an agency's mission performance. Therefore, clothing is generally considered a personal expense unless a statute provides to the contrary. *See* IRS Purchase of T-Shirts, B-240001, 70 Comp. Gen. 248 (1991) (Combined Federal Campaign T-shirts for employees who donated five dollars or more per pay period not authorized).

1. Statutorily-Created Exceptions. *See e.g.*, 5 U.S.C. § 7903 (authorizing purchase of special clothing, for personnel, which protects them against hazards in the performance of their duties); 10 U.S.C. § 1593 (authorizing DoD to pay an allowance or provide a uniform to a civilian employee who is required by law or regulation to wear a prescribed uniform while performing official duties); and 29 U.S.C. § 668 (requiring federal agencies to provide certain protective equipment and clothing pursuant to OSHA). *See also* Purchase of Insulated Coveralls, Vicksburg, Mississippi, B-288828, Oct. 3, 2002 (discussing the rules for purchasing clothing); Purchase of Cold Weather Clothing, Rock Island District, U.S. Army Corps of Eng's, B-289683, Oct. 7, 2002 (unpub.) (discussing all three authorities).

2. Opinions and Regulations On-point. *See also* White House Communications Agency—Purchase or Rental of Formal Wear, B-247683, 71 Comp. Gen. 447 (1992) (authorizing tuxedo rental or purchase); Internal Revenue Serv.—Purchase of Safety Shoes, B-229085, 67 Comp. Gen. 104 (1987) (authorizing

safety shoes); DoD FMR vol. 10, ch. 12, para. 120220; AR 670-10, Furnishing Uniforms or Paying Uniform Allowances to Civilian Employees, (1 July 1980).

C. Food. Buying food for individual employees – at least those who are not away from their official duty station on travel status – generally does not materially contribute to an agency's mission performance. *See* 31 U.S.C. § 1345 stating that except as provided by law, an appropriation may not be used for subsistence expenses at a meeting, but that this prohibition does not apply to expenses of an employee of the government carrying out an official duty. As a result, food is generally considered a personal expense. *See* Department of The Army—Claim of the Hyatt Regency Hotel, B-230382, Dec. 22, 1989 (unpub.) (determining coffee and donuts to be an unauthorized entertainment expense).

1. GAO-sanctioned exception where food is included as part of a facility rental cost. GAO has indicated that it is permissible for agencies to pay a facility rental fee that includes the cost of food if the fee is all inclusive, non-negotiable, and competitively priced to the fees of other facilities that do not include food as part of their rental fee. *See* Payment of a Non-Negotiable, Non-Separable Facility Rental Fee that Covered the Cost of Food Service at NRC Workshops, B-281063, 1999 U.S. Comp. Gen. LEXIS 249 (Dec. 1, 1999).

2. Regulatory-based "Light Refreshments" Exception.

a. In a 2003 opinion, the GAO all but eliminated the "Light Refreshment" exception by prohibiting agencies from paying for refreshments given to any personnel *NOT* on travel status. *See* Use of Appropriated Funds to Purchase Light Refreshments at Conferences, B-288266, 2003 U.S. Comp. Gen. LEXIS 224, (Jan. 27, 2003).

b. This decision was somewhat reversed two years later in National Institutes of Health - Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 03, 2005) ("NIH opinion"). In that case, the GAO authorized the use of appropriated funds for light refreshments, even for individuals *NOT* in travel status, under certain criteria:

(1) The meals are incidental to the conference or meeting;

(2) Attendance of the employees at the meals is necessary for full participation in the conference or meeting; and

(3) The conference or meeting includes not only the functions (speeches, lectures, or other business) taking place when the meals are served, but also includes substantial functions taking place separately from the meal-time portion of the meeting/conference.

c. The Department of Justice, Office of Legal Counsel (OLC) prohibited the executive branch from following the NIH opinion. OLC opined that "meetings" as used in 31 U.S.C. § 1345 included formal conferences sponsored by government agencies and that "subsistence expenses" included meals and light refreshments.[4] Therefore the 31 U.S.C. § 1345 prohibits conference attendees, who are from the local PDS area, from utilizing "light refreshment exception." The OLC opinion controls the activities of agencies of the federal government even though it is more restrictive than the opinions given by the GAO.

3. Statutory-based Exceptions.

a. Basic Allowance for Subsistence. Under 37 U.S.C. § 402, DoD may pay service members a basic allowance for subsistence.

b. Meetings and Conferences. Under the Government Employees Training Act, 5 U.S.C. § 4110, there is authority for the government to pay for "expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities."

(1) Conference Sponsored by Non-Federal Entities. Costs associated with meals included in a conference fee can be considered legitimate expenses of attendance under this statute if: 1) the meals are incidental to the conference or meeting; 2) attendance of the employees at the meals is necessary for full participation in the conference or meeting; and 3) the conference or meeting includes not only the functions (speeches, lectures, or other business) taking place when the meals are served, but also includes substantial functions taking place separately from the meal-time portion of the meeting/conference. *See* National Institutes of Health – Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005).

[4] Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences, 32 Op. Off. Legal Counsel 1, 5 (2007).

(a) For purposes of this exception, the conference or meeting **must not be purely internal government business meetings/conferences**. National Institutes of Health – Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005). Moreover, luncheons disguised as meetings or conferences cannot utilize 5 U.S.C. § 4110. See B-21570, Mar. 22, 1985, 64 Comp. Gen. 406, 408. This authority does not specifically authorize agencies to pay the expenses, including food, of non-governmental employees

(b) As this authority is based on 5 U.S.C. § 4110, it does not apply to military members (it applies only to civilian employees). *But see* Joint Travel Regulation (JTR) ch. 2, para. 020305, which authorizes military members to be reimbursed for occasional meals when TDY within the local area of their Permanent Duty Station (PDS) when the military member is required to procure meals at personal expense outside the physical limits of the PDS.

(c) The OLC opinion may impact the ability of a civilian, who is not in a travel status, to utilize this authority. *See* Section IX.C.2.c. above.

(2) Government Sponsored Conference. As part of the NIH opinion, the GAO authorized agencies to pay for the expenses, including food, of conference attendees from other agencies, and even *non-governmental organizations*, at "formal conferences." National Institutes of Health – Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005).

(a) As part of the decision, the GAO applied the same 5 U.S.C. § 4110 criteria[5] to "formal conferences," but also required sufficient indicia of formality (including, among other things, registration, a published substantive agenda, and scheduled speakers), and stated that the conference must involve **topical matters of interest to (and the participation of) multiple agencies and/or nongovernmental participants**.

(b) The OLC opinion may impact the ability of an agency to utilize this authority. *See* Section IX.C.2.c. above.

(3) Recent Army Guidance. In August 2017, the Army issued AR 1-50, the Army Conference Policy.

[5] *See* Section IX.C.3.b.

c. Training. Under 5 U.S.C. § 4109 (applicable to civilian employees) and 10 U.S.C. § 4301 and 10 U.S.C. § 9301 (applicable to service members), the government may provide meals when it is "necessary to achieve the objectives of a training program." *See* U.S. Army Garrison Ansbach - Use of Appropriated Funds to Purchase Food for Participants in Anti-Terrorism Exercises, B-317423 (Mary 9, 2009), Coast Guard—Meals at Training Conference, B-244473, 1992 U.S. Comp. Gen. LEXIS 740 (Jan. 13, 1992); Use of Appropriated Funds to Purchase Light Refreshments at Conferences, B-288266, Jan. 27, 2003, 2003 U.S. Comp. Gen. LEXIS 224 (including a discussion of providing food, in general, where it furthers the needs of the training program).

(1) This generally requires a determination that attendance during the meals is necessary in order for the attendees to obtain the full benefit of the training. *See* Coast Guard – Coffee Break Refreshments at Training Exercise – Non-Federal Personnel, B-247966, 1993 U.S. Comp. Gen. LEXIS 639 (Jun. 16, 1993). *See also* Pension Benefit Guar. Corp. – Provision of Food to Employees, B-270199, 1996 U.S. Comp. Gen. LEXIS 402 (Aug. 6, 1996) (food was not needed for employee to obtain the full benefit of training because it was provided during an ice-breaker rather than during actual training). In many GAO opinions, the application of this rule appears to be indistinguishable from the 3-part test for Formal Conferences and Meetings under 5 U.S.C. § 4110.

(2) This exception may even apply to non-federal employees if they are necessary to the training and taking a lunch break separately from the government employees would hurt the training. *See* U.S. Army Garrison Ansbach- Use of Appropriated Funds to Purchase Food for Participants in Anti-Terrorism Exercises, B-317423 (Mary 9, 2009) (stating that there was no objection if the Garrison Commander involved in an anti-terrorism training exercise determined that the provision of food to nonfederal participants, including host national first responders, allowed federal and nonfederal personnel to train to work in a coordinated fashion without separating for food breaks, as, most likely, they would in an actual antiterrorism response).

(3) The Training exception requires that the event be genuine "training," rather than merely a meeting or conference. The GAO and other auditors will not merely defer to an agency's characterization of a meeting as "training." Instead, they will closely scrutinize the event to ensure it was a valid program of instruction as opposed to an internal business meeting. *See* Corps of Eng'rs – Use of Appropriated Funds to Pay for Meals, B-249795, 72 Comp. Gen. 178 (1993) (determining that quarterly managers meetings of the Corps did not constitute "training").

(4) This exception is often utilized to provide small "samples" of ethnic foods during an ethnic or cultural awareness program. *See* Army – Food Served at Cultural Awareness Celebration, B-199387, 1982 U.S. Comp. Gen. LEXIS 1284 (Mar. 23, 1982). *See also* U.S. Army Corps of Engineers, North Atlantic Division – Food for a Cultural Awareness Program, B-301184 (January 15, 2004) ("samplings" of food cannot amount to a full buffet lunch and must be related to the culture being celebrated).

d. Award Ceremonies (for Civilian Incentive Awards). Under 5 U.S.C. §§ 4503-4505 (civilian employees incentive awards), federal agencies may "incur necessary expenses" including purchasing food to honor an individual who is given an incentive award.

(1) Relevant GAO Opinions. Defense Reutilization and Mktg. Serv. Award Ceremonies, B-270327, 1997 U.S. Comp. Gen. LEXIS 104 (Mar. 12, 1997) (authorizing the agency expending $20.00 per attendee for a luncheon given to honor awardees under the Government Employees Incentive Awards Act); Refreshments at Awards Ceremony, B-223319, 65 Comp. Gen. 738 (1986) (agencies may use appropriated funds to pay for refreshments incident to employee awards ceremonies under 5 U.S.C. § 4503, which expressly permits agency to "incur necessary expense for the honorary recognition . . . .").

(2) Relevant Regulations. Awards to civilian employees must be made in accordance with 5 C.F.R. Part 451. Awards to DoD civilians must also be done in accordance with DoDI 1400.25, Volume 451 as well as DoD FMR, vol. 8, ch. 3, para. 0311 (Aug. 1999). For Army civilians, the award must also be made in accordance with AR 672-20, Incentive Awards (29 January 1999) and DA Pam 672-20, Incentive Awards Handbook (1 July 1993).

(3) Military Awards. Food may also be provided at ceremonies honoring military recipients of military cash awards under 10 U.S.C. §1124 (Military Cash Awards), which also contains the "incur necessary expenses" language. However, military cash awards are very rare. Typical military awards, such as medals, badges, trophies, etc., are governed by a separate statute (10 U.S.C. § 1125) which does not have the express "incur necessary expenses" language. Therefore, food may not be purchased with appropriated funds for a typical military awards ceremony.

Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to pay for receptions for distinguished visitors. *See* discussion *infra* Part VI of this chapter for an overview.

D. Bottled Water. Bottled water generally does not materially contribute to an agency's mission accomplishment. It is therefore generally a personal expense.

1. GAO-Sanctioned Exception Where Water is Unpotable. Agencies may use appropriated funds to buy bottled water where a building's water supply is unwholesome or unpotable. *See* United States Agency for Int'l Dev. – Purchase of Bottled Drinking Water, B-247871, 1992 U.S. Comp. Gen. LEXIS 1170 (Apr. 10, 1992) (problems with water supply system caused lead content to exceed "maximum contaminant level" and justified purchase of bottled water until problems with system could be resolved).

2. GAO-Sanctioned Exception Where Duty is in Remote Area With No Access to Potable Water. Agencies have the discretion to decide between providing water in coolers or jugs for transport or by providing bottled water at remote sites without access to potable water. The agency must administratively determine that the best way to provide the water is by using bottled water. Dept. of the Army – Use of Appropriations for Bottled Water, B-310502, Feb. 4, 2008, 2008 U.S. Comp. Gen. LEXIS 38. See also Dept. of the Army, Military Surface Deployment and Distribution Command – Use of Appropriations for Bottled Water, B-318588, Sept. 29, 2009 (allowing purchase of bottled water for use at temporary work sites where potable water is not available).

3. Bottled Water as a Condition of Employment. Even if providing bottled water to union employees had become a condition of employment, once drinking water is potable, the agency does not have the authority to continue to provide bottled water. An agency cannot bargain over a matter that is inconsistent with federal law. United States Department Of The Navy, Naval Undersea Warfare Center Division Newport, Rhode Island v. Federal Labor Relations Authority, 665 F.3d 1339, 1347 (D.C. Cir. 2012).

4. Relevant Regulations. *See also* DoD FMR, vol. 10, ch. 12, para. 120324 (permitting the purchase of water where the public water is unsafe or unavailable); AFMAN 65-605, vol. 1, para. 4.58 (discussing the same); AR 30-22, para. 5-19.

5. Water Coolers. As distinguished from the water itself, which must be purchased with personal funds unless the building has no potable water, agencies may use appropriated funds to purchase water coolers as "Food Storage Equipment" (see discussion in next paragraph below), but arguably only under severely limited circumstances. There is arguably no valid purpose for water coolers in buildings that are already equipped with chilled water fountains or with refrigerators that dispense chilled water or ice. Where the facility is not so equipped, water coolers may be purchased with appropriated funds so long as the primary benefit of its use accrues to the organization. Under those circumstances, the water in the cooler must be available for use by all employees, including those who did not chip in for the water.

E. Workplace Food Storage and Preparation Equipment (i.e. microwave ovens; refrigerators; coffee pots).

1. In June 2004 the GAO reversed its own precedent[6] and held that food storage/preparation equipment reasonably relates to the efficient performance of agency activities, and thus appropriated funds could be spent for these items regardless of the availability of commercial eating facilities. *See* Use of Appropriated Funds to Purchase Kitchen Appliances, B-302993 (June 25, 2004). The Comptroller General observed that food storage/preparation equipment provided a benefit to the agency holding that they "increased employee productivity, health, and morale, that when viewed together, justify the use of appropriated funds to acquire the equipment." Further, the opinion noted that such equipment "is one of many small but important factors that can assist federal agencies in recruiting and retaining the best work force and supporting valuable human capital policies."

2. Bottom line: Food preparation and storage equipment may be purchased with appropriated funds, so long as the primary benefit of its use accrues to the agency and the equipment is placed in common areas where it is available for use by all personnel. (Note: agency regulations and policies should be consulted prior to applying this decision.)

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[6] *See e.g.*, Central Intelligence Agency – Availability of Appropriations to Purchase Refrigerators for Placement in the Workplace, B-276601, 97-1 CPD ¶ 230 (commercial facilities were not proximately available when the nearest one was a 15-minute commute from the federal workplace); Purchase of Microwave Oven, B-210433, 1983 U.S. Comp. Gen. LEXIS 1307 (Apr. 15, 1983) (commercial facilities unavailable when employees worked 24 hours a day, seven days a week and restaurants were not open during much of this time).

F. Personal Office Furniture and Equipment. Ordinary office equipment is reasonably necessary to carry out an agency's mission, so appropriated funds may be used to purchase such items, so long as they serve the needs of the majority of that agency's employees. If the equipment serves the needs of only a single individual or a specific group of individuals, then it is considered a personal expense rather than a "necessary expense" of the agency. This is true even if the equipment is essential for a particular employee to perform his or her job. Under such a scenario, it is the needs of that particular individual that causes the item to be necessary. The item is not "essential to the transaction of official business from the Government's standpoint." Internal Revenue Service – Purchase of Air Purifier with Imprest Funds, B-203553, 61 Comp. Gen. 634 (1982) (disapproving reimbursement for air purifier to be used in the office of an employee suffering from allergies); See also Roy C. Brooks – Cost of special equipment-automobile and sacro-ease positioner, B-187246, 1977 U.S. Comp. Gen. LEXIS 221 (Jun. 15, 1977) (disapproving reimbursement of special car and chair for employee with a non-job related back injury); Cf. Office of Personnel Mgt. – Purchase of Air Purifiers, B-215108, July 23, 1984, 84-2 CPD ¶ 194 (allowing reimbursement for air purifiers to be used in common areas, thus benefiting the needs of all building occupants).

1. Federal Supply Schedule Exception. If the desired equipment is available on the Federal Supply Schedule, the agency may use appropriated funds to purchase it even if the chair does not serve the needs of the majority of workers. *See* Purchase of Heavy Duty Office Chair, B-215640, 1985 U.S. Comp. Gen. LEXIS 1805 (Jan. 14, 1985) (allowing reimbursement for a heavy-duty office chair normally used only by air traffic controllers since the chair was available on FSS).

2. Exception Based Upon Statutory Authority. The Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., requires federal agencies to implement programs to expand employment opportunities for handicapped individuals. The regulations implementing this Act require agencies to make "reasonable accommodations" to include purchasing special equipment or devices in order to carry out these programs. *See* 29 C.F.R. 32.3 ("Definitions"). Thus, agencies may purchase equipment for its **qualified handicap employees** as a reasonable accommodation. *See* Use of Appropriated Funds to Purchase a Motorized Wheelchair for a Disabled Employee, B-240271, 1990 U.S. Comp. Gen. LEXIS 1128 (Oct. 15, 1990) (authorizing purchase); *see also* Equal Employment Opportunity Commission – Special Equipment for Handicapped Employees, B-203553, 63 Comp. Gen. 115 (1983) (agency could not purchase air purifier for person with allergies because the person did not meet the regulatory definition of a handicapped individual).

G. Entertainment. Entertaining people generally does not materially contribute to an agency's mission performance. As a result, entertainment expenses are generally considered to be a personal expense. *See* HUD Gifts, Meals, and Entm't Expenses, B-231627, 68 Comp. Gen. 226 (1989); Navy Fireworks Display, B-205292, Jun. 2, 1982, 82-2 CPD ¶ 1 (determining fireworks to be unauthorized entertainment); Liability of Alexander Tripp, B-304233, Aug. 8, 2005, 2005 U.S. Comp. Gen. LEXIS 158 (Sunset dinner cruise in conjunction with staff retreat a "personal expense"; official held not personally liable where he was not properly designated by the agency as a certifying officer).

1. Statutory-based Exceptions. Congress does occasionally provide authority to entertain. *See* Claim of Karl Pusch, B-182357, 1975 U.S. Comp. Gen. LEXIS 1463 (Dec. 9, 1975) (Foreign Assistance Act authorized reimbursement of expenses incurred by Navy escort who took foreign naval officers to Boston Playboy Club -- twice); Golden Spike Nat'l Historic Site, B-234298, 68 Comp. Gen. 544 (1989) (discussing authority to conduct "interpretive demonstrations" at the 1988 Annual Golden Spike Railroader's Festival).

2. Agencies may use appropriated funds to pay for entertainment (including food) in furtherance of equal opportunity training programs. Internal Revenue Serv. – Live Entm't and Lunch Expense of Nat'l Black History Month, B-200017, 60 Comp. Gen. 303 (1981) (determining a live African dance troupe performance conducted as part of an Equal Employment Opportunity (EEO) program was a legitimate part of employee training); U.S. International Trade Commission – Cultural Awareness, B-278805, Jul. 1999, 1999 U.S. Comp. Gen. LEXIS 211 (Int'l Trade Comm'n funds were available to pay for musical performance at cultural awareness event, subject to time limits on reimbursement.).

3. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to entertain distinguished visitors to the agency. *See* To The Honorable Michael Rhode, Jr., B-250884, 1993 U.S. Comp. Gen. LEXIS 481 (March 18, 1993) (interagency working meetings, even if held at restaurants, are not automatically social or quasi-social events chargeable to the official reception and representation funds).

H. Decorations. Under a "necessary expense" analysis, GAO has sanctioned the use of appropriated funds to purchase decorations so long as they are modestly priced and consistent with work-related objectives rather than for personal convenience. *See* Department of State & Gen. Serv. Admin – Seasonal Decorations, B-226011, 67 Comp. Gen. 87 (1987) (authorizing purchase of decorations); Purchase of Decorative Items for Individual Offices at the United States Tax Court, B-217869, 64 Comp. Gen. 796 (1985) (modest expenditure on art work consistent with work-related objectives and not primarily for the personal convenience or personal satisfaction of a government employee proper); *But see* The Honorable Fortney H. Stark, B-217555, 64 Comp. Gen. 382 (1985) (determining that Christmas cards and holiday greetings letters were not a proper expenditure because they were for personal convenience). *See also* AFMAN 65-601, vol. 1, para. 4.28.2. 41 C.F.R. § 101.26.103-2 (2003) governs the purchase decorative items for federal buildings. Note: Practitioners should consider also the constitutional issues involved in using federal funds to purchase and display religious decorations (e.g., Christmas decorations).

I. Business Cards. Under a "necessary expense" analysis, the GAO has sanctioned the purchase of business cards for agency employees. *See* Letter to Mr. Jerome J. Markiewicz, Fort Sam Houston, B-280759, Nov. 5, 1998 (purchase of business cards with appropriated funds **for government employees who regularly deal with public or outside organizations** is a proper "necessary expense").

1. This decision reversed a long history of Comptroller General decisions holding that business cards were a personal expense because they did not materially contribute to an agency's mission accomplishment. *See e.g.*, Forest Serv. – Purchase of Info. Cards, B-231830, 68 Comp. Gen. 467 (1989).

2. *See* Section VII.B.3 for a discussion on the more restrictive agency regulations on purchasing business cards.

J. Telephones. Even though telephones might ordinarily be considered a "necessary expense," appropriated funds may not generally be used to install telephones in private residences or to pay the utility or other costs of maintaining a telephone in a private residence. Congress decided to prohibit government phones in personal residences because their use was subject to great abuse. *See* 31 U.S.C. § 1348; *see also* Centers for Disease Control and Prevention – Use of Appropriated Funds to Install Tel. Lines in Private Residence, B-262013, Apr. 8, 1996, 96-1 CPD ¶ 180 (appropriated funds may not be used to install telephone lines in Director's residence); Use of Appropriated Funds to Pay Long Distance Tel. Charges Incurred by a Computer Hacker, B-240276, 70 Comp. Gen. 643 (1991) (agency may not use appropriated funds to pay the phone charges, but may use appropriated funds to investigate).

1. Exceptions for DoD and State Department. The above prohibition does not apply to the installation, repair, or maintenance of telephone lines in residences owned or leased by the U.S. Government. It also does not apply to telephones in private residences if the SECDEF determines they are necessary for national defense purposes. See 31 U.S.C. § 1348(a)(2) and (c). *See also* Timothy R. Manns – Installation of Tel. Equip. in Employee Residence, B-227727, 68 Comp. Gen. 307 (1989) (telephone in temporary quarters of National Park Service employee allowed, using same rationale). DoD may install telephone lines in the residences of certain volunteers who provide services that support service members and their families, including those who provide medical, dental, nursing, or other health-care related services as well as services for museum or natural resources programs. *See* 10 U.S.C. § 1588(f).

2. Exception for Data Transmission Lines. If the phone will be used to transmit data, the above prohibition does not apply. *See* Federal Commc'ns Comm'n – Installation of Integrated Servs. Digital Network, B-280698, Jan. 12, 1999 (unpub.) (agency may use appropriated funds to pay for installation of dedicated Integrated Services Digital Network (ISDN) lines to transmit data from computers in private residences of agency's commissioners to agency's local area network).

3. Cell Phones. The prohibition on installing telephones in a personal residence does not prevent an agency from purchasing cell phones for its employees, if they are otherwise determined to be a necessary expense. Agencies may also reimburse their employees for the costs associated with any official government usage of personal cell phones, but such reimbursement must cover the actual costs – not the estimated costs – of the employee. *See* Reimbursing Employees' Government Use of Private Cellular Phones at a Flat Rate, B-287524, 2001 U.S. Comp. Gen. LEXIS 202 (Oct. 22, 2001) (agency may not pay the employees a flat amount each month – in lieu of actual costs – even if the calculation of that flat amount is made using historical data); *see also* Nuclear Regulatory Commission: Reimbursing Employees for Official Usage of Personal Cell Phones, B-291076, 2003 U.S. Comp. Gen. LEXIS 240 (March 6, 2003).

4. Exception for Teleworking. In 1995, Congress authorized federal agencies to install telephones and other *necessary equipment* in personal residences for purposes of teleworking. *See* Pub. L. No. 104-52, § 620 (Codified at 31 U.S.C., § 1348). Congress also required the Office of Personnel Management (OPM) to develop guidance on teleworking that would be applicable to all federal agencies. That guidance may be found at: http://www.telework.gov/.

5. Educating public via tweet not a valid use of funds. In U.S. Department of Energy--Tweet Concerning the Secretary of Energy's Guest Column on

Health Care, B-329373 (Jul. 26, 2018). The Secretary of Energy wrote a guest column for a media outlet criticizing the Patient Protection and Affordable Care Act. The same day DoE's public affairs office tweeted "Time to discard the burdens and costs of Obamacare: @SecretaryPerry" and linked to the Secretary's column. GAO found that DoE's appropriation was not available for the purpose of informing the public about health care and so the tweet violated the purpose statute.

K. Fines and Penalties. The payment of a fine or penalty generally does not materially contribute towards an agency's mission accomplishment. Therefore, fines and penalties imposed on government employees and service members are generally considered to be their own personal expense and not payable using appropriated funds. Alan Pacanowski - Reimbursement of Fines for Traffic Violations, B-231981, 1989 U.S. Comp. Gen. LEXIS 635 (May 19, 1989); To the Honorable Ralph Regula, B-250880, Nov. 3, 1992, 1992 U.S. Comp. Gen. LEXIS 1279 (Fines imposed on Government employees driving Government vehicles also a personal expense). Where the fine itself is not reimbursable, related legal fees are similarly nonreimbursable. In the Matter of Attorney's Fees in Traffic Offense, B-186857, Feb. 9, 1978, 57 Comp. Gen. 270.

1. Exception Based Upon "Necessary Expense" Rule. If, in carrying out its mission, an agency forces one of its employees to take a certain action which incurs a fine or penalty, that fine or penalty may be considered a "necessary expense" and payable using appropriated funds. *Compare* To The Honorable Ralph Regula, B-250880, 1992 U.S. Comp. Gen. LEXIS 1279 (Nov. 3, 1992) (military recruiter is personally liable for fines imposed for parking meter violations because he had the ability to decide where to park and when to feed the meter); *with* To The Acting Attorney Gen., B-147769, 44 Comp. Gen. 313 (1964) (payment of contempt fine proper when incurred by employee forced to act pursuant to agency regulations and instructions).

2. Agencies may also pay fines imposed upon the agency itself if Congress waives sovereign immunity. *See, e.g.*, 10 U.S.C. § 2703(f) (Defense Environmental Restoration Account); 31 U.S.C. § 3902 (interest penalty).

L. Licenses and Certificates. Employees are expected to show up to work prepared to carry out their assigned duties. As a result, fees that employees incur to obtain licenses or certificates enabling them to carry out their duties are considered a personal expense rather than a "necessary expense" of the government. *See* A. N. Ross, Federal Trade Commission, B-29948, 22 Comp. Gen. 460 (1942) (fee for admission to Court of Appeals not payable); Colonel Dempsey, B-277033, Jun. 27, 1997, 1997 U.S. Comp. Gen. LEXIS 410 (Fee for state physician's license, DEA certifications not payable, even where advantageous for the Government). *But see* AFMAN 65-601, vol. 1, para. 4.60 (Payment for *certain* licenses and certificates, where not used to qualify individuals for employment, allowed).

1. GAO Sanctioned Exception—When the license is primarily for the benefit of the government and not to qualify the employee for his position. National Sec. Agency – Request for Advance Decision, B-257895, 1994 U.S. Comp. Gen. LEXIS 844 (Oct. 28, 1994) (allowing drivers' licenses for scientists and engineers to perform security testing at remote sites); Air Force—Appropriations – Reimbursement for Costs of Licenses or Certificates, B-252467, 73 Comp. Gen. 171 (1994) (approving payment of licenses necessary to comply with state-established environmental standards); Dept. of the Army – Availability of Funds for Security Clearance Expenses, B-307316, Sep. 7, 2006, 2006 U.S. Comp. Gen. LEXIS 144 (agreeing that costs associated with service-member renouncing foreign citizenship in order to obtain security clearance payable are allowable).

2. Professional Credentials. In 2001, Congress enacted legislation permitting agencies to use appropriations for "expenses for employees to obtain professional credentials, including expenses for professional accreditation, State-imposed and professional licenses, and professional certification; and examinations to obtain such credentials." Pub. L. No. 107-107, § 1112(a), 115 Stat. 1238 (Apr. 12, 2001), codified at 5 U.S.C. § 5757. The statutory language does not create an entitlement; instead, it authorizes agencies to consider such expenses as payable from agency appropriations if the agency chooses to cover them. *See* AFMAN 65-601, vol. 1, para. 4.47. *But see* Scope of Professional Credentials Statute, B-302548, 2004 U.S. Comp. Gen. LEXIS 176 (prohibiting payment for an employee's membership in a professional association not required for licensing). In 2006, the military received similar authority, codified at: 10 U.S.C. § 2015. However, this authority may not be used to pay the expenses of a member to obtain professional credentials that are a prerequisite for appointment in the armed forces.

M. Awards (Including Unit or Regimental Coins and Similar Devices). Agencies generally may not use their appropriated funds to purchase "mementos" or personal gifts. *See* EPA Purchase of Buttons and Magnets, B-247686, 72 Comp. Gen. 73 (1992) (requiring a direct link between the distribution of the gift or memento and the purpose of the appropriation in order to purchase the item with appropriated funds); *see also* Purchase of Baseball Caps by Dept. of Energy, B-260260, Dec. 28, 1995, 96-2 Com. Gen. Proc. Dec. ¶ 131 (disallowing the purchase of baseball caps where there was no direct link to the purpose of the appropriation established). Congress has enacted various statutory schemes permitting agencies to give awards, however. These include:

1. Awards for Servicemembers. Congress has provided specific authority for the SECDEF to "award medals, trophies, badges, and similar devices" for "excellence in accomplishments or competitions." 10 U.S.C. § 1125.

   a. The Army has implemented this statute in AR 600-8-22, Military Awards (5 March 2019). The bulk of this regulation deals with the typical medals and ribbons issued to service members (i.e. the Army Achievement Medal, the Meritorious Service Medal, etc).

   b. Chapter 11 of the regulation allows the presentation of other nontraditional awards for "excellence in accomplishments or competitions which clearly contribute to the increased effectiveness or efficiency of the military unit, for example, tank gunnery, weapons competition, and military aerial competition." *See* AR 600-8-22, para. 11-1a.

   c. While the regulation discusses contests and events of a continuing nature, awards "may be made on a one-time basis where the achievement is unique and clearly contributes to increased effectiveness." *See* AR 600-8-22, para. 11-2b.

   d. Theoretically, these awards could be made in the form of a coin, a trophy, a plaque, or a variety of other "similar devices." However, the ACOM/ASCC commander or head of the principal HQDA agency, or delegee, must approve the trophies and similar devices to be awarded within their command or agency. *See* AR 600-8-22, para. 1-7d. *See also* Air Force Purchase of Belt Buckles as Awards for Participants in a Competition, B-247687, 71 Comp. Gen. 346 (1992) (belt buckles may be purchased as awards for the annual "Peacekeeper Challenge").

   e. Specific Issues Concerning Unit or Regimental Coins. For a detailed discussion of the issues related to commanders' coins, *see* Major Kathryn R. Sommercamp, *Commanders' Coins: Worth Their Weight in Gold?*, Army Law., Nov. 1997, at 6.

f. The Air Force and Navy/Marine Corps have similar awards guidance. *See generally* AFPD 36-28, Awards and Decorations Programs, (27 Jun 2018); SECNAVINST 3590.4A, Award of Trophies and Similar Devices in Recognition of Accomplishments (28 Jan. 1975). *See also* AFMAN 65-601, vol. 1, para. 4.31.2.

2. Awards For Civilian Employees. Congress has provided agencies with various authorities to pay awards to their employees. *See* Chapter 45 of Title 5 of the U.S. Code. The most often utilized authority used as a basis to issue an award to a civilian employee is that found at 5 U.S.C. § 4503.

a. Regulatory Implementation of this Authority. Awards to civilian employees must be made in accordance with 5 C.F.R. Part 451. Awards to DoD civilians must also be done in accordance with DoD 1400.25, Volume 451 as well as DoD FMR, vol. 8, ch. 3. Para 0311 (May 2020) For Army civilians, the award must also be made in accordance with AR 672-20, Incentive Awards (30 Nov. 2018).

b. Non-Cash Awards. The statute technically states that the "head of an agency may pay a cash award to, and incur necessary expense for the honorary recognition of" one of their employees. The plain reading of this statute implies that non-cash awards, such as plaques and coins, are not authorized to be given to civilian employees. The agency regulations each expressly permit non-cash awards, however. The GAO has sanctioned the giving of non-cash awards to civilian employees. *See* Awarding of Desk Medallion by Naval Sea Sys. Command, B-184306, 1980 U.S. Comp. Gen. LEXIS (Aug. 27, 1980) (stating that desk medallions may be given to both civilian and military as awards for suggestions, inventions, or improvements); Nat'l Security Agency – Availability of Appropriations to Purchase Food as a Non-Monetary Award, B-271511, Mar. 4, 1997, 1997 U.S. Comp. Gen. LEXIS 105 (deciding that food vouchers may be given to civilian employees as awards). As discussed *supra*, the GAO has also sanctioned the purchase of food as one of the expenses that it deems could be necessary to honor the awardees accomplishments under 5 U.S.C. § 4503. In such circumstances, the award is not the food; the food is just an incidental expense incurred to honor the awardee.

3. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to purchase mementoes for their distinguished visitors.

N. Use of Office Equipment. Governed by the Joint Ethics Regulation, DoD 5500.07-R (Nov. 17, 2011), Standards of Conduct, DoD Directive 5500.07 (Nov. 29, 2007), 5 C.F.R. § 2635, and 5. C.F.R. Part 3601. The use of government property to respond to National Guard, Reserve matters is authorized, within certain restrictions. Lorraine Lewis, Esq., B-277678, 1999 U.S. Comp. Gen. LEXIS 104 (Jan. 4, 1999) (agency may authorize use of office equipment to respond to reserve unit recall notification as all government agencies have some interest in furthering the governmental purpose of, and national interest in, the Guard and Reserves). *See* 5 C.F.R. § 251.202; *see also* Office of Personnel Management memorandum, Subject: Use of Official Time and Agency Resources by Federal Employees Who Are Members of the National Guard or Armed Forces Reserves (3 June 1999), which provides general guidance to assist federal agencies in determining under what circumstances employee time and agency equipment may be used to carry out limited National Guard or Reserve functions. An electronic copy of this memorandum is on file with the Contract and Fiscal Law Department. *See also* CAPT Samuel F. Wright, *Use of Federal Government Equipment and Time for Reserve Unit Activities*, Reserve Officers Ass'n L. Rev., May 2001 (providing a good overview of this authority).

O. Expenditures for New or Additional Duties.

1. If during the middle of a fiscal year, legislation or an executive order imposes new or additional duties upon an agency and Congress does not provide that agency with a supplemental appropriation specifically covering that new function, may current appropriations be charged?

2. Test: Are the new duties sufficiently related to the purpose of a previously enacted appropriation? The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984); Director, Nat'l Sci. Found., B-158371, 46 Comp. Gen. 604 (1967).

VII. MILITARY CONSTRUCTION

A. Congressional oversight of the Military Construction Program, and construction throughout the Federal Government, is extensive and pervasive. For example, no contract relating to erection, repair, or furnishing of a public building or to make any public improvement shall require the government to pay more than the amount specifically appropriated for the activity covered by the contract. 41 U.S.C. § 6303. There are different categories of construction work with distinct funding requirements.[7]

[7] For in-depth guidance regarding the calculating the value of construction projects see Army Regulation 420-1, Army Facilities Management (12 Feb. 2008).

B. The FY2018 National Defense Authorization Act (NDAA), Pub. L. 115-91, significantly changed the thresholds for military construction funding:

1. Operation and Maintenance (O&M) funding. Commands must use O&M funding for unspecified minor military construction projects costing $2,000,000 or less (unless Congress has specifically authorized and appropriated military construction funds for a project). 10 U.S.C. § 2805(c). This threshold was previously $1,000,000. The 2018 NDAA also states that all military construction projects with a cost between $750,000 and $2,000,000 must receive approval from the Service Secretary (or appointed designee) before O&M can be used to fund a military construction project. 10 U.S.C. § 2805(b)(1).

   a. Construction includes alteration, conversion, addition, expansion, and replacement of existing facilities, plus site preparation and installed equipment.

   b. Project splitting is prohibited. The Honorable Michael B. Donley, B-234326.15, 1991 U.S. Comp. Gen. LEXIS 1564 (Dec. 24, 1991) (Air Force improperly split into multiple projects, a project involving a group of twelve related buildings).

2. Unspecified Minor Military Construction (UMMC). A lump sum appropriation provided by Congress to the service secretaries for minor military construction, to fund military construction projects with a funded cost of over $2,000,000, but less than or equal to $6,000,000. *See* 10 U.S.C. § 2805.

3. Specified Military Construction (MILCON) Program.

   a. Construction projects that are specifically authorized and specifically provided military construction appropriations. Such funding is required for any construction project with a funded cost of over $6,000,000, but may also apply to construction projects under $6,000,000—if authorized and appropriated. The Army's principle appropriations are the "Military Construction, Army" (MCA) appropriation, and the "Family Housing, Army" (FHA) appropriation. *See e.g.*, Military Construction Appropriations Act, 2019, Pub. L. 115-244.

   b. The conference report that accompanies the Military Construction Appropriations Act breaks down the lump sum appropriations by specific individual projects. Conference reports are available at https://conferencereport.gpo.gov/.

C. Exercise-related construction. *See* The Honorable Bill Alexander, B-213137, Jan. 30, 1986 (unpub.); The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

1. Congress has prohibited the use of O&M for minor construction outside the U.S. on Joint Chiefs of Staff (JCS) directed exercises.

2. All exercise-related construction projects coordinated or directed by the JCS outside the U.S. are limited to unspecified minor construction accounts of the Military Departments. Currently, Congress funds exercise-related construction as part of the Military Construction, Defense Agencies appropriations.

3. DoD's interpretation excludes from the definition of exercise-related construction only truly temporary structures, such as tent platforms, field latrines, shelters, and range targets that are removed completely once the exercise is completed. DoD funds the construction of these temporary structures with O&M appropriations.

D. Combat and Contingency Related O&M Funded Construction.

1. O&M funded contingency construction started with section 2808 of the FY04 NDAA and has been extended and modified by each NDAA since 2004. *See*, § 2901 *et. seq*. of FY20 NDAA.

a. Other Contingency Construction Authority.

(1) *See* 10 U.S.C. § 2804. See DoD Dir. 4270.5; AR 420-1, para. 4-9; AFI 32-1021, para. 5.2.3; OPNAVINST 11010.20H; *see also* DoD FMR, vol. 3, chs. 7 and 17.

(a) Scope of Authority. The Secretary of Defense may use this authority—or permit the Secretary of a military department to use this authority—to carry out contingency construction projects not otherwise authorized by law.

(b) Proper Appropriation. Funds are specifically appropriated for construction under 10 U.S.C. § 2804.

(c) Requirements for Use.

Before using this authority, the SECDEF must determine that deferral of the project until the next Military Construction Appropriations Act would be

inconsistent with National security or National interest.

(2) In addition, the SECDEF must:

(a) Notify the appropriate committees of Congress; and

(b) Wait 21 days.

(3) Limitations.

(a) Legislative History. H.R. Rep. No. 97-612 (1982).

(i) The legislative history of the MCCA indicates that the Secretaries of the military departments should use this authority only for extraordinary projects that develop unexpectedly.

(ii) In addition, the legislative history of the MCCA indicates that the Secretaries of the military departments may not use this authority for projects denied authorization in previous Military Construction Appropriations Acts. *See* DoD FMR vol. 3, ch. 7, para. 070303.B.

(b) DoD Limitations.

(i) DoD Dir. 4270.5, para. 4.2, requires the Heads of DoD Components to consider using other available authorities to fund military construction projects before they consider using SECDEF authorities.

(ii) DoD FMR, vol. 3, ch. 17, para. 170303.C.5, states that: "Actual construction shall not commence prior to the receipt of appropriate DoD and congressional approval [of the reprogramming request]."

(c) Army Limitations. AR 420-1, para. 4-9b(6).

(i) The Army generally reserves this authority for projects that support multi-service requirements.

(ii) Commanders should normally process urgent projects that support only one service under 10 U.S.C. § 2803.

(d) Air Force Limitations. AFI 32-1021, para. 5.2.3.1.

(i) The use of this authority is rare.

(ii) The Air Force must consider using its 10 U.S.C. § 2803 authority first.

VIII. MAINTENANCE AND REPAIR

A. **Maintenance and repair projects are <u>not</u> construction for fiscal funding purposes**. AR 420-1, Glossary, sec. II; AFI 32-1032, para. 1.3.2; OPNAVINST 11010.20F, ch. 3, para. 3.1.1, and ch. 4, para 4.1.1. Therefore, maintenance and repair projects are <u>not</u> subject to the $2,000,000 O&M limitation on construction.[8] *See* 10 U.S.C. § 2811(a) (specifically permitting the Secretary of a military department to use O&M funds to carry out repair projects for "an entire single-purpose facility or one or more functional areas of a multipurpose facility"). DoD funds these projects with O&M appropriations.

1. Definitions.

a. Maintenance.

(1) AR 420-1, Glossary, sec. II, defines maintenance as the "work required to preserve or maintain a facility in such condition that it may be used effectively for its designated purpose." It includes work required to prevent damage and sustain components (i.e., replacing disposable filters; painting; caulking; refastening loose siding; and sealing bituminous pavements). *See also* DA Pam 420-11, para. 1-6a.

(2) AFI 32-1032, para. 4.1, defines maintenance as "work required to preserve real property and real property systems or components and prevent premature failure or wearing out of the same." It includes: (a) work required to prevent and arrest component deterioration; and (b) landscaping or planting work that is not capitalized.

[8] *But see* 10 U.S.C. § 2811. If the estimated cost of a repair project exceeds $7.5 million, the Secretary concerned must approve the project in advance. 10 U.S.C. § 2811(b). The Secretary must then notify the appropriate committees of Congress of: (1) the justification and current cost estimate for the project; and (2) the justification for carrying out the project under this section. 10 U.S.C. § 2811(d).

(3) OPNAVINST 11010.20F, para. 4.1.1, defines maintenance as "the day-to-day, periodic, or scheduled work required to preserve or return a real property facility to such a condition that it may be used for its designated purpose."

(a) The term "maintenance" includes work undertaken to prevent damage to a facility that would be more costly to repair (i.e., waterproofing and painting interior and exterior walls; seal-coating asphalt pavement; resealing joints in runway concrete pavement; dredging to previously established depths; and cleaning storage tanks).

(b) Maintenance differs from repair in that maintenance does not involve the replacement of major component parts of a facility. It is the work done to:

(i) Minimize or correct wear; and

(ii) Ensure the maximum reliability and useful life of the facility or component.

b. Repair.

(1) Statutory Definition. 10 U.S.C. § 2811(e). A "repair project" is defined as a project to restore a real property facility, system, or component to such a condition that the military department or agency may use it effectively for its designated functional purpose.

(2) Sustainment Definition. DoD FMR, vol. 2B, ch. 8, para. 080105. See also Memorandum, Deputy Comptroller, Office of the Under Secretary of Defense (Program/Budget), subject: Definition for Maintenance and Repair (2 July 1997) [hereinafter DoD Repair Memorandum]. The term "repair" means to restore a real property facility, system, or component to such a condition that the military department or agency may use it effectively for its designated functional purpose.

(a) When repairing a facility, the military department or agency may:

(i) Repair components of the facility by replacement; and

(ii) Use replacements that meet current building standards or code requirements.[9]

(b) The term "repair" includes:

(i) Interior rearrangements that do not affect load-bearing walls; and

(ii) The restoration of an existing facility to:
(a) allow for the effective use of existing space; or
(b) meet current building standards or code requirements (i.e., accessibility, health, safety, or environmental).

(c) The term "repair" does not include additions, new facilities, and functional conversions. *See* 10 U.S.C. § 2811(c).

(d) Army Definition. AR 420-1, Glossary, sec. II; DA Pam 420-11, paras. 1-6 and 1-7. *See* Memorandum, Assistant Chief of Staff for Installation Management, subject: New Definition of "Repair" (4 Aug. 1997) [hereinafter DA Repair Memorandum]. The term "repair" means to restore a facility or a facility component to such a condition that the Army may use it effectively for its designated functional purpose.

(e) The DA Repair Memorandum states that: "The new definition is more liberal and expands [the Army's] ability to provide adequate facilities for [its] soldiers and civilians;" however, the DA Repair Memorandum also states that: "**A facility must exist and be in a failed or failing condition in order to be considered for a repair project**." *See* DA Pam 420-11, para. 1-7e (stating that "[r]epair means that the facility or facility component has failed, or is in the incipient stages of failing, or is no longer performing the functions for which it was designated").

(f) The term **"repair"** includes:

[9] DOD FMR, vol. 2B, ch. 8, para. 080105, and AR 420-1, para. 4-17b, provide the same example. Both state that "heating, ventilation, and air conditioning (HVAC) equipment can be repaired by replacement, can be state-of-the-art, and can provide for more capacity that the original unit due to increased demands and standards." See DA Pam 420-11, para. 1-7h (stating that the Army should use energy and water saving materials whenever feasible).

(i) Overhauling, reprocessing, or replacing deteriorated components, parts, or materials;

(ii) Correcting deficiencies in failed or failing components to meet current building standards or code requirements if the Army can perform the work more economically by performing it concurrently with the restoration of other failed or failing components;[10]

(iii) Relocating or reconfiguring components (i.e., partitions, windows, and doors) during a major repair project if they are replacements for existing components;[11]

(iv) Relocating or reconfiguring utility systems during a major repair project to meet current building standards or code requirements if the total area or population served by the utility system remains the same; and

(v) Incorporating additional components during a major repair project if: (a) the system is in a failed or failing condition;[12] and (b) incorporating the additional components makes the replacement system safer and more efficient.

(g) The term "repair" does not include:

(i) Bringing a facility or facility component up to applicable building standards or code requirements when it is not in need of repair;

(ii) Increasing the quantities of components for functional reasons;

(iii) Extending utilities or protective systems to areas not previously served;

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[10] The DA Repair Memorandum indicates that the Army can add a sprinkler system or air conditioning to bring a facility up to applicable standards or codes, provided the facility is in a failed or failing condition.

[11] A major repair project would include gutting the interior of a building.

[12] Under certain circumstances, the Army may classify a utility system or component as "failing" if it is energy inefficient or technologically obsolete. See AR 420-1, Glossary, sec. II.

(iv) Increasing exterior building dimensions; or

(v) Completely replacing a facility.

(3) Air Force Definition. AFI 32-1032, paras. 4.2. See AFI 65-601, vol. 1, attch 1. The term "repair" means to restore real property, real property systems, and real property components to such a condition that the Air Force may use it effectively for its designated functional purpose. However, AFI 32-1032, para. 4.2, specifically states that real property, real property systems, and real property components "need not have failed to permit a repair project." (emphasis added)

(a) The term "repair" includes:

(i) Replacing existing heating, ventilation, and air conditioning equipment with "functionally sized," state-of-the-art equipment;

(ii) Rearranging or restoring the interior of a facility to: (a) allow for the effective use of existing space; or (b) meet current building standards or code requirements (i.e., accessibility, health, safety, seismic, security, or fire);[13]

(iii) Removing or treating hazardous substances for environmental restoration purposes unless the work supports a construction project;

(iv) Replacing one type of roofing system with a more reliable or economical type of roofing system;

(v) Installing exterior appurtenances (i.e., fire escapes, elevators, ramps, etc.) to meet current building standards, code requirements, and/or access laws; and

(vi) Installing force protection measures outside the footprint of the facility.

(b) The term "repair" does not include:

[13] Moving load-bearing walls is construction. AFI 32-1032, para. 4.1.2.1.2.

(i) Expanding a facility's foundation beyond its current footprint;

(ii) Elevating or expanding the "functional space" of a facility;

(iii) Increasing the "total volume" of a facility;

(iv) Installing previously uninstalled equipment unless required to comply with accessibility, health, safety, seismic, security, or fire standards and codes;

(v) Relocating a facility;

(vi) Upgrading unpaved surfaces;

(vii) Increasing the dimensions of paved surfaces unless required to comply with Air Force standards or applicable code requirements;

(viii) Changing the permanent route of real property transportation systems;

(ix) Installing walkways, roadway curbs, gutters, underground storm sewers, bicycle paths, jogging paths, etc;

(x) Completely replacing the vertical section of a facility and a substantial portion of its foundation;

(xi) Completely replacing a facility;

(xii) Converting a facility or portion of a facility from one functional purpose to another;14 or

(xiii) Repairing a facility if the repair work exceeds 70% of the facility's replacement cost.[15]

[14] Repair work required regardless of a functional conversion may still be repair work. AFI 32-1032, para. 5.1.2.3.2.

[15] This limit does not apply to facilities on a national or state historic register. In addition, the SAF/MII can waive it under appropriate circumstances. AFI 32-1032, para. 5.1.2.3.2.

c. Navy Definition. OPNAVINST 11010.20H, para. 3-1[16] The term "repair" refers to "restoring real property facility, system, or component to such condition that it may be effectively used for its designated purpose.

(1) The term "repair" includes (*See* OPNAVINST 11010.20H, para. 3-1b):

(a) Relocation of, and minor additions to, components in an existing facility to return it to its customary state of operating efficiency (e.g., additional non-load bearing walls installed during repair of deteriorated interior non-load bearing walls);

(b) Interior rearrangements (except for load bearing walls) of an existing facility to allow for effective use of existing space for its current functional purpose;

(c) Replacement of facility components (including deteriorated load-bearing walls), built-in equipment, or systems with items of higher quality or more durable materials to conform to current standards (including energy efficiency standards) or codes). The replacement items should not substantially increase the capacity or change the function of the components, equipment, or systems unless there is no alternative to such replacements. However, complete replacement of the entire facility is classified as construction;

(d) Extensions and additions to systems or facilities to correct life, safety, and health code deficiencies.

IX. EMERGENCY AND EXTRAORDINARY EXPENSE FUNDS (INCLUDING OFFICIAL REPRESENTATION FUNDS)

A. Definition. Emergency and extraordinary expense funds are appropriations that an agency has much broader discretion to use for "emergency and extraordinary expenses." Expenditures made using these funds need not satisfy the normal purpose rules.

B. Historical Background. Congress has provided such discretionary funds throughout our history for use by the President and other senior agency officials. *See* Act of March 3, 1795, 1 Stat. 438.

[16] This regulatory provision pre-dates the DoD's new definition of repair. See DoD Repair Memorandum.

C. Appropriations Language.

1. For DoD, Congress provides emergency and extraordinary funds as a separate item in the applicable operation and maintenance appropriation. For example, in FY 2019, Congress provide the following O&M to the Army: "For expenses, not otherwise provided for, necessary for the operation and maintenance of the Army, as authorized by law, $32,738,173,000: *Provided*, That <u>not to exceed $12,478,000 can be used for emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Army, and payments may be made on his certificate of necessity for confidential military purposes.</u>" In the FY18 NDAA, Congress severely limited this authority for intelligence and counter-intelligence activities. *See* § 1041 of the FY18 NDAA; 10 U.S.C. §127.

2. Not all agencies receive emergency and extraordinary funds. If Congress does not specifically grant an agency emergency and extraordinary funds, that agency may not use other appropriations for such purposes. *See* <u>HUD Gifts, Meals, and Entm't Expenses</u>, B-231627, 68 Comp. Gen. 226 (1989).

D. Statutory Background.

1. To the extent Congress appropriates emergency and extraordinary funds, the Department of Defense's use of such funds is governed by 10 U.S.C. § 127. This code section:

a. Authorizes the Secretary of Defense and the Secretary of a military department to spend emergency and extraordinary expenses funds for "any purpose he determines to be proper, and such a determination is final and conclusive."

b. Requires a quarterly report of such expenditures to the Congress.

c. Congressional notice requirement. In response to a $5 million payment to North Korea in the mid-90s using DoD emergency and extraordinary expense funds, Congress amended 10 U.S.C. § 127, imposing the following additional restrictions on our use of these funds:

(1) If the amount to be expended exceeds $1 million: the Secretary of the Service involved must provide Congress with notice of the intent to make such expenditure and then wait 15 days.

(2) If the amount exceeds $500,000 (but is less than $1,000,000), the Secretary of the Service involved must

provide Congress with notice of the intent to make such expenditure and then wait 5 days.

Other executive agencies may have similar authority. *See, e.g.,* 22 U.S.C. § 2671 (authorizing the State Department to pay for "unforeseen emergencies").

E. 2. Regulatory Controls. Emergency and extraordinary expense funds have strict regulatory controls because of their limited availability and potential for abuse. The uses DoD makes of these funds and the corresponding regulation(s) dealing with such usage are as follows:

1. Official Representation (Protocol). This subset of emergency and extraordinary expense funds are available to extend official courtesies to authorized guests, including dignitaries and officials of foreign governments, senior U.S. Government officials, senior officials of state and local governments, and certain other distinguished and prominent citizens.

a. DoD Regulations: DoD Instruction 7250.13, Official Representation Funds (30 June 2009); DoD FMR, vol. 10, ch. 12, para. 120319.B.

b. Army Regulation: AR 37-47, Representation Funds of the Secretary of the Army (21 Jun 2018).

c. Air Force Regulation: AFI 65-603, Official Representation Funds: Guidance and Procedures (24 Aug 2011).

d. Navy Regulation: SECNAV 7042.7K, Guidelines for Use of Official Representation Funds (14 May 2006).

2. Criminal Investigation Activities. This subset of emergency and extraordinary expense funds are available for unusual expenditures incurred during criminal investigations or crime prevention.

a. Army Regulation: AR 195-4, Use of Contingency Limitation .0015 Funds For Criminal Investigative Activities (30 Mar 2020).

b. Air Force Regulation: AFI 71-101, vol. 1, Criminal Investigations, para. 1.18 (8 Oct 2015).

3. Intelligence Activities. This subset of emergency and extraordinary expense funds are available for unusual expenditures incurred during intelligence investigations.

a. Army Regulation: AR 381-141(C), Intelligence Contingency Funds (16 Jan 2004).

b. Air Force Regulation: AFI 71-101, Criminal Investigations, (8 Nov. 2011).

Other Miscellaneous Expenses (other than official representation). This subset of emergency and extraordinary expense funds are available for such uses as Armed Services Board of Contract Appeals witness fees and settlements of claims. Other examples include:

4. Use of Official Representation Funds.

1. Official courtesies. Official representation funds are primarily used for extending official courtesies to authorized guests. *See* DoD Directive 7250.13, Enc. 3; AR 37-47, para. 2-1. Official courtesies are subject to required ratios of authorized guests to DoD personnel. *See, e.g.*, DoD Instruction 7250.13, para. E2.4.3; AR 37-47, paras. 2-1b and 2-5.

2. Gifts. Official representation funds may be used to purchase, gifts, mementos, or tokens for authorized guests.

a. Gifts to non-DoD authorized guests may cost no more than $335.00. See DoD Instruction 7250.13, Encl. 3 (which cross references 22 U.S.C. § 2694, which in turn cross references 5 U.S.C. § 7342; the amount established in the latter statute is revised by GSA).

b. If the guest is from within DoD and is one of the specified individuals listed in Enclosure 1 to DoD Instruction 7250.13, then the command may present him or her with only a memento valued at no more than $40.00. Enclosure 2 to DoD Directive 7250.13, para. E2.4.2.10.

3. Community Relations and Public Affairs Funds. AR 360-1, para. 4-5. Do not use public affairs funds to supplement official representation funds, because by doing so violates 31 U.S.C. § 1301.

CHAPTER 5

COMPETITION

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CHAPTER 5

COMPETITION

I. INTRODUCTION

A. Competition Promotes the Public Interest. "As every individual, therefore, endeavors as much he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value; every individual necessarily labors to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention." Adam Smith, *The Wealth of Nations*, (ed. Edwin Canaan, University of Chicago Press, 1976) pp. 477.

B. Competition Yields Value. A competitive procurement process produces the best value for the government – it enables agencies to acquire high quality goods and services with the most favorable contract terms for the best possible price. See generally Professor Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUBLIC PROCUREMENT LAW REVIEW 103 (2002) (found at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304620) (discussing competition as one of several overarching principles of government procurement that sometimes are in tension with each other).

II. COMPETITION REQUIREMENTS

A. The Competition in Contracting Act of 1984. Pub. L. No. 98-369, Division B, Title VII, §§ 2701-2753, 98 Stat. 1175 (July 18, 1984) [hereinafter CICA].

1. In 1983, Congress began to look for ways to increase the use of competition in government contracting. This led to Congress' passage of CICA in 1984, which increased competition in government contracting and imposed more stringent restrictions on the award of noncompetitive–sole-source–contracts. While the Senate originally proposed a marketplace standard of "effective competition" (whereby two or more contractors acting independent of each other, and the Government, submit bids or proposals), Congress ultimately adopted the more stringent "full and open competition" requirement. H.R. Rep. No. 98-369, at 1421, reprinted in 1984 U.S.C.C.A.N. (98 Stat.) 2109-2110. Ultimately, Congress decided to promote economy, efficiency, and effectiveness in the procurement of supplies and

services by requiring agencies to conduct acquisitions on the basis of full and open competition *to the maximum extent practicable*.

2. The Competition Pendulum. Following CICA, Congress periodically revisited the amount of competition applicable to government contracting in an effort to strike a balance between efficient, commercial-like contracting procedures and maximizing the use of full and open competition. In the 1990s, Congress passed the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994) [hereinafter FASA] and the Federal Acquisition Reform (Clinger-Cohen) Act of 1996, Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186,642-79 (1996) [hereinafter FARA], which significantly reduced the competition requirements for certain acquisition methods and contract types, to include simplified acquisitions, commercial items, and indefinite delivery contracts,. Due in part to perceived excesses resulting from certain provisions of the FASA and FARA, Congress reinvigorated competition, particularly in the area of indefinite delivery contracting. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 843, 122 Stat. 3,236-39 (2008); Memorandum from Shay Assad, Director, Defense Procurement and Acquisition Policy, Improving Competition in Defense Procurements – Amplifying Guidance (Apr. 27, 2011), http://www.acq.osd.mil/dpap/policy/ policyvault/USA002080-11-DPAP.pdf; Memorandum from Richard Ginman, Director, Defense Procurement and Acquisition Policy, Contingency Competition Goals and Competition Reviews of Certain Omnibus Contracts, (Feb. 17, 2012), http://www.acq.osd.mil/dpap/ policy/policyvault/USA000907-12-DPAP.pdf; Under Secretary of Defense for Acquisition, Technology and Logistics, Defense Procurement and Acquisition Policy, Guidelines for Creating and Maintaining a Competitive Environment for Supplies and Services in the Department of Defense, (Dec. 2014), http://www.acq.oad.mil/ dpap/cpic/cp/docs/BBP_2-_Comp_Guidelines_Update_(3_Dec_2014). Notwithstanding these pendulum swings, the fundamental, general rule of CICA has remained unchanged: **Agencies must conduct acquisitions on the basis of full and open competition to the maximum extent practicable.**

3. CICA, as amended by the FASA, FARA and other acts, is located in several titles of the United States Code, including the following:

   a. Title 10 U.S.C. §§ 2202, 2301-2314, 2381, and 2383, detailing the competition requirements that apply to the Department of Defense (DOD), the individual military departments (i.e., Departments of Army, Air Force, and Navy), the Department of Homeland Security (DHS) (i.e., the Coast Guard), and the National Aeronautics and Space Administration (NASA).

b. Title 41 U.S.C. §§ 1101-1102, 1121-1131, 1301-1304, 1311-1312, 1701-1713, 3101-3106, 3301-3311.

(1) 41 U.S.C. § 1101 establishes the Office of Federal Procurement Policy (OFPP) within the Office of Management and Budget to provide leadership and guidance in the development of procurement policies and systems.

(2) 41 U.S.C. § 1708 requires agencies to publicize procurement actions by publishing or posting procurement notices.

(3) 41 U.S.C. § 1705 requires agencies to appoint advocates for competition.

4. Congress regularly works through the annual National Defense Authorization Act (NDAA) to streamline the acquisition process. These efforts are typically, though not always, found in Title VIII of the act (section 800, et seq.). Practitioners should review the annual NDAA as well as the activities of the Defense Acquisition Regulations Council and Federal Acquisition Regulatory Council as they work to implement the NDAA's provisions.

Because implementing statutory changes to the competition requirements can be time-consuming, the Defense Pricing and Contracting Office (https://www.acq.osd.mil/dpap/) issues guidance and class deviations that implement statutory changes ahead of formal regulatory changes. These deviations are available at https://www.acq.osd.mil/dpap/dars/class_deviations.html.

B. Congressional Scheme

1. The overarching goal of CICA is to achieve competition to the maximum extent practicable by opening the procurement process to all capable contractors who want to do business with the Government.

2. The FAR provides for three possible levels of.

a. Full and Open Competition. FAR Subpart 6.1.

b. Full and Open Competition After Exclusion of Sources. FAR Subpart 6.2.

c. Other Than Full and Open Competition. FAR Subpart 6.3.

3. Within each of these three levels of competition, agencies must achieve competition to the maximum extent practicable.

C. Full and Open Competition. 10 U.S.C. § 2304(a)(1); 41 U.S.C. § 3301(a)(1); FAR Subpart 6.1.

1. Definition. 41 U.S.C. § 107 and FAR 2.101.

a. "Full and open competition" refers to a contract action in which all responsible sources are permitted to compete.

b. Full and open competition does not require agencies to achieve actual competition. The standard is that interested parties are afforded the opportunity to submit bids or proposals – agencies are not required to receive more than one bid or proposal.

2. Policy. FAR 6.101.

a. Contracting officers shall provide for full and open competition by using competitive procedures to solicit offers and award contracts unless they can justify using full and open competition after exclusion of sources (FAR Subpart 6.2), or other than full and open competition (FAR Subpart 6.3).

b. Contracting officers must use the competitive procedure that is best suited to the particular contract action, consistent with the need to fulfill the Government's requirements efficiently. *See* Nat'l Gov't Servs., Inc. v. United States, 923 F.3d 977, 983 (Fed. Cir. 2019) (quoting FAR 6.101).

3. Examples of competitive procedures that promote full and open competition include (FAR 6.102):

a. Sealed bids. FAR Part 14.

b. Competitive proposals (i.e., negotiation). FAR Part 15.

c. Combination of competitive procedures (e.g., two-step sealed bidding).

d. Other competitive procedures (e.g, the Federal Supply Schedule).

4. Unfair Competitive Advantage. Competition must be conducted on an equal basis. AlliantCorps, LLC, B-417126, et al., Feb. 27, 2019 (stating a fundamental principle of government procurement is that competitions are held on an equal basis – meaning offerors are treated equally and are provided a common basis to prepare proposals). An

"unfair competitive advantage" or organizational conflict of interest, can arise in a variety of different factual contexts. See 2020 Contract Attorney's Deskbook, Chapter 34, Responsibility, Timeliness, and Organizational Conflicts of Interest for more information. But, "a competitive advantage of an incumbent contractor, which was gained by virtue of that contractor's performing the incumbent contract, is not an unfair or improper competitive advantage, and an agency is not required to attempt to equalize competition to compensate for that advantage unless there is evidence of preferential treatment or other improper action." Assured Performance Sys. Inc., B-418233.2 (Mar. 10, 2020, 2020 CPD ¶ 101 at 5.

D. Full and Open Competition After Exclusion of Sources. 10 U.S.C. § 2304(b); 41 U.S.C. § 3303(b); FAR Subpart 6.2; DFARS Subpart 206.2.

1. In CICA, Congress recognized that there were certain situations where the field of competition should be limited to certain groups.

   a. CICA allows an agency to "provide for the procurement of property or services covered by this section using competitive procedures but excluding a particular source in order to establish or maintain any alternative source or sources of supply for that property or service" as long as the agency head made the determination. CICA, § 303(b)(1), codified at 10 U.S.C. § 2304(b)(1) and 41 U.S.C. § 3303(b)(1).

   b. Congress also recognized that an agency may limit competition in order to fulfill the statutory requirements relating to small business concerns and socially and economically disadvantaged small business concerns. CICA, § 303(2), codified at 10 U.S.C. § 2304(b)(2) and 41 U.S.C. § 3303(b)(2).

2. This policy of full and open competition after excluding one or more source enacted through FAR Subpart 6.2.

   a. The policy allows contracting officers, under limited circumstances, to exclude one or more source from a particular contract action.

   b. After excluding these sources, a contracting officer must use competitive procedures (e.g. sealed bids, competitive proposals, or combination of competitive procedures) to promote full and open competition among non-excluded offerors. See FAR Sections 6.201 and 6.102.

3. A contracting officer may generally exclude one or more sources under two circumstances.

a. Establishing or maintaining alternative sources. FAR 6.202; DFARS 206.202.

(1) The agency head must determine that the exclusion of one or more sources will serve one of six purposes.

(a) Increase or maintain competition and likely result in reduced overall costs for the acquisition, or for any anticipated acquisition.

(b) Be in the interest of national defense in having facilities, producers, manufacturers, or other suppliers available to furnish necessary supplies and services in the event of a national emergency or industrial mobilization. Hawker Eternacell, Inc., Comp. Gen. B-283586, 1999 U.S. Comp. Gen. LEXIS 202 (Nov. 23, 1999); Martin Elecs. Inc., Comp. Gen. B-219803, Nov. 1, 1985, 85-2 CPD ¶ 504.

(c) Be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or nonprofit institution, or federally funded research and development center.

(d) Ensure the continuous availability of a reliable source of supply or services. E.g. PWC Logistics Servs. Corp., B-400660, Jan. 6, 2009, 2009 CPD ¶ 167 (rejecting a challenge to a DOD decision to split the logistics support contract for the Iraq AOR into two contracts and reserve the right under FAR 6.202(a) to deny both contracts to a single contractor).

(e) Satisfy projected needs based on history of high demand.

(f) Satisfy a critical need for medical, safety, or emergency supplies.

(2) The agency head must support the decision to exclude one or more sources with written determinations and findings (D&F). FAR 6.202(b)(1). The D&F is a special form of written approval by an authorized official that is required by statute or regulation as a prerequisite to taking certain governmental action. It

consists of a determination (a conclusion) that is supported by the findings (statements of fact or rationale). See FAR Subpart 1.7; see also DFARS 206.202(b); DFARS PGI 206.202(b) (providing sample format and listing required contents).

(a) The agency head or his designee must sign the D&F.

(b) The agency head cannot create a blanket D&F for similar classes of procurements.

(3) In DOD, agencies may use this exception to totally or partially exclude a particular source from a contract action. DFARS 206.202(a).

b. Set-asides for socio-economically disadvantaged businesses. FAR 6.203 thru 6.208, et seq.; DFARS 206.203.

(1) A contracting officer may limit competition to small business concerns to satisfy statutory or regulatory requirements. A "set aside for small business" is the reserving of an acquisition exclusively for participation by small business concerns. See FAR Subpart 19.5.

(2) The contracting officer is not required to support the determination to set aside a contract action with a separate written justification or D&F.

(3) Competition under FAR 6.203 cannot be restricted to only *certain* small businesses. Department of the Army Request for Modification of Recommendation, Comp. Gen. B-290682.2, Jan. 9, 2003, 2003 CPD ¶ 23 (stating that while CICA allows for the exclusion of non-small business concerns to further the Small Business Act, it still requires "full and open competition among eligible small business concerns." Such procedures must allow all responsible eligible business concerns [i.e., small business concerns] to submit offers.).

(4) FAR Subpart 6.2 contains similar additional set-aside guidance for other small business concerns as follows:

(a) FAR 6.204—Set-asides for Section 8(a) competitions;

(b) FAR 6.205—Set-asides for HUBZone small business concerns;

(c) FAR 6.206—Set-asides for service-disabled veteran-owned small business concerns;

(d) FAR 6.208—Set-asides for local firms during a major disaster or emergency.

E. Other Than Full and Open Competition. 10 U.S.C. § 2304(c); 41 U.S.C. § 3304; FAR Subpart 6.3; DFARS Subpart 206.3; AFARS Subpart 6.3.

1. Policy. FAR 6.301.

a. Executive agencies cannot contract without providing for full and open competition unless one of the statutory exceptions listed in FAR 6.302 applies.

b. A contract awarded without full and open competition must reference the applicable statutory exception.

c. Agencies cannot justify non-competitive procurements based on:

(1) A lack of advance planning. 10 U.S.C. § 2304(f)(4)(A); FAR 6.301(c)(1).

(a) Noncompetitive procedures may not be justified on an agency's failure to conduct advanced planning. RBC Bearings, Inc., Comp. Gen. B-401661, Oct. 27, 2009, 2009 CPD ¶ 207 (finding Army's failure to qualify a source for 10 years amply established a failure to conduct adequate and reasonable advanced planning); VSE Corp., B-290452.3, May 23, 2005, 2005 CPD ¶ 103 (disapproving award of sole source bridge contract in part due to agency's failure to conduct advanced planning); Worldwide Language Resources, Inc, B-296984, Nov. 14, 2005, 2005 CPD ¶ 206 (determining that a justification and approval for sole source award of bilingual-bicultural advisors contract revealed lack of advance planning and not unusual and compelling circumstances).

(b) Advanced planning must be reasonable, not completely error free. Trailboss Enterprises, Inc., B-415970, et al., May 7, 2018, 2018 CPD ¶ 171 (upholding sole source award based on unusual an compelling urgency notwithstanding the agency's failure to anticipate the time

necessary to resolve protests and complete corrective action); Bannum, Inc., B-289707, Mar. 14, 2002, 2002 CPD ¶ 61 (finding that while the agency's planning ultimately was unsuccessful, this was due to unanticipated events, not a lack of planning); Diversified Tech. & Servs. of Virginia, Inc., B-282497, July 19, 1999, 99-2 CPD ¶ 16 (refusing to fault the Department of Agriculture where the procurement was delayed by the agency's efforts to implement a long-term acquisition plan).

(c) To avoid a finding of "lack of advance planning" agencies must make reasonable efforts to obtain competition. eFedbudget Corp., B-298627, Nov. 15, 2006, 2006 CPD ¶ 159 (sustaining protest where the agency failed to show how it planned to avoid being in a sole source situation in view of the limited license the agency had in certain computer software); Heros, Inc., B-292043, June 9, 2003, 2003 CPD ¶ 111 (stating agencies "must act affirmatively to obtain and safeguard competition; they cannot take a passive approach and remain in a sole source situation when they could reasonably take steps to enhance competition."); see also Raytheon Co. - Integrated Defense Sys., B-400610, Dec. 22, 2008, 2009 CPD ¶ 8 (finding Navy's follow-on, sole source award of three contracts to modernize automated portions of the Aegis Combat System and make the software commercial-off-the-shelf (COTS) compatible promoted competition and did not constitute a lack of advanced planning).

(2) Concerns related to the amount of funds. 10 U.S.C. § 2304(f)(4)(A); FAR 6.301(c)(2). Cf. AAI ACL Tech., Inc., B-258679.4, Nov. 28, 1995, 95-2 CPD ¶ 243 (distinguishing the expiration of funds from the unavailability of funds).

(3) The contracting officer must solicit offers from as many potential sources as is practicable under the circumstances. FAR 6.301(d); Bausch & Lomb, Inc., B-298444, Sept. 21, 2006, 2006 CPD ¶ 135 (rejecting sole source award despite presence of unusual and

compelling urgency where agency failed to consider other available sources that expressed an interest); Innovation Dev. Enterprises of Am., Inc. v. United States, 108 Fed. Cl. 711, 732 (2013) (sustaining protest of a sole source award where the agency "neglected to post a synopsis which might have produced expressions of interest from competitors …; and performed only the most cursory searches for contractors capable of fulfilling the … bridge contract.").

2. There are seven statutory exceptions to the requirement to provide for full and open competition.

a. Only One Responsible Source and No Other Supplies or Services Will Satisfy Agency Requirements. 10 U.S.C. § 2304(c)(1); 41 U.S.C. § 3304(a)(1); FAR 6.302-1; DFARS 206.302-1; AFARS 5106.302-1.

(1) DOD, NASA, and the Coast Guard.

(a) The agency is not required to provide for full and open competition if:

(i) There is only one or a limited number of responsible sources; and

(ii) No other supplies or services will satisfy the agency's requirements.

(b) Smith and Wesson, Inc., B-400479, Nov., 20, 2008, 2008 CPD ¶ 215 (upholding the rationality of the agency's decision to purchase Glock firearms for the Pakistani military as the Pakistanis already had a logistics system to support the weapons and supporting a new firearm would be overly burdensome); Cubic Defense Sys., Inc. v. United States, 45 Fed. Cl. 239 (1999); Metric Sys. Corp. v. United States, 42 Fed. Cl. 306 (1998); Datacom, Inc., Comp. Gen. B-274175., Nov. 25, 1996, 96-2 CPD ¶ 199; But see Lockheed Martin Sys. Integration—Owego, Comp. Gen. B-287190.2, May 25, 2001, 2001 CPD ¶ 110 (when an agency relies on this exception, the agency must give other sources "notice of its intentions, and an opportunity to respond to the agency's requirements." The agency must "adequately

apprise" prospective sources of its needs so that those sources have a "meaningful opportunity to demonstrate their ability" to satisfy the agency's needs. When the agency gave "misleading guidance" which prejudiced the protestor, GAO invalidated the sole source award); National Aerospace Group, Inc., Comp. Gen. B-282843, Aug. 30, 1999, 99-2 CPD ¶ 43 (sustaining protest where the Defense Logistics Agency's documentation failed to show that only the specific product would satisfy the agency's need).

(2) Other Agencies.

(a) The agency is not required to provide for full and open competition if:

(i) There is only one responsible source (as opposed to "a limited number"); and

(ii) No other supplies or services will satisfy the agency's requirements.

(3) Unsolicited, unique and innovate proposals may form the basis for a sole source award. See FAR 6.302-1(a)(2)(i). But see, DFARS 206.302-1.

(4) Follow-On Contracts. Supplies (and highly specialized services for the DOD, NASA, and Coast Guard, FAR 6.302-1(a)(2)(iii)) may be deemed available only from the original source in follow-on contracts for the continued development or production of a major weapon system or highly specialized equipment, including major components thereof, when it is likely that award to any other source would result in:

(a) Substantial duplication of cost to the Government that is not expected to be recovered through competition, or

(b) Unacceptable delays in fulfilling agency requirements. FAR 6.302-1(a)(2)(ii); Raytheon Co. - Integrated Defense Sys., Comp. Gen. B-400610, Dec. 22, 2008, 2009 CPD ¶ 8 (upholding follow-on sole source award to incumbent contractor of Aegis Combat System

because award to any other offeror would lead to unacceptable delay).

(5) Use in preference to the public interest exception. Do not use if any other exception to full and open competition applies. FAR 6.302-1(b).

(6) Limitations. FAR 6.302-1(d).

(a) Must be supported by a written justification and approval (J&A). J&A must be posted on fbo.gov, along with a synopsis (if required), within 14 days after award, and remain up for 30 days. FAR 6.303 thru 6.305. McAfee, Inc. v. United States, 111 Fed. Cl. 696 (2013) (sustaining protest where the Air Force's discrete procurement actions consisting of in-scope modifications and brand name solicitations implemented a broader scheme of standardization that evidenced a predicate decision to adopt a sole source system *without* the required J&A).

(b) Must publish noticed required by FAR 5.201 and consider any bids, proposals, quotations, or capability statements received. Career Sys. Dev. Corp., B-411346.11, et al., May 18, 2018, 2018 CPD ¶ 176 (sustaining protest where the agency failed to meaningfully consider the capability statement received).

(7) But, "CICA and the FAR do not contemplate that an agency may only find supplies to be available from one responsible source in the specific circumstances identified in sub-subparagraphs 6.302–1(a)(2)(i)–(iii). Rather, those circumstances are non-exhaustive examples of scenarios in which an agency may reasonably find that only one responsible source exists." PTC Inc., B-416863, Dec. 20, 2018, 2019 CPD ¶ 48 at 8.

b. Unusual or Compelling Urgency. 10 U.S.C. § 2304(a)(2); 41 U.S.C. § 3304(c)(2); FAR 6.302-2; DFARS 206.302-2; AFARS 5106.302-2. See SSI Technology, Inc. v. United States --- Fed.Cl. ---- 2020 WL 2464801 5/12/2020 Fed.Cl. (denying protest where the agency's unusual and compelling urgency for the item it was procuring forced it to seek to

contract with only offerors that already had first article testing approval).

(1) An agency is not required to provide for full and open competition if:

(a) Its needs are of unusual and compelling urgency; and

(b) The government will be seriously injured, financially or otherwise, unless the agency can limit the number of sources from which it solicits offers.

(2) The DFARS Procedures, Guidance, and Information (PGI) 206.302-2 provide circumstances under which unusual and compelling urgency may be appropriate. They include, but are not limited to:

(a) Supplies, services or construction needed at once because of fire, flood, explosion, or other disaster.

(b) Essential equipment or repair needed at once to–

(i) Comply with orders for a ship

(ii) Perform the operational mission of an aircraft, or

(iii) Preclude impairment of launch capabilities or mission performance of missiles or missile support equipment.

(c) Construction needed at once to preserve a structure or its contents from damage.

(d) Purchase requests citing an issue priority designator under DOD 4140.1-R, DOD Materiel Management Regulation, of 4 or higher, or citing "Electronic Warfare QRC Priority."

(3) Limitations.

(a) Must be supported by a J&A which may be made and approved after contract award. The J&A must be published to fbo.gov within 30

days of contract award, and remain posted for 30 days. FAR 6.302-2(c)(1) and 6.305(b).

(b) Agencies must request offers from as many sources as practicable under the circumstances. FAR 6.302-2(c)(2); Pegasus Global Strategic Solutions, Inc., B-400422.3, Mar. 24, 2009, 2009 CPD ¶ 73 (holding that although the agency must request offers from as many as sources as practicable, the agency may properly not consider offers from those firms that it reasonably believes cannot perform the work in a combat environment); Bausch & Lomb, Inc., B-298444, Sept. 21, 2006, 2006 CPD ¶ 135 (sustaining protest where the agency could not explain why there was not time to open the competition to a limited number of offerors on an expedited basis).

(c) Period of Performance. FAR 6.302-2(d). For acquisitions greater than the simplified acquisition threshold, the period of performance:

(i) May not exceed the time necessary:

a. To meet the unusual and compelling requirements of the work to be performed under the contract; and

b. For the agency to enter into another contract for the required goods and services through the use of competitive procedures.

(ii) May not exceed one year unless the head of an agency entering into the contract determines that exceptional circumstances apply.

(4) Common situations. Camden Shipping Corp., B-406171, B-406323, Feb. 27, 2012, 2012 CPD ¶ 76 (allowing a "bridge contract" where only the incumbent could ensure uninterrupted operation of the vessel); Pegasus Global Strategic Solutions, LLC, B 400422.3, Mar. 24, 2009, 2009 CPD ¶ 73 (upholding out-of-scope

modification of counter improvised explosive device electronic warfare system contract on the basis of an unusual and compelling urgency); T-L-C Sys., B-400369, Oct. 23, 2008, 2008 CPD ¶ 195 (finding that failure of fire alarm system justified sole source award of contract limited to only those fire alarms which malfunctioned); J&J Colombia Serv., B-299595.3, June 26, 2007, 2007 CPD ¶ 126 (upholding award of sole-source bridge contract where award of a long-term contract was delayed by litigation and agency reasonably determined that only the incumbent contractor could perform the urgently required services.

(5) Common Problems. RBC Bearings, Inc., B-401661, Oct. 27, 2009, 2009 CPD ¶ 207 (disapproving agency's actions where an agency failure to approve an alternative source caused the lack of advanced planning and created the unusual and compelling urgency); Major Contracting Services, Inc., B-401472, Sept. 14, 2009, 2009 CPD ¶ 170 (sustaining protest where agency extended a contract on a sole-source basis where it did not establish that only the incumbent could provide the services and the agency could have avoided the urgency that ultimately led to the sole-source award through advance procurement planning.) Bausch & Lomb, Inc., B-298444, Sept. 21, 2006, 2006 CPD ¶ 135 (sustaining protest where the agency could not explain why there was not time to open the competition to a *limited number of offerors* on an expedited basis); Signals and Sys., Inc., B-288107, Sept., 21, 2001, 2001 CPD ¶168 (stating that an "urgency justification cannot support the procurement of more than the minimum quantity needed to satisfy the immediate urgent requirement." Since the Army did not know how many items it needed to replace, the Army also could not know what "minimum quantity" it needed. Further, the Army made no reasonable effort to discover how many items would have to be replaced. Therefore, GAO sustained the protest that the Army purchased more units than were necessary); National Aerospace Group, Inc., B-282843, Aug. 30, 1999, 99-2 CPD ¶ 43 (finding that agency documentation failed to show that need was of an unusual and compelling urgency).

c. Industrial Mobilization; Engineering, Developmental, or Research Capability; or Expert Services. 10 U.S.C. §

2304(c)(3); 41 U.S.C. § 3304(a)(3); FAR 6.302-3; AFARS 5106.302-3.

(1) An agency is not required to provide for full and open competition if it must limit competition to:

(a) Maintain facilities, producers, manufacturers, or suppliers to furnish supplies or services in the event of a national emergency or industrial mobilization. Ridgeline Ind., Inc., B-402105, Jan. 7, 2010, 2010 CPD ¶ 22 (approving of DLA's use of FAR 6.302-3 to purchase tents from one vendor, who was one of only seven military specification tent vendors in the nation, to ensure the companies continued viability); see also Outdoor Venture Corp., B-405423, Oct. 25, 2011, 2011 CPD ¶ (same); Coulson Aviation (USA) Inc., B-409356.2-6), Mar. 31, 2014 (finding that a sole source award for industrial mobilization lacked adequate justification when the J&A was devoid of evidence that the awardee required a contract to remain a viable source of supply).

(b) To establish or maintain an essential engineering, research or development capability to be provided by an educational institution, nonprofit institution, or federally funded research and development center, or

(c) Acquire the services of an expert or neutral person for any current or anticipated litigation or dispute. See SEMCOR, Inc., B-279794, July 23, 1998, 98-2 CPD ¶ 43 (defining "expert").

(2) Limitations. Must be supported by a written J&A posted to beta.SAM.gov within 14 days of the award, and remain for 30 days. FAR 6.302-3(c).

d. International Agreement. 10 U.S.C. § 2304(c)(4); 41 U.S.C. § 3304(a)(4); FAR 6.302-4.

(1) An agency is not required to provide for full and open competition if it is precluded by:

(a) An international agreement or treaty (e.g., a status of forces agreement (SOFA)); or

(b) The written direction of a foreign government that will reimburse the agency for its acquisition costs (e.g., pursuant to a Foreign Military Sales agreement). See Electro Design Mfg., Inc., B-280953, Dec. 11, 1998, 98-2 CPD ¶ 142 (upholding agency's decision to combine system requirements into single procurement at foreign customer's request); Goddard Indus., Inc., B-275643, Mar. 11, 1997, 97-1 CPD ¶ 104 (involving the purchase for spare parts at the direction of the Republic of the Philippines); Pilkington Aerospace, Inc., B-260397, June 19, 1995, 95-2 CPD ¶ 122.

(2) Limitations. Except for DOD, NASA, and the Coast Guard, must be supported by a written J&A posted to the GPE for 30 days. FAR 6.302-4(c). For DOD, the head of the contracting activity must prepare a document describing the terms of an agreement, treaty, or written directions, such as a Letter of Offer and Acceptance in a Foreign Military Sales case, that have the effect of requiring the use of other than competitive procedures. DFARS 206.302-4.

e. Authorized or required by statute. 10 U.S.C. § 2304(c)(5); 41 U.S.C. § 3304(a)(5); FAR 6.302-5; DFARS 206.302-5.

(1) An agency is not required to provide for full and open competition if:

(a) A statute authorizes or requires the agency to procure the supplies or services from another agency or a specified source.[1] OR

(i) Federal Prison Industries 18 U.S.C. § 4124; FAR Subpart 8.6;

(ii) Qualified Non-profit Agencies for the Blind or other severally disabled. 41 U.S.C. §§ 8501-8506; FAR Subpart 8.7.

[1] DFARS 206.302-5 generally permits agencies to use this authority to acquire: (1) supplies and services from military exchange stores outside the United States for use by Armed Forces stationed outside the United States pursuant to 10 U.S.C. § 2424(a) but subject to the limitations of 10 U.S.C. § 2424(b); and (2) police, fire protection, airfield operation, or other community services from local governments at certain military installations that are being closed. However, DFARS 206.302-5 also limits the ability of agencies to use this authority to award certain research and development contracts to colleges and universities.

(iii) Government Printing and Binding. 44 U.S.C. §§ 501-504, FAR Subpart 8.8.

(iv) Sole source awards under Section 8(a). 15 U.S.C. § 637; FAR Subpart 19.8.

(v) Sole source awards under the HUBZone Act. 15 U.S.C. § 657a; FAR 19.1306.

(vi) Sole source awards under the Veterans Benefits Act of 2003. 15 U.S.C. § 657f.

(vii) Sole source awards under the Woman Owned Small Business Program. 15 U.S.C. § 637(m); FAR 19.1306.

(b) The agency needs a brand name commercial item for authorized resale by a commissary or similar facilities. FAR 6.302-5(a)(2) and (c)(3).

(2) Limitations: Contracts awarded using this authority must be supported by a J&A posted to the GPE for 30 days except:

(a) Brand name commercial items for authorized resale (e.g., commissary);

(b) Qualified Non-profit Agencies for the Blind or other severally disabled. 41 U.S.C. §§ 8501-8506; FAR Subpart 8.7.

(c) Sole source awards under the 8(a) Program. 15 U.S.C. § 637; FAR Subpart 19.8. <u>But see</u> FAR 6.303-1(b) (requiring a J&A for sole source procurements in excess of $22 million under the 8(a) program).

(d) Situations where a statute <u>expressly requires</u> the procurement be made from a specified source. If a statute only <u>authorizes</u> the procurement, a J&A must be prepared. FAR 6.302-5(c)(2).

(3) Contingency Contracting Authorities. To bolster operations Afghanistan, Congress created statutory exceptions to the use of full and open competition in certain well-defined circumstances. These exceptions to competition do not fit neatly within the FAR Part 6 framework, often intermixing set-asides (FAR Subpart

6.2) with other than full and open competition (FAR Subpart 6.3). Primary authorities include:

(a) Afghanistan First Program.

(i) Authority. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 886, 122 Stat. 3, 266 (Jan. 28, 2008) as amended by the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, §842, 126 Stat. 1632 (Jan. 2, 2013) (striking Iraq); DFARS subpart 225.77.

(ii) Authorizes a preference or set-aside for goods or services from Afghanistan as well as the use of other than competitive procedures to award a contract to a particular source or sources from Iraq or Afghanistan.

(iii) Requires written determinations as set forth in DFARS 225.7703-2. A J&A is not required. DFAR 225.7703-1(b).

(iv) See Kuwait Leaders Gen. Trading & Contracting Co., B-401015.2, May 21, 2009, 2009 CPD ¶ 113 (finding that agency properly excluded non-Iraqi business from a competition while the preference for Iraq was still in effect).

(v) But see National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 892, 122 Stat. 3, 270, codified at 10 U.S.C. § 2304 note (requiring the use of full and open competition for the acquisition of small arms supplied to Afghanistan).

(b) Temporary Authority to Acquire Products and Services Produced in Countries Along a Major Route of Supply to Afghanistan.

(i) Authority. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 801, 123 Stat. 2 as amended by the National Defense

Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, §841, 126 Stat. 1845 (Jan. 2, 2013). Implemented at DFARS 225.7704 and 225.7799

(ii) Authorizes limiting competition to or establishing a preference for products and services that are from one or more countries along a major route of supply to Afghanistan.

(iii) Requires a written determination (as opposed to a J&A.)

(iv) Covered counties include Georgia, Kyrgyzstan, Pakistan, Armenia, Azerbaijan, Kazakhstan, Tajikistan, Uzbekistan, and. Turkmenistan

(v) Authority expired on December 31, 2015. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §832, 127 Stat. 814 (Jan. 2, 2013).

(vi) This authority is in addition to the authority for the Afghanistan First Program.

(c) Exception for AbilityOne products from authority to acquire goods and services manufactured in Afghanistan, Central Asian States, and Djibouti.

(i) Authority. National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 886, 129 Stat. 726 (2015).

(ii) Amends § 886 National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 886, 122 Stat. 3 (2008); § 801 of the National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 801, 123 Stat. 2 (2010); and § 1263 of the National Defense Authorization Act for Fiscal

Year 2015, Pub. L. No. 113-291, § 1263, 128 Stat. 3581 (2014).

(iii) Adds a subsection that limits the ability to acquire goods and services under the Afghanistan First, Central Asian States First, and Djibouti programs "if such good can be produced and delivered by a qualified nonprofit agency for the blind or a nonprofit agency for other severely disabled in a timely fashion to support mission requirements."

(d) Contingency Contracting Authority Outside Afghanistan

(i) Enhanced authority to acquire goods and services of Djibouti in support of Department of Defense Activities in United States Africa Command Area of Responsibility.

(ii) Authority. National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1263, 128 Stat. 3581 (2014); DFARS 225.7798.

(iii) Authorizes a preference or set-aside for goods or services from Djibouti as well as the use of other than competitive procedures to award a contract to a particular source our sources from Djibouti.

(iv) Requires a written determination. A J&A is not required.

(v) Authority expired September 30, 2018; *See* Class Deviation 2016-O0005.

f. National Security. 10 U.S.C. § 2304(c)(6); 41 U.S.C. § 3304(a)(6); FAR 6.302-6. An agency is not required to provide for full and open competition if disclosure of the government's needs would compromise national security (e.g., would violate security requirements). However, the mere fact that an acquisition is classified, or requires contractors to access classified data to submit offers or perform the contract, does not justify limiting competition. Contracts awarded under this

exception require a written Justification and Approval as described in subpart 6.303. Agencies are still required to request offers from as many potential sources as practicable under the circumstances.

g. Public Interest. 10 U.S.C. § 2304(c)(7); 41 U.S.C.§ 3304(a)(7); FAR 6.302-7; DFARS 206.302-7. An agency is not required to provide for full and open competition if the agency head determines that full and open competition is not in the public interest.

(1) The agency head must support the determination to use this authority with a written D&F. The D&F must be made on an individual basis, not a class basis.

(2) The agency must notify Congress at least 30 days before contract award. Northrop Grumman Corp. v. United States, 46 Fed. Cl. 622 (2000) (holding that NASA's use of the public interest exception required Congressional **notice**, and not Congressional **consent**). See also Spherix, Inc. v. United States, 58 Fed. Cl. 351 (2003).

(3) May not be used if any other authority in FAR 6.302 applies. But see, Sikorsky Aircraft Corp, B-403471.3, Nov. 5, 2010, 2010 CPD ¶ 271 (finding agency decision to purchase M-17 aircraft for the Afghani Army using FAR 6.302-7 over 6.302-1 reasonable and therefore unobjectionable).

3. The use of Other than Full and Open Competition requires written documentation to explicitly state why one of the exceptions applies. Exceptions one (one source) through six (national interest) require J&As for Other Than Full and Open Competition except as expressly provided in FAR 6.302 and discussed supra in Section II.E.2.(e) See FAR 6.303; FAR 6.304; DFARS 206.303; DFARS 206.304; AFARS 5106.303; AFARS 5106.304. Exception seven (public interest) requires a determination and finding as previously described supra in Section II.E.2.g. GAO's review of a decision to use other than full and open competition "focuses on the adequacy of the rationale and conclusions set forth in the written justification." CWIS, LLC, B-416530, Sept. 14, 2018, 2018 CPD ¶ 321 at 4.

a. Basic Requirements. The contracting officer must prepare a written justification, certify its accuracy and completeness, and obtain all required approvals before negotiating or awarding a

contract using other than full and open competitive procedures. FAR 6.303-1(a).

(1) Individual v. Class Justification. FAR 6.303-1(d); AFARS 5106.303-1(d). The contracting officer must prepare the justification on an individual basis for contracts awarded pursuant to the "public interest" exception (FAR 6.302-7). Otherwise, the contracting officer may prepare the justification on either an individual or class basis.

(2) Ex Post Facto Justification. FAR 6.303-1(e). The contracting officer may prepare the written justification within a reasonable time after contract award if:[2]

(a) The contract is awarded pursuant to the "unusual and compelling urgency" exception (FAR 6.302-2); and

(b) Preparing the written justification before award would unreasonably delay the acquisition.

b. Contents. FAR 6.303-2; DFARS 206.303-2; AFARS 5106.303-2 and 5106.303-2-90.

(1) Format. AFARS 5153.9005.[3]

(2) The J&A should be a stand-alone document. FAR 6.303-2; Sabreliner Corp., B-288030, Sep. 13, 2001, 2001 CPD ¶ 170 (holding that inaccuracies and inconsistencies in the J&A and between the J&A and other documentation invalidated the sole source award). But see, Argon ST, Inc, B-402908.2, Aug. 11, 2010, 2011 CPD ¶ 4 (rejecting a challenge to a J&A despite a clear error of fact, as the rest of the J&A supports the use of 6.302-2).

(a) Each justification must contain sufficient information to justify the use of the cited exception. FAR 6.303-2(a).

[2] If the contract exceeds $93 million, the agency must forward the justification to the approval authority no later than 7 calendar days after contract award. AFARS 5106.303-1(d).

[3] The format specified in AFARS 5153.9005 is mandatory for contract actions greater than $78.5 million. Note that as of 1 May 2012, the AFARS has not been updated to reflect the statutorily required inflation adjustment to $85.5 million.

(b) The J&A must document and adequately address all relevant issues.

(3) At a minimum, under FAR 6.303-2(b), the justification must:

(a) Identify the agency, contracting activity, and document;

(b) Describe the action being approved;

(c) Describe the required supplies or services and state their estimated value;

(d) Identify the applicable statutory exception;

(e) Demonstrate why the proposed contractor's unique qualifications and/or the nature of the acquisition requires the use of the cited exception;

(f) Describe the efforts made to solicit offers from as many potential sources as practicable, including whether a notice was or will be published as required by FAR Subpart 5.2, and if not, which exception under FAR 5.202 applies;

(g) Include a contracting officer's determination that the anticipated cost to the government will be fair and reasonable;

(h) Describe any market research conducted (see FAR Part 10), or state why no market research was conducted;

(i) Include any other facts that justify the use of other than full and open competitive procedures, such as:

(i) An explanation of why the government has not developed or made available technical data packages, specifications, engineering descriptions, statements of work, or purchase descriptions suitable for full and open competition, and a description of any planned remedial actions;

(ii) An estimate of any duplicative cost to the government and how the estimate was derived if the cited exception is the "sole source" follow-on contract exception (FAR 6.302-1);

(iii) Data, estimated costs, or other rationale to explain the nature and extent of the potential injury to the government if the cited exception is the "unusual and compelling urgency" exception (FAR 6.302-2).[4]

(j) List any sources that expressed an interest in the acquisition in writing;[5]

(k) State any actions the agency may take to remove or overcome barriers to competition for future acquisitions; and

(l) Include a certification that the justification is accurate and complete to the best of the contracting officer's knowledge and belief. FAR 6.303-1(a)(2).

(4) Each justification must also include a certificate that any supporting data provided by technical or requirements personnel is accurate and complete to the best of their knowledge and belief. FAR 6.303-2(b).

c. Approval. FAR 6.304(a); DFARS 206.304; AFARS 5106.304.

(1) The appropriate official must approve the justification in writing.

(2) Approving officials.

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[4] The justification should include a description of the procurement history and the government's plan to ensure that the prime contractor obtains as much competition as possible at the subcontractor level in single source acquisitions. AFARS 5153.9005.

[5] If applicable, state: "To date, no other sources have written to express an interest." In sole source acquisitions, if other sources expressed an interest, explain why the other sources were rejected. AFARS 5153.9005. See Centre Mfg. Co., Comp. Gen. B-255347.2, Mar. 2, 1994, 94-1 CPD ¶ 162 (denying protest where agency's failure to list interested sources did not prejudice protester).

(a) The approval official for proposed contract actions not exceeding $700,000 is the contracting officer.

(b) The approval official for proposed contract actions greater than $700,000, but not exceeding $13,500,000, is normally the advocate for competition.

(c) The approval official for proposed contract actions greater than $13,500,000, but not exceeding $68,000,000 (most agencies) or $93,000,000 (DOD, NASA, Coast Guard) is the head of the contracting activity or his designee.[6]

(d) The approval official for proposed contract actions greater than $68,000,000 (most agencies) or $93,000,000 (DOD, NASA, Coast Guard) is the agency's senior procurement executive.[7]

(3) The justification for a contract awarded pursuant to the "public interest" exception (FAR 6.302-7) is considered approved when the D&F is signed. FAR 6.304(b).

(4) The agency must determine the appropriate approval official for a class justification based on the total estimated value of the class. FAR 6.304(c).

(5) The agency must include the estimated dollar value of all options in determining the appropriate approval level. FAR 6.304(d).

d. Requirement to Amend the Justification. AFARS 5106.303-1-90. Prior to contract award, the contracting officer must prepare an amended J&A if:

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[6] The designee must be a general officer, a flag officer, or in a grade above GS15. FAR 6.304(a)(3).

[7] "Senior Procurement Executive" means: Under Secretary of Defense (Acquisition, Technology, and Logistics); Assistant Secretary of the Army (Acquisition, Technology, and Logistics); Assistant Secretary of the Navy (Research, Development and Acquisition); Assistant Secretary of the Air Force (Acquisition). DFARS 202.101. The directors of the defense agencies have been delegated authority to act as senior procurement executives for their respective agencies. (The list of agencies is found in DFARS 202.101.) See also DFARS 206.304.

(1) An increase in the estimated dollar value of the contract causes the agency to exceed the approval authority of the previous approval official;

(2) A change in the agency's competitive strategy further reduces competition; or

(3) A change in the agency's requirements affects the basis for the justification.

III. IMPLEMENTATION OF COMPETITION REQUIREMENTS

A. Advocate for Competition. 41 U.S.C. § 1705; FAR Subpart 6.5; AFARS Subpart 5106.5; U.S. Dep't of Army, Reg. 715-31, Army Competition Advocacy Program (18 November 2016) [hereinafter AR 715-31].

1. Requirement. FAR 6.501; AFARS 5106.501. The head of each executive agency shall designate an advocate for competition for the agency and for each procuring activity of the agency.[8] The advocates for competition shall:

a. Be in positions other than that of the agency senior procurement executive;

b. Not be assigned any duties or responsibilities that are inconsistent with 6.502; and

c. Be provided with staff or assistance (*e.g.*, specialists in engineering, technical operations, contract administration, financial management, supply management, and utilization of

[8] The Deputy Assistant Secretary of the Army for Procurement serves as the Army Advocate for Competition (AAFC). Heads of contracting activities (HCAs), delegable only to their principal assistant responsible for contracting, may appoint a command advocate for competition (CAFC) and alternates within their contracting activities. HCAs shall appoint at least one CAFC for each contracting activity. In addition, the HCA shall appoint a local advocate for competition wherever there is a small business specialist appointed for that organization. See Appendix GG AFARS 5106.501. (2) Designation of advocates for competition at contracting offices subordinate to contracting activities depends on the nature of the contracting mission of the office, the volume of significant contracting actions, the complexity of acquisition planning, and other responsibilities of such local advocates. Advocates for competition may be appointed on a part-time basis or as an additional duty when there are no conflicts of interest. AFARS 5106.501.

small business concerns), as may be necessary to carry out the advocate's duties and responsibilities.

2. Duties and Responsibilities. FAR 6.502. Agency and procuring activity advocates for competition are responsible for promoting the acquisition of commercial items, promoting full and open competition, challenging requirements that are not stated in terms of functions to be performed, performance required or essential physical characteristics, and challenging barriers to the acquisition of commercial items and full and open competition such as unnecessarily restrictive statements of work, unnecessarily detailed specifications, and unnecessarily burdensome contract clauses.

a. Agency advocates for competition. FAR 6.502(b). Agency advocates for competition shall:

(1) Review the contracting operations of the agency and identify and report to the agency senior procurement executive and the chief acquisition officer. Such as: opportunities and actions taken to acquire commercial items to meet the needs of the agency; opportunities and actions taken to achieve full and open competition in the contracting operations of the agency; actions taken to challenge requirements that are not stated in terms of functions to be performed, performance required or essential physical characteristics; and any condition or action that has the effect of unnecessarily restricting the acquisition of commercial items or competition in the contract actions of the agency.

(2) Prepare and submit an annual report to the agency senior procurement executive and the chief acquisition officer in accordance with agency procedures; and

(3) Recommend goals and plans for increasing competition on a fiscal year basis to the agency senior procurement executive and the chief acquisition officer.

(4) Recommend to the agency senior procurement executive and the chief acquisition officer a system of personal and organizational accountability for competition, which may include the use of recognition and awards to motivate program managers, contracting officers, and others in authority to promote competition in acquisition.

b. Special Competition Advocates. AFARS 5106.502; AR 715-31, para. 1.13. The ASA(ALT) appoints the Army Competition Advocate General. The Deputy Assistant Secretary of the Army for Procurement (SAAL-ZP) is the Army Competition Advocate General (ACAG). The ACAG has delegated to HCAs the authority to appoint the Special Competition Advocates (SCAs) at Army procuring activities and their alternates. This authority shall not be redelegated. Designation of competition advocates at contracting offices subordinate to contracting activities must depend on the nature of the contracting mission of the office, the volume of significant contracting actions, the complexity of acquisition planning and other responsibilities of such local advocates. Competition advocates may be appointed on a part-time basis. Their duties include, but are not necessarily limited to, the duties set forth in FAR 6.502 and AFARS 5106.502.

c. Local advocates for competition. See AR 715-31, para. 1.14.

3. An advocate for competition's (previously called "competition advocate") "review" of an agency's procurement is not a substitute for normal bid protest procedures. See Allied-Signal, Inc., B-243555, May 14, 1991, 91-1 CPD ¶ 468 (holding that a contractor's decision to pursue its protest with the agency's competition advocate did not toll the bid protest timeliness requirements). But see Liebert Corp., Comp. Gen. B-232234.5, Apr. 29, 1991, 91-1 CPD ¶ 413 (holding that a contractor's reasonable reliance on the competition advocate's representations may extend the time for filing a bid protest).

B. Acquisition Planning. 10 U.S.C. § 2305; 10 U.S.C. § 2377; 41 U.S.C. § 3306; 41 U.S.C. § 3307; FAR Part 7; DFARS Part 207.

1. "Acquisition planning" is the process of coordinating and integrating the efforts of the agency's acquisition personnel through a comprehensive plan that provides an overall strategy for managing the acquisition and fulfilling the agency's need in a timely and cost effective manner. FAR 2.101.

2. Proper acquisition planning should include communications with industry. See, e.g., Memorandum from Office of Federal Procurement Policy, "Myth-Busting #4": Strengthening Engagement with Industry Partners through Innovative Business Practices, (April 30, 2019) at 9 (Misconception #4).

3. In accordance with FAR 7.102(a), agencies must perform acquisition planning and conduct market research (see FAR Part 10) for all acquisitions to promote and provide for:

   a. The acquisition of commercial or nondevelopmental items to the maximum extent practicable (10 U.S.C. § 2377; 41 U.S.C. § 3307(d)); and

   b. Full and open competition (or competition to the maximum extent practicable). 10 U.S.C. § 2305(a)(1)(A); 41 U.S.C. § 3306(a)(1)); 41 U.S.C. § 3307(b).

   c. Selection of appropriate contract type in accordance with FAR 16; and

   d. Appropriate consideration of the use of pre-existing contracts, including interagency and intra-agency contracts to fulfill requirements before awarding new contracts.

4. Agencies must integrate the efforts of all personnel for significant aspects of the procurement in order to meet the Government's needs in the most effective, economical, and timely manner. FAR 7.102(b).

5. Acquisition planning should begin as soon as the agency identifies its needs. Wherever possible, agency personnel should avoid issuing requirements on an urgent basis, or with unrealistic delivery or performance schedules, as these generally restrict competition and increase prices. FAR 7.104.

6. Written acquisition plans are not required for every acquisition. See FAR 7.103(d). However DFARS 207.103(d)(i) requires a written acquisition plan for the following():

   a. Development acquisitions (as defined in FAR 35.001—Research and Development Contracting) when the total cost of all contracts for the acquisition program is estimated at $10 million or more;

   b. Production and service acquisitions when the total cost of all contracts for the acquisition program will be $50 million or more for all years or $25 million or more for any fiscal year; and

   c. Other acquisitions that the agency considers appropriate.

   d. The specific contents of a written acquisition plan will vary; however, it must identify decision milestones and address all the technical, business, management, and other significant

considerations that will control the acquisition. FAR 7.105; DFARS 207.105. In general it addresses the acquisition background (statement of need) and the plan of action, among other things.

C. Market Research. 10 U.S.C. § 2305; 10 U.S.C. § 2377; 41 U.S.C. §3306; 41 U.S.C. § 3307; FAR Part 10.

1. "Market research" refers to the process of collecting and analyzing information about the ability of the market to satisfy the agency's needs. FAR 2.101.

2. The process begins with a description of the Government's needs stated in terms sufficient to allow contracting personnel to conduct market research. FAR 10.002(a).

3. When conducting market research, agencies should not request potential sources to submit more than the minimum information necessary. FAR 10.001(b)

4. Policy. FAR 10.001. Agencies must conduct market research "appropriate to the circumstances" before:

a. Developing new requirements documents by the agency;

b. Soliciting offers for acquisitions with an estimated value that exceeds the simplified acquisition threshold;

c. Soliciting offers for acquisitions with an estimated value of less than the simplified acquisition threshold if adequate information is not available and the circumstances justify the cost;

d. Soliciting offers for acquisitions that could lead to a bundled contract (15 U.S.C. § 644(e)(2) and 15 U.S.C. 657 (q));

e. Awarding a task or delivery order under an indefinite-delivery/indefinite-quantity (ID/IQ) contract (*e.g.*, GWACs, MACs) for a noncommercial item in excess of the simplified acquisition threshold; and

f. On an ongoing basis, take advantage (to the maximum extent practicable) of commercially available market research methods in order to effectively identify the capabilities of small businesses and new entrants into Federal contracting that are

available in the marketplace for meeting the requirements of the agency in furtherance of-

(1) A contingency operation or defense against or recovery from nuclear, biological, chemical, or radiological attack; and

(2) Disaster relief to include debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities.

(3) See DNO Inc., B-406256, Mar. 22, 2012, 2012 CPD ¶ 136 (protest challenging the agency's decision not to set aside for small business concerns was sustained when the agency failed to perform adequate market research to ascertain whether two responsible small businesses would submit offers).

g. Agencies must use the results of market research to determine, among other things:

(1) If sources exist to satisfy the agency's needs;

(2) If commercial (or nondevelopmental) items are available that meet (or could be modified to a reasonable extent to meet) the agency's needs;

(3) The extent to which commercial (or nondevelopmental) items can be incorporated at the component level;

(4) The customary practices of firms engaged in producing, distributing, and supporting commercial items;

(5) The practicability of using recovered materials (see Subpart 23.4) and promotING energy conservation and efficiency;

(6) Whether bundling is necessary and justified (see 15 U.S.C. 644(e)(2); FAR 7.107); and

(7) The availability of electronic and information technology that meets all or part of the applicable accessibility standards issued by the Architectural and Transportation Barriers Compliance Board at 36 CFR Part 1194 (see Subpart 39.2).

5. Procedures. FAR 10.002. The extent of market research will vary, but involves obtaining information specific to the item being acquired. It should include:

   a. Whether the Government needs can be met by:

   b. Items customarily available in the commercial marketplace. See Verizon Wireless, B-406854, Sept. 17, 2012, 2012 CPD ¶ 260 (sustaining a protest where the agency failed to perform adequate market research in support of the terms of a solicitation for commercial products and services); compare Chromalloy Component Servs., Inc., B-417362.2, Nov. 6, 2019, 2019 CPD ¶ 382 (describing the agency's market research and denying protest).

   c. Commercial Items that may be modified.

   d. Items used exclusively for governmental purposes.

   e. Customary practices regarding customizing, modifying, or tailoring items to meet customer needs.

   f. Customary practices for things like warranty, buyer financing, discounts, contract type considering the nature and risk associated with the requirement etc. under which commercial sales of the product or services are made.

   g. Requirements of any laws and regulations unique to the item being acquired.

   h. Availability of items that contain recovered materials and items that are energy efficient.

   i. Distribution and support capabilities of potential suppliers, including alternative arrangements and cost estimates.

   j. Size and status of potential sources.

6. Acceptable market research techniques include:

   a. Contacting knowledgeable government and/or industry personnel;

   b. Reviewing the results of market research for the same or similar supplies or services;

   c. Publishing formal requests for information;

d. Querying government data bases;

e. Participating in interactive, on-line communications with government and/or industry personnel;

f. Obtaining source lists from other sources (e.g., contracting activities, trade associations, etc.);

g. Reviewing catalogs and other product literature;

h. Conducting interchange meetings; and/or

i. Holding pre-solicitation conferences with potential offerors.

D. Developing Specifications. 10 U.S.C. § 2305; 41 U.S.C. § 3306(a); FAR Part 11; DFARS Part 211.

1. Types of Specifications.

a. Design specifications. Specifications that set forth precise measurements, tolerances, materials, in-process and finished product tests, quality control measures, inspection requirements, and other specific information. Ralph C. Nash et al., The Government Contracts Reference Book 196 (3d Ed. 2007).

b. Performance specifications. Technical requirements that set forth the operational characteristics of an item. They indicate what the final product must be capable of accomplishing rather than how the product is to be built or what its measurements, tolerances, or other design characteristics must be. Ralph C. Nash et al., The Government Contracts Reference Book 432 (3d Ed. 2007).

c. Purchase descriptions. A description of the essential physical characteristics and functions required to meet the government's requirements. Ralph C. Nash et al, The Government Contracts Reference Book 468 (3d Ed. 2007). E.g., Brand Name or Equal Purchase Description identifies a product by its brand name and model or part number or other appropriate nomenclature by which it is offered for sale and permits offers on products essentially equal to the specified brand name product. FAR 11.104

d. Mixed specifications.

2. Policy. FAR 11.002(a) requires agencies to develop specifications that :

a. Promote full and open competition or maximum practicable competition;

b. State the agency's needs;

c. Only include restrictive provisions or conditions to the extent they satisfy the agency's needs or are authorized by law. See 10 USC § 2305(a)(1)(B). See, e.g., Cryo Technologies, B-406003, Jan. 18, 2012, 2012 CPD ¶ 29 (holding the solicitation requirement to be reasonably necessary to meet the agency's needs); CESC Skyline, LLC, Comp. Gen. B-402520, May 3, 2010, 2010 CPD ¶ 101 (rejecting protestor's contention that accelerated occupancy deadlines for leased space in a solicitation was unduly restrictive of competition); and

d. To the maximum extent practicable, acquisition officials shall:

(1) State requirements for supplies and services in terms of functions to be performed, performance required; or essential physical characteristics.

(2) Define requirements in terms that encourage offerors to supply commercial and non-developmental items.

3. Compliance with statutory and regulatory competition policy.

a. Specifications must provide a common basis for competition. PMSI, LLC d/b/a Optum Workers' Comp. Servs. of Fla., B-417237.2, et al., Jan. 29, 2020, 2020 CPD ¶ 63 at 7 ("A solicitation that contains a latent ambiguity (that is, one where the terms of the RFP are susceptible to two or more reasonable interpretations) fails to provide a common basis for competition.")

b. Competitors must be able to price the same requirement. See Deknatel Div., Pfizer Hosp. Prod. Grp., Inc., Comp. Gen. B-243408, July 29, 1991, 91-2 CPD ¶ 97 (finding that the agency violated the FAR by failing to provide the same specification to all offerors); see also Valenzuela Eng'g, Inc., Comp. Gen. B-277979, Jan. 26, 1998, 98-1 CPD ¶ 51 (chastising the Army because its "impermissibly broad" statement of work failed to give potential offerors reasonable notice of the scope of the proposed contract).

4. Common Pre-Award Problems Relating to Specifications.

a. Brand Name or Equal Purchase Descriptions.

(1) While the use of performance specifications is preferred to encourage offerors to propose innovative solutions, the use of brand name or equal purchase descriptions may be advantageous under certain circumstances. FAR 11.104(a).

(2) Brand name or equal purchase descriptions must include, in addition to the brand name, a general description of those ***salient*** physical, functional, or performance characteristics of the brand name item that an "equal" item must meet to be acceptable for award. Use brand name or equal descriptions when the salient characteristics are firm requirements. FAR 11.104(b).

(3) Failure of a solicitation to list an item's salient characteristics improperly restricts competition by precluding potential offerors of equal products from determining what characteristics are considered essential for its item to be accepted, and cancellation of the solicitation is required. California Industrial Facilities Resources, Inc., d/b/a CAMSS Shelters, B-403397.3, Mar., 21, 2011, 2011 CPD ¶ 71; Critical Process Filtration, Inc., B-400750, Jan. 22, 2009, 2009 CPD ¶ 25;; But see MediaNow., Inc, B-405067, Jun. 28, 2011, 2011 CPD ¶ 133 (upholding a rejection of "equal" products when their "equal" did not meet all of the salient characteristics); Glem Gas S.p.A., B-414179; , Feb. 23, 2017, 2017 CPD ¶ 60 at 4. (denying protest where the protester failed to demonstrate competitive prejudice by the agency's waiver of the solicitation's salient characteristics and selection of awardee's similar product).

(4) November 28, 2007 memoranda from the Office of Federal Procurement Policy restricting the use of "brand name or equal" unless advantageous or necessary to meet agency needs, available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/OMB/procurement/memo/2008_brand_name.pdf; see also, 83 Fed. Reg. 54696, Oct. 31, 2018 (proposing to amend the DFARS to implement Section 888(a) of the NDAA of 2017, which directed the Secretary of Defense to "ensure that competition in [DoD] contracts is not limited" by brand name references without a justification under 10 U.S.C. § 2304(f)).

b. Items Peculiar to one Manufacturer. Agency requirements shall not be written so as to require a particular brand-name, product, or a feature of a product, peculiar to one manufacturer, thereby precluding consideration of a product manufactured by another company, unless --

(1) The particular brand name**,** product, or feature is essential to the Government's requirements, and market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency's needs;

(2) The authority to contract without providing for full and open competition is supported by the required justifications and approvals (see 6.302-1); and

(3) The basis for not providing for maximum practicable competition is documented in the file when the acquisition is awarded using simplified acquisition procedures. FAR 11.105.

c. Unduly Restrictive Specifications.

(1) Specifications must promote full and open competition. Agencies may only include restrictive provisions to meet their minimum needs. 10 U.S.C § 2305(a)(1)(B); 41 U.S.C. § 3306(a)(2)(B). See Bristol Group, Inc.-Union Station Venture, B-298110, Jun. 2, 2006, 2006 CPD ¶ 89 (finding a requirement that office space be within 2500 walkable linear feet of amenities was reasonable given the employees only had 30 minutes for lunch); Paramount Group, Inc., B-298082, Jun. 15, 2006, 2006 CPD ¶ 98 (requirement for preexisting individual offices to be torn down to create a large open spaced office for the agency to configure its offices reasonable given that it provided the agency flexibility and it allowed the agency to more easily compare the offers); and Northwest Airport Management, LP, B-404098.2, Jan. 5, 2011, 2011 CPD ¶ 1 (finding the restrictive specifications concerning "unique and special lease requirements" reasonably relate to the agency's need).

(2) Common examples of restrictive specifications:

(a) Specifications written around a specific product. MadahCom, Inc., B-298277, Aug. 7, 2006, 2006

CPD ¶ 119 (declaring a requirement for APCO 25 standard for radio transmissions as unduly restrictive for a mass notification system since the agency was unable to articulate how the requirement was reasonably related to the system); Ressler Assoc., B-244110, Sept. 9, 1991, 91-2 CPD ¶ 230; and Desktop Alert, Inc., B-408196, Jul., 22, 2013 (finding a requirement for AtHoc software as unduly restrictive for a mass notification system since the agency was unable to articulate how the requirement was reasonably related to the system).

(b) Geographical restrictions that limit competition to a single source and do not further a federal policy. But see, e.g., Marlen C. Robb & Son Boatyard & Marina, Inc., Comp. Gen. B-256316, June 6, 1994, 94-1 CPD ¶ 351 (denying the protest and providing "an agency properly may restrict a procurement to offerors within a specified area if the restriction is reasonably necessary for the agency to meet its needs. The determination of the proper scope of a geographic restriction is a matter of the agency's judgment which we will review in order to assure that it has a reasonable basis."); see also AshBritt Inc., B-297889, et al., Mar. 20, 2006, 2006 CPD ¶ 48 (denying protest alleging that the Army Corps of Engineers improperly limited competition to Mississippi firms).

(c) Specifications that exceed the agency's minimum needs. Total Health Resources, B-403209, Oct. 4, 2010, 2010 CPD ¶ 226 (finding a requirement for the prime contractor, and not a subcontractor, to possess the requisite counseling experience as unduly restrictive); Iyabak Construction, LLC, B-409196, Feb. 6, 2014 (finding the refusal to consider affiliate experience, even when offerors demonstrate the affiliate will participate meaningfully, unduly restrictive when the agency fails to provide a reasonable basis); but see Emax Financial, B-408260, Jul. 25, 2013, (denying a protest where the Navy more favorably rated offerors with program specific experience because the

restrictive specification reasonable related to the agency's need).

(d) Requiring approval by a testing laboratory (e.g., Underwriters Laboratory (UL)) without recognizing equivalents. HazStor Co., B-251248, Mar. 18, 1993, 93-1 CPD ¶ 242. But see G.H. Harlow Co., B-254839, Jan 21, 1994, 94-1 CPD ¶ 29 (upholding requirement for approval by testing laboratory for fire alarm and computer-aided dispatch system).

(e) Improperly bundled specifications. Vantex Serv. Corp., B-290415, Aug. 15, 2002, 2002 CPD ¶ 131; EDP Enterprises, Inc., B-284533.6, May 19, 2003, 2003 CPD ¶ 93 (bundling food services, with the "unrelated base, vehicle and aircraft maintenance services," restricted competition; because the agency bundled the requirements for administrative convenience, the specification violated CICA). But see AirTrak Travel, B-292101, June 30, 2003, 2003 CPD ¶ 117 (denying allegations that bundled specifications violated CICA, because the agencies convinced GAO that mission-related reasons justified bundling requirements); FMS Inv. Corp. v. United States, 144 Fed. Cl. 140, 145-47 (2019) (denying protest contesting bundling of the agency's requirements and explaining why the decision to consolidate was rational).

d. Ambiguous Specifications.

(1) Specifications or purchase descriptions that are subject to two or more reasonable interpretations are ambiguous and require the amendment or cancellation of the solicitation. K-Con, Inc. v. Secretary of Army, 908 F.3d 719, 722 (Fed. Cir. 2018) ("A patent ambiguity is present when the contract contains facially inconsistent provisions that would place a reasonable contractor on notice."); Guzar Mirbachakot Transportation v. US, No. 11-519C (COFC) Mar. 29, 2012 (holding that the solicitation that required the documents to be turned in as MS Word files, or Adobe PDF files was ambiguous as to whether a zipped file of MS Word and Adobe PDF files was acceptable)

CWTSatoTravel, B-404479.2, Apr. 22, 2011, 2011 CPD ¶ 87 (stating a contracting agency must provide offerors with sufficient detail in a solicitation to enable them to compete intelligently and on a relatively equal basis); and Aurora Group, Inc., Comp. Gen. B-288127, Sep. 14, 2001, 2001 CPD ¶ 154. There is no requirement that a competition be based on specifications drafted in such detail as to eliminate completely any risk or remove every uncertainty from the mind of every prospective offeror. PMSI, LLC d/b/a Optum Workers' Comp. Servs. of Fla., B-417237.2, et al., Jan. 29, 2020, 2020 CPD ¶ 63.

(2) Issues raised by ambiguous (defective) specifications:

(a) Adequacy of competition.

(b) Contract interpretation.

(c) Constructive change.

E. Publicizing Contract Actions. 41 U.S.C. § 1708; FAR Part 5; DFARS Subpart 205.

1. Policy. FAR 5.002. Publicizing contract actions increases competition. FAR 5.002(a). But see Aluminum Specialties, Inc. t/a Hercules Fence Co., B-281024, Nov. 20, 1998, 98-2 CPD ¶ 116 (holding that there was no requirement for the agency to exceed publicizing requirements, even if it had done so in the past).

2. See 2020 Contract Attorney's Deskbook, Chapter 34, Responsibility, Timeliness, and Organizational Conflicts of Interest for more information.

IV. WHEN FAR PART 6 DOES NOT APPLY

A. The provisions of FAR Part 6 do not apply to certain types of procurements. FAR 6.001. The FAR provisions that govern these types of procurements set forth the applicable competition requirements:

1. Simplified acquisitions.

a. Acquisitions made using simplified acquisition procedures are exempt from the competition requirements of FAR Part 6. FAR 6.001(a); FAR Part 13. FAR Part 13 details the reduced competition requirements applicable to simplified acquisitions, to include the limited determinations the contracting officer must make to solicit from a single source. FAR 13.106-1(b).

b. An agency may neither improperly fragment its requirements in order to use simplified acquisition procedures nor may it use simplified acquisition procedures for requirements that should reasonably be valued above the simplified acquisition threshold to avoid the requirement for full and open competition. Critical Process Filtration, Inc., B-400750, Jan. 22, 2009, 2009 CPD ¶ 25.

2. Contracts awarded using contracting procedures (other than those addressed in FAR Part 6) authorized by statute. FAR 6.001(b).

a. For example, personal service contracts for health care, as authorized by 10 U.S.C. § 1091, fall within this exception. See DFARS 206.001(b) and 237.104(b)(ii).

b. This specific exemption does not address 18 U.S.C. §§ 4121-4128 and FAR Subpart 8.6 (acquisitions from Federal Prison Industries); 41 U.S.C. § 259(b)(3) and FAR Subpart 8.4 (Federal Supply Schedules); or 41 U.S.C. §§ 46-48c and FAR Subpart 8.7 (acquisitions from nonprofit agencies employing people who are blind or severely disabled).

3. Contract modifications within the scope and under the terms of an existing contract, to include the exercise of priced options that were evaluated as part of the initial competition. FAR 6.001(c) and 17.207(f).

a. Rationale. The existing contract against which a modification is made was awarded in accordance with FAR Part 6. Since an in-scope modification lies within the scope and terms of the existing contract, it is not again subject to FAR Part 6. Overseas Lease Group, Inc., B-402111, Jan. 19, 2010, 2010 CPD ¶ 34 (finding that a lease for non-tactical and up-armored vehicles included within its terms unarmored vehicles and stating that contract modifications are beyond GAO's bid protest jurisdiction unless the modification is outside the scope of the original contract). See AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201 (Fed. Cir. 1993) (asking "whether the changed contract is materially different from the competed contract?" and holding that a modification adding T3 circuits was within the scope of a comprehensive contract for telecommunication services). See also Ceradyne, Inc. v. United States, 103 Fed. Cl. 1, 2 (Fed. Cl. 2012).

b. Out-of-Scope Modifications. Contract modifications beyond the scope of an existing contract must be awarded in accordance with FAR Part 6. Pegasus Global Strategic

Solutions, Inc., B-400422.3, Mar. 24, 2009, 2009 CPD ¶ 73 (approving FAR Part 6 sole source, out-of-scope modification to an existing contract on the basis of an unusual and compelling urgency following agency's prior failed attempt to characterize the modification as an in-scope change to the existing contract).

(1) Options.

(a) To fall within this exception to FAR Part 6, options must have been evaluated as part of the initial competition and be exercisable at an amount specified in or reasonably determinable from the terms of the basic contract. FAR 6.001(c) and 17.207(f); see Magnum Opus Techs., Inc. v. United States, 94 Fed.Cl. 512 (2010) (enjoining Air Force from exercising future options under multiple award ID/IQ contract and directing a future competition under FAR Part 6 where "not to exceed pricing" was removed from options after contract award resulting in an undeterminable price for the options in violation of FAR 17.207(f)).

(b) If the option was not evaluated as part of the initial competition, to include an option to extend services under FAR Clause 52.217-8, then exercise of the option is subject to the competition requirements of FAR Part 6 as opposed to the more limited determinations contained in FAR 17.207. See Major Contracting Serv., Inc., B-401472, Sept. 14, 2009, 2009 CPD ¶ 170, aff'd upon reconsideration Dep't of Army—Reconsideration, B-401472.2, Dec. 7, 2009, 2009 CPD ¶ 250 (determining that an unpriced option to extend services under FAR Clause 52.217-8 was not evaluated as part of the initial competition and therefore was subject to the competition requirements of FAR Part 6). For a discussion of the determinations required before exercise of a properly evaluated option, see FAR 17.207; Nutriom, LLC, B-402511, May 11, 2010, 2010 WL 1915264.

4. Orders placed under requirements, definite-quantity contracts, and indefinite quantity contracts, and orders placed against task order and delivery order contracts entered into pursuant to FAR 16.5.

a. Requirement and definite quantity contracts. FAR 6.001(d); FAR 16.502 to 16.503.

b. Orders placed under indefinite quantity contracts that were entered into pursuant to FAR Part 6 when:

(1) The contract was awarded under FAR 6.1 (Full and Open Competition) or 6.2 (Full and Open Competition After Exclusion of Sources) and all responsible sources were realistically permitted to compete for the requirements contained in the order; or

(2) The contract was awarded under FAR 6.3 (Other than Full and Open Competition) and the required justification adequately covers the requirements contained in the order. FAR 6.001(e); FAR 16.504.

c. Orders placed against task order and delivery order contracts entered into pursuant to FAR 16.5. Note that while not subject to FAR Part 6, orders placed under multiple award contracts (or MACs) pursuant to FAR Subpart 16.5 have some competition-like requirements based upon the dollar amount of the order. These competition-like requirements are referred to as a "fair opportunity to be considered."

(1) Orders over $3,500 up to $250,000 require the contracting officer to provide each awardee a relatively minimal "fair opportunity to be considered." See FAR 16.505(b)(1)(i).

(2) Fair opportunity procedures for orders exceeding $250,000 up to $5.5 million placed by or on behalf of DOD (except architecture engineering services – see FAR Subpart 36.6) require the placement of orders on a "competitive basis." FAR 16.505(b)(1)(iii); DFARS 216.505-70(b). This means that the contracting officer shall provide fair notice of intent to make the purchase, including a description of the supplies or services and the basis on which the contracting officer will make the selection, and afford all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered. FAR 16.505(b)(1)(iii)(B); DFARS 216.505-70.

(3) Fair Opportunity procedures for orders exceeding $5,500,000 under FAR 16.505(b)(1)(iv):

(a) A notice of the task or delivery order that includes a clear statement of the agency's requirement;

(b) A reasonable response period;

(c) Disclosure of the significant factors and subfactors, including cost and price, that the agency expects to consider in evaluating proposals and their relative importance;

(d) In the case of an award that is to be made on a best value basis, a written statement documenting the basis for the award and the relative importance of quality and price or cost factors; and

(e) An opportunity for a post-award debriefing. FAR 16.505(b)(6).

(4) FAR 16.505(b)(2) exceptions to the fair opportunity standard include:

(a) Urgency;

(b) Only one awardee capable of providing the requirement;

(c) Efficiency or logical follow on;

(d) Necessary to achieve the minimum guarantee;

(e) For greater than simplified acquisition threshold, a statute expressly authorizes or requires a specific source;

(f) Contracting officers, at their discretion, set aside an order for a small business concern identified in FAR 19.000(a)(3).

(g) Exceptions are properly justified under FAR 16.505(b)(2)(ii).

d. Rationale. The overarching contract against which the task or delivery order is placed was subject to a FAR Part 6

competition. Since the future issuance of a task and delivery order was necessarily evaluated as part of the original competition, the issuance is not subject to a second round of competition (except as noted above for MACs).

(1) If an order increases the scope, period, or maximum value of the contract under which the order is issued, then the order is subject to FAR Part 6. See FAR 16.505a(10)(i)(A); Datamill, Inc. v. United States, 91 Fed. Cl. 740 (Mar. 23, 2010); DynCorp Int'l, LLC, B-402349, Mar. 15, 2010, 2010 CPD ¶ 39 (holding task order for general law enforcement and counter insurgency training improperly exceeded the scope of a counter drug task order contract);

(2) Note that GAO now has protest jurisdiction over any order valued in excess of $25 million place against a contract, in addition to the scope-based jurisdiction referenced in subparagraph (1) immediately above. See Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383 § 825; FAR 16.505(a)(10)(i)(B), National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81 § 813; National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-239, § 830, 126 Stat. 1632 (Repealing sunset of jurisdiction)(Codified at 10 U.S.C. § 2304c). See also EA Engineering, Science &Technology Inc., B-411967, April 5, 2016, 2016 CPD ¶ 106, (GAO determined it retained jurisdiction over the procurement even though the value of the task order dropped below $10 million as a result of agency corrective action.) Of note, this ruling occurred when the GAO threshold was $10 million.

(3) Further note that the Court of Federal Claims lacks jurisdiction to hear protests "in connection with the issuance or proposed issuance of a task or delivery order except for ... a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued." 41 U.S.C. § 4106(f)(1); 10 U.S.C. § 2304c(e); see also Akira Technologies, Inc. v. United States et al., 145 Fed.Cl. 101 (2019) (holding that modifications to existing task orders are "in connection with" the issuance of such task orders and, thus, protests of such modifications are barred by FASA).

e. Federal Supply Schedule (FSS). Directed and managed by the General Services Administration (GSA), the FSS or Multiple Award Schedule (MAS) Program consists of numerous indefinite delivery contracts to provide supplies and services at stated prices for a given period of time. FAR 8.402. Agencies obtain goods and services by placing orders with a schedule contractor utilizing the procedures set forth in FAR Subpart 8.4. Orders placed under the Federal Supply Schedules, utilizing the procedures provided at FAR Subpart 8.4, are considered to be issued using full and open competition. FAR 6.102(d)(3); FAR 8.404(a). But, agencies generally may include in FSS awards only those contract clauses that are "consistent with standard commercial practice." 41 U.S.C. § 3307(e)(2)(B); see also CGI Federal Inc. v. United States, 779 F.3d 1346 (Fed. Cir. 2015).

B. The provisions of FAR Part 6 do not apply to reprocurement contracts. FAR 49.402-6.

1. When supplies or services are still required after termination, the contracting officer shall repurchase the same or similar supplies or services at a reasonable price and against the contractor's account as soon as practicable.

2. If the repurchase quantity is less than or equal to the terminated quantity, the contracting officer can use any acquisition method the contracting officer deems appropriate; however, the contracting officer must obtain competition to the maximum extent practicable.

a. The GAO will review the reasonableness of an agency's acquisition method against the standard specified in FAR 49.402-6(b). See Derm-Buro, Inc., B- 400558, Dec. 11, 2008, 2008 CPD ¶ 226 ("[T]he statutes and regulations governing federal procurements are not strictly applicable to reprocurements of defaulted requirements.").

b. If there is a relatively short period of time between the original competition and the termination for default, it is reasonable to award the subsequent contract to the second or third lowest offeror of the original solicitation at its original price. Maersk Line, Ltd., B-410445, Dec. 29, 2014, 2014 CPD ¶ 16; Bud Mahas Constr., B-235261, Aug 21, 1989, 89-2 CPD ¶ 160 (allowing the agency, on reprocurement after T4D to change from a small business set aside to unrestricted).

3. If the repurchase quantity is greater than the terminated quantity, the contracting officer must treat the entire quantity as a new acquisition subject to the normal competition requirements.

4. Contracting officers may, but are not required to, solicit the defaulted contractor. Colonial Press Int'l, Inc., B-403632, Oct. 18, 2010, 2010 CPD ¶ 241 (holding that the agency may properly exclude a defaulted contractor from a reprocurement regardless of whether the T4D is under challenge).

C. CICA (and therefore FAR Part 6) does not apply in all circumstances. For example, it does not apply to all federal agencies. CICA does not apply to the U.S. Postal Service, United States v. Elec. Data Sys. Fed. Corp., 857 F.2d 1444, 1446 (Fed. Cir. 1988), or to the Federal Aviation Administration, 49 U.S.C. 40110(d). Similarly, CICA does not apply to contact modifications or the exercise of option, or to orders placed under indefinite quantity and requirements contracts. *See* FAR 6.001 (a)-(f). Additionally, it does not apply to non-procurement contracts, such as Other Transactions. See Other Transaction Agreements: What Applies? 32 Nash & Cibinic Rep. NL ¶ 22, at 1 (May 2018).

V. CONCLUSION

The Competition in Contracting Act establishes a statutory preference for competition that shapes government procurement from acquisition planning, through market research, to developing specifications and publicizing. FAR Part 6 implements this competition preference by establishing three levels of competition: full and open competition; full and open competition after the exclusion of sources; and other than full and open competition.

CHAPTER 6

TYPES OF CONTRACTS

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CHAPTER 6

TYPES OF CONTRACTS

I. OBJECTIVES

Following this block of instruction, the student should:

1. Understand the common contract types by structure.

2. Know the factors that a contracting officer must consider in selecting a contract type.

3. Understand the fundamental differences between fixed-price and cost-reimbursement contracts.

4. Recognize a Cost-Plus-Percentage-of-Cost contract and understand it is a prohibited contract type.

II. GENERAL INFORMATION

A. Why Types? A wide selection of contract types is available to the Government in order to provide needed flexibility in acquiring the large variety and volume of supplies and services required by agencies. FAR 16.101(a). Contract types vary according to:

1. The degree and timing of the responsibility assumed by the contractor for the costs of performance; FAR 16.101(a)(1), and

2. The amount and nature of the profit incentive offered to the contractor for achieving or exceeding specified standards or goals. FAR 16.101(a)(2).

B. Categories. Contract Types can be categorized by Structure and also by Price.

1. When categorized by structure, there are basic contracts with or without option years, indefinite delivery contract structures, letter contracts, and basic ordering or purchasing agreements (covered in the simplified acquisition instruction).

2. When categorized by price, there are two basic types of contracts: Fixed-Price Contract Types and Cost Reimbursement Contract Types. FAR 16.101(b). The selection of a contract type's price structure will allocate risk to either the Government or to the contractor. Firm fixed price contracts allocate to the contractor the full responsibility for the performance costs and resulting profit (or loss). Cost contracts

allocate minimal responsibility for the contractor to control costs. For more discussion, see figure 10 on page 6-59 and the discussion on selection of contract types.

C. Disputes. In determining which type of contract was entered into by the parties, "the court is not bound by the name or label given to a contract. Rather, it must look beyond the first page of the contract to determine what were the legal rights for which the parties bargained, and only then characterize the contract." *Crown Laundry & Dry Cleaners, Inc. v. United States*, 29 Fed. Cl. 506, 515 (1993).

III. CONTRACT TYPES – CATEGORIZED BY STRUCTURE.

A. Base Contract + Option Periods.

1. Base Contract. Most contracts are awarded with a base contract period and one or more option periods. A common structure is a one fiscal year base contract with four one-fiscal-year options where each option may be unilaterally exercised at the Government's option during a specified period of time.

2. Definition of an Option. FAR 2.201. A unilateral right in a contract by which, for a specified time, the Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract.

3. Total Contract Period.

   a. Generally, a contract, including all options, may not exceed five years. *See* FAR 17.204(e). *See also* 10 U.S.C. § 2306b and FAR Subpart 17.1 (limiting multi-year contracts); 10 U.S.C. § 2306c and FAR 17.204(e) (limiting certain service Ks); 41 U.S.C. § 6707(d) and FAR 22.1002-1 (limiting contracts falling under the SCA to 5 years in length); *see also Delco Elec. Corp.*, B-244559, Oct. 29, 1991, 91-2 CPD ¶ 391 (use of options with delivery dates seven and half years later does not violate FAR 17.204(e), because the five year limit applies to five years' requirements in a supply contract); *Freightliner*, ASBCA No. 42982, 94-1 BCA ¶ 26,538 (option valid if exercised within five years of award).

b. Variable option periods do not restrict competition. *Madison Servs., Inc.*, B-278962, Apr. 17, 1998, 98-1 CPD ¶ 113 (Navy's option clause that allowed the Navy to vary the length of the option period from one to twelve months did not unduly restrict competition).

c. The contract shall state the period within which the option may be exercised. FAR 17.204(b). The period may extend beyond the contract completion date for service contracts. FAR 17.204(d). The contract shall specify limits on the purchase of additional supplies or services, or the overall duration of the term of the contract. FAR 17.204(a).

d. Use of Options. FAR 17.202.

(1) The Government can use options in contracts awarded under sealed bidding and negotiated procedures when in the Government's interest.

(2) Inclusion of an option is normally not in the Government's interest when:

(a) The foreseeable requirements involve:

(i) Minimum economic quantities; and

(ii) Delivery requirements far enough into the future to permit competitive acquisition, production, and delivery.

(b) An indefinite quantity or requirements contract would be more appropriate than a contract with options. However, this does not preclude the use of an ID/IQ or requirements contract with options.

(3) The contracting officer shall not employ options if:

(a) The contractor will incur undue risks; *e.g.*, the price or availability of necessary materials or labor is not reasonably foreseeable;

(b) Market prices for the supplies or services involved are likely to change substantially; or

(c) The option represents known firm requirements for which funds are available unless—

(i) The basic quantity is a learning or testing quantity; and

(ii) Competition for the option is impracticable once the initial contract is awarded.

e. Evaluation of options. Normally offers for option quantities or periods are included in the solicitation and evaluated when awarding the basic contract. FAR 17.206(a). The total price of the contract includes all the option periods.

(1) If the option was not evaluated during the basic contract, leading to exercising the option only due to urgency, it may not be exercised without an approved exception to full and open competition under the Competition in Contracting Act (CICA). *See Major Contracting Services, Inc.*, Comp. Gen. B-401472, Sept. 14, 2009.

(2) An agency may only exclude options from evaluation if it would not be in the best interest of the Government and this determination is approved at a level above the contracting officer. FAR 17.206(b).

f. Contract Extensions.

(1) If an option is not evaluated as part of the initial competition, exercise of the option amounts to a "contract extension beyond the scope of the contract, and therefore effectively constitutes a new procurement" which is subject to the CICA's competition requirements. *Major Contracting Services, Inc.*, Comp. Gen. B-401472, Sept. 14, 2009.

(2) "Bridge Contracts." Often a "bridge" contract involves a contract extension for a period of time while a follow-on contract is being competed. These "bridge" contracts are subject to CICA's competition requirements. By statute, failure to adequately plan for a procurement in advance is not a proper justification for a competition exception. 41 USC § 3304(e)(5)(A); *VSE Corp.; Johnson Controls World Serv., Inc.*, B-290452.3; B-290452.4; B-290452.5, May 23, 2005; *Techno-Sciences, Inc.*, B-257686, Oct. 31, 1994; *Laidlaw Environmental Services (GS)*, B-249452, Nov. 23, 1992.

g. Exercising Options.

(1) Exception from competition. The exercise of an option permits an agency to satisfy current needs for goods and services without going back through full competitive procedures. *Banknote Corp. of America, Inc.*, Comp. Gen B-250151, Dec. 14, 1992. Thus, the Government must comply with applicable statutes and regulations before exercising an option. *Golden West Ref. Co.*, EBCA No. C-9208134, 94-3 BCA ¶ 27,184 (option exercise invalid because statute required award to bidder under a new procurement); *New England Tank Indus. of N.H., Inc.*, ASBCA No. 26474, 90-2 BCA ¶ 22,892 (option exercise invalid because of agency's failure to follow DOD regulation by improperly obligating stock funds).

(2) Per FAR 17.207(c), the Contracting Officer may exercise an option only after determining that:

(a) Funds are available;[1]

(b) The requirement fills an existing need;

(c) The exercise of the option is the most advantageous method of fulfilling the Government's need, price and other factors considered;[2]

(d) The option was synopsized in accordance with Part 5 unless exempted under that Part (i.e. Option was part of the original solicitation that was competed under CICA);

(e) The contractor does not have an active exclusion record in the System for Award Management (see FAR 9.405-1);

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[1] Failure to determine that funds are available does not render an option exercise ineffective, because it relates to an internal matter and does not create rights for contractors. *See United Food Servs., Inc.*, ASBCA No. 43711, 93-1 BCA ¶ 25,462 (holding valid the exercise of a one-year option subject to availability of funds).

[2] The determination of other factors should take into account the Government's need for continuity of operations and potential costs of disrupting operations. FAR 17.207(e).

(f) The contractor's past performance evaluations on other contracts have been considered; and

(g) The contractor's performance on this contract has been acceptable (satisfactory ratings).

(3) To determine whether it is appropriate to exercise the option instead of re-competing the need, the Contracting Officer shall make the determination to exercise the option on the basis of one of the following:

(a) A new solicitation fails to produce a better price or more advantageous offer;

(b) An informal analysis of the market indicates the option is more advantageous; or

(c) The time between contract award and exercise of the option is so short that the option is most advantageous. *See* FAR 17.207(d).

(4) The Government must exercise the option according to its terms.

(a) The Government may not include new terms in the option without meeting CICA requirements. *See 4737 Connor Co., L.L.C. v. United States*, 65 Fed. Appx. 27 (Fed. Cir. 2003) (option exercise was invalid where the Government added a termination provision not present in the base period of the contract at the time of exercise of the option); *Varo, Inc.*, ASBCA No. 47945, 47946, 96-1 BCA ¶ 28,161 (inclusion of eight additional contract clauses in option exercise invalidated the option).

(b) The Government must follow the option mechanics in the contract to include timing of notice. *See Lockheed Martin Corp. v. Walker*, 149 F.3d 1377 (Fed. Cir. 1998) (Government wrongfully exercised options out of sequence); *The Boeing Co.*, ASBCA No. 37579, 90-3 BCA ¶ 23,202 (Navy failed to exercise the option within the 60 days allowed in the contract and the board invalidated the option); *White Sands Construction, Inc.*, ASBCA Nos. 51875, 54029 (Apr. 16, 2004) (Exercise improper when preliminary notice of intent to exercise mailed

on last day available and contractor received it after the deadline). *Compare The Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442 (Fed. Cir. 1997) (exercise of option on 1 Oct. proper).

(5) If a contractor contends that an option was exercised improperly, and performs, it may be entitled to an equitable adjustment. *See Lockheed Martin IR Imaging Sys., Inc. v. West*, 108 F.3d 319 (1997) (partial exercise of an option was held to be a constructive change to the contract).

(6) The Government has the discretion to decide whether to exercise an option.

(a) Decision not to exercise.

(i) The decision not to exercise an option is generally not a protestable issue since it involves a matter of contract administration. *See Young-Robinson Assoc., Inc.*, B-242229, Mar. 22, 1991, 91-1 CPD ¶ 319 (contractor cannot protest agency's failure to exercise an option because it is a matter of contract administration); *but see Mine Safety Appliances Co.*, B-238597.2, July 5, 1990, 69 Comp. Gen. 562, 90-2 CPD ¶ 11 (GAO reviewed option exercise which was, in effect, a source selection between parallel development contracts).

(ii) A contractor may file a claim under the Disputes clause, but must establish that the Government abused its discretion or acted in bad faith. *See Kirk/Marsland Adver., Inc.*, ASBCA No. 51075, 99-2 ¶ 30,439 (summary judgment to Government); *Pennyrile Plumbing, Inc.*, ASBCA Nos. 44555, 47086, 96-1 BCA ¶ 28,044 (no bad faith or abuse of discretion).

(b) The decision to exercise an option is subject to protest. *See Alice Roofing & Sheet Metal Works, Inc.*, B-283153, Oct. 13, 1999, 99-2 CPD ¶ 70 (protest denied where agency

reasonably determined that option exercise was most advantageous means of satisfying needs).

B. **Indefinite Delivery Type Contracts** – Three Types. FAR Subpart 16.5. FAR 16.501-2(a) recognizes three types of indefinite delivery contracts: definite-quantity contracts, requirements contracts, and indefinite-quantity/indefinite delivery contracts (ID/IQ). All three types permit Government stocks to be maintained at minimum levels, and permit direct shipment to users.

1. **Terminology**. FAR 16.501-1:

a. Delivery order contract. A contract for supplies that does not procure or specify a firm quantity of supplies (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of supplies during the period of the contract.

b. Task order contract. A contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.

2. **Definite-Quantity/Indefinite-Delivery Contracts**. FAR 16.502; FAR 52.216-20. The quantity and price are specified for a fixed period. The Government issues delivery orders that specify the delivery date and location.

3. **Requirements Contracts**. FAR 16.503; FAR 52.216-21.

a. The Government promises to order all of its requirements, if any, from the contractor, and the contractor promises to fill all requirements. *See Sea-Land Serv., Inc.*, B-266238, Feb. 8, 1996, 96-1 CPD ¶ 49 (solicitation for requirements contract which contained a "Limitation of Government Liability" clause purporting to allow the Government to order services elsewhere rendered requirements contract illusory for lack of consideration).

b. The Government breaches the contract when it purchases its requirements from another source. *Datalect Computer Servs. Inc. v. United States*, 56 Fed. Cl. 178 (2003) (finding agency breached its requirements contract covering computer maintenance services where agency later obtained extended warranty from equipment manufacturer covering same items); *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982) (Navy diverted rodent pest control services); *T&M Distributors, Inc.*,

ASBCA No. 51279, 01-2 BCA ¶ 31,442 (finding that Ft. Carson breached its requirements contract covering the operation of an auto parts store when certain tenant units elected to order their parts from cheaper suppliers).

c. The Government may also breach the contract if it performs the contracted-for work in-house. *C&S Park Serv., Inc.*, ENGBCA Nos. 3624, 3625, 78-1 BCA ¶ 13,134 (failure to order mowing services in a timely fashion combined with use of Government employees to perform mowing services entitled contractor to equitable adjustment under changes clause). The Government deferral or backlogging of its orders such that it does not order its actual requirements from a contractor is also a breach of a requirements contract. *R&W Flammann GmbH*, ASBCA Nos. 53204, 53205, 02-2 BCA ¶ 32,044.

d. Contractors may receive lost profits as a measure of damages when the Government purchases supplies or services from an outside source. *See T&M Distributors, Inc.*, ASBCA No. 51279, 01-2 BCA ¶ 31,442; *Carroll Auto.*, ASBCA No. 50993, 98-2 BCA ¶ 29,864.

e. The Government cannot escape liability for the breach of a requirements contract by retroactively asserting constructive termination for convenience. *T&M Distributors, Inc.*, ASBCA No. 51279, 01-2 BCA ¶ 31,442; *Carroll Auto.*, ASBCA No. 50993, 98-2 BCA ¶ 29,864 (Government invoked constructive Termination for Convenience (T4C) theory two years after contract performance); *Torncello v. United States*, 231 Ct. Cl. 20, 681 F.2d 756 (Ct. Cl. 1982).

f. A requirements contract must contain FAR 52.216-21 as required by FAR 16.506(d). If the Government inadvertently or intentionally omits this clause, a court or board will examine other intrinsic / extrinsic evidence to determine whether it is a requirements contract. *See, e.g., Centurion Elecs. Serv.*, ASBCA No. 51956, 03-1 BCA ¶ 32,097 (holding that a contract to do <u>all repairs</u> on automated data processing equipment and associated network equipment at Fort Leavenworth was a requirements contract despite omission of requisite clause).

g. The Contracting Officer shall state a realistic estimated total quantity in the solicitation and resulting contract. The estimate is not a representation to an offeror or contractor that the estimated quantity will be required or ordered, or that conditions affecting requirements will be stable or normal. The

estimate may be obtained from records of previous requirements and consumption, or by other means, and should be based on the most current information available. FAR 16.503(a)(1). The estimate is not a guarantee or a warranty of a specific quantity. *Shader Contractors, Inc. v. United States*, 149 Ct. Cl. 535, 276 F.2d 1, 7 (Ct. Cl. 1960).

h. There is no need to create or search for additional information. *Medart v. Austin*, 967 F.2d 579 (Fed. Cir. 1992) (court refused to impose a higher standard than imposed by regulations in finding reasonable the use of prior year's requirements as estimate). The standard is for the Government to base its estimates on "all relevant information that is reasonably available to it." *Womack v. United States*, 182 Ct. Cl 399, 401, 389 F.2d 793, 801 (1968).

i. The estimates can be based on personal experience as long as it is reasonable. *National Salvage & Service Corp.*, ASBCA No. 53750 (Jun. 18, 2004).

j. The GAO will sustain a protest if a solicitation contains flawed estimates. *Beldon Roofing & Remodeling Co.*, B-277651, Nov. 7, 1997, CPD 97-2 ¶ 131 (recommending cancellation of invitation for bids (IFB) where solicitation failed to provide realistic quantity estimates).

k. Failure to use available data or calculate the estimates with due care may also entitle the contractor to additional compensation. *See Hi-Shear Tech. Corp. v. United States*, 53 Fed. Cl. 420 (2002) (noting that the Government "is not free to carelessly guess at its needs" and that it must calculate its estimates based upon "all relevant information that is reasonably available to it."); *S.P.L. Spare Parts Logistics, Inc*, ASBCA Nos. 51118, 51384, 02-2 BCA ¶ 31,982; *Crown Laundry & Dry Cleaners v. United States*, 29 Fed. Cl. 506 (1993) (finding the Government was negligent where estimates were exaggerated and not based on historical data); and *Contract Mgmt., Inc.*, ASBCA No. 44885, 95-2 BCA ¶ 27,886 (granting relief under the Changes clause where Government failed to revise estimates between solicitation and award to reflect funding shortfalls).

l. Contractors are generally not entitled to lost profits for negligent estimates. Recovery is generally limited to reliance damages and a price adjustment. *See Rumsfeld v. Applied Companies, Inc.*, 325 F.3d 1329 (Fed. Cir. 2003), and *Everett Plywood v. United States*, 190 Ct. Cl. 80, 419 F.2d 425 (Ct. Cl. 1969) (contractor entitled to adjustment of the contract price

applied to the volume of timber actually cut). The purpose of a damages award is to put the non-breaching party in as good a position as it would have been but for the breach. *S.P.L. Spare Parts Logistics, Inc.*, ASBCA Nos. 54435, 54360, 06-1 BCA ¶ 33,135.

m. A negligent estimate that was too low may result in a constructive change to the contract. *Chemical Technology v. United States*, 227 Ct. Cl. 120, 645 F.2d 934 (1981).

n. The only limitation on the Government's freedom to vary its requirements after contract award is that it be done in good faith. *See Padilla v. United States*, 58 Fed. Cl. 585, 589 (2003) (highlighting the three basic obligations of the government to act in good faith).

(1) The Government acts in good faith if it has a valid business reason for varying its requirements, other than dissatisfaction with the contract. *Technical Assistance Int'l, Inc. v. United States*, 150 F.3d 1369 (Fed. Cir. 1998) (no breach or constructive change where Government diminished need for vehicle maintenance and repair work by increasing rate at which it added new vehicles into the installation fleet); *Shear Tech. Corp. v. United States*, 53 Fed. Cl. 420 (2002); *Maggie's Landscaping, Inc.*, ASBCA Nos. 52462, 52463 (June 2, 2004) (Government had valid reasons to reduce orders, to include dry and wet conditions).

(2) "Bad faith" includes actions "motivated solely by a reassessment of the balance of the advantages and disadvantages under the contract" such that the buyer decreases its requirements to avoid its obligations under the contract. *Technical Assistance Int'l, Inc. v. United States*, 150 F.3d 1369, 1372 (Fed. Cir. 1998) (*citing Empire Gas Corp. v. Am. Bakeries Co.*, 840 F. 2d 1333, 1341 (7th Cir. 1988)).

(3) The Government is not liable for acts of God that cause a reduction in requirements. *Sentinel Protective Servs., Inc.*, ASBCA No. 23560, 81-2 BCA ¶ 15,194 (drought reduced need for grass cutting).

Limits on use of Requirements Contracts for Advisory and Assistance Services (CAAS).[3] FAR 16.503(d); *see also* 10 U.S.C. § 2304b(e)(2). Activities may not issue solicitations for requirements contracts for advisory and assistance services in excess of three years and $13.5 million, including all options, unless the contracting officer determines in writing that the services required are so unique or highly specialized that it is not practicable to make multiple awards using the procedures in FAR 16.504.

4. **Indefinite-Quantity/Indefinite-Delivery Contracts (also called ID/IQ or Minimum Quantity Contracts).** FAR 16.504.

a. Generally.

(1) Indefinite or variable quantity contracts permit flexibility in both quantities and delivery schedules.

(2) These contracts permit ordering of supplies or services as requirements materialize.

(3) An indefinite quantity contract must be either a requirements or an ID/IQ contract. *See Satellite Servs., Inc.*, B-280945, B-280945.2, B-280945.3, Dec. 4, 1998, 98-2 CPD ¶ 125 (solicitation flawed where it neither guaranteed a minimum quantity nor operated as a requirements contract).

b. An ID/IQ contract shall require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services. In addition, if ordered, the contractor shall furnish any additional quantities, not to exceed the stated maximum. FAR 16.504(a)(1).

c. Application. Contracting officers may use an ID/IQ contract when the Government cannot predetermine, above a specified minimum, the precise quantities of supplies or services that the Government will require during the contract period, and it is inadvisable for the Government to commit itself for more than a minimum quantity. The contracting officer should use an

[3] "Advisory and assistance services" means those services provided under contract by nongovernmental sources to support or improve: organizational policy development; decision making; management and administration; program and/or program management and administration; or R&D activities. It can also mean the furnishing of professional advice or assistance rendered to improve the effectiveness of Federal management processes or procedures (including those of an engineering or technical nature). All advisory and assistance services are classified as: Management and professional support services; Studies, analyses and evaluations; or Engineering and technical services. FAR 2.101.

indefinite quantity contract only when a recurring need is anticipated. FAR 16.504(b).

d. In order for the contract to be binding, the minimum quantity in the contract must be more than a nominal quantity. FAR 16.504(a)(2). *See CW Government Travel, Inc.*, B-295530 ($2500 minimum adequate when it represented several hundred transactions in travel services); *Howell, v. United States*, 51 Fed. Cl. 516 (2002); *Aalco Forwarding, Inc., et al.*, B-277241.15, Mar. 11, 1998, 98-1 CPD ¶ 87 ($25,000 minimum for moving and storage services); *Sea-Land Serv. Inc.*, B-278404.2 Feb. 9, 1998, 98-1 CPD ¶ 47 (after considering the acquisition as a whole, found guarantee of one "FEU"[4] per contract carrier was adequate consideration to bind the parties). If the contract contains option year(s), only the base period of performance must contain a non-nominal minimum to constitute adequate consideration. *Varilease Tech. Group, Inc. v. United States*, 289 F.3d 795 (Fed. Cir. 2002).

e. The contractor is entitled to receive only the guaranteed minimum. *Travel Centre v. Barram*, 236 F.3d 1316 (Fed. Cir. 2001) (holding that agency met contract minimum so "its less than ideal contracting tactics fail to constitute a breach"); *Crown Laundry & Dry Cleaners, Inc.*, ASBCA No. 39982, 90-3 BCA ¶ 22,993; *but see Community Consulting Int'l.*, ASBCA No. 53489, 02-2 BCA ¶31,940 (granting summary judgment on a breach of contract claim despite the Government satisfying the minimum requirement); *see also Vanquish Worldwide, LLC v. United States*, 147 Fed. Cl. 390, 400 (2020) (stating that the courts have not suggested that "once the minimum quantity requirement has been bet under an IDIQ contract, the government may ignore independent contractual requirements that are intended to ensure fairness in the assignment of task orders among multiple contractors"). The corrected quantum must account for the amount the contractor would have spent to perform the unordered work. *Bannum, Inc.*, DOTBCA 4452, 06-1 BCA ¶ 33,228.

f. The Government may not retroactively use the Termination for Convenience clause to avoid damages for its failure to order the minimum quantity. *Compare Maxima Corp. v. United States*, 847 F.2d 1549 (Fed. Cir. 1988) (termination many months after contract completion where minimum not ordered

[4] Meaning Forty-Foot Equivalent Unit, an FEU is an industry term for cargo volumes measuring 8 feet high, 8 feet wide, and 40 feet deep.

was invalid), *and PHP Healthcare Corp.*, ASBCA No. 39207, 91-1 BCA ¶ 23,647 (contracting officer may not terminate an indefinite-quantity contract for convenience after end of contract term), *with Hermes Consolidated, Inc. d/b/a Wyoming Refining Co.*, ASBCA Nos. 52308, 52309, 2002 ASBCA LEXIS 11 (partial T4C with eight days left in ordering period proper) *and Montana Ref. Co.*, ASBCA No. 50515, 00-1 BCA ¶ 30,694 (partial T4C proper when Government reduced quantity estimate for jet fuel eight months into a twelve-month contract).

g. The contractor must prove the damages suffered when the Government fails to order the minimum quantity. The standard rule of damages is to place the contractor in as good a position as it would have been had it performed the contract. *White v. Delta Contr. Int'l., Inc.*, 285 F.3d 1040, 43 (Fed. Cir. 2002) (noting that "the general rule is that damages for breach of contract shall place the wronged party in as good a position as it would have been in, had the breaching party fully performed its obligation"); *PHP Healthcare Corp.*, ASBCA No. 39207, 91-1 BCA ¶ 23,647 (holding the contractor was not entitled to receive the difference between the guaranteed minimum and requiring the parties to determine an appropriate quantum); *AJT Assocs., Inc.*, ASBCA No. 50240, 97-1 BCA ¶ 28,823 (holding the contractor was only entitled to lost profits on unordered minimum quantity).

h. The contract statement of work cannot be so broad as to be inconsistent with statutory authority for task order contracts and the requirements of the Competition in Contracting Act. *See Valenzuela Eng'g., Inc.*, B-277979, Jan. 26, 1998, 98-1 CPD ¶ 51 (statement of work for operation and maintenance services at any Government facility in the world deemed impermissibly broad).

i. FAR 16.506(a)(4) and 16.506 (f) & (6) set forth several requirements for indefinite-quantity solicitations and contracts, including the use of FAR 52.216-27, Single or Multiple Awards, and FAR 52.216-28, Multiple Awards for Advisory and Assistance Services.

j. Policy Preference for Multiple-Award ID/IQs: FAR 16.504(c)(1)(i) establishes a preference for making multiple awards of indefinite-quantity contracts under a single solicitation for similar supplies or services. *See Nations, Inc.*, B-272455, Nov. 5, 1996, 96-2 CPD ¶ 170 (GAO ruled that the Government must make multiple awards in CAAS indefinite

delivery/indefinite quantity type of contracts). The contracting officer must document the decision whether or not to make multiple awards in the acquisition plan or contract file.

(1) A contracting officer must give preference to giving multiple awards for ID/IQs, unless one or more of the conditions specified in FAR 16.504(c)(1)(ii)(B) are present:

(a) Only one contractor is capable of providing performance at the level of quality required because the supplies or services are unique or highly specialized;

(b) Based on the contracting officer's knowledge of the market, more favorable terms and conditions, including pricing, will be provided if a single award is made;

(c) The cost of administration of multiple contracts may outweigh any potential benefits from making multiple awards;

(d) The tasks likely to be ordered are so integrally related that only a single contractor can reasonably perform the work;

(e) The total estimated value of the contract is less than the simplified acquisition threshold; or

(f) Multiple awards would not be in the best interests of the Government.

(2) Per FAR 16.504(c)(1)(ii)(D)(1), no task or delivery order contract in an amount to exceed $112 million (including all options) may be awarded to a single source, unless the head of the agency determines, in writing, that:

(a) The task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work;

(b) The contract provides only for firm, fixed price task orders or delivery orders for products for which unit prices are established in the contract, or services for which prices are established in

the contract for the specific tasks to be performed;

(c) Only one source is qualified and capable of performing the work at a reasonable price to the Government; or

(d) Because of exceptional circumstances, it is necessary in the public interest to award the contract to a single source.

(e) Finally, the head of the agency must notify Congress within 30 days after any written determination authorizing the award of an ID/IQ estimated to exceed $100 million.

(3) For advisory and assistance services contracts exceeding three years and $12.5 million, including all options, the contracting officer must make multiple awards unless (FAR 16.504(c)(2)):

(a) The contracting officer or other official designated by the head of the agency makes a written determination as part of acquisition planning that multiple awards are not practicable because only one contractor can reasonably perform the work because either the scope of work is unique or highly specialized or the tasks so integrally related. *Compare Nations, Inc.*, B-272455, Nov. 5, 1996, 96-2 CPD ¶ 170 (ruling that Army's failure to execute D&F justifying single award rendered RFP defective) *with Cubic Applications, Inc., v. United States*, 37 Fed. Cl. 345 (1997) (Cubic not entitled to equity where it failed to raise multiple award issue prior to award);

(b) The contracting officer or other official designated by the head of the agency determines in writing, after the evaluation of offers, that only one offeror is capable of providing the services required at the level of quality required; or

(c) Only one offer is received; or

(d) The contracting officer or other official designated by the head of the agency determines

that the advisory and assistance services are incidental and not a significant component of the contract.

k. Ordering periods. DFARS 217.204.

(1) The ordering period for a task or delivery order contract may be up to five years. DFARS 217.204(e)(i)(A).

(2) Options or modifications may extend a contract, not to exceed ten years unless:

(a) The head of the agency determines in writing that exceptional circumstances require a longer period. *See* DFARS 217.204(e)(i)(B) & (C).

(b) These limitations do not apply to:

(i) Contracts awarded under other statutory authority;

(ii) Advisory and assistance service task order contracts;

(iii) Definite quantity contracts;

(iv) GSA schedule contracts;

(v) Multi-agency contracts awarded by other than NASA, DoD, or the Coast Guard. *See* DFARS 217.204(e)(ii).

(c) Approval is needed from the senior procurement executive before issuing any order if performance is expected to extend more than one-year beyond the authorized 10-year limit. DFARS 217.204(e)(iii).

l. Placing Orders. FAR 16.505.

(1) FAR 16.505(a) sets out the general requirements for orders under delivery or task order contracts. A separate synopsis under FAR 5.201 is not required for orders.

(2) Orders under multiple award contracts. FAR 16.505(b).

(a) Fair Opportunity to be Considered. Each awardee must be given a "fair opportunity to be considered for each order in excess of $3,500." FAR 16.505(b)(1)(i). *See also Nations, Inc.*, B-272455, Nov. 5, 1996, 96-2 CPD ¶ 170.

(b) Fair Opportunity to be Considered for ID/IQ Orders between $3,500 and the simplified acquisition threshold (SAT). The KO has broad discretion in developing order placement procedures that will satisfy the requirement to provide each contractor a "fair opportunity to be considered." The KO may use streamlined procedures, including oral presentations. Additionally, the KO need not contact each of the multiple ID/IQ awardees before selecting an order awardee, if the KO has the information necessary to ensure that all ID/IQ awardees have a fair opportunity to compete for each order. FAR 16.505(b)(1)(ii).

(c) Fair Opportunity to be Considered for ID/IQ Orders Exceeding SAT. Each order exceeding the simplified acquisition threshold shall be placed on a competitive basis in accordance with FAR 16.505(b)(1)(iii)(B), unless supported by a written determination that one of the FAR 16.505(b)(2)(i) applies. The KO shall:

(i) Provide fair notice of the intent to make a purchase to all contractors offering the required supplies or services under the multiple-award contract. This notice will include:

a. A clear description of the supplies to be delivered or the services to be performed and

b. The basis upon which the selection will be made.

(ii) Afford all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered. FAR 16.505(b)(iii).

(d) Fair Opportunity to be Considered for ID/IQ Orders exceeding $5.5 million. For task or delivery orders in excess of $5.5 million, the requirement to provide all awardees a fair opportunity to be considered for each order shall include, at a minimum:

(i) a notice of the task or delivery order that includes a clear statement of the agency's requirements;

(ii) a reasonable period of time to provide a proposal in response to the notice;

(iii) disclosure of the significant factors and subfactors, including cost or price, that the agency expects to consider in evaluating such proposals and their relative importance;

(iv) in the case of an order award that is to be made on a best value basis, a written statement documenting the basis for the award and the relative importance of quality and price or cost factors; and

(v) an opportunity for a post award debriefing consistent with the requirements of FAR 16.505(b)(6).

(e) Exceptions to the Requirement to provide a Fair Opportunity to be Considered. Awardees need not be given a fair opportunity to be considered for an order if: there is an urgent need; there is only one capable source; the order is a logical follow-on to a previously placed order; the order is necessary to satisfy a minimum guarantee; or a statute expressly authorizes or requires that the purchase be made from a specified source (applies only to orders exceeding SAT). FAR 16.505(b)(2).

(i) NOTE: In addition to the exceptions above, KOs may, at their discretion, set aside orders for any of the small business concerns identified in FAR

19.000(a)(3). *See* FAR 16.505(b)(2)(F); 15 U.S.C. § 644(r).

(f) DFARS 216.505(b)(2). For an order exceeding the simplified acquisition threshold, that is a follow-on to an order previously issued for the same supply or service based on a justification for an exception to fair opportunity citing the authority at FAR 16.505(b)(2)(i)(B) or (C), follow the procedures at PGI 216.505(b)(2).

(g) DFARS 216.505-70. If only offer is received in response to an order exceeding the simplified acquisition threshold that is placed on a competitive basis, the contracting officer shall follow the procedures at DFARS 215.371.

(h) The contract may specify maximum or minimum quantities that may be ordered under each task or delivery order. FAR 16.504(a)(3). However, individual orders need not be of some minimum amount to be binding. *See C.W. Over and Sons, Inc.*, B-274365, Dec. 6, 1996, 96-2 CPD ¶ 223 (individual delivery orders need not exceed some minimum amount to be binding).

(i) Any sole source order under the FSS or MAC requires approval consistent with the approval levels in FAR 6.304. *See also*, Chapter 5, Contract Attorneys Course Deskbook.

m. Protests concerning task orders. The issuance of a task or delivery order is generally not protestable.[5] Exceptions include:

(1) Protests on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued. 10 U.S.C. § 2304c(e)(1)(A); *see also* 41 U.S.C. § 4106(f)(1)(A). *See also Anteon*

[5] "A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for—(A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order issued; or (B) a protest of an order valued in excess of $25,000,000." 10 U.S.C. § 2304c(e). *See also* 4 C.F.R § 21.5(a) (providing that the administration of an existing contract is within the purview of the contracting agency, and is an invalid basis for a GAO protest). *But see Grp. Seven Assocs., LLC v. United States*, 68 Fed. Cl. 28, 32 (2005) (looking at the merits and denying the protest, although noting that jurisdiction was "doubtful.")

Corp., B-293523, B-293523.2, Mar. 29, 2004, 2004 CPD ¶ 51; *Symplicity Corp.*, B-291902, Apr. 29, 2003 (purchase order improper when it included items not part of the vendor's Federal Supply Schedule contract); *Makro Janitorial Servs., Inc.*, B-282690, Aug. 18, 1999, 99-2 CPD ¶ 39 (task order for housekeeping services beyond scope of preventive maintenance contract).

(2) Task orders whose value exceeds $25,000,000. *See* 10 U.S.C. § 2304c(e)(1)(B). *But see* 41 U.S.C. § 4106(f)(1)(B) (permitting bid protests for orders in excess of $10,000,000 for all other Federal task orders).

(3) Where an agency conducts a downselection (selection of one of multiple contractors for continued performance). *See Electro-Voice, Inc.*, B-278319, B-278319.2, Jan. 15, 1998, 98-1 CPD ¶ 23.

(4) Where an agency conducts a competition among ID/IQ contractors and arrives at its source selection using negotiated procurement procedures. *CourtSmart Digital Sys., Inc.*, B-292995.2, B-292995.3, Feb. 13, 2004; *COMARK Fed. Sys.*, B-278343, B-178343.2, Jan. 20, 1998.

(5) A competition is held between an ID/IQ contractor (or BPA holder) and another vendor. *AudioCARE Sys.*, B-283985, Jan. 31, 2000, 2000 CPD ¶ 24.

(6) The protest challenges the transfer to an ID/IQ contract the acquisition of services that had been previously set aside for small businesses. *LBM, Inc.*, B-290682, Sep. 18, 2002, 2002 CPD ¶ 157.

(7) The FAR requires the head of an agency to designate a Task and Delivery Order Ombudsman to review complaints from contractors and ensure they are afforded a fair opportunity to be considered for orders. The ombudsman must be a senior agency official independent of the contracting officer and may be the agency's competition advocate. FAR 16.505(b)(8).

Discussion Problem: Redstone Arsenal awarded a contract to Hanley's Dirty Laundry, Inc. for laundry services at the installation. The contract contained the standard indefinite quantity clause, however, it did not set forth a guaranteed minimum quantity. At the end of the first year of performance, the Government had ordered only half of the contract's estimated quantity. Hanley's filed a claim for the increased unit costs attributable to performing less work than it had anticipated. The Arsenal prepared the estimated quantities for the contract by obtaining estimated monthly usage rates from serviced activities and multiplying by twelve. These estimates were two years old at the time the Arsenal awarded the contract but no attempt was made to update them. In addition, the Arsenal had more recent historical data available but failed to use it. Hanley's argued that the Government was liable due to a defective estimate. The Government argued that the contract was an indefinite quantity contract, therefore, there was no liability for a defective estimate.

Is the Government liable?

C. **LETTER CONTRACTS**. **FAR 16.603**.

1. Use. Letter contracts are used when the Government's interests demand that the contractor be given a binding commitment so that work can start immediately, and negotiating a definitive contract is not possible in sufficient time to meet the requirement. FAR 16.603-2(a). Letter contracts are also known as *Undefinitized Contract Actions* (UCA).

2. Approval for Use. The head of the contracting activity (HCA) or designee must determine in writing that no other contract is suitable. FAR 16.603-3. Approved letter contracts must include a not-to-exceed (NTE) price.

3. Definitization. The parties must definitize the contract (agree upon contractual terms, specifications, and price) by the earlier of the end of the 180 day period after the date of the letter contract, or the date on which the amount of funds obligated under the contractual action is equal to more than 50 percent of the negotiated overall ceiling price for the contractual action.[6] 10 U.S.C. § 2326.

4. The maximum liability of the Government shall be the estimated amount necessary to cover the contractor's requirements for funds before definitization, but shall not exceed 50 percent of the estimated cost of the definitive contract unless approved in advance by the official who authorized the letter contract. 10 U.S.C. § 2326(b)(2); FAR 16.603-2(d); DFARS 217.7404-4.

5. Restrictions: Letter contracts shall not

   a. Commit the Government to a definitive contract in excess of funds available at the time of contract.

   b. Be entered into without competition when required.

   c. Be amended to satisfy a new requirement unless that requirement is inseparable from the existing letter contract. FAR 16-603-3.

6. Liability for failure to definitize? *See Sys. Mgmt. Am. Corp.*, ASBCA Nos. 45704, 49607, 52644, 00-2 BCA ¶ 31,112 (finding the Assistant Secretary of the Navy unreasonably refused to approve a proposed definitization of option prices for a small disadvantaged business's supply contract).

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[6] FAR 16.603-2(c) provides for definitization within 180 days after date of the letter contract or before completion of 40 percent of the work to be performed, whichever occurs first.

IV. CONTRACT TYPES – CATEGORIZED BY PRICE

A. **Fixed-Price Contracts**. FAR Subpart 16.2.

1. General. Fixed Price (FP) contracts provide for a firm price, or in appropriate cases, an adjustable price. Fixed-price contracts that provide for an adjustable price may include a ceiling price, a target price (including a target cost), or both. FAR 16.201. The most common types of fixed price contracts include: Firm, Fixed Price (FFP), Fixed Price with Economic Price Adjustment (EPA), Fixed Price with Award Fee, and Fixed Price Incentive Fee (FPIF) contracts.

2. Use. Use of a FP contract is normally inappropriate for research and development work, and has been limited by DOD Appropriations Acts. *See* FAR 35.006 (c) (the use of cost-reimbursement contracts is usually appropriate for R&D contracts); *but see AT&T v. United States*, 48 Fed. Cl. 156 (2000) (upholding completed FP contract for developmental contract despite stated prohibition contained in FY 1987 Appropriations Act).

3. **Firm-Fixed-Price Contracts** (FFP). FAR 16.202.

a. A FFP contract is not subject to any adjustment on the basis of the contractor's cost experience on the contract. It provides maximum incentive for the contractor to control costs, perform effectively, and impose a minimum administrative burden on the contracting parties. FAR 16.202-1. (See Figure 1, page 6-26). The contractor promises to perform at a fixed-price, and bears the responsibility for increased costs of performance. *Appeals of New Era Contract Sales, Inc.*, ASBCA Nos. 56661, 56662, 56663, April 4, 2011 (failure of subcontractor to honor previously quoted prices does not excuse prime contractor); *Chevron U.S.A., Inc.*, ASBCA No. 32323, 90-1 BCA ¶ 22,602 (the risk of increased performance costs in a fixed-price contract is on the contractor absent a clause stating otherwise). The contractor also accepts the benefit of decreased costs associated with the items to be delivered under the contract.

b. An FFP is appropriate for use when acquiring commercial items or for acquiring other supplies or services on the basis of reasonably definite functional or detailed specifications when the contracting officer can establish fair and reasonable prices at the outset, such as when:

(1) There is adequate price competition;

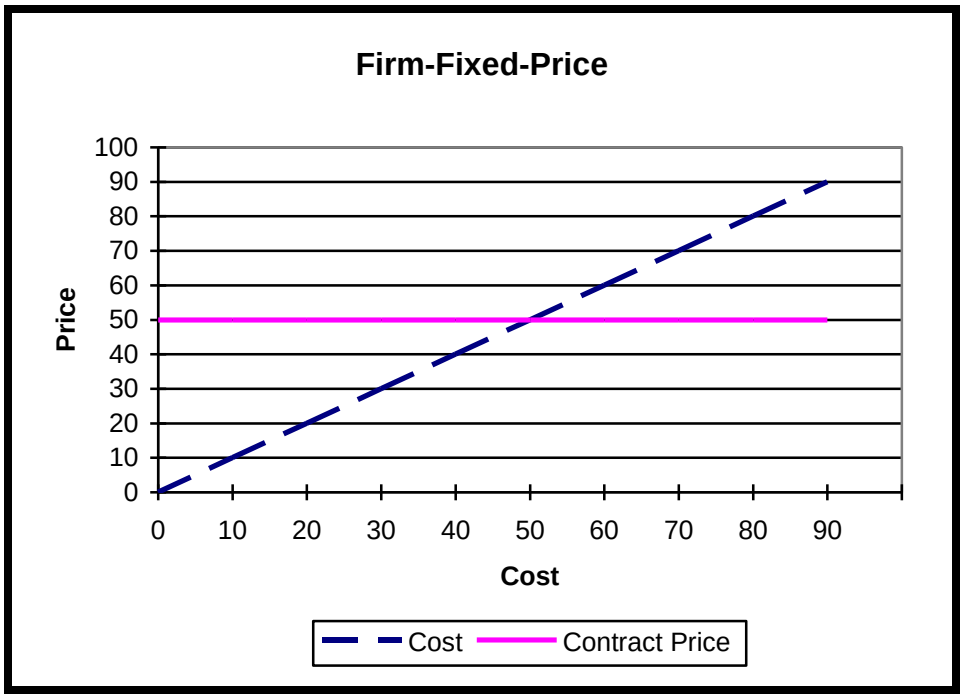
(2) There are reasonable price comparisons with prior purchases of the same or similar supplies or services made on a competitive basis or supported by valid cost or pricing data;

(3) Available cost or pricing information permits realistic estimates of the probable costs of performance; or

(4) Performance uncertainties can be identified and reasonable estimates of their cost impact can be made, and the contractor is willing to accept a firm fixed price representing assumption of the risks involved.
FAR 16.202-2.

Figure 1

Fixed Price = $50



If in performing the contract, the contractor incurs costs of:	Then the contractor is entitled to the following amount of money:
$50	$50
$40	$50
$80	$50
$10	$50

Discussion Problem: The NAVAIR Aviation Supply Office (ASO) awarded a firm-fixed-price contract for 9,397 aluminum height adapters to Joe's Aluminum Manufacturing Corp. Shortly after contract award, the price of aluminum rose drastically. Joe's refused to continue performance unless the Government granted a price increase to cover aluminum costs. The ASO terminated the contract for default and Joe's appealed the termination to the ASBCA.

Should the ASO have granted the price increase? Why or why not?

4. **Fixed-Price Contracts with Economic Price Adjustment (FP w/ EPA).** FAR 16.203; FAR 52.216-2; FAR 52.216-3; and FAR 52.216-4.

a. Provides for upward and downward revision of the stated contract price upon the occurrence of specified contingencies. *See Transportes Especiales de Automoviles, S.A.*, ASBCA No. 43851, 93-2 B.C.A. 25,745 (stating that "EPA provisions in Government contracts serve an important purpose, protecting both parties from certain specified contingencies."); *MAPCO Alaska Petroleum v. United States*, 27 Fed. Cl. 405 (1992) (indicating the potential price revision serves the further salutary purpose of minimizing the need for contingencies in offers and, therefore, reducing offer prices).

b. May be used when the contracting officer determines:

(1) There is serious doubt concerning the stability of market or labor conditions that will exist during an extended period of contract performance, and

(2) Contingencies that would otherwise be included in the contract price can be identified and covered separately in the contract. FAR 16.203-2.

c. Methods of adjustment for economic price adjustment clauses. FAR 16.203-1.

(1) Cost indexes of labor or material (no figure included). The standards or indexes are specifically identified in the contract. There is no standard FAR clause prescribed when using this method. The DFARS provides extensive guidelines for use of indexes. *See* DFARS 216.203-4-70.

(2) Based on published or otherwise established prices of specific items or the contract end items (no figure included). Adjustments should normally be restricted to industry-wide contingencies. *See* FAR 52.216-2 (standard supplies) and FAR 52.216-3 (semi standard supplies); DFARS 216.203-4 (indicating one should ordinarily only use EPA clauses when contract exceeds simplified acquisition threshold and delivery will not be completed within six months of contract award). The CAFC held that market-based EPA clauses are permitted under the FAR. *Tesoro Hawaii Corp., et al. v. United States*, 405 F.3d 1339 (Fed. Cir. 2005).

(3) Actual costs of labor or material (see Figure 2, 6-29). Price adjustments should be limited to contingencies beyond the contractor's control. FAR 52.216-4(c)(2). The contractor is to provide notice to the contracting officer within 60 days of an increase or decrease, or any additional period designated in writing by the contracting officer. FAR 52.216-4(a). Prior to final delivery of all contract line items, there shall be no adjustment for any change in the rates of pay for labor (including fringe benefits) or unit prices for material that would not result in a net change of at least 3% of the then-current contract price. FAR 52.216-4(c)(3). The aggregate of the increases in any contract unit price made under the clause shall not exceed 10 percent of the original unit price; there is no limitation on the amount of decreases. FAR 52.216-4(c)(4).

(4) EPA clauses must be constructed to provide the contractor with the protection envisioned by regulation. Courts and boards may reform EPA clauses to conform to regulations. *See Beta Sys. v. United States*, 838 F.2d 1179 (Fed. Cir. 1988) (reformation appropriate where chosen index failed to achieve purpose of EPA clause); *Craft Mach. Works, Inc.*, ASBCA No. 35167, 90-3 BCA ¶ 23,095 (EPA clause did not provide contractor with inflationary adjustment from a base period paralleling the beginning of the contract, as contemplated by regulations).

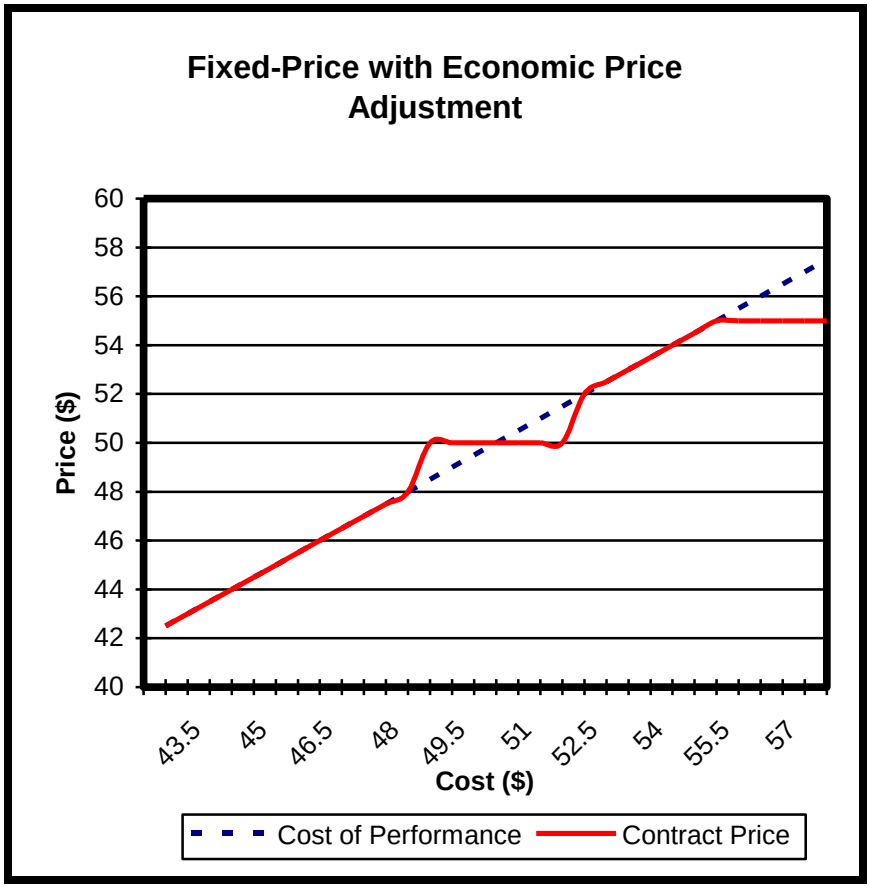
Figure 2

Fixed Price = $50

An EPA will be made if qualifying costs vary (increase or decrease) 3% of the contract price.

By contract clause, the maximum *upward* adjustment is capped at 10% of the contract price.

A downward EPA will be made if costs are 3% to 100% lower than the contract price. There is no cap on downward EPA.



If due to price fluctuations recognized by the EPA clause, the contractor incurs costs of:	**Then the contractor (Ktr) is entitled to the following amount of money:**	**Explanation**
$43	$50 – EPA $7 = $43.00	There is no cap on economic price adjustments that *reduce* the contract price. Here, the reduced cost of performance qualifies for an adjustment and the Government should pay the Ktr only $43.00.
$47	$50 – EPA $3 = $47.00	Ktr receives less than the full fixed price because the reduction in costs has exceeded 3% of the contract price. Here, 3% of $50.00 is $1.50. The cost of performance is less than $48.50, so this contract qualifies for a $3 contract adjustment. The Government should pay the Ktr only $47.00.
$49	$50	Ktr receives the full Fixed Price because the variation in costs has not exceeded 3% of the contract price. Here, 3% of $50.00 is $1.50, so the cost of performance must be below $48.50 to qualify for an adjustment.
$50	$50	Ktr receives the Fixed Price but has not qualified for any adjustment because there is no variation in cost.
$51	$50	Ktr receives the Fixed Price with no Adjustment because the variation in costs has not exceeded 3% of the contract price. Here, 3% of $50.00 is $1.50, so the increase in cost must exceed $51.50 before an adjustment is made to the contract price.
$53	$50 + EPA $3 = $53.00	Ktr receives an Adjustment because the variation in costs has exceeded 3% of the contract price. The Ktr receives an additional $3.00 as an Economic Price Adjustment (EPA).
$55	$50 + EPA $5 = $55.00	Costs have exceeded 3% of the contract price but have not exceeded the ceiling price on the contract (10%), so the Ktr receives an EPA for the full amount of its costs.
$56	$50 + EPA Ceiling $5 = $55	Costs have exceeded 3% of the contract price and the 10% contract ceiling price of $55.00. Ktr is limited to an EPA of $5.00 because that is the K ceiling.

(5) Alternatively, a party may be entitled to fair market value, or *quantum valebant* recovery. *Gold Line Ref., Ltd. v. United States*, 54 Fed. Cl. 285 (2002) (a contractor may be entitled *quantum valebant* relief *or* reformation of the EPA clause to further the parties' intent "to adjust prices in accordance with the FAR"); *Barrett Ref. Corp. v. United States*, 242 F.3d 1055 (Fed. Cir. 2001).

(6) A contractor may waive its entitlement to an adjustment by not submitting its request within the time specified in the contract. *Bataco Indus.*, 29 Fed. Cl. 318 (1993) (contractor filed requests more than one year after EPA clause deadlines).

5. **Fixed-Price Contracts with Award Fees**. FAR 16.404.

a. Award Fee contracts are a type of incentive contract. With this type of contract, the contractor receives a negotiated fixed price (which includes normal profit) for satisfactory contract performance. An award fee earned (if any) will be paid in addition to that fixed price (see Figure 3, page 6-35). Unlike the Cost-Reimbursement with Award Fee type (see section II.B.3), there is no base fee.

b. This type of contract should be used when the Government wants to motivate a contractor and other incentives cannot be used because the contractor's performance cannot be measured objectively.

c. Determination and Finding (D&F). FAR 16.401(d). A determination and finding, signed by the head of the contracting activity, is required. The D&F must justify that the use of this type of contract is in the best interests of the Government. It must address all of the following suitability items:

(1) The work to be performed is such that it is neither feasible nor effective to devise predetermined objective incentive targets applicable to cost, schedule, and technical performance;

(2) The likelihood of meeting acquisition objectives will be enhanced by using a contract that effectively motivates the contractor toward exceptional performance and provides the Government with the flexibility to evaluate

both actual performance and the conditions under which it was achieved; and

(3) Any additional administrative effort and cost required to monitor and evaluate performance are justified by the expected benefits as documented by a risk and cost benefit analysis to be included in the D&F. FAR 16.401(e).

d. The contract must provide for periodic evaluation of the contractor's performance against an award fee plan. The Defense Acquisition University (DAU) has created the Award and Incentive Fees Community of Practice (CoP). Per PGI 216.401(c), the CoP can be found at https://acc.dau.mil/awardandincentivefees.

e. The FAR establishes the adjectival ratings and award-fee pool earned percentages for determining award amount (contracting officers may supplement the adjectival rating description; the method used must be documents in the award-fee plan, *see* FAR 16.401(e)(3)(iv)):

Rating	**Definition of Rating**	**Award Fee**
Unsatisfactory	Contractor has failed to meet overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.	0%
Satisfactory	Contractor has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.	No Greater than 50%
Good	Contractor has exceeded some of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.	51% - 75%
Very Good	Contractor has exceeded many of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.	76% - 90%
Excellent	Contractor has exceeded almost all of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.	91% - 100%

f. Section 8117 of the 2008 DoD Appropriations Act, enacted by the President on 13 November 2007, contained the funding limitation that "[n]one of the funds appropriated or otherwise made available by this Act may be obligated or expended to provide award fees to any defense contractor contrary to the provisions of section 814 of the National Defense Authorization Act, Fiscal Year 2007 (Public Law 109-364)."

g. As a result of Section 8117, any obligations or expenditures for DoD contract award fees that do not conform with the DoD award fee criteria are not only policy violations, but likely per se (uncorrectable) Antideficiency Act violations as well.

h. FAR Policy Requirements. The following conditions must be present before a fixed price contract with award fee may be used:

(1) The administrative costs of conducting award-fee evaluations are not expected to exceed the expected benefits (FAR 16.404(e)(1)(iii);

(2) Procedures have been established for conducting the award-fee evaluation FAR 16.404(e)(3);

(3) The award-fee board has been established (FAR 16.404(e)(3); and

(4) The FDO, an individual above the level of the contracting officer, approved the fixed-price-award-fee incentive (FAR 16.404(e)(3)(i).

Figure 3

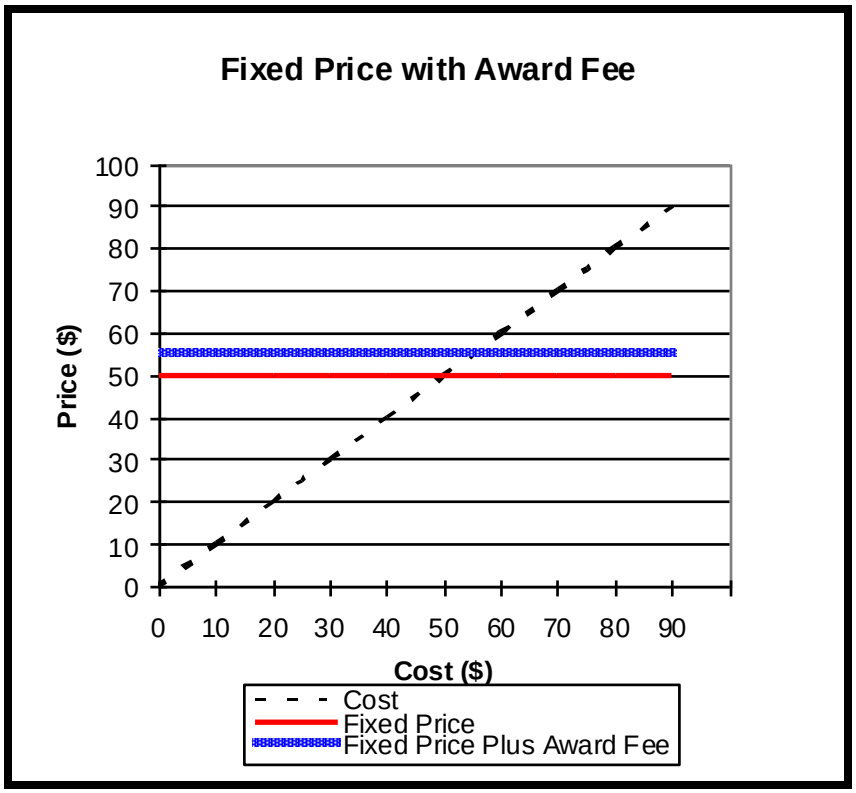
Fixed Price = $50

Potential Award Fee = $5

Total Price for this contract will be between $50 and $55.

The Maximum that the Ktr can earn is $55.00. ($50.00 Fixed Price plus 100% of the $5 Award Fee).

The Minimum the Ktr can earn is $50.00, which is the fixed price of the K.



If in performing the contract, the contractor incurs costs of:	**Then the contractor is entitled to the following amount of money:**
$50	$50 plus % of the award fee
$40	$50 plus % of the award fee
$80	$50 plus % of the award fee
If in performing the contract, the contractor performs:	**Then the contractor is entitled to the following amount of money:**
Excellent (90-100% of the $5 Award Fee)	$54.50 - $55.00
Very Good (76-90% of the $5 Award Fee)	$53.75 - $54.50
Good (51-75% of the $5 Award Fee)	$52.50 - $53.75
Satisfactory (No greater than 50% of the $5 Award Fee)	$50 - $52.50
Unsatisfactory (0% of the $5 Award Fee)	$50

6. **Fixed-Price Incentive (FPI) Contracts** (see Figure 4, page 6-38). FAR 16.204; FAR 16.403; FAR 52.216-16; and FAR 52.216-17. A FPI contract provides for adjusting profit and establishing the final contract price by application of a formula based on the relationship of final negotiated total cost to the total target cost. The final price is subject to a price ceiling that is negotiated at the outset of the contract. Because the profit varies inversely the cost, this contract type provides a positive, calculable profit incentive for the contractor to control costs. FAR 16.403-1(a).

a. The contractor must complete a specified amount of work for a fixed-price. The contractor can increase its profit through cost-reduction measures.

b. The Government and the contractor agree in advance on a firm target cost, target profit, and profit adjustment formula.

c. Use the FPI contract only when:

(1) A FFP contract is not suitable;

(2) The supplies or services being acquired and other circumstances of the acquisition are such that the contractor's assumption of a degree of cost responsibility will provide a positive profit incentive for effective cost control and performance; and

(3) If the contract also includes incentives on technical performance and/or delivery, the performance requirements provide a reasonable opportunity for the incentives to have a meaningful impact on the contractor's management of the work. FAR 16.403.

d. The parties may use either FPI (firm target) or FPI (successive targets). FAR 16.403(a)

(1) FPI (firm target) specifies a target cost, a target profit, a price ceiling, and a profit adjustment formula. FAR 16.403-1; FAR 52.216-16.

(2) FPI (successive targets) specifies an initial target cost, an initial target profit, an initial profit adjustment formula, the production point at which the firm target cost and profit will be negotiated, and a ceiling price. FAR 16.403-2; FAR 52.216-17.

e. Terms of Art with Firm Target Incentive Contracts: The following elements are negotiated at the outset.

(1) Target Cost: The parties negotiate at the outset a firm target cost of performance for the acquisition that is fair and reasonable.

(2) Target Profit: The parties negotiate at the outset a firm target profit for the acquisition that is fair and reasonable.

(3) Profit Adjustment Formula: A formula, established at the outset, will provide a fair and reasonable incentive for the contractor to assume an appropriate share of the risk. When the contractor completes performance, the parties determine what the final cost of performance was. Then, the final price is determined by applying the established formula. When the final cost to the contractor is less than the target cost, application of the formula results in a final profit greater than the target profit. When the final cost to the contractor is more than target cost, application of the formula results in a final profit less than the target profit, even a net loss. FAR 16.403-1(a).

(4) Price Ceiling (but not a profit ceiling or floor): The Ceiling Price is established at the outset, and it combines both cost and profit. It is the maximum price that the Government may pay to the contractor, except for any adjustment under other contract clauses (like the changes clause). If the final negotiated cost exceeds the price ceiling, the contractor absorbs the difference as a loss. FAR 16.403-1(a). Because this is a hard figure, the FPIC should be used when the parties can accurately estimate the cost of performance. Generally negotiated as a percentage of target cots, normal ceiling prices range from 115 to 135% of Target Cost. If ceiling prices are as high as 150% of the target cost, then a Cost-Plus-Incentive-Fee contract may be more appropriate. *See* Formation of Government Contracts, 3rd Edition, John Cibinic and Ralph Nash, p. 1132, 1998.

Figure 4

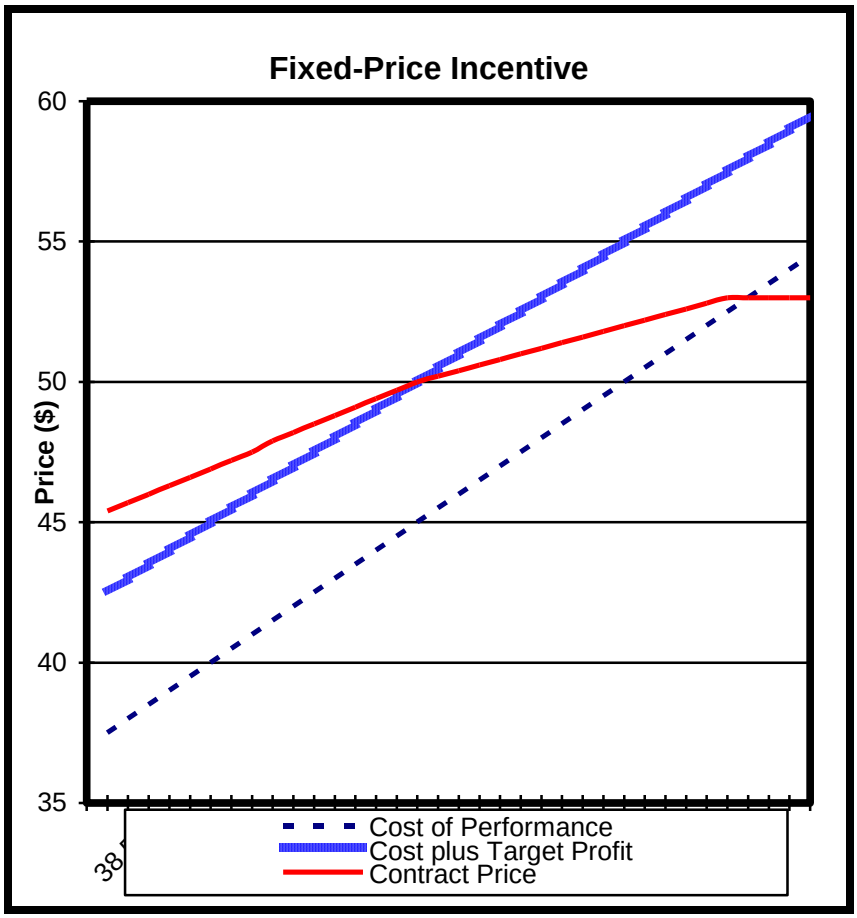
Target Cost (TC) = $45
Target Profit (TP) = $ 5
Target Price = $50

Ceiling Price (CP) = $53

Price Adj (PA) Formula: 60/40 split

Cost Overrun: The Ktr is paid for only 60% of its actual costs (AC) that exceed the target cost (Ktr is not reimbursed for the other 40%), capped at $53.

Cost Underrun: If Ktr costs are less than the target cost, the difference is computed. The Ktr receives 40% of the difference, plus the target profit.



If in performing the contract, the Ktr incurs costs:	Then the Ktr is entitled to the following amount of money:	Explanation
$45.00	$50.00	Ktr TC $45 + $5 TP = $50
$47.50	$51.00	60% of the $2.50 AC overrun = $1.50 $45 TC + 1.5 Ktr share = 46.5 + $5 TP = $51.50
$50.00	$52.00	60% PA of the $5 cost overrun = $3.00 $45 TC + $3 Ktr share = $48 + $5 TP = $52.00
$52.50	$53.00	60% PA of the $7.5 cost overrun = $4.50 $45 TC + $4.5 Ktr share = $49.5 + $5 TP = $54.50 but Ktr only receives the $53.00 ceiling price.
$55.00	$53.00	Ktr costs exceed ceiling price, which is the max the Ktr can receive. Ktr is operating at a loss.
$42.50	$48.50	$45.00 TC - $42.50 AC = $2.50 X 40% PA = $1.00 Ktr receives $42.50 + $1 PA = $43.50 + $5TP = $48.50
$40.00	$47	$45 TC - $40 AC = $5 X 40% PA = $2 Ktr receives $40 AC +$2 PA = $42 + $5 TP = $47
$37.50	$45.50	$45 TC - $37.5AC = $7.5 X 40% PA = 3 Ktr receives $37.5 AC + $3 PA = $40.5 + $5 TP = $45.50

B. Cost-Reimbursement Contracts. FAR Subpart 16.3.

1. Cost-Reimbursement contracts provide for payment of allowable incurred costs to the extent prescribed in the contract, establish an estimate of total cost for the purpose of obligating funds, and establish a ceiling that the contractor may not exceed (except at its own risk) without the contracting officer's approval. FAR 16.301-1.

a. Application. Use when (1) circumstances do not allow the agency to define its requirements sufficiently to allow for a fixed-price type contract or (2) uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract. FAR 16.301-2.

b. The Government pays the contractor's allowable costs plus a fee (often erroneously called profit) as prescribed in the contract.

c. To be allowable, a cost must be reasonable, allocable, properly accounted for, and not specifically disallowed. FAR 31.201-2.

d. The decision to use a cost-type contract is within the contracting officer's discretion. *Crimson Enters.*, B-243193, June 10, 1991, 91-1 CPD ¶ 557 (decision to use cost-type contract reasonable considering uncertainty over requirements causing multiple changes).

e. The Government bears that majority of cost or performance risk. In a cost-reimbursement type contract, a contractor is only required to use its "best efforts" to perform. A contractor will be reimbursed its allowable costs, regardless of how well it performs the contract. *General Dynamics Corp. v. United States*, 671 F.2d 474, 480-81 (Ct. Cl. 1982) (stating that "[i]f, despite its best efforts, the contractor cannot meet the contractual requirements, the government has obtained precisely what it bargained for, namely, the contractor's best efforts"); *McDonnell Douglas Corp. v. United States*, 37 Fed. Cl. 295, 299 (1997) (noting that "the focus of a cost-reimbursement contract is contractor input, not output.")

f. Limitations on Cost-Type Contracts. FAR 16.301-3.

(1) The contractor must have an adequate cost accounting system. FAR 16.301-3(a)(3). *See CrystaComm, Inc.*, ASBCA No. 37177, 90-2 BCA ¶ 22,692 (contractor failed to establish required cost accounting system).

(2) The Government must exercise appropriate surveillance to provide reasonable assurance that efficient methods and effective cost controls are used. FAR 16.301-3(a)(4).

(3) May not be used for acquisition of commercial items. FAR 16.301-3(b).

(4) Cost ceilings are imposed through the Limitation of Cost clause, FAR 52.232-20 (if the contract is fully funded); or the Limitation of Funds clause, FAR 52.232-22 (if the contract is incrementally funded). *See* FAR 16.301-1; FAR 32.706-2.

(5) The Contractor has the responsibility to notify the Contracting Officer in that it believes that the costs it expects to incur will exceed certain thresholds. . *See* FAR 52.232-20; FAR 52.232-22.

(6) FAR 32.704 provides that a contracting officer must, upon receipt of notice, promptly obtain funding and programming information pertinent to the contract and inform the contractor in writing that:

(a) Additional funds have been allotted, or the estimated cost has been increased, in a specified amount;

(b) The contract is not to be further funded and the contractor should submit a proposal for the adjustment of fee, if any, based on the percentage of work completed in relation to the total work called for under the contract;

(c) The contract is to be terminated; or

(d) The Government is considering whether to allot additional funds or increase the estimated cost, the contractor is entitled to stop work when the funding or cost limit is reached, and any work beyond the funding or cost limit will be at the contractor's risk.

(7) The contractor may not recover costs above the ceiling unless the contracting officer authorizes the contractor to exceed the ceiling. *JJM Sys., Inc.*, ASBCA No. 51152, 03-1 BCA ¶ 32,192; *Titan Corp. v. West*, 129 F.3d 1479 (Fed. Cir. 1997); *Advanced Materials v.*

Perry, 108 F.3d 307 (Fed. Cir. 1997). Exceptions to this rule include:

(a) The overrun was unforeseeable. *Johnson Controls World Servs.v. United States*, 48 Fed. Cl. 479 (2001); *RMI, Inc. v. United States*, 800 F.2d 246 (Fed. Cir. 1986) (burden is on contractor to show overrun was not reasonably foreseeable during time of contract performance); *F2 Assoc., Inc.*, ASBCA No. 52397, 01-2 BCA ¶ 31,530; Int'l Tech. Corp, ASBCA No. 54136, 06-2 BCA ¶ 33,348. To establish that the cost overrun was unforeseeable, the contractor must establish that it maintained an adequate accounting system. *SMS Agoura Sys., Inc.*, ASBCA No. 50451, 97-2 BCA ¶ 29,203 (contractor foreclosed from arguing unforeseen cost overrun by prior decision).

(b) Estoppel. *Am. Elec. Labs. v. United States*, 774 F.2d 1110 (Fed. Cir. 1985) (partial estoppel where Government induced continued performance through representations of additional availability of funds); *Advanced Materials v. Perry*, 108 F.3d 307 (Fed. Cir. 1997) (unsuccessfully asserted); *F2 Assoc., Inc.*, ASBCA No. 52397, 01-2 BCA ¶ 31,530 (unsuccessfully asserted).

2. Statutory Prohibition against Cost-Plus-Percentage-of-Cost (CPPC) Contracts.

a. The cost-plus-percentage-of-cost system of contracting is prohibited. 10 U.S.C. § 2306(a); 41 U.S.C. § 3905(a); FAR 16.102(c).

b. Identifying cost-plus-percentage-of-cost. In general, any contractual provision is prohibited that assures the Contractor of greater profits if it incurs greater costs. The criteria used to identify a proscribed CPPC system, as enumerated by the court in Urban Data Sys., Inc. v. United States, 699 F.2d 1147 (Fed. Cir. 1983) (adopting criteria developed by the Comptroller General at 55 Comp. Gen. 554, 562 (1975)), are:

(1) Payment is on a predetermined percentage rate;

(2) The percentage rate is applied to actual performance costs (as opposed to estimated or target performance costs determined at the outset);

(3) The Contractor's entitlement is uncertain at the time of award; and

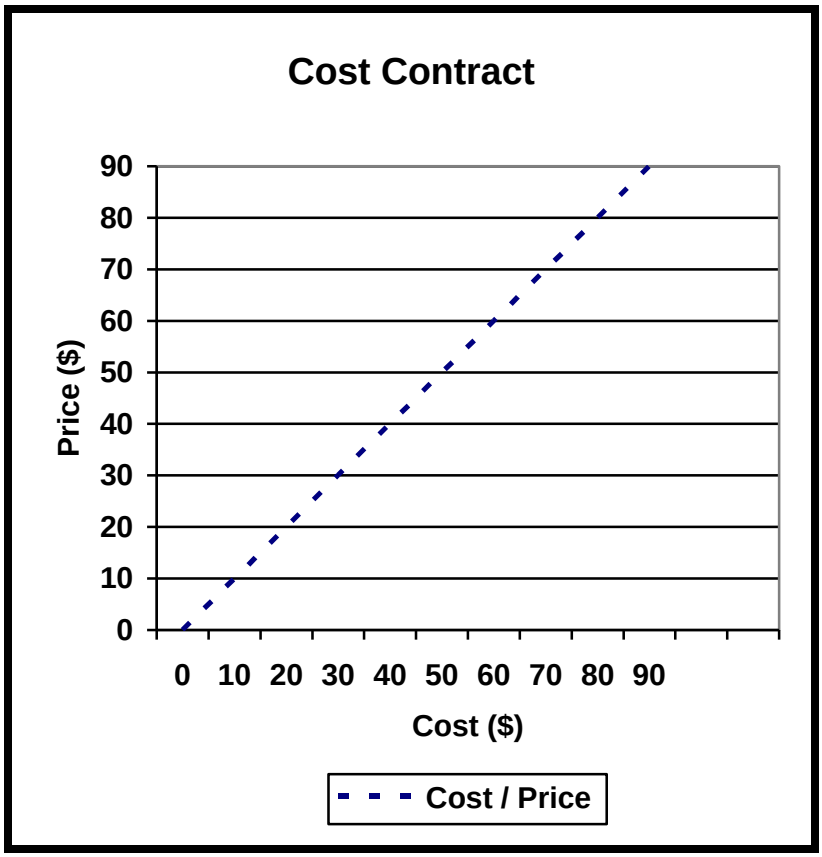
(4) The Contractor's entitlement increases commensurately with increased performance costs. *See also Alisa Corp.*, AGBCA No. 84-193-1, 94-2 BCA ¶ 26,952 (finding contractor was entitled to *quantum valebant* basis of recovery where contract was determined to be an illegal CPPC contract).

c. *Compare In re Dep't of Labor-Request for Advance Decision*, B-211213, Apr. 21, 1983, 62 Comp. Gen. 337, 83-1 CPD ¶ 429 (finding the contract was a prohibited CPPC) *with Tero Tek Int'l, Inc.*, B-228548, Feb. 10, 1988, 88-1 CPD ¶ 132 (determining the travel entitlement was not uncertain so therefore CPPC was not present).

d. Contract modifications. If the Government directs the contractor to perform additional work not covered within the scope of the original contract, the contractor is entitled to additional fee. This scenario does not fall within the statutory prohibition on CPPC contracts. *Digicon Corp.*, GSBCA No. 14257-COM, 98-2 BCA ¶ 29,988.

3. **Cost Contracts**. FAR 16.302; FAR 52.216-11. The contractor receives its allowable costs but no fee (see Figure 5, page 6-43) may be appropriate for research and development work, particularly with nonprofit educational institutions or other nonprofit organizations, and for facilities contracts.

Figure 5



If in performing the contract, the contractor incurs costs of:	Then the contractor is entitled to the following amount of money:
$50	$50
$60	$60
$30	$30
$100	$100

4. Cost-Sharing Contracts. FAR 16.303; FAR 52.216-12.

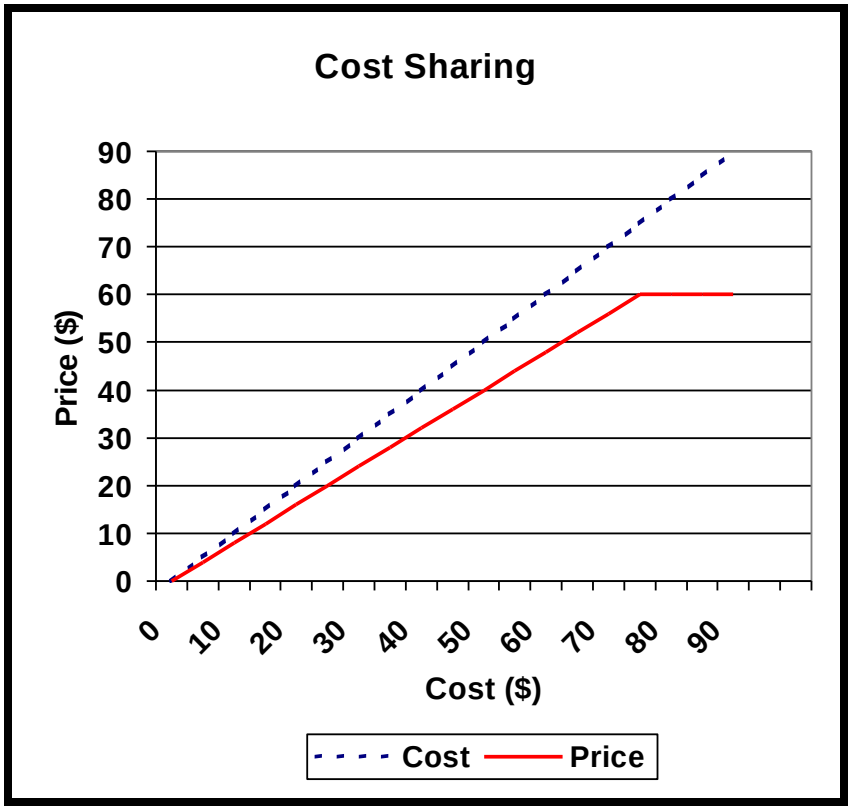
a. The contractor is reimbursed only for an agreed-upon portion of its allowable cost (see Figure 6, below).

b. Normally used where the contractor will receive substantial benefit from the effort.

FIGURE 6.

Contractor is paid 80% of negotiated costs.

Cost Ceiling = $60



a)

b)

If in performing the contract, the contractor incurs costs of:	Then the contractor is entitled to the following amount of money:
$50	$40
$60	$48
$70	$56
$80	$60 (cost ceiling)

5. **Cost-Plus-Fixed-Fee (CPFF) Contracts** (see Figure 7, page 6-47). FAR 16.306; FAR 52.216-8.

a. Definition. The contract price is the contractor's allowable costs, plus a fixed fee that is negotiated and set prior to award. The fixed fee does not vary with actual costs, but may be adjusted as a result of changes in the work to be performed under the contract. FAR 16.306(a).

b. Use. This contract type permits contracting for efforts that might otherwise present too great a risk to contractors, but it provides the contractor only a minimum incentive to control costs. FAR 16.306(a). Often used for research or preliminary exploration or study when the level of effort is unknown or for development and test contracts where it is impractical to use a cost-plus-incentive-fee contract.

c. Limitation on Maximum Fee for CPFF contracts. 10 U.S.C. § 2306(d); 41 U.S.C. § 3905; FAR 15.404-4(c)(4).

(1) Maximum fee limitations are based on the estimated cost at the time of award, not on the actual costs incurred.

(2) Research and development contracts: the maximum fee is a specific amount no greater than 15% of estimated costs at the time of award. 41 U.S.C. § 3905(b)(2).

(3) For contracts other than R&D contracts, the maximum fee is a specific amount no greater than 10% of estimated costs at the time of award. 10 U.S.C. § 2306(d).

(4) In architect-engineer (A-E) contracts, the contract price (cost plus fee) for the A-E services may not exceed 6% of the estimated project cost. *See* 41 U.S.C. § 3905(b)(3); *see also Hengel Assocs., P.C.*, VABCA No. 3921, 94-3 BCA ¶ 27,080.

d. Forms. A CPFF contract may take one of two forms: Completion or Term. FAR 16.306(d).

(1) The completion form describes the scope of work by stating a definite goal or target with a specific end product. The fixed fee is payable upon completion and delivery of the specified end product.

(2) The term form describes the scope of work in general terms and obligates the contractor to devote a specified level of effort for a stated time period. Under a term form, the fixed fee is payable at the expiration of the agreed-upon period if performance is satisfactory.

Discussion Problem: The US Army Intelligence and Security Command (INSCOM) issued a solicitation for a new computer system for its headquarters building at Fort Belvoir. The solicitation required offerors to assemble a system from commercial-off-the-shelf (COTS) components that would meet the agency's needs. The solicitation provided for the award of a firm-fixed price contract. Several days after issuing the solicitation, INSCOM received a letter from a potential offeror who was unhappy with the proposed contract type. This contractor stated that, although the system would be built from COTS components, there was a significant cost risk for the awardee attempting to design a system that would perform as INSCOM required. The contractor suggested that INSCOM award a cost-plus-fixed-fee (CPFF) contract. Additionally, the contractor suggested that INSCOM structure the contract so that the awardee would be paid all of its incurred costs and that the fixed fee be set at 10% of actual costs.

How should INSCOM respond?

Estimated Cost @ Time of Award = $50

Fixed Fee = $5

Cost Ceiling = $75

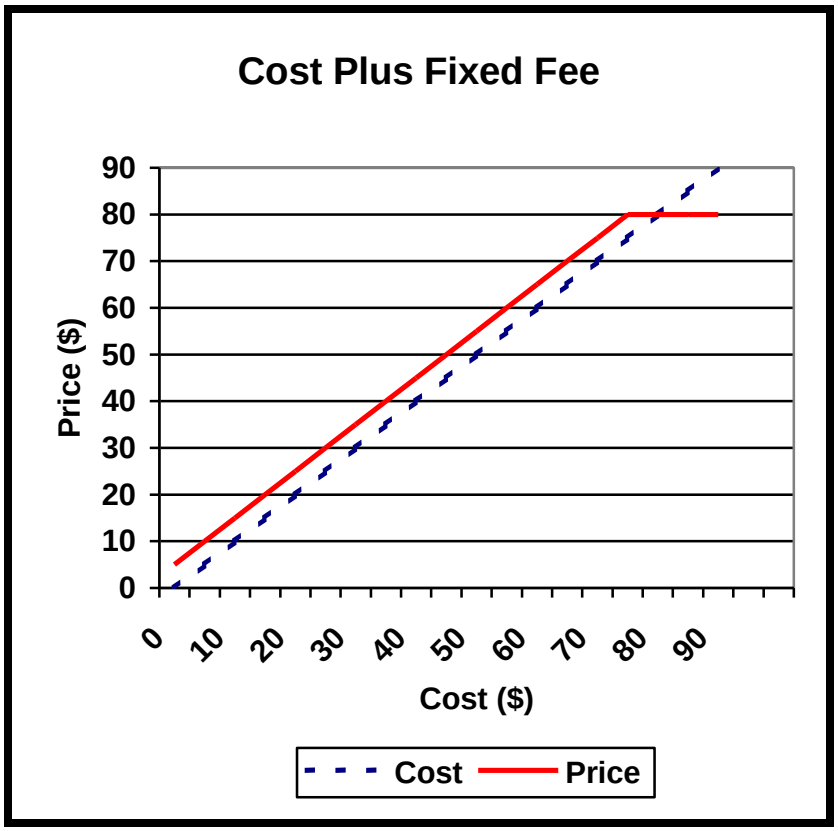


Figure 7

If in performing the contract, the contractor incurs costs of:	**Then the contractor is entitled to the following amount of money:**
$50	$50 + $5 Fixed Fee = $55
$40	$40 + $5 Fixed Fee = $45
$70	$70 + $5 Fixed Fee = $75
$80	$75 cost ceiling + $5 Fixed Fee = $80
$90	$75 cost ceiling + $5 Fixed Fee = $80

6. **Cost-Plus-Award-Fee (CPAF) Contracts**. FAR 16.305 and FAR 16.405-2.

a. The contractor receives its costs plus a fee consisting of a base amount (which may be zero) and an award amount based upon a judgmental evaluation by the Government sufficient to provide motivation for excellent contract performance (see Figure 8, below).

Rating	**Definition of Rating**	**Award Fee**
Unsatisfactory	Contractor failed to meet overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the evaluation period.	0%
Satisfactory	Contractor met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the evaluation period.	No Greater than 50%
Good	Contractor exceeded some of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the evaluation period.	51% - 75%
Very Good	Contractor exceeded many of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined/measured against the criteria in the award-fee plan for evaluation period.	76% - 90%
Excellent	Contractor exceeded almost all of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined/measured against the criteria in the award-fee plan for the evaluation period.	91% - 100%

Figure 8

b. Determination and Finding (D&F). FAR 16.401(d). A determination and finding, signed by the head of the contracting activity, is required. The D&F must justify that the use of this type of contract is in the best interests of the Government. It must address all of the following suitability items:

(1) The work to be performed is such that it is neither feasible nor effective to devise predetermined objective incentive targets applicable to cost, schedule, and technical performance;

(2) The likelihood of meeting acquisition objectives will be enhanced by using a contract that effectively motivates the contractor toward exceptional performance and provides the Government with the flexibility to evaluate both actual performance and the conditions under which it was achieved; and

(3) Any additional administrative effort and cost required to monitor and evaluate performance are justified by the expected benefits as documented by a risk and cost benefit analysis to be included in the D&F. FAR 16.401(e).

c. Funding Limitations: On 17 October 2006, the President enacted the 2007 National Defense Authorization Act (NDAA); Section 814 of the 2007 NDAA required the Secretary of Defense to issue guidance for the appropriate use of award fees in all DoD acquisitions.[7]

d. On 24 April 2007, the Director, Defense Procurement and Acquisition Policy issued the required guidance on the proper use of award fees and the DoD award fee criteria.[8] The required DoD award fee criteria is reflected in the chart above:

e. Section 8117 of the 2008 DoD Appropriations Act, contained the funding limitation from that fiscal year onward that "[n]one of the funds appropriated or otherwise made available to the Department of Defense may be obligated or expended to provide award fees to any defense contractor contrary to the provisions of section 814 of the National Defense

[7] John Warner National Defense Authorization Act, 2007, Pub. L. No. 109-364, 120 Stat. 2083, Sec. 814 (Oct. 17, 2006).

[8] *See* Appendix A: DPAP Memo on Proper Use of Award Fee Contracts and Award Fee Provisions.

Authorization Act, Fiscal Year 2007 (Public Law 109-364)." 10 U.S.C. § 2302 (Limitation on award fees).

f. As a result of Section 8117, any obligations or expenditures for DoD contract award fees that do not conform with the DoD award fee criteria are not only policy violations, but also *per se* (uncorrectable) Antideficiency Act violations as well.

g. Limitations on base fee. DOD contracts limit base fees to 3% of the estimated cost of the contract exclusive of fee. DFARS 216.405-2(3)(iii).

h. The FAR requires that an appropriate award-fee clause be inserted in solicitations and contracts when an award-fee contract is contemplated, and provided that the clause ''[e]xpressly provides that the award amount and the award-fee determination methodology are unilateral decisions made solely at the discretion of the Government.'' FAR 16.406 (e)(3). There is no such boilerplate clause in the FAR and therefore such a clause must be written manually. An award fee plan is included in the solicitation which describes the structure, evaluation methods, and timing of evaluations. Generally, award fee contracts require a fee-determining official, an award-fee board (typical members include the KO and a JA), and performance monitors (who evaluate technical areas and are not members of the board).

i. Since the available award fee during the evaluation period must be earned, the contractor begins each evaluation period with 0% of the available award fee and works up to the evaluated fee for each evaluation period. AFARS 5116.405-2(2)(A). If performance is deemed either unsatisfactory or marginal, no award fee is earned. PGI 216.405-3(2).

j. A CPAF contract shall provide for evaluations at stated intervals during performance so the contractor will periodically be informed of the quality of its performance and the areas in which improvement is expected. FAR 16.401(e)(3).

k. Unilateral changes to award-fee plans can be made before the start of an evaluation period with written notification by the KO. Changes to the plan during the evaluation plan can only be done through bilateral modifications. *See* Air Force Award Fee Guide, para. 2.8.

l. A contractor is entitled to unpaid award fee attributable to completed performance when the Government terminates a

cost-plus-award fee contract for convenience. *Northrop Grumman Corp. v. Goldin*, 136 F.3d 1479 (Fed. Cir. 1998).

m. The award fee schedule determines when the award fee payments are made. The fee schedule does not need to be proportional to the work completed. *Textron Defense Sys. v. Widnall*, 143 F.3d 1465 (Fed. Cir. 1998) (end-loading award fee to later periods)

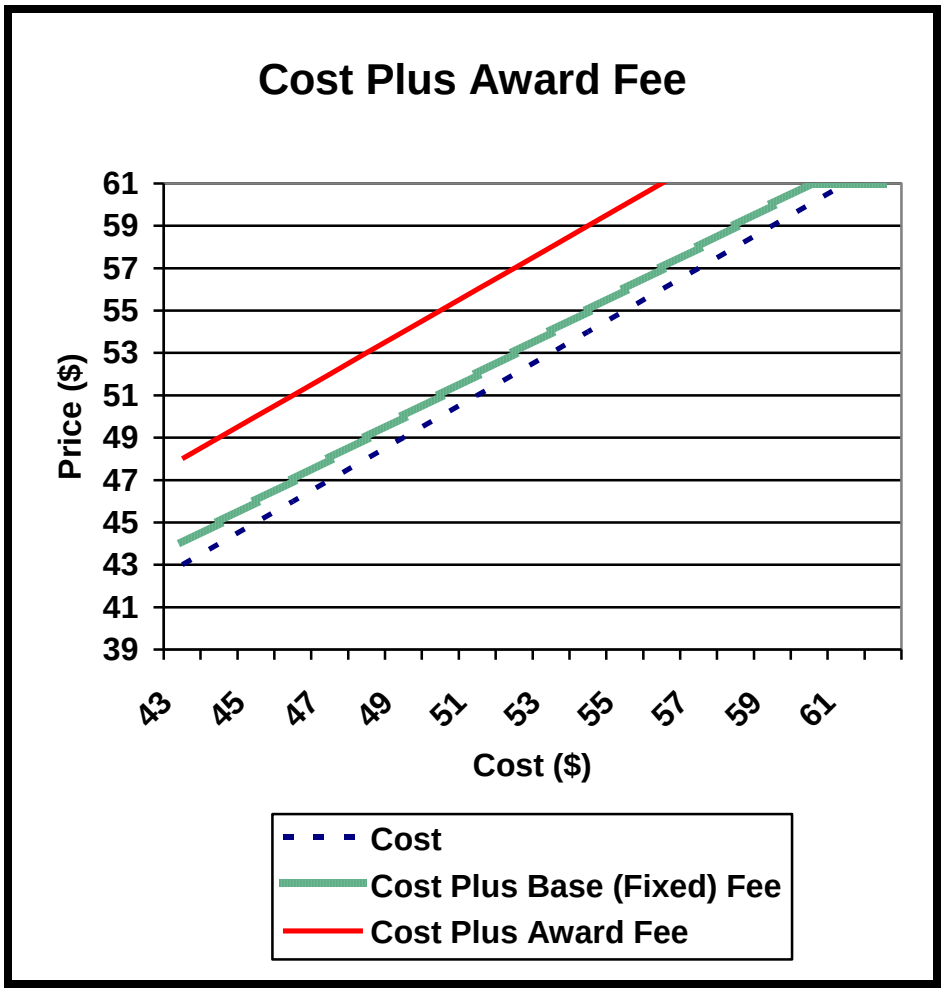
FIGURE 8.

Estimated Cost @ Time of Award = $50

Base Fee = $1

Award Fee = $4

Cost Ceiling = $60



If in performing the contract, the contractor incurs costs of:	Then the contractor is entitled to up to the following amount of money:	Notes
$50	$50 + $1 base fee + up to $4 of award fee = $55	
$55	$55 + $1 base fee + up to $4 of award fee = $60	
$57	$57 + $1 base fee + up to $4 of award fee = $62	While $60 is the cost ceiling, in cost contracts the cost ceiling is typically exclusive of any fee. (See FAR 52.232-20).
$60	$60 + $1 base fee + up to $4 of the award fee = $65	$60 is the cost ceiling. See comment above.
$68	$60 + $1 base fee + up to $4 of the award fee = $65	
If in performing the contract at $50 in cost, the contractor performs:	**Then the contractor is entitled to the following amount of money:**	
Outstanding (90-100%)	$54.60-$55	$1 Base Fee + 90-100% of the $4 Award Fee
Excellent (75-90%)	$54-$54.60	$1 Base Fee + 75-90% of the $4 Award Fee
Good (50-75%)	$53-$54	$1 Base Fee + 50-75% of the $4 Award Fee
Satisfactory (No greater than 50%)	$51-$53	$1 Base Fee + no more than 50% of the $4 Award Fee
Unsatisfactory (0%)	$51	$1 Base Fee + None of the $4 Award Fee

7. **Cost-Plus-Incentive-Fee (CPIF) Contracts**. FAR 16.304; FAR 16.405-1; and FAR 52.216-10.

a. The CPIF contract specifies a target cost, a target fee, minimum and maximum fees, and a fee adjustment formula (see Figure 9, page 6-55). After contract performance, the fee is determined in accordance with the formula. *See Bechtel Hanford, Inc.*, B-292288, et. al, 2003 CPD ¶ 199.

b. A CPIF is appropriate for services or development and test programs. FAR 16.405-1(b)(1). *See Northrop Grumman Corp. v. United States*, 41 Fed. Cl. 645 (1998) (Joint STARS contract).

c. The Government may combine technical incentives with cost incentives. FAR 16.405-1(b)(2). All multiple-incentive contracts must have cost incentives or constraints that prevent rewarding a contractor for achieving incentives which outweigh the value to the Government. *See* FAR 16.402-4(b).

d. If a contractor meets the contract criteria for achieving the maximum fee, the Government must pay that fee despite minor problems with the contract. *North American Rockwell Corp.*, ASBCA No. 14329, 72-1 BCA ¶ 9207 (1971) (Government could not award a zero fee due to minor discrepancies when contractor met the target weight for a fuel-tank, which was the sole incentive criteria).

e. A contractor is not entitled to a portion of the incentive fee upon termination of a CPIF contract for convenience. FAR 49.115(b)(2).

Target Cost (TC) = $50
Target Fee (TF) = $5

Cost Ceiling (CC): $60 (120% TC)

Minimum Fee (MF) = $2
Maximum Fee (MxF) = $7

Fee Adjustment (FA) formula: 50/50 split

Cost Overrun: The 50/50 FA formula decreases the $5 TF until the Ktr is only receiving the $2 MF. Also, the gov't will only pay actual costs up to the $60.00 CC.

Cost Underrun: The 50/50 FA formula increases the $5 TF until the Ktr tops out at the $7 MxF.

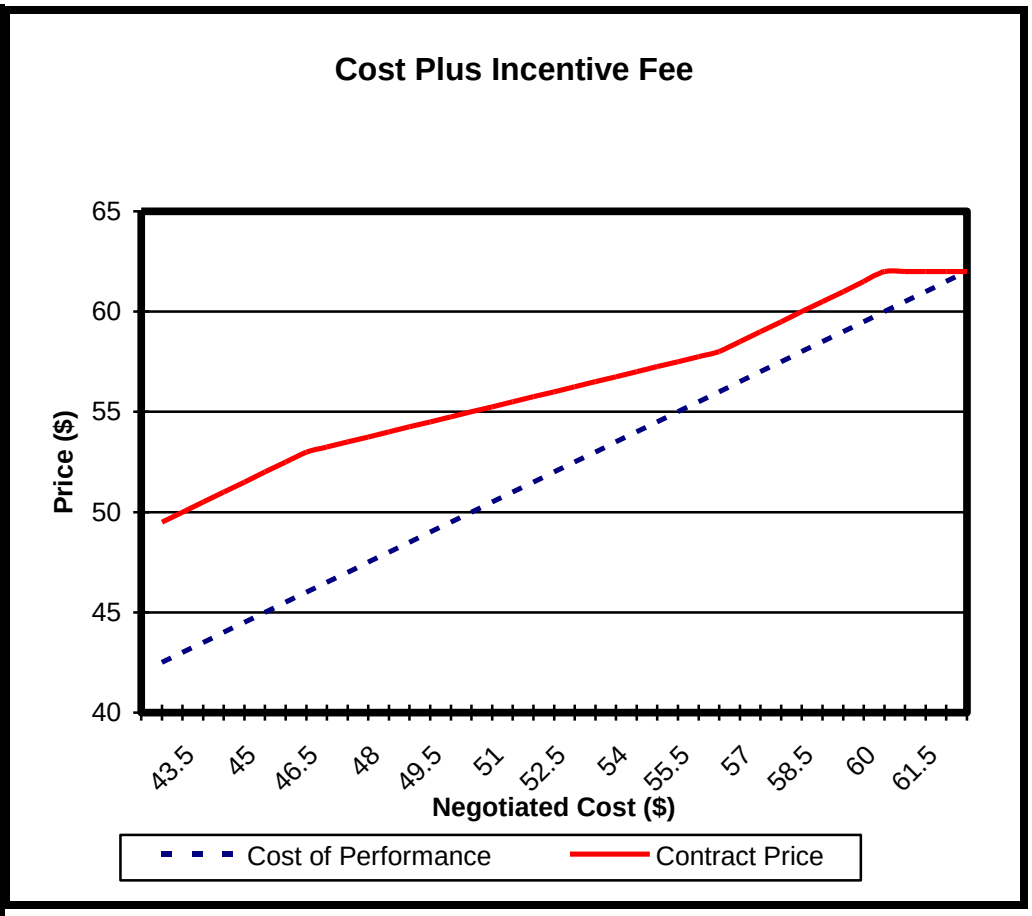


Figure 9

If in performing the contract, the contractor incurs costs of:	Then the contractor is entitled to the following amount of money:	Notes/Explanation:
$50.00	$55.00	TC $50 + TF $5 = $55.00
$55.00	$57.50	50% of $5 cost overrun = $2.50 FA to TF Actual Costs (AC) $55 + TF $5 - FA$2.50 = $57.50
$57.50	$59.50	50% of the $7.50 cost overrun = $3.75 TF $5 – FA $3.75 = $1.25 which is lower than MF $2 AC $57.50 + MF $2 = $59.50
$60.00	$62.00	50% of the $10 cost overrun = $5 FA so Ktr = MF $2 AC $60 + MF $2 = $62
$62.00	$62.00	50% of the $12 cost overrun = $6 FA, so Ktr = $2 MF AC exceed Cost Ceiling (CC) so costs are limited to $60 CC $60 + MF $2 = $62
$47.50	$55.75	50% of the $2.5 cost underrun = $1.25 FA AC $47.50 + FA $1.25 + TF $ 5= $53.75
$45.00	$52.50	50% of the $5 cost underrun = $2.50 FA which would push the fee over the MxF $7. So Ktr gets MxF $7.00 AC $45 + MxF $7 = $52.00

8. **Time-and-Materials and Labor-Hour Contracts**. FAR Subpart 16.6.

a. Application. Use these contracts when it is not possible at contract award to estimate accurately or to anticipate with any reasonable degree of confidence the extent or duration of the work. FAR 16.601(c); FAR 16.602. They are to be used only when no other contract type is suitable. FAR 16.601(d).

b. Type. T&M and LH contracts are neither fixed-price contracts nor cost-reimbursement contracts, but they constitute their own unique contract type. FAR 16.600; *see also* FAR 52.232-7 (related to reimbursement for T&M and LH contracts).

c. Government Surveillance. Appropriate surveillance is required to assure that the contractor is using efficient methods to perform these contracts, which provide no positive profit incentive for a contractor to control costs or ensure labor efficiency. FAR 16.601(c)(1); FAR 16.602. *CACI, Inc. v. General Services Administration*, GSBCA No. 15588, 03-1 BCA ¶ 32,106 (2002).

d. Limitation on use. The contracting officer must execute a D&F that no other contract type is suitable, and include a contract price ceiling. This includes Federal Supply Schedule contracts. FAR 8.404(h)(3)(i); FAR 16.601(d); FAR 16.602.

e. Types.

(1) Time-and-materials (T&M) contracts. Provide for acquiring supplies or services on the basis of:

(a) Direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit FAR 16.601(b)(1); and

(b) Materials at cost, including, if appropriate, material handling costs as part of material costs. FAR 16.601(b)(2).

(i) Material handling costs shall include those costs that are clearly excluded from the labor-hour rate, and may include all appropriate indirect costs allocated to direct materials. FAR 16.601(c)(3).

(c) Labor-hour contracts. Differs from T&M contracts only in that the contractor does not supply the materials. FAR 16.602.

C. Miscellaneous Contract Types

1. Level of Effort Contracts.

a. Firm-fixed-price, level-of-effort term contract. FAR 16.207. Government buys a level of effort for a certain period of time, *i.e.*, a specific number of hours to be performed in a specific period. Suitable for investigation or study in a specific R&D area, typically where the contract price is $100,000 or less.

b. Cost-plus-fixed-fee-term form contract. FAR 16.306(d)(2). Similar to the firm-fixed-price level-of-effort contract except that the contract price equals the cost incurred plus a fee. The contractor is required to provide a specific level of effort over a specific period of time.

2. Award Term Contracts. Similar to award fee contracts, a contractor earns the right, upon a determination of exceptional performance, to have the contract's term or duration extended for an additional period of time. The contract's term can also be reduced for poor performance. There has been no guidance from the FAR on this type of contract. The Air Force Material Command issued an Award-Fee Guide, dated October 2008, which contains useful guidance.

a. The process for earning additional periods is similar to award fees. Generally, a Term Determining Official, an Award Term Review Board, and Performance Monitors should be identified within the solicitation.

A point ceiling (+100) and a floor (-100) will be set up to incentivize the contractor's performance. Performing to either threshold will either increase or decrease the term of the contract. For example, two Very Good evaluations (80 points for each) in a row would earn another year of performance. The 60 points would carry over to the next evaluation period.

V. SELECTION OF CONTRACT TYPE

A. Factors to Consider.

1. Regulatory Limitations.

a. Sealed Bid Procedures. Only firm-fixed-price contracts or fixed-price contracts with economic price adjustment may be

used under sealed bid procedures. FAR 16.102(a) and FAR 14.104.

b. Contracting by Negotiation. Any contract type or combination of types described in the FAR may be selected for contracts negotiated under FAR Part 15. FAR 16.102(b). Contract types not described in the FAR may only be used via deviation sunder FAR 1.4. *Id*.

c. Commercial items. Agencies must use firm-fixed-price contracts or fixed-price contracts with economic price adjustment to acquire commercial items. As long as the contract utilized is either a firm-fixed-price contract or fixed-price contract with economic price adjustment, however, it may also contain terms permitting indefinite delivery. FAR 12.207. Agencies may also utilize award fee or performance or delivery incentives when the award fee or incentive is based solely on factors other than cost. FAR 12.207; FAR 16.202-1; FAR 16.203-1.

2. Negotiation. Selecting the contract type is generally a matter for negotiation and requires the exercise of sound judgment. The objective is to negotiate a contract type and price (or estimated cost and fee) that will result in reasonable contractor risk and provide the contractor with the greatest incentive for efficient and economical performance. FAR 16.103(a). (See Figure 10, page 61).

3. Allocation of Risk. Certain contract types distribute the risk of a contract cost overrun differently. For example, a firm fixed price contract places the risk of a cost overrun solely on the contractor. While the level of effort contract type places more of the risk of a cost overrun on the Government.

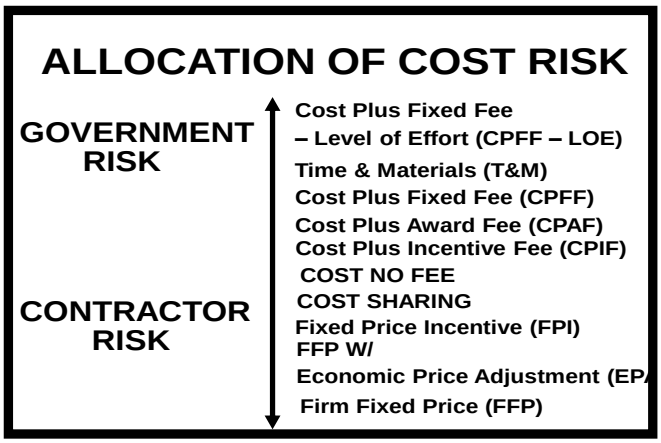


Figure 10

4. Discretion. Selection of a contract type is ultimately left to the reasonable discretion of the contracting officer. *Diversified Tech. & Servs. of Virginia, Inc.*, B-282497, July 19, 1999, 99-2 CPD ¶ 16 (change from cost-reimbursement to fixed-price found reasonable).

   a. There are numerous factors that the contracting officer should consider in selecting the contract type. FAR 16.104.

      (1) Availability of price competition.

      (2) The accuracy of price or cost analysis.

      (3) The type and complexity of the requirement.

      (4) Combining contract types.

      (5) Urgency of the requirement.

      (6) Period of performance or length of production run.

      (7) Contractor's technical capability and financial responsibility.

      (8) Adequacy of the contractor's accounting system.

      (9) Concurrent contracts.

      (10) Extent and nature of proposed subcontracting.

      (11) Acquisition history.

   b. In the course of an acquisition lifecycle, changing circumstances may make a different contract type appropriate. Contracting Officers should avoid protracted use of cost-reimbursement or time-and-materials contracts after experience provides a basis for firmer pricing. FAR 16.103(c).

VI. PERFORMANCE-BASED ACQUISITIONS - FAR SUBPART 37.6

A. Focuses on results rather than methods (*i.e.* "how the work it to be accomplished or how many work hours"). FAR 37.602(b)(1). Performance-based contracts for services shall include:

1. A performance work statement (PWS);

2. Measurable performance standards and a method of assessing performance against those standards; and

3. Performance incentives when appropriate. FAR 37.601.

B. PWS or prepares a statement of objectives (SOO) from which the contractor generates the PWS along with its offer. The SOO does not become part of the contract. The minimum elements of the SOO are:

1. Purpose;

2. Scope or mission;

3. Period or place of performance;

4. Background;

5. Performance objectives; and

6. Any operating constraints. FAR 37.602(c).

C. Performance-based contracts depend on quality assurance plans to measure and monitor performance prepared by either the Government or submitted by the contractor. FAR 37.604.

D. When drafting a performance-based contract, consider contract types that incorporate positive and/or negative performance incentives which correlate with the quality assurance plan. FPIF are useful types for performance-based contracts.

E. Resources

1. FAR 16.4, DFARS 216.1, and DFARS PGI 216.4

2. The DoD has a *Guidebook on Performance-Based Service Acquisitions* located at http://www.acq.osd.mil/dpap/Docs/pbsaguide010201.pdf. Another guide is the *Steps to Performance-Based Service Acquisitions (SPBA)*, https://pba.app.cloud.gov/app/#/pba.

3. The Defense Acquisition University has information about performance based payments on its website at https://www.dau.edu/cop/pricing/Pages/Default.aspx .

CHAPTER 7

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CHAPTER 7

SEALED BIDDING

I. INTRODUCTION

The purpose of these statutes and regulations is to give all persons equal right to compete for government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the government the benefits which arise from competition. In furtherance of such purpose, invitations and specifications must be such as to permit competitors to compete on a common basis.

United States v. Brookridge Farm, Inc., 111 F.2d 461, 463 (10th Cir. 1940).

II. THREE CONTRACT METHODS

A. Sealed Bidding. FAR Part 14.

B. Contracting by Negotiation. FAR Part 15.

C. Simplified Acquisition Procedures. FAR Part 13.

III. FRAMEWORK OF THE SEALED BIDDING PROCESS

A. Overview:

1. Sealed bidding is the oldest method of contracting in the United States. For many years, it was the contracting method of choice. Today, it is the least used method but it remains foundational to an adequate understanding of government contract law in the United States. For an excellent history of sealed bidding in government contracting, see, *A History of Government Contracting* by James F. Nagle. *See also* 2 Stat. 536; 6 Ops. Atty. Gen. 99, 1853 WL 2170; 2 Ops. Atty. Gen. 257, 1829 WL 449.

2. Sealed bidding is a method of contracting where contracts are awarded to:

   a. The LOWEST PRICED

   b. RESPONSIVE BID

   c. Submitted by a RESPONSIBLE BIDDER. FAR 14.103-2(d).

3. Contract Types: firm fixed price (FFP) contracts or, when some flexibility is necessary and feasible, firm fixed price with economic price adjustment (FFP w/EPA). FAR 14.104; FAR 14.408-4.

B. Current Statutes

1. DoD, Coast Guard, and NASA: 10 U.S.C. §§ 2302 *et seq*.

2. Other federal agencies: 41 U.S.C. §§ 3301 *et seq.*

C. Current Regulations

1. FAR Part 14 – Sealed Bidding.

2. DoD and agency regulations:

a. Defense FAR Supplement (DFARS), Part 214 – Sealed Bidding.

b. Army FAR Supplement (AFARS), Part 5114 – Sealed Bidding.

c. Air Force FAR Supplement (AFFARS), Part 5314 – Sealed Bidding.

d. Navy Marine Corps Acquisition Regulation Supplement (NMCARS), Part 5214 – Sealed Bidding.

D. Mandatory Use of Sealed Bidding

1. Agencies are **required** to use sealed bidding where all elements enumerated in these parallel statutory structures for the use of sealed bidding procedures are present. 10 U.S.C. § 2304(a)(2); 41 U.S.C. § 3301(b)(1); FAR 6.401(a); FAR 14.103-1; *see Racal Filter Technologies, Inc.*, B-240579, 90-2 CPD ¶ 453 (Comp. Gen. Dec. 4, 1990) (sealed bidding required when all elements enumerated in the Competition in Contracting Act (CICA) are present—agencies may not use negotiated procedures); *see also UBX Int'l, Inc.*, B-241028, 91-1 CPD ¶ 45 (Comp. Gen. Jan. 16, 1991) (use of sealed bidding procedures for ordnance site survey was proper).

2. **The Racal Factors** – The head of an agency **shall** solicit sealed bids if—

a. Time permits the solicitation, submission, and evaluation of sealed bids;

b. The award will be made on the basis of price and other price-related factors [*see* FAR 14.201-8];

c. It is not necessary to conduct discussions with the responding sources about their bids; and

d. There is a reasonable expectation of receiving more than one sealed bid.

3. Negotiated procedures are only authorized if sealed bids are not appropriate under FAR 6.401(a). FAR 6.401(b)(1); *see Racal Filter Technologies, Inc.*, B-240579, 90-2 CPD ¶ 453 (Comp. Gen. Dec. 4, 1990); *see also UBX Int'l, Inc.*, B-241028, 91-1 CPD ¶ 45 (Comp. Gen. Jan. 16, 1991).

4. The determination as to whether circumstances support the use of negotiated procedures is largely a discretionary matter within the purview of the contracting officer.

a. While the decision to employ negotiated procedures involves the exercise of a business judgment, such decisions must still be reasonable. *Essex Electro Eng'rs*, Inc., B-221114, 86-1 CPD ¶ 92 (Comp. Gen. Jan. 27, 1986). An agency must reasonably conclude that the conditions requiring use of sealed bidding are not present. *F&H Mfg. Corp.*, B-244997, 91-2 CPD ¶ 520 (Comp. Gen. Dec. 6, 1991.

b. If the contracting officer decides that negotiated procurement is necessary, the contracting officer must explain briefly which of the four requirements for sealed bidding is not met. *I.T.S. Corp.*, B-243223, 91-2 CPD ¶ 55 (Comp. Gen. July 15, 1991).

c. The fact that the requirement was previously procured through sealed bidding procedures is not material to whether the contracting officer's decision was reasonable. *Id.*; *see also Victor Graphics, Inc.*, B-238290, 90-1 CPD ¶ 407 (Comp. Gen. Apr. 20, 1990) (agency's past practice is not a basis for questioning its application of otherwise correct procurement procedures); *see also Zegler, LLC*, B-410877, 2015 CPD ¶ 168 (Comp. Gen. Mar. 4, 2015) (agency's corrective action to terminate a contract awarded under negotiated procurement procedures and resolicit agency requirements using sealed bid procedures was reasonable).

5. Case Study

Facts. Offeror A protested the use of negotiated procedures by the agency, arguing that the agency was required to use sealed bidding procedures under CICA. The solicitation called for construction of an intake canal as part of a flood control project. *All previous canal construction projects were awarded using price or price-related factors only*. This time, the agency chose negotiated procedures because it decided to consider six non-price related factors as equal to the price factor. The non-price related factors were past performance, technical approach, duration, personnel experience, project management, and small business subcontracting plan. The agency was also using a compressed schedule because of the urgency of improving flood control in a hurricane-stricken area. The solicitation also stated the agency could elect to hold discussions. In considering Offeror A's protest, GAO evaluated the **reasonableness** of the agency's decision to use negotiated procedures. What should the result be?

Negotiated Procurement OK. GAO held that the agency reasonably concluded the procurement required the use of negotiated procedures. The use of the new non-price factors was warranted because of the need to move quickly to restore flood control capabilities to the region. *Ceres Environmental Services, Inc.*, B-310902, 2008 CPD ¶ 48, (Comp. Gen. Mar. 3, 2008) (agency properly used negotiated procedures where compressed time schedule increased the complexity of a project normally awarded by sealed bidding); *see Comfort Inn South*, B-270819.2, 96-1 CPD ¶ 225 (Comp. Gen. May 14, 1996) (negotiated procedures okay where, after 10 years of using sealed bidding, agency changed to the use of negotiated procedures to consider past performance as a non-price factor in selection of a contractor to provide accommodations for military applicants); *TLT Constr. Corp.*, B-286226, 2000 CPD ¶ 179 (Comp. Gen. Nov. 7, 2000) (complex coordination and scheduling requirements provided reasonable support for negotiated procurement); *W.B. Jolley*, B-234490, 89-1 CPD ¶ 512 (Comp. Gen. May 26, 1989) (decision to consolidate numerous, diverse services into one contract created a complex procurement justifying use of negotiated procurement procedures).

E. Overview of Sealed Bidding Process: The Five Phases. FAR 14.101.

1. Preparation of the invitation for bids (IFB)

2. Publicizing the IFB

3. Submission of bids

4. Evaluation of bids

5. Contract award

IV. PREPARATION OF INVITATION FOR BIDS

A. Format of the IFB: the IFB is simply the sealed bidding method of soliciting bids

1. Uniform Contract Format. FAR 14.201-1.

2. Standard Form 33. Solicitation, Offer and Award; Standard Form 26, Award/Contract; or Standard Form 1447, Solicitation/Contract.

3. Standard Form 30 - Amendment of Solicitation; Modification of Contract.

B. Specifications

1. Clear, complete, and definite

2. Minimum needs of the government ("no gold plating")

3. Preference for commercial items. FAR 12.000 and FAR 12.101(b).

C. Definition. "Offer" means "bid" in sealed bidding. FAR 2.101.

D. Contract Type: Contracting officers may use only **firm fixed-price** and **fixed-price with economic price adjustment** contracts in sealed bidding acquisitions. FAR 14.104.

V. PUBLICIZING THE INVITATION FOR BIDS (IFB)

A. Policy on 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.

Late receipt of IFB. Failure of a potential bidder to receive an IFB in time to submit a bid, or to receive a requested solicitation at all, does not require postponement of bid opening **unless** adequate competition is not obtained. *See Family Carpet Serv. Inc.*, B-243942.3, 92-1 CPD ¶ 255 (Comp. Gen. Mar. 3, 1992); *see also Educational Planning & Advice*, B-274513, 96-2 CPD ¶ 173 (Comp. Gen. Nov. 5, 1996) (refusal to postpone bid opening during a hurricane was not an abuse of discretion where adequate competition was achieved and agency remained open for business); *Lewis Jamison Inc. & Assocs.*, B-252198, 93-1 CPD ¶ 433 (Comp. Gen. June 4, 1993) (GAO denies protest where contractor had "last clear opportunity" to avoid being precluded from competing). *But see Applied Constr. Technology*, B-251762, 93-1 CPD ¶ 365 (Comp. Gen. May 4, 1993) (although agency received 10 bids in response to IFB, GAO sustained protest where agency failed to solicit contractor it had advised would be included on its bidder's mailing list).

B. Failure to Provide Actual Notice to a Bidder (including the incumbent)

1. Historical. At one time (**but no longer**), the FAR required that "bids shall be solicited from . . . the previously successful bidder." *See* superseded FAR §§ 14.205-4 and 15.403. During that time, failure to give notice of a solicitation/IFB for supplies or services to a contractor currently providing such supplies or services (i.e., the incumbent) had occasionally been fatal to the solicitation, unless the agency:

a. Made a diligent, good-faith effort to comply with statutory and regulatory requirements regarding notice of the acquisition and distribution of solicitation materials; and

b. Obtained reasonable prices (competition). *Transwestern Helicopters, Inc.*, B-235187, 89-2 CPD ¶ 95 (Comp. Gen. July 28, 1989) (although the agency failed inadvertently to solicit incumbent contractor, the agency made reasonable efforts to publicize the solicitation, which resulted in 25 bids); *but see Professional Ambulance, Inc.*, B-248474, 92-2 CPD ¶ 145 (Comp. Gen. Sep. 1, 1992) (agency failed to solicit the incumbent and received only three proposals; GAO recommended resolicitation).

2. Current. If the solicitation is posted on FedBizOpps (the current GPE), then the agency has fulfilled any obligation it might have to solicit the incumbent contractor.

a. The FAR provides guidance on notification procedures. *See* FAR Part 5. However, beyond the notification procedures, **the current FAR does not require actual notice to incumbent contractors**.

(1) The agency has an affirmative obligation to use reasonable methods to publicize its procurement needs and to timely disseminate solicitation documents to those entitled to receive them. *Optelec U.S., Inc.*, B-400349, 2008 CPD ¶ 192 (Comp. Gen. Oct. 16, 2008) (publicizing on the GPE generally meets this affirmative obligation).

(2) Concurrent with the agency's obligations, prospective contractors must avail themselves of every reasonable opportunity to obtain the solicitation document. *See id.*; *see also* Laboratory Sys. Servs., Inc., B-258883, 95-1 CPD ¶ 90 (Comp. Gen. Feb. 15, 1995).

(3) In protests, GAO will consider whether the agency or the protester had the last clear opportunity to avoid the protester's being precluded from competing. *Optelec U.S., Inc.*, B-400349, 2008 CPD ¶ 192 (Comp. Gen. Oct. 16, 2008) (once advised the solicitation would be posted on FedBizOpps, it was the protestor's responsibility to take whatever steps were necessary to obtain it); *Wind Gap Knitwear, Inc.*, B-276669, 97-2 CPD ¶ 14 (Comp. Gen. July 10, 1997) (although protestor had not received the actual notice of the solicitation, it was aware of the estimated agency closing date for offers and so it was

unreasonable for the protestor to delay contacting the agency about its nonreceipt of the solicitation until after the actual closing date).

(4) *DBI Waste Systems, Inc.*, B-400687, 2009 CPD ¶ 15 (Comp. Gen. Jan. 12, 2009) (protest that notice of solicitation on Government Point of Entry (GPE) was inadequate because incumbent protester was not notified and lacked internet access was denied).

b. If agency posts solicitation on the GPE, contractor is on constructive notice of the RFP, even if contractor never received actual notice.

(1) *PR Newswire Association, LLC*, B-400430, 2008 CPD ¶ 178 (Comp. Gen. Sep. 26, 2008) (GAO held the agency's posting on FedBizOpps put PR Newswire on constructive notice even though a competitor received actual notice because of a prior bid protest agreement. Actual notice of solicitation to incumbent, PR Newswire was not required; posting of solicitation on GPE provided constructive notice).

(2) *CBMC, Inc.*, B-295586, 2005 CPD ¶ 2 (Comp. Gen. Jan. 6, 2005) (FedBizOpps website places prospective contractors on constructive notice of contract awards); *Aluminum Specialties, Inc. t/a Hercules Fence Co.*, B-281024, 98-2 CPD ¶ 116 (Comp. Gen. Nov. 20, 1998) (notice in Commerce Business Daily – formerly the official public medium for identifying proposed contract actions and now replaced by FedBizOpps – provides constructive notice of solicitation and contents).

c. Once an agency posts a solicitation on the GPE, it is solely the incumbent contractor's responsibility to take whatever steps are necessary to obtain the solicitation.

d. **Case Study**:

Facts. A prospective bidder requests that the agency provide it with a copy of the IFB. The agency tells the bidder to register on FedBizOpps for information on the procurement. The bidder registers and also signs up on FedBizOpps to receive an email notice when the solicitation was posted. However, FedBizOpps discontinues its email notification feature and the bidder does not receive notice when the solicitation is posted. The bidder receives actual notice of the solicitation on the day proposals are due. As a result, its bid is late and the agency rejects the bid. The bidder requests that GAO recommend that its offer be considered because the bidder did not received actual notice of the solicitation until the day that proposals were due. Should the bidder's late bid be considered?

No. Once the agency posts the solicitation on FedBizOpps, it becomes the contractor's sole responsibility to monitor the website for the posting of the solicitation. A bidder's decision to use any e-mail notification function on FedBizOpps was at the bidder's own risk. It did not operate to shift responsibility from the contractor to the agency. *Optelec U.S., Inc.*, B-400349, 2008 CPD ¶ 192 (Comp. Gen. Oct. 16, 2008).

VI. SUBMISSION OF BIDS

A. Safeguarding Bids. FAR 14.401.

1. Bids (including bid modifications) received before the time set for bid opening, shall be kept secure, and generally, must remain unopened in a locked bid box, a safe, or in a secured, restricted-access electronic bid box. FAR 14.401.

2. A bidder generally is not entitled to relief if the agency negligently loses its bid. *Vereinigte Gebäudereinigungsgesellschaft*, B-252546, 93-1 CPD ¶ 454 (Comp. Gen. June 11, 1993).

B. Responsiveness. To be considered for award, a bid must be **RESPONSIVE** to the solicitation, *i.e.*, comply in all material respects with the IFB, to include method, time and place of submission. FAR 14.301(a). Reasons for specific requirements:

1. Equality of treatment of bidders.

2. Preserve integrity of system.

3. Convenience of the government.

C. Method of Submission. FAR 14.301.

1. To be considered for award, a bid must be **RESPONSIVE** to the solicitation, *i.e.*, comply in all material respects with the IFB, to include the method of submission. FAR 14.301(a). This enables bidders to stand

on an equal footing and maintain the integrity of the sealed bidding system. *Id.*; *LORS Medical Corp.*, B-259829.2, 95-1 CPD ¶ 222 (Comp. Gen. Apr. 25, 1995) (bidder's failure to return two pages of IFB does not render bid nonresponsive; submission of signed SF 33 incorporates all pertinent provisions).

a. General Rule – Bidders may submit their bids by any written means permitted by the solicitation.

b. The government will not consider facsimile bids unless permitted by the solicitation. FAR 14.301(b); FAR 14.202-7; *Richcon Fed. Contractors, Inc.*, B-403223, 2010 CPB ¶ 192 (Comp. Gen. Aug. 12, 2010) (agency properly rejected quote that was submitted by facsimile because the request for quotations contained a clause prohibiting this method of submission); *but see Brazos Roofing, Inc.*, B-275113, 97-1 CPD ¶ 43 (Comp. Gen. Jan. 23, 1997) (bidder not penalized for agency's inoperable FAX machine); *PBM Constr. Inc.*, B-271344, 96-1 CPD ¶ 216 (Comp. Gen. May 8, 1996) (ineffective faxed modification had no effect on the original bid, which remained available for acceptance).

c. **Government failure to follow solicitation provisions**. If an agency exercises discretion to waive solicitation requirements *informally*, does it put itself at risk of a sustained protest for manipulating the competitive process?

d. Case Study

Facts: Solicitation for food distribution services with three offerors competing. Solicitation did not allow proposals to be submitted by email. It did allow faxes, hand-deliver and mail. However, the agency informally accepted email submission from all three offerors at one time or another. Offeror A sent its final revised proposal by email about 2 ½ hours late. Agency excluded Offeror A because it used email and because it was late. Offeror A protested to GAO. What result?

GAO denied. The protest was late. *LaBatt Food Service, Inc.*, B-310939.6, 2008 CPD ¶ 162, (Comp. Gen. Aug. 19, 2008). Offeror A protests to COFC. What result?

COFC sustained. FAR 15.208(a) provides offerors may use any transmission method authorized by the solicitation. Email was not authorized. If the agency had followed the FAR, the agency would have had to disqualify all three offerors at one time or another. Thus, the contract would have had to be recompeted. Offeror A was significantly prejudiced and so had standing to challenge the award of the contract to Offeror B. COFC found the Agency abused their discretion. COFC wrote, "There is a public interest in saluting the language of solicitations. If the agency wants to change the language, use a formal amendment . . . agency discretion to waive solicitation requirements, at different times in the same procurement, and perhaps toward one offeror and not another, renders the procurement process subject to manipulation and unfair competitive advantage." *LaBatt Food Service, Inc. v. U.S.*, 84 Fed. Cl. 50, 65 (2008). The Government appeals to CAFC. What result?

CAFC reversed. Holding that Offeror A did not have standing to challenge the award to Offeror B because Offeror A was not prejudiced by the agency's error of informally allowing email proposals. In order for Offeror A to be prejudiced, it must be harmed by the government error and the informal acceptance of email proposals. While an error, there was no harm to Offeror A. One or more of all the offerors were retained in the competition because the agency informally allowed email submissions. The fact that Offeror A's submission was late is an independent free standing ground to eliminate Offeror A from the competition. *LaBatt Food Service v. U.S.*, 577 F.3d 1375 (Fed. Cir. 2009).

D. Time and Place of Submission. FAR 14.302.

1. Bids shall be submitted so that they will be **received in the office designated** in the IFB not later than the **exact time set** for opening of bids. FAR 14.302; 14.304(a)

2. Place of submission = as specified in the IFB. FAR 14.302; 14.304(a).

   a. FAR 14.302; *see Rodale Electr. Corp.*, B-221727, 86-1 CPD ¶ 342 (Comp. Gen. Apr. 7, 1986) (an offer is later if it does not arrive at the place designated in the solicitation for the receipt of proposals by the designated time.); *J.E. Steigerwald Co., Inc.*, B-218536, 85-1 CPD ¶ 453 (Comp. Gen. Apr. 19, 1985) (receipt at other places within the agency, such as the mailroom, is not sufficient); *CSLA, Inc.*, B-255177, 94-1 CPD ¶ 63 (Comp. Gen. Jan. 10, 1994) (hand-carried proposal was "late" where it was delivered via commercial carrier to the *mailing* address rather than the address for *hand-carried* proposals and was received by the contracting officer after the closing time for receipt of proposals); *Carolina Archaeological Serv.*, B-224818, 86-2 CPD ¶ 662 (Comp. Gen. Dec. 9, 1986).

3. Time of submission = as specified in the IFB. FAR 14.302; 14.304.

   a. The official designated as the bid opening officer shall decide when the time set for bid opening has arrived and shall inform

those present of that decision. FAR 14.402-1; *Action Serv. Corp.*, B-254861, 94-1 CPD ¶ 33 (Comp. Gen. Jan. 24, 1994) (the bid opening officer is authorized to decide when the time set for opening has arrived by informing those present of that decision; the officer's declaration of the bid opening time is determinative unless it is shown to be unreasonable); *J. C. Kimberly Co.*, B-255018.2, 94-1 CPD ¶ 79 (Comp. Gen. Feb. 8, 1994); *Chattanooga Office Supply Co.*, B-228062, 87-2 CPD ¶ 221 (Comp. Gen. Sept. 3, 1987) (bid delivered 30 seconds after bid opening officer declared the arrival of the bid opening time is late);

b. The bid opening officer's declaration of the bid opening time is determinative unless it is shown to be unreasonable. *U.S. Aerospace, Inc.*, B-403464, B-403464.2, 2010 CPD ¶ 255 (Comp. Gen. Oct. 2, 2010) (the official time maintained by the agency is controlling absent a showing that it was unreasonable); Lani Eko & Company, CPAs, PLLC, B-404863, 2008 CPD ¶ 118 (Comp. Gen. June 6, 2011) (nothing inherently unreasonable with the agency's use of a security guard desk phone clock to determine the solicitation's closing time; no requirement for the time maintained by the agency to be synchronized with protester's personal cell phone or any other phone); *General Eng'g Corp.*, B-245476, 92-1 CPD ¶ 45 (Comp. Gen. Jan. 9, 1992) (may reasonably rely on the bid opening room clock when declaring bid opening time).

c. If the bid opening officer has not declared bid opening time, a bid is timely if delivered by the end of the minute specified for bid opening. *Amfel Constr., Inc.*, B-233493.2, 89-1 CPD ¶ 477 (Comp. Gen. May 18, 1989) (bid delivered within 20-50 seconds after bid opening clock "clicked" to the bid opening time was timely where bid opening officer had not declared bid submission period ended); *Reliable Builders, Inc.*, B-249908.2, 93-1 CPD ¶ 116 (Comp. Gen. Feb. 9, 1993) (bid which was time/date stamped one minute past time set for bid opening was timely since bidder relinquished control of bid at the exact time set for bid opening).

d. Arbitrary early or late bid opening is improper. *Chestnut Hill Constr. Inc.*, B-216891, 85-1 CPD ¶ 443 (Comp. Gen. Apr. 18, 1985) (importance of maintaining the integrity of the competitive bidding system outweighs any monetary savings that would be obtained by considering a late bid); *William F. Wilke, Inc.*, B-185544, 77-1 CPD ¶ 197 (Comp. Gen. Mar. 18, 1977).

4. Postponement of bid opening. FAR 14.208; FAR 14.402-3.

a. The government may postpone bid opening **before** the scheduled bid opening time by issuing an amendment to the IFB. FAR 14.208(a).

b. The government may postpone bid opening even **after** the time scheduled for bid opening if:

(1) **Segment of bids have been delayed in the mails.** The contracting officer has reason to believe that the bids of an important segment of bidders have been delayed in the mails for causes beyond their control and without their fault or negligence. FAR 14.402-3(a)(1); *see Ling Dynamic Sys., Inc.*, B-252091, 93-1 CPD ¶ 407 (Comp. Gen. May 24, 1993). The contracting officer publicly must announce postponement of bid opening and issue an amendment. FAR 14.402-3(b).

(2) **Emergency or unanticipated events** interrupt normal governmental processes so that the conduct of bid opening as scheduled is impractical. FAR 14.402-3(a)(2). If urgent requirements preclude amendment of the solicitation:

(a) the time for bid opening is deemed extended until the same time of day on the first normal work day on which Government processes resume; and

(b) the time of actual bid opening is the cutoff time for determining late bids. FAR 14.402-3(c).

(c) *Hunter Contracting Co.*, B-402575, 2010 CPD ¶ 93 (Comp. Gen. Mar. 31, 2010) (exception does not apply to a mailed proposal that was not delivered due to a snow storm because the government office was open and receiving proposals at the time proposals were due).

(d) *Conscoop—Consorzia v. US*, 62 Fed. Cl. 219 (2004) (exception applied if normal government processes were interrupted); *but see Watterson Constr. Co. v US*, 98 Fed.Cl. 84, 2011 WL 1137330 (Fed. Cl. Mar. 29, 2011) (recognizing no disruption in government processes but holding that the e-mail "storm" causing delay of delivery of e-mails constituted an "unanticipated event").

(e) Case Study:

Facts: Proposals were due by 2 p.m. on the designated day. Severe snowstorms closed the government in Washington D.C. on a day when proposals were scheduled to be received. The agency received proposals on the next day that the Government was open and resumed its normal processes. The agency continued to receive proposals until the designated time (*i.e.*, 2 p.m.) even though there was an authorized two-hour delayed arrival/unscheduled leave policy for government employees that day. Protester submitted its bid at 2:24 p.m. Is the bid late?

Yes. Held that agency acted reasonably as authorized by FAR § 52.212-1(f)(4) (Instructions to Offerors--Commercial Items (June 2008)); the fact that a two hour delayed arrival/unscheduled leave policy for government employees was authorized for that day did not mean normal government processes had not resumed. *CFS-INC, JV*, B-401809.2, 2010 CPD ¶ 85 (Comp. Gen. Mar. 31, 2010).

E. Amendment of IFB

1. The government must display amendments in the bid room and must send, before the time for bid opening, a copy of the amendment to everyone that received a copy of the original IFB. FAR 14.208(a).

2. Before amending an IFB, the period of time remaining until bid opening and the need to extend this period shall be considered and must be confirmed in the amendment. FAR 14.208(b).

3. If the government furnishes information to one prospective bidder concerning an IFB, it must furnish that same information to all other bidders as an amendment if (1) such information is necessary for bidders to submit bids or (2) the lack of such information would be prejudicial to uninformed bidders. FAR 14.208(c). *See Phillip Sitz Constr.*, B-245941, 92-1 CPD ¶ 101 (Comp. Gen. Jan. 22, 1992); *see also Republic Flooring*, B-242962, 91-1 CPD ¶ 579 (Comp. Gen. June 18, 1991).

F. The Firm Bid Rule

1. Distinguish common law rule, which allows an offeror to withdraw an offer any time prior to acceptance. *See* Restatement (Second) of Contracts § 42 (1981).

2. Firm Bid Rule:

a. After bid opening, bidders **may not withdraw** their bids during the period specified in the IFB, but must hold their bids open for government acceptance during the stated period. FAR 14.201-6(j) & 52.214-16.

b. If the solicitation requires a minimum bid acceptance period, a bid that offers a shorter acceptance period than the minimum is **nonresponsive**. *See Banknote Corp. of America, Inc.*, B-278514, 98-1 CPD ¶ 41(Comp. Gen. Feb. 4, 1998) (bidder offered 60-day bid acceptance period when solicitation required 180 days and solicitation advised bidders to disregard 60-day bid acceptance period provision contained elsewhere in the solicitation); see also *Hyman Brickle & Son, Inc.*, B-245646, 91-2 CPD ¶ 264 (Comp. Gen. Sept. 20, 1991) (30-day acceptance period offered instead of the required 120 days).

c. The bid acceptance period is a **material solicitation requirement**. The government may not waive the bid acceptance period because it affects the bidder's price. *Valley Constr. Co.*, B-243811, 91-2 CPD ¶ 138 (Comp. Gen. Aug. 7, 1991) (60-day period required, 30-day period offered).

d. A bid that fails to offer an unequivocal minimum bid acceptance period is ambiguous and nonresponsive. *See John P. Ingram Jr. & Assoc.*, B-250548, 93-1 CPD ¶ 117 (Comp. Gen. Feb. 9, 1993) (bid ambiguous even where bidder acknowledged amendment which changed minimum bid acceptance period); *but see Connecticut Laminating Company, Inc.*, B-274949.2, 99-2 CPD ¶ 108 (Comp. Gen. Dec. 13, 1999) (bid without bid acceptance period is construed as open for a reasonable period of time and is acceptable where solicitation did not require any minimum bid acceptance period).

e. Exceptions

(1) The government may accept a **solitary bid** that offers less than the minimum acceptance period. *Professional Materials Handling Co., -- Recon .*, B- 205969 (Comp. Gen. May 28, 1982).

(2) After the bid acceptance period expires, the bidder may extend the acceptance period only where the bidder would not obtain an advantage over other bidders. FAR 14-404-1(d). *See Capital Hill Reporting, Inc.*, B-254011.4, 94-1 CPD ¶ 232 (Comp. Gen. Mar. 17, 1994) (agency may properly request bidders to extend acceptance period, even where acceptance period has expired thus reviving expired bids, where such action does not compromise the integrity of the bidding system); *see also NECCO, Inc.*, B-258131, 94-2 CPD ¶ 218 (Comp. Gen. Nov. 30, 1994) (bidder ineligible for award where bid

expired due to bidder's offering a shorter extension period than requested by the agency and award was not made until a subsequent date, despite bidder's subsequent unilateral extension at the expiration of its first extension period).

G. Treatment of Late Bids, Bid Modifications, and Bid Withdrawals. FAR 14.304. "The Late Bid Rule."

1. Definition of "late" –

a. A "late" bid, bid modification, or bid withdrawal is one that is received in the office designated in the IFB **after** the exact time set for bid opening. FAR 14.304(a).

b. If the IFB does not specify a time, the time for receipt is 4:30 P.M., local time, for the designated government office. *Id.*

2. Timeliness of Bids and Solicitations. Both sealed bids and negotiated procurement proposals must be timely. Failure to submit either before the time specified in the IFB or IFP may make the bid or proposal "late" and therefore not eligible for award. More in-depth discussion of timeliness and exception to the "late is late" rule can be found in Chapter 34 of this Deskbook.

H. Modifications and Withdrawals of Bids.

1. When may offerors <u>modify</u> their bids?

a. **Before** bid opening: Bidders may modify their bids at any time before bid opening. FAR 14.303; FAR 52.214-7.

b. **After** bid opening: Bidders may modify their bids only if:

(1) One of the <u>exceptions to the Late Bid Rule</u> applies to the modification. FAR 14.304(b)(1); FAR 52.214-7(b). *See* FAR exceptions to Late Bid Rule at FAR 14.304(b)(1)(i), (ii), and (b)(2). Government Frustration Rule. *I & E Constr. Co.*, B-186766, 76-2 CPD ¶ 139 (Comp. Gen. Aug. 9, 1976).

(2) The government may also accept a late modification to an otherwise successful bid if it is <u>more favorable</u> to the government. FAR 14.304(b)(2); FAR 52.214-7(b)(2); *Environmental Tectonics Corp.*, B-225474, 87-1 CPD ¶ 175 (Comp. Gen. Feb. 17, 1987).

2. When may offerors <u>withdraw</u> their bids?

a. **Before** bid opening: Bidders may withdraw their bids at any time before bid opening. FAR 14.303 and 14.304(e); FAR 52.214-7.

b. **After** bid opening. Because of the Firm Bid Rule, bidders generally may withdraw their bids **only if** one of the exceptions to the Late Bid Rule applies. FAR 14.304(b)(1); FAR 52.214-7(b)(1).

3. The exceptions to the late bid rule apply to bid modifications and bid withdrawals only if the modification or withdrawal is received **prior to contract award**, unless it is a modification of the successful offeror's bid that makes its terms more favorable to the Government. FAR 14.304(b)(1); FAR 14.304(b)(2).

4. Transmission of modifications or withdrawals of bids. FAR 14.303 and FAR 52.214-7(e).

a. Offerors may modify or withdraw their bids by any method authorized by the solicitation, which must be received in the office designated in the invitation for bids before the exact time set for bid opening. FAR 14.303(a). *See R.F. Lusa & Sons Sheetmetal, Inc.*, B-281180.2, 98-2 CPD ¶ 157 Comp. Gen. Dec. 29, 1998) (unsigned/uninitiated inscription on outside envelope of bid not an effective bid modification because method was not authorized by the solicitation).

VII. EVALUATION OF BIDS.

A. Evaluation of **PRICE** – Lowest Priced Bid

1. Award made on basis of lowest price offered.

2. Contracting officer evaluates price and price-related factors. FAR 14.201-8.

3. The bidder must offer a firm, fixed price. FAR 14.104.

4. <u>Evaluating Bids with Options</u>. Evaluate bid prices by adding the total price of the options to the price of the basic requirement, unless such an evaluation is not in "the government's best interests." FAR 17.206. *Kruger Construction Inc.*, Comp. Gen. B-286960, 2001 CPD ¶ 43 (Comp. Gen. Mar. 15, 2001) (not in the government's best interests to add two option prices when options were alternative). *See also, TNT Industrial Contractors, Inc.*, B-288331, 2001 CPD ¶ 155 (Comp. Gen. Sep. 25, 2001). *See also, Glen Mar Construction Inc.*, B-410603, 2015 CPD ¶ 40 (Comp. Gen. Jan. 14, 2015) (Protest sustained where agency knew with reasonable certainty it lacked sufficient funds to purchase all of the

additive option items and did not have a reasonable basis for using base construction price, and bid price for options. The agency should have selected a bidder for award based on the base price and options it knew with reasonable certainty it would exercise.)

5. Check for Unbalanced Pricing. A materially unbalanced bid contains inflated prices for some contract line items and below-cost prices for other line items, and gives rise to a reasonable doubt that award will result in the lowest overall cost to the government. FAR 14.404-2(g); *LBCO, Inc.*, B-254995, 94-1 CPD ¶ 57 (Comp. Gen. Feb. 1, 1994) (inflated first article prices); *Semont Travel, Inc.*, B-291179, 2002 CPD ¶ 200 (Comp. Gen. Nov. 20, 2002). The government **may reject** a materially unbalanced bid if the bid poses an **unreasonable risk** to the government. FAR 14.404-2(g) A materially unbalanced bid may be unreasonable if it will result in unreasonably high prices for contract performance. *Serco, Inc.*, B-406683, B-406683.2, 2012 CPD ¶ 216 at 10 (Comp. Gen. Aug. 3, 2012) (noting that, where an unbalanced offer is received, agencies are not required to reject it, but should consider the risk to the government of unreasonably high prices for contract performance); FAR 14.404-2(f); *Cherokee Painting, LLC*, B-311020.3, 2009 CPD ¶ 18 (Comp. Gen. January 14, 2009); *Accumark Inc.*, B-310814, 2008 CPD ¶ 68 (Comp. Gen. Feb. 13, 2008). *See also, Ultimate Concrete, L.L.C.*, B-412255.2, 2016 CPD ¶ 20 (Comp. Gen. Jan. 13, 2016) (agency reasonably determined that awardee's bid was not materially unbalanced and did not present an unacceptable risk to the government. However, the agency improperly allowed bidder to reallocate its bid.)

6. Unreasonably Low Pricing. The contracting officer must always determine that the prices offered are reasonable in light of all prevailing circumstances before awarding a contract. Particular care should be taken if only one bid is received. FAR 14.408-2.

   a. If a price appears unreasonably low, it could indicate an error. The contracting officer should immediately request the bidder verify the bid. The bidder should be advised, as appropriate, that its bid is so much lower than the other bids or the government's estimate as to indicate a possibility of error. FAR 14.407-3. See below for discussion on bid mistakes.

   b. Unreasonably low prices can pose a serious risk to the government if the contractor doesn't understand the work, cuts corners on product quality or defaults on the work part way through performance. FAR 9.103(c). An unreasonably low price may render the bidder non-responsible in some instances. *See Atlantic Maint., Inc.*, B-239621.2, 90-1 CPD ¶ 523 (Comp. Gen. Jun. 1, 1990) (an unreasonably low price may render bidder non-

responsible); *but see The Galveston Aviation Weather Partnership*, B-252014.2, 93-1 CPD ¶ 370 (Comp. Gen. May 5, 1993) (below-cost bid not legally objectionable, even when offering labor rates lower than those required by the Service Contract Act.) *See also JCMCS*, B-409407, 2014 CPD ¶ 125 (Comp. Gen. Apr. 8, 2014) (below cost bid not improper and provides no basis for challenging award; whether a bidder can perform, even where the bid price is below cost, involves an affirmative agency responsibility determination). For a further discussion of how responsibility determinations are made, see below.

c. The Contracting officer has the option of rejecting a bid if he determines, in writing, that the price is unreasonable. He may consider not only the total price of the bid, but also the prices for individual line items. FAR 14.404-2(f).

d. If the contracting officer rejects the bid and the firm protests, GAO considers the determination of price reasonableness to be within the agency's discretion and it will not be disturbed unless the determination is unreasonable or the record shows that it is the result of fraud or bad faith on the part of the contracting officials. *See G. Marine Diesel Corp.*, B-238703, B-238704, 90-1 CPD ¶ 515 (Comp. Gen. May 31, 1990); *Joint Venture Penauille/BMAR & Associates, LLC*, B-311200, B-311200.2, 2008 CPD ¶ 118 (Comp. Gen. May 12, 2008) (protest sustained where agency concluded, without explanation, that a low price suggested a lack of understanding of the requirements).

B. Evaluation of **RESPONSIVENESS** of Bids. 10 U.S.C. § 2305.

1. Rule. The government may accept only a responsive bid.

a. The government must reject any bid that fails to conform to the essential requirements of the IFB. FAR 14.301(a); FAR 14.404-2.

b. The government may not accept a nonresponsive bid even though it would result in monetary savings to the government since acceptance would compromise the integrity of the bidding system. *MIBO Constr. Co.*, B-224744, 86-2 CPD ¶ 678 (Comp. Gen. Dec. 17, 1986).

2. When is responsiveness determined?

a. The contracting officer determines the responsiveness of each bid at the **time of bid opening** by ascertaining whether the bid meets all of the IFB's essential requirements. *See Gelco Payment Sys., Inc.*, B-234957, 89-2 CPD ¶ 27 (Comp. Gen. July 10, 1989). *See*

also Stanger Indus. Inc., B-279380, 98-1 CPD ¶157 (Comp. Gen. June 4, 1998) (agency improperly rejected low bid that used unamended bid schedule that had been corrected by amendment where bidder acknowledged amendments and bid itself committed bidder to perform in accordance with IFB requirements).

2. What is a responsive bid?

   b. A bid is "responsive" if it unequivocally offers to provide the requested supplies or services IAW the terms and conditions outlined in the IFB.

   c. A bid is "responsive" unless something on the face of the bid limits, reduces, or modifies the obligation to perform in accordance with the terms of the invitation.

3. Essential requirements of responsiveness. FAR 14.301; FAR 14.404-2; FAR 14.405.

   a. **Price**. The bidder must offer a firm, fixed price, including all fees and taxes. FAR 14.404-2(d); *United States Coast Guard—Advance Decision*, B-252396, 93-1 CPD ¶ 286 (Comp. Gen. Mar. 31, 1993) (bid nonresponsive where price included fee of $1,000 per hour for "additional unscheduled testing" by government); *J & W Welding & Fabrication*, B-209430, 83-1 CPD ¶ 92 (Comp. Gen. Jan. 25, 1983) (bid was nonresponsive where bid price included a term stating "plus 5% sales tax if applicable").

   b. **Quantity**. The bidder must offer the quantity required in the IFB. FAR 14.404-2(b). *Inscom Elec. Corp.*, B-225221, 87-1 CPD ¶ 116 (Comp. Gen. Feb. 4, 1987) (bid limited government's right to reduce quantity under the IFB); *Pluribus Prod., Inc.*, B-224435, 86-2 CPD ¶ 536 (Comp. Gen. Nov. 7, 1986).

   c. **Quality**. The bidder must agree to meet the quality requirements of the IFB, no more – no less. FAR 14.404-2(b); *Dow Electr. Inc. v. US*, 98 Fed. Cl. 688 (2011) (because agency was not obligated to participate in any discussions once bids were submitted, agency properly rejected bid where bidder proposed electrical panels that it argues were equivalent to those required in the IFB); *Reliable Mechanical, Inc; Way Eng'g Co.*, B-258231, 94-2 CPD ¶ 263 (Comp. Gen. Dec. 29, 1994) (bidder offered chiller system which did not meet specifications); *Wyoming Weavers, Inc.*, B-229669.3, 88-1 CPD ¶ 519 (Comp. Gen. June 2, 1988).

d. **Delivery**. The bidder must agree to the delivery schedule. FAR 14.404-2(c); *Valley Forge Flag Company, Inc.*, B-283130, 99-2 CPD ¶54 (Comp. Gen. Sept. 22, 1999) (bid nonresponsive where bidder inserts delivery schedule in bid that differs from that requested in the IFB); *Viereck Co.*, B-256175, 94-1 CPD ¶ 310 (Comp. Gen. May 16, 1994) (bid nonresponsive where bidder agreed to 60-day delivery date only if the cover page of the contract were faxed on the day of contract award). *But see Image Contracting*, B-253038, 93-2 CPD ¶ 95 (Comp. Gen. Aug. 11, 1993) (bidder's failure to designate which of two locations it intended to deliver did not render bid nonresponsive where IFB permitted delivery to either location).

4. Other bases for rejection of bids for being nonresponsive.

a. Signature on bid.

(1) General rule: Failure to sign the bid is not a minor irregularity, and the government must reject the unsigned bid. *See Firth Constr. Co. v. United States*, 36 Fed. Cl. 268 (1996) (no signature on SF 1442); *Power Master Elec. Co.*, B-223995, 86-2 CPD ¶ 615 (Comp. Gen. Nov. 26, 1986) (typewritten name); *Valencia Technical Serv., Inc.*, B-223288, 86-2 CPD ¶ 40 (Comp. Gen. July 7, 1986) ("Blank" signature block); *but see PCI/RCI v. United States*, 36 Fed. Cl. 761 (1996) (one partner may bind a joint venture).

(2) Exception. If the bidder has manifested an intent to be bound by the bid, the failure to sign is a minor irregularity. FAR 14.405(c).

(a) Adopted alternative. *A & E Indus.*, B-239846, 90-1 CPD ¶ 527 (Comp. Gen. May 31, 1990) (bid signed with a rubber stamp signature must be accompanied by evidence authorizing use of the rubber stamp signature).

(b) Other signed materials included in bid. *Johnny F. Smith Truck & Dragline Serv., Inc.*, B-252136, 93-1 CPD ¶ 427 (Comp. Gen. June 3, 1993) (signed certificate of procurement integrity); *Tilley Constructors & Eng'rs, Inc.*, B-251335.2, 93-1 CPD ¶ 289 (Comp. Gen. Apr. 2, 1993); *Cable Consultants, Inc.*, B-215138, 84-2 CPD ¶ 127 (Comp. Gen. July 30, 1984).

b. Failure to acknowledge amendment of IFB.

(1) General rule: Failure to acknowledge a **material** amendment renders the bid nonresponsive. *MG Mako, Inc.*, B-404758, 2011 CPD ¶ 88 (Comp. Gen. Apr. 28, 2011).

(2) Exception: An amendment that is nonessential or trivial need not be acknowledged. FAR 14.405(d)(2); *Lumus Construction, Inc.*, B-287480, 2001 CPD ¶ 108 (Comp. Gen. June 25, 2001) (Where an "amendment does not impose any legal obligations on the bidder different from those imposed by the original solicitation," the amendment is not material); *Jackson Enterprises*, B-286688, 2001 CPD ¶ 25 (Comp. Gen. Feb. 5, 2001); *L&R Rail Serv.*, B-256341, 94-1 CPD ¶ 356 (Comp. Gen. June 10, 1994) (amendment decreasing cost of performance not material); *Day & Night Janitorial & Maid Serv., Inc.*, B-240881, 91-1 CPD ¶ 1 (Comp. Gen. Jan. 2, 1991) (negligible effect on price, quantity, quality, or delivery).

(3) Materiality. An amendment is material if it imposes legal obligations on a party that are different from those contained in the original solicitation, or if it would have more than a negligible impact on price, quantity, quality, or delivery. *ECI Defense Group*, B-400177; B-400177.2, 2008 CPD ¶ 141 (Comp. Gen. July 25, 2008) (finding a material amendment where the amendment changed the guaranteed minimum quantity for the base year of a contract from 25 percent to 99 percent of the total estimated quantity under the contract).

(4) *See Christolow Fire Protection Sys.*, B-286585, 2001 CPD ¶ 13 (Comp. Gen. Jan. 12, 2001) (Amendments "clarifying matters that could otherwise engender disputes during contract performance are generally material and must be acknowledged." Amendment revising inaccurate information in bid schedule regarding number, types of, and response times applicable to service calls was material.); *Environmediation Srvcs., LLC*, B-280643, 98-2 CPD ¶ 103 (Comp. Gen. Nov. 2, 1998); *see also Logistics & Computer Consultants Inc.*, B-253949, 93-2 CPD ¶ 250 (Comp. Gen. Oct. 26, 1993) (amendment placing additional obligations on contractor under a management contract); *Safe-T-Play, Inc.*, B-250682.2, 93-1 CPD ¶ 292 (Comp. Gen. Apr. 5, 1993) (amendment classifying workers under Davis-Bacon Act).

(5) Even if an amendment has no clear effect on the contract price, it is material if it changes the legal relationship of the parties. *Specialty Contractors, Inc.*, B-258451, 95-1 CPD ¶ 38 (Comp. Gen. Jan. 24, 1995) (amendment changing color of roofing panels was material); *Anacomp, Inc.*, B-256788, 94-2 CPD ¶ 44 (Comp. Gen. July 27, 1994) (amendment requiring contractor to pickup computer tapes on "next business day" when regular pickup day was a federal holiday); *Favino Mechanical Constr., Ltd.*, B-237511, 90-1 CPD ¶ 174 (Comp. Gen. Feb. 9, 1990) (amendment incorporating Order of Precedence clause).

(6) How does a bidder acknowledge an amendment?

(a) In writing only. Oral acknowledgement of an amendment is insufficient. *Alcon, Inc.*, B-228409, 88-1 CPD ¶ 114 (Comp. Gen. Feb. 5, 1988).

(b) Formal acknowledgement.

(i) Sign and return a copy of the amendment to the contracting officer.

(ii) Standard Form 33, Block 14.

(iii) Notify the government by letter or by telegram of receipt of the amendment.

(c) Constructive acknowledgement. The contracting officer may accept a bid that clearly indicates that the bidder received the amendment. *C Constr. Co.*, B-228038, 87-2 CPD ¶ 534 (Comp. Gen. Dec. 2, 1987).

c. Failure to strictly follow the IFB instructions. *ATR Logistics Co. LLC*, B-402606, 2010 CPD ¶ 140 (Comp. Gen. June 15, 2010) (bid failed to comply in all material respects with IFB where IFB required unit prices for each CLIN; amendment added a sub-CLIN to each CLIN; bidder acknowledged amendment but did not revise bidding schedule); *SNAP, Inc.*, B-402746, 2010 CPD ¶ 165 (Comp. Gen. July 16, 2010) (agency properly rejected proposal where proposals did not redact all identifying information as required by the solicitation).

d. Ambiguous, indefinite, or uncertain bids. FAR 14.404-2(d); *Dow Electr. Inc. v. US*, 98 Fed. Cl. 688 (2011) (properly rejected bid where discussions would have been necessary to determine

whether proposed electrical panels were equivalent to those required in the IFB); *Trade-Winds Envtl. Restoration, Inc.*, B-259091, 95-1 CPD ¶ 127 (Comp. Gen. Mar. 3, 1995) (bid contained inconsistent prices); *Caldwell & Santmyer, Inc.*, B-260628, 95-2 CPD ¶ 1 (Comp. Gen. July 3, 1995) (uncertainty as to identity of bidder); *Reid & Gary Strickland Co.*, B-239700, 90-2 CPD ¶ 222 (Comp. Gen. Sept. 17, 1990) (notation in bid ambiguous); *New Shawmut Timber* Co., B-286881, 2001 CPD ¶ 42 (Comp. Gen. Feb. 26, 2001) (bid was nonresponsive where blank line item "rendered the bid equivocal regarding whether [protestor] intended to obligate itself to perform that element of the requirement").

e. Variation of acceptance period. *John's Janitorial Serv.*, B-219194, 85-2 CPD ¶ 20 (Comp. Gen. July 2, 1985).

f. Placing a "confidential" stamp on bid. *Concept Automation, Inc. v. General Accounting Office*, GSBCA No. 11688-P, Mar. 31, 1992, 92-2 BCA ¶ 24,937. *But see North Am. Resource Recovery Corp.*, B-254485, 93-2 CPD ¶ 327 (Comp. Gen. Dec. 17, 1993) ("proprietary data" notation on cover of bid did not restrict public disclosure of the bid where no pages of the bid were marked as proprietary).

g. Bid conditioned on receipt of local license. *National Ambulance Co.*, B-184439, 75-2 CPD ¶ 413 (Comp. Gen. Dec. 29, 1975).

h. Requiring government to make progress payments. *Vertiflite, Inc.*, B-256366, 94-1 CPD ¶ 304 (Comp. Gen. May 12, 1994).

i. Failure to furnish required or adequate bid guarantee.

(1) Bid Guarantee. A form of security ensuring that a bidder will, (1) not withdraw a bid within the period specified for acceptance, and (2) if required, execute a written contract and furnish payment and performance bonds within the time period specified in the solicitation. FAR § 28.001.

(2) A bid guarantee is also available to offset the cost of reprocurement of the goods and services. Where the guarantee is in the form of a bid bond, it secures the liability of the surety to the government if the holder of the bond fails to fulfill these obligations. The surety for a bid bond can be either an individual surety or a corporate surety, although there are different requirements for each.

Paradise Constr. Co., B-289144, 2001 CPD ¶ 192 (Comp. Gen. Nov. 26, 2001). *See generally* FAR Part 28.

(3) Policy. Where a solicitation requires a bidder to submit a bid guarantee with the bid, and the bidder fails to do so (and no exception applies), the bid must be rejected. Affording a bidder the opportunity to supply its bid guarantee later provides the bidder the option of accepting or rejecting the award by either correcting or not correcting a deficiency after award, which would be inconsistent with the sealed bidding system. *Simont S.p.A.*, B-400481, 2008 CPD ¶ 179 (Comp. Gen. Oct. 1, 2008) (agency properly found bidder non-responsive for failing to submit a bid guarantee notwithstanding a patent error to a mislabeled IFB amendment stated a bid guarantee was being deleted). *See also*, *Hamilton Pacific Chamberlain, LLC*, B-409795, 2014 CPD ¶ 227 (Comp. Gen. Aug. 11, 2014) (awardee's failure to submit an original bid guarantee at bid opening when the IFB require submission of a bid guarantee could not be waived and rendered the bid nonresponsive).

(4) *Interstate Rock Products, Inc. v. United States*, 50 Fed. Cl. 349 (2001) (COFC seconded a long line of GAO decisions holding that "the penal sum [of a bid bond] is a material term of the contract (the bid bond) and therefore its omission is a material defect rendering the bid nonresponsive); *Schrepfer Industries, Inc.*, B-286825, 2001 CPD ¶ 23 (Comp. Gen. Feb. 12, 2001) (photocopied power of attorney unacceptable); *Quantum Constr., Inc.*, B-255049, 93-2 CPD ¶ 304 (Comp. Gen. Dec. 1, 1993) (defective power of attorney submitted with bid bond); *Kinetic Builders, Inc.*, B-223594, 86-2 CPD ¶ 342 (Comp. Gen. Sept. 24, 1986) (bond referenced another solicitation number); *Clyde McHenry, Inc.*, B-224169, 86-2 CPD ¶ 352 (Comp. Gen. Sept. 25, 1986) (surety's obligation under bond unclear). *But see*, FAR 28.101-4(c) (setting forth nine exceptions to the FAR's general requirement to reject bids with noncompliant bid guarantees); *South Atlantic Construction Company, LLC.*, B-286592.2, 2001 CPD ¶ 63 (Comp. Gen. Apr. 13, 2001); *Hostetter, Keach & Cassada Constr.,LLC*, B-403329, 2010 CPB ¶ 246 (Comp. Gen. Oct. 15, 2010) (responsive despite discrepancy in the names of the bidder and bid bond principal where the record shows that the two are the same entity so that it is certain that the surety would be liable to the government).

(5) *All Seasons Construction, Inc. v. United States*, 55 Fed. Cl. 175 (2003) (all documents accompanying a bid bond, including the power of attorney appointing the attorney-in-fact, must unequivocally establish, at bid opening, that the bond is enforceable against the surety).

(6) Example: An individual surety with assets described as an "allocated portion of $191,350,000.00 of previously mined, extracted, stockpiled and marketable coal, located on property X" is not a valid bid bond because the assets are not able to be placed in an escrow account. The government's interest in a security asset in escrow must be made perfect through filing, rather than by taking possession. *Tip Top Construction Corporation*, B-311305, 2008 CPD ¶ 91 (Comp. Gen. May 2, 2008). FAR 28.203-1.

(7) Example: Bidder's pledge of allocated portion of previously mined, extracted, stockpiled, and marketable coal located on surety's property was not acceptable asset under FAR 28.203-2(b), (c) because coal was a speculative asset with value highly dependent upon variables such as type, quality, and provenance of coal proffered, rather than assert that was readily marketable with identifiable value and liquidity. *Tip Top Constr. Corp. v. United States*, 563 F.3d 1338 (2009).

j. Exception to liquidated damages. *Dubie-Clark Co.*, B-186918, 76-2 CPD ¶ 194 (Comp. Gen. Aug. 26, 1976).

k. Solicitation requires free on board (F.O.B.) *destination* (contractor responsible for shipping costs and liability); bid states F.O.B. *origin* (government responsible for shipping costs and liability). *Taylor-Forge Eng'd Sys., Inc.*, B-236408, 89-2 CPD ¶ 421 (Comp. Gen. Nov. 3, 1989).

l. Descriptive Literature. Contracting Officers must not require bidders to furnish descriptive literature unless it is needed before award to determine whether the products offered meet the specifications and to establish exactly what the bidder proposes to furnish. *See* FAR 14.202-5 and 52.214-21. *Adrian Supply Co.*, B-250767, 93-1 CPD ¶ 131 (Comp. Gen. Feb. 12, 1993). **NOTE**: The contracting officer generally should disregard **unsolicited** descriptive literature. However, if the unsolicited literature raises questions reasonably as to whether the offered product complies with a material requirement of the IFB, the bid should be rejected

as nonresponsive. FAR 14.202-5(e); FAR 14.202-4(f); *Delta Chem. Corp.*, B-255543, 94-1 CPD ¶ 175 (Comp. Gen.) Mar. 4, 1994); *Amjay Chems.*, B-252502, 93-1 CPD ¶ 426 (Comp. Gen. May 28, 1993).

m. Conditional terms. *Tel-Instrument Electronics Corp.* 56 Fed. Cl. 174 (2003) (a bid conditioned on the use of equipment not included in the solicitation, requiring special payment terms, or limiting its warranty obligation modifies a material requirement and is nonresponsive); *New Dimension Masonry, Inc.*, B-258876, 95-1 CPD ¶ 102 (Comp. Gen. Feb. 21, 1995) (statements in cover letter limiting rights of the government expressly reserved in the solicitation conditioned the bid).

n. Objection to indemnification requirements changed legal relationship anticipated in IFB. *Metric Sys. Corp.*, B-256343, 94-1 CPD ¶ 360 (Comp. Gen. June 10, 1994) (bidder's exception to IFB indemnification requirements changed legal relationship between parties).

C. Minor Informalities or Irregularities in Bids. FAR 14.405.

1. Rule. Discretionary decision—the contracting officer shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the government's advantage. FAR 14.405; *Excavation Constr. Inc. v. US*, 494 F.2d 1289 (Ct. Cl. 1974).

2. What is a minor irregularity?

a. **Definition**: A minor informality or irregularity is merely a matter of form, not of substance. The defect or variation is immaterial when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of supplies or services acquired. FAR 14.405.

b. To determine whether a defect or variation is immaterial, review the facts of the case with the following considerations:

(1) whether item is divisible from solicitation requirements;

(2) whether cost of item is *de minimis* as to contractor's total cost; and

(3) whether waiver or correction clearly would not affect competitive standing of bidders.

Red John's Stone Inc., B-280974, 98-2 CPD ¶ 135 (Comp. Gen. Dec. 14, 1998).

c. Examples of minor irregularities.

(1) Failure to return the number of copies of signed bids required by the IFB. FAR 14.405(a).

(2) Failure to furnish required information concerning the number of an employer's employees. FAR 14.405(b)

(3) Failure to sign the bid if it is accompanied by other material indicating the bidder's intention to be bound by the unsigned bid; or the firm submitting a bid has formally adopted or authorized, before date of bid opening, the execution of documents by typewritten, printed, or stamped signature, submitted evidence of the authorization and the bid carries such a signature. FAR 14.405(c).

(4) Failure to submit employer identification number. *Dyneteria, Inc.*, B-186823, 76-2 CPD ¶ 338 (Comp. Gen. Oct. 18, 1976).

(5) Mere discrepancy in the names of the bidder and bid bond principal is a minor informality where the record shows that the two are the same entity so that it is certain that the surety would be liable to the government. *Hostetter, Keach & Cassada Constr., LLC*, B-403329, 2010 CPB ¶ 246 (Comp. Gen. Oct. 15, 2010).

(6) Use of abbreviated corporate name if the bid otherwise establishes the identity of the party to be bound by contract award. *Americorp*, B-232688, 88-2 CPD ¶ 515 (Comp. Gen. Nov. 23, 1988) (bid also gave Federal Employee Identification Number).

(7) Failure to certify as a small business on a small business set-aside. *See J. Morris & Assocs.*, B-259767, 95-1 CPD ¶ 213 (Comp. Gen. Apr. 25, 1995) (bidder may correct erroneous certification after bid opening where a bidder's actual status is clear).

(8) Failure of initial bid correction. *Durden & Fulton, Inc.*, B-192203, 78-2 CPD ¶ 172 (Comp. Gen. Sept. 5, 1978).

(9) Failure to price individually each line item on a contract to be awarded on an "all or none" basis. *See Seaward Corp.*,

B-237107.2, 90-1 CPD ¶ 552 (Comp. Gen. June 13, 1990); *see also Vista Contracting, Inc.*, B-255267, Jan. 7, 1994, 94-1 CPD ¶ 61 (failure to indicate cumulative bid price where bid pricing schedule is complete and bidder's total price offer is easily determined on face of bid documents).

(10) Failure to furnish information with bid, if the information is not necessary to evaluate bid and bidder is bound to perform in accordance with the IFB. *W.M. Schlosser Co.*, B-258284, 94-2 CPD ¶ 234 (Comp. Gen. Dec. 12, 1994) (equipment history not submitted); *but see Booth & Assocs., Inc. - - Advisory Opinion*, B-277477.2, 98-1 CPD ¶104 (Comp. Gen. Mar. 27, 1998) (agency properly reinstated bid previously rejected as non-responsive where bidder failed to include completed supplemental schedule of hourly rates but schedule was not used in the bid price evaluation and omission did not affect the bidder's promise to perform as specified).

(11) Negligible variation in quantity. *Alco Envtl. Servs., Inc.*, ASBCA No. 43183, 94-1 BCA ¶ 26,261 (variation in IFB quantity of .27 percent).

(12) Failure to acknowledge amendment of the solicitation if the bid is clearly based on the IFB as amended, or the amendment is a matter of form or has a negligible impact on the cost of contract performance. *See* FAR 14.405(d).

(13) Submission of prices for work to be deleted rather than prices for work remaining was a waivable minor informality as the remaining work could easily be ascertained from the face of the contractor's bid. *JOCH Construction*, B-410980, B-410980.2, 2015 CPD ¶ 126 (Comp. Gen. Apr 7, 2015).

(14) Errors in line numbering on second page of bid schedule was found to be minor informality and immaterial, thus waived by the contracting officer. *Rush Constr., Inc. v. United States*, 117 Fed. Cl. 85 (2014) (finding GAO to be irrational); *but see* Matter of: *C&D Constr., Inc.*, B-408930.2, 2014 CPD ¶ 69 (Comp. Gen. Feb. 14, 2014). (finding the contracting officer improperly waived bidder's mistake).

3. 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, 88-2 CPD ¶ 170 (Comp. Gen. Aug. 22, 1988); *but see International Serv. Assocs.*, B-253050, 93-2 CPD ¶ 82 (Comp. Gen. Aug. 4, 1993) (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 state and local regulations, compliance with such regulations is a pre-requisite to award. *Washington Petrol Serv., Inc.*, B-195900, 80-2 CPD ¶ 132 (Comp. Gen. Aug. 19, 1980); *James C. Bateman Petroleum Serv., Inc.*, B-232325, 88-2 CPD ¶ 170 (Comp. Gen. Aug. 22, 1988).

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, 88-1 CPD ¶ 6 (Comp. Gen. Jan. 6, 1988).

(3) Submission of lobby certification. *Tennier Indus.*, B-239025, 90-2 CPD ¶ 25 (Comp. Gen. July 16, 1990).

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, 85-1 CPD ¶ 464 (Comp. Gen. Apr. 23, 1985). For more information see Chapter 34.

D. Mistakes in Bids Asserted Before Award. FAR 14.407-1.

1. General rule.

a. A bidder bears the consequences of a mistake in its bid unless the contracting officer has **actual or constructive notice** of the mistake prior to award. *Advanced Images, Inc.*, B-209438.2, 83-1 CPD ¶ 495 (Comp. Gen. May 10, 1983).

b. After bid opening, the government may permit the bidder to remedy certain substantive mistakes affecting price and price-related factors by correction or withdrawal of the bid.

2. Mistakes in bid that **ARE** correctable.

a. A clerical or arithmetic error apparent on its face in the bid normally is correctable or may be a basis for withdrawal. FAR 14.407-2.

b. FAR examples: obvious misplacement of a decimal point; obviously incorrect discounts; obvious reversal of the price F.O.B. destination and price F.O.B. origin; and obvious mistake in designation of unit. FAR 14.407-2(a)(1)-(4).

c. *United Digital Networks, Inc.*, B-222422, 86-2 CPD ¶ 79 (Comp. Gen. July 17, 1986) (multiplication error); *but see Virginia Beach Air Conditioning Corp.*, B-237172, 90-1 CPD ¶ 78 (Comp. Gen. Jan. 19, 1990) (bid susceptible to two interpretations—correction improper).

3. Mistakes in bid that are **NOT** correctable.

a. Errors in judgment. *R.P. Richards Constr. Co.*, B-274859.2, 97-1 CPD ¶ 39 (Comp. Gen. Jan. 22, 1997) (bidder's misreading of a subcontractor quote and reliance on its own extremely low estimate for certain work were mistakes in judgment); *Central Builders, Inc.*, B-229744, 88-1 CPD ¶ 195 (Comp. Gen. Feb. 25, 1988) (bid may not be corrected after bid opening where the bid submitted was the bid intended, even though it was later discovered that the bid was revised lower based upon an erroneous interpretation of the specifications); *but see, Ultimate Concrete,*

L.L.C., B-412255.2, 2016 CPD ¶ 20 (Comp. Gen. Jan. 13, 2016) (agency improperly allowed bidder to reallocate prices among contract line item numbers after bid submission without clear and convincing evidence of awardee's intended allocation of contract line item number prices).

b. Omission of items from the bid. *McGhee Constr., Inc.*, B-255863, 94-1 CPD ¶ 254 (Comp. Gen. Apr. 13, 1994) (bid may not be corrected after bid opening where the bidder did not intend to include in its bid any additional amounts for the work involved); *but see Pacific Components, Inc.*, B-252585, 93-1 CPD ¶ 478 (Comp. Gen. June 21, 1993) (bid correction permitted to revise bid upwards for mistake due to omissions from subcontractor quotation).

c. Nonresponsive bid. FAR 14.407-3. *Temp Air Co., Inc.*, B-279837, 98-2 CPD ¶ 1 (Comp. Gen. Jul. 2, 1998) (bid could not be made responsive by post-bid opening explanation or correction).

d. *Virginia Beach Air Conditioning Corp.*, B-237172, 90-1 CPD ¶ 78 (Comp. Gen. Jan. 19, 1990) (bid susceptible to two interpretations—correction improper).

4. Only the government and the bidder responsible for the alleged mistake have standing to raise the issue of a mistake. *Reliable Trash Serv., Inc.*, B-258208, 94-2 CPD ¶ 252 (Comp. Gen. Dec. 20, 1994).

5. Contracting Officer's responsibilities.

a. **Examine each bid for mistakes**. FAR 14.407-1; *Andy Elec. Co.—Recon.*, B-194610.2, 81-2 CPD ¶ 111 (Comp. Gen. Aug. 10, 1981).

(1) **Actual** notice of mistake in a bid. FAR 14.407-3.

(2) **Constructive** notice of mistake in a bid, *e.g.*, price disparity among bids or comparison with government estimate. *R.J. Sanders, Inc. v. United States*, 24 Cl. Ct. 288 (1991) (bid 32% below government estimate insufficient to place contracting officer on notice of mistake in bid); *Central Mechanical, Inc.*, B-206250, 82-2 CPD ¶ 547 (Comp. Gen. Dec. 20, 1982) (allocation of price out of proportion to other bidders).

b. Verify bid if reason to believe it contains a mistake. FAR 14.407-1 and 14.407-3(g)

(1) *When does the duty arise? CTA Inc. v. U.S.* 44 Fed.Cl. 684, 694 (Fed. Cl. 1999) (government's duty to warn arises only when the government either knew or should have known that a bid contains a mathematical or typographical error or is based on a misreading of the contract specifications).

(2) How does the contracting officer put the bidder on notice? To ensure that the bidder is put on notice of the suspected mistake, the contracting officer must advise the bidder of all disclosable information that leads the contracting officer to believe that there is a mistake in the bid. *Liebherr Crane Corp.*, ASBCA No. 24707, 85-3 BCA ¶ 18,353, *aff'd* 810 F.2d 1153 (Fed. Cir. 1987) (procedure inadequate); *but see Foley Co.*, B-258659, 95-1 CPD ¶ 58 (Comp. Gen. Feb. 8, 1995) (bidder should be allowed an opportunity to explain its bid); *DWS, Inc.*, ASBCA No. 29743, 93-1 BCA ¶ 25,404 (particular price need not be mentioned in bid verification notice).

(3) What is the effect of bidder verification? Verification generally binds the contractor unless the discrepancy is so great that acceptance of the bid would be unfair to the submitter or to other bidders. *Trataros Constr., Inc.*, B-254600, 94-1 CPD ¶ 1 (Comp. Gen. Jan. 4, 1994) (contracting officer properly rejected verified bid that was far out of line with other bids and the government estimate); *but see Foley Co.*, B-258659, 95-1 CPD ¶ 58 (Comp. Gen. Feb. 8, 1995) (government improperly rejected low bid where there was no evidence of mistake); *Aztech Elec., Inc. and Rod's Elec., Inc.*, B-223630, 86-2 CPD ¶ 368 (Comp. Gen. Sept. 30, 1986) (below-cost bid is a matter of business judgment, not an obvious error requiring rejection).

(4) What if the contracting officer fails to obtain adequate verification? If the contracting officer fails to obtain adequate verification of a bid for which the government has actual or constructive notice of a mistake, the contractor may seek additional compensation or rescission of the contract. *See, e.g., Solar Foam Insulation*, ASBCA No. 46921, 94-2 BCA ¶ 26,901.

c. The contracting officer may not award a contract to a bidder when the contracting officer has actual or constructive notice of a mistake in the bid, unless the mistake is waived or the bid is

properly corrected in accordance with agency procedures. *Sealtite Corp.*, ASBCA No. 25805, 83-1 BCA ¶ 16,243.

6. **Correcting mistakes PRIOR** to award. FAR 14.407-2; 14.407-3.

a. The bidder alleging the mistake has the burden of proof. *VA—Advance Decision*, B-225815.2, 87-2 CPD ¶ 362 (Comp. Gen. Oct. 15, 1987).

b. Apparent clerical mistakes. FAR 14.407-2.

(1) General Rule: Contracting officer may correct, before award, any clerical mistake apparent on the face of the bid. FAR 14.407-2(a).

(2) However, the contracting officer must first obtain verification of the bid from the bidder. FAR 14.407-2(a).

(3) *Brazos Roofing, Inc.*, B-275319, 97-1 CPD ¶ 66 (Comp. Gen. Feb. 7, 1997) (incorrect entry of base price used in calculation of option year prices was an obvious transcription error); *Action Serv. Corp.*, B-254861, 94-1 CPD ¶ 33 (Comp. Gen. Jan. 24, 1994) (additional zero); *Sovran Constr. Co.*, B-242104, 91-1 CPD ¶ 295 (Comp. Gen. Mar. 18, 1991) (cumulative pricing); *Engle Acoustic & Tile, Inc.*, B-190467, 78-1 CPD ¶ 72 (Comp. Gen. Jan. 27, 1978) (misplaced decimal point); *Dependable Janitorial Serv. & Supply Co.*, B-188812, 77-2 CPD ¶ 20 (Comp. Gen. July 13, 1977) (discrepancy between unit and total prices); *B&P Printing, Inc.*, B-188511, 77-1 CPD ¶ 387 (Comp. Gen. June 2, 1977) (comma rather than period making bid reasonably subject to two interpretations only one of which was low bid, bidder may not explain mistake).

c. Other mistakes disclosed before award. FAR 14.407-3.

(1) Correction by low bidder.

(a) <u>Burden of proof</u>: The low bidder must show by clear and convincing evidence: (i) the existence of a mistake in its bid; and (ii) the bid actually intended or that the intended bid would fall within a narrow range of uncertainty and remain low. FAR 14.407-3.

(b) <u>Permissible evidence</u>: Bidder can refer to such things as: (i) bidder's file copy of the bid;

(ii) original work papers; (iii) a subcontractor's or supplier's quotes; or (iv) published price lists. FAR 14.407-3(g)(2).

(c) Example: *Shoemaker & Alexander, Inc.*, B-241066, 91-1 CPD ¶ 41 (Comp. Gen. Jan. 15, 1991) (upward correction of a mistake in bid resulting from alleged failure to include proper subcontractor costs is permissible where evidence consisting of the bidder's worksheets, the subcontractor's quotations, and an adding machine tape clearly and convincingly demonstrate both the existence of a mistake and the intended bid, and the bid as corrected remained below the next low bid by approximately 3 percent).

(d) Other examples: *Three O Constr., S.E.*, B-255749, 94-1 CPD ¶ 216 (Comp. Gen. Mar. 28, 1994) (no clear and convincing evidence where bidder gave conflicting explanations for mistake); *Will H. Hall and Son, Inc. v. United States*, 54 Fed. Cl. 436 (2002), (contractor's "careless" reliance on a subcontractor's quote that excluded a price for a portion of the work solicited is a correctable mistake); *Circle, Inc.*, B-279896, 98-2 CPD ¶ 67 (Comp. Gen. July 29, 1998) (correction not permitted where agency reasonably found that discrepancies in the worksheets, as well as other evidence provided, did not establish intended bid).

(2) Correction of a bid that **displaces a lower bidder**.

(a) Burden of proof: Bidder must show by clear and convincing evidence: (a) the existence of a mistake; and (b) the bid actually intended. FAR 14.407-3; *J & J Maint., Inc.*, B-251355, 93-1 CPD ¶ 187 (Comp. Gen. Mar. 1, 1993) (correction permitted where unit price clearly is out of line with both the government estimate and the prices offered by the other bidders, and only the extended price reasonably can be regarded as having been the intended bid); *Virginia Beach Air Conditioning Corp.*, B-237172, 90-1 CPD ¶ 78 (Comp. Gen. Jan. 19, 1990); *Eagle Elec.*, B-228500, 88-1 CPD ¶ 116 (Comp. Gen. Feb. 5, 1988).

(b) **Limitation on proof** - the bidder can prove a mistake only from the solicitation (IFB) and the bid submitted, not from any other sources. *Bay Pacific Pipelines, Inc.*, B-265659, 95-2 CPD ¶ 272 (Comp. Gen. Dec. 18, 1995).

Example: The Navy issued an IFB for dredging services at a submarine base. The IFB required bidders to supply both unit prices and extended prices for 10 line items with a total of the extended prices for lines. Bidders had to submit an original and one copy of their bids. At bid opening, there were two bidders. Bidder A showed a "lump sum" mobilization line item as $425,000 per item and an extended price of $1,425,000. (Lump sum meant the unit price and extended price should have been identical.) Bidder A's total price reflected that the mobilization line item price should have been $1,425,000. Bidder A's handwritten copy of its bid reflected $1,425,000 in both the unit and the extended line item blocks. However, the IFB stated "in the event there is a difference between a unit price and the extended total, the unit price will be held to be the intended bid." Bidder B protests that the Navy should reject Bidder A's bid. Can Bidder A correct its line item price to $1,425,000?

Yes. There is considerable evidence from the bid itself that Bidder A made a clerical mistake by mistakenly omitting the digit "1" from its mobilization unit price on the "original" bid. The intended bid was readily discernable. Notwithstanding solicitation provisions that give precedence to unit prices, an obviously erroneous unit price can be corrected to correspond to an extended total price where the corrected unit price is the only reasonable interpretation of the bid. *Cashman Dredging and Marine Contracting Co. LLP*, B-401547, 2009 CPD ¶ 179 (Comp. Gen. Aug. 31, 2009).

d. Action permitted when a bidder presents clear and convincing evidence of a mistake, but not as to the bid intended; or evidence that reasonably supports the existence of a mistake, but is not clear and convincing. *Advanced Images, Inc.*, B-209438.2, 83-1 CPD ¶ 495 (Comp. Gen. May 10, 1983).

(1) The bidder may withdraw the bid, IAW FAR 14.407-3(c).

(2) The bidder may correct the bid where it is clear the intended bid would fall within a narrow range of uncertainty and remain the low bid. *Conner Bros. Constr. Co.*, B-228232.2, 88-1 CPD ¶ 103 (Comp. Gen. Feb. 3, 1988); *Department of the Interior—Mistake in Bid Claim*, B-222681, 86-2 CPD ¶ 98 (Comp. Gen. July 23, 1986).

(3) The bidder may waive the bid mistake if it is clear that the intended bid would remain low. *William G. Tadlock Constr.*, B-251996, 93-1 CPD ¶ 382 (Comp. Gen. May 13, 1993) (waiver not permitted where insufficient evidence of

intended bid price and that it would remain the low bid); *Hercules Demolition Corp. of Virginia*, B-223583, 86-2 CPD ¶ 292 (Comp. Gen. Sep. 12, 1986); *LABCO Constr., Inc.*, B-219437, 85-2 CPD ¶ 240 (Comp. Gen. Aug. 28, 1985).

e. Once a bidder asserts a mistake, the agency head or designee may disallow withdrawal or correction of the bid if the bidder fails to prove the mistake. FAR 14.407-3(d); *Duro Paper Bag Mfg. Co.*, B-217227, 86-1 CPD ¶ 6 (Comp. Gen. Jan. 3, 1986).

f. Approval levels for corrections or withdrawals of bids.

(1) Apparent clerical errors: The contracting officer. FAR 14.407-2.

(2) Withdrawal of a bid on clear and convincing evidence of a mistake, but not of the intended bid: An official above the contracting officer. FAR 14.407-3(c).

(3) Correction of a bid on clear and convincing evidence both of the mistake and of the bid intended: The agency head or delegee. FAR 14.407-3(a), FAR 14.407-3(e). **Caveat:** If correction would displace a lower bid, the government shall not permit the correction unless the mistake and the intended bid are both ascertainable substantially from the IFB and the bid submitted. FAR 14.407-3(a).

(4) Withdrawal rather than correction of a low bidder's bid: If (a) a bidder requests permission to withdraw a bid rather than correct it, (b) the evidence is clear and convincing both as to the mistake in the bid and the bid intended, and (c) the bid, both as uncorrected and as corrected, is the lowest received, the agency head or designee may determine to correct the bid and not permit its withdrawal. FAR 14.407-3(b).

(5) Neither correction nor withdrawal. If the evidence does not warrant correction or withdrawal, the agency head may refuse to permit either withdrawal or correction. FAR 14.407-3(d).

(6) Heads of agencies may delegate their authority to correct or permit withdrawal of bids without power of redelegation. FAR 14.407-3(e). This authority has been delegated to specified authorities within Defense Department and Agencies. *See* individual Agency FAR Supplements.

E. **Asserting mistakes AFTER** award. FAR 14.407-4; FAR 33.2 (Disputes and Appeals).

1. If a contractor's discovery and request for correction of a mistake in bid is not made until after the award, it shall be processed under the procedures of FAR 33.2 and FAR 14.407-4.

2. The mistake may be corrected by contract modification *IF*:

   a. Correcting the mistake would be **favorable** to the government without changing the essential requirements of the specifications. FAR 14.407-4(a).

   b. The contractor demonstrates by **clear and convincing** evidence that a mistake in bid was made and it must be clear the mistake was mutual or, if unilateral, so apparent as to have charged the contracting officer with notice of the probability of the mistake. FAR 14.407-4(c); *Government Micro Resources, Inc. v. Department of Treasury*, GSBCA No. 12364-TD, 94-2 BCA ¶ 26,680 (government on constructive notice of mistake where contractor's price exceeded government estimate by 62% and comparison quote by 33%); *Kitco, Inc.*, ASBCA No. 45347, 93-3 BCA ¶ 26,153 (mistake must be clear cut clerical or arithmetical error, or misreading of specifications, not mistake of judgment); *Liebherr Crane Corp.*, 810 F.2d 1153 (Fed. Cir. 1987) (no relief for unilateral errors in business judgment).

3. The contracting officer shall request the contractor to support the alleged mistake by submission of written statements and pertinent evidence. *See Government Micro Resources, Inc. v. Department of Treasury*, GSBCA No. 12364-TD, 94-2 BCA ¶ 26,680 (board awards contractor recovery on *quantum valebant* basis).

4. The government may (FAR 14.407-4(b)):

   a. Rescind the contract.

   b. Reform (modify) the contract to:

      (1) Delete the items involved in the mistake; or

      (2) Increase the price IF the contract price, as corrected, does not exceed that of the next lowest acceptable bid under the original IFB.

   c. Make no change if the evidence does not warrant deleting the items or increasing the price.

d. Note: The requirement under FAR 14.407-4(c) must be met where the Government intends to rescind or reform the contract pursuant to FAR 14.407-4(b)

e. Approval Levels. *See* individual Agency FAR Supplements.

5. Contract Reformation.

a. To show entitlement to reformation, the contractor must prove (i) a clear agreement between the parties and (ii) an error in reducing the agreement to writing. *Gould, Inc. v. United States*, 19 Cl. Ct. 257, 264 (1990)

b. Reformation is a form of equitable relief that applies to mistakes made in reducing the parties' intentions to writing, but not to mistakes that the parties made in forming the agreement. Hence, reformation is not available for contract formation mistakes. *Gould, Inc. v. United States*, 19 Cl. Ct. 257, 269 (1990) (reformation not permitted where plaintiff complains of a mistake in the forming the agreement, not in reducing the parties' agreement to writing).

c. The contractor must prove four elements in a claim for reformation based on mutual mistake. *Management & Training Corp. v. General Servs. Admin.*, GSBCA No. 11182, 93-2 BCA ¶ 25,814; *Gould, Inc. v. United States*, 19 Cl. Ct. 257, 269 (1990). These elements are:

(1) The parties to the contract were mistaken in their belief regarding a fact. *See Dairyland Power Co-op v. United States*, 16 F.3d 1197 (1994) (mistake must relate to an existing fact, not future events);

(2) The mistake involved a basic assumption of the contract;

(3) The mistake had a material effect on the bargain; and

(4) The contract did not put the risk of mistake on the party seeking reformation.

d. The contractor must prove five elements in a claim for reformation based on the unilateral mistake of the bidder. *Red Gold, Inc., Appellant v. Dept. of Agriculture, Respondent*, CBCA 2639, July 06, 2012, 2012 WL 2869697. These elements are:

(1) Mistake in fact occurred prior to contract award;

(2) Mistake was clear cut clerical or mathematical error or misreading of the specifications;

(3) Prior to the award, the Government knew or should of known that a mistake had been made;

(4) The Government did not request bid verification; and

(5) Proof of the intended bid. *See also* FAR 14.407-4.

6. Mistakes alleged after award are subject to the Contract Disputes Act of 1978 and the Disputes and Appeals provisions of the FAR; FAR Subpart 33.2; *ABJ Servs.*, B-254155, 93-2 CPD ¶ 53 (Comp. Gen. July 23, 1993) (the GAO will not review a mistake in bid claim alleged by the contractor after award).

7. Extraordinary contractual relief under Public Law No. 85-804. National Defense Contracts Act, 72 Stat. 972, 50 U.S.C. § 1431-1435; DFARS Subpart 250.

F. Rejection of All Bids—Cancellation of the IFB.

1. **Prior** to bid opening, almost any reason will justify cancellation of an invitation for bids if the cancellation is "in the public interest." FAR 14.209.

2. **After** bid opening, the government may not cancel an IFB unless there is a **compelling reason** to reject all bids and cancel the invitation. FAR 14.404-1(a)(1); *P. Francini & Co., Inc. v. U.S.*, 2 Cl. Ct. 7, 10 (1983) (*citing Massman Construction Co. v. United States*, 102 Ct. Cl. 699, 719 (1945) ("to have a set of bids discarded after they are opened and each bidder has learned his competitor's prices is a serious matter, and it should not be permitted except for cogent reasons.").

3. Examples of compelling reasons to cancel.

a. Violation of statute. *Sunrise International Group*, B-252892.3, 93-2 CPD ¶ 160 (Comp. Gen. Sep. 14, 1993) (agency's failure to allow 30 days in IFB for submission of bids in violation of CICA was compelling reason to cancel IFB).

b. Insufficient funds. *Michelle F. Evans*, B-259165, 95-1 CPD ¶ 139 (Comp. Gen. Mar. 6, 1995) (management of funds is a matter of agency judgment); *Armed Forces Sports Officials, Inc.*, B-251409, 93-1 CPD ¶ 261 (Comp. Gen. Mar. 23, 1993) (no requirement for agency to seek increase in funds where all bids exceed amount available for procurement).

c. Requirement disappeared. *Zwick Energy Research Org., Inc.*, B-237520.3, 91-1 CPD ¶ 72 (Comp. Gen. Jan. 25, 1991) (specification required engines driven by gasoline; agency directive required diesel); *Specialized Steel Contractors, Inc.*, B-408022, B-408022.2, 2013 CPD ¶ 122 (Comp. Gen. May 14, 2013) (agency determination that existing levee meets its needs justified cancelling of IFB as the supplies and services were no longer needed).

d. Specifications are defective and fail to state the government's minimum needs, or unreasonably exclude potential bidders. *McGhee Constr., Inc.*, B-250073.3, 93-1 CPD ¶ 379 (Comp. Gen. May 13, 1993); *Control Corp.; Control Data Sys., Inc.—Protest and Entitlement to Costs*, B-251224.2, 93-1 CPD ¶ 353 (Comp. Gen. May 3, 1993) (compelling reason to cancel procurement where solicitation overstated service call response time needed); *Digitize, Inc.*, B-235206.3, 90-1 CPD ¶ 403 (Comp. Gen. Oct. 5, 1989) (agency determined government needs satisfied by products meeting less restrictive specifications and award to protestor would not be fair to competitors); *Chenega Management*, B-290598, 2002 CPD ¶ 143 (Comp. Gen. Aug. 8, 2002) (specifications that are impossible to perform in required time period provide a basis to cancel the IFB after bid opening); *Grot, Inc.*, B-276979.2, 97-2 CPD ¶ 50 (Comp. Gen. Aug. 14, 1997) (cancellation proper where all bids exceeded the "awardable range" and agency concluded that specifications were unclear).

e. Agency determines to perform the services in-house. *Mastery Learning Sys.*, B-258277.2, 95-1 CPD ¶ 54 (Comp. Gen. Jan. 27, 1995) (agency reasonably determined performing services in-house was in its best interest because it would assure continuity of services).

f. Time delay of litigation. *P. Francini & Co. v. United States*, 2 Cl. Ct. 7 (1983) (cancellation was justified in light of the delay that would have attended an appeal of the court's preliminary injunction and taken longer to resolve than resoliciting the IFB); *but see Northern Virginia Van Co. Inc. v. U.S.*, 3 Cl. Ct. 237, 242 (1983); *Great Lakes Dredge & Dock Company, LLC*, B-411207, 2015 CPD ¶ 177 (Comp. Gen. Jun. 8, 2015) (condemnation proceedings of an indeterminate duration coupled with unforeseen litigation over the property easements, provided a compelling reason to cancel the solicitation).

g. All bids unreasonable in price. *California Shorthand Reporting*, B-250302.2, 93-1 CPD ¶ 202 (Comp. Gen. Mar. 4, 1993); *Grot,*

Inc., B-276979.2, 97-2 CPD ¶ 50 (Comp. Gen. Aug. 14, 1997) (cancellation proper where all bids exceeded the "awardable range" and agency concluded that specifications were unclear).

h. Eliminate appearance of unfair competitive advantage. *P&C Constr.*, B-251793, 93-1 CPD ¶ 361 (Comp. Gen. Apr. 30, 1993).

i. Failure to incorporate wage rate determination. *JC&N Maint., Inc.*, B-253876, 93-2 CPD ¶ 253 (Comp. Gen. Nov. 1, 1993) (wage determination received after bid opening, but prior to award).

j. Failure to set aside a procurement for small businesses or small disadvantaged businesses when required. *Baker Support Servs., Inc.; Mgmt. Technical Servs., Inc.*, B-256192.3, 95-1 CPD ¶ 75 (Comp. Gen. Sept. 2, 1994); *Ryon, Inc.*, B-256752.2, 94-2 CPD ¶ 163 (Comp. Gen. Oct. 27, 1994).

k. *Site Support Services, Inc.*, B-270229, 96-1 CPD ¶ 74 (Comp. Gen. Feb. 13, 1996) (cancellation proper where IFB contained incorrect government estimate of services needed); *Canadian Commercial Corp./ Ballard Battery Sys. Corp.*, B-255642, Mar. 18, 1994, 94-1 CPD ¶ 202 (no compelling reason to cancel simply because some terms of IFB are somehow deficient when solicitation read as a whole only has one reasonable interpretation); *US Rentals*, B-238090, 90-1 CPD ¶ 367 (Comp. Gen. Apr. 5, 1990) (contracting officer cannot deliberately let bid acceptance period expire as a vehicle for cancellation); *C-Cubed Corporation*, B-289867, 2002 CPD ¶ 72 (Comp. Gen. Apr. 26, 2002) (agency may cancel a solicitation after bid opening if the IFB fails to reflect the agency's needs).

4. Before canceling the IFB, the contracting officer must consider any prejudice to bidders. If cancellation will affect bidders' competitive standing, such prejudicial effect on competition may offset the compelling reason for cancellation. *Canadian Commercial Corp./ Ballard Battery Sys. Corp.*, B-255642, Mar. 18, 1994, 94-1 CPD ¶ 202; *Cummins Power Systems, LLC*, B-402079.2, January 7, 2010.

5. If an agency relies on an improper basis to cancel a solicitation, the cancellation may be upheld if another proper basis for the cancellation exists. *Shields Enters. v. United States*, 28 Fed. Cl. 615 (1993).

6. Cancellation of the IFB may be post-award. *Control Corp.*, B-251224.2, 93-1 CPD ¶ 353 (Comp. Gen. May 3, 1993).

VIII. AWARD OF THE CONTRACT.

A. Statutory standard. The contracting officer shall award with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and other price-related factors included in the solicitation. 10 U.S.C. § 2305(b)(3); 41 U.S.C. § 3701, *et seq*; FAR 14.408-1.

B. Equal low bids. Contracts shall be awarded in the following order of priority when two or more low bids are equal in all respects: small business concerns that are also labor surplus concerns; other small business concerns; and other business concerns. FAR 14.408-6.

C. Communication of acceptance of the offer and award of the contract. The contracting officer makes award by giving written notice within the specified time for acceptance. FAR 14.408-1(a).

D. Multiple awards. If the IFB does not prohibit partial bids, the government must make multiple awards when they will result in the lowest cost to the government. FAR 52.214-22; *WeatherExperts, Inc.*, B-255103, 94-1 CPD ¶ 93 (Comp. Gen. Feb. 9, 1994) (required to make multiple awards, rather than an aggregate award, under an IFB for services which contains four separate items, each covering a separate location, where the IFB permitted bids on single locations and did not require an aggregate award, and where multiple awards will result in a lower price than an aggregate award).

E. An agency may not award a contract to an entity other than that which submitted a bid. *Gravely & Rodriguez*, B-256506, 94-1 CPD ¶ 234 (Comp. Gen. Mar. 28, 1994) (sole proprietorship submitted bid, partnership sought award).

F. The "mail box" rule applies to award of federal contracts. Award is effective upon mailing (or otherwise furnishing the award document) to the successful offeror. FAR 14.408-1(c)(1). *Singleton Contracting Corp.*, IBCA 1770-1-84, 86-2 BCA ¶ 18,800 (notice of award and request to withdraw bid mailed on same day; award upheld); *Kleen-Rite Corp.*, B-190160, 78-2 CPD ¶ 2, (Comp. Gen. July 3, 1978).

G. Economic price adjustment. Contracts shall be awarded in the following order of priority when two or more low bids are equal in all respects: small business concerns that are also labor surplus concerns; other small business concerns; and other business concerns. FAR 14.408-6.

IX. CONCLUSION

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CHAPTER 8

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I. INTRODUCTION

CHAPTER 8

NEGOTIATED PROCUREMENTS AND SOURCE SELECTION

A. Assisting at all stages of the procurement process is critical for the contract attorney.

1. Helping prepare acquisition documents is one of the paramount roles for the contract attorney.

2. It is important for the contract attorney to help avoid problems by becoming involved early on during the extensive planning process required when agencies conduct a competitively negotiated procurement.

3. The contract attorney must understand the procedures used to conduct a competitively negotiated source selection.

4. Contract attorneys should look for ways to simplify the process whenever possible.

5. Contract attorneys should help their agencies avoid some of the common problem areas in awarding competitively negotiated procurements.

6. Contract attorneys should help their agencies assert maximum flexibility and not fear subjectivity (a/k/a business judgment); contract attorneys should help their agencies adequately explain and document such judgments.

B. Background.

1. In the past, negotiated procurements were known as "open market purchases." These procurements were authorized only in emergencies.

2. The Army Air Corps began using negotiated procurements in the 1930s to develop and acquire aircraft.

3. Negotiated procurements became universal during World War II. The Armed Services Procurement Act of 1947 authorized negotiated procurements for peacetime use if one of seventeen exceptions to formal advertising (now sealed bidding) applied.

4. In 1962, Congress codified agency regulations that required contractors to submit cost/pricing data for certain procurements to aid in the negotiation process.

5. The Competition in Contracting Act (CICA) of 1984 expanded the use of negotiated procurements by eliminating the traditional preference for formal advertising (now sealed bidding).

6. In the early 1990s, Congress: (a) modified the procedures for awarding contracts on initial proposals; (b) expanded debriefings; and (c) made other minor procedural changes in the negotiated procurement process.

7. In 1997, the Federal Acquisition Regulation (FAR) Part 15 rewrite effort resulted in significant changes to the rules regarding: (a) exchanges with industry; (b) the permissible scope of discussions; and (c) the competitive range determination.

II. CHOOSING NEGOTIATIONS.

A. Sealed Bidding or Competitive Negotiations. The CICA eliminated the historical preference for formal advertising (now sealed bidding). Statutory criteria now determine which procedures to use.

B. Criteria for Selecting Competitive Negotiations. 10 U.S.C. § 2304(a)(2) and 41 U.S.C. § 3301(b)(1). The CICA provides that, in determining the appropriate competitive procedure, agencies:

1. Shall solicit sealed bids if:

   a. Time permits the solicitation, submission, and evaluation of sealed bids;

   b. The award will be made solely on the basis of price and other price-related factors;

   c. It is unnecessary to conduct discussions with responding sources about their bids; and

   d. There is a reasonable expectation of receiving more than one sealed bid.

2. Shall request competitive proposals <u>if</u> sealed bids are not appropriate under B.1, above. *See also* FAR 6.401 (listing these same criteria).

3. Competitive proposals are the default for contracts awarded and performed outside the United States. *See* FAR 6.401(b)(2) (directing the use of competitive proposals for contracts to be made and performed

outside the United States and its outlying areas unless discussions are not required and the use of sealed bids are otherwise appropriate).

4. Contracting Officer's Discretion.

a. The decision to use competitive negotiations under FAR Part 15 is largely a discretionary matter within the purview of the contracting officer's business judgment, which will not be upset unless it is unreasonable.

b. For the decision to be considered reasonable, the contracting officer must demonstrate that one or more of the sealed bidding criteria is not present. *See Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1364 (Fed. Cir. 2009) (reversing the trial court and holding that the contracting officer reasonably included non-price evaluation factors in the RFP and concluded that sealed bidding was not required); *see also Ceres Envtl. Serv., Inc.*, B-310902, Mar. 3, 2008, 2008 CPD ¶ 148 (finding that the Corps of Engineers reasonably concluded it needed to evaluate non-price factors, to include a possible price/technical tradeoff, in a canal construction project despite previous canal construction projects having been awarded under sealed bidding); *Specialized Contract Serv., Inc.*, B-257321, Sept. 2, 1994, 94-2 CPD ¶ 90 (finding that the Army reasonably concluded it needed to evaluate more than price in procuring meal and lodging services). *Compare Racal Corp.*, B-240579, Dec. 4, 1990, 70 Comp. Gen. 127, 90-2 CPD ¶ 453 (finding that the possible need to hold discussions to assess offerors' understanding did not justify the use of negotiated procedures where the Army did not require offerors to submit technical proposal), *with Enviroclean Sys.*, B-278261, Dec. 24, 1997, 97-2 CPD ¶ 172 (finding that the Army reasonably concluded that discussions might be required before award).

5. A Request for Proposals (RFP) by any other name is still a RFP. *Balimoy Mfg. Co. of Venice, Inc.*, B-253287.2, Oct. 5, 1993, 93-2 CPD ¶ 207 (finding that a purported invitation for bids (IFB) that calls for the evaluation of factors other than price is not an IFB and is not a proper matter for protest post-award). Any inconsistency between labeling a solicitation an IFB and providing for consideration of non-price factors may only be protested prior to bid opening when the inconsistencies are apparent on the face of the solicitation. *Id*.

C. Comparing the Two Methods.

	Sealed Bidding	Negotiations
Evaluation Criteria	Price and Price-Related Factors	Price and Non-Price Factors
Responsiveness	Determined at Bid Opening	N/A
Responsibility	Based on Pre-Award Survey; SBA May Issue COC	May be Evaluated Comparatively Based on Disclosed Factors
Contract Type	FFP or FP w/EPA	Any Type
Discussions	Prohibited	Required (Unless Properly Awarding w/o Discussions)
Right to Withdraw	Firm Bid Rule	No Firm Bid Rule
Public Bid Opening	Yes	No
Flexibility to Use Judgment	None	Much
Late Offer/Modifications	Narrow Exceptions	Narrow Exceptions
Past Performance	Evaluated on a Pass/Fail Basis as Part of the Responsibility Determination	Included as an Evaluation Factor; Comparatively Assessed; Separate from the Responsibility Determination

III. ACQUISITION PLANNING.

A. Key Definitions.

1. Acquisition Planning. means the process by which the efforts of all personnel responsible for an acquisition are coordinated and integrated through a comprehensive plan for fulfilling the agency need in a timely manner and at a reasonable cost. It includes developing the overall strategy for managing the acquisition.. FAR 2.101.

2. Market Research. Market research means collecting and analyzing information about capabilities within the market to satisfy agency needs.

FAR 2.101; FAR 10.001; Defense Acquisition Regulation Supplement (DFARS) 210.001.

3. Source Selection Process. The process of soliciting and evaluating proposals for award in a competitively negotiated environment. FAR 2.101; DFARS 215.1.

B. Policy. Agencies shall perform acquisition planning and conduct market research to promote full and open competition, or if full and open competition is not required, to promote competition to the maximum extent practicable. FAR 7.102; *see* 10 U.S.C. § 2305(a)(1)(A)(ii).

C. General Principles.

1. Begin Planning Early.

a. Planning should start before the fiscal year in which the contract will be awarded. Begin planning when the need is identified. FAR 7.104(a).

b. A lack of advance planning does not justify using other than competitive acquisition procedures. 10 U.S.C. § 2304(f)(5); *see, e.g., Major Contracting Svcs., Inc.*, B-401472, Sep. 14, 2009, 2009 CPD ¶ 170 (sustaining a protest that the Army improperly extended a contract on a sole source basis due to inadequate advance planning).

D. Responsibilities.

1. The program manager or other official responsible for the program has overall responsibility for acquisition planning. DFARS 207.103(g).

2. Agency heads must ensure that an increasing level of formality in the planning process is used as acquisitions become more costly and complex. FAR 7.103(e).

E. Written Acquisition Plans.

1. Written acquisition plans are required for:

a. Development acquisitions exceeding $10 million total cost for the acquisition program. DFARS 207.103(d)(i)(A).

b. Production or service acquisitions when the total cost of all program contracts will exceed $50 million for all years, or $25 million in a single year. DFARS 207.103(d)(i)(B).

c. Acquisition Planning Resources

(1) FAR subpart 7.1 and DFARS subpart 207.1.

(2) Department of Defense Source Selection Procedures, April 1, 2016: https://www.acq.osd.mil/dpap/policy/policyvault/USA004370-14-DPAP.pdf

(3) Army Source Selection Supplement (AS3) to the Department of Defense Source Selection Procedures, November 28, 2017: https://acquisition.gov/sites/default/files/farhill/afars/Appendix%20AA.pdf

(4) Navy Acquisition Plan Guide: http://www.secnav.navy.mil/rda/Policy/Department%20of%20the%20Navy/donapg0227074.

(5) Department of Homeland Security: http://www.dhs.gov/xlibrary/assets/DHS_ACQ_Planning_Guide_Notice_05-02.pdf.

F. Source Selection Plan. Source selection plans are internal agency working documents. An agency's evaluation of proposals must be reasonable and consistent with the solicitation's stated evaluation criteria. An agency's failure to adhere to its source selection plan does not provide a viable basis of protest because offerors have no rights in an agency's source selection plan. *Islandwide Landscaping, Inc.*, B-293018, Dec. 24, 2003, 2004 CPD ¶ 9; *All Star-Cabaco Enter., Joint Venture*, B-290133, B-290133.2, June 25, 2002, 2002 CPD ¶ 127. For a discussion on source selection plans, *see* Army Federal Acquisition Regulation Supplement (AFARS), Appendix AA, Army Source Selection Manual, Chapter 2.2, Source Selection Plan.

IV. PLANNING CONSIDERATIONS.

A. Acquisition Background and Objectives. FAR 7.105(a).

1. Statement of Need.

2. Applicable conditions.

3. Cost.

4. Capability or performance.

5. Delivery or performance-period times.

6. Trade-offs.

7. Risks.

8. Acquisition Streamlining.

B. Plan of Action. FAR 7.105(b).

1. Identification of potential sources.

2. Competition – How will full and open competition be obtained? If it will not be obtained, what justifies other than full and open competition?

3. Contract type selection.

4. Source-selection procedures – the timing for submission and evaluation of proposals and the relationship of evaluation factors to the attainment of the acquisition objectives. *See* FAR Subpart 15.3.

5. Acquisition considerations.

a. Contract Types.

b. Multiyear contracting, options, special contracting methods.

c. Special contract clauses, solicitation provisions, or FAR deviations.

d. Consolidation. FAR 7.107 and 15 U.S.C. § 657q.

(6) Under 15 U.S.C. § 657q (as implemented by FAR 7.107) the term "consolidation of contract requirements," with respect to contract requirements of a Federal agency, means a use of a solicitation to obtain offers for a single contract or a multiple award contract (A) to satisfy 2 or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under 2 or more separate contracts lower in cost than the total cost of the contract for which the offers are solicited; or (B) to satisfy requirements of the Federal agency for construction projects to be performed at 2 or more discrete sites.

(7) Under 15 U.S.C. § 657q, the head of a Federal agency may not carry out an acquisition strategy that includes a consolidation of contract requirements of the Federal agency with a total value of more than $2,000,000, unless the senior procurement executive or Chief Acquisition Officer for the Federal agency, before carrying out the acquisition strategy, has conducted market research, identified alternative approaches, made a written determination that consolidation is necessary and justified, identified any negative impact on small business concerns, and ensure that steps will be taken to include small business concerns in the acquisition strategy.

e. Performance-based service contracts.

(8) In general, agencies must use performance-based acquisition methods to the maximum extent practicable when acquiring services. Exceptions include certain architect-engineer services, construction, utility, and services that are incidental to supply purchases. FAR 37.102(a).

(9) Section 821 of the FY 2001 National Defense Authorization Act established a preference for performance-based service contracts (PBSC). Pub. L. No. 106-398, § 821, 114 Stat. 1654 (2000).

(10) The Government Accountability Office concluded that while agencies are utilizing performance-based contracting, more guidance was needed to increase agency understanding of PBSCs and how to best take advantage of the methodology. GEN. ACCT. OFF., REP. NO. GAO-02-1049, *Contract Management: Guidance Needed for Performance-Based Service Contracting* (Sept. 2002).

6. Funding. (FAR Subpart 32.7)

7. Prohibition on contracts for performance of Inherently Governmental functions. (FAR Subpart 7.5)

8. When Government-furnished property for performance of contract is appropriate (FAR 45.102)

9. Environmental Considerations (FAR Part 23).

10. General prohibition on personal service contracts (FAR 37.104).

C. Peer Reviews

1. DoD acquisitions valued at $1 billion or more – The Office of the Director, Defense and Acquisition Policy (DPAP), will organize teams of reviewers and facilitate Peer Reviews for solicitations and contracts valued at $1 billion or more. DFARS 201.170(a).

a. Pre-award Peer Review of solicitations valued at $1 billion or more (including options) are required for all acquisitions. DFARS 201.170(a)(1)(i).

b. Pre-award peer reviews for noncompetitive procurements will be conducted in two phases for new contract actions valued at $500 million or more. DFARS 201.170(a)(1)(ii).

c. Post-award Peer Reviews will be conducted for all contracts for <u>services</u> valued at $1 billion or more (including options). DFARS 201.170(a)(1)(iii).

d. Peer Reviews will be conducted using the procedures at PGI 201.170.

2. DoD acquisitions valued at less than $1 billion – The military departments, defense agencies and DoD field activities shall establish procedures for Pre-Award and Post-Award Peer Reviews of solicitations

and contracts valued at less than $1 billion, and noncompetitive procurements valued at less than $500 million. DFARS 201.170(b).

a. For the Army, all solicitations and contracts with an estimated value greater than $50 million will be approved through a Solicitation Review Board (SRB) and Contract Review Board (CRB). AFARS 5101.170(b).

b. Post-Award Peer Reviews for services contracts shall occur when the contract value is more than $250 million but less than $1Billion The Senior Contracting Officer will establish procedures for postaward peer reviews for contracts for services valued at $50 million or more but less than $250 million. AFARS 5101.170(b)(vi).

V. PREPARING SOLICITATIONS AND RECEIVING INITIAL PROPOSALS.

A. Developing a Request for Proposals (RFP). The three major sections of an RFP are: Specifications (Section C), Instructions to Offerors (Section L), and Evaluation Criteria (Section M). *See* FAR 15.204-2 to 15.204-5 (briefly describing Sections A thru M of an RFP). Contracting activities should develop these three sections simultaneously so that they are tightly integrated.

1. Section B lays out the pricing and contract line item structure of the procurement including quantities.

2. Section C describes the required work and is referred to as a statement of work or performance work statement.

3. Section D discusses packaging, packing, preservation, and marking requirements, if any.

4. Section E describes inspection, acceptance, quality assurance, and reliability requirements.

5. Section F outlines the time, place, and method of delivery and performance.

6. Section G contains contract administration data, e.g., any required accounting and appropriation data and any required contract administration information or instructions other than those on the solicitation form.

7. Section H contains special contract clauses applicable to the current acquisition (e.g., special warranty requirements, key personnel).

8. Section I contains the contract clauses.

9. Section J contains attachments, if any.

10. Section K includes the solicitation provisions that require representations, certifications, or submission of other information by offerors.

11. Section L describes what information offerors should provide in their proposals and prescribes the format.

    a. Well written instructions may reduce the need for discussions merely to understand the offerors' proposals.

    b. Instructions also make the evaluation process more efficient by dictating page limits, paper size, organization, and content. [NOTE: An offeror ignores these instructions and limitations at its peril. *See Mathews Assocs., Inc.*, B-299305, Mar. 5, 2007, 2007 CPD ¶ 47 (upholding Army's rejection of an electronically submitted proposal where the proposal exceeded the margin limit set forth in the solicitation and concluding there is nothing unfair, or unduly burdensome, about requiring offerors to assume the risks associated with submitting proposals that do not comply with clearly stated solicitation formatting requirements); *Coffman Specialists, Inc.*, B-284546, B-284546.2, May 10, 2000, 2000 CPD ¶ 77 (finding that the agency reasonably downgraded a proposal that failed to comply with solicitation's formatting requirement); *see also U.S. Envtl. & Indus., Inc.*, B-257349, July 28, 1994, 94-2 CPD ¶ 51 (concluding that the agency properly excluded the protester from the competitive range after adjusting its proposal length for type size smaller than the minimum allowed and refusing to consider the "excess" pages)].

    c. Instructions should avoid requesting surplus information and simply request information that will be evaluated in Section M. Well written proposal instructions and Section M evaluation criteria should be consistent and read well together.

12. Section M describes how the government will evaluate proposals.

    a. The criteria must be detailed enough to address all aspects of the required work, yet not so detailed as to mask differences in proposals. FAR 15.304 discusses evaluation factors and significant subfactors, to include factors that must be considered by the agency and therefore referenced in Section M.

b. Solicitations must provide offerors enough information to compete equally and intelligently, but they need not give precise details of the government's evaluation plan. *See QualMed, Inc.*, B-254397.13, July 20, 1994, 94-2 CPD ¶ 33.

c. Evaluation scheme must include an adequate basis to determine cost to the government of competing proposals. *S.J. Thomas Co, Inc.*, B-283192, Oct. 20, 1999, 99-2 CPD ¶ 73.

B. Drafting Evaluation Criteria.

1. Statutory Requirements.

a. 10 U.S.C. § 2305(a)(2) and 41 U.S.C. § 3306(b) require each solicitation to include a statement regarding:

(1) All the significant factors and subfactors the agency reasonably expects to consider in evaluating the proposals (including cost or price, cost-related or price-related factors and subfactors, and non cost-related or non price-related factors and subfactors), and

(2) The relative importance of each factor and subfactor.

(3) *See* FAR 15.304(d).

b. 10 U.S.C. § 2305(a)(3) and 41 U.S.C. § 3306(c) further require agency heads to:

(1) Clearly establish the relative importance of the evaluation factors and subfactors, including the quality factors and subfactors (e.g., technical capability, management capacity, prior experience, and past performance);

(2) Include cost/price as an evaluation factor; and

(3) Disclose whether all of the non-cost and non-price factors, when combined, are:

(4) Significantly more important than cost/price;

(5) Approximately equal in importance to cost/price; or

(6) Significantly less important than cost/price.

See FAR 15.304(d), (e).

2. Mandatory Requirements for Evaluation Factors.

a. Cost or Price. 10 U.S.C. § 2305(a)(3)(A)(ii); 41 U.S.C. § 3306(c(1)(B); FAR 15.304(c)(1). Agencies must evaluate cost/price in every source selection.

(1) While cost/price need not be the most important evaluation factor, cost or price must always be a factor. See Medical Staffing Joint Venture, B-400705.2, B-400705.3, Mar. 13, 2009, 2009 CPD ¶ 71 (stating that the evaluation criteria must provide for a reasonable assessment of the cost of performance of competing proposals);

(2) But see RTF/TCI/EAI Joint Venture, B-280422.3, Dec. 29, 1998, 98-2 CPD ¶ 162 (denying a protest alleging failure to consider price because the protestor was unable to show prejudice from Army's error).

(3) This requirement extends to the evaluation of Indefinite Delivery / Indefinite Quantity ("ID/IQ") Contracts. CW Govt. Travel, Inc. – Reconsideration, B-295530, July 25, 2005, 2005 CPD ¶ 139 (sustaining a protest where the agency's use of a sample task order for evaluation purposes for an ID/IQ did not bind the offers to the prices used in the sample task and therefore did not consider price); accord S.J. *Thomas Co, Inc.*, B-283192, Oct. 20, 1999, 99-2 CPD ¶ 73.

b. Technical and Management (i.e., Quality) Factors. The government must also consider quality in every source selection. *See* FAR 15.304(c)(2).

(4) The term "quality" refers to evaluation factors other than cost/price (e.g., technical capability, management capability, prior experience, and past performance). *See* 10 U.S.C. § 2305(a)(3)(A)(i); 41 U.S.C. § 3306(c)(1)(A); *see also* FAR 15.304(c)(2) (adding personnel qualifications and compliance with solicitation requirements as "quality" evaluation factors).

(5) FAR 15.304(a) recommends tailoring the evaluation factors and subfactors to the acquisition, and FAR 15.304(b) recommends including only evaluation factors and significant subfactors that:

(6) Represent key areas that the agency plans to consider in making the award decision;[1] and

(7) Permit the agency to compare competing proposals meaningfully.

c. Past Performance.

(1) Statutory Requirements.

(a) The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 1091, 108 Stat. 3243, 3272 [hereinafter FASA], expressed Congress' belief that agencies should use past performance as an evaluation factor because it is an indicator of an offeror's ability to perform successfully on future contracts.

(b) The FASA also directed the Administrator Office of Federal Procurement Policy (OFPP) to provide guidance to executive agencies regarding the use of past performance 41 U.S.C. § 1126.

(c) The OFPP in May 2000 published a guide titled Best Practices for Collecting and Using Current and

[1] It is Army policy to establish the absolute minimum number of factors necessary for evaluation of proposals. Factors and subfactors must be limited to those which (a) are expected to surface real and measurable discriminators between offerors, and (b) have enough value to warrant the payment of a meaningful cost/price premium to obtain the measured discrimination. AFARS 5115.304(b)(2).

Past Performance Information, available at: https://obamawhitehouse.archives.gov/omb/best_practice_re_past_perf/. In July 2003, OFPP published Performance-Based Service Acquisition, Contracting for the Future available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/procurement_guides/0703pbsat.pdf.

(2) FAR Requirement. FAR 15.304(c)(3); FAR 15.305(a)(2).

(a) Agencies must include past performance as an evaluation factor in all RFPs expected to exceed the simplified acquisition threshold.

(b) On September 24, 2013, the Director of Defense Procurement and Acquisition Policy (DPAP) issued a class deviation. *See* DFARS 215.304. DARS Tracking Number 2013-O0018, available at: http://www.acq.osd.mil/dpap/dars/class_deviations.html. For the Department of Defense, past performance is mandatory only for the following contracts:

(i) Systems & operation support > $5 million.

(ii) Services, information technology, or science & technology > $1 million.

(iii) For all other acquisitions expected to exceed the simplified acquisition threshold.

(c) The contracting officer may make a determination that past performance is not an appropriate evaluation factor even if the contract falls in either category *(a) or (b) above.* The contracting officer must document why past performance is not an appropriate evaluation factor. FAR 15.304(c)(3).

(d) The RFP must:

(i) Describe how the agency plans to evaluate past performance, including how it will evaluate offerors with no relevant performance history;

(ii) Provide offerors with an opportunity to identify past or current contracts for similar work; and

(iii) Provide offerors an opportunity to provide information regarding any problems they encountered on the identified contracts and their corrective actions.

(e) Contrasted with Past Experience.

(i) Past Performance is **HOW WELL** the offeror performed on previous efforts.

(ii) Experience evaluation is **WHAT** past experience the offeror possesses and brings to the current procurement.

(iii) Example. GAO denied a protest claiming that an agency failed to consider negative information regarding the awardee's past performance where the solicitation specifically provided for evaluation of past experience, *but not* past performance. *Highland Engineering, Inc.*, B-402634, June 8, 2010, 2010 CPD ¶ 137.

(iv) A cautionary note is warranted to avoid double counting/penalizing an offeror if evaluating both past performance and experience. *See GlassLock, Inc.*, B-299931, Oct. 10, 2007, 2007 CPD ¶ P 216.

(v) Small Business Participation.

(3) FAR Requirements. FAR 15.304(c)(4). For solicitations involving bundling that offer a significant opportunity for subcontracting, the contracting officer must include proposed small business subcontracting participation in the subcontracting plan as an evaluation factor.

But see FAR Part 19 (imposing additional requirements and limitations).

(4) DOD Requirements. DFARS 215.304. Agencies must evaluate the extent to which small businesses, historically black colleges, and minority institutions will participate in the performance of the contract if:

(a) The FAR requires the use of FAR 52.219-9, Small Business Subcontracting Plan (*see* FAR 19.708; *see also* FAR 15.304(c)(4)), and

(b) The agency plans to award the contract on a tradeoff as opposed to lowest price technically acceptable basis.

3. Requirement to Disclose Relative Importance. FAR 15.304(d).

a. Agencies must disclose the relative importance of all significant evaluation factors and subfactors and describe at a minimum whether the non-price factors when combined are:

(1) Significantly more important than cost/price, OR

(2) Significantly less important than cost/price, OR

(3) Approximately equal to cost/price. FAR 15.304(e), 10 U.S.C. § 2305(a)(3)(A)(iii) and 41 U.S.C. § 3306(c)(1)(C).

b. Agencies should disclose the relative order of importance either by:

(1) Providing percentages or numerical weights[2] in the RFP;

(2) Providing an algebraic paragraph;

(3) Listing the factors or subfactors in descending order of importance; or

(4) Using a narrative statement.

[2] Numerical weighting is no longer an authorized method of expressing the relative importance of factors and subfactors in the Army. Evaluation factors and subfactors must be definable in readily understood qualitative terms (e.g., adjectival, colors, or other indicators, but not numbers) and represent key areas of importance to be considered in the source selection process. *See* AFARS 5115.304(b)(2)(B).

c. The GAO presumes the listed factors are equal if the RFP does not state their relative order of importance.

(1) For example, in *Fintrac, Inc.*, B-311462.3, Oct. 14, 2008, 2008 CPD ¶ 191, the RFP listed the major evaluation factors in "descending order of importance" but was silent as to the weight of the subfactors. GAO stated that where a solicitation does not disclose the relative weight of evaluation factors or subfactors in the solicitation, they are presumed approximately equal in importance or weight. *See also Bio-Rad Labs., Inc.*, B-297553, Feb. 15, 2006, 2007 CPD ¶ 58 (finding that where an agency failed to inform offerors it was conducting the procurement as a simplified acquisition and conducted the acquisition in a manner indistinguishable from a negotiated procurement, offerors could reasonably presume listed subfactors were approximately equal in importance).

(2) The better practice is to state the relative order of importance expressly.

(3) Agencies should rely on the "presumed equal" line of cases only when a RFP inadvertently fails to state the factors' relative order of importance. *See LLH & Assoc., LLC*, B-297804, Mar. 6, 2006, 2006 CPD ¶ 52; *Meridian Corporation*, B-246330, B-246330.3, July 19, 1993, 93-2 CPD ¶ 29 (applying the "equal" presumption).

d. Agencies need not disclose their specific rating methodology in the RFP. FAR 15.304(d); *see D.N. American, Inc.*, B-292557, Sept. 25, 2003, 2003 CPD ¶ 188 (noting that unlike evaluation factors for award, an agency is not required to disclose its specific rating methodology such as the color-coded scheme used to rate offerors' proposals in the case); *ABB Power Generation, Inc.*, B-272681, Oct. 25, 1996, 96-2 CPD ¶ 183.

e. GO/NO GO. The FAR does not prohibit a pure pass/fail method. *SOS Int'l, Ltd.*, B-402558.3, B-402558.9, June 3, 2010, 2010 CPD ¶ 131. Because pass/fail criteria imply a minimum acceptable level, these levels should appear in the RFP. *See Nat'l Test Pilot Sch.*, B-237503, Feb. 27, 1990, 90-1 CPD ¶ 238 (holding that award to the low-cost, technically acceptable proposal was inconsistent with the statement that the technical factors were more important than cost); *see also CXR Telecom*, B-249610.5, Apr. 9,

1993, 93-1 CPD ¶ 308 (discouraging benchmarks that lead to the automatic exclusion of otherwise potentially acceptable offerors but noting that benchmarks within the discussion process provide an opportunity to highlight and correct deficiencies).

4. Requirement to Disclose Basis of Award. FAR 15.101-1; FAR 15.101-2.

a. Agencies must disclose how they intend to make the award decision.

b. Best Value Continuum. An agency may obtain the best value by using any one or a combination of source selection approaches as the relative importance of cost or price may vary in different types of acquisitions. FAR 15.101.

c. Agencies generally choose the tradeoff process or the lowest price technically acceptable to achieve best value.

(4) The tradeoff process. FAR 15.101-1.

(a) Appropriate where it may be in the best interests of the government to consider award to other than the lowest priced offeror or other than the highest technically rated offeror.

(b) Permits tradeoffs among cost or price and non-cost factors and allows the Government to accept other than the lowest priced proposal.

(c) The perceived benefits of the higher priced proposal shall merit the additional cost, and the rationale for tradeoffs must be documented in the file.

(5) Lowest Price Technically Acceptable (LPTA). FAR 15.101-2. The LPTA process results in award going to the lowest priced, technically acceptable offer. This is different from sealed bidding where the agency only considers price and price-related factors, not quality factors such as technical acceptability. Additionally, in an LPTA award scheme, the agency can hold discussions to ensure offerors understand the requirements and to help determine acceptability.

(a) Used only when requirements are clearly defined and risk of unsuccessful performance is minimal.

(b) Technical factors are "Go"/"No Go." Proposals are rated only for acceptability and are not ranked using the non-cost/price factors.

(c) A cost/technical tradeoff is not permitted; award will go to the lowest price offer which meets the minimum technical standards. FAR 15.101-2. No additional credit will be awarded.

(d) Past performance must be considered as pass/fail (or neutral if no past performance) unless waived as a factor IAW FAR 15.304(c)(3)(iii).

(e) Of late, Congress instituted a preference for best value contracting methods over LPTA and has even prohibited LPTA use for certain types of acquisition; however, Contracting Officers have been slow to acknowledge these prohibitions. 2019 NDAA Pub L. 115-232, Section 880 states that "it shall be the policy of the United States Government to avoid using lowest price technically acceptable source selection criteria in circumstances that would deny the Government the benefits of cost and technical tradeoffs in the source selection process." Section 880(c) further provides that "to the maximum extent practicable," LPTA procedures "shall be avoided" when purchasing "(1) information technology services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, audit or audit readiness services, health care services and records, telecommunications devices and services, or other knowledge-based professional services; (2) personal protective equipment; or (3) knowledge-based training or logistics services in contingency operations or other operations outside the United States…"[3]2017 NDAA, Pub. L. 114-328, sec. 814. It has also limited DOD's use of LPTA, establishing parameters for its use. *Id.* at sec. 813; 2018 NDAA, Pub. L. 115-91 sec. 822. Congress also prohibited DOD from using LPTA in major

[3] 2017 NDAA, Pub. L. 114-328 and 2018 NDAA, Pub. L. 115-91 had previously limited DOD's use of LPTA, establishing parameters for its use. Congress also prohibited DOD from using LPTA in major defense acquisition programs, for aviation critical safety items, for personal protective equipment, in instances when quality or failure of items could result in combat casualties, and for auditing services; *see also* 10 U.S.C. § 2442; 2017 NDAA secs. 814 & 892. DFARS updates are pending. DFARS Case 2018-D010.

defense acquisition programs, for aviation critical safety items, for personal protective equipment, in instances when quality or failure of items could result in combat casualties, and for auditing services. 2018 NDAA secs. 832 & 882; *see also* 10 U.S.C. § 2442; 2017 NDAA secs. 814 & 892. DFARS updates are pending. DFARS Case 2018-D010.

5. Problem Issues When Drafting Evaluation Factors.

a. Options.

(1) The evaluation factors should address all evaluated options clearly. FAR 17.203. A solicitation that fails to state whether the agency will evaluate options may be ambiguous and susceptible to protest. *See generally* FAR Subpart 17.2. *See also Occu-Health, Inc.*, B-270228.3, Apr. 3, 1996, 96-1 CPD ¶ 196 (sustaining a protest where the agency failed to inform offerors that it would not evaluate options due to a change in its requirements).

(2) Agencies must evaluate options at the time of award; otherwise, they cannot exercise options <u>unless</u> the agency prepares a Justification and Approval (J&A) for the use of other than full and open competition under FAR Part 6. FAR 17.207(f); *see Major Contracting Serv., Inc.*, B-401472, Sept. 14, 2009, 2009 CPD ¶ 170, *aff'd upon reconsideration Dep't of Army—Reconsideration*, B-401472.2, Dec. 7, 2009, 2009 CPD ¶ 250 (determining that an unpriced option to extend services under FAR Clause 52.217-8 was not evaluated as part of the initial competition and therefore was subject to the competition requirements of FAR Part 6).

(3) If the option quantities/periods change during solicitation, the agency may cancel or amend the solicitation. *Saturn Landscape Plus, Inc.*, B-297450.3, Apr. 18, 2006, 2006 CPD ¶ 70 (finding no basis to question the agency's reasonable decision to cancel the solicitation and issue a revised solicitation to reflect reduced option periods).

(4) Variable Option Quantities are problematic because agencies must evaluate option prices at the time of

award. Agencies use variable option quantities due to funding uncertainty. Consider averaging all option prices to determine evaluated price.

b. Key Personnel.

(1) A contractor's personnel are very important in a service contract.

(2) Evaluation criteria should address:

(a) The education, training, and experience of the proposed employee(s);

(b) The amount of time the proposed employee(s) will actually perform under the contract;

(c) The likelihood that the proposed employee(s) will agree to work for the contractor; and

(d) The impact of utilizing the proposed employee(s) on the contractor's other contracts.

See Biospherics, Inc., B-253891.2, Nov. 24, 1993, 93-2 CPD ¶ 333; *cf. ManTech Advanced Sys. Int'l, Inc.*, B-255719.2, May 11, 1994, 94-1 CPD ¶ 326 (finding that the awardee's misrepresentation of the availability of key personnel justified overturning the award). *But see SRS Tech.*, B-258170.3, Feb. 21, 1995, 95-1 CPD ¶ 95 (concluding that it was not improper for an offeror to provide a substitute where it did not propose the key employee knowing that he would be unavailable).

(3) Agencies should request resumes, hiring or employment agreements, and proposed responsibilities in the RFP.

(4) To avoid problems during performance, the solicitation should contain a contract clause in Section H providing that key personnel can only be replaced with personnel of equal qualifications after contracting officer approval.

C. Notice of Intent to Hold Discussions.

1. 10 U.S.C. § 2305(a)(2)(B)(ii)(I) and 41 U.S.C. § 3306(b)(2)(B)(i) require RFPs to contain either:

   a. "[A] statement that the proposals are intended to be evaluated with, and award made after, discussions with the offerors," (The clause at FAR 52.215-1 Alternate I (f)(4) satisfies this requirement) ***or***

   b. "[A] statement that the proposals are intended to be evaluated, and award made, without discussions with the offerors (other than discussion conducted for the purpose of minor clarification[s]), unless discussions are determined to be necessary." (The clause at FAR 52.215-1(f)(4) satisfies this requirement)

2. Statutes and regulations provide no guidance on whether an agency should award with or without discussions. Contracting officers should consider factors indicating that discussions may be necessary (e.g., procurement history, competition, contract type, specification clarity, etc.). Discussions may be as short or as long as required, but offerors must be given an opportunity to revise proposals after discussions end.

3. The primary objective of discussions is to maximize the government's ability to obtain best value, based on the requirement and evaluation factors set forth in the solicitation. FAR 15.306(d)(2).

4. For the Department of Defense, the Director, Defense Procurement and Acquisition Policy issued a memorandum on 8 January 2008 directing that awards should be made without discussions only in limited circumstances generally routine, simple procurements. The memorandum is available at http://www.acq.osd.mil/dpap/policy/policyvault/2007-1480-DPAP.pdf.

5. A protest challenging the failure to include the correct notice in the solicitation is untimely if filed after the date for receipt of initial proposals. *See Warren Pumps, Inc.*, B-248145.2, Sept. 18, 1992, 92-2 CPD ¶ 187.

D. Exchanges with Industry Before Receipt of Proposals. The FAR encourages the early exchange of information among all interested parties to improve the understanding of the government's requirements and industry capabilities, provided the exchanges are consistent with procurement integrity requirements. *See* FAR 15.201. There are many ways an agency may promote the early exchange of information, including:

1. Industry day or industry/small business conferences;

2. Draft RFPs with invitation to provide comments to the contracting officer;

3. Requests for information (RFIs); and

4. Site visits.

E. Receipt of Initial Proposals.

1. Proposal Preparation Time.

a. Agencies must give potential offerors at least 30 days after they issue the solicitation to submit initial proposals for contracts over the simplified acquisition threshold. 41 U.S.C. § 1708(e); 15 U.S.C. § 637(e)(3); FAR 5.203(c). *But see* FAR 12.603 and FAR 5.203 for streamlined requirements for commercial items. For research and development contracts, agencies must give potential offerors at least 45 days after the solicitation is issued to submit initial proposals. 41 USC § 1708(e); FAR 5.203(e).

b. Amendments.

(1) An agency must amend the RFP if it changes its requirements (or terms and conditions) significantly. FAR 15.206; *see Digital Techs., Inc.,* B-291657.3, Nov. 18, 2004, 2004 CPD ¶ 235 (upholding agency's decision to amend solicitation to account for a 40 percent increase in the amount of equipment to be maintained); *Northrop Grumman Info. Tech., Inc.,* B-295526, *et al.*, Mar. 16, 2005, 2005 CPD ¶ 45 (sustaining a protest when the Government should have amended the solicitation (but did not) to reflect that the agency was unlikely to exercise options).

(2) After amending the RFP, the agency must notify all offerors of the changed requirements and give them an opportunity to respond. *Diebold, Inc.,* B-404823, June 2, 2011, 2011 CPD ¶117; *see* FAR 15.206(g).

(3) Timing:

(a) ***Before*** established time and date for receipt of proposals, amendment goes to all parties receiving the solicitation. FAR 15.206(b).

(b) ***After*** established time and date for receipt of proposals, amendment goes to all offerors that have

not been eliminated from the competition. FAR 15.206(c).

(4) If the change is so substantial that it exceeds what prospective offerors reasonably could have anticipated, the contracting officer shall cancel the original solicitation and issue a new one, regardless of the stage of the acquisition. FAR 15.206(e). An agency has broad authority to cancel a solicitation and need only establish a reasonable basis for cancellation. *See Trade Links General Trading & Contracting*, B-405182, Sept. 1, 2011, 2011 CPD ¶ 165.

2. Early "Proposals."

a. FAR 2.101 defines "offer" as a "response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract."

b. Agencies must evaluate offers that respond to the solicitation, even if the offer pre-dates the solicitation. *STG Inc.*, B-285910, Sept. 20, 2000, 2000 CPD ¶ 155.

c. If an agency wants to preclude evaluation of proposals received prior to the RFP issue date, it must notify offerors and allow sufficient time to submit new proposals by the closing date. *Id.*

3. Late Proposals. FAR 15.208; FAR 52.215-1.

a. A proposal is late if the agency does not receive it by the time and date specified in the RFP. FAR 15.208; *Haskell Company*, B-292756, Nov. 19, 2003, 2003 CPD ¶ 202 (key is whether the government could verify that a timely proposal was submitted).

(5) If no time is stated, 4:30 p.m. local time is presumed. FAR 15.208(a).

(6) FAR 15.208 and FAR 52.215-1 set forth the circumstances under which an agency may consider a late proposal.

(7) The late proposal rules mirror the late bid rules. *See* FAR 14.304.

(8) Example. Proposal properly rejected as late where the proposal was received by email after the closing time for proposals and no exception permitted evaluation of

the late proposal. *Alalamiah Technology Group*, B-402707.2, June 29, 2010, 2010 CPD 148.

b. However, the Contracting Officer does have some discretion. (see FAR 15.208(b)(1)). The Contracting Officer may allow a proposal, modification, or revision, received at the designated Government office after the exact time specified for receipt of proposals if it is received before award is made, the contracting officer determines that accepting the late proposal would not unduly delay the acquisition; and-

c. (i) If it was transmitted through an electronic commerce method authorized by the solicitation, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals; or

d. (ii) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of proposals and was under the Government's control prior to the time set for receipt of proposals; or

e. (iii) It was the only proposal received.

f. Both technical and price proposals are due before the closing time. *See Inland Serv. Corp.*, B-252947.4, Nov. 4, 1993, 93-2 CPD ¶ 266.

g. The underlying policy of the late proposal rule is to avoid confusion and ensure fair and equal competition. Therefore, a proposal is not late when an agency timely receives at least one complete copy of the proposal prior to closing time. *See Tishman Constr. Corp.*, B-292097, May 29, 2003, 2003 CPD ¶ 94 (finding proposal timely submitted where contractor timely submitted electronic proposal but failed to timely submit identical paper proposal IAW the solicitation).

h. Agencies must retain late proposals unopened in the contracting office. FAR 15.208(g).

4. No "Firm Bid Rule." An offeror may withdraw its proposal at any time before award. FAR 15.208(e), FAR 52.215-1(c)(8). The agency, however, only has a reasonable time in which to accept a proposal. *See Western Roofing Serv.*, B-232666.4, Mar. 5, 1991, 70 Comp. Gen. 324, 91-1 CPD ¶ 242 (holding that 13 months was too long).

5. Lost proposals. The GAO will only recommend reopening a competition if a lost proposal is the result of systemic failure resulting in multiple or repetitive instances of lost information. *Project Res., Inc.*, B-297968, Mar. 31, 2006, 2006 CPD ¶ 58.

6. Oral Presentations. FAR 15.102. A solicitation may require or permit, at the agency's discretion, oral presentations as part of the proposal process.

   a. Offerors may present oral presentations as part of the proposal process. *See NW Ayer, Inc.*, B-248654, Sept. 3, 1992, 92-2 CPD ¶ 154. They may occur at anytime in the acquisition process and are subject to the same restrictions as written information regarding timing and content. FAR 15.102(a). When oral presentations are required, the solicitation shall provide offerors with sufficient information to prepare them. FAR 15.102(d). The following are examples of information that may be put into the solicitation:

      (9) The types of information to be presented orally and the associated evaluation factors that will be used;

      (10) The qualifications for personnel required to provide the presentation;

      (11) Requirements, limitations and / or prohibitions on supplemental written material or other media;

      (12) The location, date, and time;

      (13) Time restrictions; or

      (14) Scope and content of exchanges between the Government and the offeror, to include whether or not discussions will be permitted. *Id.*

   b. The method and level of detail of the record of any oral presentation is within the discretion of the source selection authority. FAR 15.102(e). While the FAR does not require a particular method of recording what occurred during oral presentations, agencies must maintain a record adequate to permit meaningful review. *See Checchi & Co. Consulting, Inc.*, B-285777, Oct. 10, 2000, 2001 CPD 132. (Practice tip: video recording of oral presentations helps capture both audio and visual portions of the presentation and creates a record that it is helpful to refer back to when evaluating proposals and defending any protests.).

c. When an oral presentation includes information that will be included in the contract as a material term or condition, the information must be reduced to writing. The oral presentation cannot be incorporated by reference. FAR 15.102(f).

d. **Cautionary note**: Agency questions during oral presentations could be interpreted as discussions. In *Global Analytic Info. Tech. Servs., Inc.*, B-298840.2, Feb. 6, 2007, 2007 CPD ¶ 57, GAO held if agency personnel comment on, or raise substantive questions about a proposal during an oral presentation, and afford an opportunity to revise a proposal in light of the agency's comments, then discussions have occurred.

7. Confidentiality

a. Prospective offerors may restrict the use and disclosure of information contained in their proposals by marking the proposal with an authorized restrictive legend. FAR 52.215-1(e).

b. Agencies must safeguard proposals from unauthorized disclosure. FAR 15.207(b).

VI. SOURCE SELECTION (FAR SUBPART 15.3)

A. The objective of source selection is to select the proposal that represents the best value to the Government (as defined by the Government). FAR 15.302. Because the agency's award decision must be consistent with the terms of the solicitation, the agency must ensure that its solicitation fully supports the "best value" objective.

B. Responsibilities. FAR 15.303; Army Source Selection Supplement, November 28, 2017.

C. Agency heads are responsible for source selection. The contracting officer is normally designated the source selection authority unless the agency head appoints another individual for a particular acquisition or group of acquisitions.

1. The Source Selection Authority must:

a. Establish an evaluation team, tailored for the particular acquisition. The composition of an evaluation team is left to the agency's discretion and the GAO will not review it absent a showing of conflict of interest or bias. *See University Research Corp.*, B-253725.4, Oct. 26, 1993, 93-2 CPD ¶ 259; *Symtech Corp.*, B-285358, Aug. 21, 2000, 2000 CPD ¶ 143; *see also* FAR 15.303 (providing that the source selection authority shall establish an evaluation team, tailored for the particular acquisition, that

includes appropriate contracting, legal, logistics, technical, and other expertise to ensure a comprehensive evaluation of offers).

b. Approve the acquisition plan and source selection strategy.

c. Ensure that proposals are evaluated based solely on the factors and subfactors contained in the solicitation.

d. Consider the recommendation of the advisory boards and panels.

e. Select the source that provides the best value to the Government.

D. Proposal Evaluations Generally. FAR 15.305.

1. Evaluators must read and consider the entire proposal. *Intown Properties, Inc.*, B-262236.2, B-262237.1, Jan. 18, 1996, 96-1 CPD ¶ 89 (record failed to demonstrate whether agency had considered information contained in offeror's best and final offer).

2. Evaluators must be consistent. If evaluators downgrade an offeror for a deficiency, they must downgrade other offerors for the same deficiency. *See Park Sys. Maint. Co.*, B-252453, June 16, 1993, 93-1 CPD ¶ 466. If evaluators give credit to one offeror, they should give like credit to another offeror for the same provision. *Brican Inc.*, B-402602, June 17, 2010, 2010 CPD ¶ 141 (sustaining protest where the agency evaluated awardee's and the protester's proposals unequally by crediting the awardee for a specialty subcontractor, but not similarly crediting the protester who proposed the same subcontractor).

3. Evaluators must avoid double-scoring or exaggerating the importance of a factor beyond its disclosed weight. *See J.A. Jones Mgmt. Servs.*, B-254941.2, Mar. 16, 1994, 94-1 CPD ¶ 244; *cf. Glasslock, Inc.*, B-299931, B-299931.2, Oct. 10, 2007, 2007 CPD ¶ 216 (reaffirming principle in the context of a RFQ). *Compare Source One Mngt., Inc.*, B-278044, *et al.*, June 12, 1998, 98-2 CPD ¶ 11 (stating that an agency is not precluded from considering an element of a proposal under more than one evaluation criterion where the element is relevant and reasonably related to each criterion under which it is considered.)

4. Evaluators must evaluate compliance with the stated requirements. If an offeror proposes a better—but noncompliant—solution, the agency should amend the RFP and solicit new proposals, provided the agency can do so without disclosing proprietary data. FAR 15.206(d); *see Beta Analytics, Int'l, Inc. v. U.S.*, 44 Fed. Cl. 131 (1999); *GTS Duratek, Inc.*, B-280511.2, B-285011.3, Oct. 19, 1998, 98-2 CPD ¶ 130; *Labat-Anderson Inc.*, B-246071, Feb. 18, 1992, 92-1 CPD ¶ 193; *cf. United Tel. Co. of the Northwest*, B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374

(holding that substantial changes required the agency to cancel and reissue the RFP).

5. Evaluators may consider matters outside the offerors' proposals if their consideration of such matters is not unreasonable or contrary to the stated evaluation criteria. *See Intermagnetics Gen. Corp. Recon.*, B-255741.4, Sept. 27, 1994, 94-2 CPD ¶ 119.

6. Evaluation factors and subfactors represent the key areas of importance and support the evaluators in making meaningful discrimination between and among competing offerors' proposals. Accordingly, the "relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file." FAR 15.305(a).

7. The agency's evaluation must be reasonable and consistent with the stated evaluation criteria. A common evaluation error occurs when the agency's evaluation is inconsistent with the solicitation's stated evaluation approach. The failure to use stated evaluation criteria, the use of unstated evaluation criteria, or unstated minimum criteria, in the evaluation of offerors' proposals is generally fatal to an agency's source selection decision. *See, e.g., Y&K Maint., Inc.*, B-405310.6, Feb. 2, 2012, 2012 CPD ¶ 93; Orion Tech., Inc.; *Chenega Integrated Mission Support, LLC*, B-406769 et al., Aug. 22, 2012, 2012 CPD ¶ 268.

   a. While the agency has significant discretion to determine which evaluation factors and subfactors to use, evaluators have **<u>no</u>** discretion to deviate from the solicitation's stated evaluation criteria. *See, e.g., Y & K Maintenance, Inc.*, B-405310.6, Feb 2, 2012, 2012 CPD ¶ 93 (sustaining a protest because the agency failed to evaluate the experience of the awardee's key personnel consistent with the RFP's stated evaluation criteria).

   b. Protest sustained where solicitation provided that agency would conduct extensive testing on product samples, however agency failed to conduct testing on awardee's product and accepted awardee's unsubstantiated representation its product met solicitation's requirements. *Ashbury Intl. Group, Inc.*, B-401123: B-401123.2, June 1, 2009, 2009 CPD ¶ 140.

   c. Protest sustained based on a flawed technical evaluation where the agency considered an undisclosed evaluation criterion--transition risk--in assuming that any non-incumbent contractor would likely cause mistakes in performance that would result in costs for the agency. *Consolidated Eng'g Servs., Inc.*, B-311313, June 10, 2008, 2008 CPD ¶ 146.

8. Unstated Evaluation Factors

a. Agencies occasionally omit either: (1) significant evaluation factors and subfactors; (2) their relative importance; or (3) both. *See Omniplex World Servs. Corp.*, B-290996.2, Jan. 27, 2003, 2003 CPD ¶ 7 (finding an agency improperly relied on an unstated minimum requirement to exclude an offeror from the competitive range). *But see Stone & Webster Eng'g Corp.*, B-255286.2, Apr. 12, 1994, 94-1 CPD ¶ 306 (finding no prejudice even though the evaluation committee applied different weights to the evaluation factors without disclosing them); *cf. Danville-Findorff, Ltd*, B-241748, Mar. 1, 1991, 91-1 CPD ¶ 232 (finding no prejudice even though the agency listed the relative importance of an evaluation factor as 60 in the RFP, used 40 as the weight during evaluation, and used the "extra" 20 points for an unannounced evaluation factor). (Note that while the Government prevailed in these cases, it only prevailed because Government counsel clearly demonstrated to GAO that no prejudice befell the unsuccessful offeror due to these problems.).

b. While procuring agencies are required to identify the significant evaluation factors and subfactors in a solicitation, they are not required to identify every aspect of each factor that might be taken into account; rather, agencies may take into account considerations, even if unstated, that are reasonably related to or encompassed by the stated evaluation criteria. *SCS Refrigerated Servs. LLC*, B-298790, B-298790.1, B-298790.3, Nov. 29, 2006, 2006 CPD ¶ 186 (finding that the location of an offeror's back-up suppliers and the certainty of its relationships with back-up suppliers were reasonably related to a production capability/distribution plan subfactor which required offerors to provide detailed descriptions of their contingency plans for delays that could impact the delivery of food items to commissaries); *NCLN20, Inc.*, B-287692, July 25, 2001, 2001 CPD ¶ 136 (finding that organizational and start-up plans were logically related to and properly considered under a stated staffing plan factor).

c. The GAO will generally excuse an agency's failure to specifically identify more than one subfactor ***only if*** the subfactors are: (1) reasonably related to the stated criteria; and (2) of relatively equal importance. *See Johnson Controls World Servs., Inc.*, B-257431, Oct. 5, 1994, 94-2 CPD ¶ 222 (finding that "efficiency" was reasonably encompassed within the disclosed factors); *AWD Tech., Inc.*, B-250081.2, Feb. 1, 1993, 93-1 CPD ¶ 83 (finding that the agency properly considered work on similar superfund sites under

the solicitation's past project experience factor even though the agency did not specifically list it as a subfactor).

d. The GAO, however, has held that an agency must disclose reasonably related subfactors if the agency gives them significant weight. *See Lloyd H. Kessler, Inc.*, B-284693, May 24, 2000, 2000 CPD ¶ 96 (finding that agency was required to disclose in the solicitation a subfactor to evaluate a particular type of experience under the experience factor where the subfactor constituted 40 percent of the technical evaluation); *Devres, Inc.*, B-224017, 66 Comp. Gen. 121, 86-2 CPD ¶ 652 (1986) (concluding that an agency must disclose subfactors that have a greater weight than reasonably related disclosed factors).

e. Innovative solutions in satisfying an agency's stated needs are permitted. An agency may properly consider the extent to which "innovative or creative approaches may exceed the solicitation requirements or be otherwise beneficial to the Government." *Tri-Starr Management Servcies , Inc.*, B-408827.2, Jan. 15, 2015, 2015 CPD ¶ 43; *McConnell Jones Lanier and Murphy, LLP*, B-409691.3 *et al.*, Oct 21, 2015, 2015 CPD ¶ 341.

E. Cost and Price Evaluation.

1. Contracting activities should score cost/price in dollars and avoid schemes that: (1) mathematically relate cost to technical point scores; or (2) assign point scores to cost.

2. The cost to the government, expressed in terms of price or cost, shall be evaluated in <u>every</u> source selection. FAR 15.304(c)(1). An agency's cost or price evaluation is directly related to the financial risk that the government bears because of the contract type it has chosen.

3. Evaluation scheme must be reasonable, and provide an objective basis for comparing cost to government. *SmithKline Beecham Corp.*, B-283939, Jan. 27, 2000, 2000 CPD ¶ 19.

4. While cost or price to the Government need not be the most important evaluation factor, cost or price must <u>always</u> be a factor and taken into account in all award decisions, as well as all competitive range determinations.

5. Evaluating Firm Fixed-Price Contracts. FAR 15.305(a)(1).

a. Generally. When an agency contemplates the award of a fixed-price contract, the government's liability is fixed and the contractor bears the risk and responsibility for the actual costs of

performance. FAR 16.202-1. As a result, the agency's analysis of price must take into account that the government's liability is contractually limited to the offeror's proposed price.

b. Price Reasonableness. A price reasonableness analysis determines whether an offeror's price is fair and reasonable to the government, and focuses on whether the offered price is too high (not too low). *CSE Constr.*, B-291268.2, Dec. 16, 2002, 2002 CPD ¶ 207; *SDV Solutions, Inc.*, B-402309, Feb. 1, 2010, 2010 CPD ¶ 48. The concern that an offeror submitted a price that is "too low" is not a valid part of a price reasonableness evaluation; similarly, the allegation that an awardee submitted an unreasonably low price does not provide a basis upon which to sustain a protest because there is no prohibition against an agency accepting a below-cost proposal for a fixed-price contract. *See First Enter.*, B-292967, Jan. 7, 2004, 2004 CPD ¶ 11.

c. Comparing proposed prices usually satisfies the requirement to perform a price analysis because an offeror's proposed price is also its probable price. *See Ball Technical Prods. Group*, B-224394, Oct. 17, 1986, 86-2 CPD ¶ 465. *But see Triple P Servs., Inc.*, B-271629.3, July 22, 1996, 96-2 CPD ¶ 30 (indicating that an agency may evaluate the reasonableness of the offeror's low price to assess its understanding of the solicitation requirements if the RFP permits the agency to evaluate offerors' understanding of requirements as part of technical evaluation).

d. Indefinite Delivery/Indefinite Quantity (ID/IQ) contracts. Price analysis can be difficult for indefinite quantity contracts. If an agency possesses historical data on billings under prior ID/IQ contracts, the agency may develop estimates based on these and apply it to the price analysis. *R&G Food Serv., Inc., d/b/a Port-A-Pit Catering*, B-296435.4, B-296435.9, Sept. 15, 2005, 2005 CPD ¶ 194. Another method is to construct notional or hypothetical work orders. *Dept. of Agriculture—Reconsideration*, B-296435.12, Nov. 3, 2005, 2005 CPD ¶ 201.

e. Price Realism. A price realism analysis is not ordinarily part of an agency's price evaluation because of the allocation of risk associated with a fixed-price contract. The analysis is entirely optional unless expressly required by the solicitation. *Milani Constr., LLC*, B-401942, Dec. 22, 2009, 2010 CPD ¶ 87.

(15) The price realism is to be used when, among other things, new requirements may not be fully understood by competing offerors. FAR 15.404-1(d)(3); *Analytic*

Strategies, B-404840, May 5, 2011, 2011 CPD ¶ 99 ("An agency may, in its discretion, provide for a price realism analysis for the purpose of assessing whether an offeror's price is so low as to evince a lack of understanding of the contract requirements or for assessing risk inherent in an offeror's approach.").

(16) To the extent an agency elects to perform a realism analysis as part of the award of a fixed-price contract, its purpose is not to evaluate an offeror's price, but to measure an offeror's understanding of the solicitation's requirements; further, the offered prices **may not be adjusted** as a result of the analysis. FAR 15.404-1(d)(3); *IBM Corp.*, B-299504, B-299504.2, June 4, 2007, 2008 CPD ¶ 64 (sustaining protest challenging the agency's evaluation of offerors' price and cost proposals where the agency improperly adjusted upward portions of the protester's fixed-price proposals); *ITT Elec. Sys. Radar Recon. & Acoustic Sys.*, B-405608, Dec. 5, 2011, 2012 CPD ¶ 7 ("Where, as here, an RFP provides for the award of a fixed price contract, the contracting agency may not adjust offerors' prices for purposes of evaluation.").

(17) Agencies may use a variety of methods to evaluate price realism, including analyzing pricing information proposed by the offeror and comparing proposals received to one another, to previously proposed or historically paid prices, or to an independent government estimate. The nature and extent of an agency's price realism analysis are within the agency's discretion unless the solicitation commits to a particular evaluation method. *Gen. Dynamics*, B-401658, B-401658.2, Oct. 26, 2009, 2009 CPD ¶ 217.

(18) While it is within an agency's discretion to provide for a price realism analysis in awarding a fixed-price contract to assess understanding or risk, offerors competing for such an award must be given reasonable notice that a business decision to submit low pricing will be considered as reflecting on their understanding or the risk associated with their proposals. *Emergint Techs., Inc*., B–407006, Oct. 18, 2012, 2012 CPD ¶295 at 5–6.

(5) Where there is no relevant evaluation criterion pertaining to price realism, a determination that an offeror's price on a fixed-price contract is too low generally concerns the offeror's responsibility, i.e., the offeror's ability and capacity to perform successfully at its offered price. *Flight Safety Servs. Corp.*, B–403831, B–403831.2, Dec. 9, 2010, 2010 CPD ¶294 at 5.

(6) Absent a solicitation provision for a fixed-priced contract requiring a price realism analysis, no such analysis is required or permitted. *PAE Government Services, Inc.*, B-407818, Mar. 5, 2013, 2013 CPD ¶ 91.

(7) Agencies must consider whether the proposed awardee's prices were too low to accomplish the work in the proposal and the risk of poor performance. *B&B Medical Services Inc.*, B-409705.4, 2015 CPD ¶ 198.

6. Evaluating Cost Reimbursement Contracts

a. Cost Reasonableness Analysis. A cost reasonableness analysis is used to evaluate the reasonableness of individual cost elements when cost or pricing data, or information other than cost or pricing data, are required. FAR 15.404-1(a)(3) & (4). As with price reasonableness, cost reasonableness is used to determine that the offeror's overall cost is fair and reasonable to the government (*i.e.*, not too high).

b. Cost Realism Analysis (Generally). When an agency evaluates proposals for the award of a cost-reimbursement contract, an offeror's proposed costs of contract performance are not considered controlling because, regardless of the costs proposed by an offeror, the government is bound to pay the contractor its reasonable, allowable, and allocable costs. FAR 16.301-1; FAR 15.404-1(d); *Metro Mach. Corp.*, B-295744, B-295744.2, Apr. 21, 2005, 2005 CPD ¶112.

(19) Agencies should perform a cost realism analysis and evaluate an offeror's probable cost of accomplishing the solicited work, rather than its proposed cost.[4] *See* FAR 15.404-1(d); *see also Kinton, Inc.*, B-228260.2, Feb. 5, 1988, 67 Comp. Gen. 226, 88-1 CPD ¶ 112 (indicating that it is improper for an agency to award

[4] Probable cost is the proposed cost adjusted for cost realism.

based on probable costs without a detailed cost analysis or discussions with the offeror).

(20) A cost realism analysis is used to determine the extent to which an offeror's proposed costs represent what the contract performance should cost, assuming reasonable economy and efficiency. FAR 15.305(a)(1), 15.404-1(d)(1), (2); *Magellan Health Servs.*, B-298912, Jan. 5, 2007, 2007 CPD ¶ 81; *The Futures Group Int'l*, B-281274.2, Mar. 3, 1999, 2000 CPD ¶ 147.

(21) Further, an offeror's proposed costs should be adjusted when appropriate based on the results of the cost realism analysis. FAR 15.404-1(d)(2)(ii); *Magellan Health Servs.*, B-298912, Jan. 5, 2007, 2007 CPD ¶ 81 (sustaining protest where, among other things, contracting officer failed to take into account the cost adjustments recommended by the agency's cost evaluation and instead considered only the offeror's proposed cost in the agency's source selection decision).

(22) If an agency needs to perform a cost realism analysis, the agency should base any adjustments to the offered price on identifiable costs to the government (e.g., in-house costs or life-cycle costs). *See* FAR 15.404-1(d); *see also Futures Group Int'l*, B-281274.5, Mar. 10, 2000, 134 (2000, 2000 CPD ¶ 148) (cost realism analysis must consider all information reasonably available at the time of evaluation, not just what offeror submits).

(23) A cost realism analysis is the process of independently reviewing and evaluating specific elements of each offeror's cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed, reflect a clear understanding of the requirements, and are consistent with the unique methods of performance and materials described in the offeror's proposal. FAR 15.404-1(d)(1); *Advanced Commc'ns Sys., Inc.*, B-283650 *et al.*, Dec. 16, 1999, 2000 CPD ¶ 3.

(24) Agencies should consider all cost elements. It is unreasonable to ignore unpriced "other cost items," even if the exact cost of the items is not known. *See*

Trandes Corp., B-256975.3, Oct. 25, 1994, 94-2 CPD ¶ 221; *cf. Stapp Towing Co.*, ASBCA No. 41584, 94-1 BCA ¶ 26,465.

(25) Cost realism need not achieve scientific certainty; rather, it must provide some measure of confidence that the conclusions about the most probable costs are reasonable and realistic in view of other cost information reasonably available to the agency at the time of its evaluation. GAO reviews an agency's judgment only to see if the cost realism evaluation was reasonably based, not arbitrary, and adequately documented. *Metro Mach. Corp.*, B-402567, B-402567.2, June 3, 2010, 2010 CPD ¶ 132.

(26) Agencies should evaluate cost realism consistently from one proposal to the next.

(27) However, agencies may not apply estimated adjustment factors mechanically. A proper cost realism analysis requires the agency to analyze each offeror's proposal independently based on its particular circumstances, approach, personnel, and other unique factors. *See Honeywell Technology Solutions, Inc.*, B-292354, B-292388, Sept. 2, 2003, 2005 CPD ¶ 107; *Metro Mach. Corp.*, B-297879.2, May 3, 2006, 2006 CPD ¶ 80.

(28) Agencies should also reconcile differences between the cost realism analysis and the technical evaluation scores. *Information Ventures, Inc.*, B-297276.2 *et al.*, Mar. 1, 2006, 2006 CPD ¶ 45 (agency praised technical proposal's "more than adequate" staffing while lowering hours of program director because of "unrealistic expectations").

(29) Agencies must document their cost realism analysis. *See KPMG LLP*, B-406409, *et al.*, May 21, 2012, 2012 CPD ¶ 175 (explaining that GAO "will sustain a protest where the cost realism analysis [is] not adequately documented").

F. Scoring Quality Factors (e.g., Technical and Management). *See* FAR 15.305(a).

1. Rating Methods. An agency may adopt any method it desires, provided the method is not arbitrary and does not violate any statutes or regulations. *See BMY v. United States*, 693 F. Supp. 1232 (D.D.C.

1988). At a minimum, an agency must give better proposals higher scores. *See Trijicon, Inc.*, B-244546, Oct. 25, 1991, 71 Comp. Gen. 41, 91-2 CPD ¶ 375 (concluding that the agency failed to rate proposals that exceeded the minimum requirements higher than those offering the minimum). An agency may give higher scores to proposals that exceed the minimum requirements, even if the RFP does not disclose how much extra credit will be given under each subfactor. *See PCB Piezotronics, Inc.*, B-254046, Nov. 17, 1993, 93-2 CPD ¶ 286.

2. Evaluation ratings, whether numeric, color, or adjectival, are but guides to, and not a substitute for, intelligent decision making. *See ABSG Consulting, Inc.*, B-404863.7, June 25, 2014, 2013 CPD ¶ *185; C & B Constr., Inc.*, B-401988.2, Jan. 6, 2010, 2010 CPD ¶ 1. Evaluation ratings are tools to assist source selection officials in evaluating proposals; they do not mandate automatic selection of a particular proposal. *Jacobs COGEMA, LLC*, B-290125.2, B-290125.3, Dec. 18, 2002, 2003 CPD ¶ 16.

a. **Numerical**.[5] An agency may use point scores to rate individual evaluation factors. *But see C & B Constr., Inc.* B-401988.2, Jan. 6, 2010, 2010 CPD ¶ 1 (sustaining protest where record provided no contemporaneous tradeoff comparing offeror to awardee other than on the basis of point scores); *Shumaker Trucking & Excavating Contractors, Inc.*, B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 (sustaining protest where agency relied on point scores and failed to document in source selection decision any comparison of protester's lower-priced and lower-rated proposal to awardee's higher-priced, higher-rated proposal).

b. **Adjectives**. An agency may use adjectives (e.g., excellent, good, satisfactory, marginal, and unsatisfactory)—either alone or in conjunction with other rating methods—to indicate the degree to which an offeror's proposal meets the requisite standards for each evaluation factor. *See Hunt Bldg. Corp.*, B-276370, June 6, 1997, 98-1 CPD ¶ 101 (denying a challenge to the assigned adjectival ratings where the evaluators adequately documented the different features offered by each firm and conveyed the comparative merits of the proposals to the selection official); *see also* FAR 15.305(a); *Biospherics Incorp.*, B-278508.4, et al., Oct 6, 1998, 98-2 CPD ¶ 96 (holding that while adjectival ratings and point scores are useful guides to decision making, they must be supported by documentation of the relative differences between proposals).

[5] *See supra* note 2 for Army policy regarding use of numerical scoring.

c. **Colors**. An agency may use colors in lieu of adjectives to indicate the degree to which an offeror's proposal meets the requisite standards for each evaluation factor. *See Ferguson-Williams, Inc.*, B-231827, Oct. 12, 1988, 88-2 CPD ¶ 344.

d. **Dollars**. This system translates the technical evaluation factors into dollars that are added or subtracted from the evaluated price to get a final dollar price adjusted for technical quality. *See DynCorp*, B-245289.3, July 30, 1992, 93-1 CPD ¶ 69. Must be described in the solicitation's Section M, award criteria, to be utilized.[6]

3. **But remember**: The focus in the source selection decision should be the underlying bases for the ratings, including a comparison of the advantages and disadvantages associated with the specific content of competing proposals, considered in a fair and equitable manner consistent with the terms of the RFP. *See Gap Solutions, Inc.*, B-310564, Jan. 4, 2008, 2008 CPD ¶ 26; *Mechanical Equipment Company, Inc., et al.*, B-292789.2, *et al.*, Dec. 15, 2003, 2004 CPD ¶ 192.

4. Agencies possess considerable discretion in evaluating proposals, and particularly in making scoring decisions. *See MiTech, Inc.*, B-275078, Jan. 23, 1997, 97-1 CPD ¶ 208 (indicating that the GAO will not rescore proposals; it will only review them to ensure that the agency's evaluation is reasonable and consistent with the stated evaluation criteria); *see also Control Systems Research, Inc.*, B-299546.2, Aug. 31, 2007, 2007 CPD ¶ 193 (stating that GAO will not substitute its judgment for that of the agency in evaluating management and technical areas); *Antarctic Support Associates v. United States*, 46 Fed. Cl. 145 (2000) (citing precedent of requiring "great deference" in judicial review of technical matters).

5. Narrative. When tradeoffs are performed, an agency must provide a narrative to rate the strengths, weaknesses, and risks of each proposal. The narrative provides the basis for the source selection decision; therefore, the narrative should accurately reflect the proposals relative strengths, weaknesses, deficiencies, and importance of these to the evaluation factors. FAR 15.305(a)(3)(ii); *ABSG Consulting, Inc.*, B-404863.7, June 25, 2014, 2013 CPD ¶ 185.

6. Agencies must reconcile adverse information when performing technical evaluation. *See Maritime Berthing, Inc.*, B-284123.3, Apr. 27, 2000, 2000 CPD ¶ 89; *see also Carson Helicopter Servs., Inc.*, B-299720, B-299720.2, July 30, 2007, 2007 CPD ¶ 142 (stating that an agency may

[6] This method is not frequently used by the Department of Defense.

not accept at face value a proposal's promise to meet a material requirement when there is significant countervailing evidence that was, or should have been, reasonably known to the agency evaluators that should have created doubt whether the offeror would or could comply with that requirement).

7. Responsibility Concerns. A responsibility determination is not strictly part of the technical evaluation, but the evaluation process may include consideration of responsibility matters. *See Applied Eng'g Servs., Inc.*, B-256268.5, Feb. 22, 1995, 95-1 CPD ¶ 108. If responsibility matters are considered without a comparative evaluation of offers, however, a small business found technically unacceptable may appeal to the SBA for a COC. *See Docusort, Inc.*, B-254852, Jan. 25, 1994, 94-1 CPD ¶ 38. If evaluators express concern with an offeror's responsibility, the evaluators should provide input to the contracting officer for use in making a responsibility determination. For a more detailed discussion on evaluating responsibility, *see infra* Subpart VI.P.

8. In DoD, source selection rating methodology is governed by the Department of Defense Source Selection Procedures and the Army is further governed by the Supplement (AS3) to the DoD Source Selection Procedures.

G. Past Performance Evaluation.

1. Past performance is generally required to be evaluated in all source selections for negotiated competitive acquisitions issued on or after January 1, 1999. *See* FAR 15.304(c), 15.305(a)(2).

2. Past Performance Evaluation System. FAR Subpart 42.15.

a. Agencies must establish procedures for collecting and maintaining performance information on contractors. FAR 42.1502. These procedures should provide for input from technical offices, contracting offices, and end users. FAR 42.1503.

b. Agencies must prepare performance evaluation reports for each contract in excess of the simplified acquisition threshold, and in excess of other FAR-specified amounts for construction, architect-engineer, and blind/severely disabled agency (Subpart 8.7) contracts. FAR 42.1502.

3. Sources of Past Performance Information.

a. Agencies may consider their own past experience with an offeror rather than relying solely on the furnished references. *See Birdwell*

Bros. Painting and Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129.

b. An agency is not limited to considering past performance information provided by an offeror as part of its proposal, but may also consider other sources, such as:

(30) Contractor Performance Assessment Reporting System (CPARS) (https://www.cpars.gov/); and

(31) Past Performance Information Retrieval System (PPIRS) (www.ppirs.gov/).

(32) The primary purpose of the CPARS is to ensure that current and accurate data on contractor performance is available for use in source selections through PPIRS. Agencies use the CPARS database to collect and document contractor performance information consistent with the DoD CPARS Guide and the procedures at FAR 42.1503. Once the CPARS process is complete, this CPAR is loaded to PPIRS, which can be accessed by contracting officers and agency officials on source selection boards.

c. In *KMS Fusion, Inc.*, B-242529, May 8, 1991, 91-1 CPD ¶ 447, an agency properly considered extrinsic past performance evidence when past performance was a disclosed evaluation factor. In fact, ignoring extrinsic evidence may be improper. *See SCIENTECH, Inc.*, B-277805.2, Jan. 20, 1998, 98-1 CPD ¶ 33; *cf. Aviation Constructors, Inc.*, B-244794, Nov. 12, 1991, 91-2 CPD ¶ 448.

d. Information that is personally known by agency evaluators. Evaluators may consider and rely upon their personal knowledge in the course of evaluating an offeror's past performance. *Del-Jen Int'l Corp.*, B-297960, May 5, 2006, 2006 CPD ¶ 81; *NVT Techs., Inc.*, B-297524, B-297524.2, Feb. 2, 2006, 2006 CPD ¶ 36; *see TPL, Inc.*, B-297136.10, B-297136.11, June 29, 2006, 2006 CPD ¶ 104 (finding that a conflict of interest does not exist where the same contracting agency or contracting agency employees prepare both an offeror's past performance reference and perform the evaluation of offerors' proposals).

e. "Too close at hand." In fact, GAO has determined that, in certain circumstances, agency evaluators involved in the source selection process ***cannot ignore*** past performance information of which they are personally aware. *The MIL Corp.*, B-297508, B-297508.2, Jan.

26, 2006, 2006 CPD ¶ 34; *Northeast Military Sales., Inc.*, B-404153, Jan. 2011, 2011 CPD ¶ 2 (sustaining a protest challenging an agency's assessment of the awardee's past performance as exceptional where the agency failed to consider adverse past performance information of which it was aware).

f. GAO has charged an agency with responsibility for considering such outside information where the record has demonstrated that the information in question was "simply too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain, and consider this information." *International Bus. Sys., Inc.*, B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114; *G. Marine Diesel; Phillyship*, B-232619, Jan. 27, 1989, 89-1 CPD ¶ 90; *GTS Duratek, Inc.*, B-280511.2, B-280511.3, Oct. 19, 1998, 98-2 CPD ¶ 130. The protester, however, must demonstrate that agency source selection officials ***were aware or should have been aware*** of the adverse information to sustain a protest on this basis. *Carthage Area Hospital, Inc.*, B-402345, Mar. 16, 2010, 2010 CPD ¶ 90.

4. Past Performance Evaluation Considerations. An agency's evaluation of an offeror's past performance must be reasonable and consistent with the stated evaluation criteria. An agency's past performance evaluation should also take into account: (a) the relevance of an offeror's past performance; (b) the quality of an offeror's past performance; and (c) the source objectivity of an offeror's past performance information.

a. Relevance of Past Performance. An agency must determine what if any weight to give to an offeror's past performance reference by determining its degree of relevance to the contract requirements.

(33) "Same or Similar." When an RFP states the agency will evaluate whether an offeror's past performance reference is "same or similar" as part of determining relevancy, an agency must examine if the reference is same or similar in both size and scope to the awarded contract. *Si-Nor, Inc.*, B-292748.2 *et al.*, Jan. 7, 2004, 2004 CPD ¶ 10 (finding in part a prior contract which represented less than 7 percent of the solicitation requirements was not similar in size, scope, and complexity); *Continental RPVs*, B-292768.2, B-292678.3, Dec.11, 2003, 2004 CPD ¶ 56 (finding prior contracts no larger than 4 percent of the solicitation requirements were not similar or relevant); *Kamon Dayron, Inc.*, B-292997, Jan. 15, 2004, 2004 CPD ¶ 101; *Entz Aerodyne, Inc.*, B-293531, Mar. 9, 2004,

2004 CPD ¶ 70; *KMR, LLC*, B-292860, Dec. 22, 2003, 2003 CPD ¶ 233.

(34) Recency. An agency may consider the recency of an offeror's past performance reference as part of determining its overall relevance. *See Knoll, Inc.*, B-294986.3, B-294986.4, Mar. 18, 2005, 2005 CPD ¶ 63; *FR Countermeasures, Inc.*, B-295375, Feb. 10, 2005, 2005 CPD ¶ 52 (agency was not, per the terms of the RFP, required to consider offeror's past performance performed after solicitation closing date and before contract award).

(35) Duration. An agency may consider the duration of an offeror's past performance reference as part of determining its relevance. *Chenega Tech. Prods., LLC.*, B-295451.5, June 22, 2005, 2005 CPD ¶ 123 (agency properly gave little weight to an offeror's past performance reference that had been performed for only one month); *SWR, Inc.--Protest & Costs*, B-294266.2 *et al.*, Apr. 22, 2005, 2005 CPD ¶ 94; *EastCo Bldg. Servs., Inc.*, B-275334, B-275334.2, Feb. 10, 1997, 97-1 CPD ¶ 83.

(36) Geographic Location. Geographic location can be considered as part of determining past performance relevance. *Si-Nor, Inc.*, B-292748.2 *et al.*, Jan. 7, 2004, 2004 CPD ¶ 10 (agency properly took into account the different geographic location of the prior worked performed when considering the relevance of the offeror's past performance).

(37) Different Technical Approach. The fact that an offeror utilized a different technical approach under the prior contract does not affect the relevance of an offeror's past performance. *AC Techs., Inc.*, B-293013, B-293013.2, Jan. 14, 2004, 2004 CPD ¶ 26.

(38) All References. Unless a solicitation states otherwise, there is generally no requirement that an agency obtain or consider all of an offeror's references in the past performance evaluation. *Dismas Charities*, B-298390, Aug. 21, 2006, 2006 CPD ¶ 131; *BTC Contract Servs., Inc.*, B-295877, May 11, 2005, 2005 CPD ¶ 96 (agency considered the most relevant seven references submitted).

b. Quality of Past Performance. An agency should first determine the relevance of an offeror's past performance reference before considering the quality of performance. In determining past performance quality, factors that may be considered include:

(39) timeliness of performance;

(40) cost control;

(41) customer satisfaction; and

(42) performance trends. *Yang Enters., Inc.*, B-294605.4 *et al.*, Apr. 1, 2005, 2005 CPD ¶ 65; *Entz Aerodyne, Inc.*, B-293531, Mar. 9, 2004, 2004 CPD ¶ 70.

c. Source Objectivity of Past Performance Information. An agency should also consider the source of an offeror's past performance information, to determine its objectivity. *See Metro Machine Corp.*, B-295744, B-295744.2, Apr. 21, 2005, 2005 CPD ¶ 112 (agency properly considered the fact that prime contractor had furnished the past performance ratings for its proposed subcontractors); *Hughes Missile Sys. Co.*, B-259255.4, May 12, 1995, 95-1 CPD ¶ 283.

d. Agencies must make rational—rather than mechanical—comparative past performance evaluations. In *Green Valley Transportation, Inc.*, B-285283, Aug. 9, 2000, 2000 CPD ¶ 133, GAO found unreasonable an agency's use of absolute numbers of performance problems, without considering the "size of the universe of performance" where problems occurred. The GAO also sustained a protest in which the past performance evaluation merely averaged scores derived from the past performance questionnaires without additional analysis of the past performance data. *Clean Harbors Environmental Services, Inc.*, B-296176.2, Dec. 9, 2005, 2005 CPD ¶ 222.

e. Lack of past performance history should not bar new firms from competing for government contracts. *See Espey Mfg. & Elecs. Corp.*, B-254738, Mar. 8, 1994, 94-1 CPD ¶ 180; *cf. Laidlaw Envtl. Servs., Inc.*, B-256346, June 14, 1994, 94-1 CPD ¶ 365 (permitting the agency to give credit for commercial past performance if it is equivalent to comparable prior government experience). Agencies must give a neutral rating to firms "without a record of relevant past performance." FAR 15.305(a)(2)(iv); *see Excalibur Sys., Inc.*, B-272017, July 12, 1996, 96-2 CPD ¶ 13 (stating that while a neutral rating does not preclude award to a

higher-priced, higher technically-rated offeror in a best value procurement, an agency may nevertheless award a contract to a lower-priced offeror without a past performance history where the solicitation provides that price alone would be considered in evaluating first time offerors); *see also Blue Rock Structures, Inc.*, B-287960.2, B-287960.3, Oct. 10, 2001, 2001 CPD ¶ 184.

f. Past Performance Attribution; Using the Experience of Others. In many instances it is necessary for agencies to consider the proper attribution of an offeror's past performance references. As a general rule, the agency's evaluation should carefully examine the role(s) to be performed by the entity in question under the contract being awarded when determining the relevance of the past performance reference. Agencies may attribute the past performance or experience of parents, affiliates, subsidiaries, officers, and team members, although doing so can be difficult. *See U.S. Textiles, Inc.*, B-289685.3, Dec. 19, 2002, 2002 CPD ¶ 218; *Oklahoma County Newspapers, Inc.*, B-270849, May 6, 1996, 96-1 CPD ¶ 213; *Tuscon Mobilephone, Inc.*, B-258408.3, June 5, 1995, 95-1 CPD ¶ 267.

(43) Joint Venture Partners. *Base Techs., Inc.*, B-293061.2, B-293061.3, Jan. 28, 2004, 2004 CPD ¶ 31 (agency may consider the references of one joint venture partner in evaluating a joint venture offeror's past performance where they are reasonably predictive of performance of the joint venture entity); *JACO & MCC Joint Venture, LLP*, B-293354.2, May 18, 2004, 2004 CPD ¶ 122 (agency may consider the past performance history of individual joint venture partners in evaluating the joint venture's proposal where solicitation does not preclude that and both joint venture partners will be performing work under the contract).

(44) Subcontractors. *AC Techs., Inc.*, B-293013, B-293013.2, Jan. 14, 2004, 2004 CPD ¶ 26 (agency reasonably considered the performance of contracts performed by awardee's subcontractor where nothing in the solicitation prohibited the agency from considering subcontractor's prior contracts). However, solicitation must permit attribution of subcontractor to the prime.

(45) Individuals to a new company as offeror. *United Coatings*, B-291978.2, July 7, 2003, 2003 CPD ¶ 146 (agency properly considered the relevant experience and past performance history of key individuals and

predecessor companies in evaluating the past performance of a newly-created company); *see Interstate Gen. Gov't Contractors, Inc.*, B-290137.2, June 21, 2002, 2002 CPD ¶ 105; *SDS Int'l*, B-285822, B-285822.2, Sept. 29, 2000, 2000 CPD ¶ 167.

(46) Parent companies to a subsidiary as offeror. *Aerosol Monitoring & Analysis, Inc.*, B-296197, June 30, 2005, 2005 CPD ¶ 132 (agency properly may attribute the past performance of a parent or affiliated company to an offeror where the firm's proposal demonstrates that the resources of the parent or affiliated company will affect the performance of the offeror); *Universal Bldg. Maint., Inc.*, B-282456, July 15, 1999, 99-2 CPD ¶ 32 (agency improperly attributed past performance of parent company or its other subsidiaries to awardee where record does not establish that parent company or subsidiaries will be involved in the performance of the protested contract).

g. Agencies may not downgrade past performance rating based on offeror's history of filing claims. *See AmClyde Engineered Prods. Co., Inc.*, B-282271, June 21, 1999, 99-2 CPD ¶ 5. On 1 April 2002, the Office of Federal Procurement Policy instructed all federal agencies that the "filing of protests, the filing of claims, or the use of Alternative Dispute Resolution, must not be considered by an agency in either past performance or source selection decisions."[7]

h. Evaluating Past Performance or Experience. *See John Brown U.S. Servs., Inc.*, B-258158, Dec. 21, 1994, 95-1 CPD ¶ 35 (comparing the evaluation of past performance and past experience).

i. Comparative Evaluations of Small Businesses' Past Performance.

(47) If an agency comparatively evaluates offerors' past performance, small businesses may <u>not</u> use the SBA's Certificate of Competency (COC) procedures to review the evaluation. *See Nomura Enter., Inc.*, B-277768, Nov. 19, 1997, 97-2 CPD ¶ 148; *Smith of Galeton*

[7] Memorandum, Angela B. Styles, Administrator, Office of Federal Procurement Policy, to Senior Procurement Executives, subject: Protests, Claims, and Alternative Dispute Resolution (ADR) as Factors in Past Performance and Source Selection Decisions (Apr. 1, 2002), available at https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/procurement/publications/pastperfmemo.pdf.

Gloves, Inc., B-271686, July 24, 1996, 96-2 CPD ¶ 36.

(48) If an agency fails to state that it will consider responsibility-type factors, small businesses may seek a COC. *See Envirosol, Inc.*, B-254223, Dec. 2, 1993, 93-2 CPD ¶ 295; *Flight Int'l Group, Inc.*, B-238953.4, Sept. 28, 1990, 90-2 CPD ¶ 257.

(49) If an agency uses pass/fail scoring for a responsibility-type factor, small businesses may seek a COC. *See Clegg Indus., Inc.*, B-242204.3, Aug. 14, 1991, 91-2 CPD ¶ 145; *Meeks Disposal Corp.*, B-299576, B-299576.2, June 28, 2007, 2007 CPD ¶ 127 (stating in dicta a small business may seek a COC when an agency uses an acceptable/neutral/unacceptable rating scheme to evaluate corporate experience).

j. Agencies must clarify adverse past performance information when there is a clear basis to question the past performance information. *See A.G. Cullen Constr., Inc.*, B-284049.2, Feb. 22, 2000, 2000 CPD ¶ 145. Agencies also must clarify adverse past performance if an offeror may be excluded from the competitive range as well as when an offeror has not previously had an opportunity to respond to adverse past performance. FAR 15.306(1)(i).

H. Products of the Evaluation Process.

1. Evaluation Report.

a. The evaluators must prepare a report of their evaluation. *See Son's Quality Food Co.*, B-244528.2, Nov. 4, 1991, 91-2 CPD ¶ 424; *Amtec Corp.*, B-240647, Dec. 12, 1990, 90-2 CPD ¶ 482. The relative strengths, deficiencies, significant weaknesses, and risk supporting proposal evaluation shall be documented in the contract file. FAR 15.305(a); *see also* FAR 15.308 (establishing a similar requirement for the source selection decision).

b. The contracting officer should retain all evaluation records. *See* FAR 4.801; FAR 4.802; FAR 4.803; *Southwest Marine, Inc.*, B-265865.3, Jan. 23, 1996, 96-1 CPD ¶ 56 (stating that where an agency fails to document or retain evaluation materials, it bears the risk that there is an inadequate supporting rationale in the record for the source selection decision and that GAO will conclude the agency had a reasonable basis for the decision); *see also Technology Concepts Design, Inc*. B-403949.2, March 25, 2011,

2011 CPD ¶ 78 (sustaining a protest where the agency did not provide adequate supporting rationale in the record for GAO to conclude that the agency's evaluation of the protester's proposal was reasonable).

c. If evaluators use numerical scoring, they should explain the scores. *See J.A. Jones Mgmt Servs, Inc.*, B-276864, Jul. 24, 1997, 97-2 CPD ¶ 47; *TFA, Inc.*, B-243875, Sept. 11, 1991, 91-2 CPD ¶ 239; *S-Cubed*, B-242871, June 17, 1991, 91-1 CPD ¶ 571.

d. Evaluators should ensure that their evaluations are reasonable. *See DNL Properties, Inc.*, B-253614.2, Oct. 12, 1993, 93-2 CPD ¶ 301.

2. Deficiencies. The initial evaluation must identify all parts of the proposals that fail to meet the government's minimum requirements.

3. Advantages and Disadvantages. The initial evaluation should identify the positive and negative aspects of acceptable proposals.

4. Questions and Items for Negotiation. The initial evaluation should identify areas where discussions are necessary/desirable.

I. Award Without Discussion, 10 U.S.C. § 2305(b)(4)(i); 41 U.S.C. § 3306(b)(2)(B)(i); FAR 15.306(a)(3).

1. An agency may <u>not</u> award on initial proposals if it:

a. States its intent to hold discussions in the solicitation; or

b. Fails to state its intent to award without discussions in the solicitation.

2. A proper award on initial proposals need not result in the lowest overall cost to the government (depending on the stated evaluation criteria).

3. To award without discussions, an agency <u>must</u>:

a. Give notice in the solicitation that it intends to award without discussions;

b. Select a proposal for award which complies with all of the material requirements of the solicitation;

c. Properly evaluate the selected proposal in accordance with the evaluation factors and subfactors set forth in the solicitation;

d. Not have a contracting officer determination that discussions are necessary; and

e. Not conduct discussions with any offeror, other than for the purpose of minor clarifications.

See TRI-COR Indus., B-252366.3, Aug. 25, 1993, 93-2 CPD ¶ 137.

4. Discussions v. Clarifications. FAR 15.306(a), (d).[8]

(50) An agency may <u>not</u> award on initial proposals if it conducts discussions with <u>any</u> offeror. *See To the Sec'y of the Navy*, B-170751, 50 Comp. Gen. 202 (1970); *see also Strategic Analysis, Inc.*, 939 F. Supp. 18 (D.D.C. 1996) (concluding that communications with one offeror concerning the employment status of its proposed key personnel were discussions). *But see Data General Corp. v. Johnson*, 78 F.3d 1556 (Fed. Cir. 1996) (refusing to sustain a protest because the protester could not show that there was a "reasonable likelihood" that it would have been awarded the contract in the absence of the improper discussions).

(51) "Discussions" are "negotiations that occur <u>after</u> establishment of the competitive range that may, at the Contracting Officer's discretion, result in the offeror being allowed to revise its proposal." FAR 52.215-1(a); FAR 15.306(d). Discussions may include bargaining. Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract. FAR 15.306(d).

(a) The COFC has found "mutual exchange" a key element in defining discussions. *See Cubic Defense Sys., Inc. v. United States*, 45 Fed. Cl. 450 (2000) (finding that an offeror's submission of data that had been previously addressed and anticipated by an agency, without requests for further clarification by the agency, lacks the element of mutual exchange that is explicit in the FAR's treatment of discussions).

[8] See the Army Source Selection Supplement (28 November 2017) chart outlining the differences between Clarifications, Communications, and Negotiations/Discussions for a detailed analysis of the differences.

(b) The GAO has focused on "opportunity to revise" as the key element distinguishing discussions from clarifications. *See MG Indus.*, B-283010.3, Jan. 24, 2000, 2000 CPD ¶ 17.

b. An agency, however, may "clarify" offerors' proposals.

(52) "Clarifications" are "limited exchanges between the Government and offerors that may occur when award without discussions is contemplated." FAR 15.306(a).

(a) Clarifications include:

(i) The opportunity to clarify—rather than revise—certain aspects of an offeror's proposal (e.g., the relevance of past performance information to which the offeror has not previously had an opportunity to respond); and

(ii) The opportunity to resolve minor irregularities, informalities, or clerical errors.

(iii) The parties' actions control the determination of whether "discussions" have been held and not the characterization by the agency. *See Priority One Servs., Inc.*, B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 (finding "discussions" occurred where awardee was allowed to revise its technical proposal, even though the source selection document characterized the communication as a "clarification").

c. Examples.

(53) The following are "discussions:"

(a) The substitution of resumes for key personnel. *See University of S.C.*, B-240208, Sept. 21, 1990, 90-2 CPD ¶ 249; *Allied Mgmt. of Texas, Inc.*, B-232736.2, May 22, 1989, 89-1 CPD ¶ 485. *But see SRS Tech.*, B-258170.3, Feb. 21, 1995, 95-1 CPD ¶ 95; *Park Tower Mgmt. v. United States*, 67 Fed. Cl. 548 (2005) (holding that where agency contacted offeror to "clarify" whether it still intended to hire

incumbent personnel, offeror's provision of additional information regarding its staffing and management plan did not transform the agency request into a discussion because the agency did not intend for the offeror to modify its proposal when it contacted the offeror).

(b) Allowing an offeror to explain a warranty provision that results in a revision of its proposal. *See Cylink Corp.*, B-242304, Apr. 18, 1991, 91-1 CPD ¶ 384.

(54) The following were <u>not</u> "discussions:"

(c) Audits. *See Data Mgmt. Servs., Inc.*, B-237009, Jan. 12, 1990, 69 Comp. Gen. 112, 90-1 CPD ¶ 51; *see also SecureNet Co. Ltd. v. United States*, 72 Fed. Cl. 800 (2006) (holding that agency's request of offeror's labor rates were clarifications because the agency did not intend for the offeror to modify its proposal as a result of the contact).

(d) Allowing an offeror to correct a minor math error, correct a certification, or acknowledge a non-material amendment. *See E. Frye Enters., Inc.*, B-258699, Feb. 13, 1995, 95-1 CPD ¶ 64; *cf. Telos Field Eng'g*, B-253492.2, Nov. 16, 1993, 93-2 CPD ¶ 275.

(e) A request to extend the proposal acceptance period. *See GPSI-Tidewater, Inc.*, B-247342, May 6, 1992, 92-1 CDP ¶ 425.

(f) An inquiry as to whether figures in a proposal were stated on an annual or monthly basis that did not provide the offeror an opportunity to alter its proposal. *Int'l Res. Recovery, Inc., v. United States*, 64 Fed. Cl. 150 (2005).

(g) Responsibility inquiries. *Gen. Dynamics—Ordnance & Tactical Sys.*, B-295987, B-295987.2, May 20, 2005, 2005 CPD ¶ 114 (holding that requests for information relating to an offeror's responsibility, rather than proposal evaluation, does not constitute discussions); *see also Computer Sciences Corp.*, B-298494.2, *et al.*, May 10, 2007, 2007 CPD ¶ 103 (stating that exchanges concerning

an offeror's small business subcontracting plan are not discussions when they are evaluated as part of an agency's responsibility determination, but that such exchanges constitute discussions when incorporated into an agency's technical evaluation plan); *Overlook Sys. Techs., Inc.*, B-298099.4, B-298099.5, Nov. 28, 2006, 2006 CPD ¶ 185 (analogizing pre-award exchanges reference the adequacy of an offeror's mitigation plan to a responsibility determination, which does not constitute discussions).

(h) *See Dyncorp Int'l LLC v. United States*, 76. Cl. 528 (2007) (providing a lengthy discussion on the differences between clarifications and discussions to conclude that three evaluation notices requesting information related to mission capability were not discussions).

d. Minor clerical errors should be readily apparent to both parties. If the agency needs an answer before award, the question probably rises to the level of discussions. *See CIGNA Gov't Servs., LLC*, B-297915.2, May 4, 2006, 2006 CPD 73 ¶ (finding that request to confirm hours in level of effort template that results in an offeror stating the hours were "grossly overstated" and the provision of corrections constituted discussions); *University of Dayton Research Inst.*, B-296946.6, June 15, 2006, 2006 CPD ¶ 102 (finding that the correction of evaluation rates and reconciliation of printed and electronic versions of subcontractor rates are not clarifications where several offerors thereby make dozens of changes to the rates initially proposed).

J. Determination to Conduct Discussions.

1. To conduct discussions with one or more offerors after stating an intent to award without discussions, the contracting officer must find that discussions are necessary and document this conclusion in writing. 10 U.S.C. § 2305(b); 41 U.S.C. § 3306(b)(2)(B)(i); FAR 15.306(a)(3).

2. Statutes and implementing regulations provide little guidance for making this determination. A contracting officer should consider factors such as favorable but noncompliant proposals, unclear proposals, incomplete proposals, unreasonable costs/prices, suspected mistakes, and changes/ clarifications to specifications. *See Milcom Sys. Corp.*, B-255448.2, May 3, 1994, 94-1 CPD ¶ 339.

3. The agency has wide discretion in deciding not to hold discussions, and an agency's decision to ***not*** hold discussions is generally not a matter that GAO will review. *Booz Allen Hamilton, Inc.*, B-405993, B-40599.2, Jan 19, 2012, 2012 CPD ¶ 30.[9]

K. Communications. FAR 15.306(b).

1. "Communications" are limited "exchanges of information, between the Government and offerors, after receipt of proposals, leading to establishment of the competitive range." FAR 15.306(b).

a. These exchanges are limited to offerors whose:

(55) past performance information is preventing them from being in the competitive range, and

(56) exclusion / inclusion in the competitive range is uncertain.

b. The communications should "enhance Government understanding . . . ; allow reasonable interpretation of the proposal; or facilitate the Government's evaluation process." FAR 15.306(b)(2).

c. Communications "are for the purpose of addressing issues that must be explored to determine whether a proposal should be placed in the competitive range." FAR 15.306(b)(2) and (3). Interestingly, FAR 15.306(b)(3)(i) references FAR 14.407, mistakes in bids. Therefore, case law concerning mistakes in bid can be used to help Contracting Officers determine when they can engage in communications to help establish the competitive range.

2. The parties, however, cannot use communications to permit an offeror to revise its proposal. FAR 15.306(b)(2).

3. The contracting officer <u>must</u> communicate with offerors who will be excluded from the competitive range because of adverse past performance information. Such communications must give an offeror an opportunity to respond to adverse past performance information to which it has not previously had an opportunity to respond. FAR 15.306(b).

[9] But see the DoD DPAP memorandum dated 8 January 2008 directing that awards should be made without discussions <u>only</u> in limited circumstances, generally routine, simple procurements. *See* http://www.acq.osd.mil/dpap/policy/policyvault/2007-1480-DPAP.pdf

4. The contracting officer may also communicate with offerors who are neither clearly in nor clearly out of the competitive range. FAR 15.306(b)(1)(ii). The contracting officer may address "gray areas" in an offeror's proposal (e.g., perceived deficiencies, weaknesses, errors, omissions, or mistakes). FAR 15.306(b)(3).

L. Establishing the Competitive Range. FAR 15.306(c).

1. The competitive range is the group of offerors with whom the contracting officer will conduct discussions and from whom the agency will seek revised proposals.

2. The contracting officer (or SSA) may establish the competitive range any time after the initial evaluation of proposals. *See SMB, Inc.*, B-252575.2, July 30, 1993, 93-2 CPD ¶ 72.

3. The contracting officer must consider all of the evaluation factors (including cost/price) in making the competitive range determination. *See Kathpal Techs., Inc.*, B-283137.3 *et al.*, Dec. 30, 1999, 2000 CPD ¶ 6; *Arc–Tech, Inc.*, B-400325.3, Feb. 19, 2009, 2009 CPD ¶ 53.

a. The contracting officer may exclude a proposal from the competitive range despite its lower cost or the weight accorded cost in the RFP if the proposal is technically unacceptable. *See Crown Logistics Servs.*, B-253740, Oct. 19, 1993, 93-2 CPD ¶ 228.

b. The contracting officer may exclude an unacceptable proposal that requires major revisions to become acceptable if including the proposal in the competitive range would be tantamount to allowing the offeror to submit a new proposal. *See Harris Data Commc'ns v. United States*, 2 Cl. Ct. 229 (1983), *aff'd*, 723 F.2d 69 (Fed. Cir. 1983); *see also Strategic Sciences and Tech., Inc.*, B-257980, 94-2 CPD ¶ 194 (holding that it was reasonable for the agency to exclude from the competitive range an offeror who proposed inexperienced key personnel—which was the most important criteria); *InterAmerica Research Assocs., Inc.*, B-253698.2, Nov. 19, 1993, 93-2 CPD ¶ 288 (holding that it was proper for the agency to exclude an offeror that merely repeated back language from solicitation and failed to provide required information).

4. The contracting officer must include all of the "most highly rated proposals" in the competitive range <u>unless</u> the contracting officer decides to reduce the competitive range for purposes of efficiency. *See* FAR 15.306(c)(2).

a. The GAO ordinarily gives great deference to the agency. To prevail, a protester must show that the decision to exclude it was:

(1) clearly unreasonable; or (2) inconsistent with the stated evaluation factors. *See Mainstream Eng'g Corp.*, B-251444, Apr. 8, 1993, 93-1 CPD ¶ 307; *cf. Intertec Aviation*, B-239672, Sept. 19, 1990, 69 Comp. Gen. 717, 90-2 CPD ¶ 232 (holding that the agency improperly excluded an offeror from the competitive range where its alleged technical deficiencies were minor, its cost was competitive, and the agency's action seriously reduced available competition).

b. If the contracting officer has any doubts about whether to exclude a proposal from the competitive range, the contracting officer should leave it out. In the past, agencies generally included any proposal in the competitive range that had a reasonable chance of receiving award. With the FAR rewrite in 1997, the drafters intended to permit a competitive range more limited than under the "reasonable chance of receiving award" standard. *See SDS Petroleum Prods.*, B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59.

5. The contracting officer may limit the number of proposals in the competitive range to "the greatest number that will permit an efficient competition among the most highly rated offerors" **only if**:

a. The agency notified offerors in the solicitation that the contracting officer may limit the competitive range for purposes of efficiency; and

b. The contracting officer determines that the number of proposals the contracting officer would normally include in the competitive range is too high to permit efficient competition.

6. The contracting officer must continually reassess the competitive range. If after discussions have begun, an offeror is no longer considered to be among the most highly rated, the contracting officer may eliminate that offeror from the competitive range despite not discussing all material aspects in the proposal. The excluded offeror will not receive an opportunity to submit a proposal revision. FAR 15.306(d)(3).

7. Common Errors.

a. Reducing competitive range to <u>one</u> proposal.

(57) A competitive range of one is not *per se* illegal or improper. *See Clean Servs. Co.*, B-281141.3, Feb. 16, 1999, 99-1 CPD ¶ 36; *SDS Petroleum Prods.*, B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 (concluding that the new standard for establishing the competitive range does not preclude a range of one *per se*).

(58) However, a contracting officer's decision to reduce a competitive range to one offeror will receive "close scrutiny." *See L-3 Commc'ns EOTech., Inc.,* 83 Fed. Cl. 643 (2008); *Dynamic Mktg. Servs.*, B-279697, July 13, 1998, 98-2 CPD ¶ 84.

(59) Under FAR 52.215-20 and DFARS 252.215-7008, Agencies may be required to request certified cost and pricing data from the lone offeror in certain circumstances.

b. Eliminating a technically acceptable proposal from the competitive range without taking into account or evaluating cost or price. *See Kathpal Techs., Inc.*, B-283137.3 *et al.*, Dec. 30, 1999, 2000 CPD ¶ 6; *SCIENTECH, Inc.*, B-277805.2, Jan. 20, 1998, 98-1 CPD ¶ 33.

c. Excluding an offeror from the competitive range for omissions that the offeror could easily correct during discussions. *See Dynalantic Corp.*, B-274944.2, Feb. 25, 1997, 97-1 CPD ¶ 101.

d. Using predetermined cutoff scores. *See DOT Sys., Inc.*, B-186192, July 1, 1976, 76-2 CPD ¶ 3.

e. Excluding an offeror from the competitive range for "nonresponsiveness."

(60) An offeror may cure a material defect in its initial offer during negotiations; therefore, material defects do not necessarily require exclusion from the competitive range. *See ManTech Telecomm & Info. Sys. Corp.*, 49 Fed. Cl. 57 (2001).

(61) The concept of "responsiveness" is incompatible with the concept of a competitive range. *See Consolidated Controls Corp.*, B-185979, Sept. 21, 1976, 76-2 CPD ¶ 261.

M. Conducting Discussions. FAR 15.306(d).

1. The contracting officer must conduct oral or written discussions with each offeror in the competitive range. FAR 15.306(d)(1).

a. The contracting officer may <u>not</u> hold discussions with only one offeror. *See Computer Sciences Corp.*, B-298494.2, *et al.*, May 10, 2007, 2007 CPD ¶ 103 (finding that when an agency conducts discussions with one offeror, it must conduct discussions with all other offerors whose proposals are in the competitive range, and

those discussions must be meaningful; that is, the discussions must identify deficiencies and significant weaknesses in each offeror's proposal); *Raytheon Co.*, B-261959.3, Jan. 23, 1996, 96-1 CPD ¶ 37 (stating that the "acid test" of whether discussions have been held is whether an offeror was provided the opportunity to modify/revise its proposal).

b. The contracting officer may hold face-to-face discussions with some—but not all—offerors, provided the offerors with whom the contracting officer did not hold face-to-face discussions are not prejudiced. *See Data Sys. Analysts, Inc.*, B-255684, Mar. 22, 1994, 94-1 CPD ¶ 209.

c. In a lowest-priced, technically acceptable solicitation, an agency is not required to conduct discussions with an offeror already determined technically acceptable, provided that offeror is given the opportunity to submit a revised proposal. *Commercial Design Grp., Inc.*, B-400923.4, Aug. 6, 2009, 2009 CPD ¶ 157 (finding there was no prejudice where agency held discussions with deficient offerors but not technically acceptable protestor in a LPTA acquisition).

2. The contracting officer determines the scope and extent of the discussions; however, it is a fundamental precept of negotiated procurements that discussions, when conducted, must be meaningful, equitable, and not misleading. *See The Boeing Co*., B–311344 *et al.*, June 18, 2008, 2008 CPD ¶ 114 at 49; *Biospherics, Inc. v. United States*, 48 Fed. Cl. 1 (2000); *Multimax, Inc, et al.*, B-298249.6 *et al.*, Oct. 24, 2006, 2006 CPD ¶ 165 ("mechanistic" application of formula); *AT&T Corp*, B-299542.2, B-299542.4, Nov. 16, 2007, 2007 CPD ¶ (concluding discussions not reasonable where agency determines protester's staffing is unreasonable but fails to identify the scope of the agency's concerns in discussions.

a. The contracting officer must discuss any matter that the RFP states the agency will discuss. *See Daun-Ray Casuals, Inc.*, B-255217.3, 94-2 CPD ¶ 42 (holding that the agency's failure to provide an offeror with an opportunity to discuss adverse past performance information was improper—even though the offeror received a satisfactory rating—because the RFP indicated that offerors would be allowed to address unfavorable reports).

b. The contracting officer must tailor discussions to the offeror's proposal. FAR 15.306(d)(1), (e)(1); *see Metropolitan Interpreters and Translators, Inc.*, B-403912.4, May 31, 2011, 2012 CPD ¶ 130 ("Although discussions may not be conducted in a manner that

favors one offeror over another, discussions need not be identical among offerors; rather, discussions are to be tailored to each offeror's proposal.").

c. At a minimum, the contracting officer must notify each offeror in the competitive range of deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had the opportunity to respond. FAR 15.306(d)(3). An agency failed to conduct meaningful discussions when discussions were limited to cost proposals and the discussions failed to identify significant weaknesses or deficiencies identified in the protester's technical proposal. *Burchick Constr. Co.*, B-400342, Oct. 6, 2008, 2009 CPD ¶ 203. *But see* FAR 15.306(d)(5) (indicating that the contracting officer may eliminate an offeror's proposal from the competitive range after discussions have begun, even if the contracting officer has not discussed all material aspects of the offeror's proposal or given the offeror an opportunity to revise it).

(62) Deficiencies.

(a) The FAR defines a "deficiency" as "a material failure of a proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level." FAR 15.001.

(b) The contracting officer does ***not*** have to specifically identify each deficiency. Instead, the contracting officer merely has to lead the contractor into areas requiring improvement. *See Du & Assocs., Inc.*, B-280283.3, Dec. 22, 1998, 98-2 CPD ¶ 156; *Arctic Slope World Servs., Inc.*, B-284481, B-284481.2, Apr. 27, 2000, 2000 CPD ¶ 75. An agency's failure to advise an offeror, in some way, of material proposal deficiencies vitiates the meaningfulness of the discussions. There is, however, no requirement that all areas of a proposal which could have a competitive impact be addressed in discussions. *Dynacs Eng'g Co.,* Inc. v. United States, 48 Fed. Cl. 124 (2000); *see Info. Sys. Tech. Corp.*, B-289313, Feb. 5, 2002, 2002 CPD ¶ 36 (stating that agencies need not conduct all encompassing discussions, or discuss every element of a proposal receiving less than a maximum rating).

(c) The contracting officer does ***not*** have to point out a deficiency if discussions cannot improve it. *See Specialized Tech. Servs., Inc.*, B-247489, B-247489.2, June 11, 1992, 92-1 CPD ¶ 510; *Eng'g Inc.*, B-257822, B-257822.5, Aug. 18, 1995, 95-2 CPD ¶ 130 (business experience).

(d) The contracting officer does ***not*** have to inquire into omissions or business decisions on matters clearly addressed in the solicitation. *See Wade Perrow Constr.*, B-255332.2, Apr. 19, 1994, 94-1 CPD ¶ 266; *Nat'l Projects, Inc.*, B-283887, Jan. 19, 2000, 2000 CPD ¶ 16.

(e) The contracting officer does ***not*** have to actually "bargain" with an offeror. *See Northwest Reg'l Educ. Lab.*, B-222591.3, Jan. 21, 1987, 87-1 CPD ¶ 74. *But cf.* FAR 15.306(d) (indicating that negotiations may include bargaining).

(63) Significant Weaknesses.

(f) A "significant weakness" is "a flaw that appreciably increases the risk of unsuccessful contract performance." FAR 15.001. Examples include:

(i) Flaws that cause the agency to rate a factor as marginal or poor;

(ii) Flaws that cause the agency to rate the risk of unsuccessful contract performance as moderate to high; and

(iii) Relatively minor flaws that have a significant cumulative impact (e.g., minor flaws in several areas that impact the overall rating).

(g) The contracting officer does ***not*** have to identify every aspect of an offeror's technically acceptable proposal that received less than a maximum score. *See Robbins-Gioia, Inc.*, B-274318, Dec. 4, 1996, 96-2 CPD ¶ 222; *SeaSpace Corp.*, B-252476.2, June 14, 1993, 93-1 CPD ¶ 462, *recon. denied*, B-252476.3, Oct. 27, 1993, 93-2 CPD ¶ 251.

(h) In addition, the contracting officer does ***not*** have to advise an offeror of a minor weakness that the agency does not consider significant, even if it subsequently becomes a determinative factor between two closely ranked proposals. *See Brown & Root, Inc. & Perini Corp., A Joint Venture*, B-270505.2, Sept. 12, 1996, 96-2 CPD ¶ 143; *cf. Prof'l Servs. Grp.*, B-274289.2, Dec. 19, 1996, 97-1 CPD ¶ 54 (holding that the discussions were inadequate where "deficient" staffing was not revealed because the agency perceived it to be a mere "weakness").

(i) The contracting officer does ***not*** have to inform offeror that its cost/price is too high where the agency does not consider the price unreasonable or a significant weakness or deficiency. *See JWK Int'l Corp. v. United States*, 279 F.3d 985 (Fed. Cir. 2002); *SOS Interpreting, Ltd*., B-287477.2, May 16, 2001, 2001 CPD ¶ 84.

(64) Other Aspects of an Offeror's Proposal. Although the FAR used to require contracting officers to discuss other material aspects, the rule now is that contracting officers are "encouraged to discuss other aspects of the offeror's proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award." FAR 15.306(d)(3).

d. Since the purpose of discussions is to maximize the agency's ability to obtain the best value, the contracting officer should do more than the minimum necessary to satisfy the requirement for meaningful discussions. *See* FAR 15.306(d)(2).

e. To satisfy the requirement for meaningful discussions, an agency need only lead an offeror into the areas of its proposal requiring amplification or revision; all-encompassing discussions are not required, nor is the agency obligated to "spoon-feed" an offeror as to each and every item that could be revised to improve its proposal. *L–3 Commc'ns Corp., BT Fuze Prods. Div*., B–299227, B–299227.2, Mar. 14, 2007, 2007 CPD ¶ 83 at 19; *Robbins–Gioia, LLC*, B-402199 *et al.*, Feb. 3, 2010, 2010 CPD ¶ 67 n.5; *Labarge Elecs.*, B-266210, Feb. 9, 1996, 96-1 CPD ¶ 58 at 6 ("While agencies generally are required to conduct meaningful discussions by leading offerors into the areas of their proposals requiring

amplification, this does not mean that an agency must 'spoon-feed' an offeror as to each and every item that must be revised, added, deleted, or otherwise addressed to improve a proposal.").

3. Limitations on Exchanges.

a. FAR Limitations. FAR 15.306(e).

(65) The agency may not favor one offeror over another.

(66) The agency may not disclose an offeror's technical solution to another offeror.[10]

(67) The agency may not reveal an offeror's prices without the offeror's permission. However, the Government may inform the offeror that their price is considered to be too high, or too low, and reveal the analysis that went into that conclusion.

(68) The agency may not reveal the names of individuals who provided past performance information.

(69) The agency may not furnish source selection information in violation of the Procurement Integrity Act (41 U.S.C. § 2101-07).

b. Other Prohibitions. The FAR no longer includes specific prohibitions on technical leveling, technical transfusion, and auctioning; however, the Procurement Integrity Act and the Trade Secrets Act still apply.

(70) Technical leveling involves helping an offeror bring its proposal up to the level of other proposals through successive rounds of discussion. *See Creative Mgmt. Tech., Inc.*, B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61.

(71) Technical Transfusion. Technical transfusion involves the government disclosure of one offeror's proposal to another to help that offeror improve its proposal.

(72) Auctioning.

(a) Auctioning involves the practice of promoting price bidding between offerors by indicating the price

[10] This prohibition includes any information that would compromise an offeror's intellectual property (e.g., an offeror's unique technology or an offeror's innovative or unique use of a commercial item). FAR 15.306(e)(2).

offerors must beat, obtaining multiple proposal revisions, disclosing other offerors' prices, etc.

(b) Auctioning is not inherently illegal. *See Nick Chorak Mowing*, B-280011.2, Oct. 1, 1998, 98-2 CPD ¶ 82. Moreover, the GAO usually finds that preserving the integrity of the competitive process outweighs the risks posed by an auction. *See Navcom Defense Elecs., Inc.*, B-276163.3, Oct. 31, 1997, 97-2 CPD ¶ 126; *Baytex Marine Commc'n, Inc.*, B-237183, Feb. 8, 1990, 90-1 CPD ¶ 164.

(c) The government's estimated price will not be disclosed in the RFP.[11] However, FAR 15.306(e)(3) allows discussion of price. *See Nat'l Projects, Inc.*, B-283887, Jan. 19, 2000, 2000 CPD ¶ 16. While FAR 15.306(e)(3) gives the contracting officer the discretion to inform an offeror its price is too high (or too low), it does not require that the contracting officer do so. *HSG Philipp Holzmann Technischer*, B-289607, Mar. 22, 2002, 2002 CPD ¶ 67.

c. Fairness Considerations.

(73) Discussions, when conducted, must be meaningful and must not prejudicially mislead offerors. *See Metro Mach. Corp.*, B-281872.2, Apr. 22, 1999, 99-1 CPD ¶ 101 (finding that a question about a proposal that did not reasonably put the offeror on notice of agency's actual concern was not adequate discussions); *see also Velos, Inc.*, B-400500 *et al.*, Nov. 28, 2008, 2010 CPD ¶ 3 (Agency agreed software license was acceptable, then rejected the protester's revised proposal because the agency, after final proposal submission, determined same license was unacceptable); *SRS Tech.*, B-254425.2, Sept. 14, 1994, 94-2 CPD ¶ 125 (concluding that the Navy misled the offeror by telling it that its prices were too low when all it needed was better support for its offered prices); *Ranor, Inc.*, B-255904, Apr. 14, 1994, 94-1 CPD ¶ 258 (concluding that the agency misled the offeror and caused it to raise its price

[11] In the area of construction contracting the FAR requires disclosure of the magnitude of the project in terms of physical characteristics and estimated price range, but not a precise dollar amount (e.g., a range of $100,000 to $250,000). *See* FAR 36.204.

by telling it that its price was below the government estimate); *DTH Mgmt. Grp.*, B-252879.2, Oct. 15, 1993, 93-2 CPD ¶ 227 (concluding that the agency misled an offeror by telling it that its price was below the government estimate when it knew that the government estimate was faulty); *Creative Info. Techs.*, B-293073.10, Mar. 16, 2005, 2005 CPD ¶ 110 (holding that discussions must deal with the underlying cause and that notifying an offeror that its price was overstated was insufficient).

(74) The contracting officer must provide similar information to all of the offerors. *See Securiguard, Inc.*, B-249939, Dec. 21, 1992, 93-1 CPD ¶ 362;; *SeaSpace Corp.*, B-241564, Feb. 15, 1991, 70 Comp. Gen. 268, 91-1 CPD ¶ 179.

(75) All offerors must be given the opportunity to revise their proposals following discussions. *Raytheon Co.*, B-404998, July 25, 2011, 2011 CPD ¶ 232 (sustaining a protest where discussions were conducted but the protester was never provided with an opportunity to address and revise a significant weakness identified in its proposal, even though an awardee had been given the opportunity to revise its proposal).

N. Final Proposal Revisions. FAR 15.307.

1. Requesting final proposal revisions concludes discussions. The request must notify offerors that:

a. Discussions are over;

b. They may submit final proposal revisions to clarify and document any understandings reached during negotiations;

c. They must submit their final proposal revisions in writing;

d. They must submit their final proposal revisions by the common cutoff date/time; and

e. The government intends to award the contract without requesting further revisions.

2. Agencies do not have to reopen discussions to address deficiencies introduced in the final proposal revision. *Sabre Systems, Inc.*, B-402040.2, B-402040.3, June 1, 2010, 2010 CPD ¶ 128; *Smith Detection, Inc.*, B-298838, B-298838.2, Dec. 22, 2006, 2007 CPD ¶ 5; *Ouachita Mowing, Inc.*, B-276075, May 8, 1997, 97-1 CPD ¶ 167.

a. Agencies, however, must reopen discussions in appropriate cases. *See Al Long Ford*, B-297807, Apr. 12, 2006, 2006 CPD ¶ 67 (finding that an agency must reopen discussion if it realizes, while reviewing an offeror's final proposal revision, that a problem in the initial proposal was vital to the source selection decision but not raised with the offeror during discussion); *TRW, Inc.*, B-254045.2, Jan. 10, 1994, 94-1 CPD ¶ 18 (holding that the agency erred in not conducting additional discussions where there were significant inconsistencies between technical and cost proposals that required resolution); *cf. Dairy Maid Dairy, Inc.*, B-251758.3, May 24, 1993, 93-1 CPD ¶ 404 (holding that a post-FPR amendment that changed the contract type from a requirements contract to a definite quantity contract was a material change that required a second round of FPRs); *Harris Corp.*, B-237320, Feb. 14, 1990, 90-1 CPD ¶ 276 (holding that the contracting officer properly requested additional BAFOs after amending the RFP).

b. Agencies may request additional FPRs even if the offerors' prices were disclosed through an earlier protest if additional FPRs are necessary to protect the integrity of the competitive process. *BNF Tech., Inc.*, B-254953.4, Dec. 22, 1994, 94-2 CPD ¶ 258.

3. If the agency reopens discussions with one offeror, the agency must reopen discussions with all of the remaining offerors. *See Lockheed Martin*, B-292836.8 *et al.*, Nov. 24, 2004, 2005 CPD ¶ 27; *Int'l Res. Grp.*, B-286663, Jan. 31, 2001, 2001 CPD ¶ 35.

O. Source Selection Decision. FAR 15.308.

1. Agencies must evaluate final proposals using the evaluation factors set forth in the solicitation.

a. Bias in the selection decision is improper. *See Latecoere Int'l v. United States*, 19 F.3d 1342 (11th Cir. 1994) (stating that bias against a French firm "infected the decision not to award it the contract").

b. There is no requirement that the same evaluators who evaluated the initial proposals also evaluate the final proposals. *See Med. Serv. Corp. Int'l*, B-255205.2, Apr. 4, 1994, 94-1 CPD ¶ 305.

2. The source selection decision should be based on the solicitation's evaluation factors and significant subfactors that were previously tailored to the current acquisition. The solicitation must have already notified offerors in the solicitation whether award will be made on the basis of lowest priced, technically acceptable proposals, or on the basis of a price/technical (or cost/technical) tradeoff analysis. FAR 15.101-1, 15.101-2.. While agencies have broad discretion in making source selection decisions, their decisions must be rational and consistent with the evaluation criteria in the RFP. *See Liberty Power Corp.*, B-295502, Mar. 14, 2005, 2005 CPD ¶ 61 (stating that agencies may not announce one basis for evaluation and award in the RFP and then evaluate proposals and make award on a different basis); *Marquette Med. Sys. Inc.*, B-277827.5, B-277827.7, Apr. 29, 1999, 99-1 CPD ¶ 90; *Found. Health Fed. Servs., Inc.*, B-254397.4, Dec. 20, 1993, 94-1 CPD ¶ 3; *see also* FAR 15.305(a).

3. A proposal that fails to conform to a material solicitation requirement is technically unacceptable and cannot form the basis of award. *Stewart Distribs.*, B-298975, Jan. 17, 2007, 2007 CPD ¶ 27; *Farmland Nat'l Beef*, B-286607, B-286607.2, Jan. 24, 2001, 2001 CPD ¶ 31. If the agency wants to accept an offer that does not comply with the material solicitation requirements, the agency must issue a written amendment and give all of the remaining offerors an opportunity to submit revised proposals. FAR 15.206(d); *see Beta Analytics Int'l, Inc. v. U.S.*, 44 Fed. Cl. 131 (1999); *4th Dimension Software, Inc.*, B-251936, May 13, 1993, 93-1 CPD ¶ 420.

4. The source selection process is inherently subjective.

   a. The fact that an agency reasonably might have made another selection does not mean that the selection made was unreasonable. *See Red R. Serv. Corp.*, B-253671.4, Apr. 22, 1994, 94-1 CPD ¶ 385. However, the decision must be based on accurate information. *See CRA Associated, Inc.*, B-282075.2, B-282075.3, Mar. 15, 2000, 2000 CPD ¶ 63.

   b. Point scoring techniques do not make the evaluation process objective. *See VSE Corp.*, B-224397, Oct. 3, 1986, 86-2 CPD ¶ 392. Therefore, the RFP should not state that award will be made based on the proposal receiving the most points. *See Harrison Sys. Ltd.*, B-212675, May 25, 1984, 84-1 CPD ¶ 572. *See also* DOD Source Selection Procedures, pg. 20, which prohibits using numerical weighting of factors and subfactors. https://www.acq.osd.mil/dpap/policy/policyvault/USA004370-14-DPAP.pdf

5. A cost/technical trade-off analysis is essential to any source selection decision using a trade-off (rather than an LPTA) basis of award. *See Special Operations Grp., Inc.*, B-287013; B-287013.2, Mar. 30, 2001, 2001 CPD ¶ 73.

   a. Agencies should make the cost/technical tradeoff decision after receiving final proposals if final proposals were requested. *See Halter Marine, Inc.*, B-255429, Mar. 1, 1994, 94-1 CPD ¶ 161.

   b. A cost/technical trade-off evaluation requires evaluation of differences in technical merit beyond the RFP's minimum requirements. *See Johnson Controls World Servs., Inc.*, B-281287.5 *et al.*, June 21, 1999, 2001 CPD ¶ 3.

6. Agencies have broad discretion in the source selection process, but the source selection decision must be adequately documented, and it must be consistent with the evaluation criteria and applied consistently to each offeror's proposal.

   a. Agencies have broad discretion in making cost/technical tradeoffs, so long as they are rational and consistent with the stated evaluation criteria and adequately documented. *See Chenega Tech. Prods., LLC*, B-295451.5, June 22, 2005, 2005 CPD ¶ 123; *Leach Mgmt. Consulting Corp.*, B-292493.2, Oct. 3, 2003, 2003 CPD ¶ 175.

   b. The source selection decision document should also demonstrate that the evaluation criteria were applied equally to all offerors. *See Brican Inc.*, B-402602, June 17, 2010, 2010 CPD ¶ 141 (sustaining a protest when the agency evaluated the awardee's and the protestor's proposals unequally by crediting the awardee for the experience and past performance of a subcontractor but not similarly crediting the protester, who had proposed the same subcontractor).

   c. In the cost/technical trade off, the extent to which one is sacrificed for the other is tested for rationality and consistency with the stated evaluation factors. *See Tenderfoot Sock Co., Inc.*, B-293088.2, July 30, 2004, 2004 CPD ¶ 147; *see also Synectic Solutions, Inc.*, B-299086, Feb. 7, 2007, 2007 CPD ¶ 36 (stating that an agency retains the discretion to select a higher priced, higher technically rated proposal if doing so is reasonably found to be in the government's best interests and is consistent with the solicitation's stated evaluation scheme); *Widnall v. B3H Corp.*, 75 F. 3d 1577 (Fed. Cir. 1996) (stating that "review of a best value agency

procurement is limited to independently determining if the agency's decision was grounded in reason").

d. More than a mere conclusion, however, is required to support the analysis. *See Shumaker Trucking and Excavating Contractors*, B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 (finding award decision unreasonable where the "agency mechanically applied the solicitation's evaluation method" and provided no analysis of the advantages to the awardee's proposal); *Technology Concepts Design, Inc*. B-403949.2, March 25, 2011, 2011 CPD ¶ 78 (sustaining a protest where the agency did not provide adequate supporting rationale in the record for GAO to conclude that the agency's evaluation of the protester's proposal was reasonable); *Beacon Auto Parts*, B-287483, June 13, 2001, 2001 CPD ¶ 116 (finding that a determination that a price is "fair and reasonable" doesn't equal a best-value determination); *ITT Fed. Svs. Int'l Corp.*, B-283307, B-283307.2, Nov. 3, 1999, 99-2 CPD ¶ 76; *Redstone Tech. Servs.*, B-259222, Mar. 17, 1995, 95-1 CPD ¶ 181.

e. Beware of tradeoff techniques that distort the relative importance of the various evaluation criteria (e.g., "Dollars per Point"). *See Billy G. Bassett*, B-237331, Feb. 20, 1990, 90-1 CPD ¶ 195; *T. H. Taylor, Inc.*, B-227143, Sept. 15, 1987, 87-2 CPD ¶ 252.

f. A cost/technical tradeoff analysis may consider relevant matters not disclosed in the RFP as tools to assist in making the tradeoff. *See Sys. Research and Applications Corp*, B-257939, Feb. 28, 1995, 95-1 CPD ¶ 214; *Advanced Mgmt., Inc.*, B-251273.2, Apr. 2, 1993, 93-1 CPD ¶ 288 (holding that it is permissible to consider that loss of efficiency in awarding to a new contractor would reduce effective price difference between the contractor and the incumbent).

7. The source selection authority's (SSA) decision shall be based on a comparative assessment of proposals against all source selection criteria in the solicitation. The decision must be the SSA's ***independent judgment.*** FAR 15.308. However, the SSA need not personally write the source selection decision memorandum. *See Latecoere Int'l Ltd.*, B-239113.3, Jan. 15, 1992, 92-1 CPD ¶ 70.

a. While the related FAR provisions suggest the source selection decision is made by a single person, some noted government contract experts "believe the source selection decision is a team decision, and . . . that is as it should be." Ralph C. Nash & John Cibinic, *The Source Selection Decision: Who Makes It?*, 16 NASH & CIBINIC REP. 5 (2002).

b. Source selection officials have considerable discretion in making the selection decision, including tradeoffs: The selection decision is subject to review only for rationality and consistency with the stated evaluation criteria. *See KPMG Consulting LPP*, B-290716, B-290716.2, Sept. 23, 2002, 2002 CPD ¶ 196; *Johnson Controls World Servs., Inc.*, B-289942; B-289942.2, May 24, 2002, 2002 CPD ¶ 88;

c. SSA can disagree with the majority of the evaluators and accept one of the minority's recommendation for award. GAO upheld the SSA's selection for award where the SSA reached a reasoned conclusion, supported by the record, that the awardee's lower-priced, lower-rated proposal deserved a higher technical rating than was assigned by the majority and that proposal represented the best value to the government. *TruLogic, Inc*, B-297252.3, Jan. 30, 2006, 2006 CPD ¶ 29.

d. An agency's source selection decision cannot be based on a mechanical comparison of the offerors' technical scores or ratings *per se*, but must rest upon a qualitative assessment of the underlying technical differences among the competing proposals (i.e., "look behind the ratings"). *C&B Constr., Inc.*, B-401988.2, Jan. 6, 2010, 2010 CPD ¶ 1; *Metro Machine Corp.*, B-295744, B-295744.2, Apr. 21, 2005, 2005 CPD ¶ 112; *The MIL Corp.*, B-294836, Dec.30, 2004, 2005 CPD ¶ 29.

8. A well-written source selection memorandum should contain:

a. A summary of the evaluation criteria and their relative importance;

b. A statement of the decision maker's own evaluation of each of the proposals: (1) adopting recommendations of others or stating a personal evaluation; and (2) identifying major advantages and disadvantages of each proposal (*see J&J Maintenance Inc.*, B-284708.2, B-284708.3, June 5, 2000, 2000 CPD ¶ 106); **and**

c. A description of the reasons for choosing the successful offeror, comparing differences in cost with differences in technical factors.

(76) The source selection decision memorandum must include the rationale for any trade-off made, "including benefits associated with additional costs." FAR 15.101-1(c) and 15.308; *Midland Supply, Inc.*, B-298720, B-298720.2, Nov. 29, 2006, 2007 CPD ¶ 2 (finding an agency's award unreasonable where it mechanically compares total point scores and provides no

documentation or explanation to support the cost/technical tradeoff); *Opti-Lite Optical*, B-281693, Mar. 22, 1999, 99-1 CPD ¶ 61 (finding it improper to rely on a purely mathematical price/technical tradeoff methodology).

(77) This explanation of any tradeoffs made, including the benefits associated with additional costs can be given by the SSA in the source selection decision, or it can be evidenced from the documents on which the source selection decision is based. *TRW, Inc.*, B-260788.2, Aug. 2, 1995, 96-1 CPD ¶ 11. The source selection decision memorandum should indicate what evaluation documents it relies upon.

P. GAO Review. In reviewing protests against allegedly improper evaluations, the GAO will examine the record to determine whether the agency's evaluation was reasonable and in accordance with the solicitation's stated evaluation criteria. *FP-FFA Seattle, LLC*, B411-544, B-411544.2, Aug. 26, 2015 CPD ¶ 274 at 7.

1. Reasonable and in Accordance with Evaluation Criteria.

a. In reviewing an agency's evaluation, GAO will not reevaluate the proposals. Rather, it will only consider whether the agency's evaluation was reasonable and in accord with the evaluation criteria listed in the solicitation and applicable procurement laws and regulation. *Id.*; *Advanced Techs. & Labs. Int'l, Inc.*, B-411658 *et al.*, Sept. 21, 2015, 2015 CPD ¶ 301 at 5. An offeror's mere disagreement with the agency's evaluation is not sufficient to render the evaluation unreasonable. *Ben-Mar Enters., Inc.*, B-295781, Apr. 7, 2005, 2005 CPD ¶ 68; *C. Lawrence Constr. Co.*, B-287066, Mar. 30, 2001, 2001 CPD.

b. In a negotiated procurement for award on a trade-off basis, which provided for the evaluation of the degree to which offerors' proposals met or exceeded requirements, protest was sustained where the agency failed to qualitatively assess the merits of the offerors' differing approaches. *Sys. Research and Applications Corp.*, B-299818 *et al.*, Sept. 6, 2007, 2008 CPD ¶ 28.

c. Reliance on the scores of evaluators alone, without looking at strengths and weaknesses of each proposal, may be unreasonable. *See Midland Supply, Inc.*, B-298720, B-298720.2, Nov. 29, 2006, 2007 CPD ¶ 2; *SDA, Inc.*, B-248528.2, Apr. 14, 1993, 93-1 CPD ¶ 320.

d. The source selection authority need not accept the findings and conclusions of the agency evaluators, so long as the SSA's reason for doing so is reasonable, consistent with the stated evaluation criteria, and sufficiently documented. *SAMS El Segundo, LLC*, B-291620, B-291620.2, Feb. 3, 2003, 2003 CPD ¶ 44; *Earl Indus.*, B-309996, B-309996.4, Nov. 5, 2007, 2007 CPD ¶ 203; *DynCorp Int'l LLC*, B-289863.2, May 13, 2002, 2002 CPD ¶ 83 (finding no support in the record for the SSA to question the weaknesses in the awardee's proposal as identified by the evaluation teams).

(78) The SSA may consider proposals to be technically equivalent, notwithstanding different evaluation ratings, and award to the lower cost offeror. *See Camber Corp.*, B-293930; B-293930.2, July 7, 2004, 2004 CPD ¶ 144; *PharmChem, Inc.*, B-291725.3 *et al.*, July 22, 2003, 2003 CPD 148

(79) Conversely, the SSA may reasonably consider one proposal to be technically superior to another notwithstanding equivalent evaluation ratings. *See Vantage Assocs., Inc.*, B-290802.2, Feb. 3, 2003, 2003 CPD ¶ 32; *Science & Eng'g Servs., Inc.*, B-276620, July 3, 1997, 97-2 CPD ¶ 43.

e. *Gen. Dynamics One Source, LLC*, B-400340.5, B-400340.6, Jan. 20, 2010, 2010 CPD ¶ 45. The agency failed to evaluate disparity between staffing offered in awardee's technical proposal and its price proposal, as well failed to evaluate awardee's ability to hire incumbent's employees (as it proposed) at the low labor rates in its price proposal. GAO sustained the protest and found unreasonable the agency's failure to consider this price realism concern in both the price and technical evaluations.

f. *Ahtna Support and Training. Servs.*, B-400947.2, May 15, 2009, 2009 CPD ¶ 119 (sustaining protest where the agency evaluated the awardee and the protester unequally by crediting the awardee with the experience of its subcontractor, but not similarly crediting the protester with the experience of its subcontractor, even though the agency viewed both subcontractors as having relevant experience).

2. Adequacy of Supporting Documentation.

a. *Apptis, Inc.*, B-299457 *et al.*, May 23, 2007, 2008 CPD ¶ 49 (sustaining protest that the agency's evaluation and source selection decision were unreasonable where the agency described

the protester's demonstration as "problem plagued," but the agency's record lacked adequate documentation to support its findings and, as a result, GAO could not determine if the agency's evaluation was reasonable).

b. *AT&T Corp.*, B-299542.3, B-299542.4, Nov. 16, 2007, 2007 CPD ¶ 65 (finding SSA's evaluation of offeror's management approach unreasonable where the agency reached a conclusion regarding the offeror's staffing plan that was inconsistent with the underlying evaluation findings and provided no explanation for this inconsistency, and then relied on this conclusion as a material part of its best value tradeoff determination); *Cortland Mem'l Hosp.*, B-286890, Mar. 5, 2001, 2001 CPD ¶ 48; *Wackenhut Servs., Inc.*, B-286037; B-286037.2, Nov. 14, 2000, 2001 CPD ¶ 114 (emphasizing the importance of contemporaneous documentation).

c. *C&B Constr., Inc.*, B-401988.2, Jan. 6, 2010, 2010 CPD ¶ 1 (protest challenging award to the higher priced, higher technically-rated vendor sustained where the contemporaneous evaluation record consists of numerical scores assigned to each vendor's quotation, and lacks any information to show a basis for those scores, or a reasoned basis for any tradeoff judgments made in the source selection).

d. In one case, the SSA's source selection decision to award to a substantially lower scored offeror, whose cost was only slightly lower, was not adequately justified. *TRW, Inc.*, B-234558, June 21, 1989, 68 Comp. Gen. 512, 89-1 CPD ¶ 584. However, after the SSA's reconsideration, the same outcome was adequately supported. *TRW, Inc.*, B-234558.2, Dec. 18, 1989, 89-2 CPD ¶ 560.

e. *Honeywell Tech. Solutions, Inc.*, B-400771; B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49. Having decided to consider a particular contract performed by the awardee, the agency was required to evaluate the relevance of that contract consistent with the evaluation criteria in the RFP, i.e., the degree of similarity in size, content and complexity between an offeror's past performance information and the RFP requirements. Here, there was nothing in the contemporaneous record to suggest that the agency engaged in such an analysis.

3. The standard of review for the Court of Federal Claims is whether the agency's decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(A)(2); *Cubic Applications, Inc. v. U.S.*, 37 Fed. Cl. 339, 342 (1997).

Q. Responsibility Determination.

1. A contract may only be awarded to a responsible prospective contractor. FAR 9.103(a). No award can be made unless the contracting officer makes an affirmative determination of responsibility; in the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer is required to make a determination of non-responsibility. FAR 9.103(b). A finding of responsibility requires, among other things, that the potential contractor have adequate financial resources, a satisfactory record of performance, integrity, and business ethics, and the necessary organization, experience and technical skills to perform the contract. FAR 9.104-1.

2. "Negative" vs. "Affirmative" Responsibility Determinations.

a. Negative Responsibility Determinations.

(80) Since the agency must bear the brunt of any difficulties experienced in obtaining the required performance, contracting officers have broad discretion and business judgment in reaching non-responsibility determinations, and GAO will not question such a determination unless a protester can establish that the determination lacked any reasonable basis. *See XO Commc'ns, Inc.*, B-290981, Oct. 22, 2002, 2002 CPD ¶ 179; *Global Crossing Telecomms., Inc.*, B-288413.6, B-288413.10, June 17, 2002, 2002 CPD ¶ 102.

(81) Small Business Responsibility. If the contracting officer determines that a small business lacks certain elements of responsibility, under FAR 9.105-2 (a)(2) the contracting officer must comply with FAR Subpart 19.6 and refer the determination to the SBA.

b. Affirmative Responsibility Determinations

(82) Pre-*Garufi*. Although the FAR requires the contracting officer to make an affirmative determination of responsibility before contract award, prior to 2001 a disappointed offeror challenging such a determination found the contracting officer's decision nearly unassailable.

(a) Previously, the GAO quickly disposed of such challenges (*see e.g.*, *SatoTravel*, B-287655, July 5, 2001, 2001 CPD ¶ 111) by simply referencing its Bid Protest Regulations, which provided that:

because the determination that a bidder or offeror is capable of performing a contract is based in large measure on subjective judgments which generally are not readily susceptible of reasoned review, an affirmative determination of responsibility will not be reviewed absent a showing of possible bad faith on the part of the government officials. 4 C.F.R. § 21.5 (2002).

(b) Similarly, the COFC had been equally inhospitable to affirmative responsibility challengers. *See, e.g., Trilon Educ. Corp. v. United States*, 578 F. 2d 1356 (Cl. Ct. 1978); *News Printing Co., Inc. v. United States*, 46 Fed. Cl. 740 (2000).

(83) *Impresa Construzioni Geom. Domenico Garufi v. United States* (Garufi), 238 F.3d 1324 (Fed. Cir. 2001).

(c) In *Garufi*, the CAFC stated the standard of review in cases challenging agency affirmative responsibility determinations should be whether "there has been a violation of a statute or regulation, or alternatively, if the agency determination lacked a rational basis."

(d) Applying this standard to the facts of the case, however, CAFC found it could not assess the reasonableness of the contracting officer's determination "because the contracting officer's reasoning supporting that determination is not apparent from the record." *Garufi*, 238 F.3d at 1337.

(e) On remand, the COFC sustained the protest, having determined the "contracting officer, based on his deposition testimony, . . . failed to conduct an independent and informed responsibility determination." *Impresa Construzioni Geom. Domenico Garufi*, 52 Fed. Cl. 421, 427 (2002).

(84) Post-*Garufi*.

(f) As the standard set forth by CAFC in *Garufi* conflicted with the GAO's Bid Protest Regulation addressing affirmative responsibility determinations, the GAO changed its rule.

Applicable to all bid protests filed after 1 January 2003, the final rule permits GAO review of such challenges "that identify evidence raising 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(c)

(g) In *Southwestern Bell Tel. Co.*, B-292476, Oct. 1, 2003, 2003 CPD ¶ 177, the GAO relied on the new exception to entertain and sustain the protestor's challenge to a contracting officer's affirmative responsibility determination. The GAO noted that, while contracting officers need not explain the basis for responsibility determinations, "documents and reports supporting a determination of responsibility and nonresponsibility . . . must be included in the contracting file."

(h) Compare the result in *Marinette Marine Corp.*, B-400697 *et al.*, Jan. 12, 2009, 2009 CPD ¶ 16 (citing evaluation of awardee's past performance, the agency was aware of and considered awardee's failed performance on another program, as well as Justice Department investigation into that program. GAO's review could not conclude that the agency failed to consider all relevant information when making a responsibility determination). *See also FN Mfg., Inc.*, B-297172, B-297182.2, Dec. 1, 2005, 2005 CPD ¶ 212.

VII. DEBRIEFINGS

A. Purpose

1. 10 U.S.C. § 2305(b)(5-6); FAR 15.505-506.

2. Inform the offeror of its significant weaknesses and deficiencies, and

3. Provide essential information in a post-award debriefing on the rationale for the source selection decision.

B. Preaward Debriefings. FAR 15.505.

1. An offeror excluded from the competitive range (or otherwise eliminated from consideration for award) may request a preaward debriefing.

2. An offeror must submit a written request for a debriefing within 3 days after receipt of the notice of exclusion from the competition.

3. The contracting officer must "make every effort" to conduct the preaward debriefing as soon as practicable.

4. The contracting officer may delay the debriefing until after contract award if the contracting officer concludes that delaying the debriefing is in the best interests of the government. *See Global Eng'g. & Const. Joint Venture*, B-275999, Feb. 19, 1997, 97-1 CPD ¶ 77 (declining to review the contracting officer's determination).

5. At a minimum, preaward debriefings must include:

   a. The agency's evaluation of significant elements of the offeror's proposal;

   b. A summary of the agency's rationale for excluding the offeror; and

   c. Reasonable responses to relevant questions.

6. Preaward debriefings must <u>not</u> include:

   a. The number of offerors;

   b. The identity of other offerors;

   c. The content of other offerors' proposals;

   d. The ranking of other offerors;

   e. The evaluation of other offerors; or

   f. Any of the information prohibited in FAR 15.506(e).

C. Postaward Debriefings. FAR 15.506.

1. An unsuccessful offeror may request a postaward debriefing.

   a. An offeror must submit a written request for a debriefing within 3 days of the date it receives its postaward notice.

   b. The agency may accommodate untimely requests; however, the agency decision to do so does not extend the deadlines for filing protests.

2. "To the maximum extent practicable," the contracting officer must conduct the postaward debriefing within 5 days of the date the agency receives a timely request.

3. At a minimum, postaward debriefings must include:

   a. The agency's evaluation of the deficiencies and significant weaknesses in the offeror's proposal;

   b. The overall ratings of the debriefed offeror and the successful offeror;

   c. The overall rankings of all of the offerors;

   d. A summary of the rationale for the award decision;

   e. The make and model number of any commercial item(s) the successful offeror will deliver; and

   f. Reasonable responses to relevant questions.

4. Postaward debriefings must <u>not</u> include:

   a. A point-by-point comparison of the debriefed offeror's proposal with other offerors' proposal; or

   b. Any information prohibited from disclosure under FAR 24.202 or exempt from release under the Freedom of Information Act, including the names of individuals providing reference information about an offeror's past performance.

5. Enhanced Post-Award Debriefing Rights

   a. Agencies are required to disclose their written source selection document to both unsuccessful- and winning offerors where award value exceeds $100 million. Unsuccessful- and winning small business or non-traditional contractor offerors have the option to request disclosure of the source selection document where award value is between $10 million and $100 million. 2018 NDAA, sec. 818.

   b. Agencies are required to provide written or oral debriefings for all contract awards or task- or delivery orders valued at $10 million or more. *Id.*

c. Disappointed offerors may submit additional questions related to the debriefing up to two (2) business days after receiving the debriefing and the agency must respond within five (5) business days. 10 U.S.C. § 2305(b)(5)(B) & (C)

(85) The agency should not consider the debriefing to be concluded until it delivers the written responses to the disappointed offeror.

(86) For DOD component procurements, the five-day clock for a disappointed offeror to file a protest does not commence until the day the Government delivers the written responses to the additional questions. 31 U.S.C. § 3553 (d)(4)(B).

d. The 2018 NDAA requires amendment of the DFARS to reflect enhanced post-award debriefing rights. DFARS Case 2018-D009.

6. General Considerations:

a. The contracting officer should normally chair any debriefing session held.

b. Debriefings may be done orally, in writing, or by any other method acceptable to the contracting officer.

c. Tailor debriefings to emphasize the fairness of the source selection procedures.

d. Point out deficiencies that the contracting officer discussed but the offeror failed to correct.

e. Documentation. An official summary of all preaward and postaward debriefings shall be included in the contract file. FAR 15.505(g), 15.506(f).

f. Point out areas for improvement of future proposals.

g. Statements made by the agency at a debriefing that are inaccurate (*i.e.*, inconsistent with the contemporaneous evaluation documents) may give rise to a bid protest challenging the agency's evaluation of proposals, but do not provide a basis for sustaining such a protest. GAO looks to see whether the agency's evaluation of proposals, as evidenced by the contemporaneous evaluation documents, was reasonable and consistent with the stated evaluation criteria. Debriefing misstatements do not invalidate the contemporaneous evaluation documents.

h. Agencies should look to debriefings as a means to prevent bid protests. A well-conducted debriefing can head off many protests. GAO dismisses protests where the protestor alleges that a debriefing was inadequate because a debriefing is a procedural matter which does not involve the award's validity. *Raydar & Associates, Inc.*, B-401447, Sept. 1, 2009, 2009 CPD ¶ 180.

VIII. CONCLUSION

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CHAPTER 9

SIMPLIFIED ACQUISITIONS

I. INTRODUCTION

Following this block of instruction, students should:

A. Understand that Simplified Acquisitions streamline the acquisition process and can result in substantial savings of time and money to the Government.

B. Understand how Simplified Acquisitions differ from the Sealed Bidding and Negotiated Procurement methods of acquisitions.

C. Understand when you can use Simplified Acquisitions, and the different competition requirements and thresholds that apply to different Simplified Acquisition procedures.

D. Understand the various simplified acquisitions procedures and the situations when each procedure should be used.

II. REFERENCES

A. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994) (hereinafter FASA).

B. Federal Acquisition Regulation (FAR) Part 13, Simplified Acquisition Procedures.

C. FAR Part 8, Required Sources of Supplies and Services.

D. FAR Part 5, Publicizing Contract Actions.

E. FAR Part 2, Definitions of Words and Terms.

F. Defense Federal Acquisition Regulation Supplement (DFARS) Part 213, Simplified Acquisitions Procedures.

G. DOD Financial Management Regulation (FMR), Volume 5, 0204, Imprest Funds (May 2012).

H. DOD FMR, Volume 10, Chapter 23, Purchase Card Payments (Sep 2010).

I. Ronald W. Reagan National Defense Authorization Act (NDAA) for Fiscal Year 2005, Pub. L. No. 108-375, § 822.

III. OVERVIEW

A. What is a Simplified Acquisition? To streamline the federal procurement process, in 1994, Congress authorized the use of a simplified acquisition process for purchases of supplies and services under certain thresholds. The goal was to allow agency officials to expedite the evaluation and selection processes and keep documentation to a minimum.[1]

B. Simplified acquisition procedures are those procedures prescribed in Part 13 of the FAR, Part 213 of the DFARS, and agency FAR supplements for making simplified acquisitions. The simplified acquisition procedures include the use of Standard Form (SF) 1449 (Solicitation / Contract / Order for Commercial Items), SF 18 (Request for Quotation), purchase orders, blanket purchase agreements (BPAs), imprest funds, and government purchase cards (GPCs are basically government credit cards).

C. Purpose. FAR 13.002. Simplified acquisition procedures are used to:

1. Reduce administrative costs;

2. Improve opportunities for small disadvantaged, women-owned, veteran-owned, HUBZone, and service-disabled veteran-owned small business concerns to obtain a fair proportion of government contracts;

3. Promote efficiency and economy in contracting;

4. Avoid unnecessary burdens for agencies and contractors.

D. Policy. Agencies shall use simplified acquisition procedures to the maximum extent practicable for all purchases of supplies or services not exceeding the simplified acquisitions threshold, unless the services or supply are available from:

1. A required sources of supply listed in FAR Part 8;

2. An existing indefinite delivery/indefinite quantity contract; or

3. Another previously established contract. FAR 13.003.

E. Simplified Acquisition Thresholds.[2] There are four categories of purchases authorized to use some form of simplified acquisition procedures. Three of

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[1] GAO Report to Congressional Committees, September 2003, Contract Management, No Reliable Data to Measure Benefits of the Simplified Acquisition Test Program, GAO-03-1068, pg. 2.

[2] Unless otherwise noted, the thresholds referenced throughout this chapter pertain to DoD acquisitions. The thresholds applicable to civilian agencies can be found in FAR 2.101 and 13.003(b). However, the Civilian Agency Advisory Council (CAAC) issued guidance effective on February 16, 2018, (CAAC Letter 2018-02) permitting civilian agencies to issue class deviations to immediately implement the increased threshold.

the four categories are primarily defined by thresholds, while the fourth does not have a threshold. The following chart summarizes the thresholds, which are then further defined below:

Purchase Type	**Normal Threshold**	**Purchase made (or awarded & performed) *inside* the U.S.: 1) In support of a contingency operation; 2) To facilitate the defense against or recovery from CNBCR; 3) In support of a request from DoS or USAID to facilitate International Assistance; or 4) In support of an emergency or major disaster.[3]**	**Purchase made (or awarded & performed) *outside*[4] the U.S. (Same four categories as *inside* the U.S.)[5]**
Micro-Purchase	$10,000[6]	$20,000	$30,000
Standard Simplified Acquisition	$250,000[7]/ $500,000[8]	$750,000	$1,500,000

[3] On March 13, 2020, in response to the Novel Coronavirus Diseases (COVID-19), the President declared the ongoing COVID-19 pandemic of sufficient severity and magnitude to warrant an emergency declaration for all states, tribes, territories and the District of Columbia pursuant to section 502(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42. US.C. 5212 – 5207 (the "Stafford Act"). As of 26 May 2020, thresholds resulting from the Presidential Proclamation are still in effect.

[4] Section 843 of the National Defense Authorization Act for Fiscal Year 2012 permits DoD to designate a single lead contracting activity inside the United States to act as a "reach-back contracting authority" in support of Operation Enduring Freedom and Operation New Dawn. The single reach-back contracting authority may use the increased thresholds available to support contingencies even if a contract is awarded inside the United States.

[5] *See* footnote 3 above.

[6] The NDAA for FY 2018, PL 115-91, § 806 increased the micro-purchase threshold to $10,000. DOD issued a Class Deviation 2018-O0018, effective August 31, 2018, increasing the DOD micro-purchase threshold to $10,000, except for: (1) acquisitions for construction subject to 40 U.S.C. 31, subchapter IV, Wage Rate Requirements which have a micro-purchase threshold of $2,000; (2) services subject to 41 U.S.C. 67, Service Contract Labor Standards which have a micro-purchase threshold of $2,000; and (3) acquisitions from institutions of higher education or related nonprofit entities, or nonprofit or independent research entities, which have a micro-purchase threshold in excess of $10,000 if determined appropriate by the head of agency.

[7] The NDAA for FY 2018, PL 115-91, § 805 increased the normal simplified acquisition threshold (SAT) to $250,000. DOD issued a Class Deviation 2018-O0018, effective August 31, 2018, increasing the DOD simplified acquisition threshold to $250,000 (with increased threshold in particular circumstances as described in the chart). Unless an applicable class deviation is issued, the SAT for civilian agency procurements is $150,000. FAR 2.101 and 13.003(b).

[8] Per DOD Class Deviation 2018-O0018, the SAT is $500,000 "for acquisitions to be to be used to support a *humanitarian or peacekeeping operation* and to be awarded and performed, or purchased, outside the United States." (emphasis added).

Commercial Items[9]	$7,000,000	$13,000,000	$13,000,000
Personal Services[10]	None	None	None

1. Micro-Purchase Threshold. Acquisition of supplies or services, the aggregate amount of which does not exceed **$10,000** are called micro purchases.[11] DOD Class Deviation 2018-O0018. In the case of construction, the limit is $2,000, in the case of acquisitions subject to the Service Contract Labor Standards the limit is $2,500, and in the case of acquisitions from institutions of higher education or related nonprofit entities, or nonprofit or independent research entities the limit is in excess of $10,000 if determined appropriate by the head of agency.[12] FAR 2.101; DOD Class Deviation 2018-O0018.

   a. If the head of the contracting activity determines the acquisitions of supplies or services is in support of a contingency operation or to facilitate defense against or recovery from cyber, nuclear, biological, chemical or radiological attack; to support a request from the Secretary of State of Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant pursuant to chapter 9 of part I of the Foreign Assistance Act of 1961, or in support of an emergency or major disaster (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), the micro-purchase threshold increases to **$20,000** for any contract to be awarded and performed, or purchase to be made **inside the U.S.** FAR 13.201(g)

   b. If the head of the contracting activity determines the acquisitions of supplies or services is in support of a contingency operation or to facilitate defense against or recovery from cyber, nuclear, biological, chemical or

[9] The previous temporary Commercial Item Test Program (CITP) was made permanent in the NDAA for FY 2015, PL 113-291, § 815.

[10] When an agency is specifically authorized to award personal services contracts (*see* FAR 37.104), there is no applicable threshold and it may do so using simplified acquisition procedures. FAR 13.3003(d).

[11] Unless an applicable class deviation is issued, the normal Micro-Purchase Threshold for civilian agency procurements is $3,500. FAR 2.101 and 13.003(b)

[12] Effective September 28, 2006, the Civilian Agency Acquisition Council and the Defense Acquisition Regulation Council (FAR Councils) adjusted general micro-purchase for inflation from $2,500 to $3,000, pursuant to Pub. L. No. 108-375, § 807. The FAR Councils could not adjust the micro-purchase thresholds for non-exempt service contracts and construction contracts because of limitation created by the Service Contract Act and the Davis-Bacon Wage Act. *See* Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds, 71 Fed. Reg. 57,363.

radiological attack; to support a request from the Secretary of State of Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant pursuant to chapter 9 of part I of the Foreign Assistance Act of 1961, or in support of an emergency or major disaster (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), the micro-purchase threshold increases to **$30,000** for any contract to be awarded and performed, or purchase to be made **outside the U.S.** FAR 13.201(g)

(1) Purchases using this authority must have a clear and direct relationship to the support of a contingency operation or the defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack.

(2) The government-wide commercial purchase card is the preferred method of making micro-purchases, although any of the contract vehicles may be used if agency procedures allow it. FAR 13.201(b). NOTE: As of 31 July 2000, DoD requires the use of the government purchase card (GPC) for all purchases at or below the micro-purchase threshold. 65 Fed. Reg. 46,625 (2000). See DFARS 213.270 (for exceptions to the policy); see AFARS 5113.270-90 (for agency specific requirements for the purchase card program).

(3) No provisions or clauses are required for micro-purchases, but they may be used. FAR Part 8 DOES apply to micro-purchases. FAR 13.201(d).

(4) Competition is not required if the authorized individual considers the price reasonable. To the extent practicable, micro-purchases shall be distributed equitably among qualified suppliers. FAR 13.203(a).

2. Simplified Acquisition Threshold (SAT). Acquisitions of supplies or services in the amount of **$250,000** or less are called simplified acquisitions. They may use the simplified acquisition procedures listed in FAR Part 13. DOD Class Deviation 2018-O0018.

a. The SAT increases to **$750,000** for contract awards and purchases **inside the U.S.** if the head of the contracting activity determines the acquisition of supplies or services is to be used to in support of a *contingency operation*, to facilitate defense against or recovery from cyber, nuclear, biological, chemical,

or radiological attack (CNBCR), in support of a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate the provision of international disaster assistance pursuant to chapter 9 of part I of the Foreign Assistance Act of 1961, or in support of an emergency or major disaster (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)). DOD Class Deviation 2018-O0018.

b. The SAT increases to **$500,000** for contract awards and purchases **outside the U.S.** if the head of the contracting activity determines the acquisition of supplies or services is to be used to in support of a *humanitarian or peacekeeping operation*, as defined in FAR 2.101. DOD Class Deviation 2018-O0018.

c. The SAT increases to **$1,500,000** for contract awards and purchases **outside the U.S.** if the head of the agency determines the acquisition of supplies or services is to be used to in support of a contingency operation or to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack (CNBCR), in support of a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate the provision of international disaster assistance pursuant to chapter 9 of part I of the Foreign Assistance Act of 1961, or in support of an emergency or major disaster (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)). DOD Class Deviation 2018-O0018.

3. Commercial Item Threshold. Congress created a Commercial Item Test Program (CITP) authority for agencies to use simplified acquisition procedures to purchase commercial item supplies and services for amounts greater than the SAT but not greater than **$7,000,000**. National Defense Authorization Act (NDAA) for Fiscal Year (FY) 1996, Pub. L. No. 104-106, § 4202(a) (1) (A) (codified at 10 U.S.C. § 2304(g)(1)(B)). The NDAA for FY 2015, Pub. L. 113-291, § 815, made the program permanent. FAR 13.5.

a. For a **contingency operation** or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States, the $7,000,000 commercial item threshold increases to **$13,000,000**. *See* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1443.

b. Congress created the CITP authority to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors. 10 U.S.C. § 2304(g)(1). Therefore, agencies should take advantage of the simplified acquisition method of acquisition whenever possible in conjunction with the CITP authority. *See* East West Research, Inc., B-239516, Aug. 29, 1990, 90-2 CPD ¶ 178 (In keeping with their purpose promoting efficiency and economy in contracting small purchase procedures are specifically excepted from the full and open competition requirements of the Competition in Contracting Act of 1984 and the mandatory use of commercial item descriptions); *see also* American Eurocopter Corporation, B-283700, Dec. 16, 1999, 99-2 CPD P 110 (agency used authority of FAR 13.5 to purchase a Bell Helicopter).

4. Personal Services. If an agency has specific statutory authority to acquire personal services, that agency may use simplified acquisition procedures to acquire those services. FAR 13.003(d) and FAR 37.104.

IV. DEFINITIONS

A. Authorized Individual. A person who has been granted authority under agency procedures to acquire supplies and services in accordance with the simplified acquisition procedures of FAR Part 13. FAR 13.001.

B. Commercial Item Program.[13] A program designed to implement the federal government's preference for the acquisition of commercial items by establishing acquisition policies more closely resembling those of the commercial marketplace. In general, this program allows for the procurement of commercial items using simplified acquisition procedures as long as the commercial item costs less than $7,000,000. See FAR Part 13.5 and Chapter 10 of the Contract Attorneys Deskbook for a comprehensive outline.

C. Contingency Operation. For purposes of determining the applicable SAT, a contingency operation is a military operation that is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operation, or hostilities against an enemy of the United States or against an opposing military force; or a military operation that results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of chapter 15 of title 10, United States Code, or any other provision of law during a war or national emergency declared by the President or Congress. FAR 2.101 and 10 U.S.C. § 101(a)(13).

[13] *See* footnote 11 above.

D. Governmentwide Commercial Purchase Card. A purchase card, similar in nature to a commercial credit card, issued to authorized agency personnel to use to acquire and to pay for supplies and services. FAR 13.001.

E. "In support of." For purposes of determining applicable SAT, the determination as to whether the supplies or services are to be used in support of such a contingency operation is to be made by the head of the agency, which for the Army is the Assistant Secretary of the Army (Acquisition, Logistics and Technology) (ASA (ALT)). FAR 2.101. By memorandum dated March 24, 2004, the ASA(ALT) delegated this authority down to each Head of Contracting Activity, who may further delegate this authority down to "any official in procurement channels, who is at least one level above the contracting officer." Typically, the authority is re-delegated down to the Directors of Contracting or to the chiefs of contracting offices.

F. Imprest Fund. A cash fund of a fixed amount established by an advance of funds, without charge to an appropriation, from an agency finance or disbursing officer to a duly appointed cashier, for disbursement as needed from time to time in making payment in cash for relatively small amounts. FAR 13.001.

G. Humanitarian or Peacekeeping Operation. A military operation in support of the provision of humanitarian or foreign disaster assistance or in support of a peacekeeping operation under chapter VI or VII of the Charter of the United Nations. The term does not include routine training, force rotation, or stationing (10 U.S.C. § 2302(8) and 41 U.S.C § 153(2)). FAR 2.101.

H. Purchase Order. A government offer to buy certain supplies or services, including construction and research and development, upon specified terms and conditions, using simplified acquisition procedures. FAR 2.101.

I. Request for Quotations (RFQ). When a contracting officer solicits vendors to fill an agency need while using simplified acquisitions procedures, the solicitation is called a Request for Quotations. Vendors' responses to fill the agency needs are called "quotations." A quotation is not an offer, and consequently, cannot be accepted by the government to form a binding contract. The order by the government is the offer. When the contractor accepts the government's order, a legal contract is formed. FAR 13.004.

V. POLICY PRE-REQUISITES

A. General Rule: Agencies **shall use** simplified acquisition procedures to the "maximum extent practicable" for all purchases of supplies or services not exceeding the SAT (including purchases at or below the micro-purchase threshold). FAR 13.003(a).

B. Overview of Pre-Requisites. There are pre-requisites to using SAP.

1. Agencies shall **not** use simplified acquisition procedures to acquire supplies and services initially estimated to exceed the SAT, or that will, in fact, exceed it. FAR 13.003(c).

   a. Options. Options may be included in simplified acquisitions, but the threshold value of the acquisition is determined by adding the value of the base contract and all options. FAR 13.106-1(e).

2. Agencies shall **not** divide requirements that exceed the SAT into multiple purchases merely to justify using simplified acquisition procedures. 10 U.S.C. § 2304(g)(2); FAR 13.003(c).

   a. *See* L.A. Systems v. Department of the Army, GSBCA 13472-P, 96-1 BCA ¶ 28,220 (Government improperly fragmented purchase of computer upgrades into four parts because agency knew that all four upgrades were necessary and were, therefore, one requirement).

   b. *But see* Petchem, Inc. v. United States, 99 F. Supp. 2d 50 (D.D.C. 2000) (Navy did not violate CICA by purchasing tugboat services on a piecemeal basis when it used an ID/IQ contract, even though total value of the services were expected to exceed $100,000, because actual requirement was indeterminate and a prior competitive solicitation did not result in reasonable offers); Mas-Hamilton Group, Inc., B-249049, Oct. 20, 1992, 72 Comp. Gen. 6, 92-2 CPD ¶ 259 (Where an agency was not in a position to proceed with fully competitive award for critical items, agency's utilization of small purchase procedures to make interim, emergency filler buys on an as-needed, urgent basis was not improper).

3. If other existing ID/IQ contracts or other existing contracts would satisfy the agency's requirement, the agency must order off the other contract. FAR 13.003(a)(2) & (3).

4. Required Source of Supply or Service: If the agency's requirement can be met by using a required source of supply or a required source of services under FAR Part 8, then the agency must acquire the item in that manner. FAR 13.003(a)(1); *see* FAR 8.002.

5. Small Business Set-Aside. All acquisitions exceeding the micro-purchase threshold but under the SAT are reserved exclusively for small business concerns and **shall** be set aside. FAR 13.003(b); DOD Class Deviation 2018-O0018.

   a. Exceptions. In general, the set-aside requirement above does not apply when:

(1) The small business set-aside requirement does not apply to purchases of $3,500 or less, or purchases from required sources of supply under FAR Part 8. FAR 19.502-1(b).

(2) Purchases occur outside the United States or its outlying areas. FAR 19.000(b).

(3) There is no reasonable expectation of obtaining quotations from two or more responsible small business concerns that are competitive in terms of market prices, quality, or delivery. This is called the Rule of Two. FAR 19.502-2(b)(1). However, there are small business programs that permit or require awards to small business even where the Rule of Two is not met.

b. For a more complete discussion of small business set-asides, please refer to the Chapter 13.

VI. COMPETITION REQUIREMENTS

A. General Rules. FAR 13.104; FAR 13.106-1.

1. The Competition in Contracting Act of 1984 (CICA) exempts simplified acquisition procedures from the requirement that agencies obtain full and open competition. 10 U.S.C. § 2304(g)(1); 41 U.S.C. § 3301.

2. For simplified acquisitions, CICA requires only that agencies obtain competition to the "**maximum extent practicable**" to obtain supplies and services from the source whose offer is the most advantageous to the government, considering the administrative cost of the purchase. 10 U.S.C. § 2304(g)(3); 41 U.S.C. §§ 3301, 111; FAR 13.104.

B. Defining "maximum extent practicable."

1. Agencies must make reasonable efforts, consistent with efficiency and economy, to give responsible sources the opportunity to compete.

a. FAR 13.104 no longer requires the solicitation of three or more vendors to ensure competition to the maximum extent practicable when using simplified acquisition procedures.

(1) Contracting officers, however, should consider using solicitation of at least three sources to promote competition to the maximum extent practicable; and

(2) Whenever possible, they should request quotations or offers from two sources not included in the previous solicitation.

b. If not providing access to notice through the single government-wide point of entry, required competition ordinarily can be obtained by soliciting quotes from sources within the local trade area. FAR 13.104(b).

c. Vendors who ask to compete should be afforded a reasonable opportunity to compete. Proper publication of a solicitation on beta.sam.gov will satisfy agency's obligation to encourage maximum competition.

(1) PR Newswire Assn, LLC, B-400430, 26 Sept. 2008 (incumbent claimed no actual notice, GAO ruled post on FEDBIZOPS put PR Newswire on constructive notice); Optelec U.S. Inc., B-400349, B400349.2, 16 Oct. 2008 (Optelec found solicitation day before proposals due, GAO held once advised solicitation would be posted on FEDBIZOPS, it was Optelec's responsibility to obtain it).

(2) Gateway Cable Co., B-223157, Sep. 22, 1986, 65 Comp. Gen. 854, 86-2 CPD ¶ 333 (agency failed to satisfy competition to the maximum extent practicable when it failed to solicit the protesting vendor, who called the contracting officer 19 times in regards to an acquisition requirement).

(3) While the "maximum extent practicable" standard can generally be met through the solicitation of at least three sources, an agency may not deliberately fail to solicit a responsible source that has expressed interest in competing without a reasonable basis for questioning the source's ability to meet the agency's needs. Solutions Lucid Group, LLC, B-400967, Comp. Gen., Apr. 2, 2009 (Vendor exclusion for use of non-domestic products on prior purchase order unreasonable when domestic requirement no longer applied to current purchase); Military Agency Servs. Pty., Ltd., B-290414 et al., Aug. 1, 2002, 2002 CPD ¶ 130 (Deliberate vendor exclusion from competition for a BPA order not decided by GAO because Vendor unable to show it would have had a substantial chance of award, but for the agency's actions); Bosco Contracting, Inc., B-270366, Mar. 4, 1996, 96-1 CPD ¶ 140 (Deliberate

exclusion of incumbent from solicitation for two-month interim services contract unreasonable where incumbent asked to compete and incumbent's alleged poor past performance was unsupported by the record).

d. Contracting officers should generally solicit the incumbent.

(1) An agency's failure to solicit an incumbent, however, is not an automatic violation of the requirement to promote competition to the maximum extent practicable.

(2) Rather, the determinative question is whether an agency that deliberately excluded a firm that expressed an interest in competing acted reasonably. PR Newswire Assn, LLC, B-400430, 26 Sept. 2008, 2008 CPD ¶ 178 (incumbent claimed no actual notice, GAO ruled post on FEDBIZOPS put PR Newswire on constructive notice).

C. Considerations for soliciting competition.

1. Contracting officers shall not:

a. Solicit quotations based on personal preference (FAR 13.104(a)(1)); or

b. Restrict solicitation to suppliers of well-known and widely distributed makes or brands (FAR 13.104(a)(2)). An agency should not include restrictive provisions, such as specifying a particular manufacturer's product, unless it is absolutely necessary to satisfy the agency's needs.[14] *See* American Eurocopter Corporation, B-283700, Dec. 16, 1999, 99-2 CPD ¶ 110 (finding reasonable the solicitation for a Bell Helicopter model 407); *But see* Delta International, Inc., B-284364.2, May 11, 2000, 2000-1 CPD ¶ 78 (agency could not justify how only one type of x-ray system would meet its needs). *See also*, FAR 11.104.

2. Before requesting quotes, FAR 13.106-1(a) requires the contracting officer to consider:

[14] FAR 13.106-3 and 13.501 outline file documentation requirements that explain the use of brand name specifications or other circumstances that explain the absence of competition.

a. The nature of the article or service to be purchased and whether it is highly competitive and readily available in several makes or brands, or is relatively noncompetitive;

b. The availability of an electronic commerce method that employs widespread electronic public notice;

c. The urgency of the proposed purchase;

d. The dollar value of the proposed purchase; and

e. Past experience concerning specific dealers' prices.

3. Sole Source Acquisitions (including Brand Name).

a. For items under the SA threshold, an agency may limit a Request For Quotes (RFQ) to a single source ONLY IF the contacting officer has determined that only one source is reasonably available (e.g., urgency, exclusive licensing agreements, brand name, or industrial mobilization). FAR 13.106-1(b). A formal justification and approval (J&A) is not required by the FAR, but FAR 13.106-3(b)(3)(i) does require the explanation of the absence of competition.

b. For commercial items in excess of the SA threshold, a formal J&A is required pursuant to the requirements listed in FAR 13.501(a). FAR 13.106-1(b)(2).

c. Agencies must furnish potential offerors a reasonable opportunity to respond to the agency's notice of intent to award on a sole source basis. *See* Jack Faucett Associates, Inc., B-279347, June 3, 1998, 98-1 CPD ¶ 155 (unreasonable to issue purchase order one day after providing FACNET notice of intent to sole-source award); Information Ventures, Inc., B-293541, Apr. 9, 2004, 2004 CPD ¶ 81 (1 1/2 business days does not provide potential sources with a reasonable opportunity to respond, particularly where the record does not show a need for the short response period and the agency knew of the requirement well in advance of issuing the notice). Similarly, FAR 5.102(a)(6) requires publication of a brand name justification.

4. Micro-purchases & Competition. FAR 13.203.

a. Competition is not required for a micro-purchase if the contracting officer or the individual appointed in accordance with 1.603-3 determines that the price is reasonable. FAR 13.203(a)(2); Michael Ritschard, B-276820, Jul. 28, 1997, 97-2

CPD ¶ 32 (contracting officer properly sought quotes from two of five known sources, and made award).

b. To the maximum extent practicable, micro-purchases shall be distributed equitably among qualified suppliers. FAR 13.203. *See* Grimm's Orthopedic Supply & Repair, B-231578, Sept. 19, 1988, 88-2 CPD ¶ 258 (agency properly distributed orthopedic business based on a rotation list).

VII. SIMPLIFIED ACQUISITION METHOD OF CONTRACTING

A. Policy. Authorized individuals shall make purchases in the simplified manner that is most suitable, efficient, and economical based on the circumstances of each acquisition. FAR 13.003(g). In some cases, agencies delegate authority to use simplified acquisition procedures below the contracting officer to these "Authorized Individuals."

B. Request for Quotations – Legal Formation of the Contract.

1. In simplified acquisitions, the government solicits quotations. A quotation is not an offer, and can't be accepted by the government to form a binding contract. FAR 13.004(a); Eastman Kodak Co., B-271009, May 8, 1996, 96-1 CPD ¶ 215 (contending that the cancellation was unreasonable due to a lack of planning. GAO held that DOT properly cancelled the solicitation after determining that: (1) the solicitation did not meet its needs; and (2) more relaxed specifications would result in more savings and competition. Accordingly, the protest was denied.).

2. Offer. After considering the quotations, if the government is interested, it submits an order, which is a legal offer to buy supplies or services under specified terms and conditions. A supplier creates a contract when it accepts the government's order. FAR 13.004(a). C&M Mach. Prods., Inc., ASBCA No. 39635, 90-2 BCA ¶ 22,787 (bidder's response to purchase order proposing a new price was a counteroffer that the government could accept or reject). *See,* Kingdomware Technologies, B-407628, Jan. 9, 2013, 2013 CPD ¶ 27 (agency not required to remove all uncertainty from the mind of every prospective vendor).

3. Acceptance. FAR 13.004(b). A contractor may accept a government order by:

a. notifying the government, preferably in writing;

b. furnishing the supplies or services; or

c. proceeding with work to the point where substantial performance has occurred.

(1) When does substantial performance occur?[15] *See* the case study following "Cancellation of an RFQ" below.

(2) Sunshine Cordage Corp., ASBCA 38904, 90-1 BCA 22,382 at 112,471 (Oct. 18, 1989)(citing Klass Engineering, Inc., ASBCA 22052, 78-2 BCA 13,236, at 64,716, modified and aff'd on recon., 78-2 BCA 13,463. *See also*, Tefft, Kelly and Motley, Inc., GSBCA 6562, 83-1 BCA 16,177, at 80,388 (1982) (teaching contractor entitled to compensation for preparation expense incurred before government terminated contract).

4. Cancellation of an RFQ. A contracting agency needs a reasonable basis to support a decision to cancel an RFQ. Deva & Assoc. PC, B-309972.3, Apr. 29, 2008, 2008 CPD ¶ 89 at. 3.

a. A reasonable basis to cancel exists when, for example, an agency determines that a solicitation does not accurately reflect its needs, or where there is a material increase in the services needed to satisfy the agency's requirements. Logistics Solutions Group, Inc., B-294604.7, B-294604.8, July 28, 2005, 2005 CPD ¶ 141 at 3.

b. A solicitation may be cancelled where, during the course of the procurement, the item or services involved are discovered to be on, or have been added to, a required source list. Best Foam Fabricators, Inc., B-259905.3, Jun. 16, 1995, 95-1 CPD ¶ 275 at 2 (Item added to the list on 1 January during the procurement and agency properly canceled the procurement on 30 January when original awardee could not perform.) *But see* OSC Solutions, Inc., B-401498, Sept. 14, 2009 (RFQ may not be cancelled and a BPA sole-sourced to the Industries of the Blind under the authority of the Javits-Wagner-O'Day (JWOD) Act when an item is not yet added to the JWOD procurement list).

c. Cancellation versus Termination. If acceptance of an order has occurred, the agency must terminate the contract rather than cancel it. Termination normally involves a monetary settlement for the vendor. FAR 13.302-4.

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[15] "Substantial performance" is performance short of full performance, but nevertheless good faith performance in compliance with the contract except for minor deviations. RALPH C. NASH, ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK, at 555 (3d ed. 2007).

Case Study: GSA solicited quotes for instructors to teach a four-week acquisition course in Arlington, Virginia. GI, who was just one of several vendors, sent a quote for $6,800. GSA issued the purchase order to GI on April 21. On May 11, GSA gave GI the course materials and GI began reviewing them immediately. May 18, a losing vendor filed a protest with GAO protesting the award to GI. On May 27, GSA canceled the purchase order with GI. GAO dismissed the protest on 2 June after GSA stated it canceled the order due to the use of "defective evaluation criteria" in the selection of instructors. GI filed a T4C settlement proposal to recover $3,849.20, based on an hourly teaching rate of $50.00 per hour. GI stated he incurred 61 hours of preparation time plus overhead expenses. GSA paid GI a total settlement of $425.00. GI appealed to the ASBCA.

Question: Did GI accept the government's purchase order by substantial performance such that there was a binding contract?

At trial, the government requested dismissal arguing that GI had not "accepted" the government's purchase order so no legally binding contract existed. The GSBCA stated "so long as the contractor does not ask to change the terms of the contract after issuance of a purchase order, acceptance of an offer occurs once the contractor commences 'substantial performance' of the order, which in turn creates a binding contract." In this case, the GSBCA found that acceptance had occurred by examining the actions of both parties. The GSBCA stated that when the government provided GI the course materials and they received and began reviewing them, acceptance had occurred. The GSBCA also noted that by paying $425.00, the contracting officer had correctly decided a binding contract existed (there could be no settlement if there was no contract). The GSBCA eventually awarded GI a termination settlement of $2,236.92. Giancola & Associates vs. GSA, GSBCA 12128, Feb. 5, 1993.

C. Authority to Combine Methods of Contracting.

1. For acquisitions under the SAT for other than commercial items, authorized individuals may use any appropriate combination of the procedures in FAR Part 13 (simplified acquisitions), Part 14 (sealed bidding), Part 15 (competitive negotiations), Part 35 (research and development contracting), or Part 36 (construction and architect-engineer contracts). FAR 13.003(g)(1).

2. For acquisitions of commercial items under the commercial item threshold, authorized individuals shall make purchases using any appropriate combination of FAR Part 12 (commercial items), Part 13 (simplified acquisitions), Part 14 (sealed bidding), and Part 15 (competitive negotiations). FAR 13.003(g)(2).

D. Evaluation Procedures & Criteria.

1. Evaluations must be conducted fairly and in accordance with the terms of the solicitation. Kathryn Huddleston & Assocs., Ltd., B-289453, Mar. 11, 2002, 2002 CPD ¶ 57; Finlen Complex Inc., B-288280, Oct. 10, 2001, 2001 CPD ¶ 167; Diebold, Inc., B-404823, Jun 2, 2011, "it is a fundamental principle of government procurement that competition must be conducted on an equal basis, that is, offerors must be treated equally and be provided with a common basis for the preparation of their proposals." When using simplified acquisitions, agencies must still follow stated evaluation criteria. Low & Associates, Inc., B-297444.2, Apr. 13, 2006, 2006 CPD ¶ 76 (LAI successfully protested Nat'l Science Foundation award claiming agency waived material solicitation requirements).

   a. Sea Box, Inc., B-405711.2, 2012 CPD ¶ 116 (Comp. Gen. Mar. 18, 2012) (GAO will review allegations of improper agency actions in conducting simplified acquisitions to ensure that the procurements are conducted consistent with a concern for fair and equitable competition and with the terms of the solicitation.) *See also* Novex Enterprises, B-407914, April 5, 2013, (Protester's argument that it was improper to consider PTI's shorter delivery schedule has no merit because the solicitation specifically provided for the consideration of both price and non-price factors in the award decision, and also stated that one of the non-price factors was offered delivery).

   b. Agency unreasonably evaluated the protester's bid of an equal product under a brand name or equal solicitation conducted under simplified acquisition procedures where the solicitation lacked salient characteristics and the equal product was not shown to be significantly different from the brand name product. *See* Veterans Healthcare Supply Solutions, Inc., B-407223.2, Dec. 13, 2012, 2013 CPD ¶ 3.

2. Evaluation Procedures. The contracting officer has broad discretion in creating suitable evaluation criteria. The procedures in FAR Part 14 (sealed bidding) and Part 15 (competitive negotiations) are NOT mandatory. At the contracting officer's discretion, one or more, but not necessarily all, of the evaluation procedures in FAR Part 14 or 15 may be used. FAR 13.106-2(b). *See* Cromartie and Breakfield, B-279859, Jul. 27, 1998, 98-2 CPD ¶ 32 (upholding rejection of quote using Part 14 procedures for suspected mistake). When the contracting officer uses procedures outlined in Parts 14 or 15, GAO will evaluate the government's conduct in light of the standards outlined in those Parts. *See* ERIE Strayer Company, B-406131, Feb. 21, 2012 (sustaining a protest when the government had

communications with one contractor that amounted to discussions under Part 15, but did not have communications or discussions with the protestor; "Although an agency is not required to conduct discussions under simplified acquisition procedures, where an agency avails itself of negotiated procurement procedures, the agency should fairly and reasonably treat offerors in the conduct of those procedures."). *See* Tipton Textile Rental, Inc., B-406372, May 9, 2012 (GAO sustained the protest because once the agency opened discussions, the discussions had to be meaningful and they were not.)

3. Contracting officers shall consider all quotations that are timely received. FAR 13.003(h)(3).

   a. The Government can solicit and receive new quotations any time before contract formation, unless a request for quotations establishes a firm closing date. Technology Advancement Group, B-238273, May 1, 1990, 90-1 CPD ¶ 439; ATF Constr. Co., Inc., B-260829, July 18, 1995, 95-2 CPD ¶ 29.

   b. When a purchase order has been issued prior to receipt of a quote, the agency's decision not to consider the quote is unobjectionable. Comspace Corp. B-274037, Nov. 14, 1996, 96-2 CPD ¶ 186.

   c. Agency was not obligated to consider vendor's quote where the record shows that the agency did not receive written verification of information related to the quote and the vendor was advised that failure to respond would constitute withdrawal of quote. B&S Transport, Inc., B-407589, Dec. 27 2012, 2012 CPD ¶ 354.

4. If a solicitation contains no evaluation factors other than price, price is the sole evaluation criterion. AMBAC International, B-234281, May 23, 1989, 89-1 CPD ¶ 492 (price was the only term solicited from each participating contractor).

5. If using price and other factors, ensure quotations can be evaluated in an efficient and minimally burdensome fashion. Formal evaluation plans, discussions, and scoring of quotations are not required.[16] Contracting officers may conduct comparative evaluations of offers. FAR 13.106-2(b)(3); *See* United Marine International LLC, B-281512, Feb. 22, 1999, 99-1 CPD ¶ 44 (discussions not required).

6. Evaluation of other factors, such as past performance:

[16] Some documentation in the contract file to support the award decision is still required (*see* FAR 13.106-3 and documentation discussion *infra*).

a. Does not require the creation or existence of a formal database; and

b. May be based on information such as the contracting officer's knowledge of, and previous experience with, the supply or service being acquired, customer surveys, or other reasonable basis. FAR 13.106-2(b)(3); *See* MAC's General Contractor, B-276755, July 24, 1997, 97-2 CPD ¶ 29 (reasonable to use protester's default termination under a prior contract as basis for selecting a higher quote for award); Environmental Tectonics Corp., B-280573.2, Dec. 1, 1998, 98-2 CPD ¶ 140 (Navy properly considered evidence of past performance from sources not listed in vendor's quotation).

E. Award and Documentation. FAR 13.106-3

1. Basis of Award. Regardless of the method used to solicit quotes, the contracting officer shall notify potential quoters of the basis on which award will be made (price alone or price and other factors, e.g., past performance and quality). Contracting officers are encouraged to use best value. FAR 13.106-1(a)(2). Notice to unsuccessful vendors shall be provided if requested. FAR 13.106-3(c) and (d).

2. Price Reasonableness. The contracting officer must determine that a price is fair and reasonable before making a contract award. *See* Preferred Systems Solutions, Inc., B-407234; B-407234.2, November 30, 2012 (protest challenging agency's price realism evaluation denied where agency compared quotes to IGE and to each other and considered awardee's labor hours, mix, and rates).

3. Documentation.

a. Documentation should be kept to a minimum. FAR 13.106-3 (b) provides examples of the types of information that should be recorded.[17]

b. The contracting officer ***must*** include a statement in the contract file supporting the award decision if other than price-related factors were considered in selecting the supplier. FAR 13.106-3(b)(3)(ii); *See* Universal Building Maintenance, Inc., B-282456, Jul. 15, 1999, 99-2 CPD ¶ 32 (protest sustained because contracting officer failed to document award selection, and FAR Parts 12 and 13 required some explanation of the

[17] For oral solicitations, the contracting office should maintain records of oral price quotations to reflect clearly the propriety of placing the order at the price paid with the supplier concerned. For written solicitations, the contracting office should maintain notes or abstracts to show prices, delivery, references to printed price lists used, the supplier or suppliers contacted, and other pertinent data. FAR 13.106-3(b)(1) and (b)(2).

award decision). *See also*, Resource Dimensions, LLC, B-404536, Feb. 24, 2011, 2011 CPD ¶ 50 (sustaining a protest where an agency used SAP and oral presentations, but the agency failed to provide adequate supporting rationale in the record for GAO to conclude the agency acted reasonably; "Moreover, even for procurements under simplified acquisition procedures, it is a fundamental principle of government accountability that an agency be able to produce a sufficient record to allow for a meaningful review where its procurement actions are challenged. In this regard, where an agency fails to adequately document its actions, it bears the risk that there may not be adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for the source selection decision.").

F. Authority to Innovate. Contracting Officers shall use innovative approaches, to the maximum extent practicable, in awarding contracts using simplified acquisition procedures. FAR 13.003(h)(4).

1. Example of an Innovative Approach: Reverse auctions. Prospective contractors bid down the price in real time to compete to provide the product sought by the government. *See* Thomas F. Burke, *Online Reverse Auctions*, West Group Briefing Papers (Oct. 2000).

a. An increasing number of GAO cases deal directly with reverse auctions: *See, e.g.*, Native American Construction Services, LLC, B-415386, B-415386.2, Jan. 2, 2018; Royal Hawaiian Movers, B-288653, Oct. 31, 2001, 2001 CPD ¶ 182; Pacific Island Movers, B-287643.2, July 19, 2001, 2001 CPD ¶ 126. The GAO has also issued a report with 21 recommendations regarding the proper and effective use of reverse auctions. U.S. Government Accountability Office. (2018, July). *Reverse Auctions: Additional Guidance Could Help Increase Benefits and Reduce Fees* (Publication No. GAO-18-446). Retrieved from https://www.gao.gov/products/GAO-18-446.

b. In general, the use of reverse auctions has been sustained by GAO. *See* MTB Group, B-295463, Feb. 23, 2005 (concluding that procurement using reverse auction format is permissible because agency is conducting reverse auction under simplified acquisition procedures which encourage use of innovative procedures). There has been some recent criticism of reverse auctions however in that: they typically require contractors to disclose their prices to each other (contractors are informed whether they are the current low bidder, but don't see the name of the low-bidding contractor or the actual bid price until close of the auction); the pricing competition saves money for the

government but reduces prices to levels that small business cannot afford; the reverse auction websites sometimes have confusing default language for Evaluation criteria; reverse auction platforms often require fees which are not always understood by contracting professionals and requiring activities; and reverse auctions fail to take into account past performance and other non-price factors that help the government achieve the best value on a specific procurement.

c. Additionally, the GAO has held that internet failure may not excuse late delivery of contractor's proposal. Performance Construction, Inc., B-286192, Oct. 30, 2000, 2000 CPD. ¶ 180.

d. For DoD, DFARS 217.78 (effective 1 October 2019) prohibits the use of reverse auctions when procuring items designated by the requiring activity as personal protective equipment or an aviation critical safety item, when the requiring activity advises the contracting officer that the level of quality or failure of the equipment or item could result in combat casualties.

VIII. PUBLICIZING AGENCY CONTRACT ACTIONS

A. Policy. Prior to awarding government contracts, agencies must comply with the publicizing requirements of FAR Part 5.[18]

B. Exception for contract actions outside the United States. The contracting officer need not submit a notice to the government point of entry (GPE) if the proposed contract action is by a defense agency and the proposed contract action will be made and performed outside the United States and its outlying areas, and only local sources will be solicited. This exception does NOT apply to proposed contract actions covered by the World Trade Organization Government Procurement Agreement or a Free Trade Agreement. FAR 5.202(a)(12).

C. Definitions.

1. Publicizing means to disseminate information in a public forum so that potential vendors are informed of the agency's need and the agency's proposed contract action. As the value of the anticipated acquisition increases, agencies have to meet more stringent requirements to ensure the proposed contract action is disseminated to the public.

2. Posting is a limited form of publicizing where a contracting officer informs the public of a proposed contract action by displaying a

[18] *See infra*, Appendix B: Publicizing and Synopsis Requirements for Government Procurements (containing a chart that summarizes publicizing and synopsis requirements for all methods of acquisitions depending on the value of the procurement).

summary of the anticipated solicitation (a synopsis), or displaying the actual 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).

3. A synopsis is a notice to the public that summarizes the anticipated solicitation. At a minimum, a synopsis must include a clear and concise description of the supplies or services that the agency needs. The description must not be unnecessarily restrictive of competition and should allow prospective offerors to make an informed business judgment as to whether they should seek more information (a copy of the solicitation) and/or offer to fulfill the agency need. FAR 5.207(c).

4. A solicitation means any request to submit offers or quotations to the Government. Solicitations under sealed bidding procedures are called "invitations for bids" or IFB. Solicitations under negotiated procedures are called "requests for proposals" or RFP. Solicitations under simplified acquisition procedures may require submission of either a quotation or an offer (FAR 2.101), but most frequently take the form of a "request for quotation" or RFQ.

D. Publicizing Requirements. Contracting officers must publicize proposed contract actions as follows:

1. For proposed contract actions less than $15,000 and/or the micro-purchase threshold, there are no required publicizing requirements.

2. 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).

3. Except for commercial item acquisitions, for proposed contract actions expected to exceed $25,000 but less than the Simplified Acquisitions Threshold (SAT), agencies must synopsize on the Government-wide Point of Entry (GPE) [19] for at least **15 days**, and then issue a solicitation and allow a "reasonable opportunity to respond." FAR 5.203. *This can be less than the 30 days required for acquisitions above the SAT.*

[19] The GPE is available online at the System for Award Management website, *available at https://beta.sam.gov/*. .

4. When acquiring commercial items whose value exceeds $25,000, the contracting officer may publicize the agency need, at his/her discretion, in one of two ways:

   a. Combined Synopsis/Solicitation: Agencies may issue a combined synopsis/solicitation on the GPE in accordance with the procedures detailed at 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).

   b. 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*. FAR 5.203

   c. Reasonable Response Time. Contracting officers shall establish deadlines for the submission of responses to solicitations that afford suppliers a reasonable opportunity to respond. FAR 13.003(h)(2). *See* American Artisan Productions, Inc., B-281409, Dec. 21, 1998, 98-2 CPD ¶ 155 (finding fifteen day response period reasonable); Military Agency Services Pty., Ltd., B-290414 et al., Aug. 1, 2002 (finding near immediate response period (24 hours) reasonable where publication requirements did not apply overseas, only prices were requested, all requested sources timely submitted quotes and due to security concerns, agency routinely received and filled requests for picket boat services within a 72 hour period). *But see* KPMG Consulting, B-290716, B-290716.2, Sept. 23, 2002, 2002 CPD ¶ 196 (agency may, if not prohibited by solicitation, consider a late quote if acceptance will not prejudice the other competitors.).

5. Synopsis requirements. FAR 5.207.

   a. The synopsis must include a statement that all responsible sources may submit a response, which, if timely received, must be considered by the agency.

   b. The synopsis must be posted not later than the date the solicitation is issued, and must remain posted for at least 10 days or until after quotations have been opened, whichever is later.

c. If solicitations are posted instead of a synopsis, the contracting officer may employ various methods of satisfying the description of supplies or services required by FAR 5.207(c). For example, the contracting officer may meet the requirements of 5.207(c) by stamping the solicitation, by a cover sheet to the solicitation, or by placing a general statement in the display room. FAR 5.101(a)(2)(i).

d. Exception to Posting Requirement. If an agency issues an oral solicitation (as opposed to a written solicitation), it needs not comply with the public posting/display requirements. FAR 5.101(a)(2)(ii). Oral solicitations, however, should only be used for non-complex requirements.

E. Methods of soliciting quotes.

1. Oral. FAR 13.106-1(c).

a. Contracting officers shall solicit quotes orally to the maximum extent practicable, if:

(1) The acquisition does not exceed the SAT;

(2) It is more efficient than soliciting through available electronic commerce alternatives; and

(3) Notice is not required under FAR 5.101.

b. It may not be practicable for actions exceeding $25,000 unless covered by an exception in FAR 5.202.

c. The contracting officer shall issue a written solicitation for construction requirements exceeding $2,000. FAR 13.106-1(d).

2. Electronic Commerce.

a. Agencies shall use electronic commerce when practicable and cost-effective. FAR 13.003(f); FAR Subpart 4.5.

b. Drawings and lengthy specifications can be provided off-line in hard copy or through other appropriate means. FAR 13.003(f).

c. This is an exploding growth area involving numerous "e-government" initiatives.

(1) In December 2002, the President established an e-government office within the White House Office of

Management and Budget. E-Government Act of 2002, Pub. L. No. 107-347.

(2) On May 12, 2004, the Office of Federal Procurement Policy issued a memorandum on the subject of "Utilization of Commercially Available Online Procurement Services," which encouraged agencies to take advantage of these services for the acquisition of commercial items, including goods and services.

(3) Electronic Signatures in federal procurement. 65 Fed. Reg. 65,698 (Nov. 1, 2000) (*see* FAR 2.101 and 4.502).

(4) From 1 October 2001 until 2019, the mandatory single point of electronic access to government-wide procurement opportunities was www.fbo.gov. On 12 November 2019, the GSA announced that FBO.gov [Federal Business Opportunities] is retired, and Beta.SAM.gov is now the authoritative location for finding contract opportunities and will be the official U.S. government website for people who make, receive, and manage federal awards.

(5) Section 508 of the Rehabilitation Act of 1973. As of June 25, 2001, government contracts awarded for electronic and information technology (EIT) must contain technology that is accessible to disabled federal employees and disabled members of the public ("508 Compliant"). 66 Fed. Reg. 20,894 (Apr. 25, 2001); *see also* FAR 39.2.

3. Written. FAR 13.106-1(d).

a. Contracting officers shall issue a written solicitation for construction requirements exceeding $2,000.

b. If obtaining electronic or oral quotations is uneconomical, contracting officers should issue paper solicitations for contract actions likely to exceed $25,000.

IX. PURCHASING TECHNIQUES

A. General. There are four basic simplified acquisition options for procuring items: Purchase Orders (FAR 13.302 and 13.306); Blanket Purchase Agreements (FAR 13.303); Imprest Funds (FAR 13.305); and Governmentwide Commercial Purchase Card (government credit card) (FAR 13.301).

B. Purchase Orders. FAR 13.302.

1. Definition. A purchase order is a government offer to buy certain supplies, services, or construction, from commercial sources, upon specified terms and conditions. FAR 13.004. A purchase order is different than a delivery order, which is placed against an established contract (*e.g*. a delivery order for supplies might be placed against an existing indefinite delivery type contract; a task order is used to order services from and indefinite delivery contract).

2. Forms. FAR 13.307.

a. SF 1449, Solicitation/Contract/Order.

(1) The SF 1449 is a multipurpose form used for negotiated purchases of supplies or services, delivery or task orders, inspection and receiving reports, and invoices.

(2) Contracting officers use this form for purchases of commercial items. Per DFARS 213.307, if SF 1449 is not used, DD Form 1155 (Order for Supplies or Services) should be used. FAR 13.307 and FAR 12.204.

(3) Except when quotations are solicited electronically or orally, the SF 1449, SF 18, or an agency automated form is used to request quotations.

b. SF 44 Purchase Order – Invoice Voucher. This is a multipurpose pocket-size purchase order form designed primarily for on-the-spot, over-the-counter purchase of supplies and nonpersonal services while away from the purchasing office or at isolated activities. FAR 13.306. Due to the increased use and acceptance of the Governmentwide Commercial Purchase Card, the use of the SF44 within DoD is typically limited to purchases of: overseas transactions in support of a contingency environment; and purchases in support of certain intelligence activities. U.S. Government fuel cards may be used in lieu of a SF 44 for fuel, oil, and authorized refueling-related items. DFARS 213.306(a)(1).

(1) Because the SF 44 is used only for on-the-spot purchases of supplies or services that are immediately available, no clauses are used with this form. Properly authorized field ordering officers may also use the SF44, but only up to the micro-purchase threshold.

(2) This form may be used only if all of the following conditions are satisfied:

(a) The amount of the purchase is at or below the micro-purchase threshold, except for purchases made under unusual and compelling urgency or in support of contingency operations. Agencies may establish higher dollar limitations for specific activities or items;

(b) The supplies or services are immediately available;

(c) One delivery and one payment will be made; AND

(d) Its use is determined to be more economical and efficient than use of other simplified acquisition procedures. FAR 13.306(a).

3. General Rules for Purchase Orders.

a. Purchase Orders are generally issued on a fixed price basis. FAR 13.302-1(a). However, the FAR does provide guidelines for an "unpriced purchase order method" in FAR 13.302-2.

b. FAR 12.207 governs contract types for the acquisition of commercial items.

c. Purchase orders shall:

(1) Specify the quantity of supplies or scope of services ordered.

(2) Contain a determinable date by which delivery or performance is required.

(3) Provide for inspection as prescribed in FAR Part 46. Generally, inspection and acceptance should be at destination.

(4) Specify F.O.B. destination for supplies within the continental United States unless there are valid reasons to the contrary. FAR 13.302-1(b).

4. Unpriced Purchase Orders. FAR 13.302-2.

a. An unpriced purchase order is an order for supplies or services where the price is not established when the order is issued. A realistic monetary limitation, either for each line item or for the total order, shall be placed on each unpriced purchase order.

b. It may be used only when it is impractical to obtain pricing in advance AND the purchase is for:

(1) Repairs to equipment requiring disassembly to determine the nature and extent of repairs;

(2) Material available from only one source and for which cost cannot be readily established; OR

(3) Supplies or services for which prices are known to be competitive, but exact prices are not known (*e.g.*, miscellaneous repair parts, maintenance agreements).

5. Termination or cancellation of purchase orders. FAR 13.302-4.

a. The government may withdraw, amend, or cancel an order at any time before acceptance. See Alsace Industrial, Inc., ASBCA No. 51708, 99-1 BCA ¶ 30,220 (holding that the government's offer under the unilateral purchase order lapsed by its own terms when Alsace failed to deliver on time); Master Research & Mfg., Inc., ASBCA No. 46341, 94-2 BCA ¶ 26,747.

b. If the contractor has not accepted a purchase order in writing, the contracting officer may notify the contractor in writing, and:

(1) Cancel the purchase order, if the contractor accepts the cancellation; or

(2) Process the termination action if the contractor does not accept the cancellation or claims that it incurred costs as a result of beginning performance. FAR 13.302-4(b). *But see* Rex Sys., Inc., ASBCA No. 45301, 93-3 BCA ¶ 26,065 (contractor's substantial performance only required government to keep its unilateral purchase order offer open until the delivery date, after which the government could cancel when goods were not timely delivered).

c. Once the contractor accepts a purchase order in writing, the government cannot cancel it; the contracting officer must terminate the contract in accordance with:

(1) FAR 12.403(d) and 52.212-4(l) for commercial items; or

(2) FAR Part 49 and 52.213-4 for other than commercial items.

C. Blanket Purchase Agreements. FAR 13.303.

1. Definition. A blanket purchase agreement (BPA) is a simplified method of filling anticipated repetitive needs for supplies or services by establishing "charge accounts" with qualified sources of supply. FAR 13.303-1(a).

a. A BPA is **not** a contract. The actual contract is not formed until an order is issued or the basic agreement is incorporated into a new contract by reference. Zhengxing v. U.S., 71 Fed. Cl. 732, 738 (2006) (discussing that it is well settled that a BPA is not a contract); Modern Systems Technology Corp. v. United States, 24 Cl.Ct. 360 (1991) (Judge Bruggink provides comprehensive analysis of legal effect of a BPA in granting summary judgment to Postal Service in breach claim); Envirosolve, LLC, B-294974.4, June 8, 2005, 2005 CPD ¶ 106 (for a summary of the law surrounding BPAs); Prod. Packaging, ASBCA No. 53662, 03-2 BCA ¶ 32,388 (ASBCA 2003) (stating "it is well established that a BPA is not a contract. Rather, a BPA is nothing more than an agreement of terms by which the government could purchase.").

b. BPAs may be issued without a commitment of funds; however, a commitment and an obligation of funds must separately support each order placed under a BPA. FAR 13.303-1(c).

c. Blanket purchase agreements should include the maximum possible discounts, allow for adequate documentation of individual transactions, and provide for periodic billing. FAR 13.303-2(d).

d. Since a BPA is not a contract, there is no established jurisdiction under the Contract Disputes Act (CDA). Zhengxing v. U.S., 71 Fed. Cl. 732, 739 (2006); Julian Freeman, ASBCA No. 46675, Oct. 27, 1994, 94-3 BCA ¶ 135,906.

2. Limits on BPA usage.

a. The use of a BPA does not justify purchasing from only one source or avoiding small business set-asides. FAR 13.303-5(c).

b. If there is an insufficient number of BPAs to ensure maximum practicable competition for a particular purchase, the contracting officer must solicit from other sources or create additional BPAs. FAR 13.303-5(d). *Compare* Logan, LLC, B-294974.6, Dec. 1, 2006, 2006 CPD ¶ 188 (There is no requirement that an agency conduct further competition among the BPA holders in connection with each individual purchase order subsequently issued under the BPAs, when the BPAs were originally competitively established).

c. A BPA may be properly established when:

(1) There is a wide variety of items in a broad class of supplies and services that are generally purchased, but the exact items, quantities, and delivery requirements are not known in advance and may vary considerably.

(2) There is a need to provide commercial sources of supply for one or more offices or projects that do not have or need authority to purchase otherwise.

(3) Use of BPAs would avoid the writing of numerous purchase orders.

(4) There is no existing requirements contract for the same supply or service that the contracting activity is legally obligated to use. FAR 13.303-2(a).

3. Establishment of BPAs. FAR 13.303-2(b-c).

a. After determining a BPA to be advantageous, contracting officers shall:

(1) Establish the parameters of the BPA. Will the agreement be limited to individually identified items, or will it merely identify broad commodity groups or classes of goods and services?

(2) Consider quality suppliers who have provided numerous purchases at or below the SAT.

b. BPAs may be established with:

(1) More than one supplier for goods and services of the same type to provide maximum practicable competition.

(2) A single source from which numerous individual purchases at or below the SAT will likely be made. This may be a useful tool in a contingency operation where vendor choices may be limited, and contract personnel can negotiate the terms for subsequent orders in advance of, or concurrent with, a deployment.

(3) The FAR authorizes the creation of BPAs under the Federal Supply Schedule (FSS) "if not inconsistent with the terms of the applicable schedule contract." FAR 13.303-2(c)(3).

(a) FAR 8.405-3 provides detailed guidance for creating a BPA under the FSS. Among other things, it provides:

(i) Ordering activities shall establish BPAs to fill repetitive needs or supplies and services with the schedule contractor(s) that can provide the supply or service that represents the best value;

(ii) Ordering activities may consider factors other than price when determining best value (such as past performance, special features, warranty considerations, delivery terms, environmental concerns, etc.);

(iii) Ordering offices shall, to the maximum extent practicable, give preference to establishing multiple-award BPAs rather than single-award BPAs. FAR 8.405-3(b) provides additional guidance for awarding BPAs pursuant to a competitive process. When single award BPAs are appropriate, FAR 8.405-3(a)(3) provides additional limitations and guidance;

(iv) BPAs should address the frequency of ordering and invoicing, discounts, and delivery locations and times.

(v) Ordering offices should specify the procedures for placing orders or calls against a BPA.

(b) GSA provides information regarding BPAs and GSA schedules and a sample BPA format for agencies to use. *See* Appendix B (also *available at* http://www.gsa.gov/portal/content/199353).

(c) Benefits of establishing BPAs with an FSS contractor.

(i) It can reduce costs. Agencies can seek further price reductions from the FSS contract price.

(ii) It can streamline the ordering process. A study of the FSS process revealed that it was faster to place an order against a BPA than it was to place an order under an FSS contract.

(iii) Purchases against BPAs established under GSA multiple award schedule contracts can exceed the SAT and the $7,000,000 limit of FAR 13.5. FAR 13.303-5(b)(1).

4. Preparation of BPAs. BPAs must contain the following terms and conditions (FAR 13.303-3):

a. A description of the agreement;

b. The extent of the obligation;

c. Purchase limitation, which includes pricing;

d. Notice of individuals authorized to purchase under the BPA, and the dollar limitations by title of position and name;

e. Delivery tickets; and

f. Invoices.

5. Review of BPAs. The contracting officer who entered into the BPA shall (FAR 13.303-6):

a. Ensure it is reviewed at least annually and updated if necessary;

b. Maintain awareness in market conditions, sources of supply, and other pertinent factors that warrant new arrangements or modifications of existing arrangements; and

c. Review a sufficient random sample of orders at least annually to make sure authorized procedures are being followed.

D. Imprest Funds. FAR Part 13.305; DFARS 213.305.

1. Definition. An imprest fund is a "cash fund of a fixed amount established by an advance of funds, without charge to an appropriation, from an agency finance or disbursing officer to a duly appointed cashier, for disbursement as needed from time to time in making payment in cash for relatively small amounts." FAR 13.001.

2. DOD Policy. DOD does not support the use of cash payments from imprest funds. This policy is based, in part, on the mandatory electronic funds transfer requirements of the Debt Collection Improvement Act of 1996 (Pub. L. 104-134).

3. DOD Use.

a. Use of imprest funds must comply with the conditions stated in the DOD Financial Management Regulation (DOD 7000.14-R, Volume 5, Chapter 2, Disbursing Offices, Officers, and Agents (*see* para. 0204, discussing Imprest Funds specifically).), the Treasury Financial Manual (TFM, Vol.1, Part 4, Chapter 3000, section 3020), FAR 13.305, and DFARS 213.305.

b. On a very limited basis, installation commanders and commanders of other activities with contracting authority may be granted authority to establish imprest funds. DFARS 213.305-3(d)(i). Approval is required from the Director for Financial Commerce, Office of the Deputy Chief Financial Officer, Office of the Under Secretary of Defense (Comptroller). DFARS 213.305-3(d)(ii).

c. The DoD FMR explains that "Imprest funds are generally not authorized for DoD activities. Exceptions are allowed for contingency and classified operations. Submit specific requests for exception in accordance with Chapter 1 [of DoD FMR, Vol. 5]. Include adequate justification and demonstrate that the use of a government purchase card, third party draft, purchase card convenience check, government travel card, or other reasonable alternatives are not feasible for the specific situation." DoD FMR Vol. 5, Chapter 2, para. 020901.

d. When specifically authorized, DFARS 213.305-3(d)(iii), provides that imprest funds can be used without further approval for:

(1) Overseas transactions at or below the micro-purchase threshold in support of a contingency operation as defined in 10 U.S.C. § 101(a)(13) or a humanitarian or peacekeeping operation as defined in 10 U.S.C. § 2302(8); and

(2) Classified transactions.

e. The DoD FMR provides additional limitations on the use of, and safeguarding of imprest funds on the rare occasions that they are authorized. *See generally*, DoD FMR Vol. 5, Chapter 2, para. 0209.

f. The use of imprest funds has been largely displaced by the use of Government-wide Commercial Purchase cards.

E. Governmentwide Commercial Purchase Card. FAR 13.301; DFARS 213.270; DFARS 213.301.

1. Purpose. The governmentwide commercial purchase card (GCPC or GPC) is a government-managed charge card used by specific authorized individuals to make purchases on behalf of the government. Like any other contract, purchases made with the GPC obligate appropriated funds. The GPC is authorized for use in making and/or paying for purchases of supplies, services, or construction.[20] DOD contracting officers must use the card for all acquisitions at or below the micro purchase card threshold unless a specific exception applies. DFARS 213.270.

2. Use. Agencies shall use the GPC and electronic purchasing techniques to the maximum extent practicable in conducting simplified acquisitions. FAR 13.003(e).

3. Implementation.

a. Currently, the General Services Administration (GSA) runs this initiative through the SmartPay purchase charge card program. Information on this program can be found at https://smartpay.gsa.gov (last visited 25 May 2020).

[20] DOD's purchase card limit is $25,000 if the criteria in DFARS 213.301(2) are met. DFARS 213.301(3) permits a contracting officer supporting a contingency, humanitarian, or peacekeeping operation to make purchases that exceed the micro-purchase threshold but do not exceed the SAT so long as other stated criteria are met.

b. Agencies using government-wide commercial purchase cards shall establish procedures for use and control of the card. FAR 13.301(b). Procedures and purchasing authority differ among agencies (e.g., AFARS 5113.202-90, 5113.270-90). Policies applicable to the DoD can be found on the Defense Procurement Acquisition Policy Website at https://www.acq.osd.mil/dpap/pdi/pc/policy_documents.html.

a. Agencies must have effective training programs in place to avoid card abuses. An Army GPC SOP was published on 22 July 2015 and supersedes previous policy. The new SOP has been added to the AFARS as Appendix EE (available at https://www.acquisition.gov/afars/government-purchase-card). Training Requirements are established at Section 2-2.

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4. Required Sources. GPC Cardholders must still abide by the FAR's provisions for required sources of supply and services. For example, cardholders may be bypassing required sources of supply. See Memorandum, Administrator of the Office of Federal Procurement Policy, to Agency Senior Procurement executives, subject: Applicability of the Javits-Wagner-O'Day Program for Micro purchases (Feb. 16, 1999) (clarifies that JWOD's status as a priority source under FAR 8.7 applies to micro purchases)

5. Restrictions.

a. Agency specific policies may restrict what GPC holders can purchase.[21] Most agencies will restrict cash advances.

b. The GPC may not be used to purchase long-term rental or lease of land or buildings.

c. The GPC may not be used for travel or travel-related expenses. But see AFARS Appendix EE (available at https://www.acquisition.gov/afars/government-purchase-card), Appendix C for exceptions.

d. Contracting officers may not use the GPC to purchase goods or services exceeding the micro-purchase threshold if the contractor has a delinquent debt flag in the Central Contractor

[21] *See* Army GPC SOP added to the AFARS as Appendix EE, specifically Appendix C: Prohibited Purchases. For example, ASA(ALT) memo of 31 Oct 2011, "Mandatory Use of Blanket Purchase Agreements (BPAs) for Office Supplies," requires cardholders to use established Army-wide BPAs to fill needs for office supplies, absent one of several listed exceptions. Memo available at http://acc.army.mil/contractingcenters/acc-nj/CreditCard/PolicyAndSOP/Mandatory%20Use%20of%20BPA%20for%20Supplies.pdf

Registration (CCR) database. FAC 2005-38, 74 FR 65600, 12/10/2009, effective 2/1/2010; FAR 32.1108.

(1) Contracting officers must check the CCR database when the contract or order is over the micro-purchase threshold, even if purchasing from GSA. GPC holders are exempt as long as the purchase is under the micro-purchase threshold.

(2) This rule does not apply to individual travel charge cards or centrally billed accounts for travel/transportation services.

(3) Contracting officers shall not use the presence of the CCR debt flag to exclude a contractor from receipt of contract award or placement of an order. Instead, other payment methods (like an electronic funds transfer) must be pursued. If the Contractor pays the debt, then GPC may be used as a payment method. FAR 32.1108; FAC 2005-38, 74 FR 65600, 12/10/2009, effective 2/1/2010.

(4) Why? This restriction is in place so that the government can increase its ability to recoup funds when a contractor owes the government funds. Since the GPC system employs a 3rd party (the charge card company) to pay for goods and services, a direct offset between a debtor contractor and the government is not practicable.

6. Uses. FAR 13.301(c).

a. To make micro-purchases.

b. To place task or delivery orders (if authorized in the basic contract, basic ordering agreement, or BPA).

c. To make payments when the contractor agrees to accept payment by the card.

d. Additional uses and guidance for DoD are described above and are included in DFARS 213.301.

e. As a general rule, ***DO NOT ISSUE THE GPC TO CONTRACTORS!*** But see GPC SOP, in Appendix EE of AFARS, specifically para. 1-5, GPC Authority, providing that certain contractors working under cost type contracts may request a GPC, as well as additional exceptions.

AFI 64-117, Air Force Government Purchase Card Program (20 September 2011); FAR 13.301(a); FAR 1.603-3.

7. "Control Weaknesses." Several GAO reports and a DOD IG Audit Report have identified control weaknesses that leave agencies vulnerable to fraud and abuse. DOD IG Audit Report, Controls Over the DoD Purchase Card Program, Rept. No. D-2002-075, 29 March 2002; GAO Rept. No. 02-676T, Government Purchase Cards: Control Weaknesses Expose Agencies to Fraud and Abuse, (May 1, 2002); GAO Rept. No. 02-506T, Governmentwide Purchase Cards: Actions Needed to Strengthen Internal Controls to Reduce Fraudulent, Improper, and Abusive Purchases, March, 2008. Problem areas include:

   a. Lack of Training for both GPC cardholders and issuing/approving officials.

   b. Selecting Cardholders and Assigning Approving Officials. Cardholders should be mature, responsible individuals. Approving Officials should be individuals with some supervisory responsibility over individual cardholders.

   c. Inadequate Internal Controls. Poor review and approval procedures lead to fraudulent transactions and mistakes. Internal controls must also account for the management and accounting of personal property after purchase to ensure that an otherwise legitimate purchase is not converted to personal use.

   d. Splitting purchases. Splitting a known requirement into multiple smaller procurements to avoid formal contracting procedures, competition requirements, or to keep spending limitations under the micro-purchase threshold is an impermissible, but tempting, pitfall for cardholders and commands.

8. Practical Pointers

   a. Training. Army Training requirements can be found at paragraph 2-2, Training Requirements of GPC SOP, in Appendix EE of AFARS. The training must be completed prior to issuance of appointment letters and/or establishment of GPC accounts. Online training is available from the GSA SmartPay website at http://www.gsa.gov.

   b. Issue cards only to GOVERNMENT employees (NOT contractors) who are authorized and trained to use the GPC.

c. Authorizing officials should be responsible for no more than 5-7 cardholders. Authorizing officials should have some supervisory responsibility over their cardholders.

d. Authorizing officials should not also be a cardholder.

e. Scrutinize single purchases and monthly spending limits.

f. Closely monitor the use of convenience checks.

g. The DoD has issued an extensive Guidebook related to establishing and maintaining Purchase, Travel, and Fuel Card programs. The guidebook was last released on 8 April 2020 and is available at https://www.acq.osd.mil/dpap/pdi/pc/docs/DoD_Govt_Charge_Card_Guide_04-08-20.pdf. (last visited 25 May 2020).

X. FEDERAL SUPPLY SCHEDULES (FSS)

A. Background.

1. The General Services Administration (GSA) manages the FSS program pursuant to the Section 201 of the Federal Property Administrative Services Act of 1949. A FSS is also known as a multiple award schedule (MAS).

2. The Federal Supply Schedule (FSS) program provides federal agencies with a simplified process for obtaining commonly used commercial supplies and services at prices associated with volume buying. The FSS program provides over four million commercial off-the-shelf products and services, at stated prices, for given periods of time.

3. Congress recognizes the multiple award schedule (MAS) program as a full and open competition procedure if participation in the program has been open to all responsible sources and orders and contracts under the program result in the lowest overall cost alternative to the United States. 10 U.S.C. § 2302(2)(C). But see Reep, Inc., B-290665, Sep. 17, 2002, 2002 CPD ¶ 158 (to satisfy the statutory obligation of competitive acquisitions . . . "an agency is required to consider reasonably available information . . . typically by reviewing the prices of at least three schedule vendors." The agency failed to meets its obligation by not awarding to a vendor providing the best value to the government at the lowest overall cost.).

4. Therefore, an agency need not take certain additional actions, such as:

a. NO need to seek further competition outside the FSS itself. But see Draeger Safety, Inc., B-285366, B-285366.2, Aug. 23,

2000, 2000 CPD ¶ 139 (though the government need not seek further competition when buying from the FSS, if it asks for competition among FSS vendors, it must give those vendors sufficient details about the solicitation to allow them to compete intelligently and fairly).

b. Generally, NO Synopsis requirement under FAR Part 5. FAR 8.404(a).[22]

c. No separate determination of fair and reasonable pricing (FAR 8.404(d)), except for price evaluation required by 8.405-2(d), which states that when services require a statement of work, the ordering activity is responsible for considering the level of effort and the labor mix proposed to perform a specific task being ordered, and for determining that the total price is reasonable. However, on 13 May 2014, DoD issued a class deviation clarifying that ordering activity contracting officers are responsible for making a determination of fair and reasonable pricing when using Federal Supply Schedules for individual orders. Office of the Under Secretary of Defense-Acquisition, Technology, and Logistics, Class Deviation—Determination of Fair and Reasonable Prices When Using Federal Supply Schedule Contracts, DARS Tracking Number: 2014-O00011 (13 May 2014).

d. NO small business set-asides in accordance with FAR 19.5. FAR 8.405-5. *See* Global Analytic Information Technology Services, Inc., B-297200.3, Mar. 21, 2006, 2006 CPD ¶ 53 (Small business set-aside requirements in FAR Part 19 do not apply to FSS Schedules). However, orders placed with small business concerns may still be credited toward an organization's small business goals. FAR 8.405-5(b). Further, activities may consider socio-economic status during competitively awarded orders or BPAs. FAR 8.405-5(c).

e. NO responsibility determination for FSS order. *See* Advance Tech. Sys., Inc., B-296493.6, Oct. 6, 2006, 2006 CPD ¶ 151 (an ordering agency is not required to make a responsibility determination each time it places a task or delivery order).

f. However, the FAR was amended effective April 2, 2012, to enhance competition in the purchase of supplies and services by all executive agencies under multiple-award contracts. *See*

[22] See FAR 8.404(g)(1) which does require publication of contract actions funded in whole or in part by the American Recovery and Reinvestment Act of 2009. FAR 8.404(g)(2) requires publication when an order is awarded, or a BPA is established, with an estimated value in excess of the SAT, and it is supported by a limited sources justification.

below Section X.B.6. under "Ordering under the FSS, Thresholds." *See* also FAR 8.405-1.

B. Ordering under the FSS.

1. **For DoD agencies**, Section 854 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, as implemented by DFARS 217.7, requires departments and agencies to review and approve orders placed for supplies or services under non-DoD contracts, whether through direct acquisition or assisted acquisitions, when the amount of the order exceeds the SAT. Before placing an order against these non-DoD contract vehicles, which include FSS, contracting officers must consider various factors and determine the acquisition is in the best interest of DoD. *See* Director, Defense Procurement and Acquisition Policy (DPAP), memos of 24 Aug 2009 (Interagency Acquisition Update); 25 Apr 2013) (Support Agreements); and (17 June 2005) (Proper Use of Non-DoD Contracts); *see also* Memorandum, Principal Deputy Under Secretary of Defense (Comptroller) & Acting Under Secretary of Defense (Acquisition, Technology & Logistics), Subject: Proper Use of Non-DoD Contracts (Oct. 29, 2004); Memorandum, Assistant Secretary of the Army (Financial Management and Comptroller) & Secretary of the Army (Acquisition, Logistics, and Technology), Subject: Proper Use of Non-Department of Defense (Non-DoD) Contracts (July 12, 2005) (**establishes Army policy for reviewing and use of non-DoD contracts vehicles**). A summary of current Interagency Acquisition Policy and links to many of the memos referenced above can be found at http://www.acq.osd.mil/dpap/cpic/cp/interagency_acquisition.html. *See also*, DFARS 217.

2. Agencies place orders to obtain supplies or services from a FSS contractor. When placing the order, the agency has determined that the order represents the best value and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the government's needs. Even though GSA has already determined prices to be fair and reasonable, Agencies may always seek additional discounts. FAR 8.404(d). **For DOD agencies**, Class Deviation 2014-O0011 states that GSA's determination **does not** relieve the contracting officer from the responsibility of making a determination of fair and reasonable pricing for individual orders, BPAs, and orders under BPAs. DFARS 208.404.

3. An agency must reasonably ensure that the selection meets its needs by considering reasonably available information about products offered under FSS contracts. Pyxis Corp., B-282469, B-282469.2, July 15, 1999, 99-2 CPD ¶ 18.

4. If an agency places an order against an expired FSS contract, it may result in an improper sole-source award. DRS Precision Echo, Inc., B-284080; B-284080.2, Feb. 14, 2000, 2000 CPD ¶ 26.

5. If an agency places an order against an FSS contract, then all items or supplies ordered must be covered by the vendor's FSS contract (no "off the schedule buys"). Science Appl. Internat'l Corp., B-401773, Nov. 10, 2009, 2009 CPD ¶ 229 (holding agencies could not submit purchase order to FSS vendor when two of six items were not on the FSS contract at the time of the order but were added prior to the delivery date); Symplicity Corp., B-291902, Apr. 29, 2003, 2003 CPD ¶ 89 (Agency cannot award to a vendor whose labor categories are outside the scope of its FSS contract); Omniplex World Servs., Corp., B-291105, Nov. 6, 2002, 2002 CPD ¶ 199 (BPA improper when the services are not within the scope of the offeror's FSS contract). *See also* FAR 8.402(f), which explains that items not on FSS schedule may be added to FSS orders only if those added items meet all applicable competition and procurement regulations. *See also*, Rapiscan Systems, Inc., B-401773.2, B-401773.3, March 15, 2010 (explaining that the "sole exception to [the FAR 8.402(f)] requirement is for items that do not exceed the micro-purchase threshold of $3,000, since such items properly may be purchased outside the normal competition requirements in any case.").

6. Thresholds.

   a. *At or under the micro-purchase threshold.* Agencies can place an order with any FSS contractor. FAR 8.405-1(b).

   b. *Above the micro-purchase threshold, but not exceeding the SAT.* Procedures vary slightly depending on whether a statement of work is required. *See* FAR 8.405-1 and 8.405-2.

      (1) *Orders exceeding the micro-purchase threshold, but not exceeding the SAT, and which do NOT require a statement of work (SOW).* FAR 8.405-1(c). Activities shall place the order with the schedule contractor that represents the best value. Before placing orders, the activity shall:

         (a) Consider reasonably available information using the "GSA Advantage!" on-line shopping service, by reviewing catalogs/pricelists of at least three schedule contractors, or by requesting quotes from at least three schedule contractors; or

(b) Document the circumstances for restricting consideration to fewer than three schedule contractors based on one of the reasons specified in FAR 8.405-6(a):

(i) An urgent and compelling need exists;

(ii) Only one source is capable of providing the required supplies or services because they are unique or highly specialized; or

(iii) In the interests of economy and efficiency, the new work is a logical follow-on to a previous FSS order. The previous FSS order must have been placed in accordance with proper ordering procedures and must not have been ordered as a sole-source or limited source order.

(2) *Orders exceeding the micro-purchase threshold, but not exceeding the SAT, and which DO require a statement of work (SOW).* FAR 8.405-2(c)(2). Activities shall place the order with the schedule contractor that represents the best value. Before placing orders, the activity shall:

(a) Develop a SOW in accordance with FAR 8.405-2(b) (*i.e.*, they shall include: descriptions of work to be performed; deliverables schedules; performance standards; location of work; period of performance; special requirements; and whenever possible, shall be performance-based);

(b) Provide an RFQ to at least three schedule contractors that offer services that will meet or exceed the agency's needs, or document circumstances for restricting consideration based on one of the reasons specified in FAR 8.405-6(a) (urgent and compelling need; only one source capable; logical follow-on); and

(c) Specify the type of order (*i.e.* firm-fixed-price, labor-hour) for the services specified in the SOW. The KO should establish firm-fixed prices, as appropriate.

(3) *Above the SAT*. Procedures vary depending on whether a statement of work is required. *See* FAR 8.405-1 and 8.405-2.

(4) *Orders exceeding the SAT and which do NOT require a statement of work (SOW)*. FAR 8.405-1(d). Each order shall be placed on a competitive basis unless a justification is prepared and approved in accordance with FAR 8.405-6.

(a) Activities shall place the order with the schedule contractor that represents the best value and may consider a variety of factors (*see* FAR 8.405-1(f)). Before placing orders, the activity shall:

(i) Post an RFQ on e-Buy to afford all relevant schedule contractors offering the required supplies or services an opportunity to submit a quote; or

(ii) Provide the RFQ to as many schedule contractors as practicable, consistent with market research, to reasonably ensure that quotes will be received from at least three contractors. When fewer than three quotes are received, the KO shall prepare a written determination explaining that no additional contractors could be identified despite reasonable efforts to do so.

(b) Activities shall ensure that all quotes received are fairly considered and award is made in accordance with the evaluation criteria set out in the RFQ. The basis for the award decision, and other required aspects of the procurement must be documented in the contract file. FAR 8.405-1(g).

(5) *Orders exceeding the SAT and which DO require a statement of work (SOW)*. FAR 8.405-2(c)(3). In addition to the requirements for an order between the micro-purchase threshold and SAT that requires a SOW as stated above, each order above the SAT shall be placed on a competitive basis unless a justification is

prepared and approved in accordance with FAR 8.405-6.

(a) Activities shall place the order with the schedule contractor that represents the best value and may consider a variety of factors (*see* FAR 8.405-2(d)). Before placing orders, the activity shall prepare an RFQ that includes the SOW and evaluation criteria. The activity must then:

(i) Post an RFQ on e-Buy to afford all relevant schedule contractors offering the required supplies or services an opportunity to submit a quote; or

(ii) Provide the RFQ to as many schedule contractors as practicable, consistent with market research, to reasonably ensure that quotes will be received from at least three contractors. When fewer than three quotes are received, the KO shall prepare a written determination explaining that no additional contractors could be identified despite reasonable efforts to do so.

(b) Activities shall ensure that all quotes received are fairly considered and award is made in accordance with the evaluation criteria set out in the RFQ. The basis for the award decision, and other required aspects of the procurement must be documented in the contract file. FAR 8.405-2(f). Note the documentation for this type of order must consider the level of effort and labor mix in order to determine if price is reasonable.

(c) Time and materials and labor hour orders for services require additional determinations and findings. *See* FAR 8.405-2(e) and 8.404(h).

7. Advantages of FSS ordering.

a. Reduce the time of buying.

b. Reduce the cost of buying. Agencies can fill recurring needs while taking advantage of quantity discounts associated with government-wide purchasing.

c. While not protest proof, ordering from a FSS should diminish the chances of a successful protest.

(1) Whether the agency satisfies a requirement through an order placed against a MAS contract/BPA or through an open market purchase from commercial sources is a matter of business judgment that the GAO will not question unless there is a clear abuse of discretion. AMRAY, Inc., B-210490, Feb. 7, 1983, 83-1 CPD ¶ 135.

(2) An agency may consider administrative costs in deciding whether to proceed with a MAS order, even though it knows it can satisfy requirements at a lower cost through a competitive procurement. Precise Copier Services, B-232660, Jan. 10, 1989, 89-1 CPD ¶ 25.

(3) The GAO will review orders to ensure the choice of a vendor is reasonable. Commercial Drapery Contractors, Inc., B-271222, June 27, 1996, 96-1 CPD ¶ 290 (protest sustained where agency's initial failure to follow proper order procedures resulted in "need" to issue order to higher priced vendor, on the basis it was now the only vendor that could meet delivery schedule).

(4) Section 843 of the 2008 NDAA granted GAO the authority to review bid protests of task or delivery orders over $10 million. This authority was later codified at 41 U.S.C. § 253j(e) (now 41 U.S.C. § 4106(f)) for civilian agencies and 10 U.S.C. § 2304c(e) for DoD. Prior to the enactment of section 843, a protest of a task or delivery order was only authorized on the grounds that the order increased the scope, period, or maximum value of the contract under which the order was issued. Section 835 of the 2017 NDAA increased the threshold for task orders issued by DOD, NASA, and the Coast Guard to $25 million – it remains $10 million for other agencies. FAR 16.505(a)(10).

d. GSA awards and administers the contract (not the order). Problems with orders should be resolved directly with the contractor. Failing that, complaints concerning deficiencies can be lodged with GSA telephonically (1-800-488-3111) or electronically (through "GSA Advantage!").

8. Disadvantages.

a. May be responsible for paying GSA's "service charge" or "Industrial Funding Fee" which funds GSA's costs associated with running the FSS program. Since January 1, 2004, the "Industrial Funding Fee" has been .075 percent. This fee is generally built into the cost of the supplies or services procured, but in some instances, contractors cover the cost.

b. Agencies cannot order "incidentals" on Federal Supply Schedule orders.

(1) In ATA Defense Industries, Inc., 38 Fed. Cl. 489 (1997), the Court of Federal Claims ruled that "bundling" non-schedule products with schedule products violated the Competition in Contracting Act. The contract in question involved the upgrade of two target ranges at Fort Stewart, Georgia. The non-schedule items amounted to thirty-five percent of the contract value.

(2) Prior to 1999, the GAO allowed incidental purchases of non-schedule items in appropriate circumstances. ViON Corp., B-275063.2, Feb. 4, 1997, 97-1 CPD ¶ 53 (authorizing purchase of various cables, clamps, and controller cards necessary for the operation of CPUs ordered from the schedule).

(3) The GAO has concluded, in light of the COFC's analysis in ATA, that there is no statutory basis for the incidental test it enunciated in ViON. Agencies must comply with regulations governing purchases of non-FSS items, such as those concerning competition requirements, to justify including those items on a FSS delivery order. Pyxis Corp., B-282469, B-282469.2, July 15, 1999, 99-2 CPD ¶ 18.

(4) FAR 8.402(f) permits adding "open market items" (i.e. items not on FSS schedule) to FSS orders provided that all other applicable acquisition regulations regarding the non-FSS items have been complied with (publicizing – Part 5; competition – Part 6; commercial item procurement – Part 12; method of procurement – Part 13, 14, or 15; and small business programs – Part 19). Non-FSS items must also be fairly and reasonably priced, must be clearly identified as non-FSS items on the order, and the order must contain all clauses

applicable to non-FSS orders. Note that if the amount of non-schedule items does not exceed the micro-purchase threshold, these items may be added (*see* Rapiscan Systems, Inc., B-401773.2, B-401773.3, March 15, 2010 (explaining the "micro-purchase exception") and Section X.B.5 above.

CHAPTER 10

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CHAPTER 10

I. INTRODUCTION

COMMERCIAL ITEMS

Access to innovations driven by the commercial marketplace is central the United States' ability to maintain the technological and battlefield superiority. Solicitations and contracts that impose burdensome compliance obligations on contractors significantly reduce the government's ability to harness these important technologies—particularly when such technologies are developed by companies that are not reliant on the government for revenue. The rules around commercial items acquisitions are designed to streamline acquisitions related to the commercial items and services required by the government. However, in order to ensure the access to the most critical items and technologies, contracting officers must fully and properly exercise the discretion granted to them under FAR Part 12 to make the government a more commercial-friendly business partner.

Following this block of instruction, the students should:

1. Understand the government's emphasis on purchasing commercial items.

2. Understand the FAR definition of a commercial item.

3. Understand the methods that can be used to acquire commercial items.

4. Understand that the acquisition of commercial items streamlines all contracting methods.

5. Understand that negotiation can be a major part of the acquisition of commercial items.

6. Understand that we may see major reforms regarding the acquisition of commercial items in the near future.

II. REFERENCES

1. Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355 § 8104, 108 Stat. 3243 (codified, as amended, at 10 U.S.C. § 2377). [hereinafter FASA].

2. Federal Acquisition Reform (Clinger-Cohen) Act of 1996, Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186,642-79 (1996) [hereinafter FARA].

3. Federal Acquisition Regulation (FAR) Part 8, Required Sources of Supplies and Services; FAR Part 12, Acquisition of Commercial Items; FAR Part 13, Simplified Acquisition Procedures; FAR Part 14, Sealed Bidding; FAR Part 15, Contracting by Negotiation; FAR Part 16, Types of Contracts.

4. General Service Administration Regulation (GSAR) Part 512, Acquisition of Commercial Items.

5. DOD Guidebook for Acquiring Commercial Items, Part A: Commercial Item Determination, January 2018 (Revised July 2019) https://www.acq.osd.mil/dpap/cpic/cp/commercial_item_guide.html (last visited May 31, 2020).

6. DOD Guidebook for Acquiring Commercial Items, Part B: Commercial Item Pricing, January 2018 https://www.acq.osd.mil/dpap/cpic/cp/commercial_item_guide.html (last visited May 31, 2020).

7. Under Secretary of Defense (Acquisition, Technology & Logistics), GUIDANCE ON COMMERCIAL ITEM DETERMINATIONS AND THE DETERMINATION OF PRICE REASONABLENESS FOR COMMERCIAL ITEMS (September 2, 2016); available at https://www.acq.osd.mil/dpap/policy/policyvault/USA003554-16-DPAP.pdf (last visited May 31, 2020).

III. DEFINITIONS

A. Commercial Item.[1] 41 U.S.C. § 103; FAR 2.101.

1. Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes; and:

   a. Has been sold, leased, or licensed to the general public; or

   b. Has been offered for sale, lease, or license to the general public. *See* Coherent, Inc., B-270998, 96-1 CPD ¶ 214 (Comp. Gen. May 7, 1996) (actual sale or license to general public not required for commercial item classification; determination of commercial item status is discretionary agency decision).

[1] Pending change to the definition of *commercial* item forthcoming, as the definition of "commercial item" will be separated into the definitions of "commercial products" and "commercial services." John S. McCain National Defense Authorization Act for Fiscal Year 2019 (*hereinafter* FY19 NDAA), Pub. L. No. 115-232, 132 Stat. 1636 (2018). Set to be implemented through FAR Case 2018-018, it remains open as of June 8, 2020. Substantively, the definition will remain unchanged, except the revision will expressly include sales to local and state governments as establishing commerciality.

2. Any item that evolved from an item described in subsection 1 (above) through advances in technology or performance and is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements specified in the Government solicitation.

3. Any item that would satisfy a criterion expressed in subsection 1 or 2 (above) but for:

   a. Modifications of a type customarily available in the commercial marketplace. *See* NABCO, Inc., B-293027, B-293027.2, 2004 CPD ¶ 15 (Comp. Gen. Jan. 15, 2004) (protest denied where solicitation required door modification on proposed commercial item explosive ordinance disposal containment vessel was made previously available to awardee's other commercial customers, therefore meeting the definition's "of a type" requirement).

   b. Minor modifications of a type not customarily available in the commercial marketplace made to meet federal government requirements.[2]

      (1) "Minor" modifications are modifications that do not significantly alter the non-governmental function or essential physical characteristics of an item or component, or change the purpose of a process. Canberra Indus., Inc., B-271016, 96-1 CPD ¶ 269 (Comp. Gen. Jun. 5, 1996) (combining commercial hardware with commercial software in new configuration, never before offered, did not alter "non-governmental function or essential physical characteristics").

      (2) Factors to be considered in determining whether a modification is minor include the value and size of the modification, and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor.[3]

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[2] Modifications of this type may require the submission of cost and pricing data if the acquisition is funded by DoD, NASA, or the Coast Guard, and the cost of the modification exceeds specified thresholds or percentages. *See* FAR 15.403-1(c)(3)(iii).

[3] *See, e.g.*, DoD IG Report D-2004-064, Acquisition of the Boeing KC-767A Tanker Aircraft, Mar. 29, 2004, for an example of the analysis and potential controversy that may arise as a result of classifying a modification as a "minor modification of a type not customarily available in the commercial marketplace" (available at https://media.defense.gov/2004/Mar/29/2001712733/-1/-1/1/04-064.pdf).

4. Installation services, maintenance services, repair services, training services, and other services, IF

(1) Those services are procured for support of an item (other than real property and NDIs) that otherwise meets the definition of a commercial item (see above). It does not matter whether the services are provided by the same source or at the same time as the item; and

(2) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the federal government. FAR 2.101 (*See* Sletager, Inc., B-237676, 90-1 CPD ¶ 298 at 3, (Comp. Gen. Mar. 15, 1990) (finding painting and surface preparation services can be a commercial item because they are sold to the general public in the course of normal business operations based on market prices).

But see Office if Federal Procurement Policy Memo, dated 3 July 2003, which provides that FAR Part 12 should "rarely, if ever, be used for new construction acquisitions or non-routine repairs/alterations." Part 36 is more appropriate and provided better clauses and terms more to better protect both Government and contractors.

5. Any combination of items meeting the criteria expressed in subsections (1), (2), (3), or (4) above, that are of a type customarily combined and sold in combination to the general public.

6. Services **of a type** offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.

(1) "Catalog price" means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public.

(2) "Market prices" means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be

substantiated through competition or from sources independent of the offerors.

7. Any item, combination of items, or service referred to in subsections (1) through (6), notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

8. A non-developmental item (NDI), if the agency determines it was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple state and local governments. Non-developmental items include:

   a. Any previously developed item of supply used exclusively for governmental purposes by a federal agency, a state or local government, or a foreign government with which the United States has a mutual defense cooperation agreement. (*See* Avtron Manufacturing, Inc., B-280758, 98-2 CPD ¶ 148 (Comp. Gen. Nov. 16, 1998) (protest denied where awardees proposed test stand was found to be a "commercial NDI" because it in fact existed as a commercial item needing only minor modification.))

   b. Any item described in paragraph a. above that requires only minor modification or modifications of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency; (*See* Lucent Technologies World Services Inc., B-295462, 2005 CPD ¶ 55 (Comp. Gen. Mar. 2, 2005) (With regard to the definition of NDI, the parties agree that the TETRA devices are commercial items, in that they are sold commercially. The parties dispute, however, whether the TETRA devices are NDI, as that term is used in the FAR.)) or

   c. Any item of supply being produced that does not meet the requirements of paragraph a. or b. above solely because the item is not yet in use. (*See* Trimble Navigation, Ltd., B-271882, 96-2 CPD ¶ 102 (Comp. Gen. Aug. 26, 1996) (award improper where awardee offered a GPS receiver that required major design and development work to meet a material requirement of the solicitation that the receiver be a NDI.))

   d. Pilot Program for Acquisition of Military-Purpose Nondevelopmental Items: (DFARS 212.71) established a pilot program to assess the feasibility and advisability of acquiring military-purpose nondevelopmental items in accordance with

streamlined procedures.[4] The authority to carry out this pilot program expired December 31, 2019.

B. Commercially Available Off-the-Shelf Item (COTS).[5] A COTS item is a commercial item that has not been modified in any way from its commercial design when it is sold to the Government. FAR 2.101. COTS are a subset of commercial items in that they are:

1. A commercial item of supply;

2. Sold in substantial quantities in the commercial marketplace; and

3. Offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace. See Chant Engineering Co., Inc., B-281521, 99-1 CPD ¶ 45 (Comp. Gen. Feb. 22, 1999) ("[n]ew equipment like Chant's proposed test station, which may only become commercially available as a result of the instant procurement, clearly does not satisfy the RFP requirement for commercial-off-the-shelf (existing) equipment.").

IV. GENERAL RULES

A. If a supply or service meets the definition of a commercial or non-developmental item, agencies **must use** the procedures outlined in FAR Part 12,[6] unless the purchase is:

1. At or below the Micro-Purchase Threshold (*see* FAR 13.000; *see also* DOD Class Deviation 2018-O0018, issued August 31, 2018);

2. Completed using Standard Form 44 (*see* FAR 13.306);

3. Completed using Imprest Funds (*see* FAR 13.305);

4. Completed using a Government Purchase Card (GPC) as the method of purchase (*see* FAR 13.301); or

5. Directly from another Federal Agency.[7] FAR 12.102(e).

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[5] Unless otherwise indicated, all polices that apply to commercial items also apply to COTS items. FAR 12.103.

[6] FAR 12.102; *see also* Palantir USG, Inc. v. United States, 904 F.3d 980 (Fed Cir. 2018).

[7] Additionally, the government may treat **any** acquisition of supplies or services that, as determined by the head of the agency, are to be used to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack, as an acquisition of commercial items. FAR 12.102(f). DoD contracting officers may also treat supplies and services provided by non-traditional defense contractors as commercial items without a commercial items determination. DFARS 212.102(a)(iii). "Non-traditional defense contractor" means any

B. Market Research must be used in order to determine whether commercial items or non-developmental items are available that can meet the agency's requirements.[8] FAR 12.101(a).

1. For DoD commercial item acquisitions in excess of $1 million, the contracting officer shall: (1) Determine in writing that the acquisition meets the commercial item definition in FAR 2.101; (2) Include the written determination in the contract file; (3) Obtain approval at one level above the contracting officer when a commercial item determination relies on subsections (1)(ii), (3), (4), or (6) of the "commercial item" definition at FAR 2.101; and (4) Follow the procedures at PGI 212.102(a)(i) regarding file documentation and commercial item determinations. DFARS 212.102.

2. In the DoD, contracting officers must presume that a prior DoD commercial item determination applies to subsequent procurements of the same item. Overcoming this presumption requires written approval from the head of contracting activity, if the acquisition is greater than $1 million, that the prior determination was improper.[9] DFARS 212.102 and 212.7001.

3. Information Technology. A contracting officer may not enter into a contract in excess of the simplified acquisition threshold for information technology products or services that are not commercial items unless the head of the contracting activity determines in writing that no commercial items are suitable to meet the agency's needs, as determined through the use of market research appropriate to the circumstances. DFARS 239.101 (see FAR 10.001(a)(3)) (section 855 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92)).

4. Major Weapons Systems. A DoD major weapon system may be treated as a commercial item, or acquired under procedures established for the acquisition of commercial items, only if approved by the Secretary of Defense. DFARS 234.70.

C. FAR Part 12 is used in conjunction with the policies and procedures for solicitation, evaluation, and award prescribed under FAR Part 13, Simplified

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entity that has not performed (and is not currently performing) a DoD contract that was subject to full coverage under the cost accounting standards within the past year. 10 U.S.C. §2302(9).

[8] Proper market research is also central to preparing the description of agency need in a manner sufficient for potential offerors to know which commercial products or services may be suitable. For acquisition in excess of the Simplified Acquisition Threshold, the description of need must describe the type of product or service to be acquired and explain how the agency intends to use the product or service in terms of function to be performed, performance requirement or essential characteristics. FAR 12.202.

[9] Although not required but statute or regulation, it is highly recommend that agencies document any decision not to use FAR Part 12 procedures, particularly if there is any indication that a commercial solution may be able to meet the government's need. *See* Palantir USG, Inc. v. United States, 904 F.3d 980 (Fed Cir. 2018).

Acquisition Procedures; Part 14, Sealed Bidding; or Part 15, Contracting by Negotiation; as appropriate for the particular acquisition. FAR 12.102(b).

D. Contracts for the acquisition of commercial items are subject to the policies in other parts of the FAR. However, if parts of the FAR conflict, FAR Part 12 takes precedence for the acquisition of commercial items. FAR 12.102(c).

E. The Government shall require prime contractors and sub-contractors to incorporate, to the maximum extent practicable, commercial items or non-developmental items as components of items supplied to the agency. FAR 12.101(c).

F. Prior to executing a commercial items acquisition, agencies must attempt to meet their needs through the Required Sources of Supplies and Services listed in FAR Part 8.[10]

V. CONTRACT TYPES

A. In general, agencies shall use firm-fixed-price (FFP) contracts or fixed price contracts with economic price adjustments (FP/EPA) for the acquisition of commercial items. FAR 12.207; *See* Northrop Grumman Technical Services, Inc., B-406523, 2012 CPD ¶ 197 (Comp. Gen. Jun. 22, 2012) (GAO denied protest arguing that the solicitation was unduly restrictive of competition and deviated from customary commercial practices by requiring a 90-day transition period and fixed-price CLINs, while excluding an economic price adjustment clause.).

B. Under certain circumstances, Time-and-Material (T&M) or Labor-Hour (LH) contracts may be used, but a D&F is required by the contracting officer which concludes that no other contract is suitable. The Determination must: include a description of market research conducted; establish that it is not possible at the time of placing the contract or order to accurately estimate the extent or duration of the work; establish that the requirement has been structured to maximize use of the FFP or FP/EPA contracts; and describe actions planned to maximize the use of FFP or FP/EPA contracts on future acquisitions for the same or similar requirements. Additionally, the contract must include a ceiling price, which the contractor exceeds at its own risk. *See* FAR 12.207(b). The DoD is even further restricted in using T&M or LH contracts. See DFARS 212.207(b).

C. Indefinite-delivery contracts are also allowable if prices are established on a FFP or FP/EPA basis, or rates are established for commercial services acquired on a time-and-materials or labor-hour basis. *See* FAR 12.207(c).

[10] *See* the *Simplified Acquisitions* chapter of this Desk Book for a more detailed explanation of FAR Part 8 and required sources of supply.

D. Award fees and performance or delivery incentives in FFP or FP/EPA contracts are allowable if based solely on factors other than cost (e.g., factors such as quality, timeliness, or technical ingenuity). See FAR 12.207(d).

VI. COMPETITION PROCEDURES

A. Streamlined Solicitation of Commercial Items. Streamlined procedures allow the contracting officer to expedite[11] the acquisition process of preparing and issuing solicitations and evaluating offers when purchasing commercial items. FAR 12.601.

1. Whenever agencies are required to publish notice of contract actions under FAR 5.201, the contracting officer may issue a solicitation less than 15 days after publishing notice. FAR 5.203(a)(1); or,

2. Use a combined synopsis/solicitation procedure under FAR 12.603.

(1) The combined synopsis/solicitation is only appropriate where the solicitation is relatively simple. It is not recommended for use when lengthy addenda to the solicitation are necessary.

(2) Do not use the Standard Form 1449 when issuing the solicitation.

(3) Amendments to the solicitation are published in the same manner as the initial synopsis/solicitation. FAR 12.603(c)(4).

3. Response time. FAR 5.203(b).

a. The contracting officer shall establish a solicitation response time that affords potential offerors a reasonable opportunity to respond to commercial item acquisitions. *See* American

[11] A November 24, 2010 DPAP memo (Improving Competition in Defense Procurements) and an April 27, 2011 memo amplifying the original memo, lay out additional requirements in certain cases *above the SAT* when only one offer is received. The guidance applies to "all competitive procurements of supplies and services above the SAT including commercial items and construction." Specifically, it covers procurements conducted under FAR parts/subparts 8.4 (Federal Supply Schedules), 12 (Commercial Items), 13.5 (Commercial Items Test Program), 14 (Sealed Bidding), 15 (Contracting by Negotiation), and 16.5 (Indefinite Delivery Contracts). The memos provide that: unless an exception applies or a waiver is granted: [1] if the solicitation was advertised for fewer than 30 days and only one offer is received, then the contracting officer shall cancel the solicitation and resolicit for an additional period of at least 30 days; or [2] if a solicitation allowed at least 30 days for receipt of offers and only one offer was received, then the contracting officer shall not depend on the standard at FAR 15.403-1(c)(1)(ii) (expectation of adequate price competition) in determining price to be fair and reasonable, instead using FAR 15.404-1 (price and cost analysis) to make that determination. Authority to waive this requirement has been delegated to the HCA, and can be further delegated no lower than one level above the contracting officer. Memos *available at* http://www.acq.osd.mil/dpap/policy/policyvault/USA002080-11-DPAP.pdf.

Artisan Productions, Inc., B-281409, 98-2 CPD ¶ 155 (Comp. Gen. Dec. 21, 1998) (finding fifteen-day response period reasonable); GIBBCO LLC, B-401890, 2009 CPD ¶255 (Comp. Gen. Dec. 14, 2009) (finding 22-day response period reasonable)

b. The contracting officer should consider the circumstances of the individual acquisition, such as its complexity, commerciality, availability, and urgency, when establishing the solicitation response time.

B. Streamlined Evaluation of Offers. FAR 12.602

1. When evaluation factors are used, the contracting officer may insert a provision substantially the same as the provision at FAR 52.212-2, Evaluation-Commercial Items in solicitations for commercial items. Paragraph (a) of the provision shall be tailored to the specific acquisition to describe the evaluation factors and relative importance of those factors. When using Part 13 procedures in conjunction with Part 12, contracting officers are not required to describe the relative importance of evaluation factors.

2. Evaluate in accordance with the solicitation criteria. For many commercial items, proper evaluation will only require consideration of an item's technical capability (the ability of the item to meet the agency's need), price, and past performance.

a. Technical capability may be evaluated by how well the proposed product meets the Government requirement instead of predetermined subfactors. A technical evaluation would normally include examination of such things as product literature, product samples (if requested), technical features, and warranty provisions.

b. Commercial item acquisitions are exempt from rules pertaining to certified cost or pricing data. FAR 15.403-1. However, if contracting officers may obtain data other than certified cost or pricing data if required to determine a price is fair and reasonable. FAR 15.403-3. Such requests shall be limited in accordance with FAR 15.403-3(2).

c. Past performance shall be evaluated in accordance with the procedures in FAR 13.106 or subpart 15.3, as applicable.

d. The contracting officer must ensure the instructions provided in the provision at 52.212-1, Instructions to Offerors – Commercial Items, and evaluation criteria provided in the

provision at 52.212-2, Evaluation – Commercial Items, are in agreement.

3. Award. Select the offer that is most advantageous to the Government based on the factors contained in the solicitation. Fully document the rationale for selection of the successful offeror including discussion of any trade-offs considered. FAR 12.602(c).

a. Universal Building Maintenance, Inc., B-282456, 99-2 CPD ¶ 32 (Comp. Gen. Jul. 15, 1999) (GSA failed to document its source selection decision; failed to conduct a proper cost/technical tradeoff in selecting the awardee's proposal; and improperly attributed the past performance of the awardee's parent company to the awardee, since the record did not establish that the parent company would be involved in the performance of the contract.).[12]

b. Midland Supply, Inc., B-298720; B-298720.2, 2002 CPD ¶ 2 (Comp. Gen. Nov. 29, 2006) (protest sustained by GAO under a best value procurement where selection of lower technically rated, lower-priced proposal was determined to be improper where the record showed that the selection decision was based on a mechanical comparison of offerors' total point scores and lacked any documentation indicating that a price/technical tradeoff was made.).

VII. SOLICITATION PROVISIONS AND CONTRACT CLAUSES

A. In accordance with 41 U.S.C. 3307, contracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those clauses:

1. Required to implement provisions of law or executive orders applicable to the acquisition of commercial items;[13] or

2. Determined to be consistent with customary commercial practice. FAR 12.301(a).[14]

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[12] *See also*: Tiger Enterprises, Inc., B-293951, July 26, 2004; Checchi and Co. Consulting, Inc., B-285777, Oct. 10, 2000, 2001 CPD ¶ 132 at 6; Matrix Intl Logistics, Inc., B-272388, B-272388.2, Dec. 9, 1996, 97-2 CPD ¶ 89 at 5.

[13] DFARS 212.5 provides a list of laws that are not applicable to the acquisition of commercial items, or modified with regard to such procurements.

[14] The inclusion of terms in a solicitation that are inconsistent with customary commercial practice opens the possibility of a successful protest. *See* Department of the Army—Reconsideration and Request for Modification of Recommendation, B-411760.3, Jun. 15, 2016, 2016 CPD ¶ 162; Verizon Wireless, B-406854, B-406854.2, Sep. 17, 2012, 2012 CPD ¶ 260.

B. Notwithstanding prescriptions contained elsewhere in the FAR, when acquiring commercials items, contracting officers are only required to use the provisions and clauses prescribed in FAR 12.301, revised as necessary to reflect the applicability of statutes and executive orders to the acquisition of commercial items. FAR 12.301(d).

C. Other provisions and clauses may be included and appropriate when their use is consistent with FAR 12.302. For example, clauses pertaining to indefinite delivery contracts, options, ordering procedures, etc. FAR 12.301(e)

D. Agencies may only supplement the clauses and provisions prescribed in FAR 12.301 as necessary to reflect:

1. Agency unique statutes applicable to the acquisition of commercial items; or

2. If approved by the agency senior procurement executive or individual responsible for representing the agency on the FAR Council. FAR 12.301(f).[15]

E. No law passed after October 13th, 1994 can be applied to a commercial item contract without a written determination that applying the law is in the best interest of the DoD. FY19 NDAA, Section 837, Pub. L. No. 115-232, 132 Stat. 1636 (2018).

F. <u>Solicitation Provisions</u>

1. The following provisions should be inserted into all solicitations for the acquisition of commercial items:

a. *FAR 52.212-1, Instructions to Offerors -- Commercial Items*. This provision provides a single, streamlined set of instructions and is incorporated in the solicitation by reference in Block 27a of the SF1449. The contracting officer **may tailor these instructions** or provide additional instructions tailored to the specific acquisition in accordance with 12.302 (discussed in further detail below). FAR 12.301(b)(1).

b. *FAR 52.212-3, Offeror Representations and Certifications -- Commercial Items*. This provision provides a single, consolidated list of representations and certifications for the acquisition of commercial items and is attached to the solicitation for offerors to complete. **This provision may not be tailored except in accordance with FAR Subpart 1.4,** Deviations from the FAR. For solicitations issued by the DoD,

[15] DFARS Subpart 212.3 contains numerous clauses that may be applicable to commercials item acquisitions within the DoD.

NASA, or the Coast Guard, *Alt. I* of the clause must be used. FAR. 12.301(b)(2).

c. *FAR 52.204-7, System for Award Management.* FAR 12.301(d)(1).

d. *FAR 52.204-16, Commercial and Government Entity Code Reporting.* FAR 12.301(d)(3).

e. FAR 52.204-24, *Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.* FAR 12.301(d)(6).

f. *FAR 52.207-6, Solicitation of Offers from Small Business Concerns and Small Business Teaming Arrangements of Joint Ventures.* FAR 12.301(d)(6).

g. *52.209-7, Information Regarding Responsibility Matters.* FAR 12.301(d)(7).

h. *52.209-12, Certification regarding Tax Matters.* FAR 12.301(d)(8).

i. *52.222-56, Certification Regarding Trafficking in Person Compliance Plan.* FAR 12.301(d)(9).

2. When the use of evaluation criteria is appropriate, the contracting officer may insert the following provisions (as applicable):

a. *FAR 52.212-2, Evaluation -- Commercial Items*. This provision provides a list of evaluation factors and is a fill-in format for evaluation factors for the acquisition of commercial items; or

b. The contracting officer may include a similar provision containing all evaluation factors required by FAR 13.106, Subpart 14.2 or Subpart 15.3, as an addendum (see 12.302(d)). FAR 12.301(c).

c. The Contracting Officer has tremendous discretion to identify and include significant evaluation factors, such as: technical capability of the item offered to meet the Government's requirement/s; price; past performance; small disadvantaged business participation; and include them in the relative order of importance of the evaluation factors, such as in descending order of importance.

G. Contract Clauses

1. The following clauses should be inserted into all contracts for the acquisition of commercial items:

a. *52.212-4, Contract Terms and Conditions -- Commercial Items*. This clause includes terms and conditions which are, to the maximum extent practicable, consistent with customary commercial practices and are incorporated in the solicitation and contract by reference (see Block 27, SF 1449). Use this clause with its Alternate I when a time-and-materials or labor-hour contract will be awarded.

(1) The contracting officer **may tailor this clause** in accordance with FAR 12.302 (discussed in further detail below).

(2) However, an agency **cannot tailor any clause or otherwise include any additional terms or conditions in a manner that is inconsistent with customary commercial practices**, unless a waiver is approved in accordance agency procedures. FAR 12.302(c), *see also* Department of the Army—Reconsideration and Request for Modification of Recommendation, B-411760.3, Jun. 15, 2016, 2016 CPD ¶ 162; Verizon Wireless, B-406854, B-406854.2, Sep. 17, 2012, 2012 CPD ¶ 260. A protester bears the initial burden of alleging how the provision is contrary to customary commercial practice. FAR 12.302(c); *see also* Matter of JRS Staffing Servs., B-410098, *et al*., 2014 CPD ¶ 312 (Comp. Gen. Oct. 22, 2014). (Protest denied because protester failed to show that the requirement for notice and approval for the permanent substitution of contractor personnel was inconsistent with customary commercial practice, and because the provision was determined to be reasonably related to ensuring compliance with a mandatory legal requirement.)

b. *52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercial Item*s. This clause incorporates by reference only those clauses required to implement provisions of law or Executive orders applicable to the acquisition of commercial items. The contracting officer shall attach this clause to the solicitation and contract and, using the appropriate clause prescriptions, indicate which, if any, of the additional clauses cited in FAR

52.212-5(b) or (c) are applicable to the specific acquisition. Some of the clauses require fill-in; the fill-in language should be inserted as directed by FAR 52.104(d). When cost information is obtained pursuant to FAR Part 15 to establish the reasonableness of prices for commercial items, the contracting officer shall insert the clauses prescribed for this purpose in an addendum to the solicitation and contract. **This clause may not be tailored**.[16]

c. *FAR 52.204-13, System for Award Management Maintenance.* FAR 12.301(d)(2).

d. *FAR 52.204-18, Commercial and Government Entity Code Maintenance* (when there is a requirement to be registered in SAM or a requirement to have a unique entity identifier). FAR 12.301(d)(4).

e. *52.204-21, Basic Safeguarding of Covered Contractor Information Systems* (except for COTS acquisitions). FAR 12.301(d)(5).

f. *52.225-19, Contractor Personnel in Designated Operational Area or Supporting Diplomatic or Consular Mission outside the United States.* FAR 12.301(d)(10).

g. *52.232-40, Providing Accelerated Payments to Small Business Subcontractors.* FAR 12.301(d)(11).

VIII. TAILORING PROVISIONS AND CLAUSES

A. The provisions and clauses listed within FAR 12.302 are intended to address, to the maximum extent practicable, commercials market practices for a wide range of acquisitions. However, after conducting appropriate market research, in order to address the commercial practices related to a particular market, FAR 52.212-1 and 52.212-4 may be tailored within the limitations of FAR 12.302. FAR 13.302(a).

B. Notable limitations on tailoring within FAR 12.302:

[16] DoD Class Deviation 2018-O0021, Commercial Item Omnibus Clause for Acquisitions Using the Standard Procurement System, allows for the use of Standard Procurement System clause logic to automatically select clauses within 52.212-5 applicable to the acquisition. DFARS 212.301. The contracting officer shall ensure that the deviation clause is incorporated into these solicitations and contracts because the deviation clause fulfills the statutory requirements on auditing and subcontract clauses applicable to commercial items. The deviation also authorizes adjustments to the deviation clause required by future changes to the clause at 52.212-5 that are published in the FAR. This deviation is effective until September 30th, 2023, or until otherwise rescinded.

1. The following paragraphs contained within FAR 52.212-4 implement statutory requirements and may not be tailored: (1) Assignments; (2) Disputes; (3) Payment (except as provided in FAR 32.11); (4) Invoice; (5) Other compliances; (6) Compliance with laws unique to Government Contracts; and (7) Unauthorized Obligations.[17] FAR 12.302(b); *see also* Smelkinson Sysco Food Services, B-281631, 99-1 CPD ¶ 57 (Comp. Gen. Mar. 15, 1999) (protest sustained where agency failed to conduct market research before incorporating an "interorganizational transfers clause"); CW Government Travel, Inc. v. U.S. and Concur Technologies, No., 99 Fed. Cl. 666 (Fed. Cl. 2011) (holding that the government's insistence on a fixed, 15-year pricing schedule was inconsistent with customary commercial practice, was in violation of FAR 12.301(a), and was unsupported by market research)

2. Before a contracting officer tailors a clause or includes a term or condition that is inconsistent with customary commercial practice for the acquisition, he must obtain a waiver under agency procedures. FAR 12.302(c). The request for waiver must describe the customary practice, support the need to include the inconsistent term, and include a determination that use of the customary practice is inconsistent with the Government's needs. A waiver can be requested for an individual or class of contracts for an item. For DoD, the Head of the Contracting Activity is the approval authority for waivers under FAR 12.302(c). DFARS 212.302.

C. Commonly tailored paragraphs within FAR 52.212-4 include:

1. Acceptance. FAR 12.402; FAR 52.212-4.

a. Generally, the Government relies on a contractor's assurance that commercial items conform to contract requirements. The Government always retains right to reject nonconforming items.

b. Other acceptance procedures may be appropriate for the acquisition of complex commercial items, or items used in critical applications. The contracting officer should include alternative inspection procedures in an addendum to the SF 1449, and must examine closely the terms of any express warranty.

[17] FAR 52.212-4(s), Order of Precedence, frequently removes the need to negotiate commercial licenses, as these terms, and the terms found in FAR 52.212-5 take precedence over any terms contained within a commercial license.

2. Termination.[18]

a. FAR Clause 52.212-4, Contract Terms and Conditions - Commercial Items, permits Government termination of a commercial items contract either for convenience of the Government or for cause. *See* FAR 12.403(c)-(d).

b. This clause contains termination concepts different from the standard FAR Part 49 termination clauses.

c. Contracting officers may use FAR Part 49 as guidance to the extent Part 49 does not conflict with FAR Part 12 and the termination language in FAR 52.212-4.

3. Warranties. The Government's post-award rights contained in 52.212-4 include the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. FAR 12.404 provides guidance for both implied warranties[19] and express warranties.

a. Implied warranty of merchantability. Provides that an item is reasonably fit for the ordinary purposes for which such items are used.

b. Implied Warranty of Fitness for a Particular Purpose. Provides that an item is fit for use for the particular purpose for which the Government will use the item. The seller must know the purpose for which the Government will use the item, and the Government must have relied upon the contractor's skill and judgment that the item would be appropriate for that purpose.

c. Express warranties. Contracting officers are required to take advantage of commercial warranties.

(1) Solicitations shall require offerors to offer the Government at least the same warranty terms, including offers of extended warranties, offered to the general public in customary commercial practice.

(2) Solicitations may specify minimum warranty terms.

(3) Express warranties the Government intends to rely on must meet the needs of the Government and therefore should be analyzed by the contracting officer for

[18] *See* the *Termination for Default and Termination for Convenience* chapters of this Desk Book for more information. Also note that termination for default of a commercial contract is called Termination for Cause.
[19] FAR 12.404(a)(3) directs contracting officers to consult with legal counsel prior to asserting any claim for breach of an implied warranty.

adequacy of coverage (e.g. scope of coverage and length of warranty), effectiveness of post-award administration, and cost effectiveness.

4. Contract Financing. If customary market practice includes buyer contract financing, the contracting officer may offer Government financing IAW FAR Part 32.[20] FAR 12.210.

5. Technical Data.[21]

   a. "Technical Data" means recorded information of a scientific or technical nature (including computer databases and computer software documentation). This term does **not** include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. It includes recorded information of scientific or technical nature that is included in computer databases. FAR 2.101

   b. Except as provided by agency-specific statutes, the Government's goal is to acquire the minimum rights necessary and shall acquire only the technical data and the rights in that data customarily provided to the public with a commercial item or process. FAR 12.211.[22]

   c. The contracting officer shall presume that data delivered under a contract for commercial items was developed exclusively at private expense. *Id*. By statute, Congress has established the presumption that commercial items are developed at private expense. 10 USC 2320(b)(1).

6. Commercial Computer Software.[23]

   a. "Commercial Computer Software" means any computer software that is a commercial item. FAR 2.101.

   b. Commercial computer software or commercial computer software documentation shall be acquired under licenses customarily provided to the public to the extent such licenses

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[20] *See* the *Contract Financing* chapter of this Desk Book for more information.
[21] *See* the *Intellectual Property* chapter of this Desk Book for more information. Additionally, the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics prepared a handbook related to negotiating Intellectual Property Terms with commercial companies, located at http://www.acq.osd.mil/dpap/specificpolicy/intelprop.pdf (last visited June 25, 2019).
[22] *See* DFARS 227.7102 and 212.211 for DoD policy for acquiring technical data for commercial items.
[23] *See Intellectual Property Chapter* of this Desk Book for more information.

are consistent with Federal law and otherwise satisfy the Government's needs. FAR 12.212(a).

c. The government shall only have those rights specified in the license contained in any addendum to the contract. This is normally the commercial software vendor's commercial license, modified as required by federal law.[24] FAR 12.112(b).

D. Tailoring shall be executed by adding an addendum to both the solicitation and the contract. FAR 12.302(d); *see also* Diebold, Inc., B-404823, June 2, 2011, 2011 CPD ¶ 117 ("a contracting officer exercising the authority to change the terms and conditions must do so in manner that gives all offerors an equal opportunity to compete by publishing the tailored clauses in the initial solicitation's addenda or by providing an amendment to the solicitation to include revised terms and conditions").

IX. SECTION 809 PANEL

A. The "Section 809 Panel" was established by Congress in Section 809 of the FY16 NDAA to address issues with DoD acquisition policies. From August 2016 to its conclusion in July 2019, the panel released five publications: an interim report, a final report in three volumes, and a roadmap organizing all 98 recommendations within four founding principles for "reduc[ing] the burden and increase[ing] the functioning" of the DOD acquisition system. Several of the recommendations would drastically change the way the DOD acquires products and services, and in particular commercial items.[25]

B. Implementation of many of recommendations would require Congressional action to revise statutes, while the remainder would have to be implemented through changes to the DFARS or other regulations. It is unclear if or when such changes may occur, however, considering the potential of a significant overhaul of the DoD's procurement system, it is important to stay apprised of the potential changes and any actions related to them.[26]

C. The following recommendations are those likely to have the most significant impact on commercial item procurements if implemented:

1. Dynamic Marketplace Framework. The panel recommends replacing the current DoD commercial buying framework and existing simplified acquisition procedures and thresholds with simplified

[24] GSAR 552.212-4 identifies 15 common commercial license terms that the General Services Administration has determined are contrary to federal law. This clause is a good starting point for negotiating commercial licenses.

[25] The full text of the 809 Panel report and summarized recommendations can be found here: https://discover.dtic.mil/section-809-panel/ (last visited June 13, 2020).

[26] See Implementation Tracker at https://discover.dtic.mil/wp-content/uploads/809-Panel-2019/Promo-Outreach/ImplementationTracker.pdf.

procedures for buying “readily available” products without issuing requests for proposals or holding competitions. The Panel estimates that roughly 80% of DoD procurements could be handled using these simplified procedures.

2. Administrative Burdens Related to Domestic Sourcing, Supply Chains, and Socioeconomic Issues. The panel recommends that Congress give the DoD the ability to grant exceptions or remove numerous requirements that limit the DoD’s access to innovative technologies.

CHAPTER 11

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CHAPTER 11

INTERAGENCY ACQUISITIONS

I. INTRODUCTION

A. Key References.

1. FAR Subpart 17.5 (Interagency Acquisitions); 17.7 (Interagency Acquisitions by Nondefense Agencies on Behalf of the Department of Defense).

2. Department of Defense Financial Management Regulation (DoD FMR), volume 11A, chapters 1-4, 6, 18.

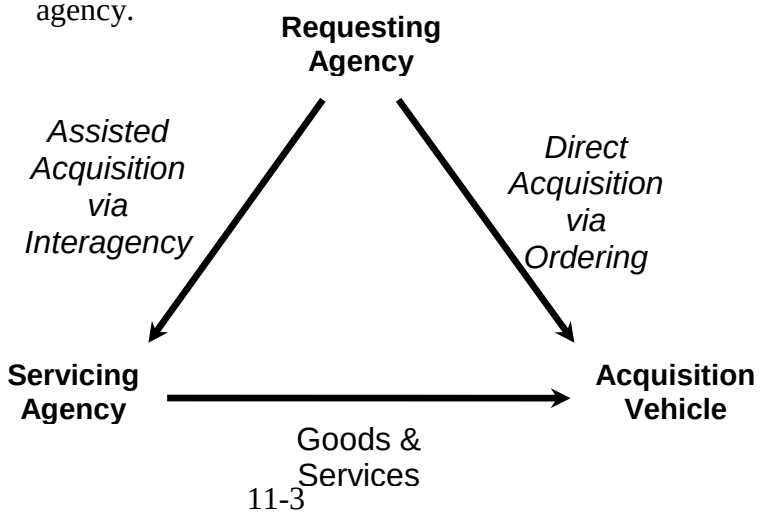
3. Department of Defense Instruction (DoDI) 4000.19, *Support Agreements* (April 25, 2013, Incorporating Change 2, August 31, 2018).

B. Interagency Acquisition (IA): the procedure by which an agency needing supplies or services (the *requesting agency* or *ordering agency*) obtains them through another federal government agency (the *servicing agency* or *performing agency*).

1. Interagency Acquisition types.

a. Direct Acquisitions: the requesting agency places an order directly against a servicing agency's contract.

b. Assisted Acquisitions: the servicing agency and requesting agency enter into an interagency agreement pursuant to which the servicing agency performs acquisition activities on behalf of the requesting agency, such as awarding a contract or issuing a task or delivery order, to satisfy the requirements of the requesting agency.



2. Determination of Best Procurement Approach. Please note: a Determination of Best Procurement Approach is no longer required for Interagency Acquisitions. The final rule for FAR Case 2018-015 *Governmentwide and Other Interagency Contracts* was published on May 6, 2019 amending the FAR to implement section 875 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019. The 2019 NDAA removed the requirement for agencies to make a determination that the use of an interagency acquisition represents the best procurement approach. The determination was required prior to requesting another agency conduct an acquisition on its behalf, and before placing an order against another agency's indefinite-delivery contract vehicle. This requirement was also removed from DFARS 217.502-1.

a. Some agency regulations still may require a Determination of Best Procurement Approach. For agencies still requiring such a determination below this is the previous FAR 17.502-1(a) guidance.

(1) Assisted Acquisitions. Prior to requesting that another agency conduct an acquisition on its behalf, the requesting agency shall make a determination that the use of an interagency acquisition represents the best procurement approach. This determination requires the requesting agency's contracting office to concur that using the acquisition services of another agency satisfies the following criteria: meet the requesting agency's schedule, performance, and delivery requirements; is cost effective (taking into account the reasonableness of the servicing agency's fees); and, will result in the use of funds in accordance with appropriation limitations and compliance with the requesting agency's laws and policies. FAR 17.502-1(a)(1).

(2) Direct acquisitions. Prior to placing an order directly against another agency's indefinite-delivery vehicle, the requesting agency shall make a determination that use of another agency's contract vehicle is the best procurement approach. This determination requires the requesting agency's contracting office to consider numerous factors including: the contract vehicle's suitability; the contract vehicle's value, including administrative cost savings from using an existing contract, prices, the number of vendors, and reasonable vehicle access fees; and, the requesting agency's expertise at placing orders and administering them against the selected contract vehicle. FAR 17.502-1(a)(2).

C. Interagency Agreements.

1. Assisted Acquisitions. Prior to the issuance of a solicitation under an assisted acquisition, the servicing and requesting agencies shall sign a written interagency agreement that establishes the general terms and conditions governing the relationship between the parties. The agreement should cover roles and responsibilities for acquisition planning, contract execution, and contract administration. It should also include any unique terms and conditions[1] of the requesting agency that must be incorporated into the order or contract awarded by the assisting agency. If there are no unique terms or conditions, the agreement should so state. A copy of the interagency agreement, prepared in accordance with current OFPP[2] guidance, must be included in the files of both the servicing and requesting agencies. FAR 17.502-1(b).

2. Direct Acquisitions. Since the requesting agency administers its own order under a direct acquisition, an interagency agreement is not required under the FAR. FAR 17.502-1(a)(2).

D. Contract Vehicles: Interagency acquisitions are often arranged using indefinite delivery/indefinite quantity contracts, under FAR Subpart 16.5 authority, and rely upon task or delivery orders to acquire goods and/or services. Contract vehicles used most frequently to support interagency acquisitions are the General Services Administration's Schedules (the Federal Supply Schedules), government-wide acquisition contracts or GWACs and multi-agency contracts or MACs (a task or delivery order contract established by one agency for use by other agencies IAW the Economy Act). In order to establish new multi-agency or government-wide acquisition contracts, a business-case analysis must be prepared and approved in accordance with current Office of Federal Procurement Policy (OFPP) guidance. FAR 17.502-1(b). [3]

E. Fiscal Policy: Unless authorized by Congress, interagency transactions are generally prohibited.

1. Under 31 U.S.C. § 1301, a federal agency must use its appropriated funds for the purposes for which the appropriations were made (a.k.a., the "Purpose Statue"). Unless authorized by Congress, funds appropriated for

[1] FAR 17.7 outlines many of the unique terms and conditions that apply when a non-Defense agency procures supplies and services on behalf of a DoD entity.
[2] https://www.whitehouse.gov/omb/management/office-federal-procurement-policy/.
[3] *See also*, OFPP Memorandum, "Development, Review and Approval of Business Cases for Certain Interagency and Agency-Specific Acquisitions," 29 Sept. 2011 *available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/procurement/memo/development-review-and-approval-of-business-cases-for-certain-interagency-and-agency-specific-acquisitions-memo.pdf.

the needs of one federal agency may not be used to fund goods and services for the use of another federal agency.

a. From the standpoint of the requesting agency, receiving goods or services funded by another agency's appropriations without reimbursing the servicing agency would constitute an improper augmentation of the requesting agency's funds.

b. Funds sent by the requesting agency to the servicing agency as reimbursement for goods or services provided could not be retained and spent by the servicing agency, but instead would have to be turned over to the Treasury under 31 U.S.C. § 3302(b) (a.k.a., the Miscellaneous Receipts statute).

2. Congress has provided several statutory authorities for interagency acquisitions, allowing agencies to avoid these fiscal law limitations.

a. The Economy Act: 31 U.S.C. §§ 1535-1536. This is the general authority for interagency acquisitions, but is used only when more specific authority does not apply. *See* FAR 17.502-2(b).

b. The Project Order Statute: 41 U.S.C. § 6307.

c. Other Non-Economy Act Authorities: Government Employees Training Act (GETA), Federal Supply Schedules (FSS), Government Wide Acquisition Contracts (GWAC), and other required sources.

F. Practitioner's Note.

1. While the statutory requirements driving interagency acquisitions are fairly straightforward, this is an area of law that is predominately regulatory driven. Those practicing in this area need to be keenly aware as to whether the governing regulations have been updated.

2. Moreover, the regulatory framework for interagency acquisitions is incredibly fact-specific. Depending on the nature of the transaction, certain regulations may or may not apply.

II. THE ECONOMY ACT (31 U.S.C. §§ 1535-1536)

A. Purpose: Provides authority for federal agencies to order goods and services from other federal agencies, or with a major organizational unit within the same agency, if: [4]

1. Funds are available;

2. The head of the ordering agency or unit decides the order is in the best interests of the government;

3. The agency or unit filling the order can provide or get by contract the goods or services; **and**

4. The head of the agency decides that the ordered goods or services cannot be provided as conveniently or cheaply by a commercial enterprise.[5]

B. Authorized Uses.

1. Inter-service Support: orders placed between DoD activities, including those: (1) between military departments; or (2) between military departments and other defense agencies.[6] (a.k.a., intra-agency support within DoD).

2. Intra-service Support: orders placed between major organizational unit within the same service (*e.g.* Army Material Command and CENTCOM).[7]

3. Intra-governmental Support: orders placed with non-DoD federal agencies. (a.k.a., interagency support).

4. The Economy Act applies only in the absence of a more specific acquisition authority. (FAR 17.502-2(b)).[8]

C. Determinations and Findings (D&F) Requirements. FAR Subpart 17.502-2(c); DoD FMR vol. 11A, ch. 3, para. 030501.

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[4] 31 U.S.C. §1535(a); DoD FMR, vol. 11A, ch. 3, para. 030102. The Economy Act was passed in 1932 as an effort to obtain economies of scale and eliminate overlapping activities within the federal government.

[5] *See Dictaphone Corp.*, B-244691.2, 92-2 Comp. Gen. Proc. Dec. ¶ 380 (Nov. 25, 1992). *See also*, DoD FMR, vol. 11a, ch. 3, para. 030101.D..

[6] *See* FAR 2.101 (defining executive agencies as including military departments); *Obligation of Funds under Military Interdepartmental Purchase Requests*, B-196404, 59 Comp. Gen. 563 (1980

[7] The term "major organizational unit" is not a term defined by the DoD FMR or other pertinent DoD regulations.

[8] *See also,* N&N Travel & Tours, Inc.,2000 CPD ¶ 146, 2000 U.S. Comp. Gen. LEXIS 128, at *12-13(Comp. Gen. Aug. 31, 2000)

1. Basic Determinations. All Economy Act orders must be supported with a written D&F by the requesting agency stating that:

   a. The use of an interagency acquisition is in the government's best interest (FAR 17.502-2(c)(1)(i));

   b. The supplies or services cannot be obtained as conveniently or economically by contracting directly with a private source. FAR 17.502-2(c)(1)(ii)) **and**

   c. A statement that at least one of the three following circumstances apply:

      (1) The acquisition will appropriately be made under an existing contract of the servicing agency, entered into before placement of the order, to meet the requirements of the servicing agency for the same or similar supplies or services;

      (2) The servicing agency has the capability/expertise to contract for the supplies or services, which capability is not available within the requesting agency; or

      (3) The servicing agency is specifically authorized by law or regulation to purchase such supplies or services on behalf of other agencies. (FAR 17.502-2(c)(1)(iii) *See also* DoD FMR, vol. 11A, ch. 3, para. 030202.B.[9]

2. DoD-specific Determinations.

   a. Interservice (a.k.a. Intra-Agency) Support. DoD activities shall render requested support to other DoD activities when the requesting activity head determines (1) it would be in the government's best interest and (2) the servicing activity head determines that capabilities exist to render support without jeopardizing assignment missions. DoD FMR, vol. 11A, ch. 3, para. 030303.

   b. Intragovernmental (a.k.a. Interagency) Support. DoD activities may enter into support agreements with non-DoD federal activities when the major organizational unit head ordering the support

[9] The current version of DoD FMR, vol. 11A, ch. 3, para. 030202.B, specifies that one of these statements would need to be included in D&Fs if the transaction contemplates a contract action by a non-DoD servicing agency. Note, however, that the current version of the FAR would seem to require broader application to *all* D&Fs. Despite this inconsistency, a best practice may be to include these statements in all D&Fs, regardless of whether the Economy Act transition requires a contract action or not.

determines that (1) funding is available to pay for the support, (2) it is in the government's best interest, (3) the supplying activity is able to provide the support, (4) the support cannot be provided as conveniently or economically by a commercial enterprise, and (5) it does not conflict with any other agency's authority. This authority may be delegated no lower than the SES or flag officer levels. DoD FMR, vol. 11A, ch. 3, para. 030304.[10]

3. D&F Approval Authority. FAR 17.502-2(c)(2).

a. The D&F must be approved by a contracting officer of the requesting agency with the authority to contract for the supplies or services ordered (or by another official designated by the agency head).

b. If the servicing agency is not covered by the FAR, then the D&F must be approved by the requesting agency's Senior Procurement Executive. FAR 17.502-2(a)(2).

c. The requesting agency shall furnish a copy of the D&F to the servicing agency with the order.

d. DoD-specific Requirements. DoD FMR vol. 11A, ch. 3, para. 030304requires that DoD components comply with any additional requirements in DFARS or within individual DoD Component's guidance.

(1) DFARS guidance found at Subpart 217.5—Interagency Acquisitions and Subpart -Acquisitions by Non-Defense Agencies on Behalf of the Department of Defense.

(2) Army requirements are found at AFARS Subpart 5117.5 - Interagency Acquisitions.

(3) Air Force requirements are found at AFFARS Subpart 5317.5 - Interagency Acquisitions and Subpart 5317.7 Acquisitions by Non-Defense Agencies on Behalf of the Department of Defense.

(4) Navy and Marine requirements are found at NMCARS Subpart 5217.5 Interagency Acquisitions and Subpart 5217.7 Acquisitions by Non-Defense Agencies on Behalf of the Department of Defense. .

[10] Note the more robust determinations required when ordering outside of DoD.

D. Additional Determinations by DoD Policy.

1. Using a non-DoD contract to procure goods or services in excess of the simplified acquisition threshold requires determinations in addition to the D&F. *See* FAR 17.7.[11]

a. A DoD acquisition official may place an order, make a purchase, or otherwise acquire supplies or services for DoD in excess of the simplified acquisition threshold through a non-DoD agency[12] **only** if the head of the non-DoD agency has certified that the non-DoD agency will comply with defense procurement requirements for the fiscal year to include applicable DoD financial management regulations. FAR 17.703

b. Acknowledging differences between the military departments, current IA-related policies may require additional attestations:

(1) The order is in the best interest of the military department considering the factors of ability to satisfy customer requirements, delivery schedule, availability of a suitable DoD contract vehicle, cost effectiveness, contract administration (including ability to provide contract oversight), socioeconomic opportunities, and any other applicable considerations;

(2) The supplies or services to be provided are within the scope of the non-DoD contract;

(3) The proposed funding is appropriate for the procurement and is being used in a manner consistent with any fiscal limitations; and

(4) The servicing agency has been informed of applicable DoD-unique terms or requirements that must be incorporated into the contract or order to ensure compliance with applicable procurement statutes, regulations, and directives.

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[11] *See* Appendix A which provides a collection of memoranda applicable to use of non-DoD contracts under both Economy Act and non-Economy Act authorities. These and other applicable memoranda related to interagency acquisitions can be found on the Defense Procurement and Acquisition Policy (DPAP) webpage under "Interagency Acquisition" *available at* http://www.acq.osd.mil/dpap/cpic/cp/interagency_acquisition.html.

[12] These requirements do not apply to contracts entered into by a nondefense agency that is an element of the intelligence community for the performance of a joint program conducted to meet the needs of DoD and the nondefense agency.

c. The officials with authority to make these determinations are designated by agency policy (e.g., Army policy requires that these written certifications be executed by the head of the requiring activity (O-6/GS-15 level or higher)).

E. Fiscal Matters.

1. Economy Act orders are funded either on a reimbursable basis or by a direct fund citation basis. The ordering agency must pay the actual costs of the goods or services provided. 31 U.S.C. § 1535(b); DoD FMR, vol. 11A, ch. 3, 030801..

a. Actual costs include:

(1) All direct costs attributable to providing the goods or services, regardless of whether the performing agency's expenditures are increased. DoD FMR, vol. 11A, ch. 3, para. 030801 and vol. 11A, ch. 1, para. 010203;[13] and

(2) Indirect costs, to the extent they are funded out of currently available appropriations, bear a significant relationship to providing the goods or services, and benefit the ordering agency. DoD FMR, vol. 11A, ch. 3, para. 030801.[14]

(3) DoD activities not funded by working capital funds normally do not charge indirect costs to other DoD activities. DoD FMR, vol. 11A, ch. 3, para. 030801.[15]

b. When providing goods or services via a contract, the servicing agency may not require payment of a fee or charge which exceeds the actual cost of entering into and administering the contract t or other agreement under which the order is filled. FAR 17.502-2(d)(4); DoD FMR, vol. 11A, ch. 3, para. 030801.

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[13] *See Washington Nat'l Airport; Fed. Aviation Admin.*, B-136318, 57 Comp. Gen. 674 (1978). *See GSA Recovery of SLUC Costs for Storage of IRS Records*, B-211953, Dec. 7, 1984 (unpub.) (storage costs); *David P. Holmes*, B-250377, Jan. 28, 1993 (unpub.) (inventory, transportation, and labor costs).

[14] *See Washington Nat'l Airport, supra* (depreciation and interest); *Obligation of Funds Under Mil. Interdep'tal Purchase Requests*, B-196404, 59 Comp. Gen. 563 (1980) (supervisory and administrative expenses).

[15] This tenet of IA support is reiterated in DoD Instruction 4000.19, *Interservice and Intragovernmental Support*, para. 4.a.5 (Apr. 25, 2013). A DoD Working Capital Fund is a revolving, reimbursable operations fund established by 10 U.S.C. § 2208 to sell support goods and services to DoD and other users with the intent to be zero-profit. *See* DoD FMR vol. 11B, chp 1-2.

c. Payments by the requesting agency are credited to the appropriation or fund that the servicing agency used to fill the order. 31 U.S.C. § 1536; 10 U.S.C.§ 2205.

d. Economy Act orders may **NOT** be used to circumvent the fiscal principles of purpose, time, and amount for appropriations. It is the responsibility of the requesting agency to certify that the funds used are proper for the purpose of the order and for a bona fide need in the fiscal year for which the appropriation is available. DoD FMR vol. 11A, ch. 3, para. 030602. *See also*, FAR 17.501(b).

2. Obligation and Deobligation of Funds.

a. Obligation.

(1) Reimbursable Order: the requesting agency obligates funds current when the performing activity accepts the reimbursable order. 31 U.S.C. § 1535(d); DoD FMR, vol. 11A, ch. 3, para. 030604.A.

(2) Direct Citation Order: the servicing agency will provide a copy of the contract or other obligating document to the requesting agency. This will provide the documentation required to record the obligation. DFAS-IN Reg. 37-1, chapter 8, table 8-2.

b. Deobligation.

(1) At the end of the period of availability of the requesting agency's appropriation, funds must be deobligated to the extent that the servicing agency has not itself incurred obligations by: (1) providing the goods or services; or (2) by entering into an authorized contract with another entity to provide the requested goods or services. 31 U.S.C. § 1535(d).[16]

(2) This deobligation requirement is intended to prevent misusing the Economy Act to "park" funds with another agency in order to extend an appropriation's availability.

[16] *See* GAO Redbook, vol. III, ch. 12 (3rd Ed.), pp. 12-43 to 12-50.

F. Ordering Procedures.[17]

1. The guidance in TFM, Volume I, Part 2, Chapter 4700, Appendix 6, Section 9 provides the standard Interagency Agreement (IAA) containing two Fiscal Service (FS) Forms:. Treasury has mandated the use of FS Form 7600A, General Terms and Conditions (GT&C) and FS Form 7600B, Order Form. Accordingly, all DoD Components must use the latest published versions of FS Forms 7600A/B when completing an Economy Act Order. DoD FMR, vol. 11A, ch. 3, para 030503

2. Orders must be specific, definite, and certain both as to the work encompassed by the order and the terms of the order itself. DoD FMR, vol. 11A, ch. 3, para. 030601. Minimum order requirements under FAR 17.503(b):

   a. Specific description of the supplies or services required;

   b. Delivery requirements,

   c. Fund citation (either direct or reimbursable);

   d. Payment provision;

   e. Acquisition authority as may be appropriate; and

   f. Additional ordering procedures contained in DFARS 217.503.

3. The requesting agency shall furnish a copy of the required D&F to the servicing agency with the request for order. FAR 17.502-2(c)(3).

   a. When the requesting agency is within DoD, a copy of the executed D&F shall also be furnished to the servicing agency as an attachment to the order.

   b. When a DoD contracting office is acting as the servicing agency, a copy of the executed D&F shall be obtained from the requesting agency and placed in the contract file for the Economy Act order. DFARS 217.503(d).

4. The work to be performed under Economy Act orders shall be expected to begin within a reasonable time after its acceptance by the servicing agency. DoD FMR, vol. 11A, ch. 3, para. 030605. The requesting agency

[17] *See* FAR 17.503; DoD FMR, vol. 11A, ch. 3. In addition, individual agencies will have their own policies for ordering. Note that DoDI 4000.19, *Support Agreements* has limited applicability here, as the DoDI does not apply to "Interagency assisted acquisitions that are defined as a type of interagency acquisition where a servicing agency performs acquisition activities on a requesting agency's behalf, such as awarding and administering a contract, task order, or delivery order, in accordance with sub-part 2.101 of the Federal Acquisition Regulation."

should therefore ensure in advance of placing an order that such capability exists.

5. Funds are not to be advanced to non-DoD Federal entities or be used to pay for advance billings without the receipt of goods or services unless the DoD Component is specifically authorized by law, legislative action or Presidential authorization.31 U.S.C. § 1535(d); FAR 17.502-2(d); DoD FMR, vol. 11A, ch. 3, para. 030701,

G. Recurring Interagency Support. DoDI 4000.19 (if applicable).

1. Each party to a reimbursable support agreement will annually review the agreement for financial impacts. DoDI 4000.19, Encl. 3, para. 1.e.(1)).

2. In DoD, recurring interagency support that requires reimbursement should be documented on a DD Form 1144, Support Agreement, or similar format that contains all the information required on the form. DoDI 4000.19, Encl. 3, para. 2.a.(1). **Please Note:** DoDI 4000.19 has not been updated to include the revised guidance on the mandatory use of the Treasury FS7600A and 7600B forms.

3. Reimbursement may not be charged for provided support that has been included in the supplier's budget process. DoDI 4000.19, Encl. 3, para. 4.a.(2).

4. Support provided by the supplier for the benefit of the supplier's component that also benefits other activities without increasing the cost is not reimbursable. DoDI 4000.19, Encl. 3, para. 4.a.(3).

5. Support is reimbursable to the extent that provision of the specified support for a receiver increases the support supplier's direct costs. These costs must be measurable and directly attributable to the support received and should be expressed in units of support appropriate to the type of service calculation of reimbursement charges. DoDI 4000.19, Encl. 3, para. 4.a.(4).

6. Indirect costs are not normally reimbursable between DoD components. Indirect costs may be included in reimbursement charges to the extent they have a significant relationship to providing the support and benefit the receiver. DoDI 4000.19, Encl. 3, para. 4.a.(5).

7. Costs associated with common use infrastructure are non-reimbursable, except for support provided solely for the benefit of one or more receivers. DoDI 4000.19, Encl. 3, para. 4.a.(6).

H. Interagency Details of Personnel.

1. General Rule: Details of employees from one agency to another must be done under Economy Act authority on a reimbursable basis.[18]

2. Exception: Details of employees may be made on a non-reimbursable basis when: (1) specifically authorized by law; (2) the detail involves a matter similar or related to matters ordinarily handled by the detailing agency and will aid the detailing agency's mission; or (3) the detail is for a brief period and entails minimal cost.[19] For this exception to apply, the statute must not only authorize the transfer, but also the nonreimbursement. (*Matter of: Nonreimbursable Transfer of Administrative Law Judges*, B-221585, 65 Comp. Gen. 635 (June 9, 1986)).

I. Limitations.

1. Funding Limitations. An agency shall not use an interagency acquisition to circumvent any conditions or limitations imposed on the funds. FAR 17.501(b).

2. Disputes. The requesting and servicing agencies "should agree" to procedures for the resolution of disagreements that may arise under interagency acquisitions, including, in appropriate circumstances, the use of a third-party forum. FAR 17.503(c). DoD components will resolve support agreement differences and disputes with federal agencies through their chains of command. DoDI 4000.19, Encl. 3, para. 3.c.(2).

3. CICA Compliance. The requesting agency may not procure from a servicing agency that fails to comply with the Competition in Contracting Act (CICA) when contracting for a requirement. 10 U.S.C. § 2304(f)(4); 41 U.S.C. § 253(f)(4); *Valenzuela Eng'g, Inc.*, B-277979, 98-1 Comp. Gen. Proc. Dec. ¶ 51 (Jan. 26, 1998).

III. THE PROJECT ORDERS STATUTE (41 U.S.C. § 6307)

A. Purpose: A "project order" is a specific, definite and certain order issued under the authority contained in 41 U.S.C. § 6307.

1. Allows DoD to place orders or contracts pertaining to approved projects with Government-owned establishments. All orders or contracts for work placed with government owned establishments shall be considered as

[18] The detail must be on a reimbursable basis in order to avoid a violation of the Purpose Statute and an improper augmentation of the appropriations of the agency making use of the detailed employees. Note that other detail statutes may apply.

[19] *See Department of Health & Human Servs. Detail of Office of Community Servs. Employees*, B-211373, 64 Comp. Gen. 370 (1985).

obligations in the same manner as prescribed for similar orders or contracts placed with commercial manufacturers or private contractors. These orders are considered to be obligations "in the same manner as provided for similar orders or contracts placed with…private contractors."

a. The term "approved projects" in the statute simply refers to projects approved by officials having legal authority to do so. DoD FMR, vol. 11A, ch. 2, para. 020204.

b. A "project order" is a specific, definite, and certain order issued under the Project Order Statute. DoD FMR, vol 11A, ch.2, para 020302.

2. Within DoD, regulatory guidance on project orders is found at DoD FMR, vol. 11A, ch. 2, and DFAS-IN Regulation 37-1, ch. 12, para. 1208.[20]

B. Applicability.

1. DoD-Owned Establishment. Although the language of the statute refers broadly to "Government-owned establishments," it applies only to transactions between military departments and government-owned, government-operated (GOGO) establishments within DoD. DoD FMR, vol. 11A, ch. 2, para. 020201.

2. GOGO establishments include:

a. Equipment overhaul or maintenance shops, manufacturing or processing plants or shops, research and development laboratories, computer software design activities, testing facilities, proving grounds, and engineering and construction activities. DoD FMR, vol. 11A, ch. 2, para. 020201.

b. GAO decisions have also "found arsenals, factories, and shipyards owned by the military to be GOGOs." *Matter of John J. Kominski*, B-246773, 72 Comp. Gen. 172 (1993).

3. Government-Operated.

a. The DoD-owned establishment must substantially do the work in-house.

b. While the DoD-owned establishment may contract for incidental goods or services pursuant to a project order, the GOGO must

[20] The Coast Guard has similar project order authority, at 14 U.S.C. § 151.

itself incur costs of not less than 51% of the total costs attributable to performing the work. DoD FMR, vol. 11A, ch. 2, para. 020515.

4. Nonseverable Work Only.

a. Under DoD FMR, vol. 11A, ch. 2, para. 020509, activities may use project orders only for nonseverable or "entire" efforts that call for a single or unified outcome or product, such as the manufacture, production, assembly, rebuild, reconditioning, overhaul, alteration, or modification of:

(1) Ships, aircraft, and vehicles of all kinds;

(2) Guided missiles and other weapon systems;

(3) Ammunition;

(4) Clothing;

(5) Machinery and equipment for use in such operations;

(6) Other military and operating supplies and equipment (including components and spare parts);

(7) Construction or conversion of buildings and other structures, utility and communication systems, and other public works;

(8) Development of software programs and automated systems when the purpose of the order is to acquire a specific end-product; and

(9) Production of engineering and construction related products and services.

5. Activities may <u>not</u> use project orders for:

a. Severable services, such as custodial, security, fire protection, or refuse collection;

b. Routine maintenance in general, such as grounds maintenance, heat and air conditioning maintenance, or other real property maintenance;

c. Services such as education, training, subsistence, storage, printing, laundry, welfare, transportation, travel, utilities, or communications; or

d. Efforts where the stated or primary purpose of the order is to acquire a level of effort (e.g., 100 hours, or one year) rather than a specific, definite, and certain end-product;

C. Fiscal Matters.

1. Obligation of Funds.

a. A project order is a valid and recordable obligation of the requesting agency when the order is issued and accepted. DoD FMR, vol. 11A, ch. 2, para. 020302[21]

b. The project order must serve a valid *bona fide need* that exists in the fiscal year in which the project order is issued. DoD FMR, vol. 11A, ch. 2, para. 020508.

2. Deobligation of Funds.

a. Unlike orders under the Economy Act, there is no general requirement to deobligate the funds if the servicing agency has not performed before the expiration of the funds' period of availability. 41 U.S.C. § 6307.

b. At the time of acceptance, evidence must exist that the work will be commenced without delay (usually within 90 days) and that the work will be completed within the normal production period for the specific work ordered. DoD FMR, vol. 11A, ch. 2, para. 020510.A.

c. If evidence existed at the time of acceptance and is documented in the file, then there are no consequences if the servicing agency subsequent fails to begin work within the 90 days unless that delay extends beyond 1 January of the following calendar year.

(1) If work on a project order does not begin, or is not expected to begin, by January 1 of the following calendar year, then the project order must be returned for cancellation and the funds deobligated.

(2) If it is documented that the delay is unavoidable and could not have been foreseen at the time of project order acceptance, and that documentation is retained for audit

[21] Providing the obligation otherwise meets the criteria for recording an obligation contained in 31 U.S.C. § 1501(a) (the "Recording Statute").

review, then the project order can be retained and executed. DoD FMR, vol. 11A, ch. 2, para. 020510.B.

D. Ordering Procedures.

1. Project orders are analogous to contracts placed with commercial vendors and, similar to such contracts, must be specific, definite, and certain both as to the work and the terms of the order itself. DoD FMR, vol. 11A, ch. 2, para. 020506.

2. Project orders shall be issued on a reimbursable basis only (no direct cite orders). DoD FMR, vol. 11A, ch. 2, para. 020519. The project order may be on a fixed-price or costs-incurred (cost-reimbursement) basis.

3. The MIPR is normally used for issuing and accepting project orders.

a. The DoD FMR states that although "the use of a specific project order form is not prescribed," activities shall use the "Universal Order Format" described in DoD FMR, vol.11A, ch. 1, whenever practicable. DoD FMR, vol. 11A, ch. 2, para. 020302.

b. The various Military Departments, however, may require that project orders be issued on a MIPR or other specific forms.

4. At the time of acceptance, evidence must exist that the work will be commenced without delay (usually within 90 days) and that the work will be completed within the normal production period for the specific work ordered. DoD FMR, vol. 11A, ch. 2, para. 020510.A.

5. Because project orders are not made under the authority of the Economy Act, there is no requirement for determinations and findings (D&F).[22]

IV. OTHER NON-ECONOMY ACT AUTHORITIES.

A. Purpose: Provides specific statutory authority for interagency acquisitions allowing DoD to obtain goods and services from a non-DoD agency outside of the Economy Act. When any of these specified, non-Economy Act authorities apply, they must be used instead of the Economy Act.

B. Fiscal Matters.

[22] *See also*, FAR 17.500(c), which excludes interagency reimbursable work performed by federal employees from the requirements of FAR 17.5.

1. Obligation of Funds. The requesting agency records an obligation upon meeting all the following criteria:[23]

   a. A binding agreement, in writing, between the agencies;

   b. For a purpose authorized by law;

   c. Serve a bona fide need of the fiscal year or years in which the funds are available for new obligations;[24]

   d. Executed before the end of the period of availability of the appropriation used; and

   e. Provides for specific goods to be delivered or specific services to be supplied.

2. De-obligating Funds.

   a. General Rule: the order is generally treated like a contract with a private vendor in that requesting agency does not have to deobligate its funds if the servicing agency has not performed or incurred obligations at the end of the funds' period of availability.[25]

   b. DoD Policy: In response to several GAO and DoD Inspector General audits indicating contracting and fiscal abuses with DoD agencies' use of interagency acquisitions, the DoD has issued policy that severely restricts the flexibility that these non-Economy Act authorities provide and now applies a deobligation requirement similar to that of the Economy Act. DoD FMR, vol. 11A, ch. 18, para. 180506.[26]

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[23] DoD FMR vol. 11A, ch. 18, para. 180505.

[24] While *bona fide need* is generally a determination of the requesting agency and not that of the servicing agency, a servicing agency can refuse to accept a non-Economy Act order if it is obvious that the order does not serve a need existing in the fiscal year for which the appropriation is available. (DoD FMR, vol. 11A, ch. 18, para. 180504).

[25] *Expired Funds and Interagency Agreements between GovWorks and the Department of Defense*, B-308944, 2007 Comp. Gen. Proc. Dec. ¶ 157

[26] Office of the Under Secretary of Defense (Comptroller) memorandum, Subject: Non-Economy Act Orders, dated October 16, 2006. (Appendix C).

(1) General: Expired funds must be returned by the servicing agency and deobligated by the requesting agency to the extent that the servicing agency has not:

(a) Provided the goods or services (or incurred actual expenses in providing the goods or services); or

(b) Entered into a contract with another entity to provide the goods or services before the funds expired, subject to the bona fides need rule.

(2) Non-severable services: the contract must be funded entirely with funds available for new obligations at the time the contract was awarded, even though performance may extend across fiscal years. DoD FMR, vol. 11A, ch. 18, para. 180506.C.

(3) Severable Services: one-year funds may be used to fund up to twelve months of continuous severable services beginning in the fiscal year of award and crossing fiscal years under the authority of 10 U.S.C. § 2410a. DoD FMR, vol. 11A, ch. 18, para. 180506.B.[27]

(4) Goods: if the contract is for goods that were not delivered within the funds period of availability, the funds must be deobligated and current funds used, unless the goods could not be delivered because of delivery, production or manufacturing lead time, or unforeseen delays that are out of the control and not previously contemplated by the contracting parties at the time of contracting. DoD FMR, vol. 11A, ch. 18, para. 180506.A.

3. Advance Payment. [28]

[27] The funding availability period does not start upon obligation of the funds by the servicing agency, but upon obligation of the funds by the requesting agency. *See* DoD FMR, vol. 11A, ch. 18, para. 180203.F (requiring a statement on the funding document that states: "all funds not placed on contract this fiscal year shall be returned promptly to the ordering activity, but *no later than one year after the acceptance of the order, or upon completion of the order, whichever is earlier*.")(emphasis added). Therefore, a DoD requesting activity can still "lose" funds if the servicing agency does not award a contract promptly after acceptance of the order.

[28] Under Secretary of Defense (Comptroller) memorandum, subject: Advance Payments to Non-Department of Defense Federal Agencies for Interagency Acquisitions, dated March 1, 2007, *available at* http://www.acq.osd.mil/dpap/specificpolicy/attachments/advance-payments-20070307.pdf.

a. DoD agencies are prohibited from making advance payments to non-DoD agencies unless specifically authorized by law. DoD FMR, vol. 11A, ch. 18, para. 180507.

b. For those few exceptions where DoD is specifically authorized to advance funds, the specific appropriation or law authorizing the advance must be cited on the obligating and/or interagency agreement documents and orders, and any unused amounts of the advance must be collected from the servicing agency immediately and returned to the fund from which originally made. DoD FMR, vol. 11A, ch. 18, para. 180507.

C. DoD Policy for non-DoD orders.[29]

1. If the non-Economy Act order is over the simplified acquisition threshold (SAT), additional Service Component regulatory requirements may apply.

2. Non-Economy Act orders may be placed with a non-DoD agency for goods or services if:[30]

a. Proper funds are available;

b. The non-Economy Act order does not conflict with another agency's designated responsibilities (*e.g.*, real properly lease agreements with GSA);

c. The requesting agency determines the order is in the best interest of the Department; and

d. The servicing agency is able and authorized to provide the ordered goods or services.

3. Best Interest Determination.

a. Each requirement must be evaluated to ensure that non-Economy Act orders are in the DoD's best interest. Factors to consider include: satisfying customer requirements; schedule, performance, and delivery requirements; cost effectiveness, taking into account the discounts and fees; and contract administration, to include oversight. DoD FMR, vol. 11A, ch. 18, para. 180403; *see also* FAR 17.502-1(a) requiring a determination of best procurement approach and consideration of similar factors.

[29] *See generally*, DoD FMR, vol. 11A, ch. 18.

[30] DoD FMR, vol. 11A, ch. 18, para. 180302

b. If the order exceeds the SAT, then the best interest determination must be documented in accordance with individual service component requirements.

D. Content of Orders. DoD FMR, vol. 11A, ch. 18, para. 180401.

1. A firm, clear, specific, and complete description of the goods or services ordered;

2. Specific performance or delivery requirements;

3. A proper fund citation;

4. Payment terms and conditions;

5. The specific non-Economy Act statutory authority used;

6. *For severable services*: "These funds are available for severable service requirements crossing fiscal years for a period not to exceed one year, where the period of any resultant contract for services commences this fiscal year. All funds not placed on contract this fiscal year shall be returned promptly to the ordering activity, but no later than one year after the acceptance of the order or upon completion of the order, whichever is earlier."

7. *For goods and non-severable services*: "I certify that the goods or non-severable services to be acquired under this agreement are a necessary expense of the appropriation charged, and represent a bona fide need of the fiscal year in which these funds are obligated."

8. The requesting agency's DoD Activity Address Code (DODAAC).

9. Contracting Officer Review. If the non-Economy Act order is in excess of $500,000, it must be reviewed by a DoD warranted contracting officer prior to sending the order to the funds certifier or issuing the MIPR. DoD FMR, vol. 11A, ch. 18, para. 180502.

E. Commonly used non-Economy Act transaction authorities.

1. Government Employees Training Act (GETA). 5 U.S.C. § 4104.

a. Purpose: permits agencies to provide training to employees of other federal agencies on a reimbursable basis.

(1) Servicing agency is authorized to collect and to retain a fee to offset the costs associated with training the employees of other agencies.

(2) Reimbursement is NOT authorized for training of other agency employees if funds are already provided for interagency training in its appropriation.[31]

b. Federal agencies must provide for training, insofar as practicable, by, in, and through government facilities under the jurisdiction or control of the particular agency.

c. Limitation: Non-government personnel.

(1) This authority applies only to transactions between federal government agencies; therefore, it does not authorize the provision of training to non-government personnel.

(2) The Comptroller General has not objected to federal agencies providing training to non-government personnel on a space-available basis incidental to the necessary and authorized training of government personnel, but the non-government personnel must reimburse the government for the costs of that training, and the agency providing the training must deposit the fees collected in the Treasury as miscellaneous receipts.[32]

2. Federal Supply Schedules (FSS). 41 U.S.C. 251 *et seq* -- The Federal Property and Administrative Services Act of 1949; 40 U.S.C. § 501; FAR Subpart 8.4.

a. Purpose: authorizes the General Services Administration (GSA) to enter into contracts for government-wide use outside of the restrictions of the Economy Act.

(1) The FSS program (also known as the GSA Schedules Program or the Multiple Award Schedule Program) provides federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying.

(2) The GSA negotiates with vendors for the best prices afforded their preferred customers for the same or similar items or services, and awards thousands of government-

[31] Office of Personnel Management, Training Policy Handbook: Authorities and Guidelines 26, May 11, 2007.

[32] *Army Corps of Engineers - Disposition of Fees Received from Private Sector Participants in Training Courses*, B-271894, 1997 U.S. Comp. Gen. LEXIS 252; *To the Secretary of Commerce*, B-151540, 42 Comp. Gen. 673 (1963).

wide ID/IQ contracts for over 11 million commercial items and services.

(3) Agencies place orders or establish blanket purchasing agreements against these Schedule contracts.

b. The procedures of FAR 17.5 do not apply to orders of $550,000 or less issued against Federal Supply Schedules. FAR 17.500(c)(2).

c. Ordering Guidelines: FAR Subpart 8.4 provides detailed guidance on the use of FSS, including ordering procedures for services requiring or not requiring a statement of work, establishing blanket purchase agreements under an FSS contract, and the limited "competition" requirements for FSS orders (*see also* DFARS 208.404 for requirements for DoD orders against the FSS).

d. DoD Policy: contracting officers must: (1) consider labor rates as well as labor hours and labor mixes when establishing a fair and reasonable price for an order; (2) evaluate proposed prices for both services and products when awarding combination orders; (3) seek discounts and explain why if they were not obtained; and (4) solicit as many contractors as practicable.[33]

3. Committee for Purchase From People Who Are Blind or Severely Disabled. 41 U.S.C. §§ 8501 - 8506 – The Javits-Wagner-O'Day Act (JWOD Act); 41 C.F.R. Part 51; FAR Subpart 8.7.

a. Purpose: Provides authority to orchestrate agencies' purchase of goods and services provided by nonprofit agencies employing people who are blind or severely disabled.

b. Program Oversight: The Committee for Purchase From People Who Are Blind or Severely Disabled (the Committee) oversees the AbilityOne program (formerly known as the JWOD Program).

c. Ordering Requirements:

(1) The JWOD Act requires agencies to purchase supplies or services on the Procurement List maintained by the Committee (this list may be accessed at

[33] Office of the Under Secretary of Defense (AT&L) memorandum, Subject: Use of Federal Supply Schedules and Market Research, dated January 28, 2005 *available at* http://www.acq.osd.mil/dpap/specificpolicy/DPAP%20Memo%20dtd%20Jan%2028%202005.pdf. See also, Office of the Under Secretary of Defense (AT&L) memorandum, Subject: Proper Use of Federal Supply Schedule Contracts – A Reminder, dated July 31, 2015 *available at* https://www.acq.osd.mil/dpap/policy/policyvault/USA004263-15-DPAP.pdf

http://www.abilityone.gov), at prices established by the Committee, from AbilityOne nonprofit agencies if they are available within the period required.

(2) These supplies or services may be purchased from commercial sources only if specifically authorized by the applicable central nonprofit agency or the Committee.

4. Federal Prison Industries, Inc. (FPI or UNICOR). 18 U.S.C. §§ 4121-4128; FAR Subpart 8.6.

a. Originally required federal departments and agencies to purchase products of FPI that met requirements and were available at market price or less, unless FPI granted a waiver for purchase of the supplies from another source. 10 U.S.C. § 2410n.[34]

b. Current Requirements:

(1) The law has changed in recent years, minimizing the "mandatory source" nature of FPI.[35] Under FAR 8.601(e), agencies are encouraged to purchase supplies and services to the maximum extent practicable.

(2) When acquiring an item for which FPI has a significant market share DoD must use competitive procedures or fair opportunity procedures under the FAR to procure the product.[36] (DFARS 208.602-70).

(3) If FPI does not have a significant market share, comply with procedures under FAR 8.602.

(a) Before purchasing products from FPI, agencies must conduct market research to determine whether the FPI item is comparable to supplies available from the private sector in terms of price, quality, and time of delivery. This is a unilateral

[34] FPI products are listed in the FPI Schedule, at http://www.unicor.gov. FPI also offers services, though agencies have never been required to procure services from FPI.

[35] National Defense Authorization Act for FY2002, Pub. L. No. 107-107; Bob Stump National Defense Authorization Act for FY2003, Pub. L. No. 107-314; Consolidated Appropriations Act of 2004, Pub. L. No. 108-199.

[36] Significant market share is defined as "FPI share of the Department of Defense market is greater than five percent." See Appendix E, Office of the Under Secretary of Defense (AT&L) Policy Memorandum, Subject: Competition Requirements for Purchases from Federal Prison Industries, dated 28 March 2008.

determination of the contracting officer that is not subject to review by FPI. FAR 8.602.

(b) If the FPI item is determined not to be comparable, then agencies should acquire the items using normal contracting (i.e., competitive) procedures, and no waiver from FPI is required.

(c) If the FPI item is comparable, then the agency must obtain a waiver to purchase the item from other sources.:

5. The Clinger-Cohen Act of 1996. 40 U.S.C. § 11302.

a. Purpose: Requires the Director, Office of Management and Budget (OMB) to improve the way the federal government acquires and manages information technology by designating one or more heads of executive agencies as executive agent for Government-wide acquisitions of information technology.

(1) Government-Wide Acquisition Contracts (GWACs) are multiple award task order or delivery order contracts used by other agencies to procure information technology products and services outside of the Economy Act. (FAR 2.101).

(2) To use GWACs, agencies may either obtain a delegation of authority from the GWAC Center or work through a procurement support operation such as GSA's Office of Assisted Acquisition Services.

b. Presently, three agencies serve as executive agents to award and administer GWACs pursuant to OMB designation: GSA, NASA, and the National Institutes of Health. These agencies operate the GWACs as follows:

Government-wide Acquisition Contracts (GWACs)

Managing Agency	Vehicle	Available Information Technology Products and Services	Agency website address for more information
3. GSA	Alliant	Provides flexible access to customized IT solutions from a large, diverse pool of industry partners.	www.gsa.gov/gwacs
4. GSA	Alliant Small Business	Provides flexible access to customized IT solutions from a large, diverse pool of small business industry partners.	www.gsa.gov/gwacs

5. GSA	VETS 2 (SDVOSB)	This GWAC will be a service-disabled, veteran-owned small business (SDVOSB) set-aside that provides access to customized IT solutions from a diverse pool of industry partners.	www.gsa.gov/vets2
6. GSA	Alliant 2 (A2) & Alliant 2 Small Business (A2SB)	These GWACs are GSA's the next generation vehicles for comprehensive information technology (IT) solutions through customizable hardware, software, and services solutions purchased as a total package.	www.gsa.gov/gwacs
8. GSA	STARS II	Services from 8(a) disadvantaged small businesses	www.gsa.gov/gwacs
10. HHS- NIH	Chief Information Officer Solutions & Partners 3 (CIO-SP3)	Cutting-edge technology, streamlined acquisition and fast provisioning.	https://nitaac.nih.gov/services/cio-sp3
11. HHS- NIH	Chief Information Officer Solutions & Partners 3 Small Business (CIO-SP3 Small Business)	Similar to CIO-SP3, but offering direct access to multiple small businesses operating in five socio-economic categories: Small Business, (8(a), Service Disabled Veteran Owned, HubZone, and Woman Owned).	https://nitaac.nih.gov/services/cio-sp3-small-business
12. HHS- NIH	Chief Information Officer-Commodities and Solutions (CIO-CS)	IT commodity products and commodity-enabling solutions, on-site or in the cloud.	https://nitaac.nih.gov/services/cio-cs
13. NASA	Solutions for Enterprise-Wide Procurement V(SEWP)	Information Technology products and services.	https://www.sewp.nasa.gov/

6. Franchise Funds. The Government Management Reform Act of 1994, Pub. L. No. 103-356, Title IV, § 403, 103 Stat. 3413 (Oct. 13, 1994).

a. Purpose: Authorized the OMB Director to establish franchise fund pilot programs to provide common administrative support services on a competitive and fee basis.

(1) OMB designated pilots at Department of Interior, Department of Treasury, Department of Commerce, Environmental Protection Agency, Veterans Affairs, and Department of Health and Human Services.

b. Operating Details:

(1) Franchise funds are revolving, self-supporting businesslike enterprises that provide a variety of common administrative services, such as payroll processing, information technology support, employee assistance programs, and contracting services.

(2) To cover their costs, the franchise funds charge fees for services. Unlike other revolving funds, the laws authorizing each franchise fund allow them to charge for a reasonable operating reserve and to retain up to 4 percent of total annual income for acquisition of capital equipment and financial management improvements.

c. Recent Change: although these pilots were to expire at the end of fiscal year 1999, they have been extended several times.

(1) Recently, the termination provision at section 403(f) was amended so as to be limited to the DHS Working Capital Fund. (Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Title VII, § 730, 121 Stat. 1844 (Dec. 26, 2007)).

(2) Because the termination provision no longer applies to the other franchise fund pilot programs, the others are now apparently permanent.

(3) OMB recently released guidance on the use of these funds with efforts to transform the delivery these types of services into a shared services model.[37] This transformation is ongoing, and as a result, OMB will have the latest guidance on how agencies can best utilize these shared services. The current iteration of this effort is the Quality Service Management Offices (QSMOs) model. More information can be found at: https://ussm.gsa.gov/qsmo/.

d. NOTE: while the deobligation requirements of the Economy Act do not apply, various audits have identified contracting and fiscal abuses with DoD's use of franchise funds.[38] Accordingly, the deobligation policies described in section IV.B supra, would apply here as well.

V. DOD POLICY ON USE OF NON-DOD CONTRACTS.[39]

[37] Centralized Mission Support Capabilities for the Federal Government, OMB M-19-16 dated April 26, 2019. Available at: https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-16.pdf

[38] *See, e.g.*, GOVERNMENT ACCOUNTABILITY OFFICE, INTERAGENCY CONTRACTING: FRANCHISE FUNDS PROVIDE CONVENIENCE, BUT VALUE TO DOD IS NOT DEMONSTRATED, GAO-05-456 (July 2005); *Expired Funds and Interagency Agreements between GovWorks and the Department of Defense*, B-308944, 2007 Comp. Gen. Proc. Dec. ¶ 157.

[39] Common policy applicable for Economy Act and non-Economy Act transactions.

A. General Policy: "use of non-DoD contracts and the services of assisting agencies to meet DoD requirements, when it is done properly, is in the best interest of the Department, and necessary to meet our needs."[40]

B. Requirements For Use of Non-DoD Contracts Over the Simplified Acquisition Threshold.[41]

1. The policies of the Military Departments require certain written determinations or certifications prior to using a non-DoD contract for goods or services over $150,000 (under the Economy Act or under any non-Economy Act authority, to include orders against GSA's FSS).

2. The officials with authority to make these determinations/certifications are designated by agency policy (e.g., Army policy requires that these written certifications be executed by the head of the requiring activity (O-6/GS-15 level or higher)).

3. This requirement is separate and distinct from the D&F required for Economy Act transactions, but may be combined with the D&F for approval by an official with authority to make all determinations and issue all approvals.

4. While there are differences between Service Components, most require the following findings:

a. The order is in the Service Component's best interest considering the factors of ability to satisfy customer requirements, delivery schedule, availability of a suitable DoD contract vehicle, cost effectiveness, contract administration (including ability to provide contract oversight), socioeconomic opportunities, and any other applicable considerations;

b. The supplies or services to be provided are within the scope of the non-DoD contract;

c. The proposed funding is appropriate for the procurement and is being used in a manner consistent with any fiscal limitations; and

d. The servicing agency has been informed of applicable DoD-unique terms or requirements that must be incorporated into the contract

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[40] *See e.g.*, Office of the Under Secretary of Defense (AT&L) memorandum, Subject: Interagency Acquisition, dated January 18, 2008 *available at* http://www.acq.osd.mil/dpap/policy/policyvault/2007-0203-dpap.pdf.

[41] *See e.g.*, Office of the Secretary of Defense memorandum, Subject: Proper Use of Non-DoD Contracts, dated October 29, 2004 *available at* http://www.acq.osd.mil/dpap/specificpolicy/attachments/2005-0924-DPAP.pdf .

or order to ensure compliance with applicable statutes, regulations, and directives.

5. Several of the Army's unique requirements are as follows:

a. For all non-DoD orders over the SAT, the required written certification must be prepared with the assistance (and written coordination) of the Army contracting officer and the fund certifying official.

b. For direct acquisitions of services, the requiring activity must also obtain written concurrence from the non-DoD contracting officer at the servicing agency that the services are within the scope of the contract (unless the Army contracting office has access to the non-DoD contract document), and the Army contracting officer must obtain written coordination from supporting legal counsel.

c. For assisted acquisitions of both supplies and services:

(1) The requiring activity must first consult with the Army contracting office, which will advise regarding the various DoD contractual options available to obtain the goods or services, and which will provide any unique terms, conditions and requirements that must be incorporated into the resultant non-DoD order to comply with DoD rules.

(2) The fund authorizing official must annotate the MIPR with the following statement: "This requirement has been processed in accordance with Section 854 of the Ronald W. Reagan National Defense Authorization Act for Fiscal year 2005 (Public Law 108-375) and the Army Policy memorandum on Proper Use of Non-Department of Defense contracts, dated July 12, 2005. The order is properly funded (correct appropriation and year), and it is in compliance with Army procedures for placement of orders on the Army's behalf by a non-DoD organization."

(3) The head of the requiring activity shall obtain written coordination from supporting legal counsel prior to sending the order to the servicing agency.

(4) The requiring activity must also provide a copy of the certification to the non-DoD contracting officer.

C. Interagency Agreements. Prior to the issuance of a solicitation arising from an assisted acquisition, the servicing agency and the requesting agency shall both

sign a written interagency agreement that establishes the general terms and conditions governing the relationship between the parties.[42] (FAR 17.502-1(b)).

1. An interagency agreement should cover roles and responsibilities related to acquisition planning, contract execution, and contract administration. It should also cover procedures for resolution of disputes that may arise.[43]

2. DoD agencies are specifically required to use an Agreement for all assisted IAs regardless of dollar value. Additionally, DoD agencies must include specific enumerated elements or utilize a model agreement per Office of Federal Procurement Policy Memo.[44]

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[42] Since the requesting agency administers an order in a direct acquisition themselves, there is generally no need for a written interagency agreement outlining roles and responsibilities as there is in an assisted acquisition. *See* FAR 17.502-1(b)(2).

[43] FAR 17.503(c); *see also* Office of Federal Procurement Policy Memorandum, Subject: Improving the Management and Use of Interagency Acquisitions, dated June 6, 2008, *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/procurement/iac_revised.pdf.

[44] *See* Office of the Under Secretary of Defense (AT&L) Memorandum, Subject: Meeting Department of Defense Requirements Through Interagency Acquisition, dated October 31, 2008 *available at* http://www.acq.osd.mil/dpap/policy/policyvault/USA000871-08-DPAP.pdf . This memo does not eliminate requirements under FAR 17.5, which take precedence in any conflict with OFPP guidance.

CHAPTER 12

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CHAPTER 12

CONTRACT PRICING

I. INTRODUCTION

A. Objectives

Following this block of instruction, the student should:

1. Understand the purpose of the Truth in Negotiations Act (TINA) and how it is implemented, including regulatory guidance and case law interpreting that guidance.

2. Understand the various methods used by the Government to establish price reasonableness of a contract award, to include the different types of contractor pricing information available to determine price reasonableness, and when to require its submission.

3. Understand what defective pricing is and the remedies available to the Government.

B. References

1. The Truth in Negotiations Act (TINA), 10 U.S.C. § 2306a, and also found at 41 U.S.C. Chapter 35 – Truthful Cost or Pricing Data [formerly codified in Title 41 at §§ 254b(a) – 254b(h)]. The language of 41 U.S.C. Chapter 35 essentially mirrors 10 U.S.C. § 2306a, with minor modifications.

2. Federal Acquisition Regulation (FAR) Subpart 15.4—Contract Pricing.

3. Department of Defense FAR Supplement (DFARS) Subpart 215.4, Contract Pricing; DFARS Procedures, Guidance, and Information (PGI) 215.4, Contract Pricing.

4. Army Federal Acquisition Regulation Supplement (AFARS) Subpart 5115.4, Contract Pricing.

5. DoD Contract Pricing Reference Guides, a five volume set of Contract Pricing Reference Guides to guide pricing and negotiation personnel. Maintained by the Undersecretary of Defense for Acquisition, Technology, and Logistics, Office of the Deputy Director of Defense Procurement and Acquisition Policy for Cost, Pricing, and Finance; and developed jointly by the Federal Acquisition Institute and the Air Force Institute of Technology, located at:

www.acq.osd.mil/dpap/cpic/cp/contract_pricing_reference_guides.html. These guides are not directive and should be considered informational only. FAR 15.404-1(a)(7).

6. Defense Contract Audit Agency (DCAA) Manual 7640.1, provides technical audit guidance and techniques, audit standards, and technical policies and procedures followed by DCAA personnel in the execution of a contract audit. Its material is instructive for some aspects of contract pricing. It is also referred to as the "CAM." It is available at: http://www.dcaa.mil/cam.html.

II. DEFINITIONS

A. "**Cost or Pricing Data**" is a legal term of art.[1] It is all facts that prudent buyers and sellers would reasonably expect to affect price negotiations significantly, as of the date of price agreement or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement upon price. It is also defined in the FAR's definitions section, 2.101. Cost or pricing data are:

1. More than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred.

2. Factual – not judgmental – and verifiable. While cost or pricing data do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. See also DCAA Manual 7640.1 ¶ 14-104.4.

B. "**Certified Cost or Pricing Data**" as defined at FAR 2.101 means "cost or pricing data" required to be submitted in accordance with FAR 15.403-4 and 15.403-5 and have been certified, or is required to be certified, in accordance with 15.406-2. This certification states that, to the best of the person's knowledge and belief, the cost or pricing data are accurate, complete, and current as of a date certain before contract award. Cost or pricing data are required to be certified in certain procurements (10 U.S.C. 2306a and 41 U.S.C. Chapter 35).

1. When TINA requires "cost or pricing data," it is always required to be certified. The certificate of current cost or pricing data is found at FAR 15.406-2.

[1] The FAR definitions for cost or pricing data, certified cost or pricing data, and data other than certified cost and pricing data were redefined in August 2010 in order to clarify the existing authority. Court cases prior to this time may refer to only two categories: "Cost or Pricing Data" and "Information Other Than Cost or Pricing Data." See FAC 2005-45; FAR Case 2005-036; Fed. Reg. Vol 75, No. 167, 53135 – 53153.

2. When certified cost or pricing data is required, the contracting officer will always do a cost analysis, and sometimes will also perform a price analysis to determine if the price is fair and reasonable based on market research or comparison of proposed prices received in response to a solicitation.

C. "**Data Other Than Certified Cost or Pricing Data**" or "DOTCCPD" means pricing data, cost data, and judgmental information necessary for the contracting officer to determine a fair and reasonable price or to determine cost realism. Such data may include the identical types of data as certified cost or pricing data, consistent with Table 15-2 of FAR 15.408, but without the certification. The data may also include, for example, sales data and any information reasonably required to explain the offeror's estimation process, including, but not limited to: (1) the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data; and (2) the nature and amount of any contingencies included in the proposed prices. See FAR 2.101

1. This type of data is never required to be certified.

2. When adequate price competition exists, generally no additional data is necessary. The contracting officer will always do a price analysis for commercial item procurements and, in some situations, may also do a limited cost analysis to determine if the price is fair and reasonable.

3. When this type of data is requested, if the Contractor fails to provide the data, it is generally ineligible for award. FAR 15.403-3(a)(4).

D. Note that this data can include information that has been excluded from "cost and pricing data" by definition or by court ruling. So, for example, judgmental information may be requested as DOTCCPD.

E. "**Price**" means cost plus any fee or profit applicable to the contract type. FAR 15.401.

F. "**Pricing**" is the process of establishing a reasonable amount or amounts to be paid for supplies or services. FAR 2.101

III. GENERAL PRICING CONCEPTS

A. Concept Number One – Purchase supplies and services at fair and reasonable prices.

1. It is Government policy to purchase supplies and services at fair and reasonable prices.

2. Contracting officers are responsible to ensure the Government purchases supplies and services from responsible sources at fair and reasonable prices. **The contracting officer is responsible for evaluating the reasonableness of offered prices.** FAR 15.402(a) & 15.404-1(a)(1); see also PGI 215.404-1 for more detailed procedures for obtaining data needed to determine fair and reasonable prices.

   a. The contracting officer's primary concern is the overall price the Government will actually pay. The contracting officer's objective is to negotiate a contract of a type and with a price providing the contractor the greatest incentive for efficient and economical performance. FAR 15.405(b).

   b. The negotiation of a contract type and a price are related and should be considered together with the issues of risk and uncertainty to the contractor and the Government. Therefore, the contracting officer should not become preoccupied with any single element and should balance the contract type, cost, and profit or fee negotiated to achieve a total result – a price that is fair and reasonable to both the Government and the contractor. FAR 15.405(b).

3. In certain situations, **TINA requires contractors to make disclosures of information** to the contracting officer so the Government can determine whether it is getting a fair and reasonable price.

B. Concept Number Two. Obtain necessary information in the least burdensome manner possible, given the circumstances of each procurement.

1. **In establishing the reasonableness of offered prices, the contracting officer must NOT obtain more information than is necessary**. Contracting officers must not require unnecessarily the submission of cost or pricing data. FAR 15.402(a)(3).

2. Unnecessary requirements for cost or pricing data increases proposal preparation costs, extends acquisition lead-time, and wastes both contractor and Government resources. FAR 15.402(a)(3).

3. Order of Precedence. To the extent cost or pricing data is not required by TINA, the contracting officer must generally use the following order of preference when requesting information to determine price reasonableness. FAR 15.402(a)(2)(i) & FAR 15.402(a)(2)(ii):

a. First, request no additional information if the agreed upon price is based upon **adequate price competition**, except as provided by 15.403-3(b). FAR 15.402(a)(2)(i).

(1) If an unusual circumstance leads the contracting officer to conclude that additional information is required to determine price reasonableness, then:

(2) Additional information shall be obtained from sources other than the offeror(s), to the maximum extent practicable. FAR 15.403-3(b).

(3) The contracting officer may request information to determine the cost realism of competing offers or to evaluate competing approaches. FAR 15.403-3(b).

b. Second, if adequate price competition among competing offerors is not present, request additional price information from sources other than the offeror(s), to the maximum extent practicable. Other steps for obtaining comparison prices are in FAR 15.404-1.

(1) This can mean requesting information related to prices, relying first upon:

(a) Information available within the Government, such as independent Government cost estimates;

(b) Information obtained from sources other than the offeror, and if necessary;

(c) Information related to prices includes established catalog or market prices or previous contract prices;

(d) Limited information obtained from the offeror. When there is NOT adequate price competition and prices are NOT set by law or regulation, the contracting officer may find it is necessary to obtain information from the offeror to evaluate price reasonableness. In that case, the contracting officer shall require, at a minimum, appropriate information on the prices at which the same or similar items have been sold previously.

c. Third, request other than certified cost or pricing data needed to determine fair and reasonable price. FAR 15.402(a)(2)(ii)(B).

d. Fourth, request certified cost or pricing data, if authorized. Under TINA's threshold, the contracting officer should use every means available to determine a fair and reasonable price before requesting certified cost or pricing data. FAR 15.402(a)(3). See also FAR 15.403-1(a) & (b) for other limitations on obtaining certified data.

C. Concept Number Three. The objective of proposal analysis is to ensure that the final agreed-to price is fair and reasonable. FAR 15.404-1(a).

1. In general, price each contract separately and independently.

a. To ensure a fair and reasonable price, the contracting officer may use analytical techniques and procedures singly or in combination with others. The complexity and circumstances of each acquisition should determine the level of detail of the analysis required. The contracting officer may request the advice and assistance of other experts to ensure an appropriate analysis is performed. FAR 15.404-1(a)(1) & FAR 15.404-1(a)(5).

b. Do not use proposed price reductions under other contracts as an evaluation factor. FAR 15.402(b)(1).

c. Do not consider losses or profits realized or anticipated under other contracts. FAR 15.402(b)(2).

d. Do not include in a contract price any amount for a specified contingency to the extent that the contract provides for a price adjustment based upon the occurrence of the contingency. FAR 15.402(c).

2. "**Price Analysis**" is the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit. FAR 15.404-1(b)(1). A price analysis is required on procurements where a contractor is not required to submit certified cost or pricing data. FAR 15.404-1(a)(2). When a contractor submits certified cost or pricing data, a "cost analysis" is required and a price analysis should be used to verify that the overall price is fair and reasonable. FAR 15.404.1(a)(3).

a. Non-exclusive list of price analysis techniques. There are various price analysis techniques and procedures used by the contracting officer to examine and evaluate a proposed price to determine if it is fair and reasonable.

(1) Comparison of proposed prices received in response to a solicitation. This is used whenever there is adequate price competition. This is a preferred technique. FAR15.404-1(b)(2)(i); FAR 15.404-1(b)(3).

(2) Comparison of the proposed prices to historical prices paid, whether by the Government or other than the Government, for the same or similar items. This is a preferred technique. FAR 15.404-1(b)(2)(ii); FAR 15.404-1(b)(3).

(3) Application of parametric estimating methods or rough yardsticks to highlight significant inconsistencies that warrant additional pricing inquiry. Example: dollars per pound or per horsepower, or other units. FAR 15.404-1(b)(2)(iii).

(4) Comparison with competitive published price lists, published market prices of commodities, similar indexes, and discount or rebate arrangements. FAR 15.404-1(b)(2)(iv).

(5) Comparison of proposed prices with independent Government cost estimates. FAR 15.404-1(b)(2)(v).

(a) The FAR does not define independent Government cost estimate (IGCE), nor does it provide what constitutes an independent Government estimate (IGE), but both terms are used within the FAR. Part 15 is the only FAR part to use IGCE, with other areas of the FAR using the term IGE.

(b) Normally, this estimate is completed prior to release of the solicitation to the public for competition, or prior to any offer to purchase being made. Often, the contracting officer's representative (COR) or the contracting officer's technical representative (COTR) prepares it with assistance from the supporting contracting office.

(c) FAR Sections 36.203 and 36.605, pertaining to architect-engineering work and construction, are the only sections of the FAR to require that an IGE be performed. Some Federal agencies require an IGE to be performed for procurements exceeding amounts set for the simplified acquisition threshold.

See The Defense COR Handbook, Appendix D, at http://www.acq.osd.mil/dpap/ccap/cc/corhb/ and the Assistant Secretary of the Army - (ALT) Memorandum for PARCs and Policy Chiefs, Number 12-26, dated 13 April 2012.

(d) Regarding simplified acquisition procurements, FAR 13.106-3(a)(2)(vi) provides that a contracting officer may use comparison to an IGE as the basis for a statement of price reasonableness, if only one quotation or offer is received.

(6) Comparison of proposed prices with prices obtained through market research for the same or similar items. FAR 15.404-1(b)(2)(vi).

(7) Analysis of DOTCCPD provided by the offeror. FAR 15.404-1(b)(2)(vii).

b. **"Value Analysis"** can give insight into the relative worth of a product. It can be used in conjunction with the seven price analysis techniques listed above. FAR 15.404-1(b)(4). It is a technique created by Lawrence D. Miles in the 1940's and is based upon the application of a function analysis to the component parts of a product to find ways to reduce component costs.

3. **"Cost analysis**" is an analysis by the contracting officer that reviews and evaluates separate cost elements and profit or fee within a proposal to determine a fair and reasonable price or to determine cost realism (explained below). FAR 15.404-1(c). Cost analysis is required when a contractor must provide certified cost and pricing data. FAR 15.404-1(a)(3). Its use is optional when DOTCCPD is instead being reviewed. FAR 15.404-1(a)(4). It requires the application of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency. FAR 15.404-1(c).

a. Various cost analysis techniques and procedures provided at FAR 15.404-1(c)(2):

(1) Verification of cost or pricing data and evaluation of cost elements, including –

(a) The necessity for, and reasonableness of, proposed costs, including allowances for contingencies;

(b) Projection of the offeror's cost trends, on the basis of current and historical cost or pricing data;

(c) Reasonableness of estimates generated by appropriately calibrated and validated parametric models or cost-estimating relationships; and

(d) Application of audited or negotiated indirect cost rates, labor rates, and cost of money or other factors.

(2) Evaluation of the effect of the offeror's current practices upon future costs to ensure the effects of inefficient or uneconomical past practices are not projected into the future. This should include trend analysis of basic labor and material costs when pricing production of recently developed complex equipment. FAR 15.404-1(c)(2)(ii).

(3) Comparison of costs proposed by the offeror for individual cost elements with –

(a) Actual costs previously incurred by the same offeror;

(b) Previous cost estimates from the offeror or from other offerors for the same or similar items;

(c) Other cost estimates received in response to the Government's request;

(d) Independent Government cost estimates (IGCE) by technical personnel; and

(e) Forecasts of planned expenditures. FAR 15.404-1(c)(2)(iii).

(4) Verification that the cost submissions are in accordance with contract cost principles, FAR Part 31, and Cost Accounting Standards (CAS), where applicable. FAR 15.404-1(c)(2)(iv); 48 CFR Chapter 99.

(5) Review of whether cost or pricing data necessary to make the proposal suitable for negotiation has not been submitted or identified in writing. FAR 15.404-1(c)(2)(v).

(6) To evaluate subcontractor costs, analysis of the results of any "Make-Or-Buy" program reviews, in evaluating subcontract costs. A Make-Or-Buy program review looks at whether a contractor should make a component or subcontract the work. It is generally used only on contracts over $13.5 million that also require cost or pricing data. FAR 15.404-1(c)(2)(vi); FAR 15.407-2.

(7) "Should-Cost" Reviews. FAR 15.407-4. Should-Cost Reviews are a specialized form of cost analysis that evaluate the economy and efficiency of the contractor's existing work force, methods, materials, equipment, real property, operating systems, and management. They differ from traditional evaluation methods because they do not assume a contractor's historical costs reflect efficient and economical operation. There are two types of should-cost reviews:

(a) Program Should-Cost Review. This review is used to evaluate significant elements of direct costs, such as labor and material. It also evaluates indirect costs that are usually associated with the production of major systems. A separate audit report is also required for this review. See FAR 15.407-4(b).

(b) Overhead Should-Cost Review. This review is used to evaluate indirect costs, such as fringe benefits, shipping and receiving, real property and equipment, depreciation, plant maintenance and security, taxes, and general and administrative expenses. A separate audit report is also required for this review. See FAR 15.407-4(c).

4. **"Cost realism analysis**" is mandatory on all cost-reimbursement contracts. It is optional on fixed price incentive contracts and some other competitive contracts. The objective is to determine the probable cost of performance for each offeror in order to ensure the final price is fair and reasonable. FAR 15.404-1(d).

a. Definition. "Cost realism" is a proposal analysis technique used by the contracting officer to independently review and evaluate specific elements of each offeror's proposed cost estimate to determine whether the estimated proposed cost elements are:

(1) Realistic for the work to be performed;

(2) Reflective of a clear understanding of the requirements; and

(3) Consistent with the unique methods of performance and materials described in the technical proposal. FAR 2.101 and FAR 15.404-1(d).

b. Probable Cost of Performance. The probable cost may differ from the proposed cost and should reflect the Government's best estimate of the cost of any contract that is most likely to result from the offeror's proposal. The probable cost is used for purposes of evaluation to determine the best value. FAR 15.404-1(d)(2)(i).

c. A cost realism analysis may also be used on:

(1) Competitive fixed-price incentive contracts

(2) In exceptional cases, on other competitive fixed price type contracts when:

(a) New requirements may not be fully understood by competing offerors;

(b) There are quality concerns; or

(c) Past experience indicates that contractors' proposed costs have resulted in quality or service shortfalls. FAR 15.404-1(d)(3).

d. Results of a cost realism analysis may be used in performance risk assessments and responsibility determinations. However, the offered prices shall not be adjusted as a result of the analysis and the proposals shall be evaluated using the criteria in the solicitation. FAR 15.404-1(d)(3).

e. Cost realism generally addresses whether a cost estimate is too low, while price reasonableness generally addresses whether a price is too high. First Enterprise v. United States, 61 Fed. Cl. 109, 123 (2004).

5. "**Technical Analysis**" is a proposal analysis technique used by the contracting officer when personnel with specialized knowledge, skills, experience or capability in engineering, science, or management are needed to assist the contracting officer in determining the need for and

reasonableness of the resources proposed for use by a contractor, assuming reasonable economy and efficiency. FAR 15.404-1(e)(1).

a. At a minimum, the analysis includes:

(1) The types and quantities of material proposed;

(2) The need for the types and quantities of labor hours the contractor is proposing to use, and the labor mix; and

(3) Any other data that may be pertinent to an assessment of the offeror's ability to accomplish the technical requirements or to the cost or price analysis of the service or product being proposed should also be included in the analysis. FAR 15.404-1(e)(2).

b. The contracting officer should request technical price evaluative assistance in evaluating items that are "similar to" items to be purchased, or commercial items that are "of a type" as those to be procured, or requiring minor modifications from that of proposed deliverables. FAR 15.404-1(e)(3).

IV. TRUTHFUL COST OR PRICING DATA --- PREVIOUSLY KNOWN AS THE TRUTH IN NEGOTIATIONS ACT (TINA) - INTRODUCTION

A. Evolution

1. May 1959 – The Government Accountability Office (GAO) reported a large number of overpricing cases.

2. October 1959 – DoD revised the Armed Services Procurement Regulation (ASPR), a predecessor to the FAR, to require contractors to provide a Certificate of Current Cost or Pricing Data during contract negotiations. In 1961, DoD added a price reduction clause to the ASPR.

3. 1962 – Congress passed TINA. Pub. L. No. 87-653, 76 Stat. 528 (1962) (formerly codified at 10 U.S.C. § 2306f). TINA applied to DoD, the Coast Guard, and NASA. Public Law 89-369 extended TINA's reach to all Executive Branch Departments and Agencies.

4. Significant amendments to TINA occurred in 1986 (Pub. L. No. 99-661, 100 Stat. 3946), 1994 (the Federal Acquisition Streamlining Act of 1994

(FASA)), and 1996 (the Clinger-Cohen Act of 1996, a.k.a. the Federal Acquisition Reform Act of 1996 (FARA)).

5. **TINA's named changed to Truthful Cost or Pricing Data in 2013 and is currently codified at 10 U.S.C. § 2306a and 41 U.S.C. Chapter 35. This was merely a name change, with no substantive changes. Despite the new name, the Act is still commonly referred to in practice as "TINA." For purposes of the deskbook, we will refer to it as TINA. It is covered in FAR 15.403-4**.

B. Purpose

1. TINA requires contractors, sub-contractors and prospective contractors to provide the Government with information on the costs ("cost or pricing data") of a procurement in certain limited circumstances. If the information provided is not accurate, complete, and current, the Government has the right to certain remedies against the contractor.

2. TINA's purpose is to level the negotiation playing field by ensuring that Government negotiators have access to the same pricing information as the contractor's negotiators, to establish a fair and reasonable contract price. The purpose of TINA is <u>not</u> to detect fraud. However, this result is often an ancillary effect.

3. "The objective of these provisions is to require truth in negotiating. Although not all elements of costs are ascertainable at the time a contract is entered into, those costs that can be known should be furnished currently, accurately, and completely. If the costs that can be determined are not furnished accurately, completely, and as currently as is practicable, the Government should have the right to revise the price downward to compensate for the erroneous, incomplete, or out-of-date information." S. REP. NO. 1884, at 3 (1962), <u>reprinted in</u> 1962 U.S.C.C.A.N. 2476, 2478.

4. "In enacting the Truth in Negotiations Act, P.L. 87-653, 10 U.S.C. §2306(f), Congress recognized that in a noncompetitive atmosphere, contractors had little motivation to base their prices upon the lowest possible costs." <u>Hardie-Tynes Mfg. Co.</u>, ASBCA No. 20367, 76-1 B.C.A. para. 11,827, at 56,475, 56,480. TINA was designed to prevent and avoid "situations in which inaccurate, incomplete, or noncurrent information is known by the contractor, but withheld from the Government to its detriment." <u>Sylvania Elec. Prods., Inc. v. United States</u>, 479 F.2d 1342, 1346 (Ct. Cl. 1973). Contractors must certify '"to the best of their knowledge and belief, that the 'cost or pricing data [they] submitted [to the Government] was accurate, complete and current.'" <u>Universal Restoration, Inc. v. United States</u>, 798 F.2d 1400, 1402 (Fed. Cir. 1986)

(brackets in original) (citing TINA). "When a contractor has breached its duty to disclose such data . . . the Government is entitled to a downward price adjustment in the amount of the overstated costs." Unisys Corp. v. United States, 888 F.2d 841, 844-845 (1989) (citing M-R-S Mfg. Co. v. United States, 492 F.2d 835 (Ct. Cl. 1974)).

5. TINA sets a threshold, as well as other limits, for obtaining cost and pricing data. The threshold is adjusted for inflation and rounded to the nearest $50,000 every five years. The past threshold was $750,000 for prime contracts awarded on or after October 1, 2015 and $700,000 for prime contracts awarded on or after October 1, 2010.[2] However, Section 811 of the 2018 NDAA increased the TINA threshold to $2 million for all contracts entered into after July 1, 2018. DoD directed the new thresholds to be effective July 1, 2018.

V. TINA - REQUIREMENTS FOR COST OR PRICING DATA

A. Disclosure Requirements. Contractors submit cost or pricing data only for large-dollar, negotiated contract actions. Disclosure can be either mandatory or non-mandatory.

1. **Mandatory disclosure.** 10 U.S.C. § 2306a(a)(1); 41 U.S.C. § 3502(a); FAR 15.403-4(a)(1). Unless an exception applies, the contracting officer must require the contractor or applicable subcontractor to submit certified cost or pricing data before accomplishing any of the following actions:

a. Award of a negotiated contract expected to exceed $2M (except undefinitized actions such as a letter contracts);

b. Award of a subcontract at any tier expected to exceed $2M if the Government required the prime contractor and each higher-tier subcontractor to submit certified cost or pricing data;[3]

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[2] The formula is "[e]ffective on October 1 of each year that is divisible by 5, each amount set forth in paragraph (1) shall be adjusted to the amount that is equal to the fiscal year 1994 constant dollar value of the amount set forth. Any amount, as so adjusted, that is not evenly divisible by $50,000 shall be rounded to the nearest multiple of $50,000. In the case of an amount that is evenly divisible by $25,000 but not evenly divisible by $50,000, the amount shall be rounded to the next higher multiple of $50,000." Section 1201 of the Federal Acquisition Streamline Act of 1994 (FASA), P.L. 130-355, 108 Stat. 3243; see also 80 Fed. Reg. 38,293. The threshold was adjusted effective October 2015 pursuant to the statutory requirement to keep it constant in terms of fiscal year 1994 dollars. See 80 Fed. Reg. 38,293; see also, 10 U.S.C. § 2306a(a)(7) and 41 U.S.C. § 254b(a)(7).

[3] If the head of contracting activity (HCA) has waived the requirement for submission of certified cost or pricing data (in exceptional cases) for the prime contractor or one of its higher-tier subcontractors, the prime contractor or higher-tier subcontractor is considered to have been required to submit cost or pricing data for the purpose of this

c. Modification of:

(1) Any sealed bid or negotiated prime contract involving a price adjustment[4] expected to exceed $2M (regardless of whether cost or pricing data was initially required); or

(2) Subcontract at any tier involving a price adjustment expected to exceed $2M if the Government required the prime contractor and each higher-tier subcontractor to furnish cost or pricing data under the original contract or subcontract.

d. Negotiated final pricing actions such as termination settlements and total final price agreements for fixed-price incentive and redeterminable contracts are considered contract modifications requiring cost or pricing data if:

(1) The total final price agreement for such settlements or agreements exceeds $2M; or

(2) The partial termination settlement plus the estimate to complete the continued portion of the contract exceeds $2M. See also FAR 49.105(c)(15).

2. Nonmandatory

10 U.S.C. § 2306a(c); 41 U.S.C. § 3504(a).

a. Unless prohibited because an exception applies, the head of the contracting activity (HCA) can authorize a contracting officer to obtain cost or pricing data for pricing actions expected to cost between the simplified acquisition threshold and $2M if the HCA finds that it necessary to determine whether the price is fair and reasonable and is factually supported. The HCA's decision must

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rule, although data was not actually submitted by the prime contractor or higher-tier subcontractor due to the waiver. Consequently, a lower-tier subcontractor expected to exceed the $2M threshold must submit cost or pricing data, unless an exception applies or the waiver specifically includes that lower-tier subcontractor. FAR 15.403-1(c)(4).

[4] Price adjustment amounts must include both increases and decreases. For example, a $200,000 modification resulting from a reduction of $1,500,000 and an increase of $1,300,000 is a pricing adjustment exceeding $2M. This requirement does not apply when unrelated and separately priced changes (for which certified cost or pricing data would not otherwise be required) are included in one modification for administrative convenience. FAR 15.403-4(a)(1)(iii).

be documented in writing and is may not be further delegated. FAR 15.403-4(a)(2).

B. Six Exceptions to the Certified Cost or Pricing Data Requirements

1. Simplified Acquisitions. FAR 15.403-1(a). A contracting officer cannot require a contractor to submit certified cost or pricing data for a procurement that is at or below the simplified acquisition threshold (i.e., $250,000).

2. Adequate Price Competition. 10 U.S.C. § 2306a(b)(1)(A)(i); 41 U.S.C. § 3503(a)(1)(A); FAR 15.403-1(b)(1) and (c)(1). A contracting officer cannot require a contractor to submit cost or pricing data if the agreed upon price is based upon adequate price competition.

a. Definition of adequate price competition if <u>two or more offers</u> are received. FAR 15.403-1(c)(1)(i).

(1) Adequate price competition exists if two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement; <u>and</u>

(2) The Government will award the contract to the offeror whose proposal represented the best value (see FAR 2.101), and in which price was a substantial factor in the source selection. FAR 15.403-1(c)(1)(i)(A); <u>and</u>

(3) The contracting officer did not find the successful offeror's price unreasonable.[5] <u>See</u> <u>Serv-Air, Inc.</u>, B-189884, Sept. 25, 1978, 78-2 CPD ¶ 223, <u>aff'd on recons.</u>, Mar. 29, 1979, 79-1 CPD ¶ 212 (holding that cost or pricing data was not required because there was adequate price competition); <u>cf</u>. <u>Litton Sys., Inc., Amecom Div.</u>, ASBCA No. 35914, 96-1 BCA ¶ 28,201 (denying the contractor's motion for summary judgment because a dispute of fact existed regarding whether there was adequate price competition).

b. Requiring a contractor to submit certified cost or pricing data when there is adequate competition may be an abuse of the contracting officer's discretion. <u>See</u> <u>United Technologies Corp., Pratt &</u>

[5] The contracting officer must: (1) support any finding that the successful offeror's price was unreasonable with a statement of facts; and (2) obtain approval at a level above the contracting officer. FAR 15.403-1(c)(1)(i)(B).

Whitney, ASBCA No. 51410, 99-2 BCA ¶ 30,444 (rejecting Air Force's contention that the contracting officer had absolute discretion both to require certified cost or pricing data and to include a price adjustment clause where the price was negotiated based upon adequate price competition).

3. Prices set by law or regulation. FAR 15.403-1(c)(2). Pronouncements in the form of periodic rulings, reviews, or similar actions of a Government body, or embodied in the laws, are sufficient to set a price.

4. Commercial items.

   a. Acquisitions of items meeting the commercial item definition in FAR 2.101 are exempt from the requirement for cost or pricing data. FAR 15.403-1(c)(3).

   b. The Department of Defense must annually report to Congress all commercial item procurements over $19,500,000 that received an exemption from the cost or pricing data requirements. DFARS 215.403-1(c)(3)(B).

5. Modifications to commercial items. When minor modifications to commercial items do not make the item "non-commercial," then:

   a. If funded by an agency other than DoD, NASA, or Coast Guard, no cost or pricing data is required. FAR 15.403-1(c)(3)(iii)(A).

   b. If funded by DoD, NASA, or the Coast Guard, cost or pricing data is only required if the total price of all such modifications under a particular contract action exceed the greater of $2M or five percent of the contract's total price. FAR 15.403-1(c)(3)(iii)(C).

   c. When purchasing **services** that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered and sold competitively in substantial quantities in the commercial marketplace, they may be considered commercial items ONLY if the contracting officer determines in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price of such services. FAR 15.403-1(c)(3)(ii)(A); Section 868, Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2009, Pub. L. 110-417, 14 Oct 2008.

      (1) In order to make this determination, the contracting officer may request that the offeror submit prices paid for the same

or similar commercial items under comparable terms and conditions by both Government and commercial customers; and

(2) If the contracting officer determines that the information described above is not sufficient to determine the reasonableness of price, other relevant information regarding the basis for price or cost, including information on labor costs, material costs and overhead rates may be requested. FAR 15.403-1(c)(3)(ii)(B)&(C).

6. Waivers

a. The HCA, without power of delegation, may waive in writing the requirement for certified cost or pricing data in exceptional cases if the price can be determined to be fair and reasonable without submission of cost or pricing data.[6] FAR 15.403-1(c)(4).

(1) Example: If cost or pricing data were furnished on previous production buys and the contracting officer determines such data are sufficient, when combined with updated information, a waiver may be granted.

b. DoD has additional restrictions on waivers. DFARS 215.403-1(c)(4). The HCA may apply the exceptional circumstance waiver authority only after making a determination that:

(1) The property or services cannot reasonably be obtained under the contract, sub-contract, or modification, without the waiver;

(2) The price can be determined to be fair and reasonable without the submission of certified cost or pricing data; and

(3) There are demonstrated benefits to granting the waiver. See PGI 215.403-1(c)(4)(A) for DoD procedures.

(4) An annual report to Congress is required for all waivers granted under FAR 15.403-1(b)(4), for any commercial item contract, subcontract, or modification expected to have a value of over $19.5 million. See PGI 215.403-1(c)(4)(B).

[6] See Footnote 3, *supra*.

7. Other exceptions

a. Exercise of an option. The exercise of an option at the price established at contract award or initial negotiation does not require submission of certified cost or pricing data. FAR 15.403-2(a).

b. Interim Billings: Proposals used solely for overrun funding or interim billing price adjustments. FAR 15.403-2(b).

c. Defense of NBC attack. Any acquisition of supplies or services that the HCA determines are used to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack, will be treated as a commercial item and will be exempt from certified cost or pricing data. If the contract exceeds $19 million and is awarded upon a sole source basis, then cost or pricing data requirements apply. FAR 12.102(f)(1) and FAR 12.102(f)(2)(ii).

C. Defining Cost or Pricing Data. See FAR Section 2.101, Definitions.

1. Examples of cost or pricing data:

a. Vendor quotations;

b. Nonrecurring costs: Those costs which are generally incurred on a one-time basis and include such costs as plant or equipment relocation, plant rearrangement, special tooling and special test equipment, preproduction engineering, initial spoilage and rework, and specialized work force training. This is different from recurring costs that vary with the quantity being produced, such as labor and materials. Separately defined at FAR 17.103;

c. Information on changes in production methods and in production or purchasing volume;

d. Data supporting projections of business prospects and objectives and related operational costs;

e. Unit-cost trends such as those associated with labor efficiency;

f. Make-or-buy decisions. This term refers to the prime contractor's decisions regarding whether to use subcontracting to ensure the lowest overall cost to the Government. The term "make item" refers to an item or work effort produced or performed by the prime contractor rather than "buying" the item from a subcontractor.

(1) "Make-or-buy program" is separately defined at FAR 2.101 and is separately covered in Subpart 15.4 at FAR 15.407-2;

g. Estimated resources to attain business goals; and

h. Information on management decisions that could have a significant bearing upon costs.

2. Board of Contract Appeals guidance on applicable test for determining cost or pricing data.

a. According to the Armed Services Board of Contract Appeals (ASBCA), the statutory and regulatory definitions "plainly denote" a more expansive interpretation of cost or pricing data than routine corporate policy, practice, and procedures.

b. Is the data insignificant? The test is an **objective,** in effect a **"reasonable person"** test. "What a particular contractor, in a given case, in fact considered or would have considered significant, is not controlling." United Techs. Corp./Pratt & Whitney, ASBCA No. 43645, 94-3 BCA ¶ 27,241. See Plessey Indus., ASBCA No. 16720, 74-1 BCA ¶ 10,603 at 50,278.

c. The determination must be made from the perspective of the date of the certificate of cost or pricing data, not with the benefit of hindsight. Appeals of Lockheed Corporation, ASBCA Nos. 36420, 27495 and 39195, 95-2 BCA ¶27,722 at 27,770.

d. Whether a particular item is cost or pricing data is a factual question. Appeal of PAE International, ASBCA 20595, 76-2 BCA 12044 (1976).

3. Cost or pricing data must be **factual** versus judgmental.

a. Cost or pricing data are factual, not judgmental, and are verifiable. While they do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data. They are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. FAR 2.101; Appeal of PAE International, ASBCA 20595, 76-2 BCA 12044 (1976).

b. Factual information is discrete, quantifiable information that can be verified and audited. Estimates and judgments, by their very nature, cannot be verified. Litton Sys., Inc., Amecom Div., ASBCA No. 36509, 92-2 BCA ¶ 24,842.

c. These distinctions are often difficult to make. Information that mixes fact and judgment may require disclosure because of the underlying factual information. See, e.g., Texas Instruments, Inc., ASBCA No. 23678, 87-3 BCA ¶ 20,195; cf. Litton Sys., Inc., Amecom Div., ASBCA No. 36509, 92-2 BCA ¶ 24,842 (holding that reports regarding estimated labor hours were not required to be disclosed because they were "pure judgment").

d. Cost or pricing data may in some instance include information that would be considered judgmental if the facts and data are so intertwined with judgments that the judgments must be disclosed to make the facts or data meaningful. A decision to act upon judgmental data, should be disclosed even if not yet implemented. H.R. Conf. Rep. No. 446, 100th Cong., 1st Sess. 657.

e. **Management decisions** are generally a conglomeration of facts and judgment. See, e.g., Lockheed Corp., ASBCA No. 36420, 95-2 BCA ¶ 27,722. To determine whether management decisions could reasonably be expected to have a significant bearing upon costs and, therefore, be classified as cost or pricing data, one should consider the following factors:

(1) Did management actually make a "decision?" Kisco Co., ASBCA No. 18432, 76-2 BCA ¶12,147.

(2) Was the management decision made by a person or group with the authority to approve or disapprove actions affecting costs?

(3) Did the management decision require some sort of "action" affecting the relevant cost element, or was the "decision" more along the lines of preliminary planning for possible future action?

(4) Is there a substantial relationship between the management decision and the relevant cost element?

(5) Is the management decision the type of decision that prudent buyers and sellers would reasonably expect to affect price negotiations significantly?

(6) A management decision to act, which has not been implemented, may be cost or pricing data in certain circumstances. Appeals of Lockheed Corporation, ASBCA Nos. 36420, 37495 and 39195, 95-2 BCA ¶27,722; H.R. Conf. Rep. No. 100-446, 100th Cong., 1st Sess. 657, reprinted in 1987 U.S. Code Cong. & Admin News 1769; see Boeing Co, ASBCA No. 33881, 92-1 BCA ¶24,414 and Appeal of Millipore Corp, GSBCA no. 9453, 91-1 BCA 23,345 (1991) (finding a contractor's imminent plans to revise its dealer discount program to be cost or pricing data).

4. Cost or pricing data must be significant.

a. The contractor must disclose the data if a reasonable person (*i.e.*, a prudent buyer or seller) would expect it to have a **significant** effect upon price negotiations. Plessey Indus., Inc., ASBCA No. 16720, 74-1 BCA ¶ 10,603.

b. Prior purchases of similar items may be "significant data." Kisco Co., ASBCA No. 18432, 76-2 ¶ 12,147; Hardie-Tynes Mfg., Co., ASBCA No. 20717, 76-2 BCA ¶ 12,121.

c. The duty to disclose extends not only to data that the contractor knows it will use, but also to data that the contractor thinks it might use. If a reasonable person would consider the data in determining cost or price, the data is significant and the contractor must disclose it. Hardie-Tynes Mfg., Co., ASBCA No. 20717, 76-2 BCA ¶ 12,121; P.A.L. Sys. Co., GSBCA No. 10858, 91-3 BCA ¶ 24,259 (holding that a contractor should have disclosed vendor discounts even though the Government was not entitled to them).

d. The amount of the overpricing is not determinative of whether the information is significant. See Conrac Corp. v. United States, 558 F.2d 994 (1977) (holding that the Government was entitled to a refund totaling one-tenth of one percent of the total contract price); Kaiser Aerospace & Elecs. Corp., ASBCA No. 32098, 90-1 BCA ¶ 22,489 (holding that the Government was entitled to a refund totaling two-tenths of one percent of the total contract price); but see, Boeing Co., ASBCA No. 33881, 92-1 BCA ¶ 24,414 (holding that a $268 overstatement on a $1.7 billion contract was "*de minimis*").

e. The DCAA Contract Audit Manual (DCAA CAM) states that potential defective pricing price adjustments of five percent of the

contract value or $50,000, whichever is less, should normally be considered immaterial by auditors. DCAA CAM ¶ 14-120.1. These materiality criteria do not apply when:

(1) A contractor's deficient estimating practices results in recurring defective pricing; or

(2) The potential price adjustment is due to a systemic deficiency which affects all contracts priced during the period. DCAA CAM ¶ 14-120.1.

5. Court and Board Decisions

a. Receipt of additional sealed bids from suppliers was held to be cost and pricing data because knowledge of undisclosed bids clearly was information that a prudent buyer or seller would reasonably expect to affect price negotiations. Aerojet Solid Propulsion Co. v. White, 291 F.3d 1328 (Fed. Cir. 2002).

b. A contractor's computer generated report, used as an estimating tool for system unit costs at a given period of time, was found to be cost or pricing data, even though the selection of that estimating tool at that time was a judgment and the results were estimates. Appeal of Texas Instruments, Inc., ASBCA 23678, 87-3 BCA 20195 (1987).

D. Submission of Cost and Pricing Data

1. Procedural requirements

a. Format. FAR 15.403-5.

(1) In the past, contractors used a Standard Form (SF) 1411, Contract Pricing Proposal Cover Sheet, to submit cost or pricing data; however, this form is obsolete.

(2) Today, the contracting officer can:

(a) Require contractors to submit cost or pricing data in the format specified in FAR 15.408, Table 15-2;

(b) Specify an alternate format; or

(c) Allow contractors to use their own format.

b. Submitting the certified cost or pricing data.

(1) Contractors must ensure they submit the data to the proper Government official, generally the contracting officer or the contracting officer's authorized representative. 10 U.S.C. § 2306a(a)(3); 41 U.S.C. § 3502(c).

(2) The boards often look at whether the person to whom the disclosure was made participated in the negotiation of the contract. See Singer Co., Librascope Div. v. United States, 217 Cl. Ct. 225, 576 F.2d 905 (1978) (holding that disclosure to the auditor was not sufficient where the auditor was not involved in the negotiations); Sylvania Elec. Prods., Inc. v. United States, 479 F.2d 1342 (Ct. Cl. 1973) (holding that disclosure to the ACO was not sufficient where the ACO had no connection with the proposal and the contractor did not ask the ACO to forward the data to the PCO); cf. Texas Instruments, Inc., ASBCA No. 30836, 89-1 BCA ¶ 21,489 (holding that disclosure to the ACO was sufficient where the ACO was involved in the negotiation of the disputed rates and knew that the subject contract was being negotiated); Litton Sys., Inc., Amecom Div., ASBCA Nos. 34435, et. al., 93-2 BCA ¶ 25,707 (holding that disclosure of indirect cost actuals to resident auditor based upon established practice was sufficient disclosure though auditor did not participate in negotiations).

c. Adequate Disclosure. A contractor can meet its obligation if it provides the data physically to the Government and discloses the significance of the data to the negotiation process. M-R-S Manufacturing Co. v. United States, 492 F.2d 835 (Ct. Ct. 1974).

(1) The contractor must advise Government representatives of the kind and content of the data and their bearing upon the prospective contractor's proposal. Texas Instruments, Inc., ASBCA No. 23678, 87-3 BCA ¶ 20,195.

(2) Making records available to the Government may constitute adequate disclosure. Appeals of McDonnell Douglas Helicopter Sys., ASBCA No. 50447, 50448, 50449, 2000 BCA¶ 31,082 (furnishing or making available historical reports to DCAA resident auditor and DLA in-plant personnel in connection to Apache procurement make-buy decisions held adequate).

(3) Knowledge by the other party of the data's existence is no defense to a failure to provide data. Grumman Aerospace Corp., ASBCA No. 35188, 90-2 BCA ¶ 22,842 (prime contractor's alleged knowledge of subcontractor reports not sufficient because subcontractor was obligated to physically deliver the data).

2. Obligation to Update Data

a. The contractor is obligated to disclose data in existence as of the date of price agreement. Facts occurring before price agreement and coming to the negotiator's attention after that date must be disclosed before award if they were "reasonably available" before the price agreement date.

b. The contractor's duty to provide updated data is not limited to the personal knowledge of its negotiators. Data within the contractor's (or subcontractor's) organization are considered readily available.

c. Near the time of price agreement, a contractor sometimes conducts internal "sweeps" of cost or pricing data to ensure information is still current, accurate, and complete.

3. Certification of the Certified Cost or Pricing Data

a. Requirement. FAR 15.406-2. When cost or pricing data is required, the contractor must submit a Certificate of Current Cost or Pricing Data using the format found at FAR 15.406-2(a). See 10 U.S.C. § 2306a(a)(2) and 41 U.S.C. § 3502(b)(requiring any person who submits cost or pricing data to certify that the data is accurate, complete, and current).

b. Due date for certificate. The certificate is due as soon as practicable after the date the parties conclude negotiations and agree to a contract price. FAR 15.406-2(a).

c. Failure to submit certificate. A contractor's failure to certify its cost or pricing data does not relieve it of liability for defective pricing. 10 U.S.C. § 2306a(f)(2); 41 U.S.C. § 3507(b); see S.T. Research Corp., ASBCA No. 29070, 84-3 BCA ¶ 17,568.

VI. DATA OTHER THAN CERTIFIED COST OR PRICING DATA

A. Application: Even if an exception to cost or pricing data applies to an acquisition, the contracting officer is still required to determine price reasonableness. In order

to make this determination, the contracting officer may require data other than certified cost or pricing data, including information related to prices and cost information that would otherwise be defined as cost or pricing data, if certified.

1. General requirements. 10 U.S.C. § 2306a(d); 41 U.S.C. § 3505; FAR 15.403-3(a). The contracting officer shall –

   a. Obtain whatever data are available from Government or other secondary sources and use that data in determining a fair and reasonable price;

   b. Require submission of DOTCCPD from the offeror to the extent necessary to determine a fair and reasonable price, if determined that adequate data from sources other than the offeror are not available.[7] This includes requiring data from an offeror to support a cost realism analysis;

   c. Consider whether cost data are necessary to determine a fair and reasonable price when there is not adequate price competition;

   d. Require that the data submitted by the offeror include, at a minimum, appropriate data on the prices at which the same item or similar items have previously been sold, adequate for determining the reasonableness of the price unless an exception under FAR 15.403-1(b)(1) or (2) applies; and

   e. Consider the guidance in Section 3.3, Chapter 3, Volume I of the Contract Pricing Reference Guide cited at FAR 15.404-1(a)(7) to determine the data an offeror shall be required to submit.

2. Adequate price competition. FAR 15.403-3(b).

   a. Additional information is not required to determine price reasonableness and/or cost realism when adequate price competition, defined at FAR 15.403-1(c)(1), exists.

   b. If there are unusual circumstances where it is concluded that additional data are necessary in determining price reasonableness, the contracting officer shall, to the maximum extent practicable, obtain the information from sources other than the offeror.

[7] Section 803 of the FY20 NDAA amended 10 U.S.C. § 2306a(d). This change prohibits contracting officers from determining the price of a contract or subcontract to be fair and reasonable based solely on historical prices paid by the Government.

c. The contracting officer may request data other than certified cost or pricing data to:

(1) Determine the cost realism of competing offers; and/or

(2) Evaluate competing approaches.

B. Submission of Data Other Than Certified Cost or Pricing Data. FAR 15.403-3(a)(2); FAR 15.403-5(a)(3) and (b)(2); FAR 15.408(l) and (m).

1. The contracting officer must state the requirement to submit data other than certified cost or pricing data in the solicitation. See FAR 52.215-20 (Requirements for Certified Cost or Pricing Data or Data Other than Certified Cost or Pricing Data); FAR 52.215-21 (Requirements for Certified Cost or Pricing Data or Data Other than Certified Cost or Pricing Data – Modifications).

2. If the contracting officer requires the submission of data other than certified cost or pricing data, the contractor may submit the information in its own format unless the contracting officer concludes that the use of a specific format is essential and describes the required format in the solicitation.

3. The offeror is not required to certify data other than certified cost or pricing data.

4. A contractor or subcontractor who fails to submit requested DOTCCPD is ineligible for award. FAR 15.403-3(a)(4). The HCA may determine that it is in the best interest of the Government to make the award to that offeror after considering:[8]

a. The effort made to obtain the data;

b. The need for the item or service;

c. The increased cost or significant harm to the Government if award is not made.

VII. CONTRACT PRICING BY METHOD OF CONTRACTING

[8] Section 803 of the FY20 NDAA amended 10 U.S.C. § 2306a(d) requiring the HCA to consider additional factors before determining it is in the Government's best interest to make to award to an offeror, who failed to make a good faith effort to comply with a reasonable request for DOTCCPD. Additionally, the change imposed quarterly and annual reporting requirements for HCA waivers, and empowered the Secretary of Defense to note an offeror's lack of good faith compliance in its past performance record.

A. Sealed Bidding. FAR 14.408-2 and FAR 15.404-1(b).

1. Certified cost or pricing data is not required for contracts obtained initially by sealed bidding when two or more offerors, competing independently, submit priced offers satisfying requirements. FAR 15.403-1(c)(1). Modifications, however, may require cost or pricing data if they are over the threshold and an exception does not apply. FAR 15.403-4(a)(1)(iii).

2. Contracting officer must determine the prices offered are reasonable in light of all prevailing circumstances before awarding the contract. Particular care should be taken if only one bid is received. FAR 14.408-2.

3. Price analysis techniques may be used as guidelines. The contracting officer <u>must</u> consider whether the bids are unbalanced. FAR 15.404-1(g).

a. Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more Contract Line Item Numbers (CLINs) are significantly over or understated.

b. The contracting officer may reject a bid if it is determined that the unbalanced prices pose an unacceptable risk. FAR 15.404-1(g)(3).

B. Simplified Acquisitions. FAR Part 13.

1. The contracting officer shall not request certified cost or pricing data for items at or under the simplified acquisition threshold. FAR 15.403-1(a).

2. Micropurchases. FAR 13.2.

a. To the extent possible, micro-purchases shall be distributed equitably among qualified suppliers. FAR 13.203(a)(1).

b. Micropurchases may be awarded without soliciting competitive quotations if the authorized purchaser considers the price to be reasonable. FAR 13.203(a)(2). If competitive quotations were solicited and award was made to other than the low quoter, documentation to support the purchase may be limited to identification of the solicited concerns and an explanation for the award decision. FAR 13.203(b).

c. The administrative cost of verifying the reasonableness of the purchase price may more than offset potential savings from detecting instances of overpricing. Therefore, action to verify price reasonableness need <u>only</u> be taken if the authorized purchaser:

(1) Suspects the price may not be reasonable; or

(2) No comparable pricing information is readily available for that item. FAR 13.203(a)(3)(i) and FAR 13.203(a)(3)(ii).

3. Price reasonableness for simplified acquisitions. FAR 13.106-3.

a. The contracting officer should evaluate price and other factors in an efficient and minimally burdensome manner. The contracting officer must determine the proposed price is fair and reasonable.

b. Whenever possible, base price reasonableness upon competitive quotations.

If only **one response** is received, include a statement of price reasonableness in the contract file. The statement may be based upon (1) market research, (2) comparison of proposed price with prices found reasonable on previous purchases, (3) current price lists, catalogs, or advertisements, (4) a comparison of similar items in a related industry, (5) the contracting officer's personal knowledge of the item being purchased, (6) comparison to an independent Government estimate, or (7) any reasonable basis.

C. Commercial Items - 10 U.S.C. § 2306a(d)(2); 41 U.S.C. § 3505(b)(1); FAR 15.403-1(c)(3); FAR 15.403-3(c); and defined at FAR 2.101.

1. At a minimum, the contracting officer must use price analysis to determine whether the price is fair and reasonable. FAR 15.403-3(c).

a. The fact that a price is included in a catalog does not, in and of itself, make it fair and reasonable.[9]

b. The contracting officer must establish price reasonableness in accordance with FAR 13.106-3 (Simplified Acquisition Procedures), FAR 14.408-2 (Sealed Bidding), or FAR Part 15.4 (Contract Pricing), as applicable.

(1) The contracting officer should be aware of customary commercial terms and conditions when pricing commercial items.

[9] In an evaluation of how DoD prices commercial items, the GAO identified problems with the Government's price analysis. In more than half of the purchases, the contracting officer compared the offered price with the offeror's catalog price, or with the price paid in previous procurements. The Government negotiated lower prices in only three of the thirty-three cases. Government Accountability Office, Contract Management: DoD Pricing of Commercial Items Needs Continued Emphasis, Report No. GAO/NSIAD-99-90 (June 24, 1999).

(2) The contracting officer must ensure that contract terms, conditions, and prices are commensurate with the Government's need.

(3) Commercial item prices are affected by the following factors: speed of delivery, length and extent of warranty, limitations of seller's liability, quantities ordered, length of the performance period, and specific performance requirements.

c. If the contracting officer cannot determine whether an offered price is fair and reasonable, even after obtaining additional information from sources other than the offeror, then the contracting officer must require the offeror to submit DOTCCPD for further analysis.

(1) Requests for sales data must be limited to sales data relating to commercial items to data for the same or similar items during a relevant time period; and

(2) To the maximum extent possible, requests for data other than certified cost or pricing data must be limited in scope to include only information that is in the form regularly maintained by the offeror as part of its commercial operations. FAR 15.403-3(c)(2).

2. The contracting officer may not request certified cost or pricing data for commercial items as long as the Government is not modifying it. FAR 15.403-1(c)(3).

a. If the contracting officer determines a claimed commercial item is non-commercial, and no other exception or waiver applies, cost or pricing data is required.

b. When minor modifications to commercial items do not make the item “non-commercial,” then:

(1) If funded by an agency other than DoD, NASA, or Coast Guard, no cost or pricing data is required. FAR 15.403-1(c)(3)(iii)(A).

(2) If funded by DoD, NASA, or the Coast Guard, cost or pricing data is only required if the total price of all such modifications under a particular contract action exceed the

greater of $2M or five percent of the total price of the contract. FAR 15.403-1(c)(3)(iii)(C).

3. If an item is procured by a sole source award of less than $19 million to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack and only qualifies as a commercial item pursuant to FAR 12.102(f)(1), then the item is exempt from cost or pricing data requirements. FAR 15.403-1(c)(3)(iv).

D. Competitive Negotiations.

1. The contracting officer is responsible to determine price reasonableness for the prime contract, including subcontracts. The contracting officer may request the advice and assistance of other experts to ensure that an appropriate analysis is performed. The contracting officer is responsible to follow all the pricing policies previously discussed in this outline. FAR 15.404-3 and 15.404-1(a)(5).

2. A price analysis is required whenever TINA does not require certified cost or pricing data. When certified cost or pricing data is required, a price analysis is also recommended to verify the overall price is fair and reasonable. A cost analysis is required when TINA requires certified cost or pricing data in order to evaluate the reasonableness of individual cost elements. FAR 15.404-1(a)(2) & (3).

3. Data other than certified cost or pricing data. See Section VI, *supra.*

VIII. DEFECTIVE PRICING

A. Definition. Defective cost or pricing data is that data that, as of the date of agreement on the price of the contract (or another date as agreed to), is subsequently discovered to have been inaccurate, incomplete, or noncurrent. 10 U.S.C. § 2306a(e)(1)(B); 41 U.S.C. § 3506(a)(2). Under TINA and contract price reduction clauses, the Government is entitled to an adjustment in the contract price, to include profit or fee, when it relied upon defective cost or pricing data.

B. Audit Rights. Subsequent to award of a negotiated contract under which the contractor submitted cost or pricing data, the Government has several rights to audit the contractor's records.

1. Contracting Agency's right.

a. Statutory basis. 10 U.S.C. § 2306a(g); 41 U.S.C. § 3508. For the purpose of evaluating the accuracy, completeness and currency of cost or pricing data, TINA gives the head of an agency, acting

through an authorized representative, the right to examine contractor (or subcontractor) records. This right is identical to the rights given to the head of an agency under 10 U.S.C. § 2313(a)(2) and 41 U.S.C. § 4706(b)(2).

b. Definitions. 10 U.S.C. § 2313(i); 41 U.S.C. § 4706(a). The term "records" includes "books, documents, accounting procedures and practices, and any other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form."

c. Examination authority. 10 U.S.C. § 2313(a)(2), (e)-(f); 41 U.S.C. § 4706(b)(2), (f)-(g).

(1) The head of an agency, acting through an authorized representative, has the right to examine all records related to:

(a) The proposal for the contract (or subcontract);

(b) The discussions conducted on the proposal;

(c) The pricing of the contract (or subcontract); or

(d) The performance of the contract (or subcontract).

(2) The examination right expires three years after final payment on the contract.

(3) The examination right does not apply to contracts (or subcontracts) that do not exceed the simplified acquisition threshold.

d. Contract clauses. FAR 52.214-26 (Audit and Records – Sealed Bidding) and FAR 52.215-2 (Audit and Records – Negotiation) both state that the contracting officer, an authorized representative of the contracting officer, and the Comptroller General, have the right to examine and audit the contractor's records for specific information when cost or pricing data has been submitted.

e. Subpoena power. 10 U.S.C. § 2313(b); 41 U.S.C. § 4706(c)(1).

(1) The Director of DCAA[10] can subpoena any of the records that 10 U.S.C. § 2313(a) gives the HCA the right to examine.

(2) The Director of the DCAA can enforce this subpoena power by seeking an order from an appropriate U.S. district court.

(3) DCAA's subpoena power extends to objective cost information related to government contracts, but does not extend to a contractor's internal audit reports. United States v. Newport News Shipbldg. and Dry Dock Co., 837 F.2d 162 (4th Cir. 1988) (Newport News I).

(a) Internal audits are not related to a particular contract.

(b) Internal audits contain the subjective evaluations of the contractor's audit staff.

(4) DCAA's subpoena power is aimed at obtaining objective data upon which to evaluate the specific costs a contractor charged to the Government.

(5) DCAA's subpoena power extends to a contractor's federal income tax returns and other financial data. United States v. Newport News Shipbldg. and Dry Dock Co., 862 F.2d 464 (4th Cir. 1988) (Newport News II).

(6) DCAA's subpoena power is not limited to records relating to a contractor's pricing practices.

(7) DCAA's subpoena power extends to objective factual records relating to overhead costs that the contractor may pass on to the Government.

(8) DCAA's subpoena power also extends to a contractor's work papers for its federal income tax returns and financial statements. United States v. Newport News Shipbldg. and Dry Dock Co., 737 F. Supp. 897 (E.D. Va. 1989) (Newport News III), aff'd, 900 F.2d 257 (4th Cir. 1990).

[10] For civilian agencies, this right extends to the Inspector General of an executive agency, or upon the request of the head of an executive agency, the Director of the DCAA or the Inspector General of the General Services Administration. 41 U.S.C. § 4706(c)(1).

2. Comptroller General's right.

a. Statutory basis. 10 U.S.C. § 2313(c), (e)-(f); 41 U.S.C. § 4706(d), (f)-(g). The Comptroller General (or the Comptroller General's authorized representative) has the right "to examine any records of the contractor, or any of its subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract…"

b. The Comptroller General may interview current employees regarding transactions being examined during an audit of contracting records. 10 U.S.C. § 2313(c).

c. The Comptroller General's examination right only applies to contracts awarded using other than sealed bid procedures. The Comptroller General's examination right expires three years after final payment on the contract. 10 U.S.C. § 2313(c).

d. The Comptroller General's examination right does not apply to contracts (or subcontracts) that do not exceed the simplified acquisition threshold. 10 U.S.C. § 2313(c).

e. Contract clauses. FAR 52.214-26 (Audit and Records – Sealed Bidding); FAR 52.215-2 (Audit and Records – Negotiation).

f. Subpoena power. 31 U.S.C. § 716.

(1) The Comptroller General has the power to subpoena the records of a person to whom the Comptroller General has access by law or agreement.

(2) The Comptroller General can enforce this subpoena power by seeking an order from an appropriate U.S. district court. United States v. McDonnell-Douglas Corp., 751 F.2d 220 (8th Cir. 1984).

g. Scope of the Comptroller General's examination right.

(1) The term "contract," as used in the statute, embraces not only the specific terms and conditions of a contract, but also the general subject matter of the contract. Hewlett-Packard Co. v. United States, 385 F.2d 1013 (9th Cir. 1967), cert. denied, 390 U.S. 988 (1968).

(2) For cost-based contracts, the Comptroller General's examination right is extremely broad; however, for fixed-

price contracts, the books or records must bear directly on the question of whether the Government paid a fair price for the goods or services. Bowsher v. Merck & Co., 460 U.S. 824 (1983).

3. Inspector General's right. 5 U.S.C. App. 3 § 6.

a. Statutory basis. 5 U.S.C. App. 3 § 6(a)(1).

(1) The Inspector General of an agency has the right "to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material . . . which relate to programs and operations with respect to which that Inspector General has responsibilities…"

(2) This statutory right requires no contractual implementation.

b. Subpoena power. 5 U.S.C. App. 3 § 6(a)(4).

(1) The Inspector General has the power to subpoena all data and documentary evidence necessary to perform the Inspector General's duties.

(2) The Inspector General can enforce this subpoena power by seeking an order from an appropriate U.S. district court.

c. Scope of the Inspector General's right. The scope of the Inspector General's right is extremely broad and includes internal audit reports. United States v. Westinghouse Elec. Corp., 788 F.2d 164 (3d Cir. 1986).

4. Obstruction of a Federal audit. 18 U.S.C. § 1516.

a. This statute does not increase or enhance the Government's audit rights.

b. The statute makes it a crime for anyone to influence, obstruct, or impede a Government auditor (full or part-time Government/ contractual employee) with the intent to deceive or defraud the Government.

IX. DEFECTIVE PRICING REMEDIES

A. Contractual

1. Price adjustment. The Government can reduce the contract price if the Government discovers that a contractor, prospective subcontractor, or actual subcontractor submitted defective certified cost or pricing data. 10 U.S.C. § 2306a(e)(1)(A); 41 U.S.C. § 3506(a)(1); and FAR 15.407-1(b)(1).

   a. Amount. 10 U.S.C. § 2306a(e)(1)(A); 41 U.S.C. § 3506(a)(1); FAR 15.407-1(b)(1); FAR 52.215-10 (Price Reduction for Defective Certified Cost or Pricing Data); FAR 52.215-11 (Price Reduction for Defective Certified Cost or Pricing Data – Modifications).

      (1) The Government can reduce the contract price by any significant amount by which the contract price was increased because of the defective cost or pricing data. Unisys Corp. v. United States, 888 F.2d 841 (Fed. Cir. 1989); Kaiser Aerospace & Elec. Corp., ASBCA No. 32098, 90-1 BCA ¶ 22,489; Etowah Mfg. Co., ASBCA No. 27267, 88-3 BCA ¶ 21,054.

      (2) Profit or fee can be included in the price reduction.

      (3) Interest. The Government can recover interest on any overpayments it made because of the defective cost or pricing data. 10 U.S.C. § 2306a(f)(1)(A); 41 U.S.C. § 3507(a)(1); FAR 15.407-1(b)(7); FAR 52.215-10 (Price Reduction for Defective Certified Cost or Pricing Data); FAR 52.215-11 (Price Reduction for Defective Certified Cost or Pricing Data – Modification). The contracting officer must:

         (a) Determine the amount of the overpayments;

         (b) Determine the date the overpayment was made;[11] and

         (c) Apply the appropriate interest rate.[12]

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[11] For prime contracts, the date of overpayment is the date the Government paid for a completed and accepted contract item. For subcontracts, date of overpayment is the date the Government paid the prime contractor for progress billings or deliveries that included a completed and accepted subcontract item. FAR 15.407-1(b)(7)(ii).

[12] The Secretary of the Treasury sets interest rates on a quarterly basis. 26 U.S.C. § 6621(a),(b). FAR 52.214-27; FAR 52.215-10; and FAR 52.215-11 requires "interest compounded daily as required by 26 USC 6622" to Government overpayments as a result of defective cost or pricing data. This rule replaces the term "simple interest"

b. Defective subcontractor data. FAR 15.407-1(e)-(f).

(1) The Government can reduce the prime contract price regardless of whether the defective subcontractor data supported subcontract cost estimates or firm agreements between the subcontractor and the prime.

(2) If the prime contractor uses defective subcontractor data, but subcontracts with a lower priced subcontractor (or fails to subcontract at all), the Government can only reduce the prime contract price by the difference between the subcontract price the prime contractor used to price the contract and:

(a) The actual subcontract price if the contractor subcontracted with a lower priced subcontractor; or

(b) The contractor's actual cost if the contractor failed to subcontract the work.

(3) The Government can disallow payments to subcontractors when these payments result from defective cost or pricing data under:

(a) Cost-reimbursement contracts; and

(b) All fixed-price contracts except firm fixed-price contracts and fixed-price contracts with economic price adjustments (e.g., fixed-price incentive contracts and fixed-price award fee contracts).

2. If the Government fails to include a price reduction clause in the contract, courts and boards will read them in pursuant to the Christian Doctrine. University of California, San Francisco, VABCA No. 4661, 97-1 BCA ¶ 28,642; Palmetto Enterprises, Inc., ASBCA No. 22839, 79-1 BCA ¶ 13,736.

3. A defective pricing claim is not subject to the normal six-year statute of limitations. Radiation Sys., Inc., ASBCA No. 41065, 91-2 BCA ¶ 23,971.

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and aligns with a Court of Appeals for the Federal Circuit decision in Gates v. Raytheon Co., 584 F.3d 1062 (Fed. Cir. 2009).

4. A defective pricing claim cannot be asserted by the Government as an affirmative defense to a contractor's money claim. Computer Network Sys., Inc., GSBCA No. 11368, 93-1 BCA ¶ 25,260.

5. Penalties. 10 U.S.C. § 2306a(f)(1)(B); 41 U.S.C. § 3507(a)(2); FAR 15.407-1(b)(7); FAR 52.215-10 (Price Reduction for Defective Certified Cost or Pricing Data); FAR 52.215-11 (Price Reduction for Defective Certified Cost or Pricing Data – Modification).

   a. The Government can collect penalty amounts where the contractor (or subcontractor) knowingly submitted defective cost or pricing data.

   b. The contracting officer can obtain a penalty amount equal to the amount of the overpayment.

   c. The contracting officer must consult an attorney before assessing any penalty.

6. Government's burden of proof. The Government bears the burden of proof in a defective pricing case. General Dynamics Corp., ASBCA No. 32660, 93-1 BCA ¶ 25,378. To meet its burden, the Government must prove that:

   a. The information meets the definition of cost or pricing data;

   b. The information existed before the date of agreement on price;

   c. The data was reasonably available before the date of agreement on price;

   d. The data the contractor (or subcontractor) submitted was not accurate, complete, or current;

   e. The undisclosed data was the type that prudent buyers or sellers would have reasonably expected to have a significant effect upon price negotiations;

   f. The Government relied on the defective data; and

   g. The Government's reliance on the defective data caused an increase in the contract price.

7. Once the Government establishes nondisclosure of cost and pricing data, there is a rebuttable presumption of prejudice.

a. The contractor must then demonstrate that the Government would not have relied upon this information.

b. Once demonstrated, the burden of showing detrimental reliance shifts back to the Government.

c. Hence, the ultimate burden of showing prejudice rests with the Government.

8. The ASBCA often views defective pricing cases as "too complicated" to resolve by summary judgment. Grumman Aerospace Corp., ASBCA No. 35185, 92-3 BCA ¶ 25,059; McDonnell Douglas Helicopter Co., ASBCA No. 41378, 92-1 BCA ¶ 24,655; but see Rosemount, Inc., ASBCA No. 37520, 95-2 BCA ¶ 27,770 (granting the contractor's motion for summary judgment because the Government failed to meet its burden of proof).

9. Successful defenses to price reductions.

a. The information at issue was not cost or pricing data.

b. The Government did not rely on the defective data. 10 U.S.C. § 2306a(e)(2); 41 U.S.C. § 3506(b).

c. The price offered by the contractor was a "floor" below which the contractor would not have gone.

10. Unsuccessful contractor defenses to price reductions. 10 U.S.C. § 2306a(e)(3); 41 U.S.C. § 3506(c); FAR 15.407-1(b)(3).

a. The contractor (or subcontractor) was a sole source supplier or otherwise was in a superior bargaining position.

b. The contracting officer should have known that the cost or pricing data the contractor (or subcontractor) submitted was defective. FMC Corp., ASBCA No. 30069, 87-1 BCA ¶ 19,544.

c. The contract price was based upon total cost and there was no agreement about the cost of each item procured under the contract.

d. The contractor (or subcontractor) did not submit a Certificate of Current Cost or Pricing Data.

11. Offsets. 10 U.S.C. § 2306a(e)(4)(A)-(B); 41 U.S.C. § 3506(d); FAR 15.407-1(b)(4)-(6); FAR 52.215-10 (Price Reduction for Defective Certified Cost or Pricing Data); FAR 52.215-11 (Price Reduction for Defective Certified Cost or Pricing Data – Modification).

a. The contracting officer must allow an offset for any understated certified cost or pricing data the contractor (or subcontractor) submitted.

b. The amount of the offset may equal, but not exceed, the amount of the Government's claim for overstated certified cost or pricing data arising out of the same pricing action.

c. The offset does not have to be in the same cost grouping as the overstated cost or pricing data (e.g. material, direct labor, or indirect costs).

d. The contractor must prove that the certified cost or pricing data:

(1) Were available before the "as of" date specified on the Certificate of Current Cost or Pricing Data; and

(2) Were not submitted.

e. The contractor is not entitled to an offset under two circumstances:

(1) The contractor knew that its cost or pricing data was understated before the "as of" date specified on the Certificate of Current Cost or Pricing Data. See United Tech. Corp.,Pratt & Whitney v. Peters, No. 98-1400, 1999 U.S. App. LEXIS 15490 (Fed. Cir. July 12, 1999) (affirming in part ASBCA's denial of offsets for "sweep" data intentionally withheld from Government).

(2) The Government proves that submission of the data before the "as of" date specified on the Certificate of Current Cost or Pricing Data would not have increased the contract price in the amount of the proposed offset.

B. Administrative Remedies

1. Termination of the contract. FAR Part 49; Joseph Morton Co. v. United States, 3 Cl. Ct. 120 (1983), aff'd, 757 F.2d 1273 (Fed. Cir. 1985).

2. Suspension and debarment. FAR Subpart 9.4; DFARS Subpart 209.4.

3. Voiding and rescinding the contract. 18 U.S.C. § 218; FAR Subpart 3.7.

4. The Program Fraud Civil Remedies Act of 1986. 31 U.S.C. §§ 3801-3812; DOD Dir. 5505.5 (Aug. 30, 1988).

C. Judicial remedies.

1. Criminal.

a. False Claims Act. 18 U.S.C. § 287. See Communication Equip. and Contracting Co., Inc. v. United States, 37 CCF ¶ 76,195 (Cl. Ct. 1991) (unpub.) (holding that TINA does not preempt the False Claims Act so as to limit the Government's remedies).

b. False Statement Act. 18 U.S.C. § 1001. See, e.g., United States v. Shah, 44 F.3d 285 (5th Cir. 1995).

c. The Major Fraud Act. 18 U.S.C. § 1031.

2. Civil.

a. False Claims Act. 10 U.S.C. §§ 3729-33. Civil penalty not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990, plus treble damages. 10 U.S.C. §§ 3729(a).

D. Fraud indicators. DOD Inspector General's web link found at http://www.dodig.mil/resources/fraud/scenarios.html.

1. High incidence of persistent defective pricing.

2. Continued failure to correct known system deficiencies.

3. Consistent failure to update cost or pricing data with knowledge that past activity showed that prices have decreased.

4. Failure to make complete disclosure of data known to responsible personnel.

5. Protracted delay in updating cost or pricing data to preclude possible price reduction.

6. Repeated denial by responsible contractor employees of the existence of historical records that are later found to exist.

7. Repeated utilization of unqualified personnel to develop cost or pricing data used in estimating process.

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CHAPTER 13

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CHAPTER 13

SOCIOECONOMIC POLICIES

I. INTRODUCTION

A. Vision of the Acquisition Process

1. Deliver on a timely basis…

2. the best value product or service to the customer,

3. while maintaining the public's trust…

4. and fulfilling **public policy** objectives. FAR 1.102(a) (emphasis added).

II. POLICY AND PROCEDURE IN SUPPORT OF SMALL BUSINESS

A. **Policy**.[1] 15 U.S.C. §§ 631-650; FAR 19.201.

1. Place a "fair proportion"[2] of acquisitions (prime contracts) with small business concerns.

2. Promote maximum subcontracting opportunity for small businesses. FAR 19.702. Prime contractors must agree to provide small businesses the "maximum practicable opportunity to participate in subcontracts."

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[1] Congress declared its policy in promoting small businesses in 15 U.S.C. § 631. "The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment is assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. *Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed*. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a *fair proportion* of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) *be placed with small-business enterprises*, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation." (italics added).

[2] The goal for <u>small businesses</u> is that not less than **23%** of the total value of all government prime contract awards should go to small businesses. 15 U.S.C. § 644(g). The goal for <u>service-disabled veteran-owned small businesses</u> is not less than **3%** of the total value of all government prime contract and subcontract awards. 15 U.S.C. § 644(g). The goal for <u>HUBZone small businesses</u> is not less than **3%** of the total value of all government prime and subcontract contract awards. 15 U.S.C. § 644(g). The goal for <u>women-owned small businesses</u> is not less than **5%** of the total value of all government prime contract and subcontract awards. 15 U.S.C. § 644(g). The goal for <u>socially and economically disadvantaged individual-owned small businesses</u> is not less than **5%** of the total value of all government prime contract and subcontract awards. 15 U.S.C. § 644(g).

3. **Small business defined**. FAR 2.101; FAR 19.001 and 15 U.S.C. § 632.

   a. Independently owned and operated;

   b. Not dominant in field in which it is bidding on government contracts; and,

   c. Meets applicable size standards under FAR 19.102.

4. Most Small Business Programs only apply in the United States or its outlying areas (i.e. Puerto Rico, Guam, U.S. Virgin Islands, American Samoa and others listed in FAR 2.101). *See* FAR 19.000(b). Note, however, that FAR Part 19.6 (Certificates of Competency and Determinations of Responsibility) does apply worldwide.

B. Size Standards and Size Determination Procedures

1. The Small Business Administration (SBA) establishes small business size standards on an industry-by-industry basis. FAR 19.102(a); *see also* 13 C.F.R. § 121.

2. Small business size standards are applied by classifying the product or service being acquired in the industry whose definition best describes the principal nature of the product or service being acquired. FAR 19.102(b).

   a. Depending on the industry, the size standards are based on either annual receipts or number of employees.

      (1) Size standards based on annual receipts includes all revenue, which factors in total income plus the cost of goods sold within the past year. 13 C.F.R. § 121.104. A firm is small if its average annual receipts do not exceed the specified number of dollars.

      (2) Size standards based on number of employees includes the average number of all employees for each of the last twelve months. 13 C.F.R. § 121.106. A firm is small if its average number of employees does not exceed the figure associated with the particular NAICS code in question.

3. **NAICS Classification.** To establish the applicable size standard, the contracting officer adopts an appropriate product or service classification called a North American Industry Classification System (NAICS) code and *includes it in the solicitation for all acquisitions exceeding the micropurchase threshold.*[3] FAR 19.303. The NAICS Manual which

[3] The micropurchase threshold is generally $10,000 (as of FY19), but it could increase depending on special circumstances. See Contract Attorney's Deskbook, Chapter 9, Simplified Acquisitions.

explains and defines the codes (from 13 C.F.R. § 121.201) is available on the internet at http://www.census.gov/eos/www/naics/.

a. This NAICS classification establishes the applicable size standard for the acquisition. The contracting officer then specifies in the solicitation this NAICS size standard classification so offerors can appropriately represent themselves as small or large when responding to the solicitation.

b. For size standard purposes, a product or service shall be classified in only one NAICS code, whose definition best describes the principal nature of the product or service. FAR 19.102(c); *Technica Corp.*, SBA No. NAICS-5248, June 20, 2011.

c. **NAICS Code Appeals.** The contracting officer's NAICS code designation is final unless appealed directly to the SBA's Office of Hearings and Appeals (OHA) located in Washington, D.C. Any interested party adversely affected by a NAICS code designation may appeal the contracting officer's NAICS code selection in writing as a matter of right to the SBA's OHA **within 10 calendar days after** the issuance of the initial solicitation; the SBA's OHA will summarily dismiss an untimely appeal. The appellant must exhaust the OHA appeal process before seeking judicial review. 13 C.F.R. § 121.1103, and FAR 19.303(c).

d. **Delay of opening offers or contract award pending a NAICS code appeal.** *See Aleman Food Serv., Inc.*, B-216803, 85-1 CPD ¶ 277 (Comp. Gen. Mar. 6, 1985). If the SBA finds the original NAICS code improper, the contracting officer must amend the solicitation to reflect the SBA's decision *only* if the contracting officer receives the SBA determination *before* the date offers are due. If the contracting officer receives the SBA's decision after the date that offers are due, then that decision will apply only to future solicitation of the same products and services. *See* FAR 19.303(c)(8).

e. The GAO does not review NAICS Code appeals (a.k.a. "classification" protests). *A-P-T Research, Inc. Costs*, B-298352.3, 2007 CPD ¶ 60 (Comp. Gen. Sep. 28, 2006) (stating that "our Bid Protest Regulations provide that 'challenges of the selected standard industrial classification may be reviewed *solely* by the Small Business Administration'"); *Tri-Way Sec. & Escort Serv., Inc.*, B-238115.2, 90-1 CPD ¶ 380 (Comp. Gen. Apr. 10, 1990); *JC Computer Servs., Inc. v. Nuclear Regulatory Comm'n*, GSBCA No. 12731-P, 94-2 BCA ¶ 26,712; *Cleveland Telecommunications Corporation*, B-247964, July 23, 1992, 92-2 CPD ¶ 47. However, GAO may recommend an agency comply with an OHA decision

that an agency ignores. *Eagle Home Medical Corp.*, B-402387, 2010 CPD ¶ 82 (Comp. Gen. Mar. 29, 2010).

4. **Small business certification**. Representations. FAR 19.301.

a. Self-certification. "To be eligible for award as a small business, an offeror must represent, in good faith, that it is a small business at the time of the written representation." FAR 19.301-1(a). *See also Randolph Eng'g Sunglasses*, B-280270, 98-2 CPD ¶ 39 (Comp. Gen. Aug. 10, 1998); *United Power Corp.*, B-239330, 90-1 CPD ¶ 494 (Comp. Gen. May 22, 1990). The "contracting officer shall accept an offeror's representation . . . that it is a small business unless" another offeror challenges the representation or the contracting officer has reason to question the representation. FAR 19.301-1(b). *AMI Constr.*, B-286351, 2000 CPD ¶ 211 (Comp. Gen. Dec. 27, 2000).

b. SBA certification. The offeror's representation that it is a small business is not binding on the SBA. If an offeror's status as a small business is challenged, then the SBA will evaluate the business' status and make a determination, which is binding on the contracting officer. FAR 19.301-1(c). *MTB Investments, Inc.*, B-275696, 97-1 CPD ¶ 112 (Comp. Gen. Mar. 17, 1997); *Olympus Corp.*, B-225875, 87-1 CPD ¶ 407 (Comp. Gen. Apr. 14, 1987).

c. If an acquisition is set-aside for small business, the failure of the bidder to certify its status ***does not***, in and of itself, render the bid nonresponsive. *Last Camp Timber*, B-238250, 90-1 CPD ¶ 461 (Comp. Gen. May 10, 1990); *Concorde Battery Corp.*, B-235119, 89-2 CPD ¶ 17 (Comp. Gen. June 30, 1989).

d. Neither the FAR nor the SBA regulations require a firm to re-certify size status before an agency exercises an option where the agency awarded the original contract on a set-aside basis. *See Vantex Serv. Corp.*, B-251102, 93-1CPD ¶ 221 (Comp. Gen. Mar. 10, 1993). *But see CMS Info. Servs., Inc.*, B-290541, 2002 CPD ¶ 132 (Comp. Gen. Aug. 7, 2002)(holding that agency may properly require firms to certify their size status as of the time they submit their quotes for an indefinite delivery/indefinite quantity (IDIQ) task order). *But see* 13 C.F.R. § 121.404(g) regarding novations or mergers.

e. If a contractor misrepresents its status as a small business ***intentionally***, the contract is void or voidable. *C&D Constr., Inc.*, ASBCA No. 38661, 90-3 BCA ¶ 23,256 (A.S.B.C.A. Aug. 20, 1990); *J.E.T.S., Inc.*, ASBCA No. 28642, 87-1 BCA ¶ 19,569, *aff'd, J.E.T.S., Inc. v. United States*, 838 F.2d 1196 (Fed. Cir.

1988). *Cf. Danac, Inc.*, ASBCA No. 30227, 92-1 BCA ¶ 24,519. Additionally, such a misrepresentation may be a false statement under 18 U.S.C. §1001 and 15 U.S.C. §645.

f. Self-certification only applies to status as a small business, minority-owned business, woman-owned business, veteran-owned business, and service-disabled veteran-owned business. SBA certification and approval are *required* for entrance into the 8(a) business development program, and the HUBZone program.

5. **Size status protests** (a.k.a. protesting representation of being a "small business"). FAR 19.302.

a. Per 19.302(a), "an offeror, the SBA, or another interested party [includes the contracting officer] may protest *the sma*ll business representation of an offeror in a specific offer. However, for competitive 8(a) contracts, the filing of a protest is limited to an offeror, the contracting officer, or the SBA."

b. A protest is "timely" if received by the contracting officer by close of business of the 5th business day either (1) after bid opening in a sealed bid acquisition or (2) after the protester receives notice of the proposed awardee's identity in a negotiated acquisition. A size status protest filed by either the contracting officer or by the SBA is always timely whether filed before or after contract award. FAR 19.302(d). 13 C.F.R. § 121.1004(b),(c). *Alliance Detective & Security Service, Inc.*, B-299342, 2007 CPD ¶ 56 (Comp. Gen. Apr. 13, 2007)[4] *Eagle Design and Mgmt., Inc.*, B-239833, 90-2 CPD ¶ 259 (Comp. Gen. Sept. 28, 1990); *United Power Corp.*, B-239330, 90-1 CPD ¶ 494 (Comp. Gen. May 22, 1990).

(1) The contracting officer ***must forward the protest*** (whether timely or not) to the SBA Government Contracting Area Office for the geographic area where the principal office of the business in question is located and ***must withhold award*** until: (1) the SBA has made a size determination or (2) 15 business days have elapsed since SBA's receipt of the protest, whichever occurs first, absent a finding of

[4] The GAO reiterated that an SBA protest is always timely. In this case, a Department of Homeland Security (DHS) contracting officer awarded a contract to C&D Security Management, Inc. (C&D) despite pending size status protests. The GAO found timely an SBA size status protest filed over two months after the contracting officer notified the offerors that he intended to award to C&D. Further, because the SBA protest was timely, the GAO found that the SBA's determination that C&D was not a small business applied to the procurement at issue and so, C&D was not eligible for award. While GAO considered recommending that the contracting officer terminate the contract with C&D, because C&D had already incurred substantial performance costs, GAO recommended that DHS allow C&D to perform during the base performance period, but that it not exercise any of the options available under the contract.

urgency; however, award shall not be withheld when the contracting officer determines in writing that an award must be made to protect the public interest. FAR 19.302(g). *Alliance Detective & Security Service, Inc.*, B-299342, 2007 CPD ¶ 56 (Comp. Gen. Apr. 13, 2007)[5] *Aquasis Servs., Inc.*, B-240841.2, 91-1 CPD ¶ 592 (June 24, 1991).

(2) The SBA Government Contracting Area Office ***must rule within 15 business days*** or the contracting officer may proceed with award, if the contracting officer makes a written determination that there is an immediate need to award and that waiting will be disadvantageous to the Government. FAR 19.302(g)(2). *Systems Research and Application Corp.*, B-270708, 96-1 CPD ¶ 186 (Comp. Gen. Apr. 15, 1996); *International Ordnance, Inc.*, B-240224, 90-2 CPD ¶ 32 (Comp. Gen. Jul. 17, 1990). Even if the 15 days have passed (and whether or not award has been made), if the SBA rules that the awardee is not a small business, the agency should consider that ruling, and award or continue to allow performance at its own peril. *ALATEC*, B-298730, Dec. 4, 2006, 2006 CPD ¶ 191; *Hydroid LLC*, B-299072, Jan. 31, 2007, 2007 CPD ¶ 20. [6] *TrustComm, Inc.*, 2013 CPD ¶ 237 (Comp. Gen. 2013).[7]

(3) The SBA Government Contracting Area Office decisions are appealable to the Office of Hearings and Appeals within the time limits contained in Subpart C of Part 13 C.F.R. 134 and FAR 19.302(h).

(a) If a post-award appeal is submitted to OHA within the time limits, the contracting officer shall consider

[5] In this case, the GAO found that a DHS contracting officer's award of a contract before referring two size status protests to SBA was improper in that he failed to withhold award as required under FAR 19.302.

[6] These cases stand for the proposition that even where the requirements of 19.302 have been met by the agency, termination may be appropriate where: 1) a timely protest was filed; 2) the area office found the business not small and there was no appeal of the SBA ruling, and; 3) there are no countervailing circumstances that weigh in favor of allowing a "not small" business to continue performance. In short, letting a "known" large business perform a small-business set-aside is going to be frowned upon by GAO.

[7] The GAO found that the Coast Guard was reasonable in not terminating contract of awardee despite SBA determination (almost 9 months after size status protest) that the awardee is other than small. There were *countervailing circumstances* that weighed against termination. Namely, the delay that would result in going to the next in line offeror would have required repeating extensive first article testing, and the resulting delay to an already delayed program would have resulted in significant costs and adversely affected mission effectiveness of Coast Guard cutters.

suspending contract performance until an SBA Judge decides the appeal.

c. SBA's decision, if received before award, will apply to the pending acquisition. If the contracting officer has made a written determination in accordance with FAR 19.302(g)(1) or (2), the contract has been awarded, the SBA rulings is received after award, and OHA finds the protested concern to be ineligible for award, the contracting officer shall *terminate* the contract unless termination is not the best interests of the Government, in keeping with the circumstances described in the written determination. However, the contracting officer shall not exercise any options or award further task or delivery orders. FAR 19.302(h); *McCaffery & Whitener, Inc.*, B-250843, 93-1 CPD ¶ 168 (Comp. Gen. Feb. 23, 1993); *Verify, Inc.*, B-244401.2, 92-1 CPD ¶ 107 (Comp. Gen. Jan. 24, 1992). *Trident, LLC*, 2012 CPD ¶ 201 (Comp. Gen. Jul. 5, 2012).[8] In negotiated small business set-asides, the agency must inform each unsuccessful offeror prior to award, upon completion of negotiations, determinations of responsibility. The notice shall include: the name and location of the apparent successful offeror; that the Government will not consider subsequent revisions; and that no response is required unless a basis exists to challenge. FAR 15.503(a)(2) and FAR 19.302(d)(1); *Resource Applications, Inc.*, B-271079, 96-2 CPD ¶ 61 (Comp. Gen. Aug. 12, 1996); *Phillips Nat'l, Inc.*, B-253875, 93-2 CPD ¶ 252 (Comp. Gen. Nov. 1, 1993).

d. As discussed above, late size status protests (and timely protests filed after contract award) generally do not apply to the current contract under competition; rather, the protest will be considered for future actions. FAR 19.302(i). *See Chapman Law Firm v. United States*, 63 Fed. Cl. 25 (2004). *But see Adams Indus. Servs., Inc.*, B-280186, Aug. 28, 1998, 98-2 CPD ¶ 56 (protester filed protest after award; however, under the circumstances of this procurement, simplified acquisition procedures did not require the agency to issue a pre-award notice to unsuccessful vendors. Since the protest was filed within 5 days after the protester received notice of the issuance of a purchase order to the awardee, the protest was considered timely).

e. The GAO does not review size protests. *McCaffery & Whitener, Inc.*, B-250843, 93-1 CPD ¶ 168 (Comp. Gen. Feb. 23, 1993) (stating that "the Small Business Act . . . gives the SBA, not our

[8] The GAO denied protester's assertion that contract award that was terminated pursuant to negative size status determination should be reinstated following successful appeal to the SBA OHA, because the Navy followed all applicable regulations in terminating the award, and properly solicited revised proposals from all offerors.

Office, the exclusive and conclusive authority to determine matters of small business size status for federal procurement"); *DynaLantic Corp.*, B-402326, 2010 CPD ¶ 103 (Comp. Gen. Mar. 15, 2010); *Hughes Group Sol*., B-408781.2, 2014 CPD ¶ 91 (Comp. Gen. Mar. 5, 2014).

f. Courts will not overrule a SBA determination unless it is arbitrary, capricious, an abuse of discretion, or not in accordance with law or regulation. *STELLACOM, Inc, v. United States*, 24 Cl. Ct. 213 (1991).

C. Responsibility Determinations and Certificates of Competency (COCs).

1. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 7101, 108 Stat. 3243, 3367 [hereinafter FASA] (repealing § 804, National Defense Authorization Act, 1993, Pub. L. No. 102-484), 106 Stat. 2315, 2447 (1992); FAR Subpart 19.6.

2. The contracting officer must determine an offeror's responsibility. FAR 9.103(b).

3. **Responsibility defined:** Prospective contractors must have adequate resources, be capable of complying with proposed delivery schedules, have a satisfactory performance record; have a satisfactory record of business integrity and ethics; have the necessary organization, experience, accountability measures, etc; have the necessary production/technical equipment/facilities; and be qualified and eligible to receive award. FAR 9.104.

4. **Certificate of Competency Program.** This program empowers the SBA to certify to a contracting officer that a small business is responsible so that it can perform a particular government contract. *If the contracting officer finds a small business nonresponsible, he or she **must** forward the matter to the SBA Government Contracting Area Office immediately and must withhold award* (for 15 business days after receipt by SBA). FAR 19.602-1. *Latvian Connection, LLC*, B-410947, 2015 CPD ¶117 (Comp. Gen. Mar 31, 2015); *Latvian Connection, LLC*, B-410981, 2015 CPD ¶125 (Comp. Gen. Apr 6, 2015).[9] Then the SBA will notify the business of the contracting officer's determination and offer the business the opportunity to apply for a COC. If the business applies for a COC, then the SBA will either ***issue a COC*** (if it finds the business responsible) or the SBA will ***deny the COC***. FAR 19.602-2.

5. The SBA issues a COC if it finds that the offeror is responsible.

[9] Protests were sustained where FedBid, acting as the agent for the contracting agency, excluded the protester, a small business, from the competition based on a perceived lack of business integrity, in effect making a negative responsibility determination, without referring the matter to the SBA under the COC procedures.

a. The burden is on the offeror to apply for a COC. FAR 19.602-2(a). *Thomas & Sons Bldg. Contr., Inc.*, B-252970.2, 93-1 CPD ¶ 482 (Comp. Gen. Jun. 22, 1993).

b. The contracting officer may appeal a decision to issue a COC if the contracting officer and the SBA disagree regarding a small business concern's ability to perform. For COCs valued between $100,000 and $25,000,000, the SBA Associate Administrator for Government Contracting will make the final determination on whether to issue a COC. For COCs valued over $25,000,000, the SBA Headquarters will make the final determination. *See* FAR 19.602-3; AFARS 5119.602-3; *Holiday Inn-Laurel—Protest and Request for Costs*, B-270860.3, B-270860.4, 96-2 CPD ¶ 259 (Comp. Gen. May 30, 1996).

6. The contracting officer "shall" award to another offeror if the SBA does not issue a COC within 15 business days of receiving a referral. FAR 19.602-4(c); *Mid-America Eng'g and Mfg.*, B-247146, 92-1 CPD ¶ 414 (Comp. Gen. Apr. 30, 1992). *Cf. Saco Defense, Inc.*, B-240603, 90-2 CPD ¶ 462 (Comp. Gen. Dec. 6, 1990).

7. If the SBA refuses to issue a COC, the contracting officer need not refer the case back to the SBA upon presentation of new evidence by the contractor. *Discount Mailers, Inc.*, B-259117, 95-1 CPD ¶ 140 (Comp. Gen. Mar. 7, 1995).

8. Once the SBA issues a COC, it is ***conclusive*** as to all elements of responsibility. So, once the contracting officer receives notice of the COC, the contracting officer ***must*** award the contract to the small business. FAR 19.602-4. GAO review of the COC process is limited to determining whether government officials acted in bad faith or failed to consider vital information. *The Gerard Co.*, B-274051, 96-2 CPD ¶ 177 (Comp. Gen. Nov. 8, 1996); *UAV Sys., Inc.*, B-255281, 94-1 CPD ¶ 121 (Comp. Gen. Feb. 17, 1994); *J&J Maint., Inc.*, B-251355.2, 93-1 CPD ¶ 373 (Comp. Gen. May 7, 1993).

9. The COC procedure does not apply when an agency declines to exercise an option due to responsibility-type concerns. *E. Huttenbauer & Son, Inc.*, B-258018.3, 95-1 CPD ¶ 148 (Comp. Gen. Mar. 20, 1995).

10. The COC procedure generally does not apply when the contracting officer rejects a technically unacceptable offer. *See Paragon Dynamics, Inc.*, B-251280, 93-1 CPD ¶ 248 (Comp. Gen. Mar. 19, 1993); *Pais Janitorial Serv. & Supplies, Inc.*, B-244157, June 18, 1991, 91-1 CPD ¶ 581; *compare with Fabritech, Inc.*, B-298247, July 27, 2006.

11. The COC procedure applies when an agency determines that a small business contractor is nonresponsible based solely on a pass/fail evaluation of the firm's past performance. *See Phil Howry Co.*, B-291402.3, B-291402.4, 2003 CPD ¶ 33 (Comp. Gen. Feb. 6, 2003); *In re FitNet Purchasing Alliance*, 2014 CPD ¶ 344 (Comp. Gen. 2014).

D. Regular Small Business Set-Asides

FAR Subpart 19.5.

1. The decision to set aside procurement for participation only by small businesses is a business judgment within the discretion of the contracting officer, which will not be disturbed absent a showing that it was unreasonable with that discretion limited by various provisions of law and regulation. The SBA may also *sua sponte* recommend that a certain acquisition be set aside for small businesses. FAR 19.501; *Neal R. Gross & Co.*, B-240924.2, 91-1 CPD ¶ 53 (Comp. Gen. Jan. 17, 1991); *Espey Mfg. & Elecs. Corp.*, B-254738.3, 94-1 CPD ¶ 180 (Comp. Gen. Mar. 8, 1994).

2. The agency must exercise its discretion reasonably and in accordance with statutory and regulatory requirements. *DCT Inc.*, B-252479, 93-2 CPD ¶ 1 (Comp. Gen. July 1, 1993); *Neal R. Gross & Co.*, B-240924.2, 91-1 CPD ¶ 53(Comp. Gen. Jan. 17, 1991); *Quality Hotel Offshore*, B-2900462002 CPD ¶ 91(Comp. Gen. May 31, 2002).

3. DFARS 219.201 requires small business specialist review of all acquisitions over $10,000, except simplified acquisition threshold contracts that are total small business set asides. See also PGI 219.201(c)(10).

4. Types of set-asides:

a. Total Set-Asides

(1) <u>Acquisitions between the micro-purchase threshold ($10,000) and the simplified acquisition threshold ($250,000)</u>. 15 U.S.C. § 644(j), 13 CFR 125.2(f)(1), FAR 19.502-2(a), and Deviation 2018-O0013 (effective April 13, 2018). Acquisitions in this range are ***automatically*** reserved for small business concerns and the contracting officer ***shall*** set aside any acquisition with an anticipated dollar value exceeding micro-purchase threshold ($10,000) but not greater than simplified acquisitions threshold ($250,000) for small businesses unless an exception applies.

(a) Exceptions.

(i) There is no requirement to set aside if there is no reasonable expectation of receiving offers from two or more responsible small businesses that will be competitive in terms of "market prices, quality, and delivery."

(ii) Overseas? In *Latvian Connection, LLC*, B-408633, 2013 CPD ¶ 224 (Comp. Gen. Sept. 18, 2013), GAO found that the Small Business Act did not require agencies to set aside for small businesses located outside the U.S. procurements valued under the simplified acquisition threshold when the SBA is silent and FAR Part 19 is expressly limited to the United States (FAR 19.000(b)). However, in response to GAO's decision, the SBA amended its regulation to establish worldwide applicability of small business provisions. 13 C.F.R. § 125.2. The FAR still explicitly exempts from FAR Part 19 any contracts to be performed outside the U.S. or its outlying areas, with the exception of the Certificate of Competency Program. FAR 19.000(b). Defense Pricing and Contracting (DPC) is working on FAR Case 2016-002, to resolve this conflict. While the case remains open as of June 2019, reports suggest that the final rule will provide agencies with discretion to use set-asides under FAR Part 19 to acquire goods for delivery and services for performance outside of the United States. It is important to consider treaties and international agreements when exercising this discretion. The SBA has included overseas contracts as part of the baseline used to rate agency performance against small business subcontracting goals beginning in 2016.

(2) Acquisitions over the SAT. FAR 19.502-2(b). The contracting officer ***shall*** set aside any acquisition over the SAT for small business participation ***if*** the contracting officer reasonably expects that:

(a) Offers will be obtained from at least two responsible small businesses and,

(b) Award will be made at fair market prices. *Adams & Assoc., v. United States*, 741 F.3D 102, 110 (Fed. Cir. 2014).

(3) Is there any real difference? While the language in the FAR is similar, the real difference lies in the interaction with other SBA programs. For acquisitions over the SAT, the contracting officer MUST consider the 8(a), HUBZone, WOSB, and SDVOSB programs before using a small business set aside (*See* Parts III and IV).

b. **Partial**. FAR 19.502-3; *Aalco Forwarding, Inc., et. al.*, B-277241.16, 98-1 CPD ¶ 75 (Comp. Gen. Mar. 11, 1998). The contracting officer ***shall*** set aside a portion of an acquisition, except for construction, for exclusive small business participation when:

(1) A total set-aside is not appropriate;

(2) The requirement is severable into two or more economic production runs or reasonable lots;

(3) One or more small business concerns are expected to have the technical competence and capacity to satisfy the requirement at a fair market price. (Note if the contracting officer only expects one capable small business to respond, then a partial set aside will not be made, unless authorized by the head of the contracting activity); and

(4) The acquisition is not subject to simplified acquisition procedures

(5) Note: A partial set aside will not be made if there is a reasonable expectation that only two concerns (one large and one small) with capability will respond to the solicitation (FAR 19.502-3(a)(5)).

5. Limitations on Subcontracting by Small Businesses. If the agency sets aside an acquisition, certain subcontracting and domestic end item limitations apply to the small business awardee. *See* 15 U.S.C. § 657s, 13 C.F.R. § 125.6 and FAR 52.219-14. *See also Innovative Refrigeration Concepts*, B-258655, 95-1 CPD ¶ 61 (Comp. Gen. Feb. 10, 1995); *Adrian Supply Co.*, B-257261, 95-1 CPD ¶ 21 (Comp. Gen. Sept. 15, 1994); *Kaysam Worldwide, Inc.*, B-247743, 92-1 CPD ¶ 500 (Comp. Gen. June 8, 1992).

a. Services and Supplies use the same methodology for applying the limitation on subcontracting rule.

(1) The contractor may not expend on subcontractors more than 50% of the amount paid to the concern under the contract based on a percentage of the overall award. 15 U.S.C. 657s(a).

(2) Similarly situated entities. A similarly situated entity is defined as a small business subcontractor that is a participant of the same small business program as the prime contractor, and is small for the NAICS code assigned by the prime contractor to the subcontract.

(a) 15 U.S.C. 657s(b) provides that work done by a similarly situated entities as subcontractors is not considered in determining if the limitation on subcontracting is violated. *E.g.*, if an 8(a) subcontracts to another 8(a), it is treated for purposes of the threshold as if the prime was doing that work.

(b) Only a first-tier subcontractor, however, can be counted as a similarly situated entity, and the first-tier subcontractor must perform the work with its own employees to receive the benefit of the similarly situated entity exemption

(3) In the case of a regular dealer in supplies, the dealer must supply the product of a domestic small business, unless waived.

b. Construction. The small business contractor cannot pay subcontractors more than 85% of amount they receive from the government.

6. Rejecting SBA set-aside recommendations and withdrawal of set-asides. FAR 19.505, 19.506.

a. The contracting officer may reject a SBA recommendation or withdraw a set-aside before award, however, the contracting officer must notify the SBA of the rejection. The SBA may then appeal the rejection to the head of the contracting activity. FAR 19.505, DFARS 219.505, and AFARS 5119.505.

b. The FAR sets forth notice and appeal procedures for resolving disagreements between the agency and the SBA. If the contracting agency and the SBA disagree, the <u>contracting agency</u> has the final word on set-aside or withdrawal decisions.

c. Potential offerors also may challenge the contracting officer's decision to issue unrestricted solicitations or withdraw set-asides. *DMS Pharmaceutical Group, Inc.*, B-406305, 2012 CPD ¶ 140 (Comp. Gen. Apr. 6, 2012); *Aerostructures, Inc.*, B-280284, 98-2 CPD ¶ 71 (Comp. Gen. Sep. 15, 1998); *American Imaging Servs.*, B-238969, 90-2 CPD ¶ 51 (Comp. Gen. Jul. 19, 1990).

d. If the activity receives ***no*** small business offers or the contracting officer determines that award would be "detrimental to the public interest," the contracting officer may not simply award the contract to a large business but rather, must withdraw the solicitation and resolicit on an unrestricted basis (allowing the potential for both small and large businesses to compete). FAR 19.506. *Western Filter Corp.*, B-247212, 92-1 CPD ¶ 436 (Comp. Gen. May 11, 1992); *CompuMed*, B-242118, 91-1 CPD ¶ 19 (Comp. Gen. Jan. 8, 1991); *Ideal Serv., Inc.*, B-238927.2, 90-2 CPD ¶ 335 (Comp. Gen. Oct. 26, 1990).

7. An agency is not required to set aside the reprocurement of a defaulted contract. FAR 49.405. *Premier Petro-Chemical, Inc.*, B-244324, 91-2 CPD ¶ 205 (Comp. Gen. Aug. 27, 1991).

III. PROGRAMS FOR SMALL DISADVANTAGED BUSINESSES

A. **Contracting with the SBA's "8(a)" Business Development Program**. 15 U.S.C. § 637(a); 13 C.F.R. Part 124; FAR Subpart 19.8.

1. **Policy**. The primary program in the federal government designed to assist small disadvantaged businesses is commonly referred to as the "8(a) program." The program derives its name from Section 8(a) of the Small Business Act. Section 8(a) authorizes the SBA to enter into contracts with other federal agencies. The SBA then subcontracts with eligible small disadvantaged businesses (SDBs). 15 U.S.C. §637(a). The purpose of the 8(a) program is to "assist eligible small disadvantaged business concerns [to] compete in the American economy through business development." 13 C.F.R. §124.1.

a. By Partnership Agreement (PA), between DOD and the SBA, the SBA delegated its authority to DOD to enter into 8(a) prime contracts with 8(a) contractors. Per the PA, the DOD contracting officers can bypass the SBA and contract ***directly*** with 8(a) SDBs on behalf of the SBA. The DOD contracting officers ***only*** have the authority to sign contracts on behalf of the SBA. The SBA remains the prime contractor on all 8(a) contracts, continues to determine eligibility of concerns for contract award, and retains appeal rights under FAR 19.810. *See* DFARS 219.800.

b. Either the SBA or the contracting activity may initiate selection of a requirement or a specific contractor for an 8(a) acquisition. FAR 19.803; DFARS PGI 219.803

c. Businesses must meet the criteria set forth in 13 C.F.R. §§ 124.101 - 124.112 to be eligible under the 8(a) program. FAR 19.802; *Autek Sys. Corp*., 835 F. Supp. 13 (D.D.C. 1993), *aff'd*, 43 F.3d 712 (D.C. Cir. 1994).

(1) The firm must be "owned and controlled by…socially ***and*** economically disadvantaged individuals." 13 C.F.R. § 124.101. The regulations require 51% ownership and control by one or more individuals who are ***both*** socially ***and*** economically disadvantaged. 13 C.F.R. § 124.105. *See also Software Sys. Assoc. v. Saiki*, No. 92-1776 (D.D.C. June 24, 1993) 19,932 F.3d 1143; *SRS Technologies v. United States*, No. 95-0801 (D.D.C. July 18, 1995) 894 F.Supp. 8.

(a) "**Socially disadvantaged**" individuals are those who have been "subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control." 13 C.F.R. § 124.103(a).

(i) There is a "rebuttable presumption" that members of the following designated groups are socially disadvantaged: Black Americans, Hispanic Americans, Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians), Asian Pacific Americans, among others. 13 C.F.R. § 124.103(b)(1).

(ii) Individuals who are not members of designated socially disadvantaged groups must establish individual social disadvantage by a "preponderance of the evidence." 13 C.F.R § 124.103(c)(1). Previously, individuals not members of designated groups needed to prove social disadvantage by "clear and convincing evidence."

(b) "**Economically disadvantaged**" individuals are "socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished credit capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged." 13 C.F.R. § 124.104(a).

(i) In considering diminished capital and credit opportunities, the SBA will consider such factors as:

a. Personal income for the last three years;

b. Personal net worth;

c. And the fair market value of all assets.

(ii) Net Worth. 13 C.F.R. § 124.104(c). For initial 8(a) eligibility, the net worth of an individual claiming disadvantage must be *less than $250,000*. For continued 8(a) eligibility, net worth must be *less than $750,000*. (Note "net worth" excludes the value of the primary personal residence).

(2) The firm must possess the "potential for success." 15 U.S.C. § 637(a)(7) and 13 C.F.R. § 124.107. One aspect of "potential for success" is the requirement that the firm must have been in business for two full years in the industry for which it seeks certification. The SBA is responsible for determining which firms are eligible for the 8(a) program. The SBA has reasonable discretion to deny participation in the 8(a) program to clearly unqualified firms as long as applications receive careful and thorough review. *See Neuma Corp. v. Abdnor*, 713 F. Supp. 1 (D.D.C. 1989).

d. The firm must have an approved business plan. 15 U.S.C. §636(j)(10)(A)(i).

e. Generally, per 13 C.F.R. § 124.504, the SBA will not accept a procurement for award as an 8(a) contract if:

(1) An activity already has issued a solicitation with the intent to set aside the procurement for small businesses or SDBs prior to offering the requirement to SBA;

(2) The procuring activity competed the requirement among participants prior to offering the requirement to SBA and receiving SBA acceptance.

(3) The SBA determines that inclusion of a requirement in the 8(a) program will affect a small business or SDB adversely. 13 C.F.R. § 124.504(c)(1)-(3)(2004). *See Designer Assocs*., B-293226, 2004 CPD ¶114 (Comp. Gen. Feb. 12, 2004); *C. Martin Co., Inc.*, B-292662, 2003 CPD ¶ 207 (Comp. Gen. Nov. 6, 2003); *John Blood*, B-28031898-2 CPD ¶ 58(Comp. Gen. Aug. 31, 1998); *McNeil Technologies, Inc.*, B-254909, 94-1 CPD ¶ 40 (Comp. Gen. Jan. 25, 1994).

2. **Procedures**. 13 C.F.R. §124.

a. If the activity decides that an 8(a) contract is feasible and desirable, it offers SBA an opportunity to participate. Contracts currently performed by an 8(a) via the 8(a) BD program must remain in the 8(a) BD program unless the SBA allows the requirement to be released. This includes follow on contracts. *See* 13 C.F.R. §124.505.

b. Contracts may be awarded to the SBA (or directly to the 8(a) contractor for DoD) for performance by eligible 8(a) firms "on either a sole source or competitive basis." FAR 19.800(b).

c. If the SBA accepts, the agency or the SBA chooses a contractor, or eligible firms compete for award. *See Defense Logistics Agency and Small Bus. Admin. Contract No. DLA100-78-C-5201*, B-225175, Feb. 4, 1987, 87-1 CPD ¶ 115. Frequently, SBA chooses only one contractor to perform. If so, such a sole-source acquisition is an exception to "full and open competition" authorized under FAR Part 6.2 (referred to as "full and open competition after exclusion of sources").

d. Per FAR 19.805-1, activities must generally compete larger 8(a) acquisitions if:

(1) The activity expects offers from two eligible, responsible 8(a) firms at a fair market price, *see Horioka Enters*., B-259483, 94-2 CPD ¶ 255(Comp. Gen. Dec. 20, 1994),; ***and***

(2) The value of the contract is expected to exceed $7 million for actions assigned manufacturing NAICS codes or $4 million for all other codes. *See* 13 C.F.R. § 124.506(a); FAR § 19.805-1(a)(2). The threshold applies to the

agency's estimate of the total value of the contract, including all options.

(3) Where the acquisition exceeds these thresholds, the SBA may still accept the acquisition for sole-source award if:

(a) There is no reasonable expectation that at least two eligible 8(a) firms will submit fair market offers; or

(b) The SBA accepts the requirement on behalf of a concern owned by an Indian tribe or an Alaskan Native Corporation. FAR 19-805-1(b). In DOD, this also includes Native Hawaiian Organizations. FAR 219.805-1(b)(2).

(4) The contracting officer must prepare a written Justification & Approval (J&A) to sole source to an 8(a) if an acquisition exceeds $22 million. FAR 19.808-1; FAR 6.303. Any sole source to an 8(a) with a value over $22 million must be approved by an appropriate agency official (as currently defined by FAR 6.304) and made public after award. FAR 6.303.

e. The COC procedures do not apply to sole source 8(a) acquisitions. *DAE Corp. v. SBA*, 958 F.2d 436 (1992); *Action Serv. Corp. v. Garrett*, 797 F. Supp. 82 (D.P.R. 1992); *Joa Quin Mfg. Corp.*, B-255298, Feb. 23, 1994, 94-1 CPD ¶ 140; *Aviation Sys. & Mfg., Inc.*, B-250625.3, 93-1 CPD ¶ 155 (Comp. Gen. Feb. 18, 1993); *Alamo Contracting Enters.*, B-249265.2, 92-2 CPD ¶ 358 (Comp. Gen. Nov. 20, 1992).

f. Subcontracting limitations apply to competitive 8(a) acquisitions.[10] 13 C.F.R. §124.510; See FAR 52.219-14; *Tonya, Inc. v. United States*, 28 Fed. Cl. 727 (1993); *Jasper Painting Serv., Inc.*, B-251092, 93-1 CPD ¶ 204 (Comp. Gen. Mar. 4, 1993).

g. Partnership between General Services Administration (GSA) and SBA.[11]

(1) SBA agreed to accept all 8(a) firms in GSA's Multiple Award Schedule Program.

(2) Agencies that buy from a Federal Supply Schedule 8(a) contractor may count the purchase toward the agency's small business goals.

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[10] *See* Section II.C.5 *infra* for more information of subcontracting limitations.

[11.] Press release highlighting agreement available at https://www.gsa.gov/portal/content/100394.

h. Graduation from 8(a) program. A firm "graduates" from the 8(a) program when it "completes its nine year term of participation in the 8(a) business development program." This nine year term may be shortened by termination, early graduation, or voluntary graduation under 13 C.F.R. § 124.3. *See Gutierrez-Palmenberg, Inc.*, B-255797.3, 94-2 CPD ¶ 158 (Comp. Gen. Aug. 11, 1994).

(1) 8(a) time period upheld. *Minority Bus. Legal Defense & Educ. Funds, Inc. v. Small Bus. Admin.*, 557 F. Supp. 37 (D.D.C. 1982). No abuse of discretion by refusing to keep a contractor in 8(a) program beyond nine years. *Woerner v. United States*, 934 F.2d 1277 (App. D.C. 1991).

i. GAO Protests

(1) GAO normally will not review a contracting officer's decision to set aside a procurement under the 8(a) program absent a showing of possible bad faith on the part of the government officials or that regulations may have been violated. 4 C.F.R. § 21.5(b)(3). *See American Consulting Servs., Inc.*, B-276149.2, B-276537.2, 97-2 CPD ¶ 37 (Comp. Gen. Jul. 31, 1997); *Comint Sys. Corp.*, B-274853, B-274853.2, 97-2, CPD ¶ 14 (Comp. Gen. Jan. 8, 1997). *See also, Rothe Computer Solutions*, B-299452, May 9, 2007.

(2) The GAO will not consider challenges to an award of an 8(a) contract by contractors that are not eligible for the program or particular acquisition. 13 C.F.R. § 124.1007(a); *CW Constr. Servs. & Materials, Inc.*, B-279724, 98-2 CPD ¶ 20 (Comp. Gen. July 15, 1998) (SBA reasonably determined that protestor was ineligible for award of 8(a) construction contract because it failed to provide sufficient information to show that it established and maintained an office within geographical area specified in solicitation as required by SBA regulations); *AVW Elec. Sys., Inc.*, B-252399, 93-1 CPD ¶ 386 (Comp. Gen. May 17, 1993). Likewise, the GAO will not consider challenges to a SBA decision that an 8(a) contractor is not competent to perform a contract. *L. Washington & Assocs.*, B-255162, 93-2 CPD ¶ 254 (Comp. Gen. Oct. 19, 1993).

3. **Mentor/Protégé Program**. 13 C.F.R. § 124.520.

a. The Mentor/Protégé Program is designed to encourage approved mentors to provide various forms of assistance to eligible 8(a) contractors. The purpose of mentor/protégé relationship is to

enhance the capabilities of the protégé and to improve its ability to successfully compete for contracts. (Sec. 1641 of the 2013 NDAA provided a statutory framework for a mentor-protégé program for agencies other than the DOD, which already had a program in place.) This assistance may include:

(1) Technical and/or management assistance;

(2) Financial assistance in the form of equity investments and/or loans;

(3) Subcontracts; and

(4) Joint ventures arrangements.

b. Mentors. Any concern that demonstrates a commitment and the ability to assist an 8(a) contractor may act as a mentor. "This includes businesses that have graduated from the 8(a) BD program, firms that are in the transitional stage of program participation, other small businesses, and large businesses." 13 C.F.R. § 124.520(b).

c. A mentor benefits from the relationship in that it may:

(1) Joint venture as a small business for any government procurement;

(2) Own an equity interest in the protégé firm up to 40%; and

(3) Qualify for other assistance by the SBA.

B. Challenges to the 8(a) Program

1. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). In a five to four holding, the Supreme Court declared that all racial classifications, whether benign or pernicious, must be analyzed by a reviewing court using a "**strict scrutiny**" standard. Thus, only those affirmative action programs that are narrowly tailored to achieve a compelling government interest will pass constitutional muster. *Cf. American Federation of Government Employees (AFL-CIO) v. United States*, 195 F. Supp. 2d 4 (D.D.C. 2002) (holding that the rational basis standard is still applicable to "political" (e.g. Native-American) rather than racial classifications).

2. Post-*Adarand* Reactions and Initiatives. *See* 49 C.F.R. § 26 (current DOT regulations implementing Disadvantaged Business Enterprise program).

3. Post-*Adarand* Cases.[12] *Sherbrooke Turf Inc. v. Minn. Dep't of Transp.*, 2001 U.S. Dist. LEXIS 19565 (D. Minn. Nov. 14, 2001); *Cache Valley Elec. Co. v. State of Utah*, 149 F.3d 1119 (10th Cir. 1998); *Cortez III Serv. Corp. v. National Aeronautics & Space Admin.*, 950 F. Supp. 357 (D.D.C. 1996); *Ellsworth Associates v. U.S.*, 917 F. Supp. 841 (D.D.C. 1996).

4. *Rothe Development Corporation v. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008). In this decision the United States Court of Appeals, Federal Circuit held that 10 U.S.C. § 2323, granting evaluation preferences to small disadvantaged businesses (SDBs), failed to withstand strict scrutiny analysis and violated the equal protection clause. The court found that there was not sufficient evidence to show a national pattern of discrimination in either private or public contracting. This was a fact-specific case and does not unequivocally rule out any future SDB-like programs.

5. *Rothe Development, Inc. v. Department of Defense*, 836 F.3d 57 (Fed. Cir. 2016). Rothe challenged the SBA's 8(a) business development program under the Due Process Clause, claiming their access to business opportunities was impaired due to the program's racial classification that presumes that certain racial minorities are eligible for the program. The Federal Circuit held the definition of "socially disadvantaged" did not contain a racial classification; the Small Business Act did not create a presumption that all individuals who were members of certain racial groups were socially disadvantaged; the 8(a) program was supported by a rational basis; and Congress did not unconstitutionally delegate legislative power to SBA in the 8(a) program. Rothe later appealed to the Supreme Court but certification was denied.

C. Historically Underutilized Business Zone (HUBZone). HUBZone Act of 1997, Title VI of Public Law 105-135, enacted on December 2, 1997 (111 Stat. 2592). Incorporated at FAR Subpart 19.13.

1. The purpose of the HUBZone program is to provide federal contracting assistance for qualified small business concerns located in historically underutilized business zones in an effort to increase employment opportunities. 13 C.F.R. § 126.100, FAR 19.1301, *et seq.*

2. The program applies to all federal departments and agencies that employ contracting officers. 13 C.F.R. § 126.101.

3. Benefits to HUBZone Small Business Concerns (SBCs) include price preferences and set asides.

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[12] Adarand on Remand. Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556 (D. Colo. 1997). But see Adarand Constructors, Inc. v. Slater, 169 F.3d 1292 (10th Cir. 1999); Adarand Constructors, Inc. v. Slater, 120 S. Ct. 722 (2000). Adarand Constructors, Inc., v. Slater, 228 F. 3d 1147 (10th Cir. 2000).

4. Methods of Acquisition:

a. Awards to qualified HUBZone SBCs through full and open competition. For these acquisitions, a price preference of 10% is generally applied in acquisitions expected to exceed the simplified acquisition threshold against non-HUBZone SBCs or other small-business concerns. The price preference is applied by adding a factor of 10% to all offers except: (1) offers from HUBZone small businesses and (2) otherwise successful offers from other small businesses. FAR 19.1307.

b. Set aside awards; FAR 19.1305.

(1) Order of Precedence. There is no longer any order of precedence among the 8(a) Program (subpart 19.8), HUBZone Program (subpart 19.13), Service-Disabled Veteran-Owned Small Business (SDVOSB) Procurement Program (subpart 19.14), or the Women-Owned Small Business (WOSB) Program (subpart 19.15). FAR 19.203.

(2) Permissive set-asides. For these acquisitions, a contracting officer **may** set aside an acquisition that exceeds the micro-purchase threshold for competition restricted to HUBZone SBCs if the contracting officer has a reasonable expectation that: (1) he/she will receive offers from two or more HUBZone SBCs and (2) award will be made at fair market price. FAR 19.1305(a).

c. **Sole source awards** to HUBZone SBCs. FAR 19.1306. A contracting officer **may** award a contract to a HUBZone SBC on a sole source basis if: (1) only one HUBZone SBC can satisfy the requirement, (2) the anticipated price of the contract (including options) will not exceed $7M for NAICS codes for manufacturing or $4M for any other NAICS codes, (3) the requirement is not currently being performed by an 8(a) participant (or has been accepted as a requirement under 8(a)), (4) the acquisition is greater than the simplified acquisition threshold, (5) the HUBZone SBC has been determined to be a responsible contractor, and (6) award can be made at a fair and reasonable price.

5. Requirements to be a Qualified HUBZone Small Business Concern[13] (SBC). 13 C.F.R. § 126.103 and FAR 19.1303.

[13] HUBZone small business concern (HUBZone SBC) means an SBC that is: (1) at least 51% owned and controlled by 1 or more persons, each of whom is a United States citizen; or (2) an Alaskan Native Corporation (ANC) owned and controlled by Natives (as determined pursuant to section 29(e)(1) of the ANC Settlement Act (ANCSA), 43 U.S.C. 1626(e)(1)) or; (3) a direct or indirect subsidiary corporation, joint venture, or partnership of an ANC

a. The concern must be a HUBZone SBC as defined by 13 C.F.R. § 126.103.

b. At least 35 percent of the concern's employees must reside in a HUBZone, and the HUBZone SBC must certify that it will attempt to maintain this percentage during the performance of any HUBZone contract it receives. 13 C.F.R. § 126.200.

c. If the SBA determines that a concern is a qualified HUBZone SBC, it will issue a certification to that effect and will add the concern to the List of Qualified HUBZone SBCs. A firm on that list is eligible for HUBZone program preference without regard to the place of performance. The concern must appear on the list to be considered a HUBZone SBC.

d. A joint venture may be considered a HUBZone SBC if the concern meets the criteria in 13 C.F.R. § 126.616.

e. An owner of a HUBZone SBC is a person who owns any legal or equitable interest in the concern. More specifically, SBCs included: corporations, partnerships, sole proprietorships and limited liability companies. 13 C.F.R. § 126.201.

6. **Size standards**. 13 C.F.R. § 126.203. At time of application for certification, a HUBZone SBC must meet SBA's size standards for its primary industry classification.

7. **Certification**. 13 C.F.R. § 126.300. A SBC must apply to the SBA for certification to be considered a HUBZone SBC.

8. **Subcontracting Limitations**. *See* section II.D.5. *infra*, for the subcontracting rules that reflect the 2013 NDAA amendments.

9. **Protest Procedures**. FAR 19.306; 13 C.F.R. § 126.801.

a. Protests based upon type of acquisition. For sole source acquisitions, the SBA or the contracting officer may protest the

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qualifying pursuant to section 29(e)(1) of the ANCSA, 43 U.S.C. 1626(e)(1)), if that subsidiary, joint venture, or partnership is owned and controlled by Natives (as determined pursuant to section 29(e)(2) of the ANCSA, 43 U.S.C. 1626(e)(2)); or (4) wholly owned by one or more Indian Tribal Governments, or by a corporation that is wholly owned by one or more Indian Tribal Governments; or (5) a small business that is owned in part by one or more Indian Tribal Governments or in part by a corporation that is wholly owned by one of more Indian Tribal Governments, if all other owners are either U.S. citizens or small businesses; or (6) a small business that is wholly owned by a CDC or owned in part by one or more CDCs, if all other owners are either United States citizens or SBCs; or (7) a small business that is a small agricultural cooperative organized or incorporated in the United States, wholly owned by one or more small agricultural cooperatives organized or incorporated in the United States or owned in part by one or more small agricultural cooperatives organized or incorporated in the United States, provided that all other owners are small business concerns or United States citizens. 13 C.F.R. § 126.103.

apparently successful offeror's HUBZone SBC status. For all other acquisitions, an offeror, the SBA, or the contracting officer may protest the apparently successful offeror's HUBZone SBC status.

b. Who May Protest and When to Protest. FAR 19.306.

(1) An offeror must submit its protest in writing to the contracting officer no later than (1) the 5th business day after bid opening or (2) the 5th business day after notification by the contracting officer of the apparently successful offeror. The contracting officer will forward the offeror's protest to the SBA's Director of HUBZone Program for the HUBZone Program for decision. FAR 19.306(f)(1). Premature protests will be returned to the protester.

(2) Protests submitted by a contracting officer or by the SBA must be submitted in writing to the Director of HUBZone Program for a decision.

(3) The SBA will determine the HUBZone status of the protested HUBZone small business within 15 business days after receiving the protest. The SBA's decision is final unless overturned on appeal by the SBA's Associate Deputy Administrator for Government Contracting and 8(a) Business Development. If the SBA does not contact the contracting officer with its decision within 15 business days, the contracting officer may award the contract to the apparently successful offeror.

D. Service-Disabled, Veteran-Owned Small Businesses. FAR 19.14; 13 C.F.R. § 125.8 to § 125.29

1. The purpose of the Service-Disabled Veteran-Owned Small Business (SDVOSB) Program is to provide federal contracting assistance to these businesses. Status as a SDVOSB is determined in accordance with 13 C.F.R. §125.8-125.13. FAR 19.14. SDVOSB status protests are handled similar to HUBZone status protests, discussed supra, sec. III.C.9.; FAR 19.307.

2. Set-Asides authorized. A contracting officer ***may*** set aside acquisitions exceeding the micro-purchase threshold for competition restricted to SDVOSB concerns if the contracting officer has a reasonable expectation that: (1) offers will be received from two or more SDVOSBs and (2) award will be made at a fair market price.

3. Sole Source awards authorized. A contracting officer **may** award contracts to SDVOSBs on a sole source basis if: (1) only one such business can satisfy the requirement, (2) the anticipated award price of the contract (including options) will not exceed $6.5 million for a requirement with a NAICS code for manufacturing or $4 million for all other NAICS codes, (3) the SDVOSB has been determined to be responsible, and (4) award can be made at a fair and reasonable price. FAR 19.1406.

4. Department of Veterans Affairs – Rule of Two: *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969 (2016)

   a. In 2006 Congress passed the Veterans Benefits, Health Care, and Information Technology Act of 2006. This Act included a provision requiring the VA to restrict competitions to veteran-owned firms so long as the "rule of two" is satisfied. The VA Act states, at 38 U.S.C. 8127(d):

      > "(d) Use of Restricted Competition.— Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States." The Women-Owned Small Business (WOSB) Program. 15 U.S.C. §637(m); FAR 19.15.

   b. In the Supreme Court's June 16, 2016 decision, the Court held that the contracting procedures under Section 8127(d) are mandatory and apply to all contracting determinations by the Department of Veterans Affairs. This is the Rule of Two – which provides that a contracting officer award contracts by restricting competition for contracts to veteran-owned small businesses if the officer reasonably expects that at least two such businesses will submit offers and that the award can be made at a fair and reasonable price that offers best value to the U.S.

   c. Note that the GAO has since held that *Kingdomware* holding that the Rule of Two applies to multiple award contracts or Federal Supply Schedule (FSS) awards is limited to the Department of Veterans Affairs. *American Relocation Connections, LLC*, B-416035 (May 18, 2018). Thus, all other agencies still have discretion to decide whether to set-aside multiple award contracts or FSS procurements for small businesses.

E. The Women-Owned Small Business (WOSB) Program. 15 U.S.C. §637(m); FAR 19.15

1. Subpart 19.15 was added to the FAR to address statutory amendments and changes in the SBA's regulations concerning the women-owned small business program. The Small Business Act had previously established a Government-wide goal for participation by women-owned and controlled small business concerns. The goal is not less than 5 % of the total value of all prime and subcontracts awards each fiscal year.[14]

2. Status as an economically disadvantaged women-owned small business (EDWOSB) or WOSB concern is determined in accordance with 13 CFR Part 127. FAR 19.1503(a). EDWOSB and WOSB status protests are handled similar to HUBZone status protests. FAR 19.308.

3. Set-Asides for EDWOSBs and WOSBs. The contracting officer may set-aside acquisitions exceeding the micro-purchase threshold for competition restricted to EDWOSB or WOSB concerns eligible under the WOSB Program in those NAICS codes in which SBA has determined that women-owned small business concerns are underrepresented or substantially underrepresented in Federal procurement, as specified on SBA's Web site at http://www.sba.gov/WOSB. FAR 19.1505; 13 C.F.R. Part 127.

   a. For requirements in NAICS codes designated by SBA as underrepresented, a contracting officer may restrict competition to EDWOSB concerns or qualified WOSBs if the contracting officer has a reasonable expectation that (1) two or more WOSB or EDWOSB concerns will submit offers; and (2) the award will be made at a fair and reasonable price. FAR 19.1505 (b),(c)

   b. The contracting officer may make an award, if only one acceptable offer is received from a qualified EDWOSB or WOSB concern, but if no acceptable offers are received from an EDWOSB or WOSB concern, the set-aside shall be withdrawn and the requirement, if still valid, must be considered for set aside in accordance with 19.203 and subpart 19.5. FAR 19.1505(d) and (f).

4. **Sole Source Awards**. There is now independent authority to make a sole source award to WOSBs or EDWOSB. SBA's final rule implements the statutory requirements of paragraph (a)(3) of section 825 of the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Public Law 113-291, which permits contracting officers

[14] On 23 May 2000, President Clinton signed Executive Order 13,157, 65 Fed. Reg. 34,035 (2000), highlighting his commitment to expanding opportunities for Women Owned Small Businesses. The EO sets out several steps Executive Agencies should take to increase contracting opportunities.

to make sole source contract awards, when the anticipated price, including options, does not exceed $6.5 million for manufacturing NAICS codes, or $4 million for other NAICS codes. This rule is now codified as 15 U.S.C. § 637(m)(7)(B).

IV. CHOOSING THE CORRECT SET-ASIDE

A. **The order of precedence controversy**. Recent Amendments to the FAR have settled a long-running controversy between all three branches of Government concerning the proper order of precedence for set-asides among small business socioeconomic concerns.

1. Previously, there was much confusion about the order of precedence among SB programs. This confusion arose out of the statutory language of the HUBZone statute, which provides that "a contract opportunity shall be awarded pursuant to this section on the basis of competition restricted to qualified HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price." 15 U.S.C. 657a(b)(2)(B).

2. The GAO previously held that, if there was a reasonable expectation that two or more HUBZones would perform the contract at a fair market value, then the HUBZone statute's mandatory language *required* agencies to use a HUBZone set-aside prior to considering a SDVOSB or 8(a) set-aside. *International Program Group, Inc.*, Comp. Gen. B-400278; B-400308, September 19, 2008; *Mission Critical Solutions*, Comp. Gen. B-401057, May 4, 2009.

3. On July 10, 2009, the Office of Management and Budget issued a memorandum to the heads of all Executive Branch agencies and departments stating that pending a legal analysis of the GAO's basis for its recent decisions, they were to follow the SBA's regulations which call for parity between the HUBZone, 8(a) and SDVOSB programs. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB MEMO. NO. 09-23, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES (2009). On August 21, 2009, the Department of Justice (DOJ) issued a memorandum directing Executive Branch agencies to follow the SBA regulations, finding that they are reasonable and binding, and reminding agencies that GAO decisions are not binding on the Executive Branch. OFFICE OF THE DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE, MEMORANDUM OPINION FOR SARA LIPSCOMB (2009).

4. The COFC eventually sided with the GAO holding that the plain language of the HUBZone statute required the use of HUBZone contracting when the requirements were met, and rejecting DoJ's (and SBA's) parity

arguments. *See Mission Critical Solutions v. United States*, 91 Fed. Cl. 386 (2010) (providing a thorough description of the controversy between the executive, legislative (GAO) and judiciary concerning the order of precedence for set-asides between the various small-business socioeconomic concerns).

B. **Congress steps in**. On March 16, 2011, the FAR Council issued implementing Section 1347 of the Small Business Jobs Act of 2010 (Pub. L. 111-240), clarifying that there is no order of precedence among the HUBZone, 8(a) and SDVOSB programs.

C. ***There is no longer any order of precedence***. After an additional amendment to the FAR to incorporate the WOSB program, FAR 19.203 now states, unequivocally, that "there is no order of precedence among the 8(a) Program (subpart 19.8), HUBZone Program (subpart 19.13), Service-Disabled Veteran-Owned Small Business (SDVOSB) Procurement Program (subpart 19.14), or the Women-Owned Small Business (WOSB) Program (subpart 19.15)."

D. Contracting Officer's Discretion. This change to the FAR allows contracting officers to freely choose among available SB socioeconomic concerns when determining whether to set-aside an acquisition, provided the relevant criteria is met (as outlined above).

V. COMPETITION ISSUES

A. Contract Bundling. FAR 7.107; DFARS 207.170; 15 U.S.C. §657q; 13 C.F.R. §125.2

1. Contract bundling is the practice of combining two or more procurement requirements, which were previously provided or performed under separate smaller contracts, into a solicitation for a *single contract* that is likely to be unsuitable for award to a small business due to:

   a. The diversity, size, or specialized nature of the elements of the performance specified;

   b. The aggregate dollar value of the anticipated award;

   c. The geographical dispersion of the contract performance sites; or

   d. Any combination of the factors described above.

   15 U.S.C. § 632(o)(2); FAR 2.101; 13 C.F.R. § 125.2(d); *USA Info. Sys., Inc.*, B-291417, 2002 CPD ¶ 224 (Comp. Gen. Dec. 30, 2002).

2. A "separate smaller contract" means a contract that has been performed by one or more small business concerns or that was *suitable for award* to one or more small business concerns. FAR 2.101.

3. The bundling rules apply to multiple awards of IDIQ contracts and to Federal Supply Schedule orders. A "single contract" includes indefinite-quantity contracts and any *order* placed against an indefinite quantity contract. FAR 2.101.

4. Bundling is not *per se* prohibited. In fact, bundling may provide substantial benefits to the Government. However, because of the potential negative impact on small business participation, the "head of the agency *must* conduct market research to determine whether bundling is necessary and justified." Market research may indicate that bundling is necessary and justified if an agency or the government would derive "measurably substantial benefits." FAR 7.107(a).

5. The DOD has restricted bundling when the total cost of the contract exceeds $2 million[15] unless the acquisition strategy includes:

   a. Results of market research;

   b. Identification of any alternative contract approach that would involved a lesser degree of consolidation; and

   c. Determination by the senior procurement executive that consolidation is necessary and justified. This determination must be included in the contract file. DFARS 207.170-3.

   d. The 2013 NDAA, Pub. L. 103-355, repealed the former consolidation statute, 10 U.S.C. 2382, which was implemented by DFARS 207.170-3(a). However, the DFARS provision has not been repealed or amended at this time. Thus, we currently have two different definitions of consolidation; until incorporated in the FAR/DFARS, or rescinded, we must operate under both of them to the extent possible, giving priority to the statute if there is a conflict.

6. In addition, the SBA has tried to reign in bundled contracts. *See* 13 C.F.R. §125.2.

7. Key parts of the rules on contract bundling. 13 C.F.R. §125.2; FAR 7.107; FAR 2.101.

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15 See DoD Class Deviation 2013-O0021, Contract Consolidation. This class deviation lowers the dollar threshold as set forth at DFARS 207.170-3(a) from $6 million to $2 million. This class deviation is effective until incorporated into the FAR and/or DFARS, or rescinded.

a. Permits "teaming" among two or more small firms, who may then submit an offer on a bundled contract.

b. Requires the agency to submit to the SBA for review any statement of work containing bundled requirements. If the SBA concludes that the bundled requirements are too large, it may appeal to the agency. *See e.g., Phoenix Scientific Corp.*, B-286817, 2001 CPD ¶ 24 (Comp. Gen. Feb. 24, 2001); *Encompass Group*, B-410726, 2015 CPD ¶ 93 (Comp. Gen. 2015).

c. In determining "measurably substantial benefits" for the purpose of assessing whether bundling is "necessary and justified," the agency should look to the following factors: cost savings or price reduction, quality improvements, reduction in the acquisition cycle, better terms or conditions, or other benefits. An agency may find a bundled requirement "necessary and justified" if it will derive more benefit from bundling than from not bundling. *See TRS Research*, B-290644, 2002 CPD ¶ 159 (Comp. Gen. Sept. 13, 2002).

d. Per FAR 7.107, an agency may determine that bundling is "necessary and justified" if, as compared to the benefits that it would derive from contracting to meet those requirements if not bundled, it would derive measurably substantial benefits from:

(1) Benefits equivalent to 10% if the contract value (including options) is $94 million or less; or

(2) Benefits equivalent to 5% or $9.4 million, whichever is greater, if the contract value (including options) is over $94 million.

e. Reducing only administrative or personnel costs does not justify bundling unless those costs are expected to be at least 10 percent of the estimated contract (including options) of the bundled requirements. FAR 7.107(d)

f. FAR 7.104(d)(2) requires acquisition planning to prevent "substantial bundling if estimated contract order exceeds $8 million (DoD); $6 million (NASA, GSA, DOE); and $2.5 million for all other agencies.

g. Bundling rules do NOT apply to contracts awarded and performed entirely outside the United States.

8. Notification of bundling of DoD contracts. DFARS 205.205-70

a. When a proposed acquisition is funded entirely using DoD funds and potentially involves bundling, the contracting officer shall, at least 30 days prior to the release of a solicitation or 30 days prior to placing an order without a solicitation, publish in FedBizOpps.gov a notification of the intent to bundle the requirement.

b. In addition, if the agency has determined that measurably substantial benefits are expected to be derived as a result of bundling, the notification shall include a brief description of those benefits.

c. This requirement is in addition to the notification requirements concerning bundling at FAR 10.001(c)(2)(i) and (ii).

9. Reference. In October 2007, the Office of Small Business Programs released a benefit analysis guidebook that assists DoD acquisition teams considering contract bundling.

B. Tiered / Cascading Set-Asides

1. "Tiered" or "cascading set-asides" are set-asides where the contracting officer informs prospective offerors that he/she will award the contract to only certain socio-economic status offerors so long as two or more responsible offers are received from such offerors. On the other hand, if two or more such offers are not received, then the contracting officer will then award the contract to the next "tier" of socio-economic status offerors so long as two or more responsible offers are received from such offerors. If no tier has two such offers, then the contracting officer will award the contract on the basis of full and open competition. *Carriage Abstract, Inc.*, B-290676, B-290676.2, 2002 CPD ¶ 148 (Comp. Gen. Aug. 15, 2002).

2. Problems:

a. Abdicates government's market research responsibilities.

b. Places too much market research and risk on contractors who may spend bid and proposal preparation cost, and yet never have their offer considered if the competition never makes it to their tier.[16]

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[16] Some industry groups say cascading set aside acquisitions are unfair because in such acquisitions, contracting officers may never consider offers from bigger companies. One industry representative explained, "You spend all this bid and proposal money and you thought you had a chance of winning, and, oops, there was a HUBZone," said Cathy Garman, senior vice president of public policy at the Contract Services Association. Ms. Garman said that if she operated a medium or large business, she would not present an offer on a solicitation advertising a cascading set aside. *New Acquisition Strategy Alarms Industry*, June 29, 2005, Government Executive, available at http://www.govexec.com/federal-news/2005/06/new-acquisition-strategy-alarms-industry/19550/.

3. Statutory Solution

a. Section 816 of the 2006 National Defense Authorization Act Pub. L. 109-163 provides that:

(1) The Secretary of Defense shall prescribe guidance for the military departments and the Defense Agencies on the use of tiered evaluations of offers for contracts and for task or delivery orders under contracts.

(2) Elements. The guidance prescribed under subsection (a) shall include a <u>prohibition</u> on the initiation by a contracting officer of a tiered evaluation of an offer for a contract or for a task or delivery order under a contract **unless** the contracting officer—

(a) has conducted market research in accordance with part 10 of the Federal Acquisition Regulation in order to determine whether or not a sufficient number of qualified small businesses are available to justify limiting competition for the award of such contract or task or delivery order under applicable law and regulations;

(b) is unable, after conducting market research under paragraph (1), to make the determination described in that paragraph; and

(c) includes in the contract file a written explanation of why such contracting officer was unable to make such determination.

b. DFARS implemented the Act via amendments to DFARS 202.101, 210.001, 213.106-1-70, 215.203-70, and 219.1307. See 71 Fed. Reg. 53042. DFARS 219.1307 instructs a contract officer to "not use the price evaluation preference in acquisitions that use tiered evaluation of offers, until a tier is reached that considers offers from other than small business concerns."

C. Multiple Award Contracts.

1. Small business set asides also apply to IDIQ contracts. Regardless of whether the overall contract was restricted, a KO <u>may</u> set aside a task/delivery order for small business concerns. FAR 19.502-4.

2. This implements Sec. 1331 of Public Law 111-240 (15 U.S.C. 644(r)).

VI. THE RANDOLPH-SHEPPARD ACT

A. REFERENCES

1. The Randolph-Sheppard Act for the Blind (RSA) 20 U.S.C. §§ 107-107f.

2. U.S. DEPT. OF DEFENSE, INSTRUCTION 1125.03, VENDING FACILITY PROGRAM FOR THE BLIND ON FEDERAL PROPERTY (2009) [hereinafter DODI 1125.03].

3. 34 C.F.R. Part 395, Vending Facility Program for the Blind on Federal Property (Department of Education).

B. History of the Randolph-Sheppard Act for the Blind

1. The Current RSA—Generally

a. Purpose. The purpose of the Randolph-Sheppard Act is to "provide blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting." Specifically, under this act, "blind persons [are] licensed …to operate vending facilities on any Federal property." 20 U.S.C. § 107(a)

b. Preferences for the blind. The statute gives a preference for "blind vendors licensed by a State agency" in the "operation of vending facilities on Federal property…wherever feasible." 20 U.S.C. § 107(b).

2. Original Act. Act of June 20, 1936, Pub. L. No. 732, 49 Stat. 1559.

a. The purpose of the Act was for federal agencies to give blind vendors the authorization to operate in federal buildings.

b. The Act gave agency heads the discretion to exclude blind vendors from their building if the vending stands could not be properly and satisfactorily operated by blind persons.

c. Location of the stand, type of stand and issuing the license were all subject to approval of the federal agency in charge of the building.

d. Office of Education, Department of Interior, was designated to administer the program, and could designate state commissions or agencies to perform licensing functions. Department of Education Regulations appears to take precedence over other agency regulations in the event of a conflict. 61 Fed. Reg. 4,629, February 7, 1996.

3. The 1954 Amendments. Act of Aug. 3, 1954, Pub. L. No. 565m, 68 Stat. 663 (1954).

   a. The invention of vending machines served as an impetus to re-examine the Act. The amendments also showed concern for expanding the opportunities of the blind.

   b. The amendments made three main changes to the act:

      (1) The vending program was changed from federal *buildings* to federal *properties*. "Federal property" was defined as "any building, land, or other real property owned, leased, or occupied by any department, agency or instrumentality of the United States…including the Department of Defense." This definition is also the current definition. The Act applies to all federal activities—whether appropriated or nonappropriated.

      (2) Agencies were required to give blind persons a preference, "wherever feasible," when deciding who could operate vending stands on federal property.

      (3) This preference was protected by requiring agencies to write regulations assuring the preference.

   c. The "wherever feasible" language still gave agencies wide discretion in administering the Act, and in reality, fell far short of Congressional intent to expand the blind vending program.

4. The 1974 Amendments. Act of Dec 7, 1974, Pub. L. No. 516, 88 Stat. 1623 (1974).

   a. Impetus—the proliferation of automatic vending machines and lack of enthusiasm for the Act by federal agencies.

   b. Comptroller General study showcased the abuses and ineffectiveness of the Act. Review of Vending Operations on Federally Controlled Property, Comp. Gen. Rpt. No. B-176886 (Sept. 27, 1973).

C. Current Act

1. The current RSA imposes several substantive and procedural controls. Key definitions are included in the regulations issued pursuant to the Act.[17] The Act mandated three main substantive provisions:

[17] Key Definitions.

a. Give blind vendors priority on federal property for the operation of "vending facilities" so long as the blind vendor has been issued a "license" by the state licensing agency and in DOD, the blind vendor's state licensing agency has been issued a "permit" (See definitions in footnote);

b. New buildings to include satisfactory sites for blind vendors; and

c. Require paying some vending machine income to the blind.

2. Priority Given to Blind Vendors

a. In authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency. 20 U.S.C. § 107(b).

b. The Secretary of Education, the Commissioner of Rehabilitative Services Administration, and the federal agencies shall prescribe regulations which assure priority.

c. **"Vending facilities"** has a very broad definition and includes automatic vending machines, cafeterias, snack bars, cart services, shelters, counters, and such other appropriate auxiliary equipment…[which is]…necessary for the sale of articles or services…and which may be operated by blind licensees." 20 U.S.C. § 107e(7).

(1) Vending facilities typically sell newspapers, periodicals, confections, tobacco products, foods, beverages, and other articles or services dispensed automatically or manually and prepared on or off the premises, and include the vending or exchange of chances for any State lottery. 20 U.S.C. § 107a(a)(5) 32 C.F.R. § 395.1(x). See, e.g., Conduct on the Pentagon Reservation, 32 C.F.R. Parts 40b and 234, para. 234.16, exempting sale of lottery tickets by Randolph-Sheppard vending facilities from the general prohibition of gambling.

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a. Blind person: a person whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses as determined by a physician or optometrist. 20 U.S.C. § 107e.
b. Blind Licensee: a blind person licensed by the state licensing agency to operate a vending facility on federal property. 34 C.F.R. 395.1.
c. License: a written instrument issued by the state licensing agency, to a blind person, authorizing that person to operate a vending facility on Federal property. 34 C.F.R. 395.1.
d. State licensing agency: the state agency designated by the U.S. Secretary of Education to issue licenses to blind persons for the operation of vending facilities on Federal property. 34 C.F.R. 395.1.
e. Permit: the official written approval to establish and operate a vending facility request by and issued to a state licensing agency by the Head of a DOD Component. DODI 1125.3, encl 1, para.E1.1.11.

(2) Vending machines (a type of "vending facility") are defined as a "coin or currency operated machine that dispense articles or services, except that machines providing services of a recreational nature (e.g. jukeboxes, pinball machines, electronic game machines, pool tables, shuffle boards, etc.) and telephones are not considered to be vending machines." DODI 1125.03, encl 1, para E1.1.17.

(3) The blind vendor may only receive these preferences under the RSA regarding vending facilities if the State Licensing Agency (SLA) issues the blind vendor a "license." **Additionally, in DoD, the <u>SLA must seek out and apply for a permit to operate on a DoD installation</u>.** The DOD installation has no affirmative obligation until the DOD Component issues a permit to the SLA. Once issued, the blind vendor has priority unless the interests of the U.S. are adversely affected. DODI 1125.03, encl 2.

D. Arbitration Procedures

1. Arbitration procedures. Two roads to arbitration:

a. Grievances of Blind Licensee. A dissatisfied blind licensee may submit a request to the SLA for a full evidentiary hearing on any action arising from the operation or administration of the vending facility program. 20 U.S.C. § 107d-1. If the blind licensee is dissatisfied with the decision made by the SLA, the vendor may file a complaint with the Secretary of Education who shall convene a panel to <u>arbitrate</u> the dispute; this decision is final and binding on the parties, except that appeal may be made under the Administrative Procedure Act.

b. Complaints by the SLA. SLA may file a complaint with the Secretary of Education if it determines that the agency is failing to comply with the Randolph-Sheppard Act or its implementing regulations. Upon filing of such a complaint the Secretary convenes a panel to <u>arbitrate</u>. The panel's decision is final and binding on the parties, except that appeal may be made under the Administrative Procedure Act. 20 U.S.C. § 107d-1(b) and 20 U.S.C. § 107d-2(a). **NOTE**: The arbitration procedures do not provide the blind vendors with a cause of action against any agency. The blind vendors have an avenue to complain of wrongs by the SLA. The SLA has a forum to complain against a federal agency, which it believes is in violation of the act.

E. Protests to the Government Accountability Office (GAO)

1. Relationship to the Small Business Act's 8(a) Provisions. The *requirements of the Randolph-Sheppard Act take precedence over the 8(a) program*. Triple P. Services, Inc., Recon., B-250465.8, 93-2 CPD ¶ 347 (Comp. Gen. Dec. 30, 1993) (denying challenge to agency's decision to withdraw and 8(a) set aside and to proceed under the Randolph-Sheppard Act); *but see Intermark*, B-290925, 2002 CPD ¶180, (Comp. Gen. Oct. 23, 2002) (holding that the Army improperly withdrew a small-business set-aside solicitation for food services at Fort Rucker and reissued a solicitation on a full and open competition basis allowing for RSA businesses to compete. GAO sustained incumbent small business contractor's protest stating there was no proper basis for withdrawing the small business set aside. GAO recommended that the agency's acquisition include both small businesses and the SLA using a "cascading" set of priorities whereby competition is limited to small business concerns and the SLA, with the SLA receiving award if its proposal is found to be within the competitive range).

2. Protest by State Licensing Agency (on behalf of blind vendors). The GAO will not normally consider a protest lodged by an SLA, because binding arbitration is the appropriate statutory remedy for the SLA. *Washington State Department of Services for the Blind*, B-293698.2, 2004 CPD ¶84 (Comp. Gen. Apr. 27, 2004) (dismissing a protest filed by the SLA stating that the RSA "vests exclusive authority with the Secretary [of Education] regarding complaints by SLAs concerning a federal agency's compliance with the Act, including challenges to agency decisions to reject proposals in response to a solicitation"); *Mississippi State Department of Rehabilitation Services*, B-250783.8, 94-2 CPD ¶ 99 (Comp. Gen. Sept. 7, 1994).

F. Controversial Issues

1. Burger King and McDonald's restaurants on military installations. 60 Fed. Reg. 4406, January 23, 1995. An arbitration panel convened in 1991 under the RSA decided that AAFES Burger King and the Navy's McDonald's franchise agreements violated two provisions of the Randolph-Sheppard Act.

   a. DoD failed to notify state licensing agencies of its intention to solicit bids for vending facilities (i.e. Burger King and McDonalds), and

   b. DoD's solicitation for nationally franchised fast food restaurants constituted a limitation on the placement or operation of a vending facility. DoD violated the Randolph-Sheppard Act by failing to seek the Secretary of Education's approval for such limitation.

   c. Arbitration Panel's remedy:

(1) AAFES must contact the SLA in each state with a Burger King facility to establish a procedure acceptable to the SLA for identifying, training, and installing blind vendors as managers of all current and future Burger King operations. Additionally, DoD should give the SLA 120 days written notice of any new Burger King operations.

(2) Navy Resale and Services Support Office (NAVRESSO) will provide the appropriate SLA with 120 days notice of any new McDonald's facility to be established on a Navy installation. The SLA must determine whether it wishes to exercise its priority and to provide funds to build and operate a new McDonald's facility. See 60 Fed. Reg. 4406, January 23, 1995; *see also Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90 (Fed. Cir. 1986). SLA sued protesting contracts between AAFES and Burger King, and the Navy Exchange Service and McDonald's. The court remanded to the District Court with an order to dismiss, because the SLA had failed to exhaust administrative remedies.

G. Applicability to Military Mess Hall Contracts

1. The Government Accountability Office has determined that the Randolph-Sheppard Act applies to military dining facilities. In doing so, the GAO focused on the regulatory definition of "cafeteria." In addition the GAO gave significant weight to the regulatory interpretation of the Department of Education and to interpretations by certain high level officials within DOD. *Department of the Air Force—Reconsideration*, B-250465.6, 93-1 CPD ¶ 431 (Comp. Gen. June 4, 1993). *See also Intermark*, B-290925, 2002 CPD ¶180, (Comp. Gen. Oct. 23, 2002) (GAO sustained protest by offeror in Army dining facility contract where Army applied RSA preference). The applicability of the Randolph-Sheppard Act to mess halls remains a topic of considerable debate.

2. In *NISH v. Cohen*, 247 F.3d 197 (4th Cir. 2001), the Fourth Circuit affirmed a District Court holding that the Act applied to military "mess hall services." Court relied heavily on the DoD position that Randolph-Sheppard applies.

3. In *Automated Comm'n Sys., Inc. v. United States*, 49 Fed. Cl. 570 (2001), the Court of Federal Claims (COFC) refused to hear a challenge to the validity of DOD Directive 1125.03, which mandates the RSA preference for DOD dining facility contracts. COFC concluded that only federal district courts may hear a challenge to the validity of procurement statutes and regulations under their federal question and declaratory judgment authorities. COFC also held that the more specific RSA preference takes

precedence over less-specific statutes, specifically, the HUBZone preference.

VII. THE BUY AMERICAN ACT (BAA)

A. Origin and Purpose

41 U.S.C. §§ 8302-8305 (1995); Executive Order 10582 (1954), as amended by Executive Order 12608 (1987); Executive Order 13788 (2017). FAR Part 25. The Act was passed during the Depression of the 1930s and was designed to save and create jobs for American workers.

B. Domestic Preference

Preference for Domestic End Products and Domestic Construction Materials. FAR 25.001.

1. As a general rule, under the BAA, agencies may acquire only domestic end products. Unless another law or regulation prohibits the purchase of foreign end items, however, the contracting officer may not reject as nonresponsive an offer of such items.

2. Exceptions: The prohibition against the purchase of foreign goods does not apply if:

   a. the product is not available in sufficient commercial quantities;

   b. domestic preference would be inconsistent with the public interest;

   c. the product is for use outside the United States;

   d. the cost of the domestic product would be unreasonable;

   e. the product is for commissary resale; or

   f. the product is information technology that is a commercial item. FAR 25.103

3. Executive Order 13788, April 18, 2017, directs agencies to "monitor, enforce, and comply with Buy American Law … and minimize the use of waivers … [a]nd maximize the use of materials produced in the United States."

4. The Trade Agreements Act (TAA) and the North American Free Trade Agreement (NAFTA) may also provide exceptions to the Buy American Act.

5. The prohibition also does not apply to contracts procuring supplies where the contract value is under the micro-purchase threshold. FAR 25.100.

C. Definitions and Applicability

1. Domestic end products (FAR 25.003) are those articles, materials, and supplies acquired for public use under the contract that are:

a. An ***unmanufactured*** domestic end product must be mined or produced in the United States. FAR 25.003; or

b. An end product manufactured[18] in the United States, if:

(1) Comprised of "substantially all" domestic components (cost of components mined, produced or manufactured in the U.S. must exceed 50% of the cost of all components). For DOD, the components may be domestic or *qualifying country* components. *See* DFARS 252.225-7001. Or

(2) The end product is a commercial off the shelf (COTS) item.

c. The nationality of the company that manufactures an end item is irrelevant. *Military Optic, Inc.*, B-245010.3, Jan. 16, 1992, 92-1 CPD ¶ 78. What is relevant under the BAA is whether an item is manufactured, mined or produced in the U.S. FAR 25.001.

2. ***Components*** are articles, materials and supplies incorporated directly into the end product. FAR 25.003. *Orlite Eng'g Co.*, B-229615, Mar. 23, 1988, 88-1 CPD ¶ 300; *Yohar Supply Co.*, B-225480, 66 Comp. Gen. 251, 87-1 CPD ¶ 152 (Comp. Gen. Feb. 11, 1987).

a. Parts are not components, and their origin is not considered in this evaluation. *Hamilton Watch Co.*, B-179939, 74-1 CPD ¶ 306 (Comp. Gen. Jun. 6, 1974).

b. A "component" under the BAA is either entirely foreign or entirely domestic. A component is domestic only if it is manufactured in the United States. *Computer Hut Int'l, Inc.*, B-249421, 92-2 CPD ¶ 364 (Comp. Gen. Nov. 23, 1992).

c. A foreign-made component may become domestic if it undergoes substantial remanufacturing in the United States. *General Kinetics, Inc, Cryptek Div.*, B-242052.2, 70 Comp. Gen. 473, 91-1 CPD ¶ 445 (Comp. Gen. May 7, 1991).

d. ***Material*** that undergoes manufacturing is not a "component" if the material is so transformed that it loses its original identity. *See*

[18] *General Kinetics, Inc., Cryptek Div*., B-242052.2, May 7, 1991, 70 Comp. Gen. 473, 91-1 CPD ¶ 445 ("manufacture" means completion of the article in the form required for use by the government); *A. Hirsh, Inc.*, B 237466, Feb. 28, 1990, 69 Comp. Gen. 307, 90-1 CPD ¶ 247 (manufacturing occurs when material undergoes a substantial change).

Orlite Eng'g Co., B-229615, Mar. 23, 1988, 88-1 CPD ¶ 300; *Yohar Supply Co.*, B-225480, 66 Comp. Gen. 251, 87-1 CPD ¶ 152 (Comp. Gen. Feb. 11, 1987).

e. The cost of components includes transportation costs to the place of incorporation into the end product, and any applicable duty. FAR 25.101; DFARS 252.225-7001. Component costs do **NOT** include:

(1) Packaging costs, *S.F. Durst & Co.*, B-160627, 46 Comp. Gen. 784 (Comp. Gen. May 9,1967);

(2) The cost of testing after manufacture, Baldt Inc., 98-1 CPD. ¶ 36 (Comp. Gen. 1998) Patterson Pump Co., B-200165, 80-2 CPD ¶ 453 (Comp. Gen. Dec. 31, 1980); Bell Helicopter Textron, B-195268, 79 CPD ¶ 431 (Dec. 21, 1979); or

(3) The cost of combining components into an end product, *To the Secretary of the Interior*, B-123891, 35 Comp. Gen. 7 (1955).

3. Qualifying country end products/components

a. DoD does not apply the restrictions of the BAA when acquiring equipment or supplies that are mined, produced, or manufactured in "qualifying countries." Qualifying countries are countries with which we have reciprocal defense agreements. They are enumerated in DFARS 225.872-1(a).

b. A manufactured, qualifying country end product must contain over 50% (by cost) components mined, produced, or manufactured in the qualifying country or the United States. DFARS 225-101(a)(ii).

c. Qualifying country items thus receive a "double benefit" under the BAA. First, qualifying country components may be incorporated into a product manufactured in the United States to become a *domestic end product*. Second, products manufactured by a qualifying country are exempt from the BAA.

D. Certification Requirement

1. A contractor certifies by its offer that each end product is domestic and/or indicates which end products are foreign. FAR 52.225-2; DFARS 252.225-7000.

2. The contracting officer may rely on the offeror's certification that its product is domestic, unless, prior to award, the contracting officer has reason to question the certification. *Simba USA, LLC*, 2009 CPD ¶ 265 (Comp. Gen. Dec. 28, 2009); *New York Elevator Co.*, B-250992, 93-1 CPD ¶ 196 (Comp. Gen. Mar. 3, 1993) (construction materials); *Barcode Indus.*, B-240173, 90-2 CPD ¶ 299 (Comp. Gen. Oct. 16, 1990); *American Instr. Corp.*, B-239997, Oct. 12, 1990, 90-2 CPD ¶ 287. *See also Klinge Corp. v. United States and Sea Box, Inc.*, No. 08-134C, slip op. at 15 (Fed. Cl. June 10, 2008) (applied to TAA certification).

E. Exceptions to the Buy American Act

As a general rule, the Buy American Act does not apply in the following situations:

1. The contract is procuring supplies, where the contract value is under the micro-purchase threshold. FAR 25.100(b)(2).

2. The required products are not available in sufficient commercial quantities. FAR 25.103(b). For a list of items determined to be "unavailable," *see* FAR 25.104; *see also Midwest Dynamometer & Eng'g Co.*, B-252168, 93-1 CPD ¶ 408 (Comp. Gen. May 24, 1993).

3. The agency head (or designee) determines that domestic preference is inconsistent with the public interest. FAR 25.103(a). DoD has determined that it is inconsistent with the public interest to apply the BAA to qualifying countries. *Technical Sys. Inc.*, B-225143, 66 Comp. Gen. 297, 87-1 CPD ¶ 240 (Comp. Gen. Mar. 3, 1987).

4. The Trade Agreements Act (TAA) authorizes the purchase. 19 U.S.C. §§ 2501-2582; FAR 25.4; *Olympic Container Corp.*, B-250403, 93-1 CPD ¶ 89 (Comp. Gen. Jan. 29, 1993); *Becton Dickinson AcuteCare*, B-238942, 90-2 CPD ¶ 55(Comp. Gen. July 20, 1990); *IBM Corp.*, GSBCA No. 10532-P, 90-2 BCA ¶ 22,824.

   a. If the TAA applies to the purchase, only domestic products, products from **designated** foreign countries, qualifying country products, and products which, though comprised of over 50% foreign components, are "substantially transformed" in the United States or a designated country, are eligible for award. *See Compuadd Corp. v. Dep't of the Air Force*, GSBCA No. 12021-P, 93-2 BCA ¶ 25,811 ("manufacturing" standard of the BAA is less stringent than "substantial transformation" required under TAA); *Hung Myung (USA) Ltd.*, B-244686, 91-2 CPD ¶ 434 (Comp. Gen. Nov. 7, 1991); *TLT-Babcock, Inc.*, B-244423, Sept. 13, 1991, 91-2 CPD ¶ 242.

      (1) To be a substantial transformation there must be a new and different end product. For instance, attaching handles to a

pot would not be sufficient. Ralph C. Nash, *INTERPRETING THE TRADE AGREEMENTS ACT*: *Conflicting Decisions* 22 No. 8 Nash & Cibinic Rep. 45, 2008.

b. The TAA applies only if the estimated cost of an acquisition equals or exceeds the threshold set by the U.S. Trade Representative. FAR 25.402(b)

c. The TAA does **not** apply to DOD unless the DFARS lists the product, **even** if the threshold is met. *See* DFARS 225.401-70. If the TAA does not apply, the acquisition is subject to the BAA. *See, e.g., Hung Myung (USA) Ltd.*, B-244686, 91-2 CPD ¶ 434 (Comp. Gen. Nov. 7, 1991); *General Kinetics, Inc., Cryptek Div.*, B-242052.2, 91-1 CPD ¶ 445 (Comp. Gen. May 7, 1991).

d. Because of the component test, the definition of "domestic end product" under the BAA is more restrictive than the definition of "U.S. made end product" under the TAA. Thus, for DoD, if an offeror submits a U.S. made end product, the BAA evaluation factor still may apply.

5. The North American Free Trade Agreement (NAFTA) Implementation Act authorizes the purchase. Pub. L. No. 103-182, 107 Stat. 2057 (1993) (19 U.S.C. §3332); FAR 25.402. Note, however, that NAFTA does not apply to DOD procurements unless the DFARS lists the product. *See* DFARS 225.401-70.

6. The Caribbean Basin Economic Recovery Act authorizes the purchase. 19 U.S.C. §§ 2701-05; FAR 25.400.

7. The product is for use outside the United States.

a. Under the Balance of Payments Program, an agency must buy *domestic* even if the end item is to be used overseas. A number of exceptions allow purchase of foreign products under this program. If both domestic and foreign products are offered, and if the low domestic price exceeds the low foreign price by more than 50%, the contracting officer must buy the foreign item. FAR Subpart 25.3; DFARS Subpart 225.3.

b. For Contracts supporting Armed Forces engaged in hostilities and in certain AFRICOM and CENTCOM theaters of operation refer to the most recent guidance on Theater Business Clearance for such contracts.[19]

[19] http://www.acq.osd.mil/dpap/policy/policyvault/USA007256-14-DPAP.pdf.

8. The cost of the domestic product is unreasonable. FAR 25.105; DFARS 225.103(c); DFAR 225.5. Although cost reasonableness normally is a preaward determination, an agency may also make this determination after award. *John C. Grimberg Co. v. United States*, 869 F.2d 1475 (Fed. Cir. 1989).

   a. Civilian agencies

      (1) If an offer of a non-domestic product is low and a large business offers the lowest-priced, domestic product, increase the non-domestic product by 6%.

      (2) If an offer of a non-domestic product is low and a small business offers the lowest-priced, domestic product, increase the non-domestic product by 12%.

   b. DoD agencies increase offers of non-domestic, non-qualifying country products by 50%, regardless of the size of the business that offers the lowest-priced, domestic end product. Under the DFARS, if application of the differential does not result in award on a domestic product, disregard the differential and evaluate offers at face value. DFARS 225.105.

   c. Do not apply the evaluation factor to post-delivery services such as installation, testing, and training. *Dynatest Consulting, Inc.*, B-257822.4, 95-1 CPD ¶ 167 (Comp. Gen. Mar. 1, 1995).

   d. In a negotiated procurement, agencies may award to a firm offering a technically superior but higher priced non-domestic, non-qualifying country product. *STD Research Corp.*, B-252073.2, 93-1 CPD ¶ 406 (Comp. Gen. May 24, 1993).

   e. Afghanistan first. IAW DFARS 225.7703, whenever the acquisition is in support of operations in Afghanistan different rules apply and the price may be higher.

9. Resale. The contracting officer may purchase foreign end products specifically for commissary resale. FAR 25.103.

10. Information technology that is a commercial items. The restriction on purchasing foreign end products does not apply to the acquisition of information technology that is a commercial item, when using fiscal year 2004 or subsequent fiscal year funds (Section 535(a) of division F, Title V, Consolidated Appropriations Act, 2004, and similar sections in subsequent appropriations acts). FAR 25.103

F. Construction Materials (41 U.S.C. §8303; FAR Subpart 25.2)

1. This portion of the BAA applies to contracts for the construction, alteration, or repair of any public building or public work in the U.S.

2. The Act requires construction contractors to use only domestic construction materials for construction contracts performed in the U.S.

3. "Construction material" means an article, material, or supply brought to the construction site by a contractor or subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material. FAR 25.003.

4. Exceptions. This restriction does not apply if:

   a. The head on the contracting activity determines nonavailability;

   b. The cost would be unreasonable, as determined by the contracting officer;

   c. The agency head (or delegee) determines that use of a particular domestic construction material would be impracticable or inconsistent with public policy; or,

   d. Information technology that is a commercial item. The restriction on purchasing foreign construction material does not apply to the acquisition of information technology that is a commercial item.

5. Application of the restriction. The restriction applies to the material in the form that the contractor brings it to the construction site. *See S.J. Amoroso Constr. Co. v. United States*, 26 Cl. Ct. 759 (1992), *aff'd*, 12 F.3d 1072 (Fed. Cir. 1993); *Mauldin-Dorfmeier Constr., Inc.*, ASBCA No. 43633, 93-2 BCA ¶ 25,790 (board distinguishes "components" from "construction materials"); *Mid-American Elevator Co.*, B-237282, 90-1 CPD ¶ 125 (Comp. Gen. Jan. 29, 1990).

6. Post-Award Exceptions

   a. Contractors may formally request waiver of the BAA, however, normally, the contractor must request such a waiver prior to contract award. *C. Sanchez & Son v. United States*, 6 F.3d 1539 (Fed. Cir. 1993) (contractor failed to formally request waiver of BAA; claim for equitable adjustment for supplying domestic wire denied).

   b. Failure to grant a request for waiver may be an abuse of discretion. *John C. Grimberg Co. v. United States*, 869 F.2d 1475 (Fed. Cir.

1989) (contracting officer abused discretion by denying post-award request for waiver of BAA, where price of domestic materials exceeded price of foreign materials plus differential).

7. The DOD qualifying country source provisions do *not* apply to construction materials. DFARS 225.872-2(b).

G. Remedies for Buy American Act Violations

1. If the agency head finds a violation of the Buy American Act—Construction Materials, the findings and the name of the contractor are made public. The contracting officer may have contractual actions against the offender, including, but not limited to termination for default and suspension/debarment. FAR 25.206 or 25.607.

2. Termination of the contract for default is proper if the contractor's product does not contain over 50% (by cost) domestic or qualifying country components. *H&R Machinists Co.*, ASBCA No. 38440, 91-1 BCA ¶ 23,373.

3. A contractor is not entitled to an equitable adjustment for providing domestic end items if required by the BAA. *Valentec Wells, Inc.*, ASBCA No. 41659, 91-3 BCA ¶ 24,168; *LaCoste Builders, Inc.*, ASBCA No. 29884, 88-1 BCA ¶ 20,360; *C. Sanchez & Son v. United States*, *supra*.

H. The Berry Amendment

10 U.S.C. § 2533a. The "Berry Amendment" is an industrial protectionist law that requires DOD to buy certain listed items only from domestic sources. The statute is more draconian in its requirements than the Buy American Act because the Berry Amendment contains fewer exceptions.

1. The Berry Amendment requires DOD to procure the following items that are "grown, reprocessed, reused, or produced" in the U.S.:

a. Food; clothing, and material components, thereof, other than sensors, electronics, or other items added to, and not normally associated with, clothing (and the materials and components thereof); tents, tarpaulins or covers; cotton and other natural fiber products, woven silk…canvas, or wool; specialty metals (located at 10 U.S.C. § 2533b); and hand and measuring tools.

b. American Flags. IAW Section 8123 of the NDAA 2014 (Pub. L. 113-76, division C, title VIII), and the same provision in subsequent NDAAs, except as provided in 225.7002-2, do not acquire a flag of the United States (PSC 8345), unless such flag, including the materials and components thereof, is manufactured in the United States, consistent with the requirements at 10 U.S.C. 2533a. This restriction does not apply to the acquisition of any end-items or components related to flying or displaying the flag (e.g., flag poles and accessories). DFARS 225.7002-1(b).

2. The Beret Saga. See 43 The Gov't Contractor 18 at ¶ 191 (Associate Professor Stephen L. Schooner, George Washington University Law School, and Judge Advocate (USAR retired), discussing the purchase of berets).

3. Result of beret saga: Berry Amendment amended so that only Service Secretaries and the Under Secretary of Defense for Acquisition, Technology, and Logistics have Berry Amendment waiver authority. The Berry Amendment "does not apply to the extent that the Secretary of Defense or the Secretary of the military department covered determines that satisfactory and sufficient quantity of any such article or item…cannot be procured as and when needed at United States market prices." 10 U.S.C. § 2533a(c).

4. The National Defense Authorization Act of 2007 added section § 2533b, to title 10.

   a. Entitled "Requirement to buy strategic materials critical to national security from American sources; exceptions," these provisions were deleted from § 2533a and placed in § 2533b to address specialty metals. The new section provides that appropriated funds may not be used to purchase the following end items, or components thereof, containing specialty metal not melted or produced in the United States: aircraft; missile and space systems; ships; tank and automotive items; weapon systems; ammunition; or specialty metals themselves that are purchased by DOD or a prime DOD contractor. 10 U.S.C. § 2533b.

      (1) The Act defines "specialty metals" to include steel, nickel, iron-nickel, cobalt based alloys, titanium, and zirconium. Id. U.S. Dep't of Defense, Defense Federal Acquisition Reg. Supp. 225-7003) also contains certain restrictions on the use of proper specialty metals on DOD contracts.

   b. The law provides exceptions for some purchases including: procurements of commercially available electronic components whose specialty metal content is *de minimis* compared to the value of the overall item; procurements under the simplified acquisition threshold; procurements outside the United States in support of combat or contingency operations; procurements where purchase under other than competitive procedures has been approved for urgent and compelling urgency; and procurements where the Secretary of Defense or a military department determines that "compliant specialty metal of satisfactory quality and sufficient quantity, and in the required form, cannot be procured as and when needed." 10 U.S.C. § 2533b.

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CHAPTER 14

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CHAPTER 14

LABOR STANDARDS

I. INTRODUCTION

A. Contract labor laws exist to prevent exploitation of the employees working on Government contracts and to eliminate the wage-depressing tendencies of the federal procurement process. This chapter summarizes these labor laws and the current application to Government contracts. Knowledge of the basic requirements will enable contract attorneys to advise contracting officers on labor standards to ensure contractor compliance in order to avoid labor disputes that could cause costly delays in performance of contracts.

B. Each Service has a designated Agency labor advisor to advise contracting agency officials on Federal contract labor matters. See FAR 22.1003-7; DFARS 222.001; and https://beta.sam.gov/help/wage-determinations[1] or https://www.acq.osd.mil/dpap/cpic/cp/service_labor_advisors.html for names and phone numbers. The Defense Pricing and Contracting (DPC)[2] office has a helpful website to assist government officials. See http://www.acq.osd.mil/dpap/cpic/cp/labor_information.html.

II. FAIR LABOR STANDARDS ACT OF 1938 (FLSA)

29 U.S.C. §§ 201-219, 29 C.F.R. Parts 500-899.

A. Covered Workers:

1. General Applicability. Most employees in the United States are covered by the FLSA. Its application is not limited to government contracts.

2. Exempted Employees. Executive, Administrative, Professional, Computer, and Outside Sales Employees that meet the following standards are exempted from the wage and overtime requirements of the FLSA. (See Exemption Tests in 29 C.F.R. Part 541).

a. Salary Level: earning an income, at a rate per week, of not less than the minimum amount provided by operative regulations at 29

[1] Effective 14 June 2019, the Wage Determination Online website (www.wdol.gov) moved to www.beta.sam.gov. Labor Advisor contact information and wage determinations can now be found on www.beta.sam.gov. At a future date, the beta.sam.gov will itself be deactivated and succeeded by part of the sam.gov website.

[2] On 11 September 2018, the Defense Procurement and Acquisition Policy office (DPAP) was re-organized as the Defense Pricing and Contracting office (DPC).

C.F.R. Subpart 541.600. As of June 2020, that salary level is $684 per week.[3]

b. Salary Basis: receives regularly predetermined amount of compensation each pay period that does not vary based on the quality or quantity of work performed.

c. Job Duties: in addition to salary basis and level tests, there are duties tests that must be met for each category to qualify as exempt.

(1) Executive (29 C.F.R. Subpart 541.100)

(2) Administrative (29 C.F.R. Subpart 541.200)

(3) Professional (29 C.F.R. Subpart 541.300)

(4) Computer Analysts, Programmers, Software Engineers, or similarly skilled workers (29 C.F.R. Subpart 541.400)

(5) Outside Sales (C.F.R. Subpart 541.500)

B. Requirements.

1. Federal Minimum Wage: employers must pay all covered nonexempt employees a minimum of $7.25 per hour (current rate under 29 U.S.C. § 206).

2. Overtime Pay.

a. Employers must pay for any work performed over 40 hours in a workweek at a rate not less than one and one-half times the regular rate of pay. (29 U.S.C. § 207).

b. Practitioner's Note: Federal Government policy requires that contractors perform contracts without the use of overtime when practicable unless overall costs are lower for the Government or when necessary to meet urgent program needs. (See FAR 22.103-2).

3. Record Keeping. All employers with FLSA covered employees must make, keep, and preserve certain records, to include wages, hours, conditions and practices of employment. There is no particular form required, but the records must contain the information and data required

[3] 2016 regulatory changes were to raise the standard salary level to $913 per hour. In 2017, a federal district court invalidated that change. The district court decision has been appealed. Nevada v. United States, 275 F.Supp.3d 795 (E.D. TX, 2017), appeal pending in the U.S. Court of Appeals for the 5th Circuit.

by the FLSA and its implementing regulations. (29 U.S.C. § 211; 29 C.F.R. Part 516).

4. Child Labor. Must be at least 16 years old to work in most non-farm occupations covered under the FLSA and at least 18 years old to work in non-farm hazardous jobs. (29 U.S.C. §§ 212, 213(c) 29 C.F.R. § 570.2). Child labor restrictions also exist for agricultural employment. (29 U.S.C. § 213(c); 29 C.F.R. §§ 570.70-570.72).

5. Reasonable break time for nursing mothers. Employers must provide reasonable break time and a suitable place for an employee to express breast milk for her nursing child for one year after birth each time employee needs to express the milk. (29 U.S.C. § 207(r)).

C. Enforcement. Department of Labor (DoL) enforces the requirements of the FLSA. (29 U.S.C. §§ 204, 216). The FLSA also provides a private right of action. (29 U.S.C. § 216 (b)).

III. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT (CWHSSA)

40 U.S.C. §§ 3701-3708, 29 C.F.R. § 4.181(b), 29 C.F.R. §§ 5.5(b), 5.8., 5.15, FAR Subpart 22.3, FAR 22.403-3, FAR 52.222-4, DFARS Subpart 222.3

A. Covered Workers.

1. Laborers and Mechanics. Includes apprentices, trainees, helpers, watchmen, guards, firefighters, and workmen who perform services in connection with dredging or rock excavation in rivers and harbors (but not seamen).

2. Working on construction or service contracts in excess of $150,000.[4]

3. Exemptions.

a. Contracts valued at or below $150,000. (FAR 22.305).

b. Commercial items.

c. Transportation or transmission of intelligence.

[4] Although the CWHSSA directs applicability to contracts in excess of $100,000, in accordance with section 807 of the 2005 National Defense Authorization Act, the FAR Council reviews and adjusts all acquisition-related thresholds for inflation (except for the Davis Bacon Act and Service Contract Act). Effective 1 Oct. 2010, FAR 22.305 was amended to $150,000. (See 75 Fed. Reg. 53,133 (Aug. 30, 2010)).

d. Work performed outside the U.S. (See FAR 22.305 for applicable definition of U.S.).

e. Supplies that include incidental services that do not require substantial employment of laborers or mechanics.

4. Specific exemption by the Secretary of Labor in special circumstances, such as public interest or to avoid serious impairment of government business. (FAR 22.304, 29 C.F.R. § 5.14).

B. Requirements.

1. Standard workweek: 40 hours of labor.

2. Overtime pay:

a. Minimum of 1.5 times basic rate of pay for any hours in excess of 40 hours.

b. Practitioner's Note: As noted supra at II.B.2.b., Federal Government policy generally requires that contractors perform contracts without the use of overtime. (See FAR 22.103-2).

3. Certain health and safety requirements for construction industry (see 40 U.S.C. § 3704).

4. For 3 years following contract completion, contractors and subcontractors must maintain the payroll and basic payroll records for each laborer and mechanic working on a contract. (See FAR 52.222-4(d)).

C. Enforcement.

1. Day-to-day enforcement is by the Contracting Agency when used in conjunction with the Davis-Bacon Act; while DoL retains administrative and oversight enforcement authority.

2. DoL has all enforcement authority when used in conjunction with the Service Contract Act.

D. Remedies for Violations.

1. Termination for Default: After investigation and non-compliance found. (40 U.S.C. § 3703; FAR 49.401).

2. Debarment: upon finding of aggravated or willful violation. (40 U.S.C. § 3704; 29 C.F.R. § 5.12).

3. Liquidated Damages: contracting officer assesses at a rate of $27 (as of 1 June 2020, adjusted annually) for each affected employee per calendar day on which the employee worked in excess of 40 hours without paying required overtime compensation. (40 U.S.C. §3703; 29 C.F.R. § 5.8; FAR Subpart 22.302 and 52.222-4(b)). Violations are investigated by DoL. The DoL report is ordinarily sent to the agency contract labor advisor who contacts the contracting office to collect the assessed liquidated damages.[5]

4. Withholding Contract Funds:

   a. Contracting officer withholds from payments due to contractor sufficient funds to satisfy subcontractor liabilities for unpaid wages and liquidated damages. (40 U.S.C. §3703; 29 C.F.R. § 5.9; FAR 22.302 and 52.222-4(c)).

   b. Consult agency regulations for guidance on disposition of withheld funds.

IV. COPELAND (ANTI-KICKBACK) ACT

18 U.S.C. § 874 (criminal), 40 U.S.C. § 3145, 29 C.F.R. Part 3, 29 C.F.R. § 5.5(a)(3), FAR 22.403-2, FAR 22.406-6, FAR 22.407(a)(5); FAR 52.222-10

A. Covered Workers. Any person engaged in the construction or repair of a public building or public work (including projects that are financed at least in part by federal loans or grants under the so-called Davis-Bacon related Acts). The Copeland Act applies in tandem with the Davis-Bacon Act and the Davis-Bacon related Acts.

B. Requirements.

   1. Purpose: Prohibits employers from exacting "kickbacks" from employees as a condition of employment.

   2. Reporting: For construction contracts in excess of $2000, every covered contractor and subcontractor must provide the contracting officer with a weekly statement of wages, a "certified payroll," paid to each laborer and mechanic during the preceding week and a signed compliance statement. Contractors may use Standard Form WH-357. (See FAR 22.403-2; FAR 22.406-6; FAR 52.222-8 and -10; 29 C.F.R. § 3.3; 29 C.F.R. 5.5(a)(3)).

[5] The term "liquidated damages" for purposes of CWHSSA means a type of civil money penalty.

3. Recordkeeping: both the contractors and the agency must keep payroll records for three years after completion of the contract. (See FAR 22.406-6).

4. Construction contracts above $2,000 must contain the clauses at FAR 52.222-8 (payroll and recordkeeping) and 52.222-10 (compliance with Copeland Act requirements). (FAR 22.407(a)).

C. Enforcement.

1. Contracting Agency conducts day-to-day enforcement (because linked to Davis-Bacon Act covered contracts).

2. DoL administers the provisions of the Act and has oversight enforcement authority.

D. Remedies.

1. Civil and or Criminal Prosecution: up to 5 years imprisonment and/or a criminal fine.

2. Termination for Default: based on willful falsification of statement of compliance.

3. Debarment: based on aggravated or willful violations or willful falsification of compliance statement.

V. DAVIS-BACON ACT (DBA) ((a.k.a. the CONSTRUCTION WAGE RATE REQUIREMENTS STATUTE)

40 U.S.C. §§ 3141-3144, 3146-3148, 29 C.F.R. Part 5, FAR Subpart 22.4, FAR clauses 52.222-5,6,7,9,11,12,13,14,15,16, DFARS Subpart 222.4.

A. Covered Workers and Contracts. (29 C.F.R. § 5.2(m); FAR 22.401).

1. Laborers or mechanics. (FAR 22.401, 22-403-1).

a. Workers, employed by a contractor or subcontractor at any tier,[6] whose duties are manual or physical in nature as distinguished from mental or managerial, including:

[6] The act applies to workers employed by a contractor or subcontractor at any tier. (29 C.F.R. §§ 5.2(h), 5.5(a)(6), 5.5(b)(4). Cf. Ken's Carpets Unlimited v. Interstate Landscaping, Inc., 37 F.3d 1500 (6th Cir. 1994) (unpublished) (holding prime contractor alone responsible for DBA wages where prime failed to include proper clauses in subcontract, and failing to hold subcontractor accountable under the *Christian* doctrine)).

(1) Apprentices, trainees, helpers – subject to specific limitations;

(2) Working foremen who devote more than 20 percent of their time during a workweek to performing duties as a laborer or mechanic; and

(3) Every person performing duties of laborer or mechanic, regardless of contractual relationship.

b. Exempted Employees:

(1) clerical workers;

(2) salaried workers with duties that are primarily executive, supervisory, or administrative in nature (see 29 C.F.R. Part 541); or

(3) Watchmen and guards.[7]

2. Working on federal contracts for construction, alteration, or repair of public buildings or public works performed in the U.S. that exceed $2,000.

a. "Public building" or "public work" means a construction or repair project that is carried on by the authority, or with the funds, of a federal agency to serve the interests of the general public. (29 C.F.R. § 5.2 (k)).

b. "Site of the work." (FAR 22.401; 29 C.F.R. § 5.2(l)).

(1) The primary site of the work. The physical place or places where the construction called for in the contract will remain when it is completed; and

(2) The secondary site of the work, if any. Any other site located in the U.S. where a significant portion of the building or work is constructed, if it is established specifically for the performance of the contract or project.

(3) The site of the work can also include fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., provided that they are: (1) dedicated exclusively (or nearly so) to performance of

[7] While guards and watchmen are not considered laborers or mechanics for DBA purposes, they are covered by the overtime requirements of CWHSSA. Therefore, contractors should include them on the payrolls for contracts with CWHSSA.

the contract or project, and (2) adjacent (or virtually adjacent) to the primary or secondary site of the work.

c. Construction, Alteration, or Repair means all types of work done by covered workers on a particular building or work at the site, including:

(1) Altering, remodeling, installation on the site of work of items fabricated off-site;

(a) Carpeting. If carpet installation is performed in connection with construction or general renovation project, DBA applies.

(b) Environmental Cleanup. If involves substantial excavation and reclamation or elaborate landscaping activity, DBA applies. Does not apply to simple grading and planting of trees, shrubs, and lawn, unless in conjunction with substantial excavation and reclamation.

(c) Demolition. DBA applies to demolition when further construction activity at the site is contemplated that would be covered by DBA or a DBRA. For example, demolition performed to permit construction of a new building or highway.

(d) Installation work in conjunction with a supply contract. DBA applies to installation of supplies (such as a security system) where the installation involves more than an incidental amount of construction.[8]

(2) Painting and decorating;

(a) Asbestos and/or Paint Removal. DBA generally applies. However, the Service Contract Act applies if asbestos or paint is removed prior to demolition, and subsequent construction on the site is not contemplated. (See 29 C.F.R. 4.131(f)).

[8] The Department of Labor Field Operations Handbook, Chapter 15, contains discussions of this and other examples of the applicability of the DBA. https://www.dol.gov/agencies/whd/field-operations-handbook.

(b) Refinishing wood floors or concrete sealant application, DBA applies.

(c) For painting, the work is subject to the DBA if the order requires painting of 200 square feet or more, regardless of work hours. (See DFARS 222.402-70(d)(3)).

(3) Manufacturing or furnishing of materials, articles, supplies, or equipment on the site of the building or work;

(4) Transportation of materials within the site of the work (e.g., between the primary and secondary sites) is considered "construction" covered by the DBA.

(5) Transportation of materials to and from the site is not considered "construction" covered by the DBA.[9]

(6) Practitioner's Note: Maintenance vs. Repairs. The DFARS provides a bright line test to determine whether, in unclear circumstances, work is maintenance (Service Contract Act) or repair (DBA). If a service order requires 32 or more work hours (or the painting of 200 square feet or more) the work is DBA-covered as "repair." Otherwise, consider the work to be Service Contract Act-covered as "maintenance." (DFARS 222.402-70(d)).[10]

3. Non-Construction contracts with partial DBA coverage. (See FAR 22.402(b); DFARS 222.402-70).

a. Apply DBA standards to the work in question if the contract requires a substantial and segregable amount of construction, repair, painting, alteration, or renovation that also exceeds the DBA monetary threshold of $2,000. (See 29 C.F.R. 4.116(c)(2)).

(1) Substantial: the type and quantity of construction work, not merely the dollar value.

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[9] See 29 C.F.R. § 5.2(j) (1)(iv) and 5.2(j)(2)); Building & Constr. Trades Dep't, AFL-CIO v. Department of Labor Wage Appeals Board, 932 F.2d 985 (D.C. Cir. 1991), rev'g 747 F. Supp. 26 (D.D.C. 1990).

[10] While DFARS 222.402-70 applies primarily to installation support contracts, the coverage yardstick at subsection (d) applies more broadly.

(2) Segregable: the construction work being physically or functionally separate.

b. Apply DBA standards to supply contracts where there is more than a minor or incidental amount of construction. For example, an information technology acquisition may include infrastructure improvements to the facility as well as the purchase of the various computers, servers, network cabling, and other hardware.

c. Do not apply DBA standards to the work in question if the

(1) Construction work is merely incidental to other contract requirements; or the

(2) Construction work is so merged with non-construction work, or so fragmented in terms of the locations or time spans in which it is to be performed, that it cannot be segregated as a separate contractual requirement.

B. Requirements. (40 U.S.C. § 3142; FAR 22.403-1).

1. Contractors must pay mechanics and laborers at least the applicable "prevailing wage rate" on covered contracts.

a. Coverage is determined on the prime contract level. This means that any subsequent task orders or subcontracts that are less than $2,000 are still covered by the DBA once it was determined that the work on the overarching contract exceeded $2,000.

b. DoL determines the prevailing wage rate, which normally is based on the wage actually paid to the majority of a class of employees in an area. (See 29 C.F.R. § 1.2).

c. A wage determination is not subject to review by the Government Accountability Office or boards of contract appeals.[11] However, an interested party can seek review of a wage determination within DoL. (29 C.F.R. § 1.8, 29 C.F.R. Part 7).

d. DBA "Wages" include the basic hourly pay rates plus fringe benefits.

[11] See American Fed'n of Labor - Congress of Indus. Org., Bldg., and Constr. Trades Dep't, B-211189, Apr. 12, 1983, 83-1 CPD ¶ 386; Woodington Corp., ASBCA No. 34053, 87-3 BCA ¶ 19,957; but see Inter-Con Sec. Sys., Inc., ASBCA No. 46251, 95-1 BCA ¶ 27,424 (finding board has jurisdiction to consider effect of wage rate determination on contractual rights of a party).

2. Wage Determinations (WDs). (29 C.F.R. § 1.6; FAR 22.404-1 and 22.404-3)

a. Character of the Construction. There are four types of DBA WDs based on the character of the construction that is being done (See FAR 22.404-2, DoL All Agency Mem. No. 130):

(1) Residential – construction, alteration, or repair of single-family houses or apartment buildings of no more than 4 stories. Includes incidental items such as site work, parking, utilities.

(2) Building – construction of sheltered enclosures with walk-in access for the purpose of housing persons, machinery, equipment, or supplies. Examples include industrial buildings, barracks, detention facilities.

(3) Highway – the construction, alteration, or repair of streets, highways, runways, taxiways, alleys, trails, paths, parking areas, and other similar projects not incidental to building or heavy construction.

(4) Heavy – a "catch-all" category – those projects that are not properly classified as "building", "highway", or "residential". Examples include dams, dikes, antenna towers, pipe lines, land leveling (not incidental to other construction).

b. General WDs. (See 29 C.F.R. §§ 1.5(b) and 1.6(a)(2); FAR 22.404-1(a)).

(1) Contains prevailing wage rates for the types of construction specified in the determination, and is used in contracts performed within a specified geographical area.

(2) Remains valid until modified or canceled by DoL.[12]

(3) General WDs incorporated into a contract ordinarily remain effective for the life of a contract. However, if the contracting officer exercises an option to extend the term of the contract, the contract must be modified at that time to include the most current wage determination. (FAR 22.404-12).

[12] WDs of the DOL Wage and Hour Division appear at beta.sam.gov, or its successor site.

(4) If a general WD is applicable to the project, the agency may download and use it without notifying DoL. (FAR 22.404-3(a)).

c. Project WDs. (29 C.F.R. § 1.6(a)(1); FAR 22.404-1(b)).

(1) Issued at the specific request of a contracting agency only when no general WD applies.

(2) The project WD is effective for 180 calendar days from date of issuance. If it expires, the contracting officer must follow special procedures for extension of the 180-day life depending on whether sealed bidding or negotiation was used. (FAR 22.404-5).

(3) Once incorporated into a contract, the project WD is effective for the duration of that contract unless the contracting officer exercises an option to extend the term of the contract. (FAR 22.404-12).

(4) Contracting officers may request a project WDs from DoL by specifying the location of the project and including a detailed description of the types of construction involved and the estimated cost of the project. SF-308 is available for use.

(5) Processing time for a project WD is at least 30 days.

d. Conformance Procedure (missing job classifications). (FAR 22.406-3 and 52.222-6(b), 29 C.F.R. § 1.6(a)(1) and § 5.5(a)).

(1) When a WD applicable to a contract or solicitation does not include all labor classifications needed for the contract, missing classifications must be added, or "conformed," as follows.

(a) The contractor completes a SF-1444, proposing a wage rate for the missing classification that bears "a reasonable relationship" to one or more labor classification listed in the WD, and sends the SF-1444 to the contracting officer.

(b) The contracting office submits the completed SF-1444, related documentation and written concurrence or disagreement with the

contractor's proposal to DoL for their determination and response.[13]

(c) After receiving DoL's controlling response, the contracting officer provides a copy to the contractor.

(2) While the conformance request is pending, the contractor may pay employees the rate it proposed for approval. If DoL approves a rate higher than the proposed rate, the contractor must pay the higher rate retroactive to the start of performance of that classification on the contract.

3. Contract Process.

a. Solicitations.

(1) The contracting officer must include the appropriate WD and designate the work to which each determination applies in each solicitation covered by the DBA.

(2) When the construction site is unknown at the time of a contract award, the contracting officer will incorporate the most current, applicable DBA WD at the issuance of each task order.

(3) Solicitations issued without a WD must advise that the contracting officer will issue a schedule of minimum wage rates as an amendment to the solicitation. FAR 22.404-4(a).[14]

(a) Sealed Bidding: may not open bids until a reasonable time after furnishing the WD to all bidders.

(b) Negotiated Procurements: may open the proposals and conduct negotiations before

[13] Contracting officers may submit completed SF1444 requests to DoL via email at WHD-CBACONFORMANCE_INCOMING@dol.gov by attaching a scanned completed form and all supporting documents in a 'pdf' file. SF-1444 are available at https://www.gsa.gov/forms-library/request-authorization-additional-classification-and-rate.

[14] If an offeror fails to acknowledge an amendment to an IFB that adds or modifies a wage rate, the offer is nonresponsive if the trade covered by the WD is involved in the contract's scope. ABC Project Mgmt., Inc., B-274796.2, Feb. 14, 1997, 97-1 CPD ¶ 74.

obtaining the WD, but must include the WD in the solicitation before calling for final proposal revisions. (FAR 22.404-4(c)).

b. When the contract is awarded without the required WD, the contracting officer must:

(1) Modify the contract to incorporate the required WD, retroactive to the date of award, and equitably adjust the contract price, if appropriate. (FAR 22.404-9(b)(1); or

(2) Terminate the contract. (FAR 22.404-9(b)(2)).

4. Inclusion of Current WDs.[15] (FAR Subpart 22.404).

a. General Rule: The requirement to include a current, new or revised DOL WD in a solicitation depends upon when the Contracting Agency "receives" notice of the WD.

(1) General WDs: receipt by the agency of actual written notice or constructive notice (publication on www.beta.sam.gov, or a successor site) whichever occurs first.

(2) Project WD: actual receipt by the agency.

(3) Practitioner Note: "Agency" receipt is broadly defined. It is not dependent on when the contracting officer receives notice (as that may occur later). Contracting officers should continually monitor the www.beta.sam.gov website, or a successor site, for any new/revised version of WDs that may affect a solicitation.

b. Sealed Bidding. (FAR 22.404-6(b)).

(1) Before bid opening, a new/revised WD is effective if:

(a) ≥ 10 calendar days before bid opening date: the contracting agency receives it, or DoL publishes notice of the new or revised WD on www.beta.sam.gov, or a successor site.

(b) < 10 calendar days before bid opening: the contracting agency receives it, or DoL publishes

[15] Revisions to DBA WDs are termed "modifications;" however, to avoid confusion with contract modifications, this chapter describes updates to WDs as revisions.

notice on the dedicated website, unless the contracting officer finds there is insufficient time before bid opening to notify prospective bidders.

(c) Practitioner's Note: when new/revised WDs for the primary site of work are effective before bid opening, the contracting officer must permit bidders to amend their bids. If necessary, bid opening must be postponed.

(2) After bid opening, but before an award, a new or revised WD is effective if:

(a) Award is not made within 90 days after bid opening. (FAR 22.404-6(b)(6)).

(b) Practitioner's Note: when new/revised WDs for the primary site of work are effective after bid opening, but before award, the contracting officer must:

(i) Award the contract and incorporate the effective WD on the date of contract award; or

(ii) Cancel the solicitation in accordance with FAR 14.404-1.

(3) An effective new/revised WD received after award requires the contracting officer to do the following: (FAR 22.404-6(b)(5)).[16]

(a) Modify the contract to incorporate the revised rates retroactive to the date of award, and

(b) Equitably adjust the contract price.

c. Negotiated Procurements. (FAR 22.404-6(c)).

(1) A new or revised WD before award is effective for contract incorporation purposes if:

[16] This exception - for either sealed bid or negotiated procurement - occurs when the Contracting Agency erred by failing to incorporate a WD in a covered contract, or incorporated the wrong WD. See FAR 22. 404-6(b)(5) and 404-6(c)(3); Twigg Corp. v. General Servs. Admin., GSBCA No. 14639, 99-1 BCA ¶ 30,217 (holding contractor entitled to an equitable adjustment where agency failed to incorporate a revised WD).

(a) Received by the contracting agency or published on www.beta.sam.gov, or a successor site. (FAR 22.404-6(c)(1)).

(b) If the contracting officer receives an effective WD before award, the solicitation must be amended to incorporate the new/revised WD. (FAR 22.404-6(c)(2)).

(i) If closing date has not passed, all prospective offerors who were sent solicitations must be given a reasonable opportunity to revise proposals.

(ii) If closing date has passed, all offerors who submitted proposals must be given a reasonable opportunity to revise proposals.

(2) An <u>effective</u> new/revised WD received <u>after award,</u> requires the contracting officer to do the following: (FAR 22.404-6(c)(3)).

(a) Modify the contract to incorporate the new or revised rates retroactive to the date of award, and

(b) Equitably adjust the contract price.

5. Contracts with Options.

a. The WD incorporated in a contract must be updated for the current version when contract options are exercised to extend the term of the contract. The contracting officer must modify the contract to incorporate the revised rates. (FAR 22.404-12(a)).

b. Whether or not incorporating current WDs at option exercise will result in a contract price adjustment depends on type of contract and the contract clause incorporated by the contracting officer. (FAR 22.404-12(c), 52.222-30, 52.222-31, 52.222-32).

(1) FAR 22.407(e), (f), and (g) require including one of three price adjustment clauses in solicitations and contracts that contain option provisions:

(a) FAR 52.222-30 (None or Separately Specified Method)

(b) FAR 52.222-31 (Percentage Method)

(c) FAR 52.222-32 (Actual Method)

C. Enforcement. While DoL retains administrative and oversight enforcement, day-to-day enforcement is by the Contracting Agency.

1. Contracting Agency: Compliance Checks and Investigations. (FAR 22.406-7, DFARS 222.406-1).

a. Regular compliance checks:

(1) Employee interviews;

(2) On-site inspections;

(3) Payroll reviews; and

(4) Comparison of information gathered during checks with available data, e.g., inspector reports and construction activity logs.

b. Special compliance checks:

(1) When inconsistencies, errors, or omissions are discovered during regular checks; or

(2) Complaints are filed.

c. Labor Standards Investigations. (FAR 22.406-8; DFARS 222.406-8).

(1) The contracting agency investigates when compliance checks indicate that violations are substantial in amount, willful, or uncorrected.

(2) Practitioner's Note: DoL also may perform or request an investigation.

(3) The contracting officer notifies the contractor of preliminary findings, proposed corrective actions, and certain contractor rights. (FAR 22.406-8(c)).

(4) The contracting officer forwards a report to the agency head and to DoL in the following circumstances (FAR 22.406-8(d)):

(a) Contractor/subcontractor underpaid by $1,000 or more.

(b) Contracting officer believes violations are aggravated or willful.

(c) Contractor/subcontractor has not made restitution.

(d) Future compliance has not been assured.

(5) If the contracting officer finds substantial evidence of criminal activity, the agency head must forward the report to the U.S. Attorney General.

2. Department of Labor.

a. Upon receipt of a complaint, DoL immediately refers the complaint to the Contracting Agency for enforcement action.

b. If Contracting Agency enforcement attempts fail, DoL reviews the investigative file for final attempt at resolution of disputes concerning the labor standards provisions of the contract. (FAR 22.406-10; FAR 52.222-14). DoL may also exercise its overarching enforcement authority.

c. The Boards of Contract Appeals and federal courts review claims relating to labor disputes if the dispute is based on the contractual rights and obligations of parties.[17]

d. Federal district courts also have jurisdiction to review appeals of DoL's implementation and adjudication of the DBA.[18]

D. Military Housing Privatization Initiative (MHPI).

1. The Army, Navy, and Air Force are improving the conditions of military housing in a project referred to as the Military Housing Privatization Initiative (MHPI). Under this initiative, in most instances, a private developer leases the land for a long term and then is responsible for constructing or renovating existing housing developments using military rental referrals to fund and maintain the newly renovated and privatized developments. Each Service has agreed to include DBA provisions and applicable WDs in all MHPI

[17] See, e.g., Burnside-Ott Aviation Training Center, Inc. v. United States, 985 F.2d 1574, 1579-81 (Fed. Cir. 1993); MMC Constr., Inc., ASBCA No. 50,863, 99-1 BCA ¶ 30,322 (claim for excessive DBA wage withholding); Commissary Servs. Corp., ASBCA No. 48613, 97-1 BCA¶ 28,749 (dispute regarding DBA offset when ultimate issue was whether same prime contractor was involved in both contracts); cf. Page Constr. Co., ASBCA No. 39685, 90-3 BCA ¶ 23,012 (declining jurisdiction over claim that government breached statutory obligation).

[18] See, e.g., Building and Constr. Trades Dep't, AFL-CIO v. Secretary of Labor, 747 F. Supp. 26 (D.D.C. 1990).

contracts and has agreed that all developers will be required to comply with the DBA labor standard provisions.

2. The Installation Housing Asset Manager administers the application of DBA to MHPI.[19]

E. Remedies.

1. Suspending Contract Payments. The contracting officer shall suspend any further payment, advance, or guarantee of funds otherwise due to a contractor if a contractor or subcontractor fails or refuses to comply with the DBA. (FAR 22.406-9).

2. Withholding contract payments. The contracting officer shall withhold contract payments if the contracting officer believes a violation of the DBA has occurred, or upon request by the DoL. (40 U.S.C. § 3142(c)(3); 29 C.F.R. § 5.5(a)(2); FAR 22.406-9(a)(1)).[20]

3. Termination for Default. (40 U.S.C. § 3143).

4. Debarment. The contractor may be debarred for disregard of its DBA obligations to employees or subcontracts. (40 U.S.C. § 3144; 29 C.F.R. § 5.12).

F. Private Right of Action. *Christian* doctrine does not provide a DBA private right of action. The Supreme Court has determined that if clauses required by the DBA are omitted from a construction contract, a contractor ***is not subject to private suit by aggrieved employees***. This is because Congress intended the DBA to strike a balance between the rights of employees and the rights of contractors. Univs. Research Ass'n, Inc. v. Coutu, 450 U.S. 754, 782-84 (1981).

G. Miller Act (a.k.a. Bonds Statute) (40 U.S.C. §§ 3131-3134, FAR 28.102, FAR 52.228-15).

1. The Miller Act requires surety bonds on federal construction projects for contracts exceeding $150,000. Prime contractors must post a performance bond and a payment bond covering all labor and material. The payment bond protects those supplying labor and/or materials.

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[19] The Army Assistant Chief of Staff for Installation Management (ACSIM) has prepared a Portfolio and Asset Manager's Handbook that identifies the duties and responsibilities of the Asset Manager to include DBA compliance procedures. *Available at* www.rci.army.mil.

[20] See Westchester Fire Insurance Co. v. United States, 52 Fed. Cl. 567 (2002) (although contract terminated five months earlier, contracting officer was required to withhold funds per DoL request).

Applicable forms are at FAR 53.301-25 (SF-25 Performance Bond) and FAR 53.301-25A (SF-25A Payment Bond).

2. The contracting officer shall insert FAR 52.228-15 (or one accomplishing the same purpose) in solicitations and contracts for construction expected to exceed $150,000. (If the expected contract value is over $35,000 but under $150,000, the contracting officer shall insert FAR 52.228-13 specifying the payment protection selected. (FAR 28.102-1b)).

3. Failure by a prime contractor to pay suppliers and subcontractors gives such suppliers and subcontractors the right to sue the contractor in U.S. District Court. https://www.gsa.gov/cdnstatic/miller_brochure.pdf

VI. MCNAMARA-O'HARA SERVICE CONTRACT ACT OF 1965 (SCA) (a.k.a. the SERVICE CONTRACT LABOR STANDARDS STATUTE)

41 U.S.C. §§ 6701-6707, 29 C.F.R. Part 4, FAR Subpart 22.10, DFARS Subpart 222.10.

A. Covered Contracts and Workers. (FAR 22.1002-1; FAR 22.1003).

1. Service Contracts. (41 U.S.C. § 6702; FAR 22.1001).

a. Contracts made by the federal government;

b. Amount > $2,500; and

c. Principal purpose is to furnish services through the use of service employees. (See 29 C.F.R. § 4.130 and FAR 22.1003-5 for examples of service contracts covered).

d. SCA does NOT apply if the principle purpose of the contract is to provide something other than services, or the services performed are merely incidental to a non-service contract.[21] (See 29 C.F.R. § 4.134).

2. Service Employees. (41 U.S.C. § 6701).

a. Any person engaged in the performance of a service contract or subcontract;

[21] For example, the rental of vehicles alone is a contract for a tangible item and not a covered service contract; however, the SCA does apply if the rental is for vehicles with operators. Also, contracts for printing, reproduction, and duplicating are ordinarily for the principal purpose of furnishing written materials rather than the furnishing of services through the use of service employees; however, in some cases, the details of the procurement may indicate that its purpose is chiefly the furnishing of services.

b. Regardless of the existence of a contractual relationship with a contractor or subcontractor; but

c. Does NOT include persons employed in bona fide executive, administrative, or professional capacities, under 29 C.F.R. Part 541

3. Exemptions. (41 U.S.C. § 6702; 29 C.F.R. §§ 4.115 to 4.122; FAR 22.1003-3.

a. Contracts principally for the construction, alteration, or repair (including painting and decorating of public buildings or public works).

(1) These are covered by the DBA.

(2) Practitioner's Note: Contracting Officers must incorporate DBA provisions and clauses into a service contract if there is a substantial amount of segregable construction work. (See supra at V.A.3.a.).

b. Contracts principally for the manufacture or delivery of supplies, materials or equipment are covered by the Walsh-Healy Public Contracts Act, 41 U.S.C. §§ 6501-6511. (See infra at VII). The remanufacturing of equipment falls within this SCA exemption and requires that the

(1) Equipment is completely or substantially torn down and totally rebuilt – such as with aircraft engines or large generators and compressors – at a contractor's facility. Remanufacturing work differs from SCA-covered work maintaining, testing and otherwise servicing equipment to keep it in working order. Prior to applying the remanufacturing exemption, all criteria at FAR 22.1003-6 should be carefully reviewed.

(2) Practitioner's Note: Under certain circumstances, an SCA-covered contract may include some non-covered work that is, for example, for the manufacture or delivery of supplies, materials, or equipment. (See infra at VII.A.3.).

c. Contracts for transporting freight or personnel by vessel, aircraft, bus truck, express, railroad, or oil or gas pipelines where published tariffs are in effect.

d. Contracts for public utility services.

e. Contracts for furnishing services by radio, telegraph, telephone, or cable companies subject to the Communications Act of 1934.

f. Employment contracts providing for direct services to a Federal agency by an individual or individuals.

g. Contracts for principally for operating postal contract stations for the U.S. Postal Service.

4. Administrative Limitations, Variances, Exemptions. (29 C.F.R. § 4.123; FAR 22.1003-4).

a. The DoL may establish reasonable variations, tolerances, and exemptions from SCA provisions (41 U.S.C. § 6707) if it determines that it is:

(1) necessary in the public interest, or

(2) avoids serious impairment of federal government business, and

(3) is within the overall purpose of protecting prevailing labor standards.

b. When services are to be performed by both non-exempt and exempt employees, if a substantial portion (@ 20% or more) of the services are performed by non-exempt employees, then the SCA applies to that work performed by those employees. (29 C.F.R. §§ 4.113(a)(3), 4.113(a)(4).

B. Requirements.

1. Covered service contracts must contain the applicable FAR clauses and mandatory provisions regarding:

a. Minimum wages. (29 C.F.R. §§ 4.161 - 4.163; FAR 22.1002-2).

(1) A contractor must pay service employees wages not less than what is required by the prevailing WD applicable to the contract, or

(2) In accordance with economic terms of an applicable collective bargaining agreement (CBA), or

(3) If there is no prevailing WD or an effective CBA, the FLSA minimum wage applies. (But note, for covered contracts, EO 13658 requires a higher minimum wage than the FLSA, <u>see</u> <u>infra</u> at IX.)

b. Fringe benefits,[22]

c. Safe and sanitary working conditions,

d. Recordkeeping and posting requirements such as notification to employees of the minimum allowable compensation, and

e. Statement of rates paid to equivalent federal employees.

2. SCA WDs. (FAR 22.1007, 22.1008; DFARS 222.1008; 29 C.F.R. § 4.143).

a. The contracting officer must obtain current WDs for:

(1) Each new solicitation and contract exceeding $2,500;

(2) A contract modification that increases the contract value to over $2,500, and,

(a) Extends the contract pursuant to an option clause or otherwise; or

(b) Changes the scope of a contract in a way that affects labor requirements significantly.

(3) On multiple year contracts in excess of $2,500,[23] obtain the current new or revised WD at the following times:

(a) Annually, on the anniversary date of the start of performance, if funding is subject to annual appropriations, or

(b) Biennially, on the anniversary date of the start of performance, if funding is not subject to annual appropriations and its proposed term exceeds two years.

(c) Practitioner's Note: the default practice for updating service task orders exceeding one year is to use the task order's start of performance date as the annual/biennial anniversary date on which to obtain WDs.

[22] Examples of those provided include medical/hospital care, pensions, workers compensation, unemployment benefits, life insurance, disability pay, and those not otherwise required under federal, state or local law.

[23] For purposes of FAR Subpart 22.10, the term "multiple year contract" means a contract having a term of more than 1 year. Compare FAR 17.103.

b. Proper WD (FAR 22.1008-1).

(1) General Rule: use the current prevailing WD for the area or locality of contract performance from www.beta.sam.gov, or a successor site.

(2) Contract Specific WD: where no standard prevailing WD is available, the contracting officer must request a contract specific determination from DoL by submitting a SF-e98 electronically.

(3) If DoL does not issue a WD to cover SCA employees, then the EO 13658 minimum wage for government contractors applies. (See infra at IX).

c. CBA-Based WDs: Successor Contract Rule. (41 U.S.C. § 6707(c); FAR 22.1008-2; 29 C.F.R. 4.163).

(1) Under the statute, a contractor must pay wages and fringe benefits at least equal to those contained in a CBA effective under the previous contract for new contracts, or options, for substantially the same services, performed in the same locality.

(2) Contracting officers must inquire "early in the acquisition cycle" if the predecessor/incumbent contractor has a CBA applicable to workers performing on the contract. (FAR 22.1008-2(a)).

(3) The "Successor Contract" rule usually applies only to the base period of the follow-on contract, after which a prevailing WD would apply, or a WD based on a CBA between the follow-on contractor and the union.

(4) Successor Contract Rule Limitations. (FAR 22.1008-2(c), FAR 22.1012-2).

(a) The CBA's wage and fringe benefit terms must apply during the predecessor contract/period of performance to control for the successor contract/period of performance. Thus, a CBA is NOT applicable to a follow-on period of performance/contract if it did not become effective until after the expiration of the incumbent's contract.

(b) DoL may determine, usually after an evidentiary hearing, that a CBA was not negotiated at arms-

length, or that a CBA's rates vary substantially from locally prevailing rates for the same or similar services. The party challenging the CBA bears the evidentiary burden of proof. (29 C.F.R. §§ 4.10, 4.11 and 4.163).

d. Conformance Procedure (missing job classifications). (FAR 22.1019 and 52.222-41(c), 29 C.F.R. §§ 4.6(b)(2) and 4.152(c)(1)). See Section V.B.2.d, infra.

e. Timeliness Rules for Including Revised/New WDs. (29 C.F.R. § 4.5(a)(2); FAR 22.1008, 1010 and 1012).

(1) Sealed bidding. (FAR 22.1012).

(a) If notice of WD or CBA is received 10 days or more before bid opening, then incorporate the WD or CBA into the solicitation.[24]

(b) If notice of WD or CBA is received less than 10 days before bid opening do not incorporate the WD or CBA into the solicitation, unless the Contracting Officer finds that there is reasonable time to notify bidders.[25]

(2) Negotiations. (FAR 22.1012).

(a) If notice of WD or CBA is received before contract award - or modification to exercise an option or extend the contract - then incorporate the WD or CBA into the solicitation or the existing contract to be effective the first day of the new period of performance.

(b) If notice of WD or CBA is received after award of contract - or option exercise/extension - and performance starts within 30 days after award/option, then do NOT incorporate the WD or CBA.

[24] Only the CBA's economic terms (wages and fringe benefits) become part of the government contract.

[25] A special rule applies to WDs obtained by the e98 process for which delays over 60 days in bid opening occurred - for both sealed bidding and negotiated procurement. (FAR 22.1014).

CBA example: An option is exercised on 15 Sept., and performance begins 1 Oct. Then the contractor's CBA notice deadline is 15 Sept.

(c) If notice of WD/CBA is received after award/option but performance starts later than 30 days after award/option, then incorporate WD/CBA provided notice of WD/CBA received NLT 10 days before start of performance.

CBA example: A contract is awarded on 15 Aug., and performance begins 1 Oct. Then the contractor's CBA notice deadline is 21 Sept.

(3) FAR 22.1010 - Notification to interested parties under CBAs

(a) Contracting officers must provide written notification to the incumbent contractor and any union recognized by the contractor NLT 30 days prior to the issuance of a solicitation, exercise of options, extensions, or award of a new contract.

(b) Practitioner's Note: Issuing a letter of intent to exercise an option, per FAR Part 17, does not fulfill the FAR 22.1010 notice requirement, unless the letter of intent has an explicit section for FAR 22.1010 purposes and is sent to the union representative in addition to the contractor.

(c) Practitioner's Note: Failure to provide proper, timely FAR 22.1010 notification will prevent application of the contractor's FAR 22.1012 CBA notice deadlines, resulting in late CBAs applying, nonetheless, to the service contract.

A sample letter for FAR 22.1010 notification is at Appendix A.

3. Nondisplacement of Qualified Workers. REVOKED by Executive Order 13897, FAR Case 2020-01 removed subpart 22.12 effective 5 June 2020 (85 Fed. Reg. 27,087, June 5, 2020).

a. Executive Order 13495, issued January 30, 2009, imposed a requirement that successor contractors and subcontractors offer the employees of the predecessor contract a right of first refusal of

employment. This requirement was implemented in FAR 22.12, FAR 52.222-17, and 29 C.F.R. Part 9.

b. On October 31, 2019, Executive Order 13897 was issued revoking EO 13495 and the nondisplacement rule.

c. FAR Case 2020-01 removed FAR 22.12 effective 5 June 2020. Contracting Officers should not take any action on any complaints filed under the former FAR subpart 22.12.

4. Price Adjustments Contract Clauses.[26] (FAR 52.222-43; 52.222-44).

a. Generally, SCA price adjustments are allowed only for increases due to Congressional or DoL action. For example, if the FLSA minimum wage rate is amended or a WD revision incorporated upon exercise of an option increases labor costs, then the contractor is entitled to an adjustment under the applicable clause;[27] however

(1) Adjustments for increased wages arising out of a CBA negotiated during a contract period of performance are not retroactive to date of CBA execution. Contract price adjustments in these cases apply only upon subsequent option exercise or to a follow-on contract.[28]

(2) A contractor is not entitled to a price adjustment for the increased costs, such as during a base year, of complying with a WD that existed at the time of contract award.[29]

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[26] These price adjustment clauses are generally not included in cost contracts.

[27] See Williams Servs., Inc., ASBCA No. 41121, 91-1 BCA ¶ 23,486; Cf. Sterling Servs., Inc., ASBCA No. 40475, 91-2 BCA ¶ 23,714 (allowing partial relief on claim arising from corrected WD).

[28] See Ameriko, Inc., d/b/a Ameriko Maint. Co., ASBCA No. 50356, 98-1 BCA ¶ 29,505 (holding contractor was not entitled to price adjustment for increase in base year wages where increase was due to CBA executed after contract award); Classico Cleaning Contractors, Inc., DOTBCA No. 2786, 98-1 BCA ¶ 29,648 (holding contractor could not recover during first option year for increases under CBA executed during same year). Phoenix Management, Inc., ASBCA No. 53409, 02-1 BCA¶ 31,704 (agency required to comply with DoL's WD because contracting officer failed to seek clarification regarding employees included in the CBA). But See Alutiiq Commercial Enterprises, Inc., ASBCA No. 61503, 20-1 BCA ¶ 37,506 (finding that the contractor was entitled to a price adjustment under FAR 52.222043 for increased costs associated with a new CBA executed after an option was exercised because the CO failed to provide the 30-day notice required by FAR 22.1010(b) to the contractor and the CBA agent).

[29] Holmes & Narver Servs., ASBCA No. 40111, 93-3 BCA ¶ 26,246 (holding contractor could not recover cost of complying with WD that had not changed); Johnson Controls World Servs., Inc., ASBCA No. 40233, 96-2 BCA ¶ 28,548 (agency not liable for failing to inform contractor of previously disapproved conformance request).

Exception: The Federal Circuit has allowed SCA price adjustments for fringe benefit compliance cost increases in option years, even when not caused by Congressional or DoL action. (See Lear Siegler Servs. v. Rumsfeld, 457 F.3d 1262, 1269 (Fed. Cir. July 28, 2006) (CBA health benefits plan increases); United States v. Serv. Ventures, Inc., 899 F.2d 1 (Fed. Cir. 1990) (vacation benefit amount increases)). In these cases, the contractor did not cause the unforeseen fringe benefit compliance cost increases. These decisions do not support a price adjustment in the base year of the service contract for unanticipated costs of fringe benefit compliance – such as vacation benefits.

b. It is the contractor's responsibility to submit a detailed proposal to adjust the contract price because of a new/revised WD or CBA.

(1) The contractor is only entitled to an adjustment when it demonstrates there is a causal relationship between the new/revised WD and the increased cost it incurs in wages and fringe benefits for its service employees.

(2) Contract price may also be adjusted downward when voluntarily made by the contractor. Request must be made within 30 days of the date when the new/ revised WD is incorporated into the contract.

c. Recovery under the price adjustment clauses is limited to wages, fringe benefits, social security, unemployment taxes, and workers' compensation. It will NOT include general or administrative costs, overhead, or profit. (FAR 52.222-43(e)). In this respect, SCA price adjustments differ from equitable adjustments.

d. Adjustments on other bases.

(1) Not all adjustments for increased wage rates are made under the FAR "price adjustment" clauses. The contractor may be able to show that recovery is based on a clause other than a price adjustment clause (e.g., changes clause).[30]

[30] For example, the parties may agree to wage revisions outside the terms of the price adjustment clauses. Security Servs. Inc. v. General Servs. Admin., GSBCA No. 11052, 93-2 BCA ¶ 25,667; The price adjustment clauses may not apply where the adjustment occurred during base year of contract and was not due to a FLSA minimum wage increase. See, e.g., Lockheed Support Sys., Inc. v. United States, 36 Fed. Cl. 424 (1996) (holding that price adjustment clause did not apply to a wage rate price adjustment made four months after the start of a contract). Professional Servs. Unified, Inc., ASBCA No. 45799, 94-1 BCA ¶ 26,580 (price adjustment clause inapplicable where adjustment occurred after contract award).

(2) Mutual mistake concerning employee classification or the propriety of a WD may shift the cost burden to the government.[31] For this reason, contracting agency should avoid opining on the exempt status of contract employees.

C. Enforcement.

1. DoL enforces SCA compliance.

2. Contracting Agency responsibility is to ensure that the proper labor standard clauses and appropriate WDs are in the contract.

D. Remedies.

1. Termination for Default. (41 U.S.C. § 6705(c)).

2. Three-Year Prohibition on New Contracts. (41 U.S.C. § 6706).

3. Withholding of Contract Funds. (41 U.S.C. § 6705; 29 C.F.R. § 4.187).

VII. WALSH-HEALEY PUBLIC CONTRACTS ACT (PCA) (a.k.a. the CONTRACTS FOR MATERIALS, SUPPLIES, ARTICLES AND EQUIPMENT EXCEEDING $15,000[32] STATUTE)

41 U.S.C. §§ 6501-6511; 41 C.F.R. Parts 50-201 to 50-210; FAR Subpart 22.6: FAR 52.222-20; DFARS Subpart 222.6.

A. Covered Workers and Contracts.

1. Contracts for manufacture or furnishing of materials, supplies, articles, and equipment that exceed $15,000.

2. Exemptions. (FAR 22.604-1 and 22.604-2).

a. Perishables, including livestock, dairy, and nursery products.

b. Agricultural or farm products processed for first sale by the original producer.

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[31] See, e.g., Richlin Sec. Serv. Co., DOTBCA Nos. 3034, 3035, 98-1 BCA¶ 29,651 (mutual mistake as to employee classification).

[32] Although the statute and regulation say the PCA applies to contracts exceeding $10,000, the threshold in FAR Subpart 22.6 has ben increased to $15,000 pursuant to FAR 1.109 and 41 U.S.C. § 1908.

c. Agricultural commodities or products purchased under contract by the Secretary of Agriculture.

d. Public utility services.

e. Supplies manufactured outside the U.S.

f. Newspapers, magazines, or periodicals contracted for with sales agents or publisher representatives

g. Items where the contracting officer is authorized by a PCA-exempting statute to purchase "in the open market," such as commercial items. (FAR 12.503).

3. Dual Statute Coverage.

a. PCA and SCA. When supplies and services specifications are combined in the same contract for the procurement of different or unrelated items, the PCA and SCA may apply to different portions of the procurement. (29 C.F.R. §§ 4.117, 4.131 and 4.132).

b. PCA and DBA. If installation of supplies is "minor and incidental," then DBA will not be required. If installation requires more than an incidental amount of construction, DBA will likely be required for that portion of contract performance. (FAR 22.402(b) and 29 C.F.R. 4.116).

B. Requirements. (41 U.S.C. § 6502).

1. Must pay at least the prevailing minimum wage, if any, otherwise the FLSA minimum wage.

a. In the past, DoL determined the PCA prevailing wage based on similar wages in the applicable industry and locale in which the supplies are to be manufactured or furnished under a contract.

b. Currently, there is no PCA prevailing wage rate determination activity, nor has there been for over 40 years. As a result, the FLSA minimum wage also serves as the PCA minimum wage.

c. Practitioner's Note: The EO 13658 minimum wage, which applies to service and construction contracts, does not apply contracts for supplies. (See supra at IX).

2. Overtime Provisions. Maximum workweek is established as 40 hours.

3. Child and Convict Labor. No one under the age of 16 or incarcerated individual.

4. Health and Safety Requirements.

C. Enforcement by DoL.

D. Remedies. (41 U.S.C. § 6503-6504)

1. Termination for Default.

2. Three-Year Prohibition on New Contracts.

3. Withholding Contract Funds.

4. Liquidated Damages ($10.00 a day for each employee paid improperly).

VIII. DEFENSE BASE ACT (OVERSEAS CONTRACTS ONLY)

42 U.S.C. §§ 1651-1655; FAR Subpart 28.3.

A. Covered Workers and Contracts.

1. The Defense Base Act, in conjunction with the War Hazards Compensation Act, 42 U.S.C. 1701, provides workers compensation type insurance coverage for contractor employees performing under government contracts outside the United States, including those in U.S. Territories and possessions.

2. Applies to federal contracts with employees:

a. Engaged in U.S. government funded public works

b. Engaged in public works or military contracts with a foreign government which has been deemed necessary to U.S. national security.

c. Providing services funded by U.S. government outside realm of regular military issue or channels.

d. Any subcontractor of prime involved in a contract that qualifies under a-c supra.

e. If any one of the above criteria is met, all employees engaged in such employment, regardless of nationality, are covered under the Act.

f. May be waived by the Secretary of Labor.

(1) Once granted, the waiver is only valid if alternative workers' compensation benefits are provided to the waived employees pursuant to applicable local law.

(2) A list of countries with Defense Base Act waivers, as well as procedures for requesting a waiver, can be found at the DPC website https://www.acq.osd.mil/dpap/cpic/cp/waivers_for_defense_base_act_insurance.html.

3. Used in conjunction with the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 et seq.

a. Provides workers compensation type insurance coverage for federal contractor employees engaged in maritime employment.

b. The Defense Base Act adopts the provisions of the LHWCA, with a few exceptions. The insurance requirements for the Defense Base Act are identical to those found in the LHWCA.

B. Requirements.

1. Covers injury or death of covered employees.

2. Requires contractor to obtain Defense Base Act insurance prior to performance of contract.

3. Provides injury benefits such as medical care, disability compensation, and death benefits.

4. Provides minimum insurance coverage for covered employees.

C. Contract Actions. As prescribed by FAR 28.309 or 28.310, insert FAR 52.222-3, 52.222-4, or 52.222-5 in applicable contracts.

D. Enforcement. DoL, Office of Workers' Compensation Program (OWCP). (See https://www.dol.gov/owcp/dlhwc/lsdba.htm).

IX. EXECUTIVE ORDER 13658 – CONTRACT MINIMUM WAGE

79 Fed. Reg. 9,851, 83 Fed. Reg. 2,531, FAR Subpart 22.19, FAR 52.222-55, 29 C.F.R. Part 10

A. Beginning 1 January 2015, requires covered federal contractors to pay an hourly minimum wage rate to workers performing on or in connection with a covered contract. (79 Fed. Reg. 9,851 (Feb. 20, 2014));

B. DoL annually adjusts the minimum wage rate for immediate application to covered contracts. As of January 1, 2020, the minimum hourly wage rate is $10.80. (84 Fed. Reg. 49,345 (Sep. 19, 2019)).

C. FAR Implementation.

1. The FAR amendments established Subpart 22.19 and FAR clause. 52.222-55.

2. The clause requiring the minimum wage is inserted in contracts that include FAR 52.222-6 (DBA Contracts) or FAR 52.222-41 (SCA Contracts). (FAR 22.1906).[33]

3. The EO, as amended, at § 7(f) excludes from coverage seasonal recreational services, or seasonal recreational equipment rental services, for the general public on federal lands. Not exempted, however, are lodging and food services associated with seasonal recreational services. (EO 13838, 83 Fed. Reg. 2531 (June 1, 2018)).

4. Various provisions are in place to enforce this requirement, including payroll records, enforcement procedures, special requirements for tipped workers, and subcontract flow down requirements.

D. Price adjustment. When an annual raise is implemented, there are procedures under FAR 52.222-55 for the contractor to request a price adjustment for any costs resulting from the annual raise.

E. Practitioner's Note: The EO minimum wage usually appears on the first page of DBA and SCA WDs. In most cases, all the other rates listed on the WDs will exceed that of the EO minimum wage.

X. EXECUTIVE ORDER 13665 – NON-RETALIATION FOR DISCLOSURE OF COMPENSATION INFORMATION

79 Fed. Reg. 20,749, FAR Subpart 22.810(e), FAR 52.222-26, 41 C.F.R. Part 60-1

A. Prohibits contractors from discharging or otherwise discriminating against any employees or job applicants because they inquire about, discuss, or disclose their own compensation or the compensation of another employee or applicant. (79 Fed. Reg. 20,749 (Apr. 11, 2014)).

B. In effect, the rule prohibits federal contractors from enforcing compensation confidentiality agreements.

[33] The minimum wage EO also applies to concession contracts excluded from SCA coverage at 29 C.F.R. § 4.133(b), and to contracts in connection with Federal property or lands that offer services for Federal employees, their dependents, or the general public. (29 C.F.R. § 10.2).

C. DoL regulations, implemented in the FAR, apply to covered federal contracts and subcontracts entered into on, or modified after, January 11, 2016. https://www.dol.gov/ofccp/paytransparency.html.

D. The FAR Council published an interim rule amending the equal opportunity clause, FAR 52.222-26, to implement EO 13655. (81 Fed. Reg. 67,732 (Sept. 30, 2016)). The subsequent final rule made no changes to the interim rule. (83 Fed. Reg. 42,570 (Aug. 22, 2018)).

XI. EXECUTIVE ORDER 13706 – CONTRACT PAID SICK LEAVE

80 Fed. Reg. 54,697, FAR Subpart 22.21, FAR 52.222-62, 29 C.F.R. Part 13.

A. Requires federal contractors to provide at least 1 hour of paid sick leave for every 30 hours worked to covered employees. (80 Fed. Reg. 54,697 (Sept. 10, 2015), FAR 22.2105(a)).

B. FAR Implementation. The FAR requires contracting agencies to include FAR 52.222-62 in covered solicitations and contracts that include FAR 52.222-6 (DBA Contracts) or FAR 52.222-41 (SCA Contracts).[34]

C. Overview.

1. PSL does not preempt or supersede state or local leave requirements.

2. PSL is available for certain use not related to illness, such as those related to domestic violence, assault, or stalking circumstances.

3. Employees exempt under 29 C.F.R. Part 541 are entitled to PSL.

4. In addition to the basic paid leave requirement, FAR 52.222-62 mandates various record keeping and enforcement provisions, but does not contain price adjustment procedures.

XII. LABOR RELATIONS

29 U.S.C. §§ 157, 158, FAR 22.101, DFARS 222.101, PGI 222.101, AFARS 5122, AAFARS 5322, NMCARS 5222, 32 C.F.R. § 552.18(k)

A. Strict Impartiality.

[34] The PSL EO also applies to concession contracts excluded from SCA coverage at 29 C.F.R. § 4.133(b), and to contracts in connection with Federal property or lands that offer services for Federal employees, their dependents, or the general public. (29 C.F.R. § 13.3).

1. "Agencies shall remain impartial concerning any dispute between labor and contractor management and not undertake the conciliation, mediation, or arbitration of a labor dispute." (FAR 22.101(b)(1)).

2. Civilian and military personnel must avoid interfering with or influencing the contract labor relations activity, including collective bargaining negotiations. Contracting officers, however, may wish to engage the contractor to seek assurance of continued contract performance. Some contracts will contain FAR 52.222-1 (Notice to the Government of Labor Disputes) and a contractor strike plan.

B. Base Access.

1. Within an installation commander's general authorities and general responsibilities is responding to requests from private sector union representatives to enter the installation. (32 C.F.R. § 552.18(k); AF Instruction 64-107; SECNAV Instruction 4200.36A).

2. Such access, exclusively for matters directly connected with the Government contract on the installation, are often granted provided, among other things, that

a. The presence and activities of the labor representatives will not interfere with the progress of the contract work involved; and

b. The entry of the representatives to the installation will not violate pertinent safety or security regulations.

C. Reserve Gates

1. Demonstrations involving labor disputes generally are not permitted on installations or controlled sites. For labor demonstrations or picketing in the immediate vicinity outside an installation, apply procedures established by policy, or recommended by the contract labor advisor, to minimize adverse impact on base operations or missions without interfering with rights under the National Labor Relations Act, 29 U.S.C. §§ 151-169.

2. Under a reserve gate system, command designates an access gate, or gates, for the exclusive use of the relevant contract.

3. Overview.

a. Designated gate provides the sole means of access for the targeted contractor's employees and suppliers.

b. Other gates are reserved for the use of other, neutral contractors and their employees and suppliers.

c. Related picketing occurs only in the vicinity of the designated gate

d. Command sends letters to contractor and union; provides notices to base personnel, posts signs, and monitors gates. Sample documents are provided at Appendices B and C.

D. Role of the Contract Labor Advisor. The command contracting office shall contact the agency contract labor advisor for assistance concerning such contract labor relations matters. (AFARS 5122.101, PGI 222.101).

XIII. CONCLUSION.

Direct all questions concerning DoL regulations, usually implemented in FAR Part 22, to the agency contract labor advisor. (DFARS 222.403-4).

APPENDIX A: SAMPLE FAR 22.1010 NOTIFICATION LETTER

Mr. John Jones, President
ABC Janitorial Services, Inc.
123 Main Street
Washington DC 20374 and

Mr. Harry Smith, Business Representative
Laborers Union Local #10
456 Front Street
Washington DC 20374

Subject: Contract N12345-01-D-1234, Janitorial Services at Army Facilities, Washington DC

Dear Sirs:

This letter will serve as notice to you under Federal Acquisition Regulation Section 22.1010 that the Government is considering . . .

[issuing a resolicitation of]
[issuing a modification to significantly change the scope of work in a manner that may significantly affect labor requirements on]
[issuing a modification to exercise the First Option [Second, etc] on], [issuing a modification to extend the term of]

the subject contract. The [modification, solicitation] may be issued on or after [date]. The new period of performance effective subsequent to this contract action will begin on or about XXXXXXXXXX.

If you have any questions, please contact me at (123) 456-7890.

Sincerely,

Ms. April Showers
Contracting Officer

APPENDIX B: SAMPLE RESERVE GATE LETTER[35]

Mr. John Jones, President
ABC Janitorial Services, Inc.
123 Main Street
Washington DC 20374 and

Mr. Harry Smith, Business Representative
Laborers Union Local #10
456 Front Street
Washington DC 20374

Subject: Reserved Gate Procedure in the Event of Picketing

I have been advised that a labor dispute may result in picketing of (contractor) during performance of (contract) at (base). The Army maintains strict neutrality in contractor labor disputes. Consistent with this policy, I must make every effort to ensure the ability of the Army to perform its mission is not adversely affected by your dispute.

Accordingly, observe the following procedures for the duration of the dispute or until otherwise removed by official action:

a. Do not picket within the confines of the installation.
b. All employees, vendors and suppliers of (contractor) will enter and exit the installation only through the reserved gate: (gate designation, may be more than one).
c. Confine demonstrations, including picketing, to the reserved gate, (restate the reserved gates).

The Government will post appropriate signs identifying the reserved gate at all entrances to the installation. You must ensure all individuals are aware of and fully comply with these procedures. Direct any questions or problems regarding these procedures to (point of contact for commander) at (phone no.)

Sincerely

Installation Commander
Signature Block

[35] The Reserve Gate sample documents provided here reflect materials at AF Instruction 64-107 and SECNAV Instruction 4200.36A.

APPENDIX C: SAMPLE RESERVE GATE SIGNS

Sign for the Designated Reserve Gate

NOTICE:

ALL EMPLOYEES AND SUPPLIERS OF

[Name of Contractor Involved in Dispute]

MUST ENTER AND EXIT THIS INSTALLATION VIA

THIS GATE ONLY

BY ORDER OF THE COMMANDING OFFICER

Sign for all other, Non-Reserve Gates on the Installation

NOTICE:

ALL EMPLOYEES AND SUPPLIERS OF

[Name of Contractor Involved in Dispute]

MAY NOT ENTER OR EXIT THIS INSTALLATION VIA

THIS GATE.

GATE [Clearly identify the Reserved Gate by Name] IS

RESERVED FOR THE USE OF [Contractor Name]

EMPLOYEES AND SUPPLIERS

BY ORDER OF THE COMMANDING OFFICER

CHAPTER 15

COMPETITIVE SOURCING AND PRIVATIZATION

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I. COMPETITIVE SOURCING[1]

A. COMPETITIVE SOURCING AND OMB CIRCULAR A-76

1. 1955: The Bureau of the Budget (predecessor of the Office of Management and Budget (OMB)) issued a series of bulletins establishing the federal policy to obtain goods and services from the private sector. See Federal Office of Management and Budget Circular A-76, Performance of Commercial Activities, ¶ 4.a (Aug. 4, 1983, Revised 1999) [hereinafter Circular A-76 (1999)]. [2]

2. 1966: The OMB first issued Circular A-76, which restated the federal policy and the principle that "[i]n the process of governing, the Government should not compete with its citizens." The OMB revised the Circular in 1967, 1979, 1983, and again in 1999. See Circular A-76 (1999), ¶ 4.a.

3. 1996: The OMB issued a Revised Supplemental Handbook setting forth procedures for determining whether commercial activities should be performed under contract by a commercial source or in house using government employees. In June 1999, OMB updated the Revised Supplemental Handbook. See Circular A-76 (1999), ¶ 1.

4. 2003: The OMB issued the current version of OMB Circular A-76 superseding the prior circular and any related guidance.[3]

5. 2009: By the spring of 2009 public-private competitions which would convert federal employee jobs into contractor jobs under Circular A-76 had been suspended, and in most cases remain so.[4] Competitive sourcing is currently only permitted in DoD where the result is to determine how to best source work that is not currently performed by federal employees (i.e.

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[1] While referred to in the past as "contracting out" or "outsourcing," this outline will use the term-of-art "competitive sourcing." Competitive sourcing as used herein describes the implementation of procedures whereby a federal agency formally compares the performance of a commercial activity by government employees against performance by the private sector, to determine which is more cost-effective.

[2] The full text of Circular A-76 (2003) is available on-line at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A76/a76_incl_tech_correction.pdf [hereinafter Circular A-76 (Revised)].

[3] Circular A-76 (Revised), *supra* note 2.

[4] Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, § 737 (2009); Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 325 (2009).

new work, or work currently done by contractors). In March 2009, President Obama reiterated the importance of Congress' taskings and further directed the OMB to "clarify when governmental outsourcing of services is, and is not, appropriate, consistent with section 321 of the 2009 NDAA."[5]

6. 2010: In the National Defense Authorization Act for Fiscal Year 2010 (NDAA 2010), Congress imposed a temporary moratorium on new competitions involving functions currently performed by DoD civilian employees until, among other things, DoD reviewed and reported to Congress on various aspects of its public-private competition policies.[6] DoD complied with the statutory requirements in conducting its review of public-private competitions and in submitting its June 2011 report to Congress. Specifically, the report addressed the five required topics:

   a. compliance with a new requirement expanding competition requirements to activities with fewer than 10 federal employees;

   b. actions taken in response to issues raised by the DoD Inspector General (IG) in a 2008 report;

   c. the ability of existing systems to provide comprehensive and reliable data on the cost and quality of functions subject to public-private competition;

   d. the appropriateness of certain cost differentials and factors, such as the overhead rate, used in public-private competitions; and

   e. the adequacy of DoD policies regarding mandatory recompetitions of work previously awarded to employee groups.

7. 2011: In response, to the directive of 2009, OMB (OFPP) issued Policy Letter 11-01.[7] Policy Letter 11-01 is the most recent attempt to define inherently governmental function and subsequently, what functions may and may not be outsourced. In essence, Policy Letter 11-01 prohibits outsourcing "inherently governmental functions" and cautions against

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[5] Memorandum of the President to the Heads of Exec. Dep'ts and Agencies, subject: Government Contracting (Mar. 4, 2009).

[6] Pub. L. No. 111-84 § 325 (2009).

[7] OFFICE OF FED. PROCUREMENT POL., OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OFPP POL. LETTER 11-01, PERFORMANCE OF INHERENTLY GOVERNMENTAL AND CRITICAL FUNCTIONS (2011) [hereinafter POLICY LETTER 11-01]. On February 13, 2012, OFPP published a correction to POLICY LETTER 11-01. POLICY LETTER 11-01 was originally addressed only to the Civil Executive Branch Departments and Agencies. *See* 77 Fed. Reg. 29, 7609 (Feb. 13, 2012) (extending the application of POLICY LETTER 11-01 to Defense Executive Branch Departments and Agencies). (Sec. C, Public Comments to the Notice of Final Policy Letter). The OFPP published its proposed policy letter on March 31, 2010 for public comments. More than 30,000 public and private organizations and/or citizens submitted comments and recommendations. Some recommendations were adopted by OFPP and incorporated into POLICY LETTER 11-01. A review of Section C, Public Comments, is instructive and may be used as a resource when dealing with Closely Associated and Critical Functions.

outsourcing "closely associated with inherently governmental functions" and "critical functions." Policy Letter 11-01 is composed of six parts, but for purposes of this outline, only three of the parts relevant parts are discussed below.[8]

8. 2011: In addition to the important Policy Letter 11-01 issued by OFPP referenced above, the GAO published in 2011, DOD MET STATUTORY REPORTING REQUIREMENTS ON PUBLIC-PRIVATE COMPETITIONS which was a review of the 2010 competitive sourcing review conducted by DoD.[9]

9. 2011: Although not controlling, an interesting review of the discussion surrounding Inherently Governmental Functions, can be found in Congressional Research Service, INHERENTLY GOVERNMENTAL FUNCTIONS AND OTHER WORK RESERVED FOR PERFORMANCE BY FEDERAL GOVERNMENT EMPLOYEES: THE OBAMA ADMINISTRATION'S PROPOSED POLICY LETTER, Oct. 1, 2011.

B. Legislative Roadblocks

1. Legislative hurdles to the use of Circular A-76 studies are not a new phenomenon. The National Defense Authorization Act for Fiscal Year (FY) 1989 allowed installation commanders to decide whether to study commercial activities for outsourcing. Pub. L. No. 101-189, § 1319(a)(1), 103 Stat. 1352, 1560 (1989). Codified at 10 U.S.C. § 2468, this law expired on 30 September 1995. Most commanders opted not to conduct such studies due to costs in terms of money, employee morale, and workforce control.

2. The Department of Defense (DoD) Appropriations Act for FY 1991 prohibited funding Circular A-76 studies. See Pub. L. No. 101-511, § 8087, 104 Stat. 1856, 1896.[10]

3. The National Defense Authorization Acts for FY 1993 and FY 1994 prohibited DoD from entering into contracts stemming from cost

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[8] *See* id. The components not discussed in this primer are generally procedural and only apply once a determination is made to compete out Closely Associated Functions and Critical Functions for contractors to perform. The purpose of this primer is to provide sufficient knowledge of POLICY LETTER 11-01 for the reader to recognize when they are dealing with Inherently Governmental Functions, Closely Associated Functions, and Critical Functions. If the reader is able to spot these issues as they arise, the reader may return to POLICY LETTER 11-01 to determine what procedural safeguards are required.

[9] GAO-11-923R (2011).

[10] While not a "roadblock," a recurring limitation in DOD Appropriations Acts prohibited the use of funds on Circular A-76 studies if the DOD component exceeded twenty-four months to perform a single function study, or thirty months to perform a multi-function study. See Department of Defense Appropriations Act for FY 2008, Pub. L. No. 110-116, § 8021, 121 Stat. 1295 (2007); Department of Defense Appropriations Act for FY 2006, Pub. L. No. 109-148, § 8021, 119 Stat. 2680 (2005). The thirty-month limitation represents a change from prior years, as previously Congress provided forty-eight months for multi-function studies. See e.g., Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8022, 116 Stat. 1519, 1541 (2002).

comparison studies under Circular A-76. See Pub. L. No. 102-484, § 312, 106 Stat. 2315, 2365 (1992) and Pub. L. No. 103-160, § 313, 107 Stat. 1547, 1618 (1993).

4. Recently, as noted above, the Omnibus Appropriations Act, 2009, prohibited the funding of any new studies funded from *any* source.[11] Similar prohibitions and limitations have occurred in all DoD authorizations/appropriations since.[12]

5. DoD is far from the only federal agency to which these limitations were applied.[13] The government-wide moratorium, including the Department of Defense, on the use of funds for public-private competitions was extended for FY 2014 by section 737 (Title VII, General Provisions - Government-wide) of Division E- Financial Services and General Government Appropriations of the Consolidated Appropriations Act, 2014 (Public Law 113-76). Furthermore, the DoD specific suspension of public-private competitions remains in effect per section 325 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. No. 111-84).[14]

C. Government-wide use of Competitive Sourcing through 2007

Until 2009, the OMB issued an annual report on competitive sourcing describing the competitive sourcing efforts throughout the government for the past fiscal year. The table below indicates government-wide numbers for previous fiscal years.

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[11] Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, § 737 (2009) ("None of the funds appropriated or otherwise made available by this or any other Act may be used to begin or announce a study or public-private competition regarding the conversion to contractor performance of any function performed by Federal employees pursuant to Office of Management and Budget Circular A–76 or any other administrative regulation, directive, or policy.").

[12] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 325 (2009); Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8117 (2009). The government-wide moratorium on use of funds for public-private competitions was extended through Fiscal Year 2012 by section 733, Title VII (General Provisions-Government-wide Departments, Agencies, and Corporations) of Division C (Financial Services and General Governmental Appropriations Act, 2012) of the Consolidated Appropriations Act, 2012, P.L. 112-74, *available at* http://www.asamra.army.mil/scra/documents/2014%20Update%20on%20OMB%20Circular%20A-76%20Public-Private%20Competition%20Prohibitions%20(10%20February%202014).pdf

[13] *See e.g.* Consolidated Appropriations Act, 2010, Pub. L. No. 111-117 § 735 (2009).

[14] Office of the Assistant Secretary of Defense (OASD) Memo, "Update on OMB Circular A-76 Public-Private Competition Prohibitions - FY 2019" dated 12 Dec 2018.

	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Sourcing Competitions	662	217	181	183	132
FTE's Affected	17,000+	13,000+	10,000+	6,000+	4,000+
Retained In-house	89%	91%	83%	87%	73%

Source: OMB, Report on Competitive Sourcing Results: Fiscal Year 2004 (May 2005); OMB, Report on Competitive Sourcing Results: Fiscal Year 2005 (April 2006); OMB, Report on Competitive Sourcing Results: Fiscal Year 2006 (May 2007); OMB, Report on Competitive Sourcing Results: Fiscal Year 2007 (May 2008).

D. So what did not fall under Circular A-76?

7. Inapplicability. Agencies were not required to conduct A-76 competitions under the following circumstances:

a. Private sector performance of a "new requirement"[15];

b. Private sector performance of a segregable expansion[16] of an existing commercial activity performed by government personnel; or

c. Continued private sector performance of a commercial activity (i.e. following contract award after an A-76 competition or otherwise). Circular A-76 (Revised) ¶ 5.d.

Note: Circular A-76 (Revised) ¶ 5.d. mandates that before government personnel may perform a "new requirement," an expansion to an existing commercial activity, or an activity performed by the private sector, the agency must conduct a competition which determines that government personnel should perform this activity.[17] ***However***: 10 U.S.C. § 2463(c) specifically prohibits SECDEF from conducting an A-76 (or other such)

[15] Circular A-76 (Revised) Attachment D. A "new requirement" is defined as "[a]n agency's newly established need for a commercial product or service that is not performed by (1) the agency with government personnel; (2) a fee-for-service agreement with public reimbursable source; or (3) a contract with the private sector. Any activity that is performed by the agency and is reengineered, reorganized, modernized, upgraded, expanded or changed to become more efficient, but still essentially provides the same service is *not* considered a new requirement." Id.

[16] Circular A-76 (Revised) Attachment D. An "expansion" is defined as "an increase in the operating costs of an existing commercial activity based on modernization, replacement, upgrade or increased workload. An expansion of an existing commercial activity is an increase of 30 percent or more in the activity's operating costs (including the cost of FTEs) or total capital investment." Id. In contrast, a "segregable expansion" is defined as "an increase to an existing commercial activity that can be separately competed." Id.

[17] AR 5-20, effective 27 July 2008, has the same, arguably "illegal" mandate. U.S. DEP'T OF ARMY, REG. 5-20, COMPETITIVE SOURCING PROGRAM para. 2-6 (27 June 2008).

competition before assigning the function to DoD civilians (not to mention the plethora of legislation mentioned above which have suspended A-76 studies in general).

8. Application to wartime and contingencies. "The DoD Competitive Sourcing Official[18] (without delegation) shall determine if this [A-76] circular applies during times of a declared war or military mobilization." Circular A-76 (Revised) ¶ 5.h.

E. DoD and Competitive Sourcing

9. 1993: National Performance Review (NPR). Part of Vice President Gore's "Reinventing Government" initiative, the NPR stated public agencies should compete "for their customers . . . with the private sector." AL GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS, CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS (1993).

10. 1997: Quadrennial Defense Review (QDR). Addressing the issue of maintaining combat readiness, the QDR urged outsourcing defense support functions in order to focus on essential tasks while also lowering costs. WILLIAMS S. COHEN, REPORT ON THE QUADRENNIAL DEFENSE REVIEW 6 (May 1997).

11. 1997: Defense Reform Initiative (DRI). Expanding upon the QDR, the DRI recommended outsourcing more in-house functions and established outsourcing goals for DoD. WILLIAM S. COHEN, DEFENSE REFORM INITIATIVE REPORT (Nov. 1997).

12. Between Fiscal Year (FY) 1997 and FY 2001, DoD had completed approximately 780 sourcing decisions involving more than 46,000 full-time equivalent (FTE) positions (approximately 34,000 civilian positions and 12,000 military provisions). See GEN. ACCT. OFF., COMMERCIAL ACTIVITIES PANEL, IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT (2002) *available at* www.gao.gov.

13. From FY 2003 to 2007, DoD completed 208 sourcing competitions affecting 20,520 full-time equivalent positions. The most commonly

[18] The Competitive Sourcing Official (CSO) is an assistant secretary or equivalent level official within an agency responsible for implementing the policies and procedures of the circular. Circular A-76 (Revised) ¶ 4.f. For the DoD, the designated CSO is the Deputy Under Secretary of Defense (Installations and Environment). Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments et al., subject: Designation of the Department of Defense Competitive Sourcing Official (12 Sept. 2003). The DoD CSO has in turn appointed DoD Component CSOs (CCSOs) and charged them with providing Circular A-76 (Revised) implementation guidance within their respective Components. Memorandum, Deputy Under Secretary of Defense (Installations and Environment), to Assistant Secretary of the Army (Installations and Environment) et al., subject: Responsibilities of the DoD CSO and Component CSOs (29 Mar. 2004).

competed functions in that timeframe include: maintenance/property management, logistics, health services, and finance & accounting. OMB calculates the actual savings to the department to date from completed competitions to be $1.2B, with a projected net savings of $17,000 per FTE competed. In FY 2007, only 42% of DoD's competed positions were kept in-house (based on a percentage of FTE's competed). In contrast, only 22 percent of the FTE's competed by DoD during FY 2006 were kept in-house (compared to 73% and 87% government-wide, respectively, as shown in the table above). See, OMB, REPORT ON COMPETITIVE SOURCING RESULTS: FISCAL YEAR 2007 (May 2008), *available at* http://www.whitehouse.gov/omb/procurement_commercial_service_mgmt.

14. DoD released a new instruction implementing many of the procedural and policy changes which requires the use of DTM compare which is very similar to the A-76 competitions. This instruction is DoDI 7041.04 Estimating and Comparing the Full Costs of Civilian and Active Duty Military Manpower and Contract Support (3 July 2013).

a. When determining workforce mix the instruction recognizes that 10 U.S.C. §§ 129a, 2330a, 2461, and 2463, DoDI 1100.22, "Policy and Procedures for Determining Workforce Mix," April 12, 2010, Office of Management and Budget Circular A-76, and Office of Federal Procurement Policy letter 11-01 are particularly relevant to decisions on workforce mix.[19] Cost analysts must consult these references when determining workforce mix options.[20]

(1) If a manpower analysis shows that a **new or expanded mission** requirement is not inherently governmental or exempt from private-sector performance, as required by § 2463, the official responsible for the function(s) in question will conduct a cost comparison using the business rules prescribed in DoDI 7041.04 Enclosure 3 to determine which would cost less: DoD civilian employees or a private-sector contractor. [21]

(2) When considering conversion from contractor to government performance (**In-sourcing**) the analysis must first determine if the function was inherently governmental or exempted by § 2463. If the function is neither exempted nor inherently governmental, then a cost comparison (using the business rules prescribed in DoDI 7041.04 Enclosure 3) must be done prior to converting to DoD civilian employee performance. The purpose of the cost comparison is to determine whether DoD civilian employees or a private sector

[19] DoDI 7041.04 Enclosure 3, Estimating and Comparing the Full Costs of Civilian and Active Duty Military Manpower and Contract Support (3 July 2013).
[20] Id.
[21] Id.

contractor would perform the function at a lower cost. Conversions must meet the cost differential requirements set forth by § 2463.[22]

(3) For manpower conversions between military and DoD civilian where manpower may be either military or DoD civilian performance based, and can be converted from one to the other as needed in accordance the analysis should be done IAW DoDI 1100.22. Although cost is not the only factor in such decisions, analysts may be asked to estimate the cost impact of the conversions. In such cases, an analyst will conduct a cost comparison (using the business rules prescribed in DoDI 7041.04, Enclosure 3) to estimate the cost of converting a function from military to DoD civilian performance or from DoD civilian to military performance.[23]

(4) For conversions from government to contractor performance (**outsourcing**) DoD Components are required to conduct public-private competitions in accordance with OMB A-76, 10 USC 2461, and other applicable laws and regulations, in determining whether to convert a commercial activity performed by any number of civilian DoD personnel to private-sector performance.[24] Note currently there is a moratorium on A-76 studies.[25]

II. AGENCY ACTIVITY INVENTORY

A. Key Terms

The heart and soul of competitive sourcing rests on whether a governmental activity/function is categorized as commercial or inherently governmental in nature.

1. Commercial Activity. A recurring service that could be performed by the private sector. Circular A-76 (Revised), Attachment A, ¶ B.2. Some examples include functions that are primarily ministerial and internal in nature (i.e. building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet maintenance, routine electrical or mechanical services).[26] **If a service is determined to be a "commercial activity," then that service *MAY* be subject to a streamlined or standard competition under OMB Circular A-76**. Circular A-76 (Revised) ¶ 4.c.

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[22] Id.
[23] Id.
[24] Id.
[25] *See Supra* note 13.
[26] Cf. Federal Activities Inventory Reform Act (FAIR Act) of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998) (codified at 31 U.S.C. § 501 (note)).

2. Inherently Governmental Activities.[27] An activity so intimately related to the public interest as to mandate performance by government personnel. Such "activities require the exercise of *substantial* discretion in applying government authority and/or making decisions for the government." Circular A-76 (Revised), Attachment A, ¶ B.1.a. (emphasis added). **If a service is determined to be an "inherently governmental activity," then that service *MAY NOT* be subject to a competition under OMB Circular A-76**. Circular A-76 (Revised) ¶ 4.b.

a. Policy Letter 11-01 provides three methods to determining whether the work in question is an inherently governmental function: does it satisfy the definition, is it one of the examples and, even if the answer to the first two questions above is no, does it fall under one of the catch-all test?[28]

b. Policy Letter 11-01's definition of inherently governmental function is not a new definition but rather adopts the definition contained in the FAIR Act.[29] The policy's standardized definition of inherently governmental function is "a function that is so intimately related to the public interest as to require performance by Federal Government Employees."[30] As additional guidance, Policy Letter 11-01 states that, "The term [inherently governmental function] includes functions that require *either* the exercise of discretion in applying Federal Government authority *or* the making of value judgments in making decisions for the Federal Government."[31]

c. Policy Letter 11-01, Appendix A: Examples of Inherently Governmental Functions. The list contains 24 historically and commonly accepted examples of inherently governmental functions[32] the primary purpose of the list is illustrative in nature and not intended to be interpreted as an exhaustive list.[33]

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[27] Additionally, absent specific authority to do so, the Federal Acquisition Regulation (FAR) generally prohibits the award of any contract for the performance of inherently governmental activities stating "contracts shall not be used for the performance of inherently governmental functions." FAR 7.503(a).
[28] POLICY LETTER 11-01., *supra* note 6 para. 5-1(a).
[29] *See* FAIR ACT, *supra* note 27, § 5, 2384-5.
[30] Id. para. 3.
[31] Id. para. 3(a) (emphasis added).
[32] Id.
[33] Id.

d. Policy Letter 11-01, Catch-All Tests: Nature of the Function and Exercise of Discretion Tests. The OFPP created a third method for making inherently governmental functions determination.[34] This third method involves applying two separate tests: the nature of the function test and the exercise of discretion test.[35] Under the nature of the functions test, a function is inherently governmental when it involves the exercise of the Government's sovereign powers.[36] This test does not look to see whether the work has the ability to exercise discretion, but rather classifies work based "strictly on its uniquely governmental nature."[37] In contrast, the exercise-of-discretion test classifies work as inherently governmental when the work leaves room for the actor to commit the government to a certain course of action where "two or more alternative courses of action exist."[38]

3. Inherently governmental activities fall into two broad categories:

a. The exercise of sovereign government authority. For example, exercise of command, prosecuting those accused of crimes, investigating crimes, awarding contracts, or to otherwise determine, advance, or protect the United States' interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, etc.[39]

b. The establishment of procedures and processes related to the oversight of monetary transactions or entitlements. For example, making the decision to pay claims against the government, disbursing appropriated funds, or developing policies for the disbursement of appropriated funds.[40]

4. Closely Associated Functions.[41] Closely associated functions are not *per se* inherently governmental but may become so when the nature of the functions impacts or impinges on a federal employee's ability to execute inherently governmental powers.[42]

5. Policy Letter 11-01, Appendix B: Examples of Closely Associated Functions. Closely associated functions may be competed out to

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[34] Id. para. 5-1(a).
[35] Id. paras. 5-1(a)(1)(i)-(ii).
[36] Id. para. 5-1(a)(1)(i) (listing representing the government at governmental functions and engaging in law enforcement and judicial type activities as examples of inherently governmental functions).
[37] Id.
[38] Id. para. 5-1(a)(1)(ii).
[39] *See* FAIR Act, *supra* note 27.
[40] Id.
[41] Id. para. 5-1(a)(2).
[42] Id. para. 5-2(a)(2).

contractors to perform but before doing so, agencies are required to at least consider reserving these functions for federal employees.[43]

6. Critical Functions. Critical function is "a function that is necessary to the agency being able to effectively perform and maintain control of its mission and operations"[44] and typically "are recurring and long-term in duration."[45] Critical functions are defined as those functions that are critical to the mission and operations of an agency. Does not necessarily require the exercise of discretion or making of a value judgment that may bind the government, but it may depending on the size of the office, capacities of other employees, etc.

B. Inventory Requirements

Federal executive agencies are required to prepare annual inventories categorizing all activities performed by government personnel as either commercial or inherently governmental. The requirement is based on statute and the Circular A-76 (Revised).

1. Statutory Requirement - Federal Activities Inventory Reform Act (FAIR Act) of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998) (codified at 31 U.S.C. § 501 (note)).

   a. Codifies the definition of "inherently governmental" activity.

   b. Requires each executive agency to submit to OMB an annual list (by 30 June) of non-inherently governmental (commercial) activities. After mutual consultation, both OMB and the agency must make the list of commercial activities public. The agency must also forward the list to Congress.

   c. Provides "interested parties" the chance to challenge the list within 30 days after its publication. The "interested party" list includes a broad range of potential challengers to include the private sector, representatives of business/professional groups that include private sector sources, government employees, and the head of any labor organization referred to in 5 U.S.C. § 7103(a)(4).

2. Circular A-76 (Revised) Inventory Requirements.

   a. Requires agencies to submit to OMB by 30 June each year an inventory of commercial activities, an inventory of inherently

[43] Id.
[44] Id. para. 3(b).
[45] Id.

governmental activities, as well as an inventory summary report. Circular A-76 (Revised), Attachment A, ¶ A.2.

b. After OMB review and consultation, agencies will make both the inventory of commercial activities and the inventory of inherently governmental functions available to Congress and the public unless the information is classified or protected for national security reasons. Circular A-76 (Revised), Attachment A, ¶ A.4.

c. Categorization of Activities.

(1) The agency competitive sourcing official (CSO)[46] must justify in writing any designation of an activity as inherently governmental. The justification will be provided to OMB and to the public, upon request. Circular A-76 (Revised), Attachment A, ¶ B.1.

(2) Agencies must use one of six reason codes to identify the reason for government performance of a commercial activity.[47] When using reason code A, the CSO must provide sufficient written justification, which will be made available to OMB and the public, upon request. Circular A-76 (Revised), Attachment A, ¶ C.2.

d. Challenge Process.

(1) The head of the agency must designate an inventory challenge authority and an inventory appeal authority.

(a) Inventory Challenge Authorities. Must be "agency officials at the same level as, or a higher level than, the individual who prepared the inventory." Circular A-76 (Revised), Attachment A, ¶ D.1.a.

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[46] For explanation of CSO, see *supra* note 18.

[47] The six reason codes include the following:

Reason code A – "commercial activity is not appropriate for private sector performance pursuant to a written determination by the CSO."
Reason code B – "commercial activity is suitable for a streamlined or standard competition."
Reason code C – "commercial activity is subject of an in-progress streamlined or standard competition."
Reason code D – "commercial activity is performed by government personnel as the result of a streamlined or standard competition . . . within the past five years."
Reason code E – "commercial activity is pending an agency approved restructuring decision (e.g., closure, realignment)."
Reason code F – "commercial activity is performed by government personnel due to a statutory prohibition against private sector performance."

Circular A-76 (Revised), Attachment A, ¶ C.1, Figure A2.

(b) Inventory Appeal Authorities. Must be "agency officials who are independent and at a higher level in the agency than inventory challenge authorities." Circular A-76 (Revised), Attachment A, ¶ D.1.b.

(2) Inventory challenges are limited to "classification of an activity as inherently governmental or commercial" or to the "application of reason codes." Circular A-76 (Revised), Attachment A, ¶ D.2.[48]

III. OMB CIRCULAR A-76 (REVISED)[49]

A. Resources

1. Statutes.

a. 10 U.S.C. § 2461 (Public-Private Competition Required Before Conversion to Contractor Performance).

b. 10 U.S.C. § 2462 (Reports on Public-Private Competition).

c. 10 U.S.C. § 2463 (Guidelines and Procedures for Use of Civilian Employees to Perform DoD Functions).

d. 31 U.S.C. § 501 note (Federal Activities Inventory Reform Act).

e. Annual DoD Appropriations and Authorization Acts.

2. OMB Guidance. OMB Circular A-76 (2003).[50]

3. DoD Guidance.[51]

a. U.S. Dep't of Defense Instruction (DoDI) 7041.04, Estimating and Comparing the Full Costs of Civilian and Active Duty Military Manpower and Contract Support (3 July 2013).[52]

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[48] Originally Circular A-76 (Revised) stated interested parties could only challenge "reclassifications" of activities. The OMB issued a technical correction, however, revising Attachment A, paragraph D.2 by deleting the word "reclassification" and inserting "classification." Office of Mgmt. & Budget, Technical Correction to Office of Management and Budget Circular No. A-76, "Performance of Commercial Activities," 68 Fed. Reg. 48,961, 48,962 (Aug. 15, 2003). The Circular A-76 has been modified several times since 1966. As of June 2019, the last review of the circular was in 2003.

[49] Attachments 1, 2, and 3 at the end of this outline pertain to the revised circular.

[50] Circular A-76 (Revised), *supra* note 1. OMB has since amended this Circular without changing the date, the latest amendment being the 2006 version.

[51] The applicable regulations, instructions, and guidance of the Department of the Army can be found at http://www.asamra.army.mil/scra/

[52] *Available at* http://www.asamra.army.mil/scra/documents/DoDI%207041.04%20Estimating%20and%20Comparing%20the%20

4. Military Department Guidance.

a. U.S. Dep't of Army, Reg. 5-20, Competitive Sourcing Program (27 June 2008)(rescinded May 2019 but not replaced.)

b. U.S. Dep't of Army, Pam. 5-20, Competitive Sourcing Implementation Instructions (27 June 2008) (rescinded May 2019 but not replaced.)

c. U.S. Dep't of Air Force, Instr. 38-203, Commercial Activities Program (20 June 2008) (rescinded but not replaced.)

d. U.S. Dep't of Navy, Instr. 4860.7D, Navy Commercial Activities Program (28 September 2005)(rescinded but not replaced).

B. Key Players/Terms

1. Most Efficient Organization (MEO). The staffing plan of the agency tender, developed to represent the agency's most efficient and cost-effective organization. An MEO is required for a standard competition and may include a mix of government personnel and MEO subcontracts. Circular A-76 (Revised), Attachment D. Note that while under Circular A-76 (Revised), an MEO is not required for any streamlined competitions, federal law requires DoD to create an MEO for all competitions affecting 10 or more FTEs.[53]

2. Performance Work Statement (PWS). A statement in the solicitation that identifies the technical, functional, and performance characteristics of the agency's requirements. The PWS is performance-based and describes the agency's needs (the "what"), not the specific methods for meeting those needs (the "how"). The PWS identifies essential outcomes to be achieved, specifies the agency's required performance standards, and specifies the location, units, quality, and timeliness of the work. Circular A-76 (Revised), Attachment D.

3. Agency Tender. The agency management plan submitted in response to and in accordance with the requirements in a solicitation. The agency tender includes a most-efficient organization (MEO), agency cost estimate, MEO quality control and phase-in plans, and any subcontracts. Circular A-76 (Revised), Attachment D.

Full%20Costs%20of%20Civilian%20and%20Active%20Duty%20Military%20Manpower%20and%20Contract%20Support%20(3%20July%202013).pdf

[53] *See* Department of Defense Appropriations Act for FY 2008, Pub. L. No. 110-116, § 8015(b), 121 Stat. 1295 (2007); 10 U.S.C. § 2461(a) (stating that DOD must complete an "MEO" (among other requirements) prior to converting any function that involves *10 or more civilian employees.*) There is an exception to 10 U.S.C. § 2461 for JWOD procurements and nonprofit agencies for the blind or severely handicapped. 10 U.S.C. § 2461(d). *See also infra* notes 55, 56 and 58.

4. Agency Tender Official (ATO). An inherently governmental official with decision-making authority who is responsible for developing, certifying, and representing the agency tender. The ATO also designates members of the **MEO Team** and is considered a "directly interested party" for contest purposes. The ATO must be independent of the contracting officer, Source Selection Authority/Source Selection Evaluation Board, and the PWS Team. Circular A-76 (Revised), Attachment B, ¶ A.8.a.

5. **MEO Team**. (Conflict of Interest Avoidance) Directly affected government personnel (i.e. employees whose positions are being competed) may participate on the MEO Team. However, to avoid any appearance of a conflict of interest, members of the MEO Team shall not be members of the PWS Team. Circular A-76 (Revised), Attachment B, ¶ D.2. (emphasis added). See also Attachment 5 (this outline).

6. Contracting Officer (CO). An inherently governmental official who is a member of the PWS Team and is responsible for issuing the solicitation and the source selection methodology. The CO must be independent of the ATO, MEO Team, and the Human Resource Advisor (HRA). Circular A-76 (Revised), Attachment B, ¶ A.8.b and Attachment D.

7. PWS Team Leader. An inherently governmental official, independent of the ATO, Human Resource Advisor (HRA), and MEO team, who develops the PWS and the quality assurance surveillance plan, determines government-furnished property, and assists the CO in developing the solicitation. Responsible for appointing members of the **PWS Team**. Circular A-76 (Revised), Attachment B, ¶ A.8.c.

8. **PWS Team.** (Conflict of Interest Avoidance) *Directly affected government personnel* (i.e. employees whose positions are being competed) may participate on the PWS Team. However, to avoid any appearance of a conflict of interest, members of the MEO Team shall not be members of the PWS Team. Circular A-76 (Revised), Attachment B, ¶ D.2. See also attachment 5 (this outline).

9. Human Resource Advisor (HRA). An inherently governmental official and human resource expert. The HRA must be independent of the CO, the Source Selection Authority (SSA), the PWS Team, and the Source Selection Evaluation Board (SSEB). As a member of the MEO Team, the HRA assists the ATO and MEO Team in developing the agency tender. The HRA is also responsible for employee and labor-relations requirements. Circular A-76 (Revised), Attachment B, ¶ A.8.d.

10. Source Selection Authority (SSA). An inherently governmental official appointed IAW FAR 15.303. The SSA must be independent of the ATO, HRA, and MEO team. Responsible for appointing members of the **Source Selection Evaluation Board (SSEB) Team**.

11. **Source Selection Evaluation Board (SSEB) Team**. (Conflict of Interest Avoidance) *Directly affected personnel* (i.e. employees whose positions are being competed) and other personnel (including but not limited to the ATO, HRA, MEO team members, advisors, and consultants) *with knowledge of the agency tender* shall not participate in any manner on the SSEB Team (as member or as advisors). So, PWS Team members (so long as they are not directly-affected personnel) may participate on the SSEB Team. Additionally, MEO Team members (because they have direct knowledge of the MEO) generally may not participate on the SSEB Team. Circular A-76 (Revised), Attachment B, ¶ D.2. See also Attachment 5 (this outline).[54]

C. Competition Procedures

1. Previously, agencies could "directly convert" to contractor performance functions performed by 10 or fewer full-time equivalents (FTEs). The Revised Circular A-76 eliminates the use of "direct conversions." Office of Management and Budget; Performance of Commercial Activities, 68 Fed. Reg. 32,134; 32,136 (May 29, 2003).[55] Under the current circular, the only two authorized competition procedures are "streamlined competitions" and "standard competitions."

2. **Streamlined Competitions**. The new "streamlined competition" process may be used for activities performed by 65 or fewer FTEs[56] "and/or any number of military personnel," or the agency may elect to use the standard competition. Circular A-76 (Revised), Attachment B, ¶¶ A.5.b. Recent Army and Air Force guidance allow the use of the streamlined process

[54] *But see* AR 5-20, para 4-1 (stating "members of the MEO team . . . will not be members of the PWS team and the SSEB").

[55] While the Circular A-76 (Revised) eliminates "direct conversions", Congress permits DoD to directly convert performance through a recurring provision in appropriation acts, to functions that: 1) are Javits-Wagner-O'Day (JWOD) Act procurements; 2) are converted to performance by qualified nonprofit firms for the blind or severely handicapped employees in accordance with JWOD; or 3) firms that are at least fifty-one percent owned by an Indian tribe or a Native Hawaiian organization. *See* Department of Defense Appropriations Act for FY 2008, Pub. L. No. 110-116, § 8015(b), 121 Stat. 1295 (2007).

[56] Note that for DoD, 10 U.S.C. § 2461 effectively changes the threshold. In DoD, if a commercial activity is being performed "by 10 or more Department of Defense civilian employees," then the agency must: (1) develop an agency tender and MEO, (2) issue a solicitation, (3) utilize a cost conversion differential in determining whether to award a contract, and (4) submit a report to Congress prior to commencing the competition. So, although DoD could still use streamlined competitions for those competitions affected sixty-five or less FTEs, the statute discourages streamlined competitions where the number of FTEs performing the commercial activity is ten or more since the time period for streamlined competitions is only ninety days (vice twelve months for a standard competition). *See* 10 U.S.C. § 2461 (Westlaw 2008); *see also* Department of Defense Appropriations Act for Fiscal Year 2008, Pub. L. No. 110-116, § 8015, 121 Stat. 1295 (2007). In 2008, an amendment to 41 U.S.C. § 403 added similar requirements for non-DoD competitions where the commercial activity is being performed "by 10 or more agency civilian employees". *See* 41 U.S.C. § 403 (Westlaw 2008); *see also* Department of Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, § 271, 122 Stat. 62 (2008); *cf. infra* note 27.

only for competitions of less than 10 FTEs.[57] The streamlined competition process includes:

a. Determining the Cost of Agency Performance. An agency may determine the agency cost estimate on the incumbent activity; "however, an agency is encouraged to develop a more efficient organization, which may be an MEO." Circular A-76 (Revised), Attachment B, ¶ C.1.a.[58]

b. Determining the Cost of Private Sector/Public Reimbursable Performance. An agency may use documented market research or solicit proposals IAW the FAR, to include using simplified acquisition tools. Circular A-76 (Revised), Attachment B, ¶ C.1.b; Office of Management and Budget; Performance of Commercial Activities, 68 Fed. Reg. 32,134; 32,137 (May 29, 2003).

c. Establishing Cost Estimate Firewalls. The individual(s) preparing the in-house cost estimate and the individual(s) soliciting private sector/public reimbursable cost estimates must be different and may not share information. Circular A-76 (Revised), Attachment B, ¶ C.1.d.

d. Implementing the Decision. For private sector performance decisions, the CO awards a contract IAW the FAR. For agency performance decisions, the CO executes a "letter of obligation" with an agency official responsible for the commercial activity. Circular A-76 (Revised), Attachment B, ¶ C.3.a.

e. **Protests**. See discussion below in paragraph 3.e. (Standard Competition Protests) regarding changes made by the National Defense Authorization Act of 2008 to the Competition in

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[57] Though the Army has recently published a new AR and DA PAM, the two conflict on their guidance. *Compare* U.S. DEP'T OF ARMY, REG. 5-20, COMPETITIVE SOURCING PROGRAM Figure 2-2 (27 June 2008), *with* U.S. DEP'T OF ARMY, PAM. 5-20, COMPETITIVE SOURCING IMPLEMENTATION INSTRUCTIONS Figure 2-2 (27 June 2008). It appears however, that the intent, for the reasons in note 56 *supra*, was to limit streamlined competitions to those involving less than 10 FTEs. Similar guidance can be found in U.S. DEP'T OF AIR FORCE, INST. 38-203, COMMERCIAL ACTIVITIES PROGRAM paras. 3.5.1.4 and 3.5.1.5 (20 June 2008).

[58] Though civilian agencies have historically been able to determine the estimated cost of in-house performance without creating an MEO, DoD's ability to do so is limited. Recall that DoD (and other executive agencies pursuant to 41 U.S.C. § 403) generally must complete a "most efficient and cost effective organization analysis" prior to converting any function that involves *more than 10 civilian employees*. *See supra* note 56. Note, however, that 10 U.S.C. § 2461(a), conflicts with the annual appropriation act language on the minimum number of civilian employees that must be affected to make the creation of an MEO (and other requirements) mandatory. The annual appropriations acts' requirements apply to the conversion of any function that involves *more than 10 DoD civilian employees* (instead of "*10 or more*" from the statute). Thus, practitioners, faced with exactly 10 FTEs, should look at the most recent appropriations act for guidance. *Compare* Department of Defense Appropriations Act for Fiscal Year 2008, Pub. L. No. 110-116, § 8015(a), 121 Stat. 1295 (2007) *with* 10 U.S.C. § 2461(a)(1) (Westlaw 2008).

Contracting Act (CICA) for protests. The amended CICA grants GAO jurisdiction to hear protests in both streamlined and standard competitions.

3. **Standard Competitions**. The new "standard competition" procedures must be used for commercial activities performed by more than 65 FTEs. Circular A-76 (Revised), Attachment B, ¶ A.5.[59]

a. Solicitation. When issuing a solicitation, the agency must comply with the FAR and clearly identify all the evaluation factors.

(1) The solicitation must state that the agency tender is not required to include certain information such as subcontracting plan goals, licensing or other certifications, or past performance information (unless the agency tender is based on an MEO implemented IAW the circular). Circular A-76 (Revised), Attachment B, ¶ D.3.a(4).

(2) The solicitation closing date will be the same for private sector offers and agency tenders. Circular A-76 (Revised), Attachment B, ¶ D.3.a(5). If the ATO anticipates the agency tender will be submitted late, the ATO must notify the CO. The CO must then consult with the CSO to determine if amending the closing date is in the best interest of the government. Circular A-76 (Revised), Attachment B, ¶ D.4.a(2).

4. Source Selection.

(1) In addition to sealed bidding and negotiated procurements based on a lowest priced technically acceptable source selections IAW the FAR, the Circular A-76 (Revised) also permits:

b. Phased Evaluation Source Selections.

(i) Phase One - only technical factors are considered and all prospective providers (private sector, public reimbursable sources, and the agency tender) may propose alternative performance standards. If the SSA accepts an alternate performance standard, the solicitation is amended and revised proposals are requested. Circular A-76 (Revised), Attachment B, ¶ D.5.b.2.(a).

[59] *See supra* note 48.

(ii) Phase Two – the SSA makes the performance decision after the CO conducts price analysis and cost realism on all offers/tenders determined technically acceptable. Circular A-76 (Revised), Attachment B, ¶ D.5.b.2.(b).

(b) Cost-Technical Tradeoff Source Selections. May only be used in standard competitions for (1) information technology activities, (2) commercial activities performed by the private sector, (3) new requirements, and (4) segregable expansions. Circular A-76 (Revised), Attachment B, ¶ D.5.b.3.[60]

(2) The agency tender is evaluated concurrently with the private sector proposals and may be excluded from a standard competition if materially deficient. Circular A-76 (Revised), Attachment B, ¶ D.5.c.1.

(a) If the CO conducts exchanges with the private sector offerors and the ATO, such exchanges must be IAW FAR 15.306, except that exchanges with the ATO must be in writing and the CO must maintain records of all such correspondence. Circular A-76 (Revised), Attachment B, ¶ D.5.c.2.

(b) If an ATO is unable to correct a material deficiency, "the CSO may advise the SSA to exclude the agency tender from the standard competition." Circular A-76 (Revised), Attachment B, ¶ D.5.c.3.

(3) All standard competitions will include the cost conversion differential (i.e., 10% of personnel costs or $10 million, whichever is less). Circular A-76 (Revised), Attachment B, ¶ D.5.c.4.[61]

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[60] Note that the cost conversion differential effectively precludes the use of this method. *See infra* text at (3) below; *infra* note 30.

[61] As stated above, the "10% or $10 million" conversion differential requires the agencies to apply the differential in all competitions (streamlined or standard) involving ten or more (or more than ten) civilian employees. *See supra* notes 56 and 58. Additionally, both 10 U.S.C. §2461 and the Department of Defense Appropriations Act for FY 2008 contain a limitation that states the contractor cannot receive an advantage for a proposal that reduces DoD costs by "not making an employer-sponsored health insurance plan available" to the workers who will perform the work under the proposal, or by "offering to such workers an employer-sponsored health benefits plan that the requires the employer to contribute less towards the premiums" than the amount paid by the DoD under chapter 89, title 5 of the United States Code. *See* Department of Defense Appropriations Act for Fiscal Year 2008, Pub. L. No. 110-116, § 8015(a)(3), 121 Stat. 1295 (2007); 10 U.S.C. § 2461(a)(1)(G).

c. Implementing a Performance Decision. For private sector performance decisions, the CO awards a contract IAW the FAR. For agency performance decisions, the CO executes a "letter of obligation" with an agency official responsible for the commercial activity. Circular A-76 (Revised), Attachment B, ¶ D.6.f.

d. Contests.[62]

e. A "directly interested party" (i.e., the agency tender official, a single individual appointed by a majority of directly affected employees, a private sector offeror, or the certifying official of a public reimbursable tender) may contest certain actions in a **standard competition**. Matters that may be contested include: (1) the solicitation, (2) the cancellation of a solicitation, (3) a determination to exclude a tender or offer from a standard competition and (4) a performance decision. Circular A-76 (Revised), Attachment B, ¶ F.1.

(1) All such challenges will now be governed by the agency appeal procedures found at FAR 33.103. Circular A-76 (Revised), Attachment B, ¶ F.1.

(2) **No party** (private or government) **may contest** any aspect of **a streamlined competition**. Circular A-76 (Revised), Attachment B, ¶ F.2.

f. Protests

(1) Historical development of protest rights involving A-76 competitions.

(a) An "interested party" under the Competition in Contracting Act (CICA) may protest certain actions concerning a competition (streamlined or standard) conducted under OMB Circular A-76. Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (2000).

(b) Shortly after OMB issued the Circular A-76 (Revised), GAO published a notice in the Federal Register requesting comments on whether the GAO should accept jurisdiction over bid protests submitted by the Agency Tender Official and/or an "agent" for affected employees. Government Accountability Office; Administrative Practices and

[62] A "contest" is the term the OMB Circular A-76 (Revised) uses to describe what is referred to in FAR Part 33 as an agency-level protest.

Procedures; Bid Protest Regulations, Government Contracts, 68 Fed. Reg. 35.411 (June 13, 2003).

(c) In April 2004, the GAO ruled that notwithstanding the changes in the Circular A-76 (Revised), the in-house competitors in public/private competitions are not offerors and, therefore, under the current language of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (2000), no representative of an in-house competitor is an "interested party" eligible to maintain a protest before the GAO. Dan Dufrene et al., B-293590.2 et al. (April 19, 2004).[63]

(d) In response, Congress included Section 326 in the Ronald W. Reagan National Defense Authorization Act, 2005 (2005 NDAA), and granted ATOs limited, yet significant bid protest rights. Pub. L. No. 108-375, § 326, 118 Stat. 1811, 1848 (2004).

(i) Amended the CICA definition of "interested party" by specifying that the term includes ATOs in public-private competitions involving more than sixty-five FTEs. *See* 31 U.S.C. § 3551(2).

(ii) Stated that ATOs "shall file a protest" in a public-private competition at the request of a majority of the affected federal civilian employees "unless the [ATO] determines that there is no reasonable basis for the protest." The ATO's determination whether to file a protest "is not subject to administrative or judicial review," however, if the ATO determines there is no reasonable basis for a protest, the ATO must notify Congress.

(e) Additionally, in any protest filed by an interested party in competitions involving more than sixty-five

[63] Recognizing the concerns of fairness that weigh in favor of correcting the current situation, where an unsuccessful private-sector offeror has the right to protest to the GAO, while an unsuccessful public-sector competitor does not, the Comptroller General sent a letter to Congress suggesting that Congress may wish to consider amending the CICA to provide for MEO standing. Dan Dufrene et al., B-293590.2 (April 19, 2004). The letter also suggested that any amendment to the CICA specify who would be authorized to protest on the MEO's behalf: the ATO, affected employees (either individually or in a representative capacity), and/or employees' union representatives. *Id*.

FTEs, a representative selected by a majority of the affected employees may have "intervened" in the protest.

(f) On 14 April 2005, the GAO amended its Bid Protest Regulations by revising the definition of "interested party" and "intervenor" IAW with the 2005 NDAA. 70 Fed. Reg. 19,679 (Apr. 14, 2005).

(2) On 28 January 2008, Congress significantly expanded protest rights for civilian employees involved in an A-76 competition pursuant to Section 326 of the National Defense Authorization Act of Fiscal Year 2008 (2008 NDAA) by again re-defining "interested party" under CICA. Pub. L. No. 110-181, § 326 (a), 122 Stat. 62 (2008). The 2008 NDAA thus amended CICA (31 U.S.C. § 3551) at paragraph (2) to state that an interested party with respect to a competition under OMB Circular A-76 includes:

(a) "Any official who submitted the agency tender in such [a] competition;" and

(b) "Any one individual who, for the purpose of representing the Federal employees engaged in the performance of the activity or function for which the public-private competition is conducted in a protest. . .has been designated as the agent of the Federal employees by a majority of such employees."

This new language gives the GAO jurisdiction to hear a protest filed by the ATO or a representative elected by a majority of the affected employees on behalf of the losing employees, without regard to whether or not sixty-five FTEs are involved.

5. Timeframes

a. Streamlined Competitions. Must be completed within ninety calendar days from "public announcement" to "performance decision," unless the agency CSO grants an extension not to exceed forty-five days. Circular A-76 (Revised), Attachment B, ¶ C.2.[64]

[64] *See supra* note 10.

b. Standard Competitions. Must not exceed twelve months from "public announcement" to "performance decision," unless the CSO grants a time limit waiver not to exceed six months. Circular A-76 (Revised), Attachment B, ¶ D.1.[65]

c. Preliminary Planning. Because time frames for completing competitions have been reduced, preliminary planning takes on increased importance. The new rules state that prior to public announcement (start date)[66] of a streamlined or standard competition, the agency must complete several preliminary planning steps to include: scoping the activities and FTEs to be competed, grouping business activities, assessing the availability of workload data, determining the incumbent activities baseline costs, establishing schedules, and appointing the various competition officials. Circular A-76 (Revised), Attachment B, ¶ A.

D. Final Decision and Implementation

1. After all appeals/protests have been resolved, the decision summary is sent to the Secretary of Defense (SECDEF) for approval and notice is forwarded to Congress. See 10 U.S.C. § 2462. This provision requires the SECDEF to notify Congress of the outcome of a competitive sourcing study which affects 10 or more FTEs, regardless of whether the study recommends converting to contractor performance or retaining the function in-house.

2. Contractor Implementation. If the private sector offer wins, the contracting officer awards the contract. Circular A-76 (Revised), Attachment B, ¶ D.

3. MEO Implementation. If the agency tender wins, then the contracting officer will issue a "letter of obligation" to an "official responsible for performance of the MEO." Circular A-76 (Revised), Attachment B, ¶ D.

E. Post Competition Accountability

1. Monitoring. After implementing a performance decision, the agency must monitor performance IAW with the performance periods stated in the solicitation. The CO will make option year exercise determinations (for

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[65] Id.

[66] Recall that both DoD and other federal agencies have a statutory requirement to notify Congress "before commencing a public-private competition" if the competition will involve 10 or more FTES of: (1) the function to be competed, (2) the location of the proposed competition, (3) the number of civilian employees potentially affected, and (4) the anticipated length and cost of the competition. 10 U.S.C. § 2461(b) and 41 U.S.C. § 401.

either contract performance or MEO performance) IAW FAR 17.207. Circular A-76 (Revised), Attachment B, ¶¶ E.4 and 5.

2. Terminations for Failure to Perform. The CO must follow the cure notice and show cause notification procedures consistent with FAR Part 49 prior to issuing a notice of termination. Circular A-76 (Revised), Attachment B, ¶ E.6. According to the circular, the CO may terminate a contract or a letter of obligation for failure to perform.

F. Follow-on Competition

1. Following contractor performance. After a commercial activity has been subjected to an A-76 competition and a private sector offeror has been awarded a contract, the commercial activity **does not** have to be competed again under A-76. After performance of the contract, the agency may simply re-solicit private sector offerors under the applicable provisions of the FAR. Circular A-76 (Revised), 5d.[67]

2. Following MEO performance. In contrast, pursuant to Circular A-76 (Revised), if a commercial activity is subject to a competition and the agency's employees were issued a letter of obligation, then the commercial activity **does** have to be competed again. So, after performance of the MEO under the letter of obligation, the agency must re-initiate the entire A-76 process. Circular A-76 (Revised), Attachment B, ¶ E.5. Ostensibly, this requirement supports the underlying presumption in the circular that "the longstanding policy of the federal government has been to rely on the private sector for needed commercial services." Circular A-76 (Revised). **<u>However</u>**, the 2008 NDAA amended 10 U.S.C. § 2461, adding a section that specifically exempts DoD from the requirement to recompete such functions. 10 U.S.C. § 2461(a)(4).

G. Exclusions (When Does OMB Circular Not Apply?)

In the Army, the following are excluded from using OMB Circular A-76 per AR 5-20, paragraph 2-2: [68]

a. Depot-level maintenance of mission-essential material at Army depots.

b. Installations that are 180 days from closure.

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[67] *But see* 10 U.S.C. §2463 (Westlaw 2008) (calling for increased consideration of "insourcing" requirements, especially where those requirements have been recently outsourced).

[68] Additionally, while Outside the Continental United States (excluding Alaska and Hawaii), commanders "may use…OMB Circular A-76 procedures…when doing so conforms to applicable law, treaties and international agreements."

c. Production operations performed in government-owned plants

d. Privatizations (such as housing and utility privatizations).

H. Latest Changes

The most recent changes to the law regarding competitions in DoD, performed under OMB Circular A-76, came as part of the National Defense Authorization Act (NDAA) of 2008 **(Practitioners should read these provisions of the NDAA in their entirety).**

1. The NDAA of 2008 made significant changes to DoD A-76 competitions. See NDAA of 2008, Pub. L. No. 110-181, §§ 322-342, 122 Stat. 62 (2008).

2. The following highlights some of these changes:

a. Section 322 (Modification to Public-Private Competition Requirements Before Conversion to Contractor Performance). Amends 10 U.S.C. §2461 by stating that a private offeror in a competition shall not receive an advantage over an agency tender by reducing the health or retirement benefits afforded to employees. Specifically, there can be no advantage given for:

(1) "[N]ot making an employer-sponsored health insurance plan" for workers who would be employed to perform the commercial activity if the work was transferred to contract performance;

(2) "[O]ffering to such workers an employer-sponsored health benefits plan that requires the employer to contribute less toward the premium…than the amount that is paid by the DoD;" and

(3) "[O]ffering to such workers a retirement benefit that, in any year, costs less than the annual retirement cost factor applicable to civilian employees of the DoD."

Additionally, Section 322 adds a requirement for monthly consultation with, and consideration of the views of, those civilian employees who will be affected by the potential conversion. This consultation is to occur during the development and preparation of the performance work statement and the management efficiency study.

b. Section 323 (Public-Private Competition at End of Period Specified in Performance Agreement Not Required). Amends 10 U.S.C. § 2461 by stating that where the agency tender "wins"

the A-76 competition and DoD civilian employees perform the activity pursuant to a "letter of obligation" (LOO), at the end of LOO's performance period, DoD is not required to conduct another A-76 competition. This provision supersedes (for DoD) the OMB Circular A-76 general requirement that the agency conduct another competition at the end of a performance period under a LOO. *See* Circular A-76, para 5(d).[69]

c. Section 324 (Guidelines on Insourcing New and Contracted Out Functions). Amends 10 U.S.C. § 2462 by stating that the Secretary of Defense shall issue guidance "to ensure that consideration is given to using, on a regular basis, DoD civilian employees to perform new functions and functions that are performed by contractors and could be performed by DoD civilian employees." This provision thus requires special consideration be given to performance by DoD civilian employees of not only new functions, but also commercial activities that are being currently performed by contractors. So, this provision encourages, "insourcing" (transferring to in-house performance work that is being performed by a contractor). Specifically, this section states that "special consideration" must be given to using DoD employees to perform any function that:

(1) Is currently "performed by a contractor" *and* (a) "has been performed by DoD employees at any time during the past 10 years"; or (b) "is a function closely associated with performance of an inherently governmental function"; or (c) "has been performed pursuant to a contract awarded on a non-competitive basis"; or (d) "has performed poorly as determined by a contracting officer"; or

(2) Is a "new requirement."

d. Section 325 (Restriction of OMB Influence Over DoD Public-Private Competitions). States that OMB may not direct DoD "to prepare for, undertake, continue, or complete a public-private competition or direct conversion" of a DoD function to performance by a contactor pursuant to OMB Circular A-76. Thus, this provision explicitly curtails the authority that OMB (an arm of the executive branch) has over DoD in A-76 competitions.

e. Section 326 (Bid Protests by Federal Employees in Actions Under OMB Circular A-76). See earlier discussion on page 22 (Sec. C.4.f(2)), regarding changes to bid protest rights.

[69] *See also supra* Sec. III.F.2.

3. Continual provisions in each fiscal year have extended the prohibition to conduct A-76 competitions, not only within DoD.[70]

   a. In FY2010, NDAA Section 322 amended language in 10 U.S.C. § 2461(a) that limited the duration of an A-77 competition to 24 months, with the possibility to extend that competition to 33 months if DoD notified Congress that an extension was needed.[71]

   b. In FY2010, NDAA Section 325 extended the prohibition on A-76 competitions. Section 325 also required DoD to report to Congress on the status of its previous competitions under 10 U.S.C. § 2461, the actions it planned to take to address the DoD IG report, the appropriateness of the cost differential used; and the adequacy of DoD's policies. In addition, DoD was required to certify that it had completed its report and has implemented a plan for future A-76 competitions and/or services that could fall under the A-76 purview.[72]

   c. In FY2011, NDAA section 8103 prohibited A-76 competitions except when certain conditions were met, such as completing all reporting and certifications required under section 325 of NDAA FY10.[73]

   d. NDAA FY2012, Section 733 prohibited funds from being used to begin or announce a study or public-private competition.[74]

   e. The government-wide moratorium, including the Department of Defense, on the use of funds for public-private competitions was extended for FY 2014 by section 737 (Title VII General Provisions - Government-wide) of Division E- Financial Services and General Government Appropriations of the Consolidated Appropriations Act, 2014,[75] and the DoD specific suspension of public-private competitions remains in effect per section 325 of the National Defense Authorization Act for Fiscal Year 2010.[76] Practitioners should check all current policies and review OASD Memo, dated 17 May 2018, "Update on OMB Circular A-76 Public-Private Competition Prohibitions - FY 2018."

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[70] *SeeInfra*. Section I.A.5. The government-wide moratorium, including the Department of Defense, on the use of funds for public-private competitions was extended for FY 2014 by section 737 (Title VII, General Provisions - Government-wide) of Division E- Financial Services and General Government Appropriations of the Consolidated Appropriations Act, 2014 (Public Law 113-76).
[71] Pub. L. No. 111-84.
[72] Id.
[73] Pub. L. No. 112-10.
[74] Pub. L. No.112-74.
[75] Pub. L. No. 113-76
[76] Pub. L. No. 111-84

IV. CIVILIAN PERSONNEL ISSUES

A. Employee Consultation

By statute, the DoD must consult with affected employees. In the case of affected employees represented by a union, consultation with union representatives satisfies this requirement. 10 U.S.C. § 2461(a)(4).

B. Right-of-First-Refusal of Employment

1. The CO must include the Right-of-First-Refusal of Employment clause in the solicitation. See Circular A-76 (Revised), Attachment B, ¶ D.6.f.1.b; Revised Supplemental Handbook, Part I, Chapter 3, ¶ G.4; and FAR 7.305.

2. The clause, at FAR 52.207-3, requires:

a. The contractor to give the government employees, who have been or will be adversely affected or separated due to the resulting contract award, the right of first refusal for employment openings under the contract in positions for which they are qualified, if that employment is consistent with post-government employment conflict of interest standards.

b. Within 10 days after contract award, the contracting officer must provide the contractor a list of government employees who have been or will be adversely affected or separated as a result of contract award.

c. Within 120 days after contract performance begins, the contractor must report to the contracting officer the names of displaced employees who are hired within 90 days after contract performance begins.

C. Right-of-First-Refusal and the Financial Conflict of Interest Laws

1. Employees will participate in preparing the PWS and the MEO. Certain conflict of interest statutes may impact their participation, as well as, when and if they may exercise their Right-of-First Refusal.

2. Procurement Integrity Act, 41 U.S.C. § 2101 et seq.; FAR 3.104.

a. Disclosing or Obtaining Procurement Information (41 U.S.C. §§ 2102(a)-(b)). These provisions apply to all federal employees, regardless of their role during a Circular A-76 competition.

b. Reporting Employment Contacts (41 U.S.C. § 2103(a)).

(1) FAR 3.104-1generally excludes from the scope of "personally and substantially" the following employee duties during an OMB Cir. A-76 study:

(a) Management studies;

(b) Preparation of in-house cost-estimates;

(c) Preparation of the MEO; or

(d) Furnishing data or technical support others use to develop performance standards, statements of work, or specifications.

(2) PWS role. Consider the employee's role. If strictly limited to furnishing data or technical support to others developing the PWS, then they are not "personally and substantially" participating. See FAR 3.104-1. If the PWS role exceeds that of data and technical support, then the restriction would apply.

c. Post-Employment Restrictions (41 U.S.C. § 2104). Bans certain employees for one year from accepting compensation.

(1) Applies to contracts exceeding $10 million, and

(a) Employees in any of these positions:

(i) Procuring contracting officer;

(ii) Administrative Contracting Officer;

(iii) Source Selection Authority;

(iv) Source Selection Evaluation Board member;

(v) Chief of Financial or Technical team;

(vi) Program Manager; or

(vii) Deputy Program Manager.

(b) Employees making these decisions:

(i) Award contract or subcontract exceeding $10 million;

(ii) Award modification of contract or subcontract exceeding $10 million;

(iii) Award task or delivery order exceeding $10 million;

(iv) Establish overhead rates on contract exceeding $10 million;

(v) Approve contract payments exceeding $10 million; or

(vi) Pay or settle a contract claim exceeding $10 million.

(2) No exception exists to the one-year ban for offers of employment pursuant to the Right-of-First-Refusal. Thus, employees performing any of the listed duties or making the listed decisions on a cost comparison resulting in a contract exceeding $10 million are barred for one year after performing such duties from accepting compensation/employment opportunities from the contractor via the Right-of-First-Refusal.

3. Financial Conflicts of Interest, 18 U.S.C. § 208. Prohibits officers and civilian employees from participating personally and substantially in a "particular matter" affecting the officer or employee's personal or imputed financial interests.

a. Cost comparisons conducted under OMB Cir. A-76 are "particular matters" under 18 U.S.C. § 208.

b. Whether 18 U.S.C. § 208 applies to officers and civilian employees preparing a PWS or MEO depends on whether the participation will have a "direct and predictable" effect on their financial interests. This determination is very fact specific.

4. Representational Ban, 18 U.S.C. § 207. Prohibits individuals who personally and substantially participated in, or were responsible for, a particular matter involving specific parties while employed by the government from switching sides and representing any party back to the government on the same matter. The restrictions in 18 U.S.C. § 207 do not prohibit employment; they only prohibit communications and appearances with the "intent to influence."

a. The ban may be lifetime, for two years, or for one year, depending on the employee's involvement in the matter.

b. Whether 18 U.S.C. § 207 applies to employees preparing a PWS or MEO depends on whether the cost comparison has progressed to the point where it involves "specific parties."

c. Even if 18 U.S.C. § 207 does apply to these employees, it would not operate as a bar to the Right-of-First-Refusal. The statute only prohibits representational activity; it does not bar behind-the-scenes advice.

V. HOUSING PRIVATIZATION

A. Generally

Privatization involves the process of changing a federal government entity or enterprise to private or other non-federal control and ownership. Unlike competitive sourcing, privatization involves a transfer of ownership and not just a transfer of performance.

B. Authority

1. 10 U.S.C. §§ 2871-85 provides permanent authority for military housing privatization.[77] This authority applies to family housing units on or near military installations within the United States and military unaccompanied housing units on or near installations within the United States.

2. Service Secretaries may use any authority or combination of authorities to provide for acquisition or construction by private persons. Authorities include:

   a. Direct loans and loan guarantees to private entities.

   b. Build/lease authority.

   c. Equity and creditor investments in private entities undertaking projects for the acquisition or construction of housing units (up to a specified percentage of capital cost). Such investments require a collateral agreement to ensure that a suitable preference will be given to military members.

   d. Rental guarantees.

   e. Differential lease payments.

   f. Conveyance or lease of existing properties and facilities to private entities.

3. Establishment of Department of Defense housing funds.

[77] Originally granted in 1996 as "temporary" legislation, this authority was made permanent by the FY 2005 National Defense Authorization Act. Pub. L. No. 108-375, § 2805, 115 Stat. 1012 (2005).

a. The Department of Defense Family Housing Improvement Fund.[78]

b. The Department of Defense Military Unaccompanied Housing Improvement Fund.[79]

C. Implementation

1. The service conveys ownership of existing housing units, and leases the land upon which the units reside for up to fifty years.

2. The consideration received for the sale is the contractual agreement to renovate, manage, and maintain existing family housing units, as well as construct, manage, and maintain new units.

3. The contractual agreement may include provisions regarding:

a. The amount of rent the contractor may charge military occupants (rent control).

b. The manner in which soldiers will make payment (allotment).

c. Rental deposits.

d. Loan guarantees to the contractor in the event of a base closure or realignment.

e. Whether soldiers are required to live there.

f. The circumstances under which the contractor may lease units to nonmilitary occupants.

g. Termination provisions and criteria.

D. Issues and Concerns[80]

1. Making the transition positive for occupants; including keeping residents informed during the process.

2. Loss of control over family housing.

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[78] 10 U.S.C. § 2883(a)(1).
[79] 10 U.S.C. § 2883(a)(2).
[80] *See* Government Accountability Office, Military Housing: Management Issues Require Attention as the Privatization Program Matures, Report No. GAO-06-438 (April 2006); Government Accountability Office, Military Housing: Management Improvements Needed As Privatization Pace Quickens, Report No. GAO-02-624 (June 2002); Government Accountability Office, Military Housing: Continued Concerns in Implementing the Privatization Initiative, NSIAD-00-71 (March 30, 2000); Government Accountability Office, Military Housing: Privatization Off to a Slow Start and Continued Management Attention Needed, Report No. GAO/NSIAD-98-178 (July 17, 1998).

3. The effect of long-term agreements.

a. Future of installation as a potential candidate for housing privatization.

(1) DoD must determine if base a candidate for closure.

(2) If not, then DoD must predict its future mission, military population, future housing availability and prices in the local community, and housing needs.

b. Potential for poor performance or nonperformance by contractors.

(1) Concerns about whether contractors will perform repairs, maintenance, and improvements in accordance with agreements. Despite safeguards in agreements, enforcing the agreements might be difficult, time-consuming, and costly.

(2) Potential for a decline in the value of property towards the end of the lease might equal decline in service and thus quality of life for military member.

4. Effect on federal employees

a. The privatization of housing will result in the elimination of those government employee positions that support family housing.

b. Privatization is not subject to Circular A-76.

5. Prospect of civilians living on base.

a. Civilians are allowed to rent units not rented by military families.

b. This prospect raises some issues, such as security concerns and law enforcement roles.

VI. UTILITIES PRIVATIZATION

A. Authority

10 U.S.C. § 2688 (originally enacted as part of the FY 1998 National Defense Authorization Act) permits the service secretaries to convey all or part of a utility system to a municipal, private, regional, district, or cooperative utility company. This permanent legislation supplements several specific land conveyances involving utilities authorized in previous National Defense Authorization Acts.

B. Implementation

1. In 1998, DoD set a goal of privatizing all utility systems (water, wastewater, electric, and natural gas) by 30 September 2003, except those needed for unique mission/security reasons or when privatization is uneconomical. Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, et al., subject: Defense Reform Initiative Directive (DRID) #49—Privatizing Utility Systems (23 Dec. 1998).

2. In October 2002, DoD revised its goal and replaced DRID #49 with updated guidance. Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, et al., subject: Revised Guidance for the Utilities Privatization Program (9 Oct. 2002) [hereinafter Revised Guidance Memo]. The Revised Guidance Memo establishes 30 September 2005 as the date by which "Defense Components shall complete a privatization evaluation of each system at every Active, Reserve, and National Guard installation, within the United States and overseas, that is not designated for closure under a base closure law." In addition to revising the milestones for utilities privatization, the Revised Guidance Memo addresses:

    a. Updated guidance concerning the issuance of solicitations and the source selection considerations in utilities privatization;

    b. DoD's position concerning the applicability of state utility laws and regulations to the acquisition and conveyance of the Government's utility systems;

    c. New instruction on conducting the economic analysis, including a class deviation from the cost principle at FAR 31.205-20 authorized by DoD for "utilities privatization contracts under which previously Government-owned utility systems are <u>conveyed</u> by a Military Department or Defense Agency to a contractor;" and

    d. The authority granted the Service Secretaries to include "reversionary clauses" in transaction documents to provide for ownership to revert to the Government in the event of default or abandonment by the contractor.

3. On 2 November 2005, the Undersecretary of Defense for Acquisition, Technology and Logistics issued a supplemental guidance. This guidance stated that "each Component shall provide the DUSD(I&E) [Deputy Under Secretary of Defense for Installations and Environment] with a plan of action and timeline by November 18, 2005 for the completion of all remaining evaluations. The Components shall continue to conduct privatization evaluations and provide quarterly updates to DUSD(I&E) until all remaining evaluations are complete." Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, et al.,

subject: Supplemental Guidance for the Utilities Privatization Program (2 Nov. 2005).

4. Requests for exemption from utility systems privatization, based on unique mission or safety reasons or where privatization is determined to be uneconomical, must be approved by the Service Secretary.

5. Agencies must use competitive procedures to sell (privatize) utility systems and to contract for receipt of utility services. 10 U.S.C.§ 2688(b). DoD may enter into ten-year contracts (but not to exceed 50-years) for utility service when conveyance of the utility system is included. 10 U.S.C. § 2688(d)).

6. Any consideration received for the conveyance of the utility system may be accepted as a lump sum payment, or a reduction in charges for future utility services. If the consideration is taken as a lump sum, then payment shall be credited at the election of the Secretary concerned for utility services, energy savings projects, or utility system improvements. If the consideration is taken as a credit against future utility services, then the time period for reduction in charges for services shall not be longer than the base contract period. 10 U.S.C. § 2688(c).

7. Installations may, with Secretary approval, transfer land with a utility system privatization. 10 U.S.C. § 2688(i)(2); U.S. Dep't of Army, Privatization of Army Utility Systems—Update 1 Brochure (March 2000). In some instances (environmental reasons) installations may want to transfer the land under wastewater treatment plants.

8. Installations must notify Congress of any utility system privatization. The notice must include an analysis demonstrating that the long-term economic benefit of privatization exceeds the long-term economic cost, and that the conveyance will reduce the long-term costs to the DoD concerned for utility services provided by the subject utility system. The installation must also wait twenty-one days after providing such congressional notice. 10 U.S.C. § 2688(e).

C. Issues and Concerns

1. Effect of State Law and Regulation. State utility laws and regulations, the application of which would result in sole-source contracting with the company holding the local utility franchise at each installation, do not apply in federal utility privatization cases. See Virginia Electric and Power Company; Baltimore Gas & Electric, B-285209, B-285209.2 (Aug. 2, 2000) 2000 U.S. Comp. Gen. LEXIS 125 (holding 10 U.S.C. § 2688 does not contain an express and unequivocal waiver of federal sovereign immunity); see also Baltimore Gas & Electric v. United States, US District Court, District of Maryland, No AMD 00-2599 Mar. 12, 2001

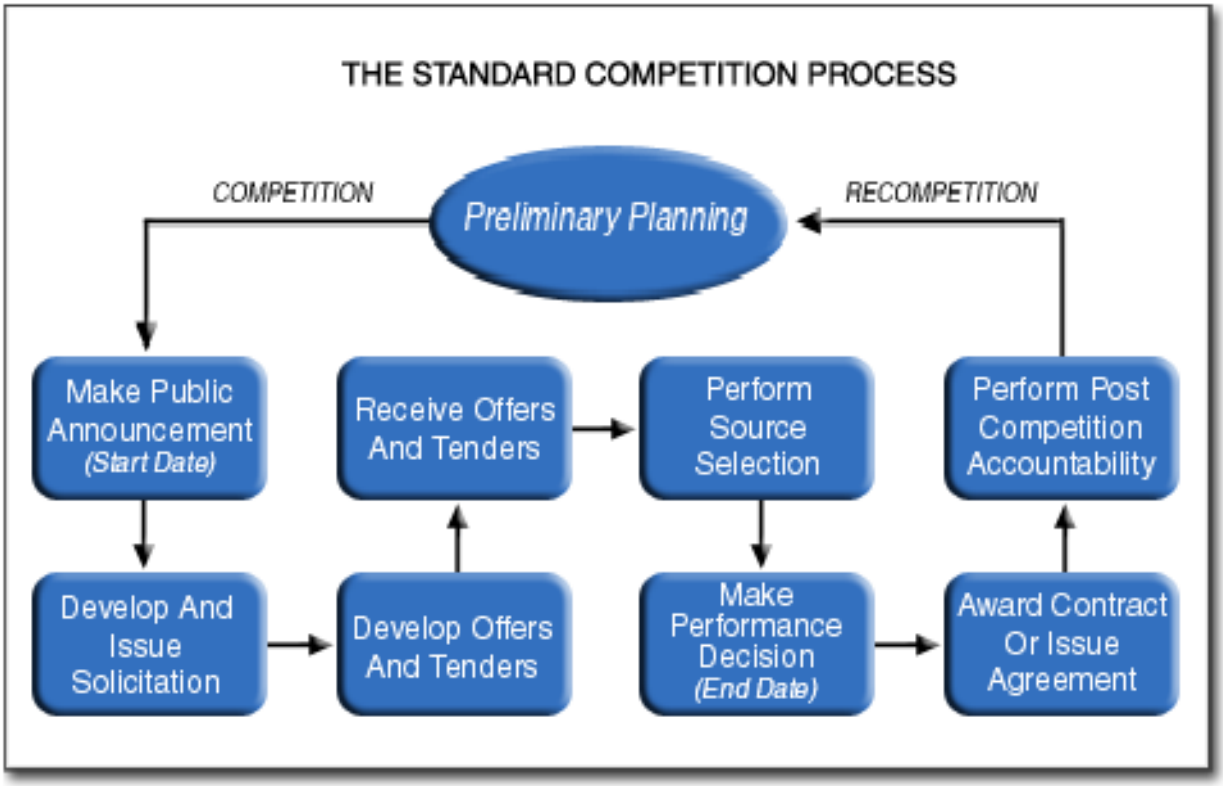
(following the earlier GAO decision and finding no requirement for the Army to use sole-source procedures for the conveyance of utilities distribution systems and procurement of utilities distribution services). The DoD General Counsel has issued an opinion that reached the same conclusion. Dep't. of Def. General Counsel, The Role of State Laws and Regulations in Utility Privatization (Feb. 24, 2000).

2. Utility Bundling. An agency may employ restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs. Bundled utility contracts, which not only achieve significant cost savings, but also ensure the actual privatization of all utility systems, are proper. Virginia Electric and Power Company; Baltimore Gas & Electric, B-285209, B-285209.2 (Aug. 2, 2000) 2000 U.S. Comp. Gen. LEXIS 125.

3. Reversionary Clauses. The contractual agreement must protect the government's interests in the event of a default termination. The use of reversionary clauses, which revoke the conveyance of the utility system, are an option. Revised Guidance Memo, supra.

VII. CONCLUSION

ATTACHMENT 1 (STANDARD COMPETITION)



Standard Competition Process under Circular A-76 (Revised)

ATTACHMENT 2 (CONFLICT OF INTEREST TABLE)

Which A-76 Teams May Share Members
Without Violating the Conflict of Interest Rules
(OMB Circular A-76, dated May 29, 2003)*

	PWS Team	**MEO Team**	**SSEB Team**
PWS Team	*NA*	No[81]	Depends[82]
MEO Team	No[83]	*NA*	Depends[84]
SSEB Team	Depends[85]	Depends[86]	*NA*

*The purpose of this chart is to show which of the three "teams" (PWS Team, MEO Team, and SSEB Team) in an OMB Circular A-76 competition may—or may not—share some of the same members. Note that there are other conflict of interest rules which are not addressed by this chart.

[81] PWS Team and MEO Team may NOT share the same members. See OMB Cir. A-76, Attach B, para D(2).
[82] PWS and SSEB Teams may share members so long as the PWS Team members that are serving on the SSEB Team are not directly-affected employees. See OMB Cir. A-76, Atch B, para D(2).
[83] PWS Team and MEO Team may NOT share the same members. See OMB Cir. A-76, Attach B, para D(2).
[84] MEO and SSEB Teams may generally not share members *since most MEO Team members will have direct knowledge of the agency tender*. See OMB Cir. A-76, Atch B, para D(2).
[85] PWS and SSEB Teams may share members so long as the PWS Team members that are serving on the SSEB Team are not directly-affected employees. See OMB Cir. A-76, Atch B, para D(2).
[86] MEO and SSEB Teams may generally not share members *since most MEO Team members will have direct knowledge of the agency tender*. See OMB Cir. A-76, Atch B, para D(2).

CHAPTER 16

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CHAPTER 16

INTELLECTUAL PROPERTY

I. REFERENCES

A. Statutes and Regulations

1. 10 U.S.C. §§ 2320, 2321.

2. Title 15, Chapter 22, United States Code, Trademarks.

3. Title 17, United States Code, Copyrights.

4. Title 35, United States Code, Patents.

5. 41 U.S.C. §§ 2302, 4703.

6. Federal Acquisition Regulation (FAR), Part 27, Patents, Data, and Copyrights.

7. Department of Defense FAR Supplement (DFARS), Part 227, Patents, Data, and Copyrights.

B. Policies and Guidance

1. Department of Defense Instruction 5010.44, Intellectual Property (IP) Acquisition and Licensing (16 October 2019), *available at* https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/501044p.PDF?ver=2019-10-16-144448-070.

2. Department of Defense, Intellectual Property: Navigating Through Commercial Waters (Version 1.1, Oct. 15, 2001), *available at* http://www.acq.osd.mil/dpap/docs/intelprop.pdf.

3. Implementation Directive for Better Buying Power 3.0 (9 April 2015), *available at* https://www.acq.osd.mil/fo/docs/betterBuyingPower3.0(9Apr15).pdf.

4. DoD Open Systems Architecture Contract Guidebook for Program Managers (Version 1.1, June 2013), *available at* http://www.acqnotes.com/Attachments/Open%20System%20Architecture%20%28OSA%29%20Contract%20Guidebook%20for%20Program%20Managers%20June%2013.pdf .

5. Intellectual Property Strategy Brochure (August 2014), *available at* https://www.dau.mil/cop/mosa/DAU%20Sponsored%20Documents/IP%20Strategy%20Brochure_Final%202-10-15.pdf ("IP Strategy Brochure").

6. Understanding and Leveraging Data Rights in DoD Acquisitions (October 2014), *available at* https://www.dau.mil/cop/mosa/DAU%20Sponsored%20Documents/Data%20Rights%20Focus%20Sheet%20final.pdf ("Data Rights Focus Sheet").

7. Acquiring and Enforcing the Government's Rights in Technical Data and Computer Software Under Department of Defense Contracts: A Practical Handbook for Acquisition Professionals (9th ed. October 2018), *available at* https://www.dau.mil/tools/t/TDR-GB.

8. Army Data & Data Rights (D&DR) Guide: A Reference for Planning and Performing Data Acquisition and Data Management Activities Throughout the DoD Life Cycle (1st ed. August 2015), *available at* http://www.acq.osd.mil/dpap/cpic/cp/docs/Army_Data_and_Data_Rights_Guide_1st_Edition_4_Aug_2015.pdf.

9. *Best Practices and Opportunities for Improvement*, 24 Fed. Cir. B.J. 319 (2015).

C. Treatises

1. James G. McEwen, David S. Bloch, Richard M. Gray, and John T. Lucas, *Intellectual Property in Government Contracts: Protecting and Enforcing IP at the State and Federal Level* (Matthew Binder 2019 Ed.).

2. Ralph C. Nash, Jr. and Leonard Rawicz, *Intellectual Property in Government Contracts* (CCH 6th ed. 2008).

3. Xuan-Thao N. Nguyen, Robert W. Gomulkiewicz, and Danielle M. Conway, *Intellectual Property, Software & Information Licensing: Law and Practice* (BNA 2006 & 2016 Cum. Supp.).

II. OVERVIEW

A. Intellectual property ("IP") refers to creations of the mind. Despite the term "property," IP is better characterized as a proprietary interest in intangibles. The term IP is used in reference to, *inter alia*, inventions, literary and artistic works, symbols, names, images, and designs.

B. IP has value because federal and state laws, the laws of other countries, and contracts (including licenses) recognize ownership interests therein and provide exclusive rights to the owners thereof.

C. The policies supporting the protection of IP are myriad and, at times, contrary to other important policies such as competition and best value. These policies include, but are not limited to, the following: providing incentives to inventors/authors to encourage scientific and technological advances, innovation, and creativity; providing a *quid pro quo* between inventors/authors and the public;

promoting consumer protection; and upholding the standard of commercial ethics. There are also those of the view that respecting and protecting IP rights fosters national security through its impact on the economy. *See* Reggie Ash, *Protecting Intellectual Property and the Nation's Economic Security*, Landslide, Vol. 6, No. 5 at 20-24 (May/June 2014).

D. From a contractor's perspective, IP is a valuable corporate asset that can be used to generate revenue, to create a competitive advantage, to create barriers to entry by competitors, and to act as a deterrent to litigation.

E. From the Government's perspective, considering IP issues during the acquisition planning process can help promote competition, reduce lifecycle/O&M costs, and reduce reprocurement costs, amongst other advantages. *See* United States Government Accountability Office, *Defense Contracting: Early Attention in the Acquisition Process Needed to Enhance Competition* (GAO-14-395) (May 2014); Office of the Under Secretary for Defense for Acquisition, Technology, and Logistics, *Guidelines for Creating and Maintaining a Competitive Environment for Supplies and Services in the Department of Defense* (August 2014).

1. DoD guidance seeks to balance the contractor's interest in preserving its rights and recouping its investment in innovation with the Government's interest in increased competition and reduced cost. *See* IP Strategy Brochure at 1 ("An IP Strategy is needed to take advantage of innovation and to provide fair compensation.").

   a. "The IP Strategy is the program's approach, which will be captured as part of the program documentation, to managing the IP issues that will affect the program's cost, schedule, and performance. The IP Strategy helps a program identify and manage the full spectrum of IP and related issues from the inception of a program and throughout the lifecycle, by assessing program needs for, and enabling the acquisition of, deliverables of IP (e.g., technical data and computer software) and the associated license rights necessary for competitive and affordable acquisition and sustainment." *Id.*

   b. "IP rights can co-exist or be integrated into a competitive environment, with some advance planning. In these cases the IP Strategy will help the program take appropriate steps to promote competition to the maximum extent practical, and avoid or mitigate scenarios in which a relatively small amount of proprietary technology restricts the re-procurement or sustainment of the system or system elements." *Id.*

2. DoD guidance echoes the GAO's call for "early attention" to IP rights and encourages a thoughtful approach to IP deliverables and rights.

a. "It is impossible to craft an effective IP Strategy without addressing the program's need for BOTH IP rights and IP deliverables. . . . Moreover, the data deliverables and data rights for any particular technology must be managed together, like two sides of the same coin, in any given contract or program activity." *Id.* at 2 (emphasis in original).

b. "IP rights are allocated early, at first development or first delivery of the technology, even though the Government's need to use or release the delivered data likely occurs later in the program life cycle, sometimes significantly later. Given the inherent challenges in predicting the future . . . and the immense pressures of today's fiscally constrained environment . . . the temptation is to 'kick the can down the road' on IP issues. *Programs must resist that temptation and make a cold, calculated, smart, business decision*." *Id.* (emphasis added).

c. Approaches to managing the difficulties "inherent . . . in predicting the future" include the use of separate, competitively priced options for additional data deliverables or rights and the use of the deferred delivery clause (DFARS 252.227-7026) and the deferred ordering clause (DFARS 252.227-7027).[1]

3. DoD policy encourages activities to be respectful of a contractor's investment in its IP.

a. "DoD policy is to acquire only the technical data, and the rights in that data, necessary to satisfy agency needs." DFARS 227.7103-1(a); *see also* DFARS 227.7203-1(a).[2]

b. "Don't make an unnecessary 'grab' for deliverables or additional license rights for 'Proprietary' IP[.]" IP Strategy Brochure at 3.

4. Considerations of data deliverables and data rights are an important aspect of an open systems architecture ("OSA") acquisition approach. *See id.* Yet, full and open competition can often be achieved without "leveling the playing field" in a manner that nullifies the competitive advantage that IP affords certain offerors.

a. DoD policy permits the evaluation of data deliverables and data rights as part of the source selection process. *See, e.g.*, DFARS

[1] 10 U.S.C. § 2320 was recently amended in a manner that may ultimately lead to the deferred ordering clause becoming a mandatory clause in more situations. *See* 10 U.S.C. § 2320(b)(9). On February 23, 2017, DFARS Case 2017-D006 was placed into a holding file pending the report from the joint Government-Industry panel established by Section 813 of the NDAA for 2016.

[2] DFARS Subpart 227.71 deals with rights in technical data. DFARS Subpart 227.72 deals with rights in computer software and computer software documentation, with analogous language and numbering that generally parallels Subpart 227.71.

227.7103-10(a)(5) ("Information provided by offerors in response to the solicitation provision [at 252.227-7017] may be used in the source selection process to evaluate the impact on evaluation factors that may be created by restrictions on the Government's ability to use or disclose technical data."); DFARS 227.7203-10(a)(5).

b. Care must be taken, however, to ensure that the evaluation criteria, either as written or as applied, do not have the prohibited effect of:

(1) Requiring, as a condition of responsiveness or of award, that the contractor give the Government greater rights when otherwise entitled to assert limited or restricted rights (10 U.S.C. § 2320(a)(2)(F); DFARS 227.7103-10(a)(5); DFARS 227.7203-10(a)(5))[3]; or

(2) Prohibiting or discouraging the contractor from proposing limited rights technical data or restricted rights computer software (*id.*).

c. As part of achieving an open architecture, DoD guidance identifies alternatives to the acquisition of IP deliverables in which a contractor is entitled to assert limited or restricted rights, such as the acquisition of form, fit, and function data ("FFF data") and operation, maintenance, installation, and training data ("OMIT data"), both of which are subject to unlimited rights by default and regardless of the source of development funding. IP Strategy Brochure at 2; *see also* 60 Fed. Reg. 33,464, 33,467 (June 28, 1995) ("[U]nder 10 U.S.C. 2320, a contractor may not restrict the Government's rights to release or disclose [OMIT data] or to permit others to use the data.").

d. DoD guidance also emphasizes that the Government should audit restrictive legends applied to data deliverables and initiate challenges to and validations of restrictive markings when appropriate. *Id.* at 4.

5. "[A]n effective and robust IP Strategy will require active participation of subject matter experts from a wide variety of disciplines, including engineering, logistics, contracting, cost and accounting, and legal." *Id.* at 1.

[3] *See* Sikorsky Aircraft Corp., B-416027 et al., May 22, 2018 (dismissing protest of data rights solicitation provisions as academic where agency confirmed to offerors that it would not require relinquishment of rights greater than the level granted to the government by regulation as a condition of contract award).

III. TYPES OF INTELLECTUAL PROPERTY

A. Patents

1. Art. I, § 8, cl. 8 of the U.S. Constitution authorizes the patent system in order "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Based upon this authority, Congress enacted the Patent Act of 1952, now codified as amended at Title 35, United States Code.

2. A patent is a written instrument issued by the U.S. Patent and Trademark Office (PTO), an agency of the Department of Commerce.

3. Types of patents:

   a. Plant (*e.g.*, a new variety of rose bush). *See* 35 U.S.C. §§ 161-164.

   b. Design (*e.g.*, a new ornamental/non-functional design for a piece of furniture). *See* 35 U.S.C. §§ 171-173.

   c. Utility. *See* 35 U.S.C. §§ 100-157. Can be a "new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof." 35 U.S.C. § 101.

4. An issued patent bestows a limited government-granted monopoly to an inventor and grants the inventor the right to exclude all others from practicing the invention (*e.g.*, making, using, selling, or importing the invention or offering the invention for sale) for a period of 20 years from the date the patent application is filed. *See* 35 U.S.C. §§ 154, 271.

5. To receive the exclusive rights associated with a patent, the inventor must make an application to the PTO and submit to an examination process. As part of the process, the inventor must provide a sufficiently detailed written description of the invention. This written description, or "specification," must describe the invention in a manner that enables a person skilled in the art to practice the invention without undue experimentation. It must also disclose the subjective best mode of practicing the invention. *See* 35 U.S.C. § 112(a). Failure to disclose the best mode, however, is no longer a defense to a charge of infringement. *See* 35 U.S.C. § 282(b)(3)(A).

6. An invention is patentable if it is:

   a. Patent-eligible subject matter (*see* 35 U.S.C. § 101).

      (1) The Supreme Court has held that "anything under the sun that is made by man" qualifies as patent-eligible subject

matter. *Diamond v. Diehr*, 450 U.S. 175 (1981). The only exclusions are laws of nature, physical phenomena, and abstract ideas. *See Bilski v. Kappos*, 561 U.S. 593 (2010).

(2) In *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014), the Supreme Court set forth a two-part test to determine whether a patent claim is patent eligible:

(a) Is the claim directed to a patent-ineligible concept (*i.e.*, a law of nature, a physical phenomenon, or an abstract idea)?

(b) If so, do the remaining elements of the claim, considered both alone and as an ordered combination, "transform the nature of the claim into a patent eligible application?"

Id. at 2355 (internal quotations omitted).

(3) "[T]ransformation into a patent-eligible application requires 'more than simply stat[ing] the [abstract idea] while adding the words 'apply it.'" *Id.* at 2357. "The introduction of a computer into the claims does not alter the analysis . . . . [T]he prohibition against patenting abstract ideas cannot be circumvented by attempting to limit the use of [the idea] to a particular technological environment. . . . Stating an abstract idea while adding the words 'apply it with a computer' simply combines those two steps, with the same deficient result." *Id.* at 2357-58 (internal quotations omitted).

(4) A claim is likely patent-eligible if it "is necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks." *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1257 (Fed. Cir. 2014). This analysis applies primarily at step 2 of the *Alice* test.

(5) At step 1 of the *Alice* test, a claim may be considered non-abstract, and thus patent-eligible, if "the focus of the claims is on the specific asserted improvement in computer capabilities" rather than "on a process that qualifies as an 'abstract idea' for which computers are invoked merely as a tool." *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1336 (Fed. Cir. 2016).

b. Useful (*see* 35 U.S.C. § 101). This is an exceptionally low hurdle. For most inventions, it requires little more than a single, credible,

real-world use for the invention. The invention need not be marketable, work particularly well, or have industrial applicability in order to be useful.

c. Novel (*see* 35 U.S.C. § 102).

(1) Novelty requires that the invention be different than any single thing that came before.

(2) An invention is not novel if it was patented, described in a printed publication, in public use, on sale, or otherwise available to the public prior to the application for patent. *See* 35 U.S.C. § 102(a)(1). Subject to certain limitations (*see* 35 U.S.C. § 102(b)(2)), issued patents and published patent applications are deemed effective as prior art as of the date they were ***filed***, not the day they actually ***published***. *See* 35 U.S.C. § 102(a)(2).

(3) Most countries apply an "absolute novelty" standard, such that any of the acts described above are immediate and absolute bars to patentability. The United States, however, has a substantially unique exception to the absolute novelty standard allowing, under certain circumstances, a one-year grace period to file a patent application following a disclosure by the inventor or by one who obtained the disclosure from the inventor. *See* 35 U.S.C. § 102(b)(1). As noted above, additional exceptions limit the retroactive applicability of issued patents and published applications. *See* 35 U.S.C. § 102(b)(2).

d. Non-obvious (*see* 35 U.S.C. § 103). The obviousness analysis considers whether the invention is sufficiently different than the state of the art when viewed through the eyes of one of ordinary skill in the art. Certain objective evidence, such as commercial success, copying, or simultaneous independent invention, can also be considered as part of the obviousness analysis. *See Graham v. John Deere Co.*, 383 U.S. 1 (1966).

B. Trade Secrets

1. Trade secret protection is primarily a matter of state law. To protect trade secrets from misappropriation, the various states rely on some or all of the following sources:

a. State common law and/or statutes.

b. The Restatement (First) of Torts §§ 757-759.

c. The Uniform Trade Secrets Act.

d. The Restatement (Third) of Unfair Competition §§ 39-45.

e. Defend Trade Secrets Act of 2016, Pub. L. 114-153, 130 Stat. 376 (May 11, 2016) (amending Chapter 90, Title 18, U.S. Code).

2. The Uniform Trade Secrets Act (UTSA) has been adopted in some form by nearly every state, the District of Columbia, and the U.S. Virgin Islands. This uniform act represents a largely accepted legal framework for the protection of trade secrets and commercial industry.

3. Although the precise definition will vary from state to state, a "trade secret" is generally defined as information that derives independent economic value from not being generally known to, or readily ascertainable by proper means by, others. To preserve a trade secret, the owner thereof must make reasonable efforts to maintain its secrecy. UTSA § 1(4).

   a. A substantial amount of trade secret litigation centers on whether the company seeking protection took reasonable measures to keep the information a secret.

      (1) The only way an owner of a trade secret can economically benefit from it is to sell access to that information to others.

      (2) As long as the disclosure is made to a recipient who agrees to keep the information confidential, the trade secret retains its protection.

   b. There is no limit to how long a trade secret may last; duration depends only upon how long it remains secret and retains independent economic value as a result of its secrecy.

4. Trade secrets do not protect against independent discovery by others. Nor do they, by themselves, protect against reverse engineering. Thus, trade secret owners typically include a contractual prohibition against reverse engineering when sharing their trade secrets with others.

5. By their nature, trade secrets cannot co-exist with patents in the same intellectual property (though a single article may have some aspects protected by patents and other aspects protected by trade secret). The following factors, among others, will inform the decision of which form of protection is more appropriate for a particular piece of IP:

   a. How quickly the market moves/how quickly the IP will become obsolete;

b. How easy it is to maintain the secret in light of reverse engineering efforts, the likelihood of independent discovery, and the level of access the public will have to articles embodying the trade secret (and whether they can be bound by contract not to reverse engineer the secret);

c. How easy it is to detect infringement/misappropriation; and

d. Whether foreign protection is desired.

6. Federal Protection for Trade Secrets

a. Although trade secret protection lies primarily with the states, there are some federal statutes that punish trade secret theft in limited circumstances. Two of these federal acts are better known than the others: The Economic Espionage Act (18 U.S.C. §§ 1831-1839), which makes it a crime to steal trade secrets, and the Trade Secrets Act (18 U.S.C. § 1905), which makes it a crime for a Federal Government employee to release confidential or proprietary information gained during the course of her employment.

b. Recent amendments to the Economic Espionage Act, contained in the Theft of Trade Secrets Clarification Act of 2012 and the Foreign and Economic Espionage Penalty Enhancement Act of 2012, have strengthened the federal protections for trade secrets.

(1) The Theft of Trade Secrets Clarification Act of 2012 makes express coverage for trade secrets that are services. It also expands coverage to products and services "used in or intended for use in" interstate commerce, rather than the more limited "produced for or placed in" interstate commerce.

(2) The Foreign and Economic Espionage Penalty Enhancement Act of 2012 increases penalties for violations of the EEA ten-fold.

c. On 11 May 2016, President Obama signed the Defend Trade Secrets Act of 2016 (DTSA) into law. The DTSA amends the Economic Espionage Act to provide a federal, private, civil cause of action for trade secret misappropriation. Defend Trade Secrets Act of 2016, 130 Stat. 376 (May 11, 2016) (codified at, *inter alia*, 18 U.S.C. § 1836.

d. Although it protects information that likely meets the applicable definition of trade secret, the Procurement Integrity Act is not, strictly speaking, a trade secret statute. Instead, it protects contractor bid and proposal information, which may include

proprietary trade secrets. The Department of Justice provides an excellent outline of the Procurement Integrity Act.

C. Copyrights

1. Like the patent system, the copyright system is authorized by Art. I, § 8, cl. 8 of the U.S. Constitution.

2. Congress extensively amended copyright laws in 1976. Prior to 1976, there was a dual federal and state system of copyright protection. The Copyright Act of 1976 preempted state copyright laws. *See* 17 U.S.C. § 301. Some residual, copyright-like state law claims survive, however.

3. The Register of Copyrights within the Library of Congress (LOC) is the Government agency that has oversight responsibility for the copyright system. 17 U.S.C. § 701.

4. Copyright laws give the author of an original work of authorship fixed in a tangible medium of expression (*see* 17 U.S.C. § 102) a bundle of five exclusive rights (*see* 17 U.S.C. § 106):

   a. The right to reproduce the copyrighted work;

   b. The right to prepare derivative works based upon the original work;

   c. The right to distribute copies of the work to others;

   d. The right to perform the work in public; and

   e. The right to display the work in public.

5. The types of original works that may be copyrighted include, but are not limited to (*see* 17 U.S.C. § 102(a)):

   a. Literary works;

   b. Musical works, including any accompanying words;

   c. Dramatic works, including any accompanying music;

   d. Pantomimes and choreographic works;

   e. Pictorial, graphic, and sculptural works;

   f. Motion pictures and other audiovisual works;

   g. Sound recordings; and

h. Architectural works.

6. The term of this right varies. For a sole author who created a work after 1998, the term is for the life of the author plus 70 years. Alternate terms depend upon when the work was created, whether there was more than one author, whether the work was done anonymously, and whether the work qualifies as a "work made for hire." 17 U.S.C. §§ 302-305.

7. Although the work has to be "original," the statute does not define the term. Courts have interpreted the term to merely require that the work be independently created and possess some modicum of creativity—a very low hurdle. Unlike patents, the work need not entail more than an obvious revision to existing art. *Feist Publ'ns, Inc. v. Rural Telephone Serv. Co., Inc.*, 499 U.S. 340 (1991). The strength of the copyright, however, is related to the level of originality in the work.

8. An author may place the world on notice that s/he is claiming a copyright in the work by placing a notice on all distributed copies of the work. This notice commonly consists of the symbol "©" followed by the year the work was first published and the name of the copyright owner. 17 U.S.C. § 401. Distribution of material without the copyright notice may invalidate the copyright in certain older (pre-1988) works under certain circumstances. 17 U.S.C. § 405(a). Even where the copyright is not invalidated, the author will not be able to recover royalties from an innocent infringer, one who was unaware of the copyright. 17 U.S.C. § 405(b).

9. Authors may (but are not required to) register for a copyright in a work by depositing a copy of the work at the LOC. 17 U.S.C. § 407(a). Registration is a prerequisite to filing suit in federal court (that is, to enforcement of the copyright). Moreover, unless a work is timely registered, certain remedies for copyright infringement will not be available. 17 U.S.C. §§ 411-412.

10. No copyright subsists in U.S. Government works (that is, works that were created, modified, or improved by various officers and employees of the U.S. Government acting in the scope of their official duties). The Government can, however, own copyrights via assignment. 17 U.S.C. § 105.

D. Trademarks

1. The Patent and Copyright provision of the U.S. Constitution does not expressly grant Congress any authority to enact Trademark Laws.

2. In 1870, Congress, relying upon its inherent authority under the Constitution's Interstate Commerce Clause, enacted the first federal trademark statute, but it opted not to preempt state law. The Lanham Act

of 1946 established the current federal trademark law. The Lanham Act continues to co-exist with state and common law, allowing trademark owners to enforce their rights under multiple, co-existing regimes of protection.

3. Trademark law allows manufacturers and service providers to use marks that distinguish their goods or services from the goods and services of others and to restrict others from using confusingly similar marks. 15 U.S.C. § 1125.

4. Types of marks:

   a. Trademarks. Used to identify the source or origin of goods.

   b. Service marks. Used to identify the source or origin of services.

   c. Collective marks. Used by members of an organization or group to distinguish their products or services from non-group members.

   d. Certification marks. Used to show the product or service meets certain characteristics or function levels.

5. The first user of an "inherently distinctive" mark, or of a "descriptive" mark that has acquired "secondary meaning" (*e.g.*, a mark that, once descriptive, has nonetheless acquired distinctiveness), has the right to continue to make use of that mark so long as the mark is used in commerce in association with goods or services. The first user can exclude others from, *inter alia*:

   a. Using the mark in a confusingly similar manner (*e.g.*, selling a similar product under the same mark);

   b. Using confusingly similar marks (*e.g.*, selling a similar product under a similar mark); and

   c. Diluting the value of the mark (*e.g.*, tarnishing the value of a mark by associating it with pornographic material).

6. Registration of the mark with the PTO is not required to gain these rights, but doing so establishes *prima facie* evidence of the registrant's exclusive right to use the mark. 15 U.S.C. § 1115. If the user registers the mark and makes continuous usage of the mark for five years, the *user's* right to the continued use of the mark, upon application, may become incontestable. 15 U.S.C. § 1065.

7. The Government achieves some trademark-like protection through statutes other than the Lanham Act. *See, e.g.*, 14 U.S.C. § 639 ("USCG," "USCGR," "Coast Guard," and the like); 18 U.S.C. § 711 (Smokey Bear).

The Government also owns federally registered trademarks, particularly after 1999 amendments to the Lanham Act clarified that the Government can register marks.

8. The Departments of Defense and Homeland Security have special authority to use the proceeds earned by licensing certain of their trademarks for morale, welfare, and recreation activities. *See* 10 U.S.C. § 2260. As a result, there is an increased focus on military "branding." *See* DoDD 5535.09 and DoDI 5535.12; MAJ Jeffrey T. Breloski, *S.O.S.: Save Our Service Marks,* 203 MILITARY L. REV. 78 (Spring 2010).

9. Trademark considerations also appear in the procurement context, such as when contractors attempt to register (or actually succeed in registering) marks that have an association with the Government (*e.g.*, HUMVEE, which AM General has registered in connection with numerous goods and services beyond the military vehicle). Brand name or equal solicitations also implicate trademarks.

E. Multiple Avenues of Protection. Many innovations/creative concepts may be protected under more than one of the above areas.

1. Opting to protect under one regime often will not prevent later protection under an alternate regime, so long as requirements are met and terms of protection have not expired.

2. Sometimes inventors will have to choose among alternate regimes, such as between patent protection and trade secret protection.

IV. RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE – HISTORICAL BACKGROUND AND FUNDAMENTAL PRINCIPLES

A. The data rights allocation regimes do not represent a stand-alone form of intellectual property. Rather, they are a merger of copyright law, trade secret law, and contract law. In other words, for example, technical data rights are not an additional form of intellectual property, but rather an amalgam of copyright and trade secret rights. Likewise, the Government's rights, for example, in a contractor's computer software are the Government's rights in the copyrights and trade secrets embodied in that computer software.

B. Purpose, Policy, and Historical Background. *See* FAR 27.402 (data generally); DFARS 227.7102-1 (commercial technical data); DFARS 227.7103-1 (non-commercial technical data); DFARS 227.7202-1 (commercial computer software); DFARS 227.7203-1 (non-commercial computer software).

1. There are numerous purposes underlying the technical data and computer software regimes, including:

a. Fulfilling certain responsibilities for disseminating and publishing results of activities;

b. Ensuring appropriate utilization of the results of research, development, and demonstration activities, including the dissemination of technical information to foster subsequent technological developments;

c. Acquiring maintenance and repair from other than the original equipment manufacturer (OEM); and

d. Planning for competitive reprocurement.

2. Historical Development

a. Prior to World War II, there was no standing military of significant size, so there was also no need to maintain, repair, and replace large quantities of equipment. Regulations first addressed technical data separately from patent rights in 1955 and provided the Government with complete access to data. *See Bell Helicopter Textron*, ASBCA 21192, 85-3 BCA ¶ 18,415. This was unacceptable to many contractors, who gradually refused to do work for the Government (at least, not at a reasonable price).

b. The current system was established in 1984 as part of the drastic overhaul that Congress made to the government contracts process in the Competition in Contracting Act and the Defense Procurement Reform Act.[4] Congress believed a lack of technical data forced the Government to reprocure on a sole-source basis with the original manufacturer, thus causing inflated prices. Some of these same criticisms survive today. *See* United States Government Accountability Office, *Defense Contracting: Early Attention in the Acquisition Process Needed to Enhance Competition* (GAO-14-395) (May 2014).

c. The Government adopted the policy that it is not in its best interest to use its bargaining power to obtain unlimited rights to use all of a contractor's technical data. Rather, the policy is to balance the interests in establishing rights to technical data when the contractor has developed items, components, or processes partially or fully at private expense.

[4] Despite the many advances that came about in 1984, the FAR did not initially address substantive data rights. FAR subpart 27.4 finally did so when it was added in 1987. For many years after that, both technical data and computer software were addressed together in DFARS 252.227-7013. The DFARS data rights provisions were significantly revised in 1995, when treatment of technical data in DFARS 252.227-7013 was separated from that of computer software, which received its own analogous provision in DFARS 252.227-7014. There have, however, been efforts in the past several years to reconsolidate the DFARS data rights regime into a single clause.

d. The relevant statutes (*e.g.*, 10 U.S.C. § 2320 and 41 U.S.C. § 2302) speak only to the Government's rights in technical data and are silent as to the Government's rights in computer software. Computer software, however, is generally treated analogously to technical data. *See generally infra*. This is important because while the government's minimum technical data rights are statutory and cannot be waived, the government's minimum data rights in computer software are regulatory and can be waived through appropriate DFARS or FAR waiver authority, depending on the agency.

3. In general, there are two separate data rights regimes. The data rights regime for civilian agencies is set forth in Part 27 of the FAR, with the corresponding clauses at FAR 52.227. The data rights regime for defense agencies is set forth in Part 227 of the DFARS, with the corresponding clauses at DFARS 252.227.

   a. FAR 27/52.227 and DFARS 227/252.227 do not both apply to the same procurement. With the exception of the general policy statement in FAR 27.402, the Department of Defense is exempt from FAR Part 27 and the clauses at FAR 52.227. *See* FAR 27.400; DFARS 227.400.

   b. It is important to understand which regime controls your procurement, because the FAR and DFARS take divergent approaches to the Government's rights in contractor IP. As a result, a contract or solicitation that includes data rights clauses from both the FAR and DFARS (*e.g.*, FAR 52.227-14 and DFARS 252.227-7013) is, at best, ambiguous. This can be especially problematic in GSA Schedule and GWAC orders by defense agencies.

4. Other agencies (notably including the Department of Energy and NASA) have slight variations on the basic FAR and DFARS regimes discussed in this outline in their relevant agency FAR supplements. These variations, however, can be understood by analogy (and, in certain cases, exception) to the discussion herein.

C. Fundamental Data Rights Principles and Concepts

1. Ownership vs. License: The Government rarely takes ownership of contractor IP. Typically, the contractor retains ownership of its IP, subject to a non-exclusive Government license, the scope of which depends on several factors discussed *infra*.

2. Deliverables vs. Rights

a. Deliverables are the items of data that the contractor is required to deliver as an element of contract performance (*e.g.*, a particular technical data package or drawing; a particular piece of computer software). Typically, the deliverables are set forth in a contract data requirements list ("CDRL").

b. Rights are what the Government is permitted to do with the data deliverables (*e.g.*, to whom the Government may disclose the data deliverables, and for what purposes). The rights are set forth in a license that is incorporated into the contract.

c. The Government may have rights in items of technical data or computer software that are not deliverables. In this situation, the Government is often said to have "inchoate rights," because, without the data deliverable, the Government is unable to exercise its rights therein. The deferred delivery and/or deferred ordering clauses (*see* Section X.E below) can be used to remedy the inchoate rights situation.

3. Taking the Minimum Necessary Data and Rights: As discussed above, the Government's policy is to take only the minimum necessary deliverables, and the minimum necessary rights in those deliverables, in order to meet its needs. *See, e.g.*, FAR 27.102(d); FAR 27.406-1(a); DFARS 227.7103-1; DFARS 227.7203-1. The determination of minimum needs, however, involves multiple considerations including short- and long-term requirements. *See* DFARS 227.7103-2(b)(1); DFARS 227.7203-2(b)(1).

4. The Doctrine of Segregability: Under contracts with defense agencies (*i.e.*, contracts subject to DFARS Part 227), rights can be allocated at the sub-item or sub-component level for technical data (*see* DFARS 227.7103-4(b)), and at "the lowest segregable portion of the software or documentation" for computer software and computer software documentation (DFARS 227.7203-4(b)). This concept of segregability does not exist in FAR Part 27.

D. The following questions provide a framework to help identify what data rights provision(s) and/or clause(s) should be included in a solicitation or contract.

1. Is the contract with a civilian agency or a defense agency?

2. Is the item in question technical data or computer software?

3. Are the data deliverables related to commercial items or non-commercial items (as defined by FAR 2.101)?

E. For purposes of explanation, this outline will use non-commercial technical data under defense contracts as an explanatory baseline. Other aspects of both the

defense and civilian agency data rights regimes will be explained by analogy thereto.

V. RIGHTS IN NON-COMMERCIAL TECHNICAL DATA – DEFENSE AGENCIES (DFARS 252.227-7013)

A. Definition of Technical Data. *See* 10 U.S.C. § 2302(4); DFARS 252.227-7013(a)(14).

1. "Technical data" is recorded information, regardless of the form or method of the recording, of a scientific or technical nature.

2. "Technical data" includes computer software documentation and computer databases. It does not include computer software. Ex: if the agency is buying a software application that includes a packaged database, both the rights in computer software and rights in technical data clauses would be appropriate.

3. "Technical data" does not include data incidental to contract information, such as financial or management information (*e.g.*, cost and pricing data). Nor does it include unrecorded information (*e.g.*, general "know how" or "show how").

4. "Technical data" does not include the end item itself. *See Night Vision Corp. v. United States*, 68 Fed. Cl. 368, 381 n.16 (2005).

   a. As a result, absent an express contractual prohibition, the Government is free to reverse engineer items and components or provide those items and components to third parties to do the same, including to generate additional quantities of the end item.

   b. Reverse engineering is expressly contemplated as a viable alternative when a contractor is unwilling or unable to grant the Government a sufficient license in its technical data, unless the contract specifically prohibits such reverse engineering. *See* DFARS 227.7103-5(d)(2)(iii); DFARS PGI 217.7504(4).

   c. Note that this is the case even if the contractor properly asserted restrictions in the technical data corresponding to the item or component. The Government may be prohibited from sharing the technical data package with the contractor's competitors, but it is likely not prohibited from "reinventing the wheel" through reverse engineering.

   d. Note that while this is the case for noncommercial procurements, commercial item software procurements typically include license provisions that prohibit reverse engineering.

B. Standard Licenses. DFARS 252.227-7013 provides three standard licenses:

1. Unlimited Rights: An unlimited rights license allows the Government to use, modify, reproduce, perform, display, release, or disclose technical data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do the same. DFARS 252.227-7013(a)(16).

   a. This is the broadest of the standard licenses and is occasionally characterized as the Government "owning" the technical data. Such a characterization is inaccurate, because the contractor retains ownership rights in the technical data. The contractor also retains ownership of any copyrights.

      (1) Thus, although the Government's rights are broad, the Government does not have the right to exclude the owner from using the technical data (at least, not as a consequence of its license in and to the technical data).

         (a) A contractor may benefit from being able to use the technical data in which the Government has unlimited rights, including for commercial purposes.

         (b) The breadth of the Government's license, however, may make it difficult for the contractor to do so, at least relative to technical data controlled exclusively by the contractor.

      (2) The contractor may have lost any trade secret protection otherwise applicable to the technical data, depending on the relevant trade secrets law. At least one court has held that an unlimited rights license given to the government extinguishes trade secret protection from competitors. *See L-3 Comm's Westwood Corp. v. Robichaux,* 2008 U.S. Dist. LEXIS 15682 at *24, 2008 WL 57756 (Feb. 29, 2008).

   b. Because the license belongs to the Government, the Government has the discretion to decide whether and to whom it will further disclose the technical data and for what purposes the technical data can be used if it is further disclosed by the Government. Thus, even though the Government could provide the technical data to a competitor to use (including for commercial purposes), the competitor cannot simply point to the Government's unlimited rights and make use of the technical data absent a sublicense thereto from the Government or a license thereto from the owner.

2. Government Purpose Rights ("GPR"): A GPR license provides the Government with rights to use, modify, reproduce, release, perform, display, or disclose the technical data within the Government. The Government can also release or disclose GPR technical data outside the Government, and authorize third parties to use, modify, reproduce, release, perform, display, or disclose such technical data, for government purposes. DFARS 252.227-7013(a)(13).

   a. "Government purposes" means any activity in which the Government is a party. It includes competitive procurement (such that GPR technical data can, for example, be included in an on-line bidder's library for follow-on procurements). "Government purposes" excludes commercial purposes, but can include foreign military sales by the Government. DFARS 252.227-7013(a)(12).

   b. Disclosure of GPR technical data outside the Government must be either (i) subject to the non-disclosure agreement at DFARS 227.7103-7; or (ii) to a Government contractor receiving access to the technical data for performance of a Government contract that contains DFARS 252.227-7025. DFARS 252.227-7013(b)(2)(iii).

   c. By default, GPR become unlimited rights five years after execution of the contract, option, or similar instrument that requires development of the technical data. 10 U.S.C. § 2320(c); DFARS 227.7103-5(b)(2)-(3); DFARS 252.227-7013(b)(2)(ii). This five-year sunset period can be, and often is, extended by mutual agreement of the parties.

   d. When and for so long as the Government has GPR, the contractor retains the exclusive right to license the technical data to others for commercial purposes. DFARS 252.227-7013(b)(2)(iv).

3. Limited Rights: A limited rights license provides the Government with rights to use, modify, reproduce, release, perform, display, or disclose the technical data within the Government. The Government cannot release or disclose limited rights technical data outside the Government except in limited circumstances. The Government also cannot use limited rights technical data for manufacture. DFARS 252.227-7013(a)(14).

   a. The two most common circumstances where outside disclosures of limited rights technical data are permitted are disclosures necessary for emergency repair and overhaul and disclosures to covered government support contractors.

      (1) A covered government support contractor is a technical assistance/advisory services contractor acting in support of the Government's management and oversight of a program

or effort (*e.g.*, a management consultant). The covered government support contractor cannot be affiliated with a direct competitor of the prime contractor or a first-tier subcontractor in furnishing end items or services of the type developed or produced on the effort. DFARS 252.227-7013(a)(5).

(2) The owner of limited rights technical data will be notified of any outside disclosures. DFARS 252.227-7013(a)(14)(iii). Outside disclosures of limited rights technical data must also be subject to prohibitions on the further reproduction, release, disclosure, or use of the technical data. DFARS 252.227-7013(a)(14)(ii). For example:

(a) A recipient of limited rights technical data disclosed for emergency repair or overhaul must be required to destroy the data upon completion of the repair or overhaul and to notify the technical data owner of the destruction. DFARS 252.227-7013(b)(3)(ii).

(b) The owner of limited rights technical data disclosed to a covered government support contractor can require the covered government support contractor to sign a non-disclosure agreement. DFARS 252.227-7013(b)(3)(iv)(C)-(D).

b. In § 815 of the National Defense Authorization Act for Fiscal Year 2012, 10 U.S.C. § 2320 was amended to allow disclosures of limited rights technical data when necessary to segregate or reintegrate an item or process from or with other items or processes. *See* 10 U.S.C. § 2320(a)(2)(D). Such disclosures are subject to similar restrictions as disclosures to covered government support contractors. This amendment to the statute has not yet been implemented in the DFARS, however.

C. Specifically Negotiated License Rights. DFARS 252.227-7013 also allows the Government and the contractor to modify the standard licenses described above. 10 U.S.C. § 2320(a)(2)(G) and (c); DFARS 227.7103-5(d); DFARS 252.227-7013(b)(4).

1. The Government may not receive less than limited rights in the technical data. DFARS 227.7103-5(d); DFARS 252.227-7013(b)(4).

a. A specifically negotiated license that goes “below” limited rights (*e.g.*, a license that is limited to a single military department) would constitute a deviation.

b. Deviations to DFARS Subpart 227.4, and as such to DFARS Subparts 227.71 and 227.72) require approval from the Director of Defense Procurement and Acquisition Policy ("DPAP") in the Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics). DFARS 201.402(1)(ii).

2. The specifically negotiated license must be made part of the contract. DFARS 252.227-7013(b)(4).

D. Funding-Based Allocations of Rights in Technical Data. In many cases, the Government's default rights in non-commercial technical data are dictated by the source of development funding for the item, component, or process to which the technical data pertain.

1. "Developed" (DFARS 252.227-7013(a)(7))

a. An item, component, or process is "developed" when it exists and is workable (*e.g.*, the item has been constructed or the process practiced).

b. Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the art that there is a high probability that it will operate as intended. The level of proof required will depend upon the nature of the item and the state of the art, but workability generally does not require that the item, component, or process be at a stage where it could be offered for sale or sold on the commercial market. Nor does workability require an actual reduction to practice within the meaning of patent law.

2. The Source of Funds Determination

a. An item, component, or process is "developed exclusively at private expense" if development was accomplished entirely with costs charged to indirect cost pools and/or costs not allocated to a Government contract. DFARS 252.227-7013(a)(8).

(1) Independent research and development (IR&D) costs and bid and proposal costs are two examples of private expense. 10 U.S.C. § 2320(a)(3).

(2) Provided doing so is consistent with their disclosed accounting practices, contractors are free to charge any costs that are not "specifically required" by a contract to

IR&D. *See ATK Thiokol, Inc. v. United States*, 598 F.3d 1329 (Fed. Cir. 2010).[5]

(3) Development costs in excess of the firm-fixed-price or ceiling price in a firm-fixed-price contract are not considered as part of the source of funds determination. DFARS 252.227-7013(a)(8)(ii).

b. An item, component, or process is "developed exclusively at Government expense" if it is not developed exclusively or partially at private expense. DFARS 252.227-7013(a)(9).

c. An item, component, or process is "developed with mixed funding" if development is accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a Government contract and partially with costs charged directly to a Government contract. DFARS 252.227-7013(a)(10).

d. Under the doctrine of segregability, determinations of the source of development funding are made at the lowest practicable level, allowing the contractor to assert funding-based restrictions in technical data pertaining to a "segregable sub-item, subcomponent, or portion of a process." DFARS 227.7103-4(b); DFARS 252.227-7013(a)(8)(i); *see also* Section IV.C.4, *supra.*

3. Default Funding-Based Allocations of Rights in Technical Data

a. The Government shall have unlimited rights in technical data:

(1) Pertaining to items, components, or processes developed exclusively at Government expense. DFARS 252.227-7013(b)(1)(i).

(2) Created exclusively with Government funds in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes. DFARS 252.227-7013(b)(1)(iii)

[5] Section 824(b) of the National Defense Authorization Act for Fiscal Year 2011 amended 10 U.S.C. § 2320 to treat IR&D as Government expense in certain circumstances. Section 815 of the National Defense Authorization Act for Fiscal Year 2012 reversed this amendment. Nonetheless, in a similar vein to the 2011 amendments, the Implementation Directive for Better Buying Power 3.0 portends the development of new guidelines for the allowablity of contractor IR&D expenses. For example, contractors must now coordinate IR&D efforts in Fiscal Year 2017 and afterwards in a "technical interchange" with government technical contacts in order for IR&D costs to be allowable. DFARS 231.205-18. Future treatment of IR&D costs are a source of continual policy debate.

b. Unless the Government is entitled to unlimited rights (*see* Section V.E below), the Government shall have GPR in technical data:

(1) Pertaining to items, components, or processes developed with mixed funding. DFARS 252.227-7013(b)(2)(i)(A).

(2) Created with mixed funding in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes. DFARS 252.227-7013(b)(2)(i)(B).

c. Unless the Government is entitled to unlimited rights (*see* Section V.E below), the Government shall have limited rights in technical data:

(1) Pertaining to items, components, or processes developed exclusively at private expense. DFARS 252.227-7013(b)(3)(i)(A).

(2) Created exclusively at private expense in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes. DFARS 252.227-7013(b)(3)(i)(B).

E. Non-Funding-Based Categories of Unlimited Rights Technical Data. The Government shall also have unlimited rights in additional categories of technical data, without regard to funding.

1. Studies, analyses, test data, or similar data that are produced for the contract when the work was specified as an element of contract performance. DFARS 252.227-7013(b)(1)(ii).

2. Form, fit, and function ("FFF") data. DFARS 252.227-7013(b)(1)(iv). FFF data is "technical data that describes the required overall physical, functional, and performance characteristics . . . of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items." DFARS 252.227-7013(a)(11).

3. Data necessary for operations, maintenance, installation, or training purposes ("OMIT" data), other than detailed manufacturing or process data. DFARS 252.227-7013(b)(1)(v).

4. Corrections or changes to technical data furnished to the contractor by the Government. DFARS 252.227-7013(b)(1)(vi).

5. Technical data that is otherwise publicly available or released/disclosed by the contractor without restriction. DFARS 252.227-7013(b)(1)(vii).

6. Technical data in which the Government has obtained unlimited rights under another contract or as a result of negotiation. DFARS 252.227-7013(b)(1)(viii).

7. Technical data furnished with GPR and the restrictions have expired (*e.g.*, the default 5 year sunset period, or other specifically negotiated sunset period, has elapsed). DFARS 252.227-7013(b)(1)(ix).

F. Contractors cannot be required to provide the Government with additional rights, beyond those to which the Government is entitled, as a condition of responsiveness to a solicitation or contract award. DFARS 227.7103-1(c). For example, the Government cannot condition eligibility for award on receiving unlimited rights where the contractor is entitled to assert limited rights.

G. The Government can, however, consider the rights a contractor is willing to grant when making its source selection decision, provided such consideration is consistent with the established evaluation criteria. For example, assuming the established evaluation criteria so provide, the Government can, as part of its cost-technical tradeoff analysis, rate a proposal that offers GPR higher than a proposal that offers only limited rights, so long as the limited rights proposal was allowed the opportunity to qualify as technically acceptable.

H. Subcontractor technical data is subject to the same rules discussed above. DFARS 252.227-7013(k).

1. The data rights clauses allocate rights as between the Government and a contractor at any tier, not as between contractors at various tiers.

2. Prime contractors and higher-tier subcontractors are required to satisfy their obligations to the Government and are permitted to negotiate (on what is essentially a commercial basis) for rights in lower-tier contractor technical data. They are not, however, permitted to use their position and power to award subcontracts to leverage rights for themselves. DFARS 252.227-7013(k)(4).

3. Subcontractors are also permitted to submit their technical data directly to the Government, particularly where the technical data to be submitted is GPR or limited rights technical data. 10 U.S.C. § 2320(a)(1); DFARS 227.7103-15; DFARS 252.227-7013(k)(3).

VI. RIGHTS IN NON-COMMERCIAL COMPUTER SOFTWARE – DEFENSE AGENCIES (DFARS 252.227-7014)

A. 10 U.S.C. § 2320, which is the predicate statute for the Government's rights in non-commercial technical data, does not speak to computer software. Nonetheless, the regulations addressing the Government's rights in non-commercial computer software generally parallel those discussed in connection with non-commercial technical data. As such, the discussion in Section V above generally applies *mutatis mutandis* to DoD acquisitions of non-commercial computer software. This section highlights certain salient points and differences unique to acquisitions of non-commercial computer software.

B. Definitions. *See* DFARS 252.227-7014(a)(4).

1. "Computer software" means computer programs, source code, source code listings, object code listings, design details, algorithms, and the like that would enable the software to be reproduced, recreated, or recompiled.

2. "Computer software" excludes computer software documentation and computer databases, which are technical data.

a. "Computer software documentation" means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

b. A "computer database" is a collection of recorded data in a form capable of being processed by a computer.

3. A "computer program" is a set of instructions, rules, or routines, recorded in a form that is capable of causing a computer to perform a specific operation or series of operations.

4. Modern "Software-as-a-Service" and "Cloud" applications may combine delivery of software, databases, and documentation. Therefore, both the standard technical data and computer software clauses may be applicable to a particular software procurement.

C. Standard Licenses. DFARS 252.227-7014 provides three standard licenses, which are analogous to those provided for non-commercial technical data:

1. Unlimited Rights: Unlimited rights in the computer software context are defined identically to unlimited rights in the technical data context. *See* DFARS 252.227-7014(a)(16).

2. Government Purpose Rights: GPR in the computer software context are defined identically to GPR in the technical data context. *See* DFARS 252.227-7014(a)(12).

3. Restricted Rights: The narrowest standard license in non-commercial computer software is known as "Restricted Rights," and is analogous to limited rights in technical data. Under a restricted rights license, the Government can:

a. Use a computer program with one computer at one time. The program may not be accessed by more than one terminal or central processing unit or time shared unless otherwise permitted under the contract.

b. Transfer a computer program to another Government agency without the further permission of the contractor, provided the transferor agency destroys all copies of the program and related computer software documentation in its possession and notifies the contractor of the transfer. The transferred software remains restricted rights software.

c. Make the minimum number of copies of the computer software required for archive, backup, or modification purposes.

d. Modify the software. The modified software is itself restricted rights computer software.

e. Permit contractors or subcontractors performing certain service contracts to use the computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs, or when necessary to respond to urgent tactical situations.

(1) The Government must notify the owner of the computer software of the disclosure to the other contractor.

(2) The recipient contractor must either be (i) subject to the non-disclosure agreement at DFARS 227.7103-7 or (ii) receiving the software under a contract that contains DFARS 252.227-7025.

(3) The Government must prohibit the recipient contractor from decompiling, disassembling, or reverse engineering the software.

(4) Additional restricted rights limitations apply as well. *See* DFARS 252.227-7014(a)(15)(i)-(iii).

f. Permit contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under certain contracts to use the computer software when necessary to

perform the repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul made.

(1) The recipient contractor must either be (i) subject to the non-disclosure agreement at DFARS 227.7103-7 or (ii) receiving the software under a contract that contains DFARS 252.227-7025.

(2) The Government must prohibit the recipient contractor from decompiling, disassembling, or reverse engineering the software.

(3) Additional restricted rights limitations apply as well. *See* DFARS 252.227-7014(a)(15)(i)-(iii).

g. Permit covered Government support contractors in the performance of covered Government support contracts that contain DFARS 252.227-7025 to use, modify, reproduce, perform, display, or release or disclose the computer software to a person authorized to receive restricted rights computer software.

(1) The Government must prohibit the covered Government support contractor from decompiling, disassembling, or reverse engineering the software.

(2) Additional restricted rights limitations apply as well. *See* DFARS 252.227-7014(a)(15)(i)-(iv).

See DFARS 252.227-7-14(a)(15).[6]

D. Specifically Negotiated License Rights. DFARS 252.227-7014 also allows the Government and the contractor to modify the standard licenses described above so long as the Government receives no less than restricted rights in the computer software. DFARS 227.7203-5(d); DFARS 252.227-7014(b)(4). The specifically negotiated license must be made part of the contract. *Id. See also* Section V.C.1 above regarding deviations.

E. Funding-Based Allocations of Rights in Computer Software. As with technical data, in many cases, the Government's rights in non-commercial computer software will be dictated by the source of development funding for the software itself.

1. "Developed" (DFARS 252.227-7014(a)(7).

[6] Needless to say, DFARS 252.227-7014 has not kept up with modern software development (*e.g.*, downloadable software and cloud-based, software-as-a-service ("SaaS") models). Reforming the standard licenses to reflect modern technology could be a result of the pending Section 813 and Section 809 Panels.

a. A computer program is "developed" when it has been successfully operated in a computer and tested to the extent sufficient to demonstrate to reasonable persons skilled in the art that the program can reasonably be expected to perform its intended purpose.

b. Computer software is "developed" when it has been tested or analyzed to the extent sufficient to demonstrate to reasonable persons skilled in the art that the software can reasonably be expected to perform its intended purpose.

c. Computer software documentation required to be delivered under a contract is "developed" when it has been written, in any medium, in sufficient detail to comply with contractual requirements.

2. The Source of Funds Determination

a. The definitions of "developed exclusively at private expense," "developed exclusively at Government expense," and "developed with mixed funding" are identical to the definitions of these terms in the technical data context.

b. As with technical data, the doctrine of segregability applies, allowing the source of funding to be determined "at the lowest practicable segregable portion of the software or documentation (*e.g.*, a software sub-routine that performs a specific function)." DFARS 227.7203-4(b); DFARS 252.227-7014(a)(8)(i).

3. The default funding-based allocations of rights in computer software parallel those in the technical data context. Thus:

a. The Government shall have unlimited rights in computer software developed exclusively with Government funds;

b. The Government shall have GPR in computer software developed with mixed funding (unless otherwise entitled to unlimited rights); and

c. The Government shall have restricted rights in computer software developed exclusively at private expense (unless otherwise entitled to unlimited rights).

F. Non-Funding-Based Categories of Unlimited Rights Computer Software. Similar to non-commercial technical data, the Government shall also have unlimited rights, without regard to funding, in:

1. Computer software documentation required to be delivered under the contract. DFARS 252.227-7014(b)(1)(ii);

2. Corrections or changes to Government-furnished computer software or computer software documentation. DFARS 252.2270-7014(b)(1)(iii);

3. Computer software or computer software documentation that is otherwise publicly available or has been released or disclosed without restriction, except in the case of a transfer of ownership (*e.g.*, an acquisition of the computer software by another company). DFARS 252.227-7014(b)(1)(iv);

4. Computer software or computer software documentation obtained with unlimited rights under another contract or as a result of negotiations. DFARS 252.227-7014(b)(1)(v); and

5. Computer software or computer software documentation furnished with restrictions that have expired, including the sunset of GPR to unlimited rights. DFARS 252.227-7014(b)(1)(vi).

G. As with technical data, contractors cannot be required to provide the Government with additional rights, beyond those to which the Government is entitled, as a condition of responsiveness to a solicitation or contract award. DFARS 227.7203-1(c). The Government can, however, consider the rights a contractor is willing to grant when making its source selection decision, provided such consideration is consistent with the established evaluation criteria.

H. Finally, just as in the case of technical data, subcontractor computer software is subject to the same rules discussed above. DFARS 252.227-7014(k).

VII. RIGHTS IN COMMERCIAL TECHNICAL DATA AND COMPUTER SOFTWARE – DEFENSE AGENCIES

A. Commercial Technical Data (DFARS 252.227-7015)

1. Commercial Technical Data Deliverables.

a. The Government generally acquires only the technical data customarily provided to the public with a commercial item or process. DFARS 227.7102-1(a).

b. Exceptions include: FFF data; data required for repair or maintenance of commercial items or processes; data required for the proper installation, operation, or handling of a commercial item; and data that describe the modifications made at Government expense to a commercial item or process in order to meet Government requirements. *Id.*

2. Commercial Technical Data Rights

a. The Government receives the equivalent of unlimited rights in the following commercial technical data:

(1) Technical data that have been provided to the Government or others without further restriction, except in the case of a transfer of ownership (*e.g.*, an acquisition of the intellectual property by another company). DFARS 252.227-7015(b)(1)(i);

(2) FFF data. DFARS 252.227-7015(b)(1)(ii);

(3) Corrections and changes to technical data furnished to the contractor by the Government. DFARS 252.227-7015(b)(1)(iii);

(4) OMIT data (other than detailed manufacturing or process data). DFARS 252.227-7015(b)(1)(iv); and

(5) Technical data provided with unlimited rights in a prior contract or agreement. DFARS 252.227-7015(b)(1)(v).

b. For all other commercial technical data, the Government is subject to similar restrictions as with non-commercial technical data subject to limited rights. *See* DFARS 252.227-7015(b)(2).

(1) The Government shall have rights to use, modify, reproduce, perform, display, or disclose the technical data within the Government.

(2) The Government shall not use the technical data to manufacture additional quantities of the commercial item.

(3) The Government shall not release or disclose the technical data outside of the Government, except for emergency repair or overhaul or to a covered government support contractor. Disclosures of commercial technical data to a covered government support contractor are restricted similarly to disclosures of non-commercial technical data to covered government support contractors.

c. The parties can also negotiate specific license rights in commercial technical data. DFARS 252.227-7015(c). Any additional rights granted to the Government must be made part of the contract. *Id.*

3. The Government's default rights in commercial technical data closely resemble limited rights because commercial items are often (perhaps typically) developed exclusively at private expense.

a. If, however, some or all of the commercial item was developed at Government expense, DFARS 252.227-7013 will apply to those (segregable) portions of the commercial item that were so developed. DFARS 252.227-7015 will continue to apply to those portions of the commercial item developed exclusively at private expense. *See* DFARS 227.7102-4(b).

b. For purposes of validation of and challenges to a contractor's assertion of restrictions on technical data (*see* Section X.D below), the following funding presumptions will apply:

(1) Commercial items will be presumed to have been developed exclusively at private expense (DFARS 227.7103-13(c)(2)(i)); *except*

(2) Major weapons systems and subsystems/components thereof are *not* presumed to have been developed exclusively at private expense *unless* 1) it is a commercial subsystem or component of a major weapons system acquired as a commercial item IAW DFARS subpart 234.70; 2) it is a component of a subsystem that was acquired as a commercial item; or 3) it is a commercially available off-the-shelf ("COTS") item, including COTS items with modifications available in the commercial marketplace or COTS items with minor modifications to meet government requirements. DFARS 227.7103-13(c)(2)(ii).

(a) A major weapons system is defined in DFARS 234.7001 as a weapons system that qualifies as a major defense acquisition program (MDAP).

4. Subcontractor technical data is subject to the same rules discussed above. DFARS 252.227-7015(e).

B. Commercial Computer Software (No Clause)

1. The Government licenses commercial computer software subject to the same license as any other commercial licensee unless that license is inconsistent with federal law or otherwise does not meet the Government's needs. The license must be incorporated into the contract. DFARS 227.7102-1. When the government accepts a commercial license, no standard rights in computer software clause should appear. However, the standard Technical Data – Commercial Items clause may be appropriate for computer software documentation or computer databases.

2. There are a number of common commercial license clauses to which the Government often objects. These include:

a. Click-wrap and browse-wrap license terms;[7]

b. Open-ended indemnification by the licensee. Per FAR 52.212-4, such clauses are unenforceable against the Government and are severed from the agreement, unless otherwise authorized by law;

c. Choice of law and choice of forum clauses;

d. Contractual limitations on actions;

e. Automatic renewal terms;

f. Limitations on warranties;

g. Injunctive relief for breach by the licensee;

h. Clauses that permit immediate, unilateral termination by the licensor for breaches by the licensee;

i. Clauses that permit the licensor to unilaterally modify the license terms or terms of service;

j. Clauses that impose liability on the licensee for the licensor's taxes; and

k. Certain confidentiality provisions (*e.g.*, to the extent inconsistent with the Freedom of Information Act).

3. The GSA created a "Fail Chart" as an internal guideline to identify common "unacceptable" provisions in standard commercial software licenses. Many of the items on the Fail Chart are enumerated above. The Chart itself, however, is not publicly available.

4. In March 2015, the GSA published Notice of a Class Deviation to Address Commercial Supplier Agreement Terms Inconsistent with Federal Law. The Notice purported to address many of the provisions enumerated above that GSA deems inconsistent with federal law or otherwise "unacceptable." 80 Fed. Reg. 15011 (Mar. 20, 2015). The American Bar Association Section of Public Contract Law submitted comments in response. The proposed class deviation was adopted, with minor revisions, in July 2015.

5. In May 2016, the GSA proposed a rule to amend the General Services Acquisition Regulation (GSAR) "to implement standard terms and conditions for the most common conflicting Commercial Supplier

[7] Click-wrap and browse-wrap licenses may also be objectionable to contractors because of the risk that it is the end-user (who may not have authority to bind the Government), not a contracting officer, that agrees to the license.

Agreement terms to minimize the need for the negotiation of the terms of Commercial Supplier Agreements on an individual basis." 81 Fed. Reg. 34,302, 34,304 (May 31, 2016). The final rule was published on February 22, 2018 and amends GSAR 552.212-4. 82 Fed. Reg. 7,631.

VIII. RIGHTS IN DATA – CIVILIAN AGENCIES (FAR 52.227-14)

A. The FAR has a single clause, FAR 52.227-14, which controls the Government's rights in "data," including both technical data and computer software and commercial and non-commercial procurements. FAR 52.227-14 does not, however, apply to commercial computer software.

B. Data (Other Than Commercial Computer Software)

1. "Data" is defined to include recorded information, regardless of the form or media on which it may be recorded. FAR 52.227-14(a).

a. "Data" includes both technical data and computer software. The definitions, inclusions, and exclusions of "technical data" and "computer software" under the FAR are similar to those discussed above in connection with the DFARS. Specifically:

(1) "Technical data" means recorded information, regardless of the form or method of recording, of a scientific or technical nature. The term includes information in computer databases. "Technical data" excludes computer software and data incidental to contract administration (*e.g.*, financial, administrative, cost or pricing, or management information).

(2) "Computer software" means computer programs that comprise a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations. It also includes recorded information comprising source code listings, design details, algorithms, processes, flow charts, formulas, and related material that would enable the computer program to be produced, created, or compiled. "Computer software" does not include computer databases or computer software documentation.

b. "Data" does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.

c. "Data" also does not include the end item itself.

2. Other Key Contrasts with the DFARS Regime

a. The standard manner in which the FAR allows a contractor to protect data that qualifies as limited rights technical data or restricted rights computer software is by ***withholding*** that data from delivery to the Government and delivering FFF data in its place. FAR 52.227-14(g). Indeed, under FAR 52.227-14, the Government receives unlimited rights in all data delivered under the contract. Some Alternates of the clause contemplate delivery of data with other limited rights, subject to disclosure and marking requirements.

b. More Limited Standard Licenses. The FAR expressly recognizes only unlimited rights, limited rights (for certain technical data), and restricted rights (for certain computer software). The FAR does not expressly recognize GPR or specifically negotiated license rights. Moreover, limited rights and restricted rights are only provided for in *alternate* clauses.

c. The FAR does not expressly recognize the doctrine of segregability.

d. The FAR generally does not consider the source of development funding when allocating rights, unless it is considering issuing an alternate clause. Nonetheless, to the extent that the Government receives unlimited rights in "data first produced in the performance of" a contract (FAR 52.227-14(b)(1)(i)), it is likely that the data was generated at Government expense.

3. Standard Licenses. FAR 52.227-14 provides three standard licenses (two of which would only be applicable if the relevant alternate clauses are included in the contract):

a. Unlimited Rights: Unlimited rights allow the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

b. Limited Rights: Limited rights, which are applicable to technical data, are defined by reference to the rights provided in a limited rights notice. The basic limited rights notice prevents the Government from using limited rights technical data for manufacture and from disclosing limited rights technical data outside the Government. The parties can negotiate the purposes for which the Government can disclose limited rights technical data outside the Government. *See* FAR 52.227-14 Alternate II.

c. Restricted Rights: Restricted rights, which are applicable to computer software, are defined by reference to the rights provided in a restricted rights notice. The basic restricted rights notice limits the Government's rights in the computer software in a manner similar to that applicable to restricted rights under DFARS 252.227-7014, discussed above. In particular, as set forth in FAR 52.227-14 Alternate III:

(1) The software may be used or copied for use in or with the computer(s) for which it was acquired, including use at any Government installation to which the computer(s) may be transferred.

(2) The software may be used or copied for use in a backup computer if any computer for which it was acquired is inoperative.

(3) The software may be reproduced for archival or backup purposes.

(4) The software may be modified, adapted, or combined with other computer software, *provided* that the modified, adapted, or combined portions of the derivative software incorporating any of the restricted computer software shall itself be restricted computer software.

(5) The software may be disclosed to and reproduced for use by certain support service contractors.

(6) The software may be used or copied for use in or transferred to a replacement computer.

(7) The parties can negotiate other rights and limitations.

4. Allocation of Rights in Data (Other Than Commercial Computer Software)

a. The Government shall have unlimited rights in the following data:

(1) Data first produced in the performance of the contract. FAR 52.227-14(b)(1)(i).

(2) FFF data delivered under the contract. FAR 52.227-14(b)(1)(ii).

(3) Data delivered under the contract (except for restricted computer software) that constitute manuals or instructional and training material for OMIT or repair of items,

components, or processes delivered or furnished for use under the contract. FAR 52.227-14(b)(1)(iii).

(4) All other data delivered under the contract, unless provided otherwise as limited rights data or restricted computer software (pursuant, as noted above, to an alternate clause). FAR 52.227-14(b)(1)(iv).

b. Limited Rights Data and Restricted Computer Software

(1) Definitions

(a) Limited rights data are data, other than computer software, that embody trade secrets or are commercial or financial and confidential or privileged, to the extent that such data pertain to items, components, or processes developed at private expense, including minor modifications to the same. FAR 52.227-14(a).

(b) Restricted computer software is computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is copyrighted computer software, including minor modifications thereof. *Id.*

(2) Protecting Limited Rights Data and Restricted Computer Software

(a) Under the standard FAR 52.227-14 clause, limited rights technical data and restricted computer software can only be protected by withholding it and delivering FFF data (subject to unlimited rights) instead.

(i) FFF data for limited rights data are data sufficient to enable physical and functional interchangeability, and data identifying source, size, configuration, mating, and attachment characteristics, functional characteristics, and performance requirements.

(ii) FFF data for restricted computer software are data identifying source, functional characteristics, and performance requirements. FFF data for restricted computer software expressly excludes the

source code, algorithms, processes, formulas, and flow charts of the software.

(b) If the Government requires delivery of limited rights data and/or restricted computer software, it should include Alternates II and/or III, respectively. The Government should not generally require, as a condition of the procurement, that the contractor surrender unlimited rights in data that qualify as limited rights data or restricted computer software. FAR 27.406-1(c).

5. Contractors are responsible for securing all subcontractor data and rights therein necessary to fulfill the contractor's obligations to the Government. If a subcontractor refuses to accept terms affording the Government such rights, then the contractor must notify the contracting officer and withhold subcontract award unless it receives written authorization from the contracting officer. FAR 52.227-14(h).

C. Commercial Computer Software

1. In general, the rules that civilian agencies will follow when licensing commercial computer software are identical to those that the DoD will follow when licensing commercial computer software. That is, civilian agencies will also generally license commercial computer software subject to the same license as any other commercial licensee, unless that license is inconsistent with federal law or otherwise does not meet the Government's needs. The license must be incorporated into the contract. FAR 12.212.

2. Unlike the DFARS, however, the FAR provides a "standard" commercial license clause, FAR 52.227-19, that can be used, *inter alia*, if there is confusion as to whether the Government's needs are satisfied by the customary commercial license, if there is confusion as to whether the customary commercial license is consistent with federal law, or if the contractor has no customary commercial license. FAR 27.405-3; FAR 27.409(g). FAR 52.227-19 is ***not*** a mandatory clause in commercial software procurements.

	Commercial Technical Data	Commercial Software	Non-commercial Technical Data	Non-commercial Software
Defense	252.227-7015 (for elements developed exclusively at private expense) 252.227-7013 (for elements developed at Government expense)	No clause; adopt standard commercial license unless inconsistent with federal law or does not meet needs	252.227-7013	252.227-7014
Civilian	52.227-14	Adopt standard commercial license unless inconsistent with federal law or does not meet needs; can use 52.227-19	52.227-14	52.227-14

Table 1: Summary of Applicable Clauses

IX. OTHER DATA RIGHTS PROVISIONS

A. Rights in Bid and Proposal Data

1. Unsolicited Proposals (FAR Subpart 15.6)

a. Generally, the Government shall not use data, concepts, ideas, or other parts of an unsolicited proposal as the basis for a solicitation or negotiation with other firms, unless the offeror is notified and agrees. FAR 15.608(a).

b. The Government shall not disclose restrictively marked unsolicited proposal data. FAR 15.608(b).

(1) If an offeror desires to protect information in its unsolicited proposal from disclosure, the offeror is required to mark the title page and each subsequent page with prescribed legends. FAR 15.609.

(2) If any other legend is used, the Government is required to return the unsolicited proposal with a letter indicating that

it will review the proposal if it is resubmitted with the prescribed legends. FAR 15.609(c).

2. Other Proposals

a. FAR 52.215-1(e)(1) allows offerors to restrict the Government's rights in data contained in proposals. As with unsolicited proposals, the offeror is required to mark the proposal with a prescribed restrictive legend.

b. If present (in a civilian agency solicitation), FAR 52.227-23 allows the Government to obtain unlimited rights in technical data in successful proposals. The offeror/awardee can exclude technical data from this grant of unlimited rights by specific identification of page(s) of its proposal. *See* FAR 27.407; 27.409(*l*).

c. The rules are more restrictive for defense solicitations. *See* DFARS 252.227-7016.

(1) For bid and proposal information other than technical data and/or computer software to be delivered under the contract:

(a) Pre-award, the Government may copy and use the information for evaluation purposes only and may not disclose it to others unless such person is authorized by the contracting officer or the agency head to receive the information.

(b) Post-award, the Government may use and disclose the information within the Government.

(c) There is generally no prescribed legend to effect these restrictions. Many contractors, however, will borrow the restrictive legend from the FAR as a best practice. Additionally, like civilian agency solicitations, DoD solicitations may contain FAR 52.215-1, which includes a prescribed legend in subparagraph (e).

(2) For technical data and/or computer software deliverables, the Government's rights are dictated by the rights allocation clause(s) contained in the contract (*e.g.*, DFARS 252.227-7013, -7014, and/or -7015).

B. Rights in Special Works

1. The Special Works clauses are used when the Government has a specific need to limit the contractor's distribution and/or use of a work created under contract or when the Government needs to obtain indemnification from the contractor for liabilities that may arise out of the content, performance, or disclosure of the work. For example:

    a. Contracts for the production of audiovisual works, or for the preparation of motion picture scripts, musical compositions, sound tracks, translations, adaptations, and the like;

    b. Histories of departments, agencies, services, or units thereof;

    c. Surveys of Government establishments;

    d. Instructional works or guidance to Government officers and employees on the discharge of their official duties;

    e. Reports, books, studies, surveys, or similar documents;

    f. Collections of data containing information pertaining to individuals that, if disclosed, would violate the right of privacy or publicity of the individuals to whom the information relates; and

    g. Investigative reports.

    See FAR 27.405-1; DFARS 227.7106.

2. The Special Works clauses not only grant the Government unlimited rights in the works, they also enable the Government to restrict the contractor's use of the work or to require that title in the work be assigned to the Government.

    a. For example, FAR 52.227-17 allows the contracting officer "to limit the release and use of certain data" belonging to the contractor and/or "to obtain assignment of copyright in that data[.]" FAR 52.227-17(b).

    b. Similarly, DFARS 252.227-7020, the contractor is required to assign to the Government copyright in works first produced, created, or generated under a contract, and required to be delivered under the contract.

3. The Special Works clauses also require the contractor to indemnify the Government against certain liabilities. *See* FAR 52.227-17(e); DFARS 252.227-7020(e).

C. Rights in Existing Works

1. The Existing Works clauses are used when the Government is acquiring an existing work, such as a motion picture, television recording, sound recording, sculptural work, or the like, without modification. FAR 27.405-2; DFARS 227.7105-2.

2. The Existing Works clauses grant the Government rights to distribute, publicly perform, and publicly display the work. FAR 52.227-18(a); DFARS 252.227-7021(b).

3. The Existing Works clauses also require the contractor to indemnify the Government against certain liabilities. FAR 52.227-18(b); DFARS 252.227-7021(c).

D. Small Business Innovation Research ("SBIR") Data Rights

1. Section 9 of the Small Business Act, 15 U.S.C. § 638, provides authority for the SBIR Program. The Small Business Administration (SBA) is the Executive Branch agency responsible for administering this program. 15 U.S.C. § 638(b). Accordingly, "Federal agencies participating in the SBIR Program (SBIR agencies) are obligated to follow the guidance provided by [the SBA SBIR Program Policy Directive]." SBA OFFICE OF INVESTMENT AND INNOVATION, SBIR PROGRAM POL'Y DIRECTIVE, 79 Fed. Reg. 1,303, Jan. 8, 2014, incorporating corrections to Appendix data tables made on Feb. 24, 2014 ("SBA SBIR Policy Directive"), § 1(d).

2. SBIR is a three-phase acquisition process, with the first two phases constrained by funding and durational limitations. SBA SBIR POLICY DIRECTIVE, § 4.

a. Phase I explores project feasibility.

b. Phase II covers project development to prototyping.

c. Phase III focuses on commercialization.

(1) According to DoD Policy, "SBIR Phase III refers to work that derives from, extends, or logically concludes effort(s) performed under SBIR funding agreements." Memorandum from Deputy Under Sec'y of Def., to Secretaries of Mil Dep'ts Directors of Def. Agencies, subject: Small Business Innovation Research (SBIR) Program Phase III Guidance (8 Dec. 2008); SBA SBIR POLICY DIRECTIVE § 8(b)(4).

(2) Phase III contracts can be awarded to businesses of any size. *Id*. § 4(c)(6).

3. Contracts awarded under the SBIR program enable contractors to assert unique protections commonly referred to as "SBIR Rights" or "SBIR Data Rights." *See* FAR 52.227-20; DFARS 252.227-7018(a)(19). SBIR Data Rights also apply to subcontracts that meet the requirements of any phase of the SBIR program. SBA SBIR POLICY DIRECTIVE § 8(b)(4). These SBIR Data Rights are non-negotiable. *Id*.

4. SBIR contractors are entitled to assert SBIR Rights/SBIR Data Rights regardless of the source of development funding. Stated another way, contractors can assert SBIR Rights/SBIR Data Rights to all data developed under the SBIR contract, even if that data was developed exclusively with Government funds. FAR 27.409(h); DFARS 227.7104(a). This is true even for data generated during the performance of a Phase III SBIR contract. SBA SBIR POLICY DIRECTIVE § 4(c)(2).

5. Additionally, for data (including both technical data and computer software) developed exclusively with private funds or outside the SBIR contract, an SBIR contractor can assert limited rights or restricted rights as applicable. FAR 52.227-20(b)(2)(iv); DFARS 252.227-7018(b)(2), (3).

6. Similar to Government Purpose Rights under DFARS 252.227-7013 and -7014, SBIR Rights/SBIR Data Rights broaden after the passage of a designated period of time. FAR 52.227-20(d); DFARS 252.227-7018(b)(4). As discussed below, both the duration of SBIR Rights/SBIR Data Rights protection and the scope of the Government's rights during and after the protection period differs as between the FAR and DFARS.

7. The DoD IG recently concluded that the inconsistencies between the DoD and SBA policies on SBIR Data Rights led to inconsistent application of protections for contractors. U.S. DEP'T OF DEFENSE INSPECTOR GENERAL, DOD CONSIDERED SMALL BUSINESS INNOVATION RESEARCH INTELLECTUAL PROPERTY PROTECTIONS IN PHASE III CONTRACTS, BUT PROGRAM IMPROVEMENTS ARE NEEDED, REPORT NO. DODIG-2014-049, 27 Mar. 2014, at 10-11.

8. SBIR Rights – Civilian Agencies (FAR 52.227-20)

   a. "SBIR Data" means data first produced by a contractor that is a small business concern in performance of an SBIR contract, which data are not generally known, and which data without obligation as to its confidentiality have not been made available to others by the contractor or are not already available to the Government. FAR 52.227-20(a).

   b. For SBIR data that are delivered under the contract, the "Government [may] use these data for Government purposes only, and they shall not be disclosed outside the Government (including

disclosure for procurement purposes) . . . without permission of the Contractor, except that, subject to the foregoing use and disclosure prohibitions, these data may be disclosed for use by support Contractors." FAR 52.227-20(d).

c. FAR 52.227-20(d) protects SBIR Data Rights for four years from the date of "acceptance of all items to be delivered under [the] contract."

d. FAR 27.409(h) permits extending this period of protection by using authority in the SBA SBIR Policy Directive to extend protections through subsequent SBIR awards.

e. Following the expiration of the SBIR Data Rights protection period, the Government has "a paid-up license to use, and to authorize others to use on its behalf [the SBIR Data] for Government purposes[.]" FAR 52.227-20(d).

9. SBIR Data Rights – Defense Agencies (DFARS 252.227-7018)

a. For technical data, SBIR Data Rights are equivalent to limited rights. For computer software, SBIR Data Rights are equivalent to restricted rights. DFARS 252.227-7018(a)(19).

b. The SBIR Data Rights period begins upon contract award and ends "five years after completion of the project from which [the technical data or computer software] were generated." DFARS 252.227-7018(b)(4).

c. The DFARS does not explicitly authorize extending SBIR Data Rights by tacking on periods of protection from subsequent SBIR awards.

d. After the expiration of the SBIR Data Rights protection period, the Government has unlimited rights in the SBIR Data. DFARS 252.227-7018(b)(1)(vi).

X. DATA RIGHTS IN PRACTICE

A. Asserting Proprietary Rights for Noncommercial Items

1. Contractors' restrictions on the Government's rights in data are not self-executing and depend upon proper pre- and post-award identification and the application of prescribed markings. In other words, the Government receives unlimited rights in technical data and computer software delivered to the Government unless the contractor takes affirmative steps to limit such rights.

2. To preserve its proprietary rights, a contractor must both identify data to be delivered with less than unlimited rights in its proposal (*see* Section X.B below), and mark the deliverable (*see* Section X.C below). Only those items that have been identified can be marked and only properly marked items are entitled to protection.

B. Contractor Identification and Assertion of Restrictions

1. Contractors identify data in which the Government will have less than unlimited rights by including with their offers a listing of all data in which the Government will not have unlimited rights. *See* FAR 52.227-15; DFARS 252.227-7017.

a. For civilian agencies, FAR 52.227-15 requires the offeror to represent either (1) that none of the data proposed to be delivered under the contract qualifies as limited rights data or restricted computer software; or (2) that certain data to be delivered under the contract qualifies as limited rights data or restricted computer software. Where the contractor represents that data to be delivered under the contract qualifies as limited rights data or restricted computer software, the contractor must identify the same.

b. For defense agencies, DFARS 252.227-7017 requires offerors to identify, to the extent known at the time the offer is submitted, the technical data and/or computer software that the offeror and its actual or potential subcontractors and suppliers assert should be furnished with less than unlimited rights.

(1) Assertions at all tiers are submitted as an attachment to the offer in a prescribed tabular format (known as a "rights assertion table"), dated and signed by an authorized representative of the offeror.

Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Technical Data or Computer Software.

The Offeror asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following technical data or computer software should be restricted:

Technical Data or Computer Software to be Furnished With Restrictions*	Basis for Assertion**	Asserted Rights Category***	Name of Person Asserting Restrictions****
(LIST)*****	(LIST)	(LIST)	(LIST)

*For technical data (other than computer software documentation) pertaining to items, components, or processes developed at private expense, identify both the deliverable technical data and each such item, component, or process. For computer software or computer software documentation identify the software or documentation.

**Generally, development at private expense, either exclusively or partially, is the only basis for asserting restrictions. For technical data, other than computer software documentation, development refers to development of the item, component, or process to which the data pertain. The Government's rights in computer software documentation generally may not be restricted. For computer software, development refers to the software. Indicate whether development was accomplished exclusively or partially at private expense. If development was not accomplished at private expense, or for computer software documentation, enter the specific basis for asserting restrictions.

***Enter asserted rights category (e.g., government purpose license rights from a prior contract, rights in SBIR data generated under another contract, limited, restricted, or government purpose rights under this or a prior contract, or specially negotiated licenses).

****Corporation, individual, or other person, as appropriate.

*****Enter "none" when all data or software will be submitted without restrictions.

Date _____
Printed Name and Title _____
_____
Signature _____

(2) If the proposal is successful, the rights assertion table is attached to the contract.

(3) The contractor shall not deliver any technical data or computer software with restrictive markings (*see* Section X.C below) unless the technical data or computer software is listed in the rights assertion table. DFARS 252.227-7013(e)(2); DFARS 252.227-7014(e)(2).

(4) Additional data to be provided with restrictions may be identified and added to the assertion table after award only if the addition is based on new information (*e.g.*, a new deliverable is added to the contract) or was inadvertently omitted, unless the inadvertent omission would have materially affected the source selection decision. DFARS 252.227-7013(e)(3); DFARS 252.227-7014(e)(3).

c. DFARS 252.227-7017 generally applies to non-commercial and SBIR technical data and computer software. Strictly speaking, it does not apply to commercial technical data and computer software. Nonetheless, the DoD Open Systems Architecture Contract Guidebook suggests an analogous format for identifying restrictions on commercial technical data and computer software. DoD Open Systems Architecture Contract Guidebook for Program Managers, ch. III, ¶ 3.e (Version 1.1, June 2013).

C. Marking of Technical Data and Computer Software

1. Contractors may only assert restrictions by marking the deliverable technical data or computer software with an appropriate legend. The only "appropriate" legends are those set forth in the rights allocation clauses themselves, which are reproduced below. FAR 52.227-14(g)(3) (Alt. II); FAR 52.227-14(g)(4)(i) (Alt. III); DFARS 252.227-7013(f); DFARS 252.227-7014(f); DFARS 252.227-7018(f).

2. DFARS Marking Requirements

a. Contractors are prohibited from delivering technical data and computer software with restrictive markings unless that data is identified on the assertion table or other attachment to the contract. *See* DFARS 252.227-7013(e)(2); DFARS 252.227-7014(e)(2).

b. Contractors are required to have procedures that ensure restrictive legends are only used when appropriate, and to have records that justify the validity of any restrictive legends. *See* DFARS 252.227-7013(g); DFARS 252.227-7014(g).

c. The marking must be conspicuous and legible. It must appear on the transmittal document or storage container and on each page of printed material where applicable. *See* DFARS 252.227-7013(f)(1). For software, the restrictive legend should also be embedded in the software (*e.g.*, on splash screens) and the code (*e.g.*, headers), except where doing so could impair the usability of such software in combat situations or simulations. *See* DFARS 252.227-7014(f)(1).

d. Only the following markings are authorized. *See* DFARS 252.227-7013(f); DFARS 252.227-7014(f); DFARS 252.227-7018(f).

(1) For technical data to be delivered with GPR:

GOVERNMENT PURPOSE RIGHTS

Contract No.

Contractor Name

Contractor Address

Expiration Date

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(2) of the Rights in Technical Data—Noncommercial Items clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings.

(2) For technical data to be delivered with limited rights:

LIMITED RIGHTS

Contract No.

Contractor Name

Contractor Address

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(3) of the Rights in Technical Data--Noncommercial Items clause contained in the above identified contract. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such data must promptly notify the above named Contractor.

(3) For technical data to be delivered with specifically negotiated license rights:

SPECIAL LICENSE RIGHTS

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these data are restricted by Contract No. _____(Insert contract number)____, License No. ____(Insert license identifier)____. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings.

(4) For computer software to be delivered with GPR:

GOVERNMENT PURPOSE RIGHTS

Contract No.

Contractor Name

Contractor Address

Expiration Date

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by paragraph (b)(2) of the Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of the software or portions thereof marked with this legend must also reproduce the markings.

(5) For computer software to be delivered with restricted rights:

RESTRICTED RIGHTS

Contract No.

Contractor Name

Contractor Address

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by paragraph (b)(3) of the Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation clause contained in the above identified contract. Any reproduction of computer software or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such software must promptly notify the above named Contractor.

(6) For computer software to be delivered with specifically negotiated license rights:

SPECIAL LICENSE RIGHTS

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these data are restricted by Contract No. _____(Insert contract number)____, License No. ____(Insert license identifier)____. Any reproduction of computer software, computer software documentation, or portions thereof marked with this legend must also reproduce the markings.

(7) For technical data to be delivered with limited rights under an SBIR contract:

LIMITED RIGHTS

Contract No.

Contractor Name

Contractor Address

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(2) of the Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program clause contained in the above identified contract. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such data must promptly notify the above named Contractor.

(8) For computer software to be delivered with restricted rights under an SBIR contract:

RESTRICTED RIGHTS

Contract No.

Contractor Name

Contractor Address

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by paragraph (b)(3) of the Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program clause contained in the above identified contract. Any reproduction of computer software or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such software must promptly notify the above named Contractor.

(9) For technical data or computer software to be delivered with SBIR Data Rights:

SBIR DATA RIGHTS

Contract No.

Contractor Name

Contractor Address

Expiration of SBIR Data Rights Period

The Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software marked with this legend are restricted during the period shown as provided in paragraph (b)(4) of the Rights in Noncommercial Technical Data and Computer Software–Small Business Innovation Research (SBIR) Program clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of technical data, computer software, or portions thereof marked with this legend must also reproduce the markings.

e. Marking Commercial Items.

(1) Although DFARS 252.227-7015(d) requires commercial technical data to be restrictively marked, the clause does not prescribe any specific format for the legend. Many contractors will adopt a marking analogous to the authorized legend for non-commercial technical data, but they are not required to do so.

(2) There is no regulatory marking requirement for commercial computer software. Contractors often follow their standard commercial practices to mark commercial computer software. William C. Anderson, *Comparative Analysis of Intellectual Property Issues Relating to the Acquisition of Commercial and Noncommercial Items by the Federal Government*, 33 Pub. Cont. L. J. 37, 58-59 (2013).

3. FAR Marking Requirements

a. As discussed above, the standard FAR Rights in Data—General clause (FAR 52.227-14) grants the Government unlimited rights in all data delivered under contract. Thus, in order for a contractor to protect its limited rights technical data or restricted rights computer software under FAR 52.227-14, it must withhold the protected data and deliver FFF data instead. FAR 52.227-14(g)(1).

b. If the Government requires delivery of limited rights technical data or restricted computer software, it must include Alternate II or Alternate III to FAR 52.227-14, respectively. Both provide a legend that must be applied to the data being delivered.

(1) Alternate II prescribes the following notice that must be affixed to limited rights technical data:

Limited Rights Notice (Dec 2007)

(a) These data are submitted with limited rights under Government Contract No. _____ (and subcontract _____, if appropriate). These data may be reproduced and used by the Government with the express limitation that they will not, without written permission of the Contractor, be used for purposes of manufacture nor disclosed outside the Government; except that the Government may disclose these data outside the Government for the following purposes, if any; provided that the Government makes such disclosure subject to prohibition against further use and disclosure: *[Agencies may list additional purposes as set forth in 27.404(c)(1) or if none, so state.]*

(b) This Notice shall be marked on any reproduction of these data, in whole or in part.

(2) Alternate III prescribes the following notice that must be affixed to restricted computer software:

Restricted Rights Notice (Dec 2007)

(a) This computer software is submitted with restricted rights under Government Contract No. _____ (and subcontract _____, if appropriate). It may not be used, reproduced, or disclosed by the Government except as provided in paragraph (b) of this notice or as otherwise expressly stated in the contract.

(b) This computer software may be—

(1) Used or copied for use in or with the computer(s) for which it was acquired, including use at any Government installation to which such computer(s) may be transferred;

(2) Used or copied for use in a backup computer if any computer for which it was acquired is inoperative;

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, *provided* that the modified, adapted, or combined portions of the derivative software incorporating any of the delivered, restricted computer software shall be subject to the same restricted rights;

(5) Disclosed to and reproduced for use by support service Contractors or their subcontractors in accordance with paragraphs (b)(1) through (4) of this notice; and

(6) Used or copied for use in or transferred to a replacement computer.

(c) Notwithstanding the foregoing, if this computer software is copyrighted computer software, it is licensed to the Government with the minimum rights set forth in paragraph (b) of this notice.

(d) Any other rights or limitations regarding the use, duplication, or disclosure of this computer software are to be expressly stated in, or incorporated in, the contract.

(e) This Notice shall be marked on any reproduction of this computer software, in whole or in part.

(3) Alternate III also includes a "short form" notice that can be used when the longer form notice, shown above, is "impractical:"

Restricted Rights Notice Short Form (Jun 1987)

Use, reproduction, or disclosure is subject to restrictions set forth in Contract No. _____ (and subcontract, if appropriate) with _____ (name of Contractor and subcontractor).

(4) FAR 52.227-20(d) provides that the following legend is authorized for SBIR data delivered under a FAR-based contract:

SBIR Rights Notice (Dec 2007)

These SBIR data are furnished with SBIR rights under Contract No._____ (and subcontract _____, if appropriate). For a period of 4 years, unless extended in accordance with FAR 27.409(h), after acceptance of all items to be delivered under this contract, the Government will use these data for Government purposes only, and they shall not be disclosed outside the Government (including disclosure for procurement purposes) during such period without permission of the Contractor, except that, subject to the foregoing use and disclosure prohibitions, these data may be disclosed for use by support Contractors. After the protection period, the Government has a paid-up license to use, and to authorize others to use on its behalf, these data for Government purposes, but is relieved of all disclosure prohibitions and assumes no liability for unauthorized use of these data by third parties. This Notice shall be affixed to any reproductions of these data, in whole or in part.

c. There is no regulatory marking requirement for commercial computer software. Contractors often follow their standard commercial practices to mark commercial computer software. William C. Anderson, *Comparative Analysis of Intellectual Property Issues Relating to the Acquisition of Commercial and Noncommercial Items by the Federal Government*, 33 Pub. Cont. L. J. 37, 58-59 (2013).

d. FAR 52.227-14 does not prescribe the manner in which the notices must be affixed to the data.

4. Unmarked Data

a. If non-commercial technical data or computer software are delivered without restrictive markings of any sort, then they are presumed to be delivered with unlimited rights. FAR 52.227-14(f)(1); DFARS 227.7103-10(c); DFARS 227.7203-10(c).

b. The contractor can request permission to correct this omission, at its expense, within six months (or longer, at the contracting officer's discretion) after the unmarked data is delivered.

(1) The contractor must identify the technical data or computer software to be marked, demonstrate that the omission of markings was inadvertent, justify the proposed markings, and acknowledge in writing that that Government is not liable for any disclosure, use, or release of the data made before the markings were added or resulting from the lack of markings.

(2) The contracting officer should only grant the request where the data has not yet been distributed absent compatible restrictions on its use or disclosure.

5. Non-Conforming Markings

a. For contracts with defense agencies, if technical data or computer software are delivered with non-conforming markings (i.e., markings that do not match a prescribed legend, such as "Confidential and Proprietary"), the Government must notify the contractor of the non-conformity. If the non-conforming legend is not corrected or removed within 60 days, the Government may remove, ignore, or correct the non-conforming marking. DFARS 252.227-7013(h); DFARS 252.227-7014(h). This process can sometimes constitute a claim over which the Boards of Contract Appeals have jurisdiction. *See Alenia North America, Inc.*, ASBCA No. 57935, 2013 WL 1871512 (Mar. 26, 2013).

b. For contracts with civilian agencies, if technical data is delivered with an incorrect marking, the Government may allow the contractor to correct the marking at the contractor's expense or correct the marking itself. FAR 52.227-14(f)(3).

D. Validations and Challenges of Restrictive Markings

1. Contracts that include the delivery of noncommercial technical data or computer software will include a clause that allows the Government to challenge and validate the contractor's asserted restrictions. *See* FAR 52.227-14(e); DFARS 252.227-7019 (computer software); DFARS

252.227-7037 (technical data). This clause enables contracting officers to challenge potentially unjustified restrictive markings.

2. General Procedure – Defense Agencies

a. The challenge process begins when the contracting officer has "reasonable grounds to challenge the validity of an asserted restriction." DFARS 227.7103-13(c)(1); *see also* DFARS 227.7203-13. Where the presumption that commercial items (including computer software) are developed at private expense applies (*see* Section VII.A.3.b above), the Government cannot initiate a challenge unless it can demonstrate that it contributed to development. DFARS 227.7103-13(c)(1).

b. Prior to initiating a challenge, the contracting officer can request that the contractor provide a written justification for any restriction asserted and can request further information (*e.g.*, contracts, correspondence, engineering documents, accounting and financial records) as necessary to justify the basis for the contractor's asserted restrictions. DFARS 252.227-7019(d); DFARS 252.227-7037(d). This essentially serves as a pre-challenge request for information (RFI). If the contracting officer determines that reasonable grounds exist to question the validity of the marking, the contracting officer can initiate a challenge.

c. To initiate the challenge, the contracting officer sends a written notice to the contractor. DFARS 252.227-7019(g); DFARS 252.227-7037(e).

(1) The notice must state specific grounds for challenging the contractor's asserted restriction.

(2) The contractor is required to provide a response justifying the restrictive marking within 60 days. The contracting officer has discretion to extend this deadline.

(3) For challenges under DoD contracts, a prior contracting officer's final decision sustaining the validity of an identical restrictive marking within three years shall be conclusive justification for the restrictive marking. DFARS 252.227-7037(e)(1)(iii); DFARS 252-22.7019(g)(1)(iv).

d. The contractor's response to the challenge notice constitutes a claim under the Contract Disputes Act and is required to be certified in the form prescribed by FAR 33.207 regardless of amount. Contractors may respond by providing a timeline of the development history, timekeeping records showing development outside of the contracts, test reports, documents evidencing that the

technology is segregable (*e.g.*, drawings, diagrams, code analysis), and the like.

e. Following the contractor's response (or after the period for response has elapsed with no response), the contracting officer will issue a final decision.

(1) If the contracting officer finds that the restriction is valid, then the Government will be bound by the contracting officer's finding.

(2) If the contracting officer finds that the restriction is not justified, then the Government will be bound by the restrictive marking for 90 days, pending notice of the contractor's decision to appeal the contracting officer's final decision to the Court of Federal Claims or the Board of Contract Appeals, and until final disposition if the decision is appealed.

f. The Government's right to challenge a contractor's asserted restrictions extends until the later of three years after the software or technical data is delivered or three years after final payment on the contract. *See* DFARS 252.227-7037(i); DFARS 252.227-7019(e)(1).

3. The general procedure for civilian agencies, found in FAR 52.227-14(e), parallels that of the DFARS (*e.g.*, the contracting officer makes a written inquiry requiring the contractor to justify its restrictive markings; the contractor responds; the contracting officer issues a final decision; the contractor can appeal). The most substantial difference is that FAR 52.227-14(e)(1) permits the Government to bring its challenge "at any time." It is unclear if this means the Government can bring such a challenge after final acceptance and payment; ostensibly, the Government's ability to challenge data could at least be constrained by the CDA's six year statute of limitations for government claims.

E. Deferred Delivery and Deferred Ordering of Non-Commercial Technical Data and Computer Software

1. Deferred Delivery. Several versions of an item or process may be developed before it is finalized for production and fielding. The Government may not want or need data related to every iteration. To accommodate these considerations, the DFARS Deferred Delivery clause (DFARS 252.227-7026) permits the Government to defer delivery of data for up to two years after contract termination. The data should be identified in the contract as "deferred delivery."

2. Deferred Ordering. It is also sometimes the case that the Government may not know at contract award what data it will require, or even whether it will require data at all. The Deferred Ordering clauses (FAR 52.227-16; DFARS 252.227-7027) allow the Government to order technical data and computer software generated in performance of the contract for up to three years after contract termination.

   a. The deferred ordered data is subject to the rights allocation clauses otherwise in the contract.

   b. The contractor is compensated only for the cost of converting the data into its prescribed form and for the costs of reproduction and delivery. The contractor is not entitled to additional consideration for the deferred ordered data itself.

F. Withholding of Payment

1. DFARS 252.227-7030 authorizes withholding payment of up to ten percent of the total contract price or amount "[i]f technical data specified to be delivered under th[e] contract, is not delivered within the time specified by th[e] contract or is deficient upon delivery." This withholding clause enables a contracting officer to withhold payment "pending correction or replacement of the nonconforming technical data or negotiation of an equitable reduction in contract price." DFARS 227.7103-14(b)(2).

   a. While the clause authorizes withholding up to ten percent of the price or amount of the contract, DFARS 227.7103-14 states that "the amount subject to withholding shall be determined giving consideration to the relative value and importance of the data."

   b. The IP Strategy Brochure identifies DFARS 252.227-7030 as among the "Key IP Management Activities, Considerations, Resources" in its Intellectual Property Strategy Checklist. Although this clause can be a powerful tool to protect the Government's interests, contracting officials should consider whether other contractual remedies are available to more effectively protect the Government or accomplish its objectives. *See* DFARS 252.227-7030(b) ("The withholding of any amount or subsequent payment to the Contractor shall not be construed as a waiver of any rights accruing to the Government under this contract.").

2. FAR 52.227-21 is the FAR counterpart to DFARS 252.227-7030. The FAR clause, however, only authorizes withholding payment of "an amount not exceeding $100,000 or 5 percent of the amount of th[e] contract."

G. Other Transactional Authority (OTA)

1. 10 U.S.C. § 2371b expanded DoD's authority to use Other Transactional (OT) Authority to "adopt and incorporate business practices that reflect commercial industry standards and best practices into its award instruments" in order to obtain prototypes. See DAU Other Transactions Guide, https://aaf.dau.edu/ot-guide/.

2. Because of the unique nature of OTs, the Government has enormous flexibility when negotiating with industry on the terms and conditions of OT agreements (to include IP terms). The Government should negotiate rights consistent with the objectives of the program. Generally speaking, "if a strategy, practice, or procedure is in the best interest of the Government and is not prohibited by law or Executive Order, the Government team should assume it is permitted." *Id.*

3. For OTs, the IP rights under the Bayh-Dole Act (35 U.S.C. §§ 201-204) and 10 U.S.C. §§2320-2321 **do not apply**. Agreements Officers are permitted and encouraged to negotiate rights of a different scope from the above statutes if advantageous to the government. *Id.*

XI. RIGHTS IN PATENTS UNDER GOVERNMENT CONTRACTS

A. The FAR and DFARS distinguish between the Government's rights in a contractor's technical data and computer software, on the one hand, and the Government's rights in a contractor's patents, on the other hand. *See* FAR 52.227-14(i); DFARS 252.227-7013(i); DFARS 252.227-7014(i).

B. The Bayh-Dole Act, codified as amended at 35 U.S.C. §§ 200-212, is the primary source of rights and duties in this area.

1. Prior to World War II, industry, not the Federal Government, was the leader in research and development (R&D) funding. After World War II, the Government's desire to maintain a standing military, explore space, and develop nuclear energy caused it to become the largest sponsor of R&D.

2. There was initially a great deal of disparity among the federal agencies concerning who took what rights in a patent. Some agencies took title to the patent, while others left ownership with the inventor and merely required a license.

3. To remedy the disparity and to attract more contractors to participate in the Government's "information industrial complex," Congress passed the Bayh-Dole Act in 1980, which gave the patent title to the inventor and required the agency to take certain license rights in the invention. 35 U.S.C. § 200.

4. Only small and non-profit firms fall under the statutory language of the Bayh-Dole Act. 35 U.S.C. § 201(c). Congress feared that granting title in inventions to large firms would enable them to monopolize their respective technological fields.

5. A 1983 Presidential Memorandum extended coverage of the Act to large, for-profit firms as well. Presidential Memorandum on Governmental Patent Policy to the Heads of Executive Departments and Agencies, Feb. 18, 1983 (reprinted in 1983 Public Papers 248). This memo may be waived under certain circumstances. Some provisions of Bayh Dole still apply specifically to nonprofit organizations engaged in research by operation of Bayh Dole's implementing regulations.

6. The Bayh-Dole Act does not apply to agreements awarded under the authority of 10 U.S.C. § 2371b for Other Transactions (OTs). https://aaf.dau.edu/ot-guide/IP.

C. The requirements of the Bayh-Dole Act apply to "subject inventions," which are [1] inventions; [2] of the contractor; [3] conceived or first actually reduced to practice; [4] in the performance of work under a funding agreement. 35 U.S.C. § 201(e).

1. An "invention" is something that is or may be patentable. 35 U.S.C. § 201(d).

2. An invention is "of the contractor" if the contractor (or a contractor employee) is an inventor.

3. The terms "conception" and "actual reduction to practice" have their ordinary patent law meanings.

a. "Conception" is "the formation in the mind of the inventor of a definite and permanent idea of the complete and operative invention as it is thereafter to be applied in practice[.]" *Townsend v. Smith*, 36 F.2d 292, 295 (C.C.P.A. 1930).

b. "Actual reduction to practice" occurs when the invention is embodied in a physical form used to demonstrate its workability.

(1) The invention is embodied when the physical form has all of the claimed elements.

(2) The invention is workable when it has been tested to the extent necessary to show that the invention will perform as intended beyond a probability of failure. Perfection is not required.

4. Work is "in the performance of work under a funding agreement" if it occurs during the period of the funding agreement and is related to the work specified by the funding agreement. A project that is "closely related," but that nonetheless "falls outside the planned and committed activities of a government-funded project" is not a subject invention. 37 C.F.R. § 401.1(a)(1); *see also Collins v. Western Digital Techs., Inc.*, No. 2:09-cv-219-TJW, 2011 WL 3848631, at *3 (E.D. Tex. 2011).

D. Procedural Requirements. The Bayh-Dole Act includes certain procedural requirements relative to subject inventions. These requirements are implemented in patent rights clauses. *See, e.g.*, 37 C.F.R. Part 401; FAR 52.227-11; FAR 52.227-13; DFARS 252.227-7038; DFARS 252.227-7039 (required when FAR 52.227-11 is used by a Defense agency). Thus, a contractor's specific obligations vis-à-vis a subject invention will be spelled out in the contract itself. Generally, however, the obligations include:

1. Disclosure of Subject Inventions. The contractor must timely disclose subject inventions to the Government. 35 U.S.C. § 202(c)(1); FAR 52.227-11(c); FAR 52.227-13(c)(1)(iii); FAR 52.227-13(e). The purpose of the disclosure requirement is to protect the Government's interests in potentially patentable inventions under both domestic and international laws.

   a. The statute requires disclosure within a reasonable time.

   b. The standard patent rights clause (*i.e.*, FAR 52.227-11) provides that disclosure must be made within two months after the inventor discloses the invention to the contractor or six months after the contractor otherwise becomes aware of the invention.

   c. The disclosure must have sufficient technical detail to convey a clear understanding of the subject invention. It must also provide information as to any potentially novelty-defeating acts (*e.g.*, publications, on-sale activities, and the like).

   d. No particular form of disclosure is specified in either the standard patent clause or the FAR patent rights clauses. *But see Campbell Plastics Eng'g & Mfg., Inc. v. Brownlee*, 389 F.3d 1243 (Fed. Cir. 2004) (allowing agency to take rights where disclosure was not in a single disclosure but was rather done piecemeal). Within the Department of Defense, disclosure may be made on a DD Form 882, Report of Inventions and Subcontracts. *See* DFARS 227.304-1.

2. Election of Title. Once the contractor has disclosed the subject invention to the Government, the contractor must decide whether it wishes to retain title to the invention. FAR 27.302(b)(1). By statute, this election must be

done within two years of disclosure of the subject invention. 35 U.S.C. § 202(c)(2); FAR 52.227-11(c)(2). This deadline can be shortened if there has been a potentially novelty-defeating event.

3. Filing of Patent Application. If the contractor elects to retain title, it is required to timely file a United States patent application (*e.g.*, within one year of any novelty defeating event). 35 U.S.C. § 202(c)(3); FAR 52.227-11(c)(3). Optionally, the contractor can file foreign and international counterpart applications.

4. Additional procedural requirements will be spelled out in the contract's patent rights clause.

5. The contractor can request, and the contracting officer can grant, extensions of time to the deadlines for disclosure of subject inventions, election of title, and filing of patent applications. Under a first-to-file system, however, such extensions may jeopardize both the contractor's rights and the Government's rights. *See* Scott A. Felder and Rachel K. Hunnicutt, *Where AIA Meets Bayh-Dole Act: Beware the Ticking Clock*, Law360 (Oct. 29, 2013), *available at* http://www.wileyrein.com/publications.cfm?sp=articles&id=9198.

E. Allocation of Rights

1. If the contractor elects title, the Government is granted a "nonexclusive, nontransferable, irrevocable, paid-up license" to practice, or have practiced for or on behalf of the United States, the subject invention throughout the world. 35 U.S.C. § 202(c)(4); FAR 27.302(c); FAR 52.227-11(d)(2); FAR 52.227-13(c)(1). Note that this license is to the *invention*, not to a *patent on the invention*.

2. If the contractor does not elect title, or fails to meet a deadline (*e.g.*, fails to timely file a patent application), the Government can take title to the invention. FAR 52.227-11(d)(1).

3. The Government can also take title in countries where the contractor decides not to file a patent application and in countries where the contractor abandons its efforts to secure patent protection. FAR 52.227-11(d)(1).

4. When the Government takes title, the contractor will generally be granted a revocable, nonexclusive, paid-up, worldwide license to the invention. FAR 27.302(i).

F. March-in rights. March-in rights are reservations by the funding agency in elected subject inventions that permit the agency to require the contractor to grant licenses to responsible applicants on reasonable terms. 35 U.S.C. § 203; FAR 27.302(f); FAR 52.227-11(h). The contractor is given procedural due process,

including the right to be heard and an opportunity for oral arguments. There is also a mandate that only the head of the agency can exercise these march-in rights. 35 U.S.C. § 203(2); FAR 27.302(f); FAR 27.304-1(g). To date, no agency has ever exercised its march-in rights. However, NIH has recently received several petitions to exercise march-in rights to address the affordability of certain pharmaceuticals, all of which to date have been denied.

G. Domestic Licensing. Contractors are prohibited from exclusively licensing their patented invention to US firms unwilling to "substantially manufacture" their product within the U.S. 35 U.S.C. § 204; FAR 27.302(g); FAR 52.227-11(g); FAR 52.227-13(h). There are exceptions if the contractor can demonstrate it was unable to find a domestic licensee or that domestic manufacturing is not commercially feasible. 35 U.S.C. § 204; FAR 27.302(g); FAR 52.227-11(g); FAR 52.227-13(h). For example, if a contractor develops a new bulletproof material that it patents, it is generally required to license that invention only to firms willing to manufacture the bulletproof material within the US.

H. Applicability to Subcontractors

1. The Bayh-Dole Act prevents prime contractors from obtaining rights in subcontractor inventions within the subcontract itself. 35 U.S.C. § 202(a); FAR 27.304-3; FAR 52.227-11(k); FAR 52.227-13(i).

2. The contractor may obtain rights in subcontractor inventions but must do so outside of the subcontract and must pay some additional compensation to the subcontractor. FAR 27.304-4; FAR 52.227-11(k); FAR 52.227-13(i).

3. These same protections are also given to lower tier subcontractors. FAR 52.227-11(k); DFARS 252.227-7038.

4. Put simply, the Bayh-Dole Act establishes the allocation of rights in an invention between the *Government* and a contractor at any tier, and does not allocate rights in an invention as between contractors at various tiers.

I. Use of DFARS 252.227-7038. Defense agencies will use the clause at DFARS 252.227-7038, rather than FAR 52.227-11, in solicitations and contracts for experimental, developmental, or research work if the contractor is other than a small business or nonprofit and an alternative patent rights clause (*e.g.*, FAR 52.227-13, discussed *infra*) is not used. DFARS 227.303(2). As does FAR 52.227-11, DFARS 252.227-7038 includes disclosure, election, and patent filing requirements, as well as additional procedural requirements.

J. Use of FAR 52.227-13. The basic patent rights clause is FAR 52.227-11, which allows the contractor to elect to retain title. In certain circumstances, however, FAR 52.227-13 is used instead. The clause at FAR 52.227-13 requires the contractor to assign title to the Government, subject to a license back to the contractor.

1. The contractor's minimum license is a revocable, nonexclusive, paid-up license in each patent application filed in any country on a subject invention and any resulting patent in which the Government retains title, unless the contractor fails to make the required Bayh-Dole disclosure. FAR 52.227-13(d).

2. The contractor can request, and the Government can grant, greater rights to the contractor, up to and including allowing the contractor to retain ownership. FAR 52.227-13(b)(2).

3. If the contractor is allowed to retain ownership after a greater rights determination, the Government receives a nonexclusive, nontransferable, irrevocable, paid-up, worldwide license to practice the invention or have the invention practiced on its behalf. FAR 52.227-13(c). The Government also receives march-in rights. *Id.*

4. The following are reasons to use FAR 52.227-13:

    a. The contractor is not in the US;

    b. The contractor has no place of business in the US;

    c. The contractor is subject to the control of a foreign government;

    d. The invention relates to foreign intelligence or counterintelligence activities;

    e. The invention relates to a Department of Energy Government Owned-Contractor Operated facility for nuclear propulsion or weapons programs; or

    f. Other exceptional circumstances.

XII. GOVERNMENT USE OF PATENTS

A. Contractor Background Patents

1. "Background patents" are patents that the contractor brings to the table. They are not expressly addressed by the FAR or DFARS. Nonetheless, many contractors will choose to place the Government on notice of their background IP, and the rights (if any) the Government will receive therein. Often, contractors use a format similar to that found in DFARS 252.227-7017 for technical data and computer software.

2. The ownership of background patents may provide a contractor a competitive advantage in the procurement process. Ownership of a patent, however, is not, in and of itself, sufficient to justify a sole-source award to the patent owner.

B. Third-Party Patents

1. Contractors may need to utilize inventions made by others when working on Government contracts. Generally, the Government will not refuse to award a contract on the grounds that the prospective contractor may infringe a patent. FAR 27.102(b).

2. In the ideal case, the parties will identify, up front, any patents that will need to be practiced in performing the contract. This allows offerors to seek a license and include the same in their proposal. Certain requirements are imposed upon patent royalties that the contractor may need to pay as a result. *See* FAR 52.227-9; DFARS 252.227-6.

3. Most cases, however, are not ideal. Instead, the parties discover during contract performance that they are practicing a third-party's patent. To address this situation, many Government contracts include three types of clauses: Authorization and Consent (*e.g.*, FAR 52.227-1); Notice and Assistance (*e.g.*, FAR 52.227-2); and Indemnification (*e.g.*, FAR 52.227-3 to -5).

   a. Authorization and Consent. Authorization and consent clauses can shift the liability for acts of patent infringement by the contractor back to the Government in the first instance. *See* Section XIII.A.2.a(2) below.

   b. Indemnification.

      (1) Just because the Government accepts liability for its contractors' acts of infringement in the first instance does not mean that the contractor can escape liability for patent infringement entirely. By including an indemnification clause in the contract, the Government can shift the burden of infringement back to the contractor.

      (2) Indemnification can be blanket (*e.g.*, FAR 52.227-3), or by specific inclusion and/or exclusion of particular patents, products, and/or services (*e.g.*, FAR 52.227-3, Alt. I and Alt. II). Indemnification is, however, always a contractual question.

   c. Notice and Assistance. The Notice and Assistance clause requires contractors to notify the Government of claims of patent infringement and to assist the Government in defending such claims by turning over "all evidence and information in the Contractor's possession pertaining to such claim or suit."

XIII. "PATENT INFRINGEMENT" BY THE GOVERNMENT AND ITS CONTRACTORS[8]

A. Judicial Remedy – 28 U.S.C. § 1498(a)

> "Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture.
>
> * * *
>
> For purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor…for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States."

1. The plain meaning of § 1498 makes clear that, when the Government itself manufactures or uses a patented invention, the patentee's remedy is an action at the Court of Federal Claims.

2. Additionally, when a contractor uses or manufactures a patented invention "for the United States," the patentee's remedy is an action at the Court of Federal Claims, and the contractor is immune from suit for patent infringement in the district courts. *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331 (1928) (stating that the purpose of § 1498(a) is to "relieve the contractor entirely from liability of every kind for the infringement of patents in manufacturing anything for the government, and to limit the owner of the patent . . . to suit against the United States"); *see also Zoltek Corp. v. United States*, 672 F.3d 1309, 1324 (Fed. Cir. 2012) (reinforcing the rationale of *Richmond Screw*).

   a. A contractor's use or manufacture is "for the United States" if it is "for the Government" and "with the authorization or consent of the Government." This immunity is broadly construed "so as not to limit the Government's freedom in procurement by considerations of private patent infringement." *TVI Energy Corp. v. Blane*, 806 F.2d 1057, 1060 (Fed. Cir. 1986).

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[8] Strictly speaking, the Government does not infringe patents. Rather, the Government's use of a patented invention constitutes the taking of a compulsory license in the patent through an exercise of the eminent domain power. *See Leesona Corp v. United States*, 599 F.2d 958, 966 (Ct. Cl. 1979); *see also Decca, Ltd. V. United States*, 640 F.2d 1156, 1166 (Ct. Cl. 1980).

(1) Use or manufacture is "'for the Government' if it is 'in furtherance and fulfillment of a stated Government policy; which serves the Government's interests and which is 'for the Government's benefit.'" *Madey v. Duke Univ.*, 413 F. Supp. 2d 601, 607 (M.D.N.C. 2006).

(a) Performance of a Government contract will almost certainly qualify as "for the Government." *See, e.g., Sevenson Envtl. Servs., Inc. v. Shaw Envtl., Inc.*, 477 F.3d 1361, 1366 (Fed. Cir. 2007) ("[W]here infringing activity has been performed by a government contractor pursuant to a government contract and for the benefit of the government, courts have all but bypassed a separate inquiry into whether infringing activity was performed 'for the Government.'").

(b) Activities during and/or leading up to a competitive selection process will likely qualify as "for the Government." *See Trojan, Inc. v. Shat-R-Shield, Inc.*, 885 F.2d 854, 856-57 (Fed. Cir. 1989); *TVI Energy Corp.* 806 F.2d at 1060.

(c) Activities under a non-Government contract that nonetheless benefits the Government can qualify as "for the Government." *Advanced Software Design Corp. v. Federal Reserve Bank of St. Louis*, 583 F.3d 1371, 1375-76 (Fed. Cir. 2009).

(d) Performing a quasi-Governmental function pursuant to a statutory and/or regulatory scheme can qualify as "for the Government." *IRIS Corp. v. Japan Airlines Corp.*, 769 F.3d 1359, 1362-63 (Fed. Cir. 2014) (passport inspection by commercial airline).

(2) Authorization and consent may be express (*e.g.*, by contract clause) or implied (*e.g.*, from the Government's conduct). *See TVI Energy Corp.*, 806 F.2d at 1060. It may be narrow (*e.g.*, FAR 52.227-1) or broad (*e.g.*, FAR 52.227-1 Alt. I). It may be provided up front (*e.g.*, in the contract) or after the fact (*e.g.*, by the Government inserting itself into litigation between the patentee and the contractor). *See Hughes Aircraft Co. v. United States*, 534 F.2d 889, 901 (Ct. Cl. 1976); *see also Advanced Software Design Corp.*, 583 F.3d 1376-77.

(3) In the case of service contracts, authorization and consent will often be found where the contractor cannot adopt a non-infringing alternative without breaching the contract. *See, e.g.*, *Sevenson Envtl. Servs.*, 477 F.3d at 1367 ("Shaw's use of a noninfringing alternative would put it in breach of its contracts. Thus, Shaw's use of the accused method was 'necessar[y]' . . . ."); *TDM America, LLC v. United States*, 83 Fed. Cl. 780, 785-86 (2008) ("If the contractor deviated from the proposed processing methods…that contractor would have been in breach of the contract."). *Accord IRIS Corp.*, 769 F.3d at 1362 ("In this case, the government has clearly provided its authorization or consent because—as the parties and the United States agree—JAL cannot comply with its legal obligations without engaging in the allegedly infringing activities.").

b. "Reasonable and entire compensation" is most typically measured as a reasonable royalty for the use or manufacture, considered in light of the factors set forth in *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970). *See Honeywell Int'l, Inc. v. United States*, 107 Fed. Cl. 659, 679-80 (2012).

(1) Other measures, such as lost profits and cost savings to the Government, are disfavored, but have been used in limited circumstances. *See, e.g.*, *Decca, Ltd.*, 640 F.2d at 1167.

(2) Reasonable and entire compensation can include attorneys' fees and costs. *See* 28 U.S.C. § 1498(a).

(3) Reasonable and entire compensation does not include treble damages for willfulness. *See Leesona Corp.*, 599 F.2d at 964.

c. The monetary remedy provided by § 1498(a) is exclusive ("reasonable and ***entire***"). *See Morpho Detection, Inc. v. Smiths Detection Inc.*, No. 2:11-cv-498, 2013 WL 5701522, at *5 (E.D. Va. Oct. 17, 2013).

(1) A patent owner cannot enjoin the Government from manufacturing or using its patented invention. *See Motorola, Inc. v. United States*, 729 F.2d 765, 768 n.3 (Fed. Cir. 1984) (holding that injunctive relief is not available against the Government).

(2) A patent owner cannot enjoin a Government contractor from manufacturing or using its patented invention "for the

United States." *See, e.g.*, *Trojan, Inc.*, 885 F.2d at 856-57 ("[A] patent owner may not use its patent to cut the government off from sources of supply, either at the bid stage of during performance of a government contract.").

(3) Section 1498 also applies to immunize a contractor from claims for indirect infringement (*i.e.*, inducing infringement under 35 U.S.C. § 271(b) and/or contributory infringement under 35 U.S.C. § 271(c)) where the predicate direct infringement is use and/or manufacture of the patented invention by the United States. *See Astornet Techs. Inc. v. BAE Systems, Inc.*, 802 F.3d 1271, 1277-78 (Fed. Cir. 2015) ("The language [of § 1498(a)] is not limited to claims that are *filed against the United States or its government agencies*. And it would cut a substantial hole in the provision, and its intended function, to read it to be limited in that way. Doing so would expose a significant range of government contractors to direct liability (and possible injunctive remedies), namely, those accused of indirect infringement of claims directly infringed by the government. There is no justification for departing from the clear meaning of the text to produce a result that runs counter to the evident, established statutory policy.") (emphasis in original).

B. Administrative Remedy for "Infringement" By Defense Agencies.

1. 10 U.S.C. § 2386, which permits DoD appropriations to be used to procure intellectual property licenses, allows DoD to settle patent infringement claims administratively.

2. The administrative claim procedures are set forth at DFARS Subpart 227.70.

3. An advantage of the administrative claims process is that it potentially allows the parties to avoid the time and expense of litigation.

4. Disadvantages of the administrative claims process include "piecemeal" settlements (*e.g.*, settlement on an agency-by-agency basis instead of a Government-wide settlement brokered by the Department of Justice) and the use of agency appropriations (vs. the Judgment Fund for Department of Justice settlements).

XIV. OTHER AGENCY REGULATIONS

A. Department of Energy Acquisition Regulation ("DEAR") Provisions

1. Patent Rights

   a. The DoE normally takes title to inventions made (that is, conceived or first actually reduced to practice) under contracts with entities that do not fall within the statutory language of the Bayh-Dole Act (*e.g.*, large, for-profit companies; foreign organizations). DoE can, however, waive this right to take title, either at the time of contracting or thereafter (*e.g.*, when the contractor reports an invention). *See* 42 U.S.C. §§ 2182, 5908; DEAR 927.300(b); DEAR 927.302. *Compare* DEAR 952.227-13 (Patent Rights Acquisition by the Government, required in most DoE contracts) *with* DEAR 952.227-11 (Patent Rights by the Contractor (Short Form), for contracts with parties that fall within the statutory language of the Bayh-Dole Act).

   b. If the DoE takes title, the contractor will ordinarily retain a nonexclusive, revocable, royalty-free license in the invention. *See* DEAR 927.302(a).

   c. At a minimum, the Government shall have a worldwide, nonexclusive, nontransferable, irrevocable, paid-up license to practice the invention or to have the invention practiced by or on behalf of the Government. *See* DEAR 952.227-13(c)(1).

2. Contracts for the Management and Operation of DoE Facilities. The DoE also has special patent and data rights clauses for use in contracts for the management and operation ("M&O") of DoE facilities (*e.g.*, Government-owned, contractor-operated facilities).

   a. Patent Rights

      (1) The DoE will generally take title to inventions made under an M&O contract related to DoE's naval nuclear propulsion or weapons programs. *See* DEAR 970.2703-2(b); DEAR 970.5227-11.

      (2) The DoE will also generally take title to inventions made by large, for-profit M&O contractors where the M&O contract does not include a technology transfer mission. *Id.*

      (3) On the other hand, M&O contractors that fall within the statutory scope of the Bayh-Dole Act will generally have the right to elect to retain title to subject inventions. *See* DEAR 970.2703-2(a); DEAR 970.5227-10.

   b. Data Rights

(1) There are two data rights clauses for DoE M&O contracts: DEAR 970.5227-1 for use in M&O contracts without a technology transfer mission, and DEAR 970.5227-2 for use in M&O contracts with a technology transfer mission. *See* DEAR 970.2704-1(a).

(2) Both clauses generally grant the Government ***ownership*** of data first produced in the performance of the contract. *See* DEAR 970.5227-1(b)(1)(i); DEAR 970.5227-2(b)(1)(i). The contractor, however, generally retains a license to use such data "for its private purposes[.]" DEAR 970.5227-1(b)(2)(ii); DEAR 970.5227-2(b)(2)(ii).

(3) The clauses also grant the Government ***unlimited rights*** in data "specifically used in the performance of [the] Contract, except as provided . . . regarding copyright, limited rights data, or restricted computer software[.]" DEAR 970.5227-1(b)(1)(ii); DAR 970.5227-2(b)(1)(ii).

(4) The principal difference between the clauses is that the "Technology Transfer" clause has a more detailed treatment of copyright. This is because "[i]n management and operating contracts that have technology transfer as a mission, the right to assert copyright in data first produced under the contract will be a valuable right, and commercialization of such data, including computer software, will assist the management and operating contractor in advancing the technology transfer mission of the contract." DEAR 970.2704-2(e). Thus, the "Technology Transfer" clause "provides for DOE approval of DOE's taking a limited copyright license for a period of five years, and, in certain rare cases, specified longer periods in order to contribute to commercialization of the data." *Id. See also* DEAR 970.5227-2(c)-(e).

B. NASA FAR Supplement ("NFS") Patent Rights Provisions

1. The contractor's right to elect to retain title in and to a subject invention under the Bayh-Dole Act only applies to contracts with small businesses and non-profit organizations (*e.g.*, entities that fall within the statutory language of the Bayh-Dole Act). *See* NFS 1827.302(b)(i).

2. NASA will waive its right to obtain title to subject inventions in other cases, either at the time of contracting or on an invention-by-invention basis "if the Administrator determines that the interests of the United States will be served" by so doing. NFS 1827.302(b)(ii).

3. At a minimum, the contractor shall have a revocable, nonexclusive, royalty-free license in any patent application or patent directed to a subject invention in which NASA took title. *See* NFS 1827.302(i)(1).

4. At a minimum, the Government shall have a worldwide, nonexclusive, nontransferable, irrevocable, paid-up license to practice the invention or to have the invention practiced by or on behalf of the Government. *See* NFS 1827.302(c).

CHAPTER 17

ETHICS IN GOVERNMENT CONTRACTING

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CHAPTER 17

ETHICS IN GOVERNMENT CONTRACTING

"Implementing values-based decision-making from the top down will foster a culture of ethics and promote accountability, respect and transparency throughout the Department."

-- Ash Carter (Secretary of Defense from Feb. 2015 to Jan. 2017)

I. REFERENCES

1) Statutes

18 U.S.C. § 208, Acts Affecting A Personal Financial Interest.

41 U.S.C. § 2101 et seq., The Procurement Integrity Act.

18 U.S.C. § 207, Restrictions on Former Officers, Employers, and Elected Officials of the Executive and Legislative Branches.

2) Regulations

5 C.F.R. Part 2635, Standards of Ethical Conduct for Employees of the Executive Branch.

5 C.F.R. Part 2637, Regulations Concerning Post Employment Conflict of Interests. These regulations only apply to employees who left Federal service before 1 January 1991. The Office of Government Ethics (OGE), however, continues to rely on them for issuing guidance for employees who left Federal service after 1 January 1991.

5 C.F.R. Part 2640, Interpretations, Exemptions and Waiver Guidance Concerning 18 U.S.C. § 208.

5 C.F.R. Part 2641, Post-Employment Conflict of Interest Restrictions.

OGE Memorandum, Summary of Post-Employment Restrictions of 18 U.S.C. § 207 (July 29, 2004).

Federal Acquisition Regulation (FAR) Part 3 (Dec. 4, 2015).

Department of Defense (DoD) Defense Federal Acquisition Regulation Supplement (DFARS) Part 203 (Dec. 11, 2014).

National Defense Authorization Act for Fiscal Year 2004 (P. L. 108-136), Section 1125.

3) Directives.

DoD 5500.07-R, Joint Ethics Regulation (JER), including changes 1-7 (Nov. 17, 2011).

4) Websites.

United States Department of Defense Standards of Conduct Office (SOCO), available at http://ogc.osd.mil/defense_ethics/. Handouts and forms: https://ogc.osd.mil/defense_ethics/handouts/handouts.html.

United States Office of Government Ethics, available at https://www.oge.gov/.

II. FINANCIAL CONFLICTS OF INTEREST.

An employee is prohibited from participating personally and substantially in his or her official capacity in any particular matter in which he or she has a financial interest, if the particular matter will have a direct and predictable effect on that interest. 18 U.S.C. § 208; 5 C.F.R. § 2640.103.

1) *Applicability*.

Officers and Government Civilians – Direct application by the statute.

Enlisted Personal – 18 U.S.C. § 208 does not apply to enlisted members, but the Joint Ethics Regulation (JER) subjects enlisted members to similar regulatory prohibitions that are punishable under the Uniform Code of Military Justice. *See* JER, paras. 1-300.b(1)(a) and 5-301. Regulatory implementation of 18 U.S.C. § 208 is found in chapters 2 and 5 of the JER and at 5 C.F.R § 2640.

Reserve Personnel – Prior to the start of active duty for Reserve personnel, Ethics Counselors should screen such personnel to prevent conflicts of interest, the appearance of conflicts of interest, or organizational conflicts of interest. Reservists have an affirmative obligation to disclose material facts in this regard. Reserve personnel also should not be assigned to duties in which they could obtain non-public information that they or their private employer could use to gain an unfair competitive advantage. JER 5-408.

2) *Definitions.*

<u>Financial Interests.</u> The term financial interest means the potential for gain or loss to the employee or other persons whose interests may be imputed to the employee (discussed below), as a result of governmental action on the particular matter. The disqualifying financial interest might arise from ownership of certain financial instruments or investments such as stock, bonds, mutual funds, or real estate. Additionally, a disqualifying financial interest might derive from a salary, indebtedness, job offer, or any similar interest that may be affected by the matter. 5 C.F.R. § 2640.103(b). The statute also prohibits an employee from personally

and substantially participating in a particular matter that has a direct and predictable effect on the financial interests of a prospective employer with whom the employee is seeking employment. 5 C.F.R. § 2635.604(a)(1).

Personally. Defined as direct participation, or direct and active supervision of a subordinate. 5 C.F.R. § 2640.103(b)(2).

Substantially. Defined as an employee's involvement that is significant to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to the matter, but also on the importance of the effort. 5 C.F.R. § 2640.103(b)(2).

Particular Matter. Defined as a matter involving deliberation, decision, or action focused on the interests of specific persons, or an identifiable class of persons. However, matters of broad agency policy are not particular matters. 5 C.F.R. § 2640.103(b)(1).

Direct and Predictable Effect. Defined as a close, causal link between the official decision or action and its effect on the financial interest.

An effect may be direct even though it does not occur immediately. A particular matter will not have a direct effect on a financial interest, however, if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter.

A particular matter will have a "predictable" effect if there is a real, as opposed to a speculative, possibility that the matter will affect the financial interest. It is not necessary, however, that the magnitude of the gain or loss be known, and the dollar amount of the gain or loss is immaterial. 5 C.F.R. § 2640.103(b)(3).

3) *Imputed Interests.*

Under 5 C.F.R. § 2640.103(c), the financial interests of the following persons are imputed to the employee:

a) The employee's spouse (including same-sex marriages);[1]

b) The employee's minor child;

c) The employee's general partner;

[1] *See* "Effect of the Supreme Court's Decision in United States v. Windsor on the Executive Branch Ethics Program," Aug. 19, 2013. https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/6D38C1EBF15F873885257E96005FBF02/$FILE/LA-13-10.pdf?open

d) An organization or entity which the employee serves as an officer, director, trustee, general partner, or employee; and

e) A person with whom the employee is negotiating for employment or has an arrangement concerning prospective employment.

4) *Negotiating for Employment.*

The term "negotiating" is interpreted broadly. United States v. Schaltenbrand, 930 F.2d 1554 (11th Cir. 1991).

No special action is required. Any discussion regarding opportunities, however tentative, may be negotiating for employment. Something as simple as going to lunch to discuss future prospects could be the basis for a conflict of interest.

Negotiating for employment is the same as buying stock in a company. If an employee could own stock in a company without creating a conflict of interest with his official duties (*e.g.*, the company does not do business with the government), then that person may negotiate for employment with that company.

Conflicts of interest are always analyzed in the present tense. If an employee interviews for a position and decides not to work for that company, then he or she is free to later work on matters affecting that company.

The Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act), Pub. L. No. 112-105, 126 Stat. 291 (2012), includes a provision that applies to OGE 278 filers who are negotiating, or have secured, future employment or compensation. Such filers may not directly negotiate, or have any agreement of future employment or compensation, unless such individual, within 3 business days after the commencement of such negotiation or agreement of future employment or compensation, files with the individual's supervising ethics office a statement, signed by such individual, regarding such negotiations or agreement, including the name of the private entity or entities involved in such negotiations or agreement, and the date such negotiations or agreement commenced.

5) *Seeking Employment.*

OGE regulations contain additional requirements for disqualification of employees who are "seeking employment." 5 C.F.R. §§ 2635.601 - 2635.606. "Seeking employment" is a term broader than "negotiating for employment" found in 18 U.S.C. § 208. An employee begins "seeking employment" if he or she has directly or indirectly:

a) Engaged in employment negotiations with any person. "Negotiations" means discussing or communicating with another person, or that person's agent, with the goal of reaching an agreement for employment. This term is not limited to discussing specific terms and conditions of employment. 5 C.F.R. § 2635.603(b)(1)(i).

b) Made an unsolicited communication to any person or that person's agent, about possible employment. 5 C.F.R. § 2635.603(b)(1)(ii).

c) Made a response ***other than an immediate rejection*** to an unsolicited communication from any person or that person's agent about possible employment. 5 C.F.R. § 2635.603(b)(1)(iii).

An employee has not begun "seeking employment" if he or she makes an unsolicited communication for the sole purpose of requesting a job application.[2] 5 C.F.R. § 2635.603(b)(1)(ii).

An employee is no longer "seeking employment" under the following circumstances:

a) The employee or prospective employer rejects the possibility of employment and all discussions have terminated. 5 C.F.R. § 2635.603(b)(2)(i). However, a statement by the employee that merely defers discussions until the foreseeable future does not reject or close employment discussions. 5 C.F.R. § 2635.603(b)(3).

b) Two months have lapsed after the employee has submitted an unsolicited résumé or employment proposal with no response from the prospective employer. 5 C.F.R. § 2635.603(b)(2)(ii).

6) *Remedies.*

Disqualification. Disqualification is the statutory default remedy. With written notice to, and the approval of, his or her supervisor, the employee must change duties to eliminate any contact or actions affecting that company. 5 C.F.R. § 2640.103(d); JER, para. 2-204.

Waiver. An employee otherwise disqualified by 18 U.S.C. § 208(a) may be permitted to participate personally and substantially in a particular matter if the disqualifying interest is the subject of a waiver. Waivers may be "individual" or "blanket." Waivers are appropriate if all other options are inadequate or inappropriate. 5 C.F.R. § 2635.402(d).

Individual Waivers. The rules for individual waivers are at 5 C.F.R. §§ 2640.301-302, and JER, para. 5-302. An agency may grant an individual waiver on a case-by-case basis after the employee fully discloses the financial interest to the agency. The criterion is whether the employee's conflicting financial interest is not so substantial as to affect the integrity of his or her service to the agency. 5 C.F.R. § 2640.301(a)(4). In reaching this decision, 5 C.F.R. § 2640.301(b) directs the responsible official to consider:

[2] Previously, 5 C.F.R. § 2635.603(b)(1)(ii)(B) excepted from "seeking employment" submitting a resume or proposal only as part of an industry or other discrete class.

a) The type of interest that is creating the disqualification (*e.g.*, stocks, bonds, real estate, other securities, cash payment, job offer, and enhancement of spouse's employment).

b) The identity of the person whose financial interest is involved and if that interest is not the employee's, the relationship of that person to the employee.

c) The dollar value of the disqualifying financial interest, if it is known or can be estimated (*e.g.*, the amount of cash payment that may be gained or lost, the salary of the job that may be gained or lost, the predictable change in either the market value of the stock or the actual or potential profit or loss or cost of the particular matter to the company issuing the stock, or the change in the value of real estate or other securities).

d) The value of the financial instrument or holding from which the disqualifying financial interest arises (*e.g.*, face value of the stock, bond, other security, or real estate) and its value in relationship to the individual's investments.

e) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter.

f) Other potentially relevant factors: The sensitivity of the matter; the need for the employee's services in the particular matter; and adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that the integrity of the employee's services would be questioned by a reasonable person.

Divestiture. The employee may sell the conflicting financial interest to eliminate the conflict.[3] 5 C.F.R. § 2640.103(e).

Blanket (or Regulatory) Waivers and Exemptions. The rules for blanket waivers are at 5 C.F.R. § 2640, Subpart B. Blanket waivers include the following:

Pooled Investment Vehicles:

Diversified Mutual Funds. Diversified funds do not concentrate in any industry, business, or single country other than the United

[3] *See* OGE Program Advisory, "Release of OGE's Certificate of Divestiture Reference Guide," June 3, 2016, https://www2.oge.gov/web/oge.nsf/Program%20Management%20Advisories/A949E4FD89C07BA085257FC7006E343D/$FILE/PA-16-04.pdf?open; and Program Advisory, "Revised Format for Requesting a Certificate of Divestiture," August 27, 2019, https://www2.oge.gov/Web/OGE.nsf/Program%20Management%20Advisories/C39E4A61E5915A6385258464005E2EBE/$FILE/PA-19-10.pdf?open.

States. 5 C.F.R. § 2640.102(a). Owning a diversified mutual fund does not create a financial conflict of interest. 5 C.F.R. § 2640.201(a).

Sector Funds. Sector funds are those funds that concentrate in an industry, business, or single country other than the United States. 5 C.F.R. § 2640.201(b).

Owning a sector fund may create a conflict of interest, but there is a regulatory exemption if the holding that creates the conflict is not invested in the sector where the fund or funds are concentrated. 5 C.F.R. § 2640.201(b)(1).

An employee may participate in a particular matter affecting one or more holdings of a sector mutual fund where the disqualifying financial interest in the matter arises because of ownership of an interest in the fund and the aggregate market value of interests in any sector fund or funds does not exceed $50,000. 5 C.F.R. § 2640.201(b)(2).

Employee Benefit Plans. An employee may participate in an particular matter affecting the holdings of (a) a Thrift Savings Plan, (b) a pension plan established or maintained by a state government or political subdivision of a State government for its employees, or (c) a diversified employee benefit plan that meets the requirements of 5 C.F.R. § 2640.201(c)(1)(iii)(A) and (B). 5 C.F.R. § 2640.201(c).

De Minimis Exemptions related to Securities. 5 C.F.R. § 2640.202 creates *de minimis* exemptions for ownership by the employee, spouse, or minor child in publicly traded, long-term Federal Government, or municipal securities. The amount of the exemption depends on the type of matter at issue, and the type of security involved.

Miscellaneous Exemptions. 5 C.F.R. § 2640.203 creates numerous "miscellaneous" exemptions, including exemptions related to hiring decisions, issues related to institutions of higher education, financial interests related to Federal Government employment; commercial discount and incentive programs; etc.

7) *Penalties.*

Violating 18 U.S.C. § 208 may result in imprisonment up to one year, or, if willful, five years. *See* 18 U.S.C. § 216.

In addition, a fine of $5,000 to $250,000 is possible. *See* 18 U.S.C. § 3571.

FAR 3.1003 and 3.1004(a) require contractor reporting of conflicts of interests that violate 18 U.S.C. § 208. In contracts expected to exceed $5.5 million with a performance period 120 days or more, FAR 52.203-13 must be included.

III. THE PROCUREMENT INTEGRITY ACT.

On January 4, 2011, the Procurement Integrity Act (PIA) was codified for the first time at 41 U.S.C. §§ 2101-2107. The codified statute does not have a name but will be referred to in this chapter as "the Procurement Integrity Act." Prior to January 4, 2011, the PIA was found at Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186, 659-665 (1996) (rewriting Section 27, Office of Federal Procurement Policy Act (OFPPA) amendments of 1988, 41 U.S.C. § 423).

1) *Background of the PIA.* The basic provisions of the statute are set forth in FAR 3.104-3, and:

a) Prohibits disclosing and obtaining procurement information related to competitive federal procurements for supplies or services from non-federal sources using appropriated funds.

b) Requires reporting employment contacts related to competitive federal procurements above the simplified acquisition threshold.

c) Places post-employment restrictions on former officials for services provided or decisions made on or after January 1, 1997.

2) *Coverage*. Applies to "persons," "agency officials," and "former officials" as defined in the PIA. *See* GEO Group, Inc. v. United States, 100 Fed. Cl. 223 (2011) (finding that the PIA, as well as the organizational conflict of interest rules, do not cover situations in which a bidder directly obtains information from a competing bidder).

3) *Restrictions on Disclosing and Obtaining Contractor Bid or Proposal Information or Source Selection Information.*

a) Restrictions on Disclosure of Information. 41 U.S.C. § 2102(a)(3). The following persons are forbidden from knowingly disclosing contractor bid or proposal information or source selection information before the award of a contract:

i) Present or former federal officials;

ii) Persons (such as contractor employees) who are currently advising the federal government with respect to a procurement; or

iii) Persons (such as contractor employees) who have advised the federal government with respect to a procurement, but are no longer doing so; and

iv) by virtue of their office, employment, or relationship have access to contractor bid or proposal information or source selection information.

b) Restrictions on Obtaining Information. 41 U.S.C. § 2102(b). Persons (other than as provided by law) are forbidden from knowingly obtaining contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.

c) Relevant Definitions:

Contractor bid or proposal information. 41 U.S.C. § 2101(2) defines contractor bid or proposal information as any of the following that has not been disclosed publicly:

i) Cost or pricing data as defined in 10 U.S.C. § 2306a and 41 U.S.C. § 3501(a);

ii) Indirect costs and direct labor rates;

iii) Proprietary information about manufacturing processes, operations, or techniques marked in accordance with applicable law or regulation; and

iv) Information marked by the contractor as "contractor bid or proposal information" in accordance with applicable law or regulation. If the contracting officer disagrees with the Contractor's position, he or she must give the contractor notice and an opportunity to respond prior to release of marked information. FAR 3.104-4(d). *See* Chrysler Corp. v. Brown, 441 U.S. 281 (1979); CNA Finance Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987), cert. den. 485 U.S. 917 (1988).

Source Selection Information. 41 U.S.C. § 2101(7) defines source selection information as any of the following that has not been disclosed publicly:

i) Bid prices before bid opening;

ii) Proposed costs or prices in negotiated procurement;

iii) Source selection plans;

iv) Technical evaluation plans;

v) Technical evaluations of proposals;

vi) Cost or price evaluations of proposals;

vii) Competitive range determinations that identify proposals that have a reasonable chance of being selected for award;

viii) Rankings of bids, proposals, or competitors;

ix) Reports and evaluations of source selection panels, boards, or advisory councils; and

x) Other information marked as "source selection information" if release would jeopardize the integrity of the competition.

4) *Reporting Non-Federal Employment Contacts*.

Mandatory Reporting Requirement. 41 U.S.C. § 2103(a). An agency official who is participating personally and substantially in an acquisition over the simplified acquisition threshold must report employment contacts with bidders or offerors. Reporting may be required even if the contact is through an agent or intermediary. FAR 3.104-5(a).

Report must be in writing and provided to the official's supervisor and the designated agency ethics official. 41 U.S.C. § 2103(a)(1); *see also* FAR 3.104-1.

The agency official must also:

a) Promptly reject the possibility of employment; or

b) Disqualify him/herself from the procurement until authorized to resume participation in accordance with 18 U.S.C. § 208.

i) Disqualification notice. Employees who disqualify themselves must submit a disqualification notice to the head of the contracting activity (HCA) or designee, with copies to the contracting officer, source selection authority, and immediate supervisor. FAR 3.104-5(b).

ii) As discussed above in Section 3, 18 U.S.C. § 208, requires employee disqualification from participation in a particular matter if the employee has certain financial interests in addition to those which arise from employment contacts.

Both officials and bidders who engage in prohibited employment contacts are subject to criminal penalties and administrative actions.

"Participating personally and substantially" means active and significant involvement in:

a) Drafting, reviewing, or approving a statement of work;

b) Preparing or developing the solicitation;

c) Evaluating bids or proposals, or selecting a source;

d) Negotiating price or terms and conditions of the contract; or

e) Reviewing and approving the award of the contract. FAR 3.104-1.

The following activities are generally considered **not** to constitute personal and substantial participation:

a) Certain agency level boards, panels, or advisory committees that make recommendations regarding approaches for satisfying broad agency-level missions or objectives;

b) General, technical, engineering, or scientific effort of broad applicability and not directly associated with a particular procurement;

c) Clerical functions in support of a particular procurement; and

d) For OMB Circular A-76 cost comparisons: participating in management studies; preparing in-house cost estimates; preparing "most efficient organization" (MEO) analyses; and furnishing data or technical support **to be used by others** in the development of performance standards, statements of work, or specifications. FAR 3.104-1.

5) *Post-Government Employment Restrictions*. *See* FAR 3.104-3(d).

<u>One-Year Ban</u>. 41 U.S.C. § 2104(a). A former official of a Federal agency may not accept compensation as an employee, officer, director, or consultant from a contractor that has been awarded a contract **in excess of $10 million** (inclusive of options), within a **period of one-year** after such former official served, with respect to that contract, as:

a) Contracting officer (procuring or administrating CO),

b) Source Selection Authority (SSA),

c) Member of the Source Selection Evaluation Board (SSEB),

d) The chief of a financial or technical evaluation team, or

e) Program manager or deputy program manager.

This one-year ban also applies with to a government official that <u>personally</u> made a decision with respect to that contract to:

a) Award a contract, subcontract, modification of a contract or subcontract, or issue a task order or delivery order in excess of $10 million;

b) Establish overhead or other rates valued in excess of $10 million;

c) Approve a contract payment or payments in excess of $10 million; or

d) Pay or settle a claim in excess of $10 million.

In "excess of $10 million" means:

a) The value or estimated value of the contract including options;

b) The total estimated value of all orders under an indefinite-delivery, indefinite-quantity contract, or a requirements contract;

c) Any multiple award schedule contract, unless the contracting officer documents a lower estimate;

d) The value of a delivery order, task order, or order under a Basic Ordering Agreement;

e) The amount paid, or to be paid, in a settlement of a claim; or

g) The estimated monetary value of negotiated overhead or other rates when applied to the Government portion of the applicable allocation base. FAR 3.104-1.

Start of the One-Year Ban Period.

If the former official was in a specified position (source selection type) on the date of contractor selection, but not on the date of award, the ban begins on the date of selection.

If the former official was in a specified position (source selection type) on the date of award, the ban begins on the date of award.

If the former official was in specified position (program manager, deputy program manager, administrative contracting officer), the ban begins on the last date of service in that position.

If the former official personally made certain decisions (award, establish overhead rates, approve payment, settle claim), the ban begins on date of decision. FAR 3.104-3(d)(2).

The one-year ban does not prohibit an employee from working for any division or affiliate that does not produce the same or similar product or services. 41 U.S.C. § 2104(b).

Ethics Advisory Opinion. Agency officials and former agency officials may request an advisory opinion as to whether he or she is precluded from accepting compensation from a particular contractor. FAR 3.104-6(a).

6) *Penalties and Sanctions.*

Criminal Penalties. 41 U.S.C. § 2105(a). Violating the prohibition on disclosing or obtaining procurement information may result in confinement for up to five years and a fine if done in exchange for something of value, or to obtain or give a competitive advantage.

Civil Penalties. 41 U.S.C. § 2105(b).

The Attorney General may take civil action for wrongfully disclosing or obtaining procurement information, failing to report employment contacts, or accepting prohibited employment.

Civil penalty is up to $50,000 (individuals) and up to $500,000 (organizations) plus twice the amount of compensation received or offered.

If violations occur, the agency shall consider cancellation of the procurement, rescission of the contract, suspension or debarment, adverse personnel action, and recovery of amounts expended by the agency under the contract. FAR 52.203-8 advises contractors of the potential for cancellation or rescission of a contract, recovery of any penalty prescribed by law, and recovery of any amount expended under the contract. Another clause advises the contractor that the government may reduce contract payments by the amount of profit or fee for violations. FAR 52.203-10.

A contracting officer may disqualify a bidder from competition whose actions fall short of a statutory violation, but call into question the integrity of the contracting process. *See* Compliance Corp., B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126, aff'd on recon., B-239252.3, Nov. 28, 1990, 90-2 CPD ¶ 435; Compliance Corp. v. United States, 22 Cl. Ct. 193 (1990), aff'd, 960 F.2d 157 (Fed. Cir. 1992) (contracting officer has discretion to disqualify from competition a bidder who obtained proprietary information through industrial espionage not amounting to a violation of the PIA); *see also* NKF Eng'g, Inc. v. United States, 805 F.2d 372 (Fed. Cir. 1986) (contracting officer has authority to disqualify a bidder based solely on appearance of impropriety when done to protect the integrity of the contracting process).

The Contracting Officer must:

a) Take action on possible violations; and

b) Determine impact of violation on award or source selection.

i) If no impact, forward information to individual designated by agency. Proceed with procurement, subject to contrary instructions.

ii) If impact on procurement, forward information to the HCA or designee. FAR 3.104-7.

Limitation on protests. 41 U.S.C. § 2106. No person may file a protest, and GAO may not consider a protest, alleging a PIA violation unless the protester first reported the alleged violation to the agency within 14 days of its discovery of the possible violation. *See also* FAR 33.102(f).

IV. REPRESENTATIONAL PROHIBITIONS.

1) *Background*. 18 U.S.C. § 207 and its implementing regulations bar certain acts by former employees that may reasonably give the appearance of making unfair use of their prior employment and affiliations.

A former employee involved in a particular matter while working for the government may not "switch sides" after leaving government service to represent another person on that matter.

18 U.S.C. § 207 does not bar a former employee from working for any public or private employer after government service. The regulations state that the statute is not designed to discourage government employees from moving to and from private positions. Rather, such a "flow of skills" promotes efficiency and communication between the government and the private sector, and is essential to the success of many government programs. The statute bars only certain acts "detrimental to public confidence."

18 U.S.C. § 207 does not prohibit an employee from working for any entity, but it does restrict how a former employee may work for the entity. With the exception of §§ 207(b) and (f), the statute does not bar behind the scenes involvement. But see January 19, 2001, opinion from the Department of Justice to OGE suggesting that a former employee who is the sole proprietor of a business "working behind the scenes" may constitute "communication with the intent to influence" Government decisions, found at: https://www.justice.gov/sites/default/files/olc/opinions/2001/01/31/op-olc-v025-p0059_0.pdf.

2) *Applicability*. 18 U.S.C. § 207 applies to all former officers and civilian employees whether or not retired, but **does not apply to enlisted personnel** because they are not included in the definition of "officer or employee" in 18 U.S.C. § 202.

Military officers on terminal leave are still on active duty. While they may begin a job with another employer during this time, their exclusive loyalty must remain with the government until their retirement or ETS pay date.

Two restrictions apply to non-government employment during terminal leave:

a) All officers and employees are prohibited from representing anyone in any matter in a U.S. forum, or in any claim against the United States. 18 U.S.C. § 205.

b) Commissioned officers are prohibited from holding a state or local government office, or otherwise exercising sovereign authority. 10 U.S.C. § 973. This does not prohibit employment by a state or local government; it only prohibits the exercise of governmental authority. For example, a police officer or judge exercises governmental authority; a motor pool chief does not.

3) *Permanent Ban*.

18 U.S.C. § 207(a)(1) imposes a permanent prohibition on the former employee against communicating or appearing[4] **with the intent to influence a particular matter**, on behalf of anyone other than the government, when:

a) The government is a party, or has a direct and substantial interest in the matter;

b) The former officer or employee participated personally and substantially in the matter while in his official capacity; and

c) At the time of the participation, specific parties other than the government were involved.

4) *Two-Year Ban*.

18 U.S.C. § 207(a)(2) prohibits, for two years after leaving federal service, a former employee from communicating or appearing with the intent to influence a particular matter, on behalf of anyone other than the government, when:

a) The government is a party, or has a direct and substantial interest in the matter; and

b) The former officer or employee knew or should have known that the matter was pending under his official responsibility during the one year period prior to leaving federal service; and

c) At the time of participation, specific parties other than the government were involved.

5) *One-Year Ban*.

18 U.S.C. § 207(b) prohibits, former officers and employees, for one year after leaving federal service, from knowingly representing, aiding or advising an employer or any entity regarding ongoing trade or treaty negotiations based on information that they had access to and that is exempt from disclosure under the Freedom of Information Act. This restriction begins upon separating or retiring from government service and, unlike the restrictions of provisions of 18 U.S.C. §

[4] "Communication" and "appearance" are broadly defined under 5 C.F.R. § 2641.201(d) and (e)(4).

207(a)(1) or (2) discussed above, **prohibits former officials from providing "behind-the-scenes" assistance on the basis of the covered information to any person or entity**.

This restriction applies only if the former official was personally and substantially involved in ongoing trade or treaty negotiations within the last year of his government service, but it is not necessary that the former official have had contact with foreign parties in order to have participated personally and substantially in a trade or treaty negotiation.

The treaty negotiations covered by this section are those that result in international agreements that require the advice and consent of the Senate. 18 U.S.C. § 207(b)(2)(B).

The trade negotiations covered are those that the President undertakes under section 1102 of the Omnibus Trade and Competitiveness Act of 1988. 18 U.S.C. § 207(b)(2)(A).

18 U.S.C. § 207(c) prohibits, for one year after leaving federal service, certain "senior employees" (determined by specified pay thresholds, typically general officer or SES-level) from communicating or appearing with the intent to influence a particular matter, on behalf of anyone other than the U.S. Government, when:

The communication or appearance involves the department or agency the officer or employee served during his last year of federal service as a senior employee; and

The person represented by the former officer or employee seeks official action by the department or agency concerning the matter.[5]

V. SECTION 847 OF PUB. L. 110-181 - COVERED DOD EMPLOYEES

1) On January 15, 2009, the Department of Defense (DoD) issued an interim rule enacting Section 847 of Pub. L. 110-181 and requiring certain "Covered DOD officials" to acquire an ethics opinion letter prior to going to work for a DoD contractor. DFARS 203.171-3

2) The DFARS defines covered DoD officials as DoD personnel who leave or left federal service on or after January 28, 2008, and who meet either of the following two service criteria:

[5] 18 U.S.C. § 207(h) permits DoD to be divided into components for purposes of restrictions imposed by § 207(c). Thus, a Navy Admiral is prohibited from communicating, with the intent to influence official action, with Department of Navy officials. However, the officer may communicate with representatives of other services and OSD (unless he or she was assigned to a joint command during his last year of service).

a) They participated personally and substantially in an acquisition as defined in 41 U.S.C § 131 with a value in excess of $10 million, and serves or they served:

i) In an Executive Schedule position;

ii) In a Senior Executive Service position; or

iii) In a general or flag officer position in the pay grade of 0-7 or higher.

iv) They served in DoD in one of the following positions for a contract with a value in excess of $10 million:

A) program manager (or deputy);

B) contracting officer (administrative or procuring);

C) source selection authority or source selection evaluation board member; or

D) chief of a financial or technical evaluation team for a contract in excess of $10 million. DFARS 252.203-7000.

3) This rule prohibits Contractors from knowingly providing compensation to a covered DoD official within 2 years after the official leaves DoD service, without first determining that the official has sought and received, or has not received after 30 days of seeking, a written opinion from the appropriate DoD ethics counselor. DFARS 252.203-7000(b). Failure to comply with this requirement may subject the Contractor to recession of a contract, suspension or debarment.

VI. DEALING WITH CONTRACTORS.

1) General Rule. Government business shall be conducted in a manner that is above reproach, with complete impartiality, and with preferential treatment for none. FAR 3.101-1.

2) Some pre-contract contacts with industry are permissible, and in fact are encouraged where the information exchange is beneficial (*e.g.*, necessary to learn of industry's capabilities or to keep them informed of our future needs). FAR Part 5. Some examples are:

a) Research and development. Agencies will inform industrial, educational, research, and non-profit organizations of current and future military RDT&E requirements. However, a contracting officer will supervise the release of the information. AR 70-38, para. 1-6(c)(3), Research, Development, Test, and Evaluation of Materiel for Extreme Climatic Conditions (Reprinted W/Basic Incl C1) (Sept. 15, 1979).

b) Unsolicited proposals. Companies are encouraged to make contacts with agencies before submitting proprietary data or spending extensive effort or money on these efforts. FAR 15.604.

VII. RELEASE OF ACQUISITION INFORMATION.

1) The integrity of the acquisition process requires a high level of business security.

2) Contracting officers may make information available to the public except for information regarding:

a) Plans that would provide undue discriminatory advantage to private or personal interests.

b) Received in confidence from offerors. 18 U.S.C. § 1905; FAR 15.506(e).

c) Otherwise requiring protection under the Freedom of Information Act.

d) Pertaining to internal agency communications (e.g., technical reviews). FAR 5.401(b).

e) Estimates regarding unclassified long-range acquisition estimates. FAR 5.404.

3) When releasing acquisition information, the Agency should:

a) Furnish identical information to all prospective contractors.

b) Release information as nearly simultaneously as possible, and only through designated officials (i.e., the contracting officer).

c) Not give out advance information concerning future solicitations to anyone. See generally FAR 14.203-2; but see FAR 15.201 (early exchange of information regarding future acquisitions promotes early identification and resolution of a variety of concerns).

VIII. CONTRACTOR PERSONAL CONFLICTS OF INTEREST

Background. FAR 3.11 implements the Duncan Hunter National Defense Authorization Act, 41 U.S.C. § 2303, and addresses personal conflicts of interest of Federal contractor and subcontractor employees performing "acquisition functions closely associated with inherently governmental functions."

1) *Rule.* The rule requires Federal government contractors and qualifying subcontractors to:

a) Identify and prevent personal conflicts of interest of their covered employees; and

b) Prohibit covered employees who have access to non-public information--by reason of performance on a Government contract--from using such information for personal gain. FAR 3.1102.

2) *Applicability*. FAR clause 52.203-16, Preventing Personal Conflicts of Interest, must be included in Federal contracts and task or delivery orders issued after December 2, 2011 that require contractor employees to perform tasks closely associated with "inherently governmental functions." However, the rule does not apply to certain acquisitions below the simplified acquisition threshold. *See* FAR 3.1106.

3) *Government Requirements*. Upon receipt of a report of a possible personal conflict of interest from a contractor, the contracting officer must:

a) Review the actions taken by the contractor and determine whether the contractor actions have resolved the issue.

b) If the contractor has not satisfactorily resolved the issue, the contracting officer should take "appropriate action" after consulting with legal counsel. FAR 3.1103(b).

IX. MISCELLANEOUS TOPICS.

1) OGE 278s. Termination Public Financial Disclosure Reports must be filed within 30 days of leaving a covered 278 position (date of retirement for Flag and General Officers). *See* JER 7-200 thru 7-209.

2) Non-public Information. All former officers and employees must protect non-public information, trade secrets, classified information, and procurement sensitive information after leaving federal service. 18 U.S.C. § 1905.

3) JER 11-301 requires post-employment and disqualification issues to be included in annual ethics training.

4) JER 8-400 requires that all public financial disclosure filers certify annually that they are aware of the post-government service restrictions and the PIA post-government service restriction. See the OGC Annual Post-Employment Certification.
http://ogc.osd.mil/defense_ethics/resource_library/post_emp_cert.pdf

5) JER 9-402 requires that ethics officials provide post-government service employment guidance during out processing. Travel, Meals & Reimbursements. Government employees may accept travel expenses to attend job interviews if such expenses are customarily paid to all similarly situated job applicants. These

payments must be reported on Schedule B of the OGE 278. 5 C.F.R. § 2635.204(e)(3).

6) Reserve Officers. Reserve officers are subject to the post-government employment law. While it is not possible to include every situation in a summary, the SOCO has prepared a quick-reference table that summarizes restrictions applicable to Reserve Officers in various situations. The table is styled as the Reserve Officer Post-Government Employment Matrix and can be found at: http://ogc.osd.mil/defense_ethics/resource_library/reserve_matrix.pdf.

7) OPM Notice. The Office of Personnel Management requires that Departments notify all public filers subject to 18 U.S.C. § 207(c) what the restrictions are, restrictions regarding 18 U.S.C. § 207(f), and the penalties for violating 18 U.S.C. § 207. 5 C.F.R. Part 730.104. The post-government employment handouts on the SOCO web site customized to your agency, along with the ethics official's name, address and phone number, should be given to your personnel office so that it can include this information in its notice.

8) Government Charge Card Abuse Prevention Act, 41 U.S.C. § 1909 requires agency heads to establish safeguards to over government charge cards, including:

a) Card holders may not be approving official for their own purchases.

b) Charges must be reconciled with receipts and supporting documentation.

c) Agencies must have appropriate penalties for violations, up to and including dismissal from employment.

d) Reporting requirements to OMB for certain violations.

e) Credit checks and minimum credit score before travel cards can be issued.

The requirements of 41 U.S.C. § 1909 do not apply to the Department of Defense. 41 U.S.C. § 1909(e). Rather, the Secretary of Defense is required under 10 U.S.C. § 2784 to prescribe regulations governing the use and control of all purchase cards and convenience checks.

X. CONCLUSION.

1) The ethical rules governing procurement officials are stricter than the general rules governing federal employees.

2) You must be familiar with the various ethical rules stated in the PIA and other statutes governing employment of former Federal employees.

3) Check the SOCO website (http://ogc.osd.mil/defense_ethics/) for the most up-to-date ethics related information.

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CHAPTER 18A

BID PROTESTS

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CHAPTER 18A

BID PROTESTS

"The laws and regulations that govern contracting with the federal government are designed to ensure that federal procurements are conducted fairly. On occasion, bidders or others interested in government procurements may have reason to believe that a contract has been or is about to be awarded improperly or illegally, or that they have been unfairly denied a contract or an opportunity to compete for a contract."

OFFICE OF GENERAL COUNSEL, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE (10th ed. 2018)

I. REFERENCES

A. Competition in Contracting Act (CICA), 31 U.S.C. §§ 3551-3556.

B. Tucker Act, 28 U.S.C. § 1491.

C. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 133(a), 96 Stat. 25, 40 (1982), 28 U.S.C. § 1491(a)(3).

D. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996), 28 U.S.C. §1491(b)(1).

E. Contracts: Competition Requirements, 10 U.S.C. §2304.

F. Government Accountability Office (GAO) Protest Regulations, 4 C.F.R. Part 21.

G. Federal Acquisition Regulation (FAR), 48 C.F.R. Subpart 33.

H. Agency FAR Supplements. See Appendix A for listing.

I. Rules of the United States Court of Federal Claims (RCFC), available at http://www.uscfc.uscourts.gov/rcfc

J. Bid Protests at GAO: A Descriptive Guide (10th ed. 2018), Office of General Counsel, U.S. GAO (GAO-18-510SP). Available at https://www.gao.gov/products/GAO-18-510SP.

II. INTRODUCTION

A. A "protest" is a written objection by an "interested party"[1] to a solicitation or other agency request for bids or offers, cancellation of a solicitation or other request, award or proposed award of a contract, or termination of a contract if terminated due to alleged improprieties in the award. FAR 33.101.

B. **Background.** Today's protest system was established by: (1) Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (1995) (agency-level protests); (2) the Competition in Contracting Act of 1984 (CICA), U.S.C. §§3551-3556 (protests before the Government Accountability Office); and (3) and the Tucker Act, 28 U.S.C. §1491 (as amended by the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996)) (protests before the Court of Federal Claims).

C. **Jurisdiction.** Multiple fora. An interested party may protest to the agency, the Government Accountability Office (GAO), or the United States Court of Federal Claims (COFC).[2] Regardless of the protest venue, contracting officers **must consider all protests and seek legal advice** regarding all protests filed with the agency. FAR 33.102(a). Section III of this chapter addresses protests filed with the agency, Section IV addresses protests filed at the GAO, and Section V addresses protests filed with the COFC.

D. **Remedies**.

1. Generally, protest fora can recommend or direct such remedial action as will bring the procurement into compliance with relevant acquisition laws and regulations. Normally however, neither directed contract award nor lost profits is available. Remedies are discussed further in the respective sections for each protest fora.

2. Injunctive or Similar Relief. Whether the filing of a protest to challenge a contract solicitation or an award creates an automatic stay or suspension of any work on the procurement is of critical importance and varies from forum to forum. Such relief is discussed in the Section for the relevant forum, *infra*.

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[1] An "interested party" is an actual or prospective offeror whose direct economic interests would be affected by the award of a contract or the failure to award a contract. FAR 33.101.

[2] While protesters are encouraged to seek resolution at the agency level prior to filing at the GAO or COFC, they are not required to do so. FAR 33.102(e); 4 C.F.R. Part 21; *see also* 28 U.S.C. §1491.

III. AGENCY PROTESTS.

A. Authority. Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (1995); FAR 33.103; Agency FAR Supplements – See Appendix A for a complete list of agency FAR supplement protest references.

B. Background and Policy. In 1995, President Clinton issued an Executive Order directing all executive agencies to establish alternative disputes resolution (ADR) procedures for bid protests. The order directs agency heads to create systems that, "to the maximum extent possible," will allow for the "inexpensive, informal, procedurally simple, and expeditious resolution of protests." Exec. Order No. 12979, 60 Fed. Reg. 55,171 (1995). FAR 33.103 implements this Order.

1. Prior to the submission of an agency protest, all parties shall use "their best efforts" to resolve issues and concerns **at the contracting officer level**. FAR 33.103(b).

2. Agency protest systems should:

   a. effectively resolve agency protests;

   b. help build confidence in the federal acquisition system; and

   c. reduce protests to the GAO and other judicial protest fora. FAR 33.103(d).

C. Procedures. FAR 33.103.

1. All protests filed with the agency should be addressed to the contracting officer or official designated to receive protests. FAR 33.103(d)(3).

2. Protests must be concise, logically presented, and include the following information:

   a. Name, address, and fax and telephone numbers of the protester.

   b. Solicitation or contract number.

   c. Detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protester.

   d. Copies of relevant documents.

   e. Request for a ruling by the agency.

   f. Statement as to the form of relief requested.

   g. All information establishing that the protester is an interested party for the purpose of filing a protest.

h. All information establishing the timeliness of the protest. FAR 33.103(d)(1) and (2).[3]

3. Timing of Protests.

a. Protests challenging the propriety of a solicitation must be filed **prior to bid opening or the closing date for receipt of proposals**. FAR 33.103(e).

b. In all other cases, the protests must be filed with the agency **within 10 days of when the protester knew or should have known of the basis for the protest**. For "significant issues" raised by the protester, however, the agency has the discretion to consider the merits of a protest that is otherwise untimely. FAR 33.103(e).

c. In both instances, "filed" means the complete receipt of any document by an agency before its close of business – 4:30 p.m., local time (unless otherwise stated). FAR 33.101.

4. Suspension of Procurement - Regulatory Stay.

a. Pre-Award Stay. The contracting officer **shall not** make award if an agency protest is filed before award. FAR 33.103(f)(1) imposes an administrative stay of the contract award.

(1) The agency may override the stay if one of the following applies:

(a) contract award is justified in light of "urgent and compelling" reasons; or

(b) a prompt award is in "the best interests of the Government."

(2) The override decision must be made in writing and then approved by an agency official "at a level above the contracting officer" or another official pursuant to agency procedures. FAR 33.103(f)(1).

(3) If the contracting officer elects to withhold award, she must inform all interested parties of that decision. If appropriate, the contracting officer should obtain extensions of bid/proposal acceptance times from the offerors. If the contracting officer cannot obtain extensions, she should

[3] Failure to provide the information contained in paragraphs C(2)(a)-(h) may be grounds for dismissal of the protest. FAR 33.103(d)(1).

consider an override of the stay and proceed with making contract award. FAR 33.103(f)(2).

b. Post-Award Stay. If the agency receives a protest within 10 days of contract award or 5 days of a "required" debriefing date offered by the agency,[4] the contracting officer shall suspend contract performance immediately. FAR 33.103(f)(3).

(1) The agency may override the stay if one of the following applies:

(a) contract performance is justified in light of "urgent and compelling" reasons; or

(b) contract performance is in "the best interests of the Government."

(2) The override determination must be made in writing and then approved by an agency official "at a level above the contracting officer" or another official pursuant to agency procedures. FAR 33.103(f)(3).

4. **NOTE:** Pursuing an agency protest does not extend the time for obtaining a CICA stay at GAO. Agencies may include, as part of the agency protest process, a voluntary suspension period when agency protests are denied and the protester subsequently files at GAO. FAR 33.103(f)(4).

D. Processing Protests.

1. Protesters generally present protests to the contracting officer, but they may also request an independent review of the protest at a level above the contracting officer, in accordance with agency procedures. Solicitations should advise offerors if this option is available. FAR 33.103(d)(4).

a. Agency procedures shall inform the protester whether this independent review is an alternative to consideration by the contracting officer or an "appeal" of a contracting officer's protest decision.

b. Agencies shall designate the official who will conduct this independent review. The official need not be in the supervisory chain of the contracting officer. However, "when practicable," the official designated to conduct the independent review "should not" have previous "personal involvement" in the procurement.

[4] *See* FAR 15.505 and FAR 15.506.

c. **NOTE:** If this "independent review" is an appeal of the contracting officer's initial protest decision, it does **NOT** extend GAO's timeliness requirements. *See infra* paragraph IV.E.

2. Agencies "shall make their best efforts" to resolve agency protests within 35 days of filing. FAR 33.103(g).

3. Discovery. To the extent permitted by law and regulation, the agency and the protester may exchange information relevant to the protest. FAR 33.103(g).

4. The agency decision shall be "well-reasoned" and "provide sufficient factual detail explaining the agency position." The agency must provide the protester a written copy of the decision via a method that provides evidence of receipt. FAR 33.103(h).

E. Remedies. FAR 33.102.

1. Failure to Comply with Applicable Law or Regulation. FAR 33.102(b). If the agency head determines that, as a result of a protest, a solicitation, proposed award, or award is improper, he may:

   a. take any action that the GAO could have "recommended," had the protest been filed with the GAO; and,

   b. award costs to the protester for prosecution of the protest.

2. Misrepresentation by Awardee. If, as a result of awardee's **intentional** or **negligent** misstatement, misrepresentation, or miscertification, a post-award protest is sustained, the agency head may require the awardee to reimburse the government's costs associated with the protest. The government may recover this debt by offsetting the amount against **any** payment due the awardee under **any** contract between the awardee and the government.[5] This provision also applies to GAO protests. FAR 33.102(b)(3).

3. Follow-On Protest. If unhappy with the agency decision, the protester may file its protest with either the GAO or COFC. If the vendor elects to proceed to the GAO, it must file its protest within 10 days of receiving notice of the agency's **initial adverse action**.[6] 4 C.F.R. § 21.2(a)(3).

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[5] In determining the liability of the awardee, the contracting officer shall take into consideration "the amount of the debt, the degree of fault, and the costs of collection." FAR 33.102(b)(3)(ii).

[6] In its Descriptive Guide, the GAO advises that it applies a "straightforward" interpretation of what constitutes notice of adverse agency action. Specific examples include: bid opening; receipt of proposals; rejection of a bid or proposal; or contract award. Bid Protests at GAO: A Descriptive Guide (10th ed. 2018), Office of General Counsel,

IV. GOVERNMENT ACCOUNTABILITY OFFICE (GAO).

A. Statutory Authority. The Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56, is the current statutory authority for GAO bid protests of federal agency procurements. 31 U.S.C. § 3533 authorizes GAO to issue implementing regulations.

B. Regulatory Authority. The GAO's bid protest rules are set forth at 4 C.F.R. Part 21. FAR provisions governing GAO bid protests are at FAR 33.104. Agency FAR supplements contain regulatory procedures for managing GAO protests. See generally AFARS 5133.104; AFFARS 5333.104; NMCARS 5233.104; DLAD 33.104. See also Appendix A, listing all agency FAR supplement protest references.

C. Standing Requirements.

1. 31 U.S.C. § 3551(1) and 4 C.F.R. § 21.1(a) provide that an "interested party" may protest to the GAO.

2. An "**interested party**" is "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract." 31 U.S.C § 3551(2); 4 C.F.R. § 21.0(a)(1).

   a. **Before** bid opening or proposal submission due date, a protester must be a **prospective bidder or offeror with a direct economic interest**.

      (1) A prospective bidder or offeror is one who has expressed an interest in competing. Integral Sys., Inc., B-405303, Aug. 16, 2011, 2011 CPD ¶ 161. ITT Elec. Sys., Inc., B-406405, B-406405.2, May 21, 2012, 2012 CPD ¶ 174.

      (2) If a protester challenges the terms of the solicitation, but it is clear, even if the protest is sustained, that the protester would be ineligible for award under the remaining terms of the solicitation, they are not an interested party. DGCI Corp., B-418494, Apr. 27, 2020, citing RELM Wireless Corp., B-405358, Oct. 7, 2011, 2011 CPD ¶ 211.

   b. **After** bid opening or the submission of proposals, a protester must be an **actual bidder or offeror with a direct economic interest**.

      (1) Next-in-Line. A bidder or offeror who is "**next-in-line**" for award is most likely an interested party. However, if a

U.S. GAO (GAO-18-510SP).

protester cannot receive award if it prevails on the merits, it is not an interested party. Ogden Support Servs., Inc., B-270354.2, Oct. 29, 1996, 97-1 CPD ¶ 135 (protester not an interested party where an intervening offeror has a higher technical score and a lower cost); International Data Prods., Corp., B-274654, Dec. 26, 1996, 97-1 CPD ¶ 34 (protesters rated eighth and ninth in overall technical merit were interested parties because improper technical evaluation alleged and lower-priced than awardee); Aegis Defense Services, LLC., B-412755, March 25, 2016, 2016 CPD ¶ 98 (in a multiple award contract, an awardee is not an interested party to protest another award, irrespective any alleged economic interest); Metson Marine Servs, Inc.,B-299705, July 20, 2007, 2007 CPD ¶ 159 (offeror reasonably found to be ineligible for award lacks interested party status).

(2) A high-priced bidder may be able to demonstrate that all lower-priced bidders would be ineligible for award, thus becoming the next-in-line. Professional Medical Prods., Inc., B-231743, July 1, 1988, 88-2 CPD ¶ 2.

(3) In a "best value" negotiated procurement, the GAO determines whether a protester is an interested party by examining the probable result if the protest is successful. Government Tech. Servs., Inc., B-258082, Sept. 2, 1994, 94-2 BCA ¶ 93 (protester not an interested party where it failed to challenge higher-ranked intervening offerors); Rome Research Corp., B-245797, Sept. 22, 1992, 92-2 CPD ¶ 194.

(4) Opportunity to Compete. An actual bidder, not next-in-line for award, is an interested party if it would **regain the opportunity to compete** if the GAO sustains its protest. This occurs if the GAO could recommend re-solicitation. Teltara, Inc., B-245806, Jan. 30, 1992, 92-1 CPD ¶ 128 (eventual 11th low bidder protested – before bid opening - the adequacy of the solicitation's provisions concerning a prior collective bargaining agreement; remedy might be re-solicitation); Remtech, Inc., B-240402, Jan. 4, 1991, 91-1 CPD ¶ 35 (protest by nonresponsive second low bidder challenged IFB as unduly restrictive – filed before bid opening; interested party because remedy is re-solicitation).

3. **Intervenors**. Immediately after receipt of the protest notice, the agency must notify the awardee (post-award protest) or all offerors who have a "substantial prospect" of receiving award if the protest is denied (pre-

award protest). 4 C.F.R. § 21.0(b), § 21.3(a).[7] Generally, if award has been made, GAO will only allow the awardee to intervene. If award has not been made, GAO will determine whether to allow a specific firm to intervene upon its request.

D. The GAO's Jurisdiction.

1. The protester must allege a violation of a procurement statute or regulation. 31 U.S.C. § 3552. The GAO will also review allegations of unreasonable agency actions. S.D.M. Supply, Inc., B-271492, June 26, 1996, 96-1 CPD ¶ 288 (simplified acquisition using defective FACNET system failed to promote competition "to the maximum extent practicable" in violation of CICA). This includes the termination of a contract where the protest alleges the government's termination was based upon improprieties associated with contract award (sometimes referred to as a "reverse protest"). 4 C.F.R. § 21.1(a); Severn Cos., B-275717.2, Apr. 28, 1997, 97-1 CPD ¶ 181. The GAO's jurisdiction includes:

   a. The procurement of property or services by a federal agency. 31 U.S.C. § 3551. New York Tel. Co., B-236023, Nov. 7, 1989, 89-2 CPD ¶ 435 (solicitation to install pay phones is an acquisition of a service). The transaction, however, must relate to the agency's mission or result in a benefit to the government. Maritime Global Bank Group, B-272552, Aug. 13, 1996, 96-2 CPD ¶ 62 (Navy agreement with a bank to provide on-base banking services not a procurement). See also Starfleet Marine Transportation, Inc., B-290181, July 5, 2002, 2002 CPD ¶ 113 (GAO holding that it had jurisdiction of a mixed transaction involving both the "sale" of a business opportunity and the procurement of services); Government of Harford County, Md., B-283259, B-283259.3, Oct. 28, 1999, 99-2 CPD ¶ 81.

   b. Protests involving non-federal agencies if:

      (1) The agency involved has agreed in writing to have the protest decided by the GAO. 4 C.F.R. § 21.13.

      (2) Agency officials were involved to such an extent that it really was a procurement "by" an executive agency. Asiel Enterprises, Inc., B-408315.2, Sept. 5, 2013, 2013 CPD ¶ 205 (considered whether NAFI used as a conduit to circumvent CICA). This includes procurements conducted by federal agencies (i.e., processed by an agency contracting officer) on behalf of a NAFI, even if no

7 FAR 33.104(a)(2) directs the Agency, if not award has been made, to notify "all parties who appear to have *reasonable* prospect of receiving award if the protest is denied" (emphasis added) rather than those with a "substantial prospect" – the standard in 4 C.F.R. 21.3(a).

appropriated funds are to be obligated. Premier Vending, Inc., B-256560, July 5, 1994, 94-2 CPD ¶ 8; Americable Int'l, Inc., B-251614, Apr. 20, 1993, 93-1 CPD ¶ 336.

(3) The protest challenges the terms of solicitation for the award of a lease of federal property where the record shows that the agency will receive benefit in connection with the award of the lease, such that the agency is, in effect, conducting a procurement for goods and services. Blue Origin LLC, B-408823, Dec. 12, 2013, 2013 CPD ¶ 289.

c. Sales of government property if the agency involved has agreed in writing to allow GAO to decide the dispute. 4 C.F.R. § 21.13(a) (2005); Assets Recovery Sys., Inc., B-275332, Feb. 10, 1997, 97-1 CPD ¶ 67; *see also* Fifeco, B-246925, Dec. 11, 1991, 91-2 CPD ¶ 534 (sale of property by FHA not a procurement of property or services); Columbia Communications Corp., B-236904, Sept. 18, 1989, 89-2 CPD ¶ 242 (GAO declined to review a sale of satellite communications services).

d. Instances where the agency elected not to issue a solicitation or contract after the Agency held "extensive discussions" with a firm. Health Servs. Mktg. & Dev. Co., B-241830, Mar. 5, 1991, 91-1 CPD ¶ 247. *Accord* RJP Ltd., B-246678, Mar. 27, 1992, 92-1 CPD ¶ 310.

e. An agency's decision to use authority to award an Other Transaction (OT) instead of a procurement contract. While the GAO will not review protests of the award or solicitations for award of OTs, it will review whether an Agency has failed to comply with the statutory other transaction authority and is improperly using an OT when a procurement contract should be used. Oracle America, Inc., B-416061, May 31, 2018, 18 CPD ¶ 180; MD Helicopters, Inc., B-417379, April 4, 2019, 19 CPD ¶ 120.

2. The GAO generally will NOT consider protests on the following matters:

a. **Contract Administration.** 4 C.F.R. § 21.5(a). Al Baz 2000 Trading & Contracting Co., W.L.C., B-416622.2, Dec. 12, 2018, 2018 CPD ¶ 422 (whether a contractor complies with a contract's license and permit requirements is a matter of contract administration the GAO will not review) ; JA & Assocs., B-256280, Aug. 19, 1994, 95-1 CPD ¶ 136 (decision to novate contract to another firm rather than recompete); Caltech Serv. Corp., B-240726, Jan. 22, 1992, 92-1 CPD ¶ 94 (modification of contract, unless it is a cardinal change thus requiring competition);

Casecraft, Inc., B-226796, June 30, 1987, 87-1 CPD ¶ 647 (decision to terminate a contract for default); CACI Tech., Inc., B-408858, B-408858.2, Dec. 5, 2013, 2013 CPD ¶ 283 (whether key personnel perform on contract is matter of contract administration, absent "bait and switch."); but see Marvin J. Perry & Assocs., B-277684, Nov. 4, 1997, 97-2 CPD ¶ 128 (GAO asserts jurisdiction over agency acceptance of different quality office furniture that was shipped by mistake); Sippican, Inc., B-257047, Nov. 13, 1995, 95-2 CPD ¶ 220 (GAO will review agency exercise of contract option).

b. **Small Business Size and Industrial Classification Determinations.** 4 C.F.R. § 21.5(b)(1). Challenges to size or status of small businesses are left to exclusive review by the Small Business Administration. 15 U.S.C. 637(b)(6). Lawyers Advantage Title Group, Inc., B-275946, Apr. 17, 1997, 97-1 CPD ¶ 143; Columbia Research Corp., B-247073, June 4, 1992, 92-1 CPD ¶ 492; Sea Box, Inc., B-408182.5, Jan. 10, 2014, 2014 CPD ¶ 27 (GAO will consider protest challenging agency's decision not to refer matter to SBA, when proposal, on its face, shows offeror is not a small business).

c. **Small Business Certificate of Competency (COC) Determinations.** 4 C.F.R. § 21.5(b)(2). Issuance of, or refusal to issue, a certificate of competency will generally not be reviewed by GAO. Exceptions, interpreted narrowly in deference to the SBA, are: (1) protests which show bad faith by government officials, (2) protests that allege that the SBA failed to follow its own regulations, or (3) protests that allege that the SBA failed to consider vital information. MPC Containment Systems, LLC, B-416188.2, July 23, 2018, 18 CPD ¶ 251.

d. **Procurements Under Section 8(a) of the Small Business Act** (i.e., small disadvantaged business contracts). 4 C.F.R. § 21.5(b)(3). The GAO will review a decision to place a procurement under the 8(a) program only for possible bad faith by agency officials or a violation of applicable law or regulation. See Grace Indus., Inc., B-274378, Nov. 8, 1996, 96-2 CPD ¶ 178. See also Security Consultants Group, Inc., B-276405.2, June 9, 1997, 97-1 CPD ¶ 207 (protest sustained where agency failed to provide complete and accurate information of all vendors eligible for an 8(a) award).

e. **Affirmative Responsibility Determinations.** 4 C.F.R. § 21.5(c). The determination that a bidder or offeror is capable of performing is largely committed to the contracting officer's discretion. Imaging Equip. Servs., Inc., B-247197, Jan. 13, 1992, 92-1 CPD ¶

62. GAO will not review contracting officer's determination, even for reasonableness, as such a review would accord too little weight to the agency's discretion in this area. SumCo Eco-Contracting LLC, B-409434, B-409434.2, Apr. 15, 2014, 2014 CPD ¶ 129.

(1) Exception: Where definitive responsibility criteria in the solicitation were not met. King-Fisher Co., B-236687, Feb. 12, 1990, 90-1 CPD ¶ 177.

(2) Exception: Where protester alleges fraud or bad faith. HLJ Management Group, Inc., B-225843, Mar. 24, 1989, 89-1 CPD ¶ 299. But see Impresa Construzione Geom. Domenico Garufi v. U.S., 238 F.3d 1324 (Fed. Cir. 2001) (the CAFC held that the COFC's standard of review for responsibility determinations would be those set forth in the Administrative Procedures Act, i.e., would include one requiring lack of rational basis or a procurement procedure involving a violation of a statute or regulation).

(3) Exception: Where there is evidence that the contracting officer failed to consider available relevant information, or otherwise violated a pertinent statute or regulation. PMO Partnership Joint Venture, B-401973.3, B-401973.5, Jan. 14, 2010, 2010 CPD ¶ 29.

f. **Procurement Integrity Act Violations.** FAR 33.102(f); 4 C.F.R. § 21.5(d); 41 U.S.C. § 423. The protester must first report information supporting allegations involving violations of the Procurement Integrity Act to the agency within 14 days after the protester first discovered the possible violation. See, e.g., SRS Techs., B-277366, July 30, 1997, 97-2 CPD ¶ 42; Y&K Maint., Inc., B-405310.6, Feb. 2, 2012, 2012 ¶ 93.

g. **Procurements by Non-Federal Agencies** (e.g., United States Postal Service, Federal Deposit Insurance Corporation (FDIC), nonappropriated fund instrumentalities [NAFIs]). 4 C.F.R. § 21.5(g); The Brunswick Bowling & Billiards Corp., B-224280, Sept. 12, 1986, 86-2 CPD ¶ 295; *but see* Section D(1)(b) above.

h. **Subcontractor Protests.** The GAO will not consider subcontractor protests unless requested to do so by the procuring agency. 4 C.F.R. § 21.5(h). See RGB Display Corporation, B-284699, May 17, 2000, 2000 CPD ¶ 80. See also Compugen, Ltd., B-261769, Sept. 5, 1995, 95-2 CPD ¶ 103. However, the GAO will review subcontract procurements where the subcontract is "by" the government. See supra RGB Display Corporation (subcontract procurement is "by" the government where agency

handles substantially all the substantive aspects of the procurement and the prime contractor acts merely as a conduit for the government); The Panther Brands, LLC, B-409073, Jan. 17, 2014, 2014 CPD ¶ 54.

i. **Suspension & Debarment Issues**. 4 C.F.R. §21.5(i). The GAO does not review protests that an agency improperly suspended or debarred a contractor. See Shinwha Electronics, B-290603, Sept. 3, 2002, 2002 CPD ¶ 154; Aria Target Logistics Servs., B-408308.14, B-409055.2, Feb. 27, 2014, 2014 CPD ¶ 72.

j. **Judicial Proceedings.** 4 C.F.R. §21.11. The GAO will not hear protests that are the subject of pending federal court litigation unless requested by the court. SRS Techs., B-254425, May 11, 1995, 95-1 CPD ¶ 239; Snowblast-Sicard, Inc., B-230983, Aug. 30, 1989, 89-2 CPD ¶ 190. The GAO also will not hear a protest that has been finally adjudicated, e.g., dismissed with prejudice. Cecile Indus., Inc., B-211475, Sept. 23, 1983, 83-2 CPD ¶ 367.

k. **Task and Delivery Orders.** The GAO's jurisdiction over Task and Delivery Orders is limited to: (1) orders which increases the scope, period, or maximum value of the contract under which the order is issued; and (2) orders valued in excess of $10,000,000 for orders issued by civilian agencies or $25,000,000 for orders issued by DoD, NASA, and the Coast Guard. FAR 16.505(a)(10).[8] [9]

l. Procurements subject to the Federal Aviation Administration's (FAA) Acquisition Management System (AMS) are specifically exempt from GAO jurisdiction. 49 U.S.C. §40110(d)(2)(F). This exemption originally covered only procurements of equipment, supplies, and materials; thus, the GAO maintained jurisdiction and decided protests filed concerning the procurement of services. Congress has since extended the exemption to cover services also. Pub. L. No. 109-90, 119 Stat. 2064 *et seq*, Title V, Sec. 515. Procurements by the Transportation Security Administration (TSA) are covered by the AMS; GAO has no jurisdiction over

[8] This authority was extended indefinitely for Title 10 contracts by the FY 2013 NDAA. While the authority lapsed for Title 41 contracts in September 2016, it was restored indefinitely by the "GAO Civilian Task and Delivery Order Protest Authority Act of 2016." Pub. L. 114-260, § 1, Dec. 14, 2016, 130 Stat. 1361.

[9] The value of a task or deliver order includes options, to include the option to extend services under FAR 52.217-8, if those options are priced and evaluated as part of the source selection. Adams and Associates, Inc., B-417534, Jun 4, 2019, 2019 WL 2522079.

TSA procurements. Knowledge Connections, Inc., B-298172, Apr. 12, 2006, 2006 CPD ¶ 67.

E. Timeliness. 4 C.F.R. § 21.2. [10]

1. **Protests Related to Defective Solicitations**. GAO must receive protests based on alleged improprieties or errors in a solicitation that are apparent on the face of the solicitation, i.e., patent ambiguities or defects, **prior to bid opening or the closing date for receipt of initial proposals**. 4 C.F.R. § 21.2(a)(1); DCR Services & Construction, Inc., B-415565.2, Feb, 13, 2018 (request for clarification indicated a patent ambiguity that should have been challenged prior to the close of the solicitation); Kiewit Louisiana Co., B-403736, Oct. 14, 2010, 2010 CPD ¶ 243 (untimely challenge of agency failure to include mandatory clause indicating whether agency will conduct discussions prior to making award); AKRAY USA, Inc., B-408981.4, Mar. 5, 2014, 2014 CPD ¶ 90 (firm cannot compete under patently ambiguous solicitation and then complain when agency proceeds in a way consistent with one of the possible interpretations). Protests filed prior to bid opening or closing date for receipt of initial proposals are timely even when protester learned the basis of its protest more than ten days prior to protest filing. MadahCom, Inc.--Recon., B-297261.2, Nov. 21, 2005, 2005 CPD ¶ 209.

2. Protesters **challenging a Government-wide point of entry (GPE) notice of intent** to make a sole source award must **first** respond to the notice in a timely manner. See Norden Sys., Inc., B-245684, Jan. 7, 1992, 92-1 CPD ¶ 32 (unless the specification is so restrictive as to preclude a response, the protester must first express interest to the agency); see also PPG Indus., Inc., B-272126, June 24, 1996, 96-1 CPD ¶ 285, fn. 1 (timeliness of protests challenging Commerce Business Daily (CBD) notices discussed). Only publication in the official public medium [formerly Federal Business Opportunities (FedBizOpps), now at beta.sam.gov] will constitute constructive notice. Worldwide Language Resources, Inc.; SOS Int'l Ltd., B-296993 et al., Nov. 14, 2005, 2005 CPD ¶ 206 (publishing notice of procurement on DefenseLink.mil will NOT provide constructive notice.)[11]

3. When an **amendment to a solicitation** provides the basis for the protest, then the protest must be filed by the next due date for revised proposals. 4 C.F.R. § 21.2(a)(1). This rule applies even with tight timelines.

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[10] Under the GAO bid protest rules, "days" are calendar days. In computing a period of time for protest purposes, do not count the day on which the period begins. When the last day falls on a weekend day or federal holiday, the period extends to the next working day. 4 C.F.R. § 21.0(e).

[11] Where a notice is published is irrelevant if the protestor had actual knowledge of the basis of protest. Latvian Connection, LLC – Reconsideration, B-415043.3, November 29, 2017, 2017 CPD ¶ 354.

WareOnEarth Commc'ns, Inc., B-298408, Jul. 11, 2006, 2006 CPD ¶ 107 (protest not timely filed when filed after revised due date from amendment despite only four days between solicitation amendment and proposal due date.)

4. **Protests Following a Required Debriefing.** Procurements involving competitive proposals carry with them the obligation to debrief the losing offerors, if the debriefing is timely requested. See FAR 15.505 and 15.506. In those cases, the protester must file its protest no later than 10 days "after the date on which the debriefing is held."[12] 4 C.F.R. § 21.2(a)(2). Statutorily required debriefings for task and delivery order contracts are within scope of these timeliness rules. Professional Analysis, Inc., B-410202, Aug. 25, 2014, 2014 CPD ¶ 247.

   a. Premature Protests. Protesters may not file a protest prior to the debriefing date offered by the agency. 4 C.F.R. §21.2(a)(2). Celeris Systems, Inc., B-416890, October 11, 2018, 2018 CPD ¶ 354 (protest filed before enhanced debrief concluded was untimely); Kord Technologies Inc., B-417748.5, Apr. 17, 2020, 2020 WL 2216655 (protest challenging elimination from the competitive range is premature when it was filed prior to the protester receiving the required debriefing).

   b. A debrief provided, but not required, does not trigger this exception and the general rule that a protest must be filed 10 days from when the protester knew or should have known of the basis of protest applies. Centerra Integrated Facilities Servs, LLC, B-418628, Mar. 19, 2020, 2020 CPD 155.

   c. DoD Enhanced Debrief: On March 22, 2018, DoD instituted enhanced postaward debrief procedures which allow the unsuccessful offerors two business days after the debrief to submit written questions and the agency five business days to answer those questions. The debrief is not concluded until the written responses are delivered to the unsuccessful offeror. *See* 10 U.S.C. § 2305(b)(5) and DoD Class Deviation 2018-O011. The enhanced debrief procedures do not change the GAO timelines for filing a protest. State Women Corp., B-416510, Jul. 12, 2018, 2018 CPD ¶ 240. If the unsuccessful offeror chooses not to submit questions, the Court of Federal Claims has held that the debrief is not closed until the end of the two business days, effectively extending the

[12] The protest must be filed within 5 days of a required debrief to trigger an automatic stay of performance under CICA. 31 U.S.C. § 3553(d)(4)(B); FAR 33.104(c)(1). For a full discussion regarding CICA stays, see Sections J (1) and (2) below.

protest period by those two days. NIKA Tech., Inc. v. U.S., __ Fed. Cl. __, 2020 WL 1922381 (Apr. 21, 2020).

5. **Delay of Pre-Award Debriefings.**

a. Government Delay: The agency may delay pre-award debriefings until after award when it is in "the government's best interests." FAR 15.505(b). If the agency decides to delay a pre-award debriefing that is otherwise timely requested and required, the protester is entitled to a post-award debriefing and the extended protest time frame. Global Eng'g & Constr. Joint Venture, B-275999, Feb. 19, 1997, 97-1 CPD ¶ 77 (protest of exclusion from competitive range).

b. Offeror Requested Delay: The unsuccessful offeror may request that the pre-award debrief be delayed until after award. FAR 15.505(a)(2). When an offeror does so, a subsequent post-award/post-debrief protest challenging exclusion from the competitive range will be untimely. Further, the unsuccessful offeror will not be an interested party for challenges of the award decision or the evaluation of other offerors. VMD Systems Integrators, Inc., B-412729, March 14, 2016, 2016 CPD ¶ 88; Granite State Manufacturing, B-415730, February 23, 2018, 2018 CPD ¶ 98.

6. Protests based on **any other matter** must be submitted within 10 days after receiving actual or constructive (whichever is earlier) knowledge of the basis for protest. 4 C.F.R. § 21.2(a)(2). Learjet, Inc., B-274385, Dec. 6, 1996, 96-2 CPD ¶ 215 (interpretation of solicitation untimely); L. Washington & Assocs., Inc., B-274749, Nov. 18, 1996, 96-2 CPD ¶ 191 (untimely protest of elimination from competitive range); SNAP, Inc., B-409609, B-409609.3, June 20, 2014, 2014 CPD ¶ 187 (protest untimely when protester should have known basis of protest from debriefing, but waited until comments to file supplemental protest). Noble Supply & Logistics, B-417269, April 30, 2019, 19 CPD ¶ 167 (supplemental protest allegations based on a materially different legal basis than the initial protest allegations must independently satisfy the timeliness requirements).

7. **Protests Initially Filed with an Agency**:

a. If the protester previously filed a timely agency protest, a subsequent GAO protest must be filed within 10 days of actual or constructive (whichever is earlier) knowledge of the initial adverse agency decision. 4 C.F.R. § 21.2(a)(3) (2005); FAR 33.103(d)(4). Consolidated Mgt. Servs., Inc.--Recon., B-270696, Feb. 13, 1996, 96-1 CPD ¶ 76 (oral notice of adverse agency action starts protest

time period). **Continuing to pursue agency protest after initial adverse decision does not toll the GAO time limitations**. Telestar Int'l Corp.--Recon., B-247029, Jan. 14, 1992, 92-1 CPD ¶ 69. See also Raith Engineering and Manufacturing Co, W.L.L., B-298333.3, Jan. 9, 2007, 2007 CPD ¶ 9. Adverse agency action includes a determination by the agency that it lacks jurisdiction over the protest issue. Logis-Tech, Inc., B-407687, Jan. 24, 2013, 2013 CPD ¶ 41.

b. The agency protest must generally be filed within the same time restrictions applicable to GAO protests, unless the agency has established more restrictive time frames. 4 C.F.R. § 21.2(a)(3). Orbit Advanced Techs., Inc., B-275046, Dec. 10, 1996, 96-2 CPD ¶ 228 (protest dismissed where protester's agency-level protest untimely even though it would have been timely under GAO rules); IBP, Inc., B-275259, Nov. 4, 1996, 96-2 CPD ¶ 169.

8. Protesters must use due diligence to obtain the information necessary to pursue the protest. See Automated Medical Prods. Corp., B-275835, Feb. 3, 1997, 97-1 CPD ¶ 52 (protest based on FOIA-disclosed information not timely where protester failed to request debriefing); Products for Industry, B-257463, Oct. 6, 1994, 94-2 CPD ¶ 128 (protest challenging contract award untimely where protester failed to attend bid opening and did not make any post-bid attempt to examine awardee's bid); Adrian Supply Co.--Recon., B-242819, Oct. 9, 1991, 91-2 CPD ¶ 321 (use of FOIA request rather than the more expeditious document production rules of the GAO may result in the dismissal of a protest for lack of due diligence and untimeliness). **But see** Geo-Centers, Inc., B-276033, May 5, 1997, 97-1 CPD ¶ 182 (protest filed three months after contract award and two months after debriefing is **timely** where the information was obtained via a FOIA request that was filed immediately after the debriefing); Motorola Solutions, Inc., B-409148, B-409148.2, Jan. 28, 2014, 2014 CPD ¶ 59 (agency delayed furnishing protester information critical to raising supplemental protest ground, which protester diligently pursued and filed as soon as it received; agency cannot profit from dilatory behavior, protest ground is timely).

9. Exceptions for otherwise untimely protests. 4 C.F.R. § 21.2(c).

a. **Significant Issue Exception**: The GAO may consider a late protest if it involves an issue significant to the procurement system. See Pyxis Corp., B-282469, B-282469.2, July 15, 1999, 99-2 CPD ¶ 18 (ordering of non-FSS items in connection with an FSS buy); Premier Vending, Inc., B-256560, July 5, 1994, 94-2 CPD ¶ 8 (whether agency improperly diverted requirements to a NAFI for noncompetitive acquisition); Cyberdata Techs, Inc., B-406692, Aug. 8, 2012, 2012 CPD ¶ 230 (requirement that

price/cost be considered before technically acceptable proposal can be excluded from competition for BPAs under FSS).

(1) Significant issues generally: 1) have not been previously considered; and 2) are of widespread interest to the procurement community. Pyxis Corp., B-282469, B-282469.2, Jul. 15, 1999, 99-2 CPD ¶ 18. Matter of: Tiger Truck, LLC, B-400685, Jan 14, 2009, 2009 CPD ¶ 19.

(2) This exception is strictly constructed and rarely granted. NPF Services, Inc. – Request for Recon., B-236841, B-246841.2, January 3, 1990, 90-1 CPD ¶ 9; Matter of: U.S. Systems – Request for Recon., B-228245, B-228245.2, October 27, 1987, 87-2 CPD ¶ 402.

b. **Good Cause Exception**: The GAO may consider a protest if there is good cause, beyond the protester's control, for the lateness. A.R.E. Mfg. Co., B-246161, Feb. 21, 1992, 92-1 CPD ¶ 210; Surface Combustion, Inc.--Recon., B-230112, Mar. 3, 1988, 88-1 CPD ¶ 230.

F. Bid Protest Procedures.

1. All protests, excluding those containing classified materials, must be filed through the GAO's Electronic Bid Protest Filing and Dissemination System (EPDS). 4 C.F.R. § 21.1(b). Filing via EPDS requires the payment of a $350 filing fee.[13]

2. Although the GAO does not require formal pleadings submitted in a specific technical format, a protest, at a minimum, shall:

a. include the name, address, email, telephone and facsimile (fax) numbers of the protester (or its representative);

b. be signed by the protester or its representative;

c. identify the contracting agency and the solicitation and/or contract number;

d. provide a detailed legal and factual statement of the grounds of protest, to include copies of relevant documents;

e. provide all information demonstrating the protester is an interested party and that the protest is timely;

[13] As of 1 May 2018, all protest related filings must be made through the EPDS, replacing the previous practice of filing documents by email with the GAO. Communications between the parties may be made via EPDS or via email. For detailed information and instructions of the usage of the EPDS system visit: https://epds.gao.gov/login.

f. specifically request a decision by the Comptroller General; and

g. state the form of relief requested. 4 C.F.R. § 21.1(c).

3. If appropriate, the protest may also include:

a. a request for a protective order;

b. a request for specific documents relevant to the protest; and,

c. a request for a hearing. 4 C.F.R. § 21.1(d).

4. The GAO may dismiss a protest which is frivolous, or which does not state a valid ground for a protest. 31 U.S.C. ¶ 3554(a)(4); Mare Island Dry Dock, LLC, B-410821, Feb. 26, 2015, 2015 CPD ¶ 100 ("bare assertions that an award was improper, with neither evidence nor explanation of the protester's theory regarding the alleged violation, are insufficient"); Med-South, Inc., B-401214, May 20, 2009, 2009 CPD ¶ 112 (allegations on "information and belief" without evidence or explanation, are insufficient to establish a cognizable protest ground); View One, Inc., B-400346, July 30, 2008, 2008 CPD ¶ 142 (protests that lack a detailed statement of legal and factual grounds of protest shall be dismissed).

a. At a minimum, a protester must make a *prima facie* case asserting improper agency action. Brackett Aircraft Radio, B-244831, Dec. 27, 1991, 91-2 CPD ¶ 585. Protester must present either allegations or evidence sufficient, if uncontradicted, to establish the likelihood of the protester's claim of improper agency action. Systems Dynamics Int'l, Inc.-Recon., B-253957.4, Apr. 12, 1994, 94-1 CPD ¶ 251.

b. Generalized allegations of impropriety are not sufficient to sustain the protester's burden under the GAO's Bid Protest Rules. See 4 C.F.R. § 21.5(f); Akima Support Operations, LLC, B-415401, B-415401.2, October 30, 2017, 2017 CPD ¶ 341-; Palmetto Container Corp., B-237534, Nov. 5, 1989, 89-2 CPD ¶ 447.

5. The protest must also include sufficient information to demonstrate that it is timely. The GAO will not permit protesters to introduce for the first time, in a motion for reconsideration, evidence to demonstrate timeliness. 4 C.F.R. § 21.2(b) (2005). Management Eng'g Assoc.--Recon., B-245284, Oct. 1, 1991, 91-2 CPD ¶ 276.

6. The protester must provide a complete copy of the protest and all attachments to the contracting agency no later than one day after the protest is filed with the GAO. 4 C.F.R. § 21.1(e); Rocky Mountain Ventures, B-241870.4, Feb. 13, 1991, 91-1 CPD ¶ 169 (failure to timely

provide contracting agency copy of the protest resulted in dismissal). However, the GAO has also held, absent prejudice to the agency, it will not dismiss a protest if the protester fails to timely the agency a copy of the protest. Arlington Public Schools, B-228518, Jan. 11, 1988, 88-1 CPD ¶ 16 (although protester was late in providing agency the protest documents, the agency already knew of the protest and its underlying bases).

7. The GAO generally provides immediate notice of a protest to the agency's protest litigation division. **It is this notice by the GAO that triggers the CICA stay**, discussed above. 4 C.F.R. § 21.3(a). With the implantation of the EPDS filing system, once a protest is filed, the system automatically notifies the representative(s) registered in the system as the Agency's point of contact.

8. Document Production. [14]

   a. Agency List of Documents. 4 C.F.R. §21.3(c). In response to a protester's request for production of documents, the agency must provide to all interested parties and the GAO **at least five days prior to submission of the agency report** a list of:

      (1) Documents or portions of documents which the agency has released to the protester or intends to produce in its report; and

      (2) Documents or portions of documents which the agency intends to withhold from the protester and the reasons underlying this decision.

      (3) Parties to the protest must then file any objections to the agency list within two days of receipt of the list.

   b. If the agency fails to respond to the protesters document request, or to produce all relevant or requested documents, the GAO may impose sanctions. Among the possible sanctions are:

      (1) Providing the document to the protester or to other interested parties.

      (2) Drawing adverse inferences against the agency. Textron Marine Sys., B-243693, Aug. 19, 1991, 91-2 CPD ¶ 162 (GAO refused to draw an adverse inference when an

[14] **PRACTICE TIP:** Keep in mind that the government may also request relevant documents from the protester. See 4 C.F.R. 21.3(d). See also "GAO Orders Protester to Comply with Agency's Document Request," 61 FED. CONT. REP. 409 (1994).

agency searched for and was unable to find a document that protester speculated should be in the files).

(3) Prohibiting the government from using facts or arguments related to the unreleased documents.

c. Following receipt of the agency report, the protester may request additional documents. Except as otherwise authorized by GAO, all requests for documents must be filed with GAO and the contracting agency no later than two days after their existence or relevance is known or should have been known, whichever is earlier. The agency must either provide the documents (or portions thereof) or explain why production is not appropriate within two days. 4 C.F.R. § 21.3(g).

9. Agency's Administrative Report. The agency must **file an agency report within 30 days** of receiving notice from the GAO. 4 C.F.R. § 21.3(c); FAR 33.104(a)(3)(i). Subject to any protective order, discussed below, the agency will provide copies of the administrative report simultaneously to the GAO, protester(s), and any intervenors. 4 C.F.R. § 21.3(e).

a. Contents of an agency report, as relevant to the protest grounds alleged. 4 C.F.R. § 21.3(d).

(1) The protest.

(2) The protester's proposal or bid.

(3) The successful proposal or bid.

(4) The solicitation.

(5) The abstract of bids or offers.

(6) A statement of facts by the contracting officer.

(7) All evaluation documents.

(8) All <u>relevant</u> documents.

(9) Documents requested by the protester.

(10) A legal memorandum suitable for forwarding to GAO;

(11) An index of all relevant documents provided under the protest.

b. Agencies must include all relevant documents in the administrative report. <u>See</u> <u>Federal Bureau of Investigation-Recon.</u>, B-245551,

June 11, 1992, 92-1 CPD ¶ 507 (incomplete report misled GAO about procurement's status).

c. Late agency reports. Given the relatively tight time constraints associated with the protest process, the GAO will consider agency requests for extensions of time on a case-by-case basis. 4 C.F.R. § 21.3(f).

10. Protective Orders. Either on its own initiative or at the request of a party to the protest, the GAO may issue a protective order controlling the treatment of protected information. 4 C.F.R. § 21.4.

a. The protective order is designed to limit access to trade secrets, confidential business information, and information that would result in an unfair competitive advantage.

b. The request for a protective order should be filed as soon as possible. It is the responsibility of protester's counsel to request issuance of a protective order and submit timely applications for admission under the order. 4 C.F.R. § 21.4(a).

c. Individuals seeking access to protected information may not be involved in the competitive decision-making process of the protester or interested party. 4 C.F.R. § 21.4(c).

(1) Protesters may retain outside counsel or use in-house counsel, so long as counsel is not involved in the competitive decision-making process. Robbins-Gioia, Inc., B-274318, Dec. 4, 1996, 96-2 CPD ¶ 222 (access to protected material appropriate even though in-house counsel has regular contact with corporate officials involved in competitive decision-making); Mine Safety Appliance Co., B-242379.2, Nov. 27, 1991, 91-2 CPD ¶ 506 (retained counsel). See also Harmonia Holdings Group, LLC, B-417475.3, B-417475.4, September 23, 2019, 2019 CPD ¶ 333 (discussion of criteria for admission of consultants to a protective order).

(2) The GAO grants access to protected information upon application by an individual. The individual must submit a certification of the lack of involvement in the competitive decision-making process and a detailed statement in support of the certification. Atlantic Research Corp., B-247650, June 26, 1992, 92-1 CPD ¶ 543.

(3) The GAO may report violations of the protective order to the appropriate bar association of the attorney who violated the order, and may ban the attorney from GAO practice.

Additionally, a party whose protected information is disclosed improperly retains all of its remedies at law or equity, including breach of contract. 4 C.F.R. § 21.4(d). See also "GAO Sanctions 2 Attorneys for Violating Terms of Protective Order by Releasing Pricing Info," 65 FED. CONT. REP. 17 (1996). GAO may dismiss protests for violation of the protective order. PWC Logistics Servs Co. KSC(c), B-310559, Jan. 11, 2008, 2008 CPD ¶ 25. Distinguish this from Waterfront Technologies, Inc. B-401948.16, B-401948.18, June 24, 2011 2011 CPD ¶ 123 (GAO did not dismiss the protest because although protective order was violated, there is no indication protester knew that outside counsel improperly released the protected material).

(4) If the GAO does not issue a protective order, the government has somewhat more latitude in determining the contents of the administrative report. If the government chooses to withhold any documents from the report, it must include in the report a list of the documents withheld and the basis for not producing the documents. The agency must furnish all relevant documents and all documents specifically requested by the protester to the GAO for *in camera* review. 4 C.F.R. § 21.4(b).

11. Unless provided a different deadline by the GAO, Protester must comment on the agency report within 10 days of receipt.[15] Failure to timely comment or request a decision on the record will result in dismissal. 4 C.F.R. § 21.3(i). The Continuum Engineering-Recons. B-410298.2, Feb. 12, 2015, 2015 CPD ¶ 79; Piedmont Sys., Inc., B-249801, Oct. 28, 1992, 92-2 CPD ¶ 305 (agency's office sign-in log used to establish date when protester's attorney received agency report); Aeroflex Int'l, Inc., B-243603, Oct. 7, 1991, 91-1 CPD ¶ 311 (protester held to deadline even though the agency was late in submitting its report).

12. Hearings. On its own initiative or upon the request of the protester, the government, or any interested party, the GAO may conduct a hearing in connection with a protest. The request shall set forth the reasons why the requester believes a hearing is necessary and why the matter cannot be resolved without oral testimony. 4 C.F.R. § 21.7(a).

[15] The Intervenor may also submit comments to the Agency Report within 10 days of receipt.

a. The GAO officer has the discretion to determine whether or not to hold a hearing and the scope of the hearing.[16] Jack Faucett Assocs.--Recon., B-254421, Aug. 11, 1994, 94-2 CPD ¶ 72.

(1) As a general rule, the GAO conducts hearings where there is a factual dispute between the parties which cannot be resolved without oral examination or without assessing witness credibility, or where an issue is so complex that developing the protest record through a hearing is more efficient and less burdensome than proceeding with written pleadings only. Southwest Marine, Inc., B-265865, Jan. 23, 1996, 96-1 CPD ¶ 56 (as a result of improper destruction of evaluation documentation by agency, GAO requested hearing to determine adequacy of agency award decision); see also Allied Signal, Inc., B-275032, Jan. 17, 1997, 97-1 CPD ¶ 136 (protest involving tactical intelligence system required hearing and technical assistance from GAO staff).

(2) Absent evidence that a protest record is questionable or incomplete, the GAO will not hold a hearing "merely to permit the protester to reiterate its protest allegations orally or otherwise embark on a fishing expedition for additional grounds of protest" since such action would undermine GAO's ability to resolve protests expeditiously and without undue disruption of the procurement process. Town Dev., Inc., B-257585, Oct. 21, 1994, 94-2 CPD ¶ 155.

b. The GAO may hold pre-hearing conferences to resolve procedural matters, including the scope of discovery, the issues to be considered, and the need for or conduct of a hearing. 4 C.F.R. § 21.7(b).

c. Note that the GAO may draw an adverse inference if a witness fails to appear at a hearing or fails to answer a relevant question. This rule applies to the protester, interested parties and the agency. 4 C.F.R. § 21.7(f).

13. Alternative Dispute Resolution. The GAO offers three forms of alternative dispute resolution (ADR) – Negotiation Assistance, Litigation Risk Assessment and Outcome Prediction.

a. Negotiation Assistance. The GAO attorney will assist the parties with reaching a "win/win" situation. This type of ADR occurs

[16]According to the GAO's procedural rules, hearings are ordinarily conducted in Washington, D.C. The rule further notes that hearings may also be conducted by telephone. 4 C.F.R. § 21.7(c).

usually with protests challenging a solicitation term or a cost claim.

b. Litigation Risk Assessment. The GAO attorney will identify risks with respect to the positions of each party to the protest. Generally, less formal than outcome prediction and can be conducted at an earlier stage in the protest.

c. Outcome Prediction. The GAO attorney will inform the parties of what he or she believes will be the protest decision. The losing party can then decide whether to withdraw/take corrective action or continue with the protest. Outcome prediction may involve an entire protest or certain issues of a multi-issue protest. The single most important criterion in outcome prediction is the GAO attorney's confidence in the likely outcome of the protest.

14. The GAO must issue a decision within 100 days after the filing of the protest.[17] 31 U.S.C. § 3554(a)(1); 4 C.F.R. § 21.9(a).

15. Express Option. 31 U.S.C. § 3554(a)(2); 4 C.F.R. § 21.10.

a. Decision in 65 days.

b. The protester, agency, or other interested party may request the express option in writing within five days after the protest is filed. The GAO has discretion to decide whether to grant the request. The GAO may also use the express option on its own initiative. Generally, the GAO reserves use of this expedited procedure for protests involving relatively straightforward facts and issues.

c. The following schedule applies under the express option (4 C.F.R. § 21.10(d)):

(1) Agency Report due within 20 days after notice from GAO of express option;

(2) Protester's comments on Agency Report due within 5 days of receiving Agency Report;

(3) GAO may alter the schedule if the case becomes no longer appropriate for the express option.

G. Scope of GAO Review.

[17] **PRACTICE TIP:** Anyone may check on the status of current protests, or view GAO Bid Protest Decisions, using the GAO's online docket at: http://www.gao.gov/legal/bid-protests/search.

1. The scope of GAO's review of protests is similar to that of the Administrative Procedures Act. 5 U.S.C. § 706. GAO does not conduct a *de novo* review. Instead, it reviews the agency's actions for violations of procurement statutes or regulations, arbitrary or capricious actions, or abuse of discretion. New Breed Leasing Corp., B-274201, Nov. 26, 1996, 96-2 CPD ¶ 202 (agency violated CICA due to lack of reasonable advanced planning); current GAO case law reviews agency actions for reasonableness, consistency with the solicitation, and compliance with applicable procurement statutes and regulations. See, e.g., Analytical Innovative Solutions, LLC, B-408727, Nov. 6, 2013, 2013 CPD ¶263.

2. Burden of Proof. The protester generally has the burden of demonstrating the agency action is unreasonable. EA Engineering, Science, and Technology, Inc., B-411967.2, B-411967.3, B-411967.4, April 5, 2016, 2016 CPD ¶ 106.

3. Agency Record. When conducting its review, the GAO will consider the **entire** record surrounding agency conduct, to include statements and arguments made in response to the protest. AT&T Corp., B-260447, Mar. 4, 1996, 96-1 CPD ¶ 200. The agency may not, however, for the first time in a protest, provide its rationale for the decision in a request for reconsideration. Department of the Army—Recon., B-240647, Feb. 26, 1991, 91-1 CPD ¶ 211. GAO will give little weight to post-protest documents that constitute reevaluations and redeterminations prepared in the heat of an adversarial process.[18] Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97–2 CPD ¶ 91. However, GAO will consider post-protest explanations of the record that are credible and consistent with the contemporaneous record and "simply fill in previously unrecorded details." ENSCO, Inc.; PAE National Security Solutions, LLC, B-414844, B-414844.2, B-414844.3, October 2, 2017, 2017 CPD ¶ 357; Mgmt Sys. Int'l, Inc., B-409415, B- 409415.2, Apr. 10, 2014, 2014 CPD ¶ 117.

4. Substantive Review. As part of its review, the GAO has demonstrated a willingness to probe factual allegations and assumptions underlying agency determinations or award decisions. See, e.g., Redstone Tech. Servs., B-259222, Mar. 17, 1995, 95-1 CPD ¶ 181; Secure Servs. Tech., Inc., B-238059, Apr. 25, 1990, 90-1 CPD ¶ 421 (GAO conducted a comparative analysis of competitors' proposals and the alleged deficiencies in them and sustained the protest when it determined that the agency had not evaluated the proposals in a consistent manner); Frank E. Basil, Inc., B-238354, May 22, 1990, 90-1 CPD ¶ 492 (GAO reviewed source selection plan).

[18] **PRACTICE TIP:** This one reason it is very important for the Agency to ensure it has a complete record prior to releasing solicitation documents or awarding a contract.

5. Bad Faith. Government officials are presumed to act in good faith. Allegation of bias or bad faith must be supported by convincing proof. GAO will not consider allegations based on mere inference, supposition, or unsupported speculation. Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶111; Empire Veteran Group, Inc., B-408866.2, B-408866.3, Dec. 17, 2013, 2013 CPD ¶ 294.

6. Timeliness Issues.

   a. The GAO will generally resolve factual disputes regarding timeliness of protest filing in favor of the protester if there is at least a reasonable degree of evidence to support protester's version of the facts. Packaging Corp. of America, B-225823, July 20, 1987, 87-2 CPD ¶ 65 (disagreement over when protester knew or should have known of basis for protest).

   b. The protester is required to include "all the information needed to demonstrate timeliness." 4 C.F.R. § 21.2(b); Foerster Instruments, Inc., B-241685, Nov. 18, 1991, 91-2 CPD ¶ 464.

   c. When there is a doubt as to whether a protest is timely, GAO will generally consider the protest. CAD Language Sys., Inc., B-233709, Apr. 3, 1989, 89-1 CPD ¶ 405.

7. Unduly Restrictive Specification or Requirement. Where a protester challenges a specification as unduly restrictive, that is, challenges both the restrictive nature of the specification and the agency's need for the restriction, the agency has the responsibility of establishing that the restrictive specification is reasonably necessary to meet its legitimate needs. J. Squared Inc., d/b/a University Loft Co., B-408388, Aug. 27, 2013, 2013 CPD ¶ 201. Once the agency establishes support for the challenged solicitation term, the burden shifts to the protester to show that it is clearly unreasonable. Id.

8. Prejudice. To prevail, a protester must demonstrate prejudice. To meet this requirement, a protester must show that but for the agency error, there existed "a substantial chance" that the offeror would have been awarded the contract. Odyssey Marketing Group, Inc., B-412695, B-412695.2, April 21, 2016, 2016 CPD ¶ 109. See, e.g., Bath Iron Works Corp., B-290470, Aug. 19, 2002, 2002 CPD ¶ 133 (denying protester's proposed use of a decommissioned destroyer for at-sea testing, while at the same time accepting awardee's proposed use constituted unequal treatment, but did not result in competitive prejudice). GAO will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions. Armed Forces Hospitality, LLC, B-298978.2, B-298978.3, Oct. 1, 2009, 2009 CPD ¶ 192; McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54. GAO resolves any

doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is a sufficient basis for sustaining a protest. See Kellogg, Brown & Root Servs., Inc.-Recon., B-309752.8, Dec. 20, 2007, 2008 CPD ¶ 84; Piquette & Howard Electric Service, Inc., B-408435.3, Dec. 16, 2013, 2014 CPD ¶ 8.

H. Remedies.

1. GAO decisions are "recommendations" and not binding on the agency. 31 U.S.C. § 3554; The Centech Group, Inc. v. U.S., 78 Fed.Cl. 496 (2007).

2. Agencies that do not implement GAO's recommendations fully within 60 days of a decision must report this fact to the GAO. FAR 33.104(g). The GAO, in turn, must report all instances of agency refusal to accept its recommendation to Congress. 31 U.S.C. § 3554(e).

3. The GAO may recommend that an agency grant the following remedies (4 C.F.R. § 21.8):

   a. Refrain from exercising options under an existing contract;

   b. Terminate an existing contract;

   c. Recompete the contract;

   d. Issue a new solicitation;

   e. Award the contract consistent with statute and regulation; or

   f. Such other recommendation(s) as the GAO determines necessary to promote compliance with CICA.

4. Impact of a Recommended Remedy. In crafting its recommendation, the GAO will consider all circumstances surrounding the procurement, to include: the seriousness of the deficiency; the degree of prejudice to other parties or the integrity of the procurement process; the good faith of the parties; the extent of contract performance; the cost to the government; the urgency of the procurement; and the impact on the agency's mission. 4 C.F.R. § 21.8(b).

5. CICA Override. However, where the head of the contracting activity decides to continue contract performance because it represents the best interests of the government, the GAO "shall" make its recommendation "without regard to any cost or disruption from terminating, recompeting, or reawarding the contract." 4 C.F.R. § 21.8(c). Department of the Navy – Modification of Remedy, B-274944.4, July 15, 1997, 97-2 CPD ¶ 16 (Navy contends that "it may not be able to afford" costs associated with GAO recommendation).

I. "Appeal" of the GAO Decision.

1. Reconsideration of GAO Decisions.

   a. 4 C.F.R. §21.14(b). The request for reconsideration must be submitted to the GAO within 10 days of learning of the basis for the request or when such grounds should have been known, whichever is earlier. DynaLantic Corp. – Recon., B-402326.3, Aug 10, 2010, 2010 CPD ¶ 189 (request for reconsideration untimely where it was filed more than 10 days after protester's counsel received notice of GAO's decision). The requester must state the factual and legal grounds upon which it seeks reconsideration and must show that the decision contained an error of fact or law. 4 C.F.R. § 21.14. Rehashing previous arguments and expressing disagreement with the prior decision is not sufficient. Dept. of the Army – Recon., B-401472.2, Dec. 7, 2009, 2009 CPD ¶ 250.

   b. Requests for reconsideration must be based upon new facts, unavailable at the time of the initial protest. The GAO does not allow piecemeal development of protest issues. SCB Solutions, Inc., - Recon., B-410450.2, Aug. 12, 2015, 2015 CPD ¶ 255.

   c. The GAO will not act on a motion for reconsideration if the underlying procurement is the subject of federal court litigation, unless the court has indicated interest in the GAO's opinion. Department of the Navy – Recon., B-253129, Sept. 30, 1993, 96-2 CPD ¶ 175.

2. Judicial Appeal.

   a. A protester always may seek judicial review of an agency action under the Administrative Procedures Act. Courts may, however, give great deference to the GAO in light of its considerable procurement expertise. Shoals American Indus., Inc. v. United States, 877 F.2d 883 (11th Cir. 1989). But see California Marine Cleaning, Inc. v. United States, 42 Fed. Cl. 281 (1998) (COFC overturned GAO decision finding that GAO's decision was irrational, that GAO misapplied the late bid rule, and that it failed to consider all relevant evidence).

   b. This deference is not absolute. A court may still find an agency decision to lack a rational basis, even if the agency complies with the GAO's recommendations in a bid protest. Firth Constr. Co. v. United States, 36 Fed. Cl. 268, 271-72 (1996); Advanced Distribution Sys., Inc. v. United States, 34 Fed. Cl. 598, 604 n. 7 (1995); see also Mark Dunning Indus. v. Perry, 890 F. Supp. 1504

(M.D. Ala. 1995) (court holds that "uncritical deference" to GAO decisions is inappropriate). But see Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989) (Federal Circuit notes that "it is the usual policy, if not the obligation, of procuring departments to accommodate themselves to positions formally taken by the Government Accountability Office").

J. Other Considerations.

1. **"The CICA Stay"—Automatic Statutory Stay**. 31 U.S.C. § 3553(c) and (d).

   a. Pre-award Protests: An agency may not award a contract after receiving notice **from the GAO** of a timely-filed protest. 31 U.S.C. § 3553(c); 4 C.F.R. § 21.6; FAR 33.104(b).

   b. Post-award Protests: The contracting officer shall suspend contract performance immediately when the agency receives notice **from the GAO** of a protest filed **within 10 days of the date of contract award or within five days AFTER THE DATE OFFERED for the required post-award debriefing**. The CICA stay applies under either deadline, whichever is later. 31 U.S.C. § 3553(d); 4 C.F.R. § 21.6; FAR 33.104(c).

   c. The automatic stay is triggered **only** by notice from GAO. See McDonald Welding v. Webb, 829 F.2d 593 (6th Cir. 1987); Survival Technology Inc. v. Marsh, 719 F. Supp. 18 (D.D.C. 1989). See also Florida Professional Review Org., B-253908.2, Jan. 10, 1994, 94-1 CPD ¶ 17 (no duty to suspend performance where protest filed on eighth day after award [Friday] but GAO notified agency of protest on eleventh day after award [Monday]). **NOTE:** FASA changed the rules, now allowing for a deadline falling on a weekend or holiday to extend to the next business day. Filing in EPDS now provides notice almost immediately to the Agency representatives registered EPDS, essentially eliminating the delay between filing and notice by GAO to the Agency.

   d. "Proposed Award" Protests: An agency's decision to cancel a solicitation based upon the determination that the costs associated with contract performance would be cheaper if performed in-house (i.e., by federal employees) may be subject to the CICA stay. See Inter-Con Sec. Sys., Inc. v. Widnall, No. C 94-20442 RMW, 1994 U.S. Dist. LEXIS 10995 (N.D. Cal. July 11, 1994); Aspen Sys. Corp., B-228590, Feb. 18, 1988, 88-1 CPD ¶ 166. In reviewing a protest of an in-house cost comparison, the GAO will look to whether the agency complied with applicable procedures in

selecting in-house performance over contracting. DynCorp, B-233727.2, June 9, 1989, 89-1 CPD ¶ 543.

2. **"The CICA Override"—Relief from the CICA Stay.** 31 U.S.C. § 3553(c) and (d); FAR 33.104(b) and (c); AFARS 5133.104; AFFARS 5333.104. While paragraphs (1) and (2) below provide the *general* approval authority, the Army requires the override to be approved by the Deputy Assistant Secretary of the Army (Policy and Procurement) or the Command Counsel for Army Materiel Command (AMC) for contracting offices that report to AMC. AFARS 5133.104.

a. Pre-Award Protest Stay: The head of the contracting activity (HCA) may, on a nondelegable basis, authorize the award of a contract:

(1) Upon a written finding that urgent and compelling circumstances which significantly affect the interest of the United States will not permit waiting for the decision of the Comptroller General; **AND**

(2) The agency is likely to award the contract within 30 days of the written override determination.

b. Post-Award Protest Stay: The HCA may, on a nondelegable basis, authorize **continued performance** under a previously awarded contract upon a written finding that:

(1) Continued performance of the contract is **in the best interests of the United States**; or

(2) Urgent and compelling circumstances that significantly affect the interest of the United States will not permit waiting for the decision of the Comptroller General.

NOTE: If a protest is sustained where the agency authorized continued performance under the best interests exception, GAO will make recommendations without regard to any cost or disruption from terminating, recompeting, or re-awarding the contract. 31 U.S.C. § 3554(b)(2).

c. In either instance, if the agency is going to override the automatic stay, it must notify the GAO. 31 U.S.C. 3553(c). See also Banknote Corp. of America, Inc., B-245528, Jan. 13, 1992, 92-1 CPD ¶ 53 (GAO will not review the override decision).

d. Override decisions **are** subject to judicial review at the COFC. See Fisher Sand & Gravel Co. v. U.S., 143 Fed. Cl. 247 (2019); Alion

Science and Technology Corp. v. United States, 69 Fed. Cl. 14 (2005). See also Cigna Gov't Services, LLC v. United States, 70 Fed. Cl. 100 (2006) (reinstating the CICA Stay finding that the override was arbitrary and capricious); Advanced Systems Development, Inc. v. United States, 72 Fed. Cl. 25 (2006) (same); Automation Technologies, Inc. v. United States, 72 Fed. Cl. 723 (2006) (same). See also URS Federal Services, Inc. v. United States, 102 Fed. Cl. 664 (2011), where the COFC reviewed an override determination considering four factors: (1) whether significant adverse consequences will necessarily occur if the stay is not overridden, (2) conversely, whether reasonable alternatives to the override exist that would adequately address the circumstances presented, (3) how the potential cost of proceeding with the override, including the costs associated with the potential that the GAO might sustain the protest, compare to the benefits associated with the approach being considered for addressing the agency's needs, and (4) the impact of the override on competition and the integrity of the procurement system, as reflected in the Competition in Contracting Act.

e. An agency's decision to override a CICA stay based upon its determination that such action is in the "best interests" of the United States is subject to judicial review. Alion Science and Technology Corp. v. United States, 69 Fed. Cl. 14 (2005).

3. **Availability of Funds.** The "end-of-fiscal-year spending spree" results in a large volume of protest action during the August-November time frame. To allay concerns about the loss of funds pending protest resolution, 31 U.S.C. § 1558 provides that funds will not expire for 100 days following resolution of the bid protest.[19] FAR 33.102(c).

4. **Protest Costs, Attorneys Fees, and Bid Preparation Costs.**

a. The GAO will issue a declaration on the entitlement to costs of pursuing the protest, to include attorney's fees, in each case after agencies take corrective action. 4 C.F.R. § 21.8(d). The recovery of protest costs is neither an "award" to protester nor is it a "penalty" imposed upon the agency, but is "intended to relieve protesters of the financial burden of vindicating the public interest." Department of Navy-Modification of Remedy, B-284080.3, May 24, 2000, 200- CPD ¶ 99.

[19]This authority applies to protests filed with the agency, at the GAO, or in a federal court. 31 U.S.C. § 1558. See also OFFICE OF THE GENERAL COUNSEL, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, Principles of Federal Appropriations Law 5-89 (3d ed. 2004).

(1) In practice, if the agency takes remedial action promptly, GAO generally will not award fees. See J.A. Jones Management Servs., Inc.,-Costs B-284909.4, Jul. 31, 2000, 2000 CPD ¶ 123 (GAO declined to recommend reimbursement of costs where agency took corrective action promptly in response to supplemental protest allegation); Tidewater Marine, Inc.-Costs, B-270602, Aug. 21, 1996, 96-2 CPD ¶ 81 (the determination of when the agency was on notice of error is "critical"); see also LORS Medical Corp., B-270269, Apr. 2, 1996, 96-1 CPD ¶ 171 (timely agency action measured from filing of initial protest, not time of alleged improper action by agency). The GAO has stated that, in general, if the agency takes corrective action by the due date of the agency report, such remedial action is timely. Kertzman Contracting, Inc., B-259461, May 3, 1995, 95-1 CPD ¶ 226 (agency's decision to take corrective action one day before agency report due was "precisely the kind of prompt reaction" GAO regulations encourage); Holiday Inn - Laurel-Entitlement to Costs, B-265646, Nov. 20, 1995, 95-2 CPD ¶ 233 (agency took corrective action five days after comments filed by protester).

(2) If the agency delays taking corrective action unreasonably, however, the GAO may award fees. Griner's-A-One Pipeline Servs., B-255078, July 22, 1994, 94-2 CPD ¶ 41, (corrective action taken two weeks following filing of agency administrative report found untimely). The GAO will consider the complexity of the protested procurement when determining whether the agency took action in a timely manner. Lynch Machiner Co., Inc., B-256279, July 11, 1994, 94-2 CPD ¶ 15 (protester's request for costs denied where agency corrective action taken three months following filing of protest complaint).

(3) The GAO will not award costs unless the protest was clearly meritorious, even if the agency does not take timely corrective action. Professional Security Corporation-Costs, B-407022.5, March 10, 2014, 2014 CPD ¶ 96.

(4) The GAO may limit recommendation of costs to meritorious protest issues where unsuccessful protest issues are clearly severable from the successful issues as to essentially constitute a separate protest. Carney, Inc.-Costs, B-408176.13, Feb. 14, 2014, 2014 CPD ¶ 82.

(5) Agency corrective action must result in some competitive benefit to the protester. Tri-Ex Tower Corp., B-245877, Jan. 22, 1992, 92-1 CPD ¶ 100 (protester not entitled to fees and costs where the agency cancels a competitive solicitation and proposes to replace it with a sole source acquisition; no corrective action taken in response to the protest).

(6) Protester must file its request for declaration of entitlement to costs with the GAO within 15 days after learning (or when it should have learned) that GAO has closed the protest based on the agency's decision to take corrective action. 4 C.F.R. § 21.8(e). DevTech Sys., Inc., B-284860.4, Aug. 23, 2002, CPD ¶ 150.

b. If the GAO determines that the protester is entitled to recover its costs:

(1) The protester must submit a claim for costs within 60 days of the receipt of the GAO decision. Failure to file within 60 days may result in forfeiture of the right to costs. 4 C.F.R. § 21.8(f). See Aalco Forwarding, Inc., B-277241.30, July 30, 1999, 99-2 CPD ¶ 36 (protesters' failure to file an **adequately** supported initial claim within the 60-day period resulted in forfeiture of right to recover costs). See also Dual Inc. - - Costs, B-280719.3, Apr. 28, 2000 (rejecting claim for costs where claim was filed with contracting agency more than 60 days after protester's counsel received a protected copy of protest decision under a protective order).

(2) If the agency and protester fail to agree on the amount of costs the agency will pay, the protester may request that GAO recommend an amount. In such cases, GAO may also recommend payment of costs associated with pursuing this GAO amount recommendation. 4 C.F.R. § 21.8(f)(2) (2005); DIVERCO, Inc.-Claim for Costs, B-240639, May 21, 1992, 92-1 CPD ¶ 460.

(3) Interest on costs is not recoverable. Techniarts Eng'g-Claim for Costs, B-234434, Aug. 24, 1990, 90-2 CPD ¶ 152.

(4) Amount of attorney's fees and protest costs is determined by reasonableness. See, e.g., JAFIT Enters., Inc. – Claim for Costs, B-266326.2, Mar. 31, 1997, 97-1 CPD ¶ 125 (GAO allowed only 15% of protest costs and fees). Equal

Access to Justice Act (EAJA) standards do **not** apply. Attorneys' fees (for other than small business concerns) are limited to not more than $150 per hour, "unless the agency determines based on the recommendation of the Comptroller General on a case-by-case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 31 U.S.C. § 3554(c)(2)(B). See also Sodexho Mgmt., Inc.-Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136. Similarly, fees for experts and consultants are capped at "the highest rate of compensation for expert witness paid by the Federal Government." 31 U.S.C. § 3554(c)(2); FAR 33.104(h).[20] This amount is equal to GS15 Step 10, not the highest amount paid by any federal agency for any expert in any forum at any time. Dept. of the Army; ITT Federal Services Int'l Corp., B-296783.4, B-296783.5, Apr. 26, 2006, 2006 CPD ¶ 72.

(5) Unlike the EAJA, a protester need not be a "prevailing party" where a "judicial imprimatur" is necessary to cause a change in the legal relationship between the parties. Georgia Power Company, B-289211.5, May 2, 2002, 2002 CPD ¶ 81 (rejecting the agency's argument that the Supreme Court's holding in Buckhannon Bd. and Care Home, Inc., v. W. VA. Dep't of HHR, 532 U.S. 598 (2001) rejecting the "catalyst theory" to fee-shifting statutes, applied to the Competition in Contracting Act).

(6) As a general rule, a protester is reimbursed costs incurred with respect to all protest issues pursued, not merely those upon which it prevails. AAR Aircraft Servs.-Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100. Department of the Army-Modification of the Remedy, B-292768.5, Mar. 25, 2004, 2004 CPD ¶ 74. The GAO has limited award of costs to successful protesters where part of their costs is allocable to a protest issue that is so clearly severable as to essentially constitute a separate protest. TRESP Associates, Inc.-Costs, B-258322.8, Nov. 3, 1998, 98-2 CPD ¶ 108 (no need to allocate attorneys' fees between sustained protest and those issues not addressed where all issues related to same core allegation that was sustained);

[20] The FAR refers to 5 U.S.C. § 3109 and Expert and Consultant Appointments, 60 Fed. Reg. 45649, Sept. 1, 1995, citing 5 C.F.R. § 304.105.

Interface Flooring Sys., Inc.-Claim for Attorney's Fees, B-225439.5, July 29, 1987, 87-2 CPD ¶ 106.

(7) A protester may recover costs on a sustained protest despite the fact that the protester did not raise the issue that the GAO found to be dispositive. The GAO may award costs even though the protest is sustained on a theory raised by the GAO *sua sponte*. Department of Commerce-Recon., B-238452, Oct. 22, 1990, 90-2 CPD ¶ 322.

c. The protester must document its claim for attorney's fees. Consolidated Bell, Inc., B-220425, Mar. 25, 1991, 91-1 CPD ¶ 325 (claim for $376,110 reduced to $490 because no reliable supporting documentation). See also Galen Medical Associates, Inc., B-288661.6, July 22, 2002, 2002 CPD ¶ 56 (GAO recommending that the agency reimburse the protestor $110.65 out of the $159,195.32 claim due to a lack of documentation).

d. When a claim aggregates allowable and unallowable costs and the GAO cannot determine what portion is allowable, the entire claim is unallowable. System Studies, and Simulation – Costs, B-409375.5, May 8, 2015, 2015 CPD ¶ 155.

e. Protestor must also diligently pursue its claim for costs. System Studies, and Simulation – Costs, B-409375.5, May 8, 2015, 2015 CPD ¶ 155 (denying claim for $66,078.62 in attorneys' fees where the agency offered an amount in settlement and protester did not respond and waited over four months to seek GAO recommendation.)

f. Bid Preparation Costs. 4 C.F.R. § 21.8(d)(2).

(1) GAO has awarded bid preparation costs when no other practical relief was feasible. See, e.g., Tri Tool, Inc.-Modification of Remedy, B-265649.3, Oct. 9, 1996, 96-2 CPD ¶ 139.

(2) As with claims for legal fees, the protester must document its claim for bid preparation and protest costs. A protester may not recover profit on the labor costs associated with prosecuting a protest or preparing a bid. Innovative Refrigeration Concepts-Claim for Costs, B-258655.2, July 16, 1997, 97-2 CPD ¶ 19 (protester failed to show that claimed rates for employees reflected actual rates of compensation).

g. **Anticipatory profits are not recoverable**. Keco Indus., Inc. v. United States, 192 Ct. Cl. 773, 784 (1970); DaNeal Constr., Inc., B-208469, Dec. 14, 1983, 83-2 CPD ¶ 682.

V. UNITED STATES COURT OF FEDERAL CLAIMS.

A. Statutory Authority.

1. Tucker Act. The Tucker Act grants the U.S. Court of Federal Claims (COFC) jurisdiction to decide any claim for damages against the United States founded upon the Constitution, Act of Congress, agency regulation, or express or implied-in-fact contract with the United States not sounding in tort. 28 U.S.C. § 1491.

2. Federal Courts Improvement Act of 1982. The COFC also was granted authority by the Federal Courts Improvements Act of 1982, Pub. L. No. 97-164, § 133(a), 96 Stat. 25, 40 (1982), 28 U.S.C. § 1491(a)(3), "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" (i.e., injunctive relief).

3. Administrative Dispute Resolution Act of 1996. Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) [hereinafter "ADRA"]. Effective December 31, 1996, ADRA provides jurisdiction to the Court of Federal Claims to hear pre-award and post-award bid protests. Specifically, the COFC has jurisdiction to hear protests by interested parties that object to a solicitation, proposed award, or alleged violation of statute. 28 U.S.C. § 1491(b)(1).

   a. The ADRA directs the COFC to "give due regard" to national security/defense interests and "the need" for expeditious processing of protests. Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) (adding 28 U.S.C. § 1491(b)(3)).

   b. The COFC has indicated that it will apply bid protest law developed by the U.S. District Court of the District of Columbia under the "Scanwell doctrine." (Scanwell Lab., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970)). See United States Court of Federal Claims, Court Approved Guidelines for Procurement Protest Cases (Dec. 11, 1996).

   c. The ADRA also gave jurisdiction to the federal district courts, but this jurisdiction included a sunset provision of 1 January 2001. Congress did not act to extend the federal district court jurisdiction.

B. **COFC Rules.** The COFC issued rules (RCFC), which prescribe the conduct of cases before the Court. Available at http://www.uscfc.uscourts.gov/rcfc. Appendix C of the RCFC provides procedural guidance specifically tailored for bid protest litigation to enhance the overall effectiveness of protest resolution at the COFC. (The guidance provided by Appendix C of the RCFC is cited throughout the remainder of this outline section.)

C. **Standing Requirements.**

1. **Interested Party.** The COFC appears to follow the same definition as that used in GAO protests. CC Distribs., Inc. v. United States, 38 Fed.Cl. 771 (1997); but see CCL Inc. v. United States, 39 Fed. Cl. 780 (1997) (noting that "there is not a perfect joinder between the GAO's definition of interested party and the Tucker Act's jurisdictional waiver"). The **Court of Appeals for the Federal Circuit (CAFC)** has apparently resolved the issue of who is an "interested party" by adopting the GAO definition. See Am. Fed.'n Gov't Employees, AFL-CIO v. United States, 258 F.3d 1294, 1302 (Fed. Cir. 2001) (Construing that Section 1491(b)(1) did not adopt the APA's liberal standing standards, but rather the narrow standards set forth in Section 3551(2)). See also, Myers Investigative & Sec Serv., Inc. v United States, 275 F.3d 1366 (January 8, 2002).

2. **Intervenors.** The COFC allows parties to intervene as a matter of right and allows permissive intervention. RCFC 24.

   a. Intervention of Right. Allowed when the right of intervention is mandated by statute or the applicant for intervention has an interest relating to the property or transaction that is the subject of the protest. RCFC 24(a). Case law developed by the U.S. District Court of the District of Columbia suggests that the protester must be able to demonstrate some "injury-in-fact" or otherwise be within the "zone of interest" of the statute or regulation to have standing before the court. See Scanwell Lab. Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970). See also Control Data Corp. v. Baldridge, 655 F.2d 283 (D.C. Cir. 1981).

   b. Permissive Intervention. The COFC may allow permissive intervention by parties with a claim or question of law or fact that is "in common" with that of the main action. The court will consider whether such intervention will "unduly delay or prejudice the adjudication" of the main action. RCFC 24(b).

   c. Intervention by the Proposed Awardee. An "apparent successful bidder" may enter an appearance at any hearing on an application for injunctive relief. RCFC 24(a)(2); C12. But see Anderson Columbia Envtl., Inc., 42 Fed. Cl. 880 (1999) (holding that contract awardee was not permitted to intervene as its interests

were represented adequately by an existing party, i.e., the government).

3. Effect of GAO Proceedings. A protester may file its protest with the COFC despite the fact that it was the subject of a GAO protest. 31 U.S.C. § 3556; S.K.J. & Associates, Inc. v. United States, 67 Fed. Cl. 218 (2005).

D. The COFC's Jurisdiction. The ADRA of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) (amending 28 U.S.C. § 1491).

1. An "interested party" may challenge the terms of a solicitation, a proposed award, the actual contract award, or any alleged violation of statute or regulation associated with a procurement or proposed procurement. 28 U.S.C. § 1491(b). See CCL Inc. v. United States, 39 Fed. Cl. 780 (1997) (protester has standing to challenge out-of-scope contract change).

2. Other Transactions? Award of Other Transaction Agreement under 10 U.S.C. § 2371b was not a "proposed contract" or "in connection with a procurement or a proposed procurement" and, therefore, COFC does not have jurisdiction over the award. Space Exploration Technologies, Corp. v. U.S., 144 Fed.Cl. 433 (2019). Whether a commitment in the prototype OT to award a follow-on production FAR contract would make the OT "in connection with a procurement or proposed procurement" remains an open question.

3. The COFC has jurisdiction to hear both pre- and post-award protests. 28 U.S.C. § 1491(b)(1). It will not, however, review a protest alleging that GAO did not follow its own bid protest procedures. Advance Construction Services, Inc., v. U.S., 51 Fed. Cl. 362 (2002).

E. Timeliness.

1. Unlike protests filed with the GAO, the COFC has no specific timeliness requirement. However, delays in filing could affect a protester's ability to effectively demonstrate the immediate and irreparable harm necessary to obtain injunctive relief. See Cincom Sys., Inc. v. U.S., 37 Fed. Cl. 266 (1997).

2. Defective Solicitation and Waiver. A party who has the opportunity to object to the terms of a solicitation or patent ambiguities in the solicitation and "fails to do so prior to the close of the bidding process" waives its ability to raise those issues. Blue & Gold Fleet, L.P. v. U.S., 492 F.3d 1309 (2007).

3. Latches. In the context of a post-award protest, the COFC has entertained the doctrine of latches to bar a protest, holding that a protester cannot sit on his rights while the Government moves forward. However, the "mere passage of time" does not constitute latches, there must also be some

showing that the protester's delay caused prejudice to the defendant(s). National Telecommuting Institute, Inc. v. U.S., 123 Fed. Cl. 595 (2015) (delay of six months and economic prejudice to both the awardee and the government); Software Testing Solutions, Inc, v. U.S., 58 Fed. Cl. 533 (2003) (discussing latches where protester delayed filing for two months while it was "weighing the cost of litigating this matter" but deciding the case on other grounds).

4. Absent a need to show immediate and irreparable harm, actions must be commenced within six years of the date the right of action first accrues. 28 U.S.C. § 2401(a).

F. Temporary Restraining Orders and Preliminary Injunctions.

1. RCFC C9-C15 provide for Temporary Restraining Orders and Preliminary Injunctions. The court applies the traditional four-element test. PGBA, LLC v. U.S., 57 Fed. Cl. 655 (2013); Cincom Sys., Inc. v. U.S., 37 Fed. Cl. 663 (1997). These elements are:

   a. Likelihood of success on the merits; Cincom Sys., Inc. v. United States, 37 Fed. Cl. 266 (1997) (court considered fact that plaintiff lost in earlier GAO protest);

   b. Degree of immediate irreparable injury if relief is not granted; Magellan Corp. v. United States, 27 Fed. Cl. 446, 448 (1993) (no irreparable harm if protester will have other opportunities to supply product);

   c. Degree of harm to the party being enjoined if relief is granted; Magellan Corp. v. United States, 27 Fed.Cl. 446, 448 (1993); and,

   d. Impact of the injunction on public policy considerations. Cincom Sys., Inc. v. United States, Feb. 13, 1997, 37 Fed. Cl. 266 (1997), citing Southwest Marine, Inc. v. United States, 3 Cl. Ct. 611, 613 (1983) (public policy places national security/defense interests over public interest in fair and open competition). Metcalf Const. Co., Inc. v. U.S., 53 Fed. Cl. 617 (2002) (ensuring solicitations are conducted in accordance with federal procurement laws serves the public interest).

2. Posting of Bonds and Securities. A protester must post bond via an "acceptable surety" in order to obtain a preliminary injunction. The COFC determines the sum of the bond security. This security covers the potential costs and damages incurred by the agency if the court subsequently finds that the government was unlawfully enjoined or restrained. RCFC 65(c).

G. Standard of Review.

1. The COFC will review the agency's action pursuant to the Administrative Procedures Act (APA). 5 U.S.C. § 706. The court looks to whether the agency acted arbitrarily, capriciously, or not otherwise in accordance with law. Cubic Applications, Inc. v. U.S., 37 Fed. Cl. 339, 342 (1997). See also Impresa Construzioni Geom. Domenico Garufi v. U.S., 238 F.3d 1324 (Fed. Cir. 2001) (allowing for review of a contracting officer's affirmative responsibility determination if there has been a violation of a statute or regulation, *or alternatively, if the agency determination lacked a rational basis*).

2. The plaintiff must demonstrate either that the agency decision-making process lacks a rational basis or that there is a clear and prejudicial violation of applicable statutes or regulations. Data General Corp. v. Johnson, 78 F.3d 1556 (Fed. Cir. 1996); Magellan Corp. v. United States, 27 Fed. Cl. 446 (1993). The court will consider any one, or all, of the following four factors in determining whether the agency abused its discretion or acted in an arbitrary or capricious manner:

   a. Subjective bad faith on the part of the agency official;

   b. Absence of a reasonable basis for the agency decision or action;

   c. Amount of discretion given by procurement statute or regulation to the agency official; and

   d. Proven violation of pertinent statutes or regulations. See Prineville Sawmill Co. v. United States, 859 F.2d 905, 911 (Fed. Cir. 1988).

3. The same "rational basis" standard applies when a protestor challenges an agency's decision to take corrective action. Although earlier cases indicated that the COFC would apply a heightened standard when reviewing an agency's decision to take corrective action in response to a protest. See Amazon Web Services, 113 Fed. Cl. 102, at 115 (2013)(stating that "any corrective action must narrowly target the defects it is intended to remedy.") citing Sheridan Corp. v. U.S., 95 Fed. Cl. 141, 153 (2010); Dell Federal Systems, L.P. v. U.S., 133 Fed. Cl. 92 (2017)) The Court of Appeals for the Federal Circuit rejected this heightened "narrowly targeted" standard and stated that corrective action requires only a rational basis. Dell Fed. Systems, L.P. v. U.S., 906 F.3d 982 (2018).

4. To obtain a permanent injunction, the plaintiff must show by a preponderance of the evidence that the challenged action is irrational, unreasonable, or violates an acquisition statute or regulation. See Isratex, Inc. v. United States, 25 Cl. Ct. 223 (1992); see also Logicon, Inc., 22 Cl.

Ct. 776 (1991) (plaintiff need only demonstrate likelihood of success on the merits for temporary restraining order).

5. The court gives great deference to decisions by the GAO. Honeywell, Inc. v. United States, 870 F.2d 644 (Fed Cir. 1989). However, this deference is not absolute. See California Marine Cleaning, Inc. v. United States, 42 Fed. Cl. 281 (1998) (COFC overturned GAO decision finding that GAO's decision was irrational, that GAO misapplied the late bid rule, and that it failed to consider all relevant evidence); Lyons Security Services, Inc. v. United States, 38 Fed Cl. 783 (1997) (COFC found that GAO's recommendation was irrational, and therefore, the Contracting Officer's decision to adopt that recommendation was an abuse of discretion).

H. Agency Administrative Record. The court accomplishes its review "based upon an examination of the 'whole record' before the agency." Cubic Applications, Inc. v. U.S., 37 Fed.Cl. 339, 342 (1997). RCFC C22 encourages early production of the "core documents" of the administrative record to "expedite the final resolution of the case."

1. Core Documents. The "core documents" of the Administrative Record include, as appropriate:

   a. the agency's procurement request, purchase request, or statement of requirements;

   b. the agency's source selection plan;

   c. the bid abstract or prospectus of bid;

   d. the Commerce Business Daily or other public announcement of the procurement (this will most likely be the FedBizOpps or beta.sam.gov announcement, but the RCFC still refers to the CBD);

   e. the solicitation, including any instructions to offerors, evaluation factors, solicitation amendments, and requests for best and final offers (BAFO) (the RCFC still refers to BAFO);

   f. documents and information provided to bidders during any pre-bid or pre-proposal conference;

   g. the agency's responses to any questions about or requests for clarification of the solicitation;

   h. the agency's estimates of the cost of performance;

   i. correspondence between the agency and the protester, awardee, or other interested parties relating to the procurement;

j. records of any discussions, meetings, or telephone conferences between the agency and the protester, awardee, or other interested parties relating to the procurement;

k. records of the results of any bid opening or oral motion auction in which the protester, awardee, or other interested parties participated;

l. the protester's, awardees', and other interested parties' offers, proposals, or other responses to the solicitation;

m. the agency's competitive range determination, including supporting documentation;

n. the agency's evaluations of the protester's, awardees', or other interested parties' offers, or other responses to the solicitation, proposals, including supporting documentation;

o. the agency's source selection decision, including supporting documentation;

p. pre-award audits, if any, or surveys of the offerors;

q. notification of contract award and executed contract;

r. documents relating to any pre- or post-award debriefing;

s. documents relating to any stay, suspension, or termination of award or performance pending resolution of the bid protest;

t. justifications, approvals, determinations and findings, if any, prepared for the procurement by the agency pursuant to statute or regulation; and

u. the record of any previous administrative or judicial proceedings relating to the procurement, including the record of any other protest of the procurement. RCFC C22.

2. Supplementing the Administrative Record. The COFC may allow supplementation of the administrative record in limited circumstances. Cubic Applications, Inc. v. U.S., 37 Fed.Cl. 339, 342 (1997) citing Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989) ("little weight" given "*post hoc* rationalizations by the agency"); Graphicdata, LLC v. U.S., 37 Fed. Cl. 771, 779 (1997). The reasons recognized by the COFC for supplementing the administrative record include:

a. When the agency action is not adequately explained in the record before the court;

b. When the agency failed to consider factors which are relevant to its final decision;

c. When the agency considered evidence not included in the record;

d. When the case is so complex that additional evidence will enhance understanding of the issues;

e. Where evidence arising after the agency action shows whether the decision was correct;

f. Cases where the agency is sued for failure to take action;

g. Cases arising under the National Environmental Policy Act; and

h. Cases where relief is at issue, particularly with respect to injunctive relief.

I. Procedures.

1. The court conducts a civil proceeding without a jury, substantially similar to proceedings in federal district courts. As noted above, the court has its own rules of procedure.

2. The RCFC incorporate the Federal Rules of Civil Procedure (FRCP) applicable to civil actions tried by a federal district court sitting without a jury to the extent practicable. RCFC Preamble.

3. Additionally, the plaintiff must be represented by counsel who is admitted to practice before the court. RCFC 83.1. Diaz v. U.S., 127 Fed. Cl. 664 (2016). RCFC C25 allows counsel who are not yet members of the COFC bar to make initial filings in a bid protest case (i.e., complaint and other accompanying pleadings), "conditioned upon counsel's prompt pursuit of admission to practice" before the COFC.

4. Notification. The protester must hand deliver two copies of all pleadings to the Department of Justice (DOJ), Commercial Litigation Branch, Civil Division. Additionally, the protester must notify by telephone and serve counsel for the "apparent successful bidder" any application for injunctive relief. RCFC C2.

5. Requirement for Pre-Filing Notification. The COFC requires the protester to provide **at least** 24-hours advance notice of the protest filing to the DOJ, the COFC, the procuring agency, and any awardee(s). This requirement allows DOJ time to assign an attorney to the case and permits the COFC to identify the necessary assets to process the case. Although failure to provide pre-filing notice is not jurisdictional, it is "likely to delay the initial processing of the case." RCFC C2.

6. Initial Filings. As stated above, the protester generally initiates the COFC protest process with the filing of an application for injunctive relief. Specifically, the protest commences with the filing of a complaint. RCFC 3(a). Generally, the complaint is accompanied by the application for injunctive relief. RCFC 65, C10. Additionally, any application must have with it the proposed order, affidavits, supporting memoranda, and other documents upon which the protester intends to rely. RCFC C10.

7. Initial Status Conference. The COFC will conduct an initial status conference to address pre-hearing matters, to include: identification of interested parties; any requests for injunctive relief and protective orders; the administrative file; and establishing a timetable for resolution of the protest. The COFC will schedule the initial status conference as soon as practicable following the filing of the complaint. RCFC C8.

8. Agency Response. The government must respond to the protester's complaint within 60 days of filing. RCFC 12. Responses to motions must be accomplished within 14 days of service. RCFC 7.2(a). Responses to Rule 12(b) and 12(c) motions and summary judgment motions must be filed within 28 days of service. RCFC 7.2(c). Although these are the formal timelines, the parties frequently agree to a timeline to propose to the judge with much shorter timelines – often with all filings complete within 60 days of protest filing.

9. Discovery. The APA mandates that the court's decision should be based upon the agency record already in existence that explains the agency's decision. 5 U.S.C. § 706; Camp. v. Pitts, 411 U.S. 138 (1973). Yet, the COFC has authorized limited discovery. Cubic Applications, Inc. v. United States, 37 Fed. Cl. 339 (1997) (deposition of contracting officer allowed); Aero Corp., S.A. v. United States, 38 Fed. Cl. 408 (1997) (in light of contemporaneous written explanations supporting procurement decision, deposing procurement officials improper).

10. Filing Under Seal/Protective Orders. The COFC may issue protective orders upon motion by a party to either prevent discovery or to protect proprietary/source selection sensitive information from disclosure. RCFC C4-C7, C16-20. But see Modern Technologies Corp. v. United States, 44 Fed. Cl. 319 (1998) (parties ordered to make available to the public documents that were filed previously under seal pursuant to a protective order because the proprietary and source-selection information had "minimal current value").

11. Sanctions. The COFC may impose sanctions under RCFC 11(c) if a "[p]leading, motion or other paper is signed in violation this rule. . ." RCFC 11(c). See Coastal Environmental Group, Inc. v. U.S., 118 Fed. Cl. 15 (2014) (Government sanctioned for including inaccurate, backdated document in supplemental administrative record).

J. Remedies.

1. Equitable relief, i.e., temporary restraining orders, preliminary injunctions, permanent injunctions, and declaratory judgment. 28 U.S.C. § 1491(b)(2); RCFC 65, C9-C16. Protesters commencing action in this court usually seek injunctive relief.

2. Reasonable bid preparation and proposal costs are recoverable. 28 U.S.C. § 1491(b)(2); Q Integrated Companies, LLC v. U.S., 133 Fed. Cl. 479 (2017).

3. Anticipatory profits are not recoverable. Heyer Prods. Co. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956); Compubahn, Inc. v. United States, 33 Fed. Cl. 677 (1995) (reversed on other grounds).

4. The cost of preparing for performance of an anticipated contract is not recoverable. Innovation Development Enterprises of America, Inc. v. U.S., 114 Fed. Cl. 213 (2014).

5. The cost of developing a prototype may be recovered. Coflexip & Servs., Inc. v. United States, 961 F.2d 951 (Fed. Cir. 1992).

K. Attorney's Fees and Protest Costs.

1. The court may award attorney's fees and protest costs pursuant to the Equal Access to Justice Act. 28 U.S.C. § 2412(d)(1)(A); Q Integrated Companies, LLC v. U.S., 133 Fed. Cl. 479 (2017). To be eligible for award of attorney's fees under EAJA requires the following (see 28 U.S.C. § 2412(d):

   a. Protester must be a "prevailing party";

   b. Government's position must not be "substantially justified";

   c. There must not be "special circumstances" that make an award unjust;

   d. A fee application must be submitted to the Court within 30 days of final judgment and be supported by an itemized statement; and

   e. If the qualifying party is a corporation, it must have had less than $7 million in net worth or 500 employees at the initiation of the litigation.

2. Only those attorney's fees associated with the litigation are recoverable. Cox v. United States, 17 Cl. Ct. 29 (1989). See also Levernier Constr. Co. v. United States, 21 Cl. Ct. 683 (1990), rev'd 947 F.2d 497 (Fed. Cir.

1991) (costs associated with hiring an expert witness to pursue a claim with the contracting officer, prior to the litigation, not recoverable).

3. The Demise of the "**Catalyst Theory**." Need more than a "voluntary change in the defendant's conduct" to qualify as a "prevailing party." Now there must be a "judicially sanctioned change in the parties' relationship" to be considered a "prevailing party" under fee-shifting statutes. See Brickwood Contractors, Inc. v. U.S., 288 F.3d 1371 (Fed. Cir. 2002) (holding the Supreme Court's decision in Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of HHR, 532 U.S. 598 (2001) was applicable to EAJA); Dellew Corp. v. U.S., 855 F.3d 1375 (Fed. Cir. 2017).

L. Appeals. Appeals from decisions of the Court of Federal Claims are taken to the United States Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295(a)(3).

VI. FEDERAL DISTRICT COURTS.

Prior to ADRA, federal district courts reviewed challenges to agency procurement decisions pursuant to the Administrative Procedures Act. 5 U.S.C. § 702. This authority was popularly known as the "Scanwell Doctrine." Scanwell Lab., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

The ADRA granted the federal district courts jurisdictional authority to hear pre-award and post-award bid protests. As with the COFC, the ADRA directed the district courts to "give due regard" to national security/defense interests and "the need" for expeditious processing of protests. Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) (adding 28 U.S.C. § 1491(b)(3)). However, the ADRA also provided for the "sunset" of the district courts bid protest jurisdiction as of 1 January 2001, unless Congress acted affirmatively to extend the jurisdiction. Congress did not extend the bid protest jurisdiction.

Note however, that the United States Court of Appeals for the Federal Circuit recently held that federal district courts retained their implied-in-fact jurisdiction over nonprocurement solicitations. Resource Conservation Group, LLC v. U.S, 597 F.3d 1238, (Fed.Cir. 2010).

District Court jurisdiction over bid protests and the scope of the ADRA has recently become more significant with the increase in awards of Other Transactions by DoD. As discussed above, neither the GAO nor COFC have jurisdiction over the award of an Other Transaction. One protester, after its protest was dismissed by the GAO for lack of jurisdiction, sought recourse in the U.S. District Court for the District of Arizona. The District Court found it also lacked jurisdiction, in part because the OT was "in connection with a procurement" (distinguishing the specifics of the OT from that in the COFC's decision in Space Exploration v. U.S.). See MD Helicopters, Inc., v. U.S., 435 F.Supp.3d 1003 (Jan 24, 2020).

APPENDIX A AGENCY FAR SUPPLEMENTS

The following Supplements contain provisions addressing protests:

1. Army FAR Supplement (AFARS), 48 C.F.R. Part 5101.

2. Navy Marine Corps Acquisition Regulation Supplement (NMCARS), 48 C.F.R. Part 5201

3. Air Force FAR Supplement (AFFARS), 48 C.F.R. Part 5301.

4. Defense Logistics Acquisition Directive (DLAD), 48 C.F.R. Subpart 5433.1

5. Special Operations Command FAR Supplement (SOFARS), 48 C.F.R. Part 5601.

6. Department of Agriculture Acquisition Regulation (AGAR), 48 C.F.R. Part 401

7. US Agency for International Development (USAID) Acquisition Regulation (AIDAR), 48 C.F.R. Part 701.

8. Department of Commerce Acquisition Regulation (CAR), 48 C.F.R. Part 1301.

9. Department of Energy Acquisition Regulation (DEAR), 48. C.F.R. Part 901.

10. Department of the Interior Acquisition Regulation (DIAR), 48 C.F.R. Part 1401.

11. Department of Labor Acquisition Regulation (DOLAR), 48 C.F.R. Part 2901.

12. Department of State Acquisition Regulation (DOSAR), 48 C.F.R. Part 601.

13. Department of the Treasury Acquisition Regulation (DTAR), 48 C.F.R. Part 1001.

14. Department of Education Acquisition Regulation (EDAR), 48 C.F.R. Part 3401.

15. Environmental Protection Agency Acquisition Regulation (EPAAR), 48 C.F.R. Part 1501.

16. General Services Administration Acquisition Regulation (GSAR), 48 C.F.R. Part 501.

17. Department of Health and Human Services Acquisition Regulation (HHSAR), 48 C.F.R. 3011.

18. Department of Housing and Urban Development Acquisition Regulation (HUDAR), 48 C.F.R. 2401.

19. Justice Acquisition Regulation (JAR), 48 C.F.R. 3001

20. National Aeronautics and Space Administration (NASA) FAR Supplement (NFS), 48 C.F.R. Part 1801.

21. Nuclear Regulatory Commission Acquisition Regulation (NRCAR), 48 C.F.R. Part 2001

22. Department of Transportation Acquisition Regulation (TAR), 48 C.F.R. Part 1201

23. Veterans Affairs Acquisition Regulation (VAAR), 48 C.F.R. Part 801

CHAPTER 18B

CONTRACT DISPUTES ACT AND BID PROTEST LITIGATION AT THE COURT OF FEDERAL CLAIMS (COFC)[1]

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[1] This document was prepared by Doug Mickle with the assistance of Steven Mager and and Tony Schiavetti, and the information presented in this chapter has not been endorsed by the Department of Justice. It is current as of July 6, 2020.

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CHAPTER 18B

CONTRACT DISPUTES ACT AND BID PROTEST

LITIGATION AT THE COURT OF FEDERAL CLAIMS ("COFC")

I. INTRODUCTION.

A. Court of national jurisdiction, established in 1855 to handle certain types of claims against the United States. Website: http://www.uscfc.uscourts.gov/

B. Jurisdiction – Suits primarily for money, arising out of money-mandating statutes, Constitutional provisions, Executive Orders, Executive agency regulations, and contracts.[2]

1. Government contracts and bid protests.

2. Civilian and military pay.

3. Tax refunds (concurrent jurisdiction with United States district courts).

4. Fifth Amendment takings, including environmental and natural resource issues.

5. Vaccine compensation claims. 42 U.S.C. § 300aa-12.

6. Miscellaneous.

a. Various claims pursuant to statutory loan guarantee or benefit programs, including those brought by states, localities, and foreign governments.

b. Congressional reference cases. 28 U.S.C. § 1492.

c. Intellectual property claims against the United States (and its contractors). 28 U.S.C. § 1498.

d. Indian Tribe claims. 28 U.S.C. § 1505.

C. Limitation on Remedies

[2] Most recent available data with a breakdown by case type for Fiscal Year 2018 can be found at: http://www.uscfc.uscourts.gov/sites/default/files/Statistical%20Report%20for%20FY2018.pdf

1. Generally, money damages. However, monetary relief in a bid protest is limited to bid preparation and proposal costs. 28 U.S.C. § 1491(b)(2).

2. Pursuant to the Tucker Act, the Court may provide limited forms of equitable relief, including:

   a. Reformation in aid of a monetary judgment, or rescission instead of monetary damages. John C. Grimberg Co. v. United States, 702 F.2d 1362 (Fed. Cir. 1983); Paragon Energy Corp. v. United States, 645 F.2d 966 (Ct. Cl. 1981); Rash v. United States, 360 F.2d 940 (1966).

   b. "[T]o grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief" in bid protest cases. 28 U.S.C. § 1491(b)(2).

   c. Records correction incident to a monetary award, such as correcting military records to reflect a Court finding of unlawful separation. See 28 U.S.C. § 1491(a)(2).

   d. Pursuant to the Contract Disputes Act ("CDA"), the COFC also may entertain certain nonmonetary disputes.

3. The Court may award Equal Access to Justice Act ("EAJA") attorney fees. 28 U.S.C. § 2412.

D. Composition. 28 U.S.C. §§ 171-172.

1. Currently composed of 10 active judges, along with 11 senior judges. 28 U.S.C. § 171(a) authorizes the President to appoint 16 active judges).

2. Chief Judge is Margaret M. Sweeney.

3. President appoints judges for 15-year term with advice and consent of the Senate. President may reappoint after initial term expires.

4. The Court of Appeals for the Federal Circuit ("Federal Circuit") may remove a judge for incompetence, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability.

E. Location.

1. 717 Madison Place, N.W., Washington, D.C. (across from White House and Treasury).

2. Routinely schedules trials throughout the country, 28 U.S.C. §§ 173 ("times and places of the sessions of the [COFC] shall be prescribed with a view to securing reasonable opportunity to citizens to appear … with as

little inconvenience and expense to citizens as is practicable"), 2503(c) ("[h]earings shall, if convenient, be held in the counties where the witnesses reside"), and 2505 ("[a]ny judge of the [COFC] may sit at any place within the United States to take evidence and enter judgment."). The Court also conducts telephonic hearings, motions, and status conferences.

3. Unlike the boards of contract appeals ("BCAs"), however, prior to 1992, the COFC could not conduct trials in foreign countries. 28 U.S.C. § 2505; In re United States, 877 F.2d 1568 (Fed. Cir. 1989). The Federal Courts Administration Act ("FCAA") of 1992 remedied this. See 28 U.S.C. § 798(b).

F. Caseload.

1. FY 2019, the COFC disposed of 637 complaints and 829 vaccine petitions. The total amount claimed was $7,207,044,000.00. Of the cases disposed of, the court rendered judgments for claimants in the sum of $328,969,403.31. The COFC rendered judgments for the United States on counterclaims or offsets in the amount of $10,439,691. The Court had 146 bid protests.

2. FY 2018, the COFC disposed of 774 complaints and 752 vaccine petitions. The total amount claimed was $31,621,680,000.00. Of the cases disposed of, the court rendered judgments for claimants in the sum of $257,415,838.23. The COFC rendered judgments for the United States on counterclaims or offsets in the amount of $59,359,207.76. The Court had 171 bid protests.

3. FY 2017, the COFC disposed of 1,035 complaints and 899 vaccine petitions. The total amount claimed was $146,989,958,000.00. Of the cases disposed of, the court rendered judgments for claimants in the sum of $1,299,530,292.97. The COFC rendered judgments for the United States on counterclaims or offsets in the amount of $4,273,894.05. The Court had 129 bid protests.

4. FY 2016, the COFC disposed of 569 complaints and 887 vaccine petitions. The total amount claimed was $995,275,774,000.00. Of the cases disposed of, the court rendered judgments for claimants in the sum of $803,511,996.95. The COFC rendered judgments for the United States on counterclaims or offsets in the amount of $6,658,512.48. The Court had 120 bid protests.

5. FY 2014, the COFC terminated 1,265 cases. The total amount claimed was $5,534,021,000.00. Of the cases disposed of, the Court rendered judgments for claimants in the sum of $935,532,911.22. The COFC

rendered judgments for the United States on counterclaims or offsets in the amount of $26,248,136.44. The Court had 95 bid protests.

6. FY 2012, the COFC terminated 3,391 cases. The total amount claimed was $46,408,652,000.00. Of the cases disposed of, the Court rendered judgments for claimants in the sum of $810,147,115. The COFC rendered judgments for the United States on counterclaims or offsets in the amount of $3,542,332. The Court had 91 bid protests.

7. FY 2008, the COFC disposed of 872 complaints (including Congressional Reference) and 294 vaccine petitions. The total amount claimed was $10,108,961,000.00. Of the cases disposed of, the Court rendered judgments for claimants in the sum of $1,287,014,725.40 of which $31,835,607.84 carried interest. The Court had 92 bid protests.

8. FY 2006, the COFC rendered judgments in more than 900 cases and awarded $1.9 billion in damages.

9. FY 2003, the COFC disposed of 732 complaints, including 45 bid protests, and awarded judgments totaling $878 million on claims totaling $40 billion against the Government.

II. HISTORY OF THE COURT.

A. Pre-Civil War.

1. Before 1855, Government contractors had no forum in which to sue the United States.

2. 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.

3. However, the service secretaries 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.

B. Civil War Reforms.

1. 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.

2. In 1887, Congress passed the Tucker Act to expand and clarify the Court's jurisdiction. Act of March 3, 1887, 24 Stat. 505 (codified at 28 U.S.C. § 1491).

   a. The Court has jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). For the first time, a Government contractor could sue the United States as a matter of right.

   b. Note: district courts have concurrent jurisdiction with COFC to the extent such claims do not exceed $10,000. 28 U.S.C. § 1346(a)(2) (Little Tucker Act).

C. Agencies Respond.

1. Agencies responded to the Court of Claims' 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.

2. The Supreme Court upheld the finality of these officials' decisions in Kihlberg v. United States, 97 U.S. 398 (1878).

3. 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.

4. This tension resulted in considerable litigation and a substantial body of case law.

D. The Supreme Court Weighs In.

1. 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 and legal decisions issued under disputes clauses by agency boards of contract appeals.

2. The Supreme Court further held that the Court of Claims could not review board decisions de novo.

E. Congress Reacts.

1. In 1954, Congress passed the Wunderlich Act, 41 U.S.C. §§ 321-322, to reaffirm the Court of Claims' authority to review factual and legal decisions by agency boards of contract appeals.

2. At about the same time, Congress changed the Court of Claims from an Article I (legislative) court to an Article III (judicial) court. Pub. L. No. 83-158, 67 Stat. 226 (1953).

F. The Supreme Court Weighs In Again.

1. In United States v. Carlo Bianchi & Co, 373 U.S. 709 (1963), the Supreme Court held that boards of contract appeals were the sole forum for considering de novo disputes "arising under" a remedy granting clause in the contract.

2. Three years later, the Supreme Court reaffirmed its conclusion in Utah Mining and Constr. Co. v. United States, 384 U.S. 394 (1966).

3. As a result, agency boards of contract appeals began to play a more significant role in the resolution of contract disputes.

G. The Contract Disputes Act (CDA) of 1978.

1. Pub. L. No. 95-563, 92 Stat. 2383 (codified, as amended, at 41 U.S.C. § 7101 et seq.).

2. In 1978, Congress passed the CDA to make the claims and disputes process more consistent and efficient.

3. The CDA replaced the previous disputes resolution system with a comprehensive statutory scheme.

H. Federal Courts Improvement Act of 1982.

1. Pub. L. No. 97-164, 96 Stat. 25 (codified 28 U.S.C. §§ 171 et seq., 1494-97, 1499-1503).

2. In 1982, Congress overhauled the Court of Claims and created a new Article I (legislative) court – named the United States Claims Court – from the old Trial Division of the Court of Claims. Congress then merged the old Appellate Division of the Court of Claims with the Court of Customs and Patent Appeals to create the Federal Circuit.

3. Congress also enlarged the Claims Court's equitable powers in bid protests. In 1956, the Court of Claims held that a disappointed bidder could file a protest pursuant to 28 U.S.C. § 1491(a)(1), based upon an implied contract to honestly and fairly consider bids. See Heyer Products Co. v. United States, 135 Ct. Cl. 63 (1956). Before the Federal Courts Improvement Act, protestors were limited to recovering their bid preparation and proposal costs. Keco Indus., Inc. v. United States, 192 Ct. Cl. 773, 784-85 (1970). The Federal Courts Improvement Act added 28 U.S.C. § 1491(a)(3) to the Tucker Act, authorizing the Claims Court to

award injunctive relief in pre-award protests. See United States v. John C. Grimberg Co., Inc., 702 F.2d 1362 (Fed. Cir. 1983).

I. Federal Courts Administration Act of 1992

1. Pub. L. No. 102-572, 106 Stat. 4506. For legislative history, see, inter alia, S. Rep. No. 102-342, 102d Cong., 2d Sess. (July 27, 1992); H. Rep. No. 102-1006 (October 3, 1992); Senator Heflin's remarks, Volume 138 Cong. Rec. No. 144, at S17798-99 (October 8, 1992).

2. In 1992, Congress changed the name of the Claims Court to the United States Court of Federal Claims.

3. Congress expanded the jurisdiction of the COFC to include the adjudication of nonmonetary disputes.

> The COFC has jurisdiction "to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act." Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (codified at 28 U.S.C. § 1491(a)(2)).

J. The Federal Acquisition Streamlining Act of 1994 ("FASA")

1. Pub. L. No.103-355, 108 Stat. 3243 (1994), slightly altered the Court's jurisdiction.

2. The COFC may direct that the contracting officer render a decision. Formerly, only the boards of contract appeals ("BCAs") could. FASA § 2351(e), amending 41 U.S.C. § 605(c)(4) (now § 7103.)

3. District courts may request advisory opinions from the BCAs. On matters concerning contract interpretation (any issue that could be the proper subject of a contracting officer's final decision), district courts may request that the appropriate agency BCA provide (in a timely manner) an advisory opinion. FASA § 2354, amending 41 U.S.C. § 609 (now 41 U.S.C. § 7107(f)). FASA does not permit Federal district courts to request an advisory opinion from the COFC.

K. The Administrative Dispute Resolution Act of 1996 ("ADRA")

1. Pub. L. No. 104-320, § 12 (1996), significantly altered COFC and U.S. District Court "bid protest jurisdiction." 28 U.S.C. § 1491(b) permits COFC to "render judgment on an action by an interested party objecting to

a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."

2. Jurisdiction extends to actions "in connection with a procurement or proposed procurement," has been interpreted broadly by the court, Distributed Solutions, Inc. v. United States, 539 F.3d 1340, 1346 (Fed. Cir. 2008), to include such actions as agency stay overrides pursuant to the Competition in Contract Act ("CICA"), 31 U.S.C. § 3553. RAMCOR Services Group, Inc. v. United States, 185 F.3d 1286, 1289 (Fed.Cir.1999).

3. For all procurement protests, ADRA supersedes the COFC's jurisdiction to entertain protests under the implied contract to honestly and fairly consider bids pursuant to 28 U.S.C. § 1491(a). See Resource Conservation Gp., LLC v. United States, 597 F.3d 1238, 1246 (Fed. Cir. 2010). But the Federal Circuit has held that the COFC continues to have jurisdiction to entertain non-procurement protests under 28 U.S.C. § 1491(a)(1). Id. Because 28 U.S.C. § 1491(a)(3) was repealed as part of ADRA, protestors are now limited to bid preparation and proposal costs in non-procurement protests at the COFC.

4. Statutorily-Prescribed Requirements ("interested party").

   a. "Interested party" has the same meaning as in CICA (actual or prospective bidder whose direct economic interest would be affected by an award). Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1359 (Fed. Cir. 2009); AFGE, AFL-CIO v. United States, 258 F.3d 1294 (2001). Besides demonstrating that it is an "interested party," a plaintiff must also demonstrate "prejudice." Diaz v. United States, 853 F.3d 1355, 1358-59 (Fed. Cir. 2017).

   b. To be an actual bidder, the plaintiff must have submitted a bid. See CGI Fed. Inc. v. United States, 779 F.3d 1346, 1348 (Fed. Cir. 2015); Rex Serv. Corp. v. United States, 448 F.3d 1305, 1307 (Fed. Cir. 2006). To be a prospective bidder, the plaintiff "must be expecting to submit an offer prior to the closing date of the solicitation." Rex Serv., 448 F.3d at 1308 (citation omitted) (emphasis in original). Accordingly, "the opportunity to qualify either as an actual or a prospective bidder ends when the proposal period ends." Id. (citation omitted). However, if a plaintiff challenges the terms of a solicitation before the agency or GAO prior to the close of bidding, and "thereafter diligently pursued its rights," it will be considered a prospective bidder at the COFC, even if it has not submitted a timely proposal. See CGI, 779 F.3d at 1350-51.

c. A protest will, by its nature, dictate the necessary factors for the "direct economic interest" and "prejudice" tests. In post-award protests, the plaintiff must show a "substantial chance" that it would have received the award, but for the errors alleged. Rex Serv. Corp. v. United States, 448 F.3d 1305, 1307 (Fed. Cir. 2006). In certain pre-award protests, however, the plaintiff need only show "a non-trivial competitive injury which can be addressed by judicial relief." Weeks Marine, Inc., 575 F.3d at 1362.

5. Empowered the Court to grant declaratory and injunctive relief to fashion a remedy. Monetary relief, however, is limited to bid preparation and proposal costs.

6. Granted same jurisdiction to district courts until January 1, 2001, unless jurisdiction was renewed (to date, it has not been renewed).

7. Administrative Procedures Act (APA) standard of review, i.e. "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

III. PRACTICAL EFFECTS ON LITIGATION.

A. The Judge.

1. 28 U.S.C. § 173.

2. One judge presides and decides - NO JURY TRIALS. Rules of the Court of Federal Claims ("RCFC") 38 & 39.

B. The Plaintiff.

1. RCFC 17.

2. Individuals may represent themselves or members of their immediate family. Any other party must be represented by an attorney who is admitted to practice in the COFC. RCFC 83.1(a)(3).

3. Note: at the ASBCA, an attorney is not required.

C. The Defendant = "The United States."

1. The Department of Justice ("DOJ") represents the United States. 28 U.S.C. §§ 516, 518-519. The DOJ has plenary authority to settle cases pending in the COFC. See 28 U.S.C. § 516; see also Executive Business Media v. Dept. of Defense, 3 F.3d 759 (4th Cir. 1993).

2. The National Courts Section of the Civil Division's Commercial Litigation Branch, located in Washington, D.C., represents the Government in all contract actions.

3. Effect of the "United States" as defendant. The DOJ represents the United States, not the individual agencies.

D. Practical Effect Upon Agency Once Case Is Filed.

1. The agency loses authority over the case's disposition.

2. The contracting officer loses authority to decide or settle claims arising out of the same operative facts. The Sharman Co., Inc. v. United States, 2 F.3d 1564 (1993).

3. The agency counsel, because there is only one "attorney of record" per party, appears as "of counsel," and plays a different role than s/he would at the board or even a district court, where Special Assistant U.S. Attorney appointments are commonplace.

E. Applicable Law.

1. Statutes and Federal common law, unless matter controlled by state law, e.g., property rights.

2. Stare Decisis.

a. Supreme Court.

b. United States Court of Appeals for the Federal Circuit.

c. United States Court of Claims. South Corp. v. United States, 690 F.2d 1368 (Fed. Cir. 1982) (en banc).

d. Judges not bound by the decisions of the other COFC judges.

3. Procedural Rules

a. The Rules of the Court of Federal Claims, which are based upon the Federal Rules of Civil Procedure, are published as an appendix to Title 28 of the United States Code.

b. Special Orders – The old version of RCFC 1 permitted the judges to "regulate the applicable practice in any manner not inconsistent with these rules." Thus, most judges adopted specialized procedural orders, regulating enlargements of time, dispositive motions in lieu of answers, other dispositive motion requirements, mandatory disclosure, joint preliminary status reports, preliminary

status conferences, discovery, experts, and submissions. Although the new rules do not specifically address this practice, many judges still issue special orders.

F. Electronic docket.

1. Public Access to Court Electronic Records ("PACER") is an electronic public access service that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts, and the U.S. Party/Case Index via the Internet.

2. CM/ECF stands for Case Management / Electronic Case Files. It is a joint project of the Administrative Office of the U.S. Courts and the Federal courts and establishes case management systems. This system offers web access to the Court's docket 24 hours a day, 7 days a week and to allow electronic document filing in designated cases.

3. Electronic docket basically mandates that the agency have scanning capabilities.

IV. COFC JURISDICTIONAL ISSUES.

A. Waiver of Sovereign Immunity.

Tucker Act waives sovereign immunity, but the "substantive right" claimed, whether it be the Constitution, an Act of Congress, a mandatory provision of regulatory law, or a contract, must be one which "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007-1009, 178 Ct. Cl. 599, 605-607 (1967).

B. Tucker Act - General.

1. Must be brought within six years of date claim arose. 28 U.S.C. § 2501; Soriano v. United States, 352 U.S. 270, 273 (1956); Hopland Band of Pomo Indians v. United States, 855 F.2d 1573 (Fed. Cir. 1988). The six-year statute of limitations under the Tucker Act is jurisdictional. John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008). The Federal Circuit has held, however, that the CDA's six-year statute of limitations is not jurisdictional, and thus whether a CDA claim is time-barred need not be resolved before a court decides the merits. Sikorsky Aircraft Corp. v. United States, 773 F.3d 1315, 1320-22 (Fed. Cir. 2014).

2. Equitable tolling: Irwin v. Veterans Admin., 498 U.S. 89 (1990) (rebuttable presumption that equitable tolling may be applied against the United States in the same manner as against private parties); Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998). But see, John R. Sand & Gravel

Co. v. United States, 552 U.S. 130 (2008) (holding that 28 U.S.C. § 2501 is jurisdictional and thus equitable tolling and estoppel do not extend the six-year statute of limitations embedded in 28 U.S.C. § 2501).

3. Non-appropriated fund instrumentalities ("NAFIs"):

   a. The Tucker Act jurisdiction encompasses NAFIs. See Slattery v. United States, 635 F.3d 1298 (Fed. Cir. 2011) (en banc).

   b. NOTE: Slattery reversed a long line of cases that held that the COFC's jurisdiction generally must involve an appropriated fund activity. AINS, Inc. v. United States, 365 F.3d 1333 (Fed. Cir. 2004); Furash & Company v. United States, 252 F.3d 1336 (Fed. Cir. 2001); El-Sheikh v. United States, 177 F.3d 1321 (Fed. Cir. 1999) (finding that Tucker Act jurisdiction over NAFIs is limited to claims based upon a contract, but holding that jurisdiction may be supplied through another statute waiving sovereign immunity, such as the FLSA).

   c. The Federal Circuit has not yet reached the issue of whether NAFIs are included in the CDA. The Mineson Co. v. McHugh, 671 F.3d 1332 (Fed. Cir. 2012).

4. Money claimed must be presently due and payable. United States v. King, 395 U.S. 1, 3 (1969).

5. May not also be pending in any other court. 28 U.S.C. § 1500; United States v. Tohono O'Odham Nation, 131 S.Ct. 1723 (2001).

6. May not grow out of or be dependent upon a treaty. 28 U.S.C. § 1502.

7. May not be brought by a subject of a foreign government unless the foreign government accords to citizens of the United States the right to prosecute claims against that government in its courts. 28 U.S.C. § 2502; Zalcmanis v. United States, 146 Ct. Cl. 254 (1959).

C. Tucker Act - Claims Founded Upon Contract.

1. Must demonstrate elements necessary to establish the existence of a contract (e.g., offer and acceptance, meeting of minds, consideration). E.g., Somali Dev. Bank v. United States, 205 Ct. Cl. 741, 751, 508 F.2d 817, 822 (1974); Algonac Mfg. Co. v. United States, 192 Ct. Cl. 649, 673-74, 428 F.2d 1241, 1255 (1970); ATL, Inc. v. United States, 4 Cl. Ct. 672, 675 (1984), aff'd, 735 F.2d 1343 (Fed. Cir. 1984).

2. Must demonstrate that it was entered into by authorized Government official. E.g., City of El Centro v. United States, 922 F.2d 816 (Fed. Cir. 1990).

3. Must demonstrate "privity of contract." Erickson Air Crane Co. v. United States, 731 F.2d 810, 813 (Fed. Cir. 1984); United States v. Johnson Controls, Inc., 713 F.2d 1541, 1557 (Fed. Cir. 1983); see Cienega Gardens, et al. v. United States, 162 F.3d 1123, 1129-30 (Fed. Cir. 1998).

4. If "implied," must be implied-in-fact, not implied-in-law. Merritt v. United States, 267 U.S. 338, 341 (1925); Tree Farm Dev. Corp. v. United States, 218 Ct. Cl. 308, 316, 585 F.2d 493, 498 (1978); Algonac Manufacturing Co. v. United States, 192 Ct. Cl. 649, 674, 428 F.2d 1241, 1256 (1970).

5. Cannot be for the performance of covert or secret services; not all "agreements" fall within Congress' contemplation of contract claims under the Tucker Act. Totten v. United States, 92 U.S. 105 (1875); Guong v. United States, 860 F.2d 1063 (Fed. Cir. 1988).

6. "Grants" which create formal obligations have been found sufficient for jurisdiction even though they do not appear to satisfy all elements necessary for a contract; however, the Government is bound only by its express undertakings. Missouri Health & Med. Organization v. United States, 226 Ct. Cl. 274 (1981); Thermalon Indust., Ltd. v. United States, 34 Fed. Cl. 411 (1995).

D. Claims Founded Upon Statute Or Regulation.

1. Civilian personnel pay claims: e.g., Equal Pay Act, 5 U.S.C. § 5101; Federal Employment Pay Act, 5 U.S.C. § 5542 et seq.; Fair Labor Standards Act, 29 U.S.C. §§ 201-219.

2. Military personnel pay claims: A service member's status in the armed forces is defined by the statutes and regulations which form the member's right to statutory pay and allowances. Bell v. United States, 366 U.S. 393 (1961).

E. Claims for Money Unlawfully Exacted Or Retained. Jurisdiction to entertain claim for return of money paid by claimant under protest upon grounds illegally exacted or retained. Aerolineas Argentinas v. United States, 77 F.3d 1564 (Fed. Cir. 1996).

F. Constitutional Provisions and Statutes That Do Not Waive Sovereign Immunity

1. 1st, 4th, and 5th Amendments (except Takings Clause).

2. Administrative Procedure Act. Califano v. Sanders, 430 U.S. 99, 107 (1977)

3. Declaratory Judgment Act (28 U.S.C. § 2201). United States v. King, 395 U.S. 1, 5 (1969).

V. BID PROTESTS AT THE COURT OF FEDERAL CLAIMS.

A. The COFC's jurisdiction to entertain a bid protest must be "in connection with a procurement." Resource Conservation Gp., LLC v. United States , 597 F.3d 1238, 1243-45 (Fed. Cir. 2010).

1. The Tucker Act, 28 U.S.C. § 1491(b), as amended by ADRA, Pub. L. No. 104-320 (October 19, 1996), section 12, provides the Court "jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."

2. This jurisdictional mandate has been broadly construed by the Federal Circuit. See Distributed Solutions, Inc. v. United States, 539 F.3d 1340 (Fed. Cir. 2008), Weeks Marine, Inc. v. United States, 575 F.3d 1352 (Fed. Cir. 2009), and Resource Conservation Group, LLC v. United States, 597 F.3d 1238 (Fed. Cir. 2010); but see Hymas v. United States, 810 F.3d 1312 (Fed. Cir. 2016); AgustaWestland N. Am., Inc. v. United States, 880 F.3d 1326, 1332 (Fed. Cir. 2018). However, an alleged violation of a non-procurement statute will not establish bid protest jurisdiction, even if the alleged violation occurs during a procurement. See Cleveland Assets, LLC v. United States, 883 F.3d 1378, 1381-82 (Fed. Cir. 2018).

3. COFC bid protest jurisdiction includes pre-award and post-award protests. American Federation of Gov't Employees v. United States, 258 F.3d 1294, 1299 (Fed. Cir. 2001). The COFC's bid protest jurisdiction does not extend to task orders issued under FAR 16. SRA Int'l, Inc. v. United States, 766 F.3d 1409, 1413 (Fed. Cir. 2014) (holding that the Federal Acquisition Streamlining Act of 1994 "effectively eliminates all judicial review for protests made in connection with a procurement designated as a task order[.]").

a. Pre-award**:** protests can challenge such things as: an agency's anticipated contract award to an identified low bidder or apparent successful offeror; requirements in a solicitation; alleged de facto sole source specifications; elimination of an offeror from (or improper inclusion of an offeror in) a competitive range; responsiveness and responsibility determinations; any change or amendment to a solicitation that is alleged to prejudice the litigant; or any purported illegality or regulatory violation within the solicitation process.

b. Post-award: protests generally can challenge the award decision. Be mindful however, that "a party who has the opportunity to object to the terms of a government solicitation containing a patent

error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection afterwards in a § 1491(b) action." Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1313 (Fed. Cir. 2007). The Blue & Gold waiver rule has been expanded by the Federal Circuit in COMINT Systems Corp. v. United States, 700 F.3d 1377 (Fed. Cir. 2012) (waiver rule applied to post-proposal submission issues) and Inserso Corp. v. United States, No. 2019-1933, 2020 WL 3163623 (Fed. Cir. June 15, 2020) (waiver rule applied to OCI information from a parallel procurement). Moreover, post-award, the relief available may be limited, as a practical and equitable matter, if a protest is filed long after award. This does not, however, necessarily make the protest untimely.

4. Relief.

a. COFC injunctive authority allows the Court to issue temporary restraining orders for a maximum of 28 days, and a preliminary or permanent injunction. The Court may also award bid and proposal preparation costs if the plaintiff is successful on the merits. PGBA, LLC v. United States, 389 F.3d 1219, 1225-27 (Fed. Cir. 2004). Purely declaratory relief is usually of minimal significance in bid protests. Any coercive order of the court requiring an agency to do, or not do, something in connection with a procurement is treated as injunctive relief and requires weighing the equities. PGBA, 389 F.3d at 1228.

b. The Court's grant of relief may include ordering the termination of a contract that has been awarded, but the Court cannot order a contract award to a particular bidder. United Int'l Investig. Servs., Inc. v. United States, 41 Fed. Cl. 312, 323-24 (1998) (citing Hydro Eng'g, Inc. v. United States, 37 Fed. Cl. 448, 461 (1997), and Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859, 869 (D.C. Cir. 1970)).

Practice Tip: Pursuant to RCFC 65(c) the Court must have plaintiff post a bond if a TRO/PI is issued. However, the Court has discretion on the amount of the bond, so the Government has the burden of establishing the amount of damages that will be incurred during the pendency of the injunction. Plan to have a declaration by the contracting officer addressing the costs, and any other harm the agency will suffer, in the event the procurement is enjoined.

5. Override of the automatic stay in CICA.

a. The Competition in Contract Act ("CICA"), 31 U.S.C. § 3553, requires the agency to suspend performance of the contract during

the pendency of a GAO protest. 31 U.S.C. § 3553(d)(3)(A) and (B). However, CICA permits the agency to override the stay provision if the agency finds in a determination and findings ("D&F") that continued performance is (1) in the best interests of the United States, or (2) urgent and compelling circumstances that significantly affect the interests of the United States will not permit delay. Id. at § 3353(d)(3)(C).

b. COFC may review. RAMCOR Servs. Group, Inc. v. United States, 185 F.3d 1286, 1291 (Fed. Cir. 1999); Unisys Corp. v. United States, 2009 WL 5098195 at *6 (Fed. Cl. 2009); Spherix, Inc. v. United States, 62 Fed. Cl. 497, 503-04 (2003).

c. Override decisions are highly scrutinized by the Court. Some judges require that agencies consider certain factors enunciated in Reilly's Wholesale Produce v. United States, 73 Fed. Cl. 705 (2006). See, e.g., Supreme Foodservice GmbH v. United States, 109 Fed. Cl. 369, 384-86 (2013); URS Fed. Servs., Inc. v. United States, 102 Fed. Cl. 664, 670-71 (2011). Other judges have determined that the so-called Reilly factors are not dispositive and analyzed overrides on a case-by-case basis under the "arbitrary and capricious" standard. See, e.g., Dyncorp Int'l LLC v. United States, 113 Fed. Cl. 298, 302 n.4 (2013); PMTech, Inc. v. United States, 95 Fed. Cl. 330, 343-47 (2010), Planetspace, Inc. v. United States, 86 Fed. Cl. 566, 567 (2009).

d. **PRACTITIONER'S NOTE**: We disagree that Reilly properly states the law, and the proper test is a rational basis test under the APA. See Dell Fed. Sys. L.P. v. United States, 906 F.3d 982, 992 (Fed. Cir. 2018) (confirming that the rational basis test applicable to bid protest cases asks "whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion."

e. If your agency is considering an override, contact DOJ before the D&F is finalized.

B. Standard of Review.

1. Limited to Administrative Record.

a. The scope of review is limited to the administrative record. Axiom Resource Management, Inc. v. United States, 564 F.3d 1374, 1379 (Fed. Cir. 2009); Bannum, Inc. v. United States, 404 F.3d 1346, 1355-56 (Fed. Cir. 2005) (the court resolves issues of law and decides all necessary issues of fact based upon the administrative record created before the agency); see also, Camp v. Pitts, 411 U.S.

138, 142-43 (1973) (the proper focus of the court's scrutiny is the agency's articulated rationale for the decision, and the administrative record underlying it); Cincom Sys., Inc. v. Untied States, 37 Fed. Cl. 663, 671 (1997).

b. RCFC 52.1(b) provides the standard for review of agency action on the basis of the administrative record. See A & D Fire Protection, Inc. v. United States, 72 Fed. Cl. 126, 131 (2006).

c. Pursuant to RCFC 52.1(b), the court decides whether, "given all the disputed and undisputed facts, a party has met its burden of proof based on the evidence in the record." Id. (citing Bannum, Inc. v. United States, 404 F.3d 1346, 1356 (Fed. Cir. 2005).

d. The plaintiff bears the burden of meeting this standard by a preponderance of the evidence. Rotech Healthcare, Inc. v. United States, 71 Fed. Cl. 393, 401 (2006).

2. Administrative Procedure Act.

a. Judicial review of the agency's actions in a bid protest is not a de novo proceeding.

b. In the bid protest context, the Court resolves challenges to agency actions under the standards provided in the Administrative Procedure Act, 5 U.S.C. § 706. See 28 U.S.C. § 1491(b)(4) (incorporating by reference Administrative Procedure Act's standard of review); Bannum, Inc. v. United States, 404 F.3d 1346, 1351 (Fed. Cir. 2005); Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001).

c. The Court's standard of review in bid protests is "highly deferential." Advanced Data Concepts, Inc. v. United States, 216 F.3d 1054, 1057 (Fed. Cir. 2000).

d. An agency's contracting decision may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The Centech Group, Inc. v. Untied States, 554 F.3d 1029, 1037 (Fed. Cir. 2009); Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001); see also, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), overruled on other grounds by, Califano v. Sanders, 430 U.S. 99 (1977); The Cube Corp. v. United States, 46 Fed. Cl. 368, 374 (2000).

e. Pursuant to this standard, the Court may set aside a procurement decision upon the protester's showing that "(1) the procurement official's decision lacked a rational basis; or (2) the procurement

procedure involved a violation of regulation or procedure." Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332-33 (Fed. Cir. 2001); Galen Med. Assoc., Inc. v. United States, 369 F.3d 1324, 1329-31 (Fed. Cir. 2004) (decision set aside only if there has been a "clear and prejudicial" violation of law or the agency's decision lacks a rational basis).

3. Presumption of Regularity.

a. In evaluating an agency's decision, the court "is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989) (quotations omitted) ("If the court finds a reasonable basis for the agency's action, the court should stay its hand even though it might, as an original proposition, have reached a different conclusion as to the proper administration and application of the procurement regulations.")

b. An agency's procurement decisions are entitled to a "presumption of regularity," Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971), and the Court should not substitute its judgment for that of the agency. R & W Flammann GmbH v. United States, 339 F.3d 1320, 1322 (Fed. Cir. 2003).

c. The disappointed bidder "bears a heavy burden" and the procurement officer is "entitled to exercise discretion upon a broad range of issues confronting [her]." Impressa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001).

d. This burden "is not met by reliance on [the] pleadings alone, or by conclusory allegations and generalities." Bromley Contracting Co. v. United States, 15 Cl. Ct. 100, 105 (1988); see also Campbell v. United States, 2 Cl. Ct. 247, 249 (1983).

4. Agency Action in Response to GAO Recommendation

a. Where an agency follows a GAO recommendation, even if the GAO recommendation is different from the initial decision of the contracting officer, the agency's decision shall be deemed "proper unless the [GAO's] decision was itself irrational." Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989); see also The Centech Group, Inc. v. Untied States, 554 F.3d 1029, 1039 (Fed. Cir. 2009).

b. The Court will only "inquire whether the GAO decision was rational and the agency justifiably relied upon it." SP Sys., Inc. v.

United States, 86 Fed. Cl. 1, 13 (2009) (citing Honeywell, Inc. v. United States, 870 F.2d 644, 647 (Fed. Cir. 1989).

c. GAO decisions are "traditionally treated with a high degree of deference, especially in bid protest actions." Grunley Walsh Int'l LLC v. United States, 78 Fed. Cl. 35, 39 (2007) (citations omitted).

5. Even upon the demonstration of a significant error, a protester must still establish that it was prejudiced by that error. The test for prejudice is the same at the merits stage as at the standing stage. For post-award protests, the plaintiff must demonstrate a "substantial chance that it would have received the contract award" but for the agency's error. Glenn Def. Marine (ASIA), PTE Ltd. v. United States, 720 F.3d 901, 912 (Fed. Cir. 2013). For certain pre-award protests, the "non-trivial competitive injury" standard applies. See Weeks Marine, 575 F.3d at 1359.

C. Standard for Injunctive Relief.

1. Four elements:

a. Plaintiff is likely to succeed on the merits;

b. Plaintiff will suffer irreparable harm;

c. Plaintiff's harm outweighs the harm to the government; and

d. Public interest favors equitable relief.

2. The only difference between a preliminary and permanent injunction is that a plaintiff must show likelihood of success on the merits for a preliminary injunction and actual success on the merits for a permanent injunction.

3. In Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010), the Supreme Court held that the "drastic and extraordinary remedy" of injunctive relief should not be "granted as a matter of course." Id. at 165. Importantly, the Supreme Court further held it "is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue under the traditional four-factor test[.]" Id.

4. The statute directs the court to "give due regard to the interests of national defense and national security" in bid protest cases. 28 U.S.C. § 1491(b)(3). The court gives particular deference to the interests of national security and national defense, which weigh heavily against an injunction. Winter v. Nat'l Res. Def. Council, Inc., 555 U.S. 7 (2008).

D. The Administrative Record.

1. What is included:

a. Appendix C, RCFC, contains the Court's procedures in bid protest proceedings. Paragraph VII of Appendix C provides a fairly comprehensive list of the information that may be included in the record.

Practice tip: Be familiar with the requirements of Appendix C. As soon as you think a procurement may result in a COFC protest, begin to compile the material listed in Appendix C for inclusion in the administrative record. The agency is responsible for organizing the documents and providing an index.

b. The agency should compile the full administrative record that was before it at the time it made the decision under review. James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1095 (D.C. Cir. 1996).

c. The Court should generally have before it the same information that was before the agency when it made its decision. Mike Hooks, Inc. v. United States, 39 Fed. Cl. 147, 154 (1997).

d. Thus, the administrative record should consist of the material that the agency developed and considered, directly or indirectly, in making the challenged decision. Bar MK Ranches v. Yuetter, 994 F.2d 735, 739 (10th Cir. 1993); Ad Hoc Metals Coal. v. Whitman, 227 F. Supp. 2d 134, 139 (D.D.C. 2002); Nat'l Ass'n of Chain Drug Stores v. U.S. Dep't of Health & Human Servs., 631 F. Supp. 2d 23, 26 (D.D.C. 2009) (citing Pac. Shores Subdiv., Cal. Water Dist. v. U. S. Army Corps of Eng'rs, 448 F. Supp. 2d 1, 4 (D.D.C. 2006)); Tafas v. Dudas, 530 F. Supp. 2d 786, 793 (E.D. Va. 2008).

e. The agency should include all materials that might have influenced its decision, not just the documents upon which it relied. Ad Hoc Metals Coal. v. Whitman, 227 F. Supp. 2d 134, 139 (D.D.C. 2002) (include materials considered or relied upon); Ctr. for Native Ecosystems v. Salazar, 711 F. Supp. 2d 1267, 1275-76 (D. Colo. 2010) (if decision based upon the work of subordinates, include the materials considered by the subordinates).

f. GAO proceedings – In a COFC protest that follows a GAO protest, the entire agency report submitted to the GAO and any decisions of the GAO are required, by statute, to be included in the administrative record. 31 U.S.C. § 3556. Additionally, several judges require that the entire GAO record (e.g., comments, hearing transcripts, etc.) be included in the COFC administrative record. See, e.g., PricewaterhouseCoopers Public Sector, LLP v. United States, 126 Fed. Cl. 328, 359 (2016); Holloway & Co., PLLC v.

United States, 87 Fed. Cl. 381, 391-92 (2009). The Government has taken the position that inclusion of the entire GAO record is appropriate.

g. An agency may not exclude from the administrative record documents that reflect pertinent but unfavorable information. Blue Ocean Inst. v. Gutierrez, 503 F. Supp. 2d 366, 369 (D.D.C. 2007).

However, the administrative record need not include underlying source documents that were not themselves considered by the agency. Sequoia Forestkeeper v. U. S. Forest Serv., No. 09-392, 2010 WL 2464857, at *6 (E.D. Cal. June 12, 2010).

2. What is NOT included:

a. The administrative record does not include privileged materials, such as documents that fall within the deliberative process privilege, attorney-client privilege, and work product privilege. Town of Norfolk v. U.S. Army Corps of Eng'rs, 968 F.2d 1438, 1457-58 (1st Cir. 1992); Ad Hoc Metals Coal. v. Whitman, 227 F. Supp. 2d 134, 143 (D.D.C. 2002) ("Judicial review of agency action should be based on an agency's stated justifications, not the predecisional process that led up to the final, articulated decision.").

b. The general rule is that these documents are not logged as withheld because they are not part of the administrative record. Amfac Resorts LLC v. Dept. of Interior, 143 F. Supp. 2d 7, 13 (D.D.C. 2001) ("deliberative intra-agency memoranda and other such records are ordinarily privileged, and need not be included in the record"); New York v. Salazar, 701 F. Supp. 2d 224, 236 (N.D.N.Y. 2010) ("as a matter of law, privileged documents are not part of the administrative record"); Blue Ocean Inst. v. Gutierrez, 503 F. Supp. 2d 366, 369 (D.D.C. 2007); but see Ctr. for Native Ecosystems v. Salazar, 711 F. Supp. 2d 1267, 1275-76, n.10 (D. Colo. 2010) (requiring privilege log); Miami Nation of Indians of Ind. v. Babbitt, 979 F. Supp. 771, 778 (N.D. Ind. 1996) (requiring the Government to seek a protective order to assert deliberative process privilege).

c. Internal memoranda (e.g., e-mail messages and draft documents) made during the decisional process are not typically included in a record. Norris & Hirshberg, Inc. v. SEC, 163 F.2d 689, 693 (D.C. Cir. 1947); see Joint Venture of Comint Sys. Corp. v. United States, 100 Fed. Cl. 159, 169 (2011) ("internal deliberative materials . . . are generally excluded from the record."); San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26, 45 (D.C. Cir.) (en

banc) ("We think the analogy to the deliberative processes of a court is an apt one. Without the assurance of secrecy, the court could not fully perform its functions."), cert. denied, 479 U.S. 923 (1986). There are exceptions to this rule. New York v. Salazar, 701 F. Supp. 2d 224, 238 (N.D.N.Y. 2010) (where decision-making process is itself the subject of the litigation); In re Subpoena Duces Tecum Served on the Office of the Comptroller, 156 F.3d 1279, 1280 (D.C. Cir. 1998); see also National Courier Ass'n v. Bd. of Governors, 516 F.2d 1229, 1242 (D.C. Cir. 1975).

d. EXCEPTION: Internal and deliberative memoranda may be required in an administrative record where a protestor makes an initial showing to support an allegation of bad faith; i.e., when the Court has determined the plaintiff has made a well-grounded attack upon the decision-making process itself.

3. Supplementation

a. Definitions.

(1) Supplement. A protester seeks to supplement, or go beyond, the record when the protester moves to include material in the administrative record that was not before the decision maker, *i.e.*, material that does not belong in the record. Supplementing the administrative record with extra-record evidence is different from correcting or completing the administrative record.

(2) Correct or Amend. A protester seeks to complete, or correct, the record when the protester moves to include in the administrative record material that *should have been* included, but was nonetheless inadvertently omitted. To the extent that the Government determines that it inadvertently omitted material that should have been included, it too can correct the administrative record.

b. General Rule. Courts generally deny requests to supplement the administrative record.

(1) Supplementation is not permitted because extra-record or ex-post facts and opinions simply are not relevant to the Court's inquiry. See, e.g., Emerald Coast Finest Produce, Inc. v. United States, 76 Fed. Cl. 445, 448-49 (2007) (refusing to add to the record declarations not considered by the agency when making its award decision); Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985) (court considers only those materials that were "before the

decision-making authority at the time of its decision.”); Axiom Resource Management, Inc. v. United States, 564 F.3d 1374, 1379 (2009) (judicial review is generally limited to “the administrative record already in existence, not some new record made initially in the reviewing court”); L-3 Communications EOTech, Inc. v. United States, 87 Fed. Cl. 656, 672 (2009) (no “unfettered right to submit declarations giving its commentary on every aspect of the … process, and to have those declarations included in the administrative record[.]”).

(2) Supplementing the administrative record is “an unusual action that is rarely appropriate.” Weiss v. Kempthorne, No. 08-1031, 2009 WL 2095997, at *3 (W.D. Mich. July 13, 2009); Am. Wildlands v. Kempthorne, 530 F.3d 991, 1002 (D.C. Cir. 2008); Medina Co. Envtl. Action Ass’n v. Surface Transp. Bd., 602 F.3d 687, 706 (5th Cir. 2010).

c. Supplementation Post-Axiom:

(1) In Axiom, the Federal Circuit reiterated the restrictive approach to supplementing the administrative record. Axiom Resource Management, Inc. v. United States, 564 F.3d 1374, 1379 (2009).

(2) Supplementation of the administrative record is available only when “the omission of extra-record evidence precludes effective judicial review.” Axiom, 564 F.3d at 1379 (emphasis added); see also Murakami v. United States, 46 Fed. Cl. 731, 735 (2000), aff’d, 398 F.3d 1342 (Fed. Cir. 2005) (“exceptions to the general rule against extra-record evidence are based on necessity, rather than convenience, and should be triggered only where the omission of extra-record evidence precludes effective judicial review.”).

(3) Allowing supplementation of the record, without first evaluating whether the record is sufficient to permit meaningful review is an abuse of discretion. Axiom, 564 F.3d at 1380 (“the trial court abused its discretion in this case” by failing “to make the required threshold determination of whether additional evidence was necessary.”).

(4) Therefore, before any supplementation is allowed, the Court first makes a threshold determination of “whether supplementation of the record [is] necessary in order not ‘to

frustrate effective judicial review.'" Axiom, 564 F.3d at 1379 (quoting Camp v. Pitts, 411 U.S. 138, 142-43 (1973)).

(5) Since Axiom, the Federal Circuit has continued to reiterate the limited circumstances in which supplementation is appropriate. See, e.g., Per Aarsleff A/S v. United States, 829 F.3d 1303, 1310 at fn. 3 (Fed. Cir. 2016) (citing Axiom and reiterating that the Federal Circuit "has previously found abuse of discretion where a trial court allowed supplementation of the record without first making the required determination [of 'whether supplementation of the record was necessary in order not to frustrate effective judicial review.'"]) (internal citations and quotation marks omitted); AgustaWestland N. Am., Inc. v. United States, 880 F.3d 1326, 1332 (Fed. Cir. 2018) (determining that the trial court abused its discretion by supplementing the administrative record where the existing administrative record was "sufficient" for the Court "to review the Army's sole-source procurement award[.]").

E. What to Expect After Protest is Filed.

1. Process starts with 24-hour advance notice filed by plaintiff.

a. Appendix C, ¶ 3, RCFC, requires plaintiff to file a 24-hour notice with DOJ's National Courts Section that identifies the procuring agency, contact information for the contracting officer and agency counsel, whether plaintiff is seeking a temporary restraining order or preliminary injunction ("TRO/PI"), whether plaintiff has discussed the TRO/PI with DOJ, whether there was a GAO protest, and whether a protective order will be needed.

b. Failure to file 24-hour notice is not a jurisdictional defect.

2. Upon receipt of the 24-hour notice, the case is assigned to a DOJ trial attorney, who will contact the contracting officer and agency counsel directly prior to filing a notice of appearance ("NOA") with COFC.

3. This is a time-sensitive matter and COFC will act with a sense of urgency, often holding an initial status conference within 24 hours after the complaint is filed. Although the initial status conference is typically held by teleconference, in some cases, for example, where all counsel are located in the Washington D.C. area, the Court will conduct the initial status conference in person.

a. Agency counsel and, in some cases, the contracting officer, should expect to participate in the initial teleconference.

b. Court typically concerned with:

(1) Addressing TRO/PI if raised by plaintiff (will agency voluntarily stay all or certain aspects of contract performance while protest is being litigated?);

(2) Status of the procurement (pre- or post- award?);

(3) Determining if there will be an intervenor;

(4) Setting a briefing schedule, which includes filing of the administrative record; and

(5) Did protester initially file at the GAO?

Practice Tip: If there was a GAO protest, please send the legal memorandum and contracting officer statement directly to the assigned trial attorney as soon as possible to expedite the learning curve.

F. Protective Orders:

1. Order limiting the disclosure of source selection, proprietary, and other protected information to those persons admitted to that order. The order also governs how such information is to be identified and disposed of when the case is over. The COFC regularly issues these orders, although in at least one case, the COFC denied the request of the government and the apparent awardee to issue a protective order and ordered the release of the government's evaluation documentation relating to the protester's proposal to the protester. See Pike's Peak Family Housing, Inc. v. United States, 40 Fed. Cl. 673 (1998).

2. Once the order is issued, private counsel and experts are admitted to the order by submitting an appropriate application. Form 8 of the RCFC Appendix contains a model protective order, Form 9 of the RCFC Appendix is a model application for access by outside counsel and inside counsel, and Form 10 is a model application for access by outside experts or consultants.

3. Ordinarily, objections must be made within 2 business days of receipt of a given application. If no objections are made within 2 business days, the applicant is automatically admitted to the protective order.

4. The COFC, DOJ, and procuring agency personnel are automatically admitted.

5. Most judges request or accept proposed redactions from court orders and opinions and decide what protected information to redact. See, e.g.,

WinStar Communications, Inc. v. United States, 41 Fed. Cl. 748, 750 n.1 (1998). Recently, the COFC has scrutinized proposed redactions closely. See, e.g., Akal Sec., Inc. v. United States, 87 Fed. Cl. 311, 314 n.1 (2009). In considering whether proposed redactions of protected information are appropriate, the court "begins with the presumption of public access to judicial records." Madison Servs., Inc. v. United States, 92 Fed. Cl. 120, 131 (2010) (citing Baystate Techs., Inc. v. Bowers, 283 Fed. Appx. 808, 810 (Fed. Cir. 2008)); see also Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597-99 (1978) (recognizing "a general right to inspect and copy public records and documents, including judicial records and documents."). "Protected information," as defined by the COFC protective order, is appropriate for redaction. Def. Tech., Inc. v. United States, 99 Fed. Cl. 103, 106 * (2011) (citing Magnum Opus Techs., Inc. v. United States, 94 Fed. Cl. 512, 519 * (2010)). This definition is narrow, and over redaction should be avoided in favor of greater transparency. See, e.g., In re Violation of Rule 28(D), 635 F.3d 1352 (Fed. Cir. 2011); Thus, courts have required that the proponent of the proposed redaction be able to justify how "continuing to conceal that information . . . would safeguard the competitive process." *Def. Tech.*, 99 Fed. Cl. at 106 * (internal quotations omitted).

6. Unless the standard protective order is altered for your case, at the end of the case, agency personnel will be required to delete and destroy all documents containing protected information received pursuant to the litigation. Accordingly, it is imperative that, throughout the case, agency personnel: a) properly mark protected information in accordance with the protective order; b) limit dissemination of protected information to those with a "need to know"; and c) keep track of who protected information is distributed to.

VI. THE CONTRACT DISPUTES ACT OF 1978. 41 U.S.C. §§ 7101-7109.

A. Applicability.

1. 41 U.S.C. § 7102.

2. The CDA applies to all express or implied contracts an executive agency enters into for:

a. The procurement of property, other than real property in being;

b. The procurement of services;

c. The procurement of construction, alteration, repair or maintenance of real property; or

d. The disposal of personal property.

3. It has been the law that the CDA does not normally apply to contracts funded solely with nonappropriated funds (NAFIs), with the exception of contracts with the exchanges listed in the Tucker Act. 41 U.S.C. § 7102(a); 28 U.S.C. 1491(a)(1). The Federal Circuit has held, en banc, that Tucker Act jurisdiction encompasses NAFIs. See Slattery v. United States, 635 F.3d 1298 (2011). But, it has not yet reached the issue of whether the CDA's scope is similar with respect to NAFIs. The Mineson Co. v. McHugh, 671 F.3d 1332 (Fed. Cir. 2012).

B. Jurisdictional prerequisites:

1. Contractor has submitted a proper claim to the contracting officer; or

2. The Government has submitted a proper claim (e.g., termination, liquidated damages ("LDs"), demand for money); and

3. The contracting officer has issued a final decision, or is deemed by inaction to have denied the claim. Tri-Central, Inc. v. United States, 230 Ct. Cl. 842, 845 (1982); Paragon Energy Corp. v. United States, 227 Ct. Cl. 176 (1981).

4. The COFC considers the case de novo. 41 U.S.C. § 7104(b)(4). A contracting officer's findings are not binding on the Court, or the Government, nor are omissions by the contracting officer. Wilner v. United States, 24 F.3d 1397, 1401 (Fed. Cir. 1994). Thus, so long as the information was available at the time, regardless if the Government was aware of it, the COFC may consider it in reviewing the contracting officer's decision. For example, a termination for default may be sustained at the COFC upon any ground existing at the time of termination, even one not then known to the contracting officer. See Empire Energy Mgmt. Sys., Inc. v. Roche, 362 F.3d 1343, 1357 (Fed. Cir. 2004).

5. The CDA is a waiver of sovereign immunity for the payment of interest. Interest accrues from the date the contracting officer receives the claim until the contractor receives its money.

6. Not limited to monetary damages.

   a. The COFC possesses jurisdiction to render judgments in "a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued" pursuant to the CDA. 28 U.S.C.A. § 1491(a)(2); Alliant Techsys., Inc. v. United States, 178 F.3d 1260 (Fed. Cir. 1999).

b. The Federal Circuit has held that the COFC can use this authority to review contractor performance evaluations pursuant to the CDA. Todd Const. L.P. v. United States, 656 F.3d 1306 (2011).

7. Subcontractors:

a. Generally cannot directly bring a CDA challenge, because there is no privity of contract with the United States, unless the prime contractor is a "mere government agent." United States v. Johnson Controls, Inc., 713 F.2d 1541, 1550-51 (Fed. Cir. 1983).

b. While subcontractors that were third-party beneficiaries of the contract between the Government and the prime contractor cannot proceed under the CDA, they may bring a similar claim in the COFC under the Tucker Act. Winter v. FloorPro, Inc., 570 F.3d 1367 (Fed. Cir. 2009).

8. Sureties: CDA or Equitable Subrogation. National Surety v. United States, 118 F.3d 1543 (Fed. Cir. 1997); Fireman's Fund Ins. Co. v. United States, 909 F.2d 495 (Fed. Cir. 1990).

C. Statute of Limitations.

1. For contracts awarded on or after October 1, 1995, a contractor must submit its claim within six years of the date the claim accrues. 41 U.S.C. § 7103(a)(4). This statute of limitations provision does not apply to Government claims based on contractor claims involving fraud.

a. The six-year time limit for presentment to the contracting officer is a requirement, but may be subject to equitable tolling. Al-Juthoor Contracting Co. v. United States, 129 Fed. Cl. 599 (2016). The CDA's six-year statute of limitations is not jurisdictional. Sikorsky Aircraft Corp. v. United States, 773 F.3d 1315 (Fed. Cir. 2014).

2. Complaint filing. The contractor must file its complaint in the COFC within 12 months of the date it received the contracting officer's final decision. 41 U.S.C. § 7104(b)(3). See Borough of Alpine v. United States, 923 F.2d 170 (Fed. Cir. 1991).

3. Reconsideration by the Contracting Officer. A timely request made to the contracting officer for reconsideration of a decision that results in an actual reconsideration suspends the "finality" of the decision, and provides a new statute of limitations period. See Bookman v. United States, 197 Ct. Cl. 108, 112 (1972).

4. "Deemed Denied." No statute of limitations?

a. Under the CDA, upon receipt of a written claim from a contractor, a contracting officer must issue a final decision within sixty days. 41 U.S.C. § 7103(f). If the Contracting Officer fails to issue a decision within the requisite time period, the claim may be deemed denied. 41 U.S.C. § 7103(f)(5).

b. The Court of Federal Claims has held that, if no decision is issued, the CDA's one-year statute of limitations does not begin to run and the Tucker Act's six-year statute of limitations does not apply, because the claim remains a CDA claim. See Environmental Safety Consultants, Inc. v. United States, 95 Fed. Cl. 77 (2010); System Planning v. United States, 95 Fed. Cl. 1 (2010).

D. Consolidation of Suits.

If two or more actions arising from one contract are filed in the COFC and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the COFC may order the consolidation of the actions in that court or transfer any actions to or among the agency boards involved. 41 U.S.C. § 7107(d). Morse Diesel Int'l v. United States, 69 Fed. Cl. 558 (2006) (transferring claims from board to court).

E. Relationship Between the COFC and the Boards

1. 41 U.S.C. §§ 7104(a), (b)(1).

2. The CDA provides alternative forums for challenging a contracting officer's final decision.

3. Once a contractor files its appeal with a particular forum, this election is normally binding and the contractor may no longer pursue its claim in the other forum. 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).

4. The "election doctrine" does not apply if the forum originally selected lacked subject matter jurisdiction over the appeal. See Information Sys. & Networks Corp. v. United States, 17 Cl. Ct. 527 (1989) (holding that the contractor's untimely appeal to the Agriculture Board of Contract Appeals did not preclude it from pursing a timely suit in the Claims Court).

5. Decisions of the boards of contract appeals are not binding upon the COFC. See General Electric Co., Aerospace Group v. United States, 929 F.2d 679, 682 (Fed. Cir. 1991).

VII. CONCLUSION

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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 ensure 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 ensure 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 52.246-14.

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. Concepts and 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. "Quality Control" refers to the contractor's responsibility to carry out its obligations under the contract by controlling the quality of supplies and services. FAR 46.105(a)(1).

   c. "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 required FAR clauses generally 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. See FAR 52.246-2(b), 52.246-3(b), 52.246-4(b), 52.246-5(b), 52.246-6(b), 52.246-7(a) 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. See FAR 52.246-2(c) and (j); 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 contract type and clause used in the contract

(1) For fixed-price supply inspections performed at the contractor's facility, 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 at the contractor-specified time, 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 fixed-price 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. FAR 52.246-12(e).

(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 before acceptance, 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.

D. First Article Testing and Approval under FAR Subpart 9.3

1. Introduction

a. First article means a preproduction model, initial production sample, test sample, first lot, pilot lot, or pilot models. FAR 2.101.

b. First article testing means testing and evaluating the first article for conformance with specified contract requirements before or in the initial stage of production. FAR 2.101.

c. First article testing and approval ensures that the contractor can furnish a product that conforms to all contract requirements for acceptance. FAR 9.302. FAR 9.303 provides that it can be particularly useful when

(1) The contractor has not previously furnished the product to the government;

(2) The contractor previously furnished the product to the Government, but --

(a) There have been subsequent changes in processes or specifications;

(b) Production has been discontinued for an extended period of time; or

(c) The product acquired under a previous contract developed a problem during its life;

(3) The product is described by a performance specification; or

(4) It is essential to have an approved first article to serve as a manufacturing standard.

2. Mechanics

a. Government must provide specific information in the solicitation, including the performance or other characteristics that the first article must meet for approval. FAR 9.306(a)(1) and (b)(1).

b. The administration of first article testing depends on whether the contractor or government will perform the testing. See FAR 52.209-3 and 52.209-4.

III. GOVERNMENT REMEDIES UNDER THE INSPECTION CLAUSE.

A. Introduction.

1. The inspection clauses generally provide the government's remedies. FAR 52.246-2 through -12.

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 generally 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. In some cases, terminate for default. FAR 52.249-8. For fixed-price construction and service contracts, the government must exercise caution if it terminates all work for defective performance after timely delivery, as the doctrine of substantial completion (also referred to as substantial performance) may limit the government's right to terminate due to minor and relatively unimportant deviations. Cibinic, Nash & Nagle, Administration of Government Contracts, pp. 898-905 (4th ed. 2006); for

construction, see G.A. Karnavas Painting Co., VACAB 992, 72-1 BCA ¶ 9369; PCL Constr. Servs. Inc. v. United States, 47 Fed. Cl. 745 (2000); for services, see Reliable Maint. Serv., ASBCA 10487, 66-1 BCA ¶ 5331. For fixed-price supply contracts, the doctrine of substantial compliance may limit the government's right to terminate the timely delivery of supplies that have minor defects. Radiation Tech., Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966).

2. For fixed-price supply contracts, the doctrine of substantial compliance may limit the government's right to terminate the timely delivery of supplies that have minor defects. 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. Note that the fixed-price termination for default clause, FAR 52.249-8, provides the government the right to terminate the contract, at least in part, for supplies and services the contractor fails to deliver within the time specified in the contract. Generally speaking, courts and boards uphold default terminations for late delivery on fixed-price supply contracts where government actions demonstrate time is of the essence. See, DeVito v. United States, 413 F.2d 1147 (Ct. Cl. 1969); National Farm Equip. Co., GSBCA 4921, 78-1 BCA ¶13,195; M.H. Colvin & Co., GSBCA 5209, 79-2 BCA ¶13,981; Fairfield Scientific Corp., ASBCA 21152, 78-1 BCA ¶12,869. Because the government rarely terminates contracts for slight delays, there are relatively few decisions in which the deciding issue is whether time is of the essence – i.e. is the government entitled to strict compliance with the delivery schedule. Cibinic, Nash & Nagle, Administration of Government Contracts, p. 889 (4th ed. 2006).

E. Remedies if the Contractor Fails to Correct Defective Performance Under Fixed-Price Contracts

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

(a) 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);

(b) Correct or replace the defective goods or services itself;

(c) Accept the nonconforming goods or services at a reduced price, or;

(d) Terminate the contract for default. FAR 52.246-4(f); see 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 under FAR 52.246-4 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. If the defects cannot be corrected by re-performance, 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).

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 that can be corrected within a reasonable time;

   d. 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 of supplies and services is the responsibility of the contracting officer. When this responsibility is assigned to a cognizant contracting administration office or to another agency (see 42.202(g)), acceptance by that office or agency is binding on the USG. FAR 46.502

a. Contracts often identify who is authorized to accept supplies or services on behalf of the USG but the contract should be clear to avoid possible disputes. W.S. Jenks & Son, GSBCA 10513, 92-1

BCA¶24,502 (inspector not authorized when another entity was listed as acceptance authority in the contract); *Design & Prod., Inc. v. US*, 18 CL. Ct. 168 (1989) (COTR only had authority to notify KO, not accept or reject).

2. For fixed-price contracts, 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).

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

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

5. 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).

6. 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).

7. As a general rule, under fixed-price contracts 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 transportation 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 – FAR 52.246(e).

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 (2 Feb 2015).

2. Normally, warranties are defined by the time and scope of coverage. FAR 46.702(b).

3. 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. FAR 52.246-17(b)(1); 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 46.706(b)(2), 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. Require an equitable adjustment in the contract price; however, the adjustment cannot reduce the price below the scrap value of the product.

3. Warranty remedies specified in the clause limit the Government's options to just those stated in the contract. *Kordick & Son, Inc. v. US*, 12 Cl. Ct. 662 (1987).

4. Warranty remedies are cumulative with other contractual remedies (i.e. inspection remedies). Charles G. Williams Constr., Inc., ASBCA 24967, 81-1 BCA ¶ 14,893.

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

I. INTRODUCTION.

A. This Chapter focuses on:

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. §§ 3901-3907, Prompt Payment.

C. 31 U.S.C. §§ 3701-3702, Claims.

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

E. 31 U.S.C. § 3728, Setoff against Judgement.

F. 41 U.S.C. § 4503, Security for advance payments.

G. 5 CFR Part 1315, Prompt Payment.

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

I. Defense Federal Acquisition Regulation Supplement, Part 232, Contract Financing.

[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).

J. Army Federal Acquisition Regulation Supplement, Part 5132, Contract Financing.

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

L. DoD Financial Management Regulation (FMR) (DoD 7000.14-R), vol. 16, Department of Defense Debt Management.

III. POLICIES AND PROCEDURES.

A. FAR Part 32 prescribes policies and procedures for contract financing and other payment matters. It specifically addresses:

1. Payment methods, including partial payments and progress payments based on percentage or stage of completion (FAR Part 32);

2. Loan guarantees (FAR 32.3), advance payments (FAR 32.4), and progress payments based on costs (FAR 32.5);

3. Administration of debts to the Government arising out of contracts (FAR 32.6);

4. Contract funding, including the use of contract clauses limiting costs or funds (FAR 32.7);

5. Assignment of claims to aid in private financing (32.8);

6. Selected payment clauses (see FAR 52.232-1 through FAR 52.232-40);

7. Financing of purchases of commercial items; (FAR 32.2).

8. Performance-based payments (FAR 32.10); and

9. Electronic funds transfer payments. FAR 32.11.

B. Disbursing Authority.

1. The Bureau of the Fiscal Service (formerly the Financial Management Service), a bureau of the U.S. Department of the Treasury, is the principal disbursing agent of the Federal government, accounting for approximately 85% of all Federal payments. The Bureau of the Fiscal Service website is at: http://www.fiscal.treasury.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. 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.

D. Invoice Payments vs. Financing Payments. FAR Subparts 32.104 (noncommercial items); 32.202-1 (commercial items).

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.

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

E. 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)).

F. Payment Requirements. Payments are based on receipt of a proper invoice or contract financing request, and satisfactory contract performance. FAR 32.905(a); FAR 32.007.

G. 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. See FAR 32.904(b). Failure of the Government to timely pay the contractor will automatically result in the payment of interest, without request of the contractor, when all of the conditions found in FAR 32.907(a) have been met.

H. Financing Payment Due Date. The due date for making a contract financing payment is prescribed in FAR 32.007. Generally, the due date for contract financing payments is 30 days from date of receipt by the designated payment 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. FAR 32.007(e). Although late payment can be a defense to a default termination, the 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. Jones Oil Company, ASBCA No. 42651, 98-1 BCA ¶ 29,691; A-Greater New Jersey Movers, Inc., ASBCA No. 54745, 06-1 BCA ¶ 33179.

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. Commercial item is defined at FAR 2.101, and includes items or services that have been offered for

sale, lease, or license to the general public. See Contract Attorney's Deskbook, Chapter 10.

A. Non-Commercial Contract Payments. FAR 32.1. 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, 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. FAR 32.102.

b. This is the least preferred method of contract financing. FAR 32.106(e).

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 designee findings for advance payment include[2]:

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

(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

[2] In the Army, the Assistant Secretary of the Army (Acquisition, Logistics and Technology) is the approval authority on a non-delegable basis. See AFARS 5132.402. In the Air Force, the contracting officer must submit each advance payment request through the MAJCOM to SAF/ACQ for submission to SAF/FMPA for approval. See AFFARS 5332.402.

shall be closely monitored to reduce the 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.

g. When advance payments are used, the Advance Payments clause in FAR 52.232-12 is required. FAR 32.412.

3. Progress Payments.[3] 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 $250,000, except in special circumstances such as disaster or humanitarian relief). 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 commercial item purchase financing payments, performance-based payments, or progress payments due to subcontractors as progress

[3] The DoD is currently considering changes to the rules around progress payments under DFARS Case 2019-D001. Meeting regarding the proposed changes occurred in January and February of 2019. Industry groups have strongly opposed the proposed changes. As of 8 June 2020, the DFARS case remains open.

payments, whether paid or unpaid, provided that unpaid amounts are limited to amounts determined due 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). But see Aydin Corp. v. Widnall, 61 F.3d 1571, 1577-78 (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).

b. 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, shipbuilding and ship conversion, alteration, or repair contracts.

(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. FAR 32.501-1.

4. Customary progress payments. Customary progress payments are those made under the general guidance in this subpart, using the customary progress payment rate, the cost base, and frequency of payment established in the Progress Payments clause, and either the ordinary liquidation method or the alternate method as provided in subsections 32.503-8 and 32.503-9. FAR 32.501; *see also* FAR32.501-1 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. DFARS 232.501-1(a).

(1) Unusual progress payments. Unusual progress payments are any payment that does not meet the definition of a "customary progress payment." FAR 32.501.

(a) Contracting officer may provide unusual progress payments only if:

(i) Contract necessitates pre-delivery expenditures that are large in relation to the contractor's working capital and credit (FAR 32.501-2(a)(1));

(ii) Contractor fully documents an actual need to supplement private financing available (FAR 32.501-2(a)(2));

(iii) Contractor's request is approved by the head of the contracting activity or designee (FAR 32.501-2(a)(3)); and

(iv) Approval is received from the Contract finance office. FAR 32.502-2.

(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.

5. Loan Guarantees.

a. *Guaranteed loan* or "V loan" means a loan, revolving credit fund, or other financial arrangement made pursuant to Regulation V of the Federal Reserve Board, under which the guaranteeing agency is obligated, on demand of the lender, to purchase a stated percentage of the loan and to share any losses in the amount of the guaranteed percentage. FAR 32.301.

b. 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.

c. While FAR 32.106 states that guaranteed loans are a preferred form of financing over unusual contract financing and advance payments, the use of guaranteed loans requires the availability of certain congressional authority. The DoD has not requested such authority in recent years, and does not currently possess the required authority. DFARS 232.302.

6. Unusual Contract Financing.

a. Any contract financing arrangement that deviates from this part is unusual contract financing. FAR 32.114.

b. The Director, Defense Procurement and Acquisition Policy, on a non-delegable basis, shall approve actions as stated in FAR 32.114 and DFARS 201.402(1)(vi). AFARS 5132.114, Unusual Contract Financing

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) Spares provisioning documents annexed to contracts,

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

(5) 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.[5] FAR 32.1001(a). However, in 2003, 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."[6] Again, in 2013 the DoD IG noted necessary improvements in the award and administration of performance based contracts to include: improvements to the evaluation and negotiation of event schedules; better information in contracts (e.g., contracting personnel excluded required administrative information, better quality of event schedules); and contracting personnel should verify whether contractors actually needed financing, which may have resulted in the DoD incurring unnecessary costs and not receiving adequate consideration.[7]

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.

(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).

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[4] As part of the Better Buying Power initiative, http://bbp.dau.mil/, DPAP published a Performance Based Payments Guide in 2014, available at: http://www.acq.osd.mil/dpap/cpic/cp/docs/Performance_Based_Payment_(PBP)_Guide.pdf (last visited June 14, 2020). The Defense Contract Management Agency website, https://www.dcma.mil/Portals/31/Documents/Policy/DCMA-MAN-2101-02.pdf?ver=2019-02-20-154800-810 , also provides guidance on the use and administration of performance-based payments (PBPs).

[5] Effective 8 April 2020, the DoD has amended the rules related to performance-based payments under DFARS Case 2019 D002, Federal Register Number 2020-06728 to implement section 831 of the National Defense Authorization Act for Fiscal Year 2017. This change makes performance-based payments the mandatory form of contract financing whenever practicable. Public comments on the proposed changes are due on July 1, 2019.

[6] 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).

7 OFFICE OF THE INSPECTOR GENERAL OF THE DEP'T OF DEFENSE REP. NO. DODIG-2013-063, *Award and Administration of Performance-Based Payments in DoD Contracts* (April 2013

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. Performance-based payments are contract financing payments and are NOT used as payment for accepted items. FAR 32.1001(b).

e. 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.

f. 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.

B. Commercial Items. 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 financing terms in contracts for commercial purchases when such terms are customary in the commercial marketplace and in the best interests of the government. 10 U.S.C. § 2307(f); 41 U.S.C. § 4505; FAR 32.202-1.

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) Not subject to FAR Subpart 32.4, Advance Payments for Non-Commercial Items.

(5) The contracting officer shall incorporate standard prompt payment terms for commercial items contract financing to indicate 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) The contracting officer shall incorporate standard prompt payment terms for commercial items contract financing to indicate 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. *See* 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 contractor assets of adequate worth.

(f) Other assets as described in FAR 28.203-2, FAR 28.203-3, and FAR 28.204. *See* FAR 32.202-4.

(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).

f. The aggregate of payments made prior to the start of contract performance shall not exceed 15% of the contract price.

g. The contract is awarded on the basis of competitive procedures or, if only one offer is solicited, adequate consideration is obtained if the financing is expected to be substantially more advantageous to the offeror than the offeror's normal method of customer financing; and

h. The contracting officer obtains concurrence from the payment office concerning liquidation provisions when required by FAR 32.206(e) -- if liquidation is on a whole contract basis, and the contracting officer does not use a uniform liquidation percentage as the liquidation method (unless agency regulations provide alternative liquidation methods).

C. 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. This decision must be based upon the contracting officer's assessment of past performance and the likelihood that such performance will continue, and the retainage shall not exceed 10 percent of the progress payment. FAR 32.103.

2. The entitlement to progress payments is not absolute and requires compliance with the contract and relevant regulations. Webb Electric Co. of Florida, Inc., ASBCA No. 40557, 93-2 BCA ¶ 25,715; The Davis Group, Inc., ASBCA No. 48431, 95-2 BCA ¶ 27,702.

V. THE PROMPT PAYMENT ACT.

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.[8]

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. 31 U.S.C. §§ 3901-3907; 5 CFR Part 1315.

d. The PPA provides that interest shall be paid for the period beginning on the day after the required payment date and ending on the date on which payment is made. 31 U.S.C. § 3902(b); 5 CFR Part 1315.10(a)(1).

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

d. For DoD, except for FAR 32.908, FAR subpart 32.9, Prompt Payment, does not apply when:

(1) There is: (A) An emergency, as defined in the Disaster Relief Act of 1974; (B) A contingency operation (see FAR 2.101(b)); or (C) The release or threatened release of hazardous substances (as defined in 4 U.S.C. 9606, section 106);

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

(2) The head of the contracting activity has made a determination, after consultation with the cognizant comptroller, that conditions exist that limit normal business operations; and

(3) Payments will be made in the operational area or made contingent upon receiving supporting documentation (i.e., contract, invoice, and receiving report) from the operational area. DFARS 232.901.

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

a. PPA applies to the payment (*see* 5 CFR Part 1315.1; FAR 32.901),

b. Invoice is proper (*see* FAR 32.905(b)(1)),

c. Government has accepted the supplies or services (*see* FAR 32.904), and

d. Government has paid the invoice late (*see* FAR 32.904).

4. Applicability to Types of Payments. The PPA applies to invoice payments i.e., payments made for supplies or services accepted by the government. FAR 32.901(a). For purposes of applying the PPA, invoice payments include (FAR 32.001):

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. FAR 52.232-10

e. Progress payments under fixed-price construction contracts. FAR 52.232-5

f. Interim payments on cost-reimbursement service contracts.[9]

[9] 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.

5. The PPA does not apply to contract financing payments. 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., GSBCA No. 15318, 01-2 BCA ¶ 31521; *see also* FAR 32.907(a).

B. Invoice Payment Procedures.

1. Proper invoice required. One of the two PPA triggers is receipt of a proper invoice. 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 (e.g., order number or line item number).

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

      (5) Shipping and payment terms (e.g., shipping number and date of shipment).

      (6) Name and address of contractor official to whom payment is to be sent (must be the same as that in the contract or in a proper notice of assignment).

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

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

(9) EFT Information (if required).

(10) Any other information or documentation required by the contract, (e.g., 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). *See* also DoD FMR, Vol. 10, Ch. 7, 070203B(1), Notice of Improper Invoice, If a DoD Component fails to provide notification of an improper invoice within the prescribed timeframes, the computation of the payment due date will be affected, in that the number of days allowed for payment of the corrected proper invoice will be reduced by the number of days delayed beyond the allowable invoice return notification requirement. For example, a typical invoice payable in 30 days is returned as improper on the 11th day after receipt, minus 7 days allowed, equaling a 4-day delay and reducing the payment due date of the corrected/resubmitted invoice by 4 days. As a result of the 4-day delay, the corrected invoice is now payable in 26 days upon receipt before interest begins to accrue.

(2) 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.

The receiving report or other documentation authorizing payment must, at a minimum include the following:

(a) Contract number of other authorization for the supplies delivered or services performed.

(b) Description of supplies delivered or services performed.

(c) Date of supplies delivered or serviced performed.

(d) Date the designated Government official –

(i) Accepted the supplies or services; or

(ii) Approved the progress payment request, if the request is being made under FAR 52-232-5, Payments Under Fixed-Price Construction Contracts, or FAR 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts

(e) Signature, printed name, title, mailing address, and telephone number of designated Government official responsible for acceptance or approval functions.

(2) The designated billing office must immediately annotate the invoice with the actual date it receives the invoice. FAR 32.905(d).

(3) The designated payment office will annotate the invoice and receiving report with the actual date it receives the invoice. FAR 32.905(e).

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

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, 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 and must be used only when necessary to permit proper Government inspection or testing of the services/supplies. 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 (DoD policy is to assist small business concerns by paying them as quickly as possible after invoices and all proper documentation, including acceptance, are received and before normal payment due dates established in the contract; *see also* DoD Class Deviation 2014-O0015, "Update to Accelerated Payments to Small Businesses," *see also* Memorandum, The Office of Management and Budget, for the Heads of Executive Departments and Agencies, subject: Providing Prompt Payment to Small Business Subcontractors (11 July 2012).

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. The interest penalty accrues automatically 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.[10] FAR 32.907.

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

c. Late payment penalty in addition to 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 postmarked within 40 days after the payment was made. 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.

[10] 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).

31 U.S.C. § 3902 and 41 U.S.C. § 7109.[11] Under the CDA, the 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.

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 contract's 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-Engineer Contracts. FAR 32.904(c).

[11] Information concerning the interest rate is published semi-annually in the Federal Register and can also be found on the website of the Department of the Treasury, Bureau of the Fiscal Service, at: https://www.fiscal.treasury.gov/prompt-payment/rates.html. The rate applicable from July 2019 to December 2019 was 2.625%. . The rate applicable from January 2020 to June 2020 is 2.125%. (last visited on June 14, 20120).

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 -- 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.[12]

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: (1) an earlier payment is warranted in a specific case; or (2) that the use of accelerated payment methods described in 5 CFR §1315.5 are necessary.

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 that indicate an intent to waive. Central Intelligence Agency - Waiver of Interest Under Prompt Payment Act, 62 Comp. Gen. 673 (1983), B-211737, CPD ¶ 475 (contractor refused to accept interest check prepared by agency).

[12] 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).

A. Mandatory Use. Payment by EFT is the mandatory method of contract payment[13] 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. Provided EFT is not known to be possible, or EFT payment would not support the operation's objectives, 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).

[13] 31 USC §3332 requires use of EFT in all situations unless the agency head waives the requirement upon receipt of written certification the recipient does not have an account with a financial institution or authorized payment agent.

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).

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); *see also* 31 CFR § 208.4.

B. Dates. FAR 32.902. See also FAR 52.232-33 & 34.

1. Payment Date. The date on which a check for payment is dated or, for an EFT, the settlement date.

2. Settlement Date. As it applies to EFT, the date on which an electronic funds transfer payment is credited to the contractor's financial institution.

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 within the meaning of the "Suspension of Payment" paragraphs of the EFT clauses at 52.232-33 and 52.232-34. FAR 32.1105.

D. Contractor Registration. FAR Subpart 4.11. FAR 52.204-7.

1. Contractors provide EFT data to DoD by registering in the System for Award Management (SAM).[14] Subject to the exceptions found in FAR 4.1102(a), SAM registration is mandatory prior to award of a contract, basic agreement, basic ordering agreement, or blanket purchase agreement.

2. Exceptions to this policy include:

a. Purchases under the micro-purchase threshold that use a Government-wide commercial purchase card as both the purchasing and payment mechanism, as opposed to using the purchase card for payment only;

b. Classified contracts (see FAR 2.101) when registration in the SAM database, or use of SAM data, could compromise the safeguarding of classified information or national security;

c. Contracts awarded by—

[14] The SAM is accessible at: beta.sam.gov.

(1) 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 humanitarian or peacekeeping operations as defined in 10 U.S.C. 2302(8);

(2) Contracting officers located outside the United States and its outlying areas, as defined in 2.101, for work to be performed in support of diplomatic or developmental operations, including those performed in support of foreign assistance programs overseas, in an area that has been designated by the Department of State as a danger pay post; or

(3) Contracting officers in the conduct of emergency operations, such as responses to natural or environmental disasters or national or civil emergencies, e.g., Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121);

d. Contracts with individuals for performance outside the United States and its outlying areas;

e. Contracts to support unusual or compelling needs (see FAR 6.302-2);

f. Contract actions at or below $30,000 awarded to foreign vendors for work performed outside the United States, if it is impractical to obtain System for Award Management registration; and

g. Micro-purchases that do not use the electronic funds transfer (EFT) method for payment and are not required to be reported (see FAR 4.6). FAR 4.1102(a).

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.[15] 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.[16]

G. FAR Clauses:

1. 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-System for Award Management, in all solicitations and contracts that require a contractor to be registered in the SAM database and maintain registration until final payment, unless one of the exceptions contained in FAR 32.1110(a)(1) applies.

2. The contracting officer will insert the clause at FAR 52.232-34, Payment by Electronic Funds Transfer-Other than System for Award Management in all solicitations and contracts that require EFT as the method for payment, but do require SAM registration. FAR 32.1110(a)(2).

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); FAR 52.232-34(e)(1).

2. If an uncompleted or erroneous transfer occurs because the contractor provided incorrect EFT information or revised its EFT information within 30 days, and 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 EFT information is entered. FAR 52.232-33(e)(2); FAR 52.232-34(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

[15] DoD requires use of the purchase card as payment for any purchase at or below the micro-purchase threshold (*see* FAR 2.101). 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.

[16] 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 a valid date under the rules the Federal Reserve System for settlement of the payment on or before the prompt payment due date. FAR 52.232-33(f); FAR 52.232-34(f).

I. Wide Area Work Flow (WAWF).

WAWF is the only acceptable form for submission and receiving electronic payments in the DoD unless one of the exceptions contained in DFARS 232.7002(a) or DFARS 232.7003(b)(1) applies. DFARS 232.7002 and 232.7003. WAWF combines, in a secure web-based system, electronic invoicing, receipt, and acceptance. WAWF can be accessed at https://wawf.eb.mil/.

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 FAR 32.802, 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 (*see* FAR 52.232-24).

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. Pursuant to 41 U.S.C. § 6305, and in accordance with the Presidential delegations by the President, the Secretary of Defense, and the Under Secretary of Defense (Acquisition, Technology, and Logistics), the Director of Defense Procurement has determined that, absent a determination by the contracting officer under FAR 32.803(d),[17] the DoD will agree to not reduce or set off any money due to become due under a contract when the proceeds have been properly assigned under the contract. DFARS 232.803.

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)).

[17] Under FAR 32.803(d), the 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. The Assistant Secretary of the Army (Acquisition, Logistics and Technology), on a non-delegable basis, shall make the determination as described at FAR 32.803(d). AFARS 5132.803(d).

VIII. DEBT DETERMINATION AND COLLECTION PROCEDURES.

A. Contract Debts are amounts that:

1. Have been paid to a contractor to which the contractor is not currently entitled under the terms and conditions of the contract; or

2. Are otherwise due from the contractor under the terms and conditions of the contract. FAR 32.601(a).

B. Contract Debts include, but are not limited to:

1. Billing and price reductions resulting from contract terms for price redetermination or for determination of prices under incentive type contracts.

2. Price or cost reductions for defective certified cost or pricing data.

3. Financing payments determined to be in excess of the contract limitations at 52.232-16(a)(7), Progress Payments, or 52.232-32(d)(2), Performance-Based Payments, or any contract clause for commercial item financing.

4. Increases to financing payment liquidation rates.

5. Overpayments disclosed by quarterly statements required under price redetermination or incentive contracts.

6. Price adjustments resulting from Cost Accounting Standards (CAS) noncompliances or changes in cost accounting practice.

7. Reinspection costs for nonconforming supplies or services.

8. Duplicate or erroneous payments.

9. Damages or excess costs related to defaults in performance.

10. Breach of contract obligations concerning progress payments, performance-based payments, advance payments, commercial item financing, or Government-furnished property.

11. Government expense of correcting defects.

12. Overpayments related to errors in quantity or billing or deficiencies in quality.[18]

[18] The Government Accountability 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

13. Delinquency in contractor payments due under agreements or arrangements for deferral or postponement of collections.

14. Reimbursement of amounts due under 33.102(b)(3) and 33.104(h)(8). FAR 32.601(b).

C. Determination of Contractor Debt.

1. Overpayment. Contractor reconciliation of its billings to government accounting and payment data is a key procedure for identifying government overpayments.[19] In 2002, Congress enacted the 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.[20]

2. If the contracting officer has any indication that a contractor owes money to the government under a contract, the contracting officer is responsible for determining if an actual debt is due, the amount of debt; and if warranted, issuing a demand for payment. FAR 32.603(a); FAR 32.604(a)(1).

3. The payment office is primarily responsible for:

a. Collecting debts identified by a contracting officer;

b. Identifying and collecting duplicate or erroneous payments; and

c. Authorizing liquidation of contract debts in accordance with agency procedures. FAR 32.602(b).

4. Procedures.

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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).

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

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

a. Subject to the exceptions found in FAR 32.604(c), upon determination of a debt, the contracting officer shall issue a demand for payment. FAR 32.604.

b. A demand for payment must include:

(1) A description of the debt, including the debt amount;

(2) A distribution of the principal amount of the debt by line(s) of accounting subject to the guidance found at FAR 32.604(b)(2);

(3) The basis for and amount of any accrued interest or penalty.

(4) Either:

(a) For debts resulting from specific contract terms (*e.g.*, debts resulting from incentive clause provisions, Quarterly Limitation on Payments Statement, Cost Accounting Standards, price reduction for defective pricing), a notification stating that payment should be made promptly, and that interest is due in accordance with the terms of the contract; or

(b) For all other contract debts, a notification stating that any amounts not paid within 30 days from the date of the demand for payment will bear interest.

(5) A statement advising the contractor—

(a) To contact the contracting officer if the contractor believes the debt is invalid or the amount is incorrect; and

(b) If the contractor agrees, to remit a check payable to the agency's payment office annotated with the contract number along with a copy of the demand for payment to the payment office identified in the contract or as otherwise specified in the demand letter in accordance with agency procedures.

(6) Notification that the payment office may initiate procedures, in accordance with the applicable statutory and regulatory requirements, to offset the debt against any payments otherwise due the contractor.

(7) Notification that the debt may be subject to administrative charges in accordance with the requirements of 31 U.S.C. 3717(e) and the Debt Collection Improvement Act of 1996.

(8) Notification that the contractor may submit a request for installment payments or deferment of collection if immediate payment is not practicable or if the amount is disputed. FAR 32.604.

D. 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. Voluntary Offset. . A debtor may also request to make payment by installment agreement or may permit the withholding (offset) of funds payable to the debtor by the United States. Voluntary repayment via direct remittance or offset is the preferred method for collecting debts. DoD FMR, vol. 16., Ch. 2, 020301A.

c. Withholding. If the contractor fails to make payment within 30 days of a demand, and has failed to request deferment, the government shall 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.

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); FAR 32.607-2.

b. If the contractor is appealing the debt (see FAR Part 33), 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. FAR 32.607-2(a)(2).

3. Any debt that is delinquent more than 180 days must be transfer to the Department of Treasury for collection. 31 U.S.C. § 3711(g)(1).

E. Compromise Actions. DoD FMR, Vol. 16, Ch. 2

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 department/agency finance office may compromise the debt, or terminate or suspend further collection action.[21] DFARS 232.610. DoD Contracting officers do not possess this authority.

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. DoD FMR, vol. 16, 021402B.

3. DFAS and DoD Components cannot approve a compromise on a debt referred to DOJ for litigation unless the debt is returned to the DoD for disposition. DoD FMR, vol. 16, 021402B5.

F. Funds Received from the Contractor.

[21] *See* DFARs PGI 232.070 for a listing of finance offices for DoD departments and agencies.

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 Government Accountability Office, Principles of Federal Appropriations Law, vol. II, ch. 6, § E (3d Ed. 2006); 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

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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) parts (various), including: 11, 43, 50.1, 52.243, 52.233.

2. John Cibinic, Ralph Nash & James Nagle, Administration of Government Contracts, Ch. 4, Changes (5th Ed., 2016).

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

4. Government Accountability Office Redbook, Chapter 5, Availability of Appropriations: Time (3d Ed.), available at https://www.gao.gov/legal/appropriations-law-decisions/red-book/

5. Black's Law Dictionary, Thomson Reuters (11th Ed., 2019).

C. Definitions.

1. **Contract Change** – A change to a contract under which a contractor is required to perform additional work. 31 U.S.C. 1553(c)(3). Put another way, 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 (Written) Contract Modification** – Any written change in the terms of a contract. FAR 2.101

3. **Change Order** – The Changes Clause authorizes the contracting officer to unilaterally direct the contractor, by written order, to make a change

within the general scope of the contract. This right is solely within the Government's discretion; not the contractor. FAR 43.201; FAR 43.2; 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 unilateral 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. *See Neil R. Gross & Co.*, B-237434, 90-1 CPD P 212 at 2-3 (Feb. 23, 1990), *aff'd on reconsideration*, B-237434.2, 90-1 CPD P 491 (May 22, 1990) (in-scope means there is no material difference between the modified contract and originally competed contract); *American Air Filter Co.*, 57 Comp. Gen. 567.

11. **Out-of-Scope ("Cardinal") Change** – In disputes between contractor and government, 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. *Allied Materials & Equip. Co. v. United States*, 215 Ct. Cl. 406, 569 F.2d 562, 563-64 (Ct. Cl. 1978); *see also Air-A-Plane Corp. v. U.S.*, 187 Ct. Cl. 269, 408 F.2d 1030, 1032-33 (Ct. Cl. 1969).

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.

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.

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

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 contract modifications;

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).

[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.

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, in writing, 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. 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 (e.g., to update for new fiscal years);

   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 52.243-4. 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.

(4) **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

(5) **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

(6) **Options Clause**. These clauses give the contracting officer the ability to unilaterally extend the contract, or order additional supplies/services. 52.217-6 thru 52.217-9

(7) **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.

a. Differing Site Conditions. FAR 52.236-2. Contractors "shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of-

(a) Subsurface or latent physical conditions at the site which differ materially from those indicated in this contract; or

(b) Unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract."

b. 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 52.243-5

c. Purpose for changes related to differing site conditions. The court in *J.F. Shea Co. v. United States* explained, "The purposes served by the differing site conditions clause in a construction contract, which permits a contractor to seek an equitable adjustment in the contract price for a changed condition, is to prevent bidders from increasing their bid prices to protect against misfortunes resulting from unforeseen developments . . . and thus avoid turning a construction contract into a 'gambling transaction.'" 4 Cl. Ct. 46, 50 31 Cont. Cas. Fed. (CCH) ¶ 71,811; *citing to Chermus v. United States*, 110 Ct. Cl. 264, 267, 75 F. Supp. 1018, 1019 (1948); *Peter Kiewit & Son's Co. v. United States*, 109 Ct. Cl. 517, 522-23, 74 F. Supp. 165, 168 (1947); *see also Shank-Artukovich v. United States*, 13 Cl. Ct. 346, 34 Cont. Cas. Fed. ¶ 75,372.

d. Other In-Scope Changes. The parties may agree to a change that falls within the scope of the original contract (See Section VI, below).

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

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. A constructive change occurs when the contract work is actually changed but the procedures of the Changes clause have not been followed. Administration of Gov't Contracts, Cibinic, Nash & Nagle (2016, p. 386). 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)

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

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 Sect. V, below). *Navcom Def. Elecs. v. Eng.*, 53 Fed. Appx. 897, 900 (2002), *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; *S-TRON*, ASBCA Nos. 45893, 46466, 96-2 BCA ¶ 28,319.

1. A change occurred as the result of an authorized government official's words or conduct. *Kos Kam, Inc.*, ASBCA No. 34682, 92-1 BCA ¶ 24,546;

2. The contractor's changed performance was not "volunteered," but a result of the official's direction. *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.[4] 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);

2. Defective Specifications;

3. Governmental Interference and Failure to Cooperate;

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

4 In Administration of Gov't Contracts, Cibinic, Nash & Nagle (2016, p. 389), the authors discuss the four types of constructive changes as those in Nos. 1-3, and 5, combining No. 4, "Superior Knowledge" into the other four types.

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 Administration of Gov't Contracts, Cibinic, Nash & Nagle (2016, p. 390). 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. See J.A. Ross & Co. v. United States, 115 F.Supp.187, 190 (Ct. Cl. 1953).

(3) Did the contractor timely notify the government of the impact of the government's interpretation? Administration of Gov't Contracts, Cibinic, Nash & Nagle (2016, p. 424).

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. See *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. Plain meaning. 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. *Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035 (Fed. Cir 2003); *see also 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. *LAI Servs., Inc. v. United States*, 973 F.2d 1306 (Fed. Cir. 2009); *Big Chief Drilling Co. v. United States*, 26 Cl. Ct. 1276, 1298 (1992).

c. Defining Terms.

(1) Give ordinary terms their ordinary definitions. *See Gustafson P'ship*, GSBCA 6701-COM, 84-1 BCA ¶17,086 *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 Fry Communications, Inc. v. United States*, 22 Cl. Ct. 497 (1991); *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 Travelers Cas. & Sur. Co. of Am. v. United States*, 75 Fed. Cl. 696 (2007); *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. "For an order of precedence clause to be applied, there must be a conflict between the provisions in question." Administration of Gov't Contracts, Cibinic, Nash & Nagle (2016, p. 171) *citing Amelco, Inc.*, ASBCA 50826, 99-2 BCA ¶19,687. And they are not used to deal with silence in contract documents. *Edward R. Marden Corp. v. United States*, 803 F.2d 701 (Fed. Cir. 1986).

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.

(3) When used to show the parties' intent, both parties must have had actual knowledge of the prior course of dealing. *See Sperry Flight Sys. Div. of Sperry Rand Corp. v. United States*, 548 F.2d 915 (Ct. Cl. 1977); *Transco Contracting Co.*, ASBCA 25315, 82-1 BCA ¶ 15,516.

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) Generally, 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.

f. **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).

g. 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. *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.

(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 that an objective standard applied to the latent/patent ambiguity determination); *George Hyman Constr. Co.*, ENGBCA 4653, 83-1 BCA ¶ 16,283 (setting forth elements to consider for what gives rise to a duty to inquire).

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 could result in a contract price reduction. *Donat Gerg Haustechnick*, ASBCA Nos. 41197, 42001, 42821, 47456, 97-2 BCA ¶ 29,272; *J. L. Simmons Co. v. United States*, 188 Ct. Cl. 684, 689, 412 F.2d 1360, 1362 (1969) (defining performance and design specifications, respectively).

(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 (Brand Name or Proprietary Specifications)** are specifications that designate a particular manufacturer's model, part number, product, or in the case of proprietary specifications, when no brand name is used but the specifications can only be met by a specific brand name product. Administration of Gov't Contracts, Cibinic, Nash & Nagle (2016, p. 735). Use of this type of specification is limited by FAR 11.105, so the phrase "or equal" may accompany a purchase description along with the features the government deems

important, called salient characteristics. FAR 11.104; *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, the responsibility for proper performance generally falls upon the government.

(2) If the contractor furnishes or uses an acceptable and approved substitute product in accordance with the government's designated salient characteristics, the responsibility for proper performance generally falls upon the government. *See J.K. Richardson Co.*, ASBCA 46309, 94-2 BCA ¶ 26,900; *EZ Constr. Co.*, ASBCA 31510, 87-3 BCA ¶ 20,186. However, failure by the government to designate salient characteristics means a substitute item need only be of the same standard of quality and functional equivalent of the brand name item. *See Jack Stone Co. v. United States*, 344 F.2d 370 (Ct. Cl. 1965).

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

(4) 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 and salient characteristics 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; if gov't specifies "or equal" without describing salient characteristics, Kr need only provide or use item of same standard of quality and functional equivalent.
Composite Specifications	Identify the type of specification	See above…

3. Defective Specifications – Theories of Recovery.

   a. In some cases, judges have relied on a breach of contract theory, wherein recovery is breach of contract damages. *See, e.g., Big Chief Drilling Co. v. United States*, 26 Cl. Ct. 1276 (1992); *United States v. Spearin*, 248 U.S. 132 (1918).

(1) Alternatively, under the theories discussed below, a breach of contract claim is effectively converted into a claim of a constructive change, in that the government's fault in using defective specifications required (ordered) performance not originally contemplated in order to overcome the defects. Recovery takes the form of an equitable adjustment to cover costs associated with such performance. *BECO Constr. Co.*, ASBCA 57483, 11-2 BCA ¶ 34,817; *Spencer Explosives, Inc.*, ASBCA 4800, 60-2 BCA ¶ 2795*;* *Unexcelled Chem. Corp*., ASBCA 2399, 60-1 BCA ¶ 2587; *Consolidated Diesel Elec. Corp*., ASBCA 10486, 67-2 BCA ¶ 6669. Whether the change requires an actual order, as opposed to issuance of a contract containing defective specifications, has been called into question by *Winter v. Cath-dr/Balti Joint Venture*, 497 F.3d 1339 (2007).

(2) To receive an equitable adjustment from the Government, the contractor must establish liability, causation, and resultant injury and in doing so may rely on one or more of the theories below. See *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (en banc); *Metric Constructors, Inc.*, ASBCA No. 48423, 96-2 BCA ¶ 28,459.

b. Theory of Recovery – Implied Warranty. The theory of an implied "warranty" of design 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 breach of contract by failing in 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). However, in *Hol-Gar Mfg. Corp. v. United States*, 360 F.2d 634 (Ct. Cl. 1966), the court viewed a government failure of implied warranty as a constructive change, not a breach of contract.

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

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

(b) 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

(c) 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; *S. Head Painting*

Contractor, Inc., ASBCA 26249, 82-2 BCA ¶ 15,886; *Oconto Elec., Inc.*, ASBCA 40421, 93-3 BCA¶ 26,162.

(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).

c. Theory of Recovery – Impracticability/ Impossibility of Performance. There are three elements to this theory. *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. 1966); *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 event or its non-occurrence was a basic assumption upon which the contract was based. *See Safety Training Systems, Inc.*, ASBCA Nos. 57095, 57166, 2014-1 BCA ¶ 35,509; *Shubhada Industries, Inc.*, ASBCA No. 54016, 2008-1 BCA ¶ 33,733 at 167,019;

(3) 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); *Coastal 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).

(4) Performance is <u>commercially</u> 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, not literally impossible. *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." *See Safety Training Systems, Inc.*, ASBCA Nos. 57095, 57166, 2014-1 BCA ¶ 35,509 (citing *Natus Corp. v. United States*, 371 F.2d 450, 457, 178 Ct. Cl. 1 (Ct. Cl. 1967)). Thus "[a] showing of simple economic hardship is not sufficient." *American Combustion, Inc.*, ASBCA No. 43712, 94-3 BCA ¶ 26,961 at 134,243 (citing *Jennie-O Foods, Inc. v. United States*, 580 F.2d 400, 410, 217 Ct. Cl. 314 (Ct. Cl. 1978)).

(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.

(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. 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. Whether the government has breached its implied duty to cooperate, thus resulting in a constructive change, is based on the

reasonableness of its actions. *See Ben C. Gerwick, Inc. v. United States*, 285 F.2d 432 (Ct. Cl. 1961); *Asheville Contracting Co.*, DOTCAB 74-6, 76-2 BCA ¶ 12,027; *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).

2. Generally a contractor may not recover for "interference" that results from a sovereign act. *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).

3. Theory of Recovery – 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.

4. Theory of Recovery – 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. Administration of Gov't Contracts, Cibinic, Nash & Nagle (2016, pp. 417-420). 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. Theory of Recovery – 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. Compensable acceleration occurs when the government orders the effort, and has five common elements, though more elaborate requirements have been required. *See Fermont Div. Dynamics Corp. of Am.*, ASBCA 15806, 75-1 BCA ¶ 11,139, *aff'd*, 216 Ct. Cl. 448 (1978).

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; FAR 52.249-10; *Ardelt-Horn Constr. Co.*, ASBCA 14550, 73-1 BCA ¶ 9901, *aff'd*, 207 Ct. Cl. 995 (1975). *But see* FAR 52.249-8 (does not contain notice provision); *Hoel-Steffen Constr. Co. v. United States*, 456 F.2d

760, 768 (Ct. Cl. 1972) ("notice provisions . . . should not be applied too technically and illiberally where the Government is quite aware of the operative facts.")

c. Notice to contracting officer of delay and request for time extension; *See Mechanical Utils., Inc.*, ASBCA 7466, 1962 BCA ¶ 3556; *California Shipbuilding & Dry Dock Co.*, ASBCA 21394, 78-1 BCA ¶ 13,168. But see cases wherein constructive acceleration was found without notice or request for time extension. *William Lagnion*, ENGBCA 3778, 78-2 BCA ¶ 13,260 (contracting officer closely monitored job); *Fort Howard Paper Co.*, ASBCA 20284, 78-1 BCA ¶ 12,873, *recons. denied*, 78-1 BCA 13,027.

d. An express or implied order by the government to accelerate; *See GBQC Architects v. General Svcs. Admin.*, GSBCA 15578, 02-1 BCA ¶ 31,846; See also *Winter v. Cath-dr/Balti Joint Venture*, 497 F.3d 1339 (2007) (requiring the order to come from a contracting officer); and

e. An actual acceleration resulting in increased costs. *See, e.g., Environment Consultants, Inc.*, IBCA 1192-5-78, 79-2 BCA ¶ 13,937; *Solar Foam Insulation*, ASBCA 46278, 94-1 BCA 26,288 (claim denied because increased cost incurred prior to acceleration order); *Atlantic Dry Dock Corp.*, ASBCA 42609, 98-2 BCA 30,025, *recons. denied*, 99-1 BCA 30,208 (government liable for acceleration because officials informed and did not object to contractor's course of action).

3. Excusable Delays. FAR 52.249-8, -9, -10, 14; FAR 52.212-4(f); FAR 52.213-4(e). See also Chapter 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. *United States v. Brooks-Callaway Co.*, 318 U.S. 120 (1943); *ECC Int'l*, ASBCA 55781, 2013 BCA ¶ 35,207. The focus of the determination of "excusable delay" turns on the issue of foreseeability. *General Injectables & Vaccines, Inc.*, ASBCA 54930, 06-2 BCA ¶ 33,401, *aff'd*, 519 F.3d 1360 (Fed. Cir. 2008); *Automated Extruding & Packaging, Inc.*, GSBCA 4036, 74-2 BCA ¶ 10,949.

b. Examples: Embargoes, fires, floods, strikes, sovereign acts, and unusually severe weather. Administration of Gov't Contracts, Cibinic, Nash & Nagle (2016, pp. 494-514).

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. *See Fairfield Scientific Corp.*, ASBCA 21152, 78-1 BCA ¶ 12,869, *aff'd*, 611 F.2d 854 (Ct. Cl. 1979). 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.*, ASBCA 54930, 06-2 BCA ¶ 33,401, *aff'd*, 519 F.3d 1360 (Fed. Cir. 2008), *mot. for rehrg. denied*, 527 F.3d 1375 (fed. Cir. 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.*, ASBCA 54930, 06-2 BCA ¶ 33,401, *aff'd*, 519 F.3d 1360 (Fed. Cir. 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 Recoverable Compensation.

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. *United States v. Callahan Walker Constr. Co.*, 317 U.S. 56 (1942); s*ee also New York Shipbuilding Co.*, ASBCA 1614, 76-2 BCA ¶ 11,979.

b. Common acceleration costs.

(4) Increased labor costs;

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

(6) 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 Administration of Gov't Contracts, Cibinic, Nash & Nagle (2016, pp. 657).

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).

   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. § 3301, et seq.; 10 U.S.C. § 2301, et seq. 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. *See American Air Filter Co.*, 57 Comp. Gen. 567, 572-73 (1978) (*affirming on reconsideration* 57 Comp. Gen. 285 (1978)).

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 work. *Neil R. Gross & Co.*, 69 Comp. Gen. 247, B-237434, 90-1 CPD ¶ 212; *AT&T Communications, Inc. v. Wiltel, Inc.*, 1 F.3d 1201 (Fed. Cir. 1993). Specifically:

(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. Fiscal implications (See Section VI.G, below). If an otherwise proper contract modification is considered in-scope, funds available for the original contract may be used to fund the modification. *See* 23 Comp. Gen. 943 (1944); Government Accountability Office Redbook, Ch. 5, Time at 5-33 (3d Ed.), available at https://www.gao.gov/legal/appropriations-law-decisions/red-book/.

5. 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, 41 U.S.C. § 7101, et. seq., if the dispute "arises under" the contract per the Disputes Clause contained in the contract.[5] 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) Contractor's acceptance of change. If the contractor performs the out-of-scope work without reservation, the contractor is limited to an equitable adjustment pursuant to the changes clause, and once the contractor waives the breach and performs, the government is obligated to pay for the out-of-scope work. *See Mac-Well Co.*, ASBCA 23097, 79-2 BCA ¶ 13,895; *Texas Trunk Co.*, ASBCA 3681, 57-2 BCA ¶ 1528 (government bound under changes clause once contractor waives right to cardinal change). The contractor who performs the work is not entitled to breach damages. *See Silberblatt & Lasker, Inc. v. United States*, 101 Ct. Cl. 54 (1944); *Amertex Enters., Ltd. V. United State*, 41 CCF ¶ 7,047 (Fed. Cl. 1995).

      (2) Competition. Agreeing to a change does not make an out-of-scope change into an in-scope change for purposes of competition. *Corbin Superior Composites, Inc.*, B-235019, July 20, 1989, 89-2 CPD ¶ 67. ("The contracting

[5] Other federal court protest and dispute authorities exist, e.g. the Court of Federal Claims jurisdiction under 28 U.S.C. 1491. FAR section 33.001, 33.102(a), 33.103 (protest to agency), 33.104 (GAO); 33.105 (COFC).

officer may not use modifications to avoid the statutory mandate for competition.”).

c. *See also 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. 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 <u>major</u> 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 (See Chapter on

Terminations). *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 Supplies Changes Clause does not provide for unilateral acceleration of performance. FAR 52.243-1; 52.243-2.

   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, Alternates I-V; 52.243-2, Alternates I-V.

   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; *Ion Track Instruments, Inc.*, Comp Gen. Dec. B-238893, 90-2 CPD ¶ 31; *but see CPT Corp.*, Comp. Gen. Dec. B-211464, 84-1 CPD ¶ 606 (significant modification to contract adding requirements and extending performance time was outside scope).

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.

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."). The term "arising under the contract" refers only to in-scope changes." *See* FAR 33.213(a) ("A claim arising under a contract is a claim that can be resolved under a contract clause, other than the clause at 52.233-1, Disputes, that provides for the relief sought by the claimant; however, relief for such claim can also be sought under the clause at 52.233-1. A claim relating to a contract is a claim that cannot be resolved under

a contract clause other than the clause at 52.233-1.). *See also* FAR 52.243-1(e), 52.243-3.

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: Out-of-scope changes, or cardinal changes, are those that are "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. These arise in disputes between contractors and the government.

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. 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. *See* Fiscal Law Deskbook Chapter 3, Availability of Appropriations as to Time; 23 Comp. Gen. 943 (1944); Government Accountability Office Redbook, Ch. 5, Time at 5-33 (3d Ed.).

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 of scope determinations 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. 100306.

(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. 100307.

c. If the original appropriation is closed (cancelled), or if no funds remain in otherwise available expired appropriations accounts, the contracting officer should use current-year funds to fund the contract modification. *See* DOD FMR, Vol. 3, Ch. 10, para. 100309.

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, since there was no written order that started the notice period running. *See Burton-Rodgers, Inc.*, ASBCA 5438, 60-1 BCA ¶ 2558.

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 § 7103(a)(4)(B) 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. Constructive 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 22A

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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 officers' 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 Claims' 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 its current name, the United States Court of Federal Claims (COFC). This Act also 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.[4]

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

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[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.

[4] In practice, it can sometimes be difficult for contractors to determine when alleged wrongful action by the Government is a matter of contract administration (and should be a CDA claim) or rather is a matter of improper restriction of competition (which should be a bid protest). *See, e.g.*, Coast Prof'l, Inc. v. United States, 120 Fed. Cl. 727 (2015) (dismissing bid protest where agency's decision not to allow plaintiffs to compete for award term extensions should have been submitted as CDA claims, notwithstanding the alleged anticompetitive effect of the decisions).

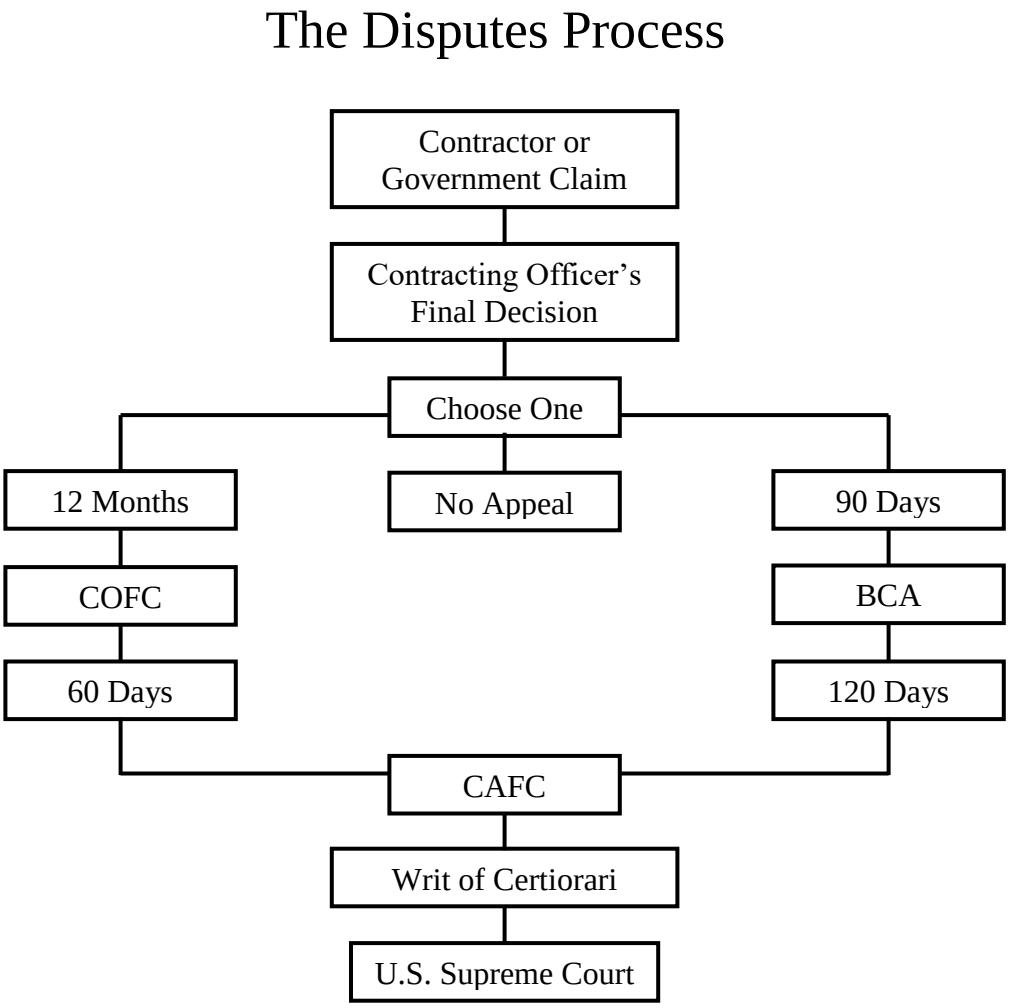
b. In contract disputes, contractors seek relief from actions and events that occur *after* contract award (i.e., during contract administration). *See generally* FAR Subpart 33.2.

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 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 Election Doctrine. The CDA provides alternative forums—*i.e.*, a BCA or the COFC—for challenging a contracting officer's final decision. Once a contractor files its appeal in a particular forum, this election is normally binding and the contractor can no longer pursue its claim in the other forum.

Note: 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, 1362 (Fed. Cir. 1999); Ogunniyi v. United States, 124 Fed. Cl. 525, 534 (2015) ("For a complainant's choice of forum to bar subject matter jurisdiction in the unselected forum, the reviewing forum must have had jurisdiction over the original claims.").

4. The disputes process flowchart.[5]



III. APPLICABILITY OF THE DISPUTES CLAUSE.

A. Appropriated Fund Contracts.

[5] 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); L-3 Services, Inc., Aerospace Electronics Division v. United States, 104 Fed. Cl. 30 (2012) (holding that the exclusive jurisdiction of the Court of Federal Claims over bid protest matters involving maritime contracts has 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 involve the performance of a maritime contract).

1. The CDA applies to most express and implied-in-fact[6] contracts.[7] 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.[8] FAR 33.215.

   a. FAR 52.233-1, Disputes, requires the contractor to continue to perform pending resolution of disputes "arising under"[9] 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*"[10] the contract.[11] *See* Attachment A.

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*

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[6] 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).

[7] 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).

[8] 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.

[9] "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 34-5 (4th ed. 2013).

[10] "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 424 (4th ed. 2013).

[11] 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.

apply to other nonappropriated fund contracts.[12] *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); *cf.* Slattery v. United States, 635 F.3d 1298 (Fed. Cir. 2011) (Tucker Act is not limited by the appropriation status of the agency's funds or the source of funds by which any judgment may be paid). The Federal Circuit in dicta has suggested that it might consider in the future an appeal from a board decision regarding a NAFI claim under the board's CDA decision, using the same rationale in Slattery. *See* Mineson Co. v. McHugh, 671 F.3d 1332, 1337 (Fed. Cir. 2012) ("Because the question of whether claims against NAFIs can be made pursuant to the CDA is complex post-*Slattery*, we will assume jurisdiction for present purposes and proceed directly to the substance of the appellate waiver argument."); *id.* at 1344-45 (Bryson, J., dissenting) ("This court made clear in United States v. General Electric Corp., 727 F.2d 1567 (Fed. Cir. 1984), that "[n]othing in the [CDA] limits is application to appropriated funds.").

IV. CONTRACTOR CLAIMS.

[12] 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); Threshold Techs., Inc. v. United States, 117 Fed. Cl. 681 (2014) (rejecting subcontratctor argument that agency knowledge and approval of its subcontract established contract with the government); *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). There may be no CDA jurisdiction if the prime contractor has no liability to reimburse the subcontractor for a pass-through claim—this is known as the Severin Doctrine. *See* Severin v. United States, 99 Ct. Cl. 435 (1943), *cert. denied*, 322 U.S. 733 (1944); M.A. Mortenson Co., ASBCA No. 53761, 06-1 BCA ¶ 33,180 (to escape jurisdiction under the Severin Doctrine, the prime contractor's release of liability to the subcontractor must be "iron clad").

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); *but see* 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 "contractor" 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; FAR 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 33.206. *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,[13] 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

[13] 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).

Rockhill Industries, Inc., ASBCA No. 51541, 00-1 BCA ¶ 30,693 (money claim "masquerading as claim for contract interpretation")[14]; 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).

(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).

[14] Contractors may make non-monetary claims challenging past performance reports (*i.e.*, CPARS), even if there is no accompanying monetary claim for a sum certain. Todd's Constr., L.P. v. United States, 656 F.3d 1306; 1314-15 (finding jurisdiction under the CDA to challenge past performance evaluations but affirming dismissal on other grounds); Versar., Inc., ASBCA No. 56857, 10-1 BCA ¶ 34,437.

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(a).

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"); Andrews Contracting Services, ASBCA No. 60808, 17-1 BCA ¶ 36,766 (finding the contractor's request for equitable adjustment not to have implicitly or explicitly requested a contracting officer's final decision, based upon a review of the totality of the correspondence between the parties").

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).

f. The Federal Circuit has stated that claims need not be submitted in any particular form, or use any particular wording, but what is required is for the contractor to provide a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim. Contract Cleaning Maintenance, Inc. v. United States, 811 F.2d 586, 592 (Fed. Cir. 1987). Whether a sufficient claim has been presented to the contracting officer is a question of judgment, which is exercised on a case-by-case basis. Holk Dev., Inc., ASBCA Nos. 40579, 40609, 90-3 BCA ¶ 23,086 at 115,938; *see e.g.*, CiyaSoft Corporation, ASBCA No. 59519, 18-1 BCA ¶ 37,084 ("We find the revised claim does not include language sufficiently clear to give the contracting officer an understanding that appellant was claiming the contract had been breached by the government's continued use of the software for more than a year.").

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.[15] 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). *See also* K-Con Bldg. Sys. v. United States, 778 F.3d 1000, 1005-1006 (Fed. Cir. 2015) for an excellent discussion of how to identify what constitutes a separate claim for purposes of the CDA.

(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.

[15] 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. 41 U.S.C. § 7103(b)(1); 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.[16]

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*

[16] 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).

Metric Constructors, Inc., ASBCA No. 50843, 98-2 BCA ¶ 30,088 (concluding that senior project manager was proper certifying official); Green Dream Group, ASBCA No. 57413, Apr. 4, 2011, 11-1 BCA ¶ 34,739 (concluding chief financial officer 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).

(c) Failure to properly sign or execute claim not correctable. F Tokyo Co., ASBCA No. 59059, Apr. 23, 2014, 2014 WL 1792750; Teknocraft Inc., ASBCA No. 55438, Apr. 3, 2008, 08-1 BCA ¶ 33,846.

(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, May 30, 2012, 12-1 BCA ¶ 35,055, where the board 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* FAR 33.201; FAR 33.207(f); 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; Zaafer Taahhut Insaat Ve Ticaret A.S., ASBCA No. 56770, Sept. 14, 2011, 11-2 BCA ¶ 34841 (REA submitted with CDA certification is a claim). *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 KO 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 KO 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.[17] FAR 33.210.

[17] 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; Kellogg, Brown & Root Services, Inc., ASBCA No. 56358, Nov. 23, 2010, 11-1 BCA ¶ 34,614. In Suh'dutsing Techs., the ASBCA stated the following test: "(1) whether the facts, issues, and witnesses in both

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. § [7109] "trumps" conflicting regulations that prohibit claims for future costs).

4. Interest is calculated at a simple rate and is not compounded. Brookfield Constr. Co. v. United States, 661 F.2d 159, 170 n.27 (Ct. Cl. 1981). This contrasts with Prompt Payment Act interest, which uses the same rate but compounds monthly. FAR 32.907(e); 5 C.F.R. 1315.10(a)(3).

H. Termination for Convenience (T4C) Settlement Proposals. FAR 49.206.

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 Constr. Co., Inc. v. United States, 93 F.3d 1542 (Fed. Cir. 1996) (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, 93 F.3d at 1537 (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

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proceedings are substantially similar; (2) whether the ongoing investigation or litigation would be compromised by going forward with the case before us; (3) the extent to which the proposed stay would harm the nonmoving party; and (4) whether the duration of the requested stay is reasonable." ASBCA No. 58760, 15-1 BCA ¶ 36,058.

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); Systems Development Corp. v. McHugh, 658 F.3d 1341, 1345 (Fed. Cir. 2011) (impasse not required for an equitable adjustment claim to accrue).

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. A claim accrues when "all events, that fix the alleged liability...and permit assertion of the claim, were known or should have been known," and some injury has occurred. Raytheon Company, Space & Airborne Systems, ASBCA No. 57801, Apr. 22, 2013, 13-1 BCA ¶ 35,319.

   c. This statute of limitations provision does not apply to government claims based on contractor claims involving fraud.

3. The Federal Circuit recently held that the CDA statute of limitations is not jurisdictional, reversing prior precedent to the contrary. Sikorsky Aircraft Corp. v. United States, 773 F.3d 1315, 1320-22 (Fed. Cir. 2014) (holding that the Supreme Court in Sebelius v. Auburn Regional Medical Center, 133 S. Ct. 817 (2013) effectively overruled prior Federal Circuit precedent, including Systems Development Corp. v. McHugh, 658 F.3d 1341, 1347 (Fed. Cir. 2011), holding that the CDA statute of limitations was jurisdictional. This has been recognized by the boards of contract appeals. Pub. Warehousing Co. K.S.C., ASBCA No. 59020, 2016 ASBCA LEXIS 170; Sys. Mgmt. & Research Techs. Corp. v. Dep't of Energy, CBCA 4068, 15-1 BCA ¶ 35,976. The effect of this is that the six year statute of limitations can no longer be asserted in a motion to dismiss for lack of jurisdiction, but can be asserted as an affirmative defense and raised on the merits or in a motion to dismiss for failure to state a claim or motion for summary judgment.

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 through a set off 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; *cf*. Thomas & Sons Bldg. Contractors, Inc., ASBCA No. 51590, Apr. 9, 2002, 02-1 BCA ¶ 31,837 (Board lacked jurisdiction to hear appeal of a withholding because a claim was never submitted to the contracting officer).

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. The government does, however, have a broad right to assert fraud counterclaims at COFC in the first instance. 28 U.S.C. § 1503.

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. Contractor defenses. In certain instances, a contractor's defense to a government claim must first be submitted as a contractor claim and receive a final decision, if that defense requires a "modification" to the contract to be effective. *See* M. Maropakis Carpentry, Inc. v. United States, 609 F.3d 1323 (Fed. Cir. 2010); *see also* Laguna Construction Company v. Carter, 828 F.3d 1364 (Fed. Cir. 2016) (finding agency's affirmative defense of prior material breach not be a "claim" and therefore not required to be submitted to a contracting officer for a final decision).

E. 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.

F. 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.[18] *See* Boeing Co. v. United 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); Suh'dutsing Techs., LLC, ASBCA No. 58760, 14-1 BCA ¶ 35,596 (concluding that contracting officer statement that he needed "at least another 60 days" was too indefinite and allowing appeal based on deemed denial).

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:

[18] 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). *Compare* Defense Sys. Co., ASBCA No. 50534, 97-1 BCA ¶ 28,981 (holding that nine months to review a $72 million claim was reasonable) *with* Eaton Contract Servs., Inc., ASBCA Nos. 54054, 54055, 03-2 BCA ¶ 32,273 (finding three month delay for audit unreasonable where government had previous opportunity to evaluate claims).

(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.

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. 7102, regarding Maritime Contracts) within 12 months of the date you receive this decision.

b. Failure to properly advise the contractor of its appeal rights may 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. Decker & Co. v. West, 76 F.3d 1573, 1580 (Fed. Cir. 1996).

4. Specific findings of fact are not required and, if made, are *not* binding on the government in any subsequent proceedings. *See* Wilner v. United 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); 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 (Fed. Cir. 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) *and* 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). *But see* Wimberley, Allison, Tong & Goo, ASBCA No. 56432, 10-1 BCA ¶ 34,365 (finding, in the context of a government claim, that rescission of the final decision robs the board of jurisdiction as no claim remains).

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); RO.VIB. Srl, ASBCA No. 56198, 09-1 BCA ¶ 34,068 (applying Fulford Doctrine at ASBCA).

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. *See* 41 U.S.C. 7105(a)(2)

3. The Rules of the Armed Services Board of Contract Appeals appear in Appendix A of the DFARS (48 C.F.R. Chapter 2, Appendix A, Part 2).

C. Jurisdiction. 41 U.S.C. § 7105(e)(1)(A). The ASBCA has jurisdiction to decide appeals regarding contracts[19] 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).

1. Exception: Bad Faith. Allegations of bad faith against government officials must be substantiated with clear and convincing evidence or "well-nigh irrefragable proof." IMS Eng'rs-Architects, P.C., ASBCA No. 53471, 06-1 BCA ¶ 33,231 (citing Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234 (Fed. Cir. 2002)).

2. Exception: Discretionary Acts. Certain contracting officer actions that are discretionary in nature are reviewed on a more forgiving "abuse of discretion" standard, most notably terminations for default. Third Coast Fresh Distrib., LLC, ASBCA No. 59696, 16-1 BCA ¶ 36,340 (citing Gen. Injectables & Vaccines, Inc. v. Gates, 519 F.3d 1360, 1363 (Fed. Cir. 2008)).

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

[19] An appellant "need only allege the existence of a contract to establish the Board's jurisdiction under the CDA." American General Trading & Contracting, WLL, ASBCA No. 56758, 12-1 BCA ¶ 34,905 at 171,640 (quoting Engage Learning, Inc. v. Salazar, 660 F.3d 1346, 1353 (Fed. Cir. 2011)). An appellant "need not prove that either an express or implied-in-fact contract exists. Whether such a contract was formed and breached goes to the merits of the appeal." Tele-Consultants, Inc., ASBCA No. 58129, 13 BCA ¶ 35,234 at 172,994. However, an appellant must be able to make a non-frivolous allegation that a contract existed between it and the government. *Leviathan Corporation*, ASBCA No. 58659, 16-1 BCA ¶ 36,372 at 177,294; *see also* Tech Projects, ASBCA No. 58789, 15-1 BCA ¶ 35,940; Safeco Insurance Company of America, ASBCA No. 60952, 17-1 BCA ¶ 36,819 (dismissing appeal where contractor failed to make a "non-frivolous" allegation that an implied-in-fact contract existed.

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. So far, the 90 day filing

deadline is still deemed to be jurisdictional, notwithstanding the Federal Circuit's decision in Sikorsky regarding the six year deadline for claims not being jurisdictional. Military Aircraft Parts, ASBCA No. 60139, 2016 ASBCA LEXIS 210; Estes Bros. Constr., Inc. v. Dep't of Transp., CBCA 4963, 2015 CIVBCA LEXIS 404.

(2) In computing the time taken to appeal (See ASBCA Rule 5(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 1(c). 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.[20]

3. Complaint. ASBCA Rule 6(a).

a. The appellant must file a complaint within 30 days of the date it receives the docketing notice. Recently, contractors have increasingly requested the Board to order the government to file the complaint in the case of government claims. To prevail on a request, the contractor must demonstrate that requiring the government to file the complaint will "facilitate efficient resolution of the appeal," such as when "relevant information concerning the basis of the claim resides with the government, and not the appellant." BAE Sys. Land & Armaments Inc., ASBCA No. 59374, 15-1 BCA ¶ 35,817.

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.

5. Discovery. ASBCA Rule 8.

[20] As a practical matter, the ASBCA generally allows either party to supplement the R4 file up to the date of the hearing.

a. The parties may only serve discovery after meeting and conferring about their discovery needs; this meeting must take place no later than 45 days after the pleadings are filed.

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.

d. When appropriate, the Board looks to case law interpreting the Federal Rules of Civil Procedure to resolve discovery disputes. Copy Data Sys., Inc., 98-1 BCA ¶ 23,390. The Federal Rules were recently amended effective December 1, 2015, with significant changes to Rule 26's scope of discovery, as well as a broad prohibition in Rule 34 against general objections in discovery responses. The Board has not yet ruled on how these changes affect its discovery jurisprudence.

6. Pre-Hearing Conferences. ASBCA Rule 9. 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 7.

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 Rule 10.

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. ASBCA Rule 22.

f. A court reporter will prepare a verbatim transcript of the proceedings.

g. Each party is afforded the opportunity to make an opening statement. However, there are no summations; argument is reserved for post-hearing briefs.

10. Briefs. ASBCA Rule 14. The judge may order post-hearing briefs after the parties receive the transcript and/or the record is closed. The judge may also order pre-hearing briefs; if not, any party may choose to file one.

11. Representation.[21] ASBCA Rule 15.

a. An individual may represent his or her interests before the Board.

b. A corporation may be represented by one if its officers. *See* Smart Construction & Engineering Co., ASBCA No. 59534, 15-1 BCA ¶ 36,018 (dismissing appeal where representative fails to establish that it is a corporate officer of appellant).

c. A partnership or joint venture may be represented by one of its members.

d. An attorney at law, duly licenses in any state, commonwealth, territory, the District of Columbia, or in a foreign country, may represent an appellant.

12. Decisions. ASBCA Rule 19.

a. The ASBCA issues written decisions.

b. The presiding judge normally drafts the decision; however, three judges decide the case.

13. Motions for Reconsideration. ASBCA Rule 20.

a. Either party may file a motion for reconsideration within 30 days of the date it receives the board's decision.

[21] *Pro se* litigants are given leeway by the Board with regard to administrative matters, but are otherwise accorded no special consideration. *See* Environmental Safety Consultants, Inc., ASBCA No. 47498, 00-1 BCA ¶ 30,826 at 152, 143.

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. But, a party may file a memorandum after 30 days to support a motion that is otherwise timely filed.

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.

14. Appeals. 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 Solicitor 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. Small Claims (Expedited) Appeals. 41 U.S.C. § 7106; ASBCA Rule 12.2.

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 that would be 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). Note: "No award for the fee of an attorney or agent may exceed $125 per hour." Rules of the ASBCA, Addendum I, Equal Access to Justice Act Procedures (Revised 21 July 2014), at (e)(2).

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 online at www.uscfc.uscourts.gov.

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 CDA 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. However, any declaratory relief regarding non-CDA claims must be accompanied by a monetary demand.

D. Standard of Review. 41 U.S.C. § 7104(b)(4). The COFC will review the case de novo. The COFC *will not* 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). *But see* Meridian Eng'g Co. v. United States, 122 Fed. Cl. 381, 416-17 (2015) (applying "arbitrary and capricious" standard of the Administrative Procedures Act in determining whether a construction punchlist was "excessive" in nature).

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. For attorneys who are members of the court's bar, COFC has enabled a method of filing complaints electronically.

3. Contents. RCFC 8(a); RCFC 9(j)-(k), (o).

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.

c. The United States is the only proper defendant to a lawsuit at COFC. Unlike APA actions in federal district court, an officer of the United States cannot be individually named, even if sued in the individual's official capacity. RCFC 4, Rules Committee Notes, 2002 Revision.

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. RCFC 12(a)(1). 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); Chevron USA, Inc. v. United States, 110 Fed. Cl. 747, 806-07 (2014) (government assessed with nearly $1 million in sanctions for bad faith conduct in discovery, including broad assertions of privilege, 42% of which the Court found improper). As the rules are based on the Federal Rules of Civil Procedure, COFC often looks to district court decisions for guidance in resolving discovery disputes. *See, e.g.*, Ross-Hime Designs, Inc. v. United States, 124 Fed. Cl. 69, 73-74 (2015).

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 (except in bid protests) or specific performance, except for reformation in aid of a monetary judgment, or rescission instead of monetary damages. Rig Masters, Inc. v. United States, 42 Fed. Cl. 369 (1998); Vanalco, Inc. v. United States, 48 Fed. Cl. 68, 74 (2000).

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 58.1.

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 possesses 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 issues of law which it reviews de novo. *See* Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1574-75 (Fed. Cir. 1995).

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); Raytheon Co. v. United States, 747 F.3d 1341, 1348 (Fed. Cir. 2014) (applying the "clear error" standard to findings of fact).

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. *See, e.g.*, General Dynamics Corp. v. United States, 563 U.S. 478 (2011).

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.

4. Consider fiscal law issues, i.e. are funds available to pay the claim.

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 attorney 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. Do not forward the Rule 4 file without performing a privilege review.

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 attorney during depositions (e.g., by identifying key contractor personnel and pertinent documents related to the dispute). Coordinate with the trial attorney 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. Integrate fiscal law analysis into settlement discussions.

XI. CONCLUSION.

ATTACHMENT A

52.233-1 Disputes.

As prescribed in 33.215, insert the following clause:

Disputes (May 2014)

(a) This contract is subject to 41 U.S.C. chapter 71, Contract Disputes.

(b) Except as provided in 41 U.S.C. chapter 71, 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 41 U.S.C. chapter 71 until certified. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under 41 U.S.C. chapter 71. The submission may be converted to a claim under 41 U.S.C. chapter 71, 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 authorized to certify the claim on behalf of the Contractor."

(3) The certification may be executed by any person 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 41 U.S.C. chapter 71.

(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 the 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.

CHAPTER 22B[1]

THE COURT OF FEDERAL CLAIMS LITIGATION PROCESS

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[1] This document was prepared by Doug Mickle with the assistance of Steve Mager and Tony Schiavetti, and the information presented in this chapter has not been endorsed by the Department of Justice. It is current as of July 7, 2020.

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CHAPTER 22B

THE LITIGATION PROCESS

I. REFERENCES

A. Rules of the United States Court of Federal Claims (RCFC), July 1, 2019.

B. United States Court of Federal Claims website, http://www.uscfc.uscourts.gov/.

II. INITIATING SUIT.

A. Action Commenced With A Complaint at the Court of Federal Claims ("COFC").

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 the board of contract appeals ("BCAs"), action commenced with notice of appeal.

B. Statute of Limitations.

1. Contract claims. Generally, six years after the claim first accrues. 28 U.S.C. § 2501.

C. The "Call Letter."

1. 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. 28 U.S.C. § 520(a).

2. The responsible military department must then provide the Attorney General with a "written statement of all facts, information, and proofs." 28 U.S.C. § 520(b)

3. Don't wait for the call letter before contacting DOJ. If you think that a plaintiff might file a complaint, be proactive and contact DOJ.

4. Litigation hold. It is the obligation of the agency when litigation is anticipated or begun to retain documents and materials that are potentially relevant to this litigation, including electronically stored information ("ESI"). Once an agency reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of potentially relevant documents. The type of information to be preserved in this "litigation hold" shall include all documents, records, data, correspondence, notes, and other materials, whether official or unofficial, original or duplicative, drafts or final versions, partial or complete versions, that may relate to the claims. Moreover, preservation must occur regardless of whether the information may ultimately be withheld as privileged, or ultimately determined to be unreasonably burdensome to produce.

III. RESPONDING TO THE COMPLAINT.

A. The Answer.

1. 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. RCFC 12(a)(1)(A).

2. If the Government submits an answer, the Government must admit or deny each averment in the complaint. RCFC 8(b)(1)(B).

3. If the Government lacks sufficient knowledge or information to admit or deny a particular averment, the Government must say so. RCFC 8(b)(5).

4. 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. RCFC 8(b)(4).

B. Defenses.

1. 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. RCFC 12(b).[2]

2. If an answer is required, the Government must plead the following affirmative defenses:

a. "accord and satisfaction;

b. arbitration and award;

c. assumption of risk;

d. contributory negligence;

e. duress;

f. estoppel;

g. failure of consideration;

h. fraud;

i. illegality;

j. laches;

k. license;

l. payment;

m. release;

n. res judicata;

o. statute of frauds;

p. statute of limitations;

q. waiver; and

r. any other matter constituting an avoidance or affirmative defense." RCFC 8(c)(1).

[2] While "lack of personal jurisdiction" and "insufficiency of process" are listed in the rule as affirmative defense, the author has never seen either of these successfully asserted and frankly does not know if it is actually possible for the United States to validly assert one of these defenses in the COFC.

C. Counterclaims.

1. 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. RCFC 13(a)(1).

D. Signing Pleadings, Motions, and Other Papers.

1. 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. RCFC 11(a) & (b).

2. 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. RCFC 11(a).

3. 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. RCFC 11(c)(1).

E. Early Meeting of Counsel. RCFC, App. A, Pt. II.

1. The Case Management Procedure, located at RCFC, App. A, Pt. II, contain procedures "intended to promote cooperation among counsel, assist in early identification of issues, minimize the cost and delay of litigation, and enhance the potential for settlement." RCFC, App. A, Pt. I.

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. 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, unless a party files a dispositive motion addressing all issues on or before the due date. RCFC, App. A, Pt. III.

2. 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, what schedule do the parties propose?

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?

IV. BASIS FOR RESPONSE - THE LITIGATION REPORT.

A. The agency is required, by statute, to file a litigation report. 28 U.S.C. § 520(b).

1. Army Regulation 27-40, paragraph 3-9 requires the SJA or legal advisor to prepare the litigation report when directed by the United States Army Legal Services Agency's Litigation Division. Neither the Court nor the plaintiff sees the report. Therefore the attorney preparing the litigation report should err on the side of inclusion, not exclusion, and stamp the report "Attorney Work Product."

2. Litigation Reports. AR 27-40, para. 3-9.

3. 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. AR 27-40, para. 3-9(a).

4. Setoff or Counterclaim. Identify with supporting facts. AR 27-40, para. 3-9(b).

5. Responses to Pleadings. Prepare a draft answer or other appropriate response to the pleadings. Discuss whether allegations of fact are well-founded. Refer to evidence that refutes factual allegations. AR 27-40, para. 3-9(c).

6. 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." AR 27-40, para. 3-9(d).

   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.

7. 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, also provide the individual's home address and telephone number. Also, summarize the information or potential testimony that each person listed could provide. Finally, provide potential witnesses' expected availability (retiring? PCS'ing to Greenland?). AR 27-40, para. 3-9(e).

8. 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." AR 27-40, para. 3-9(f).

9. 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.

10. 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).

11. Consider drafting a motion for summary judgment, RCFC 56.

B. 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.

V. AGENCY ROLE THROUGHOUT DISCOVERY.

A. Discovery scope.

1. Discovery rules and discussion are located at RCFC 26 and Appendix A, Pt. V, ¶¶ 9-10. Clear communication and cooperation between the agency and DOJ throughout the litigation process are essential.

Agency counsel <u>must</u> assist in the discovery process and the preservation of records.

B. Methods of Discovery.

1. 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. RCFC, App. A, Pt. V.

2. The scope of discovery is controlled by RCFC 26(b)(1):

"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable."

3. The Court must 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.

4. Remember, the defendant is the United States. Thus, discovery requests could include more than one Federal agency. RCFC 26(b)(2)(C).

C. Protective Orders.

1. It is important that all counsel involved in litigation are aware of the details of all protective orders in place. RCFC 26(c) and Form 8.

2. The Court may make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." RCFC 26(c)(1).

D. Depositions. RCFC 30.

1. 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.

2. Subpoenas may be served at any place within 100 miles of a deposition, hearing or trial. Upon a showing of good cause, a subpoena may be

served at any other place. RCFC 45(b)(2). A subpoena may command a person to attend a deposition, hearing, or trial within 100 miles of where the person resides, is employed, or regularly transacts business in person; or at any place within the United States if the person is a party or the party's officer or is commanded to attend a trial and would not incur substantial expense. RCFC 45(c)(1).

3. 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. RCFC 30(g).

   c. DOJ should take the 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.

4. Submission of Transcript to Witness. RCFC 30(e).

   The deponent may make changes to the deposition transcript; however, the deponent must sign a statement that details the deponent's reasons for making them. RCFC 30(e)(1)(B).

E. Interrogatories. RCFC 33.

1. The parties may seek discovery through interrogatories after the early meeting of counsel to address issues required by the Joint Preliminary Status Report. RCFC 26(d)(1).

2. 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. RCFC 33(b)(2).

3. 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. RCFC 33(d).

4. The answering party must sign a verification attesting to the truth of the answers. The answering party's attorney must sign the objections. RCFC 33(b)(5).

F. Requests for the Production of Documents. RCFC 34.

1. Request for Production of Documents may be served as early as 21 days after the complaint is filed, but they are not deemed served until the Early Meeting of Counsel. RCFC 26(d)(2).

2. Otherwise, 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 the identity of sender/recipient's office (e.g., "Counsel").

5. Consider entering into a Federal Rules of Evidence Rule 502(d) claw-back agreement, which provides that the disclosure of attorney-client or work product information in a federal proceeding does not waive either privilege, so long as (1) the disclosure was inadvertent, (2) the holder of the privilege took reasonable steps to prevent the disclosure, and (3) the holder promptly took reasonable steps to rectify the error. Rule 502 claw-back agreements are a way to avoid the excessive costs of pre-production review for privilege and work product because under a claw-back agreement, the parties can agree (and a court can order) that, if a party inadvertently produces a privileged document, the receiving party must return it. If a federal court enters a claw-back order, FRE 502(d) provides that the order can prevent the inadvertent disclosure from being a waiver not just between the parties to the agreement, but also "in any other Federal or State proceeding." Thus, for maximum effect, parties should typically ask federal courts to enter clawback orders to give the broadest protection to the attorney-client and work product privileges in case of inadvertent disclosure. The COFC encourages such Fed. R. Evid. 502(d) orders and has a model order available on its website (Form 14), though the terms of a clawback order may require tailoring in a given case.

G. Requests for Admission. RCFC 36.

1. The answering party must:

   a. Specifically admit or deny each matter; or

   b. State why the answering party cannot truthfully admit or deny the matter.

2. The answering party may not allege lack of information or knowledge unless the answering party has made a reasonable inquiry into the matter. RCFC 36(a)(4).

3. If the answering party fails to answer or object to a matter in a timely manner (usually within 30 days after being served), the matter is admitted. RCFC 36(a)(3).

4. Admissions are conclusive unless the Court permits the answering party to withdraw or amend its answer. RCFC 36(b).

5. 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 they should begin to collect and identify all files related to the lawsuit – including those at home. AR 27-40.

3. Inform potential witnesses not to dispose of any potentially relevant documents. Disposing of relevant documents could subject the Government, attorneys, or witnesses to sanctions. Agency counsel should also work with the information technology department to ensure that all relevant electronically stored information is preserved.

4. Current employees should also 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. When DOJ will produce documents instead of responding to an interrogatory in accordance with RCFC 33(d).

   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. Are there any security concerns or 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. If a party or a deponent fails to cooperate in discovery, the party seeking the discovery may move for an order compelling discovery. RCFC 37(a)(3)(B).

2. Expenses. The Court may order the losing party or deponent to pay the winning party's reasonable expenses, including attorney fees. RCFC 37(a)(5).

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.

   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; 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 Federal Circuit 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. See also K-Con Bld'ing Systems Inc. v. United States, 106 Fed. Cl. 652 (2012). (Court concludes that sanctions are appropriate because of the government's failure to produce relevant documents during discovery and the disposal of those documents before plaintiff had the opportunity to review them. Court precludes use of evidence, strikes testimony and orders the government to pay costs, including, but not limited to, attorney fees and travel expenses.).

VI. TRIAL.

A. Meeting of counsel. RCFC, Appendix A, ¶ 13.

1. No later than 63 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. 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.

2. Ordinarily, the parties must file:

a. A memorandum of contentions of fact and law;

b. A joint statement setting forth the factual and legal issues that the Court must resolve NLT 21 days before the pretrial conference;

c. A witness list;

d. An exhibit list.

3. Failure to identify an exhibit or a witness may cause the Court to exclude the exhibit or witness. RCFC, Appendix A ¶¶ 13(a), 13(b), 15.

4. The attorneys who will try the case must attend the pretrial conference. RCFC, Appendix A, ¶ 11.

B. Pre-Trial Preparation.

1. Contact all witnesses to ensure all will be present during trial and that former Government employees have signed representation agreements if they wish to.

2. Outline Witness Testimony.

3. Prepare Witnesses.

4. Prepare FRE 1006 summaries.

5. Copy and organize documents.

C. Offers of Judgment.

1. The Government may make an offer of judgment at any time more than 14 days before the trial begins. RCFC 68(a).

2. If the offeree fails to accept the offer and the judgment the offeree ultimately obtains is not more favorable than the offer, the offeree must pay any costs the Government incurred after it made the offer. RCFC 68(d).

VII. SETTLEMENT.

A. Authority

1. The 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., Assistant Attorney General (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 to office heads and U.S. Attorneys, but the redelegation is subject to exceptions, including cases where the Agency opposes settlement.

3. Whether a 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 the matter is in litigation and all settlement 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 the client understand the difference between their belief in 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.

2. Litigation attorney coordinates with installation attorney and contracting officer to determine whether settlement is appropriate.

3. If settlement is 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 the DOJ goes through a similar process to get approval of a settlement.

VIII. ALTERNATIVE DISPUTE RESOLUTION (ADR).

A. ADR Automatic Referral Procedures, General Order No. 44, was revoked in August of 2016. The COFC now follows its Appendix H procedures.

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.

IX. 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. RCFC 59.

The COFC may, on motion, grant a new trial or rehearing or reconsideration based on common law or equity. RCFC 59(a)(1).

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 Federal Circuit within 60 days of the date the party received the decision. 28 U.S.C. § 2522.

D. Paying Plaintiff's 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 in a CDA case must repay the Fund from appropriations that were current at the time the judgment was rendered against it. 41 U.S.C. § 612(c).

X. CONCLUSION

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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 or the Government 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 a price adjustment may entail.

II. REFERENCES

A. 41 U.S.C., Chapter 15 - Cost Accounting Standards.

B. Pricing of Adjustments, Chapter 8, Administration of Government Contracts, 5th Edition, Cibinic, Nagle & Nash, 2016.

C. Federal Acquisition Regulation (FAR) 15.4, Contract Pricing; 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 9903.202-1 to 5 (FAR Appendix).

D. Accounting Guide, Defense Contract Audit Agency Manual No. 7641.90, Information for Contractors (Jun. 26, 2012), http://www.dcaa.mil.

III. OVERVIEW

A. Entitlement to More Money. There are three circumstances that entitle contractors to more than the original contract price:

1. Equitable Adjustment (EA). Although the FAR does not specifically define equitable adjustment, it is a contract term used in government contract practice. The true object in an equitable adjustment is to have the parties in the same position cost-wise and profit-wise as they would have occupied had there been no change. Appeal of Massman Construction

Co., ENG BCA No. 3660, 81-1 BCA ¶ 15,049. A basic formula for an equitable adjustment is an estimate of the difference between: a) what it would have reasonably cost to perform the work as originally required; and b) what it will reasonably cost to perform the work as changed. Modern Foods, Inc., ASBCA 2090, 567 BCA ¶ 1229; See Cibinic, Nagle & Nash, Administration of Government Contracts 594-619 (5th ed. 2016). If an addition, deletion, or substitution of work changes the cost of performance, a party to the contract may be entitled to a price adjustment. Through a request for an equitable adjustment, a contractor may receive additional costs of performance **plus a reasonable profit** on those costs. Equitable adjustments are based on numerous contract clauses granting that remedy, including, but certainly not limited to:

a. FAR 52.243-1 thru -7, **Changes** (Major Clause for EAs).

b. FAR 52.245-1, Government Property.

c. FAR 52.248-1 thru -3, Value Engineering.

d. FAR 52.242-15, Stop Work Order.

2. Adjustments. An adjustment is an alteration of the contract price that entitles the contractor to recover certain additional performance costs, but typically, not profit. The rationale for lack of profit is that there is no change in the scope of 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 (Analyzes 52.212-12, Suspension of Work, which after the award of the contract in question was redesignated as 52.242-41, Suspension of Work); *see also* GASA, Inc. v. United States, 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.

(1) 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 Adjustment (Multiple Year and Option Contracts); FAR 52.222-44, Fair Labor Standards Act and Service Contract Act – Price Adjustment; 52.222-32 Construction Wage Rate Requirements – Price Adjustment Actual Method; FAR 22.1904, Annual Executive Order Minimum Wage Rate; 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.

(2) However, if the Government attempts to impose a higher wage determination retroactively that the Government failed to include in the contract at the time of award, Boards have interpreted that adjustment to fall under the Changes clause instead of under the limiting labor standards clause. Consequently, contractors claim profit and indirect costs under those circumstances. See W.G. Yates & Sons, Construction Co., CBCA No. 1495, 11-1 BCA ¶34,638; BellSouth Communications Sys., Inc., ASBCA No. 45955, 94-3 BCA ¶ 27,231; Professional Servs. United, Inc., ASBCA 45799, 94-1 BCA ¶26,580.

3. Damages. Recovery of monetary compensation based upon common law breach of contract by the other party, in certain 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; Rumsfeld v. Applied Cos., 325 F.3d 1328 (Fed. Cir.), cert. denied, 540 U.S. 981 (2003); Hi-Shear Tech. Corp. v. United States, 356 F.3d 1372 (Fed. Cir. 2004).

(2) Bad faith termination for convenience. Praecomm, Inc. v. United States, 78 Fed. Cl. 5, 12 (2007); Torncello v. United States, 231 Ct. Cl. 20, 681 F.2d 756 (1982); but see Custom Printing v. United States, 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. United States, 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. White v. Delta Constr. Int'l, Inc., 285 F.3d 1040, 1043 (Fed. Cir. 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." United States. 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 GmbH & Co. KG, ASBCA No. 39401, 96-1 BCA ¶ 28194 (Reversed, remanded, based on factual issue, not legal premises).

2. Pricing Additional Work. If the parties negotiate the price of the change prior to its execution, the Government and the contractor will determine its value based upon estimates. After the execution of the additional work, the contractor's entitlement is based upon the reasonable costs actually incurred in performing the new work. CEMS, Inc. v. United States, 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. Courts and Boards generally price deleted work based on the difference between the actual cost to the contractor of performing the work had the Government not directed the change and the cost of performing the work as changed. In applying this measure, the amount the contractor's bid allocated to the performance of the deleted or reduced work is irrelevant. Knights' Piping, Inc., ASBCA No. 46985, 94-3 BCA ¶ 27,026, citing S.N. Nielsen Co. v. United States, 141 Ct. Cl. (1958); Anderson/Donald, Inc., ASBCA No. 31213, 86-3 BCA ¶ 19,036. Under this general rule, the

Government's entitlement is equal to the actual net cost saving to the contractor.

b. When the government partially terminates a contract for convenience deleting work, a contractor may still be 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 a cost analysis is performed and when the determination, negotiation or allowance of costs required by a contract clause. FAR 31.000, Scope of Subpart; 31.102, Fixed-Priced Contracts.1 Some Agencies require the cost principles to be applied when costs are a factor in any price adjustment, such as a modification. For example, the DoD requires the use of the cost principles and FAR Part 31 for the pricing of modifications in fixed-priced contracts. DFARS 243.205-70; 252.243-7001, Pricing of Contract Modifications. Generally, recoverable costs should be **allowable, reasonable,** and **allocable**.

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1 FAR 31.102 requires the use of the cost principles in the pricing of modifications to fixed-priced contracts and subcontracts, but as this direction is not contained within a FAR clause, it is uncertain whether it will bind contractors to the use of the cost principles for adjustments, absent express contract language. See Cibinic, Nagle & Nash, Administration of Government Contracts 601 (5th ed. 2016)

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) Reasonable. See discussion below.

      (2) Allocable. See discussion below.

      (3) Standards promulgated by the Cost Accounting Standards (CAS) Board, if applicable, **or** generally accepted accounting principles (GAAP) and practices appropriate to the circumstances. Cross-reference with Section C.4., infra.

      (4) Terms of the contract. See discussion below on advance agreements.

      (5) Any limitations as an unallowable cost, 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. Kellog Brown & Root Servs, Inc. v. United States, 103 Fed. Cl. 714 (2012), aff'd 728 F.3d 1348 (Fed. Cir. 2013) (unreasonable subcontractor costs); 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. The reasonableness of a cost is a question of fact and must be examined with particular care when the costs incurred may not be

subject to effective competitive constraints. Kellog Brown & Root Servs, Inc., ASBCA No. 58081, 17-1 BCA ¶ 36,595. 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. See BAE Sys. S.F. Ship Repair, ASBCA Nos. 58810, 59642, 16-1 BCA ¶ 36,404 (discussing the burden of proof and each party's obligations).

d. Reasonableness 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).

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 can be 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 (Fed. Cir. 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. United States, 179 Ct. Cl. 545, 375 F.2d 786, 794 (1967); Boeing North American, Inc. v. Roche, 298 F.3d 1274, 1280 (Fed. Cir. 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 (Fed. Cir. 2002).

(3) FAR 31.201-4, Determining Allocability, indicates that a cost is allocable if it is assignable to one or more cost objectives on the basis of relative benefits received or other equitable relationship. A cost is allocable to a Government contract if it:

(a) Is incurred specifically for the contract;

(b) Benefits both the contractor and other work . . . , or

(c) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

(4) Benefit to the government.

(a) For a period of time, following the Northrop decision, courts and boards held that a cost was not allocable to a government contract if it did not result in any benefit or thing of value to the government. See 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). That principle is no longer good law.

(b) As explained in the later Boeing decision, a cost does not need to benefit the government's interest directly in order to be allocable. Rather, as the court explained, "the word 'benefit' is used in the allocability provisions to describe the nexus required for accounting purposes between the cost and the contract to which it is allocated." Consequently, a finder-of-fact need not "embark on an amorphous inquiry into whether a particular cost sufficiently 'benefits' the government . . . ." Boeing North American, Inc. v. Roche, 298 F.3d 1274, 1284 (Fed. Cir. 2002). See also Rumsfeld v. United Techs Corp., 315 F.3d 1361 (Fed. Cir. 2003); Geren v. Tecom, Inc., 566 F.3d 1037 (Fed. Cir. 2009).

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. Standards applied to the methods and systems that a contractor utilizes to compile and analyze the costs of selling and manufacturing products and services. Nash, et al., The Government Contracts Reference Book (3rd ed. 2007). When applicable, a contractor must apply the Cost Accounting Standards (CAS) codified at 48 CFR, Chapter 99. If not applicable, contractors must follow Generally Accepted Accounting Principles (GAAP).

a. Introduction to Cost Accounting Standards. CAS are administrative cost rules promulgated by the Cost Accounting Standards Board (CASB) that is located within the Office of Federal Procurement Policy (OFPP), which falls under the Office of Management and Budget (OMB). CASB consists of five members from DoD, GSA, industry and the private sector (from the accounting profession), and the Administrator of OFPP who is the Chairman.

(1) The CASB is an independent statutorily-established board. 41 U.S.C. § 1502 (2011). The Board has exclusive authority to make, promulgate, and amend cost 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. 48 CFR 9901.304.

(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 (Fed. Cir. 2002) (detailing some of the history of the CASB).

(3) Examples of the nineteen CAS include:

(a) CAS 401 – Consistency in estimating, accumulating and reporting costs. 48 CFR 9904.401.

(b) CAS 402 – Consistency in allocating costs incurred for the same purpose. 48 CFR 9904.402.

(c) CAS 403 – Allocation of home office expenses to segments. 48 CFR 9904.403.

(d) CAS 404 – Capitalization of tangible assets. 48 CFR 9904.404.

(e) CAS 405 – Accounting for unallowable costs. 48 CFR 9904.405.

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 are 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[2]

[2] 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).

procurements with the United States except those listed at 48 CFR 9903.201-1:

(1) Sealed bid contracts.

(2) Negotiated contracts and subcontracts not in excess of the Truthful Cost or Pricing Data threshold.3

(3) Contracts and subcontracts with small businesses.

(4) Contracts and subcontracts with foreign governments or their agents or instrumentalities.

(5) Contracts or subcontracts in which the price is set by law or regulation.

(6) Contracts or subcontracts for the acquisition of commercial items.

(7) Contracts or subcontracts of less than $7.5 million, provided that, at the time of award, the business unit of the contractor or subcontractor is not currently performing any CAS-covered contracts or subcontracts valued at $7.5 million or greater.

(8) Subcontractors under the NATO PHM Ship program to be performed outside the United States by a foreign concern.

(9) Firm, fixed-price contracts or subcontracts awarded on the basis of adequate price competition without submission of certified cost or pricing data.

d. 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:

(1) 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 has no contracts or subcontracts subject to CAS.

[3] Formerly known as the Truth in Negotiations Act (TINA) (10 U.S.C. § 2306a), the threshold is currently $2M for a qualifying contract, subcontract, or modification entered into after June 30, 2018. 41 U.S.C. § 3502; See also Contract Pricing Chapter.

(2) The head of an executive agency may waive CAS under exceptional circumstances when necessary to meet the needs of the agency. A written determination will address certain questions listed in the FAR & DFARS.

(3) The head of an executive agency may not delegate this authority to any official in the executive agency below the senior policymaking level in the executive agency.

(4) 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) Pre-contract 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 **unallowable costs** are 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, which 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 of similar or related selected items. FAR 31.204(d).

(2) There are several cases analyzing allowability based on whether a particular cost is similar or related to selected items in FAR 31.

(a) Boeing North American, Inc. v. Roche, 298 F.3d 1274, 1285-86 (Fed. Cir. 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 found that the costs of shareholder suits are not "similar" to unallowable fraud-related costs in FAR Subpart 31.205, but that they were "related" to the disallowed costs of defending against government charges of wrongdoing. Consequently, the court determined that the government had properly disallowed 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. DFARS 243.204-71; DFARS 252.243-7002; FAR 15.403-4(a)(1)(iii).

1. In DOD, a request for equitable adjustment that exceeds the simplified acquisition threshold (currently, $250,000) 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 and belief. 10 U.S.C. § 2410(a).

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 and 48 CFR 9903.301.

   b. Direct costs generally include direct labor, direct material, snf subcontracting 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 and 48 CFR 9904.405.30. 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). Any management, financial, and other expense which is incurred by or allocated to a business unit and which is for the general

management and administration of the business as a whole. FAR 2.101; 48 CFR 99.410-30. Typical G&A cost include executive offices, executive compensation, cost of staff services (e.g., legal; accounting; public relations), and overall business expenses. Nash, et al., The Government Contracts Reference Book (3rd ed. 2007).

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 that limited recoverable overhead for change orders).

B. Profit and Loss.

1. When allowable, profit is an important part of an equitable adjustment because to deny profit would mean that the contractor was never made whole. New York Shipbuilding Co., ASBCA 16164, 76-BCA ¶ 11,979. Consequently, 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). However, note that certain price adjustment clauses expressly do not include profit (e.g., FAR 52.242-14, Suspension of Work; FAR 52.242-17, Government Delay of Work).

2. FAR 15.404-4 prescribes the policies for establishing profit objectives. In general, the rate of profit should motivate efficient and effective contract performance. FAR 15.404-4(a)(3).

3. Contracting officers shall not negotiate profit or fee that exceeds the statutory limitations imposed by 10 U.S.C. § 2306(d) and 41 U.S.C. § 3905. FAR 15.404-4(c)(4).

4. When a change or modification involves essentially the same type of work as the basic contract and is of a relatively small dollar value compared to the total contract value, contracting officers may use the basic contract's profit or fee as the prenegotiation objective. FAR 15.404-4(b)(6).

5. Except in specific identified cases, DFARS 15.404-4 requires contracting officers to use a structured approach to develop profit prenegotiation objectives when certified cost and pricing date is obtained. In these cases, depending on the circumstances, the contracting officer will use a weighed guideline, a modified weighted guideline, or an alternative approach. DFARS 215.404-4(b).

6. Common profit analysis factors include cost risk, the amount and complexity of the effort required, and the contractor's contributions to federal socioeconomic programs, cost control, and independent development. FAR 15.404-4(d)(1). Of those factors, risk is critically important in negotiating the profit applicable to a change. For example, when a change required less complex work than the underlying contract, boards have supported lower levels of profit. See Varo, Inc., ASBCA 15000, 72-2 BCA ¶ 9,717. Similarly, boards have approved a lower rates of profit in cases where the contractor had already performed the change because the reduced risk. See Texas Instruments, Inc., ASBCA 27113, 90-1 BCA ¶ 22,537, aff'd, 922 F.2d 810 (1990).

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 and Techniques of Proof.

1. Actual Cost Method. Actual costs are amounts determined on the basis of costs incurred, as distinguished from forecasted costs. Actual costs include standard costs properly adjusted for applicable variances. FAR 31.001. The actual cost method is the preferred method for proving costs after the work has been performed for an equitable adjustment. North Star Alaska Hous. Corp. v. United States, 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. See prescription at FAR 43.205. 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. For contracts subject to CAS, CAS 405 requires the "costs of any work project not contractually authorized, whether or not related to performance of a proposed or existing contract, shall be accounted for, to the extent appropriate, in a manner which permits ready separation from the costs of authorized work projects." 48 CFR 9904.405-40(d).

d. 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. Jury Verdicts.

a. Jury verdicts are not necessarily a method of proof, but a technique and means of resolving disputed and conflicting evidence, supported by consideration of the entire record. 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:

(1) That clear proof of injury exists;

(2) That there is no more reliable method for computing damages. See Azure v. United States, 129 F.3d 136 (Table), 1997 WL 665763 (Fed. Cir., Oct. 24, 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

(3) 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).

3. Total Cost Method.

a. The total cost method is the least preferred method of calculating costs because it does not consider the contractor's responsibility for an increase. Only use this method when no other method is available. 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. As a result, overrun costs fall solely on the Government. 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, 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. United States, 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. These adjustments seek to remove any amounts for which the government's change is not responsible. 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).

VI. SPECIAL ITEMS

A. Unabsorbed Overhead.

1. Generally. A claim for unabsorbed overhead seeks 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. Consequently, courts and boards have allowed contractors to recover these expenses in order to allow the impacted contract to "absorb" an appropriate share of the indirect costs incurred during the disruption or delay. In this aspect, general and administrative expense stands on the same footing as other overhead expense. Appeal of Proserv, Inc., ASBCA No. 20768, 78-1 BCA ¶ 13,066.

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 primary method of calculating unabsorbed overhead for both construction contracts and manufacturing contracts. See Wickham Contracting Co. v. Fischer, 12 F.3d 1574 (Fed. Cir. 1994); 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.

3. Proof Requirements.

a. Recovery of unabsorbed overhead is not automatic. In order to be entitled to unabsorbed overhead recovery under Eichleay, the contractor must establish:

(1) A government-caused or government-imposed delay;

(2) The original time for performance was extended or that the contractor would have sooner but for the delay; and

(3) The contractor was required to be on "standby" during the delay. 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).

b. A contractor is on "standby" if:

(1) The contracting officer issues a written order that suspends all work on the contract for an indefinite duration and requires the contractor to remain ready to resume work immediately or on short notice, or

(2) The contractor can establish:

(a) The government delay was substantial and indefinite;

(b) During the delay, the government required the contractor to be ready to resume work at full speed and immediately; and

(c) The government suspends much, if not all, of the work on the contract. P.J. Dick, Inc. v. Principi, 324 F.3d 1364 (Fed. Cir 2003).

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. 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 without proof of actual damages).

e. Once the contractor has established the three Eichleay elements, 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).

f. 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).

g. 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. Calculating Quantum. If the contractor establishes entitlement and the government cannot demonstrate that it was not impracticable for the contractor to take on replacement work or mitigate its damages, then the court or board will use the Eichleay formula to compute the quantum through three steps. Cibinic, Nagle & Nash, Administration of Government Contracts 648 (5th ed. 2016).

a. Calculate total overhead (OH) allocable to the contract (K):

Total OH during Period x (K Billings ÷ All Billings during Period)

b. Calculate overhead (OH) applicable to the contract (K) per day:

Allocable K OH ÷ Days of Actual K Performance

c. Calculate the unabsorbed overhead (OH):

Daily OH x Number of Days of Delay

5. 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).

6. 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.

7. 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;

B. Subcontractor Claims.

1. "The government consents generally to be sued only by parties with which it has privity of contract, which it does not have with subcontractors.". 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. Therefore, as a matter of law, a subcontractor may not independently file a claim against the Government, without being in privity. Severin v. United States, 99 Ct. Cl. 435, 442 (1943), cert. denied, 322 U.S. 733 (1944)). However, under the Severin Doctrine, a prime contractor could sue the government on a subcontractor's behalf through a "pass-through" suit, but only if the prime contractor is liable to the subcontractor for such costs. Id.

3. Originally, it was the prime contractor's burden to establish its liability to the subcontractor in pass-through claims, but courts have since shifted that burden to the government. Now, the government can only use the *Severin* doctrine can to bar a prime contractor's pass-through suit if the government asserts it as a defense, and then proves that the prime contractor is not liable to the subcontractor for the costs in suit. 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. E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369 (Fed. Cir. 1999).

4. While courts and boards narrowly construe the Severin doctrine (See United States v. Johnson Controls, Inc., 713 F.2d 1441 (Fed. Cir. 1983)), one way that the government can demonstrate that the prime contractor is not liable to the subcontractor is to show that the subcontract contained a clause releasing the prime contractor from liability. MW Builders, Inc. v United States, 134 Fed. Cl. 469 (Fed. Cl. 2017) (Lien waiver containing a general release signed by the subcontractor prevented the pass-through claim).

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 in house 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 U.S.C. § 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 request for equitable adjustment 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 were unallowable in the preparation of a claim). This result 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 Contract Disputes Act 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. United States, 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. See section III.C.6.b. supra.

a. Boeing North American, 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 judgment were reached, would the damages, costs, and attorneys' fees be allowable?

(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 (Fed. Cir. 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 result 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. FAR Subpart 32.9.

3. Contract Disputes Act (CDA) 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. See also FAR Subpart 33.2- Disputes and Appeals.

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. 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.

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 profits or consequential damages" (or lost profits) when the government, in good faith, terminates the contract for its convenience. See FAR 49.108-3; FAR 49.202(a); FAR 52.249-2.

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. See FAR 49.100.

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(l)(commercial items) and 52.213-4(simplified acquisitions-other than commercial items).

b. "Short form" clauses govern fixed-price contracts not to exceed the Simplified Acquisition Threshold (SAT)(generally $250,000). See FAR 2.101; FAR 13.500. 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. See FAR 49.5.

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"). However, if an incorrect clause is included in the place of a mandatory clause, the Christian doctrine may apply and bind the contracting parties to the mandatory contractual term. Bay Cnty., Florida v. United States, 112 Fed. Cl. 195 (2013).

7. When a contract lacks a termination clause, an agency cannot 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. When the government cannot meet its burden to prove a termination for cause (Commercial Items version of a termination for default), the courts and boards will convert the termination for cause to a termination for convenience and return the matter to the parties to negotiate a termination settlement. Asia Commerce Network, ASBCA 58623, 17-1 BCA ¶ 36,872.

c. Keep in mind that if the government acts 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). This judicially-created doctrine applies in situations where the government stops or curtails a contractor's performance for reasons that are later found to be questionable or invalid. Erwin v. United States, 19 Cl. Ct. 47, 53 (1989).

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. The theory of constructive termination can apply to implied contacts and the termination for convenience clause will be read into the implied contract under the Christian Doctrine. ASFA Constrs. Indrus. And Trade, Inc., ASBCA 57269, 15-1 BCA ¶ 36,034; Guardian Safety & Supply LLC DBA Enviro Safety Products, ASBCA No. 61932.

e. 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. This

distinction also impacts which party has the burden of proof for quantifying costs. John C. Person, *Deductive Changes*, 01-08 Briefing Papers 1 (July 2001).

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 due to the contractor's agreement with such treatment).

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.

(3) However, if the Parties agree that such work was a deductive change in a bilateral modification the Board will not permit the contractor to challenge such characterization if the contractor later is not satisfied with its recovery under the Changes clause. Justman Freight Lines, Inc., PSBCA 6428, 15-1 BCA ¶ 35,819.

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."). See also Tigerswan, Inc. v. United States, 110 Fed.Cl. 336 (2013) (government may be liable for breach of contract damages where its decision to terminate for convenience violates the implied duty of good faith and fair dealing.). But see Terminations for Convenience: When Are They Improper?, 26 No. 10 Nash & Cibinic Rep. ¶ 52 (2012) (stating the

factual question is whether the government personnel *knew* of the lower price at the time of award).

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.

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 ¶

[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)).

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 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 Constr. Co., Inc. v. United States, 94 F.3d 1537 (Fed. Cir. 1996).

4. Effect of Improper Termination

a. The general rule for commercial contracts 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. In most circumstances, the termination for convenience clause in government contracts permits the government to terminate at will and pay only for the cost of, and a reasonable profit on, the work completed at the time

of the termination. However the improper exercise of the termination for convenience can result in increased damages.

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); see also Sigal Constr. Corp., CBCA No. 508, 10-1 BCA ¶ 34442.

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 contacting officer may reinstate the terminated portion of a contract in whole or in part by amending the notice of termination if:

(1) The contractor has consented in writing;

(2) Circumstances require the terminated items; and

(3) The reinstatement is advantageous to the Government.

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; FAR 52.249-2(e); 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); see also Black Bear Construction Co., ASBCA No. 61181, 17-1 BCA ¶ 36,914. 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 primary bases 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).

   c. Costs for materials purchased prior to a notice to proceed may be "unreasonably premature" and not recoverable termination settlement costs. American Boys Construction Co., ASBCA No. 60515, 17-1 BCA ¶ 36,856.

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 allow-ability and reimburse-ability 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 reimbursement 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 are allowable if they are 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 are allowable.

3. Indirect costs are allowable if they are related to salary and wages incurred as settlement expenses in 1. and 2. above; these are normally limited to payroll taxes, fringe benefits, occupancy costs, and immediate supervision costs.

4. TCO shall allow profit on preparations made and work done by the contractor for the terminated portion of the contract but not on the settlement expenses. FAR 49.202(a).

5. Profit shall not be allowed for material or services that, as of the effective date of termination, have not been delivered by a subcontractor, regardless of the percentage of completion. FAR 49.202(a).

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). A threat to terminate for convenience does not constitute duress when negotiating a bilateral modification. New Iraq Ahd Company, ASBCA No. 58768, 14-1 BCA ¶ 35,779.

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. FAR 52.212-4 is the standard termination for convenience clause for commercial item contracts and entitles a contractor to recovery under two prongs: 1) payment of a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination and 2) reasonable charges, that the contractor can demonstrate to the Government's satisfaction, resulted from the termination.

   b. 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. This decision was reversed by a District Court decision in Red River Holding, LLC v. U.S., 802 F Supp. 2d 648 (D. Md. 2011). In SWR, Inc., ASBCA 56708, 15-1 BCA ¶ 35,832 the board held that the contractor was entitled to recover costs reasonably incurred in anticipation of performing.

   c. 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 Part 12 Commercial Contracts, Nash & Cibinic Report August 2010 at 117.

   d. In TriRAD Technologies Inc. ASBCA 58855, 15-1 BCA ¶ 35,898, the Board distinguished the termination provisions for commercial item contracts in FAR Part 12, which permits recovery for a "percentage of the contract price reflecting the percentage of the work performed," and explained that it includes work in progress and was not limited to work delivered or accepted by the Government, and found that TriRAD was entitled to recovery of "reasonable charges" not relating to work delivered but that

nevertheless "resulted from the termination" and "should be reimbursed to fairly compensate the contractor."

V. DISPUTES REGARDING TERMINATION SETTLEMENTS

A. When does a T4C proposal become a claim? 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 2.5 years to settle the termination); Mediax Interactive Technologies, Inc., ASBCA No. 43961, 99-2 BCA ¶ 30,318.

B. 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).

C. 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. 080612.

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).

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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." Pipe Tech, Inc., ENGBCA No. 5959, No. 6005, 94-2 BCA ¶ 26,649.

2. A termination for default (T4D) continues to have an on-going negative effect on a contractor beyond the specific contract that 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. A termination for default is regarded as the contracting officer's final decision and starts the one-year statute of limitations to file an appeal at the Court of Federal Claims. Guardian Angels Medical Service Dogs, Inc. v. U.S., 120 Fed. Cl. 8 (2015).

2. 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) (holding that termination for default is a drastic sanction 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); SIPCO Services & Marine, Inc. v. United States, 41 Fed. Cl. 196 (1998).

3. 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. See FAR 49.402-3.

4. 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.

5. 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; Centurion Electronics Service, ASBCA No. 48750, 2000-1 BCA ¶ 30,642 at 151,325.

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; 52.249-9; and 52.249-10.

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); 52.249-9(a)(1)(i); and 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 2.5 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, citing, Ralbo, Inc., ASBCA No. 43548, 93-2 BCA; citing ¶ 25,624,

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. Contractor's request for new specifications may delay delivery, making termination for default reasonable. Industrial Consultants, Inc. DBA, ASBCA Nos. 59622, 60491, 17-1 BCA ¶ 36,619.

   b. Even if the Government could have assessed financial remuneration instead of termination it is under no obligation to do so. Trojan Horse, Ltd. v. U.S., PSBCA 6474, 15-1 BCA ¶ 36,015.

   c. 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 totaling 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); DODS, Inc., ASBCA 57746, 58252, 2014-1 BCA¶ 35,677 (termination proper where uncontroverted evidence showed the contractor would not have been able to complete the work even by its proposed extended date); ACM Construction and Marine Group, Inc. v. Dept. of Transportation, CBCA 2245, 2345, 2014-1 BCA ¶ 35,537 (termination improper due to unanticipated rust and customary extensions for such circumstances); AEY, Inc., ASBCA Nos. 54670, et al., 2018-1 BCA ¶ 37,076 (termination improper where KO terminated contract prior to specified delivery date).

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.

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 (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); Bulova Technologies Ordnance Systems LLC, ASBCA No. 59089, 2018-1 BCA ¶ 37,183 (repudiation found where contractor refused to perform without an increase in price).

   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). Prior history of repudiation and asking for cancelation of contracts after award is not relevant to whether the standard for anticipatory repudiation had been met. Capy Machine Shop, Inc., ASBCA 59133, 2015 WL 6349584.

4. Abandonment is **actual** repudiation.

   a. Where contractor abandons the work at a site and does not intend to return, the abandonment trumps any excuse the contractor might offer. See Liquidating Trustee Ester DuVal of KI Liquidation, Inc. v. United States, 116 Fed. Cl 338 (2014) (Government waived completion date for U.S. Embassy in Tajikistan, but the termination for default was still upheld because the contractor abandoned the worksite).

   b. 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).

g. JM Carranza Trucking Co., PSBCA No. 6354, 14-1 BCA ¶ 35,776 (failure by contractor to continue performance despite the Postal Service improperly withholding payment was anticipatory repudiation because the contractor did not show that the withholding made performance impossible.)

h. Symvionics Inc., ASBCA Nos. 60335, 60612, 17-1 BCA ¶ 36,790 (contractor announced it could not meet delivery dates without a change to the contract specifications).

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., 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). Boards may uphold additional termination grounds, even when those grounds are not mentioned in the termination notice. MOQA-AQYOL JV, Ltd., ASBCA Nos. 57963, 60456, 17-1 BCA ¶ 36,909.

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 <u>except</u> 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) <u>See</u> <u>"K" Servs.</u>, 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) <u>Beeston, Inc.</u>, ASBCA No. 38969, 91-3 BCA ¶ 24,241; <u>Scott Aviation</u>, 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 was 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 deliver); 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).

(c) Failure to perform due to a Subcontractor not being able to maintain a safe and secure environment for performing is not excusable. Terraseis Trading Ltd., ASBCA 58731, 2015 WL 7783658.

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, 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. IAP Worldwide Services Inc., ASBCA No. 59397, 17-1 BCA ¶ 36,763 (contractor entitled to acceleration costs after government threatens termination following closure of AFG/PAK border, which was found to be 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).

   d. For a recent in-depth review of waiver see AEY, Inc., ASBCA Nos. 54670, et al., 2018-1 BCA ¶ 37,076.

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 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. In 2014, the board again reaffirmed this rule in MIC/CCS Joint Venture, ASBCA 58242, 2014-1 BCA ¶ 35,612 (the facts did not support that there were "unusual circumstances" justifying an exception, and nothing indicated that the contractor relied on the Government by going forward.)

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). Once new dates are agreed upon, the Government cannot T4D for failure to meet the original dates. Avant Assessment, LLC, ASBCA No. 58903, 17-1 BCA ¶ 36,837.

(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).

(3) A cure notice, by itself, does not reestablish a waived delivery schedule. Lanzen Fabricating, ASBCA No. 40328, 93-3 BCA ¶ 26,079. Government must reestablish a delivery schedule making time again of the essence.

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 due to causes beyond its control or without its fault or negligence. Aeon Group, LLC, ASBCA No. 56142, 14-1 BCA ¶ 35692 (citing ADT Constr. Group, Inc., ASBCA No. 55358, 13 BCA,¶ 35,307 at 173,309).

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) A contracting officer's T4D, based upon materially erroneous information, is an abuse of discretion. L&H Construction Co., ASBCA No. 43833, 97-1 BCA ¶ 28,766; but see Delfasco LLC, ASBCA No. 59153, 17-1 BCA ¶ 36,659 (contracting officer must "act reasonably with the facts before her and that those placing the facts before the TCO must not be acting in bad faith.").

(4) 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]

[1] This "clear and convincing" or "highly probable" (formerly described as "well-nigh irrefragable") standard was articulated by the Federal Circuit in Am-Pro Protective Agency, Inc., v. United States, 281 F.3d 1234,

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 White Buffalo Constr. Co. v. United States, 101 Fed.Cl. 1, aff'd in part, vacated and remanded in part by 546 Fed.Appx. 952 (Fed. Cir. 2013); 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.

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. This 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. v. Perry, 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); compare, Atkins N. Am., Inc. v. United States, 106 Fed. Cl. 491, 505 (2012) (because "there is no rigid test" or "one-size-fits-all approach" for contracting officers to become sufficiently familiar with the facts and conclusions in a contracting officer's decision, "rather than compare what [the contracting officer] did and did not do with what the contracting officers did and did not do in other cases, the court focuses on whether, in the particular circumstances presented in this case, [the contracting officer] satisfied the CDA, FAR, and EFARS by becoming familiar with the facts and conclusions contained in the draft contracting officer's decision, such that the decision she issued was, in fact, her product and reflected her independent judgment.").

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). The FAR also states that the contracting officer "should whenever practicable,

consult with the small business specialist before proceeding with a default termination." Id.

8. Although the contracting officer has authority to terminate a contract for default, she may be required to refer allegations of excusable delay to another contracting officer prior to deciding to terminate. K-Con Bldg. Sys., Inc. v. United States, 114 Fed. Cl. 722 (2014) (holding that an applicable Federal Supply Schedule clause (I-FSS-249B) and related FAR provision (8.405-5(a)), when read together, required the Coast Guard contracting officer to refer allegations of excusable delay to the GSA contracting officer for the applicable schedule).

9. 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.

10. Contracting officers are required to report terminations for cause or default via the Federal Awardee Performance and Integrity Information System (FAPIIS). See. FAR 42.1503.

11. 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. The different services regulations should be reviewed for detailed procedures for these congressional notifications and possible additional notification procedures for other high-interest terminations.

VII. RIGHTS AND LIABILITIES ARISING FROM TERMINATIONS FOR DEFAULT

A. Contractor Liability

1. Rule. Upon termination of a contract for default, 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); Maersk Line, Ltd., B-410445, B-410445.2:, Dec. 29, 2014, 2015-1 CPD ¶ 16 (approximately 6 months was determined to be a sufficiently short time span to permit reprocurement from the next-lowest-priced offeror for a time charter contract for United States-flagged vessel).

(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 without making the requisite determinations under FAR 17.207); 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, some attorneys 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); compare, M.E.S., Inc. v. United States, 104 Fed. Cl. 620, 636 (2012) ("[I]t is because the court recognizes that termination and the resulting excess reprocurement costs are separate claims that the court continues to follow the Fulford doctrine."); Hearthstone, Inc., CBCA No. 3725, 2015-1 BCA ¶ 35,895 ("Although the United States Court of Appeals for the Federal Circuit has not yet endorsed [the Fulford Doctrine], the Board continues to employ the practice [of allowing the contractor to wait until the contracting officer assesses reprocurement costs to challenge the underlying default termination] as an efficient means of resolving all of the issues arising from a termination for default.").

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. Liquidated damages are not assessed for periods of excusable delay. See e.g., FAR 52.211-11(c). 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. Liquidated damages are not punitive. FAR 11.501(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. See e.g., FAR 52.249-8 ("The rights and remedies of the Government in [the Default] clause are in addition to any other rights and remedies provided by law or under this contract."); see also FAR 52.249-10 (same).

e. DFARS 211.503 requires that the liquidated damages clause at FAR 52.211-12 "be included in all construction contracts exceeding $700,000, except cost-plus-fixed-fee contracts or contracts where the contractor cannot control the pace of the work. Use of the clause in contracts of $700,000 or less is optional."

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 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 are required to report terminations for cause or default reporting to be accomplished via the Federal Awardee Performance and Integrity Information System (FAPIIS). See. FAR 42.1503.

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. 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.

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; Bulova Techs. Ordnance Sys., LLC, ASBCA No. , 2014-1 B.C.A. ¶ 35,521 (denying appeal of termination decision for medium machine gun line item where contractor failed to meet delivery date and sniper rifle and scope line items for failure to make progress, but sustaining appeal of termination decision as to heavy machine gun line items where there was no anticipatory repudiation).

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. Fraud in the inducement of a contract renders the contract void ab initio, and justifies termination for default. Vertex Construction & Engineering, ASBCA No. 58988, 14-1 BCA ¶ 35,804 (submission of a fraudulent

master electrician certificate in order to secure the contract); 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 a claim under the Contract Disputes Act. 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. See England v. Swanson Group, Inc., 353 F.3d 1375, 1379-80 (Fed. Cir. 2004), *abrogated on other grounds by* Sikorsky Aircraft Corp. v. United States, 773 F.3d 1315 (Fed. Cir. 2014).

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.

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CHAPTER 26

ALTERNATIVE DISPUTE RESOLUTION

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CHAPTER 26

ALTERNATIVE DISPUTE RESOLUTION (ADR)

I. INTRODUCTION.

A. Objectives.

This deskbook explores 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 Instruction 5145.5, Alternative Dispute Resolution (ADR) and Conflict Management, May 27, 2016.

5. Interagency Alternative Dispute Resolution Working Group provides guidance and requirements at ADR.GOV.

6. U.S. Army Alternative Dispute Resolution Program (ADR), Office of the Army General Counsel provides Army-specific guidance

7. Alternative Dispute Resolution, Its Place In The Spectrum of Conflict Resolution, Army ADR Program, Office of the Army General Counsel (Revised May 2015).

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 the claim 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. §§ 7104, 7105; FAR 33.204, 33.206 and 33.211.

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, 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), 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, 104 Stat. 2738 (1990).

3. The 1990 ADRA defined ADR as any procedure used, in lieu of adjudication, to resolve issues in controversy, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, 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, POTUS established the Interagency Alternative Dispute Resolution Working Group. *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)[1] 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 "appropriate to their respective Components and in accordance with law and DoD policy" and shall establish ADR policies and programs. DOD Inst. 5145.05.

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

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1 **(b)** An agency shall consider not using a dispute resolution proceeding if—
(1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;
(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 such a proceeding would not likely serve to develop a recommended policy for the agency;
(3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;
(4) the matter significantly affects persons or organizations who are not parties to the proceeding;
(5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and
(6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.

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 "Electronic Guide to Federal Procurement ADR (Second Edition)," a product of the Interagency ADR Working Group Steering Committee, and can be found at http://www.adr.gov/adrguide/home.html; and additional guidance is also available at https://ogc.altess.army.mil/ADR/ADR_policy_guidance.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 (5 June 2018) and AFFARS 5333.214 (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* https://www.secnav.navy.mil/ADR/Pages/default.aspx; *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. Special considerations relating to partnering are:

(1) Partnering 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/

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.

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* 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.

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* Greentree Transportation

Company, Inc. B-403556.4, May 16, 2011. *See also* Bid Protests at GAO: A Descriptive Guide (April 3, 2009) 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.[2] Pursuant to the ADRA of 1996,[3] 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.[4] 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.

(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

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[2] 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).

[3] *See* ADRA, 5 U.S.C. § 575(c).

[4] *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.

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 Proceeding with Binding Decision (ASBCA).** In practice before the ASBCA, a summary proceeding results in a binding decision. The parties try the case informally before a board judge on an expedited, abbreviated basis. The Administrative Judge will issue a binding "bench" decision or summary written decision which has no precedential value but is binding on the parties and the parties have no right to appeal a decision resulting from this process. R. of the Armed Services Board of Cont. Appeals, 48 C.F.R. Addendum II to Appendix A to Chapter 2, (2014). *See* Donald Arnavas, Alternative Dispute Resolution for Government Contracts 127 (2004). For non-Navy DoD disputes, this is the only type of binding arbitration that is allowed under ADRA.

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. *See* Bid Protests at GAO: A Descriptive Guide (April 3, 2009) *available at* http://www.gao.gov/products/GAO-09-471SP. As noted earlier, parties frequently utilize an "outcome prediction" conference.

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. For more information regarding ADR at the Armed Services Board of Contract Appeals, *see* https://www.asbca.mil/ADR/adr.html. For more information regarding ADR at the Civilian Board of Contract Appeals, *see* https://www.cbca.gov/adr/general.html.

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 were automatically and simultaneously referred to an ADR judge for ADR consideration and participation by the parties. General Order No. 44, however, was revoked by Chief Judge Patricia Campbell-Smith in 2016. Current information about ADR in matters before the COFC is available for download at the COFC web site. *See* http://www.uscfc.uscourts.gov/alternative-dispute-resolution

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;

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;

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;

4. The matter significantly affects persons or organizations who are not parties to the proceeding;

5. A full public record of the proceeding is important, and an ADR proceeding cannot provide such a record; or

6. The agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in light of changed circumstances, and an ADR proceeding would interfere with the agency's ability to fulfill that requirement. 5 U.S.C. § 572(b).

[Note: The ADRA, 5 U.S.C. § 572(b), only requires that an agency <u>consider</u> 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). Contract Disputes Act of 1978, 41 U.S.C. § 7103(h)(3).

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, and

   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 "enter into a settlement concerning the matter." 5 U.S.C. § 575(b)(1).

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. § 575(c). Recall that the Navy issued an instruction on the appropriate use of binding arbitration in March 2007.[5] Air Force guidance can be found at http://www.adr.af.mil/Resources/Fact-Sheets/Display/Article/421844/binding-arbitration. *See* http://www.justice.gov/olp/adr/arbitration_kant.htm. Until the Army issues guidance regarding the use of binding arbitration, such a proceeding may only be available at the ASBCA.

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] See SECNAV Instruction 5800.15, *supra* note 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; 9 U.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 participating in binding arbitration if:

      (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.

      (3) Also, ADRA requires an agency to issue guidance before it can use binding arbitration. Currently, the Navy is the only DoD agency to have issued such guidance.

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.

CHAPTER 27

GOVERNMENT INFORMATION PRACTICES

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I. INTRODUCTION

1. The federal government collects an immense amount of information on individuals and organizations, both commercial and non-commercial. Whether to process passport applications, determine compliance with workplace safety regulations, or solicit bids on construction projects at military bases, information is gathered, processed, stored, and disseminated by a variety of entities of the federal government. Over time, an elaborate system of statutes, regulations, and policies has developed which governs these information practices.

2. The purpose of this chapter is to highlight some of the more important statutes, regulations, and policies which govern federal government information practices, with an emphasis on practices relevant to the federal acquisitions process.

II. RESTRICTIONS ON THE RELEASE OF INFORMATION

A. CLASSIFIED INFORMATION

1. Classified information is "official information that has been determined to require, in the interests of national security, protection against unauthorized disclosure and which has been so designated." Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms (November 8, 2010, as amended through Apirl 2018).

2. Determining what information can be classified has traditionally been an executive branch prerogative.[1]

3. Executive Order 13526 establishes guidelines for the classification of information. Exec. Ord. No. 13526, 3 C.F.R. 2009 Comp. at 298.

4. Information may be classified only if all the following conditions are met. *Id.*

[1] For an overview of the history of classified information, see Harold C. Relyea, Security Classified and Controlled Information: History, Status, and Emerging Management Issues, CRS Report, RL 33494, (Updated February 11, 2008), http://fas.org/sgp/crs/secrecy/RL33494.pdf. For an overview of the legal framework for protecting classified information, see Jennifer K. Elsea, The Protection of Classified Information: The Legal Framework, CRS Report, RS21900 (January 10, 2013), http://www.fas.org/sgp/crs/secrecy/RS21900.pdf.

a. §1.1(1) The information must be classified by an official possessing original classification authority;[2]
b. §1.1(2) The information must be owned by, produced by or for, or is under the control of the United States Government;
c. §1.1(3) The information falls within one or more of specific categories of information;[3] and
d. §1.1(4) The original classification authority determines that the unauthorized disclosure of the information could reasonably be expected to result in damage to national security.

5. There are three classification levels for information:
   a. Top Secret;[4]
   b. Secret;[5] and
   c. Confidential.[6]

6. The original classification authority establishes the level of classification and sets the duration for this classification.

7. The dissemination of information that does not meet the standard for classification may still be restricted. Information labeled "For Official Use Only (FOUO)" or "LIMITED DISTRIBUTION" are examples of controlled unclassified information

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[2] According to Exec. Ord. 13526, §1.3 (1-3) this authority is limited to the President and the Vice President; agency heads and officials designated by the President, and United States Government officials delegated this authority. Delegations of this authority must be limited to the minimum required to comply with this order.

[3]Exec. Ord. No. 13526 §1.4
(a) military plans, weapons systems, or operations;
(b) foreign government information;
(c) intelligence activities (including covert action), intelligence sources or methods, or cryptology;
(d) foreign relations or foreign activities of the United States, including confidential sources;
(e) scientific, technological, or economic matters relating to the national security;
(f) United States Government programs for safeguarding nuclear materials or facilities;
(g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or
(h) the development, production, or use of weapons of mass destruction

[4] §1.2(1) "'Top Secret' shall be applied to information, the unauthorized disclosure of which reasonably could be expect to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe." Exec. Ord. No. 13526, 2009 Supp. §1.2(1) at 298.

[5] §1.2(2) "'Secret' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe". *Id.* at §1.2(2) at 299.

[6] §1.2(3) "'Confidential' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe." *Id.* at §1.2(3) at 299.

(CUI). Department of Defense Manual 5200.01, Volume 4 (February 24, 2012) provides guidance for the identification and protection of CUI.

8. Information that is derived from classified information is also classified. This information receives derivative classification.[7]

9. In some cases, the mere existence of particular records may be classified. Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976) (request for records concerning the Glomar Explorer, a ship built for the CIA in order to covertly retrieve a Soviet submarine that sank in the Pacific Ocean, led to the CIA's position that the very existence of such records was itself classified and that the CIA would neither confirm or deny the existence of these records). Afterwards, the "neither confirm nor deny" response was known as the "Glomar" response or Glomarization.

10. Department of Defense Manual No. 5200.01, Volume 2 (February 24, 2012) provides extensive guidance on the correct marking of classified information.

11. Information should be declassified as soon as it no longer meets the standards for classification. In general, only the original classification authority or his or her successor may declassify information prior to the declassification date established when the information was classified. Exec. Ord. 13526 at §3.1.

National Industrial Security Program

12. In 1993, President Clinton established the National Industrial Security Program (NISP), whose purpose was to safeguard classified information that may be released or has been released to government contractors. Exec. Ord. No. 12829, 3 C.F.R. 1994 Comp. at 570.

13. Department of Defense Manual 5220.22, Volume 2 (August 2018) implements policy, assigns responsibilities, establishes requirements, and provides procedures for the protection of classified information that is disclosed to, or developed by contractors, licensees, and grantees of the U.S. Government (USG).

14. The Defense Security Service, a component of the Department of Defense, manages and administers the DOD portion of the NISP. Department of Defense Directive 5105.42, para. 3 (August 3, 2010).

[7] Exec. Ord. No. 13526, at §2.1.

15. Executive Order 12829 required the Secretary of Defense to issue a National Industrial Security Program Operating Manual, now known as the Industrial Security Manual for Safeguarding Classified Information (ISM).[8] This manual includes provisions that apply to the release of classified information "during all phases of the contracting process including bidding, negotiation, award, performance, and the termination of contracts, the licensing process, or the grant progress, with our under the control of departments or agencies." Exec. Ord. No. 12829, §201(b), 3 C.F.R. 1994 Comp. at 572.

16. The ISM also contains detailed instructions for safeguarding classified information in the custody of government contractors or under their control. *See* Chapter 5 of DoD 5220.22-M.

17. The ISM binds contractors upon execution of the Department of Defense Security Agreement (DD Form 441), and by reference in the "Security Requirements Clause" in the contract. DoDM 5220.22, Volume 2, Section 3.2.b. (Aug. 1, 2018).

18. The Federal Acquisition Regulation (FAR) requires that contracting officers prepare a Department of Defense Contract Security Classification (DD Form 254) for contracts involving contractor access to classified information. This form provides guidance on the security classification of information that the contractor will access and how to safeguard this information. FAR §4.403(c)(1).

B. DOD POLICY ON THE RELEASE OF ACQUISITION-RELATED INFORMATION

1. In Section 822 of the National Defense Authorization Act for Fiscal Years 1990 and 1991, P.L. 101-189, 103 STAT. 1352, Congress required the Secretary of Defense to amend the FAR to provide a uniform regulation regarding the dissemination of, and access to, acquisition information.

2. DOD policy on the release of acquisition-related policy is codified at 32 C.F.R. §286h.1-§286h.4.

3. It is DOD policy to make information related to the acquisition process available to the public **except** for the following types of information §286h.3(a)(emphasis added):

[8] Department of Defense Directive 5220.22-M, National Industrial Security Program Operation Manual (February 28, 2006).

a. Release is subject to statutory restrictions §286h.3(b)(1)
The release of acquisition-related information must comply with statutory requirements. Once statutory requirements are fulfilled, the release of the information described in the remaining categories is governed by DOD policy.

b. Classified Information §286h.3(b)(2)
   i. National security information must be protected against unauthorized disclosure and marked with the appropriate classification.
   ii. Release, access, and dissemination of classified information must be in accordance with DoDM 5220.22, Volume 2; DoD 5220.22-M; and DoDM 5200.01, Volumes 1- 4.

c. Contractor Bid or Proposal Information §286h.3(b)(3)
   i. Contractor bid and proposal information is information submitted by an offeror to the government in support of the offeror's bid to enter into a contract with the government whose release would place the offeror at a competitive disadvantage.
   ii. Contractor bid and proposal information includes cost and pricing data, profit data, overhead and direct labor rates, and manufacturing processes and techniques.
   iii. Prior to the opening of sealed bids or the conclusion of negotiated procurements, no contractor bid or proposal information may be released to anyone other than those who are involved in the evaluation of the bid or proposal.
   iv. After the awarding of the contract, contractor bid information may be disclosed by those authorized by the Head of the DoD Component, unless the release of the information is subject to a restrictive legend authorized by FAR §52.215-12 or FAR §15.509 or otherwise restricted by law.

d. Source Selection Information §286h.3(b)(4)
   i. Source selection information is information prepared for use by the Government when selecting bids or proposals for the award of a contract and consists only of the following information:

      1. Bid prices
      2. Proposed costs or prices
      3. Source selection plans
      4. Technical evaluation plans

5. Technical evaluations of competing proposals
6. Cost or price evaluations of competing proposals
7. Competitive range determinations
8. Rankings of competitors
9. The reports and evaluations or source selection boards, advisory councils, or the source selection authority
10. Any other information, if disclosed, would give an offeror a competitive advantage or jeopardize the integrity of the procurement process.

ii. Prior to the contract award, source selection information will not be released unless the Head of the DoD Component determines that release of the information is in the public interest and its release will not jeopardize the integrity of the procurement process.

iii. After the award of the contract, the contracting officer may release source selection information related to the contract except for:

1. Source Selection Information specifically developed for more than one solicitation of bids when there is a continuing need to protect the information;
2. Source Selection Information which contains contractor data protected by law;
3. Information which would reveal the relative merits or technical standing of the competitors or evaluation scoring;
4. Pre-decisional or other information not subject to release under the Freedom of Information Act.

e. Planning, programming, and budgetary information §286h.3(b)(5)
In general, Planning, Programming, and Budgeting System (PPBS) documents[9] and supported data are not to be disclosed outside the Department of Defense. Exceptions to this policy may be granted on a case-by-case basis by the Head of the OSD office responsible for the PPBS phase, in coordination with the Office of General Counsel. Disclosure of PPBS information to Congress or the General Accounting Office is covered by statute.

f. Negotiating Documents §286h.3(b)(6)
Documents that would reveal the government's negotiating position or would adversely impact the government negotiating strategy should not be disclosed.

[9] A list of PPBS documents for each phase can be found at 32 CFR §286b.3(b)(5)(ii)(C).

g. Drafts and Working Papers §286h.3(b)(7)
Unless required by statute, drafts and working papers shall not be released where their release would inhibit the development of agency positions, jeopardize the free exchange of information, or compromise the decision-making process.

h. Freedom of Information Act Request §286.3(b)(8)
Release of information pursuant to a request under the Freedom of Information Act shall be in accordance with Department of Defense Manual 5400.07, DoD Freedom of Information Act (FOIA) Program (25 January 2017).

C. EXECUTIVE PRIVILEGE

1. There are two primary uses of the executive privilege: to protect presidential communications from congressional inquiries, and to protect information held by the executive branch from disclosure during litigation.

2. The executive privilege protects information that reflects the "deliberative process" of executive branch officials.

3. There are at least three policy bases for this privilege. The privilege protects:

   a. "creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions;"
   b. "the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon;" and
   c. "the integrity of the decision-making process itself by confirming that 'officials' should be judged by what they decided, not for matters they considered before making up their minds." Jordan v. U.S. Dep't of Justice, 591 F.2d 753, 772-773 (D.C. Circuit 1978).

4. To assert the privilege,

   a. "there must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." United States v. Reynolds, 345 U.S. 1, 7 (1953). This authority may be delegated to a high-ranking authority provided the head of the agency has issued

guidelines on the use of the privilege. Mobile Oil Corp. v. Dep't of Energy, 520 F.Supp 414, 416 (N.D.N.Y. 1981);

b. the person claiming the privilege must provide "a specific designation and description of the documents within its scope" Black v. Sheraton Corp. of America, 371 F.Supp. 97, 101 (D.D.C. 1974); and

c. the person claiming the privilege must provide "precise and certain reasons for preserving their confidentiality." *Id.*

5. The information withheld must be pre-decisional and deliberative. In re SEALED CASE, 121 F.3d 729, 737 (D.C. Cir. 1997)(holding that documents created at the request of White House Counsel during a grand jury investigation of a former Secretary of Agriculture were privileged). Such information includes "intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966)(refusing to order the U.S. Government to disclose documents that revealed the Government's decision-making process in previous litigation).

6. Pre-decisional information is generated prior to a final decision or the adoption of an agency policy. Maricopa Audubon Soc. v. U.S. Forest Serv., 108 F.3d 1089, 1094 (9th Cir. 1997)(holding that an agency must identify a specific decision or policy by which to date pre-decisional information); In re Charlesgate Construction Company, 1997 DOL BCA LEXIS 2 at*4 (asserting that information produced after the contracting officer's final decision is not protected by the deliberative process privilege); Walsky Construction Company v. United States, 20 Cl. Ct. 317, 322 (1990) (stating that the final report of an investigation into U.S. Air Force contract administration conducted by the U.S. Air Force Inspector General did not contain pre-decisional information and therefore was not protected).

7. Information that is purely factual in nature is not protected by the privilege. EPA v. Mink, 410 U.S. 73, 87-88 (1973); *See also* Soucie V. David, 448 F.2d 1067 (D.C. Cir. 1971)(requiring the disclosure of the factual portions of a report prepared by the Office of Science and Technology on the Government's development of a supersonic transport aircraft); Appeal of Ingalls Shipbuilding Division, Litton Systems, Inc., 73-2, B.C.A. 48,093, 48,100 (identity of persons with first-hand knowledge of facts relevant to a claim is not protected).

8. Factual information contained in documents that also contain privileged information must be released to the extent the factual information can be severed from the privileged information. Appeal of Federal Data Corp., 1991 DOT BCA LEXIS 6 at *54 (DOT B.C.A. 1991).

9. Despite the privilege, a court may order the disclosure of information if there is a compelling need for the information. Sun Oil Co. v. United States, 514 F.2d 1020, 1025 (Cl.Ct. 1975)(ordering the disclosure of records regarding Government's decision to deny plaintiff's application to install an offshore oil drilling platform).

10. In determining whether to order the disclosure of information, courts look at a number of factors: 1) the relevance of the evidence sought to be protected; 2) the availability of other evidence; 3) the seriousness of the litigation and the issues involved; 4) the role of the government in the litigation; and 5) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. In re Franklin National Bank Securities Litigation, 478 F. Supp. 577, 583 (E.D.N.Y. 1979).

D. THE PRIVACY ACT OF 1974

1. The Privacy Act of 1974, Pub. L. No. 93-579, 88 STAT. 1896 (codified at 5 U.S.C. §552a), was passed by Congress to balance the government's need to collect information about individuals with the individual's right to protect this information from disclosure.

2. Keys to understanding the Privacy Act:

   a. The Privacy Act applies only to federal agencies.[10]

   b. The Privacy Act protects information collected on individuals, not corporations and organizations. 5 U.S.C. §552(a)(2). *See* St. Michaels Convalescent Hosp. v. California, 643 F.2d 1369, 1373 (1981)(holding that corporations are not individuals and therefore lack standing to file a claim under the Privacy Act).

   c. The Privacy Act applies to "a group of records under the control of any agency from which information is retrieved by the name of the individual or by some

[10] For the purposes of the Privacy Act, the definition of agency is provided by the Freedom of Information Act. *See infra* pp. 12-13.

identifying number, symbol, or other identifying particular assigned to the individual". 5 U.S.C. §552a(a)(5).

d. The Privacy Act prohibits agencies from disclosing information contained in a system of records without the written consent of the individual to whom the record pertains unless such disclosure fits in one of the twelve exemptions. 5 U.S.C. §552a(b)(1-12). These exemptions include disclosure based on a need-to-know basis, disclosure mandated by court order, and disclosure in response to a Freedom of Information Act request.

III. DISCLOSURE OF INFORMATION

A. ADMINISTRATIVE PROCEDURE ACT OF 1946

1. The New Deal of the 1930s led to a vast expansion of federal administrative power, including the creation of dozens of agencies within the executive branch. As administrative action began to impact more private citizens, pressure mounted within Congress to establish guidelines for promulgating regulations and adjudicating rights. The result was the Administrative Procedure Act (APA), Pub. L. No. 404, 60 STAT. 237 (1946).

2. The APA established a "simple and standard plan of administrative procedure"[11] and was not a comprehensive statement of administrative law. A basic premise of the APA was that administrative rules and procedures affecting the public should not be kept secret.

3. Section 3 of the APA delineated three types of information for disclosure. 60 STAT. at 238:

   a. Rules
      -<u>To be published in the Federal Register</u>
      - The agency's organizational structure
      - The agency's places of doing business with the public
      - The agency's methods of rule-making and adjudication
      - The agency's substantive rules that apply to the public

   b. Opinions and Orders
      <u>- To be made available for public inspection</u>

[11] S. Rep. No. 752, at 1 (1945).

- All final opinions or orders from the agency's adjudication of cases

c. Public Record
   - To be made available to persons properly and directly concerned
   - Matters of official record generated by the agency

4. However, an agency could withhold information if secrecy was in the public interest or the information pertained solely to the internal management of the agency. *Id.*

5. The APA did not provide a mechanism by which an individual could challenge an agency for denying a request for information.

B. FREEDOM OF INFORMATION ACT

1. History

   a. The Freedom of Information Act (FOIA), Pub. L. No. 89-487, 80 STAT. 250 (1966), was passed to remedy perceived deficiencies in the APA.

   b. Contrary to the purpose of Section 3 of the APA, which was to provide information to the public, a House committee in 1966 noted that this section had become "the major statutory excuse for withholding Governments records from public view."[12]

   c. The FOIA eliminated the APA requirement that the person requesting the information must be properly and directly concerned with the information.

4. Keys to Understanding the FOIA

   a. The FOIA applies only to federal agencies.

   b. The FOIA applies to records - information that is collected, produced or maintained by the government.

   c. The FOIA does not require federal agencies to create or retain records.

   d. The FOIA applies to information that is readily retrievable and reproducible.

[12] H.R. Rep. No. 1497, at 3 (1966).

e. Upon request, federal agencies must release information that the agency possesses and controls unless the information is protected by one of the nine FOIA exemptions.

5. The FOIA applies only to federal agencies.

a. An 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." 5 U.S.C. §552(f).

b. The definition of agency does not include:

i. 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. Armstrong v. Executive Office of the President, 90 F.3d 553, 567 (D.C. Cir. 1996);

ii. Congress,[13] the Judiciary,[14] or state agencies;[15]

iii. Private organizations, unless the government engages in "extensive, detailed, and virtually day-to-day supervision." Burka v. HHS, 87 F.3d 508, 515 (D.C. Cir. 1996)(finding data tapes created and possessed by contractor to be agency records because of extensive supervision exercised by agency which provided evidence of constructive control); or

iv. Private citizens. Allnut v. Dep't of Justice, 99 F.Supp. 2d 673, 678 (D. Md. 2000) (records held by a private bankruptcy trustee acting as agent for the federal government are not subject to the FOIA).

c. Subdivisions of an agency are not treated as independent agencies. *See* Judicial Watch, Inc. v. FBI, 190 F.Supp.2d 29, 30 n.1 (D.D.C. 2002)(holding that the proper defendant in a FOIA action filed against the FBI is the Department of Justice rather than the FBI. The FBI is a component of the Department of Justice and therefore not an "agency" within the FOIA). Accordingly, since the Departments of the Army, Air Force, and Navy are subdivisions of the

[13] 5 U.S.C. §551(1)(A).
[14] *Id.* at §551(1)(B).
[15] *Id.* at §551(1)(A).

Department of Defense, the proper defendant in a FOIA action would be the Department of Defense.

6. FOIA applies to records - information that is collected, produced or maintained by the government.

   a. The agency must both possess and control the information ("the record"). Dep't of Justice v. Tax Analysts, 492 U.S. 136, 144-145 (1989) (agency must create or obtain the records and must possess them due to the legitimate conduct of agency business). *See also* DoD Manual 5400.07, para. 6.2.h.

   b. Records in the possession of one agency, but created by another agency are deemed agency records of the agency in possession of them for the purposes of FOIA requests. McGehee v. CIA, 697 F.2d 1095, 1109 (D.C. Cir. 1983).

   c. For the FOIA to apply to records generated from sources outside the Government, the records must be either government-owned or subject to substantial government control or use. Burka v. HHS, 87 F.3d 508, 515 (D.C. Cir. 1996) (data tapes created and possessed by contractor are agency records because the agency had "constructive control" of the tapes); Hercules, Inc. v. Marsh, 839 F.2d 1027, 1029 (4th Cir. 1988) (a telephone directory for an Army ammunition plant is an agency record even though the directory was prepared by a government contractor because the entire cost of preparing the directory was borne by the Government).

   d. Private parties can request data held by third parties if the data was generated by federally-funded research.[16]

   e. The OPEN Government Act of 2007, P.L. 110-175, 121 STAT. 2524, amended the definition of record to include information "maintained for an agency by an entity under government contract, for the purpose of records management."

   f. The following categories are not records for FOIA purposes:

      i. Personal records. Documents created or maintained without official requirement for the convenience of the creator as a memory refresher and not shared with others. Bureau of Nat'l Affairs v. DOJ, 742 F.2d 1484, 1494-1496 (D.C. Cir. 1984) (appointment calendar and telephone message slips of agency official are not agency records); Fortson v. Harvey, 407 F.Supp.

[16] Circular A-110 (November 19, 1993, as amended September 30, 1999), 2 C.F.R. §215.36(d)(1).

2d 13, 15-16 (D.D.C. 2005) (the notes of an Army officer conducting an equal opportunity investigation were personal records because the notes were used only to refresh the officer's memory and were neither integrated into agency files nor relied on by other agency employees). *See also* DoD Manual 5400.07, para. G.2., "personal file".

ii. Tangible, evidentiary objects. Nichols v. United States, 325 F.Supp 130, 133-137 (D. Kan. 1971) (archival exhibits consisting of guns, bullets, and clothing pertaining to the assassination of President Kennedy are not agency records).

iii. Documents generated by and under the control of federal entities, which are not agencies under the FOIA. United States v. Anderson, Crim. No. 95-0040, 2003 U.S. Dist. LEXIS 725 (E.D. La. Jan. 16, 2003) (grand jury transcripts are court records and, therefore, not agency records under the FOIA).

7. The FOIA does not require federal agencies to create or retain records.

   a. A request for information under the FOIA does not imply that an agency must create a new record to accommodate a request. FlightSafety Services Corp. v. DOL, 326 F.3d 607, 613 (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"); *See also* DoD Manual 5400.07, para. 6.2.h.

   b. 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.

   c. DOD may create a new record when more useful to requester or less burdensome to agency. DoD Manual 5400.07, para. 6.2.h.(1).

8. FOIA applies to information that is readily retrievable in the requested format and reproducible.

   a. Components of the DoD "will make reasonable efforts to maintain records in forms and formats that are reproducible." DoD Manual 5400.07, para. 3.12.a.(3).

   b. A record is not considered readily reproducible if the DoD Component does not have the reproduction capability or if significant resources must be

expended to reproduce it into the requested format. DoD Manual 5400.07, para. 3.12.b.

9. Upon request, federal agencies must release information that the agency possesses and controls unless the information is protected by one of the nine FOIA exemptions.

   a. Exemption 1: Classified Records 5 U.S.C. §552(b)(1)

      i. This exemption applies to information that has been properly classified under the criteria established by Executive Order and implemented by regulations. DoD Manual 5400.07, para. 5.2.a.

      ii. The doctrine of segregability applies to Exemption 1. Church of Scientology v. U.S. Dep't of Army, 611 F.2d 738, 743-744 (9th Cir. 1979)(remanding case to lower court to determine whether specific portions of a document withheld by the Government in its entirety might be released); Judicial Watch, Inc v. Dep't of the Navy, 971 F. Supp 2d 1, 4 (D.D.C. 2013)(information redacted from e-mail chains regarding the preparation for and the burial at sea of a terrorist leader was properly withheld); Winter v. NSA/CSS, 569 F. Supp. 545, 549 (S.D. Cal. 1983)(holding that no portion of a document containing information about the interception of foreign communications could be redacted to permit disclosure).

      iii. During FOIA litigation, a court may order an agency to submit a detailed index of the documents it seeks to withhold and provide reasons for withholding each document. This is known as a "Vaughan Index". Vaughan v. Rosen, 484 F.2d 820 (9th Cir. 1991).

   b. Exemption 2: Internal Personnel Rules and Practices 5 U.S.C. §552(b)(2)

      i. Exemption 2 permits an agency to withhold from disclosure information about the agency's internal personnel rules and practices.

      ii. Exemption 2, consistent with the plain meaning of the phrase internal personnel rules and practices, encompasses only records pertaining to issues of employee relations and human resources. Milner v. Dep't of the Navy, 131 S. Ct. 1259, 1264-1265 (2011)(citing examples such as hiring and firing, work rules, discipline, compensation, and benefits).

      iii. In Milner, the U.S. Supreme Court established a three-part test for information to fall within Exemption 2:[17] (1) The information must be

[17] DOJ's Office of Information Policy provides guidance for the interpretation of Exemption 2 after the *Milner* decision at http://www.justice.gov/oip/blog/foia-guidance-7.

related to personnel rules and practices; (2) the information must "solely" relate to those personnel rules and policies;[18] and (3) the information must be "internal" to the agency for their records and use.[19]

c. Exemption 3: Other Federal Withholding Statutes 5 U.S.C. §552(b)(3)

i. Exemption 3 permits agencies to withhold information whose disclosure is prohibited by federal statutes other than the FOIA. These statutes are known as Exemption 3 statutes.

ii. To qualify as an Exemption 3 statute, the statute must "[require] that the matters be withheld from the public in such a manner as to leave no discretion on the issue, establish particular criteria for withholding or refer to particular types of matters to be withheld and, if enacted after the date of enactment of the OPEN FOIA ACT of 2009, specifically [cite] to this paragraph". 5 U.S.C. §§ 552(b)(3)(A)-(B).

iii. An example of an Exemption 3 statute is 10 U.S.C. §2305(g)(1), which prohibits releasing contractor proposals in the possession of certain agencies, including the Department of Defense, in response to FOIA requests.

iv. The DoD Freedom of Information Act Annual Report includes a list of Exemption 3 statutes relied upon by DoD during the reporting period. http://open.defense.gov/Transparency/FOIA/DoD-Annual-Reports-to-AG/

v. The Department of Justice maintains a complete list of statutes currently in force that qualify as withholding statutes at http://www.justice.gov/oip/exemption3.pdf.

d. Exemption 4: Trade Secrets and Confidential or Financial Information 5 U.S.C. §552(b)(4)

i. Exemption 4 applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4).

ii. Exemption 4 has three prongs:

[18] *Milner* at 1265, n. 4. The Court does not explain the difference between the first and second requirements.
[19] *Id.*

1. The information must be a trade secret, commercial information, or financial information**;**

2. obtained from a person; and

3. privileged or confidential**.**

iii. Trade Secrets

1. The FOIA does not define the term trade secrets.

2. The Restatement (First) on Torts provides non-binding guidance on the definition of a trade secret. "A trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." Restatement (First) on Torts §757, cmt. B (AM. LAW. INST. 1939)

3. Factors in determining whether information is a trade secret include:

   a. the extent to which the information is known outside of his business;

   b. the extent to which it is known by employees and others involved in his business;

   c. the extent of measures taken by him to guard the secrecy of the information;

   d. the value of the information to him and to his competitors;

   e. the amount of effort or money expended by him in developing the information; and

   f. the ease or difficulty with which the information could be properly acquired or duplicated by others. *Id.*

4. However, courts have found that the Restatement definition is too broad and "inconsistent with the language of the FOIA and its underlying policies" Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983)(declining also to follow the

FDA's regulatory definition of trade secrets found at 21 C.F.R. §20.61(a)).

5. For the purposes of Exemption 4, courts have used the common law definition of trade secrets, which links information to its creative process. Accordingly, the D.C. Circuit defined a trade secret "as 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, 704 F.2d at 1280. Other courts adopting the D.C. Circuit's definition include Anderson v. HHS, 907 F.2d 936, 939, 944 (10th Cir. 1990) and Burnside-Ott Aviation Training Center, Inc. v. United States, 617 F.Supp. 279, 285 (S.D. Fla. 1985).

6. Examples of information held by courts to be trade secrets exempt from disclosure include line-item pricing for a contract to provide turbojet engine services to the Air Force[20] and drawings of fuel pumps for aircraft used by the U.S. Air Force[21]; but not the physical and performance characteristics of airbags[22], or information about staffing, organization, experience in the field of aviation management, and personnel qualifications submitted in a technical proposal to provide helicopter maintenance services to the U.S. Navy[23].

iv. Commercial or Financial Information

1. The FOIA does not define the terms "commercial" or "financial."

2. Absent statutory definitions, courts have applied the ordinary meaning of both terms. Public Citizen Health Research Group, 704 F.2d at 1290.

3. Under Exemption 4, information is commercial if it serves a commercial function or is of a commercial nature. National Ass'n of Home Builders v. Norton, 309 F.3d. 26, 38-39 (D.C. Cir. 2002)(Fish

[20] *Canadian Commercial Corp. v. Dep't of Air Force*, 514 F.3d. 37 (D.C. Cir. 2008).
[21] *Pacific Sky.Supply, Inc. v. Dep't of the Air Force*, 1987 WL 25456 (D. D.C. Nov. 20, 1987).
[22] *Center for Auto Safety v. National Highway Traffic Safety Admin*., 244 F.3d. 144 (D.C. Cir. 2001).
[23] *Burnside-Ott Aviation Training Center, Inc v. United States*, 617 F.Supp. 279 (S.D. Fla. 1985).

and Wildlife Service information about nesting locations of pygmy owls on private property is not commercial information); Judicial Watch, Inc. v. U.S. Dept. of Commerce, 337 F.Supp. 2d 146, 168 (D. D.C. 2004)(stating that the term "commercial" should be broadly construed to include information in which the submitting party has a commercial interest"); Chicago Tribune Co. v. FAA, 1998 WL 242611 (N.D. Ill. 1998) at *3 (asserting that for information to be considered commercial, it has to have a direct relationship to the operations of a commercial venture).

4. However, "([n]ot every type of information provided to the government by an entity engaged in commerce falls within (b)(4)." British Airports Auth. v. U.S. Dep't. of State, 530 F. Supp. 46, 49 (D. D.C. 1981)(information given to the U.S. Government regarding negotiating strategies of airlines with the British Airports Authority was not commercial or financial); Chicago Tribune Co. v. FAA, 1998 WL 242611 at *3 (stating that "[i]f Congress intended the exemption to cover documents containing information concerning anything that occurs during a commercial operation, the words 'commercial information' are scarcely suitable words to express the idea").

v. Obtained from a person

1. A person includes "an individual, partnership, corporation, association, or public or private organization other than an agency." 5 USC §551(2).

2. For Exemption 4 to apply, courts have held that the information must be obtained from outside the government. Consumers Union of U.S. Inc. v. VA, 301 F. Supp. 796, 803 (S.D.N.Y. 1969)(claiming that to include information from government sources would pervert the purpose of the FOIA by allowing commercial and financial information to be rendered non-disclosable by transferring this information from one agency to another under seal of confidentiality); *But see* Brockway v. Dep't of the Air Force, 518 F.2d 1184, 1188 (8th Cir. 1975)(claiming that the language of Exemption 4 does not support the distinction between intra-governmental and extra-governmental sources).

vi. Privileged

1. For the purposes of Exemption 4, "privileged" refers only to privileges created by the Constitution, statute, or common law. Sharyland Water Supply Corp. V. Block, 755 F.2d 397, 400 (5th Cir. 1985).

2. Since Exemption 4 has three prongs which must be met, the privileged information must also be a trade secret, or commercial or financial information. McDonnell Douglas Corp. v. EEOC, 922 F. Supp. 235, 241-243 (E.D. Mo. 1996)(holding that corporate records about the impact on employees of the company's reduction in force prepared for counsel for use in providing legal advice were protected from disclosure by Exemption 4).

3. Most litigation that arises under Exemption 4 is focused on whether the information is confidential[24] and few cases discuss privilege in the context of this exemption.

vii. Confidential

1. To determine whether a commercial or financial matter is confidential, courts apply a two-part test: (1) Would disclosure of the information negatively impact the government's ability to obtain necessary information in the future; and (2) Would disclosure of the information cause harm to the competitive position of the person from whom the information was obtained? National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

2. However, the D.C. Circuit in Critical Mass Energy Project v. NRC, 975 F.2d, 871, 678-880 (D.C. Cir. 1992), limited this two-part test to cases in which the Government required a person to provide commercial or financial information to the Government.

3. Information required by the Government to be included in contract bids and proposals is considered a "required submission" and therefore requests for disclosure of this information are analyzed under the

[24] Department of Justice Guide to the Freedom of Information Act, Exemption 4 at 263 (2009 edition), http://www.justice.gov/oip/foia_guide09/exemption4.pdf.

National Parks two-part test. *See* Honeywell Technology Solutions Inc. v. Dep't of Air Force, 779 F.Supp. 2d 14 (D. D.C. 2011)(genuine issue of fact whether the Air Force's request for proposals for technical services for its satellite control network mandated submission of work solutions for work beyond the "core" requirements specified in the contract).

4. If the commercial or financial information was submitted voluntarily, then the information will be deemed confidential if the information "would customarily not be released to the public by the person from whom it was obtained." Sterling Drug Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971)(quoting S. Rep. No. 813 at 9 (1965)); Judicial Watch v. Dep't of the Army, 466 F. Supp. 2d 112 (D. D.C 2006)(holding that documents containing detailed pricing and equipment information in no-bid oil well fire-fighting contracts in aftermath of the U.S. invasion of Iraq in 2003 would not customarily be released by the contractor to the public).

e. Exemption 5: Privileged Memoranda and Internal Agency Communications 5 U.S.C. §552(b)(5)

i. The FOIA allows an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §552(b)(5).

ii. The U.S. Supreme Court developed a two-part test for the application of Exemption 5:

1. The source of the information must be a government agency; and

2. the information must be information that would be privileged under civil discovery rules. Dep't of Interior v. Klamath Water Users Protective Ass'n, 121 S.Ct. 1060, 1065 (2001).

3. Courts have developed the consultant corollary principle, which extends Exemption 5 to communications between an agency and outside consultants hired by the agency. "[R]ecords submitted by outside consultants played essentially the same part in an agency's process of

deliberation as documents prepared by agency personnel might have done." Klamath, 121 S.Ct. at 1062; Nat'l Inst. of Military Justice v. DOD, 512 F.3d 677 (D.C. Cir. 2008)(memoranda provided to the Department of Defense by outside experts for consideration in establishing regulations for terrorist trial commissions qualify for the consultant corollary principle under Exemption 5).

iii. Exemption 5 incorporates civil discovery privileges into the FOIA. Accordingly, the test under Exemption 5 is whether the information would normally be disclosed upon a showing of relevance, which is the standard for disclosure under the civil discovery rules. A privileged document would normally not be disclosed during discovery. FTC v. Grolier Inc., 462 U.S. 19, 26 (1983).

f. Exemption 6: Protection of Personal Privacy 5 U.S.C. §552(b)(6)

i. An agency may withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6).

ii. The U.S. Supreme Court has interpreted the term "similar files" broadly. If the information pertains to a particular individual, then the information meets the initial threshold for Exemption 6 protection. U.S. Dep't of State v. Washington Post. Co, 456 U.S. 595, 600-602 (1982).

iii. However, the information must be roughly equivalent to the personal information found in personnel and medical records and in which the individual has a privacy interest. Maclean v. Dep't of Army, No. 05-1519, 2007 WL 935604 at *14 (S.D. Cal. Mar. 6, 2007)(stating that Exemption 6 applies even though the files contain much information that is not intimate in nature such place of birth or employment history); Bonilla v. DOJ, 798 F. Supp. 2d 1325, 1331 (S.D. Fla 2011)(finding that Exemption 6 applied to reference letters from Assistant U.S. Attorneys describing the personal characteristics of another Assistant U.S. Attorney); Judicial Watch Inc. v. Dep't of the Navy, 25 F. Supp. 3d 131 (D. D.C. 2014)(holding that names of Department of Navy employees who signed an internal memorandum supporting a contract for renewal energy were "similar files" under Exemption 6); Sims v. CIA, 479 F.Supp. 84, 89 (D. D.C. 1979)(claiming that the names of researchers under contract with the CIA for the MK-ULTRA

program could fall under Exemption 6 if the researchers had a reasonable expectation of privacy).

iv. The privacy interests protected by Exemption 6 reflect both common law and literal concepts of privacy. DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763-65 (1989); Sherman v. Dep't of the Army, 244 F. 3d 357, 363 ("[t]he privacy interest at stake in FOIA exemption analysis belongs to the individual, not the agency holding the information"). Therefore, only the individual whose privacy interests are implicated may validly waive them. *Id.* at 364.

v. To be exempt, the privacy interest must be substantial and the privacy interest must outweigh the public interest in disclosure. Multi Ag Media LLC v. USDA, 515 F.3d 1224 (D.C. Cir. 2008)(finding that the public interest in the disclosure of information about crops derived from hundreds of thousands of individual farms outweighed the individual privacy interests involved); L.A. Times Commc'ns LLC v. DOL, 483 F. Supp.2d 975, 985-86 (C.D. Cal 2007)(holding that Exemption 6 protected the identities of civilian contractors supporting Allied military operations in Iraq and Afghanistan); Sheet Metal Workers Intern. Ass'n Local No. 9 v. U.S. Air Force, 63 F.3d 994 (10th Cir. 1995)(preventing the release of the names of employees working for government contractors to union representatives seeking information about contractor compliance with the Davis-Bacon Act); Homer J. Olsen, Inc. v. DOT, 2002 U.S. Dist. LEXIS 23292 at *20 (N.D. Cal. 2002)(stating that the Government had met its burden under Exception 6 and would not compel the disclosure of names of employees found in the oversight contractor's monthly reports).

g. Exemption 7: Law Enforcement Records 5 U.S.C. §552(b)(7)

i. Exemption 7 applies to "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information. 5 U.S.C. §552(b)(7)

1. could reasonably be expected to interfere with enforcement proceedings (7)(A);

2. would deprive a person of a right to a fair trial or an impartial adjudication (7)(B);

3. could reasonably be expected to constitute an unwarranted invasion of personal privacy (7)(C);

4. could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source (7)(D);

5. would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law (7)E); or

6. could reasonably be expected to endanger the life or physical safety of any individual (7)(F)".

ii. For a record to qualify under Exemption 7, an agency must use the record for a law enforcement purpose, which includes the detection and investigation of violations of federal law. Malizia v. DOJ, 519 F.Supp. 338, 347 (S.D.N.Y. 1981)(holding that there must be a rational nexus between the investigative activities and suspected violations of federal law for Exemption 7 to apply); Raytheon Co. v. Dep't of Navy, 731 F.Supp. 1097, 1100-1101 (D. D.C. 1989)(federal contractor audit documents originally prepared for non-law enforcement purposes were exempt from disclosure if later segregated and compiled for use in a law enforcement investigation);

iii. Exception 7(A):

1. "The principle purpose of Exemption 7(A) is to prevent disclosures which might prematurely reveal the government's cases in court, its evidence and strategies, or the nature, scope, direction, and focus of its investigations, and thereby enable suspects to establish defense or fraudulent alibis or to destroy or alter evidence." Maydak v. DOJ, 218 F.3d. 760, 762 (D.C. Cir. 2000). *See* Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 928 (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.").

2. However, this exception does not require the agency to make a specific showing within the context of a particular case. *See* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 236 (1978)(stating that federal courts may determine "that, respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings'")

iv. Exception 7(B)

1. Use of this exemption is dependent upon a two-part test: (1) a pending or imminent proceeding and (2) a determination that disclosure more likely than not would interfere with fairness. *See* Dow Jones Co., Inc. v. FERC, 219 F.R.D. 167, 174 (C.D. Cal. 2003) (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).

v. Exception 7(C):

1. Exception 7(C) protects the personal privacy of individuals named in law enforcement files. *See* SafeCard Serv. V. SEC, 926 F.2d 1197, 1205-1206 (D.C. Cir. 1991)("[U]nless there is compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the names of private individuals appearing in the agency's law enforcement files is necessary in order to confirm or refute that evidence, there is no reason to believe that the incremental public interest in such information would ever be significant").

2. Privacy protections standards are greater under 7(C) than under Exemption 6. DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 757 (1989) ("reasonably be expected to constitute an unwarranted invasion of personal privacy" [Exemption 7(C)] versus "clearly unwarranted invasion" [Exemption 6]).

3. Exception 7(C) protects the names of both witnesses and investigators. *See* O'Keefe v. DoD, 463 F.Supp. 2d 317, 324 (E.D.N.Y. 2006)(protecting the identity of DOD personnel conducting an investigation into alleged misconduct by plaintiff's commanding officers).

4. Within the context of Exception 7(C), Glomar responses to targeted requests are appropriate. DOJ v. Reporters Comm. For Freedom of the Press, 489 U.S. at 780 (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, 451 (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); *See also* DoD Manual 5400.07, paras. 5.1.f.(1)-(2).

5. The U.S. Supreme Court has held that corporations do not have personal privacy interests under Exception 7(C). FCC v. AT&T, Inc., 131 S. Ct. 1177, 1183 (2011)(rejecting the argument that the word "personal" included a corporation in the phrase "personal privacy").

vi. Exception 7(D):

1. The purpose of Exemption 7(D) is to ensure that "confidential sources are not lost through retaliation against the sources for past disclosure or because of the source's fear of future disclosure." Brandt Construction v. EPA, 778 F.2d 1258, 1262 (7th Cir. 1985).

2. This exception protects the source's identity whenever the source provides information if there has been an explicit assurance of confidentiality or circumstances "from which such an assurance could reasonably be inferred." Landano v. DOJ, 956 F.2d 422 (3rd Cir. 1992)(quoting S. Rep. No. 93-1200, at 13 (1974)). However, "[t]he Government is not entitled to a presumption that a source is confidential within the meaning of Exemption 7(D) whenever the source provides information to the FBI in the course of a criminal investigation." DOJ v. Landano, 508 U.S. 165, 181 (1993).

vii. Exception 7(E):

For Exception 7(E) to apply, the investigative techniques used by law enforcement officials must not be well known to the public. Rugiero v. DOJ, 257 F.3d 534, 551 (6th Cir. 2001); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d at 181-82 (refusing to order the disclosure of Department of Commerce techniques of identifying parties to monitor for violations of Export Administration regulations).

viii. Exception 7(F)

The agency must only show a reasonable likelihood of physical danger to withhold information. L.A. Times Common's, LLC v. Dep't of the Army, 442 F.Supp.2d 880 (C.D. Cal. 2006) (applying Exemption 7(F) where disclosure of the names of private security contractors contained in serious incident reports could endanger the lives of these individuals currently in Iraq); Ctr. for Nat'l Sec. Studies v. DOJ, 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).

ix. Exemption 8: Regulation of Financial Institutions 5 U.S.C. §552(b)(8)

1. An agency may withhold information "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions" 5 U.S.C. §552(b)(8)

2. Courts have found two purposes for Exemption 8: (1) protecting the security of financial institutions, which full disclosure of agency regulating the financial institutions might jeopardize; and (2) safeguarding the relationship between the financial institutions and their agency regulators. *See* Nat'l Cmy. Reinvestment Coal v. Nat'l Credit Union Admin, 290 F. Supp. 2d 124, 135-36 (D. D.C. 2003).

x. Exemption 9: Geological, Geophysical Information and Data on Wells 5 U.S.C. §552(b)(9)

Agencies may withhold information on "geological and geophysical information and data, including maps, concerning wells. 5 U.S.C. §552(b)(9)

IV. CONCLUSION

The introductory paragraph to Executive Order 13526 states that "[o]ur democratic principles require that the American people be informed of the activities of their Government". To further this goal, Congress passed the Freedom of Information Act, which made the disclosure of government information the default position. Absent a contrary rule restricting disclosure, upon request, government agencies are required to disclose the information they have in their possession. Under the current framework

for the governance of government information, the burden of justifying the withholding of information rests firmly on the shoulders of the Government.

CHAPTER 28

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CHAPTER 28

PROCUREMENT FRAUD

I. INTRODUCTION.

A. "Corruption wins not more than honesty." (Shakespeare, KING HENRY THE EIGHTH, act 3, sc. 2 (Cardinal Wolsey's concessionary speech to Lord Thomas Cromwell, after the King expresses his displeasure with Wolsey).

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. In the Army, 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 (AR) 27-40, Legal Services, Section II, Terms.

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.[1]

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 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.

[1] *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* Auditor Fraud Resources – Scenarios and Indicators, *available at* http://www.dodig.mil/Resources/Fraud-Detection-Resources/Fraud-Scenarios/.

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. Under the Sherman Act, 15 U.S.C. § 1, "[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." Such acts circumvent competition, which increases cost to the government, and deprives it of the most reliable measure of what price should be. 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 (Fed. Cir. 1976); *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 (i.e. only one contractor could possibly provide the desired product).

3. Defective Pricing.

a. The Truth in Negotiations Act ("TINA"), 10 U.S.C. § 2306a and 41 U.S.C. Chapter 35, requires contractors in certain negotiated procurements to disclose and certify that disclosed details concerning expected costs 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 Competition 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. Each of the Subparts provides justification criteria for when full and open competition can be waived. A procurement that cannot meet this criterion may be suspect and indicative of fraud.

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 $700,000 or less, for example, requires approval of the contracting officer (unless agency rules require higher-level approval), while those greater than $700,000 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 (i.e. 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 subsets of Product Substitution and 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.

(1) Acquisition officials sometimes cannot spot defective products at time of acceptance due to the high volumes of goods or services being delivered. Latent defects are the most susceptible to being undiscovered.

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 contravening the contract's specifications.

(3) Goods that appear to be used when the government contract specifies that new goods should be delivered.

(4) Missing source documentation.

(5) Source information accompanying the shipping materials that contain the product, or the actual product's identification information is removed.

d. Deliverables that contain counterfeit components.

(1) FAR 46.101 defines "counterfeit items" as being any "unlawful or unauthorized reproduction, substitution, or alteration that has been knowingly mismarked, misidentified, or otherwise misrepresented to be an authentic, unmodified item from the original manufacturer, or a source with the express written authority of the original manufacturer or current design activity, including an authorized aftermarket manufacturer."

(2) Section 818 of the 2012 National Defense Authorization Act brought about a renewed focus on counterfeit parts in Government procurements. [2] Included within this section was a change to the Federal criminal code (18 U.S.C. § 2320) to criminalize any trafficking of known counterfeit military goods or services, for which the use of the counterfeits could cause death, serious injury, classified disclosures, or impairment of combat operations.[3]

(3) This is further implemented by DoD Instruction 4140.67, the DoD Counterfeit Prevention Policy (April 26, 2013), and in new additions to Defense Federal Acquisition Regulation Supplement (DFARS). The DoD's Counterfeit Policy sets forth a holistic approach for prevention and detection. But the new DFARS sections pertain only to counterfeit *electronic* parts. [4]

(4) Suspected counterfeits are reported in GIDEP (the Government-Industry Data Exchange Program), an

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[2] National Defense Authorization Act (NDAA), Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1493, § 818.
[3] *Id.* at § 818(h), 125 Stat. 1497.
[4] *Detection and Avoidance of Counterfeit Electronic Parts*, 79 FR 26092 (DFARS Case No. 2012-D055); codified at 48 CFR 202, 231, 244, 246, and 252 (May 6, 2014).

information clearinghouse that reports and tracks instances of non-conforming materials.

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 (i.e. white-outs or other redaction).

(2) Payment invoice exceeds contract amount.

(3) Invoiced goods cannot be located.

(4) Missing or copied receiving documents.

c. Audits can uncover credible evidence of False Invoices

(1) Contractors are put on notice of the Defense Contract Audit Agency (DCAA) audit practices and procedures, as found in Information for Contractors, DCAA Manual No. 7641.90 (June 26, 2012).

(2) Employees completing false timesheets and/or supervisors who allow this to happen can be spotted during labor floor checks or interviews. *See* DCAA Manual No. 7641.90 at enclosure 2, page 16.

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 or Army CID) 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. Disclosures Required for Certain Contractors by Contract Clause:[6] This is prescribed in FAR 3.1004(a) for when the value of the contract is to exceed $5.5 million and will have a performance period of 120 days or more. FAR 52.203-13(b)(3) requires the contractor to timely disclose in writing to the agency Inspector General (with a copy to the contracting officer) credible evidence that a principal, employee, agent, or subcontractor has committed:

[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). Also found at FAR 52.203-13(a).
[6] FAR 52.203-13, *Contractor Code of Business Ethics and Conduct*, applies if FAR 3.1004 thresholds are met.

a. a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations of Title 18, U.S. Code; or

b. a violation of the Civil False Claims Act (31 U.S.C. §§ 3729-3733).

3. Business Ethics Awareness and Compliance Program and Internal Control System Required by Contract Clause (FAR 52.203-13(c)): Unless the contractor holds itself out as a small business concern to obtain contract award, or unless the contract is for acquisition of a commercial item, FAR clause 52.203-13(c) applies to contracts that exceed $5,500,000 and the period of performance is 120 days or more.[7] If the FAR 3.1004 threshold ($5.5 million/120 days) is met, then the small business and commercial item exemptions do not apply to the other sections of 52.203-13, such as 52.203.13(b).

a. FAR 52.203-13(b)(1) 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, within 90 days of award, to 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 (IG), whenever the contractor has "credible evidence" that a principal, employee, agent, or a subcontractor has committed:

[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 $5.5 million and a period of performance of more than 120 days.

(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.

D. **Individual Reporting**:

1. Hotline Posters / General Notice to Employees. FAR 3.1004(b) states that unless the contract is for acquisition of a commercial item or will be performed entirely outside the United States, FAR 52.203-14, Display of Hotline Poster(s) shall be inserted into the contract if it exceeds $5.5 million or a lesser amount established by the agency[8]; and

a. The agency has a fraud hotline poster; or

b. The contract to be performed is funded with disaster assistance funds

c. NOTE: DFARS 203.1004(a) instructs that the clause at DFARS 252.203-7003 should be used in solicitations and contracts. DFARS 203.1004(b) instructs that the clause at DFARS 252.203-7004 should be used in lieu of the clause at FAR 52.203-14 in solicitations and contracts not for the acquisition of commercial items if the contract value exceeds $5.5 million.

2. Whistleblower Protection for Contractor Employees.

a. The 2008 NDAA (Pub. L. 110-181); 2009 NDAA (Pub. L. 110-417); and 2013 NDAA (Pub. L. 112-239) provided enhanced whistleblower protections for contractor employees, by amending 10 U.S.C. § 2409, Contractor employees: protection from reprisal for disclosure of certain information.

b. 10 U.S.C. § 2409 is applicable only to DoD, NASA, and the Coast Guard. 41 U.S.C. § 4705 provides protections for contractor employees from reprisals for disclosures of certain information pertaining to contracts issued by the civilian agencies. 41 U.S.C. §

[8] FAR Clause 52.203-14, *Display of Hotline Poster(s)*, also applies to subcontractors, unless meeting the commercial item/foreign performance exceptions, and if the value meets the $5 million and/or agency determined thresholds noted for prime contractors.

4712 codifies the pilot program for enhancement of those protections.

c. The DoD/NASA/Coast Guard statute (10 U.S.C. § 2409) prohibits a contractor or a subcontractor employee from being discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress, a committee representative of Congress, disclosing to an IG[9], a DoD employee responsible for contract management or oversight, disclosing to the Government Accountability Office, or an authorized official of an agency of the Department of Justice information the person reasonably believes is evidence of –

(1) Gross mismanagement;

(2) Gross waste of funds;

(3) Substantial and specific danger to health and safety; or

(4) A violation of law related to the contract.

d. FAR Subpart 3.9 – Whistleblower Protections for Contractor Employees implements the statutory authority and further provides procedures for the filing of complaints and their investigation, along with remedies the head of the agency or the designee may take if reprisal is substantiated.

(1) FAR Clause 52.203-17, Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights shall be placed in all solicitations and contracts that exceed the simplified acquisition threshold. Per DFARS 203.970, DoD uses the clause at DFARS 252.203-7002 to inform employees of rights in all solicitations and contracts.

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: criminal, civil, administrative, and contract. 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.

9 For DoD commands, activities, or agencies, it is an Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of the DoD. DFARS 203.903(3)(ii).

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 Directive 5106.01, Inspector General of the Department of Defense (IG DoD) (May 29, 2020).

2. Military Criminal Investigative Organizations. (CID, NCIS, AFOSI).

3. Department of Justice. DOD Instruction. 5525.07, Implementation of the Memorandum of Understanding between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes (Mar 5, 2020).

4. *Army Specific: 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 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, Regulatory and Administrative Proceedings) (May 2018), citing Attorney General policy on the same subject, dated January 30, 2012, at *www.justice.gov/usao/eousa/foia_reading_room/usam/title1/doj00027.htm*.

D. **DOD Fraud Policy.** *DOD policy requires the coordinated use of criminal, civil, administrative, and contractual remedies* in suspected cases involving procurement fraud. *See* DoDI 7050.05, Coordination of Remedies for Fraud and Corruption Related to Procurement Activities (May 12, 2014). 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 <u>serious hazard</u> to

health, safety, or operational readiness is indicated (regardless of loss value).

3. Each centralized organization individually and jointly 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: U.S. Dep't of Army Reg. 27-40, Litigation, 19 Sept. 1994.

2. Air Force Policy: Air Force Instruction (AFI) 51-1101, The Air Force Procurement Fraud Remedies Program, 19 October 2017.

3. Navy Policy: SECNAVINST 5430.92C, Assignment of Responsibilities to Counteract Fraud, Waste, and Related Improprieties within the Department of the Navy, 11 June 2018.

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.3d 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 F.2d 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. 3d 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, grant, subcontract, subsidy, loan, guarantee, insurance, or other form of Federal assistance; 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 107 – False Official Statements; Article 121 – Larceny and Wrongful Appropriation; Article 131f - Noncompliance with Procedural Rules; 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.

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*[10] 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

[10] *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).

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.[11]

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, 304-305 (4th Cir. 2009) (holding that Developmental Funds Iraq met the requirements to be a claim under the FCA).

B. **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 could preclude the imposition of treble damages.

2. Different Scenarios.

a. Defective Products.

b. Defective Testing.

c. Bid-Rigging.

d. Bribery and Public Corruption.

C. **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).

[11] Allison Engine, et al. v. United States, ex rel. Sanders, 553 U.S. 662 (2008)

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).

D. **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."). Allows a private individual to sue contractors for fraud 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)[12] 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. There have been various Qui Tam developments since the 1986 Qui Tam amendments.[13]

E. **Special Plea in Fraud**. 28 U.S.C. § 2514.

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[12] 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.

13 *See Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016) (Addressing implied false certification theory as a basis for liability and the fact the FCA does not limit liability only to instances where defendant fails to disclose a violation of a contractual, statutory, or regulatory provision that the government expressly designated a condition of payment); *see also 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* United 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 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 (10th Cir. 2003) (en banc) (federal employee could be a qui tam plaintiff); and *see also United States ex rel. Oberg v. Kentucky Higher Education Student Loan Corp. et al.*, 681 F.3d 575 (4th Cir. 2012)(extends the *Stevens* analysis to whether an entity is an "arm of the state").

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.

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.

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. **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 **preponderance 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 FAR 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 FAR 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. **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 FAR 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 FAR 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 FAR 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 VSDA, 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*, Civ.A. No. 89-6544, 1992 WL 345106, (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. The APA does not usually provide a right to judicial review of an agency's decision not to take enforcement action. *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985). In *Caiola v. Carroll*, 851 F.2d 395 (D.C.Cir.1988), however, the DC Circuit Court rejected an agency suspension of two corporate official, but not a third when the agency did

not provide in their administrative record support for the differing treatment. In *Kisser v. Cisneros*, 14 F.3d 615 (D.C.Cir 1994) the court made clear that there is no reasoned explanation requirement" when exercising discretion.

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 six 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 (D. Kan. 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 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. § 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." FAR 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. re. Wilkins 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*, 103 Fed. Cl. 252 (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 initiate 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 CAB 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. 31752, 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 FAR 3.7 is derived from:

   a. 18 U.S.C. § 218;

   b. Executive Order 12448, 50 Fed. Reg. 23,157-01 (May 31, 1985); and,

   c. 41 U.S.C. § 2105(c)(1).

G. **Suspending Payments upon a Finding of Fraud**.

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."

   a. NOTE: This authority does not apply to commercial item interim payments (FAR 32.2) or performance-based payments (FAR 32.10).

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. There is at least one board decision involving this provision of the FAR. *TRS Research*, ASBCA No. 51712, 01-1 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**.

1. FAR 52.203-3 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. Contractors received considerable due process protections.

4. However, violators can received 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. CONCLUSION.

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CHAPTER 29

CONSTRUCTION CONTRACTING

I. INTRODUCTION. By the end of this chapter, 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 24 August 2012) [hereinafter AR 420-1].

2. AR 415-32, Engineer Troop Unit Construction in Connection with Training Activities (18 June 2018) [hereinafter AR 415-32].

3. DA Pam 420-11, Project Definition and Work Classification (18 March 2010) [hereinafter DA Pam 420-11].

C. Directives and Instructions.

1. Air Force Policy Directive (AFPD) 32-90, Real Property Management (6 August 2007) [hereinafter AFPD 32-90].

2. Air Force Instruction (AFI) 32-1021, Planning and Programming Military Construction (MILCON) Projects (29 December 2016, amended by memorandum 24 April 2018) [hereinafter AFI 32-1021].

3. AFI 32-1032, Planning and Programming Appropriated Funded Maintenance, Repair, and Construction Projects (24 September 2015, amended by memorandum 23 May 2018) [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 (20 November 2015) [hereinafter AFI 32-6002].

6. AFI 65-601, vol. 1, Budget Guidance and Procedures (16 Aug 2012, incorporating change 1 29 July 2015) [hereinafter AFI 65-601].

7. U.S. Army Corps of Engineers (USACE) Acquisition Instruction (Effective 3 June 2019, Updated 10 April 2020) [hereinafter UAI].

D. Navy Regulation. OPNAVINST 11010.20H CH-1, Navy Facilities Projects (16 May 2014 amended by memorandum 24 June 2015) [hereinafter OPNAVINST 11010.20H].

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) 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 11010.20H, ch. 3, para. 2. 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

[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).

[2] The term "facility" means "a building, structure, or other improvement to real property." 10 U.S.C. § 2801(c)(2).

(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.

1. As a general rule, the government funds construction projects costing not more than $2 million with Operation and Maintenance (O&M) funds; projects costing more than $2 million, but not more than $6 million, with Unspecified Minor Military Construction (UMMC) funds; and projects costing more than $6 million with Military Construction (MILCON) funds. §2802 of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 STAT. 1845 (2017). 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://tjaglcspublic.army.mil/adk).

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, paras. 4.1, 4.2; OPNAVINST 11010.20H, ch. 3, para. 2.

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. Determining what source of funding is appropriate;

d. Deciding what, if any, pre-bid communications are required (or otherwise warranted);

e. Deciding what information and which clauses to place in the solicitation;

f. Deciding which contractor should receive the award; and

g. 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. FAR 2.1. 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. However, Congress established new, two-phase design-build selection procedures in 1995 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) 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 based upon the stated Phase One evaluation criteria to determine which offerors the agency will ask to submit Phase Two proposals.

(2) The Phase One solicitation must include:

[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.

(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]

c. Phase Two. FAR 36.303-2. Phase two evaluation and evaluation factors are independent from phase one. 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:

[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).

(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)[5]. 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, and a pre-negotiation objective memorandum (POM) is completed to determine fair and reasonable pricing, the parties enter into bilateral task orders for individual projects based on the tasks and prices specified in the JOC.[6]

4. JOC Limitations.

a. The government should not use a JOC for projects with an estimated value less than $2,000, or greater than the amount of sustainment, restoration, and modernization (SRM) authority delegated to the installation by the ACOM and/or HQDA. AFARS 5117.9000(a).

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[5](d) The role of each member of the Acquisition Team is to exercise personal initiative and sound business judgment in providing the best value product or service to meet the customer's needs. In exercising initiative, Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority.

[6] Each task order becomes a fixed-price, lump sum contract. AFARS 5117.9003-1(e).

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 <u>not</u> 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.

AFARS 5117.9003-3(a).

G. Simplified Acquisition of Base Engineer Requirements (SABER) Program, AFFARS PGI 5336.9002 Air Force Construction Guide.

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.

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.

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.

b. Saber shall not be used to acquire architect-engineering (A-E) services.

c. SABER may not be used to perform non-personal services subject to the Service Contract Act.

VI. PRE-BID COMMUNICATIONS.

A. Presolicitation Notices. FAR 36.213-2; FAR 36.701(a); 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;[7]

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

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[7] 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:

(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, $250M - $500M, and over $500M.) DFARS 236.204.

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. FedBizOpps.gov (www.fbo.gov)

VII. SOLICITATION.

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 252.236-7001.

C. Statutory Limitations. FAR 36.205; DFARS 252.236-7006.

1. The solicitation must include any statutory cost limitations.[8] See K.C. Brandon Constr., B-245934, Feb. 3, 1992, 92-1 CPD ¶ 139;see also

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8 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;

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;[9] or

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;

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(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.

[9] 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.

(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. Normally, the contracting officer must 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. However, the chief of the contracting office, 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). FAR 28.102-1(c)

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 Dept 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. However, the contracting officer may waive the requirement to submit a bid guarantee under nine circumstances. See FAR 28.101-4(c) for detailed list. 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.[10]

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).

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; DFARS 236.604; AFARS 5136.201 and 5142.1503-90; DD Form 2626, Performance Evaluation (Construction).

[10] 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).

a. Contracting activities must prepare performance evaluation reports for:

(1) Construction contracts valued at $700,000 or more;

(2) Architect-Engineer services contracts valued at $35,000 or more; and

(3) Default terminated construction and A-E contracts regardless of contract value.

FAR 42.1502(e) and (f).

b. 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 $35,000 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.

(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 <u>unless</u> 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. Waiver Provisions. 40 U.S.C. §§3131(d) and 3134; FAR 28.102-1(a).

[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).

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.

5. 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.").

6. 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.

[12] However, see FAR 52.232-5 -- Payments Under Fixed-Price Construction Contracts. Permits withholding from future payments for improper certification of subcontractor payments.

c. Labor Violations. See generally FAR Part 22.

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.

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, 1942 WL 4438 (Ct.Cl.); 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, 06-1 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, 11 F.3d 1072 (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

[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.

Potashnick Constr., Inc., ENG BCA No. 5551, 92-2 BCA ¶ 24,985; Aulson Roofing, Inc., ASBCA No. 37677, 91-2 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 ¶ 26,028; Tyler Constr. Co., ASBCA No. 39365, 91-1 BCA ¶ 23,646; D.J. 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, 92-1 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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J. Defense Procurement and Acquisition Policy (DPAP) webpage, *located at* http://www.acq.osd.mil/dpap/ccap/cc/jcchb/#Checklists (containing training materials, checklists, policy documents, acquisition instructions, and contract clauses).

K. Money as a Weapon System Afghanistan (MAAWS-A) webpage, *located at* https://www.jagcnet.army.mil/Sites%5C%5Ccontractandfiscallaw.nsf/0/9A566BF0D10C631B85257B0100650290/$File/MAAWS-A%20-%20Feb%2012.pdf.

II. INTRODUCTION

A. General. The consistent combat and humanitarian operations of the 21st century 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:

"The process of obtaining goods, services, and construction via contracting means in support of contingency operations." JP 4-10, Part II-Terms and Definitions.

B. Legal Support to Operations. Doctrine covering legal support to operations provides that the Staff Judge Advocate's "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. 5-39. Specifically, judge advocates 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. 5-40; *see also* AFARS 5101.602-2-90 (describing contracting officers' use of legal counsel).

2. Pre-Deployment. Judge Advocates should take the lead in advocating for expeditionary contracting preparation. FM 1-04, para. 13-8. This begins with the Judge Advocate ensuring they receive the contract and fiscal law training necessary to succeed in their contingency mission. This also includes the judge advocate holding contract/fiscal law training for key personnel such as claims officers and logistics personnel; reviewing acquisition and logistics plans as part of the units' operation plan (OPLAN), and being 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, judge advocates with contract law experience or training should be assigned to division and corps-level main and tactical command posts, Theater Sustainment Command (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 Advocates or Deputy Command Judge Advocates for a Contract Support Brigade (CSB). These judge advocates 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. 1-14. Judge Advocates at sustainment brigades, theater sustainment brigades, and expeditionary sustainment brigades perform similar functions. FM 1-04, para. 5-41. Judge Advocates assigned to these and other contracting organizations should have contract and fiscal law training. *Id*.

5. Demonstrated Importance. After action reports (AAR) from Iraq and Afghanistan consistently indicate that judge advocates, including Brigade Judge Advocates, throughout both theaters—regardless of the position to which they are assigned—practiced fiscal law on a daily basis. These same AARs indicated that while most judge advocates encountered contract law issues less frequently, they needed an understanding of basic government contract law principles to intelligibly conduct fiscal law analyses. For judge advocates 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, paras. 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 Armed Conflict – Combat. The Law of Armed Conflict applies during combat operations and imposes limitations, for example, on the use of prisoners of war (POW) 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 Armed Conflict – Occupation. The Law of Armed Conflict 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. Judge advocates should ensure they have a current version of all international agreements applicable to their area of operations. 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 Security and Defense Cooperation Agreement (SDCA), also known as the Bilateral Security Agreement (BSA), executed between the United States and the Government of the Islamic Republic of Afghanistan (effective 1 January 2015) covers many of the duties and rights of the United States and its contractors operating in Afghanistan. The agreement states that the Government of the United States, its military and civilian personnel, contractors and contractor personnel "*shall not be liable to pay any tax or similar or related charges* assessed by the Government of Afghanistan…" (emphasis added). Obviously, 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. 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 details the use of simplified acquisition procedures (SAP). Approximately 95% of all contracting actions in contingency operations will use SAP, which are based primarily on acquisitions falling below a certain cost threshold. 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 cover 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 ($70,000) 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 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 $70,000 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. ATP 4-92, para. 1-40; *see also* JP 4-10, p. I-12.

2. Contract Authority. Premised on the U.S. Constitution, federal statutes, 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 his or her 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-13; ATP 4-92, para. 1-40.

B. Planning. The type of organization to which a judge advocate is assigned will dictate the degree to which they must become involved in planning for contract support. At a minimum, however, judge advocates 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-9. 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. ATP 4-92, para. 2-24.

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 to acquire and manage contracted support, the CMP is focused on government obligations under contracts to provide support to contractor personnel. JP 4-10, p. V-5.

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, paras. V-5 to V-6. 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. *Id*. To accomplish this task, the GCC should publish a CMP. JP 4-10, para. V-6.

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 the Defense Logistics Agency to incorporate these into

applicable contracts. JP 4-10, para. V-6 to V-8. 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. ATP 4-92, paras. 2-13 to 2-14.

e. The contracting officer, working with the requiring activity and the supporting command's SJA, determines contractor employee CAAF/non-CAAF status in all operations outside the US as early as possible in the contracting process. For many employees, determining their status is relatively simple; for others, it is not. The key to success is for the contracting officer to be familiar with and follow DOD contractor management policy, including applicable DFARS guidance and specific theater requirements. This determination should be made in close coordination with the command's SJA. JP 4-10, p.V-7.

f. 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 ch. 31, Contingency Contractor Personnel (updated frequently and available online at www.jagcnet.army.mil).

3. In a developed theater, judge advocates 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 at various levels and with varying levels of authority. AFARS 5101.603. The chief of a contracting office, also a contracting officer, may appoint field ordering

officers (FOOs) to conduct relatively low dollar value purchases. AFARS 5101.602-2-92. 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. Soldiers or DOD civilians known as paying agents (formerly known as Class A 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. 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 Materiel 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 an HCA. DFARS 202.101; AFARS 5101.692.

    c. See generally AFARS 5101.692 for a discussion on the responsibilities of HCAs.

2. Senior Contract Official (SCO). (previously known in the Army as the). 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; one for support to forces and one for reconstruction support. JP 4-10, para. I-2c(2) (17 Oct. 2008). Presently, CENTCOM Contracting Command (C3) has one SCO or PARC for Afghanistan.

    b. In the Army, SCOs were previously known as a Principal Assistants Responsible for Contracting (PARC). The 10 September 2019 AFARS update changed the term in AFARS 5101.693 PARC to SCO aligning the Army with much of the rest of the Executive branch. However, the term and title of PARC is still used throughout many contracting offices and by many Army regulations and doctrinal publications.

    c. HCAs appoint SCOs. AFARS 5101.692.

d. The SCO 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 do not require the HCA to perform personally (except when the HCA elects to exercise selected authorities). The SCO, by virtue of the organizational position occupied, may execute command functions for the contracting activity, however, these functions are separate and distinct from procurement authority. AFARS 5101.693(3).

(1) Example—The Commander of the Army Materiel Command (AMC) is an HCA. The HCA normally appoints each Contracting Support Brigade Commander as a SCO. ATP 4-92, para. 1-7.

3. Contracting Officer (KO). The government official (military officer, enlisted, or civilian) with the legal authority to enter into, administer, modify, and/or terminate contracts. JP 4-10, p. GL-6; *see also* FAR 1.602.

a. Appointed in writing through a warrant (Standard Form 1402) by the HCA or SCO/PARC. JP 4-10, p. I-7.

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 (TCOs). *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 (usually after nomination by the unit command). FAR 1.602-2(d). CORs do NOT exercise any contract authority and are used for communication regarding contract performance. *See* FAR 1.602-2(d). Any issues with the contractor must still be resolved by the KO. *See* DFARS 201.602-2; JP 4-10, p. I-6.

a. A properly trained COR shall be designated in writing prior to contract award. FAR 1.602-2(d), PGI 201.602-2, DoDI 5000.72, DoD COR HANDBOOK, March 22, 2012. 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. Local policies and mission specific orders may dictate additional responsibilities regarding CORs due to their importance for mission success. Many of these require the identification and training of CORs well in advance of deployment or mission execution.

(1) For example, see HQDA EXORD 048-10: Pre-Deployment Training for Contracting Officer's Representative and Commander's Emergency Response Program (CERP) Personnel, dated 5 Dec. 2009. This required brigades, brigade equivalents, and smaller units deploying in support of OEF or OIF to determine the number of CORs needed to meet theater contracting requirements no later than (NLT) 180 days before the latest arrival date (LAD), and then complete preliminary training for the identified CORs NLT 90 days before LAD. They would then require additional training from the KO upon appointment as a COR.

c. For more detailed information on COR responsibilities, *see* DEFENSE CONTINGENCY COR HANDBOOK, V2 (Sep. 2012); *see also* DFARS 201.602-2(2) and PGI 201.602-2.

5. Field Ordering Officer (FOO).

a. Service member or DOD civilian appointed in writing and trained by a contracting officer. AFARS 5101.602-2-92; 5101.603-1; 5101.603-3-90.

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 5101.602-2-92. FOOs may also be government purchase card holders. AFARS 5113.2. However, FOOs are still 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 5153.303-2.

d. AFARS 5101.602-2-92 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.

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 generally*, FM 1-06; *see also* DOD FMR, vol. 5, para. 020704 (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. I-9 and app. B. 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—a specific operation. JP 4-10, app. A, p. A-1. Of note, 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. I-9.

   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. *Id.*

      (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 (AMC). *See generally*, JP 4-

10, p. I-9. Only AMC has the authority to change the LOGCAP contract.

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 DLA Energy; 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, p. I-9.

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, p. I-9.

(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, app. E, p. E-2 to E-3. 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). *See generally*, ATP 4-92, ch. 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, p. IV-2.

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 commanders of each of six regionally focused contracting support brigades (CSB) are PARCs or SCOs. FM 4-92, p. 1-2. In turn, each brigade has a number of contingency contracting battalions, contingency contracting teams, and senior contingency contracting teams. *Id.* para. 1-7. CSB units are deployed as necessary to meet mission contracting requirements. *Id.* para. 1-8. Specifically, the CSB may be organized to provide Service component support to Army forces. *Id.*

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, p. IV-2 to IV-3.

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. *Id*.

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. *Id*.

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). ATP 4-92, p. 2-2.

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, p. E-7 to E-13. 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.*

c. Within the Army, the CSB may serve as the building block for the formation of a joint theater support contracting command. ATP 4-92, p. 3-3.

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. B, 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. ATP 4-92, p. 2-12.

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. *Id*.

6. Reachback Contracting. The National Defense Authorization Act for Fiscal Year 2012 granted the Under Secretary of Defense for Acquisition, Technology, and Logistics the power to designate a lead contracting activity for Operation Enduring Freedom and Operation New Dawn.

a. Army Contracting Command – Rock Island (ACC-RI) was designated in June 2012 as the Lead reach-back contracting authority by DOD.

b. ACC-RI directly contracts for theater requirements over $1M. ACC-RI provides support in Afghanistan to all services.

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 1-6; ATP 4-92, p. 2-13, FM 1-04, p. 13-1.

1. Requiring Activity. Units requesting the goods and services 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, p. III-18. Unit commanders and staff identify, develop, validate, prioritize, and approve requirements. ATP 4-92, p. 2-16.

   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. *Id.*; *see also* JP 4-10, app. C.

   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. JP 4-10, p. III-18. 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. Serves 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.

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, p. GL-6; *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. ATP 4-92, p. 1-10.

c. Responsible for appointing and training field ordering officers (FOO).

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, or electronic funds transfer. FM 1-06, p. 1-26.

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. ATP 4-92, p. 2-14. 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) (also known as base life support or base operations support) 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, ch. 4; *see also* ATP 4-92, para. 3-3.

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, p. III-6, GL-6. 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.

4. Joint Requirements Review Board (JRRB). JP 4-10, III-6.

   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 Deputy Commander or designated staff officer, with participation by the functional staff (to include judge advocates) 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. The role of theater support and external support contracting members is to inform the other JRRB 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 JRRB, the resource manager certifies funding and the packet is provided to a contracting activity.

g. Judge advocate should serve as an advisory (non-voting) member of the JRRB.

5. Joint Contracting Support Board (JCSB). JP 4-10, p. F-8.

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.

6. Legal Reviews. JP 4-10, p. III-15.
Judge Advocates supporting the commander exercising requirement approval authority should review contract support requirements for legal sufficiency. These legal reviews encompass funding sources and constraints, contracting methods, and associated issues. They also include operational and jurisdictional issues concerning HN Chapter III III-16 JP 4-10 agreements, security agreements, and other contractor personnel-related issues. Legal reviews should also address any statutory and regulatory issues, as well as any other pertinent issues (e.g., appropriateness of armed PSC support) that may not have a statutory or regulatory basis but do reflect appropriate judgment and analysis for the best decision.

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://www.acq.osd.mil/dpap/pacc/cc/policy.html#TBC

3. CENTCOM Contracting Command uses the TBC review process to ensure that contracting officers outside theater (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 June 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 nature 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 or she 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 applies when 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

[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 the 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).

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, 5153.303-4, and 5153.-303-5. 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 $700,000: the contracting officer.

b. Actions from $700,000 to $13.5 million: the competition advocate designated pursuant to FAR 6.501.

c. Actions from $13.5 million to $68 million (or $93 million for DOD, NASA, and the Coast Guard): the HCA or designee.

d. Actions above $68 million (or above $93 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 have included 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 a cyber, NBC, or radiological attack. Presently, the base thresholds and the increased contingency thresholds are as follows:

a. Simplified Acquisition Threshold - Generally. 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 million. 41 U.S.C. § 1903; FAR 2.101 (restating SAT and defining contingency operation). The SAT is $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.

b. Department of Defense (DOD) Simplified Acquisition Threshold. Notably, the Department of Defense recently increased its SAT to $250,000 as implemented by Class Deviation 2018-O0018, "Micro-Purchase Threshold, Simplified Acquisition Threshold, and Special Emergency Procurement Authority," dated 31 August 2018. For DOD purchases supporting a contingency operation but made (or awarded and performed) inside the United States, the SAT is now **$750,000**. For DOD purchases supporting a contingency operation made (awarded and performed) outside the United States, the SAT is **$1.5 million**. The SAT is **$500,000** when the DOD is soliciting or awarding contracts to be awarded and performed outside the United States to support a humanitarian or peacekeeping operation.

c. Micro-purchase threshold. The normal DOD "micro-purchase threshold," below which purchases may be made without competition, is **$10,000**. 10 U.S.C § 2338. For DOD purchases supporting a contingency operation but made (or awarded and performed) inside the United States, the micro-purchase threshold is **$20,000**. For DOD 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. These changes were implemented via Class Deviation

2018-O0018, "Micro-Purchase Threshold, Simplified Acquisition Threshold, and Special Emergency Procurement Authority," dated 31 August 2018.

d. Commercial items. Commercial Items (CI) may be procured using Simplified Acquisition Procedures (SAP) using increased thresholds. The normal CI SAP threshold is **$7,000,000**. For purchases supporting a declared contingency operation, or to defend or recover from a chemical, biological, radiological, nuclear (CBRN) or cyber attack, the threshold is **$13,000,000**. 41 U.S.C. § 1903; FAR 13.500(c).

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. Purchase Orders. 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 (pay agent). 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 approved by the Director for Financial Commerce, Office of the Deputy Chief financial Officer, Office of the Under Secretary of Defense (Comptroller). DFARS 213.305-3. Two exceptions to receiving approval at this level include overseas transactions at or below the micro-purchase threshold in support of a declared contingency operation, a humanitarian/peacekeeping operation, or a classified operation. DFARS 213.305-3.

b. 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 $25,000 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 (containing additional limitations on and requirements for 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. 10, ch. 23, para. 2305.

8. Commercial Items Acquisitions. FAR Part 12. Much of 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). Contracting officers 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 awardee 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 (ACSA) 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). These authorities permit acquisitions and transfers of specific categories of logistical support, supplies, and services (LSSS) 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 Public 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 $70,000 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., B-242019, Aug. 5, 1991, 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. *Id.*

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 https://ogc.osd.mil/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 (COFC) 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 (Pub. L. 112-81) authorized the HCA to restrict award, terminate contracts already awarded, or void contracts over $100,000 to contractors who directly or indirectly fund the insurgency or forces opposing the U.S. in the CENTCOM theater of operations. Section 831 of the FY14 NDAA (Pub. L. 113-66) carried forward the requirements of Section 841, lowered the contract threshold to $50,000, and expanded the law's scope to include the U.S. European Command, U.S. Africa Command, U.S. Southern Command, and U.S. Pacific Command. Section 831 is implemented through DFARS 252.225-7993, "Prohibition on Contracting with the Enemy (DEVIATION 2014-O0020)." Further, the CENTCOM Commander can use battlefield intelligence to make this determination and does not have to disclose that intelligence to the affected contractor.

2. Section 842 of the 2012 (Public Law 112-81) NDAA required the inclusion of a contract term for contracts covered by sections 841 and 842 that allowed 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 U.S. action in the CENTCOM AOR. *See* DFARS 252.225-7994 (DEVIATION 2014-O0020). Section 842(c) of the FY15 NDAA (Pub. L. 113-291) amended section 842(d) of the FY12 NDAA to also include that funds are not "(1) [s]ubject to extortion or corruption; or (2) Provided, directly or indirectly, to persons or entities

that are actively supporting an insurgency or otherwise actively opposing United States or coalition forces in a contingency operation." DFARS DEVIATION 2015-O0013**.**

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.

CHAPTER 31

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CHAPTER 31

CONTINGENCY CONTRACTOR PERSONNEL

I. INTRODUCTION

Throughout the history of U.S. military operations, the U.S. 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. In 2016, reports from DOD and the Congressional Research Service showed a contractor to Soldier ratio of 3:1 in Afghanistan and 2:1 in Iraq.[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. 225.371 [hereinafter DFARS]; U.S. Dep't of Defense, Defense Procedures, Guidance, and Information 225.371. [hereinafter DFARS PGI]; DFARS Class Deviation 2017-O0004, Contractor Personnel Performing in the United States Central Command Area of Responsibility, with its accompanying clause at DFARS 252.225-7995 (updated 15 Sept. 2017), available at https://www.acq.osd.mil/dpap/policy/policyvault/Class_Deviation_2017-O0004.pdf [hereinafter DFARS Class Deviation 2017-O0004].

B. U.S. Dep't of Defense, Instr. 3020.41, Operational Contract Support (31 Aug. 2018) [hereinafter DoDI 3020.41].

C. JOINT PUBLICATION 4-10, OPERATIONAL CONTRACT SUPPORT (4 Mar. 2019) [hereinafter JP 4-10].

D. 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 (31 Aug. 2018) [hereinafter DoDI 3020.50].

1. The DOD stopped reporting the number of U.S. military personnel in Afghanistan, Iraq and Syria in late 2017.

E. 32 CFR Part 153, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS (2013).

F. Defense Contingency Contracting Handbook Webpage, located at http://www.acq.osd.mil/dpap/ccap/cc/jcchb/index.html (containing an online handbook designed to provide essential information, tools, and training to help DOD Contingency Contracting Officers (CCOs) and other Operational Contract Support (OCS) staff meet the challenges they may face in contingency environments).

G. Contingency Contracting Resources, available at http://www.acq.osd.mil/dpap/pacc/cc/resources.html (containing links to materials relevant to contingency contracting; deployments; contingency contractor personnel; suggested contracting clauses; contingency contracting articles; etc.).

H. CENTCOM- Joint Theater Support Contracting Command (C-JTSCC) Information, located at http://www.acq.osd.mil/dpap/ccap/cc/jcchb/HTML/Topical/cjtscc.html (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 (24 Mar. 2017) [hereinafter AR 715-9].

J. U.S. Dep't Of Army, Reg. 700-137, Logistics Civil Augmentation Program (LOGCAP) (23 Mar. 2017) [hereinafter AR 700-137].

K. See Section XII below for additional references.

III. CATEGORIES OF CONTRACTORS

A. General.

1. The contract is the principle document for establishing the legal 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. <u>Types of contingency contractors</u>. 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 must 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. (DFARS 252.225-7995(c)(3))

B. Contractors Authorized to Accompany the Force (CAAF).

1. Contractors authorized to accompany the force (CAAF) may receive Government-furnished support commensurate with the operational situation in accordance with the terms and conditions of their contract. These contractors are imbedded in units, live in government housing on the compound or camp, and often perform duties 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.

2. Legal Status. CAAF personnel are neither combatants nor noncombatants. This means that CAAF are entitled to most protections afforded to noncombatants in addition to some protections afforded to combatants. For instance, if captured during international armed conflict, contractors with CAAF status are entitled to prisoner of war status. CAAF may not be legitimately targeted by enemy forces, but CAAF personnel could be exposed to risk of injury or death while supporting military operations. CAAF status does not apply to contractor personnel supporting domestic contingencies.

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 252.225-7995, Contractor Personnel Performing in the United States Central Command Area of Responsibility. 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 to the Government), 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. Medical or dental care beyond this standard can no longer be authorized via contract. (DFARS 252.225-7995(c)(2)).

(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. When armed for personal protection, contingency contractor personnel are only authorized to use force for individual self-defense. Unless immune from local laws or HN jurisdiction by virtue of an international agreement or international law, the contract shall include language advising contingency contractor personnel that the inappropriate use of force could subject them to U.S. and local or host nation (HN) prosecution and civil liability. DoDI 3020.41, Enclosure 2, para 4(e)(2).

5. To be considered a Prisoner of War if captured by the enemy, CAAF must carry a Geneva Conventions ID card identifying the individual as one authorized to accompany the force.

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 at the same location, or even alongside, DOD employees.

2. DFARS Class Deviation 2017-O0004, Contractor Personnel Performing in the United States Central Command (CENTCOM) Area of Responsibility (AOR), governs contractor personnel in a Designated Operational Area or

Supporting a Diplomatic or Consular Mission within the CENTCOM AOR, but who are not considered CAAF.

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 typically 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 and Liberia). 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.

E. Non-DOD Contractors in Contingency Environments.

Contractors of other government agencies, such as the Department of State, are governed by the FAR Section 25.301 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 issued 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 awarded CONUS to support operations overseas. Still others are issued 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.

These contracts are awarded by contracting organizations with a contracting authority not derived directly from theater support contracting HCAs or from systems support contracting authorities. External support contracts provide a variety of logistics and other noncombat-related services and supply support. External support contracts are illustrated by the services' CAP (Civil Augmentation Programs) contracts, including the Army LOGCAP, Air Force AFCAP, Navy GCCC and GCSC, DLA prime vendor contracts, and Navy fleet husbanding contracts. External support contracts normally include a mix of U.S. citizens, third-country nationals, and local national contractor employees. 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 Other Country National (OCN) personnel and local national personnel who are hired under a subcontract relationship of a prime external support contract.

C. System Support Contracts.

1. These contracts are awarded by a military department acquisition PMO (Program Management Office) that provides 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 support newly fielded weapons systems, including aircraft, land combat vehicles, and automated command and control systems. Systems support contracting, contract management, and program management authority reside with the military department systems materiel acquisition program offices. Support under systems support contracts is often designated as "essential contractor services" under the contract.

2. Systems support contractor employees, mostly U.S. citizens, provide support in garrison and often deploy with the force in both training and contingency operations. Much of a service component's equipment is maintained partially or fully through contracted logistics support. These are often U.S. Citizens and are considered CAAF in most cases.

D. Theater Support Contracts.

1. These contracts are awarded by contracting officers in the operational area, serving under the direct contracting authority of the service component, SOF command, or designated joint HCA for the specific contingency operation. During a contingency, theater support contracts are normally executed under expedited contracting authority and provide supplies, services, and construction from commercial sources that, in general, are in the operational area. Also important from the contractor

management perspective are the local national personnel who make up the bulk of the theater support contract employees.

2. Theater support contracting can be used to acquire support from commercial sources, similar to external support contract services. In addition, theater support contracting can be used to acquire commercially available supply items from local and global sources.

3. These contracts often rely on local nationals (LNs) or other country nationals (OCNs). These personnel 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 VIII.

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 laws and regulations.

B. Host Nation (HN) and Other-Country National (OCN) Laws.

1. Subject to international agreements, CAAF are subject to HN law and the law of their home country (OCN 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. The United States may have a lesser international agreement than a SOFA, such as Diplomatic Notes (as of 2019 the current US presence in Iraq is currently governed by such an exchange of Diplomatic Notes).

b. 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 international agreement, if any, that are applicable between the U.S. and the country of deployment at the time of deployment.

c. 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.

d. 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.

e. 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.

f. 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.

g. 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.

h. If there is any contradiction between a SOFA and an employer's contract, the terms of the SOFA will take precedence.

i. The following websites may help determine if the U.S. has a SOFA agreement with a particular country: https://www.jagcnet.army.mil/Sites/io.nsf/homeLibrary.xsp (CLAMO and Army NSL Document Library); 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 IX.

C. Afghanistan.

1. **US Contractors - Operation Resolute Support (Afghanistan)**.

a. Authority. United States relations with the Government of the Islamic Republic of Afghanistan (GIRoA) and immunities are discussed in the Security and Defense Cooperation Agreement Between the United States of America and the Islamic Republic of Afghanistan (SDCA). The agreement, also known as the Bilateral Security Agreement (BSA), entered into force on 1 January 2015.

b. U.S. Military and Civilian Personnel. Article 13 of the agreement provides "the United States shall have the exclusive right to exercise jurisdiction over [U.S. Military and Civilian Personnel] in respect of any criminal or civil offenses committed in the territory of Afghanistan." Members of the US military and civilian component "may not be arrested or detained by Afghan authorities for any reason" and "may not be surrendered to, or otherwise transferred to, the custody of an international tribunal or any other entity or state without the express consent of the United States."

c. Contractor Personnel. Article 13(6) states, "Afghanistan maintains the right to exercise jurisdiction over United States contractors and United States contractor employees." Article 17(3) states, "United States contractors shall not be liable to pay any tax or similar or related charges assessed by the Government of Afghanistan."

VI. ADMINISTRATIVE ACCOUNTABILITY AND PROCESSING

A. General. Combatant Commanders are responsible, with assistance from their Component Commanders, for visibility of all personnel within their AOR, including contractors.

B. The Synchronized Pre-deployment and Operational Tracker (SPOT).

1. All defense contractors awarded contracts that support contingency operations are required to register their employees in the SPOT system. DFARS 252.225-7995(g). Registration in SPOT is required in order to receive a Letter of Authorization (LOA). *See infra* Subpart III(A)(3) 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 information on contacts with more than 14 days of performance or valued at more than $100,000 in the database.

3. SPOT may be accessed at https://spot.dmdc.mil/.

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 252.225-7995(g), DFARS Class Deviation 2017-O004, and DFARS 225.301-4 (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 252.225-7995(e)(1)(ii), DFARS Class Deviation 2017-O004, and FAR 52.225-19 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 Sites (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 252.225-7995(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 and 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/non-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. 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. Support beyond resuscitative or emergency care, such as primary medical or dental care cannot be authorized under the terms of the contract. DFARS 252.225-7995(c)(2)(iii).

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 OCN 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 3002.01, 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 (ARS) 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.

2. The contracting officer shall include the level of protection to be provided to contractor personnel 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 force protection orders, directives, and instructions. However, only the Contracting Officer is authorized to modify the terms and conditions of the contract. (DFARS 252.225-7995(p)).

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, may authorize CAAF arming for *individual* self-defense.

2. The contractor's request shall be made through the Contracting Officer.

3. The contracting officer will notify the contractor what weapons and ammunition are authorized and the contractor will ensure its personnel are adequately trained, will adhere to all applicable combatant commander and local commander force protection policies, and understand that the use of force could subject them to U.S or host-nation prosecution and civil liability. DFARS 252.225-7995(j).

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)).

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 approved or denied by the Combatant Commander.

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 instruction 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 2017-O0004 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.

IX. COMMAND, CONTROL AND DISCIPLINE

A. Contractors in the Workplace. 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 primary vehicle establishing the legal 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 official with the authority to increase, decrease, or materially alter a contract scope of work or statement of objectives.

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: applicable U.S. and HN laws; applicable international agreements; applicable U.S. regulations, directives, instructions, policies, and procedures; orders, applicable 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. DoDI 3020.41, Enclosure 2, paragraph 4d(1).

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 the contracting officer to inquire whether the employer intends to take any disciplinary action against the employee.

c. Request that the contracting officer direct removal of the individual. However, Government may be liable if the employee successfully claims they were wrongfully terminated and that termination was based upon Government direction.

3. Contracting Officer Options. If permitted under the contract, 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 OCN law is discussed above in Section V.

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 (CAAF):

(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) OCNs 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 Department of States (DOS) should be notified of any potential investigation or arrest of an OCN.

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.

f. However, see *United States v. Ali*, 71 M.J. 256, No. 12-0008/AR (C.A.A.F. 2012) (where CAAF upheld the Court-Martial conviction of and jurisdiction over an Iraqi/Canadian citizen contractor for attacking a fellow translator in Iraq) and, *United States v. Brehm*, __ F.3d __, No. 11-4755 (4th Cir. Aug. 10, 2012) (http://www.ca4.uscourts.gov/Opinions/Published/114755.P.pdf (where the 4th Circuit upheld the MEJA prosecution of a foreign national for an offense against another foreign national based on his status as a military contract employee).

X. OTHER CONTINGENCY CONTRACTOR ISSUES

A. Working Conditions.

1. 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.

2. 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 Subsection 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 U.S. Government 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. The statute does not focus on fault.

4. War Hazards Compensation Act (WHCA) 42 U.S.C. §§ 1701-17, FAR 28.309 and 52.228-4, DFARS 228.370(a) and 252.228-7000. 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. The rationale behind this policy is that 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.

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. COMBATING TRAFFICKING IN PERSONS

A. Policy. U.S. Government is committed to proactively prevent trafficking in persons and ensuring our contractors and subcontracts do as well. 22 USC § 7101 et. seq.

1. FAR Subpart 22.17 and 52.222-50 have been revised to reflect this Government priority.

2. DOD established a Task Force to Combat Trafficking in Persons involving senior personnel from all Services, AAFES, DLA and other organizations.

3. DOS releases a *Trafficking in Persons Report* each June.

4. DFARS Procedures, Guidance, and Information 222.1703 applies to contracts outside the United States.

B. 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. CENTCOM requires contractor personnel be provided square footage equivalent to an E1 in government-furnished facilities. Previously, CENTCOM required 50 sq. ft. of living space for contractor employees in government furnished facilities. (CENTCOM Clause 5152.222-5900, revised March 2014)

3. Contractors are still required to provide 50 sq. ft. in contractor-provided facilities within the CENTCOM AOR.

C. Passports.

1. Contractors may not knowingly destroy, conceal, remove, confiscate, or possess any passport or similar document in order to maintain the employment of any person (18 USC § 1592).

2. Contractors shall only hold an employee's passport or other identification documents for the shortest period of time reasonable for administrative processing purposes.

D. Native Language.

1. Employees must be provided a signed copy of their employment contract in both English *and* their native language.

2. Contractors should have informational posters in their employees' native languages regarding reporting Trafficking in Person violations and hotlines with native speakers.

XII. 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. Department of the Army Regulation Security Assistance and International Logistics Series
    a. AR 12-1 (Security Assistance, Training, and Export Policy)
    b. AR 12-7 (Security Assistance Teams)
    c. AR 12-15 (Joint Security Cooperation Education and Training)
7. ATP 4-92 (FM 4-92) (Contracting Support to Unified Land Operations)
8. DoDI 4161.02 (Accountability and Management of Government Contract Property).
9. DoDI 1000.01 (Identification Cards Required by the Geneva Convention).
10. DoDI 1100.22 (Policies and Procedures for Determining Workforce Mix).
11. DoDD 5000.01 (The Defense Acquisition System).
12. DoDD 3025.14 (Evacuation of U.S. Citizens and Designated Aliens from Threatened Areas Abroad).
13. Joint Pub 1-0, Joint Personnel Support.
14. Joint Pub 4-0, Joint Logistics.
15. Joint Pub 4-10, Operational Contract Support.
16. AMC Pamphlet, 690-10. AMC Civilian Deployment Guide. 16 July 2016.
17. Defense Contingency Contracting Officer's Representative Handbook (Sep. 2012), *available at* http://www.acq.osd.mil/dpap/ccap/cc/corhb/index.html.
18. Under Secretary of Defense, Acquisition, Technology, and Logistics and Defense Procurement and Acquisition Policy, Defense Contingency

Contracting Handbook: Essential Tools, Information, and Training to Meet Contingency Contracting Needs for the 21st Century (Oct. 2012).

XIII. CONCLUSION

During Contingency Operations, the U.S. Military will continue to use 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

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, 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].

D. U.S. DEP'T OF DEFENSE, INSTR. 4105.67, NONAPPROPRIATED FUND (NAF) PROCUREMENT POLICY AND PROCEDURE (1 December 2017 [hereinafter DODI 4105.67].

E. U.S. DEP'T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, vol. 13, *available at* https://comptroller.defense.gov/FMR.aspx[hereinafter DOD FMR] (discussing nonappropriated funds policy and procedures).

F. 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, MILITARY MORALE, WELFARE, AND RECREATION PROGRAMS 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 (30 August 2019), 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); 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.

G. 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 MWR 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 MWR 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. 010211; 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. 010212; 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 to also be designated as NAF contracting officers.[1] The authority of these contracting officers is limited by their warrant. AR 215-4,

[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.

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. The Commanding General, Installation Management Command (IMCOM) is 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. The FMWRC Commander was responsible for implementing NAF contracting policies and procedures, establishing clear lines of authority and accountability, and had authority to grant warrants to contracting officers at any dollar level. AR 215-4, para. 1-8.

b. FMWRC was deactivated as a command on 3 June 2011. The IMCOM G-9 is now responsible for delivering Family and Morale, Welfare, and Recreation programs and services. AR 215-4 has not yet been updated to reflect the deactivation of FMWRC and the shift of responsibility to IMCOM G-9.

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.

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 ($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)*, 2-12, 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 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 of individuals authorized to make such purposes.[3] AR 215-4, para. 2-24.

7. Ratification actions. AR 215-4, para. 1-16.

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[2] Although the Simplified Acquisition under the FAR is currently $250,000, AR 215-4, para. 3-3, states that the simplified acquisition threshold for NAF contracting is $100,000.

[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.

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. If 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.

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. Written Acquisition Plans are 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*(3).

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 ($100,000 for NAF contracting), [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.

3. Sealed Bidding. AR 215-4, Chapter 5. Sealed bidding may be used only in limited circumstances. See VIII.D below.

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 and 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.

[4] Although the Simplified Acquisition Threshold under the FAR is currently $250,000, AR 215-4, para. 3-3, states the simplified acquisition threshold is $100,000.

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. Contracts cannot 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 beta.sam.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, 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. 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. 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[5], 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, IMCOM,[6] 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

[5] AR 215-4 states "CG, FMWRC" vice CG, IMCOM." FMWRC deactivated in 2011 and FMWR functions now fall under IMCOM G9. AR 215-4 has not been updated to reflect this shift in responsibilities but it is reasonable to read the authorities provided to the CG, FMWRC in AR 215-4 to now reside with the CG, IMCOM.

[6] See Note 5, supra.

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 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).[7] Note, however, that:

a. There is no statutory definition of "other agreements".

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. The authority in 10 U.S.C. §2492 is limited to agreements in support of MWR services and does not allow the Government to consolidate MWR services with mission essential services and rely upon 10 U.S.C. §2492 to avoid competition and FAR contracting requirements. *See Asiel Enterprises, Inc.*, B-406780, 406836, 2012 CPD ¶ 242 (August 28, 2012) (Asiel I) and *Asiel Enterprises, Inc.*, B-408315.2, 2013 CPD ¶ 205 (September 5, 2013) (Asiel II).

d. 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).

e. AR 215-1, para. 13-12*c*(2) specifically authorizes the use of APF Government Purchase Cards at NAFIs, including AAFES, up to

[7] 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*.

$2,500[8] provided the Government rotates purchases among available vendors.

VIII. ACQUISITION METHODS

A. DOD Policy. DODI 4105.67, paras. 3b and Enclosure 2, para. 4c, 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.

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;

[8] It is unclear why AR 215-1, limits the GPC threshold to $2,500. The current micro-purchase threshold for DoD is $10,000.

(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 the 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. 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 are permissible. The NAFI, not the contractor, exercises options. Options should not be used in some situations, such as when supplies or services are readily available on the open market, the option will cause the contractor to incur undue risk, or market prices are likely to change substantially. AR 215-4, para. 4-3*a*(2).

(2) Delivery and performance time must be realistic and stated in all contracts.

(3) Quality assurance. Appropriate inspection, acceptance, and warranty requirements must be included.

(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 (prior to receipt of proposals) 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 can only be considered in limited circumstances. AR 215-4, para. 4-11*b*(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 must 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) Cannot reveal names of other offerors.

(c) Cannot reveal another offeror's technical solution or any other information that would compromise an offeror's intellectual property.

(d) Cannot reveal another offeror's 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) Cannot reveal the names of individuals providing reference information about an offeror's past performance.

g. Proposal Revisions must be requested at the conclusion of discussions. AR 215-4, para. 4-15.

h. Contract award and Debriefing Offerors. AR 215-4, paras. 4-18 through 4-20. All unsuccessful offerors, upon request, will be debriefed. Guidance on what will and will not be included in the debrief is set out in AR 215-4, para 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.

(4) Protests prior to award. Award will 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 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 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 with notice of appeal rights to the office issuing the contract.

(8) Appeals. Appellate authority must seek legal advice before deciding appeal. Appeal decision is final.

(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 can be used only if all of the following apply:

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. Bids submitted late will not be considered unless an exception set out in AR 215-4, para 5-12*c* applies. AR 215-4, para. 5-12.

c. Amendment and cancellation of bids. AR 215-4, paras. 5-10, 5-11.

d. Mistakes. AR 215-4, paras. 5-16 and 5-18.

e. 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.

f. 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.

g. 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 – signed by the contracting officer only and used to:

a. Make administrative changes;

b. Issue change orders under the changes clause;

c. Make changes authorized by other contract clause (e.g. option clause); and

d. Issue termination notices.

2. Bilateral (also called supplemental agreements) – require mutual consent and signature by both parties and are used to:

a. Make negotiated equitable adjustments resulting from a change order under the changes clause or a constructive change; and

b. Document other within scope agreements of the parties that change the terms of the 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 with the COR's authority and limitations set out in the appointment memo. A 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), if appointed, must be appointed in writing and must be warranted contracting officers in their own right.

3. Ordering Officers, if appointed, must be appointed in writing. Ordering officers 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 or Delivery 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 – can be used in response to contractor's acutal or anticipated failure to perform, but should only be used after careful review of the situation.

a. Cure notice. Typically required by the default clause and issued 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*.[9] 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. 9-3*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.

[9] *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 and *Parsons Evergreene, LLC*, ASBCA No. 58634, 18-1 BCA ¶ 37,137.9, in which the ASBCA relied upon *Slattery* to find that it had CDA jurisdiction over NAFI contracts.). *Parsons* has been appealed to the Court of Appeals for the Federal Circuit (Appeal No. 19-1931).

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.

d. Processing Appeals. Contractor will forward notice of appeal without comment, together with envelope showing postmark, to relevant higher headquarters 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 servicing 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 Army Legal Services Agency, 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,[10] 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 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 Armed Forces Recreation Center, Army Recreation Machine Program, or designee, must determine that the requirement is

[10] 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).

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 IMCOM risk management office 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 by the concessionaire;

   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 Army Recreation Machine Program). 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.beta.sam.gov 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.[11]

[11] 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."

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 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. Acquisition of Information Technology Requirements. AR 215-4, para. 7-11.

L. Construction and Architect-Engineer (A-E) Contracts. AR 215-4, Chapter. 8.

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 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~~. Although listed in AR 215-4, this DoD Directive is no longer effective.

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 Joint Ethics Regulation 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.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 for determining whether an entity is a NAFI (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).[12]

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.

[12] 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.

(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. COFC held in *AINS* that the it 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 Abrogates *AINS*:

(1) In *Slattery v United States*, 635 F.3d 1298 (C.A.F.C. 2011), the *en banc* Federal Circuit abrogated *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.

d. The Armed Services Board of Contract Appeals (ASBCA) has applied to rationale of *Slattery* to hold that the ASBCA has jurisdiction over CDA appeals of NAFI contracts. *Parsons Evergreene, LLC*, ASBCA No. 58634, 18-1 BCA ¶ 37,137 (appeal docketed at the Court of Appeals for the Federal Circuit, Appeal No. 19-1931).[13] See also, *Club Car, Inc.*, ASBCA No. 61710, 20-1 BCA ¶ 37,493 (stating that the Army MWF Fund is a NAFI and that the Board has jurisdiction pursuant to the CDA and citing to *Parsons* without further discussion of jurisdiction). Prior to *Parsons Evergeene*, the ASBCA only had jurisdiction over NAFI contract disputes if:

(1) The contract incorporated a disputes clause that granted such jurisdiction. *COVCO Hawaii Corp.*, ASBCA No. 26901, 83-2 BCA ¶ 16,554;

(2) The contract did not contain a disputes clause, but DOD regulations required incorporation of a jurisdiction-granting clause in the NAF contract. *Recreational Enters.*, ASBCA No. 32176, 87-1 BCA ¶ 19,675;

(3) The contractor sought non-monetary, declaratory judgment. *See SUFI Network Services, Inc.*, ASBCA No. 54503, 04-01 BCA ¶ 32,606; or

(4) The ASBCA was reviewing breach of contract claims under the Tucker Act rather than the CDA. *See SUFI Network Servs., Inc. v. United States*, (102 Fed. Cl. 656 (2012) (applying *Slattery* holding to ASBCA).

3. 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).

[13] In *Parsons Evergreene*, the ASBCA stated that its decision was not inconsistent with the Federal Circuit decision in *Minisen Co. v. McHugh*, 671 F.3d 1332 (C.A. Fed., 2012) because the CAFC did not directly address the issue of application of the NAFI Doctrine (the doctrine, based on Federal Circuit precedent, that the CDA did not grant the COFC or Boards of Contract Appeals jurisdiction over matters involving NAFIs).

4. 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

I. INTRODUCTION

II. REFERENCES

A. 10 U.S.C. § 9013(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, Military Morale Welfare, and Recreation (MWR) Programs (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 Policy (7 Dec 2005).

4. DODI 4105.67, Nonappropriated Fund Procurement Policy and Procedure (26 Feb 2014).

5. DoD Financial Management Regulation, Volume 13, Nonappropriated Funds Policy (Jun 2019).

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 32-1020, Planning and Programming Built Infrastructure Projects (19 Dec 2019);

2. 34 Series: AFPD 34-1, Air Force Services (11 Oct 2018); AFI 34-108, Commercial Sponsorship and Sale of Advertising (21 Aug 2018); AFI 34-201, Use of Nonappropriated Funds (28 Sept 2018); AFI 34-202, Protecting Nonappropriated Fund Assets (22 Dec 2015); AFI 34-205, Services Nonappropriated Fund Facility Projects (18 Oct 2018); AFI 34-275, Air Force Nonappropriated

Fund Government Purchase Card Program (23 June 2011); AFMAN 34-208, Nonappropriated Fund Property and Liability Program (18 Sep 2018); AFMAN 34-209, Nonappropriated Fund Financial Management and Accounting (2 Oct 2019);

3. 64 Series: AFMAN 64-302, Nonappropriated Fund (NAF) Contracting Procedures (26 Sep 2019); and

4. 65 Series: AFI 65-107, Nonappropriated Funds Financial Management Oversight Responsibilities (13 Jun 2018).

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. § 9013(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.

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. 3.12.

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. 3.13.

C. Contracting Officers. The Air Force has three different offices responsible for NAF contracting - the installation NAF contracting office, the Directorate of NAF Purchasing, 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 $10,000 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. 3.2, 3.6 and 3.7.

b. Additional limits on a NAF contracting officer's authority to contract. AFMAN 64-302, para. 3.9.

(1) Non-personal services, interior design service, and concessionaire contracts for services: The NAF contracting officer may obligate up to $2,500 when the Service Contract Labor Standards 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.). AFMAN 64-302, para. 3.4.3.

(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 $5,000. AFMAN 64-302, paras. 3.8.2.3 and 9.2.1. 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 Construction Wage Rate Requirements applies (all 50 states, the District of Columbia and U.S. territories). AFMAN 64-302, para 3.4.2.

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), *is unlimited*, subject to fund availability. AFMAN 64-302, para 3.3.

2. The Directorate of NAF Purchasing, Air Force Services Activity. The directorate formulates and oversees NAF contracting procedures throughout the Air Force. *See* AFMAN 64-302, para 1.2.2. The directorate has many responsibilities, including:

a. Managing the Commander's Smart Buy Program (a cooperative purchasing program between AFNAFPO and base level NAF activities).

b. Providing NAF contract training and issuing NAF contracting warrants.

c. Approving ratification actions above base level thresholds.

d. Requesting qualified sources evaluate contracting processes and actions.

e. Providing support for NAF requirements exceeding base level warrant authorization.

f. Representing the Air Force on the DOD subcommittee for NAF contracting.

g. Awarding contracts exceeding the authority of the base level 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. 1.2.7.

c. The SCO purchases all NAF requirements other than those specifically assigned to the AFNAFPO or the NAF contracting officer. AFMAN 64-302, para. 1.2.7.2. 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. 1.2.8. 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:

1. Determine whether NAF contracting actions comply with AFMAN 64-302 and AFPD 64-1.

2. Determine whether proposed ratifications are legally sufficient.

3. Determine whether a proposed resolution of a contract dispute is legally supportable.

4. Determine the legal sufficiency of proposed contracting actions.

5. Provide advice on potential organizational conflicts of interest.

6. Provide advice on resolution of protests.

7. Provide legal advice on 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 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. 6.1.. 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.

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. 5.1.7.

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 Labor Standards Act, then the performance period is restricted to 5 years.

2. If the contract is *not* subject to SCA, the maximum time for the contract is limited to 10 years. For AFNAFPO issued contracts that exceed 10 years, the Contracting Officer must provide a written determination that demonstrates the extended performance is in the best interest of the NAFI and be approved by the Director of NAF Purchasing. .

3. 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 for acquiring construction is based on standard commercial practices. 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 $10,000 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 $10,000 and up to $150,000. At least two sources must be solicited. AFMAN 64-302, para. 6.6.2.

D. Purchases exceeding $150,000. 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. 6.6.3.

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 AbilityOne Procurement List. AFMAN 64-302, para. 6.4.1.

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. 6.4.2.

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. 6.13.

5. 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 (Applies to AFNAFPO Only). AFMAN 64-302, para. 8.2.

1. Not required for NAF purchases.

2. NAF contracting officers *may* 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 *must* be used for open market purchases exceeding $150,000.

H. Source Selection (Applies to AFNAFPO Only). AFMAN 64-302, para. 8.3.

1. Source selections require written proposals. Contract award will be made to the offeror whose proposal represents the best value to the NAFI. The source selection approach and evaluation factors are specific to each acquisition and the Contracting Officer will ensure they are identified in the solicitation. AFMAN 64-302, para. 8.3.

2. When using source selection procedures, the Contracting Officer will identify the evaluation factors in the solicitation with their order of importance in selecting an offer for award. AFMAN 64-302, para. 8.3.1.

3. The Contracting Officer will document the source selection decision with the rationale for making award to a particular contractor. AFMAN 64-302, para. 8.3.2.

I. Responsibility. Before award of any contract, the contracting officer must determine the responsibility of the prospective awardee, using the responsibility standards in 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. 8.4.

VII. ACQUISITION METHODS

A. DOD Policy. DoDI 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. AFMAN 64-302, para. 8.6.4.

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. AFMAN 64-302, para. 9.2.

2. NAF P-Card may be used to purchase supplies, equipment, and non-personal services. Individual transactions may not exceed $10,000, except purchases enumerated, which include those 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. 9.2.1.

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. 9.2.2.

4. AFMAN 64-302, para. 9.2.3, 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, and firearms. There is an exception for purchasing ammunition and firearms for resale in Rod & Gun Clubs and skeet ranges if authorized by local law.

e. Items designated for purchase with APFs.

f. Any goods or services requiring modification to Air Force real property without Base Civil Engineer approval.

E. Purchase Order. AFMAN 64-302, para 8.6.1.

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. Contracts 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 Force use of NAFI to provide mission essential food service supported with entirely appropriated funds sustained).

2. Court of Federal Claims (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 protestor has **10 calendar days** to appeal a protest decision from the date of a decision to appeal to Deputy Assistant Secretary (Contracting). AFMAN 64-302, paras. 12.5.4. and 12.5.5.

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. The Director of NAF Purchasing is the decision authority on appeals. AFMAN 64-302, para. 12.5.6.

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); *Commercial Offset Printers, Inc.*, ASBCA No. 25302, 81-1 BCA ¶ 14,900.

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[1] In *Southern Foods*, 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 the COFC may not exercise jurisdiction if a NAFI meets the following: (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*.

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. In *AINS*, COFC held it 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)

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. *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 Court of Appeals for the Federal Circuit 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. 1.3.

B. Key Players

1. Headquarters Air Force Director of Services (HQ USAF/A1S): Approves or disapproves any requests for sponsor corporate advertising benefits. AFI 34-108, para. 1.6.1

2. Air Force Installation and Mission Support Center Commander will approve and/or disapprove sponsorship requests in support of installation morale, welfare and recreation programs and events, and the Air Force Central Morale, Welfare and Recreation Nonappropriated Fund Instrumentality in accordance with approval authorities designated in AFI 34-201. AFI 34-108, para. 1.6.2.

3. Installation Commanders: Control the commercial sponsorship program at the installation-level and approves and/or disapprove commercial sponsorship in support of installation morale, welfare and recreation programs and events in accordance with approval authorities designated in AFI 34-201. AFI 34-108, para. 1.6.5.1.

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. 2.6.

   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. 2.5.

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. The MWR elements of Services may <u>not</u> solicit sponsorship from alcohol companies or military divisions of defense contractors under any circumstances. However, these companies may be allowed to provide unsolicited sponsorship at the discretion of the commanding authority. AFI 34-108, para. 2.5.2.2.

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. 2.15.

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.

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CHAPTER 33

CONTRACT LAW RESEARCH

I. INTRODUCTION

A. Government procurement law involves a complex amalgam of statutes, regulations, policies, and judicial and administrative decisions that date back to the mid-nineteenth century.

B. The purpose of the chapter is to identify relevant resources and explain research concepts and strategies in order to assist individuals conducting research on the issues involved in government contract law.

II. STATUTES

A. Armed Services Procurement Act of 1947 (ASPA), Pub. L. No. 413, 62 STAT. 21 (1948)

1. Legislative History

a. H.R. Rep. No. 571 (1947)

b. *Armed Services Procurement Act of 1947: Hearing on H.R. 1366 Before the S. Comm. on Armed Services,* 80th Cong. (1947)

2. The ASPA was a basic procurement statute.

3. The ASPA applied to all purchases and contracts for supplies and services by the Department of the Army, Department of the Navy, Department of the Air Force, the United States Coast Guard, and the National Advisory Committee for Aeronautics.

4. The ASPA was repealed in 1956 when Title 10 of the U.S. Code was enacted into positive law. However, much of its content was codified at 10 U.S.C. §§2301-2314 in the newly enacted Title 10. Since the ASPA was repealed, references to the ASPA should be considered references to the corresponding provisions in Title 10 and other statutes.

B. Federal Property and Administrative Service Act of 1949 (FPASA), Pub. L. No. 152, 63 STAT. 377

1. Legislative History

   a. H.R. Rep. No. 670 (1949)

   b. H.R. Rep. No. 935 (1949)

2. The FPASA is a basic procurement statute.

3. The FPASA created the General Services Administration (GSA).

4. The FPASA applies to the GSA and any other executive agency that does not fall under the ASPA.

5. The procurement provisions of the FPASA are currently codified at multiple sections of Title 41 such as §§3101 -3106, §4103, and §§4501-4506.

C. Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, 98 STAT. 1175-1203

1. The CICA consisted of §§2701– 2753 of Title VII, Division B- Spending Reduction Act of 1984 within the Deficit Reduction Act of 1984.

2. Most significantly, the CICA amended FPASA sections on competition[1], required agencies to establish a "competition advocate" to review procurement activities and challenge those that limit competition, and modified protest procedures[2].

3. Various provisions of the CICA (as amended) are currently codified at 41 U.S.C. §3301, §§3303-3306 (competition provisions) and 31 U.S.C. §§3551-3556 (protest provisions).

D. Contract Disputes Act of 1978 (CDA), Pub. L. No. 95-563, 92 STAT. 2383 (codified at 41 U.S.C. §§ 7101-7109)

1. Legislative History

   a. H.R. Rep. No. 95-1556 (1978)

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[1] *See generally* Kate M. Manuel, Competition in Federal Contracting: An Overview of the Legal Requirements, CRS Report R40516, (June 30, 2011), https://www.hsdl.org/?view&did=682290.

[2] *See generally* Kate M. Manuel and Moshe Schwartz, GAO Bid Protests: An Overview of Time Frames and Procedures, CRS Report R40228 (December 2, 2014), https://www.fas.org/sgp/crs/misc/R40228.pdf; Office of General Counsel, United States Government Accountability Office, Bid Protests at GAO: A Descriptive Guide (10th ed. May 2018), GAO-18-510SP, https://www.gao.gov/assets/700/691596.pdf .

b. S. Rep. No. 95-1118 (1978)

c. *Contract Disputes Act of 1978*, Hearings on S. 2292, S. 2787, and S. 3178 Before the Subcomm. on Federal Spending Practices and Open Government of the S. Comm. on Governmental Affairs and the Subcomm. on Citizens and Shareholders Rights and Remedies of the S. Comm. on the Judiciary, 95th Cong. (1978).

2. Significant provisions included authorization to create boards of contracts appeals within agencies, authorization to pay claims against the Government filed under this Act, and the right to appeal decisions of contracting officers directly to the U.S. Court of Claims.

E. Clean Contracting Act of 2008, Pub. L. No. 110-417, 122 STAT. 4546

1. The Clean Contracting Act consists of §§861-874 of Subtitle G, Title VIII, Division A of the National Defense Authorization Act for Fiscal Year 2009.

2. Significant provisions include provisions placing limits on the length of sole source contracts entered to on the basis of urgent and compelling need, requiring the FAR to address the use of cost-reimbursement contracts and the appropriate use of award and incentive fees in federal acquisition programs, and establishing a database for federal contracting officers containing information on the legal history and the performance of contractors relevant to evaluating past performance of the contractor prior to issuing new contracts.

3. The Clean Contracting Act (as amended) is currently codified in multiple locations including 41 U.S.C. §1704, §2311, §2313, §3302, §3304, §3906, and §§4710-4711.

F. Federal Acquisitions Streamlining Act of 1994, Pub. L. No. 103-355, 108 STAT. 3243

1. Legislative History

a. S. Rpt. No. 103-258 (1994)

b. S. Rpt. No. 103-259 (1994)

c. H.R. Rpt. No. 103-712 (1994)

d. *S. 1587, Federal Acquisition Streamlining Act of 1993*, Hearings on S. 1587 Before the S. Comm. on Governmental Affairs and the S. Comm. on Armed Services, 103rd Cong. (1994).

2. Significant provisions in this Act include provisions indicating a clear preference for the purchase and use of commercial items, requiring uniformity between agencies in the procurement process when feasible, and requiring agencies to provide contractors more detailed information regarding the factors utilized when evaluating bids submitted by contractors.

3. The Federal Acquisition Streamlining Act (as amended) is currently codified in various sections of the U.S. Code including 10 U.S.C.§§2302a-2302b, §2304a-2304d, §2410, §2374, and §§2375-2377.

G. Office of Federal Procurement Policy Act, Pub. L. No. 93-400, 88 STAT. 796 (1974)

1. Legislative History

a. S. Rep. No. 93-692 (1974)

b. H.R. Rep. No. 93-1268 (1974)

c. H.R. Rep. No. 93-1176 (1974)

d. *Establishing Office of Federal Procurement Policy*, Hearings on S. 2198 and S. 2510 Before the Ad Hoc Subcomm. On Federal Procurement of the S. Comm. on Government Operations, 93rd Cong. (1973).

e. *Office of Federal Procurement Policy*, Hearings on H.R. 9059 Before a Subcomm. of the H. Comm. on Government Operations, 93rd Cong. (1973).

2. This Act created the Office of Federal Procurement Policy within the Office of Management and Budget (OMB) to provide overall direction for procurement policy, regulations, procedures, and forms.

3. The Office of Federal Procurement Policy Act (as amended) is currently codified in numerous sections of Title 41 of the U.S. Code including §§102-105, §§107-116, §§1501-1506, §§1701-1703, and §§2305-2310.

H. Equal Access To Justice Act (EAJA), Pub. L. No. 96-481, 94 STAT. 2325 (1980)

1. Legislative History

   a. S. Rep. No. 96-253 (1979)

   b. H.R. Rep. No. 96-1418 (1980)

   c. H.R. Rep. No. 96-1005, Part 1 (1980)

   d. *Equal Access to Justice Act of 1979, S. 265*, Hearings on S. 265 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary, 96th Cong. (1979).

   e. *Award of Attorney's Fee Against the Federal Government*, Hearings on S. 265 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary, 96th Cong. (1980).

   f. *Judicial Access/Court Costs-H.R. 5103 and H.R. 6429*, Hearings Before the Subcomm. on SBA and SBIC Authority and General Small Business Problems of the H. Comm. on Small Business, 96th Cong. (1980).

2. The EAJA requires the Government to pay attorney's fees, in an adversarial proceeding, if the prevailing party is a small business and the adjudicative officer finds that the Government's position was not substantially justified.

3. A later amendment to the EAJA included in the definition of "adversary adjudication" decisions made by a contracting officer that have been appealed before an agency board of contract appeals (Armed Services Board of Contract Appeals (ASBCA), the Civilian Board of Contract Appeals (CBCA), etc.).[3]

4. The EAJA (as amended) is currently codified at 5 U.S.C. §504.

III. STATUTORY RESEARCH.

A. The Legislative Process

1. As legislation is introduced in either the Senate or the House of Representatives, the legislation is assigned a bill number ("S" for Senate, "H.R." for House). Using the bill number, the progress of the bill can be tracked through the legislative process.

[3] Pub. L. No. 111-350, 124 STAT. 3677 at 3841 (2011).

2. A bill that has passed both the Senate and the House is known as an enrolled bill (ENR). This version of the bill is sent to the President for his or her signature.

3. If the President signs the bill, the bill is assigned a public law number (PL or Pub. L. No.). A public law number has two components: 1) the session of Congress in which the law was passed; and 2) the sequential number in which the bill was passed. For example, PL 103-56 signifies that this law was the 56th law enacted during the 103rd Congress.

4. Public laws are published in the *Statutes at Large*. You can also find the text of Public Laws at https://congress.gov.

5. The first page of a public law will include the bill number of the bill upon which the public law is based and a citation to where the public law is located in the *Statutes of Large*.

6. Public laws that are general and permanent in nature are codified in the *United States Code*. Public laws that are not general and permanent in nature include appropriation bills. The Office of the Law Revision Counsel maintains the Code, and it is available at: https://uscode.house.gov. The website has a variety of helpful resources to find and interpret the Code.

7. The status of current and past Appropriations Acts can be found in an easy to digest tabular format at: https://crsreports.congress.gov/AppropriationsStatusTable.

B. Legislative History

1. Legislative history refers to the history of a bill as it progresses through the legislative process.

2. During the legislative process, documents are generated that give insight into the purpose of the bill and why members of Congress do or do not support it. This insight is known as legislative intent and is the primary reason for compiling a legislative history.

3. Good sources for discerning legislative intent are the reports published by the various committees assigned the task of studying the bill, transcripts of the hearings conducted by these committees, and the comments made by members of Congress that are inserted in the *Congressional Record*.

4. Legislative history materials for public laws passed since the 104th Congress (1995-1996) can be found in the Federal Digital System (FDsys) at the website of the Government Printing Office. Legislative history materials can also be found in WestlawNext and LexisNexis Advance attached to the corresponding public laws.

5. The *United States Code Congressional and Administrative News* (U.S.S.C.A.N.), a West print publication, includes selected Senate and House committee reports.

6. For legislative history materials for legislation enacted prior to 1995, refer to a research guide on federal legislative history or contact a law librarian for assistance.[4]

C. Locating Cases That Interpret Statutes

1. The *United States Code Annotated*, published by the West, and the *United States Code Service*, published by LexisNexis, identify cases that both cite specific statutory provisions and interpret these provisions.

2. Due to the often considerable lag time between the passage of a law and the appearance of interpretative materials in the form of treatises and law review articles, practitioner-oriented or current awareness sources, which are updated frequently, are good sources for identifying pending and decided cases that deal with statutes.

IV. REGULATIONS

A. The Regulatory Process

1. Congress, by legislation, delegates to agencies the authority to pass regulations on activities within the agency's jurisdiction. Additionally, Congress often directs agencies to promulgate regulations on specific topics. Because of this delegation, all regulations can be traced back to a grant of authority from Congress.

2. The Administrative Procedures Act (APA), 5 U.S.C. §§551-559, governs the process by which agencies promulgate regulations.

3. All proposed and final rules are published in the *Federal Register*.

4. Regulations of a general and permanent nature are codified in the *Code of Federal Regulations* (C.F.R.).

[4] An example of such a research guide is Richard J. McKinney's *Federal Legislative History Research: A Practitioner's Guide to Compiling the Documents and Sifting for Legislative Intent* (last revised July 2015), http://www.llsdc.org/federal-legislative-history-guide.

5. Though not the legal version of the C.F.R., the e-CFR found at http://www.ecfr.gov is an up-to-date version produced by the National Archives and Records Administration's Office of the Federal Register.

B. Federal Acquisition Regulation (FAR)

1. The FAR is the primary regulation used by all federal agencies for the procurement of goods and services and became effective on April 1, 1984.[5]

2. The FAR is prepared, issued, and maintained jointly by the Secretary of Defense, the Administrator of the General Services Administration (GSA), and the Administrator of NASA. 48 C.F.R. §1.103(b).

3. The FAR is codified in Parts 1 through 53 of Title 48 of the C.F.R.

4. An electronic version of the FAR (maintained by GSA) is available at https://www.acquisition.gov/far. The long used Air Force FAR Site, https://farsite.hill.af.mil/, has been depreciated and now redirects to the GSA site.

C. Supplemental Regulations

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.

3. Some of the supplemental regulations can be found at https://www.acquisition.gov/Supplemental_Regulations.

4. DoD Specific information on DFARS and deviations can be found at https://www.acq.osd.mil/dpap/dars/index.html.

D. The FAR System

[5] For a brief overview of the FAR, see Kate M. Manuel and L. Elaine Halchin, The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions, CRS Report R42826 (February 3, 2015), https://www.fas.org/sgp/crs/misc/R42826.pdf

1. The FAR is divided into eight subchapters (A-H) and fifty-three parts. Parts are further divided into subparts, sections, and subsections.

2. 48 C.F.R. §1.105-2 describes the arrangement of regulations within the FAR. 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.

   Example: FAR 45.303-2. The part is 45. The subpart is 45.3. The section is 45.303. The subsection is 45.303-2.

3. FAR Subpart 52.2 provides standardized language for clauses and provisions which other FAR provisions require.

   Example: FAR 14.201-6(b) requires that invitation for bids include the language provided by FAR 52.214-5, Submission of Bids.

4. Provisions in FAR Supplements that further implement topics addressed in the FAR must be numbered to correspond to the appropriate FAR number and title. Agency FAR Supplements that address topics not covered in the FAR must utilize chapter, part, subpart, section, or subsection numbers of 70 and up. FAR 1.303(a).

V. COURTS

A. Congress established the Court of Claims in 1855 to provide an avenue for private claims against the United States.[6]

B. The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 STAT. 27, split the Court of Claims into the U.S. Claims Court (later changed to U.S. Court of Federal Claims in 1992) and the United States Courts of Appeals for the Federal Court.

C. The jurisdiction of the U.S. Court of Federal Claims is found in 28 U.S.C. §§1491-1509 and includes the power to "render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort". 28 U.S.C. §1491(a)(1).

[6] 10 STAT. 612 (1855).

D. Most court cases concerning government contracts are decided in the U.S. Court of Federal Claims, the U.S. Court of Appeals for the Federal Circuit, and the U.S. Supreme Court.

E. Specialized Reporters

1. Federal Claims Reporter (1983- date) contains procurement-related decisions issued by the U.S. Court of Federal Claims. This reporter was titled the United States Claims Court Reporter until 1992.

2. Federal Court Procurement Decisions (1982-1999) contains government contract decisions issued by the Claims Court, the Court of Appeals for the Federal Circuit, and the U.S. Supreme Court. This reporter ceased publication in 1999.

VI. BOARDS OF CONTRACT APPEALS

A. The Armed Services Board of Contract Appeals (ASBCA) was created by a joint directive of the Secretaries of the Army, Navy, and Air Force in 1949.[7] The charter for the ASBCA is published at 48 C.F.R. Appendix A to Chapter 2.

B. The Civilian Board of Contract Appeals (CBCA) was created in 2007[8] and is an independent tribunal within the GSA. The CBCA combined the boards of contracts appeals of the Departments of Agriculture, Energy, Housing and Urban Development, Interior, Labor, Transportation, Veteran's Affairs, and the GSA.

C. The jurisdiction of the CBCA excludes the DOD.

D. The Government Accountability Office Contract Appeals Board was established by §1501 of the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 STAT. 1844 (2007). The Board only considers appeals from decisions of a contracting officer with respect to any contract entered into by a legislative branch agency including the Architect of the Capitol, Congressional Budget Office, the Government Printing Office, and the Library of Congress.

E. Reports

1. Contract Appeals Decisions (BCA). A print reporter published by CCH in bound volumes dating back to 1956 (first volume is 56-2). This reporter includes the full-text decisions of the ASBCA and other contract appeals

[7] For a brief history of the creation and role of the ASBCA, see Joel P. Shedd, Jr., *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 Law and Contemporary Problems, 39-86 (Winter 1964). Available at http://scholarship.law.duke.edu/lcp/vol29/iss1/5.

[8] The CBCA was created by §847 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-63, 119 STAT. 3136 (2006).

boards. Each volume features an alphabetical list of appellants, docket numbers by title of the board, and a topical index.

2. The website for the ASBCA provides the full-text of decisions dating back to 2000 at http://www.asbca.mil/Decisions/decisions2018.html.

3. The website for the CBCA provides the full-text of decisions dating back to 2007 at https://www.cbca.gsa.gov/decisions/cda-cases.html.

4. Decisions issued by boards of contracts appeals that were merged into the CBCA in 2007 can be found at the former board of contract appeal's website. Coverage varies by website.

5. Decisions of GAO's Contract Appeals Board can be found at http://www.gao.gov/legal/contract-appeals-board/about and http://www.gpo.gov/vendors/gaocab.htm.

VII. COMPTROLLER GENERAL DECISIONS

A. The Budget and Accounting Act of 1921 established the Government Accountability Office (GAO) as an investigative arm of Congress charged with examining all matters relating to the receipt and disbursement of public funds.[9] The Comptroller General of the United States heads the GAO and issues legal opinions and reports to agencies concerning the availability and use of appropriated funds.

B. The Competition in Contracting Act of 1984 gave the Comptroller General the authority to decide protests concerning an alleged violation of a procurement statute or regulation.

C. Decisions of the Comptroller General of the United States

1. The GPO Access website contains electronic copies of select GAO decisions from June 1989 to June 2008 at http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=GAOREPORTS.

2. The GAO website contains electronic copies of bid protest decisions at. http://www.gao.gov/legal/bid-protests/search and appropriations law decisions at http://www.gao.gov/legal/appropriations-law-decisions/search.

3. Comptroller General's Procurement Decisions: A monthly publication of West. This resource contains reproductions of every bid protest and other

[9] 42 STAT. 20 (1921).

procurement rulings issued by the Comptroller General. Online coverage on WestlawNext begins with 1921.

VIII. CURRENT AWARENESS RESOURCES

A. SAM.gov (beta): Formerly FedBizOpps, https://beta.sam.gov is the official U.S. government website for the management of federal contracting. As of June 2020, it has or will soon replace a variety of other official websites. This includes the official sites for contract data (FPDS.gov), contract opportunities (FBO.gov), wage determinations (WDOL.gov), entity registration (SAM.gov), and federal assistance listings (CFDA.gov).

B. The Government Contractor: A weekly newsletter published by West. This newsletter covers legal developments in government contracting, including legislative and regulatory materials, relevant decisions from courts and administrative tribunals, and materials from the GAO. Online coverage on WestlawNext begins in January 1987.

C. Westlaw Journal Government Contract: A biweekly newsletter published by Thomson Reuters which focuses on litigation between private contractors and the federal government arising out of contracts for the Department of Defense. Online coverage on WestlawNext begins in November 1996.

D. Briefing Papers: A print newsletter, published by West thirteen times a year, providing legal guidance on government contracting. The two January issues summarize the previous year's developments and provides cites, arranged by subject matter, for the procurement articles from the previous year. Online coverage on WestlawNext begins in 1992.

E. Federal Contracts Reports: A weekly print newsletter published by the Bureau of National Affairs, Inc. (BNA). Reports on significant litigation, pending legislation, and other major developments affecting federal procurement policies, federal spending, and R&D activities. Materials are indexed by subject matter and each issue contains a table of cases reported. Cumulative indices are issued each quarter and every six months. The online newsletter is published daily at Bloomberg BNA. The online archive dates back to 1996.

F. The Nash & Cibinic Report: A monthly print newsletter published by West. Provides analysis of critical issues in government contracting by Professors Emeriti Ralph C. Nash and John Cibinic of George Washington University. Online coverage on WestlawNext begin in January 1987.

G. Government Contracts Update: An online resource published by Wolters Kluwer Law & Business Government Contracts editors. This resource contains summaries of recent developments in government contracting. Access to full-text documents mentioned in the summaries requires a subscription to the *Government*

Contracts Reports, available on IntelliConnect. https://hr.cch.com/netnews/government-contracts/current.html.

H. Government Contracts Issue Update: An online newsletter on legal developments relating to government contracts published periodically by Washington, D.C.-based law firm Wiley Rein. http://www.wileyrein.com/newsroom-newsletters-government-contracts-issue-update.html.

I. Government Contracts Insights: An online newsletter on current procurement and regulatory trends published monthly by Redstone Government Consulting. http://www.redstonegci.com/resources/government-insights-newsletters.

IX. JOURNALS

A. Public Contract Law Journal: "The only law journal dedicated exclusively, yet broadly, to public contract and grant law and related areas of practice." Published quarterly in print by the Section on Public Contract Law of the ABA in cooperation with The George Washington University Law School. The table of contents for the issues dating back to the fall of 2000 can be found at the journal's website: http://www.pclj.org.

B. Journal of Public Procurement: A journal published quarterly by the National Institute of Governmental Purchasing, Inc. The journal publishes articles that analyze procurement-related issues or describe procurement techniques and practices. The table of contents for issues dating back to 2001 are available at the journal website: http://pracademics.com/index.php/jopp.

C. Journal of Contract Management: A journal published once a year by the National Contract Management Association (NCMA**).** The journal is "devoted to the dissemination of research in the substantive domain of contract management." The most recent issue of this journal is available on the journal website: http://www.ncmahq.org/.

X. TREATISES AND REFERENCE WORKS

A. Jay Ed. Grenig, Fundamentals of Government Contracting (2013-2014 ed.).

B. John Cibinic, Jr. et al., Administration of Government Contracts (5th ed. 2016).

C. John Cibinic, Jr. et al., Formation of Government Contracts (4th ed. 2011).

D. John Cibinic, Jr. et al., Cost Reimbursement Contracting (4th ed. 2014).

E. John Cibinic, Jr. et al., Competitive Negotiation: The Source Selection Process (3rd ed. 2011).

F. James G. McEwen et al., Intellectual Property in Government Contracts (2013).

G. Seyfarth Shaw LLP, The Government Contract Compliance Handbook (5th ed. 2014).

H. Steven W. Feldman, Government Contract Awards: Negotiations and Sealed Bidding (2014-2015 ed.).

I. Ralph C. Nash Jr. et al., Government Contract Changes, 3d (updated annually).

J. Federal Contract Management: A Manual for the Contract Professional (Henry L. Goldberg ed., updated annually).

K. Ralph C. Nash, et al., The Government Contracts Reference Book: A Comprehensive Guide to the Language of Procurement (4th ed. 2013).

L. Smith, Currie & Hancock's Federal Government Construction Contracts: A Practical Guide for the Industry Professional (Thomas J. Kelleher Jr. et al. eds. 2010)

M. Kenneth Allen, The Contract Interpretation Handbook: A Guide to Avoiding and Resolving Government Contract Disputes (2014 - 2015 ed.)

N. Terrence M. O'Connor, Understanding Government Contract Law (2007).

O. Terrence M. O'Connor, Federal Procurement Ethics: The Complete Legal Guide, Revised Edition (2009).

P. Karen L. Manos, Government Contract Costs & Pricing (2nd ed. 2011).

Q. Karen L. Manos, Government Contract Costs & Pricing Handbook (2017 ed.).

R. Steven Feldman, Government Contract Guidebook, 4th (2014-2015 ed.)

S. W. Noel Keyes, Government Contracts Under the Federal Acquisition Regulation, 3d (updated annually).

T. Section of Public Contract Law, American Bar Association, Government Contract Law: The Deskbook for Procurement Professionals (4th ed. 2017).

U. John Edward Murphy, Guide to Contract Pricing: Cost and Price Analysis for Contractors, Subcontractor, and Government Agencies (5th ed. 2009).

V. Government Accountability Office, Principles of Federal Appropriations Law (The Red Book), http://www.gao.gov/legal/red-book/current-edition.

XI. OTHER RESOURCES

A. CCH Government Contracts Reporter: A comprehensive online resource published by Wolters Kluwer. This resource provides fully annotated explanations to federal government contracting laws and regulations.

B. Government Contracts Citator: This print resource, published by West, provides complete listings of citations of government contract decisions by courts and agency boards of contract appeals.

C. DoD Defense Contract Audit Agency, DCAA Contract Audit Manual, DCAAM 7640.1, https://www.dcaa.mil/cam.htm. This resource is no longer available in print.

D. Government Contracts Resources, Stan Hinton. This site contains up to date summaries of recent contract decisions, information, and other resources related to contract law. www.stanhinton.com

E. PubKLaw. A comprehensive online resource the covers newly passed law and changes to government contracts law, posts relevant decisions from the Court of Federal Claims, Government Accountability Office, Boards of Contract Appeals and other judicial and administrative forums. www.law.pubkgroup.com

F. Wifcon. A comprehensive online resource that has been on the internet since 1998 that provides the federal acquisition community quick access to contracting laws, pending legislation, current and proposed regulations, guidance, courts and board of contract appeals, bid protest decisions, selected analysis on federal acquisition issues, and discussion forums and blogs. https://www.Wifcon.com

G. TechFARHub. The TechFAR Hub provides resources to apply industry best practices to digital service acquisitions across the federal government. https://techfarhub.cio.gov/

H. Ask a Professor. This site created by the Defense Acquisition University as a resource for contracting professionals to post questions which are answered by Department of Defense officials. While not specifically targeted towards attorneys, it sometimes provides relevant policy guidance and interpretations on a variety of acquisition topics. https://www.dau.mil/aap/Pages/default.aspx

I. The Acquisition Gateway. Contains a variety of resources geared for government acquisition professionals. Attorneys working on federal contracting issues may find that the site contains useful data, training, and document templates. https://hallways.cap.gsa.gov.

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 method is necessary for a 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, whereas 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. 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 where the pre-award survey included a detailed financial analysis and the contracting officer reasonably

concluded that the firm's poor financial condition made the firm a high financial risk).

(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. Rotech Healthcare, Inc., B-409020, B-409020.2, Jan. 10, 2014, 2014 Comp. Gen. Proc. Dec. ¶ 28; 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). DynCorp Int'l LLC, B-411126.4 et al., Dec. 20, 2016, 2017 CPD ¶ 333; 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); FCi Fed., Inc., B-408558.4 et al., Oct. 20, 2014, 2014 CPD ¶ 308.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); Gaver Indus., Inc., dba Barker & Barker Paving, B-412428, Feb. 9, 2016, 2016 CPD ¶ 57.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. Reyna-Capital Joint Venture, B-408541, Nov. 1, 2013, 2013 CPD ¶ 253, 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 19.602-1.

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 of 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-297219, 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(c).

b. Subcontractor responsibility **is determined in the same fashion as** is the responsibility of the prime contractor. FAR 9.104-4(c)

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 19.301-1.

(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 22.805. Solicitations may require the contractor to develop and file an affirmative action plan. FAR 52.222-23 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 9.507-2; Blueprint Consulting Services, LLC B-413988.2, etc., Feb. 23, 2017, 2017 CPD ¶ 7, 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 9.105-1.

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 "Federal Awardee Performance and Integrity Information System." FAR 9.105-1(c). 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 also 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); FCi Federal, Inc., B-408558, B-408558.5, B-408558.6, October 20, 2014, (GAO sustained protest challenging contracting officer's affirmative responsibility determination where contracting officer failed to consider specific allegations of fraud and awardee's affiliation with its parent company).

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, how long **contract actions must be publicized**, 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**. 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. FAR 5.002.

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 generally 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 or the micro-purchase threshold, there are no required publicizing requirements.

[1] The GPE is available online at the Beta SAM website, *available at* https://beta.sam.gov/.

b. Commercial Items:

(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 accordance with FAR 12.603. The agency issues a combined synopsis/solicitation and then provides a "reasonable response time." Contracting Officers typically consider such factors as the complexity of the acquisition, urgency of the requirement, etc. 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*. FAR 5.203(a)-(b). 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); 52.214-7(b)(1); FAR 15.208(b)(1).

b. If the IFB or RFP does not specify a time, the time for receipt is 4:30 P.M., local time, for the designated government office. FAR 14.304(a); FAR 52.214-7(a); FAR 15.208(a).

2. General rule → **LATE IS LATE;** FAR 14.304(b)(1); FAR 15.208(b)(1); FAR 52.214-7(b)(1).

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**. The FAR allows for three exceptions allowing a contracting officer to consider a late proposal the electronic commerce exception, the government control exception, and the only proposal exception. FAR 52.215-1(c)(3)(ii)(A) and 52.212-1(f)(2)(i)

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 5:00 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 (Fed. Cl. 2012); see also Insight Systems Corp., and Centerscope Technologies, Inc., 110 Fed. Cl. 564, 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). Please note the GAO does not apply this exception to proposals submitted via electronic means. Sea Box, Inc., B-291056, Oct. 31, 2002, 2002 CPD ¶ 181

(1) Federal Acquisition Services Team, LLC v. The United States, 124 Fed. Cl. 690 (Fed. Cl. 2016) (government control exception to the "late is late" rule applies to electronic submissions).

(2) 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).

(3) Watterson Constr. Co. v US, 98 Fed.Cl. 84 (Fed. Cl. 2012) (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).

(4) Insight Systems Corp., and Centerscope Technologies, Inc., 110 Fed. Cl. 564, 2013 WL 1875987 (Fed. Cl. 2013) (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) 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).

(4) 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 Deadline to Prevent "Late" Proposals

1. Historically, even if the deadline for proposals had passed, GAO allowed contracting officers 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 an 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 (importance 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-221330.2, 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 governments 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 (OCI)

A. Overview. An organizational conflict of interest means that "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 an 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(b), 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. Kellogg, Brown, & Root Serv., Inc., 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 employee participates in the drafting of a SOW, this does not necessarily demonstrate that the employee's post government work for an offeror created an OCI, where the employee's work was later released to the public as part of the solicitation. Further, where the contracting officer could neither "conclusively establish, nor rule out the possibility" that the 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.

(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-403064.2, 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., B-402256, 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).

(6) C2C Innovative Solutions, Inc., B-416289, B-416289.2, July 30, 2018, 2018 CPD ¶ 269 (information need not be proprietary to create an unequal access OCI; information need only be competitively useful, non-public information about the competitor). See also Dell Servs. Fed. Gov't, B-414461.3, June 19, 2018, 2018 CPD ¶ 213 (unequal access to non-public information about a competitor, regardless whether the information is proprietary, may nevertheless create an unequal access 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 the competition to compensate for such an advantage,

unless there is evidence of preferential treatment or other improper action).

(2) PAI Corp. v. United States, 2009 WL 3049213 (Fed. Cl. 2009), 2009 U.S. Claims LEXIS 320 (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), *aff'd*, 614 F3d. 1347 (Fed. Cir. 2010).

(3) ARINC Eng'g Servs., LLC v. United States, 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.")

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, 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-292789.2, 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 a contractor'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 involve 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, B-401842.2, Jan. 25, 2010, 2010 CPD ¶ 39 (discussing agency's handling of an impaired objectivity conflict of interest); L-3 Serv., Inc., 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. C2C Innovative Solutions, Inc., B-416289, B-416289.2, July 30, 2018, 2018 CPD ¶ 269 (protest sustained where agency failed to meaningfully consider whether an impaired objectivity OCI could result from an awardee's wholly-owned subsidiary reviewing decisions on appeal from the parent company's own claims decisions).

d. 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., B-402256.3, 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 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).

e. The fact that the agency retains final approval or decision-making authority does not absolve the agency of assessing whether a conflict can arise; in this regard, the FAR requires

the agency to consider whether a contractor's advice to the government might be tainted by conflicting interests or obligations. Inquiries, Inc., B-4174152.6, Dec. 30, 2019, 2020 CPD ¶ 54.

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. Systems Made Simple, Inc., B-412948.2, July 20, 2016, 2016 CPD ¶ 207; Cyberdata Techs., Inc., B-411070 et al., May 1, 2015, 2015 CPD ¶150.

a. The FAR considers whether the contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services -- or provides material leading directly, predictably, and without delay to such a work statement. 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 awardee's expectation that the report would be used only as part of a sole source procurement, rather than a competitive procurement, the protestor was properly excluded. There is no "foreseeability" caveat to the rule. Energy Sys. Group, B-402324, 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 not be in a position to make decisions favoring its own products or capabilities."

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 government's concern is that the contractor might favor its own products or capabilities. 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. Obligation for oversight

a. Contracting Officers (and other contracting officials) must identify and evaluate potential OCIs 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., 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., 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 advantages or the existence of conflicting roles that might impair a contractor's objectivity. FAR 9.504(a)(2); Energy Sys. Group, 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 awardee's 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, B-405008.2, 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., B-405008, B-405008.2, July 27, 2011, 2011 CPD ¶ 154.

2. Reasonable consideration of offeror's 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 apprised 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 and 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-401068.4, 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-401954.2, 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,

the 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, Jan. 25, 2010, 2010 CPD ¶ 39; C2C Solution, Inc., B-401106.5, Jan. 25, 2010, 2010 CPD ¶ 38; 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., B-402256.3, 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 recuse itself from work that might create a future conflict. But see Oracle America, Inc., B-416657 et al., Nov. 14, 2018, 2018 CPD ¶ 391, where GAO determined that even if it concluded that a former government employee meaningfully participated in the agency's determinations of RFP requirements, it would be improper to recommend the agency proceed with its procurement in a manner that was inconsistent with meeting its actual needs.

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), 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

[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.

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 and -3.

   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 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 (FFRDCs)[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."

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(c).

5. Post Script. As noted, the proposed DFARS OCI rule contained provisions that would have applied to all DoD acquisitions and not just

[3] Federally Funded Research and Development Centers (FFRDCs) 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.

[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.

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

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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CHAPTER 35

OTHER TRANSACTION AUTHORITY

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CHAPTER 35

OTHER TRANSACTION AUTHORITY[1]

> *[O]ur technological superiority is slipping . . . . So it's all about innovation, it's all about staying ahead of potential adversaries. It's all about questioning our comfortable assumptions and asking whether things that have worked in the past for us are going to work in the future. . . . Battlefield advantages in the future are going to be very short-lived because the amount of technology that is out there right now is unbelievable.*

Hon. Robert Work, former Deputy Secretary of Defense, Army War College Strategy Conference (Apr. 8, 2015).

I. INTRODUCTION

Over the past several decades, various changes in the market and geopolitics have revolutionized the process of innovation. Merely a generation ago, technological advancements were developed by the government, for military use. Government spending on research and development (R&D) outpaced the private sector two to one. However, the predominance of technological innovation has shifted to the commercial sector, which now leads the way in cutting-edge military compatible advancements in areas such as robotics, artificial intelligence, cybersecurity, autonomous systems, and space. This shift from the military to the commercial sector has driven military competition with foreign forces that have access to the same global technology marketplace driving innovation. Defense Innovation Unit Experimental (DIUx), Annual Report, 2 (2017) [hereinafter DIUx Annual Report 2017], available at https://diux.mil/library. The 2018 National Defense Strategy acknowledged "that our competitive military advantage has been eroding," in large part due to rapid technological change. Summary of the 2018 National Defense Strategy, 1, available at https://www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf.

Given the rate of speed at which technology advances, the necessity of Department of Defense (DoD) in leveraging those advances to preserve national security, and the degree to which adversaries are narrowing any technological advantage the United States may have, acquisition professionals must be able to procure the right technology and quickly. In order to attract interest from innovators, flexibility in contracting is key. Congress has given the DoD statutory authority that permits agile acquisition of next-generation technology known as Other Transaction Authority (OTA). This authority permits the DoD to enter into agreements that are

[1] Sections of this chapter appear in Andrew Bowne, *Introduction to Other Transaction Authority and Intellectual Property Issues*, in STREAMLINED PROCUREMENT: THE EFFECTIVE USE OF "OTHER TRANSACTION AUTHORITY" ACQUISITIONS AND SPECIAL ISSUES RELATED TO INTELLECTUAL PROPERTY AND DATA RIGHTS 4-28 (2019).

not traditional procurement contracts bound by the Federal Acquisition Regulations (FAR). OTAs give the DoD the necessary flexibility to engage with non-traditional defense contractors in a way that is fundamentally different than contracting under the FAR. When used appropriately, OTs provide the DoD "with access to state-of-the-art technology solutions from traditional and non-traditional defense contractors, through a multitude of potential teaming arrangement tailored to the particular project and the needs of the participants." Other Transactions Guide, 4 (Nov. 2018) [hereinafter DoD OTA Guide], https://www.dau.mil/guidebooks/Shared%20Documents/Other%20Transactions%20(OT)%20Guide.pdf. This flexibility permits the military services to "accelerate technology evolution from concept to experimentation and development with the goal of placing capabilities in the hands of warfighters." DIUx Annual Report 2017, 3. Effective utilization of OTs can assist the DoD in maintaining a technological advantage vital to the preservation of national security.

II. OBJECTIVES

A. Following this block of instruction, students should:

1. Understand the reasons for using OTA for prototype projects.

2. Understand when the use of OTA is appropriate within the statutory framework.

3. Understand the statutes and regulations that apply to OTAs and those that apply to procurement contracts but not to OTAs.

4. Understand what a consortium does and how one is used by the government in competing and awarding OT agreements.

5. Understand common terms and conditions used in an OT agreement.

6. Understand how the government can award a follow-on production contract after successful completion of an OT prototype.

III. BACKGROUND

A. Definition of OTA

1. OTA is not defined in statute or in the FAR. It is defined in the negative: It is not a procurement contract, grant, or cooperative agreement. Nonetheless, these agreements are still legally binding contracts. Because this statutory authority places OTAs outside the legal and regulatory construct of federal procurement contracts, they provide greater flexibility than otherwise possible. This flexibility helps the DoD to reduce barriers to entry for non-traditional defense contractors and offers a streamlined method for carrying out prototype projects and transitioning to follow-on production. OTAs may be the only contract vehicle flexible enough to permit the government to engage with certain sectors of industry that may

be unwilling or unable to comply with the various compliance requirements and data rights framework inherent to more traditional procurement methods.

B. History

1. While OTAs are not widely known, they are by no means new. OTA actually predates the FAR by about 16 years. The first OTA was provided by Congress to the National Aeronautics and Space Administration (NASA) in the Space Act of 1958 in response to the Soviet Union's successful Sputnik mission. The Space Act created NASA and provided authority for the new agency "to enter into and perform such contracts, leases, cooperative agreements or other transactions as may be necessary in the conduct of its work." Space Act, Pub. L. 85-568, 72 Stat 426 (1958).

2. Since the Space Act, Congress has provided various forms of OTA, some permanent while others temporary, to eleven federal agencies. These agencies include NASA, DoD, National Institutes of Health, Federal Aviation Administration, Department of Transportation, Transportation Security Administration, Department of Homeland Security (DHS), Department of Energy, Department of Health and Human Services, Domestic Nuclear Detection Office, Advanced Research Projects Agency – Energy. The scope of authority provided to each agency varies and most agencies only have research and development authority as only DHS and DoD currently have prototype authority. This chapter focuses on authority provided to the DoD.

3. In 1989, Congress authorized the Defense Advanced Research Projects Agency (DARPA) to carry out basic, applied, or advanced research projects. Several years later, Congress extended authority to the rest of the DoD under Section 845 of the Fiscal Year (FY) 1994 National Defense Authorization Act (NDAA), which amended Section 2371. Section 845 also authorized the DoD temporary authority to carry out OT agreements for prototype projects. Though used sparingly, OTAs became the focus of Congress in recent years due to the flexibility and attractiveness to non-traditional defense contractors such as the tech firms in Silicon Valley. Section 815 of the FY 2016 NDAA repealed Section 845 and replaced it with expanded and permanent OTA for prototypes projects codified as Section 2371b.

4. In the years since, Congress has demonstrated a preference for the use of OTA, and has expressed frustration at the lack of awareness and education regarding OTA, "particularly among senior leaders, contracting professionals, and lawyers." S. Rep. 115-125 (2017). In the FY 2018 NDAA, Congress provided several new updates to OTA, including:

a. Section 216, authorizes the use of OTs for prototype projects with nonprofit research institutions.

b. Section 861, Contract Authority for Advanced Development of Initial or Additional Prototype Units.

c. Section 862, Methods for Entering into Research agreements.

d. Section 863, Education and Training for Transactions Other than Contracts of Grants, mandating DoD personnel receive adequate education and training, including continuous learning on OTA.

e. Section 864, OT Authority for Certain Prototype Projects, increasing dollar thresholds for delegated approval authority; expanding the definition of "transaction" to include "all individual prototype subprojects awarded under the transaction to a consortium of the United States industry and academic institutions"; and adding Small Business Innovation Research (SBIR) and Small Business Technology Transfer (SSTR) as significant participants.

f. Section 865, Amendment to the Nontraditional and Small Contractor Innovation Prototyping Program.

g. Section 866, Middle Tier of Acquisition for Rapid Prototyping and Rapid Fielding.

h. Section 867, Preference for Use of OT and Experimental Authority, directing the Secretary of Defense to establish a preference for using OTA for research and prototype projects.

C. OTA Types

1. There are three basic types of OTAs, provided for by two statutes. OT agreements awarded under 10 U.S.C. § 2371 are for basic, applied, and advanced research projects. OT agreements awarded under 10 U.S.C. § 2371b are for prototypes and follow-on production in limited circumstances.

a. Research OTA: Section 2371 provides authority for basic, applied, and advanced research projects that can be used for research projects when a procurement contract, grant, or cooperative agreement is not feasible or appropriate and the project does not duplicate research under an existing program. The main purpose of section 2371 OTA's is "to advance knowledge in science and technology and apply that knowledge to the needs of DoD operations and warfighting capabilities without the encumbrance of extraneous restrictions and unnecessary policies." Richard

Dunn, *10 U.S.C. 2371 "Other Transactions": Beyond TIA's*, Strategic Institute (July 2017). These can be used for dual-use technologies or defense-specific research. Research OTAs may be used as a Technology Investment Agreement (TIA); if so, then the DoD Grant and Agreement Regulations (DoDGARs) under 32 CFR Part 21 applies.

b. Prototype OTA: Section 2371b provides authority for the DoD to enter into agreements for prototype projects "that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the [DoD], or to improvement of platforms, systems, components, or materials in use by the armed forces." 10 U.S.C. § 2371b(a). While this chapter briefly discusses OTA for basic, applied, and advanced research, the focus is on prototype project authority under Section 2371b.

c. Production OTA: Subsection f of Section 2371b provides a pathway to non-competitive follow-on production through an OT, or FAR-based procurement, provided the original award included notice that a follow-on production OT is possible.

D. Laws and Regulations Inapplicable to OTA

1. Notable barriers to acquiring innovation include costly and burdensome procurement laws and regulations. OTAs provide DoD with a flexible acquisition tool that will stimulate innovation and provide DoD with access to cutting edge technology by attracting non-traditional defense contractors. The following laws and regulations do not apply to OTAs:

a. Competition in Contracting Act (CICA), 10 U.S.C. § 2304

b. Truthful Cost and Pricing Data Act, 41 U.S.C. Chapter 35

c. Cost Accounting Standards (CAS)

d. Contract Disputes Act (CDA)

e. Procurement Protest Process

f. Indemnification

g. Cost plus a percentage of cost prohibition

h. Buy American Act

i. Bayh-Dole Act, 35 U.S.C. §§ 202-204

j. Rights in Technical Data, 10 U.S.C. §§ 2320-21

k. FAR and agency specific regulations (DFARS, AFFARS, AFARS, NMCARS)

l. Department of Defense Grant and Agreement Regulations (DODGARS)

m. Commercial law (i.e., Uniformed Commercial Code)

E. Laws and Regulations Applicable to OTA

1. While there are many procurement regulations that do not apply to OTAs, these legally enforceable contracts do not exist in a legal vacuum. In fact, the legal and regulatory requirements for the use of OTA ensure fairness, transparency, and appropriate controls. *See* Mitre, *Other Transaction Authority (OTA)*, available at https://aida.mitre.org/references/rapid-acquisition/. The following regulations apply to OTAs in addition to the statutory authority:

a. Fiscal law (Anti-Deficiency Act, 31 U.S.C. § 1341)

b. Comptroller General access to records for OTAs over $5 Million (Note: draft versions of the FY2019 NDAA also requiring reporting to Congress at this threshold)

c. Tucker Act

d. Criminal law (false claims/statements)

e. Procurement Integrity Act (41 U.S.C. §§ 2101-2107)

f. Laws of general applicability (Civil Rights Act)

g. Arms Control

h. Programmatic Requirements (DoDI 5000 series)

i. Trade Secrets Act (18 U.S.C. § 1905)

j. Economic Espionage Act (18 U.S.C. § 1831-39)

k. Freedom of Information Act (FOIA) (5 U.S.C. § 552)

l. Privacy Act, 5 U.S.C. § 552a

m. Laws that would apply to anyone doing business in the U.S. (e.g., environmental laws, import/export control)

n. Additionally, the Government may apply principals/provisions of any inapplicable statute that provides important protections to the Government or the participants. Examples could include unilateral change clause or indemnification under 10 U.S.C. § 2354 for unusually hazardous R&D efforts.

o. While it is currently unclear, it is possible that production OTAs under Section 2371b(f), *see* Section V below, may trigger the applicability of some statutes not applicable to prototype OTAs. Richard Dunn, ¶ 22 *Other Transaction Agreements: What Applies?*, 32 Nash & Cibinic Report 5, 71 (May 2018).

F. Purpose of OTA and Reasons for Use

1. As provided in section 2371b(a), the purpose of OTA is to enhance mission effectiveness. This authority is intended to encourage development of dual-use research and development, defense-specific prototype projects and provides flexible, fast acquisition. Proper use of OTA assigns risk early on in the acquisition process, instead of during the production phase, when mistakes and mishaps are more costly. The "fail fast" approach allows program managers to quickly iterate and mature technology enough to ensure risk is minimized before establishing a program of record.

2. OTAs are best suited for:

a. Research and Development (R&D) activities to advance new technologies and processes and prototyping or models to evaluate feasibility or utility of a technology

b. Addressing perceived obstacles to doing business with the government by non-traditional vendors to include IP rights and compliance with CAS

c. Providing flexibility to tailoring agreements to reach non-traditional vendors with innovation research development and demonstration (RD&D) solutions

d. Negotiating funding arrangements, payment milestones, and length of agreement to achieve research and prototype projects. Mitre, *Other Transaction Authority (OTA)*, available at https://aida.mitre.org/references/rapid-acquisition/.

3. Some of the advantages of proper use of OTA include flexibility, promotion of innovative thinking, speed and efficiency, funding, and attracting commercial companies. *See* Richard Dunn, *Five Reasons for Using "Other Transactions"*, Strategic Institute (Jan. 16, 2017),

http://www.strategicinstitute.org/other-transactions/five-reasons-using-transactions/.

a. General Flexibility: Because OTAs are not constricted by the same regulatory and statutory barriers imposed on procurement contracts, the agreement is based my on the relationship between parties than focusing on the rules governing the contract. This flexibility allows goals to be the primary force in forming the contractual relationship.

b. Promote Innovative Thinking: OTAs require thought to avoid non-value added, time consuming processes, and promote innovative approaches to problems.

c. Speed and Efficiency: The acquisition lead time of procurement contracts costs the government time and opportunities. Streamlined processes and the inapplicability of CICA and bid protests at the Government Accountability Office (GAO) allow OTAs to find solutions and award projects quickly and efficiently. Saving time means earlier expenditure of FY sensitive RDT&E funds, permitting earlier direction and planning of future efforts. Additionally, because section 2371b provides authority to award a follow-on production OTA or procurement contract, the path to full production contract and fielding emerging technology is streamlined. 10 U.S.C. § 2371b(f). However, speed is not necessarily the purpose for executing OTAs over procurement contracts. Speed is certainly an attractive byproduct of the less restrictive procedures in the pre-award phase of OTAs, but it is not guaranteed as OTAs may require careful negotiation of terms and clauses that would otherwise be automatically included in a FAR Part 15 negotiated procurement.

d. Funding Flexibility: OTAs can be funded in a variety of ways. While these agreements may still be fully funded by the Government, they may be funded jointly, or entirely by third-parties. Unlike procurement contracts, funds can flow both ways, and funds coming to the government can be used for additional R&D without converting to the Treasury as Miscellaneous Receipts.

e. Attractive to Commercial Entities: Common barriers to entry in the procurement process include Intellectual Property (IP) requirements and expensive accounting and compliance requirements (i.e., CAS). Congress recently cited OTAs as the way to "access new source[s] of technological innovation, such as Silicon Valley startup companies and small commercial firms," as OTAs are "attractive to firms and organizations that do not usually

participate in government contracting due to the typical overhead burden and 'one size fits all' rules" that are common in traditional procurement contracts under the FAR. H. Rep. 114-270, Conference Report to Accompany H.R. 1735, NDAA for FY2016 (Sept. 29, 2015).

IV. REQUIREMENTS AND DEFINITIONS

A. Statutory Authority

1. While several agencies, such as NASA, have broad authority to enter into OTAs for any purpose necessary to carry out their agency functions, the DoD is limited by its OTA statute.

2. Prototype

(1) 10 U.S.C. § 2371b requires OTAs used for "prototype projects that are directly relevant to enhancing mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed or to improvement of platforms, systems, components, or materials in use by the armed forces." This broad authority does not limit subject matter of the acquisition, as any acquisition meeting basic fiscal law standards would enhance mission effectiveness. The limitation therefore stems from whether an acquisition is a prototype project.

(2) No statutory definition, but the DoD OTA Guide provides a definition of a "prototype project" (DoD OTA Guide, 31-32):

(a) Address a proof of concept, model, reverse engineering to address obsolescence, pilot, novel application of commercial technologies for defense purposes, agile development activity, creation, design, development, demonstration or technical or operational utility, or combinations of the forgoing.

(b) A process, including a business process, may be the subject of a prototype project.

(c) Physical, conceptual, or virtual in nature.

(d) The quantity developed should be limited to that needed to prove technical or manufacturing feasibility or evaluate military utility.

B. Funding

1. Fiscal law requirements (e.g., Anti-Deficiency Act (ADA), and prohibitions on use of funds for certain items from foreign sources) apply to all OTAs. An obligation may not be created in advance of an appropriation or in excess of funds available, and proper funds must be used. However, while the ADA applies, regulations not specific to OTAs, such as the DoD Financial Management Regulation, 7000.14-R, do not.

a. In general, Research, Development, Test & Evaluation (RDT&E) appropriations will be appropriate for OT prototype projects and research and development projects under Section 2371.

(1) One of the advantages of using an OTA is it can be much faster than FAR-based procurement. The time saved can mean earlier expenditure of FY sensitive RDT&E. Earlier R&D results help direct future efforts, permitting more use of funds throughout the period of availability.

b. Follow-on production projects under Section 2371b(f) will likely be funded with procurement funds.

(1) OTAs cannot be used for services or supplies, so Operations and Maintenance (O&M) funds would only be appropriate if the production costs are limited to the expense-investment threshold, or for technology refreshment on existing platforms or systems.

c. When agreements provide for incremental funding or include expenditure-based characteristics, the Agreements Officer should include appropriate provisions and clauses that address the limits on Government obligations, such as an explicit statement that funding of the project is subject to the availability funds.

d. One caveat to the applicability of the ADA to OTA funding is that, unlike FAR-based contracts, OTAs do not need to be fully funded by the government. Cost-sharing is permitted, and sometimes required. *See infra*, Section IV(B)(2). OTA projects can also be unfunded, where third-parties fund the entirety of the project. Finally, funds coming to the government can be used for additional R&D without converting to the Treasury under Miscellaneous Receipts.

(1) However, who funds the project will likely have lasting consequences as to data rights. Therefore, the Agreements Officer should ensure that the funding agreement is consistent with the acquisition plan and the project will be able to provide the deliverables required.

2. Cost-Sharing

a. As seen in the below discussion on participation requirements, cost-sharing is only required if the only party making significant contributions to the OTA is a traditional contractor. If no other conditions under Section 2371b(d) are met, at least one third of the total cost of the prototype project is to be paid out of funds provided by sources other than the federal government. While many OTAs will not require cost-sharing under section 2371b, cost-sharing permits funding flexibility and requirements can be met in a variety of ways. See 10 U.S.C. § 2371b(d)(1)(C).

(a) Until the FY 2018 NDAA, cost sharing was required by the parties to the transaction. However, Section 2371b now only requires that sources other than the federal government pay at least one third of the costs. There is no longer a requirement that the parties to the transaction must pay.

b. Cost sharing is defined as:

(1) Resources expended by the award recipients on the proposed project statement of work (SOW) and subject to the direction of the project management, or

(2) Costs a reasonable person would incur (necessary to) carrying out project SOW.

c. Two Types of Cost Sharing

(a) Cash: Outlays of funds to perform the OT project

(i) Includes labor, materials, new equipment, subcontractor effort

(ii) Sources include new Independent Research and Development (IR&D) funds, profit or fee from another contract, overhead or capital equipment expense pool

(b) In-Kind: Reasonable value of equipment, materials or other property used in performance of OT work

(c) Costs incurred during negotiations but before execution of the transaction are counted towards the cost share if the agreement officer determines, in writing, that the party incurred the costs in anticipation of entering into the transaction and it

was appropriate for the party to incur the costs before the transaction became effective in order to ensure the successful implementation of the transaction. 10 U.S.C. § 2371b(d)(2)(B).

d. The Government should not generally mandate cost-sharing requirements for defense unique items. Use of OTA that invokes cost-sharing requirements should typically be limited to those situations where there are commercial or other benefits to the awardee. Although there is no prohibition against requiring cost-sharing for any project, unnecessary requirements could present issues involving the Procurement Integrity Act or the Anti-Deficiency Act, as well as limiting the competition to larger commercial entities.

C. Participation

1. Use of Section 2371b requires one of the following (Section 2371b(d)):

a. There is at least one nontraditional defense contractor or nonprofit research institution participating to a significant extent

b. All significant participants in the transaction are small businesses or nontraditional defense contractors

c. At least one third of the total cost of the prototype project is paid by sources other than the federal government

d. The senior procurement executive (SPE) for the agency determines in writing that exceptional circumstances justify the use of the authority that provides for innovative business arrangements or structures that would not be feasible or appropriate under a contract, or would provide an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract.

2. Non-Traditional Defense Contractor

a. There must be at least one nontraditional defense contractor "participating to a significant extent" OR mandatory one third cost sharing for traditional defense contractor (unless waived by Senior Procurement Executive (SPE)).

b. Under Section 2371b(e), Non-Traditional Defense Contractor has the meaning given the term under 10 U.S.C. § 2302(9).

(1) Under this definition, a non-traditional defense contractor is an entity that:

(a) is not currently performing and has not performed, for at least the one-year period preceding the solicitation of sources by the DoD for the procurement or transaction, any contract or subcontract for the DoD that is subject to full CAS coverage.

(2) Most Entities will find they qualify as Non-traditional Defense Contractors, because:

(a) They are a small business exempt from CAS requirements

(b) They exclusively perform contracts under commercial procedures

(c) They perform exclusively under firm fixed price (FFP) contracts with adequate price competition

(d) They perform less than $50M in CAS covered efforts during the preceding cost accounting period

(e) NOTE: Cost-type agreements

(i) Because nontraditional defense contractors are considered such because they are exempt from CAS, cost-type agreements may be inappropriate as the nontraditional defense contractors party to the OTA likely lack acceptable accounting systems. Thus, fixed price performance-based and milestone payments may be more appropriate in certain circumstances. Nonetheless, cost-type or expenditure-type agreements are permitted and should be considered when appropriate based on the risks and goals of the project.

c. Significant Extent

(1) While the requirement that a non-traditional defense contractor participate to a significant extent is not statutorily defined, the DoD OTA Guide provides several examples of qualifying participation. DoD OTA Guide, 32.

(a) Supplying new key technology or products; or

(b) Accomplishing a significant amount of the effort; or

(c) Causing a material reduction in the cost or schedule or increase in performance.

(2) Nontraditional defense contractors do not necessarily have to be the prime contractor to meet participation requirements. Participation can be accomplished by a subcontractor, lower tier vendor, intra-company business unit or teamed with a traditional as long as participation is "significant." DoD OTA Guide, 32.

(a) Determination of what constitutes significant participation should be made by the Agreement Officer, with the advice of technical experts. There is no requirement for formulaic or percentage of work performed, so it is best practice for agreement officers to avoid constraining participation requirements unnecessarily.

D. Competition

Competitive procedures shall be used when entering into agreements to carry out prototype projects. Section 2371b requires that competitive procedures be used "to the maximum extent practicable." Section 2371b(b)(2). Although CICA does not apply, the use of OTAs should be awarded fairly and transparently. However, the DoD OTA Guide provides the agency with discretion to solicit and select sources, free from the Request for Proposal or Broad Agency Announcement processes detailed in the FAR. DoD OTA Guide, 16. Because OTAs are unencumbered by CICA, the pre-award acquisition cycle can be reduced significantly.

E. Approval Authority

1. Section 2371b provides the Director of the Defense Advanced Research Projects Agency (DARPA) and each service secretary authority to enter into an OT agreement. 10 U.S.C. § 2371b(a)(1). The statute also provides the Secretary of Defense may designate other officials. The Director of the Missile Defense Agency (MDA) has been delegated such authority. DoD OTA Guide, Appendix E.

2. The FY 18 NDAA updated and extended the approval authority available at certain threshold levels, permitting further delegation. Section 861, FY 18 NDAA. This update doubled the most recent amounts provided for by Section 2371b(a)(2)(A). The current approval authority for prototype project cost (including options) are:

a. Delegable by service up to $100 Million

b. Senior Procurement Executives (SPE) over $100 Million and up to $500 Million

(1) Authority may be authorized only if the participation requirement is met, and use of the authority is determined to be essential to *promoting the success of the prototype*. Section 2371b(a)(2)(A)(ii).

(2) SPE Approval is not delegable. The SPE varies between agency.

(a) DARPA: Director

(b) MDA: Director

(c) Military Departments

(i) Army: Assistant Secretary of the Army (Acquisitions, Logistics, and Technology), ASA(ALT)

(ii) Air Force: Assistant Secretary of the Air Force (Acquisition), ASAF(A)

(iii) Navy: Assistant Secretary of the Navy (Research, Development and Acquisition), ASN(RD&A)

(d) Other Defense Agencies (i.e., DIUx): specified by Secretary of Defense delegation

c. Non-delegable to Under Secretary of Defense (Acquisition and Sustainment) (USD(A&S)) or Under Secretary of Defense (Research and Engineering) (USD(R&E)) over $500 Million

(1) Authority may be authorized only if the participation requirement is met, and use of the authority is determined to be essential to *essential to meet critical national security objectives*. Section 2371b(a)(2)(B)(i)(II).

(2) Requires 30 days advance notice to the congressional defense committees.

3. The FY 19 NDAA clarified that the thresholds applied to both the prototype project, as well as any follow-on contract or transaction that is awarded pursuant to subsection (f), adding such clarification to Section 2371b(a)(2).

4. Each prototype project carried out under Section 2371b requires a separate determination and findings (D&F).

5. Agreements Officer (AO): must be a warranted DoD contracting officer with comparable dollar value warrant and have a level of responsibility, business acumen, and judgment that enables them to operate in this relatively unstructured environment. DoD OTA Guide, iii. Many delegations of authority required an AO to complete training on OTAs through Defense Acquisition University (DAU) prior to obtaining their appointment. Agreements Officers should not merely copy a previously issued OT agreement, template, or model. A standard, "one size fits all" model does not exist, given the need to exercise business judgment appropriate for the situation and the flexibility inherent in the authority. An AO should consider the intent and protections provided to each party in typical FAR procedures and clauses, standard commercial business practices typical of that market segment, as well as other OT agreements; but ultimately is responsible for negotiating clauses that appropriately reflect the risk to be undertaken by all parties on their particular prototype project. DoD OTA Guide, 6.

V. FOLLOW-ON PRODUCTION AUTHORITY

A. Transitioning from Prototype to Production

1. One of the most important updates Congress made to the DoD's OT authority is the follow-on production authority. Under 2371b, authority generally ends at low rate initial production (LRIP); however, Section 815 of the FY2016 NDAA expanded OT authority to follow-on production. This expanded authority, codified as 10 U.S.C. § 2371b(f), allows the DoD to award follow-on production contracts or transaction on a sole-source basis upon successful prototype project completion. If the original OTA was awarded through competitive procedures, the follow-on can be awarded without the need for further competition. This new authority provides a streamlined, effective means to transition from RDT&E to production, and can enable commercial innovation to survive the "valley of death" that potentially separates novel capabilities from warfighters. DIUx Annual Report 2017, 5. Moreover, with proper planning, limited-production prototype projects can be, and have been, scaled to department-wide production. This allows "any DoD entity to buy and use successfully prototyped capabilities without each such entity having to allocate time and resources into putting a new contract in place." *Id*.

2. Any anticipated follow-on activities should be addressed in the acquisition planning prior to award of a prototype OTA. Follow-on activities should also be included in the solicitation and prototype agreement. The follow-on strategy could include addressing issues such as life cycle costs, sustainability, test and evaluation, intellectual property requirements, the

ability to procure the follow-on activity under a traditional procurement contract, and future competition. DoD OTA Guide, 10.

3. The transaction entered into must provide for an option of follow-on production contract or transaction to the participants in the transaction. The original prototype OTA should contemplate the follow-on production option at the outset of the initial award in order to comply with the limitations to the follow-on authority provided by section 2371b(f).

4. Section 2371b(f) permits the use of follow-on production contract or transaction provided the following two criteria are met:

   a. Competitive procedures were used for the OT.

      (a) While the nature of the procedure is not defined, competitive procedures should be to the maximum extent practicable and appropriate given the nature of the project.

      (b) The follow-on effort is not considered a sole source award (FAR Part 6 does not apply).

   b. The OT participants successfully completed the prototype project provided for in the transaction.

      (1) Because successful completion is not defined, it is necessary that a transaction define this milestone to comply with the follow-on authority.

      (2) Follow-on production with consortia.

         (a) A follow-on production contract or transaction may be awarded when the Department determines that an individual prototype or prototype subproject as part of a consortium is successfully completed. There is no requirement that all prototype projects or subprojects awarded to a consortium be completed prior to award for follow-on production for successfully completed projects or subprojects within that consortium.

   c. The above should be documented in a memorandum or D&F.

5. The follow-on agreement may be a contract under the FAR, another OTA, or under such procedures, terms, and conditions as the Secretary of Defense may establish by regulation. As of 2018, the Secretary of Defense has not established any alternative contract vehicle for follow-on

agreement by regulation, though 32 C.F.R. 3.9 provides follow-on production contract procedures.

a. In September 2017, DIUx awarded the first follow-on production contract under Section 2371b(f).

b. Prototypes and follow-on production items may be provided to another contractor as government furnishes equipment (GFE).

B. Best Practices

1. Follow-on production is still in its infancy, so like many aspects of OTA, there is a learning curve. There have been so few instances that this authority has been used, there are few best practices.

2. The REAN Cloud OTA follow-on award from early 2018 serves as a cautionary tale of follow-on production award. *See* Christian Davenport & Aaron Gregg, *Faced with Increased Criticism, Pentagon Slashes Cloud Computing Contract Awarded to an Amazon Partner*, Wash. Post (Mar. 5, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/03/05/faced-with-increased-criticism-pentagon-slashes-cloud-computing-contract-awarded-to-an-amazon-partner/?noredirect=on&utm_term=.913450841da5. The surprising scope ($950 million value for DoD-wide migration of legacy software application to a commercial cloud service provider) of the follow-on production OTA lead to complaints from industry that the agency was not transparent, leading to the DoD unilaterally taking corrective action (down-scoping the award to $65 million for migration of U.S. Transportation Command's software applications). Oracle protested the follow-on award and GAO sustained the protest on the grounds that the agency did not comply with the statutory preconditions in 10 U.S.C. § 2371b(f) addressing the award of a follow-on production OTA. *Oracle America, Inc.* B-416061 (May 31, 2018). Specifically, GAO found that the agency failed to provide for a follow-on in its initial prototype OTA instrument, and that the award of a sole-source follow-on violated the requirements of Section 2371b(f) because REAN Cloud did not successfully complete the initial prototype. *Id*.

3. Transparency should be the default, not the exception. The lesson learned from the REAN Cloud OTA is that the initial announcement of the project was too limited. Had the scope of the follow-on production award been announced prior to award of the initial prototype OTA, there likely would have been less of an uproar by industry. Had the agency waited longer for completion of the initial prototype transaction, including all modifications to the OTA, then it is likely GAO would not have found the agency failed to comply with its statutory requirements.

4. While the authority for follow-on production is available, it may not always be the most prudent decision. Thoughtful consideration of whether a follow-on award under Section 2371b(f) is appropriate is required. Decisions to award a follow-on under Section 2371b(f) should be documented in a D&F, though a justification and approval (J&A) is not required as FAR 6.302 does not apply to OTAs.

VI. PLANNING AND EXECUTION

A. Process: Requirement to Award

1. Defining Needs

a. Use of an OTA is appropriate when an agency knows there is a need, but does not know how to describe a solution that would satisfy the need. When an agency requires help from industry to determine an appropriate solution, the flexibility of an OTA allows the agency to state the issue, and leave it up to the contractor to determine how to solve the issue. Focus on the problem, rather than the solution promotes more innovative solutions.

2. Solicitation

a. Agencies should avoid procurement terms of art, such as "request for proposals" when drafting solicitations to avoid GAO's protest jurisdiction. Locke Bell & Anna Sturgis, *DOD's Prototype OTA Guide Offers Insight Into DOD's Experiment In Regulation-Free Acquisition*, 59 Government Contractor 20, ¶ 155 (May 24, 2017); s*ee also infra*, Section VII(A).

b. Many solicitations state an issue and the agency requests white papers or pitches discussing the proposed solution.

(1) The agreements officer and competitors can shape the statement of work later.

c. Publication

(1) Agreements officers should publish opportunities where they are most likely to reach solution providers. Innovation is encouraged for identifying and competitively selecting sources. Accordingly, marketing the solicitation may be more difficult than for procurement contracts. Publishing on FedBizOpps alone is insufficient as the purpose of using an OTA is to include nontraditional competitors. The goal is to identify a method that maximizes competition and nontraditional defense contractor participation.

(2) Examples of possible solicitation methods include:

(a) Broad Agency Announcement

(b) Research Announcement

(c) Consortium-Model Procedures

(d) Commercial Solutions Opening

(e) Trade Show Reveal

3. Competition. *See* Section IV(A).

VII. TERMS AND CONDITIONS

A. Negotiation of Terms

1. OTAs vary greatly from FAR-based contracts in scope and scale of negotiated terms. Without required clauses, OTs terms are the product of negotiation, often with many competitors, that can vary greatly from project to project. This allows terms to be tailored to the needs of the project. This permissive environment allows the government to conduct business like a business, which is attractive to commercial entities more accustomed to engaging in the commercial industry than the byzantine world of government procurement.

2. Common terms include:

a. Scope of work

b. Term of agreement and termination procedures

c. Administration

d. Payment

e. Disputes

f. Confidential Information, such as trade secrets

g. Intellectual Property, specifically patent and technical data rights

h. Export Control

i. OPSEC

j. Quality Assurance

k. Modifications

l. Identification of GFE

m. Indemnification

B. Modifications

1. Without the FAR or DFARS, there is no changes clause in OTAs. Modifications are typically made pursuant to bilateral agreement, though the agency can negotiate for a unilateral changes clause for administrative changes. The agreement should address how changes will be handled.

2. Unilateral Changes: The Agreements Officer should consider whether the Government should have the right to make a unilateral change to the agreement, or whether all changes should be bilateral. The DoD OTA Guide warns that agreements officers contemplating unilateral changes should consider the potential of disputes and claims, particularly in agreements with fixed-amount characteristics, that could arise after executing a unilateral claim. If unilateral changes are made, the agreement should allow for equitable adjustments.

3. One of the benefits of using an OTA is the improved management of risks and uncertainties through freedom to modify the program as it evolves.

C. Terminations

1. Without the FAR, there is no right of the government to terminate for convenience. Termination clauses should therefore be carefully drafted and the agreements officer should consider the nature of the OTA prototype project when determining whether a unilateral right to termination is appropriate. In cases in which there is an apportionment of risk allocation and cost shares, it could be appropriate to allow an awardee termination right as well.

a. Such a termination could occur in instances in which an awardee discovers that the expected commercial value of the prototype technology does not justify continued investment or the Government fails to provide funding in accordance with the agreement.

b. If the Agreements Officer decides there are reasons to provide the awardee the right to terminate, then termination settlements should be limited to the payable milestone amount of the last completed milestone.

2. Termination clauses should:

a. Identify the conditions that would permit terminations

b. Consider whether the Government should be provided an opportunity to terminate for convenience or cause

c. Address what remedies are due to the Government, such as recoupment or acquiring IP rights so Government can continue the project

VIII. INTELLECTUAL PROPERTY

A. Intellectual Property Issues in OTAs

1. Based on the nature of OTAs, the Intellectual Property (IP) clauses are often the most important, yet perilous, part of the agreement. Because OTAs are not restricted by the stringent IP requirements under Bayh-Dole or the FAR and DFARS, each agreement can be tailor-made to suit the project's goals. However, unique skill and careful calculations must be made in drafting the IP clauses to ensure that the agency is able to get want it requires yet not preclude innovation by limiting the potential pool of competitors.

2. While the Bayh-Dole Act for patents and 10 U.S.C. §§ 2320-21 for technical data and computer software do not apply, the AO should have a good understanding of these statutes as a baseline for negotiations. However, one of the advantages of using an OTA is the flexibility it gives both parties, government and commercial vendor, in negotiating IP terms. It is well-recognized that many in industry, specifically high tech sectors, view assured government rights to IP overly burdensome. IP terms should be carefully considered and negotiated according to the deliverables desired in the agreement. The terms should be consistent with the acquisition strategy for the follow-on production, if any.

3. Common IP terms include: royalty provisions, limited licenses, options, conditions, right of first refusal, and exclusive dealing terms. DoD OTA Guide, 50.

4. When project goals may rely on the commercial marketplace to produce, maintain, modify, or upgrade technology, the Government may reduce rights in IP for those purposes. However, because the Government tends to use commercial solutions longer than the norm in the commercial marketplace, the Government should negotiate license sufficient to address those concerns to prevent obsolescence of technology. DoD OTA Guide, 50.

5. Many OTAs use variations of Bayh-Dole as a starting point. Examples of terms could include:

a. Permitting the contractor to keep the patentable invention as a trade secret.

b. Narrowing the Government-purpose license so that:

(1) it applies to only one agency (versus the entire Government), or

(2) it can be used only to make weapon systems.

c. Eliminating march-in rights or placing further limitations on their exercise than currently apply under existing laws and regulations.

d. Eliminating the "or first actually reduced to practice" provision in the definition of "subject invention."

6. Data Rights

a. OTA awardees must mark proprietary data/software. The agreement should presume that all technical data and computer software delivered without these legends is delivered with unlimited rights.

b. The Government is free to negotiate for rights whether such data is delivered.

c. Licensing artificial intelligence algorithms is particularly complex, considering the training tools and architecture are owned by the vendor, and the data and training process is owned by the government. Licensing agreements should run both ways to allow vendors access to government-owned data sets and the training process, and allow the government to sufficient rights to test, evaluate, and accredit algorithms.

7. Caution when Relying on DFARS Clauses

a. Although the DFARS does not apply to OTAs, nothing prohibits the use of clauses or provisions under DFARS. In fact, many OTAs default to the DFARS for technical data rights clauses, and Bayh-Dole for patent rights. However, extra caution is required when using DFARS clauses, as many DFARS clauses outside the context of the rest of the supplement are hollow.

(1) One example of a situation when DFARS clauses were used in an agreement that was not governed by DFARS is The Boeing Co., ASBCA No. 60373 (2018). In this case, Boeing developed computer software under two TIAs (TIAs, like OTAs, are not governed by DFARS). Boeing

asserted that the TIA-developed software was subject to restricted rights. The government challenged this assertion, claiming that the software was developed with government funds, with no cost share by Boeing, and the Government could assert Government Purpose Rights. The question the Board reviewed was whether software developed under a TIA, using Government financial contributions, "developed exclusively at private expense" under DFARS 252.227-7014. Under -7014, the funding determination hinges on whether the software was developed exclusively at private expense, or *costs not allocated to a government contract*. Development is considered funded by the government if it is determined the funding was not a private expense. The Board found the Government's funding was allocated to a cooperative agreement, not a government contract, thus, under -7014, the development was funded as a private expense and Boeing is entitled to assert restricted rights.

(2) Although Boeing was not an OTA case, presumably the same analysis would apply. Thus, data rights clauses should be carefully drafted to ensure that the Government is not relying on cherry-picked DFARS clauses without the rest of the FAR and DFARS to protect the Government.

B. DoD Intellectual Property Strategy

1. The negotiation of IP clauses in an OTA should be consistent with the DoD's IP Strategy, especially when follow-on production and sustainment requirements are likely. The strategy carefully balances the goals of fostering private innovation with long-term sustainment considerations. To that end, the DoD should seek only the necessary IP to meet its needs.

2. The four key principles of the policy are:

a. Foster greater communication with industry early in the process so that the data requirements are clear to all parties.

b. Plan early for data requirements and develop customized IP strategies, based on the unique needs of the system. This requires the program managers to think through needed data and rights, from acquisition through sustainment.

c. Negotiate for custom data and licenses. The DoD should seek access only to the necessary IP. The policy discourages the impractical, costly approach of seeking the maximum amount of IP.

d. Negotiate for prices early in the process while competition exists.

IX. PROTESTS AND DISPUTE JURISDICTION

A. Bid Protests

1. GAO

a. GAO has limited bid protest jurisdiction of OTAs. *MorphoTrust USA, LLC*, B-412711 (May 16, 2016) (finding agreements awarded under agency's OT authority "are not procurement contracts, and therefore [GAO] generally does not review protests of the award, or solicitations for the award, of these agreements under our bid protest jurisdiction"); *see also, MD Helicopters, Inc.*, B-417379 (Apr. 4, 2019) (dismissing protest that the agency unreasonably evaluated its proposal because GAO does not review the award of non-procurement instruments issued under an agency's OTA authority).

b. While the Federal Grant and Cooperative Agreement Act (FGCAA) establishes criteria that agencies must follow when determining whether a cooperative agreement, grant, or procurement contract may be used properly, there is no guidance when determining whether an agency may properly use its OT authority. The DoD OTA Guide makes no mention of the FGCAA, indicating that use of OTAs are appropriate if compliant with the statutory limitations. Given the new preference for OTA use over procurement contracts in any S&T program provided in the FY2018 NDAA, it is unlikely that GAO will interfere with the agency's broad discretion to enter into an OTA.

c. However, GAO did assert that it would weigh-in on whether the agency complied with its statutory obligations. *Oracle America, Inc.*, B-416061 (May 31, 2018). In *Oracle*, GAO found that the agency did not comply with Section 2371b(f) in awarding a follow-on production OTA, and sustained the protest.

2. Court of Federal Claims (COFC)

a. COFC does not have subject matter jurisdiction over an OTA because they are not procurement contracts and therefore do not fall under the Tucker Act. *Space Exploration Technologies Corp. (SpaceX) v. United States* (Ct. of Fed. Cl., 2019) In *SpaceX*, COFC held that the Tucker Act is "exclusively concerned with procurement solicitations and contract." The Court held that the protested OTA, under Phase One, was not connected to Phase Two procurement of the program, which would be a fully open competition. Moreover, the agency did not acquire any goods or services Phase One.

b. However, as with GAO, COFC could find that an OTA structured like a procurement contract is a procurement contract and assert jurisdiction. Thus, a best practice when using OTA is to ensure that the terms of the agreement differ from what is available under the FAR. There should be some reason for using an OTA other than simply avoiding the bid protest process. Whether COFC would follow GAO's lead and review statutory compliance in the award of an OTA, or second guess an agency's determination to award a follow-on production OTA remains to be seen.

3. Agency Protest

a. A protest can be filed with the agency seeking corrective action. Solicitations should detail the process for potential providers to submit an agency protest.

4. U.S. District Court

a. Finally, it is possible that a commercial entity could pursue injunctive relief in an U.S. District Court, under the Administration Procedures Act (APA). The injunctive relief could act as a stay of any action. But, U.S. District Courts have held that the limited waiver of sovereign immunity under APA does not apply to a disappointed bidder's claim for injunctive relief under an OTA were the bidder is seeking a contract. *MD Helicopters, Inc. v. United States*, 435 F.Supp.3d 1003 (U.S. Dist. of Ariz., 2020). As used in the Administrative Dispute Resolution Act (ADRA), "procurement" refers to all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout. COFC has exclusive jurisdiction over a case when the government has at least initiated a procurement or initiated the process for determining a need for acquisition.

B. Disputes

1. The CDA only applies to procurement contracts. As discussed above, OTAs are not procurement contracts, and are therefore outside of the jurisdiction of the Board of Contract Appeals (BCA), which can only hear contract disputes under the CDA.

2. While the BCA cannot hear disputes of OTAs, COFC has jurisdiction under a board reading of the Tucker Act. COFC asserted jurisdiction over an OTA claim in *Spectre Corp. v. United States*, COFC No. 16-932C (June 30, 2017). COFC explained the Tucker Act permits the court to render judgement on any claim based on "any express or implied contract with United States." *Id*.

3. A successful claim should point to a provision in the OTA that states the agency will be liable to pay damages for its breach. Absent a money-mandating provision in the OTA, the Tucker Act merely provides jurisdiction for a claim to survive a Rule 12(b)(6) motion at COFC, but no remedy for breach damages. Due to the lack of case law, procedures for disputes should be addressed in each OTA.

   a. Alternate Disputes Resolution (ADR): Given the nature of OTAs, ADR can be an effective and efficient way to handle disputes. ADR practices that are common in the commercial sector can reduce the risk of costly litigation.

X. STAND-ALONE OTA AND CONSORTIA

A. Types of OTA

1. OTAs can be awarded to a single entity, called a stand-alone agreement, or to a consortia. These two categories are also known as internal (stand-alone) vehicles and external (consortia) vehicles.

B. Stand-alone OTA

1. In a stand-alone agreement, the agency awards the OTA to a single entity. A stand-alone agreement does not involve a consortium. In this type of award, the agency and the commercial entity are in privity of contract. Based on the requirements of 10 U.S.C. § 2371b, a stand-alone OTA is often awarded to a non-traditional defense contractor.

2. Because stand-alone agreements require a blank page approach to the agreement, they tend to take longer than consortia OTAs; however, stand-alone agreements are the most flexible approach.

C. Consortium Approach

1. A Consortium is an association of two or more individuals, companies, organizations or governments (or any combination of these entities) with the objective of participating in a common activity or pooling their resources for achieving a common goal. The Consortium business model is designed to facilitate mutually beneficial collaborative research and development activities between the Government and industry/academia.

2. The benefits of utilizing a consortium include:

   a. Leveraging Industry-wide capabilities

   b. Building communities of practice with expertise in the sector

c. Maintaining effective competition (several consortia, such as C5, has nearly 1,000 members)

d. Can allow for obligation of funds early in the cycle as the relationship is in place

3. The Consortia Model

a. There are a variety of ways to use a consortium. In general terms, the use of a consortium looks like the example below

b. Consortium Management Group (CMG) Example

(1) Each Consortium reflects a different sector of industry (e.g., cyber, armaments, counter-WMD, vertical lift, robotics systems. etc.)

(2) The consortium solicits members

(3) Members may or may not sign membership agreement with the consortium

(a) The membership poses a low barrier to entry (e.g., $500 fee)

(4) The agency issues a long term, high value OTA to the consortium

(a) A consortium management company, often a non-profit, is given exclusive access to the requirements to distribute among the consortium members. Aaron Boyd, *The Gatekeepers of the Government's Other Transaction Deals*, Nextgov (April 18, 2018).

(i) This approach is somewhat analogous to the Section 8(a) program of the Small Business Administration

(5) The consortium organizes competitions and awards sub-OTAs to member companies

(a) Generally, the consortium and member enter into separate agreement for each project

(b) DIU typically awards a new OTA for each customer

(c) AFRL typically issues a task order under their existing OTA

(6) The agency has contract privity only with the consortium, so the agency pays the consortium and the consortium pays the Awardee

(7) Awardees pay the consortium (generally, a percentage of the value of the award or an administrative fee)

c. Successful consortium agreements require careful selection of partner entities, management, clearly understood roles and objectives, communication, and thorough planning.

d. Examples of existing sector-based consortium include, but is not limited to:

(1) Defense Automotive Technologies Consortium

(2) National Spectrum Consortium

(3) Medical Technologies Enterprise Consortium

(4) DoD Ordnance Technology Consortium

(5) Border Security Technology Consortium

(6) Vertical Lift Consortium

(7) Medical CBRN Defense Consortium

(8) National Shipbuilding Research Program

(9) System of Systems Enterprise Consortium

(10) Open Systems Architecture Initiative

(11) Consortium for Energy, Environment and Demilitarization

(12) Consortium for Command, Control, and Communications in Cyberspace

(13) National Advanced Mobility Consortium

(14) Sensors, Communications and Electronics Consortium

(15) Space Enterprise Consortium

(16) Modeling and Simulation Consortium

XI. CONCLUSION

Used appropriately, with the support of senior acquisition leadership, OTAs can be used effectively at securing technology vital to national security while removing barriers to entry, reducing burdensome compliance regulations, and permitting the Government to conduct business like a business. While the lack of precedent and inherent unpredictability of OTAs pose a risk to using this option, that risk is mitigated as the community of professionals using OTAs increases. An educated and trained corps of acquisition professionals, including contract attorneys, is necessary to ensure successful use of OTAs. Consistent with Congress's intent, the DoD should establish a preference for the use of OTAs when authorized, and the current trends toward more wide-scale use will likely continue.

XII. RESOURCES

DoD Other Transactions Guide for Prototype Projects (Dec. 2018), https://www.dau.mil/guidebooks/Shared%20Documents/Other%20Transactions%20(OT)%20Guide.pdf, or https://aaf.dau.edu/ot-guide/

Defense Advanced Research Projects Agency (DARPA): http://www.darpa.mil/

Defense Innovation Unit library: https://diu.mil/library

10 U.S.C. § 2371b – Authority of the Department of Defense to carry out certain prototype projects

Strategic Institute, http://www.strategicinstitute.org/

Defense Acquisition University, Prototype OTs, https://aaf.dau.edu/contracting-cone/ot/prototype/

Section 809 Panel, Volume III, Part 2, Recommendation 81, https://section809panel.org/wp-content/uploads/2019/03/Sec809Panel_Vol3-Report_JAN19_part-2_03-07.pdf

Department of Defense Use of Other Transaction Authority: Background, Analysis, and Issues for Congress (Updated February 22, 2019), https://crsreports.congress.gov/product/pdf/R/R45521

APPENDIX A

Contract and Fiscal Law Acronyms and Abbreviations

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
ASFF	Afghanistan Security Forces Fund
ASN (I&E)	Assistant Secretary of the Navy (Installations and Environment)
ASPA	Armed Services Procurement Act
ATO	Agency Tender Official
AWCF	Army Working Capital Fund

BAA	Buy American Act
BAA	Broad Agency Announcement
BAFO	Best and Final Offer (Former name of FPR)
BCA	Board of Contract Appeals
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
CM/ECF	Case management/Electronic Case Files
CN	Congressional Notification
CNO	Chief of Naval Operations
CO	Contracting Officer
COC	Certificate of Competency 8-29

COFC	Court of Federal Claims
COMMITS	Commerce Information Technology Solutions
COR	Contracting Officer Representative
COTR	Contract Officer's Technical Representative
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
DCO	Defense Coordinating Officer
DCS	Direct Commercial Sales
DEAR	Department of Energy Acquisition Regulation
DFARS	Defense Federal Acquisition Regulation Supplement
DFAS	Defense Finance and Accounting Service

DLA	Defense Logistics Agency
DLAAR	Defense Logistics Agency Acquisition Regulation
DLARS	Defense Logistics Acquisition Regulation Supplement
DO	Disbursing Officer
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
EVE	Equal Value Exchange
FAA	Foreign Assistance Act
FAC	Federal Acquisition Circular
FACNET	Federal Acquisition Computer Network

FAR	Federal Acquisition Regulation
FARA	Federal Acquisition Reform Act
FASA	Federal Acquisition Streamlining Act
FCAA	Federal Courts Administration Act
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
GOCO	Government Owned/Contractor Operated
GOGO	Government-owned/Government-operated
GPC	Government Purchase Card
GPE	Government-wide Point of Entry
GPO	Government Printing Office

GSA	General Services Administration
GSAR	General Services Administration Acquisition Regulation
GSBCA	General Services Administration Board of Contract Appeals
GWAC	Government-Wide Acquisition Contract
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
JWOD	Javits-Wagner-O'Day Act
KO	Contracting Officer
L-H Contract	Labor-Hour Contract

L&S Lift and	Sustain
LATAM COOP	Latin American Cooperation
LBCA	Department of Labor Board of Contract Appeals
LDs	Liquidated Damages
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
NSN	National Stock Number
NTE	Price Not to exceed price
O&M	Operations and Maintenance
OCI	Organizational Conflicts of Interest

OFCC	Office of Federal Contract Compliance
OFDA	Office for Foreign Disaster Assistance
OFPP	Office of Federal Procurement
OFPPA	Office of Federal Procurement Policy Act
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
RDD	Required Delivery Date
RDT&E	Research, Development, Test, and Evaluation
READ	Recycling Electronics and Asset Disposition
RFI	Request for Information
RFP	Request for Proposals

RFQ	Request for Quotes
RIK	Replacement- in-Kind
RSA	Randolph Sheppard Act for the Blind 13-32
RSS	Required Sources of Supplies or Services
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
UFM	Uniform Funding and Management
UMC	Unspecified Military Construction
UMMC	Unspecified Minor Military Construction
URD	Uniform Resource Demonstration
USAID	United States Agency for International Development

USARCS	United States Army Claims Service
USD (ATL)	Undersecretary of Defense (Acquisition, Technology, and Logistics)
USD(C)	Undersecretary of Defense (Comptroller)
UTSA	Uniform Trade Secrets Act 16-5
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